NO. 332624

WASHINGTON STATE COURT OF APPEALS
DIVISION III

CITY OF SUNNYSIDE,

Appellant,

vs.

ANDRES GONZALEZ,

Respondent.

APPELLANT'S REPLY BRIEF

Margita A. Dornay
WSBA No. 19879
Margita Dornay, Attorney at Law, PLLC
4109 Tieton Drive
Yakima, Washington 98908
Office (509) 571-1803
Cell (509) 910-7422
Fax (509) 571-1804
Attorney for Appellant, City of Sunnyside

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COMES NOW the City of Sunnyside and submits its Reply Brief in strict reply to the Respondent's Brief and addresses those issues raised in Respondent's arguments that may not have been previously addressed in the Appellant's Brief. The Respondent argues:

1. The City of Sunnyside failed to assign errors to the Superior Court's decision.
2. The Superior Court did not abuse its discretion when deciding that this matter was not subject to the Administrative Procedures Act.
3. Hearing Officer Michels was not a designated hearing officer.
4. The City of Sunnyside waived the applicability of the APA to this matter.
5. The Hearing Officer's Forfeiture Order was not issued in compliance with the APA.
6. The Superior Court's decision is not the subject of this appeal, rather the decision of the Hearing Officer is the subject of this appeal.

These arguments and the issues they raise are addressed in order below:

1. The City of Sunnyside has assigned errors and this Court may conduct its review based on those assigned errors.

Respondent argues that the City of Sunnyside was required to identify all areas where it believed that the Superior Court made erroneous findings. Respondent argues "there must be specific assignments of error

before the appellate court will go behind the findings. When there has been no specific assignment of error, the findings become the established facts of the case". *Respondent's Brief at Pg. 3.* The City did assign errors – *see Appellant's Brief at Pg.4.* Respondent erroneously believes that the City needed to assign errors to Judge Gibson's factual findings. Judge Gibson reviewed the Hearing Officer's decision in an appellate capacity. His decision was limited to the record on appeal. He made no factual findings. In his appellate capacity he was to determine, among other things, whether there was substantial evidence in the record to support the Hearing Officer's decision. As the City has argued in its Appeal Brief, Judge Gibson did not render his decision based on that analysis, instead, Judge Gibson interjected speculation and his own opinion as a basis to find the Hearing Officer's decision "unreasonable".

2. **The Superior Court's decision on whether the APA applies to this matter is not reviewable under an abuse of discretion standard.**

Respondent argues that the Superior Court did not "abuse its discretion" when it decided that the APA did not apply to this matter. Whether the APA applied in this matter or not was not a matter of discretion, rather it is a critical jurisdictional determination based on the law. Where a claimant has not removed the matter to a court of competent

jurisdiction, the APA applies. RCW 69.50.505(5). This is so as a matter of law and discretion plays no role in the determination. Here, as indicated in the Appeal Brief, the Respondent never removed this matter to a Court of competent jurisdiction, as a result, could only be processed as a hearing before an Administrative Hearing Officer. Steven Michels indicates in his declaration that he was appointed to serve as the Hearing Officer for drug forfeiture and seizure matters for the City of Sunnyside.

3. **Steven Michels was the designated hearing officer.**

The Respondent persists in its argument that Steven Michels was not the designated hearing examiner for the City of Sunnyside. The Respondent argues that the Declaration of Wallace Anderson directly disputes the assertions Stephen Michels made in his declaration. However the Wallace Anderson assertions contained in the declaration are useless at best and should be given no weight.

It is evident that Mr. Anderson has little to no memory of his appointment of Michels as the hearing examiner. Anderson first asserts that he does not *recall* being an author of a designation letter of Michels as hearing examiner. Mr. Anderson retired from his position with the City of Sunnyside 14 years ago. The likelihood that he can remember everything he did during his tenure as the police chief is slim, much less a document he authored 30 years earlier. His failure to recall authoring the

document does not mean it didn't exist at the time it was created.

Anderson then immediately states that "Even if such a document does exist, it would be invalid as of the date I retired in 2002." *Dec. of Anderson.* This clearly shows this is not an issue of whether the document was created but *whether he remembers* if it was created. Steven Michels has been handling the Sunnyside forfeiture for almost 30 years since he was appointed in 1986. The retirement of a police chief does not revoke the designation of a hearing officer.

Anderson denies having any recollection of a written appointment of Steven Michels. Anderson conveniently omits who he did appoint as the City's hearing examiner, if not Michels. Even assuming Anderson did not appoint Steven Michels as the City's Hearing Examiner, then who did he appoint? The declaration glaringly fails to note this point. Did Steven Michels usurp some unwitting person of their designated position as hearing examiner by Anderson during the 16 years that Anderson was the Chief of Police for Sunnyside? Mr. Anderson does not state that he handled the forfeitures for the City of Sunnyside; therefore it would have been his designee. More importantly, Anderson retired in 2002 and therefore, how would he know who is currently designated to handle the City of Sunnyside's forfeitures in 2015?

The Respondent asserts that there is no documentation to support that Steven Michels was the City of Sunnyside's designated hearing examiner, therefore he is not the hearing examiner. As was addressed in the initial determination by the Commissioner, there is nothing in RCW 69.50 which requires that the designation be in writing.

The Respondent's argument that Michel's was not the hearing examiner simply has no weight.

4. The City of Sunnyside could not waive the applicability of the APA.

Under the express provisions of RCW 69.50 the APA applies to this matter. RCW 69.50 requires a hearing before a hearing officer under the APA when a claimant contest a proposed forfeiture of property seized. The City cannot waive these statutory provisions. RCW 69.50.505. The only time these provisions do not apply is when the claimant takes steps to actively remove the matter to court. RCW 69.50.505. Respondent argues that because everything was processed through Sunnyside Municipal Court, the City succumbed to the jurisdiction of that court. A municipal court could never take jurisdiction of this matter under any circumstance whether the City acquiesced to such or not. Only district court and superior court are provided with such jurisdiction under RCW 69.50. Municipal courts, unlike district courts, lack jurisdiction over civil matters,

other than traffic infractions. Municipal court jurisdiction is limited to processing criminal misdemeanor, gross misdemeanor, and civil traffic infractions. RCW 3.50.020.

Furthermore, the City of Sunnyside's failure to initially point out Gonzalez's failure to properly appeal his case under the APA does not mean it is bound by Gonzalez's fatal error. This is a civil hearing where Gonzalez had hired counsel to handle his matter. The failure to properly file his appeal under the APA and follow its mandates for appeal protocol falls squarely on Gonzalez's shoulders, not the City's. This was not the City's appeal.

It's evident that the City originally addressed the issue as a RALJ matter in its initial responses at the superior court level. But there is no statute, case or administrative rule which states that this somehow excuses the petitioner from following the APA mandates it made from the very outset.

More importantly, the City filed a Motion for Reconsideration at the Superior Court level specifically addressing Gonzalez's failure to follow the APA. Therefore, the Superior Court still had the opportunity to review the issues raised by the City asserting that Gonzalez failed to follow the APA. The Superior Court erroneously found that the APA didn't apply to the drug forfeiture.

5. **The Hearing Officer's forfeiture order was issued in compliance with the APA.**

Respondent argues that the Hearing Officer's order does not comply with APA. Specifically, Respondent argues that the Hearing Officer's order does not comply with RCW 34.05.461. That provision, however, applies to "initial" orders of administrative officers. It provides:

> Entry of orders.
> (1) Except as provided in subsection (2) of this section:
> (a) If the presiding officer is the agency head or one or more members of the agency head, the presiding officer may enter an initial order if further review is available within the agency, or a final order if further review is not available;
> (b) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and
> (c) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.
> In this matter, the hearing officer is the final decision maker and need not enter any "initial" order that may be subject to further administrative review.

Subsection (3) of the statute, which Respondent relies upon specifically applies to initial orders. It provides:

> (3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on

> credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order. (Emphasis supplied)

Respondent argues that "the order by Judge Michels does not contain any language regarding the time limits for seeking reconsideration or any other administrative relief as required by the APA and therefore lack the statutorily required notice to be included in an order." *Respondent's Brief at page 32.* As indicated, such language is required in initial orders that are subject to further reconsideration and administrative review.

Contrary to Respondent's assertion, there is nothing in the APA requiring that a final order specify a "right to appeal".

6. **The Superior Court's Decision is the subject of this Appeal.**

Respondent argues that the Superior Court's decision is not the subject of this appeal. Respondent argues "the City also argues that the trial court applied the wrong standards to Judge Michels' decision. The argument is not persuasive because for purposes of this appeal, the record

on review is not the record of Judge Gibson, but the record of Judge Michels." *Respondent's brief, Pg. 38.* This is simply not the case, here the Superior Court's determinations on jurisdictional issues and whether the APA applied to this matter are clearly before this Court on Appeal. Whether Judge Gibson applied the proper standards for reviewing Hearing Officer Michels' decision is also before this Court in this appeal. Please see the Appellant's Brief concerning these matters.

When the Respondent sought appeal to Superior Court, he argued that the Steven Michels "abused his discretion" when he ordered the seized property forfeited. Respondent did not assign any errors to Steven Michels' findings. When Judge Gibson reviewed the matter, Judge Gibson did not apply the appropriate standards for review, which are: whether the hearing examiner the agency/hearing examiner (1) erroneously interpreted or misapplied the law, (2) substantial evidence did not support the agency's order, or (3) the agency order was arbitrary or capricious. RCW 34.05.570(3)(d) (e).

Instead, he concluded that Hearing Officer Michels' decision was unreasonable. He made this conclusion based on speculation and by interjecting his own opinion beyond the record developed at the administrative hearing. His decision was not limited to the record on appeal as is required.

CONCLUSION.

Based upon the argument set forth in Appellant's brief and the foregoing, the Appellant requests that this Court set aside the Superior Court decision reversing the Hearing Examiner's decision to forfeit the property in question .

RESPECTFULLY SUBMITTED this 28 day of March, 2016.

Margita A. Dornay
Attorney at Law, PLLC

By _____
Margita A. Dornay
WSBA No. 19879
Attorney for Appellant, City of Sunnyside