

65632-5

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No. 65632-5-I

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

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ERIC WERNER,

*Appellant,*

vs.

CITY OF SEATTLE, SEATTLE POLICE DEPARTMENT,

*Respondents,*

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BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

The Seattle Police Department (“SPD” or “Department”) terminated the employment of former police officer Eric Werner upon finding that he repeatedly lied during the Department’s internal use of force investigation. The Public Safety Civil Service Commission (“Commission”) unanimously found that Werner was dishonest, but nevertheless the Commission majority found that SPD officers in other cases “involving dishonesty” were not terminated and on that basis reversed the termination. Upon review of the administrative record, the Superior Court held that the Commission lacked evidence to support its finding because none of the cases cited by the Commission involved a finding of dishonesty and none included a finding of intentional dishonesty regarding use of force. “In short,” Judge Kallas wrote, “there is neither any evidence that other officers who either engaged in the same behavior or who were disciplined for dishonesty were treated differently.” CP 276. The Superior Court was correct; the Commission’s finding that SPD was not evenhanded in its treatment of SPD officers was not supported by competent evidence. The Superior Court’s decision should be upheld.

## **II. STATEMENT OF THE CASE**

Without question, honesty is critical to policing. The need for

complete honesty is at its zenith during the review of any use of force incident. Transparency regarding the use of force is vital because of the potential for disruption to relationships between police and the community that a police department serves. AR<sup>1</sup> 955 (Tr. 115-16). Any time an officer uses force against a civilian, he is required to report all force used, fully and honestly. AR 758, 778, AR 955 (Tr. 115-17); AR 940 (Tr. 56); AR 941 (Tr. 61); AR 981-83 (Tr. 220-22); AR 1001-02 (Tr. 295-301). Because officers are often the only witnesses to the use of force, their honesty and completeness in self-reporting is *vital*. AR 955 (Tr. 116-17); AR 1001-02 (Tr. 295-301).

Werner lied during SPD's Office of Public Accountability ("OPA") investigation into his use of force. During a confrontation with a citizen (who was later cleared of any wrongdoing), Werner delivered hammer strikes with his fist and repeatedly tased the suspect. AR 1048-49 (Tr. 486-87). Because Werner's sergeant was scrutinizing officers' use of tasers, Werner later admitted that he lied during the use of force investigation because he did not want to get into trouble for deploying his taser. He told OPA repeatedly that he *chose not to* strike a suspect, claiming that his only safe option was to deploy his taser.

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<sup>1</sup> "AR" references the Certified Appeal Board Record provided to the Superior Court by the Commission.

Werner's actual behavior came to light more than six months later, when he faced a polygraph exam as part of his application to another police agency and expressly *admitted* that he had lied during SPD's investigation. AR 822-49. When SPD conducted a follow-up investigation, Werner again reverted to lying, claiming that he "forgot" he struck the suspect and did not intentionally lie about doing so. AR 576-631. He concocted a convoluted story about his memory lapse that was rejected by both a psychologist and the Public Safety Civil Service Commission. The Commission unanimously found that Werner was intentionally dishonest. AR 158, 160.

**A. Werner Repeatedly Lied to SPD's Office of Public Accountability**

In August 2007, Werner and a fellow officer used force on a suspect the officers said was resisting arrest. Werner reported that he tased the suspect because he feared the suspect had something in his hand, and he made no mention of the "hammer strike" he repeatedly used. AR 758 (Use of Force Report). A complaint about Werner's August 2007 use of force was made to then-SPD Chief Kerlikowske by a member of the City of Seattle City Council, who knew the individual against whom force was

used. AR 336; AR 1023 (Tr. 384).<sup>2</sup> Werner was notified of the complaint and had six weeks between that notification and his interview with OPA to carefully consider what occurred during the altercation and to prepare himself to testify about it truthfully. AR 646, AR 662; AR 1040 (Tr. 452-53). His testimony to OPA was provided pursuant to an order to tell the truth. AR 633 (Werner 2007 OPA Statement).

On four different occasions during his interview with OPA, Werner denied striking the suspect. AR 635-36, 639-641. In explaining his actions, Werner described why he chose to tase the suspect instead of “go[ing] hands on with him,” stating that he believed “it would be safer to attempt to tase the suspect than to” strike him. AR 636; *see also* AR 1038 (Tr. 444-45). He also explained that tasing the suspect caused less damage than if he had struck the suspect. AR 641. Werner’s testimony to OPA was an attempt to explain why he “had to” use his taser *instead of* strikes; he claimed his safety required him to use his taser in order to avoid scrutiny of overusing his taser.

Werner attempts to cover up his dishonest explanation by stating that “Werner, and the internal investigation, was [*sic*] focused on the taser –

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<sup>2</sup> Werner repeatedly claimed during the hearing that the use of force complaint was about the officers’ use of tasers. He repeats that claim in his appeal brief. In fact, the complaint was broadly about the use of force, and did not specify what force was being complained about. AR 336; AR 1023 (Tr. 384-85).

which is what the suspect had complained about.” Appellant’s Brief, p. 2. This is not accurate; the uncontroverted evidence showed that the complaint was straightforward and about all force used; it was not limited to tasing.<sup>3</sup>

**B. When Facing a Polygraph Exam, Werner Repeatedly Admits He Lied to OPA**

More than six months after his 2007 OPA interview, Werner applied for employment with Snohomish County Sheriff’s Office (“SCSO”). Werner, who knew he would undergo a polygraph test regarding his application responses, admitted on his application that he *lied* during an internal investigation at SPD. The application asked whether Werner previously had lied in any internal investigations. AR 842 (SCSO Application). Werner checked the box “yes,” and explained: “On the use of force complaint, I struck the subject in the face...During an IIS interview, I stated that there was incidental contact with the suspect. I did this because I did not want myself or others to get into trouble, and I believed that it did not have an impact on the outcome...because the complaint was about tasing the suspect, which I was honest about. This was the only time that I have **not been truthful** in an interview and it will not happen again.” AR 848 (SCSO Application, Additional Comments) (emphasis added).

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<sup>3</sup> Werner claimed during the hearing that during the suspect’s interview, the suspect focused on the taser use. Werner did not have access to that interview when he gave his interview. AR 949 (Tr. 91), AR 1023 (Tr. 385.)

When interviewed by SCSO Detective Lee Malkow, Werner reiterated that he had not told OPA the truth about his use of force. AR 540, 549-50 (Malkow OPA Statement); AR 933 (Tr. 26-29). Werner told Det. Malkow that he struck a suspect intentionally but had told OPA the strike was “incidental;” at no time did Werner tell Det. Malkow that his testimony was anything other than a lie.<sup>4</sup> *Id.* Instead, he repeated to Det. Malkow his *reasons for lying* at the time of the OPA interview, which were to avoid getting himself or others into trouble. AR 933 (Tr. 29).

Weeks after his interview with SCSO, Werner received a Notice of Investigation, which informed him that OPA was investigating his disclosures to SCSO. AR 735 (Notice of Investigation regarding dishonesty). He also was aware that SCSO contacted another law enforcement agency about his disclosures. AR 717 (Lake Stevens Investigation Report). Throughout the 2008 OPA investigation and during the Commission hearing, however, Werner repeatedly claimed that he approached OPA of his own accord to “correct” his “mistaken” testimony. Appellant’s Brief, p. 8; AR 588-91 (Werner 2008 OPA Statement); AR

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<sup>4</sup> In fact, Werner had not told OPA that he struck the suspect incidentally; he told them he had chosen not to strike the suspect at all. When he disclosed to SCSO that he “lied,” Werner appeared to remember that he did, in fact, lie, but he was confused about the details of that lie.

1033-34 (Tr. 425-27). Werner, however, did not call OPA until four days *after* OPA sent the Notice of Investigation and two days *after* Werner met with an investigator from the other agency that SCSO contacted. He left a voicemail with an OPA investigator saying that he wanted to inform them of “contact [he made] with the complainant’s face” that “did not come up” in his 2007 interview. AR 649 (Voicemail Transcript). The suggestion that the strike “did not come up” in the 2007 interview conflicts with both Werner’s testimony in 2007 and his admission to SCSO that he lied to OPA about whether the strike was intentional.

**C. OPA’s Investigation Reveals a Pattern of Dishonesty**

When OPA conducted its 2008 investigation into whether Werner lied about his use of force in 2007, Werner told OPA that he had forgotten that he struck the suspect in 2007. He claimed that while he was preparing his application for SCSO, “it came into his head” that he struck the suspect in 2007. AR 649; AR 1043 (Tr. 463-64). During his 2008 interview with OPA, Werner claimed he did not remember whether the strike was with his “knuckles or a hammer strike.” During the Commission’s hearing, Werner’s story changed again; he testified with precision that he delivered a “hammer strike” with “the soft tissue” of the side of his fist. AR 1049 (Tr. 486-87). He demonstrated during the hearing how he struck the suspect, raising his hand and showing which part of it he used. This

conflicts with his testimony to OPA in both 2007 and 2008, when he alternatively denied using any strike and later claimed he did not remember the details of the strike.

Faced with a complex task of determining whether Werner's claim of forgetfulness was believable, OPA considered a number of other lies that reflected on Werner's lack of credibility<sup>5</sup> and rendered it far more plausible that his 2007 OPA testimony was intentionally dishonest. For example, Werner disclosed to SCSO certain acts of his personal misconduct made towards two individuals while those individuals slept. AR 935-36 (Tr. 36-38). Werner initially told SCSO that the acts occurred in his dreams. Informed he would not pass the polygraph, Werner admitted that he had engaged in misconduct, retracting his claim that these were merely dreams. *Id.*; *see also* AR 1045-46 (Tr. 472-74, 477). When asked about this admission by OPA, Werner again changed his story, claiming he had not engaged in misconduct but simply revealed the content of his dreams. He blamed Det. Malkow for his bizarre, shifting accounts. AR 598; AR 1035 (Tr. 433); AR 1045-46 (Tr. 473-74). Werner

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<sup>5</sup> Werner has argued that prior acts of dishonest conduct are not probative or are inadmissible character evidence. Werner is wrong. *See* AR 33-36 (Order on Motion to Exclude Evidence); *see also* Evid. R. 404(a) (expressly permitting consideration of character evidence where character is an element of a claim or defense, as it is in a case about dishonesty). Werner contends that these incidents amount to "piling on" bad acts to support termination. In fact, they are useful in determining the breadth of Werner's lack of believability.

contended that he never did these things but that he simply “opted to give the answer that [he] thought [SCSO] wanted to hear.”<sup>6</sup> AR 622. Regardless of which version of Werner’s story is correct, Werner lied; he either lied in order to pass a polygraph and further his professional goals or he lied to OPA under an order to tell the truth.

OPA also considered Werner’s lies about other matters. In response to Question 135 of the SCSO application, “Have you ever withheld any evidence seized in the course of your official duties,” Werner answered no. AR 841. During his polygraph exam, under focused questioning, Werner admitted that this too was untrue: Werner seized a flashlight and screwdriver while on duty and did not turn them in as evidence or “found property.” Instead, he threw the items away. AR 1095 (Tr. 471-72); AR 1035 (Tr. 432) (Werner told SCSO that he threw the items away because his sergeant told him to, which he later admitted was also a lie); AR 945 (Tr. 74-75). Werner tried to excuse his misbehavior by again lying about it and blaming others; he told SCSO that he threw the items away at the direction of his sergeant. AR 1035 (Tr. 433). Werner later admitted this was

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<sup>6</sup> Werner claims that Det. Malkow pressured him into stating that the misconduct occurred. Werner had eight years of experience being a police officer. One of his duties was to provide truthful testimony, potentially under pressures of effective cross examination. One would expect a police officer to be able to provide honest testimony without being easily swayed by suggestion.

a lie and that the decision to throw the items away was his alone. *Id.*; *see also* AR 1045 (Tr. 471-72).

Werner also falsified department forms, lying in order to obtain reimbursement for damaged equipment. He disclosed his behavior in response to SCSO Application Question 146, "Have you ever falsified any official document or report." AR 842 (SCSO Application). Werner asserted that his personal boots were damaged while on-duty, but because Department policy prohibits reimbursement for equipment that is over three years old, he lied about the age of his boots. *Id.*; *see also* AR 653. He believed at the time he made the claim that it was untrue, but at the Commission hearing Werner attempted to excuse his lie by claiming that the boots were, in fact, only two years old and he was thus eligible for reimbursement. AR 1035 (Tr. 430-31). He again blamed others for his lie, suggesting that he lied about the boots because the Department's policy was "stupid." *Id.* Werner also conceded that he used sick leave to get time off from the Department when he wanted to attend a family event. This too was someone else's fault; Werner claimed that his sergeant told him to call in sick. AR 848. Whenever it was convenient for him, he lied.

The cumulative impact of Werner's lies about throwing away potential evidence, the age of his boots, and his inconsistent stories regarding whether his misconduct was a dream impacted OPA's

conclusion that Werner lacked credibility for truth-telling.

**D. After Extensive Consideration, the Chief Terminates Werner's Employment**

Chief Diaz became Interim Chief of Police in March 2009, three months before he had to decide whether to fire Werner. AR 980; AR 874. To prepare, Chief Diaz reviewed the entire OPA file "a number of different times." AR 983 (Tr. 226). He met with Werner and his union representative to permit Werner to offer any explanation for his behavior. AR 982 (Tr. 224-25); AR 983 (Tr. 226-227); AR 985 (Tr. 237). During the meeting, Werner suggested that he had a medical condition impacting his memory, and asked to be evaluated by a psychologist to confirm it. In a prior case, an officer charged with dishonesty had been evaluated by a psychologist, after which discipline was reduced due to mitigating medical factors; Werner's representatives wanted a psychologist to evaluate Werner in hopes that it would lead to a reduction in discipline. AR 1019 (Tr. 369); AR 1025 (Tr. 391-93).

Chief Diaz agreed and postponed the disciplinary process while a psychologist evaluated whether Werner suffered from some sort of memory issue that prevented him from fully disclosing his use of force to OPA in 2007. AR 985 (Tr. 235). The psychologist found that Werner chose to lie about his use of force and that Werner often lied in order to

protect himself. The psychologist concluded that Werner's "consistent pattern of dishonesty" was not explained by a faulty memory.<sup>7</sup> AR 807-810; AR 798-99 (Ekemo Report); AR 969 (Tr. 172). Chief Diaz reviewed those conclusions, which supported OPA's 2008 findings that Werner lied about his use of force.

Chief Diaz testified that he spent considerable time analyzing the case and whether or not to terminate Werner's employment. Chief Diaz, who had 30 years of police experience, found that termination was mandated because honesty is "a cornerstone of being a police officer...it is critical that [officers] fully disclose all information...that we are completely honest to the best of our ability." AR 981 (Tr. 219); AR 986 (Tr. 239). "Truth telling is at the heart of a law enforcement officer...[and] the heart of the relationship with the community." AR 955 (Tr. 115-116).

Chief Diaz explained that the need for honesty is heightened even further in reporting use of force, because force is "the most contentious issue that" the police department deals with and use of force causes the most potential for harm in the relationship between SPD and the community it serves. AR 981 (Tr. 219-20). Because often the only

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<sup>7</sup> Though the Commission rejected Werner's claim of a medical condition, they cited as a comparable the case in which an individual *did* have a mitigating medical condition and thereafter received a 15-day suspension instead of termination. The Commission did not make any mention of the medical mitigating facts presented in that case.

witnesses to the force are the officer who deployed it and the citizen who received it, it is critical that an officer fully disclose all that occurred. AR 955 (Tr. 116-17). Such disclosure is necessary both to determine whether the particular incident violated policy as well as whether there are any use of force trends that need to be addressed through training or other methods. AR 981 (Tr. 220-21). “Lying in the context of a court proceeding, an [OPA] proceeding, is really the most serious kind of lie, if you will, by an officer.” AR 957 (Tr. 125). Dishonesty in a use of force testifying scenario is more serious than any other scenario involving police dishonesty. Because of Werner’s dishonesty and the nature of it, Diaz terminated Werner’s employment.

### **III. ARGUMENT**

#### **A. The Standard of Review**

The purpose of appellate review of the removal, suspension, demotion, or discharge of a Seattle police officer is to determine whether the Public Safety Civil Service Commission acted arbitrarily, capriciously, or upon an inherently wrong basis. *Appeal of Butner*, 39 Wn. App. 408, 693 P.2d 733 (1985); *Perry v. Seattle*, 69 Wn.2d 816, 420 P.2d 704 (1966). In reviewing by writ of certiorari an administrative decision, this court must determine *de novo* (1) whether the Public Safety Civil Service Commission committed an error of law when it concluded the Department

did not have just cause to terminate Werner's employment, and (2) whether the Commission's decision was supported by substantial evidence. See RCW 7.16.120(3), (5)<sup>8</sup>; see also *Hilltop Terrace Ass'n. v. Island Cy.*, 126 Wn.2d 22, 29, 891 P.2d 29 (1995). Substantial evidence is evidence of a sufficient quantity "to persuade a fair-minded, rational person of the truth of the finding." *Id.* at 34 (quoting *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994)). An agency action is based upon an inherently wrong basis when it applies the wrong legal standard in reaching its decision. *Perry v. Seattle*, 69 Wn.2d at 817-18.

Werner claims that *City of Seattle v. Public Safety Civil Service Commission and Richard Roberson*, 155 Wn. App. 878 (Div. 1 2010) (hereinafter "*Roberson*") renders disciplinary decisions "essentially non-reviewable by the courts." This is a vast, and incorrect, overstatement of *Roberson* that would eviscerate the writ statute. *Roberson* reviewed the Public Safety Civil Service's method of defining the term "in good faith for cause" that is used in the Washington and Seattle civil service statutes. RCW 41.12.090; SMC 4.08.020. Because that term is undefined in the statutes, *Roberson* held that the Commission could define the term itself so

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<sup>8</sup> RCW 7.16.120 requires the court to determine whether there was "competent proof of all the facts necessary to be proved, in order to authorize the making of the determination" and whether, "in making the determination, any rule of law affecting the rights of the parties thereto has been violated".

long as its definition was reasonable. *Roberson*, 155 Wn. App. at 899. That is the extent of the holding's reach; *Roberson* does not alter the court's statutory role in determining whether the Commission made a prejudicial legal error, and whether substantial evidence supported the Commission's decision. RCW 7.16.120.

Fundamental to the *Roberson* holding was the Department's lack of challenge to the Commission's findings. *Roberson* at 891. Here, the Department's challenge is express: the Commission's finding that SPD was not evenhanded in discipline for dishonesty was arbitrary and based on factual and legal error, as Judge Kallas found upon examining the administrative record. CP 275-277.

**B. As Found by the Superior Court, the Commission's Reliance on Legally Erroneous and Factually Insufficient "Comparable" Cases Is Error**

In determining that Werner was dishonest, the Commission specifically and unanimously rejected the argument that Werner had "forgotten" that he struck a suspect during an arrest. The Commission concluded that Werner intentionally lied to investigators. They also rejected Werner's contention that a medical impairment led to his "forgetfulness." Nonetheless, the Commission reversed the termination based on a finding that SPD did not apply discipline for dishonesty evenhandedly. This finding is not supported by substantial evidence.

**1. Comparator analysis is guided by both law and facts**

The Commission erred by treating Werner as similarly situated to other employees who were not disciplined for sustained findings of dishonesty. Werner contends that analysis of comparable evidence is an issue of fact, but provides no authority that a similarly situated analysis in an administrative proceeding must be treated as a fact issue. The Commission itself clearly does not view comparator analysis as a fact issue, as all discussion of comparables is included in its “Conclusions of Law” section. AR 153, 159.

It is well established in discrimination law that a legal framework guides any comparator analysis. In order to be treated as a comparable for discipline, an employee must show that a fellow employee is similarly situated in all material respects; courts focus their legal analysis on those distinguishing aspects relevant to claimed discrimination. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 660 (9th Cir. 2002); *see also Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000); *Washington v. Boeing*, 105 Wn. App. 1, 19 P.3d 1041 (Div. 1 2000). While employees’ roles need not be identical, they must be similar “in all material respects.” *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). One claiming

unfair treatment must show that “the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards” and that their misbehavior lacks “such differentiating or mitigating circumstances that would distinguish...the employer’s treatment of them for it.” *Romero v. UPS*, (Slip Opinion), 2007 WL 779693 (D.Ariz. 2007), citing *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir.1992); see also *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 85, 98 P.3d 1222 (2004).

The same legal framework of discrimination cases should be applied to the Commission. The Commission has previously adopted some comparator analysis from discrimination law. As in discrimination law, the Commission places the burden of showing that discipline was disproportionate on the employee making that claim. See, e.g., CP 223 (Findings, *Muhammad v. City of Seattle*, ¶ 35); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Werner did not identify a single case in which an officer faced a sustained finding of dishonesty and yet was not terminated. See AR 990 (Tr. 256-57). As such, he failed to meet his burden that he was treated differently, and the Commission’s finding of disproportionate discipline lacks evidentiary support.

**2. Werner does not identify a single case where dishonest conduct was proven and an officer not terminated**

The Commission's evaluation of purported comparables was drawn solely from documents, permitting the court to evaluate whether it constitutes sufficient "substantial evidence" without considering witness credibility or weighing the evidence. Werner introduced Disciplinary Action Reports (AR 904-05; AR 912) and the transcript of prior testimony by Human Resources Director Mark McCarty (AR 916-22). Disciplinary Action Reports contain brief summaries of the alleged conduct and the "final disposition." They do not provide any indication of the Chief's reasons for a disciplinary decision or any information that an officer might have provided in her due-process hearing with the Chief. *See, e.g.*, AR 904-905, AR 912, AR 1019 (Tr. 369); AR 1025 (Tr. 392) (employee's discipline altered due to a presentation of mitigating medical evidence). Nor do they explain why SPD characterized the officers' misconduct in any particular way, e.g. as excessive force, dishonesty, conduct unbecoming, or any other form of misconduct.

The Commission cites four cases in support of its conclusion that the Department was not evenhanded in its discipline of Werner. First, the Commission refers to a case in which an officer fired shots at a stolen car. The officer's version of events was not reconcilable with a video of the

incident. AR 919-20. The Department's investigation showed no *intent to deceive* investigators; the officer may have forgotten what happened. *Id.* The Commission's reliance on this case is misplaced for three reasons: there is no evidence that this officer was intentionally dishonest, unlike Werner; the Commission specifically rejected Werner's claim of forgetfulness; and the Commission impermissibly reached beyond the administrative record. There is no evidence on the record regarding what discipline was imposed upon this officer. An administrative agency may not base its decision upon evidence outside the record. *Morgan v. U.S.*, 298 U.S. 468, 479-81 (1936); *see also* 5 U.S.C. § 556(e) (1970) (the APA requires that an agency confine itself to the record in making adjudicatory determinations); *See NLRB v. Johnson*, 310 F.2d 550, 552 (6th Cir. 1962). Consequently, the Commission's finding that the officer was treated differently than Werner is without any evidentiary support.

The Commission next cites to an officer who did not report firing his weapon until after he learned that an incident was being investigated. The Commission's reliance on this case is erroneous for two reasons. First, the case is not comparable because there is no evidence that the officer lied to the police about his actions or engaged in any dishonest behavior. CP 212 (Findings, *Muhammad v. City of Seattle*, ¶ 13). Second, the case was entirely outside the administrative record. Neither documents

nor testimony about this case were introduced during the hearing. Consequently, the case cannot provide support for the Commission's finding of unequal treatment.

The third case cited by the Commission involves an officer who initially provided an inaccurate report but timely corrected the report and "took responsibility" for her actions. SPD identified the latter fact as part of why the officer receiving a 15-day suspension instead of harsher discipline. AR 905. This case is an inappropriate comparator because Werner, by contrast, continues to take no responsibility for his dishonesty.<sup>9</sup> Further, this case involved substantial mitigating medical factors; a psychologist provided an opinion that medical factors contributed to the behavior. AR 985 (Tr. 235). The Commission rejected Werner's claim that a medical condition impacted his memory. AR 158-159. The arbitrary nature of the Commission citing to this case as a comparator is shown by the Commission's prior, explicit recognition of those mitigating factors, which go unmentioned in its Werner decision. Compare AR 159 to CP 224 (*Muhammed v. City of Seattle*, ¶ 43) (noting the officer's medical condition as a distinguishing factor).

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<sup>9</sup> Instead, Werner continues to argue that SPD did not adequately prove that he was dishonest.

The final case cited by the Commission is the only one involving use of force. An officer who denied using force was disciplined for excessive force. AR 912. This case is an invalid comparable because the record contains no detail to support Werner's contention that OPA had sufficient evidence to pursue a charge of intentional dishonesty. It is Werner's burden to show that he was treated differently than this officer, and the one-page summary Disciplinary Action Report is not sufficient evidence to satisfy that burden.

These four cases were the Commission's only basis for its finding that Werner was treated differently than other officers "in past cases involving dishonesty." Findings, ¶ 29.<sup>10</sup> None of the officers was charged with dishonesty, and Werner did not introduce any evidence that the officers should have been so charged. The only way to effectively evaluate whether the above officers were dishonest would be to re-litigate their cases, an exercise the Commission specifically rejected. *See* CP 206 (holding that the "Commission does not relitigate other disciplinary cases" upon a motion to exclude invalid comparators).

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<sup>10</sup> The Commission's sole finding was that the Department was not even-handed in applying its rule *on dishonesty*: "there is evidence that employees in past cases involving dishonesty either received no suspension of duties or only temporary suspension of duties." Findings, AR 159, ¶ 29. The Commission majority did not evaluate whether other officers' misbehavior was "as serious or more serious" than Werner's dishonesty, as Werner invites by pointing to cases involving racial epithets and other misbehavior. Appellant's Brief, pp. 20-21.

The arbitrary use of the above “comparable” cases is evident in the inconsistencies in the Commission’s analysis. In Werner, the Commission rejected Werner’s contentions that he was forgetful and had an intervening medical issue. AR 153-63. Yet the Commission relied on two cases involving *these precise premises*, pointing to an officer who did forget the details of an incident, where there was no evidence that he intended to deceive investigators, and to an officer whose behavior was impacted by a medical condition.<sup>11</sup>

In addition, the Commission’s finding that no other officers have been terminated for dishonesty cannot be reconciled with the evidence presented in the hearing. The Commission ignored the only accurate comparator case, in which officers were found to have cheated on a promotional exam. They were found to have been dishonest and terminated. AR 986 (Tr. 239, 241).

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<sup>11</sup> The Commission’s illogical reasoning is also found in its level of discipline analysis. Despite finding that Werner’s actions should be treated similarly to the four officers cited, the Commission found that a 30-day suspension was an appropriate response to Werner’s behavior. *None* of the purported comparable cases resulted in anything close to a 30-day suspension.

**3. Werner was disciplined by a different decision-maker and under different rules than the purported comparable officers**

Generally, having different decision-makers or operating under different rules precludes a finding that two employees are similarly situated. *Vasquez v. Los Angeles*, 349 F.3d at 641-42, citing *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 659 (6th Cir. 1999) (to be similarly situated, an employee must have the same supervisor and be subject to the same standards. Werner's discipline was imposed by Chief Diaz, a different decision-maker than in each of the cases cited by the Commission as comparable. Further, as Werner concedes and unlike the purported comparables, Werner's discipline was imposed pursuant to agreed upon changes between the City and the police officers' union wherein dishonesty charges were presumed to be a terminable offense. AR 859-60 (2008 Collective Bargaining Agreement). Those changes render the cited cases incomparable as a matter of law.

The Commission's refusal to consider the different decision-makers is not only legally insufficient, it creates a troubling scenario for a Department in practical terms, suggesting that a lack of discipline in the past closes the door on discipline in the future. Such a hampering of discipline carries with obvious public safety implications.

**4. The Commission's approach creates significant constitutional problems**

The Commission's reliance on the ultimate discipline imposed in these cases, and nothing more, suggests a "one size fits all" approach to discipline that is arbitrary and not legally permissible. The Chief of Police has a constitutional obligation to consider cases on their individual merits, and to consider mitigating factors. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 542-43 (1985). The Chief is required to consider an employee's explanation of events; a *Loudermill* hearing with a predetermined result is constitutionally inadequate. *See Matthews v. Harney County*, 819 F.2d 889, 893 (9th Cir. 1987). Disability law also may require that the Chief consider medical mitigating factors prior to determining the level of discipline. By taking a wholly results-oriented view of discipline, considering solely the final discipline imposed in cases, the Commission effectively forces the Department to choose between a cookie-cutter approach to discipline and constitutionally or legally required individual evaluation of the specific facts involved in an employee's misconduct. That approach to comparable cases is not legally sufficient.

**C. Werner's Claim That the Court Erred by Not Remanding It Is Plainly Incorrect, as the Court Expressly Remanded the Case**

Werner's contention that the Court erred by not remanding it for

further proceedings is simply wrong: Judge Kallas expressly “remanded to the Commission to determine whether termination is appropriate where there is no evidence of lack of even-handedness in the Department’s disciplinary history.” CP 277. Werner argues that the case should have been remanded for consideration under a higher standard of proof under *Nguyen v. State*, 144 Wn.2d 516 (2001), “among other things.” It is unclear what “other things” Werner argues should have been remanded, and as such neither the Department nor the Court can address them.

Werner argues that a higher standard of proof should be applied, per *Nguyen*, because the allegations against him were damaging to his reputation. Werner’s waived any argument that a higher standard of proof should be applied to any finding of dishonesty because he did not appeal the Commission’s unanimous finding that he was dishonest. An unchallenged finding of fact is considered a verity on appeal. *Levine v. Jefferson County*, 116 Wn.2d 575, 581, 807 P.2d 363 (1991); *see also, Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 776, 37 P.3d 354 (2002).

Werner’s contention that the Commission erred in the legal standard it applied also contradicts his own arguments that *Roberson* defers fully to the Commission on what legal standards to employ. *Compare* Appellant’s Brief, pp. 13-16 to Appellant’s Brief, pp. 25-29. It is also distinguishable from Werner’s case. *Nguyen* was a constitutional due process case

involving property rights; the Supreme Court held that a “clear-and-convincing” standard was necessary to protect the property and liberty interests of physician during an administrative proceeding to revoke his license to practice medicine. The *Nguyen* standard is inapplicable to this case, however, because a Commission hearing is not a “quasi-criminal” proceeding in which the State attempts to remove the professional license of a skilled practitioner. See *Eidson v. Department of Licensing*, 108 Wn. App. 712, 718-719 (Div. 1. 2001). Instead, the Commission evaluated whether the Department had just cause to discipline.

The *Nguyen* court expressly distinguished proceedings for revoking a professional license—which more generally affect an individual’s right to pursue a career—from those related to “the loss of a specific job.” See *Nguyen*, 144 Wn.2d at 534. See also *Ongam v. Dept. of Health*, 159 Wn.2d 132 (2006). Courts in Washington have refused to extend *Nguyen*’s more restrictive evidentiary standard to other contexts. See *Eidson*, 108 Wn. App. 712; *Hardee v. DSHS*, 152 Wn. App. 48 (Div. 1 2009); *Brunson v. Pierce County*, 149 Wn. App. 855 (2009).

Werner provides an insufficient basis for imposing the clear-and-convincing standard described in *Nguyen*. The case before the Commission concerned a termination recommendation, not the revocation of Werner’s law enforcement authority (which is a State proceeding under RCW Ch.

43.101). While the allegations against him would obviously pose a threat to his reputation, this alone does not require a different evidentiary standard. *See Kraft v. DSHS*, 145 Wn. App. 708, 715-716 (Div. 3 2008). In any event, the bulk of the reputational harm in this case was self-inflicted by Werner's own desire to avoid getting into trouble by lying.

Werner essentially asks the Court to require the Commission to implement a two-tiered evidentiary burden. Commission Rule 6.21, requiring a preponderance of the evidence standard, would presumably be acceptable in most police discipline cases; but the Commission should use a higher standard of proof when an officer's conduct is particularly salacious. This approach is not supported by *Nguyen* or other case law, and the Court should not impose it upon the Commission.

**D. Werner Waived Any Claim that SPD Failed to Prove His Dishonesty**

Werner argues that the Superior Court erred in "failing to consider whether the Commission properly analyzed whether Officer Werner had committed 'dishonesty' as that term is narrowly defined by the City." Appellant's Brief, p. 30. The Superior Court did not consider that argument because Werner waived it by not appealing the finding of dishonesty.

Werner claims that the Department's definition of dishonesty is limited to dishonesty about material facts, and that because his strike was

not dispositive of the outcome of the Department's use of force investigation, it was not material. He points to definitions of "materiality" in the summary judgment context, which is not analogous. Several definitions of "material fact" are more on point. In the RCW related to "Perjury and Interference with Official Responsibilities," a material false statement is defined as "any false statement oral or written, regardless of its admissibility under the rules of evidence, which *could have* affected the course or outcome of the proceeding." RCW 9A.72.010(1) (emphasis added). Federal law prohibiting false statements to a government authority, 18 U.S.C. § 1001, is also relevant. Under federal law, "A material statement is one that has a natural tendency to influence, or [one that is] capable of affecting or influencing, a government function." *U.S. v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993). Under Washington contract law, a false statement is material if, when made, "*it could have* affected ... [an] investigation." *Allstate Insurance Co. v. Huston*, 123 Wn. App. 530, 540 (Div. 2, 2004) (emphasis added). Materiality is distinguished from prejudice. *See id.* A misrepresentation is prejudicial if, *after being made*, it *actually did* affect the ... investigation." *Id.*

Likewise, standards for honesty are not minimized where an officer lies in the face of charges of misconduct, such as excessive force. As recognized by the U.S. Supreme Court, "a Government agency may take

adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct.” *Lachance v. Erickson*, 522 U.S. 262, 268 (1998). “Our legal system provides methods for challenging the Government’s right to ask questions—lying is not one of them.” *Id.* at 265, quoting *Bryson v. United States*, 396 U.S. 64, 72 (1969). No employee, including a Seattle Police Officer, has a right “to make false statements with respect to the charged conduct.” *Id.* at 268. The Department is obligated to address dishonesty in internal investigations, even if the dishonesty did not ultimately impact the investigations findings. If standards for honesty were relaxed merely because the dishonesty was not dispositive to the investigation., the Department would suffer an unacceptable loss of credibility with the community it serves. Any physical force used is subject to mandatory reporting, and any force used is material to an investigation of excessive force. AR 982 (Tr. 222-23).

**E. The Commission’s Exclusive Reliance on Labor Law Is Prohibited Under *City of Kelso***

The Superior Court’s findings can also be affirmed on alternative grounds: the Commission applied the wrong legal standard when it evaluated the case by using a standard developed in the labor law context. The Commission is required to determine “whether [the] removal, suspension, demotion, or discharge was made *in good faith for cause.*”

SMC § 4.08.100(A) (emphasis added), pursuant to City Charter Article XVI, Sec. 3.<sup>12</sup> “In good faith for cause” is not defined by RCW 41.12, the City of Seattle Charter, or the Commission rules.<sup>13</sup> In order to evaluate whether Werner’s discipline was in good faith for cause, the Commission relied exclusively on the “seven-factor test” that labor arbitrators utilize in determining the just cause discipline standard often found in collective bargaining agreements. This exclusive reliance on the seven-factor test constitutes legal error.

In *Roberson v City of Seattle*, 155 Wn. App. 878 (Div. 1, 2010), the Department challenged the Commission’s application of the seven-factor “just cause” standard used by arbitrators pursuant to collective bargaining agreements. *Id.* at 887-88. This court found that the Commission has discretion to define terms “so long as its determination is reasonable.” *Id.* at 891. It then found that the Commission’s use of “several factors, **including**” the seven factors, was not unreasonable. *Id.*

The Department recognizes that *Roberson* is the law of this Court. However, the decision does not end the inquiry regarding the appropriate

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<sup>12</sup> The for-cause standard is consistent with, and required by, RCW 41.12.090, the statewide civil service statute overseeing police agencies. *See Civil Service Commission of the City of Kelso v. City of Kelso*, 137 Wn.2d 166, 173 (1999).

<sup>13</sup> The PSCSC’s Rules are available on line at:  
<http://www.seattle.gov/pscsc/Resources/Rules%20of%20Practice%20&%20Procedure.doc>

standard of review, as *Roberson* must be reconciled with the Washington Supreme Court's decision in *Civil Service Commission of the City of Kelso v. City of Kelso*, 137 Wn.2d 166, 969 P.2d 474 (1999) in which the Court expressly ruled that "good faith and for cause" found under the civil service statute 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 173 (emphasis added). The seven-factor test provides "more expansive rights" than civil service procedural rules." *See id.* at 172-173; *See Benavides v. Civil Service Comm'n*, 26 Wn. App. 531, 535-36 (1980) (discharge based on incompetence upheld, without discussion of other factors, because no indication of bad faith).

*Roberson* notes that *City of Kelso* does not require the Commission to adopt any particular test and the Department agrees: no specific test for "good faith for cause" is set out in *Kelso*. *Kelso* does *preclude* one test - exclusive reliance on the seven factors test - by finding the arbitration approach different, based on contract law, and developed through history outside the civil service context. *Kelso* evaluated whether a claim was barred by res judicata, an analysis focused on determining whether or not multiple legal claims are the same. *International Bhd. of Pulp, Sulphite & Paper Mill Workers, AFL-CIO v. Delaney*, 73 Wn.2d 956, 960, 442 P.2d 250 (1968). The Supreme Court found that res judicata did not bar the

subsequent claim because “just cause” (the arbitration standard for discipline) was *not the same* as “good faith for cause” (the civil service standard). If the seven factor approach is the sole tool for defining both “just cause” and “good faith for cause,” then there is no meaningful difference between the two proceedings and *Kelso’s* finding of no *res judicata* is rendered moot. The only way to reconcile *Roberson* with *Kelso* is to find that *Roberson* holds that a Commission can consider the seven factors, but not exclusively. In *Werner*, the Commission relied exclusively on the seven factors, which remains improper even after *Roberson*.

The more appropriate analysis requires consideration of public safety. Jurisdictions with similar civil service statutes have adopted this approach, looking to whether an administrative agency’s decision manifests an indifference to public safety. *Hankla v. Long Beach Civil Service Comm.*, 34 Cal. App. 4th 1216, 1222 (1995). 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, 217-18, 539 P.2d 774 (Cal. 1995). A similar rationale is found in Washington decisions holding that the purpose of its public safety civil service system is “to ensure that the public is protected by qualified police and fire personnel.” *Yakima v. International Association of Firefighters, AFL-CIO, Local 469, Yakima*

*Firefighters Association*, 117 Wn.2d 655, 664 (1991); *see also* RCW 41.12.080 (punishment for police officers is appropriate for acts or omissions “tending to injure the public service”). The goal of protecting the public is not a concern of labor arbitrators who developed and exclusively rely on the seven-factor analysis. Public safety is the primary purpose of a public safety civil service commission, and it is appropriate under the guidance of both *Kelso* and *Roberson* to require the Commission to consider the public’s interest as well as that of the officers.

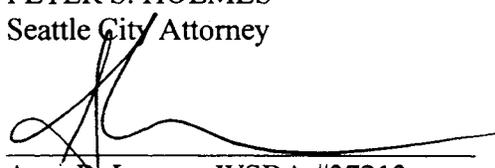
#### IV. CONCLUSION

Based on the evidence presented and the application of the appropriate legal standard, the Department respectfully requests that the Superior Court’s order be affirmed and this case be remanded to the Commission to determine whether termination is appropriate where there is no evidence of lack of even-handedness in discipline.

DATED this 7th day of October, 2010.

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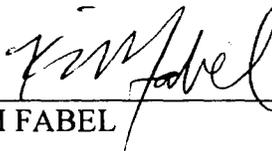
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Department

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on this date, I caused a true and correct copy of the foregoing to be served on the following in the manner(s) indicated:

Alex J. Higgins Law Office of Alex J. Higgins 810 Third Ave., Suite 500 Seattle, WA 98104	<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> LEGAL MESSENGER <input type="checkbox"/> FACSIMILE <input checked="" type="checkbox"/> E-MAIL
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DATED this 7th day of October, 2010, at Seattle, King County,  
Washington.

  
KIM FABEL

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