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Court of Appeals  
Division I  
State of Washington

No. 74329-5

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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JAMES WOODBURY,

Appellant,

v.

CITY OF SEATTLE, STATE OF WASHINGTON,  
and OFFICE OF ADMINISTRATIVE HEARINGS

Respondents.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. William Downing)

Case No. 14-2-28146-3

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This appeal comes before the Court following Deputy Chief (“D.C.”) James Woodbury’s Petition for Review of the Findings of Fact, Conclusions of Law and Final Order that Administrative Law Judge Steven C. Smith issued on September 15, 2014 (“the Order”). *See* Appendix, AR 565-613.<sup>1</sup> The Order, which was affirmed by King County Superior Court Judge William Downing, found for the City of Seattle on Woodbury’s claim of whistleblower retaliation brought under Chapter 4.20 of the Seattle Municipal Code (“SMC”) and RCW 42.41, in relation to his January 2009 demotion by the Seattle Fire Department (“SFD”).

This case involves a classic example of local government waste, misconduct, corruption, and cover-up, where the individual who brought the charges to light, D.C. Woodbury, was retaliated against for his actions. Woodbury acted in good faith and for the public good when he reported what was later determined to be a “gross waste of public funds” and “misuse of official position” by SFD Lieutenant Footer, totaling nearly \$200,000 in lost revenue to the City. *See* AR 1861-62; AR 1449. The facts in this case show that the Chief of the SFD, Gregory Dean, learned of Lt.

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<sup>1</sup> The Clerk’s Papers include a Certified Record of Administrative Adjudicative Orders pursuant to RAP 9.7(c), which will be cited herein using the acronym “AR.” The record includes an administrating hearing transcript, as well as deposition transcripts and copies of sworn declarations that were admitted as hearing exhibits. *See* Order, at n.4 (AR 570).

Footer’s misconduct in June 2008, and sought to sweep it under the rug so that neither the public nor the Mayor would learn of the gross misconduct that occurred on his watch. But owing to Woodbury’s relentless efforts to oppose and report that improper governmental action, Chief Dean could not contain Lt. Footer’s misconduct, and when Dean was asked to decide which manager to demote due to budget cuts, Dean asked Labor Relations about demoting Woodbury; guided his subordinate Assistant Chiefs to recommend Woodbury; and then exercised his sole discretion as Chief to select Woodbury for the demotion,<sup>2</sup> in substantial part based on the report to the Seattle Ethics and Elections Commission (“SEEC”).

It is undisputed D.C. Woodbury “reported improper governmental action by a Seattle Fire Department lieutenant” (*i.e.*, Lt. Footer); and was then “involuntarily reduced in rank” from Deputy Chief to Battalion Chief—an “adverse action.” The only contested element of the retaliation claim was whether there is a “causal link” between these events.<sup>3</sup>

The ALJ’s analysis of the issue appears to have been based on an erroneous application of the law. To succeed on the retaliation claim, Woodbury is not required to show retaliation was Chief Dean’s “sole” or

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<sup>2</sup> While the City prefers the term “reduction in rank” to “demotion,” the two are used interchangeably in the Seattle Fire Department. AR 2437; AR 1925.

<sup>3</sup> See AR 526; AR 608 (Order, ¶5.6).

even “principal reason” for demoting Woodbury.<sup>4</sup> Nor is Woodbury required to prove “but for” causation, or to “disprove” Dean’s articulated reasons for demotion, as Dean “may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable.”<sup>5</sup> Woodbury’s only burden is to show retaliation was among the “substantial factors” affecting Dean’s selection of him.

Woodbury presented circumstantial evidence to meet that burden. The evidence presented included Chief Dean’s admission of knowing about Woodbury’s reporting and the sequence of events and actions by Dean that followed, including the close proximity in time between Woodbury’s report and Dean’s efforts to demote him; as well as the mendacity of Dean, who denied ever once criticizing Woodbury in the selection process, in contradiction of the testimony of the Assistant Chiefs.

The ALJ erred by issuing an arbitrary order, willfully disregarding the facts Woodbury had presented. The Order fails to evaluate critical evidence Woodbury presented as circumstantial proof of retaliatory motive. By ignoring the evidence presented to show motive, the Order fails to explain why the evidence was found “unpersuasive,” offering only that general conclusion to explain the rejection of Woodbury’s evidence.

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<sup>4</sup> Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 621, 60 P.3d 106 (2002), *citing* Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 70-72, 821 P.2d 18 (1991).

<sup>5</sup> *See* Wilmot, 118 Wn.2d at 71; Scrivener v. Clark Coll., 181 Wn.2d 439, 447, 334 P.3d 541 (2014) (discussing application of “substantial factor” standard under the WLAD).

The Order fails to evaluate or discuss a key meeting in mid-November 2008 between Chief Dean and the City’s Labor Relations administrators. Dean admits that, at that time, he knew of Woodbury’s SEEC complaint and he knew of Chris Santos (the Finance Director who was investigating Lt. Footer’s financial misconduct) being questioned by the SEEC.<sup>6</sup> With that knowledge, Dean met with Labor Relations and gave the name “*Woodbury*” as the person he wanted to demote. This occurred before Dean conferred with his Assistant Chiefs about who to demote.<sup>7</sup> Labor Relations counseled Dean against demoting Woodbury based on the alleged performance reasons Dean gave them.<sup>8</sup> The Order did not address these facts, but recognized that Dean went on to criticize D.C. Woodbury’s performance in the meetings he held with his Assistant Chiefs about who Dean should select for demotion. *See* Order (Appendix), ¶ 4.52. On November 18, 2008, Labor Relations told the Union, after the meeting with Dean, “that Chief Dean was interested in selecting Woodbury to be the person . . . to be demoted”. AR 2646, 2668; AR 3974. This showed that, even before there was any input from his Assistant Chiefs, Dean had a predetermined desire to demote Woodbury—a critical fact for deciding if the reasoning Dean later gave (his alleged

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<sup>6</sup> *See* AR 761-62 (¶¶7-9); AR 1860; AR 4544-47; AR 1331.

<sup>7</sup> *See* AR 2631, 2640; AR 1938; AR 3435-36; AR 3453-55, 3467-68.

<sup>8</sup> *See* AR 4431; AR 3425-27.

reliance on the Assistant Chiefs' input) was worthy of belief; or instead a pretext to mask a retaliatory motive. The ALJ failed to make any findings about this circumstantial evidence presented to show retaliatory motive.

Also, the Order states that in Chief Dean's meetings with his Assistant Chiefs, Dean comment[ed] on the 'pros and cons' of each of the 11 Deputy Chiefs," and specifically that he "had comments critical of [D.C.] Oleson." Id. When viewed in light of the whole record, substantial evidence is lacking to support these findings.<sup>9</sup> These erroneous findings prejudiced Woodbury, as the fact that Dean disparaged Woodbury alone in meetings with his Assistant Chiefs was further proof of retaliatory motive.

For the foregoing reasons and those that follow, this Court should find that the ALJ's Order willfully disregarded material facts and circumstances. Thus, it is arbitrary and capricious. D.C. Woodbury asks the Court to enter supplemental findings for facts that were erroneously disregarded; to set aside findings not supported by substantial evidence; and to find that Woodbury established his SEEC reporting was among the "substantial factors" in Dean's selection of him for demotion. Woodbury asks that the Court remand this case to the ALJ for further proceedings consistent with such an opinion including a determination of reasonable attorney's fees and costs under RCW 42.41.040(7).

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<sup>9</sup> See AR 4348; AR 4563; AR 4624; AR 2840; AR 3104.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred in affirming the Order, concluding “the factual findings of the Administrative Law Judge have substantial evidentiary support in the record”; “[t]he ALJ did not erroneously apply the law to the facts and his ruling was neither arbitrary nor capricious.” CP 612-616.
2. The ALJ’s decision that Woodbury’s evidence of retaliation based on the reduction in rank (or demotion) was “unpersuasive,” was arbitrary and capricious. (Appendix: Order, ¶ 4.76, ¶ 4.94, ¶ 5.11).
3. The ALJ erred in not making findings about all material issues of fact presented on the record, as required by RCW 34.05.461(3).
4. The ALJ erred in disregarding Dean’s knowledge about Woodbury’s reporting to the SEEC and Chris Santos being questioned by the SEEC. (Id., ¶ 4.31-.32).
5. The ALJ erred in disregarding Dean’s effort to demote Woodbury through Labor Relations after learning of his SEEC complaint, yet before Dean asked for his Assistant Chiefs input or recommendation.
6. The ALJ erred in finding that Chief Dean made comments critical of persons other than Woodbury and that Dean “gave ‘pros and cons’ about each Deputy Chief.” (Id., ¶ 4.52, ¶ 4.75).
7. The ALJ’s finding that “Claimant’s contention of untruthfulness

was unsubstantiated” was arbitrary and capricious. (*Id.*, ¶ 4.2-4.3).

8. The ALJ misapplied the law by requiring Woodbury to prove that retaliation was a “but for” cause and to disprove the allegedly “legitimate” reason for demotion (the Assistant Chiefs’ recommendation). (*See* ¶ 4.75).

**B. Issues Pertaining to Assignments of Error**

1. Was the Order reached through a process of reason giving due consideration to the evidence Woodbury presented; or did it willfully disregard material facts? (Assignments of Error 1-7).

2. Are the facts, sequence of events, and timing of: (1) Dean’s knowledge of Woodbury filing the SEEC complaint and of Finance Director Santos being interviewed about the complaint; (2) the meetings between Dean and Labor Relations (and Labor Relations and the Union) about demoting Woodbury, before Dean asked his Assistant Chiefs for a recommendation; and (3) Dean telling his Assistant Chiefs about the SEEC complaint before they recommended Woodbury for demotion— “material issues of fact” that Woodbury presented on the record to prove the “causal link” between his protected activity and his demotion? (Assignment of Error 1-5 and 7).

3. Is there substantial evidence from which the facts, sequence of events, and timing of: (1) Dean’s knowledge of Woodbury filing the SEEC complaint and of Finance Director Santos being interviewed about

the complaint; (2) the meetings between Dean and Labor Relations, and Labor Relations and the Union, about demoting Woodbury, before Dean asked his Assistant Chiefs for a recommendation; and (3) Dean telling his Assistant Chiefs about the SEEC complaint before they recommended Woodbury for demotion, could be disputed? (Assignment of Error 3-5).

4. Is there substantial evidence to support finding that Dean made comments critical of persons other than Woodbury, when viewed in light of the whole record before the court? (Assignment of Error 6).

5. Does the Order stop short of evaluating Woodbury's circumstantial evidence of retaliatory motive and only evaluate whether Chief Dean provided a "legitimate" reason for the demotion? (Assignment of Error 8).

### III. STATEMENT OF THE CASE

**A. SFD is structured as a paramilitary organization under Chief Dean, who has the authority to demote his Assistants Chiefs and who can exert his will through indirect orders.**

The SFD is a paramilitary organization. AR 2452. Its officers are organized by rank and deference is given to senior personnel by junior personnel. AR 4132-34. Frequently, senior officers call subordinates by their first names, but junior personnel call their superiors by their rank. Id. The SFD may utilize both implied and direct orders. AR 2451-52; AR 4133-34. Receiving a direct order is "being told very specifically what to do and to do it." AR 2451. An implied order from a superior is "a more

veiled suggestion type of comment.” Id. For example, a direct order from a superior might be, “Get me a glass of water.” An indirect order might be, “I’m thirsty. I sure could use a glass of water.” AR 2452. The result is the same. The subordinate complies and provides a glass of water.

Chief Dean was the head of the SFD. In 2008, Dean supervised approximately eight direct reports who made up his leadership team, which met weekly, composed of Assistant Chief (“A.C.”) Hepburn, A.C. Vickery, A.C. Nelsen, A.C. Tipler, H.R. Dir. Linda Czeisler, Finance Dir. Chris Santos, IT Dir. Lenny Roberts, and Communications Dir. Helen Fitzpatrick. AR 2434-35. At the weekly meetings, the leadership team discussed issues of a department-wide nature. Id.

In 2008, there were eleven Deputy Chiefs who reported to the Assistants. Below them in the chain of command were Battalion Chiefs and firefighters. AR 4732; AR 4132-33. Assistant Chiefs and Deputy Chiefs are exempt employees who serve at Chief Dean’s pleasure and may be demoted for any reason so long as it is not for a retaliatory or discriminatory reason.<sup>10</sup> Dean relies on his Assistant Chiefs to inform him of what is happening in the sub-organizations they supervise. AR 3373.

**B. All the ranks are subject to the progressive discipline policy.**

“Progressive discipline is the use of increasingly more severe

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<sup>10</sup> AR 3693-94; AR 3444-46; AR 3500; AR 1134 (Ex. 205); AR 4448.

forms of discipline in an attempt to correct behavior performance problems in the workplace. ... [T]he severity of the penalty should be appropriate to effectively change the undesirable behavior or performance.” AR 1217. The SFD utilizes a “progressive discipline” policy, which is applicable to all ranks below Chief Dean. AR 2095-96. Progressive discipline ranges from informal and formal counseling at the low level, which could result in the use of a performance improvement plan, to higher level discipline ranging from an official reprimand to suspension, demotion, and finally termination. Id.; AR 2129-30, AR 1218-19. Woodbury has no documented record of progressive discipline. AR 4222, 4224. He is very bright and capable. AR 4651.

**C. Chief Dean has worked for the SFD for many years and is well versed in union contracts.**

Chief Dean has been employed by the City for forty years. AR 3355. Before entering management, he was a member of both firefighter unions. AR 3362-33. During a three-year period when he was Assistant Chief of Administration, Dean interacted with union representatives on union issues and oversaw contract negotiations between the City and the unions, which included reading union contracts. AR 3365-66.

**D. Since 2002, Lt. Footer engaged in gross misconduct under the supervision of Fire Marshals Dean, Nelsen, and Tipler.**

The Seattle Ethics and Elections Commission’s investigation found:

In 2002, Lt. Footer was assigned to be the dedicated Special Events Fire Prevention Inspector working with Qwest Field under the terms of a 2001 contract between SFD and F&G. In this position he became responsible for the day-to-day management of all SFD activities at Qwest Stadium.

The Seattle Seahawks began to play home games at Qwest Field in September 2002. During the football games, F&G would disengage the stadium's fire alarm system from the automatic alarm reporting program - a procedure known as putting the stadium in 'event mode'- bypassing the automatic emergency reporting system. In 'event mode' the stadium's fire alarm system routes all alarms to a central fire control panel located within the stadium and onsite personnel have a short period of time to investigate and verify whether an emergency in fact exists. During ... football games this process avoids disruption of the event or evacuation of the stadium due to a false alarm.

When SFD was informed by F&G that the stadium would be placed in 'event mode' for football games, SFD required F&G to staff all games with a contingent of firefighters, known as 'fireguards,' all of whom were trained fire personnel. Fireguards were stationed in the central fire alarm control room and in various parts of the stadium. The fireguards were to investigate the source of any alarm and determine if an emergency existed. F&G accepted this condition and fireguards have attended both college and professional football games since 2002.

Fireguard duty is overtime duty. Fireguards have been used at various venues throughout the City of Seattle, including Bumbershoot, raves, and pyrotechnic displays. SFD treats fireguard overtime costs as reimbursable expenses, and bills them to the organization or individual using the service. Payments are made to the City of Seattle general fund.

It is common knowledge within the FMO that all fireguard activities are billed to the requesting party. The procedure for billing fireguard services has been the same for over a decade and is well known to members of the FMO Special Events section where the majority of fireguard activity take place. Lt. Footer told us that he understood that fireguard services were to be billed.

On Qwest Field game days, usually six firefighters and a supervising lieutenant work as fireguards. ... Lt. Footer is responsible for completing the form and ensuring that it is routed to SFD's fiscal administration unit. Ideally, he obtains the signature of someone at F&G before submitting it. Since 2002, Ms. Sue Skaggs has been the person responsible for billing fireguard services.

From 2002 until the end of the 2007 season, F&G used fireguards for football games on 76 occasions. The total amount of the services provided at football games to F&G for these services was \$189,811. Of this amount only \$26,798 was billed by SFD to F&G. Lt. Footer was the supervising officer in charge of submitting the fireguard activity sheets during this period with the exception of October 2005 when he was on medical leave.

In 2002-2007 there were 39 other occasions when reimbursable SFD services were provided to F&G and not billed. These 'other services' totaled \$16,353. Lt. Footer was the supervising officer in charge of submitting the fireguard activity sheets for these additional events.

AR 1450-51 (SEEC Report, at 2-3). "Lt. Footer's failure to do his job led to a gross waste of **\$195,697** of public funds." AR 1449 (id., at 1).

Chief Dean was the Fire Marshal from 2002-2004 and was the Fire Marshal at the time Lt. Footer was sent to work at F&G. AR 3407-08. A.C. Nelsen was Fire Marshal in 2004 when Dean became Chief, and Nelsen held that position until A.C. Tipler took over as Fire Marshal at the end of 2006. AR 3375; AR 3476; AR 826; CP 168; CP 136-37.

The SEEC found that Chief Dean, A.C. Tipler, and A.C. Nelsen each bore responsibility for the failure to collect \$195,697 from F&G:

Each of the three SFD Fire Marshals who served between 2002 and 2008, having the duty and obligation to be effective stewards

of public funds, failed, despite warnings, to ensure that the Lt. Fire Inspector position at F&G was appropriately supervised, and each bears responsibility for the failure to collect \$195,697 of reimbursable expenses due from F&G from 2002 through 2007.

AR 1450 (SEEC Report, at 2).

**E. Since 2004, Chief Dean ignored Woodbury’s recommendation that Lt. Footer’s assignment be rotated to avoid improper conduct—the Mayor ultimately agreed with Woodbury.**

During his career, Woodbury was promoted to Battalion Chief on a fast track. AR 2994-95. In 2004, he was promoted by Dean to Deputy Chief. AR 4134. Upon promotion, Woodbury was assigned to be the Assistant Fire Marshal under A.C. Nelsen, and he held that position until he was demoted in January 2009. *Id.* Woodbury never directly supervised Lt. Footer; Footer reported through a different chain of command to the Fire Marshal (Dean, Nelsen, or Tipler). AR 4134-35, 4138.

In 2004, Woodbury became concerned that Lt. Footer was acting more like an F&G employee than an SFD inspector. AR 4140. Woodbury was concerned because Lt. Footer could not produce plans typically used by SFD inspectors for reoccurring events. *Id.* Woodbury recommended to A.C. Nelsen that Lt. Footer’s position be rotated to avoid potential conflicts of interest, as a good business practice. *Id.* A.C. Nelsen brought Woodbury’s concerns to Chief Dean and then reported back to Woodbury the following: A.C. “Nelsen stated to me that Chief Dean had

emphatically told him that Lieutenant Footer was not to be rotated out of this position.” AR 1430, AR 4140-41.

In 2007, when A.C. Tipler became Fire Marshal, Woodbury made the same recommendation to him about the need to rotate Footer out of the assignment. AR 4141-42. Tipler agreed, but indicated that he did not think Dean would permit the rotation. Id. Eventually, a 2009 letter from the Mayor admonishing Chief Dean overrode Dean’s decision and required the rotation of assignments in the Fire Marshal’s Office. AR 753 (¶6). Thus, the Mayor agreed with D.C. Woodbury in the result. Id.

**F. In June 2008, Chief Dean learned that Lt. Footer had failed to invoice F&G at a potential cost of \$200,000 to the City.**

In 2008, Footer reported to Capt. Greene, who reported to Tipler, who reported to Dean. AR 2228-29. In early June 2008, Capt. Greene realized that there was a problem with invoicing F&G. AR 2244-45, 2265.

Diane Hansen worked for the SFD for 29 years. AR 2338. In 2008, Hansen was a Fire Prevention Administrator and Strategic Advisor 3 with civil service protection. AR 2339. In 2008, she worked in the Fire Marshal’s Office and reported to Tipler, and before that, she reported to Nelsen and Dean when they were Fire Marshals. AR 2339-40. Hansen was an advisor and assistant to the Fire Marshals. AR 2340-41.

On June 3, 2008, Greene informed Ms. Hansen of the problem with the F&G invoicing, indicating that he discovered that the Marshal’s

Office had not collected the revenues from First and Goal. AR 2341. Greene indicated at the time that he believed it involved seven years of revenue. AR 2341-42. Greene told Ms. Hansen that Lt. Footer had told him that “he had submitted the bills.” AR 2343. On June 6, 2008, Hansen met with Woodbury to tell him what she had learned, and then they both met with A.C. Tipler. AR 2342-43; AR 4144; AR 4519-20. Woodbury, Hansen, and A.C. Tipler discussed that “this was a significant event and that it was implausible that all the invoices could be missing and not have made it to the finance department.” AR 2343; AR 4520. At the meeting with Woodbury and Tipler, Hansen told Tipler that this was “a very serious transgression against the public trust and undermined the integrity of the fire marshal’s office and the fire department and that it required action.” AR 2344. She also expressed her concern to Tipler that positions at the Fire Marshal’s Office should be rotated. Id.

That same day A.C. Tipler called Hansen into his office and reported to her that he had spoken with Chief Dean. Ms. Hansen recalled:

[A.C. Tipler] told me that he had spent the last two hours speaking with Chief Dean, that they had been discussing this matter, and that Chief Dean accused [A.C.] Tipler of being, and myself and [D.C.] Woodbury, of being out to hang Lieutenant Footer. And he indicated that Chief Dean had not been receptive to the information or the recommendation that something needed to occur. He said that Chief Dean accused him of being too closely involved and too personally involved.

...  
He told me that he had said that he would need to, he would like to

rotate him, and that Chief Dean had told him that we were out to get him, meaning, Lieutenant Footer, and that he would need a business reason in order to do that, which seemed illogical to me since I thought we had presented the business reason.

AR 2345-46. At Tipler's suggestion, Hansen met with Chief Dean on June 9, 2008. Id. When Hansen met with Dean, she reported the following:

I tried to be very nonaccusatory in presenting the information regarding, in discussing the information about Lieutenant Footer and the missing revenues.... I tried to suggest that, not knowing, that there needed to be an outside investigation conducted, because I felt that this was a serious matter and that it would not be able to be kept confidential, that too many people knew about it, and that it would -- I said I did not want to end my career with the fire marshal's office, my name, Chief Dean's name, or the fire marshal's office or the fire department having our reputation tainted by this occurrence, and that as he was to be ultimately the final arbitrator of any disciplinary action, he should distance himself from the investigation. And I suggested that he possibly contact a Mel McDonald, who worked in another city department, to conduct an investigation regarding the missing revenues.

AR 2347. In response, Chief Dean "told [Hansen] that he would have SFD's Finance Director, Chris Santos, conduct an investigation and that he would have Travis Taylor, the EEO officer, conduct an investigation."<sup>11</sup> Id. Hansen testified that she "also told him that [she] felt someone needed to address the issue that [Lt.] Footer had said he had submitted all of the invoices for seven years and that only four were found and that that was implausible. And he said, 'oh, I think they found some more in a desk.' And [Hansen] said, no, I don't think they did." AR 2438.

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<sup>11</sup> There is no evidence Taylor was asked to conduct any investigation. See AR 2985-86.

Hansen testified that after the June 2008 meeting, Dean treated her differently and she was no longer an insider. AR 2371-73, 2406-07.

Hansen was disappointed with Chief Dean's response, and she shared her disappointment with D.C. Woodbury and later A.C. Tipler. AR 2349-50, AR 3046-47. At this time, A.C. Tipler was on vacation, so Hansen briefed Tipler upon his return that "Chief Dean had not been receptive to my visit in terms of considering my recommendations." AR 2350.

Additional meetings occurred between Tipler, Greene, and Dean in June or July 2008. Greene reported his findings to A.C. Tipler, who was visibly upset and brought Capt. Greene to meet with Chief Dean. AR 2251-54. At the meeting, Greene told Dean, "It looks like there's invoices missing all the way back to 2002, I can't really find any of them. ... Milt Footer understands the process." AR 2254. At the meeting, Dean did not seem to be upset at all by the news of Footer's misconduct and suggested that, "we need to figure out how much money is missing, see if we can get 50 cents on the dollar, or whatever we can get." AR 2254-55. Greene later told the SEEC he and Tipler gave Dean a dollar range for the misconduct:

We told Chief Dean what had happened... these invoices were missing, that it appears that we haven't been invoicing for these labor hours to the tune at the time of, you know, my raw numbers and this is simply based on what rates were and how many hours people would be there, I had put together some basic numbers and it looked like it could have been as much as \$250,000 to \$300,000 that I could actually probably track but it would depend on what they had done in the past. I mean I am speculating.

AR 2255-57. A.C. Tipler verified that at the June or July 2008 meeting, Greene told Chief Dean a large amount of money may not have been invoiced: “something up there” near \$250,000 or \$300,000. AR 3029-31.

In contrast, at his depositions Dean claimed not to remember meeting with Hansen, AR 3695-97, and failed to state that Greene told him as much as \$250,000 to \$300,000 may not have been invoiced. Instead, Dean, who was first deposed in May 2010, before Greene and Tipler, claimed Tipler was the first to tell him “they thought they had a problem with invoicing.” AR 3377. Dean denied knowing before December 2008 that six figures worth of revenue was not invoiced, again claiming Tipler did not tell him and not revealing that Greene had told him that the loss could be hundreds of thousands of dollars. AR 3575-78, 3583.

**G. From June-September 2008, Dean stops any investigation, and Woodbury threatens to report the conduct to ethics—Tipler tells Chief Dean that Woodbury and others may file complaint.**

Through the summer of 2008, Hansen had no sense that active investigations were going forward. AR 2350-53. In meetings with F&G, they were instructed not to discuss the monies owed but not invoiced. *Id.* In discussions between Chris Santos, A.C. Tipler, D.C. Woodbury, and Ms. Hansen, A.C. Tipler instructed them to “focus on going forward.” *Id.*; AR 3140-41; AR 4152. Ms. Hansen understood the amount of unbilled revenue to be between \$230,000 and \$250,000. AR 2352-53.

D.C. Woodbury was an outspoken member of the Fire Marshal's Office during the summer and fall of 2008 regarding Lt. Footer's failure to invoice F&G. AR 4174-75. He participated in numerous meetings with Hansen, Tipler, English, and Greene over the issue. Id. Woodbury testified that, after he and the others began looking into the issue:

Chief Dean stopped the investigation in June 2008, and from that period forward ... very much interjected himself into the investigation and the issues surrounding [Lt.] Footer. The four of us [English, Hansen, Greene and Woodbury] ... were very concerned on the scope ... of the issues. ... We had been told that the financial investigation was over.

CP 297-98; *see* CP 136; AR 4150-53. Once they were told the financial investigation was over, and an additional issue about Lt. Footer's demand for Hannah Montana tickets came to light around the same time, Hansen and Woodbury began to speak to A.C. Tipler about filing a whistleblower complaint or talking with the FBI. AR 4529-4530; AR 3061-62. In September 2008, Woodbury also placed copies of the Seattle Municipal Code whistleblower provisions on A.C. Tipler's desk. AR 3061; AR 4173. Tipler told Dean that Woodbury, Greene, and Hansen were threatening to file an ethics complaint about Footer's misconduct. AR 3061-62.

**H. Chief Dean works to cover-up Footer's misconduct and never tells the Mayor's Office that Footer has failed to invoice F&G.**

Although by the summer of 2008 Hansen, Tipler, Woodbury, and Greene were convinced of the implausibility of almost six years of

invoices being lost in interoffice mail, Dean maintains that he believed Lt. Footer was telling the truth until early 2009. AR 3379-89, 3473. Chief Dean instead blamed the missing invoices, at least in part, on D.C. Woodbury and Harry Laban's inability to renegotiate the contract with F&G in 2004, even though the contract renegotiation was not intended to cover fireguard services. Id.; AR 1150, 1152-53, 1205-10, 1212-16.

Chief Dean testified that as of the point when A.C. Tipler offered his resignation in September 2008, Dean was still "working from that assumption" that Footer had submitted the invoices. AR 3383. In contrast, A.C. Tipler stated the following in his deposition:

- Q. Did Chief Dean ever say to you, look, let's face it, he sent the invoices, someone else messed up, or words to that effect?
- A. No, I think he pretty much without saying it conceded that Footer was lying.
- Q. And this is from the, those early meetings...?
- A. Yes.
- Q. So were you ever told by Chief Dean that basically, look, we don't know enough about Footer, about whether Footer made a mistake in order to discipline him?
- A. No, I don't think we were told that, that I was told that.

AR 3043.

- Q. During this time when you're trying to get Footer disciplined and transferred, did Chief Dean express to you a belief that Footer, that there wasn't -- that there wasn't enough evidence to say that Footer had not improperly invoiced F&G?
- A. No, I don't think there was any doubt in his mind that Footer had not properly invoiced them. I think he was more concerned that it had gone on so long without being detected and that it would involve people who were either retired or no longer in the

marshal's office.

AR 3050. A.C. Tipler also testified that Chief Dean “was concerned about the public perception if this thing got out.” AR 3036.

Chief Dean is a direct report to the mayor. AR 2024-25. Tipler's testimony is consistent with Deputy Mayor Ceis's testimony that until Woodbury filed the January 2009 whistleblower retaliation complaint with the Mayor, Ceis had no idea of Footer's misconduct because Dean had not told the Mayor. AR 2025-26. Dean's efforts to keep the facts from the Mayor were part of the Mayor's admonition of Dean in a May 2009 letter:

[W]hen ... major issues occur, you must tell me. We meet regularly. You also meet with the Deputy Mayor and the Chief of Department Operations. It is important that your Department conduct itself in a transparent manner rather than trying to handle these issues internally.

AR 1468 (Ex. 282); *see also* AR 753, 1467 (Ex. 281).

**I. On October 17, 2008, D.C. Woodbury files a whistleblower complaint with SEEC after Dean and Tipler refuse to act.**

Woodbury drafted his whistleblower complaint in September 2008 and showed it to D.C. English, Hansen, and Capt. Greene for review. AR 4180, 4184. The whistleblower complaint is dated September 30, 2008, and it concerns two allegations of misconduct by Lt. Footer – the failure to invoice F&G and the demand for all access passes to the Hannah Montana concert at Key Arena. AR 1291-95. The whistleblower complaint states that the failure to invoice F&G had gone on since 2001, with an estimated

\$210,000 to \$250,000 not recovered by the City. AR 1292. Woodbury met with Kate Flack and Wayne Barnett of the SEEC to discuss the complaint, pre-filing, on October 7, 2008. AR 4185. On October 17, 2008, Woodbury filed the whistleblower complaint with the SEEC. AR 1291.

**J. Prior to October 17, 2008, Greene betrays Woodbury and tells Dean that Woodbury is filing a complaint with the SEEC.**

Woodbury drafted his whistleblower complaint in September 2008 and showed it to D.C. English, Hansen, and Capt. Greene for their review. AR 4180, 4184. Chief Dean testified that, “in late September 2008,” after talking with Capt. Greene,<sup>12</sup> Dean called SEEC Executive Director Barnett to tell him an SEEC complaint was going to be filed. AR 3368-72. On October 13, 2008, Dean confirmed his earlier contact with Barnett with an email. AR 3453, 1331. On November 20, 2008, Barnett responded to Chief Dean’s email, confirming the SEEC had received allegations and was investigating. AR 1860-61; AR 1331.

Greene and Dean tell conflicting stories. Dean testified that he contacted Barnett in late September 2008, but not about a whistleblower or ethics issue. AR 3368-72. Instead, Dean says he “heard there was some concern about discipline that I had issued and people were complaining about it.” Id. Dean says he got that information from Greene on a street

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<sup>12</sup> A.C. Tipler testified, however, that Dean said he had called Barnett at the SEEC in response to *Tipler* telling Dean that an ethics complaint might be filed. AR 3078.

corner about the same day. Id. Dean denied Greene named Woodbury. Id. Later in his deposition, Dean said Greene came to him in **November** 2008 to complain that Woodbury was pressuring him to sign a complaint going to the SEEC. AR 3436-41. Capt. Greene says Woodbury showed him a complaint letter that he did not read, and he did not know to whom it was going to be sent. AR 2270-80. Greene admits telling Dean that Woodbury was pressuring him to sign a complaint. Id. After all the contradictory testimony, Dean came clean in his summary judgment declaration, admitting he knew Woodbury was going to the SEEC in September 2008: “[I]n **September, Greene called me and ... mentioned he was being pressured by Woodbury, to join in a complaint that would be presented to the SEEC.**” AR 761 (¶7); *cf.* Order, ¶¶4.31-.32. Thus, Dean admits he knew in September that Woodbury intended to file an SEEC complaint and he learned from Barnett when the complaint was filed.

**K. After learning Woodbury filed an SEEC complaint, Dean plots retaliation against him, de-selecting D.C. Walsh for demotion.**

In August 2008, the Mayor’s Office asked the SFD to abrogate an Assistant Chief position from the 2009 budget, but Dean instead offered to abrogate a Deputy Chief position and a Lieutenant position. AR 2168. This proposal was accepted by the Mayor’s Office. Id. In October 2008, A.C. Hepburn publicly identified Michael Walsh as the person who would be demoted because he was last to be promoted. AR 2445-48. Seniority

had been “the primary factor in making moves, when moves were required.” AR 2401. But at his deposition, Hepburn claimed he was “speaking out of school” and had no basis for his statement, despite being familiar with contract provision 20.5, which clearly delineates that deputies are not subject to civil service rules. AR 2445-48.

Dean said he thought civil service rules applied to the Deputy Chief demotion, which is why he had believed Walsh would be the person demoted. AR 3431-32, 3444-52. Dean also said he relied on advice he got from HR, which he seemed to rely on for some time—even talking to D.C. Walsh about his likely demotion. *Id.* But HR Manager Taylor admits Dean knew within twenty-four hours of inquiring that the civil service rules did not apply to Deputy Chiefs. AR 2992-94, 3002. Czeisler confirmed for Dean that he had several options and was not required to use seniority. AR 2073-77. Furthermore, it was common knowledge, at least among Deputy Chiefs and above, that the Deputy Chief position serves at the pleasure of the Fire Chief and is exempt from the Civil Service Rules. AR 3344-45. Chief Dean had also been responsible earlier in his career for overseeing contract negotiations with the two SFD unions for three years. AR 3365.

**L. Knowing that Woodbury filed the October whistleblower complaint, in November Dean searches for a way to demote Woodbury for alleged performance issues.**

In mid-November 2008, just weeks after D.C. Woodbury filed the

whistleblower complaint, Chief Dean spoke with David Bracilano and Julie McCarty in the City's Labor Relations department to ask if he could demote Woodbury in the planned abrogation based on performance. AR 3434-35, AR 3425-27; AR 4450-53. Dean was told by Bracilano and McCarty that he could not use performance as a basis for the demotion. Id.

At his deposition, Dean claimed the reasons he sought Woodbury's demotion were (1) a 2008 incident involving a firefighter named Richardson who took offense when Woodbury challenged his clothing choices since he could be called to meet with the Mayor at any time, (2) a May 2008 incident involving an occupant load question and Capt. Greene at a nightclub, in which Greene claimed Woodbury failed to follow orders about how to handle the problem, and (3) three EEO complaints against Woodbury for which Woodbury was exonerated. AR 3391-3402, 3427-30. Dean admits that for the nightclub issue and the Richardson issue he passed the information along to Tipler and there was no further action. Id. As to the EEO complaints, Woodbury was exonerated after investigations by Travis Taylor. AR 2995-3002. Woodbury's alleged "performance" problems pertained to the May 2008 timeframe, so to not raise these issues until November and December made no sense. AR 4428; AR 1018.

After Chief Dean spoke with McCarty and Bracilano about demoting Woodbury, an informal meeting was held on November 18,

2008 between SFD Labor Relations and the chiefs' union to discuss the planned abrogation of the Deputy Chief position. AR 3973-74; AR 2610-11, 2628; AR 1312-27 (Ex. 251, McCarty notes); AR 1335 (Ex. 256). Present at the meeting were Battalion Chief Rick Verlinda (Local 2898 President), Bracilano, McCarty, and Paul Harvey (a union consultant). AR 3973. During the meeting, Verlinda and Harvey expressed their belief that D.C. Walsh would be selected for demotion based on his rank as the least senior deputy chief. AR 3974. Bracilano and McCarty stated that the name they heard was D.C. **Woodbury**. *Id.*; *see also* AR 2668.

At the union's request, Dean asked for volunteers to be demoted and when no Deputy Chiefs volunteered, Dean set up meetings with the Assistant Chiefs in November and December 2008 to discuss which of Deputy Chief to demote.<sup>13</sup> AR 705 (¶2), 3454, 4439. Dean did not invite HR to attend the meetings and no notes were taken at any of the meetings. AR 3455, 3468. Chief Dean did not consult HR or the legal department regarding the demotion decision at any time. AR 3469; AR 2073.

A.C. Tipler testified that, at some point, Dean told the Assistant Chiefs an ethics complaint had been filed "from the Marshal's Office." AR 3065. A.C. Hepburn testified that he became aware of Lt. Footer's

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<sup>13</sup> At the time of the demotion decision, the Assistant Chiefs were Hepburn, Nelsen, Tipler, and Vickery. AR 2438-39. The eleven Deputy Chiefs were Duggins, English, Fosse, Jurus, Lomax, Rosenthal, Oleson, Sodeman, Youngs, Walsh, and Woodbury. *Id.*

failure to bill F&G from “general conversation amongst the Fire Chief and the other Assistant Chiefs” *before* the meetings Dean held with the Assistant Chiefs to discuss the demotion decision. AR 2433-34, 4724-25.

Chief Dean admitted he did not inform the Assistant Chiefs of what he had learned from Labor Relations – that the demotion should not be based on performance. AR 3456-57. Dean unequivocally denied that he criticized the performance of Woodbury in the meetings with his Assistant Chiefs. *Id.* Contradicting Dean, A.C. Nelsen testified that, out of the eleven Deputy Chiefs, Dean criticized **only Woodbury**’s performance in their meetings. AR 2830-31, 2837-40; *cf.* Order, ¶ 4.75. While A.C. Hepburn testified that Dean criticized the performance of two Deputy Chiefs – D.C. Woodbury and D.C. Oleson, AR 2439-41; A.C. Nelsen testified it was he (Nelsen) who spoke negatively about D.C. Oleson, and that in fact “Dean cautioned [Nelsen] that we couldn’t hold [D.C.] Oleson accountable for bad behavior that occurred a decade ago.” AR 2839-40; *cf.* Order (¶4.75). Hepburn admitted that Oleson was also ruled out because of his age and the fear of an age discrimination claim (and that Rosenthal was similarly ruled out as the only woman). AR 2442-44, 2449-51.

Ultimately, Woodbury was chosen for demotion to Battalion Chief, with the reason given that he was slated to go into the position to be abrogated (Special Operations) in January 2009. AR 3467; AR 4237. D.C.

Lomax, who was assigned to Special Operations at the time, was not considered for demotion. AR 3485-86. Chief Dean testified he simply “didn’t bring it up.” Id. When Dean informed Woodbury that he was selected for demotion, Woodbury asked if he might be considered should a Deputy Chief vacancy occur in the future. AR 4235; AR 3637-38. Dean responded: “That’s not the way the rules work,” or words to that effect. Id.

After Woodbury filed a lawsuit, Dean re-promoted him to Deputy Chief of Training. AR 603 (¶ 4.86). Dean was unable to explain why he wanted Woodbury demoted before the lawsuit but thought he would make a good Deputy Chief after the lawsuit was filed. AR 3555-56.

**M. The ALJ entered the Order, which Judge Downing affirmed.**

An administrative hearing was held after which the ALJ entered the Order, finding Woodbury did not meet his burden of proving unlawful retaliation. AR 565-613. Woodbury filed a Petition for Judicial Review. CP 1-59. On October 23, 2015, the Honorable William Downing entered the Order on Judicial Review, affirming the ALJ’s Order. CP 612-16. Woodbury’s notice of appeal to this Court followed. *See* CP 618-78.

**IV. ARGUMENT**

**A. Grounds for Review**

This Court has jurisdiction to review the ALJ’s Order based on

former SMC 4.20.860(C),<sup>14</sup> RCW 42.41.040(5), (9); and the Washington Administrative Procedure Act (“WAPA”), RCW 34.05.526. “The [WAPA] standard for judicial review is not intended to be a smoke screen for affirmation, but requires ‘thorough, probing, in-depth review.’”<sup>15</sup> The appellate court sits in the same position as the superior court and applies the WAPA standards directly to the administrative record.<sup>16</sup> The WAPA requires that a court grant relief from an administrative order if, *inter alia*, the order is arbitrary and capricious, it is not based on substantial evidence “when viewed in light of the whole record,” it fails to decide all issues requiring resolution, or it represents an erroneous application of the law. RCW 34.05.570(3)(d), (e), (f), (i). All of these grounds apply in this case.

**B. Standards Applicable to Whistleblower Retaliation Claims.**

The elements for proving the retaliation claim are borrowed from the WLAD and the wrongful discharge tort claim for whistleblowers. To establish a claim of whistleblower retaliation, Woodbury must show that (1) he engaged in a statutorily protected activity; (2) SFD took an adverse employment action against him; and (3) his protected activity was a “substantial factor” in the adverse action. *See* AR 609 (¶5.9), *citing Kahn v. Salerno*, 90 Wn. App. 110, 129 (1998); *Wilmot*, 118 Wn.2d at 72.

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<sup>14</sup> The applicable version of SMC 4.20.860(C) is provided at CP 134-35.

<sup>15</sup> *Aviation W. Corp. v. State Dep’t of Labor & Indus.*, 138 Wn.2d 413, 419 (1999).

<sup>16</sup> *Campbell v. State Employment Sec. Dep’t*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014).

It was undisputed below that Woodbury “reported improper governmental action by a Seattle Fire Department lieutenant” (Lt. Footer); subsequently “was involuntarily reduced in rank from Deputy Chief to Battalion Chief”; and that the reduction in rank was an “adverse action.” See AR 526; accord AR 608 (Order, ¶5.6). The only element of the retaliation claim based on Woodbury’s demotion that was contested was the “causal link” (or whether “retaliation was a substantial factor” in Woodbury’s demotion). AR 526; AR 608 (¶5.6).

It is the plaintiff's burden at trial to prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable....

Scrivener, 181 Wn.2d at 447 (discussing WLAD case). Substantial factor does *not* mean Woodbury would not have been demoted “but for” his protected activity. WPI 330.01.01; Wilmot, 118 Wn.2d at 71-73 (“[T]he plaintiff may respond to the employer’s articulated reason ... by showing that although the employer’s stated reason is legitimate, the [protected activity] was nevertheless a substantial factor motivating the employer”).

**C. The ALJ misapplied the law.**

The ALJ erred in analyzing in the Order only whether a legitimate or “proper cause” for demotion existed, while stopping short of evaluating the circumstantial evidence presented to show that Dean had a retaliatory

motive. The Order cites to Kahn v. Salerno, 90 Wn. App. at 129. There, it is stated that a retaliation claimant “must also show the adverse action was not for proper cause.” Id. In its post-hearing brief the City similarly argued, “Woodbury must provide evidence that the City's explanation is pretextual and the real reason is a desire to retaliate.” AR 526. That is an inaccurate statement of Woodbury’s burden, as Scrivener emphasized. *See* 181 Wn.2d at 446-47. Kahn’s statement that a plaintiff “must also show the adverse action was not for proper cause” has been overruled. *See id.* As Woodbury is not required to disprove the so-called “legitimate” reason for demotion, it was error to disregard (and make no findings about) the facts Woodbury presented to show retaliation was a substantial factor.

**D. Woodbury Presented Circumstantial Evidence To Prove Retaliatory Motive, But It Was Disregarded Without Analysis.**

“[I]t is very difficult to prove what the state of a man’s mind at a particular time is....” deLisle v. FMC Corp., 57 Wn. App. 79, 83 (1990). “Direct, ‘smoking gun’ evidence of discriminatory animus is rare, since ... ‘employers infrequently announce their bad motives....’ Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179-80 (2001). Thus, “[i]ntent may be proved by circumstantial evidence. Indeed, in discrimination cases it will seldom be otherwise....” deLisle, 57 Wn. App. at 83.

1. Decisions disregarding material facts are arbitrary and capricious.

The WAPA prohibits the ALJ from engaging in “willful and

unreasonable decision making, in disregard of facts and circumstances.”

Heinmiller v. Dep’t of Health, 127 Wn.2d 595, 609, 903 P.2d 433 (1995).

The standard mandates that the ALJ afford “both parties ample opportunity to be heard, and carefully consider[] the arguments of both parties.” Petition of Washington State Emp. Ass’n, 86 Wn.2d 124, 129, 542 P.2d 1249 (1975); *accord* Heinmiller, 127 Wn.2d at 609. To protect against arbitrary decision making, “orders *shall* include a statement of findings and conclusions, and the reasons and basis therefor, **on all the material issues** of fact, law, or discretion presented on the record....” RCW 34.05.461(3). Action is arbitrary if it is not “reached through a process of reason.”<sup>17</sup> Thus, the Order should provide the Court “guidance as to how issues involving disputed evidence were resolved.” *See* Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 36, 873 P.2d 498 (1994). “A decision is arbitrary and capricious if the agency ‘... entirely failed to consider an important aspect of the problem....’<sup>18</sup> The administrative decisionmaker “must not ignore evidence placed before it by interested parties.”<sup>19</sup>

The purpose of findings of fact is to ensure that the decisionmaker

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<sup>17</sup> *See* Rios v. Wash. Dep’t. of Labor and Indus., 145 Wn.2d 483, 501 (2002).

<sup>18</sup> O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n, 92 F.3d 940, 942 (9th Cir. 1996), *quoting* Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983). *See* Neah Bay Chamber of Commerce v. Dep’t of Fisheries, 119 Wn. 2d 464, 471 (1992), *quoting* *ibid.*

<sup>19</sup> *See* Consumers Union of U. S., Inc. v. Consumer Prod. Safety Comm’n, 491 F.2d 810, 812 (2d Cir. 1974).

‘has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved’ and the appellate court ‘may be fully informed as to the bases of his decision when it is made.’ Findings must be made on matters ‘which establish the existence or nonexistence of determinative factual matters ...’. [*In re LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986).] The process used by the decisionmaker should be revealed by findings of fact and conclusions of law. Statements of the positions of the parties, and **a summary of the evidence presented, with findings which consist of general conclusions drawn from an ‘indefinite, uncertain, undeterminative narration of general conditions and events’, are not adequate.**

*Weyerhaeuser*, 124 Wn.2d at 35-36; *accord Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 177, 588 P.2d 729 (1978) (“[A] trial court must make ultimate findings of fact on material and pivotal issues.”).

The evidence presented about Dean meeting with Labor Relations was material to proving retaliatory motive. It showed that Dean sought to demote Woodbury based on alleged incidents that Dean previously found did not warrant formal counseling or any form of discipline. The timing of the meeting is critical, as it showed Dean took actions to demote Woodbury after learning he complained, but before Dean had the input from his Assistant Chiefs (*i.e.*, the alleged “legitimate” reason offered for the demotion). Labor Relations’ meeting with the Union confirmed Dean desired to demote “Woodbury” after knowing he complained, independent of the “legitimate” reason he obtained from the Assistant Chiefs.

Thus, Woodbury showed Dean had “multiple” motives in the demotion. The facts of Dean’s meeting with Labor Relations and the later

meeting between the Union and Labor Relations, were discussed in many depositions; sworn declarations; in both parties' briefing to the ALJ; and in the testimony presented at the hearing. *See, e.g.*, AR 516-17; 704; 3975; 4450-51; 3435; 464-65. Yet, the Order contains no findings about the material factual issues surrounding these meetings. The Order makes no mention of Labor Relations (Bracilano or McCarty) or their discussions with Dean or the Union. The Order should have revealed what the ALJ found from the evidence presented and how it considered those facts, if at all. A general conclusion that the evidence of retaliation was unpersuasive is insufficient. *See Weyerhaeuser*, 124 Wn.2d at 35-36.

2. Proximity in time and knowledge of the complaint are material.

The proximity in time between the protected activity and the adverse action is a factor to be considered in deciding if an employer was motivated by retaliation. *Kahn*, 90 Wn. App. at 130-31. Here, the proximity in time between when learned of the SEEC complaint and the December 7, 2008 decision to demote Woodbury, was very close. Woodbury could “establish a rebuttable presumption of retaliation by showing that he made a report of employer misconduct, that the employer had knowledge of the report, and that the employee was discharged, or the subject of other retaliatory action.” Appendix, (¶5.9), *citing Wilmot*, 118 Wn.2d at 69. In Dean's declaration, he admitted knowing in September

that “Woodbury either had filed or intended to file” a “complaint that would be presented to the SEEC.”<sup>20</sup> That information led Dean to contact the SEEC in September.<sup>21</sup> Woodbury filed his complaint with the SEEC on October 17, 2008; and Barnett confirmed receipt of the complaint to Dean on November 20, 2008.<sup>22</sup> Chief Dean replied, in relevant part, “Thanks for keeping me in the loop. *I had heard that you were doing some follow-up....*” *Id.* Dean testified that he was aware at that time that SFD’s Finance Director, Chris Santos, who was investigating the failure to invoice First & Goal, had been questioned by the SEEC. AR 4544-45.

Although there can be no dispute Dean knew of Woodbury’s protected complaint, the ALJ’s Order fails to clearly state that the ALJ determined Dean had knowledge of Woodbury’s report at the time of the demotion decision, and that a presumption of retaliation applied. *See* Appendix, AR 584, 609 (¶¶ 4.31-.32; 5.9-.11). The implication Dean may not have known who filed the report, since “Barnett did not identify the complainant” (*see id.*, ¶ 4.32) is specious, as Dean admitted Greene told him in September “that Woodbury would be one of the persons who would sign” and that “Woodbury either had filed or intended to file a complaint.” AR 761 (¶¶ 7, 9). The ALJ’s analysis failed to consider that

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<sup>20</sup> AR 761-62 (¶¶7-9).

<sup>21</sup> AR 1860; AR 3453.

<sup>22</sup> AR 586 (Order, FF ¶4.34); AR 1331 (Ex. 253); AR 1860-61.

Dean admitted to knowing about Woodbury's complaint before Dean spoke with Labor Relations about demoting Woodbury; before Dean criticized the performance of Woodbury (and Woodbury alone) in meetings with the Assistant Chiefs; and before Dean ultimately exercised his sole discretion to select Woodbury for the demotion. It was error to wholly disregard evidence so probative to the issue of retaliatory intent.

3. Mendacious testimony and shifting explanations are evidence of retaliation the ALJ improperly disregarded.

In this case, there is significant evidence of mendacity by the City's witnesses—especially by Chief Dean. (Exception to Order, ¶ 4.2-4.3). “[T]he factfinder is entitled to consider a party's dishonesty about a material fact as ‘affirmative evidence of guilt.’” Hill, 144 Wn.2d at 184. Here, Chief Dean's mendacious testimony showed he was “dissembling to cover-up” a retaliatory intent. See id.

One egregious example of Dean's mendacity came in response to his attorney asking him, “Whose responsibility was it to make sure that the funds were collected from First & Goal?” AR 4376-77. Dean responded, “The Fire Marshal's Office.” Id. When asked, “And any particular individual within the Fire Marshal's Office,” Dean responded, “At that time I believe it was *Chief Woodbury*.” Id. This was a lie. Woodbury never directly supervised Footer, the “individual who had responsibility for collecting those fees” (*see id.*); Footer reported through a different chain

of command to the Fire Marshal (at different times, Dean, Nelsen, and Tipler). AR 4134-35, 4138. On cross-examination, Dean admitted Footer reported to Capt. Greene, and changed his testimony to claim, “I was talking about 2004 ... when they were putting together the contract.” AR 4462. Dean’s testimony seeking to implicate Woodbury in the failure to invoice F&G was an unsuccessful effort to make his focus on Woodbury credible—instead, his testimony revealed his mendacity.

On or about June 5, 2008, A.C. Tipler met with Dean about First & Goal having not paid for fireguard services. AR 581 (¶4.23). “Initially, it appeared as though as much as \$300,000 might have gone unbilled to F & G.” Id. This information was not kept secret from Chief Dean; it was communicated to him by his subordinates. AR 3029-31; AR 2255-57. Yet, Dean denied under oath knowing that six figures worth of revenue had not been invoiced until December 2008. AR 3575-78, 3583.

With regard to the meetings Dean held with the Assistant Chiefs, leading up to his decision about who to demote, Dean was asked if he “talked about the fact that [he] thought [D.C.] Woodbury maybe had some performance issues?” Dean answered with one word, “**No.**” AR 3456. Dean was asked again, “[Y]ou didn’t tell your assistants that you had been unhappy with [D.C.] Woodbury’s performance...?” and Dean again answered firmly, “**No, I did not.**” Id. When Dean was then asked, “So

what did you say about [D.C.] Woodbury as a potential candidate?” he testified, **“I didn’t personally talk about any of the candidates.”** Id.

Such unequivocal denials by Chief Dean were squarely contradicted by the testimony of the Assistant Chiefs with whom Dean met. *See* AR 2830-31, 2837-40; AR 2439-41. Chief Dean’s denial of criticizing Woodbury to the Assistant Chiefs in the context of discussing who to demote is even less credible given that Dean admits that before he met with the Assistant Chiefs,<sup>23</sup> he told Labor Relations that he was considering Woodbury for demotion based on an alleged incident at the “Neumos” nightclub, AR 4451-53; which is the exact same criticism of Woodbury that A.C. Nelsen testified Dean shared in his meetings with the Assistant Chiefs. *Cf.* AR 2836-37.

It is clear the reason Dean gave for why he selected Woodbury for demotion was not the real reason. “Dean ... informed [Woodbury] that he was being reduced in rank..., because he was scheduled to rotate into the abrogated position in January 2009.” AR 596 (¶ 4.55). That selection “criteria” for the demotion was not chosen blindly, but instead was a results-driven decision. “Everybody was aware who was going into that position.” AR 3467. In the discussions between Dean and his Assistant Chiefs, they “discussed the fact that [Woodbury] was the one rotating into

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<sup>23</sup> AR 3435-36.

the eliminated position.” AR 832 (¶17).

It cannot be ignored that Dean’s decision to demote Woodbury followed shortly after his discussion with Labor Relations about demoting Woodbury for performance reasons, and the subsequent conversations with the Assistant Chiefs involving Dean’s criticisms of only Woodbury’s performance. Yet, the Order completely disregards these facts.

When, as here, an employer’s “explanations [for its decision] change over the course of an action ... courts may consider this as evidence that the employer’s proffered explanation is pretextual.” Dumont v. City of Seattle, 148 Wn. App. 850, 869, 200 P.3d 764 (2009).<sup>24</sup> Dean’s lack of any progressive discipline and “lack of documentation for ... [the alleged] poor performance” involving the Neumo’s nightclub may also be “circumstantial evidence that [such] proffered [demotion] justification[] w[as] fabricated post hoc.” See Griffith v. Schnitzer Steel Industries, Inc., 128 Wn. App. 438, 450, 115 P.3d 1065 (2005). Compare AR 4453 (testifying “there was no discipline involved... regarding the Neumos issue;” that Dean “never told [D.C.] Woodbury that [he was] considering demoting him because of Neumos”); and AR 3400-02 (Dean testifying he had had a conversation with Woodbury and Tipler and “left it at that”).

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<sup>24</sup> See Renz, 114 Wn. App. at 623 (“[m]ultiple, incompatible reasons” for employment decision “support[s] an inference that none of the reasons given is the real reason.”).

**E. Woodbury presented a sequence of events to prove a substantial factor in the decision to demote him was his protected opposition to improper governmental action.**

The following facts support the conclusion that a substantial factor in the decision to demote Chief Woodbury was his protected opposition to improper governmental action.

1. From June or July 2008 forward, Dean sought to keep Footer's misconduct from becoming public or reaching the Mayor.

It is more likely than not that from June or July 2008 forward, Chief Dean sought to keep Footer's misconduct "in house," to prevent the scandal from becoming public and reaching the Mayor, who would likely (and ultimately did) hold Dean accountable for the error. Until Woodbury filed the January 2009 whistleblower retaliation complaint with the Mayor's Office, Deputy Mayor Ceis had no idea of Footer's misconduct because Dean had not told the Mayor. AR 2025-26. After the Mayor became aware of the issues, he admonished Dean for failing to advise him or his subordinates about Footer's activities and for trying to "handle these issues internally." AR 1045. In addition, Tipler testified to Dean's state of mind, indicating that Dean "was concerned about the public perception if this thing got out." AR 3036. Dean was "concerned that it had gone on so long without being detected and that it would involve people who were either retired or no longer in the marshal's office." AR 3050. Dean was himself the Fire Marshal from 2002-2004 and was the Fire Marshal at the

time Lt. Footer was sent to work at F&G. AR 3407-08. On cross-examination, Dean admitted he was concerned about the public perception if the failure to invoice F&G over a long period of time got out. AR 4515. Dean's efforts to "handle these issues internally" led him to retaliate against Woodbury, because Woodbury would not let the issues be ignored.

2. Dean's efforts to demote Woodbury for "performance issues" in November 2008 were an attempt to retaliate against Woodbury.

It is more likely than not that Dean's efforts to demote Woodbury for "performance issues" in November 2008 were an attempt to retaliate against him. Chief Dean admits he considered demoting Woodbury over alleged performance issues in November 2008, but his timeline reveals he made no effort to pursue demotion for alleged May 2008 performance problems until after Capt. Greene identified Woodbury as the whistleblower. *See* AR 4450-55. This supports the conclusion that Dean was seeking a means of retaliating against Woodbury.

In November 2008, *before* Dean had discussions with the Assistant Chiefs about demoting Woodbury,<sup>25</sup> he met with Labor Relations to learn if he could demote Woodbury based upon alleged performance issues. AR 2629-32; AR 1937-40. Chief Dean telephoned them and was told "the contract does require just cause standard, and ... he might prevail and he might not prevail on a challenge to have demotion as a disciplinary act."

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<sup>25</sup> AR 3435-36.

AR 1938. Based on the conversation with Dean, Labor Relations notified the Union on November 18<sup>th</sup> that Dean was considering Woodbury for demotion based on performance. AR 1935-36. Thus, Dean targeted Woodbury for demotion before November 18<sup>th</sup>, the date of the meeting between the Union and Labor Relations; and according to Dean, this was *before* Dean discussed the possibility of demoting Woodbury with any of the Assistant Chiefs. AR 3435.

The problem with Dean's inquiry and targeting of Woodbury for demotion in November 2008 is that no actions justifying demotion had occurred involving Woodbury—the only alleged “performance problems” identified by Dean occurred in May, months before the inquiry. The only real issue that was raised close in time to the November 18<sup>th</sup> meeting was Woodbury's involvement in the SEEC complaint that Dean knew Finance Director Santos had been asked about. *See* AR 4544-45.

At the hearing, on direct, Dean focused on two alleged performance issues—the first was the Neumos nightclub allegation. AR 4421-24. With regard to how to count the number of persons present, Dean alleged that Woodbury took a position opposite his. *Id.* Dean confirmed that this happened in May 2008. *Id.* As a result of a report from Greene, Dean called Woodbury who said he may have misunderstood Dean's intent, and Dean was “satisfied” with the outcome of the

conversation. AR 4426. There was no discipline, no formal counseling, nothing. AR 4453, 4455. Yet, Dean testified that the Neumos issue “was one of [his] considerations” in the demotion of Woodbury. AR 4452-53. This of course, was not permitted under the contract because there was no just cause. In fact, there was no discipline and certainly no progressive discipline that could lead to demotion—Dean was satisfied with the outcome of his conversation with Woodbury in May, but suddenly unhappy to the point of seeking Woodbury’s demotion months later. Retaliation is the only conclusion that explains this untimely and unjustified behavior. May 29, 2008 is fixed as the date of the various alleged incidents, based on Exhibit 29, which are Dean’s notes of his conversation with Greene. AR 4428. The May 2008 Pacific Place Pigs incident also was of no moment. There, Woodbury worried that one of those large pig sculptures was placed in a position that could block firefighters from ingress and egress in an emergency. AR 4453-54. Again, there was no discipline, and according to Dean, he “didn’t tell [Woodbury] that [he] was thinking of demoting him because of that.” *Id.* This May 2008 “performance issue” was unimportant until became a whistleblower.

3. The November and December demotion meetings leading to the demotion were a sham and a pretext for retaliation.

The November and December meetings with the Assistant Chiefs, leading up to Woodbury’s demotion, were a sham and a pretext for

retaliation. First, Dean identified Woodbury for demotion in mid-November in conversations with Labor Relations, which was confirmed to the Union, so the idea Dean left the decision to his Assistant Chiefs is implausible when all the facts are viewed together.

Second, the four assistant chiefs who attended demotion meetings were under Chief Dean's thumb and would do whatever he suggested—an indirect order would suffice. These four assistant chiefs served at Chief Dean's pleasure and could be reduced in rank at his discretion. AR 4448; AR 2452. By virtue of this fact alone, Chief Dean could exert influence over the decision-making of the Assistant Chiefs. But in the summer of 2008 through January 2009, the mayor's focus for reduction was the *Assistant Chiefs*, not the Deputies, so there was more pressure than ever on the Assistants to please Chief Dean. *See* AR 2161, 2165-66, 2168. Moreover, Dean, Tipler, and Nelsen had all failed in their supervisory responsibilities of Footer, which led to the almost \$200,000 failure to invoice. AR 4481. They had an interest in keeping the Footer matter internal as well.

Third, Dean allowed the Assistants to discuss performance even though he understood, based on his discussions with the Labor Relations administrators, that performance was not to be considered a factor in a demotion decision. *See, e.g.*, AR 4431 ("They [Labor Relations] said ... I

should not do it.”); AR 4556. Dean admits that at the second and third demotion meetings there were discussions about performance. AR 4557-59. Yet he could not explain why he did not tell the Assistant Chiefs that performance could not be a ground for demotion based on his earlier conversations with the Labor Relations. Dean stated, “It didn’t even enter my mind.” AR 4560-61.

Fourth, Dean mendaciously denied that he criticized Woodbury’s performance at the demotion meetings, and he even admitted that to do so would be “improper.” At the hearing, Dean sought to soften his deposition testimony regarding whether he had criticized anyone’s performance at the demotion meetings. When asked that question at the hearing, Dean repeatedly testified, “I do not believe so” and “I do not remember that.” AR 4556, 4560. But at his 2010 deposition, Dean was much less equivocal and quite certain that he “did not”—perhaps because he did not know at the time that two of the four Assistant Chiefs present would contradict him. At the hearing, Dean was confronted with his 2010 deposition testimony, in which he testified more decisively:

- Q. All right. Then the question was asked: ‘But certainly you must have talked about the fact that you thought Chief Woodbury maybe had some performance issues.’  
And your answer was?
- A. **‘No.’**
- Q. And then the question’s asked: ‘Well, you didn’t tell your assistants that you had been unhappy with Chief Woodbury’s performance on those occasions that we’ve

discussed already?' And you said?

A. **'No, I did not.'**

Q. 'So what did you say about Chief Woodbury as a potential candidate?'

And you said?

A. ***'I didn't personally talk about any of the candidates. I sat and listened to the chiefs.'***

AR 4561 (reading from AR 3456).

On cross-examination, Dean agreed it would be improper for him to criticize Woodbury, or any Deputy Chief, at a meeting where there is a discussion about who to demote, as such criticisms, especially when limited to just one person, could be taken to be as an indirect order. *See* AR 4562-63. Yet, the evidence is that Chief Dean did just that. A.C. Nelsen testified that out of all the Deputy Chiefs, Chief Dean criticized only Chief Woodbury's performance at the meetings. AR 2830-31, 2837-40. Setting aside the fact that Dean ultimately exercised sole discretion in choosing who to demote, his "improper" comments about Woodbury, which naturally influenced the sham recommendation of the Assistant Chiefs who serve at his pleasure, provides an independent basis for liability. *See Boyd v. State, Dep't of Soc. & Health Servs.*, 187 Wn. App. 1, 10, 349 P.3d 864 (2015) ("If a supervisor performs an act motivated [in part] by retaliatory animus that is intended by the supervisor to cause an adverse, employment action, and if that act is relied on by the employer and is a substantial factor in the ultimate employment action, then the

employer is liable for retaliation.”) (analyzing retaliation under WLAD).

**F. Substantial evidence is lacking to find Dean commented on the cons of each of the 11 Deputy Chiefs or criticized D.C. Oleson.**

When considering whether there is substantial evidence to support an administrative factual finding, the Court looks to see whether the evidence “is sufficient to persuade a fair-minded person of the truth or correctness of the order.” Ryan v. Dept. of Social and Health Services, 171 Wn. App. 454, 465, 287 P.3d 629 (2012).

The substantiality of the evidence is to be judged... *on the basis of the record as a whole*. [See RCW 34.05.570(3)(e).] This means that **the judicial function is not completed when the court finds in the record some evidence it regards as substantial**. The court instead must look at the entire record submitted and make its judgment about substantiality after it has considered any evidence that ‘**fairly detracts**’ from the evidence supporting the order.

William R. Andersen, The 1988 Wash. Administrative Procedure Act—an Introduction, 64 Wash. L. Rev. 781, 839-40 (1989), *citing Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456 (1951).<sup>26</sup>

The Order states Chief Dean “comment[ed] on the ‘pros and cons’ of each of the 11 Deputy Chiefs” and “had comments critical of Deputy Chief Oleson” in his meetings with the Assistant Chiefs about who to demote. AR 591 (FF ¶ 4.52). The record is insufficient to persuade a fair-minded person of the truth of these findings. A.C. **Nelsen** testified, “[O]ut

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<sup>26</sup> “[T]he Legislature specifically provided that the [W]APA be interpreted in a manner consistent with ... federal decisions. RCW 34.05.001.” Neah Bay, 119 Wn.2d at 470.

of the 11 deputies, Chief Dean only criticized Woodbury during these meetings.” AR 2840. A.C. **Hepburn** testified Dean “didn’t give any ‘cons’ about anyone other than Oleson and Woodbury,” AR 4732; yet, A.C. **Nelsen** testified it was he (Nelsen), *not* Chief Dean, who spoke negatively about Oleson; and that rather than criticize D.C. Oleson, “Dean cautioned [Nelsen] that [they] couldn’t hold Chief Oleson accountable for bad behavior that occurred a decade ago.” AR 2839-40. Chief **Dean** testified he “didn’t personally talk about any of the candidates,” but instead “sat and listened to the chiefs,” and denied criticizing D.C. Oleson. AR 4561, 4563. A.C. **Tipler**, when asked if Dean commented about D.C. Oleson, testified he did not “remember Dean making any comments at all during these discussions.” AR 4624; *also* AR 4626 (“[Dean] did not, as I remember, engage in discussions about each individual deputy chief.”). A.C. **Vickery** testified Dean “sat quiet when it came to discussing performance” and “did not criticize [D.C.] Oleson.” AR 4346, 4348.

Based on the foregoing testimony, there was no evidence, let alone substantial evidence, to find that Dean “comment[ed] on the ‘pros and cons’ of each of the 11 Deputy Chiefs.” AR 591 (¶ 4.52). The testimony of (1) Dean, (2) Tipler, (3) Vickery, and (4) Nelsen further conflicted with the finding that Dean had “comments critical of [D.C.] Oleson.” Only Hepburn’s testimony supports that finding, but Nelson’s testimony,

explaining Dean spoke up on behalf of Oleson (not to criticize him) when *Nelsen* was critical of Oleson, is evidence that “fairly detracts” from and undermines the only support in the record for the ALJ’s finding. *See Universal Camera*, 340 U.S. at 488. Thus, the finding about Dean’s “comments critical of [D.C.] Oleson” is “not supported by evidence that is substantial when viewed in light of the whole record before the court;” the record is “[in]sufficient to persuade a fair-minded person of the truth” of that finding. RCW 34.05.570(3)(e); *Ryan*, 171 Wn. App. at 465.

Proof of unlawful motive may “be inferred from the mere fact of differences in treatment.” *Johnson v. DSHS*, 80 Wn. App. 212, 227, n.20, 907 P.2d 1223 (1996) . Thus, Woodbury showing that, Dean criticized the performance of Woodbury alone in conversations with the Assistant Chiefs about who to demote of 11 Deputy Chiefs eligible for demotion, is proof of an unlawful motive. *See* AR 4348; AR 4563; AR 4624; AR 2840; AR 4728-32; AR 3104. Woodbury was therefore prejudiced by the erroneous finding that Dean criticized others, not just Woodbury.

## V. ATTORNEY FEES AND COSTS

Woodbury requests attorney’s fees and costs incurred in relation to this appeal under RCW 42.41.040(7) and former SMC 4.20.860(C).<sup>27</sup>

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<sup>27</sup> The applicable version of SMC 4.20.860(C) is provided at CP 134-35.

## VI. CONCLUSION

For the above reasons, the Order willfully disregarded facts and circumstances, misapplied the law, and lacked substantial evidence. The case should be remanded for proceedings consistent with such holdings.

Respectfully submitted this 4th day of February, 2016.

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CERTIFICATE OF SERVICE

I, Mark Rose, certify that, on February 4, 2016, I caused the foregoing pleading to be served on the parties listed below in the manner shown.

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Dated this 4th day of February, 2016.

s/ Mark Rose  
Mark Rose, Attorney

# APPENDIX

**STATE OF WASHINGTON**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
**FOR THE CITY OF SEATTLE**

**IN THE MATTER OF:**

**JAMES WOODBURY,**

**CLAIMANT<sup>1</sup>,**

**vs**

**CITY OF SEATTLE (WASHINGTON),**

**RESPONDENT.**

**Docket No. 2009-LGW-0003**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
& FINAL ORDER**

**1. ISSUES FOR DETERMINATION<sup>2</sup>:**

1.1. Issue One: Did the City of Seattle, through its Seattle Fire Department (collectively referred to herein as SFD), unlawfully retaliate against Claimant James Woodbury (Claimant) under Chapter 4.20 Seattle Municipal Code (SMC), or Chapter 42.41 Revised Code of Washington (RCW), or both, for engaging in protected whistleblower activity?

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<sup>1</sup>/ Due to the original file creation in this case, James Woodbury was denominated as "Petitioner" in these proceedings. Most statutory and case law references related to claims under Chapter 42.41 RCW use the term "Claimant", "Complainant" or "Plaintiff" and the involved local government entity as "Respondent" or "Defendant". Accordingly, for clarity and consistency in this case, Mr. Woodbury was redesignated as Claimant herein; further, City of Seattle (Washington) was added to the caption as Respondent. All references in this case to Petitioner, Complainant or Plaintiff intended to refer to Mr. Woodbury shall be deemed to mean Claimant, unless context requires otherwise. Further, all references in this case to Defendant intended to refer to City of Seattle shall be deemed to mean Respondent, unless context requires otherwise.

<sup>2</sup>/ The Issues for Determination have been reworded for clarity, but are substantively equivalent to those agreed at the evidentiary hearing (TR 19-21) as modifying the originally agreed issues as set forth by Administrative Law Judge Robert Krabill in his Order of May 26, 2009, and as stipulated in writing between the parties filed with Office of Administrative Hearings February 7, 2014 (item 7); specifically, including application to this case of Chapter 4.20 SMC and Chapter 42.41 RCW.

1.2. Issue Two: If Issue One is decided against the interests of SFD, what remedy is appropriate under Chapter 4.20 SMC, or Chapter 42.41 RCW, or both?

1.3. Issue Three: Based on the determination of Issues One and Two, what shall be the allocation of responsibility for payment of services provided by Washington Office of Administrative Hearings under RCW 34.12.039 and for party incurred attorney fees and costs under RCW 42.41.040 (7)?

**2. ORDER SUMMARY:**

2.1. Claimant James Woodbury did not establish by the preponderance of evidence that Respondent SFD violated Chapter 42.41 RCW (Local Government Whistleblower Act) or Chapter 4.20 SMC with regard to Claimant.

2.2. Because Claimant James Woodbury did not prevail in this case, Claimant shall take nothing by reason of his claim.

2.3. Under RCW 34.12.039, Respondent SFD shall pay for all services of the Washington Office of Administrative Hearings rendered in this case.

2.4. Under RCW 42.41.040(7), Respondent SFD and Claimant shall each bear their own costs and attorney fees.

### 3. STATEMENT OF THE CASE

3.1. This is a local government whistleblower retaliation claim filed with the Office of the Mayor, City of Seattle on January 9, 2009 by Claimant, James Woodbury, under Chapter 4.20 SMC and Chapter 42.41 RCW. Claimant contended in his claim that SFD, through Fire Chief Gregory Dean, retaliated against Claimant, in response to an ethics complaint filed by Claimant against another SFD officer, by: (i) transferring Claimant from position of Deputy Chief and Assist. Fire Marshall with SFD Fire Marchall's Office to Deputy Chief Special Operations; (ii) abrogating the SFD Special Operations Deputy Chief position; and, (iii) reducing Claimant's SFD rank from Deputy Chief to Battalion Chief.

3.2. On or about March 11, 2009, in response to a claim questionnaire, Claimant further stated that Chief Dean retaliated against Claimant by: (iv) intentionally isolating Claimant from contact with Chief Dean; (v) interfering with Claimant's access to the computer Claimant used for his SFD work; and, (vi) requiring Claimant to undertake a hazardous materials (hazmat) training course twice.

3.3. On or after July 29, 2009, Claimant claimed additional retaliation as: (viii) reinstatement to position of SFD Deputy Chief – Training; and, (vix) harassment by Assistant Chief Vickery who was supervisor of the Deputy Chief – Training position.

3.4. This case was brought before Washington Office of Administrative Hearings (OAH) under SMC 4.20.860 and RCW 42.41.040. Shortly after the inception of this case OAH,

Claimant filed a collateral civil action in the Washington Superior Court in King County regarding the same and additional claims. The Superior Court issued a stay order prohibiting OAH from proceeding with this case. Thereafter, the matter was considered as to procedural issues by the Superior Court, and then appealed to the Washington Court of Appeals and the Washington Supreme Court. It was returned to OAH in late 2013 for evidentiary hearing. See, *Woodbury v. City of Seattle*, 172 Wn. App. 747, 292 P.3d 134, rev. Denied, 177 Wn.2d 1018, 304 P.3d 114 (2013).

### **3.5. OAH Evidentiary Hearing**

3.5.1. On March 18, 19, 20 & 25, 2014, by agreement of the parties, this matter came before me, Steven C. Smith, Administrative Law Judge, for evidentiary hearing held in the conference facilities of the Seattle City Attorney Office. Attending with me was Ms. Brenda Cothary, judicial assistant. The proceedings were electronically recorded. By agreement of the parties post-hearing, the electronic recording was transcribed by Reed Jackson Watkins Transcripts, 1402 Third Avenue, Suite 210, Seattle, WA 98101, Telephone 206.624.3005.

3.5.2. At conclusion of the evidentiary hearing, by agreement of the parties, the record was held open through April 28, 2014, for post-hearing submissions of closing arguments and relevant legal authorities. On April 16, 2014, the parties jointly moved for extension of the previously agreed timeline for post-hearing submission of documents to accommodate

transcription of the hearing record and the respective calendars of counsel for both parties. Good cause appearing, their joint motion was granted and the post-hearing submission of documents deadline was extended through June 6, 2014 at 5:00 PM; accordingly, the evidentiary hearing record initially was closed as the first matter of business June 9, 2014.

3.5.3. It was quickly noticed that the hearing citations in the parties' post-hearing submissions were to their written transcription of the electronic hearing record, not to day/hour/minute of the electronic record. As a result, I reopened the hearing record and requested that the parties provide me with a copy of the written transcript to aid in referring to, and reviewing, the parties' citations to their written transcript. Thereafter, the parties filed a "mini-transcript", and later an electronic compact disk (CD) which was reviewed and accepted by me as a true and correct copy of the hearing transcript which had previously been arranged and agreed by the parties.

3.5.4. In light of the foregoing, I issued a written order on July 21, 2014 again closing the hearing record. Therefore, my final order in this matter is due October 19, 2014. (RCW 34.05.461(8)(a)).<sup>3</sup>

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<sup>3</sup> RCW 42.41.040 (6), provides, in relevant part, "...The administrative law judge shall issue a final decision consisting of findings of fact, conclusions of law, and judgment no later than forty-five days after the date the request for hearing was delivered to the local government. The administrative law judge may grant specific extensions of time beyond this period of time for rendering a decision at the request of either party upon a showing of good cause, or upon his or her own motion." The procedural history of this case which was originally filed with Office of Administrative Hearings in 2009, included: a parallel complaint filed in the Washington Superior Court (King County) followed by an order of the Superior Court staying further action by Office of Administrative Hearings pending the outcome of the Superior Court case; an order of the Superior Court returning the matter to OAH for an administrative appeal hearing; an appeal of the Superior Court

### 3.6. Appearances

3.6.1. Claimant, SFD Deputy Chief James Woodbury, appeared through and was represented by Attorney at Law Jack Sheridan.

3.6.2. Respondent, City of Seattle (Washington), appeared through SFD Assistant Human Resources Director Travis Taylor and was represented by Seattle Assistant City Attorney Fritz E. Wollett, who was assisted by Ms. Tamara Cole, paralegal.

3.7. **Issues For Evidentiary Hearing:** See above paragraphs 1.1 through 1.3.

### ***Witnesses***<sup>4</sup>

3.8. The following witnesses first appeared in the order listed, were placed under oath to testify truthfully in this matter, and provided testimony in response to questions put to them by the parties and by me. Their testimony was given in person at the evidentiary hearing

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determination to the Washington Court of Appeals; an order by Washington Court of Appeals affirming the Superior Court; a request for review before the Washington Supreme Court of the decision by the Washington Court of Appeals (review denied); and, ultimately, lifting of the Superior Court stay order and return of the case to OAH for evidentiary hearing at a day and time agreed by the parties. This case also included voluminous documentation of approximately 10-12 reams of paper. See, *Woodbury v. City of Seattle*, 172 Wn. App. 747, 749-50, 292 P.3d 134, review denied, 177 Wn.2d 1018, 304 P.3d 114 (2013). From the history of the case, it is self-evident that good cause exists, and it is hereby deemed that, by operation of time and procedures undertaken by the parties and courts, and the volume of materials to be considered, the forty-five day timeline has been waived. In its stead, the standard timeline of the Administrative Procedure Act is substituted. (RCW 34.05.461(8)(a))

<sup>4</sup> / The above reference to "Witnesses" only refers to those people who provided live testimonial evidence. Those people who provided evidence through sworn depositions and sworn written declarations, but did not provide live testimony, are more properly referred to as deponents and declarants. By agreement of the parties, witnesses' deposition transcripts and copies of witnesses' sworn written declarations were admitted as exhibits; reference to those exhibits will reveal their names. (TR 18 lines 10-23)

venue, unless otherwise indicated. The testimony of each witness was considered, deemed credible unless otherwise stated, and given the weight deemed appropriate by me:

- 3.8.1. SFD Deputy Chief James Woodbury
- 3.8.2. SFD Assistant Chief Alan Vickery
- 3.8.3. SFD Chief Gregory Dean
- 3.8.4. SFD Assistant Chief (Ret.) Kenneth Tipler (by telephone)
- 3.8.5. SFD Assistant Chief John Nelsen
- 3.8.6. SFD Assistant Chief William Hepburn

***Exhibits***

3.9. The following exhibits were admitted into evidence on behalf of Claimant; each was considered and given the weight deemed appropriate by the ALJ: 201-218, 224-226, 228-251, 254, 257-262, 269-272, 274, 276-282, 286-287, 292-306, 308-337

3.10. The following exhibits were admitted into evidence on behalf of Respondent; each was considered and given the weight deemed appropriate by the ALJ: 1-28, 31-40

3.11. The following witness declarations were admitted into evidence on behalf of Respondent; each was considered and given the weight deemed appropriate by the ALJ: 1-14.

3.12. During these adjudicatory proceedings, the parties stipulated to certain facts on the record and in writing; each was considered and given the weight deemed appropriate by the ALJ.

3.13. Official notice of facts stated by Washington Court of Appeals in *Woodbury v. City of Seattle*, 172 Wn. App. 747, 749-50, 292 P.3d 134, review denied, 177 Wn.2d 1018, 304 P.3d 114 (2013) taken under RCW 34.05.452(5) and WAC 10-08-200(10); each was considered and given the weight deemed appropriate by the ALJ.

***Non-Evidentiary Documents***

3.14. The following non-evidentiary documents were filed with OAH and considered by the Administrative Law Judge in making this Final Order: Claimant's request to Mayor, City of Seattle for hearing under SMC 4.20.860(C) and RCW 42.41.040; Respondent's request to OAH for "adjudicative proceeding before an administrative law judge pursuant to RCW 42.41.040(5)"; all relevant case pleadings and motions filed with OAH; all oral arguments as may have been presented by counsel for the parties throughout the administrative adjudicative process; stipulations on the record or in writing as to applicable law; and, the parties' prehearing and post-hearing briefs.

4. **FINDINGS OF FACT**<sup>5</sup>: Based on a preponderance of evidence from consideration of the record as a whole, I make the following Findings of Fact:

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<sup>5</sup> Citations to the record are used intermittently throughout these Findings of Fact as a convenience to the reader. The absence of any citation to any specific Finding of Fact is not intended to imply an absence of support in the record for that Finding; nor, is citation to only one or a few locations in the record intended to imply that support is limited to, or that the specific Finding was based solely on, the citation(s) given. All Findings of Fact are based on a totality of the evidence, including reasonable inferences to be drawn from the evidence.

### *Credibility of Witnesses*

4.1. At hearing, I determined the credibility of each witness by careful consideration of, among other indicators, each witness' demeanor (as determined by voice, straightforwardness, hesitancy or lack of hesitancy in responses, witness expressions, gestures and "body language"), apparent ability to recall specific facts, whether the testimony was of first-hand knowledge or hearsay, apparent witness motivations, reasonableness and consistency or inconsistency of testimony, and other evidence in the case, such as exhibits, declarations and the testimony of other witnesses. As to discrepancies in testimony, I considered the magnitude and importance of any apparent discrepancy, whether, if brought to the witness' attention, the witness had a reasonable explanation for the discrepancy, the approximate elapsed time between inconsistent statements (for example, declarations or depositions given months or years before the inconsistent hearing testimony), and whether the claimed discrepancies could be the result of statements being reasonably subject to multiple interpretations, one or more of which would tend to indicate no discrepancy or merely misspoken words. Finally, I considered whether discrepancies in one area, rendered the remainder of a given witness' testimony not credible.

4.2. Throughout this case, Claimant has contended, either expressly or implicitly that the testimony of SFD's witnesses was not credible, repeatedly referring to the "mendacity" of various witnesses, especially SFD Fire Chief Dean, or to their testimony as "mendacious."

For example, Claimant's counsel stated, "There's evidence that there's a lot of mendacity among the witnesses for the City [of Seattle]..." (Opening Statement/Claimant at TR 31, lines 19-20; see also, entire Claimant's Post-Hearing Brief)

4.3. After careful consideration of the testimony of the each witness, in the above-described manner, I find the Claimant's contention of witness untruthfulness to have been unsubstantiated. Rather, the weight of the evidence was that all witnesses in this case, including Claimant himself, were credible, yet each was given to ordinary lapses of memory, misunderstandings, misrecollections and misspeaking<sup>6</sup>, and most notably, simply different points of view. I have therefore given due weight to the testimony of each witness in making these findings of fact.

*Identification of People and Relationships Most Relevant to This Case*

4.4. At all times herein relevant, the City of Seattle was an incorporated municipality within the state of Washington; it's Mayor was Gregory J. "Greg" Nickels.

4.5. Seattle Fire Department was a department of the City of Seattle; Seattle Fire Department was organized and operated as a paramilitary organization.

4.6. At all times herein relevant, since January, 2004, Gregory Dean was, employed by the City of Seattle as SFD Fire Chief and the senior SFD officer. He reported to Mayor

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<sup>6</sup> / As an example of likely innocent misspeaking, see Exhibit 332 at 87:4-17 whereat Claimant's attorney, while deposing SFD Fire Chief Dean, variously refers to Capt. Greene as "Lieutenant Greene" (line 5), "Chief Greene" (line 9), "Captain Greene" (line10) and "Chief Greene" (line 16).

Nichols. Prior to becoming Fire Chief, Dean was SFD Fire Marshall from 2000 through 2003. (Exhibit 4-Declaration of Dean)

4.7. At all times herein relevant, William Hepburn (Operations), John Nelsen (Administration), Kenneth Tipler (Fire Prevention/Fire Marshall; retired May 27, 2009 with 33 years of service), and Alan Vickery (Risk Management) were SFD Assistant Chiefs, employed by the City of Seattle, and reported directly to SFD Fire Chief Dean. (Exhibit 4-Declaration of Dean; Exhibit 7-Declaration of Hepburn; Exhibit 10-Declaration of Nelsen; Exhibit 12-Declaration of Tipler; Exhibit 13-Declaration of Vickery; Exhibit 14-Declaration of Reed)

4.8. At all times herein relevant, Linda Czeisler was SFD Human Resources Director, Chris Santos was SFD Finance Director, Lenny Roberts was SFD IT Director, and Helen Fitzpatrick was SFD Communications Director; each reported directly to SFD Fire Chief Dean.

4.9. At all times herein relevant, excepting between approximately January, 2009 and August, 2009, there were 11 SFD Deputy Chiefs, including Claimant James P. Woodbury (Fire Prevention/Assistant Fire Marshall), who were, employed by the City of Seattle. The 11 SFD Deputy Chiefs reported directly to their assigned SFD Assistant Chiefs.

4.10. As will be detailed below in further findings, during the months of January, 2009 through August, 2009 Claimant held the reduced rank of SFD Battalion Chief; Claimant was

reinstated to the rank of SFD Deputy Chief in August, 2009. During all relevant times leading up to his reduction in rank, Claimant was an Assistant Fire Marshall and reported directly to SFD Assistant Chief & Fire Marshall Tipler as did Claimant's colleague SFD Deputy Chief and Assistant Fire Marshall English. (Testimony of Tipler, Dean & Claimant)

4.11. At all relevant times, Chris Greene was an SFD Captain assigned to the Special Events Unit at the Fire Marshall's Office and reported to SFD Assistant Chief and Fire Marshall Tipler. (Declaration of Greene; Declaration/Testimony of Tipler; Exhibit 35)

4.12. At all relevant times, Milton Footer was an SFD Lieutenant assigned to the Fire Marshall's Office as an inspector in the Special Events Unit and reported directly to Capt. Greene although, as a practical reality, Lt. Footer's position was semi-autonomous. (Declarations of Greene and Tipler; Exhibit 35)

4.13. At all relevant times, Diane Hansen was a strategic advisor with and to SFD Fire Marshall's Office. The record was clear that Ms. Hansen held a position of significance and interacted with the leadership of the Fire Marshall's Office; however, the record was unclear as to whom Ms. Hanson directly reported. Ultimately, the SFD Fire Marshall, in this case Assistant Fire Chief Tipler, would have had management authority over her.

*SFD Special Events Unit and Lt. Milton Footer*

4.14. During all relevant times, one purpose of the Fire Marshall's Office was to oversee compliance with legislatively enacted codes to ensure public health and safety. The breadth

of the Fire Marshall's Office inspection activities spanned from the storage and use of hazardous materials to issuing permits allowing open flame cooking at large catered events. The Special Events Unit also issued "temporary place of assembly permits," which were intended to ensure the safe operation of public events. Acquiring a temporary permit was mandatory when a building space would be used in a manner not authorized by the occupancy permit or involved a hazardous activity requiring a permit. For example, a concert venue needed to obtain a temporary permit when an outdoor concert would include a fireworks display." (Exhibit 35)

4.15. To obtain a permit, an event organizer first had to submit an application to the Fire Marshall's Office and pay a permit fee. Depending on the nature of the permit, the applicant might be required to submit a floor plan for the event, a proposed exiting plan, or other details. The permit fee covered the cost of an initial inspection by Lt. Fire Inspector. These inspections were performed to assure compliance with the fire code and any permit conditions. (Exhibit 35)

4.16. The power of a Lt. Fire Inspector was immense. Once a permit was issued, failure to comply with its terms and conditions, as judged by a Lt. Fire Inspector who inspected the event, would invalidate the permit. If the inspector found a violation of the permit or the fire code, he or she had nearly unfettered discretion to decide how the violation would be addressed. The inspector could discuss a violation with the event organizer and allow the defect to be cured at any time before or during the event; the inspector could issue a

written Notice of Violation (NOV) but allow the event manager to cure the violation without disrupting the event; or, and inspector could issue and NOV and prevent organizers from opening the doors, or if the event was in progress, they could suspend or close down the event. Event managers, promoters and venue operators were fully aware of, and respected, the power exercised by Lt. Fire Inspectors. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Exhibit 35)

4.17. In 2002, Lt. Footer was assigned to be the dedicated Special Events Fire Prevention Inspector working with Seattle's Qwest Field Stadium under the terms of the 2001 contract between SFD and Qwest Field's special events management organization First & Goal (F & G). In this position, Lt. Footer became responsible for the day-to-day management of all SFD activities at Qwest Stadium. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Exhibit 35)

4.18. In 2002, the Seattle Seahawks football team began to play home games at Qwest Field. During the football games, F & G would disengage the stadiums fire alarm system from the automatic alarm reporting program-a procedure known as putting the stadium in "event mode"-bypassing the automatic emergency reporting system. In event mode, the stadiums fire alarm system would route all alarms to a central fire control panel located within the stadium, and on-site personnel would have a short period of time to investigate and verify whether an emergency in fact existed. During professional and college football games this process avoided disruption of the event or evacuation of the stadium due to a

false alarm. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Exhibit 35)

4.19. When SFD was informed by F & G that the stadium would be placed in "event mode" for football games, SFD required F & G to staff all games with a contingent of firefighters, known as "fire guards," all of whom were trained fire personnel. Fire guards were stationed in the central fire alarm control room and in various parts of the stadium. The fire guards were to investigate the source of any alarm and determine if an emergency existed. F and G accepted this condition and fire guards had attended both college and professional football games since 2002. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Exhibit 35)

4.20. Fire guard duty was overtime duty. Fire guards had been used at various venues throughout the City of Seattle. SFD treated fireguard overtime costs as reimbursable expenses, and billed them to the organization/individual using the service. Payments were made to the City of Seattle general fund. It was common knowledge within the Fire Marshall's Office that all fireguard activities were to be billed to the requesting party. The procedure for billing fireguard services had been the same for many years and was well known to the members of the Fire Marshall's Office Special Events Unit where the majority of fireguard activity took place. Lt. Footer understood that fireguard services were to be billed to the requesting party; in this case, F & G. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Exhibit 35)

4.21. On Qwest Field game days, usually six firefighters and a supervising lieutenant worked as fire guards. Upon arriving at the stadium, each fireguard signed in by writing his or her name on a fireguard activity sheet, following which Lt. Footer was responsible for completing the form and ensuring that it was routed to SFD's fiscal administration unit. From 2002 until the end of 2007, F & G used fire guards for football games on 76 occasions. The total amount of services provided at football games to F & G amounted to \$189,811.00. Of this amount, only \$26,798.00 was billed by SFD to F & G. Lt. Footer was the supervising officer in charge of submitting the fireguard activity sheets during this period, with the exception of October, 2005 when he was on medical leave. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Exhibit 35)

4.22. During 2002-2007 there were 39 other occasions when reimbursable SFD services amounting to \$16,353.00 were provided to F & G and not billed by Lt. Footer, who was in charge of submitting the fireguard activity sheets for these additional events. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Exhibit 35)

4.23. The failure to bill F & G was discovered in spring, 2008 by SFD Capt. Greene who had been reviewing the Special Events Unit's event billing records and discovered that F & G had not paid for fireguard services. Capt. Greene then alerted Assistant Chief Tipler of his discovery. Upon hearing of the circumstances, Assistant Chief Tipler set up a meeting with Fire Chief Dean that occurred on or about June 5, 2008. Chief Dean instructed Assistant Chief Tipler and Capt. Greene to work with SFD Finance Director Chris Santos to

determine the amount of unbilled services and to develop a new policy and procedure so that such circumstances could not recur. Initially, it appeared as though as much as \$300,000 might have gone unbilled to F & G. So, Chief Dean also personally asked Mr. Santos to assist in determining the scope of the under billing and to develop a plan to avoid recurrence. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Declaration of Greene; of Declaration Santos; Exhibit 35)

4.24. Initially, Lt. Footer claimed that he had submitted all relevant fire guard activity sheets for services to F & G to SFD Finance and that he had no idea why they had not been received. As the investigation went forward, it was discovered that on October 29, 2007, Lt. Footer had used his very powerful position to obtain two free tickets for his fiancée and himself to attend a Hannah Montana Concert at Seattle's Key Arena when he was assigned as the concert's Lt. Fire Inspector. (Testimony of Claimant, SFD Assistant Chief Tipler, SFD Fire Chief Dean; Declaration of Greene; of Declaration Santos; Exhibit 35)

4.25. As a result of these two circumstances (years-long failure to bill F&G and improper use of power for personal benefit – that is, to gain two free concert tickets for his fiancé and himself), the leadership of the SFD Fire Marshall's Office wanted to discipline Lt. Footer. Assistant Chief Tipler met with Chief Dean to discuss the matter and to request discipline for Lt. Footer. Initially, Chief Dean denied the request for at least two reasons: (a) He "did not think the evidence was clear that Footer bore exclusive responsibility for the failure to

invoice and wanted to learn more about the facts as a result of the Santos investigation before he acted. (b) Additionally, Santos had passed on to Chief Dean Lt. Footer's statement that Lt. Footer had billed F & G for all services rendered. At that time, Chief Dean felt he had insufficient information to determine whether Footer was truthful. Chief Dean reasoned that before going down the path of accusing someone of lying on that scale, "I would want to make sure we had fully evaluated as much information as possible. The only substantiated incident of misconduct that I was aware of regarding Footer's improper behavior was the allegation about his taking a free ticket to the [Hannah Montana] concert. I understood Footer did not deny his conduct, but did not believe it was inappropriate. Footer did receive a formal counseling as a result of the concert tickets incident and Chief Tipler was planning to transfer." (Declarations and testimony of Dean and Tipler)

4.26. During the investigation, Chief Dean's decision not to take immediate action upset the leadership of the Fire Marshall's Office so much that Ms. Hansen broke down in tears at one point, and all of them discussed their disappointment with Assistant Chief Tipler's seeming ineffectiveness when dealing with Chief Dean. In substance, Ms. Hansen felt so strongly that she told Chief Tipler that she intended to talk with Chief Dean herself, and if he did not change his mind about disciplining Lt. Footer, she intended to go to the Seattle Ethics and Elections Commission (SEEC). The other members of the Fire Marshall's Office leadership voiced similar concerns and intentions and also said to Chief Tipler "what good are you?". (Declarations and testimony of Dean, Tipler and Woodbury)

4.27. By their remarks and actions, Assistant Chief Tipler thought his leadership team was losing so much confidence in him that if he could not convince Chief Dean to allow some level of discipline against Lt. Footer, he would not be able to repair his credibility with his team. Accordingly, he again met with Chief Dean and told Chief Dean that unless he was allowed to transfer and discipline Footer, he would resign. Chief Dean gave Assistant Chief Tipler approval to either transfer or discipline Lt. Footer, but not both. He counseled Chief Tipler that whatever Chief Tipler decided, Chief Tipler would "own it" meaning that if things went wrong with Lt. Footer's union, it would be Chief Tipler's problem to handle.

4.28. After considering the matter, Chief Tipler elected formal counseling as a substitute for discipline in order to avoid personnel issues with Lt. Footer's union. Chief Tipler believed that the formal counseling memo that would be placed in Lt. Footer's personnel file would have the same effect as formal discipline, without the potential adverse administrative concerns. (Declarations and testimony of Dean, Tipler and Woodbury)

*The Whistleblower Complaint to Seattle Ethics and Elections Commission*

4.29. For several years prior to the F & G and Hannah Montana revelations, Deputy Chief Woodbury and Assistant Chief Tipler had wanted to rotate Lt. Footer out of his position as a fire marshal inspector because they believed that Lt. Footer had developed a relationship with F & G that appeared more in the nature of an F & G supporter or employee than a fire code and safety enforcement official. Chief Dean had previously denied such requests believing there was insufficient evidence to support the removal of Lt. Footer from his

position against a predictable union challenge to a transfer. However, Chief Dean always indicated that if the Fire Marshall or Claimant could provide evidence to justify such an adverse action against Lt. Footer, Chief Dean would reconsider. Until the F & G and Hannah Montana concerns, no evidence was produced. (Declarations and testimony of Dean, Tipler and Woodbury)

4.30. Because Claimant disagreed with how Chief Dean had handled the various Lt. Footer matters, including the non-disciplinary formal counseling of Footer, and the decision to await the outcome of the Santos investigation of the F & G matter, Claimant decided he was going to file an ethics complaint with SEEC. He attempted to have Capt. Greene, Ms. Hanson and Deputy Chief English join him in the complaint. However, with Capt. Greene declined. (Testimony of Claimant Woodbury)

4.31. Before Claimant filed his ethics complaint with the SEEC, SFD Fire Chief Dean was informed by Assistant Chief Tipler that it was likely that someone from the Fire Marshall's Office would file a complaint. Assistant Chief Tipler did not specify who would be filing the complaint, but Chief Tipler actually thought it would be Ms. Hanson, because she had threatened to do just that. At the time, Chief Dean knew that at least four people were upset by his handling of the Lt. Footer matters; Deputy Chief Woodbury, Deputy Chief English, Capt. Greene and Ms. Hanson. Further, at the time Chief Dean had no way to know which of these people might file the report; at best, he could only speculate. (Testimony of Dean, Tipler, and Claimant Woodbury; Exhibit 35)

4.32. Later, Cpt. Greene told Chief Dean about "Woodbury wanting me to sign a complaint. I did not indicate the subject matter of the complaint to Dean, only that Woodbury was pressuring me to sign and I did not want to. I'm sure that I did not mention the Ethics Department ... ." Chief Dean told Capt. Greene, "if you agree, sign it. If you don't agree, don't sign it." (TR 381-382) Chief Dean assumed the complaint was about Lt. Footer and passed on the information about a possible complaint to Wayne Barnett of the SEEC. (TR 382-383; Barnett Declaration) Barnett later acknowledged that SEEC had received a complaint and would be looking into it. Barnett did not identify the complainant as he was prohibited by ordinance from releasing complainant's names. (TR 385; Barnett Declaration)

4.33. In addition to Capt. Greene reporting to Chief Dean about feeling "pressured" by Deputy Chief Woodbury several months prior, Capt. Greene had reported Chief Woodbury to Chief Dean and recounted the circumstances in his declaration: "I would describe my working relationship with Chief Woodbury as generally good, although on one occasion, I did attempt to write him up for what I considered a failure to follow orders in regard to a permitting issue at a local club. I felt our instructions from Chief Dean were clear and that we would pursue permitting for a single [occupancy] number for the entire club. Chief Woodbury did the opposite of what we were instructed, focusing instead on different occupancy numbers for different sections of the club when he and I met with [Department of Planning and Development]. Afterward, I was upset and drafted a form 250, used to initiate formal counseling. Ultimately, Chief Dean talked me out of pursuing the complaint

[against Chief Woodbury] about this incident and I dropped it.” This latter incident occurred near Memorial day of 2008. (Declaration of Greene)

4.34. On October 17, 2008, Claimant actually filed his confidential whistleblower complaint concerning the SFD’s and Lt. Footer’s failure to bill for fireguard services with SEEC in the approximate amount of \$200,000.00 and Claimant’s dissatisfaction with Chief Dean’s manner of handling the Lt. Footer issues.

4.35. Mr. Santos of SFD Finance completed his investigation requested by Chief Dean of the F & G matter in December, 2008. SFD then invoiced F & G for the overdue money.

4.36. The SEEC issued its report on Claimant’s ethics complaint on March 19, 2009 and made a finding of several acts of misconduct by Lt. Footer. After Chief Dean read the report, he was convinced that Footer had not been truthful and decided to terminate Footer’s position with SFD. Footer resigned in lieu of termination. (Exhibit 3; Testimony of Dean; testimony of Woodbury; Stipulated Fact)

*Rotation of Deputy Chiefs and Battalion Chiefs*

4.37. In December, 2007, SFD and Seattle Fire Chiefs Association, by AFF, Local 2898 (Fire Chief’s union) reached an agreement that provided for the rotation of Deputy Chiefs and Battalion Chiefs (Battalion Chiefs were one rank below Deputy Chiefs) to increase their experiences within the fire department. (Exhibit 8)

4.38. In July, 2008, Claimant Deputy Chief Woodbury was notified of his rotation from the SFD Fire Marshall's Office to Special Operations. (Exhibit 28 & 31; testimony of Woodbury & Dean)

*Abrogation of SFD Deputy Chief Position*

4.39. On August 18, 2008, approximately 2 months before Claimant filed his whistleblower complaint, Seattle Mayor Nickels requested that Chief Dean abrogate a management position (Assistant Chief) as an austerity measure. (Exhibit 10)

4.40. In response, Chief Dean spoke with the Deputy mayor and "... tried to make it a battalion Chief position, which was an administrative position. They told me that that position was not funded out of the general fund and I cannot do that." And so to take a Battalion Chief position that was in operations would have a long-term impact, so I had to look at an administrative position, and I only had administrative Deputy Chiefs." (Deposition of Dean, Exhibit 332at 83:22; Deposition of Dively, Exhibit 318 at 17-18)

4.41. On August 19, 2008 SFD leadership offered to abrogate a Deputy Chief position and a lieutenant position to offset budget cuts. (Exhibit 11)

4.42. On August 21, 2008, Mayor Nickels accepted the counter recommendation of SFD to abrogate a Deputy Chief and a lieutenant instead of an assistant Chief. (Exhibits 10, 11)

& 332 at 83:14; Testimony and declarations of Dean, Hepburn, Vickery and Woodbury; Stipulated Fact)

4.43. Although Chief Dean was responsible for the recommendation to Mayor Nickels that a Deputy Chief position and a lieutenant position be abrogated, that determination was advanced and supported by the Assistant Chiefs, recommended by them to Chief Dean, and was anticipated to save the city of Seattle approximately \$160,000.00 from payroll savings as to the Deputy Chief position. The request that Mayor Nickels accept the abrogation of a Deputy Chief position, rather than an assistant Chief position, was based on a belief by Chief Dean and SFD leadership that the fire department would be better served by keeping its existing four-person assistant Chief structure and shifting the work of an abrogated Deputy Chief position to what would then be the remaining 10 Deputy Chiefs. (Testimony and declarations of Chief Dean, all Assistant Chiefs & Santos)

4.44. It was understood that the result of abrogation of a Deputy Chief position would be a reduction in rank to battalion Chief for one of the SFD Deputy Chiefs; but not necessarily the Deputy Chief whose position was abrogated. (Exhibit 4)

*Selection of Deputy Chief Position to be Abrogated*

4.45. In mid-August, 2008, Chief Dean met with his SFD leadership team to determine the positions to be eliminated. After a discussion of the various Deputy Chief positions, the

Assistant Chiefs reached consensus and recommended to Chief Dean to abrogate the Special Operations Deputy position. This recommendation was based on the fact that the Special Operations Deputy was the newest Deputy Chief position and the fact that no employee reported to that Deputy Chief. This would have had the effect of lessening the impact of eliminating a position, because only its duties would have to be redistributed and not its personnel. The Assistant Chiefs determined that it would be easier for SFD to absorb the loss of Special Operations Deputy position than any other of the Deputy Chief jobs. Chief Dean accepted the recommendation of his leadership team. (Declarations of Dean, Nelsen Vickery & Hepburn; Exhibit 11)

*Selection of Deputy Chief to Be Reduced in Rank to Battalion Chief*

4.46. After the decision was made to abrogate the Special Operations Deputy position, Chief Dean requested SFD Human Resources to request the union to help in the selection process for determining which Deputy Chief to reduce in rank to Battalion Chief based on the abrogation. The union suggested that Chief Dean seeking volunteer for the reduction in rank.

4.47. The decision as to which Deputy Chief would be reduced in rank to battalion Chief as a result of the abrogation of the Special Operations position was difficult for Fire Chief Dean. Initially, Chief Dean was informed by SFD Human Resources personnel that he needed or might need to use time in rank in the decision-making process. Ultimately, SFD Human Resources Director Czeisler advised Chief Dean that he had the discretion under

the Public Safety Civil Service Commission rules and the Local 2898 bargaining agreement to determine which Deputy Chief would be reduced, regardless of time in rank. (Testimony and Declaration of Dean)

4.48. Based on his understanding of his discretion to make the reduction in rank selection, the union's recommendation to seek a volunteer, and similar precedent set in 2003 through Deputy Chief Jim Fosse who voluntarily downgraded from assistant Chief to Deputy Chief in order to satisfy an edict from the mayor's office that SFD eliminate one Assistant Chief position, Chief Dean decided to seek a volunteer.

4.49. On November 25, 2008 SFD Chief Dean notified his 11 Deputy Chiefs in writing that the Seattle City Council had adopted the 2009/2010 biennial budget, including elimination of the Deputy Chief of Special Operations position. In that same written notice, Chief Dean solicited volunteers to downgrade from Deputy Chief to Battalion Chief. No one volunteered. (Exhibit 9; Declaration of Dean)

4.50. Because no one had volunteered for reduction in rank, Chief Dean, as he had with the determination of the position to be abrogated, called on his Assistant Chiefs to make a recommendation to him as to which Deputy Chief to reduce in rank to Battalion Chief as a result of the abrogation of Special Operations Deputy Chief position. The Assistant Chiefs met three times to consider each of the 11 Deputy Chiefs. The meetings were facilitated by Chief Dean who, because of SFD-related matters requiring his immediate attention, was

intermittently absent from the meetings. (Declarations and testimony of all Assistant Chiefs and Chief Dean)

4.51. Throughout their deliberations, all Assistant Chiefs had the opportunity to, and did, comment on the characteristics and histories of each of the 11 Deputy Chiefs. All Deputy Chiefs were considered by the four Assistant Chiefs and by Chief Dean as well suited for their respective positions. However, because there was no option but to reduce in rank to battalion Chief one of the Deputy Chiefs, the deliberating Assistant Chiefs considered and discussed many things about the Deputy Chiefs, including even minor circumstances, that might aid them in distinguishing between 11 acknowledged very fine Deputy Chiefs. However, none of those conversations or deliberations included any comments regarding Chief Woodbury's whistleblower complaint to SEEC. In that regard, none of the Assistant Chiefs were aware during their deliberative process that Claimant Woodbury had filed a whistleblower complaint. Chief Dean did not mention to them either Capt. Greene's or Mr. Barnett's remarks about an SEEC complaint. (Declarations and testimony of all Assistant Chiefs and Chief Dean)

4.52. On occasion during the deliberations, Chief Dean would comment on the "pros and cons" of each of the 11 Deputy Chiefs. In that regard, Chief Dean made positive comments as to every Deputy Chief, including Claimant Deputy Chief Woodberry. Chief Dean had comments critical of Deputy Chief Oleson as to ability and enthusiasm towards work. Chief Dean also had comments critical of Deputy Chief Woodberry about a situation when Chief

Woodberry had been acting fire marshal and failed to follow Chief Dean's express instructions regarding a field situation. Those remarks from Chief Dean regarding Deputy Chief Woodberry were not perceived by any of the Assistant Chiefs to have been express or implied instructions as to whom the Assistant Chiefs should select for reduction in rank, nor did the remarks have any influence on any of the Assistant Chiefs in their decision to recommend Claimant for reduction in rank. (Declarations and Testimony of Hepburn, Nelsen, Vickery and Tipler)

4.53. Ultimately, after considering the "pros and cons" of each Deputy Chief, the practical impact on SFD as to their selection, the Assistant Chiefs selected Claimant to recommend for reduction in rank. Three of the Assistant Chiefs (Hepburn, Nelsen and Vickery) simply concluded that the best approach was to reduce the Deputy Chief scheduled to rotate into Special Operations. The remaining Assistant Chief (Tipler) agreed with the result, but based his determination on his knowledge of complaints about Claimant from other SFD employees in the Fire Marshall's Office and from members of the public. Chief Tipler's opinion was that Deputy Chief Woodbury was an excellent officer (initially, Chief Tipler resisted reducing Claimant), but that he had a gruff and often rude personality such that, if one of the Deputy Chiefs had to be reduced in rank, it should be Claimant. (Declarations and Testimony of Hepburn, Nelsen, Vickery and Tipler)

4.54. At the conclusion of the third day of their deliberations, the Assistant Chiefs presented to Chief Dean with their consensus recommendation that Claimant Woodbury be reduced from Deputy Chief to battalion Chief, effective the first of the new pay period, as

was the operational custom at SFD. Of his scheduled rotation into Special Operations; specifically, January 7, 2009. Chief Dean accepted the recommendation of the Assistant Chiefs. (Declarations and Testimony of Dean, Hepburn, Nelsen, Vickery and Tipler)

4.55. On December 7, 2008, Chief Dean orally informed Claimant that he was being reduced in rank to battalion Chief, because he was scheduled to rotate into the abrogated position in January 2009. On December 22, 2008 Chief Dean confirmed the reduction in rank in writing to Claimant. (Exhibit 13: testimony of Woodbury)

*Claimant Files Whistleblower Retaliation Claim with Seattle Mayor's Office*

4.56. On January 9, 2009, following notification of his reduction in rank, Claimant filed a claim under Chapter 4.20 SMC and Chapter 42.41 RCW of whistleblower retaliation with the Seattle Mayor's Office. (Stipulated Fact) He claimed that SFD, through Chief Dean, had retaliated against him specifically because he filed his ethics complaint regarding Lt. Footer with SEEC on October 17, 2008. (Exhibit 13; testimony of Woodbury)

*Claimant's Specific Allegations of Retaliation*

4.57. In his whistleblower retaliation claim filed January 9, 2009 with the Seattle Mayor's Office Claimant contended that SFD, through Fire Chief Gregory Dean, retaliated against Claimant by: (i) transferring Claimant from position of Deputy Chief and Assist. Fire Marshall with SFD Fire Marshall's Office to Deputy Chief Special Operations; (ii) abrogating

the SFD Special Operations Deputy Chief position; and, (iii) reducing Claimant's SFD rank from Deputy Chief to Battalion Chief. (Exhibit 13)

4.58. On or about March 11, 2009, in response to a claim questionnaire, Claimant further stated that Chief Dean retaliated against Claimant by: (iv) intentionally isolating Claimant from contact with Chief Dean; (v) interfering with Claimant's access to the computer Claimant used for his SFD work; and, (vi) requiring Claimant to undertake a hazardous materials (hazmat) training course twice. There was no evidence that Claimant filed a whistleblower retaliation claim with the Seattle Mayor's Office regarding these claims. (Exhibit 1)

4.59. On or after July 29, 2009, Claimant claimed additional retaliation as: (viii) reinstatement to position of SFD Deputy Chief – Training, a position that Claimant viewed as not significant, but which he accepted on or before August 5, 2009; and, (ix) harassment by Assistant Chief Vickery who was supervisor of the Deputy Chief – Training position, and therefore supervisor to claimant SFD Deputy Chief Woodbury, as soon as Chief Woodbury accepted the position. There was no evidence that Claimant filed a whistleblower retaliation claim with the Seattle Mayor's Office regarding these claims. (Claimant's hearing brief, p. 21-22; TR 726-729 & 732-733)

4.60. After the mayor's office investigated Claimant's claim and determined the SFD did not retaliate against Claimant, Claimant requested an administrative hearing. He then sued

the SFD in superior court pursuant to Seattle Municipal Code (SMC) 4.20.810 and RCW 42.41.040. (Stipulated Fact; Exhibit 14 (This exhibit was admitted solely for its factual information and not as a binding or persuasive determination of the existence or nonexistence of whistleblower retaliation which is a determination to be made solely by me in this proceeding.)

4.61. Claimant sought damages for back pay, front pay, and lost benefits; damages for loss of enjoyment of life, pain and suffering, mental anguish, emotional distress, injury to reputation, and humiliation; and injunctive relief. (Stipulated Fact)

4.62. At Claimant's request, the Superior Court stayed the administrative hearing. (Stipulated Fact)

4.63. SFD then filed a motion to strike the portion of Claimant's complaint seeking emotional distress damages, arguing that the SMC and RCW provisions relied upon by Woodbury do not support that remedy. (Stipulated Fact)

4.64. SFD also filed a motion to dismiss for lack of subject matter jurisdiction. (Stipulated Fact)

4.65. SFD argued that Claimant's claim could only be brought as a common law claim for wrongful discharge in violation of public policy, or as a review of an administrative law judge's findings and conclusions. (Stipulated Fact)

4.66. SFD claimed that Claimant could not bring a wrongful discharge claim, because Claimant was not discharged and could not bring a claim pursuant to the applicable SMC and RCW provisions because they did not create a cause of action in superior court. (Stipulated Fact)

4.67. In *Woodbury v. City of Seattle*, 172 Wn. App. 747, 749-50, 292 P.3d 134, review denied, 177 Wn.2d 1018, 304 P.3d 114 (2013), the Court held that "RCW 42.41.040 does not grant local government employees a cause of action in superior court." (Stipulated Fact) Accordingly, in due course, this case was returned to OAH for evidentiary hearing by an Administrative Law Judge under chapter 4.20 SMC and chapter 42.41 RCW.

*Whistleblower Retaliation by Reason of Transferring Claimant from Position of Deputy Chief and Assist. Fire Marshall with SFD to Deputy Chief of Special Operations*

4.68. Claimant contended that he was the subject of whistleblower retaliation by Chief Dean by reason of Claimant's transfer from Deputy Chief and Assistant Fire Marshall to Deputy Chief of Special Operations. The persuasive evidence was that: (i) Claimant was simply assigned, as part of an ordinary business activity of SFD, to a transfer rotation that had previously been agreed between SFD and Claimant's union to increase Claimant's and the other Deputy Chiefs' experiences in SFD; and, (ii) the transfer designation and notification took place before Claimant filed his whistleblower complaint with SEEC, and therefore could not have been in retaliation for a whistleblower complaint filing that had not taken place.

4.69. The evidence of whistleblower retaliation by reason of Claimant's transfer rotation from SFD Fire Marshall's Office to SFD Special Operations was unpersuasive.

Whistleblower Retaliation by Reason of Abrogation of SFD Special Operations Deputy Chief Position

4.70. Claimant contended that he was the subject of whistleblower retaliation by Chief Dean by reason of the abrogation of SFD Special Operations to which Claimant had been assigned. The persuasive evidence was that: (i) SFD fell under the authority of the City of Seattle and the City's Chief executive, Mayor Nickels, who requested that Chief Dean abrogate one of SFD's management positions. Chief Dean summoned his leadership team, including all four Assistant Chiefs and asked them to evaluate and recommend the appropriate SFD Deputy Chief position for abrogation. After consideration of the circumstances, the Assistant Chiefs recommended to Chief Dean abrogation of Special Operations. He accepted their recommendation and notified Mayor Nickels. This was a self-evident proper choice, given that Special Operations had no staff other than its Deputy Chief. Therefore, only its workload would have to be divided among the remaining Deputy Chief positions, not its personnel. (ii) The abrogation of SFD Special Operations took place before Claimant filed his whistleblower complaint with SEEC, and therefore could not have been in retaliation for a whistleblower complaint filing that had not taken place.

4.71. The evidence of whistleblower retaliation by reason of the abrogation of SFD Special Operations was unpersuasive.

*Whistleblower Retaliation by Reason of Reduction of Claimant's SFD Rank from Deputy Chief to Battalion Chief*

4.72. Claimant contended that he was the subject of whistleblower retaliation by Chief Dean by reason of his reduction in rank from SFD Deputy Chief to Battalion Chief. Claimant further contended that the motivation for this reduction in rank as retaliation was Claimant having reported the Lt. Footer circumstances and Fire Chief Dean's desire to keep those circumstances quiet. Claimant attempted to bolster his contention by accusing Chief Dean of "plotting" against Claimant and indirectly forcing the the Assistant Chiefs to go along with the plot because Chief Dean had them "under his thumb".

4.73. The persuasive evidence was to the contrary: SFD fell under the authority of the City of Seattle and the City's Chief executive, Mayor Nickels, who requested that Chief Dean reduce in rank one of SFD's management positions. Mayor Nickels had desired the reduction of an assistant Chief, but the legitimate operational decision was to negotiate with Mayor Nickels to accept a Deputy Chief and lieutenant for reduction instead.

4.74. Chief Dean summoned his leadership team, including all four Assistant Chiefs and asked them to evaluate and recommend the appropriate SFD Deputy Chief for reduction in rank to Battalion Chief. Those Assistant Chiefs had no retaliatory intent toward Claimant; rather, their intent was to evaluate all 11 SFD Deputy Chiefs, which they did. All Deputy Chiefs were considered by the Assistant Chiefs to be good SFD officers. Because all of the

SFD Deputy Chiefs, including Claimant, were of such high quality, it was very difficult for the Assistant Chiefs to make a decision. In the end, they decided on Claimant for reduction in rank for two reasons: Claimant was due to rotate into the Special Operations unit that was to be abrogated; and, while an otherwise fine SFD officer, Claimant was perceived as having challenging interactions with his SFD colleagues and the public such that both made complaints to SFD about Claimant, although none of those complaints resulted in any disciplinary measures against Claimant.

4.75. Although Chief Dean attended the three meetings at which the Assistant Chiefs deliberated, their unwavering, under-oath, credible testimony was to the effect that Chief Dean made positive remarks about all of the Deputy Chiefs, including Claimant. At one point he contributed to the deliberations by remarking in a critical way about two Deputy Chiefs, one of whom was Claimant. The Assistant Chiefs were unanimous in their testimony that they were not controlled, or even influenced, by anything Chief Dean said or did at the deliberation meetings; they were fully independent in their deliberations. After their evaluation, the Assistant Chiefs made their recommendation for reduction in rank of Claimant. Chief Dean accepted their recommendation.

4.76. Claimant's evidence of whistleblower retaliation by reason of his reduction in rank was unpersuasive.

*Whistleblower Retaliation by Intentional Isolation of Claimant from Contact with Chief Dean*

4.77. From Claimant's point of view, prior to 2008 his relationship with Chief Dean "seemed to be good." Claimant described 2008 differently: "for most of 2008 to present [March 11, 2009] my relationship with Chief Dean... is the poorest of any working relationship I have had in my entire career. Communication with him in 2008 was extremely limited and even when acting in the fire Marshall's role I was isolated from the relevant issues and limited to the role of a "placeholder." From March 2008 through March 2009, Claimant had been present in several meetings in which Chief Dean was present. These were Deputy Chief meetings, Battalion Chief meetings, and management team meetings in which Claimant was present as the acting Fire Marshall. The topics varied at the meetings and Claimant "had little contact with Chief Dean as he was there primarily to brief the specific audience on certain issues. Generally his demeanor, at the meetings, was professional." (Exhibit 1)

4.78. Claimant's contention that Chief Dean retaliated against Claimant, in part by isolating Claimant away from Chief Dean, was not persuasive. By Claimant's own description of the circumstances, Claimant's relationship with Chief Dean was, "for most of 2008... he poorest..." Because Claimant filed his SEEC report in mid October, 2008, it is clear that his feelings of isolation or inadequate contact and rapport with Chief Dean predated by three quarters of the year the filing of the whistleblower complaint. Further,

Claimant's description of events does not suggest anything more than the senior officer of the fire department for a major US city being very busy.

4.79. Claimant's evidence of whistleblower retaliation by reason of intentional isolation of Claimant from Chief Dean was unpersuasive.

*Whistleblower Retaliation By Interference With Claimant's Access to Work Computer*

4.80. In late December, 2008 and early January, 2009, Claimant was unable to access his work computer. His description of the circumstances provided no evidence of anything other than common computer issues in modern times. Claimant presented no evidence of any connection between his work computer and Fire Chief Dean. Complainant made this allegation in his March 11, 2009 responses to questions from Seattle city attorney. (Exhibit 1 ¶ 4)

4.81. As a result of Claimant's allegation, IT Group Technical Manager at SFD was asked to review the requests for IT assistance generated by Claimant during the relevant period of time. This IT manager described in substance a computer system with strong security. Part of the security system includes encrypted password protection. The manager reported that the bulk of Claimant's challenges to access were password related. In the IT manager's under oath declaration, the manager stated "password problems are really very common" and "in looking at [Chief] Woodbury's [computer assistance requests] I did not see anything

unusual either in the nature of the problems reported or the number of [assistance requests].”

4.82. Claimant's evidence of whistleblower retaliation by reason of interference with Claimant's access to his work computer was unpersuasive.

*Whistleblower Retaliation by Reason of Being Required to Repeat Hazmat Training Course*

4.83. Claimant contended that he had been subjected to whistleblower retaliation by reason of having to repeat a hazmat training course. He described the circumstances thusly: "In February, 2009 I was required to attend a 'hazmat' class twice in spite of fully completing the first class per the training memo. The second time I went another Chief... requested to go in my place as he had not yet gone and this was his last opportunity. He was denied and I had to go a second time; he has not had the required training." Complainant made this allegation in his March 11, 2009 responses to questions from Seattle city attorney. (Exhibit 1 ¶ 4)

4.84. The undisputed evidence is that SFD Deputy Chief Robert Lomax, at the relevant time assigned to Operations Deputy One with oversight of Hazardous Materials training, received a report from SFD Capt. Gagliano "regarding the fact that Chief Woodbury did not get into a Level B suit during a Hazardous Materials training program. I contacted Woodbury by telephone, told him that he is expected to fully participate in the training, which would include use of the Level B suit. I also said that since he is in a leadership

position at the Department I would ask him to retake the training. Woodbury agreed and said he had no problem in doing so. He did not say or do anything to suggest that I was singling him out or retaliating against him by asking him to retake the training. In fact, there was another captain, ... who also did not participate and I asked him to retake the training as well. My request to Woodberry to redo the training was not influenced in any way by the complaint that he filed with the Seattle Ethics & Elections Commission.” (Exhibit 9-Declaration of Lomax)

4.85. Claimant’s evidence of whistleblower retaliation by reason of being required to take hazmat training twice was unpersuasive.

*Whistleblower Retaliation by Reason of Claimant’s Reinstatement to Deputy Chief-Training*

4.86. After Claimant filed his lawsuit, he was reinstated as a Deputy Chief. (Stipulated Fact) This occurred because, a few months after the reduction in rank (that is, on or about August 5, 2009), a vacancy opened in the Deputy Chief of Training position, an existing Deputy Chief position, when it’s incumbent, Deputy Chief Jesse Youngs rotated to Operations. However, although he accepted it, Claimant was unhappy with the offer of appointment to the training position, because he wanted to work as an Operations Deputy, and in any event did not believe the training position to be important. Further, Claimant expressed concern about working for Assistant Chief Vickery. Chief Dean assured Claimant that acceptance of the position was not in any way related to Claimant’s lawsuit, nor was there any request that the lawsuit be settled in exchange for the placement, that

Chief Dean was sensitive to Claimant's concerns, and that when an operations position opened Chief Dean would transfer Claimant to that position. Chief Dean also affirmed to Deputy Chief Woodbury the importance of the training position not only to new recruits, but to existing firefighters. Sometime thereafter, Deputy Chief Youngs died and Chief Dean transferred Deputy Chief Woodberry into the Operations position he wanted. (TR 421-424; Exhibit 38 & 39)

4.87. Except that Claimant was not returned to Special Operations (the abrogated unit), and that he was not immediately placed in an operations Deputy Chief position, he had been returned to a position of substantially the same importance as the position that he held before the reduction in rank. (TR 241-243)

4.88. Further, Claimant, as Deputy Chief of Training, was placed in a position of responsibility for training all firefighters, experienced and new recruits alike. In that regard, Chief Dean stated to Claimant in Chief Dean's August 5, 2009 letter of congratulations regarding the position that, "we are responsible for providing training to new and tenured firefighters to ensure that they can do their job in a safe and efficient manner. I do not take these responsibilities lightly because our ability to prepare our firefighters has a direct impact on the services that we provide to the community." Other than Claimant's conclusory statements at hearing to the effect that the position was unimportant, he provided no credible evidence to refute the significance of being responsible for the

professional development of every Seattle firefighter. (Exhibit 13; Exhibit 39; testimony of Dean, Vickery.)

4.89. Despite the foregoing, Claimant contended that the placement as Chief of Training was retaliation. Claimant's contention of whistleblower retaliation by reason of his reinstatement to the rank of Deputy Chief of Training was unpersuasive.

*Whistleblower Retaliation by Reason of Assistant Chief Vickery's Harassment of Claimant*

4.90. Claimant contended that Assistant Chief Vickery harassed him by undermining Claimant's authority with his direct reports and subordinates by meeting with those reports and subordinates in the absence of Claimant. Further, Chief Vickery assigned projects to some of Claimant's direct reports and subordinates. Also, Claimant believed he was not adequately involved in overseeing Washington Administrative Code required in-service repeat training such as confined space, live fire, and asbestos. Because he was not involved in these things, Claimant ascribed to Chief Vickery retaliation by harassment. However, Claimant acknowledged that although he felt he could never participate in the in-service part of the training that he believed he was missing, he was never told that he could not attend the in-service training, and he never asked to be included. (TR 726-734)

4.91. Additionally, the unrefuted sworn statement of Assistant Chief Vickery was: during the time that [Deputy Chief Woodbury] reported to me, his performance was acceptable. However he frequently was unable to attend scheduled meetings and did not notify me of

his unavailability until just prior to the meeting. I asked plaintiff to provide me with 24 hours of advance notice when he intended to be absent from work. He complied with my request but his frequent absences caused problems in the operations of the Training Division.”  
(Exhibit 13)

4.92. The weight of the foregoing evidence is that Claimant was often busy with matters that kept him away from his job and his direct reports and subordinates enough to interfere with the training operation. Therefore, it was necessary for Assistant Chief Vickery to directly interact with Claimant's subordinates to undertake the training activities. When Claimant was present and wanted to be involved in in-service training activities, he did not make that known. There was no credible evidence to support Claimant's contention that he was the subject of whistleblower retaliation by Assistant Chief Vickery.

4.93. Therefore, Claimant's contention of whistleblower retaliation by reason of harassment by Assistant Chief Vickery was unpersuasive.

4.94. Claimant's evidence in this case was not persuasive as to any contention of whistleblower retaliation against Claimant.

5. **CONCLUSIONS OF LAW:** Based upon the foregoing Findings of Fact, I make the following Conclusions of Law:

*Jurisdiction*

5.1. Under Chapter 4.20 SMC and Chapter 42.41 RCW, Claimant, Seattle employee and

Fire Department (SFD) Deputy Chief James Woodbury, filed a claim against the City of Seattle, a local government agency, for unlawful retaliation against Claimant by the City's Fire Department through its employee and Fire Chief Gregory Dean. City of Seattle issued its response to which Claimant took exception. Accordingly, Claimant filed a request with City of Seattle for an administrative hearing. In turn, City of Seattle applied to the Office of Administrative Hearings (OAH) for a hearing to be conducted as provided in RCW 42.41.040. Therefore, OAH and I have jurisdiction to hear and decide this matter.

*Right of Local Government Employee to Report Improper Governmental Action*

5.2. Every local government employee has the right to report to the appropriate person or persons information concerning an alleged improper governmental action. RCW 42.41.030; SMC 4.20.810A.

5.3. Here, Claimant SFD Deputy Chief James Woodbury, reported unlawful activity by a Seattle Fire Department Lieutenant in the nature of gross waste of government funds approximating \$200,000 and abuse of authority by using his official status for personal gain in the nature of requiring free tickets to an expensive entertainment venue over which the Lieutenant fire marshal had authority. RCW 42.41.020

*Whistleblower Retaliation Unlawful*

5.4. It is unlawful for any local government official or employee to take retaliatory action against a local government employee because the employee provided information in good

faith that an improper governmental action occurred. SMC 4.20.810C; RCW 42.41.040.

5.5. "Retaliatory action" means any adverse change in a local government employee's employment status, or the terms and conditions of employment including unsatisfactory performance evaluations, unwarranted and/or unsubstantiated letters of reprimand, denial of promotion, suspension, or other unwarranted disciplinary action. SMC 4.20.850; RCW 42.41.020.

5.6. Shortly after Claimant reported improper governmental action by a Seattle Fire Department lieutenant, he was involuntarily reduced in rank from Deputy Chief to Battalion Chief. The reduction in rank was an adverse action against Claimant. If the reduction in rank were based on retaliation for having reported the improper governmental action, such would be unlawful and Claimant would likely be entitled to some or all of the relief available through RCW 42.41.040.

#### *Relief for Whistleblower Retaliation*

5.7. Relief that may be granted by the administrative law judge consists of reinstatement, with or without back pay, and such injunctive relief as may be found to be necessary in order to return the employee to the position he or she held before the retaliatory action to prevent any recurrence of retaliatory action. The administrative law judge may award costs and attorneys' fees to the prevailing party. RCW 42.41.040(7),(8).

*Burden of Proof on Claimant Employee*

5.8. The employee, as the initiating party, must prove his or her claim by a preponderance of the evidence. RCW 42.41.040(6).

5.9. It has been held that to establish a *prima facie* claim of retaliation (that is, the presentation of sufficient evidence to support the claim; in this case a preponderance - RCW 42.41.040(6)), Claimant must demonstrate three things: (1) that he engaged in a statutorily protected activity; (2) that an adverse employment action was taken against him; and, (3) that retaliation was a substantial factor in the adverse employment action. See *Kahn v. Salerno*, 90 Wn. App. 110, 129, 951 P.2d 321(1998); *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 72, 821 P.2d 18 (1991). As to the third element of the *prima facie* case, Claimant may establish a rebuttable presumption of retaliation by showing that he made a report of employer misconduct, that the employer had knowledge of the report, and that the employee was discharged, or the subject of other retaliatory action. See *Wilmot*, 118 Wn.2d at p.69; and, RCW 42.41.020(3).

5.10. If Claimant establishes a *prima facie* case, the Agency may rebut it by advancing a legitimate nonretaliatory justification for the action taken, though it need not do so by a preponderance of the evidence. *Wilmot*, 118 Wn.2d at 70. If the Agency provides a legitimate nonretaliatory justification, the burden of production shifts back to Petitioner who must prove that retaliation was pretextual or a substantial factor motivating the action. *Wilmot*, 118 Wn.2d at 73.

5.11. Here, based on the foregoing findings of fact, Claimant's evidence as to all claims of retaliation was unpersuasive. Therefore, Claimant has not met his burden of proof by a preponderance as to any his claims of retaliation in violation of chapter 42.41 RCW (Local Government Whistleblower Protection Act) or chapter 4.20 SMC, and is not entitled to relief under either chapter.

**Washington Legislative Policy Is to Encourage Local Government Employees to Make Good-Faith Reports of Improper Governmental Action**

5.6 RCW 42.41.010: Policy: It is the policy of the legislature that local government employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions of local government officials and employees. The purpose of this chapter is to protect local government employees who make good-faith reports to appropriate governmental bodies and to provide remedies for such individuals who are subjected to retaliation for having made such reports.

*Attorneys Fees and Costs*

5.7 Pursuant to RCW 42.41.040 and RCW 34.12.039 costs for the services of the Office of Administrative Hearings for the first twenty four hours of services are billed to the local administrative hearings account. Costs for services beyond twenty four hours are allocated to parties at the discretion of the administrative law judge.

5.8 RCW 42.41.040(7) authorizes the award of reasonable attorneys fees to the prevailing party. SDF is the prevailing party.

5.9 I have considered the circumstances of this case such as: the length of time that it took to get this matter to hearing before the Office of Administrative Hearings due to the collateral Superior Court action and the appeals to the Court of Appeal and the Supreme Court; the failure of Claimant to prevail in any respect; the cooperation of both sides during the OAH hearing process; the quality of representation by counsel for both sides; and, the generally understood relative ability of an individual to pay fees and costs contrasted with the ability of a government agency to pay fees and costs. I have also taken into account the policy of the Washington legislature that local government employees be encouraged to make good-faith reports of improper governmental action. The possibility of the loss of a whistleblower retaliation claim by a local government employee, coupled with the possibility of thereafter being ordered to pay significant attorney fees and costs to the local government entity initially sought to be protected by the employee's report of improper action as a result of that loss, might well be discouraging and therefore anathema to the legislative policy of RCW 42.41.010.

5.10 After balancing these considerations, I have determined to exercise my discretion as follows: (i) Respondent SDF shall pay for all services of the Washington Office of

Administrative Hearings rendered in this case. RCW 34.12.039 (ii) Aside from the foregoing OAH services costs, Respondent SFD and Claimant shall each bear their own costs and attorneys fees. RCW 42.41.040(7)

*All Arguments of Parties Considered*

5.11 I have considered all express and implied contentions and arguments made by the parties. Arguments that are not specifically addressed in this Final Order have been duly considered, but were determined to have no merit, to not substantially affect the rights of the parties, or to not otherwise require comment.

**6 ORDER**

***NOW THEREFORE, IT IS ORDERED:***

6.6 Claimant James Woodbury did not establish by the preponderance of evidence that Respondent SFD violated Chapter 42.41 RCW (Local Government Whistleblower Act) or Chapter 4.20 SMC with regard to Claimant.

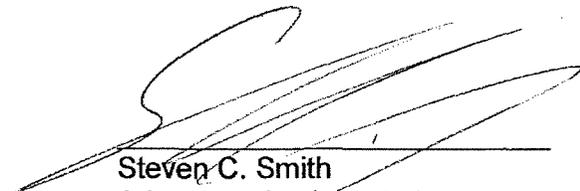
6.7 Because Claimant James Woodbury did not prevail in this case, Claimant shall take nothing by reason of his claim.

6.8 Under RCW 34.12.039, Respondent SFD shall pay for all services of the

Washington Office of Administrative Hearings rendered in this case.

6.9 Under RCW 42.41.040(7), Respondent SFD and Claimant shall each bear their own costs and attorney fees.

Signed and entered at Tacoma, Washington, September 15, 2014.



Steven C. Smith  
Administrative Law Judge  
Office of Administrative Hearings

**NOTICE TO PARTIES OF FURTHER APPEAL RIGHTS**

**PETITION FOR RECONSIDERATION:** This Final Order is subject to a petition for reconsideration if filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding. The filing of a petition for reconsideration is not required before seeking judicial review.

**JUDICIAL REVIEW AND ENFORCEMENT:** Judicial review and enforcement of this Final Order is governed by RCW 42.41.040(9) and RCW 34.05.510 - .598. Relief ordered by the administrative law judge may be enforced by petition to superior court. The Final Order is subject to judicial review under the arbitrary and capricious standard. RCW 42.41.040(9). Proceedings for review shall be instituted by paying the fee required under RCW 36.18.020 and filing a Petition for Judicial Review in the superior court, at the petitioner's option, for (a) Thurston county, or (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located. RCW 34.05.514. **Filing and service of a Petition for Judicial Review must be completed within thirty days after the date of mailing of the Final Order.** RCW 34.05.514(1), .542; WAC 10-08-110(2)(c).

If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3).

**Filing and Service of a Petition for Judicial Review, is further specified in RCW 34.05.542 as follows:**

(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other Chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

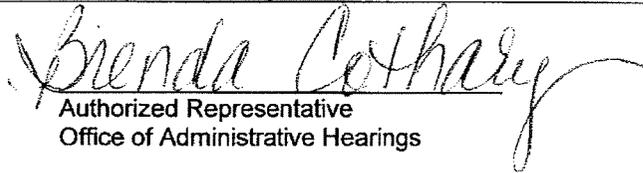
(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record."

**Certificate of Service – OAH Docket No. 2009-LGW-0003**

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

<b>Fritz Wollett</b> <b>Seattle City Attorneys</b> <b>Seattle City Attorney's Office</b> <b>PO Box 94769</b> <b>Seattle, WA 98124-4769</b>	<input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt
<b>James Woodbury</b> <b>c/o John P. Sheridan, Partner</b> <b>MacDonald Hoague &amp; Bayless</b> <b>705 Second Avenue, Suite 1500</b> <b>Seattle, WA 98104</b>	<input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt

Date: September 15, 2014

  
Authorized Representative  
Office of Administrative Hearings