

63024-5

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No. 63024-5-I

**DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

CITY OF SEATTLE, SEATTLE POLICE DEPARTMENT,

Appellant,

vs.

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

Respondents,

APPELLANT'S OPENING BRIEF

THOMAS A. CARR
Seattle City Attorney

Erin L. Overbey, WSBA #21907
Assistant City Attorney

Attorneys for Appellant
Seattle Police Department

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

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I. INTRODUCTION

The Seattle Police Department (“the Department”) appeals the Commission’s unwarranted reduction of its discipline, based on legal analysis more appropriate to a union grievance. The Department documented three incidents, in three months, in which Officer Roberson failed to act in the best interest of the public. He disregarded his dispatch to a 911 call, he destroyed evidence and he failed to investigate a crime or even review the available evidence. Despite a less than stellar history of following orders or using good judgment, the Department suspended Officer Roberson for 30 days, rather than terminate him. On appeal, the Commission reduced the suspension to 7 days. The decision to reduce the suspension of Seattle Police Officer Roberson indicates an indifference to public welfare and safety. The Department’s discipline should be reinstated.

II. ASSIGNMENTS OF ERROR

2.1 The Public Safety Civil Service Commission impermissibly applied the incorrect legal standard to the issue presented.

2.2 In applying the incorrect legal standard, the Commission impermissibly reversed a substantial portion of the discipline imposed.

III. STATEMENT OF THE CASE

A. Roberson Engaged in Three Separate Violations of Department Policy and Procedure in 2005

1. Roberson failed to take appropriate action

On June 18, 2005, Officer Roberson failed to take appropriate action in response to a report of attempted theft. CP 317. The following facts are undisputed. A Complainant, Ms. Haas, called to report a possible burglary in the secured garage of one of the residential buildings she manages, after viewing a surveillance video to locate the three to five minutes of relevant footage. CP 346, 364-65, 1150-53. Officer Roberson responded to the call and met with Ms. Haas and a white male, on the front porch of the building. CP 365-64. Ms. Haas reported to Officer Roberson that the male suspect had entered the secured garage and attempted to remove a bag from theissy bar on her motorcycle. CP 366. Ms. Haas told Officer Roberson that on the suspect's way out of the garage, he attempted to block open the door with a card, which possibly indicated his intent to enter at a later time, perhaps to complete the job of removing the bag. CP 388, 1164. She also told Officer Roberson that the incident had been caught on surveillance video. CP 390, 1153. She told Officer Roberson that the video, garage, and motorcycle, which had not been touched since the incident, were available for inspection. CP 1153-54, 1156.

Ms. Haas told Officer Roberson that the suspect had entered the building with an invited guest of a tenant and that the tenant could provide the name of the suspect. CP 387-88. Roberson summarily concluded that no crime had occurred because the suspect had not broken into the garage and had not actually taken anything. *Id.* He told Ms. Haas “there is no such thing as attempted theft.”. CP 366, CP 390. Ms. Haas was shocked to hear this, but she accepted his statement. CP 1153.

Roberson did not view or request a copy of the video. CP 390. He did not go into the garage to investigate the scene or inspect the motorcycle. CP 388. He did not take the names of the suspect or the male tenant. CP 1157. He did not write any kind of report. CP 369, 387, 1157. Roberson left the location after talking with Haas for only a few minutes. CP 367.

Several days later, Haas attended a community meeting where she reported to an SPD Captain that she had been informed by an SPD officer that there is no such thing as attempted theft. CP 1161. She showed the Captain still shots from the surveillance video and the Captain concluded the photos showed a possible crime in progress. *Id.* The Captain sent another Officer to meet with Ms. Haas. This officer spent about 40-60 minutes with Ms. Haas and wrote an incident report of a residential burglary, using the same facts available to Roberson. CP 350-51; CP1163.

Acting on the incident report, an SPD Detective did some further investigation. CP 377, 1349. He determined that since the suspect had entered the building as a “guest” of a tenant and that the access door to the garage had not had any “no trespass” signs on it, he could not charge burglary, but he could charge attempted theft. CP 377-78, 1356-57. The Detective sent the case to Municipal Court where the suspect eventually pled guilty to criminal theft and was ordered to have no contact with Ms. Haas or her building. CP 395-98, 1357-58.

2. Roberson destroyed evidence

In an incident involving suspected narcotics possession, Roberson destroyed evidence of drug possession. On July 21, 2005, Roberson responded to a call from the Capitol Hill Public Library of a suspect in custody for trespass and possible narcotic possession. CP 400-04. An update three minutes later indicated Library security found five or six rocks of cocaine. *Id.* When Roberson arrived on the scene, he learned from the security guards that they had found the rocks when searching the suspect’s bag. CP 473-74. At that point, Roberson decided the rocks were not usable evidence because the security guards’ search of the suspect’s backpack was unlawful. *Id.*

Roberson then searched the suspect’s backpack himself. He found a crack pipe and a taser. CP 956, 1655-1656. Roberson took the “rocks”, the

pipe, the taser, and the suspect from the library premises. CP 473-475. He wrote a trespass admonishment for the suspect. CP 438-39, 479. On the back of the trespass admonishment card, Roberson wrote that there was the “strong odor of crack smoking” but no crack found on the suspect. CP 439. Roberson admitted at the IIS interview that *he never went in the bathroom* and suggested he wrote this because the security guards told him this. CP 487. Neither of the guards indicated they smelled or saw the suspect smoking crack and neither said that they had told Roberson this. CP 449-55, CP 457-60. Although Roberson said the guards complained to him that the suspect was sleeping in the library, neither guard corroborated this complaint. *Id.* Roberson also told the investigator that “*a lot of times I just write stuff on the back because I want to make it as strong as possible.*” CP 485.¹

Roberson then took the items the guards had identified as rocks and threw them away on the ground. CP 474. He let the suspect leave the scene with only a trespass admonishment and threw the pipe away at the precinct. CP 477-78. He later explained that he had decided, without conducting a

¹ PSCSC Rule 5c. Provides:

The following are declared to illustrate adequate causes for discipline; discipline may be made for any other good cause:

(1) *False or fraudulent statements* or fraudulent conduct as an applicant, examinee, eligible, or employee, or such actions by others with his or her collusion;

* * *

(3) Willful or intentional violation of any lawful and reasonable regulation, order or direction made or given by a superior officer;

drug test he had the equipment to field test, that the rocks were actually wax and that there was no testable residue in the crack pipe. CP 474-478 . In the Event History, he wrote, “No crack found but found small amount of broke up wax. He might try to sell it as crack.” CP 436.

3. Roberson was insubordinate

On August 2, 2005, Officer Roberson disobeyed orders and exercised poor judgment in response to an order from dispatch to go to a “Precedence 1” 911 call. CP 526-27. At about 6:45 p.m., Officer Roberson cleared a misdemeanor assault call he had been on for nearly three hours and sent the East Dispatcher an MDC message asking for a half-hour meal break (“coded as a 931”). CP 576. The Dispatcher told Roberson that she *could not give him a 931 because he needed to respond to a 911 hang up call*, which is considered a “Precedence 1” call or a high priority call. CP 577. Roberson replied to her that he was “going out on a premise,” meaning that he was logging himself on a premise check instead of responding to the call. CP 578. The Dispatcher replied, “Do whatever you have to do. I just can’t give you a 931.” CP 579, 1818-19. The *Chief* Dispatcher immediately contacted Sgt. Guballa, Officer Roberson’s supervisor, to report the insubordination. CP 569.

Officer Roberson’s then logged himself out on a non-emergency premise check to a Park. CP 578, CP 940. Sgt. Guballa immediately

contacted Officer Roberson on an alternate frequency and ordered him to respond to the Precedence 1 call the dispatcher had already sent him to. *Id.* At the time, Officer Roberson was not at or en route to the premise check he logged himself to but had begun to park his squad car at the East Precinct instead. *Id.* After receiving Sgt. Guballa's order, Officer Roberson responded to the 911 call, which turned out to be a frivolous call. CP 600-01.

Later, during the IIS investigation, Officer Roberson acknowledged Sgt. Guballa told him before August 2, 2005, that he did not want Officer Roberson taking 931 breaks after 1815 hours. CP 603. Sgt. Guballa testified at the hearing that in order to ensure sufficient officer availability at the end of the second watch shift, he told Officer Roberson and others not to take 931s in the last hour of the shift. CP 1076; 604. Other officers also acknowledged receiving or being aware of Sgt. Guballa's order or request not to take a 931 break near the end of the shift. CP 626-27 (Officer Guay), CP 614 (Officer Sundin), CP 634 (Officer Turner). Officer Roberson's request for a 931 was during the part of his shift when Sgt. Guballa had asked him not to take 931 breaks. CP 576.

During the IIS investigation, Officer Roberson said he had needed to use the restroom. CP 599-601. None of his contemporaneous communications indicated the need for a restroom break. At his PSCSC hearing, Roberson offered (for the first time) a different explanation for his

conduct, inconsistent with the first explanation: He claimed he asked for a 931 because he needed a meal break due to his diabetes. CP 2212-13. Although he claimed he could not take a meal or restroom break at any time before he cleared his misdemeanor assault call at 1846, Roberson acknowledged that he could not account for the 30-40 minutes between the time he booked his suspect into custody at the King County Jail and his “arrival” at the East Precinct, about 1.5 miles away. CP 573; 2191; 2193; 2195; 2197; 2198. Regardless of whether Roberson needed to use the restroom or eat, it is undisputed that he eventually responded to the 911 call without using the restroom or eating, and he experienced no physical or medical emergency in the process. CP 600-601.

B. The Three Violations Involved Performance Issues for Which the Grievant Previously Had Been Counseled or Disciplined

In the four years preceding the three incidents described above, Roberson was disciplined three separate times for similar performance issues. First, he was given a verbal reprimand in 2001 for failing to take appropriate action when two women came to the South Precinct to report an alleged rape in which one of the women was the victim. CP 668. Roberson’s communications with the women resulted in them feeling that the Department was not concerned about the rape incident. *Id.*

Next, in 2002, Roberson was suspended for two days, ordered to undergo training, and transferred to another precinct for administering corporal punishment to an eight-year-old child. CP 651-52. Roberson's appeal of the suspension was denied. *Id.* Shortly thereafter, Roberson was suspended for five days for again administering corporal punishment to the same child, in violation of Chief Kerlikowske's order not to have contact with the child. CP 654-58. Roberson's appeal of the suspension was denied. *Id.*

In addition to those three sustained complaints, Roberson was investigated for other allegations, which were not sustained, but provided notice to him of the expectations for performing his job. For example, in 2004, Roberson was investigated for failure to take appropriate action when he failed to write a report of a threat to a civilian. CP 590-94. Roberson was investigated for again failing to take appropriate action when he failed to write a report of a hit and run. CP 746. This occurred after Sgt. Guballa had counseled Roberson about failure to take appropriate action. CP 592. Although these allegations were not sustained, the counseling and investigations were sufficient to put Roberson on notice of the importance of writing reports and taking appropriate action in response to civilian complaints of possible criminal activity.

In sum, before Roberson engaged in the three incidents at issue in this case, Roberson had been either counseled, referred to IIS, or disciplined for conduct involving similar performance problems, such as failure to take appropriate action and failure to follow orders.

C. Chief Kerlikowske Suspended Roberson for 30 Days, Notwithstanding Some Basis for Termination

After a complete investigation by IIS of each incident of misconduct, the investigation files were sent up the chain of command for review and analysis. In each instance, the OPA Director, Captain Lowe, recommended the allegations be sustained. CP 341-343; 402-04; 526-28. The Chief reviewed the files and met with the HR Legal Advisor, Mark McCarty, and the rest of the command staff, all of whom had also reviewed the files. The purpose of the command staff meeting was to discuss whether the allegations should be sustained and what the proposed level of discipline, if any, should be. CP 1225-26.

The command staff considered the three separate instances of misconduct together, along with the seriousness of the offenses, Roberson's disciplinary history, his length of service, and comparable instances where similarly situated employees were disciplined for engaging in similar misconduct. CP 1229, 1242. Notably, no other SPD officer had as many sustained violations as Roberson in as short a time period (six in five years).

CP 318 (¶ 14), CP 1249. Based on the totality of information, the command staff determined there was substantial evidence to support the allegations and proposed a 30-day suspension. CP 318 (¶15); CP 1247.

Roberson responded to the charges and proposed discipline in a lengthy written submission that he and his attorney hand-delivered to the Chief. CP 319 (¶ 19), CP 831-46. After considering Roberson's written submission and arguments, the Chief decided to impose the 30-day suspension.² *Id.* (¶20), CP 660. In order to soften the financial impact of a suspension of 30 consecutive days, the Department permitted Roberson to serve the suspension in two-day increments over several consecutive pay periods. CP 319 (¶21); CP 1242-51.

D. Roberson Appeals to the Public Safety Civil Service Commission

Roberson appealed the 30-day suspension to the Public Safety Civil Service Commission. The Commission held a six-day evidentiary hearing. The Department had the burden to prove by a preponderance of the evidence that it had just cause to discipline Roberson for the alleged violations, and to impose a 30-day suspension.³ The Commission then issued a majority

² PSCSC Rule 5.01 provides:

a. A department head may suspend a subordinate, without pay, for a period not to exceed thirty (30) days for good cause shown.

³ PSCSC Rule 6.21 provides:

opinion, finding the Department did not have just cause to discipline Roberson for the evidence destruction and 911 incidents, and that the garage incident, for which the Department did have just cause to discipline, warranted no more than a seven-day suspension. CP 310-336. One commissioner dissented, finding the Department proved it had just cause to discipline Roberson for all three alleged violations, and the 30-day suspension was justified. CP 336. The dissent also held the garage incident, standing alone, warranted no less than a 10-day suspension. *Id.*

The Commission's decision recites the seven labor law elements of just cause. CP 312. The test is conjunctive, meaning that failure to establish any of its elements creates a basis for reversal of the discipline. In this case, the Commission relied on hyper technical analysis of a Department rule, (CP 329, Order, ¶¶ 35-41) (destruction of evidence) and a tortured analysis of the exchange between Roberson and the Dispatcher (CP 330-32, Order, ¶¶48-50) (insubordination) to conclude the Department lacked "just cause" to discipline for two of the three events. The Department contends there was substantial evidence that Roberson destroyed evidence of a possible crime and that he was insubordinate to

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

the dispatcher, who speaks for the Chief of Police, in regard to at 911 response. CP 330, ¶ 48.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

Review of the Commission's decision is limited to determining whether, as a matter of law, the conclusions were arbitrary and capricious or contrary to law. *Simonds v. City of Kennewick*, 41 Wn. App. 851, 854 (1985). However, the discipline of a public safety civil servant presents some additional considerations in determining abuse of discretion. Reversal of the Commission is warranted when the administrative agency abuses its discretion, or exceeds the bounds of reason. *Hankla v. Long Beach Civil Service Com.*, 34 Cal.App.4th 1216, 1222 (1995). When the administrative decision manifests an indifference to public safety and welfare, it is an abuse of discretion. *Id.* The overriding consideration is the extent to which the employee's conduct resulted in, or if repeated, is likely to result in, harm to the public service. *Id.*, at 1223 citing *Skelly v. State Personnel Bd.*, 15 Cal.3d 194, 217-218, 539 P.2d 774 (Cal. 1975). The public is entitled to protection from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability. *Id.* The public is entitled to protection from an officer who does not want to follow orders or investigate crimes.

B. The Commission Applied a Legal Standard Derived from Arbitration Decisional Law, Rather Than the State Common Law Definition of “Just Cause”

Although the City’s Personnel Rules pertaining to public safety civil servants like police and fire personnel allows for discipline, only “in good faith, for cause”,⁴ this legal standard is not defined in the City’s Code or the Rules of the Commission. The seven factors appearing at the outset of the Commission’s Order in the discipline of Roberson, are derived from the 1968 decision of Arbitrator Dougherty, applied in the context of *a contract dispute*.⁵ During the hearing, the Commission provided these factors to the parties.⁶ The Commission then used its adopted seven tests as the starting point of its analysis. CP 312.

While Department contends it satisfied all seven elements, it is also the Department’s contention that it should not have to. The correct test, and one which is more deferential to the decision maker and consistent with the obligation of ensuring public safety, is whether there

⁴ See footnote 4, *supra*.

⁵ The Seven Tests were published in Arbitrator Daugherty’s decision in *Enterprise Wire Co.*, 46 LA 359 (1966).

⁶ CP 1726:8-15. This is a citation to the statement of Officer Roberson’s “expert” witness reciting his understanding regarding the “seven points of I believe law that we have to address in this hearing” in the Roberson hearing. The distribution of the seven tests does not appear in the record from the hearing, but is prominently identified at the beginning of the Commission’s Order. See CP 312.

was substantial evidence of misconduct that the Chief of Police reasonably believed to be true. In this case, the Department met the standard.

The PSCSC, as with other civil service commissions in Washington, considers disciplinary decisions under the standard articulated in RCW 41.12.090 and SMC 4.08.100(A). Under that standard, the Commission determines whether a “removal, suspension, demotion, or discharge was made in good faith for cause.” SMC 4.08.100(A). This standard requires the Commission to focus on two issues: (1) the employer’s motivation, which must be in “good faith,” and (2) the particular allegation of wrongdoing, which must be demonstrated by substantial evidence. *See Civil Service Commission of the City of Kelso v. City of Kelso*, 137 Wn.2d 166, 173, 969 P.2d 474 (1999); *Gaglidari v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 438, 815 P.2d 1362, 1369 (1991), citing *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 139, 769 P.2d 298 (1989). As noted in *Baldwin*, just cause under Washington law is—

a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. ... a discharge for “just cause” is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.

Baldwin, 112 Wn.2d 139.⁷

Washington's "good faith and for cause" is "**not** the same" as the seven-factor just cause standard applied by arbitrators under collective bargaining agreements. *City of Kelso*, 137 Wn.2d at 172 (emphasis added). The seven-factor test provides "more expansive rights," and requires consideration of such factors as "the presence of mitigating circumstances, and the appropriateness of the penalty." *See id.* at 172-173; Donald S. McPherson, *The Evolving Concept of Just Cause: Carroll R. Daughterty and the Requirement of Disciplinary Due Process*, 38 Lab. L.J. 387, 403 (1987). The seven-factor just-cause analysis is a unique feature of labor law, where "its precise meaning has been established over 30 years of case law." *Id.* at 173.

⁷ Other jurisdictions have adopted the same or similar just cause standard in cases of employee discipline. *See Gaudio v. Griffin Health Services Corp.*, 249 Conn. 523, 733 A.2d 197, 208 (1999) ("'[J]ust cause' ... simply means that employers are forbidden to act arbitrarily or capriciously") (other quotations and citation omitted; second omission in original); *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal.4th 93, 69 Cal.Rptr.2d 900, 948 P.2d 412 (1998) (resolving split among appellate courts, stating that a de novo review of the factual basis supporting the employer's decision is "neither the only alternative to a 'no review' standard, nor the one best adapted to adjust the competing interests of the employer and employee, and defining "good cause" as "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual"); *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693, 701 (1995) ("[W]e hold that discharge for 'just' or 'good' cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) clearly supported by the evidence, and (2) reasonably believed by the employer to be true"); *Braun v. Alaska Commercial Fishing and Agric. Bank*, 816 P.2d 140, 141 (1991) (adopting *Baldwin* definition).

The narrower definition of “cause” under civil service law stems from the particular interests served by civil service. Public Safety Civil Service systems have two goals: (1) to “protect [police and fire department] employees from the arbitrary and discriminatory actions of their employers in hiring, promotions, discipline and discharge” and (2) “to ensure that the public is protected by qualified police and fire personnel.” *Seattle Police Officers' Guild v. City of Seattle*, 121 Wn. App. 453, 459, 89 P.3d 287, 290 (Div. 1 2004), quoting *Yakima v. International Association of Firefighters, AFL-CIO, Local 469, Yakima Firefighters Association*, 117 Wn.2d 655, 664, 818 P.2d 1076 (1991). The second goal, *i.e.*, protection of the public, is not a concern of labor law and labor arbitrators. The public’s interest in maintaining the qualifications of police officers is an important task for the PSCSC. It is particularly important in this case because of the public’s clear and express interest in maintaining a police force marked by diligence, including the preservation of evidence, in all phases of police work. In this matter, the majority of the Commission overlooked this important obligation.

Indeed, other jurisdictions asked to consider the issue of police officer discipline have acknowledged this important factor. In determining whether an employee should be disciplined, whatever the cause, the overriding consideration is whether the conduct harms the public service.

Blake v. State Personnel Board, 25 Cal.App.3d 541, 550-551 (1972). Public safety personnel are held to a higher standard because of the nature of their work. A police professional holds a position of trust and is therefore held to the highest standards of behavior. *Paulino v. Civil Service Com.*, 175 Cal.App.3d 962, 971 (1985). A civil service commission must respect such standards in rendering its opinions. *Boston Police Dept. v. Collins*, 721 N.E.2d 928, 932 (Mass. App. Ct. 2000). At minimum, professional police obligations *must* include the investigation of crimes and response to emergency 911 calls. Otherwise, one is left to question what is the purpose of employing an individual who does not reliably perform such core duties. Applying all these concepts to the present matter, the inquiry should be whether the Chief reasonably believed Roberson failed to timely respond to a 911 call, failed to test a drug sample and destroyed it instead, and failed to take appropriate action for a burglary complaint, based on substantial evidence.

C. The Appropriate Evaluation of Public Safety Discipline Is Not Whether the Commissioners Would Make the Same Decision

In this case, the Commission not only failed to evaluate the evidence under the appropriate standard, it impermissibly substituted its

judgment for the Chief on the misconduct it did find.⁸ The Chief of a public safety department cannot uphold his or her obligation regarding the public's safety if they are to be second-guessed by hyper-technical evaluation of rules and evidence.

In matters of public safety, the Chief is in the best position to evaluate whether the actions of the officers meet the Department's obligations. *In re: Discharge of Jones*, 720 P.2d 1356, 1363 (Utah 1986). It is not the role of the Civil Service Commission to substitute its judgment for the appointing authority in the discipline of an officer. *Boston Police Dept. v. Collins*, 721 N.E.2d, at 932; *City of Cambridge v. Civil Service Commission*, 682 N.E. 2d 923, 926 (Mass. App. Ct. 1997). The appropriate inquiry in evaluating the civil service appeal is not whether the commission would make the same decision as the appointing authority, but whether the appointing authority was justified in its action based on adequate reason, credible evidence and common sense. *City of Cambridge v. Civil Service Commission*, at 926.

In sum, the Department seeks application of the tests required by RCW 41.12.090, rather than the seven-factor just cause standard used by

⁸ See Order, at ¶77 (CP 334), finding that Roberson failed to take a report of a crime but limiting suspension to 7 days. Compare dissent at ¶3, (CP 336), indicating at least ten days (twice the amount of the most recent sustained discipline) would be appropriate.

labor arbitrators. Under this standard, the Court should determine, first, that there is substantial evidence supporting the conclusions that: Roberson destroyed evidence; failed to investigate a crime as the responding officer; and disregarded orders from the Communications Department to respond to a 911 call. Second, because there is no argument or complaint that the Police Department acted in bad faith, in imposing a thirty day suspension, the Court should conclude the Department acted in good faith and reinstate the discipline imposed by the Chief.

D. The Department Provided Substantial Evidence of Roberson's Failure to Act and Destruction of Evidence

There can be no question there was substantial evidence supporting Roberson's failure to act and destruction of evidence of a potential crime. Evidence his misconduct included hundreds of pages of interviews, documents and policy manuals. CP 339-649 There was undisputed evidence that Roberson destroyed both a crack pipe and what was identified by two library guards as crack "rocks". Roberson's story about how he concluded that these rocks were actually "bunk", (a fake substance designed to look like a controlled substance), must surely be viewed in light of the fact that he *made up evidence* at the time of the call. It is not disputed that he claimed, in writing, that he smelled drugs in the bathroom where the suspect was, even though he was never actually in the bathroom

and guards did not provide this information to him. CP 438-39; 479. Roberson's propensity to "just write stuff down" (CP 485), even when he knows it is not based on true information, must be factored in to the analysis of whether he destroyed evidence of a potential crime. It goes directly to credibility and supports an additional basis for discipline.⁹

Under the Commissions analysis, no one could ever be disciplined for destruction of evidence, if they are successful in its destruction. An officer need only dispute that it was evidence and then, could not be charged with wrong-doing because the Department could not *prove* that the missing item was evidence of any crime. This is the 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 cause". If the department does not have a rule precisely on point, it is hampered in disciplining for what is clearly substandard police work, with obvious public safety implications. Even if the department has *no* rules about when an officer may destroy or throw away potential evidence of a crime, it must be able to discipline for both acts.

Additionally, it should be troubling that the Commission considered and relied on evidence offered by other officers about their

⁹ See footnote 1 *supra*, PSCSC Rule 5c (3), providing that false statements provide a basis for discipline.

own questionable conduct in order to reverse Roberson's discipline. (CP 322.) Even if there were other officers who had destroyed crack pipes,¹⁰ this does not support a finding of no cause. If other officers are destroying potential evidence of crimes, it actually means the Chief has a bigger problem than just one officer. The fact that others may be destroying evidence of drug crimes does not excuse Roberson.

Similarly, if officers are free to ignore their obligation to respond to a 911 call because the dispatcher does not use the words "I order you to respond"¹¹, then the very existence of emergency response is endangered. The Commission found that officers have some discretion in how soon, or apparently whether they respond at all, when the dispatcher is holding a 911 hang up call for an officer, as opposed to specifically ordering the officer to go. CP 324 (§63); 330-331 (§50). Roberson is an experienced and, because of that, knew exactly how to go about giving himself the break the dispatcher refused him. He put himself on a non-emergency premise check, right after the dispatcher refused him a break. At the

¹⁰ The Department did not consider evidence from other officers about whether or not they had destroyed evidence like crack pipes in reaching its decision, but focused on the issue of whether it was appropriate for Roberson to have done so. The Department contends consideration of this evidence is not relevant or appropriate.

¹¹ The Commission's Order focused on the exact words used. CP 330-31, §§ 49-50. But the Chief viewed the exchange as that of a "highly agitated" dispatcher and officer refusing her order. CP 217. The Chief views this as an obvious interpretation for anyone with experience and considered it an act of insubordination.

hearing, he presented his justification—that he could afford to take a break because it was probably a false alarm and the record did reflect it was a false alarm. However, the Chief of Police is justified in expecting responses to the dispatch communications in *all* cases. The dispatcher speaks with the voice of the Chief,¹² which affirms just how important the role of radio dispatch is in the emergency response work of the Department. The Chief was justified in disciplining an officer who failed to take his emergency response obligation seriously.

Finally, the Department agrees with the Commission that Roberson's failure to take a basic report and review available evidence of an attempted theft was the basis for discipline. In this matter, it should be the Chief's determination how serious this matter is, in light of prior offenses committed by Officer Roberson. In this case, there was evidence of increasing levels of discipline for Roberson's prior misconduct. CP 654-58. As the dissent notes, Officer Roberson should receive at least a ten day suspension, given his abysmal record on discipline in a relatively short amount of time.¹³ CP 336. At minimum, the Chief should make the

¹² The Commission acknowledges this directive to SPD personnel. CP 330, Order at ¶ 48.

¹³ His failure to take a basic report should also support the findings in other charges of misconduct because there is an obvious theme. This is an officer that does not want to work too hard: wants his breaks when he wants them, wants to write brief trespass cards (with false information) rather than working up the paperwork on evidence of a possible drug crime.

determination of the appropriate level of discipline for this offense, given Roberson's history of discipline.

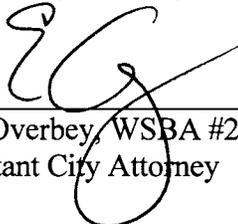
V. CONCLUSION

Based on the evidence presented and the application of the appropriate legal standard, the Department respectfully requests that the Chief's order of discipline be reinstated.

DATED this 7th day of July, 2009.

THOMAS A. CARR
Seattle City Attorney

By:



Erin Overbey, WSBA #21907
Assistant City Attorney

Attorney for Appellant
City of Seattle

CERTIFICATE OF SERVICE

I certify that on this date I caused a true and correct copy of the foregoing, along with the supporting declaration of Erin Overbey to be served on the following in the manner indicated:

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

U.S. Mail, postage prepaid

Gary Keese
Seattle City Attorney's Office
600 Fourth Ave., 4th Floor
Seattle, WA 98104
Counsel for PSCSC

Hand-delivered

DATED this 7th day of July, 2009.


KIM FABEL

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