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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 40064-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KEN BRICKER,

Appellant/Cross-Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent/Cross-Appellant.

REPLY BRIEF OF DEPARTMENT

ROBERT M. MCKENNA
Attorney General

Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

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I. INTRODUCTION

This matter involves the October 2007 public record request of Ken Bricker. On October 1, 2007, Mr. Bricker requested copies of electrical inspection reports and permits for a residence he owned. This request was sent to an electrical inspector in the Kennewick office of the Department of Labor and Industries (Department). The inspector thought that Mr. Bricker would receive the documents as part of his appeal of the citations that arose out of the inspection and did not respond to the request; rather, he placed it in his file. On July 22, 2008, Mr. Bricker filed a lawsuit to obtain the records. Once the Department's public records unit became aware of the request, the Department immediately produced the records on August 8, 2008, with the exception of three additional documents produced in November 2008.

After a trial on the penalty amount, the trial court set a penalty amount of \$90 a day in a judgment dated November 10, 2009. This penalty was notwithstanding the fact that the trial court found that "[t]he Department acted in good faith in responding to Mr. Bricker's public records request albeit in a belated manner, on 8/8/07." CP 262. The trial court found no bad faith, finding that the Department "did not intentionally or maliciously withhold records from Mr. Bricker." CP 262.

On appeal there are two issues. First, the trial court declined Mr. Bricker's request to set the penalty using a *per record* per day penalty. Rather, based on Supreme Court precedent, it imposed a per day penalty. Mr. Bricker has appealed to contest this ruling. This issue was addressed in the Department's Brief of Respondent/Cross-Appellant. Accordingly, this Reply Brief does not address the *per record* per day penalty issue. *See* RAP 10.1(c).

Second, the trial court set the penalty amount at \$90 a day, almost the top end of the \$5 to \$100 range for penalties provided in RCW 42.56.550. The Department has cross-appealed to contest this amount as too high under the *Yousoufian* factors given the findings by the trial court that the Department acted in good faith and did not act in bad faith. The Department replies here in response to Mr. Bricker's arguments regarding the application of the *Yousoufian* factors in relation to the Department's cross appeal.

II. REPLY

A. **The Trial Court Erred In Not Giving Sufficient Weight To the Department's Good Faith When Setting The Penalty Using the *Yousoufian* Factors**

The trial court erred by setting a penalty in excess of the Department's culpability. Bricker disputes that a proper application of the *Yousoufian* case should result in a penalty at less than \$90 a day (the

high end of the penalty range). The problem with the trial court's application of the *Yousoufian* factors is that the trial court did not give enough weight to the findings that the Department did not act in bad faith and acted in good faith. When determining the amount of a penalty, the existence or absence of an agency's bad faith is the principal factor that the trial court must consider. *Yousoufian v. The Office of Ron Sims*, 168 Wn.2d 444, 460, 229 P.3d 735 (2009) (*Yousoufian V*) (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997)).¹

Bricker asserts that instead of using the *Yousoufian* factors, the Department is engaging in a comparative analysis between the outcome of one public records lawsuit and another. Reply at 5. Bricker argues that by comparing the amounts between the cases, the Department is advocating abandoning the *Yousoufian* factors. Reply at 6. This is not the case. The *Yousoufian* factors must be used; however, they must be used within the good faith inquiry factual context and also the context of case law. "The language of a decision is used to explain why the particular result follows from the concrete facts of the case, and must be read with reference to the dispute before the court in that case." *United States v. Herron*, 45 F.3d

¹ Although the existence or absence of bad faith is the principal factor to consider, no showing of bad faith is necessary before a penalty is imposed on an agency; the agency's good faith reliance on an exemption does not insulate the agency from a penalty. *Yousoufian V*, 168 Wn.2d at 460. Here there is no exemption relied upon, only an inadvertent delay in production.

340, 342 (9th Cir. 1995) (citing Karl N. Llewellyn, *The Bramble Bush* 36 (1930)).

The Supreme Court in *Yousoufian V* set the penalty amount at \$45 a day. *Yousoufian V*, 168 Wn.2d at 469. This was based on far more egregious facts than those involved in this case. In June 1997, Mr. Yousoufian requested from King County documents related to the then proposed football stadium. *Id.* at 451. The County responded to these requests by parceling out documents over a period of several years, finally completely responding four years later in June 2001. *Id.* at 451-55. During this time period Mr. Yousoufian made repeated requests for the documents. He was told by one County department that it did not have the requested documents. *Id.* at 455. The superior court, however, found that the County did have the documents. *Id.* at 455. He was told that the records were being searched for when they were not. *Id.* at 456. He was told he had received the requested documents, when he had not. *Id.* at 456. The trial court found that one employee, “incrementally released information, rather than releasing it all at one time, even after he realized that Yousoufian’s request was for more information.” *Id.* at 453.

Notwithstanding Mr. Bricker’s attempts to minimize the egregious nature of the *Yousoufian* case, the *Yousoufian* Court specifically noted that the public agency acted with years of delay and misrepresentation:

It is fair to say that the unchallenged findings of fact demonstrate that over a period of several years the county repeatedly failed to meet its responsibilities under the PRA with regard to Yousoufian's request. Specifically, the county told Yousoufian that it had produced all the requested documents, when in fact it had not. The county also told Yousoufian that the archives were being searched and records compiled, when that was not correct. In addition, the county told Yousoufian that information was located elsewhere, when in fact that was not the case.

Id. at 456. Mr. Bricker characterizes the *Yousoufian* case as involving "negligence." However, the *Yousoufian* Court described the County as acting with gross negligence. *Yousoufian V*, 168 Wn.2d at 463 (citing *Yousoufian v. The Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004)).

In contrast to *Yousoufian* there are far less egregious facts here. The trial court specifically found that there was no bad faith and the agency "did not intentionally or maliciously withhold records from Mr. Bricker. The Department acted in good faith in responding to Mr. Bricker's public records request albeit in a belated manner" CP 262. When the public records unit became aware of the request, its employees immediately worked to produce the records.

Bricker asserts that "[t]he State concedes on this appeal that [the] trial court properly applied the *Yousoufian* factors, based upon the live testimony, and therefore there is no merit to this court retrying the per-day

penalty on the basis of the dry record.” Reply at 8. The Department does not concede that the *Yousoufian* factors were properly applied. The penalty amount was far beyond what is reasonable and the case should be remanded to recalculate it based on the good faith of the Department.

B. Mr. Bricker’s Arguments Are Without Merit

Mr. Bricker raises a number of arguments in response to the Department’s briefing that are without merit. Bricker points out that there was a difference in statements between the interrogatories and testimony regarding the events that occurred. Reply at 7, 11. It is not unusual to have a witness clarify his or her statement at trial. Contrary to his suggestion, such clarification does not warrant the award of a penalty at the high end of the statutory range in a public records case.

Mr. Bricker argues that it was not only the actions of Mr. Ulmer that are at issue and that the judge’s penalty decision was merited based on the findings of fact regarding the demeanor of the Department’s witnesses, Don Uhmer, Dene Koon, and Reuel Paradis² and their response to the public records request. Reply at 12, 7-8. There were issues with these witnesses’ response to the public record request; however, the trial court found overall that the Department acted in good faith and not in bad

² Mr. Bricker also characterizes as fraudulent the testimony of Mr. Paradis, who did not remember whether he talked to Mr. Bricker. Reply at 14. It is not fraudulent to not have a memory of a conversation that purportedly happened months ago, especially given the hundreds of contacts with the public a manager like Mr. Paradis would have.

faith. The penalty amount should be congruent with the finding of good faith, regardless of some problems with individual witnesses.

Bricker asserts that “[t]he evidence at trial unmistakably shows an intentional effort to ignore Mr. Bricker’s request for records because of Mr. Koon’s mistaken believe that Mr. Bricker was ‘covering’ for a third party.” Reply at 12. He points to the testimony of Faith Jeffrey, regarding the processing of his appeal, but she had nothing to do with the public records request. There is no evidence and the judge did not find that that there was an “intentional” effort to not disclose the records.

He asserts “[b]ecause of the non-responsiveness of Mr. Koons and Mr. Paradis, Mr. Bricker had to pay an attorney \$18,000 to defend himself from the fraudulent electrical citations, without the public records to prove which the state had intentionally failed to provide under the ‘do not settle’ orders from Mr. Koons to Faith Jeffries.” Reply at 13. Mr. Bricker had the public records before the hearing on his electrical citation. Plaintiff’s Ex. H.³ It was Mr. Bricker’s choice to contest his electrical citations and this is a separate matter from the public records litigation.

None of Mr. Bricker’s arguments refute the central premises of Department’s position, that the Department acted in good faith and, as

³ The administrative hearing was on December 9, 2008. Plaintiff’s Ex. H. The documents were mainly produced on August 8, 2008, with three additional records produced on November 7, 2008. CP 261.

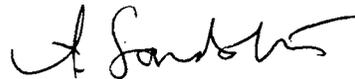
compared to the *Yousoufian* decision, the penalty amount in this case far exceeded the Department's culpability. The trial court's decision to impose a \$90 a day penalty should be reversed and the decision remanded to the trial court to set a new penalty more reflective of the culpability and good faith of the Department.

III. CONCLUSION

This Court should affirm the trial court's decision to not impose a per record per day penalty. The Court should reverse the decision to impose a \$90 day penalty and remand to redetermine the penalty amount.

RESPECTFULLY SUBMITTED this 8th day of March, 2011.

ROBERT M. MCKENNA
Attorney General



Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

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CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on March 9, 2011, she caused to be served the Reply Brief of Department and this Certificate of Service in the below-described manner:

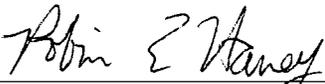
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Mr. David Ponzoha
Court Administrator/Clerk
Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

//

Christopher Bawn
Attorney at Law
1700 Cooper Point Road SW Bldg A3
Olympia, WA 98502-1109

Signed this 9th day of March, 2011, in Seattle, Washington by:



Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740