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State of Washington

No. 74329-5-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES WOODBURY,

*Appellant,*

vs.

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

*Respondents,*

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

Based on what he knew when informed of his downgrade, it is perhaps understandable that James Woodbury assumed his downgrade from Deputy Chief to Battalion Chief was related to his whistleblower complaint when he filed his retaliation complaint on January 7, 2009. Woodbury filed his whistleblower complaint on October 17, 2008, and was informed of his downgrade by Fire Chief Gregory Dean on or about December 11, 2008. He did not know of the Assistant Chiefs' role in the meticulous process that led to their decision to select him for downgrade until months later. Woodbury thought highly of the Assistant Chiefs and had no reason to believe they would react negatively to his complaint, even if they were aware of it. He filed his retaliation complaint believing Dean was solely responsible for his downgrade.

The evidence shows that Woodbury was mistaken in his assumption that he had been retaliated against. Woodbury was selected for rotation along with other Deputy Chiefs in 2008. He was notified of the rotation to his new assignment as Deputy Chief for Special Operations in July 2008. In August 2008, the Mayor's Office informed the City of Seattle Fire Department (SFD) that it needed to abrogate one to two management positions with the budgetary equivalent of the cost of an Assistant Chief. SFD responded with a request that the Mayor allow it to abrogate two positions – a Deputy Chief

and a lieutenant. The Mayor's Office approved the recommendation in August 2008. In August-September 2008, the Assistant Chiefs then decided that the position of Deputy Chief for Special Operations should be eliminated.

After initial uncertainty about the criteria to be used to determine which Deputy Chief to downgrade as a result of the abrogation, Dean learned that SFD was not required to follow time-in-rank and downgrade the junior Deputy Chief. He also discovered after asking that no Deputy Chief would volunteer for the downgrade. Dean then asked the four Assistant Chiefs to recommend a Deputy Chief for downgrade. The Assistant Chiefs met, and after prolonged discussion, decided that Woodbury should be downgraded because he was the Deputy Chief scheduled to rotate into the abrogated position.<sup>1</sup> Dean accepted their recommendation and communicated the Assistant Chiefs' decision to Woodbury. None of the Assistant Chiefs was aware that Woodbury had filed a whistleblower complaint at the time of their recommendation to select Woodbury for downgrade.

Woodbury filed a complaint of whistleblower retaliation on January 7, 2009. The complaint was investigated and found to be without merit. Woodbury appealed the finding pursuant to SMC Chapter 4.20 and Chapter

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<sup>1</sup> Except for Assistant Chief Tipler, who selected Woodbury due to what Tipler characterized as Woodbury's below-average people skills.

42.41 RCW to the Office of Administrative Hearings.

Dean offered Woodbury reinstatement to an open Deputy Chief position in August 2009. Woodbury accepted the offer thereby ending his losses due to the downgrade.

The Administrative Law Judge (ALJ) conducted a five-day hearing during which six witnesses testified and numerous exhibits were admitted into evidence, many after argument. The parties submitted post-hearing briefs. The ALJ issued his Findings of Fact, Conclusions of Law & Final Order on September 15, 2014. The Order found in favor of the City on all allegations of retaliation. The Order concludes that the Assistant Chiefs were not aware of Woodbury's October whistleblower complaint when they recommended him for downgrade. The selection of Woodbury for downgrade was based on legitimate, non-discriminatory reasons. Dean accepted the recommendation. The ALJ found no evidence of mendacity or ill will toward Woodbury by the decision makers.

The judicial standard for review is limited. The Court can decline to follow the Order only if it concludes that it: (1) is based on an erroneous application of the law, or (2) is not supported by substantial evidence of record, or (3) is arbitrary and capricious because it disregards the material facts and circumstances found in the administrative record. None of these factors is present here. The Order applies the proper legal standards and

finds that retaliation was not a factor in the downgrade. The Order is amply supported by the evidence. The Order is reasoned and carefully considers all of the relevant evidence. It is neither arbitrary nor capricious. Accordingly, the Order should be affirmed and the appeal dismissed.

## **II. STATEMENT OF THE ISSUES**

Whether Woodbury's whistleblower complaint was a substantial factor in the Fire Department's decision to downgrade him from Deputy Chief to Battalion Chief.

Whether the administrative decision in favor of the City correctly applies the law, is supported by substantial evidence of record and is neither arbitrary nor capricious.

## **III. STATEMENT OF THE CASE**

### **A. The Seattle Fire Department**

The Seattle Fire Department is a quasi-military, public safety organization dedicated to saving lives and property in the city of Seattle. At its highest rank, it employs a Fire Chief who, in 2008, was responsible for 4 Assistant Chiefs, 11 Deputy Chiefs and 26 Battalion Chiefs. The Operations division operates four 24-hour shifts, A–D. Each shift is commanded by a Deputy Chief. In addition to operations, in 2008 other divisions of the department were responsible for administrative functions including training, the fire alarm center, fire prevention, support services,

special operations, paramedics and communications. A Deputy Chief is responsible for each administrative division and works a 40-hour administrative week.

In 2008, the Fire Chief was Gregory Dean. The Assistant Chiefs were Chief of Administration John Nelsen; Chief of Safety, Training and Emergency Management A.D. Vickery; Chief of Operations William Hepburn; and Fire Marshal Ken Tipler, who was responsible for fire prevention.

Deputy chiefs and battalion chiefs are represented by Fire Chiefs Union Local No. 2898. Captains, lieutenants, firefighters, and firefighter paramedics are represented by Firefighters Union Local No. 27.

#### **B. The Rotation Agreement**

In 2007, SFD and Local 2898 reached agreement on a rotation schedule for Deputy Chiefs. The agreement was reduced to writing and signed on December 7, 2007. AR 912 (Exh. 8, p. 1).<sup>2</sup> The rotation agreement provided that “Deputy Chiefs shall be rotated between Administration and Operations positions to gain a balance of experience of the duties of Deputy Chiefs.” The Rotation Agreement also provided that Administrative Deputy Chiefs could be reassigned to various

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<sup>2</sup> References to the Administrative Record are cited “AR.” References to the hearing exhibits and hearing transcript are cited parenthetically as “Exh” and “TR.”. References to depositions/declarations cite the name of the deponent/declarant.

Administrative positions as Deputy Chiefs are rotated into and out of the Deputy Chief positions. AR 915 (Exh. 8, p. 4).

Rotations began in 2007. Prior to Woodbury's rotation, there were rotations in 2007 and early 2008. AR 4367 (TR 353:12-20). In June-July 2008, the Assistant Chiefs agreed on a rotation of three Deputy Chiefs to take place in January 2009. The rotation moved Woodbury from the Assistant Fire Marshal position to the Deputy Chief of Special Operations position. Deputy Chief Steve Oleson was scheduled to rotate into the Fire Marshal position to replace Woodbury. AR 4292 (TR 278:12-20). Deputy Chief Robert Lomax was informed that he would be rotated from the Special Operations position to the Deputy Chief of Operations position. AR 810 (Lomax Dec., ¶ 2); AR 4368 (TR 354:8-10). Woodbury admits that he was notified of the decision to rotate him sometime in late July 2008. AR 1017 (Exh. 28); AR 1020-1021 (Exh. 31); AR 4292 (TR 278:2-23);<sup>3</sup> CP 143 (165:22-166:25).<sup>4</sup>

### **C. The Abrogation Decision**

The Mayor's Office instructed SFD in summer 2008 to abrogate an

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<sup>3</sup> It is apparent from AR 1017 (Exh. 28) that the reference to July 2009 at AR 4292 (TR 278:22), should be July 2008.

<sup>4</sup> The transcript of Woodbury's deposition was erroneously excluded from the administrative record and the parties obtained an agreed order to correct the record. The transcript is part of the Clerk's Papers beginning at CP 143 and is cited to herein by referencing the CP pages and transcript line numbers in parentheses.

Assistant Chief position to satisfy the need for budgetary reductions in the forthcoming fiscal year. AR 917-918 (Exh. 10); AR 785 (Dively Dec., ¶¶ 3-5). SFD's leadership team met and agreed upon an alternative proposal which would eliminate one deputy chief position and one lieutenant position. AR 4445-4448 (TR 431:16-434:5). The Mayor's Office accepted the proposal. AR 785-786 (Dively Dec., ¶¶ 6-7).

The Assistant Chiefs then conferred with Dean to determine which of the 11 Deputy Chief positions would be eliminated. AR 4370-4372 (TR 356:21-358:14). After much consideration, they agreed that the Deputy Chief for Special Operations was the logical position to eliminate. AR 4373 (TR 359:3-4). That position had no supervisory functions and its duties could most easily be assimilated into the job duties of the remaining Deputy Chiefs. AR 1006 (Exh. 22); AR 4373 (TR 359:5-7); AR 819 (Santos Dec., ¶ 3).<sup>5</sup> The proposed abrogation was announced to Woodbury and the Deputy Chiefs in early September 2008. AR 1020 (Exh. 31, p. 1). A memorandum signed by Dean formally announcing the elimination of that position was distributed to SFD employees on December 11, 2008. AR 1009 (Exh. 24).

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<sup>5</sup> Vickery initially disagreed with the decision but eventually concurred. AR 1007 (Exh. 23); AR 4373 (TR 359:10-18); AR 4322 (TR 308:17-22); AR 4324 (TR 310:12-20).

**D. Woodbury Files His Confidential Complaint with the SEEC on October 17, 2008**

Woodbury and other employees in the Fire Marshal's Office (FMO) had concerns regarding the behavior of Lt. Milt Footer and SFD's response to Footer's perceived misconduct. Those concerns prompted Woodbury to file a "confidential complaint", dated September 17, 2008, with the Seattle Office of Ethics and Elections (SEEC), on October 17, 2008. AR 902-906 (Exh. 3). According to Woodbury, Fire Marshal Office employees Deputy Chief Gary English, Strategic Advisor Diane Hansen and Captain Chris Greene were aware that Woodbury was going to file an ethics complaint. AR 891 (Exh. 1, p. 7, ¶ 7); AR 894 (Exh. 1, p. 10, ¶ 14). The complaint submitted on October 17, 2008, was signed by Woodbury and Hansen. AR 4183-4184 (TR 169:25-170:19). English signed the complaint later. Woodbury Dep., 143:16-24. Greene refused to sign the complaint. Woodbury Dep., 132:4-16. Woodbury admits that none of the other signatories have been retaliated against. AR 891 (Exh. 1, p. 7, ¶ 9); CP 143 (148:24-149:22).

Prior to filing the complaint, Woodbury met with SEEC employees Wayne Barnett and Kate Flack on October 7, 2008, and presented the complaint to them. AR 4185 (TR 171:6-22); AR 675 (Barnett Dec., ¶ 2). They instructed Woodbury not to tell anyone about the complaint. AR 4246 (TR 232:5-9). Later, Woodbury told Local 2898 President Richard Verlinda that

he had filed a complaint with SEEC. AR 4287-4288 (TR 273:21-274:15).

**E. The Complaint Addresses Two Concerns Regarding Footer**

The complaint raised two areas of concern. First, whether Footer had failed to bill First & Goal for services rendered to it by SFD. Second, whether Footer had used his position with the Department for personal gain in order to get a ticket to a Hannah Montana concert for a friend. The facts pertaining to each concern, insofar as they are relevant to Woodbury's whistleblower complaint, are set forth below.

**1. First & Goal**

First & Goal manages events at Century Link Field (formerly Qwest Field), including Seattle Seahawks football games. In 2008 and prior years, the Fire Department entered into a contract with First & Goal which provided that First & Goal would pay the salary of a SFD employee in return for services provided by that employee to First & Goal. For several years prior to 2008, that employee was Milt Footer. In 2008 it came to the attention of Captain Chris Greene that First & Goal might not be paying the Department for Footer's services. Greene was in charge of the Special Events Unit in the FMO. That unit provided services to First & Goal. AR 791 (Greene Dec., ¶ 2). It was Footer's responsibility to invoice First & Goal for services rendered to it. *Id.* Greene passed on his concerns

about the lack of payment to Woodbury, Hansen, and ultimately to Fire Marshal Tipler. *Id.*, ¶ 3.

Greene and Tipler met with Dean on or about June 5, 2008, and explained their concerns. Dean directed Tipler and Greene to work with SFD Finance Division Director, Chris Santos, to determine the amount of unbilled services and come up with a new policy and procedure to prevent a reoccurrence. AR 792 (Greene Dec., ¶ 3); AR 4375-4377 (TR 361:25-363:9). Dean met with Santos and directed him to find out whether SFD had been collecting funds from First & Goal and report back to Dean. AR 4377 (TR 363:12-17); AR 819 (Santos Dec., ¶ 4). Dean expected Santos's investigation to reveal who was responsible for any failures. AR 4503 (TR 489:8-490:14); AR 4505 (TR 491:1-17).

Santos completed his investigation in December 2008 and shared his findings with Dean. He found that Footer had been untruthful in saying that he had submitted invoices to First & Goal. In December 2008, Santos told Dean the under billing amounted to more than \$168,000. SFD then invoiced First & Goal for the overdue money. AR 819-820 (Santos Dec., ¶ 5); AR 998-1005 (Exh. 21). A recommendation was made by the FMO to Dean to terminate Footer. AR 4588-4589 (TR 574:23-575:11). SEEC issued its report on Woodbury's ethics complaint on March 19, 2009, finding numerous acts of misconduct by Footer. AR 1025-1044 (Exh. 35). Dean read the report and

was convinced that Footer had been untruthful. AR 4505-4506 (TR 492:19-493:13). After reading the SEEC report, Dean decided to accept the FMO's recommendation to terminate Footer for failure to do his job. AR 4588 (TR 574:12-20). When the decision was communicated to Footer, he resigned in lieu of termination. AR 4390 (TR 376:10-13).

## **2. Hannah Montana Concert**

Greene received information from Key Arena manager Edie Burke in July 2008 that Footer had demanded an "all access" pass for himself and a companion to attend a Hannah Montana concert at Key Arena on October 29, 2007.<sup>6</sup> Burke felt it was improper for Footer to ask for a free pass for his friend. Greene agreed and reported the incident to Tipler, with a recommendation that Footer receive a five-day suspension. AR 792 (Greene Dec., ¶ 4); AR 907 (Exh. 4). Greene's memo to Tipler is dated August 29, 2008, more than two months after his meeting with Tipler and Dean to discuss Footer's apparent failure to invoice First & Goal.

Tipler brought the concerns expressed in Greene's August 29, 2008 memo to Dean's attention in September 2008. Dean agreed it was improper for Footer to ask for a ticket for his companion. Others in the FMO had

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<sup>6</sup> AR 907 (Exh. 4) says the concert occurred in 2009. Woodbury clarified at the hearing that the concert occurred in 2007. AR 4167 (TR 153:11-13).

committed similar transgressions. Dean directed Tipler to prepare a memorandum regarding proper use of official position for distribution to employees in the FMO and to see that employees received ethics training. AR 4378-4379 (TR 364:14-365:24). Tipler distributed the memorandum on or about September 8, 2008. AR 911 (Exh. 7). Dean reviewed and approved the memorandum before it was issued. AR 4380-4381 (TR 366:22-367:11).<sup>7</sup> Tipler imposed formal counseling on Footer for the ticket incident. AR 920 (Exh. 12). Tipler sent Dean a memorandum dated October 13, 2008, summarizing Footer's improper use of his position and the remedial actions that Dean and Tipler had agreed would be taken to ensure that abuse of official position did not reoccur. AR 899-901 (Exh. 2).

**F. Woodbury's Complaint Was Motivated by His Belief That SFD Was Not Adequately Addressing Footer's Apparent Misbehavior**

Woodbury was upset because, in his view, the actions taken by SFD, and specifically Dean, in response to Footer's misbehavior, were inadequate. Woodbury's dissatisfaction led to his SEEC complaint alleging that Footer's actions violated the Seattle Municipal Code. AR 902 (Exh. 3, p. 1). The complaint refers to the First & Goal under-billing issue

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<sup>7</sup> AR 911 (Exh. 7) is mistakenly referred to as Exh. 10 in the transcript. AR 4380 (TR 366:22-23).

as Action #1:

Captain Greene and I were directed by the Fire Marshal, Chief Ken Tipler, that at the direction of Chief Dean we were not to pursue the invoicing issue any further nor would we be allowed to take any disciplinary actions against Lt. Footer. Our recommendation to Chief Tipler was that as a result of Lt. Footer's actions and statements on the issue, he be transferred out of that position to another one in the marshal's office. This recommendation was an attempt to restore integrity and credibility to that position. This recommendation was rejected by Chiefs Tipler and Dean. We were then told by Chief Tipler that the investigation of the incident was over and we were to 'move forward' and ensure that First and Goal understood that they would be invoiced for any future fireguard services.

AR 903 (Exh. 3, p. 2).

Action #2 in Woodbury's SEEC complaint refers to Footer's improper use of his position to obtain tickets to the Hannah Montana concert in 2007. Woodbury objected to Dean's decision to allow Tipler to impose only a formal counseling session on Footer. In Woodbury's view, informal counseling was insufficient and would serve only to "...damage the integrity and credibility of not just the FMO but the entire fire department." AR 905 (Exh. 3, p. 4). Woodbury concluded his complaint by asserting that he, Diane Hansen and Chris Greene "...could be subjected to significant adverse job actions as the result of reporting these situations." AR 906 (Exh. 3, p. 5).<sup>8</sup>

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<sup>8</sup> The gap in the text at the top of AR 906 (Exh. 3, p. 5), presumably is caused by the deletion of Hansen's name since Woodbury testified she joined him in signing the complaint.

**G. Chris Greene Did Not Share Woodbury's Concerns**

Greene and Woodbury urged Tipler to take action against Footer. However, Greene did not think it was necessary to file a complaint with SEEC because he believed (correctly) that Dean would deal with the problem and take action against Footer. Greene testified that:

Woodbury approached me after these events came to light and told me that he was working on a letter and wanted me to sign it. I didn't want to sign Woodbury's letter. I knew the letter was a complaint, but I did not spend very much time looking at it. I pretty much scanned it long enough to know that it related to Footer and verify that my name was mentioned somewhere in the letter. This was enough to make me realize I wanted nothing to do with this. I did not review it long enough to understand either the details of the complaint or where it was that Woodbury intended to send it. A complaint was presented to me at a deposition and I noticed that it says "Auditing Official of the Seattle Fire Department" at the top. I had no idea in the Fall of 2008 who would be considered the auditing official or that this indicates a filing with the Ethics Department. I did not keep a copy of what Woodbury gave me, but I am guessing it was probably similar to what was shown to me at deposition. I did not want to be a part of complaining outside the Department, because I was hoping that the Department's command staff would deal with the problem and take action regarding Footer.

AR 793 (Greene Dec., ¶ 6).

Greene also testified that following Woodbury's effort to persuade him to sign the complaint, Greene contacted Dean to discuss his frustrations as Special Events Captain. Greene stated that:

Sometime after refusing to sign Woodbury's complaint letter, I called Chief Dean to discuss my frustrations in my

current assignment as a Special Events Captain. I do not remember the exact date, but I know that I called after Lt. Footer admitted to Chief Tipler and me that he had taken concert access passes in a meeting on August 29, 2008. During the telephone conversation with Chief Dean, I mentioned 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 am sure that I did not mention the Ethics Department because, as I state above, I did not know that an auditing official had any relation to the Ethics Department.

AR 794 (Greene Dec., ¶ 8).

Greene concluded his testimony by testifying that he did not tell any of the Assistant Chiefs that Woodbury was filing an ethics complaint in 2008, because "...I [Greene] did not know it myself."<sup>9</sup> Greene did not tell Tipler either that Woodbury was drafting a complaint or pressuring Greene to sign it. AR 794 (Greene Dec., ¶ 10).

Dean recalled two conversations with Greene in fall 2008 about issues at the FMO. Dean testified that he ran into Greene on a street corner and Greene told him people were talking about filing a SEEC complaint. AR 4391 (TR 377:12-20). In the second telephone conversation, Greene told Dean he was being pressured by Woodbury to sign a complaint but said nothing about the nature of the complaint. Dean told Greene "if you agree, sign it. If you

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<sup>9</sup> Like Dean, Greene did not conclude from his interaction with Woodbury that a complaint was actually filed.

don't agree, don't sign it." AR 4391-4392 (TR 381:19-382:23). Dean assumed the complaint was about Footer and e-mailed the information to Barnett. AR 4392-4393 (TR 382:24-383:4); AR 675 (Barnett Dec., ¶ 3). Barnett later responded that SEEC received a complaint and would look into it. AR 899-901 (Exh. 2); AR 908 (Exh. 5, p. 1). He did not identify the complainant. AR 4399 (TR 385:6-9). Barnett is prohibited by ordinance from releasing a complainant's names. AR 675 (Barnett Dec., ¶ 4).

**H. The Parties' Initial Assumption That SFD Was Required to Downgrade the Junior Deputy Chief Was Erroneous**

The decision to abrogate a Deputy Chief position carried with it the difficult task of determining which Deputy Chief to downgrade to Battalion Chief. Initially, Dean believed the decision must be made according to time-in-rank and that the Deputy Chief with the least service time at that rank would be downgraded. AR 4405 (TR 391:14-17). HR Director Linda Czeisler told Dean he was required to follow the rules for the Public Safety Civil Service Commission which to Dean meant "that the last person promoted would be the first one out." AR 4406 (TR 392:7-15). Dean told the junior Deputy Chief, Michael Walsh, that if service time was the criteria, he would be the Deputy Chief who would be downgraded. AR 4407-4408 (TR 393:12-394:3). Eventually, either Czeisler or Assistant Human Resource Director Travis Taylor told Dean that civil service rules did not

apply and SFD could consider any Deputy Chief for downgrade. AR 4408 (TR 394:6-12). SMC section 4.08.060(B)(1) gives the Fire Chief that discretion. AR 910 (Exh. 6).

City Labor Relations Director David Bracilano testified that he discussed with Dean the methodology to use in selecting a Deputy Chief for downgrade. He advised Dean not to treat the downgrade as a disciplinary process because he might have to show just cause for a disciplinary downgrade. Bracilano testified that Dean advised him that he would agree to follow any process to pick the Deputy Chief for downgrade as long as it was fair. AR 705 (Bracilano Dec., ¶ 3). Bracilano then met with Local 2898 on November 18, 2008. Local 2898 advised Bracilano that SFD might find a Deputy Chief to volunteer to accept a downgrade. Bracilano passed this suggestion on to Dean. AR 704-705 (Bracilano Dec., ¶ 2).

Woodbury shared Dean's initial belief as to time-in-rank as the basis for the downgrade. In his answers to questions posed by investigators who investigated his whistleblower retaliation complaint, Woodbury stated: "The demotion of the least senior Deputy Chief (Chief Mike E. Walsh) was generally accepted and understood by the other Deputy Chiefs, including myself. That is the process used by most other work units in the City." AR 888 (Exh. 1, p. 4). It turned out that Woodbury, like Dean, was mistaken and that the downgrade did not have to be made based on seniority.

In November 2008, around the time of his conversation with Bracilano, Dean learned for certain that he did not have to follow time-in-rank and select the junior Deputy Chief for downgrade. AR 4593 (TR 579:10-25). Once his discretion was clarified, Dean looked to the Assistant Chiefs to meet and recommend a Deputy Chief for downgrade. Dean did not simply downgrade junior Deputy Chief Mike Walsh because the Assistant Chiefs felt that it was important that the Department look at all options, including the “Mike Walsh option.” AR 4594 (TR 580:21-581:1). It was important to Dean to include his Assistant Chiefs in the process so as to reach a consensus that was acceptable to all. AR 4595 (TR 581:2-10).

**I. Fire Chief Dean Tasked the Assistant Chiefs with the Responsibility of Recommending a Deputy Chief for Downgrade**

**1. Efforts to find a volunteer were unsuccessful.**

Dean met with the Assistant Chiefs to task them with the responsibility for recommending a Deputy Chief for downgrade. AR 4413 (TR 399:1-6). The deputies worked for the Assistant Chiefs. Each reported directly to an Assistant Chief. Downgrade had the potential to impact significantly on a Deputy Chief’s career. AR 4412 (TR 400:8-17).

The first meeting of Assistant Chiefs occurred in mid-November. AR 4705 (TR 691:19-24). Vickery did not attend. AR 4327 (TR 312:25-313:3). Subsequently, a decision was made to seek a volunteer to accept

the downgrade. Local 2898 President Verlinda contacted SFD Labor Relations Negotiator, Julie McCarty, to suggest SFD solicit a volunteer for downgrade. As Bracilano had done, McCarty passed on Local 2898's suggestion to Dean by email dated November 24, 2008. AR 1022 (Exh. 32). On November 25, 2008, Dean sent a letter addressed to all Deputy Chiefs seeking a volunteer for downgrade. AR 916 (Exh. 9). No Deputy Chief responded. AR 4410 (TR 396:17-18). A volunteer would have avoided having to make a difficult and time consuming decision.

Then Assistant Chief Hepburn (now Deputy Chief) testified:

Between the second and third meeting we knew that the fire chief was going to ask for volunteers from the Deputy Chiefs rank to see if someone would voluntarily take a reduction in rank. At the start of the third meeting was the end of that period to put your name in for the voluntary reduction. And no one had put their name in.

So, again, we started the meeting with the proposal that since the Chief of Special Operations was the position to be abrogated and Chief Woodbury was to rotate into that position, that it should be Chief Woodbury who takes the reduction in rank.

AR 4711 (TR 697:12-23). Dean's memorandum set December 5, 2008, as the last day for a Deputy Chief to volunteer. AR 916 (Exh. 9). The third meeting was set to occur after that date. AR 4415 (TR 401:7-19).

Dean had a reasonable basis for thinking a Deputy Chief might volunteer for downgrade. Sometime between 2001 and 2003, then Assistant

Chief James Fosse had volunteered to downgrade to Deputy Chief when one of the Assistant Chief positions was eliminated. AR 764 (Dean Dec., 7:20-23). When no Deputy Chief responded to Dean's letter, the Assistant Chiefs moved forward to deliberate and come up with the name of a Deputy Chief to recommend for downgrade.

**2. Time-in-rank was considered but rejected due to Walsh's qualifications.**

Time as a Deputy Chief was one of the factors considered by the Assistant Chiefs as a basis for selecting a Deputy Chief for downgrade. However, use of that factor would have required Walsh to be downgraded. For at least three of the Assistant Chiefs that was an undesirable result. AR 4618-4620 (TR 604:21-605:10, 606:15-607:9 (Tipler testimony)); AR 4688-4689, TR 674:25-675:21 (Nelsen testimony); AR 4709-4710 (TR 695:6-696:2 (Hepburn testimony)). The Assistant Chiefs were reluctant to downgrade a 36-year Deputy Chief with Walsh's exemplary performance and unique experience.

**J. The Assistant Chiefs Chose Woodbury**

In the third meeting the Assistant Chiefs reached agreement that they would recommend that Woodbury be downgraded. For three of the four chiefs, the reason was simply that Woodbury was scheduled to rotate into the position that was being abrogated. For the remaining chief, the

reason for selecting Woodbury was the large number of complaints other employees had made about Woodbury's treatment of them.

Assistant Chiefs Hepburn, Nelsen and Vickery had no issues with Woodbury's performance. Nor did they have any significant issues with any of the other Deputy Chiefs that might provide a basis for selecting that chief. By the third meeting, they had exhausted options and had to make a decision. Either Hepburn or Vickery suggested downgrading the person who was slated to move into the abrogated position. After considerable discussion, Nelsen reluctantly agreed to use elimination of the Special Operations position as the basis for the recommendation. Tipler agreed with the result but for a different reason. Tipler based his decision on complaints about Woodbury from other employees in the FMO and members of the public. The specifics of each Assistant Chief's testimony are discussed below with citations to the record.

### **1. Hepburn**

Then Assistant Chief Hepburn described the decision as one of the most difficult he has had to make. He had a high opinion of all the Deputy Chiefs. The pros and cons of each Deputy Chief were discussed at the meetings. It was his idea to select the Deputy Chief scheduled to rotate into the abrogated position. AR 4710 (TR 696:3-15). Vickery quickly agreed. AR 4710 (TR 696:16-19). Tipler and Nelsen did not agree initially. AR 4710 (TR

696:20-697:11). Ultimately Nelsen was persuaded to use that method to select a Deputy Chief to recommend to Dean for reduction in rank. AR 4711 (TR 697:12-698:6).

Dean attended all three meetings. His role was that of a facilitator. AR 4708 (TR 694:21-25). Dean did comment on Woodbury in the first meeting. AR 4708 (TR 694:1-16). However, neither Dean's comments nor his presence influenced Hepburn's decision to recommend the chief scheduled to rotate into the Special Operations position be downgraded. Dean did not signal to Hepburn that he wanted to downgrade Woodbury or any other particular Deputy Chief. AR 4713 (TR 699:9-19).

## **2. Vickery**

Assistant Chief Vickery missed the first meeting but attended the next two. Like Hepburn, he suggested the Deputy Chief scheduled to rotate into the abrogated position be the Deputy Chief recommended for downgrade. A decision had to be made and since all the Deputy Chiefs were equal in performance, Vickery's recommendation was "...that the individual that would be moving into that special operations position would be the one that naturally would be reduced in rank." AR 4328 (TR 314:4-23). The other chiefs concurred with Vickery's recommendation. AR 4329 (TR 315:7-9).

Dean was present during the meetings Vickery attended; Dean's role was that of a facilitator. AR 4326-4328 (TR 312:14-314:3); AR 4330 (TR

316:13-18). Dean accepted the recommendation of the Assistant Chiefs. AR 4330-4331 (TR 316:19-317:10).

### **3. Nelsen**

Assistant Chief Nelsen began the process of selecting a Deputy Chief to recommend to Dean for downgrade with the strong belief that Deputy Chief Oleson was neither productive nor effective and for that reason should be the one downgraded. AR 4687 (TR 673:8-18). He maintained this position for much of the three meetings. AR 4687 (TR 673:19-21). However, the other Assistant Chiefs did not agree. Hepburn was Oleson's current supervisor and did not have productivity or performance issues with Oleson. The other Assistant Chiefs cautioned Nelsen that he should not make a decision based on working with Oleson almost a decade previous. AR 4687 (TR 673:22-674:3). Ultimately Nelsen acquiesced and agreed with the proposal to downgrade the Deputy Chief scheduled to rotate into the eliminated position who essentially would "...be the one left without a chair." AR 4687-4688 (TR 676:23-677:20). Nelsen was close to Woodbury and considered him as much a friend as a "direct report" when they both worked in the FMO. AR 4683 (TR 669:1-10).

Dean was present and did relate to the group a negative experience with Woodbury when Woodbury was acting Fire Marshal. AR 4689-4690

(TR 675:22-676:10). Dean's presence did not influence Nelsen's decision. AR 4688-4689 (TR 677:21-678:10).

#### **4. Tipler**

Assistant Chief Tipler was the Fire Marshal in 2008-2009 before he retired. Tipler functioned as Woodbury's direct supervisor at the time the decision to downgrade was made. Each Deputy Chief functioned at a very high level. The group discussed the pros and cons of each Deputy Chief. Deputy Chiefs Susan Rosenthal, Oleson, Walsh and perhaps Lomax were eliminated from consideration right from the start. At the second meeting, the Assistant Chiefs had been able to eliminate three to four Deputy Chiefs from consideration for downgrade and discuss the pros and cons of the remaining Deputy Chiefs. AR 4826 (TR 612:17-24).

Tipler recalled that Vickery had advocated for Woodbury's reduction from the outset.<sup>10</sup> Tipler, as well as Nelsen, resisted reducing Woodbury. After the second meeting, Vickery contacted Tipler to suggest that Woodbury be transferred to the position of Deputy Chief for Sound Transit. Tipler declined because he believed that the incumbent, English, was doing a good job and he was "concerned that maybe Woodbury would

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<sup>10</sup> This would be presumably at the second meeting since Vickery did not attend the first meeting.

be a little too heavy-handed in that position, so I told him no.” AR 4628-4630 (TR 614:7-616:20).

Initially, Tipler resisted downgrading Woodbury because Woodbury was good at getting the job done. AR 4631 (TR 617:12-16). Eventually, Tipler concluded that Woodbury should be recommended for downgrade because of excessive employee complaints directed at Woodbury and because of earlier concerns expressed by Dean in 2007 and 2008, before the meetings to recommend a Deputy Chief for downgrade. AR 4631-4632 (TR 617:17-618:7). Tipler testified that Woodbury was abrasive and had generated at least five complaints from other employees in the FMO. AR 4636-4638 (TR 622:12-624:12). Tipler also observed Woodbury being “unnecessarily harsh and rude to one of our customers.” AR 4638-4639 (TR 624:13-15, 625:7-19). The primary reason that Tipler agreed to recommend Woodbury was his “people skills” related to the handling of employees and customers. AR 4639 (TR 625:20-22).

In addition, during 2007 and 2008, Tipler recalled that Dean had complained to Tipler about Woodbury allowing a fire engine to be used in either the Gay Pride parade or the Torchlight parade in 2007 or 2008.<sup>11</sup> Dean

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<sup>11</sup> A Google search shows that the Gay Pride parade occurred in June of both years and the Torchlight parade, a Seafair event, in late July. Two newspaper articles regarding the Gay Pride parade are attached in the Appendix.

also had been critical of Woodbury to Tipler about Woodbury's failure to enforce occupancy limits at the Neumos nightclub on an aggregate basis rather than for each floor as Woodbury had been instructed by Dean when Tipler was away. AR 4632-4635 (TR 618:8-621:18). Tipler does not recall the month of the conversation with Dean about Woodbury's failure to follow Dean's directions but is sure that Dean's criticism was made prior to the three meetings held to determine which Deputy Chief would be reduced in rank. AR 4635 (TR 621:17-24).<sup>12</sup>

Dean was present but did not advocate for the downgrade of any particular Deputy Chief. Dean's presence did not influence Tipler's decision to recommend Woodbury. AR 4625-4626 (TR 611:17-612:14).

Tipler recalled that at some point during the time the Assistant Chiefs were discussing the downgrade issues, he attended a meeting in which Dean mentioned the SEEC complaint but discouraged the persons at the meeting from discussing it. AR 4642 (TR 628:16-25); AR 4647 (TR 633:2-11). Tipler believed that Dean's mention of the complaint occurred during a regular staff meeting. AR 4646 (TR 632:13-21). Either during or after the meetings to

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<sup>12</sup> Greene informed Dean that Woodbury had not followed Dean's direction with respect to crowd limits at Neumos and Greene even attempted to write up Woodbury for formal counseling as a result. AR 793-794 (Greene Dec., ¶ 7). Exhibit 29 reflects Dean's notes of his conversation with Greene about the Neumos incident. AR 1018 (Exh. 29); AR 4423-4426 (TR 409:20-412:4).

select a Deputy Chief for reduction, Tipler became aware that a whistleblower complaint had been filed. AR 4644-4645 (TR 630:23-631:22). Tipler assumed that the complainant was Hansen because she had threatened to file a complaint out of frustration over SFD's handling of Footer. AR 4643-4644, TR 629:19-630:12. Tipler was aware of the complaint before he learned who filed it. AR 4645, TR 631:4-22.

Tipler knew the substance of the complaint "...was that there was some sort of impropriety going on at the FMO as it related to the Special Events section. Tipler answered: "No, sir, it did not" when the ALJ asked him if his knowledge of the complaint had any bearing on his personal decision regarding a recommendation for reduction in rank during the three meetings. AR 4647 (TR 633:19-23). Nor did Tipler have any evidence that that information, if it was known to the other Assistant Chiefs, influenced their decision as to whom to recommend. AR 4647-4648 (TR 633:24-634:3).<sup>13</sup>

**K. The Assistant Chiefs Were Not Aware of Woodbury's Complaint at the Time They Recommended Him for Downgrade**

The Assistant Chiefs were not aware of Woodbury's complaint

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<sup>13</sup> The Assistant Chiefs' accounts of the 2008 meetings differed significantly. This is not evidence of dishonesty but rather is likely due to the passage of time, and in Tipler's case, the fact that he retired in March 2009. AR 4616 (TR 602:23-24). Different people remember different facts. Woodbury cannot accuse the City of scripting its witnesses.

during the period of the meetings. During the deliberations, no reference was made to issues in the FMO, to Footer, or to a possible complaint being filed with the SEEC by anyone.

Hepburn heard that a complaint had been filed in the same period as the three meetings. However, he did not learn the complainant was Woodbury until early 2009 after the decision was made. AR 4714-4715 (TR 700:17-24, 701:13-16). His knowledge that a complaint was filed had nothing to do with his decision to recommend Woodbury for reduction. AR 4714-4715 (TR 700:25-701:4). By the time Hepburn learned Woodbury was the complainant, Dean had already accepted the recommendation of the Assistant Chiefs to reduce Woodbury in rank. AR 4716 (TR 702:8-13).

Vickery testified that at the time of the three meetings to select a Deputy Chief for downgrade, he did not know that Woodbury had expressed concerns about Footer or that Woodbury had filed a complaint with the SEEC. AR 4329 (TR 315:17-25). There was no discussion in any of the three meetings about Footer or about any ethics complaint that was filed or being contemplated to be filed. AR 4330 (TR 316:4-12).

Nelsen testified that there was no discussion in the three meetings about a complaint being filed with the SEEC or about Lt. Footer. AR 4692 (TR 678:11-16). At some point Nelsen did learn that a complaint about

Footer had been filed with the SEEC but he does not recall when. AR 4692-4693 (TR 678:24-679:10).

In addition to his testimony above (p. 17, *supra*), Tipler testified that he was not aware that Woodbury had filed a complaint with the SEEC. AR 4642 (TR 628:12-15). Tipler is “pretty sure” that he did not become aware of the whistleblower complaint until after the three meetings. AR 4643-4644 (TR 629:13-630:1).

**L. Dean Was Not Aware That Woodbury Was a Whistleblower Complainant When He Asked the Assistant Chiefs to Recommend a Deputy Chief for Downgrade or When He Accepted Their Recommendation**

When Dean realized that he was not restricted by civil service rules or the bargaining agreement in deciding which Deputy Chief to reduce in rank, he met with the Assistant Chiefs and directed them to agree on a recommendation. The initial meeting occurred in mid-November. At that time, Dean knew from Greene that Woodbury was contemplating a complaint and from Barnett at SEEC that a complaint of some sort had been filed. AR 4396 (TR 382:11-14); AR 4398 (TR 384:7-9); AR 908 (Exh. 5, p. 1). Santos told Dean in December 2008 that SEEC was asking some questions about billing. AR 4591 (TR 577:4-9). Dean was not told and did not know the nature of the complaint or the identity of the complainant until January 2009. AR 4398-4399 (TR 384:25-385:11). Consequently, Dean

was not aware of Woodbury's whistleblower status when he met with Woodbury on December 11, 2008, to inform Woodbury that he was being downgraded. AR 922 (Exh. 13, p. 2).<sup>14</sup> Woodbury was not surprised. He had predicted his downgrade the previous day. AR 1024 (Exh. 34).

**M. Dean Returns Woodbury to Deputy Chief in August 2009**

A vacancy in a Deputy Chief's position occurred a few months after the downgrade, Dean offered the open position to Woodbury and Woodbury accepted. AR 1048 (Ex. 38); AR 1049 (Exh. 39). Dean's offer letter assured Woodbury that he could accept the offer without prejudicing his lawsuit. AR 1048 (Exh 38). The vacancy was in the Deputy Chief of Training position.<sup>15</sup>

**N. The Order of the Administrative Law Judge**

Following a five-day hearing on the merits of the complaint, the ALJ entered his Findings of Fact, Conclusions of Law & Final Order holding that Woodbury had failed to meet his burden of proof that the City had retaliated against him in his reduction in force or in any other way. The ALJ set out 94 findings of fact over 33 pages of the Order. AR 573-606 (Order, ¶¶ 4.1-4.94,

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<sup>14</sup> Dean gave inconsistent testimony in cross-examination when he answered yes to a question that as of November 2008 Woodbury was the only deputy chief that Dean heard had filed a SEEC complaint. AR 4458 (TR 444:15-18). Dean's prompt request to clarify his answer was denied and his answer was not clarified on redirect examination. The totality of Dean's testimony and the record demonstrates that the conversation with Greene and the email from Barnett were the only information received by Dean about a possible SEEC complaint.

<sup>15</sup> Woodbury's losses for the eight-month period of his downgrade amount to a little more than \$12,000. AR 1050 (Exh. 40).

pp. 8-42). Those findings meticulously discuss the evidence and conclusions upon which the ALJ based his decision to reject the complaint.

The ALJ articulated the test for proving retaliation as follows: (1) Woodbury engaged in protected activity; (2) an adverse action was taken against him and (3) retaliation was a substantial factor in the adverse employment action. AR 609 (Order, ¶ 5.9). Woodbury satisfied elements (1) and (2). He reported improper governmental action by Footer and shortly thereafter, he was involuntarily reduced in rank, an adverse action. AR 607-608 (Order, ¶¶ 5.3, 5.6).

Woodbury lost his claim because he failed to prove that his protected activity was a substantial factor in his downgrade or in any other way. Retaliation cannot occur unless the decision makers are aware of the protected actions and the identity of the complainant. The ALJ concluded that the Assistant Chiefs were unaware that Woodbury had filed a complaint when they made their recommendation. The ALJ found that the series of decisions that resulted in Woodbury's downgrade, including the budgetary decisions made before Woodbury complained, were legitimate and not motivated by Woodbury's SEEC complaint.

First, the decision to eliminate one deputy chief position from SFD's budget was mandated by the Mayor's Office. While initially the Mayor's Office requested SFD abrogate an Assistant Chief position, the Mayor

accepted SFD's counterproposal to eliminate a deputy chief and a lieutenant position. The ALJ stated:

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.

AR 588 (Order, ¶ 4.43).

Second, SFD had to decide which Deputy Chief position to abrogate. Dean met with his leadership team and asked the Assistant Chiefs to confer among themselves and recommend a Deputy Chief position to eliminate. They recommended abrogation of the Special Operations Deputy Chief position. The ALJ found that:

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)

AR 588 (Order, ¶ 4.45); *see also*, AR 597 (Order, ¶ 4.70).

At the time the Assistant Chiefs decided to recommend the Special Operations Deputy Chief for abrogation, they were aware Woodbury was

scheduled to rotate into that position. In July 2008, Woodbury had been notified of his rotation from the FMO to Special Operations pursuant to the collective bargaining agreement. AR 586-587 (Order, ¶¶ 4.37-4.38); AR 596 (Order, ¶ 4.68).

With respect to both the decision to rotate Woodbury to the Special Operations Deputy Chief and the decision later to abrogate that position, the ALJ found neither decision could have been retaliatory. In addition to his findings that the decisions were ordinary business activities, the ALJ reasoned "...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." AR 596 (Order, ¶ 4.68). He also concluded "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". AR 597 (Order, ¶ 4.70).

Third, and most significantly, Woodbury contended that the final event – the selection of him rather than another Deputy Chief for downgrade – was motivated by his whistleblower complaint. Woodbury contended that his reduction in rank was motivated by his reporting Footer's misbehavior to the SEEC, which allegedly upset Dean who desired to "keep those

circumstances quiet.” Claimant accused Dean “...of ‘plotting’ against Claimant and indirectly forcing the Assistant Chiefs to go along with the plot because Chief Dean had them ‘under his thumb.’” AR 598 (Order, ¶ 4.72).

The ALJ explained why the evidence did not support those allegations:

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 retaliation 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.

AR 598 (Order, ¶ 4.74).<sup>16</sup>

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

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<sup>16</sup> Three of the Assistant Chiefs (Hepburn, Nelsen and Vickery) decided to recommend the Deputy Chief scheduled to rotate into the abrogated position for reduction. The fourth Chief (Tipler) decided to recommend Woodbury for reduction because of his “gruff and often rude personality.” AR 592 (Order, ¶ 4.53).

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.

AR 599 (Order, ¶ 4.75).<sup>17</sup>

Running throughout the Order's analysis of the testimony of Dean and the four Assistant Chiefs as to how Woodbury was selected for reduction is the ALJ's conclusions as to the credibility of these critical witnesses.<sup>18</sup> The initial finding of fact explains how the ALJ evaluated the credibility of these witnesses.

4.1 At the 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, declaration and the testimony of other witnesses. As to

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<sup>17</sup> The ALJ had previously found that none of the conversations or deliberations included any comments about Woodbury's SEEC complaint. "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)." AR 591 (Order, ¶ 4.51).

<sup>18</sup> Other than Woodbury, these were the only witnesses who testified in person at the hearing due to their involvement in the process that led to Woodbury's downgrade. Tipler testified by telephone because he was in Hawaii that day. Other witnesses testified by declaration and by deposition.

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.

4.3 After careful consideration of the testimony of 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, 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.

AR 573, 574 (Order, ¶ 4.1; ¶ 4.3 [footnote omitted]).

The ALJ evaluated the evidence and the credibility of witnesses. In finding the witnesses credible, he rejected Woodbury's contention that City witnesses were dishonest. The ALJ noted that Woodbury was selected for downgrade "shortly after" his report of improper government action. AR 608 (Order, ¶ 5.6). Any inference of retaliation from proximity in time was rebutted by the testimony of the Assistant Chiefs and Dean as to how Woodbury was selected for downgrade and their ignorance of Woodbury's whistleblower status. The ALJ properly concluded that Woodbury's

protected activity had no bearing on his downgrade.

**O. The Superior Court Affirmed**

The Superior Court issued a five page “Order on Judicial Review” affirming the decision of the ALJ. CP 612. The Court found that factual findings of the ALJ had “substantial evidentiary support in the record.” The ALJ held that the decision to select Woodbury for downgrade “...was taken for non-discriminatory, non-retaliatory reasons and that, regardless of what the Chief may have personally known or felt at the time, no impermissible motive served as a substantial factor.” CP 616.

**IV. ARGUMENT**

**A. The Court’s Scope of Review Is Narrow**

Under the APA, the court may reverse an administrative decision only if: (1) the administrative decision was based on an error of law, (2) the decision was not based on substantial evidence when viewed in the light of the record as a whole, or (3) the decision was arbitrary or capricious. *Forfeiture of Chevrolet Chevelle*, 140 Wn. App, 802, 819 (2007), *rev’d on other grounds*, 166 Wn.2d 834 (2009). The substantial evidence standard is highly deferential to the agency fact finder. *Alpha Kappa Lambda Fraternity v. Washington State University*, 152 Wn. App. 401, 421-422 (2009). An administrative agency’s findings of fact are reviewed for “substantial evidence,” which is a sufficient quantity of evidence to

persuade a fair-minded person of the truth or correctness of the order. *Tafoya v. State Human Rights Com'n*, 177 Wn. App. 216, 228 (2013). Where there is room for two opinions, an agency action taken after due consideration is not arbitrary or capricious even though a reviewing court may believe it to be erroneous. *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 566 (2013). "...[A] trial court is not required to make findings of fact on all matters about which there is evidence in the record; only those which establish the existence or nonexistence of determinative factual matters need be made." *Id.* at 219, citing *Maehern v. City of Seattle*, 92 Wn.2d 480, 486 (1979) ("When findings of fact are challenged, our consideration is limited to whether there is sufficient evidence to support them.").

**B. The Order's Resolution of the Critical Determinative Issue Is Well Reasoned and Supported by Substantial Evidence**

The Order focuses on the determinative factual issue – the decision of the Assistant Chiefs to recommend Woodbury for reduction in rank. The Assistant Chiefs met three times to discuss whom to recommend. They chose Woodbury. For three of the Assistant Chiefs, the decisive factor was Woodbury's forthcoming rotation into the position that was scheduled for abrogation. For the fourth Assistant Chief, the critical fact was his perception that Woodbury did not get along well with employees who complained about

his supervision. Woodbury was unable to produce evidence that these reasons were a pretext for retaliation. No Assistant Chief was aware that Woodbury had filed a complaint; all testified that Dean's references to Woodbury (and others) did not influence their decision. Since Dean accepted their recommendation, it follows that the final decision, like the recommendation, was not influenced by animus.

**C. The Record Supports the Order's Conclusion that the Decisionmakers Did Not Exercise Animus Toward Woodbury**

Woodbury contended that his relationship with Dean deteriorated when Woodbury began to express his displeasure with Dean's handling of Footer. In 2009, in the investigation of his complaint, Woodbury claimed that his relationship with Dean in 2008 "...is the poorest of any working relationship I have had in my entire career." AR 892. However, Woodbury testified that he had only two face to face meetings with Dean in 2008 besides the meeting in which Dean informed him of his downgrade. Neither meeting supports his assertion.

The first meeting in 2008 was held to discuss Footer. Dean and Woodbury agreed that Footer should not be disciplined until the investigation of Footer's conduct was completed. The tone of the meeting was good and the working relationship "okay." CP 143 (151:22-152:12). A second meeting with Dean referenced Woodbury's desire to be mentored

by Dean. CP 143 (152:23-153:6; 155:1-5). The third meeting was Dean's notice to Woodbury that he had been selected for downgrade. These meetings do not provide a basis for Woodbury's claim of animus. AR 600 (Order, ¶ 4.77).

Woodbury's answers to questions in the investigation about his relationship with the Assistant Chiefs also demonstrate that he has no basis for a claim of animus. AR 893. Later, after suit was filed, Woodbury attempted (post-hoc) to re-label them as retaliators, along with Dean and others. CP 143 (102:17-109:11). The Order's conclusion that Woodbury did not provide evidence of discriminatory animus is supported by substantial evidence. AR 573-574 (Order, ¶ 4.1-4.3).

**D. The Order Explains Why the ALJ Concluded the Presumption of Retaliation Was Rebutted**

Woodbury argues that the Order fails to properly acknowledge the proximity in time between the protected activity and the adverse action. Brief at 35. Woodbury relies on *Kahn v. Salerno*, 90 Wn. App. 110, 130-131 (1998), and *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 69 (1991), both cited by the ALJ in his statement of the elements of retaliation. AR 609 (Order, ¶ 5.9). A presumption of retaliation can be rebutted by evidence of a legitimate non-retaliatory justification for the action in question. *Id.* Ultimately, this case, as with most allegations of disparate treatment in

employment based on circumstantial evidence, turns on whether the plaintiff (claimant) can show that the employer's reasons are a pretext for discrimination or other wrongdoing. Woodbury failed to meet his burden on the issue of pretext because he failed to show that the proffered bases for the challenged decision were anything other than genuine.

Regardless of whether the Order could have acknowledged in more detail the proximity between the filing of the complaint and the adverse action, the Order thoroughly explains how the ALJ reached the conclusion that Woodbury did not meet his burden on the ultimate question of pretext. Once all the evidence is in the record, the burden shifting scheme "drops from the case." The focus of the factfinder is on the ultimate issue of discrimination." *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 524 (1992), *aff'd*, 123 Wn.2d 93 (1994). The ALJ properly focused on the ultimate issue here.

Citing *Scrivener v. Clark Hospital*, 181 Wn.2d 439 (2014), Woodbury argues that the Order misapplies the law. Opening Brief, pp. 31. *Scrivener* reversed a summary judgment ruling in favor of the defendant because plaintiff had presented material factual issues that could not be resolved without a trial. The holding is inapposite. Woodbury received a full hearing on the merits of his claims. Woodbury lost because he failed to provide sufficient evidence to persuade the fact finder that his protected

activity was a substantial factor in his downgrade. Further, even though *Scrivener* was decided after the Order was issued, the Order properly sets forth the applicable burden of proof as set forth in *Scrivener* and finds that Woodbury did not satisfy it. AR 609-6.10 (Order, ¶¶ 5.9-5.11).

Whether Dean knew or suspected that Woodbury had filed a whistleblower complaint in December 2008 is not determinative. First, knowledge does not establish causation. Second, the Assistant Chiefs were not on notice that Woodbury had filed a complaint when they met to make their recommendation. They testified that they were unaware of the complaint and that nothing Dean said or did influenced their decision to recommend Woodbury. AR 591 (Order, ¶ 4.51). The Order credits this testimony. AR 598-599 (Order, ¶¶ 4.74-4.75). The ALJ did not need to decide what Dean knew or suspected about the complaint. It was sufficient for the Order to determine that the recommendation, and Dean's acceptance of the recommendation, was based on legitimate business reasons and was not motivated by retaliatory animus. The ALJ's reasoning is clear, neither arbitrary nor capricious, and should be affirmed.

**E. The Order did Not Need to Address Dean's Meeting with Bracilano**

Woodbury claims that the ALJ's omission of any discussion of the probative value of the meeting between Dean and City Labor Relations

Director David Bracilano renders the Order arbitrary and capricious for failure to address a material issue of fact. Opening Brief at 33-34. Woodbury exaggerates the import of the conversation and fails to explain how it impacted the process through which the Assistant Chiefs decided to recommend him for downgrade. Dean met with Bracilano prior to directing the Assistant Chiefs to recommend a candidate for downgrade. At that time, Dean was looking for a method to use to determine which Deputy Chief to downgrade.

Bracilano advised Dean not to treat the downgrade as a disciplinary process because, if challenged, Dean might have to show just cause. He told Dean that he could not use his concerns about Woodbury as a basis for selecting him for downgrade. Dean told Bracilano that he would agree to follow any process to pick the Deputy Chief to be downgraded as long as it was fair. Bracilano then met with the Fire Chiefs Union who suggested that Dean seek a volunteer to accept the reduction in rank. Dean issued a memorandum asking for volunteers. No Deputy Chief volunteered. Dean's willingness to accept a volunteer shows that he was not interested in singling out Woodbury. Once it was clear that job performance could not be a basis and no Deputy Chief was going to seek a voluntary downgrade, Dean asked the Assistant Chiefs to make a recommendation.

The WAPA requires "adequacy, not eloquence." The statute does not "...require that findings and conclusions contain an extensive analysis."

*Nationscapital Mortgage Corp. v. State Department of Financial Institutions*, 133 Wn. App. 723, 751-752 (2006). The Order’s focus is on the three meetings between the Fire Chief and the Assistant Chiefs that resulted in Woodbury’s selection for downgrade. The Order gives the Court sufficient information to allow the Court to conduct a “meaningful review” to determine if the findings meet the substantial evidence standard. *In Re LaBelle*, 107 Wn.2d 196, 218 (1986). It was not necessary for the ALJ to make findings about the significance of Dean’s references to Woodbury in his conversation with Bracilano since it had no bearing on the Assistant Chiefs’ deliberations that led to the selection of Woodbury.

**F. The Involvement of the Assistant Chiefs Was Neither a “Sham” Nor a Pretext for Retaliation**

Woodbury attacks the role of the Assistant Chiefs in selecting Woodbury for downgrade, claiming that the meetings were a “sham and a pretext for retaliation.” Brief at 43. A sham is defined as “something false that is purported to be genuine, deceitfulness, empty pretense, one who assumes a false character, an impostor.” *The American Heritage College Dictionary* 1252, *Houghton Mifflin Co.* (3<sup>rd</sup> ed., 1997). Woodbury claims that the Assistant Chiefs were “under Chief Dean’s thumb and would do whatever he suggested....” Brief at 43-44. The Assistant Chiefs testified that they reached their decision free from any influence by Dean. The ALJ observed

the Assistant Chiefs and questioned them. AR 4622-4624, 4644-4648 (Tipler); AR 4684-4685 (Nelsen); AR 4715-4716, 4733-4734 (Hepburn). He found them to be credible. AR 573-574 (Order, ¶¶ 4.1-4.3).

Determinations of credibility are the sole province of the ALJ. *Raven v. Dept. of Social & Health Services*, 167 Wn. App. 446, 461 (2012), *rev'd on other grounds*, 177 Wn.2d 804 (2013). Any inconsistencies in the testimony were due to a number of factors having nothing to do with dishonesty. AR 573-574 (Order, ¶¶ 4.1, 4.3). Certainly, the suggestion that the Assistant Chiefs feared for their jobs if they did not abide by Dean's wishes and select Woodbury is pure conjecture, unsupported by the record. Brief at 44.

As the Superior Court noted, the ALJ rejected Woodbury's contention that Dean lied:

Expressly stated was a rejection of the Petitioner's Contention that the testimony of SFD Chief Gregory Dean Was marked by 'mendacity' and 'untruthfulness.' The ALJ's finding in favor of the Chief's credibility would presumably include the following testimony:

Q: Was your decision to accept [the Assistant Chiefs'] recommendation to downgrade Chief Woodbury based on anything you had heard about Chief Woodbury being unhappy with the way the department was handling the situation with Milt Footer?

A: No.

Q: Was it based in any way on the information you received from Chris Greene that Chief Woodbury

was quote/unquote ‘pressuring him to sign a complaint?

A: No.

AR 615 (Superior Court Order at 4).

Woodbury cannot challenge the order based on the argument that the ALJ should have drawn different inferences from the evidence as to the credibility of witnesses. As the Superior Court noted, it was “commendable” that the ALJ described in detail “...just how he approached and resolved issues of witness credibility.” AR 611-612 (Superior Court Order at 3-4). The ALJ’s conclusions that Dean did not exert undue influence over the process, rejecting Woodbury’s contention that the Assistant Chiefs were “under his thumb,” must be accepted. The ruling was neither arbitrary nor capricious.

It was Dean’s practice to utilize the Assistant Chiefs to assist him in making decisions that would affect their supervision of the Deputy Chiefs. Dean had previously relied on the Assistant Chiefs to assist him in deciding which Deputy Chief position to abrogate. As the ultimate decision maker, it was Dean’s prerogative to make the decision as to whom to downgrade in any reasonable and legal manner. Initially the Assistant Chiefs delayed their decision in order to allow for the possibility that a Deputy Chief might volunteer for downgrade. When no one volunteered, they were forced to

meet and agree on a recommendation. They chose Woodbury. Woodbury's characterization of this process as a "sham" is baseless.

Woodbury contends that Dean "mendaciously" denied that he criticized Woodbury's performance at the meetings with the Assistant Chiefs. Brief at 45. He points to alleged inconsistencies between Dean's deposition testimony in 2010 and his hearing testimony in 2014. The difference is modest. In 2010 Dean testified that he did not talk about Woodbury's performance issues at the meetings. In 2014 Dean stated that he did not recall discussing performance at the meetings. Whether Dean mentioned Woodbury at the 2008 meetings is not important. The ALJ credited the testimony of the Assistant Chiefs who stated that references to Deputy Chiefs by name, if any, did not influence their decision. Even if Dean changed his testimony, the testimony of the Assistant Chiefs and the ALJ's conclusions as to their credibility, remains.

Woodbury also criticizes Dean because he failed to mention Bracilano's admonition that the downgrade should not be based on unsatisfactory performance to the Assistant Chiefs. Brief at 45. Dean stated that it did not occur to him to do so. AR 4560-61. Mentioning his conversation with Bracilano regarding Olsen and Woodbury could have risked influencing the process, however. Because Dean did not mention the conversation, the Assistant Chiefs were ignorant as to prior concerns Dean

might have had about Woodbury's performance that prompted his conversation with Bracilano. The Bracilano conversation did not taint the selection process. The reasoning of the Order is supported by substantial evidence and should be affirmed.

## **V. CONCLUSION**

It was the ALJ's obligation to issue an order with findings specific enough to permit meaningful review. The ALJ was not required to make findings on every factual dispute but only on issues that allow the appeals court to determine the basis for the decision in favor of the City and whether the decision is supported by substantial evidence. The Order includes findings on all of Woodbury's many issues. AR 593-594 (Order, ¶¶ 4.57-4.59), AR 596-606 (Order, ¶¶ 4.68-4.94). Woodbury has appealed only his failure to prove that protected activity was a substantial factor in his downgrade. The role of the Court of Appeals is to determine if there is substantial evidence to support the Order's conclusion that Woodbury failed to prove his claim of retaliatory downgrade. The record amply demonstrates that the ALJ provided the factual basis for his decision in a manner that the Court of Appeals can review and understand, even in the unlikely event that the Court of Appeals disagrees with the result. Woodbury has failed to show any grounds for disturbing the findings and conclusions of law set forth in the Order. The Order should therefore be affirmed.

DATED this 6th day of April, 2016.

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# **APPENDIX**

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## Event planner to host Seattle Center party after gay-pride parade

A local event producer has stepped forward to host a festival at Seattle Center following the traditional Sunday Pride parade on June 24...

By Lornet Turnbull  
Seattle Times staff reporter

A local event producer has stepped forward to host a festival at Seattle Center following the traditional Sunday Pride parade on June 24 — two weeks after the event's organizer, Seattle Out and Proud, announced it could not afford to do so.

Egan Orion, 35, a graphics designer and event planner from the Central Area who runs a company called One Degree Events, said he's secured Fisher Pavilion for a scaled-down, six-hour after-party he's calling PrideFest. He's reserved the space for next year, too.

Orion is not affiliated with Seattle Out and Proud, the all-volunteer group that ran up more than \$100,000 in debt for last year's festival at Seattle Center and announced last month it could not afford to put on a festival this year.

"With all the upheavals around SOAP and their problems with executing the festival and parade, I felt I was in the perfect position to step in and do a good event for the community," Orion said.

PrideFest, intended to attract Pride parade-goers, will occupy Fisher Pavilion and the 30,000-square-foot lawn outside it. It will feature onstage performers, a DJ, vendor booths and a 21-and-over beer garden.

David Heurtel, deputy director of Seattle Center, said Orion has paid in advance for the space for the day and will pay estimated costs for other event expenses — standard for producers using the facility for the first time.

Seattle Out and Proud did receive its permit from the city today to host a parade along Fourth Avenue that begins at 11 a.m. June 24. PrideFest at Seattle Center will run between 12 p.m. and 6 p.m. the same day.

On the previous day, GLBT Community Center will host a march along Broadway and a festival in Volunteer Park.

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## Seattle Out and Proud announces 2008 Pride Parade

### Seattle Out and Proud announces 2008 Pride Parade

By Tim Peter - SGN Staff Writer

Seattle Out and Proud (SOAP) announced that this year's Gay Pride Parade will be held Sunday, June 29, starting at 11:00 a.m. from the corner of Union St. and Fourth Ave. It will be limited to approximately two and-a-half hours in length and should take about an hour to go from the start to the end.

The Parade will proceed down Fourth Avenue to Denny Way. Foot traffic will be allowed to go east or west on Denny Way, but all vehicle traffic will be turned west and have until Western Ave. to pull over, quickly disembark passengers, secure their vehicles, and leave the area. SOAP will have personnel stationed at this intersection and along Denny Way to help ensure the safe and orderly flow of Parade participants out of the area.

The Parade announcer's booth, ADA viewing area and media viewing area will be located at Westlake Park between Pike and Pine streets on Fourth Ave. All those attending the Parade are asked to watch from the sidewalk in order to keep the street open for Parade participants.

The staging area can be accessed from the check in booth on Fourth Ave. and Columbia St. Groups will be staged four across starting with the first groups between Union and University. The Dykes on Bikes will check in and stage on 4th and Union. A fire lane will be kept open down the center of the street.

There will be no parking permitted in any of these areas, and all vehicles must be registered, display an Event Pass and have a driver in the vehicle at all times. Unattended vehicles will be towed at the owner's expense.

There will also be several local events leading up to the Parade. For more information about these events, please consult the Pride Calendar in the SGN.

Following the Parade will be PrideFest at the Seattle Center. "What used to be a small community event has turned into a huge regional event," says the website for PrideFest, [www.seattlepridefest.org](http://www.seattlepridefest.org). "The move has been a very successful one and helps to give more prominence to the second largest Gay community in the United States."

More than 20,000 people attended last year's Pride Festival. In addition to the fun and celebration together, attendees also helped to raise nearly \$10,000 for underfunded community non-profits.

"With a year to properly plan and execute this major Arts and Cultural Festival, One Degree is now working to produce a bigger and better Festival. Seattle Out and Proud, the producers of the Parade, are the most strategic of partners, but One Degree has many key alliances within the Gay non-profit and business communities to pull off an even more exciting event and raise more money and awareness than ever before," says their website.

Egan Orion is executive producer for One Degree Events and PrideFest. Orion is a Northwest Native and longtime Seattle resident. Orion became involved in event production several years ago, "when he noticed a lack of 'spice' in the local nightclub scene and thought he might be able to do something to infuse it with some new energy."

"This year's entertainment lineup is one we're very proud of, with representation from every corner of the LGBT Community," says Egan Orion, Festival Director for PrideFest. "A special focus has been made this year on women's entertainment and a solid Trans representation at the Festival. The Trans community in particular has had difficulty transitioning from the Capitol Hill events to the downtown events and we want to make sure all members of the community feel at home at PrideFest."

Entertainment for Seattle PrideFest 2008 ranges from international dance superstars and local singer-songwriters: Kristine W, Seeing Blind, Sue Quigley, Lisa Marshall, comedians Matt Bragg and Barbara Sehr, and drag shows by the Festival hosts Lily Armani and GLAMAZONIA, among others. Main programming at the main stage will occur between 1 p.m. and 5 p.m., with DJs spinning at the DJ stage by the Fountain throughout the entire festival. Featured DJs include DJ Kyler, LA Kendall, DJ Rob Hall, and Mathematix.

There are also various food booths, two beer gardens and over 100 tables and booths for businesses and non-profit

companies that serve the LGBT community.

Donations will be collected as people enter the festival and at one point during the programming. Donations will be split three ways between the following organizations: Rosehedge AIDS Housing and Health Care, which provides comprehensive 24-hour care to men and women living with HIV/AIDS; Lambert House, a center for Gay, Lesbian, Bisexual, Transgender and questioning youth and their allies which encourages empowerment through the development of leadership, social, and life skills; and The Pride Project, a Washington State non-profit organization that helps to put on PrideFest, PrideFeast, the Red Dress Party, and other important benefits throughout the year.