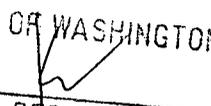


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DIVISION II

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STATE OF WASHINGTON

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No. 43744-9-II

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

DAVID S. DIVIS,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

There are at least four fatal flaws in the Final Order demoting Sgt. Divis (“Order”) under review here. First, the reason for the demotion is a “finding” that Sgt. Divis engaged in discriminatory conduct. But that “finding” is not what the Trial Board determined. The Trial Board determined that although two “insensitive” comments were made, Sgt. Divis did not violate the WSP’s discrimination regulation. The Chief made new and inconsistent findings, including “finding” a violation that was never even charged.

Second, the Order improperly relies on a prior Settlement Agreement. Such reliance is improper because the allegation that Sgt. Divis violated this prior Settlement Agreement was withdrawn by the WSP and therefore (1) Sgt. Divis was never charged with violating the Settlement Agreement as required by the Collective Bargaining Agreement (“CBA”); (2) Sgt Divis was never given notice of and an opportunity to respond to this allegation as due process requires; and (3) no evidence was introduced as to what happened in this prior situation as required by the WSP Regulation Manual. Moreover, the Settlement Agreement expressly finds that the discrimination charge was unfounded while the Order concludes that the conduct was discriminatory. Finally, because the 2005 version of Regulation 8.00.030(A) is materially different

than the 2008 version of that Regulation, the Chief's assumption about the 2006 settlement is simply wrong.

Third, the Order does not meet the comparability and proportionality requirements for the demotion to be for "cause." The WSP's sole response is that no other sergeant engaged in repeated improper behavior of a similar nature. But Sgt. Whalen also engaged in repeated misconduct by continuing to harass a female deputy prosecuting attorney after being instructed to have no further contact with her. Sgt. Whalen was found to have violated the discrimination regulation while Sgt. Divis was cleared of that allegation. The WSP has consistently refused to compare the limited facts found by the Trial Board in this case with Sgt. Whalen's repeated discriminatory conduct that resulted in only a suspension; a comparison the comparability and proportionality requirements mandates.

Fourth, Chief Batiste's prior sworn testimony and the Order make it abundantly clear that he decided this case before the Trial Board hearing was complete. Chief Batiste testified that he had lost trust and confidence in Sgt. Divis' ability to lead a detachment while the Trial Board hearing was still open. The only way Sgt. Divis would not be leading a detachment was if he was demoted to a Trooper position. The Order

demotes Sgt. Divis based on what the Chief concluded during the investigation not what the Trial Board found.

There are several other defects in the WSP's handling of this case, including the fatally flawed investigation, the spoliation of evidence and the failure to follow the CBA. For any and all of these reasons, the Order should be reversed and Petitioner should be restored to his Sergeant position.

II. ARGUMENT

A. **It is Undisputed that the Chief Lacks Authority to Make Factual Findings.**

The WSP agrees that the Chief lacks the statutory authority to make any factual findings.¹ It is undisputed that the Trial Board is the sole fact finder in this disciplinary process. This Court's review, therefore, is based on the facts found by the Trial Board.²

The WSP argues, however, that the Chief merely "stated what the discipline was and why he determined the discipline imposed was appropriate." *Brief at 15*. From this statement, the WSP suggests that the

¹ In its brief, the WSP argues that Appellant did not assign error to the Trial Board's finding. Sgt. Divis does not deny that he made two statements which he regrets. Those two statements were what the Trial Board found to be "insensitive" but not discriminatory. The Trial Board's other findings that there was cause for discipline, the investigation was fair, the discipline was comparable and proportionate, and evidence was not destroyed, are repeated in the Order and thus no separate assignment of error is necessary as to those points.

² The parties also agree that this Court's review occurs directly on the administrative record. *Chandler v. Ins. Commissioner*, 141 Wn. App. 637, *rev den.* 168 Wn.2d 1056 (2007). For this reason, Petitioner does not discuss the trial court's decision herein.

reasons given for demotion are not factual findings. But the reasons the Chief gave for demotion (i.e. Sgt. Divis engaged in discriminatory conduct) are very different than the facts found by the Trial Board. Thus, no matter what semantic terms are used, it is clear that the Chief has made his own determination of the facts.

B. The Chief Makes Factual Findings in the Order.

1. The Chief Finds Discriminatory Conduct While the Trial Board Did Not.

The Trial Board decision and the Order describe two very different cases. The Trial Board describes a situation in which an employee made two insensitive but not discriminatory comments. The Trial Board expressly finds that “The preponderance of the evidence presented clearly supports that the allegation of discrimination/harassment is **unfounded.**” *CP 199* (emphasis in original). The Trial Board also finds that Sgt. Divis’ “intent was to provide for an open and lighthearted dialogue in the group,” (*CP 203*) further explaining why the two comments were not discriminatory. The Trial Board also considered the nature of the evidence (i.e., the extreme amount of hearsay) and context within the detachment in finding no violation of the discrimination regulation.

In contrast, the Order is based on the factual determination that repeated discriminatory conduct had been established. Chief Batiste concludes that there were “racially charged” (*CP 24*) comments that

“communicated intolerance, scorn and disdain for his three African-American Troopers.” *CP 25*. Chief Batiste concludes that this was part of a repeated pattern of discriminatory comments. Sgt. Divis’ behavior is referred to as “egregious” and as part “of the same reprehensible behavior.”³ *CP 25*. Demotion was ordered because the comments were found to be discriminatory and part of a pattern of allegedly “discriminatory” behavior.⁴

In its brief, the WSP tries to square these inconsistent findings by arguing that the Trial Board’s finding that Sgt. Divis violated WSP Regulation 8.00.030(A) is the same as the Chief’s conclusion that Sgt. Divis engaged in unlawful discrimination. This is simply not true.

The 2008 WSP Regulation 8.00.030(A) consists of independent clauses (a) through (f). The violation of any of those clauses is a violation of the Regulation. Clause (f) prohibits “a hostile or discriminatory work environment.”

In the Notice of Disciplinary Charges, however, the WSP **never even charged** Sgt. Divis with a violation of clause (f). Instead, that

³ As a further example of the Chief’s fact finding, he concludes that Divis “cannot recognize the inappropriate nature and seriousness of the conduct proven in this case.” *CP 25*. Contrast that statement with the Trial Board’s conclusion that Sgt. Divis “did, in fact, recognize some of these remarks and apologize for some of them.” *CP 203*. It is unclear how the WSP can maintain that those two findings are the same.

⁴ Notably, both before the Trial Board and in the Moate settlement, the allegation that conduct violated the WSP discrimination regulation was determined to be “unfounded.” The Chief’s contrary conclusion that Sgt. Divis did engaged in discriminatory conduct is based on what was alleged, not what was proven.

Notice alleged violations of clauses (a), (b), (c), and (d) of Regulation 8.00.030(A). *CP 533*. The discrimination allegations in the Notice of Disciplinary Charges were raised under WSP Regulation 8.00.220 which expressly prohibits discrimination. *CP 533*.

Although the Trial Board does not specify which of the separate clauses it found Sgt. Divis violated in its discussion of WSP Regulation 8.00.030(A), the remainder of the Trial Board's decision makes it clear that clause (f) cannot be the basis for the violation. First, there would be no reason for the Trial Board to consider a possible violation of Regulation 8.00.030(A)(f) as such a violation **was never charged in this case**. Second, as to the discrimination issues charged, the Trial Board concluded: "[t]he preponderance of the evidence presented clearly supports that the allegation of discrimination/harassment is **unfounded**." *CP 199* (emphasis in original). From this specific finding, it follows that the Trial Board could not have simultaneously found that Sgt. Divis "created a hostile or discriminatory work environment" and thus violated 8.00.030(A)(f). Finally, given that the WSP never charged a violation of Regulation 8.00.030(A)(f), there was no need for the Trial Board to separately discuss that clause in its findings. The Trial Board's only reference to clause (f) is in its summary of the regulation itself. But once the Trial Board found no violation of regulation 8.00.220 (the only basis

for the discrimination allegations in the disciplinary charges) that finding necessary means that a violation of clause (f) is not the basis for its finding that WSP Regulation 8.00.030(A) had been breached. There is no other method to reconcile the findings of the Trial Board.

Chief Batiste (and the WSP in its brief) presumes that the Trial Board's finding that WSP Regulation 8.00.030 had been violated also includes a finding that subsection (f) had been violated. The WSP makes the point explicit on page 21 of its brief when it argues that the Order's conclusion that "Divis' comments were 'racially charged' and 'communicated intolerance' are 'entirely consistent' with 'the Board's findings that Divis' comments created a 'hostile or discriminatory work environment ...'" *Respondent's Brief*, p. 21. The WSP cites page 198 of the Clerk's Papers for this statement. That citation references the concluding paragraph of the Trial Board's discussion of Regulation 8.00.030(A) in which it merely summarizes the regulation. The WSP's statement can be true if, and only if, the Trial Board found Sgt. Divis violated Regulation 8.00.030(A)(f). But the Chief and the WSP completely fail to reconcile this argument with (a) the fact that the WSP never even charged a violation of Regulation 8.00.030(A)(f), and (b) the Trial Board's specific finding that the discrimination regulation had not been violated.

Accordingly, one cannot reconcile the Trial Board's findings with the new findings in the Order that the two comments were "racially charged," "egregious" and communicated "intolerance, scorn and disdain for his three African American Troopers." When the Chief made these new factual findings he exceeded his statutory authority and that fact alone requires reversal.

2. The Chief Finds the Word "Lazy" Was Used While the Trial Board Did Not.

Consistent with the Chief's revision of the Trial Board's findings to conclude that discriminatory conduct occurred, the Chief expressly changes the Trial Board's finding by concluding that the word "lazy" was used by Sgt. Divis. In the Order, Chief Batiste writes that "It is more likely than not that Sgt. Divis engaged in the alleged misconduct." *CP 22*. The alleged misconduct is that Sgt. Divis said, "The three laziest Troopers in this detachment happen to be black." *Record 500*. Chief Batiste supports his new conclusion with "credible testimony by Trooper Berghoff [that] confirms that Sgt. Divis made a statement to the effect, 'the three laziest Troopers in this detachment happen to be black.'" *CP 22*.

The testimony before the Trial Board explained that the word "lazy" was the basis for the WSP's allegation that this statement was discriminatory. Trooper Eric Purcell, one of the precipitating witnesses,

testified that he perceived the comment to be discriminatory because it stereotyped African Americans as lazy. Trooper Purcell testified as follows:

Q: And when Mr. Damerow was asking you questions, you were talking about viewing this as being stereotypical? Did I understand that right?

A: Yes.

Q: And what was being stereotyped would be that African Americans were lazy, right?

A: Right.

Q: So the phrase “lazy” is pretty important to how you understood this comment, right?

A: Yes.

TR Vol. 1, p. 132. As this testimony confirms, whether the word lazy was used was central to the allegation that this comment was discriminatory.

The Trial Board, however, expressly found no discrimination and did not find that Sgt. Divis used the word “lazy.” To the contrary, the Trial Board refers to the comment as “insensitive” and noted that of the three participants in this conversation, two testified that the word “lazy” was not used.⁵ The Trial Board makes it clear that its finding of a

⁵ When Trooper Berghoff was first interviewed by OPS about this allegation, he stated that what Divis said, in the form of a question, was “why is it that the only people I have problems with are my three black guys?” Record at 18 (*TR Vol. 1, pp. 55:8-56:16*). On cross examination, Trooper Berghoff testified that the word “lazy” was not used. *Id.* (*TR Vol. 1, 57:8-25*). This testimony further supports the Trial Board’s decision to not find that the word “lazy” was used.

violation is based on the reference to race and not the word “lazy:” “regardless of whether the word lazy was used or not, there should be no reference to race when reviewing or discussing employee performance.” *CP 179.*

The Chief’s contrary finding that the word “lazy” was used is a subtle but important change in the factual findings. This change allows the Chief to re-characterize the event as discriminatory. The Trial Board, however, rejected the WSP’s discrimination allegation by first expressly finding no discrimination and then refusing to find that the word “lazy” was used. Chief Batiste completely reverses this finding. As all parties agree, he lacked the statutory authority to do so. Therefore, the Order should be reversed.⁶

C. The Order Improperly Relies on a Prior Settlement.

Second, the Order should be reversed because it improperly relies on a prior settlement. It is undisputed that this prior settlement is a principal reason for the demotion sanction. *See, CP 27-28.* The Order notes that but for this prior settlement, “I [Chief Batiste] would have imposed a less severe sanction.” *CP 28.* Thus, if reliance on this prior

⁶ Chief Batiste made numerous other factual determinations as set forth in the opening brief. The WSP does not explicitly respond to these additional specifics except to generally argue that the conclusions in the Order are the same as the Trial Board’s conclusions. This is simply not true. Therefore, Sgt. Divis does not repeat the additional factual findings described in his opening brief.

settlement was improper, and it is, the demotion sanction must be reversed.

The WSP argues that using this prior settlement as a basis for demotion is permissible because it is part of considering Sgt. Divis' entire work record. *See, WSP Brief at 26.* In so contending, the WSP asserts that it may ignore the Collective Bargaining Agreement, ignore the requirements of due process and ignore its own Regulations.

1. The Violation of the Prior Settlement as a Reason for Discipline was Alleged and then Withdrawn by the WSP.

This investigation began on January 15, 2008 with a filing of an internal incident report. *CP 500.* That IIR makes no mention of the prior settlement. Thus, when the IIR was filed, the prior settlement was not part of the allegations levied.

The WSP then issued an expansion of the charges in April 2008.⁷ This expanded allegation was listed as a third separate allegation in the completed investigation summary dated May 14, 2008. *CP 2686.*

After its investigation is complete, the WSP prepares an "Administrative Insight" that lists the charges the WSP contemplates

⁷ The later documents date the expansion as April 17, 2008. In fact, the expansion was dated April 25, 2008 and served April 28, 2008. Because the WSP withdrew this allegation, the expansion allegation was excluded from the Trial Board record. It is attached as Exhibit A hereto so that the Court may see the allegation that was withdrawn. The copy attached is taken from the WSP's Trial Board Exhibit 1, although this portion of that exhibit was excluded. *See CP 2727 (Ex 1, 578 of 783) to CP 2728 (Ex. 1, 601 of 783).*

filing. With respect to this prior settlement, the Administrative Insight states, “**Expansion dated April 17 [sic], 2008, reference to Klambach’s shooting was withdrawn and not considered.**” *CP 2670 (emphasis in original).*

After the Administrative Insight is issued, the Officer has an opportunity for a “*Loudermill*” hearing as part of his due process rights. *Cleveland Bd. of Ed. v. Loudermill*, 47 W.S. 532 (1985). After that hearing, the Agency issues the formal Notice of Disciplinary Charges. *CP 532-558*. That Notice did not charge Sgt. Divis with a violation of the prior settlement. Instead, the only reference to the prior settlement is the following: “... an allegation that was withdrawn and [was] ‘not considered’ for this investigation.” *CP 553*.

At this point, any allegation that Sgt. Divis was subject to demotion for a reason relating to this prior settlement was no longer in this case. It is improper to now demote him based on the withdrawn allegation.

2. Demoting Sgt. Divis for this Withdrawn Allegation Violates the Collective Bargaining Agreement.

The CBA requires that an Officer receive notice of the allegations against him. Section 19.3 requires the WSP to “use an Internal Incident Report (IIR) form” and requires that “the form shall contain . . . the

specific allegations against the employee.” *CP at 596*. The WSP does not dispute that it must comply with this provision and that members of the WSTPA (including Sgt. Divis) are promised that they will only be disciplined in strict accordance with the negotiated provisions of the CBA. Should the WSP not comply with this provision of the CBA, the WSP would then fail to follow a prescribed procedure and thus violate RCW 34.05.570(3)(c).

Under the CBA, if the WSP wished to demote Sgt. Divis because of some issue relating to this prior settlement, it had the obligation to charge him with such violation and allow him an opportunity to respond. The WSP recognized this obligation when it issued the Expansion Notice in April 2008 containing this very allegation. When the WSP then chose to **withdraw** that Expansion Notice, it thereby **withdrew** any ability to demote Sgt. Divis because of this prior settlement. Any other result would allow the WSP to ignore the requirement that Section 19.3(C) of the CBA that Sgt. Divis is entitled to notice of “the specific allegations against [him].”

3. Demoting Sgt. Divis for this Withdrawn Allegation Violates Due Process Rights.

Basic due process requires notice of the allegations against an individual and an opportunity for that individual to be heard. The WSP’s

own definition of “cause” specifically requires that an officer be afforded due process before there is “cause” for any discipline. *CP 659*.

In this case, however, Sgt. Divis had no notice that he was subject to demotion based on this 2006 settlement and thus no opportunity to respond. To the contrary, he was expressly told in the Notice of Disciplinary Charges that this allegation had been **withdrawn**. *CP 553*. Because this allegation had been withdrawn, no evidence about it was presented to the Trial Board.

Because Sgt Divis was not given notice that this prior settlement was a basis for potential discipline, but was expressly told that this allegation was no longer at issue, he had no opportunity to respond to this allegation. Sgt. Divis was not given an opportunity to have the Trial Board make a factual determination of what happened or how those allegations, even if proven, related to the allegations here. The first Sgt. Divis learned that he was at risk of being demoted because of this prior situation was upon receiving the Order in this case.

Demoting an employee for an allegation that was withdrawn and thus not considered by the Trial Board is not consistent with due process. Accordingly, element 11 of the definition of cause is not met and the Order should be reversed.

4. Demoting Sgt. Divis for the Withdrawn Allegation Violates RCW 43.43.070.

Allowing the demotion of Sgt. Divis based on this withdrawn allegation also violates RCW 43.43.070. That statute requires that the demotion of a non-probationary officer “shall only be for cause, which shall be clearly stated in a written complaint.” There is no written complaint in this case that seeks to demote Sgt. Divis because of this prior settlement. RCW 43.43.070 provides an officer the right “to a public hearing before a Trial Board.” Because the issues in the prior settlement were never presented to the Trial Board, allowing a demotion for this reason deprives Sgt. Divis of his right guaranteed by RCW 43.43.070.

5. Demoting Sgt. Divis for this Withdrawn Allegation Violates the WSP Regulation Manual.

Finally, using this previously withdrawn allegation as a basis for demotion violates WSP Regulation Manual Ch. 13.00.808H(2)(b)(1). That Regulation required the WSP to “present evidence which shows the disciplinary history of prior actions, both of the accused and/or other employees whose conduct was sustained for the same or similar action.” Because the WSP withdrew this allegation, it therefore presented no evidence as to what happened in this situation. Therefore, relying on this prior situation violates the WSP Regulation Manual. By violating the

Regulation Manual, the WSP failed to follow a prescribed procedure and thus violated RCW 34.05.570(3)(c).

6. The Order is Inconsistent with the Settlement Agreement.

Compounding the foregoing problems, the Order makes factual findings about what happened in this prior situation that are inconsistent with the Settlement Agreement itself. The Settlement Agreement has a proven violation of Regulation 8.00.030(A) under the 2005-06 Regulation Manual. *CP 2819*. Notably, the 2005-06 version of Regulation 8.00.030(A) **does not contain clause (f)** relating to discriminatory conduct. *CP 2736* (attached as Exhibit B). The Settlement Agreement states that the discrimination allegation is “UNFOUNDED.” Thus, the settlement itself provides no basis to conclude that Sgt. Divis engaged in any discriminatory conduct.

But the Order **assumes** that this prior settlement **did** reflect discriminatory conduct. The Order refers to this settlement as “discipline for similar conduct” and this case being the same “type of misconduct.” The Order tries to rationalize its discrimination findings by asserting that the Trial Board found a violation of WSP Regulation 8.00.030(A)(f).⁸ But the 2006 settlement cannot find a violation of WSP Regulation

⁸ The Trial Board did **NOT** do so, as explained above.

8.00.030(A)(f) as that provision did not exist at the time of the settlement.

The Order's contrary assumption is inconsistent with the record facts.

7. No Evidence Supports the Chief's Determination of What Happened in 2006.

Finally, there can be no evidence to support the Chief's findings of what happened in 2006, as all such evidence was specifically excluded before the Trial Board because this allegation had been withdrawn by the WSP. The Order, however, makes many implicit findings about this 2006 situation. The Order concludes that there is "repeated" "misconduct" and that there is a "deeply troubling trend."⁹ Yet, there can be no evidence to support these findings as no evidence was introduced as to what actually happened. Quite simply, there is no evidence to support the Order's findings about this situation because this issue was excluded from the Trial Board proceeding given that it had been withdrawn by the WSP.

D. A Demotion in this Case Would Violate the Comparability and Proportionality Requirement.

The fourth element of the definition of "cause" asks whether "the discipline contemplated [is] similar to what another employee in a comparable situation would receive." *CP 657*. The WSP does not dispute that this element requires a comparison of the facts found by the Trial Board with the facts in prior disciplinary situations within the WSP. The

⁹ These are additional examples of improper fact finding by the Chief.

WSP still refuses to complete the required comparability analysis, and particularly comparability analysis with Sgt. Whalen.

The only witness who testified regarding the comparability requirement was Mr. Ravenscraft. He explained that comparability means that “If you find that the person who is alleged to have committed the offense, if you can prove that, then you look and see if there are other comparable kinds of cases that have gone forward. And, if they have, then, again, you know, you need to be consistent in treating comparable kinds of cases.” *TR Vol. 6, 84:2-8*. Ravenscraft also testified that comparability does not require identical situations but merely comparable sets of facts. *TR Vol. 6, 82:18-24*.

In its brief, the WSP continues its refusal to compare the facts in Sgt. Whalen’s situation (which resulted in a suspension) with the facts the Trial Board found were proven here. Instead, the WSP’s sole argument on comparability is that there is “no similar case where a Sergeant had committed repeat violations of the same regulations¹⁰ in a short period of time.” *WSP brief at 32*. It is unclear how the WSP can square this statement with the facts in Sgt. Whalen’s case.

¹⁰ This statement underscores Petitioner’s point about the 2005 Regulation 8.00.030(A). The “same regulation” referenced in this passage is 8.00.030(A)(f). But clause (f) did not exist in 2006 when the settlement was signed. Thus, there can be no “repeat” violation of that clause.

In Sgt. Whalen's case, he was found to have "pushed his groin area up against a female deputy prosecuting attorney who was assigned to a criminal case in which Whalen was a witness." *CP 1747*. Such conduct was Whalen's first violation of the discrimination regulation. Whalen then contacted the deputy prosecuting attorney on July 24 making inappropriate sexual comments. *Id.* A letter of complaint from Pierce County Prosecuting Attorney Gerald Horne describes this incident as follows:

On July 24 Whalen called the DPA again. He began the conversation by telling her that he noticed her in Leavenworth and again at the concert, and specifically noted that she did not say anything when he pushed up against her at the concert. He asked if she was married or had a boyfriend; she responded that she was happily married. She also pointed out that he was married. He said, "that's why this would be perfect." Whalen asked what her husband did for a living and she told him, adding that her husband was considering applying for a position at the Washington State Patrol. Whalen responded, "**that would be weird if I were his supervisor and I was 'knocking the bottom out of it'**", which the DPA understood to be slang for having sex with her. Whalen said that when he pushed up against her in line and she didn't do anything, **he should've taken it farther**" and there were plenty of places at the concert that they could "**do it**", meaning have sex. Whalen said he saw women in the men's bathroom at the concert giving oral sex. The DPA responded that she was not interested and, during the course of the conversation, repeated six to seven times that she was married. Two other DPAs were present in her office and overheard this disturbing conversation.

CP 1897 (emphasis in original).

The foregoing was Whalen's second violation of the discrimination regulation. It is also far more egregious than anything the Trial Board found here. After this violation, Whalen was asked to stop such communications and to instead keep all communications professional.

Despite that request to stop, Whalen continued to stalk this deputy prosecuting attorney. Whalen made an additional 19 telephone calls to this person from either his personal cell phone or from his work phone after he was told that his conduct was unacceptable and must stop. *CP 1877*.

The question here is whether Sgt. Whalen's case is "comparable;" it need not be identical. Sgt. Whalen engaged in two acts of discriminatory misconduct, was told to stop and then promptly engaged in 19 additional violations of the discrimination policy. Sgt. Divis, by contrast, made a settlement regarding one "unacceptable" but not "discriminatory" comment and then found to have made two other "insensitive" but not discriminatory comments. Petitioner submits that any fair reading of these two files indicates that what Sgt. Whalen did was far worse than anything Sgt. Divis has been found to have done. Sgt. Whalen, however, only received a suspension while the WSP proposes to demote Sgt. Divis.

Because both the Order and the WSP's brief refuse to even acknowledge the situation with Sgt. Whalen, no justification has ever been given as to why this specific situation is not "comparable" to the situation here. Perhaps the WSP has chosen to ignore Sgt. Whalen's case because the WSP recognizes that it prevents the desired demotion here. In any event, the situation with Sgt. Whalen demonstrates that the demotion here cannot survive the comparability analysis.

Sgt. Whalen's case also demonstrates that the proposed demotion cannot survive the proportionality analysis. It is undisputed that the proportionality requirement of "cause" requires an analysis of the severity of the conduct with the sanction imposed. Again, any fair reading of the situation with Sgt. Whalen demonstrates that the misconduct there was far more severe. Not only was Sgt. Whalen found to have violated the regulation prohibiting discrimination (of which Sgt. Divis was cleared) but he engaged in multiple acts of misconduct including 19 phone calls after being told to have no further contact. Sgt. Whalen's misconduct warranted only a 45 day suspension. If Sgt. Divis' misconduct as found by Trial Board was less severe, as it plainly is, then a sanction less than a 45 day suspension is the only possible proportionate disciplinary action.

Again, the WSP refuses to even discuss Sgt Whalen's situation with respect to the proportionality requirement for "cause." The absence

of proportionality is a further reason why the demotion sanction cannot stand.

E. The Demotion Violates the Appearance of Fairness Doctrine.

The WSP does not dispute that the appearance of fairness doctrine applies to the Order. The WSP likewise does not dispute that such Order is valid only if a reasonably prudent and disinterested observer would conclude that Sgt. Divis obtained a fair, impartial and neutral hearing. *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 478 (1983). Finally, the WSP does not deny Chief Batiste's prior sworn testimony nor does the WSP explain how this testimony does not show Chief Batiste's prejudgment of this case.

Instead, the WSP offers three responses on the appearance of fairness doctrine. First, the WSP argues that Chief Batiste does not find any facts in this case. The proposition is incorrect for the reasons cited above. Moreover, Chief Batiste is undisputedly the person who has transformed the limited facts found by the Trial Board into a very different set of facts and an unprecedented demotion. To suggest that Chief Batiste is not the decision maker to whom the appearance of fairness doctrine applies is simply wrong.

Second, the WSP argues that a "general predilection" to support a given result is not sufficient to apply the appearance of fairness doctrine.

The WSP cites *Clausing v. State*, 90 Wn. App. 863 (1988) for this proposition. *Clausing*, however, makes the distinction between cases where there is specific evidence of prejudgment (resulting in a violation of the appearance of fairness doctrine) with cases lacking such evidence (a general predilection). In this case, Chief Batiste testified under oath that he had lost confidence in Sgt. Divis' ability to lead a detachment and had made that decision even before the Trial Board hearing concluded. When the Trial Board cleared Sgt. Divis of most of the charges against him and recommended a suspension, Chief Batiste simply imposed his predetermined sanction, a decision he testified as having made months before the Trial Board hearing concluded. Thus, this is a case with actual evidence of bias and not one analyzed under the "general predilection" framework.

Third, the WSP argues that the appearance of fairness challenge has been waived. The WSP cites *Hill v. Dep't of Labor and Industries*, 90 Wn.2d 276, 280, 530 P.2d 636 (1978) for this proposition. But *Hill* does not support the result the WSP claims. *Hill* involved a case in which a former Labor and Industries supervisor became a member of the Board of Industrial Insurance Appeals. A petitioning injured worker did not raise any alleged conflict of interest of the former DLI employee/board member at the hearing on an Industrial Insurance Appeal. The Court does hold that

an effort to attack the judgment based on the alleged conflict of this board member was waived.

The Court separately discussed the appearance of fairness doctrine. *Hill*, 90 Wn.2d at 280-81. The Court does not hold that the challenge under the appearance of fairness doctrine had been waived. Rather, the Court decides that challenge on its merit, finding that the employee failed to produce facts to establish this doctrine.

In deciding the appearance of fairness challenge on its merits, the *Hill* Court implicitly recognizes that an appearance of fairness challenge could scarcely be raised before the facts sufficient to support that challenge have materialized. Assume that Sgt. Divis had raised this challenge before the Order was entered. At that point, there would be no facts to demonstrate that Chief Batiste intended to follow his predetermined outcome in this case. It was only when the Order plainly demonstrates that Chief Batiste followed his predetermined outcome by engaging in extensive fact finding in this case (rather than accepting the facts as found by the Trial Board), that the appearance of fairness challenge became ripe to present.

Sgt. Divis submits that any neutral reading of this record, the Trial Board's decision and the Order demonstrates that Chief Batiste simply applied his predetermined notions to impose his predetermined outcome in

this case. The appearance of fairness doctrine is an additional reason why this Order should be reversed.

F. Contract Violations.

In the opening brief, Sgt. Divis demonstrated that the demotion was contrary to the CBA in that the matters found by the Trial Board were different than those charged in the Complaint, the IIR failed to comply with the CBA and the investigation was not fair. Appellant believes that these issues are adequately addressed in the opening brief and provide further reasons why the Order should be dismissed.

III. CONCLUSION

For the reasons set forth above, the order demoting Sgt. Divis should be reversed and he should be reinstated to his rightful Sergeant position with back pay and benefits.

Dated this 24 day of January, 2013.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By Warren E. Martin

Warren E. Martin, WSBA No. 17235
Attorneys for Appellant

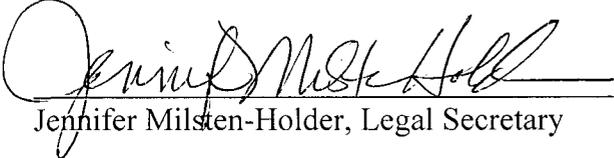
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2012, I sent out for filing by January 25, 2013 via ABC/LMI Legal Messenger an original and one copy of the **REPLY BRIEF OF APPELLANT** with the Court of Appeals, Division II and caused to be delivered as shown below a copy of the same to:

Attorney for Respondent: VIA EMAIL AND LEGAL MESSENGER

Susan Sackett DanPullo
Assistant Attorney General
7141 Cleanwater Drive SW
Olympia, WA 98504
Email: Susand1@atg.wa.gov

Dated in Tacoma, Washington this 24th day of January, 2013.


Jennifer Milsten-Holder, Legal Secretary

FILED
COURT OF APPEALS
DIVISION II
2013 JAN 25 PM 1:31
STATE OF WASHINGTON
BY  DEPUTY

**REQUEST TO EXPAND ADMINISTRATIVE INVESTIGATION - COMMISSIONED
OFFICE OF PROFESSIONAL STANDARDS (OPS) CASE NUMBER: 08-0064**

On April 21, 2008, the department received additional information expanding the alleged misconduct by you in OPS case number 08-0064.

I request the scope of the allegation(s) in OPS case number 08-0064, be expanded to include the following allegation(s) and/or regulation(s):

ALLEGATION(S) - LIST DATE(S), FULL NAME(S), LOCATION(S)

In 2006, it is alleged Sergeant DIVIS used Trooper Kelly Kalmbach's shooting as an example of why women should not be Troopers, while DIVIS was talking with Ms. Veronica Cajachuanca. It is alleged DIVIS told Cajachuanca the reason Kalmbach was shot was because Kalmbach was female. DIVIS allegedly told Cajachuanca that Kalmbach was not strong enough to hold the male suspect and she could not react fast enough because Kalmbach was a woman. Cajachuanca said she became upset with DIVIS and confronted him about his comments. Cajachuanca believed the conversation with DIVIS occurred in the spring of 2006, but definitely occurred prior to her deployment with the U. S. Navy in 2007.

LIST ALL APPROPRIATE COMPLETE REGULATION(S) (in effect in 2006)

**8.00.220 Discrimination/Harassment/Sexual Harassment
(A) Harassment/Discrimination**

[Signature] /23 4-25-08
APPOINTING AUTHORITY DATE

[Signature] 4-25-08
OPS COMMANDER DATE

CATEGORY: This complaint will remain categorized as a major/second offense, in compliance with the Disciplinary Matrix within the Guidance (copy not enclosed).

REVISED DUE DATE: June 6, 2008.

NOTE: ANY AND ALL DIRECTIVES CONTAINED IN THE ADVISING PAPERWORK YOU PREVIOUSLY RECEIVED REMAINS IN EFFECT.

EMPLOYEE INITIAL [Signature] DATE 4/28/08 WITNESS INITIAL [Signature] DATE 4/28/08



CHAPTER 8: RULES OF CONDUCT
SECTION 00: CONDUCT

Policy #: 8.00.030, Employee Conduct	Effective Date: July 1, 2005
General Order:	See Also: RCW 42.52
Supersedes: 2004 WSP Regulation Manual: 8.00.040, 8.00.060, 8.00.090, 8.00.100, 8.00.110, 8.00.120, 8.00.130, 8.00.160, 8.00.180, 8.00.190, 8.00.200, 8.00.210, 8.00.220, 8.00.320, 8.00.330, 8.00.350, 8.00.390, 8.00.400, 8.00.410, 8.00.420, 8.00.430, 8.00.450	CALEA: 26.1.1, 33.7.1, 61.1.8
Applies to: All WSP Employees	

I. POLICY

A. Unacceptable Conduct

1. Employees shall not engage in conduct which:
 - a. Impedes the ability of the department to effectively fulfill its responsibilities.
 - b. Causes a lessening of public confidence in the ability of the department to perform its functions.
 - c. Causes an adverse effect on the discipline or efficiency of the department.
 - d. Impairs their ability to perform their job.
 - e. Constitutes a conflict of interest as prohibited by law or department regulation.

B. Immoral Conduct

1. Employees shall maintain a level of moral conduct in their personal and business affairs which equates with the high ethical standards expected by the public of law enforcement agencies and which will not constitute unacceptable conduct as described in these rules.