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No. 63024-5-I

CITY OF SEATTLE, SEATTLE POLICE DEPARTMENT,

Appellant,

vs.

CITY OF SEATTLE PUBLIC SAFETY CIVIL SERVICE
COMMISSION AND RICHARD ROBERSON,

Respondents,

**RESPONDENT PUBLIC SAFETY CIVIL
SERVICE COMMISSION'S BRIEF**

THOMAS A. CARR
Seattle City Attorney

Gary Keese, WSBA #19265
Assistant City Attorney
Attorneys for Respondent
Public Safety Civil Service Commission

Seattle City Attorney's Office
600 - 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

ORIGINAL

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I. INTRODUCTION

The Seattle Public Safety Civil Service Commission is a three-member administrative body that, among other duties, hears and decides quasi-judicial appeals of terminations, suspensions, demotions, and disciplinary transfers imposed on public safety employees in the Seattle Police and Fire Departments.

The Commission normally does not appear in litigation challenging its decisions, leaving that to the prevailing party. The Commission appears in this litigation only for the limited purpose of defending its authority under its enabling ordinance to consider factors such as the reasonableness of the employer's rule or directive, the reasonableness and fairness of the employer's investigation, and the consistency of the employer's disciplinary decisions in similar cases.

After hearing six days of testimony from nearly twenty witnesses and considering dozens of exhibits, the Commission entered its findings of fact, conclusions of law, and order in this case.¹ In that decision, the Commission majority found that the Department had met the applicable burden of proof regarding one of the incidents (failure to take a report) but

¹ Commission Rules of Practice and Procedure Rule 6.27 "Decision" requires that the Commission's decision include findings of fact, conclusions of law, and an order.

not in the other two incidents (destruction of evidence and disregarding a dispatch call). Applying the plain language of its enabling legislation, the Commission majority reduced the Department's 30-day disciplinary suspension to seven days.

The Department focuses its attack on the seven analytical factors the Commission has utilized in each of its decisions since 2006. The Department utilizes a series of straw man arguments in an attempt to create a conflict where none exists - between the Commission's enabling ordinance and its use of the factors identified in a leading treatise and in the City's own Personnel Rules.

The Commission does not claim that its ordinance requires it to apply only these particular factors or especially that the employing department must prove each in order to prevail. Rather, the Commission argues only that it is permitted to consider such factors as the reasonableness of the employer's rule or directive, the reasonableness and fairness of the employer's investigation, and the consistency of the employer's disciplinary decisions in making its determination whether a particular discipline is "in good faith for cause".

II. ARGUMENT

A. The Commission's Role in the Seattle Public Safety Civil Service System

1. The Seattle City Charter

Charter Article XVI, Section 3, "Civil Service" provides that:

There may be a separate civil service system established by ordinance for firefighters and police officers, in order to substantially accomplish the purposes of pertinent state law.

2. The Public Safety Civil Service Ordinance

Seattle has done just that - create a separate civil service system for public safety personnel, based on the merit principles described in the Charter and in state law. That ordinance is codified in SMC Chapter 4.08, "Public Safety Civil Service".²

B. The standard - Was the discipline made "in good faith for cause"?

The starting point for any analysis of an administrative body's authority is its enabling ordinance. SMC 4.08.100 expressly provides that the Commission should determine in an appeal whether the discipline was made "in good faith for cause," and that if it determines the discipline was not "in good faith for cause," it may (as it did here) modify the discipline to a suspension of less than 30 days.

² SMC 4.08 is attached as Attachment A in the Appendix to this brief, as provided in RAP 10.4c.

SMC 4.08.100 Tenure of employment -- Removal for

Cause.

The hearing shall be confined to the determination of the question of whether such removal, suspension, demotion, or discharge was made in good faith for cause. After such hearing, the Commission may affirm the action of the appointing authority, or if it shall find that the action was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such person was removed, suspended, demoted, or discharged. The Commission upon such hearing, in lieu of affirming the removal, may modify the order of removal, suspension, demotion, or discharge by directing a suspension, without pay, for up to thirty (30) days, and subsequent restoration to duty, or demotion in classification, grade or pay. The findings of the Commission shall be certified in writing by the appointing authority, and shall be forthwith enforced by such officer. (Emphasis added).

C. The Factors Applied by the Commission

The Department attacks the seven factors the Commission has consistently utilized as a framework for determining whether the discipline was “made in good faith for cause”. The Department argues that the Commission must uphold the disciplinary decision of the Chief, so long as it is supported by substantial evidence and not imposed for an improper purpose.³ They claim that the decision in this case was “based on legal

³ Department’s Opening Brief, page 15.

analysis more appropriate to a union grievance”.⁴ The Commission must respectfully disagree.

In applying the “in good faith for cause” standard, the Commission has borrowed from some of the cases the Department cites as well as from other sources such as the factors identified in Koven and Smith, *Just Cause: The Seven Tests* (2d ed. 1992), an oft-cited and leading treatise on the subject of just cause.

In its May 2006 decision in *Charles v. SPD*, the Commission stated in Conclusions of Law 4 and 5:

4. The Commission finds “The Seven Factors of Just Cause”, a leading treatise on the subject of the application of the just cause standard, useful in applying the just cause standard in this case.

5. In particular, the Commission finds the following seven factors identified in that book instructive in this case, including:

- 1) was there reasonable notice to the employee,
 - 2) is the rule or order at issue reasonable;
 - 3) did the employer conduct a reasonable investigation;
 - 4) was the investigation conducted fairly;
 - 5) did the employer base the decision on substantial evidence that the employee had in fact violated the rule or order;
 - 6) has the employer treated similar cases similarly,
- and
- 7) is the penalty reasonably related to: a) the seriousness of the employee’s proven performance

⁴ Department’s Opening Brief, page. 1

deficiencies or misconduct and b) the employee's record of service.

In the balance of its decision in *Charles*, and in each of its subsequent decisions, the Commission has employed that analytical framework in analyzing whether the employing department, whether the Seattle Police Department or the Seattle Fire Department, imposed the appealed discipline in good faith for cause.⁵

The Department suggests the Commission requires that each of the factors must be present in any given case in order to find just cause, calling them "elements". "The test is conjunctive, meaning that failure to establish any of its elements creates a basis for reversal of the discipline".⁶

The Department is simply wrong. That may be the way some labor arbitrators have applied the seven factors, but is certainly not the way the Commission applies them. The express language in *Charles* and in subsequent Commission decisions is just the opposite – the factors are a tool to use in analyzing the case – not elements that the employing department

⁵ Commission decisions issued since 2005 are posted at <http://www.seattle.gov/pscsc/resources.htm> For example, the Commission affirmed a 30-day suspension in *Mahoney v. SPD*, affirmed terminations in *Powers v. SPD* and *Kinder v. SFD*, reduced a termination to a suspension in *Miles v. SPD*, reversed a suspension in *Dunn v. SPD*, reduced a suspension in *Basney v. SPD*, reversed disciplinary transfers in *Chin v SPD* and *Charles v. SPD*, and upheld a disciplinary transfer in *Muhammad v. SPD*.

⁶ Department's Opening Brief, page 12.

must prove in each case. The Commission made that clear in Conclusion of Law No. 6 in *Charles*.

The seven factors are just that – factors to be considered under the totality of the circumstances. The absence of one factor does not necessarily mean the decision was not for just cause. Some misconduct, for example, would justify immediate disciplinary action without prior notice.⁷

The Department also claims that the Commission’s use of the factors in effect prohibits an employing department from disciplining for behavior unless that behavior is expressly prohibited by a rule. “This is precisely the problem with requiring the Department to establish the violation of a workplace rule (an element of the seven tests) as part of its proof of “good faith for cause”.⁸

The Department is again wrong, as evidenced by the plain language from *Charles* cited above and in subsequent Commission decisions. In its most recent case, *Mahoney v. SPD*, the Commission affirmed a thirty day suspension despite the fact that no rule expressly prohibited the precise conduct the officer was accused of committing.⁹

⁷ *Charles v. SPD*, Commission Findings of Fact, Conclusions of Law, and Order, pages 11-12 (Decision is attached as Attachment B in the Appendix to this brief).

⁸ Department’s Opening Brief, page 21.

⁹ *Mahoney v. SPD*, Commission Findings of Fact, Conclusions of Law, and Order (Decision is attached as Attachment C in the Appendix to this brief).

Almost identical factors are also listed in the City of Seattle Personnel Rules.¹⁰ Personnel Rule 1.3.3(C) provides that City employees may be suspended, demoted, or discharged only for “justifiable cause”, and provides that:

This standard requires that: 1) the employee was informed of or reasonably should have known the consequences of his or her conduct; 2) the rule, policy or procedure the employee has violated is reasonably related to the employing unit’s safe and efficient operations; 3) a fair and objective investigation produced evidence of the employee’s violation of the rule, policy or procedure; 4) the rule, policy or procedure and penalties for the violation thereof are applied consistently; and 5) the suspension or discharge is reasonably related to the seriousness of the employee’s conduct and his or her previous disciplinary history.

The Commission is not arguing that Personnel Rule 1.3.3 controls Commission decisions under SMC 4.08.100. However, it is arguing that it is permissible for the Commission to consider similar factors in applying its “in good faith for cause” standard.

The Department also suggests that the Commission must accept the Department’s view of the gravity of the offense, thereby implying that the Commission does not have authority to reduce the discipline. The Department argues, for example, that the seven factors are not the same as “good faith for cause” and that the former “requires consideration of such

¹⁰ City of Seattle Personnel Rule 1.3 “Progressive Discipline” is attached as Attachment D to this brief.

factors as ‘the presence of mitigating circumstances, and the appropriateness of the penalty’.¹¹

The Department’s argument is again in direct conflict with the plain language of the enabling ordinance, which expressly grants the Commission the authority to reduce discipline, including reducing the length of a suspension.

The Commission upon such hearing, in lieu of affirming the removal, may modify the order of removal, suspension, demotion, or discharge by directing a suspension, without pay, for up to thirty (30) days, and subsequent restoration to duty, or demotion in classification, grade or pay.¹²

The Department does not identify any other factors that it contends conflict with the enabling ordinance. The unavoidable suggestion, however, is that Commission may not even consider the reasonableness of the rule at issue, the reasonableness or fairness of the investigation upon which the decision-maker relied, or the consistency of the discipline in light of other similar cases.

In contrast, the Commission suggests that such factors are entirely compatible with “good faith for cause” “Good faith for cause” requires

¹¹ Department’s Opening Brief, page 16.

¹² SMC 4.08.100.A.

that the employing department act both in good faith and for cause. Factors such as the reasonableness of the rule or directive and the sufficiency of the evidence that the decision maker relied upon go to whether the discipline is “for cause”. Factors such as the fairness of the investigation and the consistency of the application of the rule in other similar cases go to whether the discipline is in good faith. There is no inherent conflict between the Commission’s standard and the factors it has found useful in applying that standard.

D. The Commission’s Interpretation of its own Enabling Ordinance Is Entitled to Substantial Weight.

It is well settled that reviewing courts give due deference to an agency’s interpretation of the statutes it implements.¹³ While courts of course always have ultimate authority to construe laws, courts should accord substantial weight to a quasi-judicial administrative agency’s construction of its own enabling law.¹⁴

The Commission is the quasi-judicial administrative body responsible for implementing SMC Chapter 4.08 in general and for conducting appeals under SMC 4.08.100 in particular. The Commission interprets “in good faith for cause” and the other language in its enabling

¹³ *Spain v. Employment Sec. Dept.*, 164 Wn.2d 252, 185 P.3d 1188 (2008).

¹⁴ *Gaines v. State Dept. of Employment Sec.*, 140 Wn.App. 791, 796-97, 166 P.3d 1257 (2007) citing *Washington Cedar and Supply Co. Inc., v. Dep’t of Labor and Ind.*, 137 Wn. App. 592, 598, 154 P.3d 287 (2007).

ordinance to permit it to consider factors such as reasonableness of the rule, the reasonableness and fairness of the investigation, and the consistency of the discipline. That interpretation is entitled to substantial weight.

E. The Cases the Department Relies upon are Distinguishable

The cases relied upon by the Department are distinguishable.

Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 769 P.2d 298 (1989), for example, discusses just cause in the context of a private sector employment breach of contract case. It is not a civil service case. It may be useful, as the Commission has acknowledged in its decisions, but is not controlling, and certainly not to the exclusion of the seven-factors analysis.

Civil Service Commission of the City of Kelso v. City of Kelso, 137 Wn.2d 166, 969 P.2d 474 (1999) also involves an entirely different question – whether a Kelso Civil Service Commission decision should be given subsequent preclusive effect in a different forum – a labor arbitration. *Kelso* says that “good faith for cause” under the Kelso ordinance is not, for *res judicata* purposes, identical to “just cause” under the applicable labor agreement.

“Just cause” under a collective bargaining agreement may even require an arbitrator to consider as elements factors similar to the ones the

Commission considers as potentially relevant to “in good faith for cause”. That is not the same as precluding the Commission from even considering such factors in its cases. The Supreme Court in *Kelso* suggested that a commission has discretion to decide what it will consider in analyzing the case before it under its applicable standard.

There is no suggestion that the Commission applied the “for cause” standard improperly under RCW41.12.090. Although this court has yet to give a precise definition to this standard, the statute has not previously been interpreted to require the Commission to consider any factors apart from the particular allegation of wrongdoing and the employer’s motivation for the disciplinary action. (emphasis added)¹⁵

Kelso does not address, let alone decide, that a commission, regardless of the express language of its enabling ordinance, may not even consider factors such as the reasonableness of the rule or directive at issue, the reasonableness and fairness of the investigation upon which the decision-maker relied, and the consistency of the discipline.

The Department’s other cases simply establish that “good faith for cause” means what it says – that an employer in a civil service case should be able to show that it acted in good faith and for cause. The Department has not cited any case from any jurisdiction that says it is impermissible for a commission such as this one to consider factors such as the reasonableness

¹⁵ *Kelso*, 137 Wn.2d 166 at 173.

of the rule or directive at issue, the reasonableness and fairness of the investigation, or the consistency of the discipline.

III. CONCLUSION

The Department utilizes a series of straw man arguments in an attempt to create a conflict between the Commission's enabling ordinance and its use of factors identified in a leading treatise and in the City's own Personnel Rules. The Commission does not claim that its ordinance requires it to apply these seven particular factors or that the employing department must prove each in order to prevail. Rather, the Commission argues only that it is not error for it to consider such factors as the reasonableness of the rule or directive at issue, the reasonableness and fairness of the investigation upon which the decision-maker relied, and the consistency of the discipline.

For the foregoing reasons, the Seattle Public Safety Civil Service Commission respectfully requests only that the Court affirm the

Commission's authority to consider such factors in deciding cases before it.

DATED this 5th day of August, 2009.

THOMAS A. CARR
Seattle City Attorney

By:



Gary Keese
WSBA No. 19265
Assistant City Attorney
Attorney for Respondent
Public Safety Civil
Service Commission

CERTIFICATE OF SERVICE

I certify that on this date, I caused a true and correct copy of the foregoing to be served on the following via U.S. Mail, postage prepaid:

Richard Roberson
24914 38th Avenue S.
Kent, WA 98032
Respondent Pro Se

and via Hand Delivery to:

Erin Overby
Zahraa Wilkinson
Assistant City Attorneys
Seattle City Attorney's Office
P.O. Box 94769
Seattle, WA 98124-4769

DATED this 6th day of August, 2009.



Marisa Johnson

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ATTACHMENT A

tion is further appealed to a hearing examiner or arbitrator and the temporary worker prevails and the City Council consequently authorizes new position authority for the body of work, the temporary worker shall be appointed to the regular position and his or her time worked in the assignment to date shall be counted toward the twelve (12) month probationary period.

F. A temporary employee assigned to a vacant regular position that exceeds one (1) year may avail him or herself of the appeal process described in this section. A temporary worker in an interim assignment to a vacant regular position on or after November 16, 2005, whose assignment in that position exceeds one (1) year, shall be appointed to the regular vacant position and shall have regular status upon appointment.

G. Whenever a temporary assignment is recommended for conversion to a regular position the Personal Director may extend the time limits on the assignment as provided in SMC 4.04.030. If the conversion does not require the creation of new position authority, the Personnel Director may extend the assignment up to ninety (90) days. If the assignment conversion requires the creation of new position authority, the Personnel Director may extend the assignment for the length of time required to obtain legislative approval of such authority; provided, that if the Mayor declines to recommend or the City Council declines to approve new position authority, the assignment must terminate within thirty (30) calendar days of the rejection of the conversion proposal and the work must cease or must be assigned to a regular or probationary employee.
(Ord. 122063 § 8, 2006)

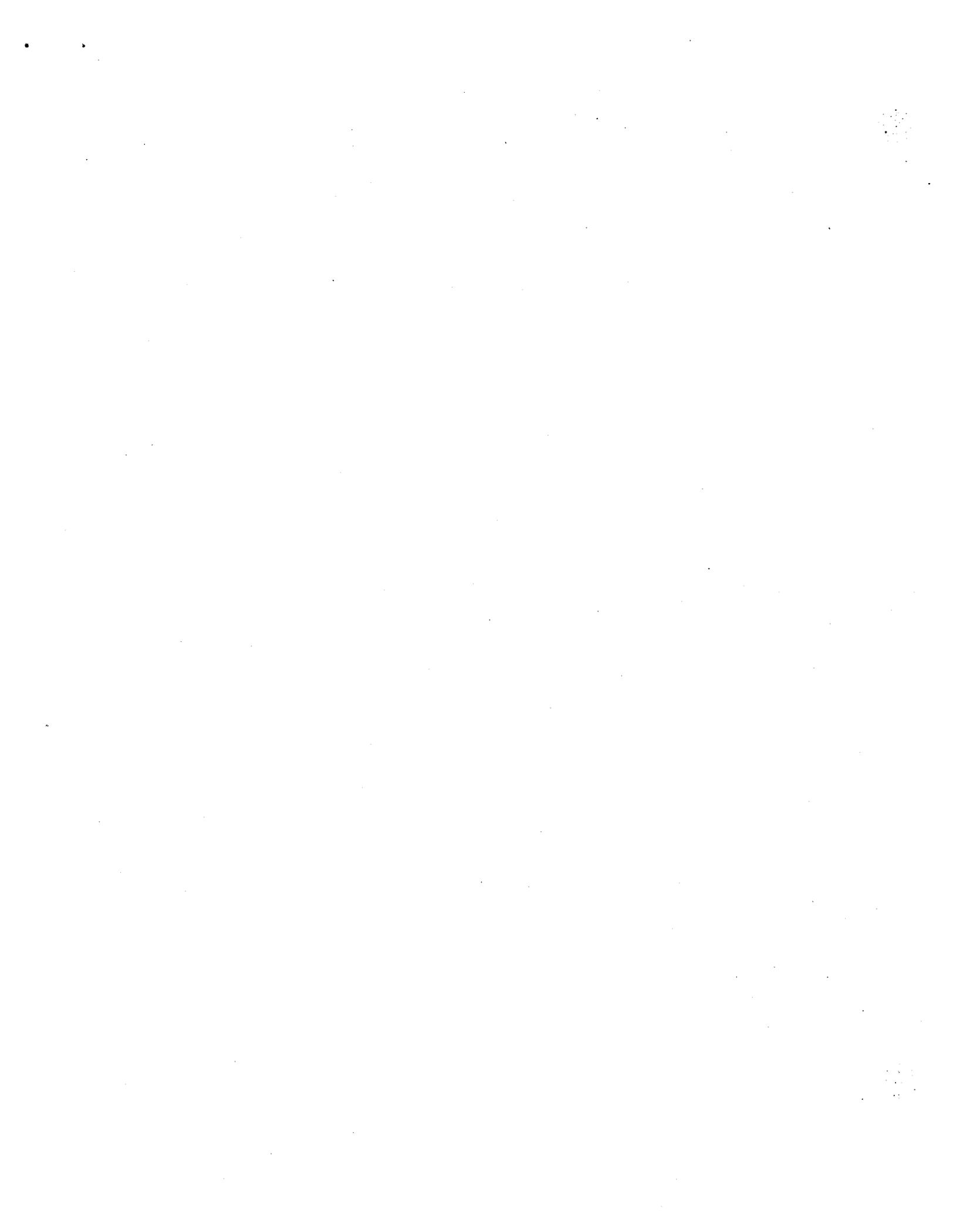
- 4.08.110 **Filling of vacancies—Probationary period.**
- 4.08.120 **Performance evaluation.**
- 4.08.130 **Training programs.**
- 4.08.140 **Rights of employees.**
- 4.08.150 **Salary or wages not paid except to those lawfully appointed.**

Chapter 4.08

PUBLIC SAFETY CIVIL SERVICE

Sections:

- 4.08.010 **Title.**
- 4.08.020 **Purpose.**
- 4.08.030 **Definitions.**
- 4.08.040 **Public Safety Civil Service Commission.**
- 4.08.050 **Organization of commission—Executive Director.**
- 4.08.060 **Jurisdiction.**
- 4.08.070 **Powers and duties of Commission.**
- 4.08.080 **Affirmative action.**
- 4.08.090 **Qualifications of applicants.**
- 4.08.100 **Tenure of employment—Removal for cause.**



- 4.08.160 **Prohibited employee conduct.**
- 4.08.170 **Cooperation of City officers and employees.**
- 4.08.180 **Collective bargaining.**
- 4.08.190 **Transition.**
- 4.08.200 **Temporary replacements.**
- 4.08.210 **Penalties.**

Statutory Reference: for Charter provisions regarding civil service regulations, see Charter Art. XVI.

Severability: The provisions of this chapter are declared to be separate and severable and the invalidity of any clause, sentence, paragraph, subdivision, section or portion of this chapter, or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of this chapter or the validity of its application to other persons or circumstances.

(Ord. 107791 § 21, 1978.)

4.08.010 **Title.**

This chapter shall be entitled "The 1978 City of Seattle Public Safety Civil Service Ordinance."
(Ord. 107791 § 1, 1978.)

4.08.020 **Purpose.**

The general purpose of this chapter is to establish a civil service system for employees in the Police and Fire Departments of the City, governing appointments, promotions, promotional testing, layoffs, recruitment, retention, classifications, removals and discipline, pursuant to Charter Article XVI, in substantial compliance with RCW Chapters 41.08, 41.12, 41.56. All appointments and promotions to Police and Fire Department positions, retention therein and removal therefrom shall be based on merit and according to the policies and procedures hereinafter specified or according to the procedures regarding the promotions of police officers and sergeants set forth in the collective bargaining agreement between the City and the exclusive bargaining agent of such employees, as approved by ordinance, to the extent such procedures are inconsistent with those set forth herein.

(Ord. 121747 § 3, 2005; Ord. 120658 § 4, 2001; Ord. 107791 § 2, 1978.)

4.08.030 **Definitions.**

The following words and phrases shall have the meanings hereinafter described unless the context in which included clearly indicates otherwise:

A. "Appointing authority" means a person who is authorized to employ others on behalf of the

City, which means: (1) the Fire Chief with respect to any Seattle Fire Department position included in this system, or (b) the Chief of Police with respect to any Seattle Police Department position included in this system.

B. "Certify" means verify to the appointing authority that a list of names of candidates for employment has been selected from the list of persons tested and found eligible for employment.

C. "City" means The City of Seattle.

D. "City Council" means the City Council of The City of Seattle.

E. "Class" means a group of positions designated by the Commission as having similarity in duties and responsibilities, by reason of which the same examination may be used for each position in the group.

F. "Commission" means the Public Safety Civil Service Commission hereinafter created, and the term "Commissioner" means any one (1) member of said Commission.

G. "Demotion" means removal of an employee from a higher to a lower class of employment, for cause.

H. "Exempt position" means a position of City employment which is subject to civil service rules and regulation only to the extent provided in the Exemptions Ordinance,¹ and in which one serves at the discretion of the appointing authority. An exempt position must be established by a two-thirds ($\frac{2}{3}$) vote of the City Council.

I. "Probationary employee" means a person appointed from a register who has not yet completed one (1) year's employment.

J. "Provisional employee" means an employee who was appointed to a position for which no register existed.

K. "Reduction" means the removal of an employee from a higher class to a lower class of employment for reasons other than cause.

L. "Register" means a list of candidates for employment who have passed an employment examination, whose names may be chosen and certified by the Commission for submission to the appointing authority for consideration for employment.

M. "Regular employee" means a person appointed from a register who has satisfactorily completed a one (1) year period of probationary employment.

N. "Reinstatement" means reappointment of a regular employee to a position in a class in which he/she was a regular employee.

O. "Suspension" means temporary withdrawal of an employee from employment with or without

4.08.030 PERSONNEL

pay, for cause, or pending determination of charges against the employee which could result in discharge.

P. "Temporary employee" means a person appointed to fill an emergency, temporary or short-term need, or to fill a position for which no register is available.

Q. "Termination" means separation from employment for cause.
(Ord. 107791 § 3, 1978.)

1. Editor's Note: The Exemptions Ordinance is codified in Chapter 4.12 of this Code.

4.08.040 Public Safety Civil Service Commission.

A. There is created a Public Safety Civil Service Commission composed of three (3) members. One (1) member shall be appointed by the Mayor, one (1) by the City Council and one (1) elected by and representing employees. The term of each Commissioner shall be three (3) years; provided, that the term of the first Council Commissioner shall be two (2) years and the term of the first Mayor's Commissioner shall be one (1) year. Each term shall commence on January 1st, and appointments to fill vacancies shall be for the unexpired term. Two (2) Commissioners shall constitute a quorum. Commissioners may receive compensation for their services as may be fixed from time to time by ordinance.

B. Officers and employees in the Mayor's office, on the City Council staff, and on the Public Safety Civil Service Commission staff, and employees holding exempt positions shall be ineligible for the office of Commissioner.

C. All regular and probationary employees who are members of this system are eligible to vote for an employee-selected Public Safety Civil Service Commissioner.

D. Election shall be administered by the City Clerk. Election shall be held during the week beginning on the first Monday in November, 1987, and every third year thereafter. The City Clerk shall give notice of such election and furnish ballots therefor. Balloting shall be permitted by mail postmarked between the hours of one minute past twelve midnight (12:01 a.m.) Monday to twelve midnight (12:00 midnight) of the succeeding Friday of the election week. Ballots may also be deposited during regular office hours at polling places prescribed by the City Clerk.

E. Not earlier than the first Monday in October of each year in which a Commissioner will be elected, nor later than the succeeding Friday, any person who is to become a candidate for Commis-

sioner shall file a declaration of candidacy for office with the City Clerk, on a form furnished by the City Clerk.

F. The candidate receiving the majority of votes cast shall win the election. If no candidate receives a majority of the votes cast, the two (2) candidates receiving the highest and next highest number of votes shall be candidates in a runoff election at a date and time to be determined by the City Clerk. The runoff election be scheduled so that completion of balloting and certification shall occur before five p.m. (5:00 p.m.) on the last business day of December of the election year. Notice and balloting shall be the same as for a regular Commissioner's election.

G. Vacancies occurring in the office of the employee's Commissioner shall be filled at a special election to be called for such purpose by resolution of the City Council.

H. No City employee who is elected to the Public Safety Civil Service Commission shall suffer a monetary loss or other penalty on account of his/her absence from his/her regular position during regular hours while performing the duties of Commissioner.

I. Candidates for Public Safety Civil Service Commission shall comply with the terms of the Fair Campaign Practices Ordinance of the City (Ordinance 106653)¹ regarding filing of disclosure statements regarding campaign financing.

J. Pursuant to the City Charter Article XIX,² Commissioners may be removed for cause by the City Council following a hearing and the Mayor's appointee may also be removed by the Mayor upon filing a statement of reasons therefor. (Ord. 118337 § 2, 1996; Ord. 117242 § 8, 1994; Ord. 116368 § 85, 1992; Ord. 112606 § 1, 1985; Ord. 109358 § 1, 1980; Ord. 107791 § 4, 1978.)

1. Editor's Note: The Fair Campaign Practices Ordinance is codified in Chapter 2.04 of this Code.

2. Editor's Note: The Charter is included at the beginning of this Code.

4.08.050 Organization of commission— Executive Director.

A. Immediately after appointment, the Commission shall organize by electing one (1) Commissioner as Chairman and thereafter hold regular meetings at least once a month, and such additional meetings as may be required for the proper discharge of duties.

B. The Commission shall appoint an Executive Director, who shall keep the records for the Commission, preserve all reports made to it, and perform such other duties as the Commission may prescribe.

C. Should the position of Executive Director be filled by appointment of a Public Safety Civil Service employee, such employee, if removed as Executive Director other than for cause, shall be appointed to the first available position in the class from which he/she was appointed to the position of Executive Director.
(Ord. 120658 § 5, 2001; Ord. 107791 § 5, 1978.)

4.08.060 Jurisdiction.

A. The Public Safety Civil Service system includes and is limited to, and the provisions of this chapter apply only to police special recruits, police recruits, police officers, police sergeants, police lieutenants, and police captains; and fire fighter prerecruits, fire fighters, fire lieutenants, fire captains, fire battalion chiefs, and fireboat pilots, fireboat engineers, and assistant fireboat engineers.

B. Appointments and promotions to the positions:

1. Above the rank and position of Battalion Chief in the Fire Department; and
2. Above the rank and position of Police Captain in the Police Department shall be made by assignment from the ranks and positions of Battalion Chief or Captain in the Seattle Fire Department for Fire Department ranks and positions, and Captain or Lieutenant in the Seattle Police Department for Police Department ranks and positions, at the sole discretion of the appointing authority. In the event of removal from the assigned position, the officer shall resume the rank and position from which he or she was so assigned.

(Ord. 112821 § 1, 1986; Ord. 109358 § 2, 1980; Ord. 107791 § 6, 1978.)

4.08.070 Powers and duties of Commission.

The Commission shall:

A. Make suitable rules to carry out the purposes of this chapter and for examination, appointments, promotions, transfers, demotions, reinstatements, suspensions, layoffs, discharges, and any other matters connected with the purposes of this chapter. Such rules may be amended, modified or rescinded from time to time and all rules and amendments thereof shall be printed for free public distribution.

B. Classify for purposes of examination, all positions covered by this system. No appointments or promotions shall be made to or from positions covered by this system except as provided in this chapter or as set forth in the effective collective bargaining agreement between the City

and the exclusive bargaining agent of such employees, as approved by ordinance, to the extent such procedures are inconsistent with those set forth herein.

C. With the support of the Personnel Director pursuant to SMC 4.04.040, prepare and administer examinations, which shall be graded and open to all who meet appropriate job-related qualifications; provided that the Commission may, by rule, designate other methods of examination based on merit when in the Commission's judgment graded examination is not practicable. Such examinations may include tests of physical fitness and/or manual skill. The Commission may designate a suitable number of persons to be examiners to conduct such examinations. A Commissioner may act as examiner. The Commission shall charge a nonrefundable application fee of Twenty-five Dollars (\$25) for entry-level firefighter and police officer applicants. The Commission shall waive this fee for indigent applicants upon submission by the applicant of a declaration of indigency.

D. With the support of the Personnel Director, examinations for all classes shall be timely prepared and administered by the Commission so as to provide at all times current registers for all classifications. Eligible registers shall remain in effect for a time determined by the Commission; provided, that no eligible register shall remain in effect for more than two (2) years.

E. With the support of the Personnel Director, provide notice of the time, place and general scope of every examination not less than ten (10) days preceding such examination, and for promotional exams by posting in the Commission office and in Police and Fire Department offices for not less than ninety (90) days, and by other notice deemed reasonable or necessary by the Commission.

F. With the support of the Personnel Director, prepare a register for each class of positions in this system from the returns or reports of the examiners of the persons whose standing upon examination for such class is not less than the minimum established by the Commission. Persons, when graded, shall take rank upon the register as candidates in the order of their relative excellence as determined by competitive examination. Veteran's preference in examination and appointment shall be granted as required by federal and state law including RCW 41.08.040 and 41.12.040; provided, a person shall be entitled to use such preference only once to successfully attain an appointment or promotion to a position.

G. When an entry level position is to be filled, certify to the appointing authority the names of candidates in the top twenty-five (25) percent of

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the eligible register or the top six (6) candidates, whichever number is larger. When a vacant position other than entry level is to be filled, certify to the appointing authority to names of the top five (5) candidates. In either circumstance, where more than one (1) position in a class is to be filled, certify one (1) additional name of the person standing next highest on the register for each additional position. The appointing authority shall fill such positions by appointment only from the persons certified by the Commission.

H. If there are no registers for a class, authorize temporary, provisional appointment to the vacant position. A provisional appointment shall not continue for a period longer than four (4) months, and no person shall receive more than one (1) provisional appointment or serve more than four (4) months as provisional appointee in any twelve-month period.

I. Make investigations concerning the enforcement and effect of this chapter and the rules prescribed hereunder; and inspect all offices, places, positions and employments affected by this chapter and ascertain whether this chapter and all such rules are being obeyed. Such investigations may be made by the Commission, or by any Commissioner or agent designated by the Commission for that purpose. Like investigation may be made on written petition of a person duly verified stating that irregularities or abuses exist, setting forth in concise language the necessity and grounds for such investigation. In the course of such investigation, the Commission shall have the power to administer oaths, subpoena and require the attendance of witnesses and the production of books and papers relevant to such investigation. Alternatively, investigation or hearing may be conducted by a delegated agent of the Commission, whose investigation may be aided by subpoenas issued by the Commission.

J. To hear and determine appeals or complaints respecting the administration of this chapter.

K. With the support of the Personnel Director, maintain a roster of employees of this system, and other records as may be necessary for proper administration of this chapter, and provide all necessary records to the Personnel Director for inclusion in the City's personnel management information records system.

L. Recommend from time to time such City legislation as the Commission may deem advisable for the betterment of this system and/or the administration thereof.

M. Comply with the procedures regarding the promotions of police officers and sergeants set forth in the effective collective bargaining agree-

ment between the City and the exclusive bargaining agent of such employees, as approved by ordinance, to the extent such procedures are inconsistent with those set forth herein.

(Ord. 121747 § 4, 2005; Ord. 120658, § 6, 2001; Ord. 119276 § 1, 1998; Ord. 118709 § 1, 1997; Ord. 107791 § 7, 1978.)

4.08.080 Affirmative action.

Personnel actions regarding employees covered by the system set forth in this chapter shall be subject to and consistent with the City's affirmative action plan as adopted by Ordinance 109112¹ and as subsequently amended.

(Ord. 109112 § 7, 1980; Ord. 107791 § 8, 1978.)

1. Editor's Note: The Personnel Ordinance is codified in Chapter 4.04 of this Code.

4.08.090 Qualifications of applicants.

An applicant for a position in the classified Public Safety Civil Service must meet the minimum qualifications prescribed by the Commission, which standards shall be documented by the Commission to be related to the physical and mental demands required to perform the duties assigned to the position to which the applicant seeks appointment.

(Ord. 121747 § 5, 2005; Ord. 120658 § 7, 2001; Ord. 107791 § 9, 1978.)

4.08.100 Tenure of employment—Removal for cause.

A. The tenure of every regular employee who is a member of this system shall be only during good behavior and acceptable job performance, and any such employee may be removed, suspended, demoted, or discharged for cause. Suspensions shall not exceed thirty (30) days. Any regular employee may be removed, suspended, demoted, or discharged by the appointing authority only upon the filing with the Commission of a statement in writing of the reasons therefor, a duplicate of which shall be served upon the employee. Any regular employee so removed, suspended, demoted, or discharged may within ten days from the date of service of such statement, file with the Commission a written demand for a hearing, whereupon, in due course, the Commission shall conduct such hearing. The hearing shall be confined to the determination of the question of whether such removal, suspension, demotion, or discharge was made in good faith for cause. After such hearing, the Commission may affirm the action of the appointing authority, or if it shall

find that the action was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such person was removed, suspended, demoted, or discharged. The Commission upon such hearing, in lieu of affirming the removal, may modify the order of removal, suspension, demotion, or discharge by directing a suspension, without pay, for up to thirty (30) days, and subsequent restoration to duty, or demotion in classification, grade or pay. The findings of the Commission shall be certified in writing by the appointing authority, and shall be forthwith enforced by such officer.

B. All hearings pursuant to this section shall be open to the public at the request of the employee. Hearings shall be held after due notice of the time and place of hearing to the affected employee. The employee has the right to representation of his/her choosing and at his/her own expense.

C. The Commission shall cause to be made a record of all such hearings. Upon request, the Commission shall furnish such record to the employee.

D. By submitting a grievance to binding arbitration under a collective bargaining agreement, the employee waives his/her right to demand a hearing under this section. A complaint alleging discrimination in violation of the City's Fair Employment Practices Ordinance¹ shall be referred by the Commission to the rights agency of the City having jurisdiction over such complaints for its recommendation as to appropriate settlement of the case.

(Ord. 107791 § 10, 1978.)

1. Editor's Note: The Fair Employment Practices Ordinance is codified in Chapter 14.04 of this Code.

4.08.110 Filling of vacancies—Probationary period.

A. Whenever a position covered by this system becomes vacant, the appointing authority, if it desires to fill the vacancy, shall make requisition upon the Commission for the names and addresses of persons eligible for and willing to accept the appointment. The appointing authority shall fill such vacancies by appointment from the register of persons certified by the Commission thereafter. To facilitate the selection of appointees from the persons so certified, the appointing authority may require such persons to come before him/her and shall be entitled to inspect such persons' application and examination papers, and

may fill such positions by appointment from the persons so certified without regard to their order of certification.

B. No appointment, employment or promotion in this system shall be deemed complete until after the expiration of a period of one (1) year's probationary service. Before the expiration of the period of probation, the appointing authority may discharge or, in the case of a promotion, demote an appointee upon filing in writing the reasons therefore with the Director of Personnel and the Commission. If an appointee is not then discharged or demoted, his/her appointment shall be deemed complete.

(Ord. 121747 § 6, 2005; Ord. 120658 § 8, 2001; Ord. 107791 § 11, 1978.)

4.08.120 Performance evaluation.

The performance of employees covered by this system shall be evaluated in accordance with rules adopted by the respective appointing authorities.

(Ord. 107791 § 12, 1978.)

4.08.130 Training programs.

The appointing authorities shall from time to time adopt and administer training programs for their respective departments, subject to provisions of the affirmative action plan.¹

(Ord. 107791 § 13, 1978.)

1. Cross-reference: The affirmative action program is codified in Chapter 4.80 of this Code.

4.08.140 Rights of employees.

A. Employees have the right to compete openly for positions on the basis of knowledge, skills, and abilities.

B. Employees have the right to a timely resolution of their grievances, and appeals.

C. Employees shall not be demoted, suspended, or discharged except only for cause, and they may appeal such adverse actions as specified in this chapter.

D. Employees have the right to fair and equal treatment as provided in Ordinance 102562, as amended (Seattle Fair Employment Practices Ordinance).¹

E. Employees may bargain collectively through representatives of their own choosing, pursuant to RCW Chapter 41.56.

F. Employees may examine their own personnel files and are entitled to a copy of anything contained therein, at the City's expense.

G. Employees may have outside employment as long as it does not interfere with their ability to

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carry out their duties for the City, subject to the provisions of the Ethics Ordinance (Ordinance 100435, as amended).²

H. Employees may engage in political activities, subject to RCW 41.06.250. Political activities of employees in operations which are financed primarily or totally by federal grant-in-aid funds are also subject to the Hatch Act, 15 USC/1501, et seq.

I. Employees have the right to report an "improper governmental action" to an "auditing official," another government official or a member of the public, to cooperate in an investigation, and to testify in a proceeding thereon, and to be protected from "retaliatory action" for doing so. (Each term in

quotation marks is defined in Section 4.20.850.) (Ord. 115464 § 3, 1990; Ord. 107791 § 14, 1978.)

1. Editor's Note: The Fair Employment Practices Ordinance is codified in Chapter 14.04 of this Code.
2. Editor's Note: The Ethics Ordinance is codified in Chapter 4.16 of this Code.

4.08.150 Salary or wages not paid except to those lawfully appointed.

The Director of Executive Administration shall not approve, or pay any salary or wages to any person for services as an officer or employee in the Police and Fire Departments unless such person is occupying an office or place of employment according to law and is entitled to payment therefor.

(Ord. 120794 § 49, 2002; Ord. 116368 § 86, 1992; Ord. 107791 § 15, 1978.)

4.08.160 Prohibited employee conduct.

A. It is unlawful for anyone to wilfully or corruptly, by himself or in collusion with one (1) or more persons, to deceive or obstruct any person in respect to his or her right of examination, or corruptly or falsely mark, grade, estimate or report upon the examination or proper standing of any person examined hereunder, or aid in doing so, or wilfully or corruptly make any false representation concerning the same or concerning the person examined, or wilfully or corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospect or chances of any person so examined, or to be examined, to be appointed, employed or promoted.

B. It is unlawful for any person to:

1. Solicit political support from City employees during the employee's working hours; or
2. Grant or promise to grant any act or thing of value to a City employee in return for the employee's giving him/her special consideration in the course of the employee's business; or
3. Withhold or threaten to withhold any right or benefit of an employee, or to bring or threaten to bring any disciplinary charge conditioned on the employee's according special consideration to that person, in the employee's course of business; or
4. To use City property or materials to engage in solicitations other than for City purposes, or for political campaign purposes; or

5. If a City employee, solicit for other than City purpose or engage in political campaigning, on City time. (Ord. 107791 § 16, 1978.)

4.08.170 Cooperation of City officers and employees.

All officers and employees of the City shall afford to the Commission reasonable access to and reasonable facilities for the inspection and copying of all books, papers, documents and accounts in any way pertaining to any office, place, position or employment under the jurisdiction of the Commission and shall also produce the books, papers, documents and accounts and attend and testify whenever requested by the Commission to do so.

(Ord. 107791 § 18, 1978.)

4.08.180 Collective bargaining.

The adoption of this chapter shall not affect the provisions of any existing collective bargaining agreement.

(Ord. 107791 § 19, 1978.)

4.08.190 Transition.

In order that the business of the City may continue without major hiatus during implementation of this new civil service ordinance, the following transitional provisions are authorized and made:

A. Upon the effective date of the ordinance codified in this chapter,¹ the appointment of each employee covered by this system is ratified and confirmed.

B. Upon the effective date of the ordinance codified in this chapter,¹ all regular employees covered by this system shall remain regular employees, without loss of accrued service time, or accrued vacation, sick leave, compensatory time or like benefit, if any, which is also recognized under this chapter.

C. Upon the effective date of the ordinance codified in this chapter,¹ probationary employees covered by this system shall remain probationary employees without loss of accrued vacation, sick leave, compensatory time, service time accrued toward regular employment, or like benefit, if any, which is also recognized under this chapter.

D. Provisional appointments to positions covered by this system shall on May 1, 1979, be deemed vacant and the incumbent thereof shall not be reappointed to such position except as provided in this chapter.

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E. Upon the effective date of the ordinance codified in this chapter,¹ the Commission shall assume jurisdiction over appeals previously made by employees who are members of this system to the previous Civil Service Commission. The Commission shall hear such cases under its choice of previous Civil Service Laws and Rules or the Commission's newer rules, if any, whichever set of rules is deemed fairer to the employee.

F. Upon the effective date of the ordinance codified in this chapter,¹ the existing job classifications in this system are ratified and confirmed, and shall remain in effect until changed. (Ord. 107791 § 20, 1978.)

1. Editor's Note: Ord. 107791 became effective on January 10, 1979.

4.08.200 Temporary replacements.

The Public Safety Civil Service Commission may appoint a temporary replacement to participate in its proceedings on a particular matter with full speaking and voting rights of a member when:

A. The Commission is hearing an appeal under Section 4.08.100 or otherwise acting in an adjudicatory capacity; and

B. The member is disqualified from acting by reason of interest or other cause or is excused in order to preserve fairness or an appearance of fairness to the Commission's proceedings.

Commission's proceedings with a temporary replacement shall be valid to all intents and purposes. The appointment of a temporary replacement shall not reduce the rights or privileges of the regular member, who is excused from acting on the particular matter, with respect to any other matters or proceedings of the Commission. (Ord. 108077 § 1, 1979; Ord. 107791 § 23, 1978.)

4.08.210 Penalties.

Any person who violates any of the provisions of Section 4.08.160 shall, upon conviction thereof, be fined in an amount not to exceed Five Hundred Dollars (\$500) and/or imprisoned in the City Jail for a period not to exceed one hundred eighty (180) days. In addition, such violation shall constitute good cause for dismissal or other discipline at the discretion of the appointing authority. (Ord. 107791 § 17, 1978.)

Chapter 4.10 LIMITED DUTY ASSIGNMENTS— PREGNANCY

Sections:

4.10.010	Purpose—Policy.
4.10.020	Procedure—Accommodation.
4.10.030	Limitations.
4.10.040	Departmental operating procedures.

4.10.010 Purpose—Policy.

It is the policy of The City of Seattle to recognize pregnancy as a normal occurrence in a woman's life and to provide female employees an opportunity to continue to participate in the work force during a normal pregnancy. (Ord. 113597 § 1(part), 1987.)

4.10.020 Procedure—Accommodation.

A. Notwithstanding other provisions of Title 4 of this Code, a female employee who, upon advice of her physician and/or a physician employed by the City, may not safely perform all of the normal duties of her job due to pregnancy and who indicates a desire to continue working prior to taking sick leave or maternity leave for which she may otherwise be eligible, shall, upon concurrence of the City, receive consideration for temporary reassignment. The employing department shall reasonably accommodate such a pregnant employee's desire for medically approved continued employment during pregnancy via one (1) or more of the alternatives listed below within the employing department, with the first alternative having preference, as long as such accommodation can be reasonably made:

1. Temporary reassignment to limited duties within the employee's job classification;
2. Temporary reassignment of the employee to a similar classification with equal pay for which the employee is qualified;
3. Temporary reassignment of the employee to another classification for which the employee is qualified but with lesser pay to be assigned to the pay step closest to that which the employee was receiving in her normal job classification.

B. Because of the separate and unique retirement system for uniformed police officers and firefighters, the temporary reassignment for pregnant firefighters or police officers shall only be provided as in subsection A1 of this section. (Ord. 113597 § 1(part), 1987.)

ATTACHMENT B

1 including the testimony, documentary evidence, and arguments of the parties and their
2 representatives, the Commission by unanimous vote enters the following Findings of
3 Fact, Conclusions of Law, and Order.

4 II. JURISDICTION

5 The Commission must, as a threshold matter, consider its jurisdiction over this
6 appeal.

7 **A. The Disciplinary Transfer**

8 In its recent decision in *Vela v. Seattle Police Department*², the Commission held
9 that it did not have jurisdiction to hear an appeal of the transfer at issue in that case.
10 PSCSC Rule 6.01(a) provides that "Any regular employee who is demoted, suspended,
11 or terminated may appeal such action to the Commission." Rule 6.01(c) provides that
12 an employee may also appeal an alleged violation of Article XVI of the City Charter, the
13 Public Safety Civil Service Ordinance, or a PSCSC Rule.

14 The transfer in *Vela*, like the transfer in this case, was not a demotion and Rule
15 6.01(a) was therefore not applicable. The *Vela* transfer also was not a disciplinary one
16 – i.e. the Department did not justify its decision to transfer Sergeant *Vela* on the basis of
17 any performance issues or misconduct. Rather, the Department justified its decision
18 solely on the basis of the needs of the Department. The Commission found that the
19 Notice of Appeal in *Vela* did not state a violation of the Charter, the Ordinance, or a
20
21
22

23 _____
² *Vela v. Seattle Police Department*, PSCSC 05-002, Order dated February 16, 2006.

1 PSCSC Rule, and so the Commission did not have jurisdiction to hear the appeal of his
2 non-disciplinary transfer.³

3 The transfer in this case is fundamentally different. The Department from the
4 outset justified the transfer as disciplinary in nature – i.e. it was based upon Sergeant
5 Charles' alleged failure to follow a directive from his superiors. The CBA expressly
6 states that an employee may appeal a disciplinary transfer to either the Disciplinary
7 Review Board or to the Commission.

8 Article 3.5.G of the CBA provides:

9 If a suspension, demotion, termination, or a transfer identified by the City
10 as disciplinary in nature is challenged, the discipline may be challenged
11 through the Public Safety Civil Service Commission or through the
12 Disciplinary Review Board (DRB), but not through both. A suspension,
13 demotion, termination, or transfer identified by the City as disciplinary in
14 nature cannot be challenged through the grievance procedure. If the guild
15 believes that a transfer not identified by the City as disciplinary in nature is
16 in fact disciplinary, the Guild's challenge to the transfer shall be handled
17 through the grievance procedure.

18 The Commission reads the Charter, the PSCSC Ordinance, and its Rules
19 together with any applicable CBA language.⁴ The Commission finds no conflict
20 between the SPOG CBA language cited above and the language of the Charter, the
21 PSCSC ordinance, or the PSCSC Rules. Accordingly, the Commission reads Article
22 XVI of the City Charter and the CBA together to provide that the Commission has
23 jurisdiction to hear this appeal of a disciplinary transfer.⁵

20 **B. The Letter of Reprimand**

21 ³ The Commission in its decision also noted that the collective bargaining agreement (CBA) between the City and
22 the Seattle Police Officers Guild (SPOG) governed situations in which a SPOG member contended that a transfer
justified for business reasons was in fact for disciplinary reasons.

23 ⁴ The City authorizes execution of CBA's by ordinance. For, example the relevant City-SPOG CBA was authorized
by Ordinance No. 121725.

⁵ The Commission's jurisdiction is concurrent with the DRB. The member must timely elect a forum, either the
Commission or the DRB.

1 In his Notice of Appeal, Sergeant Charles lists "disciplinary transfer and written
2 reprimand" on page one under the "basis for the appeal". He does not, however,
3 mention the written reprimand in the "Remedy Sought" section of the Notice of Appeal.
4 It is therefore not apparent from the face of the Notice of Appeal whether Appellant is
5 asking the Commission to assert jurisdiction over an appeal of the letter of reprimand or
6 not. In any event, the Commission finds that it should address the issue here in order to
7 provide guidance to both Departments and future potential appellants.

8 Applying the same analysis as that applied to disciplinary transfers, the
9 Commission concludes it does not have jurisdiction to hear appeals of Police
10 Department letters of reprimand issued to SPOG members.

11 The City Charter, PSCSC Ordinance, and PSCSC Rules do not mention written
12 reprimands. Nothing in the Charter, Ordinance, or Rules suggests that the Commission
13 has jurisdiction to hear appeals of letters of reprimand. Article 3.2 of the City-SPOG
14 CBA provides:

15 "Written reprimands shall be subject to the grievance procedure of the
16 Agreement."

17 Reading the applicable CBA language together with the Charter, Ordinance and
18 Rules, the Commission concludes that it would not have jurisdiction to hear an appeal of
19 the letter of reprimand in this case.

20 **III. BURDEN OF PROOF**

21 PSCSC Rule 6.21 provides:

22 **BURDEN OF PROOF.** At any hearing on appeal from a demotion,
23 suspension, or termination, the disciplining authority shall have the burden
of showing that its action was in good faith for cause. At any other

1 hearing, the petitioner or appellant shall have the burden of proof by a
2 preponderance of the evidence.

3 This appeal does not concern a demotion, suspension, or termination. The
4 appellant therefore bears the burden of proof. The Commission holds that in a
5 disciplinary transfer case the appellant bears the burden of proving by a preponderance
6 of the evidence that the disciplinary transfer was not in good faith for cause.⁶

7 IV. FINDINGS OF FACT

8 **A. Undisputed Facts**

9 Most of the important facts are uncontested. The following timeline summarizes
10 the undisputed facts and notes when witnesses testified differently about material facts.

11 **1. The Investigation of a Possible Fraud Scheme at SPU Transfer Stations**

12 a. Wednesday, April 20, 2005. Detective Heidi Traverso received a voice-mail
13 message from Joanne Peterson, Human Resources Director at Seattle Public Utilities
14 (SPU), stating that Ms. Peterson wanted to meet with her to discuss a case.

15 b. Thursday, April 21. Detective Traverso contacted Ms. Peterson Thursday
16 morning. Ms. Peterson told Detective Traverso that there was a meeting scheduled at
17 2:00 p.m. that day to discuss a case and asked her to attend. Detective Traverso did
18 not at that time know the purpose of the meeting, but assumed it was regarding a
19 current investigation she was working on involving SPU. Detective Traverso told
20 Sergeant Charles about the meeting. Sergeant Charles normally worked from 6:00 a.m.
21 to 2:00 p.m., but had scheduled an hour of vacation and planned to leave at 1:00 p.m.

22
23 ⁶ The Commission considers this Rule language to be consistent with the SPOG-City CBA which provides in Article
7.4.1: "Disciplinary Transfer – A disciplinary transfer is a permanent change in unit of assignment that is imposed
as discipline and shall be subject to the requirement of just cause."

1 that day.⁷ Sergeant Charles told Detective Traverso that he would not be in the office at
2 2:00 p.m. and so would not attend the meeting. Sergeant Charles also told Detective
3 Traverso to let him know what happened at the meeting.

4 When Detective Traverso arrived at the 2:00 p.m. meeting, she was surprised to
5 see many other people there and realized then that it was not just another meeting
6 about the already pending investigation. The subject of the meeting was instead a new
7 investigation of possible fraud at SPU Solid Waste Transfer Stations. At the meeting,
8 Detective Traverso learned, among other things, that there might be up to \$100,000
9 involved, that as many as six to nine SPU employees might be involved, and that the
10 Mayor's office was interested in the progress of the investigation.⁸

11 c. Friday, April 22. Detective Traverso met with Sergeant Charles in the morning
12 between 9:00 a.m. and 11:00 a.m. and described the meeting to him. She testified she
13 provided him with an update, but did not testify that she informed him at that time about
14 the potential losses, the number of employees potentially involved, or the interest
15 expressed by the Mayor's office. He asked her to send him an e-mail memo
16 summarizing the meeting held the previous afternoon. Detective Traverso at that time
17 did not consider the investigation to be a major one or see any time pressure to prepare
18 the e-mail immediately. She testified that a \$100,000 in potential losses was not a large
19 amount for her unit, given that her most recent investigation involved over a million
20 dollars. Detective Traverso prepared the e-mail and sent it to Sergeant Charles at 3:21
21
22

23 ⁷ Stipulated Exhibit 8.

⁸ The investigation eventually concluded that no fraud was present.

1 p.m. Friday afternoon.⁹ Sergeant Charles had left for the day and therefore did not see
2 the e-mail until the following Monday morning.

3 d. Monday, April 25. Sergeant Charles read Detective Traverso's e-mail early
4 Monday morning. He called Detective Traverso, who was attending training out of the
5 office, at about 7:00 a.m. before her training started. He asked her for some additional
6 information about the way in which the possible fraud may have been conducted. He
7 then prepared a written memorandum to his superior, Lieutenant Mount, based on
8 Detective Traverso's e-mail and the additional information he had received from her.¹⁰

9 Sergeant Charles testified he carried the memorandum, which was stamped
10 "Confidential", into Lieutenant Mount's office sometime late Monday morning, that
11 Lieutenant Mount was talking on the telephone, and that he therefore left the memo in
12 Lieutenant Mount's in-box. Sergeant Charles did not indicate to Lieutenant Mount,
13 either by words or gestures, that the memorandum was urgent. Sergeant Charles also
14 did not inform Lieutenant Mount later that day that the memo was urgent.

15 Lieutenant Mount testified he did remember Sergeant Charles delivering the
16 memo. He did not remember being on the phone when Sergeant Charles brought it in,
17 but testified that he may have been doing something else at his desk at the time. He
18 also testified that he thought it must have been in the afternoon because he normally
19 checked his in-box once a day in the morning. Since he didn't find the memo until
20 Tuesday morning, Lieutenant Mount believed Sergeant Charles must have delivered it
21 Monday afternoon after he had checked his in-box that morning.

22
23 ⁹ Stipulated Exhibit 3.
¹⁰ Stipulated Exhibit 4.

1 e. Tuesday, April 26. Lieutenant Mount read the memo early Tuesday morning,
2 realized that the new investigation could be a high-profile matter, and informed his
3 superior, Captain Mike Fann, at about 7:00 a.m. about the new investigation. Captain
4 Fann called Detective Traverso three times that day, including once on her personal cell
5 phone that evening after she was off-duty, to ask her questions about the new SPU
6 investigation, particularly about what Sergeant Charles knew and when he knew it.
7 Concerned about the unusual calls from her Captain, she asked Captain Fann if she
8 was in trouble. Captain Fann replied "No, you're not, your sergeant is".

9 Detective Traverso testified that Captain Fann also told her not to tell Sergeant
10 Charles about his calls and said at one point, "This phone call never happened".

11 Captain Fann testified he may have asked Detective Traverso not to tell
12 Sergeant Charles about the calls but that he did not recall ever saying to her "This
13 conversation never happened".

14 f. Wednesday, April 27. Sergeant Charles and Detective Traverso attended a
15 follow-up meeting regarding the new investigation. Detective Traverso wrote an e-mail
16 summarizing that meeting.¹¹ The e-mail indicated that the group agreed to meet again
17 on May 11.

18 g. Thursday, April 28. Sergeant Charles prepared a memorandum to Lieutenant
19 Mount dated April 28 that summarized the April 27 meeting.¹²

20 h. Sergeant Charles' Performance Review. Lieutenant Mount prepared a
21 Performance Review for Sergeant Charles covering the period between April 12 and
22

23 ¹¹ Stipulated Exhibit 5. The e-mail is date stamped April 27 but is entitled "SPU Meeting 4/28". Detective Traverso testified she sent the e-mail on April 27 but simply put the wrong date in the subject line.

¹² Stipulated Exhibit 6.

1 August 23, 2005.¹³ The four page document rates Sergeant Charles' performance in a
2 wide range of areas. Sergeant Charles was rated "Fully Competent" or "Exceeds
3 Expectations" in every category. The Performance Review contains one apparent
4 reference to the SPU Transfer Station matter:

5 Sergeant Charles typically provides the necessary updates to his chain of
6 command, however, in one instance, the method of notification was
7 inappropriate, based on the possible significance of the concern.¹⁴

8 **2. March 2005 Meeting Between Captain Fann and Sergeant Charles**

9 Sergeant Charles and Captain Fann both testified that the two of them had
10 discussed in March 2005 the importance of keeping the chain of command informed of
11 cases, particularly high profile cases. The context was an earlier SPU fraud case.
12 Neither Captain Fann or Sergeant Charles documented the content of the conversation.

13 Captain Fann testified that he informed Sergeant Charles that he needed to
14 always keep the chain of command informed in all high profile cases so they could offer
15 assistance and support. He testified he told Sergeant Charles that he needed to be
16 closely involved with his staff and aware of what they were doing in high profile cases.

17 Sergeant Charles testified the discussion was more particular than simply
18 keeping his chain of command informed about all high profile cases. He testified he
19 was told that he should inform his superiors about an investigation, especially when he
20 needed backup – for example support to obtain cooperation from reluctant City
21 employees.
22

23 ¹³ Stipulated Exhibit 10.

¹⁴ Exhibit 10, page 2.

1 **3. The Departmental Investigation of Sergeant Charles' Performance**

2 The Department conducted an investigation of Sergeant Charles' performance in
3 the second SPU investigation. As discussed above, Captain Fann called Detective
4 Traverso and questioned her. Captain Fann also spoke with other individuals involved
5 in the matter, including Lieutenant Mount. On May 5, Captain Fann sent Assistant Chief
6 Cynthia Miller a memorandum summarizing the investigation of Sergeant Charles'
7 handling of the SPU transfer station investigation.¹⁵

8 **4. Chief Kerlikowske's Decision**

9 Chief Kerlikowske met with Sergeant Charles on June 20th regarding the
10 Department's investigation of Sergeant Charles' performance in the SPU investigation.
11 Chief Kerlikowske sent Sergeant Charles his disciplinary decision letter and attached
12 Disciplinary Action Report (DAR), both dated July 5.¹⁶

13 Sergeant Charles testified that at the June 20 meeting, also known as a
14 *Loudermill* hearing, Chief Kerlikowske said, "You'd think if you knew about a \$100,000
15 theft and possible public corruption, you'd find a way to make it to a meeting." Chief
16 Kerlikowske corroborated that testimony, answering "Right, that's probably so" when
17 asked if he made such a statement at the *Loudermill* hearing.

18 Chief Kerlikowske's disciplinary decision letter sustained the disciplinary transfer
19 of Sergeant Charles from the Fraud and Forgery Unit. Chief Kerlikowske's letter and
20 the DAR both refer to "misconduct" on the part of Sergeant Charles. Chief Kerlikowske,
21 Captain Fann, and Lieutenant Mount all testified that there was no allegation of
22

23 ¹⁵ Stipulated Ex. 7.

¹⁶ Stipulated Ex. 2.

1 misconduct and that the investigation was in fact about Sergeant Charles' performance
2 – in particular whether he met performance expectations regarding keeping his
3 superiors informed about high-profile cases.

4 V. ANALYSIS AND CONCLUSIONS OF LAW

- 5
- 6 1. The Public Safety Civil Service Commission has jurisdiction to hear Sergeant
7 Charles' appeal of the disciplinary transfer.
 - 8 2. Sergeant Charles has the burden of proving by a preponderance of the
9 evidence that his disciplinary transfer was not in good faith for just cause.
 - 10 3. "In good faith for cause" means for just cause, i.e. "for a fair and honest cause
11 or reason, regulated by good faith on the part of the employer". *Baldwin v.*
12 *Sisters of Providence*, 112 Wn.2d 127, 139 (1989)
 - 13 4. The Commission finds "Just Cause: The Seven Tests", a leading treatise on
14 the subject of the application of the just cause standard, useful in applying
15 the just cause standard in this case.¹⁷
 - 16 5. In particular, the Commission finds the following seven factors instructive in
17 this case, including: 1) was there reasonable notice to the employee; 2) is
18 rule or order at issue reasonable; 3) did the employer conduct a reasonable
19 investigation; 4) was the investigation conducted fairly; 5) did the employer
20 base the decision on substantial evidence that the employee had in fact
21 violated the rule or order; 6) has the employer treated similar cases similarly;
22 and 7) is the penalty reasonably related to a) the seriousness of the

23 ¹⁷ Adolph Koven and Susan Smith, Just Cause: The Seven Tests, , The Bureau of Nat'l Affairs (1992).

1 employee's proven performance deficiencies or misconduct and b) the
2 employee's record of service.

3 6. The seven factors are just that – factors to be considered under the totality of
4 the circumstances. The absence of one factor does not necessarily mean
5 the decision was not for just cause. Some misconduct, for example, would
6 justify immediate disciplinary action without prior notice.

7 7. The Commission applies the factors to this case as follows:

8 **a. Reasonableness of Rule or Order.** The Commission finds that the
9 performance expectation at issue here, i.e. "keep your superiors informed about
10 high-profile cases" is reasonable. The Department must be able to require
11 employees to keep the chain of command informed about cases that the
12 Department considers significant. The Commission finds that this factor supports
13 a finding of just cause.

14 **b. Notice.** The notice the Department provided Sergeant Charles that his
15 performance was inadequate is in dispute. Captain Fann did not document the
16 March conversation with Sergeant Charles. The Commission is left with
17 somewhat conflicting testimony regarding the content of that conversation. It is
18 undisputed that the conversation, even if it constituted notice to Sergeant Charles
19 that his performance in the earlier SPU investigation was inadequate, was rather
20 general in nature. The Department did not suggest any way to identify which
21 cases were "high profile" or any training or other guidance to assist Sergeant
22 Charles in making that determination. All Departmental witnesses praised
23 Sergeant Charles performance in general and emphasized that this particular

1 issue – informing superiors of high-profile cases – was his only performance
2 problem. The Commission finds that under these circumstances, the informal
3 and undocumented conversation between Captain Fann and Sergeant Charles
4 was not adequate notice to Sergeant Charles of a performance deficiency. The
5 Commission finds that the notice factor supports a finding that the disciplinary
6 transfer was not for just cause.

7 **c. Investigation.** It is uncontested that the Department conducted an
8 investigation. Sergeant Charles claims that the CBA requires that the
9 investigation be conducted as an Internal Affairs investigation. That is not an
10 issue for the Commission to decide. The Commission finds that the Department
11 did conduct an investigation and that factor supports a finding that the
12 disciplinary transfer was for just cause.

13 **d. Fairness of Investigation.** There are undisputed irregularities in the
14 Department's investigation. The file contains several references, including in the
15 final disciplinary decision letter and DAR that the issue in the case was one of
16 "misconduct".¹⁸ At the hearing, the Department admitted that those references
17 are simply wrong – that the issue was solely one of the adequacy of Sergeant
18 Charles' performance.

19 One document that was part of the file reviewed by Chief Kerlikowske
20 erroneously states: 1) that Detective Traverso knew prior to the April 21 meeting
21 that the subject was a "new SPU fraud case"; 2) that Detective Traverso
22 "suggested to Sergeant Charles that this could be another high profile case"; and
23

¹⁸ Stipulated Exhibit 2.

1 3) that she "further suggested that he attend the meeting". It is uncontested that
2 the document is wrong on all three points.¹⁹

3 The investigation apparently did not include written interview notes or
4 other documentation that would assist the Commission in resolving differing
5 testimony or questions regarding the basis for factual statements included in
6 some exhibits.

7 The Commission finds that the investigation was not conducted as
8 professionally or fairly as it should have been and therefore that this factor
9 supports a finding that the disciplinary transfer was not for just cause.

10 **e. Decision based on substantial evidence.**

11 Chief's Kerlikowske's decision may have been based on an erroneous
12 understanding of the facts. Chief Kerlikowske's comment at the *Loudermill*
13 hearing indicates he believed then that Sergeant Charles failed to attend a
14 meeting after he knew that the investigation involved possible losses of
15 approximately \$100,000 and several public employees, and that the Mayor's
16 office was interested in the progress of the investigation.

17 While Chief Kerlikowske might well have had just cause to transfer
18 Sergeant Charles had the Sergeant failed to attend a meeting after knowing that
19 information, it is uncontested that Sergeant Charles did not know that information
20 before the April 21 meeting. It is also uncontested that after he learned that
21 information from Detective Traverso he did go to the April 27 meeting .
22

23 ¹⁹ The document is the text of an e-mail, without the "To:", "From", "Date", etc. information. It is page 7 of Exhibit
7, Lieutenant Mount's May 4, 2005 Memorandum to Assistant Chief Miller.

1 If Chief Kerlikowske was properly informed of this fact before making his
2 final decision, that is not reflected in the disciplinary transfer letter or the DAR.

3 The DAR for example states:

4 On April 21 a detective in your unit notified you that new information
5 had been received regarding a possible fraud case that was either
6 connected with a current high profile case or would be a new case
7 of a similar nature and that a meeting was scheduled for that
8 afternoon. You did not attend the meeting.

9 The DAR suggests again that Sergeant Charles failed to attend a meeting
10 he knew was regarding a possible new high profile case. That does not square
11 with the uncontested evidence that prior to arriving at the April 21 meeting
12 Detective Traverso had assumed it was about the already ongoing SPU
13 investigation, and that she never suggested anything to the contrary to Sergeant
14 Charles. The DAR goes on:

15 The next day the detective notified you that the case had potential
16 to be significant, and you did not notify your lieutenant that day.

17 That also dos not square with the uncontested evidence that Sergeant
18 Charles first learned about that the meeting involved a new investigation with
19 possible high profile status when he read Detective Traverso's e-mail on Monday
20 morning.

21 The DAR goes on:

22 On Monday, April 25th, you transferred an email from the detective
23 into memo form and placed it in the lieutenant's in-box without
making any effort to notify him of the potential significance of the
case.

1 This does square with the uncontested testimony.

2 The Commission finds that Sergeant Charles' only performance deficiency
3 was that he failed to inform Lieutenant Mount on April 25 that the memorandum
4 he left in the lieutenant's in-box that morning concerned a potential high profile
5 case.

6 The Commission finds that mistaken information was contained in the
7 investigative file, and that the mistaken information appears to have been relied
8 on in the final decision. This factor supports a finding that the disciplinary transfer
9 was not for just cause.

10
11 **f. Similar Cases Treated Similarly.** Sergeant Charles contends that the
12 evidence shows that the Department treated his investigation differently than
13 other similar investigations, in particular that the Department's investigation here
14 was not conducted as an Internal Affairs investigation. The Commission finds
15 that some similar investigations were conducted as Internal Affairs investigations
16 and that others were not, that Sergeant Charles has not proven dissimilar
17 treatment, and that this factor favors a finding of just cause.

18 **g. Penalty.** Was the penalty, a disciplinary transfer, reasonably related to: a) the
19 seriousness of the employee's proven performance deficiencies; and b) the
20 employee's record of service.

21 All witnesses agreed that Sergeant Charles was otherwise a good to
22 excellent performer. The Department contends only that his performance as
23 Detective for the Fraud and Forgery Unit, particularly his alleged failure to keep

1 his superiors adequately informed regarding high-profile cases, makes him a
2 poor fit for that particular position. The Commission has concluded that Sergeant
3 Charles failed to notify his superior (Lieutenant Mount) that the memorandum he
4 left in Lieutenant Mount's in-box was regarding a high profile case and required
5 his immediate attention. The issue then is whether the penalty (involuntary
6 transfer) fits the proven performance failure (failure to notify Lieutenant Mount
7 that the memorandum was urgent).

8 Sergeant Charles' overall record is quite good. All Department witnesses
9 praised his performance. He was rated for the relevant period as "fully
10 competent" or "exceeds expectations" in every category in his performance
11 evaluation. Even in the area where the reference to the SPU Transfer Station
12 investigation is noted ("Problem Solving/Decision Making"), he was rated as "fully
13 competent".

14 Given Sergeant Charles' relatively minor proven performance error, the
15 Commission finds that this factor favors a finding that the disciplinary transfer
16 was excessive and not for just cause.

17
18 8. Because the Department's notice to Sergeant Charles was inadequate and
19 did not clearly communicate to him the performance expectation, because the
20 investigation was not thorough and fair and contained erroneous "evidence"
21 that nevertheless found its way into the final decision and DAR, and because
22 the disciplinary transfer was excessive in light of his relatively minor proven
23 performance error and overall good to excellent performance and record, the

1 Commission concludes that the Department's disciplinary transfer of Sergeant
2 Charles was not for just cause.

3 VI. REMEDY

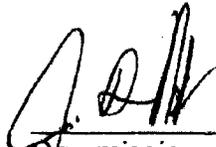
4 Having concluded the disciplinary transfer was not for just cause, the
5 Commission addresses the issue of remedy. The Commission concludes that Sergeant
6 Charles should be reinstated to his former assignment as Sergeant of the Fraud and
7 Forgery Unit.

8 VII. ORDER:

9 IT IS HEREBY ORDERED that the disciplinary transfer of Sergeant Charles from his
10 assignment as Sergeant of the Fraud and Forgery Unit is reversed.

11
12 Signed at Seattle, Washington this 30th day of May, 2006.

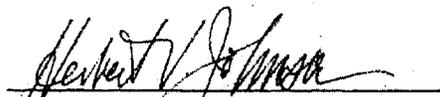
13 **BY THE PUBLIC SAFETY CIVIL SERVICE COMMISSION**
14 **OF THE CITY OF SEATTLE**

15 
16 _____
Commissioner Joel Nark, Chair

5-22-06
Date

17 
18 _____
Commissioner David Bown

5/18/06
Date

19 
20 _____
Commissioner Herb Johnson

5/20/06
Date

ATTACHMENT C

1
2
3
4
5
6 **CITY OF SEATTLE**
7 **PUBLIC SAFETY CIVIL SERVICE COMMISSION**

8 IN RE THE APPEAL OF:

9 B.T. ROBERT MAHONEY,

10 Appellant,

11 vs.

12 CITY OF SEATTLE, SEATTLE
13 POLICE DEPARTMENT,

14 Respondent/Employer.

No. 09-001

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

15
16 **I. INTRODUCTION**

17 The Commission heard this matter pursuant to a Notice of Appeal filed by Officer
18 Bernard T. Robert Mahoney appealing disciplinary action imposed by the Seattle Police
19 Department (Department). Chief Kerlikowske suspended Officer Mahoney for 30 days and
20 transferred him out of the Training Unit of the Department.

21 The Commission held a full evidentiary hearing on May 1, 4, and 5, 2009, before
22 Commissioners Joel Nark, Herb Johnson and Terry Carroll, with Commissioner Nark acting as
23 Presiding Officer. The parties submitted briefs on May 29, 2009, which is therefore the date the
Commission record closed. The Commission has jurisdiction over this matter pursuant to Article

1 XVI, Section 3 of the Seattle City Charter and Chapter 4.08 of the Seattle Municipal Code. The
2 Commission may affirm, reverse or modify the department's decision. SMC 4.08.100.

3 The standard of review is found in SMC 4.08.100 and Commission Rule 6.21. The
4 Department has the burden of showing by a preponderance of evidence that the discipline was
5 "in good faith for cause." The Commission has the authority to affirm, reverse, or modify the
6 decision of the employing department pursuant to SMC 4.08.100.A.

7 The Commission has utilized several factors in analyzing whether the Department has
8 met its burden. The factors are not exclusive - nor are they elements that each must be proven.
9 As the Commission has repeatedly said in prior decisions, the factors are just that - factors it
10 considers in its analysis.

11 The factors include whether: (1) the employee had notice that his or her conduct would
12 result in disciplinary consequences; (2) the rule was reasonable; (3) the employer investigated to
13 determine whether the rule was in fact violated; (4) the investigation was fair; (5) the employer's
14 decision-maker had substantial evidence that the employee violated the rule as charged; (6) the
15 employer applies its rules even-handedly; and (7) the discipline administered was fair in relation
16 to the nature of the offense and imposed with regard to the employee's past work record.¹

17 The Commission analyzes each of the two charges in light of the factors to determine
18 whether the Department had just cause to impose the disciplinary action. After considering the
19 evidence in this case, including testimony, documentary evidence, and arguments of the parties
20 and their representatives, the Commission enters the following Findings of Fact, Conclusions of
21 Law and Order, as provided in SMC 4.08.100.²

22 II. FINDINGS OF FACT

23 1. The Appellant, Officer B.T. Robert Mahoney, has been employed as a Seattle

¹ See PSCSC #07-005 Marcia Kinder v. SFD; PSCSC #06-006 Richard Roberson v. SPD; and PSCSC # 07-007 Felton J. Miles III v. SPD

² Unless noted otherwise, individual findings of fact and conclusions of law are unanimously adopted by the Commission.

1 Police Officer for 10 years. At the time of his suspension, Officer Mahoney was assigned to the
2 Department's Training Unit.

3 2. Prior to the suspension, Officer Mahoney had no disciplinary record during his 10
4 years of service.

5 3. In 2007, Officer Mahoney became acquainted with Heather Newstrom, a senior at
6 Holy Names Academy. She was a leader in the Department's Explorer program and was often at
7 the Department's training facility.

8 4. On April 7, 2008, Ms. Newstrom reported that Officer Mahoney forcibly kissed
9 her on the lips earlier that evening after all the other SPD employees left the training unit. She
10 reported the details of the incident to Explorer Advisor Azrielle Johnson, who documented Ms.
11 Newstrom's complaint and drafted a memo to Assistant Chief Nick Metz.

12 5. On April 10, 2008, the Department's Office of Professional Accountability (OPA)
13 began investigating the allegation.

14 6. The Department concluded that Ms. Newstrom was credible and charged Officer
15 Mahoney with misconduct. SPD later added the dishonesty charge based on official statements
16 Officer Mahoney made during the OPA investigation. Chief Kerlikowske reviewed the
17 investigation and imposed a 30-day suspension and a disciplinary transfer.

18 7. In the hearing before the Commission, Officer Mahoney denied the allegations
19 and further alleged the OPA investigation was biased against him.

20 III. CONCLUSIONS OF LAW

21 The Misconduct Charge – Inappropriate Contact with Ms. Newstrom

22 8. Notice – Officers are responsible for knowing the Department manual. Officer
23 Mahoney had proper notice and knowledge that inappropriate contact with an Explorer would
result in disciplinary action against him and that an unwelcome kiss was an inappropriate
contact.

1 9. Reasonableness of Rule – Officer Mahoney was in a position of trust in the
2 Training Unit and relative to the Explorers in the program. A prohibition against inappropriate
3 contact (such as an unwelcome kiss) with program Explorers is eminently reasonable.

4 10. Fairness of Investigation – The OPA conducted an investigation which included
5 interviews with Officer Mahoney, Ms. Newstrom and others associated with the Explorer
6 Program, the Training Unit and the Department. The Commission majority concludes that
7 Officer Mahoney did not introduce evidence to support a nexus between the alleged bias against
8 him in the Department and the investigation the Department conducted in this case. The
9 Commission majority also concludes there is no substantial evidence to support Officer
10 Mahoney’s claim that the investigation of the misconduct charge was either improperly
11 motivated or biased against him. The Commission unanimously concludes that the investigation
12 of the misconduct charge was conducted fairly.

13 11. Chief had Substantial Evidence – The Commission unanimously concludes that
14 Chief Kerlikowske had substantial evidence that Officer Mahoney had inappropriate contact with
15 Ms. Newstrom. The Chief found Ms. Newstrom’s allegation to be credible regarding this
16 incident. Officer Mahoney and Ms. Newstrom told diametrically opposing stories. Based on the
17 investigation and reports, the Chief of Police found there was substantial evidence to support Ms.
18 Newstrom’s version of events and to conclude that Officer Mahoney had engaged in misconduct.
19 The Commission also heard testimony from Ms. Newstrom and Officer Mahoney and concludes
20 that the Chief of Police had ample evidence to believe Ms. Newstrom’s version of the events,
21 based on her immediate and later consistently similar descriptions of the incident and her
22 complete lack of any demonstrated motivation to falsely make such an allegation.

23 12. Evenhandedness of Discipline –The Commission unanimously concludes that
Officer Mahoney did not introduce evidence to support a nexus between the alleged bias against
him in the Department and the disciplinary decision the Chief of Police made in this case. The
Commission majority also concludes that Officer Mahoney did not introduce any substantial
evidence to support his claim that the misconduct discipline was imposed in an inconsistent or
unfair manner.

1 13. Proportionality – The Commission majority concludes that a 30-day suspension
2 and disciplinary transfer was fair because of the serious nature of the misconduct. Although
3 Officer Mahoney had a good record previous to this incident, he was in a special position of
4 trust. His mentoring role with Ms. Newstrom and his authoritative position in the program made
5 her especially vulnerable to his misconduct. The Commission majority also concludes that
6 Officer Mahoney did not introduce any substantial evidence to support his claim that the degree
7 of discipline was disproportional in light of his record and the discipline imposed in other cases.

8 **The Dishonesty Charge – Lying in the OPA Investigation**

9 14. As noted above, the Commission unanimously concluded that the Department had
10 just cause to discipline Officer Mahoney by transferring and suspending him for misconduct.
11 The Commission majority also concluded that the Department had met its burden of showing it
12 had just cause to impose a suspension of 30 days for that misconduct.

13 15. However, a unanimous Commission has serious concerns about the application of
14 dishonesty charge in this case.

15 16. Notice. First, the Commission unanimously concludes that the Department may
16 discipline employees for dishonesty. The SPD manual has for the entire time applicable in this
17 case prohibited dishonesty and therefore put officers on notice that dishonesty could result in
18 discipline.³ However, the Commission is also unanimous in its concern that officers have
19 appropriate notice regarding when and under what circumstances dishonesty charges may be
20 brought. The Commission is particularly concerned that every misconduct case not
21 automatically also become a dishonesty case against the officer simply because the Chief of
22 Police resolves the differing statements in favor of another witness. A written policy describing
23 the circumstances under which imposition of dishonesty charges could provide such notice to
Department employees.

³ A new version of the applicable collective bargaining agreement (CBA) was adopted during the pendency of the OPA investigation of this case. It included new language regarding terminations in dishonesty cases and the level of proof required in such cases. The parties disagree about the importance of those changes to this appeal. The Commission does not have authority to construe ambiguity in a CBA, but also concludes that it need not construe the CBA, since by its plain language it applies to termination cases. This is a suspension and transfer case – not a termination case.

1 **V. ORDER**

2 1. The Commission affirms the Department's disciplinary transfer and 30-
3 day suspension of Officer Mahoney for misconduct.

4 2. The Commission dismisses the charge of dishonesty.

5 Dated this 29th day of July, 2009.

6 **PUBLIC SAFETY CIVIL SERVICE COMMISSION**
7 **OF THE CITY OF SEATTLE**

8 /s/ Herbert V. Johnson _____
Commissioner Herbert V. Johnson Date

9 /s/ Terry Carroll _____
Commissioner Terry Carroll Date

10 **PARTIAL DISSENT**

11 I agree with the Commission majority that the Department has shown that Officer
12 Mahoney engaged in serious misconduct. I also agree that the Department had just cause to
13 transfer Officer Mahoney from the Training Unit, and to suspend him for that misconduct.

14 I also agree with the Commission majority that the circumstances surrounding the
15 dishonesty charge are troubling. I am concerned that every case of conflicting statements that
16 the Chief of Police resolves in favor of another witness, whether SPD or civilian, not become a
separate dishonesty charge.

17 I do not agree, however, that the Department had just cause to suspend Officer Mahoney
18 for 30 days for this offense. Given his good record before this incident, I would find that the
19 Department had just cause to suspend him for no more than 15 days for this incident of
20 misconduct which, although serious, does not in my opinion justify a 30 day suspension.

21 /s/ Joel Nark _____ 7/29/09
22 Commissioner Joel Nark Date

ATTACHMENT D

Personnel Rule 1.3—Progressive Discipline

1.3.0 AUTHORITY

SMC 4.04.050 and subsequent revisions thereto, Rule-making Authority

SMC 4.04.230 and subsequent revisions thereto, Progressive Discipline

SMC 4.20.065 and subsequent revisions thereto, Administrative Reassignment

SMC 4.77 and subsequent revisions thereto, Drug-free Workplace and Drug and Alcohol Testing

City Charter Article XVI, Section 7, Suspension or Dismissal

Drug-free Workplace Policy, last revised February 25, 2002

1.3.1 DEFINITIONS

- A. "Administrative reassignment" shall mean the removal of an employee from the workplace without loss of pay, paid leave or benefits, authorized by the appointing authority when the employee is the cause or subject of, or otherwise significantly affected by an active investigation related to alleged violations of Personnel Rules, City ordinances, or state or federal laws or regulations, or an investigation intended to determine the employee's medical fitness for duty.
- B. "Appointing authority" shall mean the head of an employing unit, authorized by ordinance or City Charter to employ others on behalf of the City. The term includes and can be used interchangeably with department head, department director, superintendent and chief.
- C. "Classified service" shall mean all employment positions in the City that are not excluded by ordinance, City Charter or State law from the provisions of Seattle Municipal Code Title 4 or Personnel Rules passed pursuant thereto.
- D. "Demotion" shall mean the movement of an employee from his or her current classification to a classification with a lower maximum salary rate, for justifiable cause.
- E. "Discharge" shall mean separation from employment, for justifiable cause.
- F. "Disciplinary action" shall mean an action taken by the appointing authority or a designated management representative in response to a proven act of employee misconduct or uncorrected poor work performance. Disciplinary actions include verbal warnings, written reprimands, suspension, demotion and discharge.
- G. "Personnel Director" shall mean the head of the Personnel Department or his or her designated management representative.
- H. "Pre-disciplinary hearing" shall mean an opportunity for an employee to respond to the charges made against him or her that may result in the appointing authority's decision to impose a suspension, demotion or discharge.
- I. "Probationary employee" shall mean a regularly appointed employee who has not completed a one-year period of probation in the current classification.
- J. "Progressive discipline" shall mean a process of applying and documenting disciplinary actions progressing from less to more serious depending on the employee's history and the nature of his or her offense.
- K. "Regular employee" shall mean a regularly appointed employee who has completed a one-year period of probation in the current classification.
- L. "Regularly appointed employee" shall mean an individual with an exempt, probationary or regular appointment to a position of City employment.
- M. "Salaried employee" shall mean an employee who is not covered by the Fair Labor

Standards Act who regularly receives each pay period a predetermined amount constituting all or part of compensation. This base salary cannot be reduced because of variations in the quality or quantity of work performed.

- N. "Suspension" shall mean the temporary discontinuation without pay of an employee from employment for a specified period of time, for justifiable cause.
- O. "Verbal warning" shall mean a verbal notification from the appointing authority or designated management representative to an employee that specified activities or conduct are inappropriate for the work place and that continuation thereof will result in more severe discipline, up to and including discharge.
- P. "Written reprimand" shall mean a written notification from the appointing authority or designated management representative to an employee that specified activities or conduct are inappropriate for the work place and that continuation thereof will result in more severe discipline, up to and including discharge.

1.3.2 APPLICATION OF THIS RULE

- A. The provisions of this Rule apply to regularly appointed employees in the classified service.
- B. For regularly appointed employees who are represented under the terms of a collective bargaining agreement, this Rule prevails except where it conflicts with the collective bargaining agreement, any memoranda or agreement of understanding signed pursuant to the collective bargaining agreement, or any established and recognized practice relative to the members of the bargaining unit.
- C. This Rule does not apply to employees who are exempted by state law, the City Charter or SMC Chapter 4.13 from compliance with the Personnel Rules or SMC Title 4 related to selection, discipline, termination or appeals of personnel actions to the Civil Service Commission.
- D. This Rule does not apply to individuals who are hired under the terms of a grant that includes provisions that conflict with this Rule.
- E. This Rule does not apply to individuals hired by the City on a temporary, intermittent, or seasonal basis, or for a work schedule of fewer than 20 hours per week, nor does it apply to individuals hired under contract to the City.
- F. Appointing authorities may establish written policies and procedures for the implementation of this Rule to facilitate the management of the personnel system within their employing units, provided that such policies and procedures do not conflict with the provisions of this Rule.

1.3.3 ORDER OF SEVERITY OF DISCIPLINARY ACTION

- A. In order of increasing severity, an appointing authority or designated management representative may take the following disciplinary actions against an employee for misconduct or poor work performance:
 - 1. A verbal warning, which shall be accompanied by a notation in the employee's personnel file. A verbal warning is appropriate only when the supervisor determines that there are sufficient mitigating factors related to the employee's conduct or performance that suspension, demotion or discharge is unwarranted.
 - 2. A written reprimand, a copy of which must be placed in the employee's personnel file. A written reprimand is appropriate only when the supervisor determines that there are sufficient mitigating factors related to the employee's conduct or performance that suspension, demotion or discharge is unwarranted.
 - 3. Suspension up to 30 calendar days.
 - 4. Demotion.

5. Discharge.

- B. The disciplinary action imposed depends upon the seriousness of the employee's offense and such other considerations as the appointing authority or designated management representative deems relevant. In the absence of mitigating circumstances, a verbal warning or a written reprimand shall not be given for a major disciplinary offense.
- C. A regular employee may be suspended, demoted or discharged only for justifiable cause. This standard requires that:
1. The employee was informed of or reasonably should have known the consequences of his or her conduct;
 2. The rule, policy or procedure the employee has violated is reasonably related to the employing unit's safe and efficient operations;
 3. A fair and objective investigation produced evidence of the employee's violation of the rule, policy or procedure;
 4. The rule, policy or procedure and penalties for the violation thereof are applied consistently; and
 5. The suspension or discharge is reasonably related to the seriousness of the employee's conduct and his or her previous disciplinary history.
- D. The appointing authority may suspend an employee with justifiable cause pending the implementation of a demotion or discharge.

1.3.4 MAJOR DISCIPLINARY OFFENSES

- A. The following is a nonexclusive list of major disciplinary offenses where a verbal warning or written reprimand will not be appropriate in the absence of mitigating circumstances:
1. Committing an act of workplace violence, including but not limited to verbal assault, threatening behavior or physical assault occurring in or arising from the workplace;
 2. Testing positive for or being impaired or affected by alcohol or other controlled or illegal substance during working hours;
 3. Possession or sale of alcohol for use in the workplace or during working hours;
 4. Possession without a lawful prescription for or sale of a controlled or illegal substance in the workplace or during working hours.
 5. Reporting to work while taking a lawfully prescribed controlled substance or over-the-counter medication without obtaining a recommendation in writing from a health care provider, if the substance could affect the employee's ability to work safely;
 6. Use of City time, equipment or facilities for private gain or other non-City purpose;
 7. Falsifying or destroying the business records of the employer at any time or place, without authorization;
 8. Knowingly making a false statement on an application for employment or falsifying an employment-related examination document;
 9. Intentional damage to or theft of the property of the City, another employee, or others;
 10. Carrying or otherwise possessing firearms or any type of dangerous weapon and/or ammunition or similar devices or materials in the course of employment or on City property, except as authorized by the appointing authority;
 11. Making a bribe, accepting a bribe, or soliciting a bribe;
 12. Unauthorized absence;

13. Endangering the safety of, or causing injury to, the person or property of another through negligence or intentional failure to follow policies or procedures;
 14. Conviction of any felony or misdemeanor crime or release from imprisonment for such conviction within the last 10 years when such conviction is work-related or may impair the employee's ability to perform his or her job duties;
 15. A knowing or intentional violation of the City Code of Ethics or other ordinances, the Personnel Rules, or the employing unit's adopted policies, procedures and workplace expectations;
 16. Acts of harassment or acts of discrimination that are prohibited by federal, state or local laws, or a failure to fulfill a responsibility to report incidents of harassment or discrimination to an appropriate City management representative;
 17. Acts of retaliation against City employees or members of the public.
 18. Other offenses of parallel gravity.
- B. In determining the level of discipline to impose, the appointing authority or designated management representative shall consider factors that he or she deems relevant to the employee and his or her offense, including but not necessarily limited to:
1. The employee's employment history, including any previously imposed disciplinary actions;
 2. The extent of injury, damage or disruption caused by the employee's offense;
 3. The employee's intent; and
 4. Whether the offense constituted a breach of fiduciary responsibility or of the public trust.
- C. While investigating an employee's alleged misconduct the appointing authority may remove the employee or other employees who are the cause of or otherwise significantly affected by such investigation from the workplace. The employee(s) may be temporarily reassigned to another work unit, or may be placed on administrative reassignment.
1. An employee who is reassigned to another work unit pending the outcome of an investigation shall not have his or her pay rate reduced as a result of such reassignment.
 2. The appointing authority shall place an employee on paid administrative reassignment only when he or she determines that the employee's absence from the workplace is in the best business interest of the employing unit and there is no workplace to which the employee may be reassigned.

1.3.5 APPLICATION OF DISCIPLINE

- A. The appointing authority or designated management representative may suspend, demote or discharge a regular employee for justifiable cause.
- B. The appointing authority or designated management representative may suspend, demote or discharge a probationary employee without justifiable cause. A written statement of any such action shall be provided to the Personnel Director and the Civil Service Commission.
- C. An employee may be suspended without pay up to 30 calendar days for a single occurrence.
 1. Salaried employees shall be suspended in minimum increments of one workweek, except that suspensions for major safety violations may be imposed for at least 1 workday but less than 1 workweek.
 2. A supervisor may suspend an employee for up to 1 workday without the appointing authority's approval when the supervisor reasonably believes that the employee's

conduct poses a threat to the health or safety of him- or herself, other employees or the public. No pre-disciplinary hearing is required under these circumstances; however, the supervisor shall immediately notify the appointing authority of the action taken. The appointing authority or his or her designated management representative shall evaluate the evidence presented by the supervisor and determine whether additional investigation or disciplinary action is warranted.

- D. The appointing authority may demote an employee to a vacant position in a lower-paying classification or title in the same employing unit for disciplinary reasons. The employee must meet the minimum qualifications for the lower-paying classification or title. An employee who is demoted shall lose all rights to the higher class. An employee who is demoted to a classification in which he or she has no prior standing must serve a 1-year probationary period in the new classification.

1.3.6 PRE-DISCIPLINARY HEARING

- A. Except as provided by Personnel Rules 1.3.3 (D) and 1.3.5 C(2), prior to suspending, demoting or discharging a regular employee, the appointing authority shall conduct a pre-disciplinary hearing to permit the employee to respond to the charges made against him or her.
1. The appointing authority shall provide the employee with oral or written notice of the charges made against him or her, an explanation of the evidence and the disciplinary action contemplated, and a reasonable opportunity for the employee to present an account of his or her conduct or performance.
 2. Upon receipt of a notice of recommended disciplinary action, an employee may choose to respond verbally or in writing. If the employee chooses to respond verbally, the appointing authority shall schedule a pre-disciplinary hearing.
 3. An employee may have a representative accompany him or her to a pre-disciplinary hearing. However, the pre-disciplinary hearing is not an evidentiary hearing, nor will the employee or his or her representative be permitted to cross-examine witnesses.
- B. Following his or her evaluation of the information presented by the employee, the appointing authority shall determine whether to impose or modify the disciplinary action contemplated against the employee.

1.3.7 RIGHT OF APPEAL TO CIVIL SERVICE COMMISSION

- A. A written notification signed by the appointing authority of a suspension, demotion or discharge shall be delivered to the affected employee not later than 1 working day after the action becomes effective. The notification shall include the reason for the action taken. In the case of a regular employee, the notification shall also include a description of the employee's rights for appeal of the action taken to the Civil Service Commission.
1. In order to appeal the disciplinary action imposed, the employee must file a "Notice of Appeal" with the Civil Service Commission within 20 calendar days.
 2. The 20 calendar days begins to run on the date of delivery if the notice of disciplinary action and right to appeal is given to the employee personally or delivered by messenger to the employee's most recent address as shown on departmental records. If the notice of disciplinary action and right to appeal is mailed, the 20 calendar days begins to run on the third calendar day after the notice is mailed.
- B. A copy of the written notification to the employee shall be provided to the Civil Service Commission and to the Personnel Director concurrent with or prior to the effective date of the disciplinary action.
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