93800-8

Court of Appeals File No. 333523

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JONATHAN J. SPRAGUE, a married man,

Petitioner/Plaintiff,

vs.

SPOKANE VALLEY FIRE DEPARTMENT, a fire district; MIKE THOMPSON and LINDA THOMPSON, husband and wife, and the marital community composed thereof,

Respondents/Defendants.

PETITION FOR REVIEW

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Petitioner Jonathan J. Sprague ("Sprague") asks this court to accept review of the Court of Appeals decision terminating review designated below.

II. COURT OF APPEALS DECISION

A copy of the published Court of Appeals decision, including the majority, concurring and dissenting opinions, — Wn. 2d —, — P.3d —, 2016 WL 5239627 (Sept. 21, 2016), is reproduced in the Appendix to this Petition at pages A-1 to A-52.

III. ISSUES PRESENTED FOR REVIEW

A. Can claims for declaratory and injunctive relief proceed independently as to the constitutionality of an employer's speech policy even if the employee's individual employment claim was dismissed on the basis of collateral estoppel by an administrative agency ruling?

B. When an official albeit unwritten employment policy is implemented uniformly by an agency, but differs from the agency's written policy, can employee maintain a facial challenge to the constitutionality of the unwritten policy?

C. Can a public employee be fired for including his religious viewpoint in communications using email and electronic bulletin boards which are otherwise allowed properly used to communicate on the same topics?

D. Does the legal conclusion by an administrative body regarding the constitutionality of a free-speech restriction prohibit subsequent review of the constitutionality of that restriction under the doctrine of collateral estoppel?

E. Are the requirements for application of collateral estoppel satisfied in this case?

IV. STATEMENT OF THE CASE

Sprague was a firefighter, and eventually a captain, with the Spokane Valley Fire Department (the "Department") between 1995 and 2012 before he was fired, ostensibly on grounds of "insubordination."[1] Sprague's alleged insubordination consisted of emailing[2] and posting to an internal electronic bulletin board communications announcing meetings and newsletters covering current topics of discussion at the Department from his point of view as a member of a group of firefighters known as the Spokane Valley Christian Firefighter Fellowship ("Fellowship"). Sprague was told that he could communicate announcements for Fellowship meetings, but could not include citations to Scripture. After a period of attempting to comply with this and ever growing restrictions on his communications, Sprague was finally told that he could not communicate any religious

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[1] Sprague was described by the Department's Commissioners as an "excellent firefighter," and "a good human being," CP 128. Chief Thompson admitted that Sprague's religious speech had not harmed anybody. CP 78. Sprague was valuable enough to the Department that it kept him on as a temporary Battalion Commander for over a month after the decision had initially been made to terminate his employment simply because they needed him to help during the busy fire season. *Id.*

[2] The emails were sent only internally to other employees of the Department, and only to those who showed an interest in receiving this information. Several of the emails included a specific note that anyone who did not want to receive them would be removed from the address list. CP 251, 265. After this dispute arose, in 2012 one member of the Department's Management team asked to be removed and was removed from the list.

viewpoint, even on topics already being discussed on the Department's electronic communication systems. Sprague filed an EEOC charge believing it was improper for the Department to single out communications with a religious viewpoint for specific restrictions, but was fired when he joined in internal Department discussions with communications that included his religious point of view.

A. The official albeit unwritten policy enforced against Sprague.

At every stage of this dispute, the Department's briefing has denied that the Department has a policy prohibiting employees from communicating religious viewpoints where other viewpoints would be permitted. But those responsible for enforcing the Department's unwritten policy restricting communication of religious viewpoints readily admit to the actual official policy followed and enforced by the Department.

1. <u>As described by Spokane Valley Fire Department's Designated Representative.</u>

The Department appointed Valerie Biladeau, its human resources manager, as its designated representative for testimony in this lawsuit. Biladeau explained that although she could point to no written policy, the Department made sure all emails were "content neutral," by which she meant they should never mention "religion of any kind." CP 353-355. Biladeau explained that the Department allowed email communications on

topics including suicide prevention, stress reduction through meditation, alcoholism, dealing with teenagers, and dealing with divorce, among others.[3] However, she stated that communications on these topics are acceptable only from a *nonreligious* point of view, and that Sprague's communications were not acceptable because of his *religious* point of view. CP 354-55 (referring to Sprague's "individual perspective of his interpretation of what he had read in the Bible").[4]

2. As described by Spokane Valley Fire Departments Chief.

The Department admitted in response to a request for admission, "Former Chief Thompson recalls a discussion with Plaintiff about not using

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[3] A listing of the topics covered by Department newsletters sent over the same system used by Sprague includes anger management, spirituality, financial planning, physical and emotional impacts from firefighting silently spilling into home life, depression, signs of suicidal thinking, difficult team behavior, alcohol use, eating disorders, leadership, gambling disorder, binge drinking, and tending to an empty nest. CP 272. Other emails sent during the same timeframe (via bulk to ALL EVERYONE) which were allowed by the Department (and many sent by Chief Thompson) covered topics from fishing, hockey, soccer, charity golf tournaments, chili fundraisers, poker games, fun runs, adopt a dog programs, and many others. CP 273.

[4] Before this appeal in which the Department has shifted to claiming its discipline had nothing to do with religion, the Department specifically cited the fact that Sprague's communications contained religious viewpoints as its justification for disciplining him, claiming: "SVFD was constitutionally obligated to curtail the speech of Sprague in order to prevent the appearance that SVFD, a governmental entity, was endorsing religion." CP 309; *accord* CP 74.

the SVFD email system to disseminate personal religious beliefs." CP 485. This is consistent with Chief Thompson's testimony to the Civil Service Commission:

> Capt. Sprague and I have met on one occasion when I came out to the Fire Station 9 where he was assigned to talk about some of his material that he was sending out. And after that, I believe it was in October [2011] when I was on vacation, and received an email that Capt. Sprague had sent out to everybody about some religious beliefs pertaining in particular to a mental well-being of firefighters, AND I told him that he could not or should not use the department's email system to send out that information.

CP 75. The only complaint Chief Thompson had with regard to Sprague's emails and bulletin board postings was the fact that they contain language of a religious nature. CP 76.[5]

3. As described by the Spokane Valley Fire Department Civil Service Commission.

The Civil Service Commission found that the policy enforced by the Department prohibited Sprague from using "the internal electronic bulletin board and electronic mail system for the purpose of expressing his religious views, including quoting Scripture from the Bible." CP 99-100. The commission found that this policy (prohibiting expression of religious viewpoints) was being enforced against all employees of the Department.

[5] See also disciplinary notices described below and attached in the appendix to this brief, all referencing the "religious nature" of Sprague's communications as the justification for discipline.

CP 102. The Department admitted to the Civil Service Commission that the firefighters' collective bargaining agreement requires the Department to allow employees to use the internet for personal use as an employment benefit. CP 298.

B. The written policies were not violated.

The Department has only referenced two possible written rules that could justify its termination of Sprague's employment: Department Policy 171 (computers and electronics),[6] and Department Policy 120 (chain of command/insubordination).[7] The letters of discipline issued by the Department to Sprague each explained it was the "religious nature" of his communications which caused him to be disciplined:

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[6] The full text of Department Policy 171 can be found at CP 371-77. The Department relies on subsection K, which reads "[e]mail, chat room, newsgroup and all other forms of communication using the internet, intranet, or other department communications shall not contain ethnic slurs, racial epithets, or disparagement of others based on race, national origin, sex, age, disability or religious beliefs. Communication that is in any way construed by others as disruptive, offensive, abusive or threatening is prohibited." CP 375. The only mention of religion within this policy is to prohibit communications which would disparage others based on their religious beliefs—something the Department has never accused Sprague of doing.

[7] The full text of Department Policy 120(C) reads "[n]o employee of the department shall refuse to obey any reasonable order or direction given by a superior officer." CP 379. The Department's citation to the insubordination policy is a bit circular in that the insubordinate act being alleged is in all cases is the fact that Sprague continued including his religious viewpoint in communications.

1. SVFD's April 20, 2012 letter disciplines Sprague for "the use of language and written content that was of a religious nature, specifically quotation of scripture." CP 379.
2. SVFD's May 2, 2012 letter of reprimand disciplines Sprague for "written content that was of a religious nature, including religious symbols." CP 382.
3. SVFD's June 13, 2012 letter proposing to suspend Sprague describes prohibited behavior as "written content that was of a religious nature." CP 392.
4. SVFD's September 6, 2012 letter proposing to terminate Sprague's employment describes his prohibited behavior as including "written content that was of a religious nature." CP 397.

C. Sprague was fired for violating the official but unwritten policy.

When asked to explain what Sprague had done to justify the disciplinary action against him, Department Representative Biladeau testified it was Sprague's "citation of Scriptures on the supporting issues" and "not following an order by his superior to cease [citing Scripture]." CP 365. Biladeau confirmed Sprague was disciplined *not* for communicating on personal matters over the Department's electronic systems (which would have been allowed), but rather was disciplined because he continued to include his religious viewpoint:

> He could send an e-mail that said the Spokane Christian firefighter fellowship is going to meet on Monday at six p.m. at such and such a place for fellowship. He could

> have done that all day long if he wanted to. **It was because he was using religious signs and Scripture that was the problem.**

CP 480-81 (emphasis added).

According to Chief Thompson, the specific action Sprague took that the Department relied on to terminate his employment was the electronic communication Sprague sent on July 16, 2012, and specifically the fact that this communication was "again, talking about Jesus as detailed in the Bible and how he interacts with his father above and his disciples below." CP 78-9. This final "triggering" communication was titled "more discussion about leadership in suicide prevention" and is reproduced in the appendix to this petition. CP 265-6.

D. Procedural history.

1. Civil Service Commission

Sprague appealed to the Civil Service Commission to reverse SVFD's termination. Although he knew that the Commission could not remedy his constitutional claims, he believed that he should pursue the more expeditious path to his reinstatement. A hearing was conducted on October 8, 2012. On March 21, 2013 the Commission entered its decision, finding that Sprague's termination was justified because, they concluded, the policy being violated was a lawful policy. CP 98-104.

2. Summary Judgment

Sprague filed this lawsuit against the Department and defendant Thompson on February 4, 2014, CP 3, and by stipulation of the parties, CP 11, filed an amended complaint on July 23, 2014. CP 13. Sprague's amended complaint included § 1983 claims for violation of Sprague's First Amendment and Fourteenth Amendment rights, for violation of Title VII of the Civil Rights Act, for violation of Sprague's free speech and religious freedom and equal protection rights under the Washington State Constitution, and for violation of Washington's Law against Discrimination. U.S. Const. amend. I; 42 U.S.C. § 1983; 42 U.S.C. § 1981; 42 U.S.C. § 2000e-5; Wash. Const. art. I, §§ 5, 11 & 12; Wa. Const. art. I, § 11; Wa. Const. art. I, § 12; RCW § 49.60.030.

The Department answered Sprague's amended complaint and subsequently filed a motion for summary judgment seeking dismissal based upon collateral estoppel by virtue of the Civil Service Commission's decision. CP 407-419. Sprague opposed the Department's motion and filed his own motion for partial summary judgment seeking declaratory and injunctive relief that the Department's official but unwritten policy was unconstitutional. CP 334-343.

The trial court heard both motions in a consolidated hearing on May 8, 2015. The trial court ruled that although the Commission "would not

have the competence to make a legal conclusion about constitutionality," RP 50, the Commission was nonetheless a forum which

> can make factual findings, including factual findings which may support or not support a constitutional finding. It is just the constitutional finding they cannot make. But they made all the necessary findings to support one and the issue was argued to them. This case was not appealed and therefore the decision of the Civil Service Commission collaterally estops re-litigation of any of the matters before them, including whether or not the fire department rule in question here is unconstitutional.

RP 50-51.

3. Appeal

Sprague timely appealed both the denial of his motion for partial summary judgment and the granting of the Department's motion to the Court of Appeals. In a split decision with three separate opinions, the appellate court affirming dismissal of Sprague's employment claims and his requests for declaratory and injunctive relief. The majority opinion by Judge Korsmo, held that the Department's written policy was constitutional and that the Civil Service Commission ruling collaterally estopped all of Sprague's claims. The majority opinion did not address the constitutionality of the Department's official but unwritten policy. In a special concurrence, Judge Lawrence-Berrey explained that he would hold the Department's speech restrictions were lawful.

In dissent, Judge Fearing disagreed that the Civil Service Commission's decision gives rise to collateral estoppel because the constitutionality of the Department's policy presents questions of law: "based on the undisputed facts, this Court should address, without deference to the Civil Service Commission, the constitutional question of whether the fire Department unlawfully discriminated against Sprague because of his spiritual message." (Dissent, p. 17).

Judge Fearing further stated the Department is not constitutionally allowed to prohibit speech offered on topics already being discussed merely because Sprague's speech included his religious vantage point. That type of speech restriction is not viewpoint neutral. For that reason, among others, the dissent would have reversed the Department's summary judgment and remanded to determine the extent to which Sprague's discipline was based on the unlawful restriction of speech and what damages, if any, he suffered.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Review is warranted under RAP 13.4(b)(3) and (4) because the Court of Appeals decision presents a significant question of law under the state and federal constitutions and involves an issue of substantial public interest that should be addressed by this Court.

Under RAP 13.4(b)(3), review is warranted "[i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved[.]" (Brackets added). Under RAP 13.4(b)(4),

review is warranted "[i]f the petition involves an issue of substantial public interest that should be determined by this Court." (Brackets added.) The free speech rights of public employees such as Sprague, in particular the right to speak from a religious point of view on topics that are otherwise properly the subject of discussion in a public workplace, satisfy both of these criteria.

The majority opinion by the Court of Appeals below sidestepped the constitutional issue presented here by analyzing the constitutionality of the Department's written policy rather than the official-but-unwritten policy that served as the basis for the adverse employment actions against Sprague. The concurring and dissenting opinions disagreed about how the constitutional issues arising from the official-but-unwritten policy should be resolved. The constitutional magnitude of freedom of speech, and the public interest in this issue cannot be seriously denied. The lack of a controlling opinion regarding the constitutionality of the official-but-unwritten policy creates uncertainty for lower courts that should be resolved by this Court.

B. Review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals' application of collateral estoppel, over dissent, conflicts with other decisions from this Court and the Court of Appeals.

Under RAP 13.4(b)(1) and (2), review is warranted if a decision of the Court of Appeals conflicts with other decisions from this Court or the Court of Appeals. The appellate court's application of collateral estoppel in

this case conflicts with other decisions of this Court and the Court of Appeals in multiple respects, any one of which would justify review.

1. Sprague's claim for declaratory and injunctive relief based on the unconstitutionality of the Department's official albeit unwritten policy is not subject to collateral estoppel because the civil service commission did not have authority to consider the constitutionality of the policy or grant the requested relief.

Sprague pointed out that the civil service commission had no authority or jurisdiction to rule on the constitutionality of the department's official-but-unwritten policy. *See, e.g.,* App. Br., at 22-23, 29-31; Reply Br., at 2-3. The civil service commission invoked RCW § 41.08.090 as the basis for its authority to act. CP 100. The statute confines the commission's authority to determine whether an adverse employment action "was or was not made for political or religious reasons and was or was not made in good faith for cause." RCW § 41.08.090. The statute also limits the relief available to reinstatement with back pay or modification of the adverse employment action. *See id.*

The Court of Appeals decision below held that Sprague's claims for declaratory and injunctive relief were barred by collateral estoppel, with the majority opinion incorrectly characterizing those claims as an as-applied challenge to the Department's policy as written rather than a facial challenge to the Department's official albeit unwritten policy. *See Sprague,* 2016 WL 5239627, at *4 (¶ 20). In this respect, the Court of Appeals decision

conflicts with this Court's decision in *Nichols v. Snohomish County,* 109 Wn. 2d 613, 618, 746 P.2d 1208 (1987), holding that a civil service commission decision upholding an employee's termination does not give rise to collateral estoppel with respect to issues that the commission had no authority to hear or determine.

2. The Court of Appeals improperly gave collateral estoppel effect to conclusions of law.

The Court of Appeals decision below purported to give collateral estoppel effect to "findings" of the civil service commission that are, in effect, conclusions of law. As stated by Judge Fearing in his dissent:

> The majority underscores two factual findings of the civil service commission and concludes that those findings bind this reviewing court. First, the commission found that the Spokane Valley Fire Department terminated Jonathan Sprague's employment because of insubordination, not for religious reasons. I disagree that this factual finding binds this reviewing court at least to the extent of requiring us to rule that the fire department did not discriminate on the basis of the viewpoint of Sprague's messages. The finding directly relates to Sprague's First Amendment argument, and thus the finding is akin to a conclusion of law. Collateral estoppel does not extend to conclusions of law rendered by administrative agencies.

Sprague, 2016 WL 5239627, at *14. Cases from this Court support the dissent and conflict with the majority opinion. *See Kennedy v. City of Seattle,* 94 Wn. 2d 376, 379, 617 P.2d 713 (1980) (stating "relitigation of an important public question of law ... should not be foreclosed by

collateral estoppel"); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wn. 2d 413, 419 & n.5, 780 P.2d 1282 (1989) (citing *Kennedy*).

3. Properly interpreted, the civil service commission's findings actually support Sprague's employment claims.

The Court of Appeals majority stated that the Civil Service Commission determined there was no evidence that the department "discriminated against Mr. Sprague for expressing his Christian views." (*Sprague,* at *2). However, the Commission stated that they were not actually resolving disputes of fact because "[t]he facts relating to this matter are, for the most part, undisputed." CP 99. Among these undisputed facts, the Commission specifically noted that Sprague was being disciplined precisely because he expressed his Christian views on a number of topics through the department's internal electronic bulletin board and electronic mail system. CP 99. The Commission also noted "that Sprague on several occasions made it clear through both words and conduct that he would not follow Chief Thompson's **direct order not to use department property to express his religious views**, including quoting scripture from the Bible." CP 102 (bold added). The inconsistency between the Commission's findings of fact (that the department policy prohibited speech from a religious viewpoint and Sprague was disciplined for continuing to speak his religious

viewpoint) and the commissions ultimate conclusion (that Sprague was not disciplined for expressing his Christian views) highlights Commission's lack of competence on constitutional questions of law. This lack of competence, together with a lack of jurisdiction, is the reason conclusions of law from administrative agencies are not binding on the court under the doctrine of collateral estoppel.

VI. CONCLUSION

Sprague asks the Court to accept review and reverse the Court of Appeals decision, enter summary judgment in his favor that the official but unwritten policy of the Department is an unconstitutional restriction on the free speech rights of its employees, and to remand his remaining claims for trial.

Respectfully submitted this 21st day of October, 2016.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On October 21, 2016, I served the document to which this is annexed pursuant to written stipulation between the parties as follows:

By email:

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Signed on October 21, 2016 at Spokane, Washington.

Melanie A. Evans

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SEPT 21, 2016
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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JONATHAN J. SPRAGUE, a married man, Appellant, v. SPOKANE VALLEY FIRE DEPARTMENT, a fire district; MIKE THOMPSON and LINDA THOMPSON, husband and wife, and the marital community composed thereof, Respondents.	)	No. 33352-3-III PUBLISHED OPINION

KORSMO, J. — Jonathan Sprague challenges the dismissal at summary judgment of his wrongful termination action, arguing that the Spokane Valley Fire Department (SVFD) violated his First Amendment rights. We affirm.

FACTS

Mr. Sprague served as a captain for SVFD. He formed the Spokane Christian Firefighters Fellowship (SCFF) and in 2011 began distributing newsletters and meeting notices for that group via the SVFD e-mail system. Captain Sprague's use of the e-mail system begat controversy and spiraled into this litigation.

His messages concerning SCFF meetings often contained scriptural passages and mentioned the topics being discussed at the meeting. SVFD responded by reminding Captain Sprague that the e-mail system was to be used for business purposes only and that e-mails should not include religious references. SVFD allowed employees to access their personal e-mail while at work, but they were not permitted to make personal use of the department's system. Sprague complained in writing that the policy constituted religious discrimination. Commissioner Monte Nesbit responded by letter and disagreed with the complaint. He summarized the SVFD e-mail policy:

> You may not use department email to post, discuss, or in any way disseminate communications that are sent for any purpose other than official SVFD business. This means you cannot send messages using your official SVFD email which discuss the Fellowship or any other private purpose. [SVFD] email may only be used to disseminate communications concerning official SVFD business.
>
> If you wish to send personal emails while on duty (if otherwise permitted under [SVFD] policy), you may do so using a personal email account (such as a Hotmail, Gmail, Yahoo, or Comcast account). Using a personal email account, you may only send messages to other personal email accounts. You may not use a personal email account to send messages or solicitations to official SVFD accounts.

Clerk's Papers (CP) at 147.

Commissioner Nesbitt also addressed use of physical and electronic bulletin boards:

> You may not post flyers, advertisements, or solicitations that contain a religious message, on either the electronic or physical bulletin boards which are maintained by the SVFD.

> You may continue to post flyers or advertisements of local events, food drives, and meetings. The posting may contain information as to the organization, the place, the time/date, the contact information, and the event. These type of postings are acceptable for both the electronic and physical bulletin boards. For example, you might post a notice that the Fellowship is meeting at a particular time and place, but the posting may not have a religious content.

CP at 147-48.

Captain Sprague, however, declined to follow the policy and insisted on using the SVFD e-mail system to distribute information about meetings of the SCFF. He also continued to employ scriptural passages in the e-mails and in bulletin board postings. A series of progressive disciplinary actions ensued. The first action resulted in a Letter of Counseling concerning misuse of the bulletin boards, followed two weeks later by a Letter of Reprimand involving misuse of the bulletin boards and the e-mail system. Six weeks later a two shift suspension without pay was imposed due to disobedience of an order and violations of the e-mail and bulletin boards policies. The suspension was stayed pending mediation, but the mediation efforts failed.

Three months after the suspension, SVFD gave notice of its intent to discharge Captain Sprague. The notice alleged that he had engaged in "conduct unbecoming an officer," insubordination for violating an order of a superior officer, and had willfully violated department rules, procedures, and personnel policies. CP at 208. The Board of Fire Commissioners accepted the termination recommendation and found that Captain

Sprague had failed to obey direct orders in violation of department practice and personnel policies, resulting in just cause for termination.

Mr. Sprague appealed to the civil service commission which conducted a public hearing at his request. He made a personal argument to the commission and the parties submitted post-hearing briefs in lieu of closing argument. The commission upheld his termination. It found that SVFD acted in good faith by imposing progressive discipline and that Mr. Sprague's insubordination merited termination. It also found that there was no evidence that SVFD applied its internal policies unevenly or discriminated against Mr. Sprague for expressing his Christian views. The commission also went on to note some relevant law relating to valid restrictions that government entities may place on nonpublic fora in the employment context.

Mr. Sprague did not appeal the civil service commission ruling. Instead, he instituted an action in superior court against SVFD and its chief. The complaint alleged violation of the free speech and freedom of religion guarantees of both the United States and Washington Constitutions, Mr. Sprague's equal protection rights under both constitutions, the federal civil rights act, and the Washington Law Against Discrimination, ch. 49.60 RCW (WLAD). The complaint sought reinstatement, damages, injunctive relief, and declaratory relief.

Eventually, the defendants moved for summary judgment on the basis of collateral estoppel. The plaintiff, in turn, sought partial summary judgment concerning the

constitutionality of the SVFD e-mail policy. The competing motions were argued before Judge Kathleen O'Connor of the Spokane County Superior Court. Plaintiff's counsel told the court that the parties were in agreement about the facts and that his client had been insubordinate; however, the chief's order that Sprague needed to comply with the e-mail policies was unconstitutional.

Judge O'Connor determined that collateral estoppel barred the plaintiff's cause of action because of the factual findings included in the civil service commission's ruling. She noted that there was identity of issues, identity of parties, and a final judgment that was not appealed. The motion for partial summary judgment was denied and the defense motion for summary judgment was granted.

Mr. Sprague timely appealed to this court. A panel heard oral argument on the matter.

ANALYSIS

This appeal presents two issues that we will address in the following order. First we consider the contention, presented to the trial court by the partial summary judgment motion, that the SVFD e-mail policy is unconstitutional. We then consider whether the trial court properly found the claims barred by the doctrine of collateral estoppel.

The standards of review governing summary judgment applicable to both issues are well settled. This court sits in the same position as the trial court and considers the issues de novo since our inquiry is the same as the trial court's inquiry. *Lybbert v. Grant*

County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We view the facts, and all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*; *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

SVFD E-mail Policy

The initial question before us involves Mr. Sprague's First Amendment challenge to the e-mail policy. Specifically, he argues that SVFD applied an anti-religion policy that was, therefore, not content neutral. His argument challenges the policy as it was allegedly practiced rather than as it was written. However, we turn initially to the official written policy. Given our disposition of the remaining issue, we consider the policy as it was allegedly applied in that section of this opinion.

When it is alleged that the government is improperly infringing on free speech rights, the first question is to identify the nature of the forum that is being regulated in order to determine what level of judicial scrutiny applies. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 813, 231 P.3d 166 (2010). In a traditional public forum, the government generally can only impose content neutral restrictions on the time, place, and manner of expression, if those restrictions are narrowly tailored to serve a significant government interest and leave open adequate alternative fora. *Sanders v. City of Seattle*, 160 Wn.2d 198, 209, 156 P.3d 874 (2007). However, in a nonpublic forum, the

government may impose restrictions so long as they are "'reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *City of Seattle v. Eze*, 111 Wn.2d 22, 32, 759 P.2d 366 (1988) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)). Intermediate to those categories, the government can create limited public fora by opening for use by the public as a place for expressive activity. *See Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981).

The parties agreed the SVFD e-mail and bulletin board systems were both nonpublic fora.[1] Report of Proceedings (RP) at 29, 33. Our precedent compels the same result. *Knudsen v. Wash. State Exec. Ethics Bd.*, 156 Wn. App. 852, 865-66, 235 P.3d 835 (2010) (university e-mail system for employees was a nonpublic forum); *Herbert v. Pub. Disclosure Comm'n*, 136 Wn. App. 249, 263-64, 148 P.3d 1102 (2006) (school internal mail and computer systems were nonpublic fora).

[1] To the extent appellant's briefing in this court can be read otherwise, he cites to no evidence that would support finding the systems constitute limited public fora. There is no evidence that SVFD has ever opened either system to the public generally or permitted expressive activity. Rather, both of these systems have been reserved for internal, official business only. What limited exceptions are allowed are narrowly drawn and exclude expressive content. Specifically, SVFD allows limited, personal use of the e-mail system when it is incidental to work, like arranging for a babysitter because of the necessity of working late or permitting employees to post flyers about events or occasions. Consequently, these fora must be considered nonpublic.

The remaining questions are whether the SVFD policy is reasonable and viewpoint neutral. Once again, the parties[2] agreed in the trial court that it was.[3] That conclusion is unassailable. The policy of this state, expressed in the ethics in public service act, chapter 42.52 RCW, is that public resources are to be used for official public business rather than for personal benefit. *See Knudsen*, 156 Wn. App. at 860-63 (determining that e-mail sent to encourage others to lobby legislature violated de minimis use exception to statute). It would destroy the concept of a nonpublic forum to hold that limiting the use of a government computer system to government business was not reasonable. Accordingly, the written policy was a reasonable policy under the First Amendment to the United States Constitution.

The written policy also was content neutral. It distinguished between communications related to the SVFD's business and those that are personal to the employees. It is the nature of the communications, not the viewpoints expressed in them, that matters. There is no discrimination against some messages or in favor of some

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[2] While it may seem to the casual reader that Sprague conceded the entire issue in the trial court, such is not the case. There he argued the issue from an "as applied" standpoint, while here we analyze only the facial text of the policy, an issue that was not disputed below.

[3] Sprague's counsel told the trial judge: "That written policy would be facially content neutral; it allows for some personal use and it has some proscriptive use. But it does not, on its face, say personal use would be allowed except for if it has a religious viewpoint." RP at 27.

others. Instead, there is a complete ban on private usage (absent work-related necessity) of the systems without regard to the message conveyed by the sender.

The written SVFD policy does not violate the First Amendment.

Collateral Estoppel

Although the parties did not truly contest the validity of the written policy, Mr. Sprague certainly contests the validity of the policy as he believes SVFD applied it. While we normally would analyze his claims under the First Amendment, our conclusion that he is collaterally estopped by the findings made in the unappealed administrative proceedings makes it unnecessary to consider the challenge to the policy that he believes the department actually followed. Thus, we turn now to the collateral estoppel issue.

On this claim, Mr. Sprague's argument is somewhat misfocused. He correctly takes issue with the civil service commission's legal conclusions, but they are not what cause him problems here. Instead, it is the unchallenged factual determinations concerning the reasons for termination that doom this appeal. The trial court correctly determined that Mr. Sprague's failure to challenge those determinations by appeal to superior court left him without a viable cause of action.

As relevant to this appeal, the doctrine of collateral estoppel serves to bar litigation where an issue of ultimate fact has already been determined in previous litigation. *State v. Mullin-Coston*, 152 Wn.2d 107, 113, 95 P.3d 321 (2004). The party seeking to enforce collateral estoppel must establish that (1) the issue previously decided is identical to the

one presented, (2) the prior adjudication ended in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted must be the same as the party in the prior litigation, and (4) application of collateral estoppel does not work a substantial injustice. *Id.* at 114.

When considering whether to apply collateral estoppel to an administrative action, this court should consider: (1) whether the agency, acting within its competence, made a factual decision, (2) procedural differences between the agency and a court, and (3) policy considerations. *Shoemaker v. Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987). Applying these factors, *Shoemaker* concluded that civil service commissions can resolve factual issues concerning termination and employment policies and collateral estoppel can be applied to those findings. *Id.*

We agree with Mr. Sprague that the commission's legal conclusions, such as its determination that its rulings complied with the First Amendment,[4] are not subject to estoppel. Courts, not administrative agencies, determine whether the constitution has been complied with. However, *Shoemaker* confirms that a civil service commission factual finding can be given preclusive effect.

That is the case here. All of the classical elements for collateral estoppel are satisfied in this case. The issue presented to the civil service commission—whether

[4] CP at 55-56.

SVFD discriminated against Mr. Sprague because of religion—is the same issue presented at the heart of this action. The civil service commission action did end in a final decision. The parties are identical. There is no injustice in applying collateral estoppel in this circumstance. Mr. Sprague was the one who presented the issue to the commission; he had a full opportunity to present his case. Indeed, the only potential injustice in this situation would be to SVFD since it could face the possibility of inconsistent judgments arising from its termination of Mr. Sprague.

The commission made two related factual determinations that are dispositive in this case. First, it determined that "Sprague was not terminated for religious reasons." CP at 54. Second, it found that "there was no evidence presented . . . that the rules were applied unevenly and with discrimination based upon Sprague's expression of his Christian views." CP at 55. Like the trial court, we agree that these determinations are inconsistent with this civil action for damages and other relief. Mr. Sprague did not attack those factual findings by further appeal; he may not collaterally attack them by filing a separate law suit.

The determination that there was no alternative "as applied" policy is particularly critical to this case. Much of Mr. Sprague's claims, including his challenge to the SVFD e-mail policy, presume the existence of a policy of discrimination against the expression of religious viewpoints. Mr. Sprague can only establish the existence of such a policy if he can establish that the otherwise viewpoint neutral SVFD e-mail system policy was

applied in a discriminatory manner against religious expression. The civil service commission found as a matter of fact that this was not the case. There was "no evidence" of any such practice. It was unsurprising that the SVFD's complaints to Mr. Sprague involved his use of religious expression, because that was the manner in which he repeatedly violated SVFD policy against private use of government property. It should go without saying that a fire department's business is firefighting, not discussion of religion. Pointing out that Mr. Sprague violated the prohibition against public use in that specific manner did not thereby convert the policy to one of opposition to religious speech any more than challenging use of e-mails to promote chess tournaments or a political candidate could be interpreted as anti-chess or anti-political speech. The policy was anti-private use, not anti-religion.

These factual findings concerning the department's true motivation for terminating Mr. Sprague's employment are dispositive of all of his claims in this action.[5] He is not able to show that SVFD had a discriminatory policy against religious speech or that Mr. Sprague was terminated because of his religion. He was terminated for not obeying orders to stop using the e-mail and bulletin boards to promote his private activities. The

[5] *Shoemaker* involved a similar finding by a civil service commission. There a demoted deputy police chief contended that his demotion was the result of retaliatory action. The commission found otherwise. 109 Wn.2d at 505-07. Our court concluded that the finding was factual in nature and should be given preclusive effect due to collateral estoppel. *Id.* at 507-13.

policy of not permitting private use of the nonpublic forum was reasonable. Mr. Sprague lost his ability to claim that there was an alternative policy when he failed to appeal the civil service commission determination to the contrary.

The trial court correctly estopped Mr. Sprague from challenging the commission's findings. There was no error.

Affirmed.

Korsmo, J.

I CONCUR:

Lawrence-Berrey, A.C.J.

NO. 33352-3-III

LAWRENCE-BERREY, J. (concurring) — I concur in our conclusion that Spokane Valley Fire Department's (SVFD's) internal electronic employee communication (IEEC) policy[1] did not violate Jonathan Sprague's First Amendment free speech rights. I write separately to address one of the worthy points discussed by our dissenting colleague.

The dissent would find a violation of Mr. Sprague's free speech right to the extent SVFD prohibited Christian view postings that discussed topics addressed in its IEEC.

SVFD permitted Mr. Sprague, during work hours, to discuss his Christian views with his colleagues both verbally and through his personal e-mail. What SVFD prohibited was employees using its IEEC for nonbusiness purposes. Mr. Sprague knew SVFD's policy. SVFD repeatedly warned him that his postings violated its policy. Yet Mr. Sprague continued his postings. For this, he was terminated.

The dissent correctly acknowledges that SVFD could constitutionally limit its employees' free speech to the extent reasonably necessary to avoid liability under the First Amendment's Establishment Clause. The dissent concludes that SVFD did not

[1] SVFD has two forms of nonpublic IEEC—by internal e-mail and by internal electronic bulletin board. The business-only policy applies to both.

strike a reasonably necessary balance and would remand for additional findings. I disagree. As explained below, the balance struck by SVFD was reasonably necessary.

Berry v. Department of Social Services, 447 F.3d 642 (9th Cir. 2006) is instructive. In that case, Daniel Berry worked for Tehama County's Department of Social Services (Department), assisting unemployed and underemployed clients in their transition out of welfare programs. *Id.* at 645-46. His work required him to conduct client interviews, over 90 percent of which took place in his personal cubicle. *Id.* at 646. Mr. Berry described himself as an evangelical Christian and thus required to share his faith. *Id.* Upon his hiring, the Department told Mr. Berry that it had a policy that prohibited employees from talking about religion with clients and the agencies its employees contacted. *Id.* Similar to this case, the policy allowed employees to discuss religion with other employees. *Id.* However, the policy prohibited displays of religious items in areas such as cubicles, which were visible to clients. *Id.* at 647. The Department director also prohibited Mr. Berry from using a specific conference room for prayer meetings, which was a nonwork purpose. *Id.* at 646. Dissatisfied with these restrictions, Mr. Berry sued the Department. *Id.* at 647-48.

The district court granted summary judgment for the Department, and the Ninth Circuit affirmed. *Id.* at 645. In affirming, the Ninth Circuit applied the *Pickering*[2] balancing test. *Id.* at 645-46, 648. That test recognizes that public employees do not lose

[2] *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed 2d 811 (1968).

the free speech rights they enjoy as citizens. *Id.* at 648. The test also recognizes that government, in its capacity as an employer, has interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulating the speech of its citizens. *Id.* (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed 2d 811 (1968)). These rights must be reconciled and, in doing so, courts must balance "'the employee's right to engage in speech and the government employer's right to protect its own legitimate interest in performing its mission.'" *Id.* (quoting *City of San Diego v. Roe*, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004)). In addition, avoiding an Establishment Clause violation may be a compelling state interest, justifying an abridgement of free speech otherwise protected by the First Amendment. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-13, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). The Ninth Circuit concluded:

> [T]he Department's concern with an Establishment Clause violation is well taken. The Department's clients seek assistance from Mr. Berry in his capacity as an agent of the state. Accordingly, they may be motivated to seek ways of ingratiating themselves with Mr. Berry, or conversely, they may seek reasons to explain a perceived failure to assist them. It follows that any discussion by Mr. Berry of his religion runs a real danger of entangling the Department with religion. . . . We conclude that under the balancing test, the Department's need to avoid *possible* violations of the Establishment Clause of the First Amendment outweighs the restriction's curtailment of Mr. Berry's religious speech on the job.

Berry, 447 F.3d at 650-51 (emphasis added).

Here, Mr. Sprague was permitted to discuss his Christian views with his colleagues during work hours, both verbally and through his personal e-mail. He was merely prohibited from using SVFD's IEEC for nonbusiness purposes. Such a restriction curtailed, but only to a small degree, Mr. Sprague's free speech rights. SVFD had a reasonable concern that a failure to restrain Mr. Sprague's postings could lead non-Christian employees to feel marginalized, thus exposing it to Establishment Clause liability in the event an employee reasonably believed this marginalization affected his or her terms or conditions of employment. Although such a concern might not be significant, neither was the abridgement of Mr. Sprague's free speech right. If we had to reach the issue, I would hold that here, SVFD successfully navigated between the Scylla of not respecting Mr. Sprague's free speech right and the Charybdis of exposing it to Establishment Clause liability by appearing to endorse a particular religious view.

Lawrence-Berrey, J.

No. 33352-3-III

FEARING, C.J. (dissenting) —

> *And Jesus came and said to them, "All authority in heaven and on earth has been given to me. Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all that I have commanded you; and lo, I am with you always, to the close of the age." Matthew* 28:18-20 (Revised Standard Version).

Jesus Christ commissioned his contemporary and present-day disciples to teach others in the Christian faith. Religions in addition to Christianity also direct adherents to teach the religion's moral lessons, rules of conduct, and eternal values. Since a person of faith spends much time with his or her coworkers, fellow employees often become the focus of sermonizing. The religious devotee encourages, and sometimes nags, coworkers, with promises of happier days, a fuller life, and eternal salvation, to adopt a different lifestyle. While proselytizing may annoy some coworkers, Washington proudly tolerates different religious views and braves open discussion of religion. This appeal

addresses the extent to which a government employee may use government property to fulfill his or her religious commission to tell coworkers of his faith.

Jonathan Sprague, a Spokane Valley Fire Department firefighter, employed the e-mail system of the fire department as a microphone for his religious views. The majority holds that the fire department held the prerogative to preclude the use of its e-mail for the voicing of religious messages. I note that a government entity, as a general proposition, enjoys this prerogative. Nevertheless, the Spokane Valley Fire Department opened its e-mail system to employee messages of solving personal problems and societal ills through the grace of God when the fire department delivered employee assistance programs newsletters, through the department e-mail, addressing those same problems and ills. The Spokane Valley Fire Department's discipline of Sprague for addressing a topic from Sprague's spiritual perspective constituted viewpoint discrimination in violation of Sprague's free speech rights. The government may not prefer secular chatter over religious oration. I therefore dissent from the majority's affirmation of summary judgment in favor of the fire department.

Claims

Jonathan Sprague sues under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, the Washington Law Against Discrimination, chapter 49.60 RCW, the Washington Constitution, and the United States Constitution. The trial court dismissed all claims. On appeal, Sprague cites no law that establishes that the Washington

Constitution provided him greater liberty or protection than the United States Constitution's First Amendment. We do not address whether the state constitution provides a party broader rights unless that party briefs the factors announced by the state Supreme Court in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Malyon v. Pierce County*, 131 Wn.2d 779, 791, 935 P.2d 1272 (1997).

Jonathan Sprague also fails to address either the federal or state anti-discrimination in employment statutes in his appeal briefing. This court does not review issues not argued, briefed, or supported with citation to authority. RAP 10.3(a); *Valente v. Bailey*, 74 Wn.2d 857, 858, 447 P.2d 589 (1968); *Avellaneda v. State*, 167 Wn. App. 474, 485 n.5, 273 P.3d 477 (2012). Thus, this court need only ask if the conduct of the Spokane Valley Fire Department violated Jonathan Sprague's rights under the First Amendment to the United States Constitution.

Despite seeking to express his religious faith, Jonathan Sprague relies only on the free speech clause, and not the exercise of religion clause, of the First Amendment on appeal. I do not know if the analysis would change if Sprague relied on the free exercise clause.

Some Facts

I emphasize some facts. The Spokane Valley Fire Department allowed Jonathan Sprague to evangelize at work to the extent the proselytization did not disrupt business. The fire department permitted Sprague to speak with coemployees, during work hours, of

his faith and his desire that others enjoy salvation through Jesus Christ. Because of the unique work schedule of firefighters, the fire department allowed Sprague, during work time, to use a department computer to send messages about his devotion to Christ as long as Sprague used his personal e-mail address accessed through the computer and Sprague sent the messages to coworkers' private e-mail addresses.

Spokane Valley Fire Department Policy 171 (Policy) indirectly barred Jonathan Sprague's use of the department's e-mail system to send spiritual communiques. The policy read, in pertinent part:

> The electronic mail system hardware is [Spokane Valley Fire Department (SVFD)] property and all messages composed, sent, or received on the system are SVFD property. Therefore, the use of the electronic mail system is reserved solely for SVFD business and should not be used for personal business.

Clerk's Papers (CP) at 108. Sprague could use the fire department e-mail system to ask a fellow staffer to disclose his or her personal e-mail address in order to later communicate with religious messages to the personal address.

Because the Spokane Valley Fire Department maintained more than one fire station, a common physical bulletin board for all firefighters was not useful. Therefore, the fire department used its electronic mail system, in part, as a bulletin board. The record does not establish the entire gambit of subjects, on which firefighters could post on the electronic bulletin board. Deposition testimony gave examples of the selling of

concert tickets, snow tires, hay, and motorcycles and the seeking of recommendations for a babysitter.

Spokane Valley Fire Department Policy 171 and the fire department's application of the policy precluded Jonathan Sprague's use of the fire department's electronic bulletin board to post religious messages. Sprague formed the organization, Spokane Christian Firefighters Fellowship. He could post notices of the fellowship's meetings on the bulletin board. Sprague does not contend that the permission to post notices of organizational meetings and events opened the door to his being free to send messages with an overt religious content.

Jonathan Sprague contends that allowing other firefighters to sell used goods and seek recommendations for babysitters opened the bulletin board to him for purposes of religious evangelism. According to Sprague, the fire department allowed any speech, other than religious proselytizing, on the electronic bulletin board and this practice discriminated against him in violation of the First Amendment.

Jonathan Sprague contends that the Spokane Valley Fire Department electronic bulletin board contained other expressions of religious views. Nevertheless, he does not identify these expressions in his brief. When asked at oral argument to identify the page number or numbers of the record supporting this contention, Sprague's counsel could not identify a page number. Wash. Court of Appeals oral argument, *Sprague v. Spokane*

Valley Fire Dep't., No. 303352-3-III (June 10, 2016) at 8:30 to 8:45 (on file with the court).

The record on appeal contains a Spokane County website page that explains a chaplaincy program provided for law enforcement officers. A second website page introduces a new chaplain. The writer of the second page quotes three verses from the Biblical book of Psalms. We do not know what relevance this page holds to the dispute between the Spokane Valley Fire Department and one of its firefighters. Jonathan Sprague testified that he received a copy of the chaplain's message, but he did not disclose from what resource he garnered a copy.

The Spokane Valley Fire Department, as most larger employers, managed an Employee Assistance Program (EAP). The fire department's health insurer, APS Healthcare, administered the program, and the insurer periodically prepared newsletters for fire department employees. APS mailed the newsletters to the fire department, and the department's administrative director forwarded the newsletters to fire department employees through the department's e-mail system.

Two newsletters from APS Healthcare respectively discussed a parent's communicating with a teenage child and coping with an "empty nest." Another newsletter is alternatively titled "Prevent Caregiver Depression" and "Quick Change Your Mood." CP at 285. The text of this letter is unreadable. A photo under the latter heading pictures a young lady meditating in what might be a lotus position.

An APS Healthcare newsletter advised a parent to be strict with regard to a teenage child's use of alcohol and marijuana. Another page of this newsletter discusses difficult behavior of a teenager, but the text is unreadable. Another newsletter identifies forms of eating disorders and treatments for the disorders.

An APS Healthcare newsletter on suicide reads:

> A person who attempts suicide will usually reach out for help first. Behaviors or cries for help may be subtle. Would you recognize the warning signs? If someone mentions having suicidal thoughts, don't shy away. Be ready to act by knowing the risk factors and second-guessing your denial response.
>
> Here's rule No.1: Ask about it. Don't let your fear hold you back. Empathizing or inquiring about suicidal statements saves lives. It is not what pushes a suicidal person over the edge. People who are contemplating suicide will usually talk about it, but they often need to be led into the conversation. Always take the matter seriously. Stay calm, and express your concern and assure the suicidal individual of how much he or she is loved and valued. Get a commitment from the individual to seek professional help, and agree to facilitate access to help by removing obstacles to it. Provide childcare or transportation, or summon emergency help if a threat is imminent.
>
> If you need immediate help for yourself or a loved one, call 911, 1-800-SUICIDE or 1-800-273-TALK.
>
> Other resources include your Employee Assistance Program, www.suicide.org, ww.afsp.org (American Society for Suicide Prevention) or www.survivorsofsuicide.com.

CP at 286.

One Employee Assistance Program newsletter discussed team building:

> If you are part of a new work team, be sure to invest timesharing among members to determine each person's strengths, limitations, and interests before assigning roles and tasks. This exercise reduces communication problems and conflicts that can arise later from a lack of

> cohesion. Team problems often start at the beginning. Unfortunately, many teams perceive struggles with conflict as originating with the organization—the boss, politics, or other factors. Avoid these member pitfalls: 1) Believing your skills and experience demand that you do a disproportionate amount of work. 2) Assuming a team member's underperformance is due to a lack of personal organization, motivation, or skill (often team issues explain individual performance shortcomings). Always start with the team first when searching for solutions. 3) Failing to intervene early when there are indicators that one or two people are doing most of the team's work.

CP at 293.

Another APS Healthcare newsletter addressed the evils of gambling:

> Most people have heard of compulsive gambling (gambling disorder), but do you know the earliest symptoms of this addiction? Legalized avenues for gambling are increasing nationally so more people are likely to be affected. Knowing the early signs can make intervention easier to stop the devastating condition. Reportedly, the earliest signs of the disorder are chasing losses, betting more than you can afford to lose, and feeling guilty about gambling. Sound familiar? Help is available. Start with your Employee Assistance Program or a professional counseling resource.

CP at 293.

Finally, an APS Healthcare message warns of binge drinking:

> The Centers for Disease Control (CDC) has begun an effort to educate consumers about the dangers and huge economic cost of binge drinking—over $225 billion per year. It is a growing problem that they admit has been studied less than alcoholism. There are about 18 million alcoholics and regular alcohol abusers in the United States, but there are 38 million binge drinkers. That's about 15 [percent] of the population. Most are not alcoholics. Binge drinking means drinking five or more alcoholic drinks within a short period of time for men, and drinking two or more drinks within a short period of time for women. Binge drinkers consume alcohol on average four times per month. The highest average number of

> drinks consumed during at least one of those drinking sessions is eight. Auto crashes, accidents, violence, and suicide are the key risks for binge drinkers. People between the ages of 18 and 34 do the most binge drinking, and the income group with the highest number of binge drinkers is those making over $75,000 a year. What can be done to reduce binge drinking? Becoming aware of your binge drinking is the first step and evaluating your own drinking pattern is next. Helping make others aware of the problem follows, but the CDC has other recommendations too. Learn more at the Centers for Disease Control at http://www.cdc.gov/vitalsigns/BingeDrinking/.
>
> APS Healthcare's Employee Assistance Program. The EAP program through APS Healthcare assists organizations and their workforce in managing the personal challenges that impact employee well-being, performance and effectiveness. APS' life management consultants employ a comprehensive approach that identifies issues impacting the employee and assists them in developing meaningful solutions.
>
> Please call the phone number below for more information about your Employee Assistance Program and the services available to you.

CP at 294.

Jonathan Sprague writes in his appeal brief that the Spokane Valley Fire Department invited or requested responses from firefighters to the health insurer's newsletters. Nevertheless, the citation to the record given by Sprague for this factual assertion does not support the contention. Sprague also writes in his brief that the fire department permitted the use of the e-mail system by employees for the expression of personal views linked to fire department business. He fails to cite the record for this factual proposition.

In early February 2012, Jonathan Sprague quoted a biblical scripture as part of a bulletin board post announcing a Spokane County Christian Firefighters Fellowship

meeting. On April 5, 2012, Sprague quoted two sacred scriptures as part of a bulletin board announcement for the Fellowship. The announcement read:

> The April newsletter continues with our discussion on suicide. If you didn't catch March's kickoff in the series, be sure to read that first. (All back copies are available on the SCCFF website.) The question this month is what role does mental illness play in the act of suicide? Does mental failure cause moral failure? Can a person be pre-wired to sin? If so, are they still accountable for their actions? How do these ideas fit in with our foundational verse?
>
> *For none of us lives to himself, and none of us dies to himself. For if we live, we live to the Lord, and if we die, we die to the Lord. So then, whether we live or whether we die, we are the Lord's.* (*Romans 14:7-8*)
>
> We are also finishing up the series on fellowship by looking at the toughest group for us to deal with on a personal basis: nominal Christians. Most of us could have been put in that group ourselves once or twice and we work with others who currently are. What are we to do? How can we work with them to get the job done as brother firefighters, yet still follow the Scriptural mandates regarding backsliding brothers in Christ?
>
> *But actually, I wrote to you not to associate with any so-called brother if he is an immoral person, or covetous, or an idolater, or a reviler, or a drunkard, or a swindler—not even to eat with such a one. (1 Corinthians 5:11)*

CP at 151.

On April 24, 2012, Jonathan Sprague accessed the Spokane Valley Fire Department e-mail system from an outside source and used his fire department account to send a message to the fire department e-mail accounts of forty-six employees. The e-mail read, in part:

> Subject: Logo Design—Need your Vote
>
> Attached are some designs for the SCCFF [Spokane County Christian Firefighters Fellowship] logo. These are the ones that seem to wash out least in B&W. One might be a good for a patch design and

> another embroidered on a polo or silk screened on a t-shirt. I would greatly appreciate a vote for both a patch and for a logo.
>
> Jon.

CP at 157. One logo contained the Latin phrase: "Soli Deo Gloria," which translates into English as "Glory to God alone." CP at 158. A second logo contained an illustration of a flame, although one with a Christian heritage might consider the illustration to be a symbol of speaking in tongues or of the Christian holy day of Pentecost.

On April 30, 2012, Jonathan Sprague posted on the Spokane Valley Fire Department electronic bulletin board by use of the fire department e-mail system accessed from an outside source. Sprague also sent the post as an e-mail message to the fire department e-mail accounts of forty-six employees. The e-mail read:

> Newsletter
>
> The May newsletter celebrates a fresh look and a new logo. This is our new patch design and comes in a couple different variations. Another design for more casual use, similar to the one in the Classifieds, will be introduced soon.
>
> This month, we'll be reading what the Bible says about supplements. What? Yes, Peter actually talked about supplements in his second epistle, so read on and stock up now
>
> We're also continuing with our series on suicide, which will in part, answer last month's question, "Are the Darwin awards only given out in hell?" In other words, if you die as a result of your own foolish actions, what effect does that have on your eternal salvation? When the Apostle Paul says, "[W]hether we live or whether we die we are the Lord's", is he speaking conditionally or affirming our security in Christ? We all like simple answers to difficult questions, but the questions we ask may not fully represent the truths behind them.
>
> Activities

> The SFD breakfast is coming up mid-month and a dinner barbecue at the Bowl and Picture [sic] on the 19th. Bring your bikes for a nice dinner spin. (Gotta burn off that homemade ice cream!).
>
> Be watchful for some kayaking on the Little Spokane. The water is still very high, so we may have to hike the boats in, again, if we want to do another early spring run. Dates for the 2012 Biruka will be out soon.
>
> As always, check out the website or [F]acebook page for more info about what's up, or give me a call.
>
> Jon

CP at 165-66.

On May 29, 2012, Jonathan Sprague sent the following message to Spokane Valley Fire Department employees' e-mail addresses:

> Napoleon Bonaparte once said, "I know men and I tell you, Jesus Christ is no mere man. Between him and every other person in the world there is no possible term of comparison. Alexander, Caesar, Charlemagne, and I have founded empires. But on what did we rest the creations of our genius? Upon force. Jesus Christ founded his empire upon love; and at this hour, millions would die for him."
>
> This newsletter article examines the purpose of leadership's power and authority, which has been a topic of no small interest as of late. There are clearly some radical differences in the leadership style of Jesus, who, according the Bible, was given all power and authority in heaven and on earth. Why has anyone ultimately been given power and authority over others, and how might they be best utilized in the fire station or in the home? We'll take [a] look at leadership from this Biblical perspective for some answers.
>
> We're also keeping up with our series on suicide with a closer look at the intervention piece and the Biblical principles with which it may coincide. A lot has been said about the openPhoenix project, First Call Now, and other resources, most of which are designed to intervene when things are starting to spiral downhill. These types of programs are a relatively new, and by their nature don't fix anything, but rather, act as emergency medicine, arresting the damage and buying time for healing to occur. As such, they reflect the love, mercy, and compassion of God and of those who desire to have such traits in themselves.

> We're getting together for kayaking on the 6th and breakfast on the 21st. Check out the classifieds [the fire department electronic bulletin board] for more details if you are interested.
> Jon

CP at 168.

On July 16, Jonathan Sprague sent another message through the Spokane Valley Fire Department e-mail system. The message read:

> But what if your leaders are themselves are following the wrong path?
> That is the question everyone faces at some point. Little doubt why trust is such a critical factor in effective leadership-followership relationships, especially when the leader has not given you what you need to know in order to be convinced of the plan yourself.
> The answers to these questions can be found by studying the leadership-followership paradigm we see in Jesus as detailed in the Bible, as He interacts with His Father above and His disciples below. What was it, or who was it, that Jesus wanted His followers to follow and why? How might that impact your own leadership or followership? There are certainly differences in the world's understanding of followership and that of Christians. This article may stimulate some reflections along those lines as we continue to look at leadership from a Biblical viewpoint.
> We're also looking to discover what type of impact holding a religious belief has on suicide. Are some faiths better or worse in this regard? If so, why? And, which ones? The answers might help you to better understand others who may be heading down a dangerous path. Check it out, here. You might be surprised.
> There is an ice cream social at my house on the 21st, where I'd love to discuss these ideas and "sharpen swords" on some of the finer points.
> As I've said before, if you do not wish to receive these emails, please let me know and I will remove you from the list. If you would rather get them at a different email address, I'd be happy to send them there instead. Even though they deal with fire service topics, nothing in these emails is endorsed by the department anymore [sic] than other such discussions on similar topics, as should be abundantly clear by this time.

CP at 265.

On July 31, 2012, Jonathan Sprague wrote to his coworkers, through the fire department e-mail system:

> If your home can weather a disaster, it is only because it was built that way. The life of a firefighter who survives personal disasters is no less well designed. Stepping beyond suicide prevention, this article looks at ways from the Bible that we can methodically build our lives in ways that will last through the worst of days, beginning with *Building Construction 101—Site Plans*. I think you'll find these truths to have been a great help to many brother and sister firefighters, such as Jason Webster (SFD) and his wife Jessica, who is battling cancer. I know so many of you have experienced similar pains and found similar help from the Lord. Be sure to lift them up as you consider your own situation.
>
> On another note, have you ever wondered what a career of fighting fire is worth in the end? There must be more to it than a pension and fast fading memories of the "glory days." King Solomon enjoyed more accomplishments and pleasures than you or I ever could and he had much to say when he was all through. Perhaps you'll find some interesting things to consider as we look at *Firefighting - A For-Profit Enterprise*.

CP at 203.

A September 1, 2012, e-mail message from Jonathan Sprague to his coworkers, on the fire department system, read, in part:

> We started a series last month on building construction—how best to build a life that can weather the storms that invariably come, and we firefighters really have some big storms. The Bible has much to say about what and who comprise a solid foundation. Some of the verses will certainly be familiar. I hope you'll find the article encouraging and, perhaps, a reminder to check beneath the surface to see what's down there at the core of your life. Cracks in the foundation can result in catastrophic damage if not caught early.

CP at 268.

One Spokane Valley Fire Department firefighter asked Jonathan Sprague to be removed from the list of coworkers to whom Sprague sent his religious messages. No one complained to the fire department administration about messages from Sprague. No employee questioned the fire department administration as to whether the department sponsored or approved of Sprague's messages. The fire department agrees that, assuming Jonathan Sprague's proselytizing through the department's e-mail system led to costs incurred by the fire department, the cost could not be calculated and would be de minimus.

In a September 6, 2012, notice of disciplinary action, Spokane Valley Fire Department Fire Chief Mike Thompson notified Jonathan Sprague that causes of discipline included posting, on the department e-mail system, "negative comments about the leadership of SVFD and written content that was of a religious nature." CP at117.

Collateral Estoppel

The majority underscores two factual findings of the civil service commission and concludes that those findings bind this reviewing court. First, the commission found that the Spokane Valley Fire Department terminated Jonathan Sprague's employment because of insubordination, not for religious reasons. I disagree that this factual finding binds this reviewing court at least to the extent of requiring us to rule that the fire department did not discriminate on the basis of the viewpoint of Sprague's messages. The finding directly relates to Sprague's First Amendment argument, and thus the finding is akin to a

conclusion of law. Collateral estoppel does not extend to conclusions of law rendered by administrative agencies. *Silverman v. JRL Food Corp.*, 196 F.3d 334, 335-36 (2d Cir. 1999); *Nat'l Labor Relations Bd. v. Markle Mfg. Co. of San Antonio*, 623 F.2d 1122, 1126 (5th Cir. 1980); *Mosher Steel Co. v. Nat'l Labor Relations Bd.*, 568 F.2d 436, 440 (5th Cir. 1978).

When a question on review implicates constitutional rights necessitating consideration of legal concepts in the mix of fact and law and an exercise of judgment about the values that animate legal principles, the factors favoring de novo review predominate. *Levey v. D'Angelo*, 819 So. 2d 864, 867 (Fla. Dist. Ct. App. 2002); *Smith v. Fresno Irrig. Dist.*, 72 Cal. App. 4th 147, 156, 84 Cal. Rptr. 2d 775 (1999). Whether an employee's speech is protected under the First Amendment and whether a restriction on speech is constitutional are reviewed de novo. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 648 (9th Cir. 2006); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988).

Jonathan Sprague was insubordinate because he sought to sermonize. A fire department employee is mutinous only if he disobeys a lawful order, and an order violating one's First Amendment rights is unlawful. Therefore, to the extent the fire department breached Sprague's constitutional rights, Sprague must not be considered insubordinate.

The civil service commission also found that the Spokane Valley Fire Department evenly applied Policy 171 and did not discriminate based on Jonathan Sprague's

expression of Christian views. This court's majority may conclude that this finding ends our analysis as to whether the fire department violated Sprague's First Amendment rights. If so, I disagree. We should adopt the commission's finding to the extent that the finding confirms the evidence that the fire department did not allow one or more individuals to proclaim their religious views, while denying Sprague the opportunity to preach his devout beliefs. Nevertheless, as already outlined, the undisputed facts show that the fire department disseminated information from its health insurer on the department's e-mail system about personal struggles and family crises that could interfere in an employee's mental health and job performance. In turn, the fire department precluded Jonathan Sprague from discussing, by department e-mail, these same topics from his Christian perspective.

Based on the undisputed facts, this court should address, without deference to the civil service commission, the constitutional question of whether the fire department unlawfully discriminated against Sprague because of his spiritual message. The commission's determination of a lack of discrimination was a mixed question of fact and law. Again, collateral estoppel does not apply to conclusions of law. We review anew constitutional questions embedded in a medley of fact and law.

Forum Analysis and Viewpoint Discrimination

The precise issue before this court is whether the Spokane Valley Fire Department needed to permit Jonathan Sprague the use of the department's e-mail system to speak

from a religious vantage point on topics affecting firefighters' mental health when the department disseminated information on those same topics. The majority does not directly address this critical question. I dissent from the majority because the answer is in the affirmative.

Jonathan Sprague wanted to utilize an e-mail system established, operated, and paid for by a government agency, his employer. In short, he desired to use government property to advance his Christian message. Protected speech is not permissible in all places and at all times. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). Nothing in the constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 799-800. The government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 800; *Greer v. Spock*, 424 U.S. 828, 836, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976).

The United States Supreme Court has adopted a forum analysis as a means of determining when the government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other

purposes. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 800. Accordingly, the extent to which the government can control access depends on the nature of the relevant forum owned by the government. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 800.

The Supreme Court has fashioned three or four classifications of fora, for purposes of free expression: a traditional public forum, a designated public forum, a limited public forum, and a nonpublic forum. Sometimes the designated and limited public fora are treated as one category. The First Amendment rules to apply depend on the classification. The initial task for a court evaluating restrictions placed on speech or expressive conduct on government property is to define the nature of the property at issue. *Byrne v. Rutledge*, 623 F.3d 46, 53 (2d Cir. 2010). We will see later, however, that the identification of the forum is irrelevant when a speaker, such as Jonathan Sprague, argues viewpoint discrimination.

Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). A traditional public forum includes a street, sidewalk, public square, or a park. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,

460 U.S. at 45; *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939).

A designated public forum includes a civic arena available for use to private organizations. A limited public forum may be a room that a government entity opens on a temporary basis for a single topic. *Summum v. Callaghan*, 130 F.3d 906, 914 (10th Cir. 1997). As with a traditional public forum, when the government intentionally designates a place or means of communication as a public forum, speakers cannot be excluded without a compelling governmental interest. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 800 (1985). Virtually all regulations on speech in a limited or designated public forum receive the highest level of First Amendment scrutiny. *Byrne v. Rutledge*, 623 F.3d at 53 (2d Cir. 2010). Access to the fourth category of fora, a nonpublic forum, however, can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression because of the viewpoint expressed by the speaker. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 800.

Jonathan Sprague is not simply a member of the public. He is an employee of the government. Nevertheless, forum analysis applies even when the speech restricts insiders. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988); *Berry v. Dep't of Soc. Servs.*, 447 F.3d at 652-54 (9th Cir. 2006).

The parties agree that the electronic e-mail system of the Spokane Valley Fire Department constitutes a nonpublic forum. The majority and I agree with the parties.

The United States Supreme Court held, before common exploitation of the Internet, that a government entity's internal mail system is not a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46. Courts, including Washington courts, have since held an agency's e-mail system to be a nonpublic forum when the facilities are not open to the public. *Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997); *Knudsen v. Wash. State Exec. Ethics Bd.*, 156 Wn. App. 852, 865-66, 235 P.3d 835 (2010); *Herbert v. Pub. Disclosure Comm'n*, 136 Wn. App. 249, 263-64, 148 P.3d 1102 (2006).

In a nonpublic forum, the government has maximum control over communicative behavior. *Byrne v. Rutledge*, 623 F.3d at 53 (2d Cir. 2010). Speech in nonpublic fora may be restricted if the distinctions drawn are reasonable in the light of the purpose served by the forum and are viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 806 (1985); *Herbert v. Pub. Disclosure Comm'n*, 136 Wn. App. at 259 (2006). Jonathan Sprague does not argue the restriction of his e-mail use was unreasonable. He focuses on viewpoint neutrality.

We must determine if the Spokane Valley Fire Department's preclusion of Jonathan Sprague's discussion of topics from a religious outlook was viewpoint neutral when the mental health newsletter discussed some of the same topics from a secular view. In evaluating viewpoint neutrality within the context of a nonpublic forum, two guiding principles emerge. First, the government may permissibly restrict content by

prohibiting any speech on a given topic or subject matter. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001). The State may be justified in reserving its forum for certain groups or for the discussion of certain topics. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). The state may properly exclude an entire subject. *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008). Second, however, once the government permits some comment on a particular subject matter or topic, it may not regulate speech in ways that favor some viewpoints or ideas at the expense of others. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). Accordingly, while a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. *Cornelius*, 473 U.S. at 806 (1985).

Consistent with the general rule prohibiting viewpoint discrimination, speech discussing otherwise permissible subjects cannot be excluded on the ground that the subject is discussed from a religious viewpoint. *Good News Club v. Milford Cent. Sch.*, 533 U.S. at 111-12 (2001). The government may not exclude a theistic or atheistic perspective on the debate. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. at 831-32 (1995). There is no logical difference, for purposes of free speech, between one

speaker's invocation of religion to inspire conduct or explain a topic and another's invocation of teamwork, loyalty, morality, or patriotism to discuss a topic. *Good News Club v. Milford Cent. Sch.*, 533 U.S. at 111.

The test of viewpoint neutrality is the same regardless of whether the forum is a designated or limited public forum or a nonpublic forum. *Byrne v. Rutledge*, 623 F.3d at 54 n.8. Therefore, when the speaker claims viewpoint discrimination, the identification of the forum becomes irrelevant.

Jonathan Sprague principally relies on the United States Supreme Court decisions in *Good News Club v. Milford Central School* and *Rosenberger v. Rector & Visitors of University of Virginia*. The two opinions, together with *Lamb's Chapel v. Center Moriches Union Free School District* comprise a trilogy that compels the conclusion that the Spokane Valley Fire Department imposed viewpoint discrimination to the disfavor of Sprague.

In *Lamb's Chapel v. Center Moriches Union Free School District*, the Supreme Court confronted a New York law that permitted private citizens to use public school premises for "social, civic, and recreational meetings" but, as construed by state courts, prohibited such use for "religious purposes." 508 U.S. at 386. Consistent with the statute as interpreted, the school district refused to permit an evangelical church to use school facilities to show a James Dobson film series on family and parenting. The Supreme Court held the school to have violated the free speech clause. While treating the school

premises as a nonpublic forum, the Court noted that control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Nevertheless, the Court concluded that the ban was not viewpoint neutral because it impermissibly prohibited comment on otherwise permissible subject matters, such as child rearing and family values, on the ground that the film sought to discuss those subject matters from a religious perspective.

In *Rosenberger v. Rector & Visitors of University of Virginia*, the nation's highest Court considered a university program that dispensed funds to various student groups, but excluded from eligibility any student group engaged in "religious activities," defined as activities that "primarily promotes or manifested a particular belief in or about a deity or an ultimate reality." 515 U.S. at 825. Applying that rule, the university denied funding to a student group that published a magazine focused on the "Christian Perspective at the University." 515 U.S. at 826. The Supreme Court found the denial unconstitutional. The restriction constituted viewpoint discrimination, rather than a legitimate content restriction. The University did not exclude religion as a subject matter, but selected, for disfavored treatment, student journalistic efforts with religious editorial viewpoints. In an oft-quoted passage, the Court philosophized:

> Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.

Rosenberger v. Rector & Visitors of University of Va., 515 U.S. at 831.

Finally, in *Good News Club v. Milford Central School*, the United States Supreme Court confronted a school district policy that allowed private use of school facilities for "instruction in any branch of education, learning or the arts" and "social, civic and recreational meetings and entertainment events" but excluded use "by any individual or organization for religious purposes." 533 U.S. at 102-03. Consistent with the policy, the school district refused to allow a private Christian organization to hold weekly afterschool meetings that would include a Bible lesson and memorizing scripture. The Court again invalidated the ban. The school district engaged in viewpoint discrimination when it excluded the club from the afterschool forum because the club sought to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint.

Passages from some decisions imply that the government engages in viewpoint discrimination only if the government officials that restrict the speech disagree with the speaker's ideology or perspective. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 812-13 (1985); *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 336 n.4 (8th Cir. 2011); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004). Jonathan Sprague presented no evidence that the Spokane Valley Fire Department Chief or Board of Commissioners disagreed

with Sprague's religious views. The officials simply wanted to exclude all religious speech. Despite this framing of the rule in many decisions, no decision specifically holds that viewpoint discrimination must involve the government actors' disagreement with the religious views espoused. Case after case invalidates viewpoint discrimination on the sole ground that the government wanted a prohibition on religious speech for administrative purposes not for the reason of stifling religion or a sect of religion.

Jonathan Sprague contends that allowing other firefighters to sell used goods and seek recommendations for babysitters opened the bulletin board to him for purposes of religious evangelism. According to Sprague, the fire department allowed any and all speech, other than religious proselytizing, on the electronic bulletin board and this practice discriminated against him in violation of the First Amendment. Sprague contends the fire department opened a forum for all speech. I disagree. A government agency may open a nonpublic forum to limited topics. Allowing the use of an e-mail system to sell goods does not unlock the forum to religious indoctrination. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999).

I instead dissent because the Spokane Valley Fire Department targeted Jonathan Sprague's e-mail messages because of their religious content, while Sprague's messages addressed some of the same topics bespoke by the fire department or the department's health insurer through the e-mail system. Both the newsletters and Jonathan Sprague's missives mentioned suicide and how to prevent suicide. A newsletter spoke of

depression. Arguably, Sprague also mentioned coping with depression. The fire department's topic of team building may overlap Sprague's lecture on leadership. Unfortunately, the law gives no guidance as to what constitutes one topic or subject matter for purposes of viewpoint discrimination. Spokane Valley Fire Department Policy 171 did not prohibit department employees from responding to APS Healthcare's newsletters by examining the topics of teen discipline, gambling addiction, alcoholism, depression, eating disorders, and team building from a secular perspective. Presumably other firefighters within the fire department could have forwarded their views on the e-mail system as to these topics from a humanistic or philosophic position. The latitude given other workers to express their views confirms the fire department's need to grant Jonathan Sprague the freedom to espouse resolving these ills through a relationship with Jesus Christ.

The majority writes that the Spokane Valley Fire Department did not discipline Jonathan Sprague because of the religious nature of his speech, but rather because Sprague used the e-mail system for his private use and not for the business of the fire department. This comment by the majority, however, fails to note that the fire department allowed other private uses of the e-mail system by firefighters. The only instance when the fire department enforced Policy 171 to preclude private use of its property was when Sprague spoke from a religious vantage point. Moreover, Spokane Valley Fire Department notices of discipline scolded Sprague for the religious content of

his messages, including the use of religious symbols, not the private or personal nature of the messages.

The majority's observation also fails to recognize that, as part of its business of operating a firefighting force, the fire department forwarded newsletters to employees for the purpose of promoting mental health. Jonathan Sprague's advancing of employee's mental health, through a Christian perspective, also furthered the business of the fire department.

The Spokane Valley Fire Department relies on *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006). Nevertheless, *Berry* is inapposite. Daniel Berry worked for the employment services division of the California Department of Social Services. His duties included assisting unemployed clients with a transition from a welfare program to employment. He often interviewed clients. Berry's faith demanded that he share his faith with and pray with clients during these interviews. The Department of Social Services allowed Berry to talk about his religious faith to his colleagues, but barred him from sharing his views and praying with clients. The Ninth Circuit held that the department did not violate the free speech clause with this prohibition. The court noted a fear that clients of the Department of Social Services might ingratiate themselves with Berry by succumbing to his evangelism. The clients might conclude the government wanted a religious conversion in order to gain state benefits.

The Spokane Valley Fire Department has not accused Jonathan Sprague of proselytizing residents of Spokane Valley or others who receive fire department services. His evangelism was limited to coworkers.

First Amendment Establishment Clause

The Spokane Valley Fire Department raises as a defense the United States Constitution's First Amendment Establishment Clause. The fire department argues that, if it allowed Jonathan Sprague the opportunity to espouse his spiritual messages on the department's e-mail system, the department would promote or sponsor religion and thereby violate the Establishment Clause. Along these lines, the fire department contends it may engage in viewpoint discrimination if it can show a compelling interest to do so and the avoidance of establishing a religion presents a compelling state interest. The United States Supreme Court has held that the interest of the State in avoiding an Establishment Clause violation may be a compelling interest that justifies an abridgement of free speech otherwise protected by the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 271, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981).

I disagree with the Spokane Valley Fire Department's analysis. An even-handed, neutral right of access to the government forum does not violate the Establishment Clause. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. at 839 (1995). The Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice

as endorsing a religion. *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 530 U.S. 290, 302, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000). In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Supreme Court rejected the school district's argument that allowing the showing of a religious film would be viewed by the public as government advancement of religion when the school district opened its doors to a wide variety of private organizations.

The Spokane Valley Fire Department presented no evidence that any employee concluded that the fire department sponsored or approved of any message sent by Jonathan Sprague. Sprague's persistent and aggressive evangelism would alert other employees to the fact that the fire department did not sponsor his preaching. The fire department's discipline of Sprague confirmed its dissociation with the message. Sprague invited recipients the option to reject the communications.

Speech in Workplace

An urgent difference between this appeal, on the one hand, and *Good News Club v. Milford Central School*, *Rosenberger v. Rector & Visitors of University of Virginia*, and *Lamb's Chapel v. Center Moriches Union Free School District* is the fact that the speakers in the three United States Supreme Court decisions were not employees of the government agency. Therefore, I address this appeal from the perspective that Jonathan Sprague was an employee of the government.

On the one hand, the State has an interest as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech in the citizenry in general. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). This is because the government, as an employer, has an interest in promoting the efficiency of the public services it performs through its employees. *Pickering v. Bd. of Educ.*, 391 U.S. at 568. Accordingly, a government employer may impose certain restraints on the speech of its employees that would be unconstitutional if applied to the general public. *City of San Diego v. Roe*, 543 U.S. 77, 80, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004). On the other hand, a government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. *City of San Diego v. Roe*, 543 U.S. at 80.

Courts apply a balancing test when confronted with constitutional challenges to restrictions on public employee speech in the workplace. *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1210-11 (9th Cir. 1996). Under *Pickering v. Board of Education*, 391 U.S. at 568 (1968), the United States Supreme Court requires a court evaluating restraints on a public employee's speech to balance the interests of the employee, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees and the State's legitimate administrative interests.

The *Pickering* balancing test applies to an employee's religious speech. *Berry v. Dep't of Soc. Servs.*, 447 F.3d at 650 (9th Cir. 2006). A topic of public concern, for purposes of *Pickering* balancing, includes religion.

The government holds the burden to establish that its legitimate administrative interests outweigh the employee's First Amendment rights. *Clairmont v. Sound Pub. Health*, 632 F.3d 1091, 1106-07 (9th Cir. 2011). To prove an employee's speech interfered with working relationships, the government must demonstrate actual, material, and substantial disruption, or reasonable predictions of disruptions in the workplace. *Clairmont v. Sound Pub. Health*, 632 F.3d at 1107.

The Spokane Valley Fire Department had no compelling, let alone important, interest in restricting Jonathan Sprague's speech. The fire department did not expose itself to violation of the Establishment Clause by tolerating Sprague's evangelism. Sprague did not increase the costs of the fire department's e-mail system by the sending of his messages.

The government may prohibit employee speech on its grounds that it is disruptive to business. *United States v. Kokinda*, 497 U.S. 720, 733, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990). Sprague's speech caused no disruption in the workplace other than the administrative hassle of sanctioning and firing Sprague. Nevertheless, Sprague should not be charged with this disruption if his speech was unlawfully restricted.

We do not know the time of day when Jonathan Sprague sent his messages. We know that firefighters typically work twenty-four hour shifts, during which they have free time. The fire department does not complain that the e-mail messages interfered in Sprague's performance as an employee or the performance of the recipients of his message.

Tucker v. State of California Department of Education, 97 F.3d 1204 (9th Cir. 1996) is analogous. The state Department of Education promulgated a rule that prohibited employees from engaging in any oral or written religious advocacy in the workplace. The Ninth Circuit Court of Appeals held the rule violative of employees' First Amendment rights. The court noted that the department provided no evidence of a disruption in the workplace by limited proselytizing. Time spent by supervisors in enforcing the rule could not be counted toward calculating work disruption. The department presented no evidence that coemployees complained about one employee's proselytizing.

One might find it odd that a government entity must permit an employee to use the government's e-mail system to espouse religious messages. Nevertheless, in other decisions, the speaker, whether an employee of the government or member of the public, used government property. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Supreme Court permitted religious society members to walk in government corridors, occupy a government room, and repose in government

chairs to view a religious film. Presumably the religious entity even used a film screen owned by the government. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the nation's highest Court directed the government to fund a religious publication.

The Spokane Valley Fire Department observes that it did not comment or opine on the topics discussed within APS Healthcare's newsletters. The fire department further observes that the EAP newsletters corresponded with the fire department's benefits package, and, in turn, the newsletters were related to the fire department's business. I find these observations of no help to the fire department. Whether or not the fire department prepared or merely forwarded the newsletters prepared by another entity was irrelevant. The fire department allowed mention of topics, on which Jonathan Sprague later touched. As already mentioned, if steps advocated by APS Healthcare could improve the fire department's work environment, arguably Jonathan Sprague's recommendations from a religious standpoint could benefit the workplace.

Disposal of Appeal

I would reverse the summary judgment granted the Spokane Valley Fire Department and remand the case to the superior court for further proceedings. The record shows that many of Jonathan Sprague's religious expressions went beyond responding to the APS Healthcare newsletters. Sprague wrote about interacting with nominal Christians, choosing a religious logo, and health supplements, subject matter

never mentioned in the newsletters. The trier of fact should determine the extent that Sprague's missives overlapped topics in the APS Healthcare newsletters and the magnitude that Sprague's preaching did not address newsletter subjects. The trier of fact should also determine whether or not the fire department would have terminated Sprague's employment based on the noncorresponding messages and whether such termination would be warranted. If the trier of fact determines that Sprague's termination from employment was not otherwise justified, it should further determine what, if any, damages Sprague suffered from the viewpoint discrimination. I respectfully dissent:

Fearing, J.

Fearing, C.J.

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 11

§ 11. Religious Freedom

Currentness

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Credits

Adopted 1889. Amended by Amendment 4 (Laws 1903, p. 283, § 1, approved Nov. 1904); Amendment 34 (Laws 1957, S.J.R. No. 14, p. 1299, approved Nov. 4, 1958); Amendment 88 (Laws 1993, H.J.R. No. 4200, p. 3062, approved Nov. 2, 1993).

West's RCWA Const. Art. 1, § 11, WA CONST Art. 1, § 11
Current through amendments approved 11-3-2015.

End of Document

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 5

§ 5. Freedom of Speech

Currentness

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Credits
Adopted 1889.

West's RCWA Const. Art. 1, § 5, WA CONST Art. 1, § 5
Current through amendments approved 11-3-2015.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I
Current through P.L. 114-229.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter VI. Equal Employment Opportunities (Refs & Annos)

42 U.S.C.A. § 2000e-5

§ 2000e-5. Enforcement provisions

Currentness

<Notes of Decisions for 42 USCA § 2000e-5 are displayed in three separate documents. Notes of Decisions for subdivisions I to V are contained in this document. For Notes of Decisions for subdivisions VI to XVIII, see second document for 42 USCA § 2000e-5. For Notes of Decisions for subdivisions XIX to end, see third document for 42 USCA § 2000e-5.>

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Effective: October 19, 1996
Currentness

<Notes of Decisions for 42 USCA § 1983 are displayed in six separate documents. Notes of Decisions for subdivisions I to IX are contained in this document. For additional Notes of Decisions, see 42 § 1983, ante.>

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

42 U.S.C.A. § 1983, 42 USCA § 1983
Current through P.L. 114-229.

End of Document

twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual

becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended

or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CREDIT(S)

(Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104; Pub.L. 102-166, Title I, §§ 107(b), 112, 113(b), Nov. 21, 1991, 105 Stat. 1075, 1078, 1079; Pub.L. 111-2, § 3, Jan. 29, 2009, 123 Stat. 5.)

Footnotes

1 So in original. Probably should be subsection "(b)".

42 U.S.C.A. § 2000e-5, 42 USCA § 2000e-5

Current through P.L. 114-229.

End of Document

West's Revised Code of Washington Annotated
Title 49. Labor Regulations (Refs & Annos)
Chapter 49.60. Discrimination--Human Rights Commission (Refs & Annos)

West's RCWA 49.60.030

49.60.030. Freedom from discrimination--Declaration of civil rights

Effective: July 26, 2009
Currentness

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW 49.60.225 contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

Credits

[2009 c 164 § 1, eff. July 26, 2009; 2007 c 187 § 3, eff. July 22, 2007; 2006 c 4 § 3, eff. June 8, 2006; 1997 c 271 § 2; 1995 c 135 § 3. Prior: 1993 c 510 § 3; 1993 c 69 § 1; 1984 c 32 § 2; 1979 c 127 § 2; 1977 ex.s. c 192 § 1; 1974 ex.s. c 32 § 1; 1973 1st ex.s. c 214 § 3; 1973 c 141 § 3; 1969 ex.s. c 167 § 2; 1957 c 37 § 3; 1949 c 183 § 2; Rem. Supp. 1949 § 7614-21.]

West's RCWA 49.60.030, WA ST 49.60.030

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

End of Document

SPOKANE VALLEY FIRE DEPARTMENT

LETTER OF COUNSELING

Captain Sprague you are being counseled concerning your conduct as an employee of Spokane Valley Fire Department, this 20th day of April 2012.

Issues

1. Since February 2012, Captain Sprague has demonstrated continued inappropriate and prohibited behavior, through written communication involving use of the Spokane Valley Fire Department (SVFD) electronic bulletin board. The inappropriate and prohibited behavior involved the use of language and written content that was of a religious nature, specifically the quotation of scripture. This communication was in disregard to specific lawful orders initiated by the SVFD Board of Fire Commissioners and the supervisory chain of command, directed toward, and received by, Captain Sprague.

2. As a result of Captain Sprague's disregard of lawful orders the following Civil Service Rules violations occurred;

   Rule 7 – Discipline. 7.2 – Causes for Discipline

   A. Has engaged in conduct unbecoming an officer or employee of the SVFD.

   B. Has violated any reasonable direction made and given by their superior officer, where such violation or failure to obey amounts to an act of insubordination or a serious breach of proper discipline, or resulted or might reasonably be expected to result in loss or injury to the SVFD or to the public.

3. Additionally, Captain Sprague has demonstrated behavior that is in conflict with Safety & Operations #120 and #171

   A. S&O 120 – Chain of Command, Section III – Conflict of Orders, Subsection C; *No employee of the department shall refuse to obey any reasonable order or direction given by a superior officer.*

   B. S&O 171 – Computers and Electronics, Section IV – Computer and Internet Usage, Subsection K; *E-mail, chat room, newsgroup and all other forms of communication using the internet, intranet, or other Department communications shall not contain ethnic slurs, racial epithets, or disparagement of others based on race, national origin, sex, age, disability or religious beliefs. Communication that is in any way construed by others as disruptive, offensive, abusive or threatening is prohibited.*

Support of Issues

1. In 2011, Captain Sprague authored and distributed newsletters on behalf of the Spokane County Christian Fire Fighters (SCCFF) using the SVFD email system. These newsletters contained language that was specifically of a religious nature (citation of scripture).

2. Through the SVFD officer chain of command (specifically an email by Chief Thompson on October 1, 2011), Captain Sprague was directed to cease using the SVFD email system for distribution of documents and messages that contained language that was of a religious nature (citation of scripture).

3. On January 9, 2012, Captain Sprague received a formal letter, signed by SVFD Fire District Commissioner Monte Nesbitt, in response to a complaint of religious discrimination filed by Captain Sprague. In the letter signed by Commissioner Nesbitt, Captain Sprague was specifically directed to stop using SVFD equipment or network connections for the purpose of disseminating material of a religious nature; "*You cannot post substantive religious material on either the physical or electronic bulletin boards*" (electronic bulletin board of SVFD). Captain Sprague was allowed to continue to post flyers or advertisements of local events, food drives and meetings associated with the SCCFF organization, provided that those messages did not specifically cite language with a religious message.

4. Captain Sprague was directed, in an email message, by Human Resources (HR) Director Valerie Biladeau on February 8, 2012, to remove a quote from biblical scripture that was part of a classified post announcing a SCCFF fellowship meeting. HR Director Biladeau communicated the message under the authority of Chief Mike Thompson. Captain Sprague did not acknowledge the request by HR Director Biladeau and did not remove the inappropriate content. A subsequent direct order to remove religious content was provided by Battalion Chief (BC) Ken Capaul on February 17, 2012. The content related to scripture was subsequently removed.

5. On April 9, 2012, a classifieds (electronic bulletin board of SVFD) posting by Captain Sprague, referencing the SCCFF, was noted to contain two scriptural quotes. The continued practice of using scriptural quotes in messages being disseminated by Captain Sprague, while using SVFD electronic systems, is a violation of the Commissioner Nesbitt's letter referencing use of SVFD systems for religious messages, the February 8, 2012, written request by HR Director Biladeau to remove scriptural quotes and a direct order of the same by BC Capaul on February 17, 2012. Chief Thompson notified Captain Sprague by e-mail on April 10, 2012, that the content of his classified posting was inappropriate and was being removed from the system.

Conclusion

Captain Sprague has demonstrated continued unacceptable behavior through his repeated practice of posting communications that contain religious material, specifically the use of scriptural quotes. This behavior has continued subsequent to clear and unambiguous communications through the chain of command that his use of scripture in messages using SVFD email and classifieds are inappropriate. Captain Sprague has demonstrated behavior that is not consistent with what is expected of a SVFD Captain, and such behavior is considered to be insubordinate to officers (or their representatives) lawful and reasonable orders.

As a Result of This Counseling, Captain Sprague Has Been Directed to Make the Following Improvements or Changes in His Performance

1. Cease the practice of posting communications of a religious nature on physical or electronic bulletin boards (classifieds).

2. Review and comply with the letter addressed to Captain Jon Sprague signed by Commissioner Monte Nesbitt on January 9th 2012.

3. Review and comply with S&O 120 – Chain of Command. No further acts of insubordination, through the disregard of lawful and legitimate orders and directives, will be tolerated.

If no continuous improvements/changes are made over the next 12 months you will be subject to further corrective or disciplinary action, up to and including termination.

_____ _____

Signature of Battalion Chief Capaul Date

_____ _____

Signature of Captain Sprague Date

SPOKANE VALLEY
FIRE DEPARTMENT

Est. 1940

Mike Thompson, Fire Chief
10319 E. Sprague Avenue
Spokane Valley, WA 99206
Phone (509) 928-1700
FAX (509) 892-4125
www.spokanevalleyfire.com

LETTER OF REPRIMAND

Captain Sprague, you are given a Letter of Reprimand concerning your use of the SVFD email system this 2nd day of May, 2012

On April 20, 2012 you were given a Letter of Counseling by Battalion Chief Capaul concerning your conduct as an employee of Spokane Valley Fire Department. *(Exhibit A attached).*

Issues

1. On April 24, 2012 and April 30, 2012, following receipt of the Letter of Counseling, Captain Sprague has demonstrated continued inappropriate and prohibited behavior, through written communication involving use of the Spokane Valley Fire Department (SVFD) electronic bulletin board and personal use of the SVFD email system. The inappropriate and prohibited behavior involved written content that was of a religious nature, including religious symbols. This communication was in disregard to specific lawful orders initiated by the SVFD Board of Fire Commissioners and the supervisory chain of command, directed toward, and received by, Captain Sprague.

2. As a result of Captain Sprague's disregard of lawful orders the following Civil Service Rules violations occurred;

   Rule 7–Discipline. 7.2 – Causes for Discipline

   A. Has engaged in conduct unbecoming an officer or employee of the SVFD.

   B. Has violated any reasonable direction made and given by their superior officer, where such violation or failure to obey amounts to an act of insubordination or a serious breach of proper discipline, or resulted or might reasonably be expected to result in loss or injury to the SVFD or to the public.

3. Additionally, Captain Sprague has demonstrated behavior that is in conflict with Safety & Operations #120 and #171

   A. S&O 120 – Chain of Command, Section III – Conflict of Orders, Subsection C; *No employee of the department shall refuse to obey any reasonable order or direction given by a superior officer.*

   B. S&O 171 – Computers and Electronics, Section IV – Computer and Internet Usage, Subsection K; *E-mail, chat room, newsgroup and all other forms of communication using the internet, intranet, or other Department communications shall not contain ethnic slurs, racial epithets, or disparagement of others based on race, national origin, sex, age, disability or religious beliefs. Communication that is in any way construed by others as disruptive, offensive, abusive or threatening is prohibited.*

EXHIBIT
3

SPOKANE VALLEY
FIRE DEPARTMENT
Est. 1940

Mike Thompson, Fire Chief
10319 E. Sprague Avenue
Spokane Valley, WA 99206
Phone (509) 928-1700
FAX (509) 892-4125
www.spokanevalleyfire.com

4. Captain Sprague given a letter signed by Fire Commissioner Monte Nesbitt on January 9, 2012 which stated as follows:

> *(1) You may not use department email for any purpose except official business. You may not use department email for personal use.*
>
> You may not use department email to post, discuss, or in any way disseminate communications that are sent of any purpose other than official SVFD business. This mean you cannot send messages using your official SVFD email which discuss the Fellowship or any other private purpose. SVFD email many only be used to disseminate communications concerning official SVFD business.
>
> If you wish to send personal emails while on duty (if otherwise permitted under SVFD policy), you may do so using a personal email account (such as Hotmail, Gmail, Yahoo or Comcast account). Using a personal email account, you may only send messages to other personal email accounts. You may not use a personal email account to send messages or solicitations or official SVFD accounts.
>
> Please note that all such emails sent via SVFD equipment or network connections are the property of the SVFD. All such emails are subject to public disclosure upon request, unless a statutory exemption applies.

Support of Issues

1. On April 24, 2012 at 7:15 pm you accessed the SVFD email system from an outside source and used your SVFD email account to send a message with attachment to SVFD email accounts of 46 employees. *(Exhibit B attached)*

2. The email stated as follows:

> *Subject: Logo Design – Need your Vote*
> *Attached are some designs for the SCCFF logo. These are the ones that seem to wash out least in B&W. One might be a good for a patch design and another embroidered on a polo or silk screened on a t-shirt. I would greatly appreciate a vote for both a patch and for a logo. Jon.*

3. On April 30th, 2012 at 6:24 pm you posted the language below on the SVFD Classifieds and at 9:12 pm you accessed the SVFD email system from an outside source and used your SVFD email account to send a message to SVFD email accounts of 46 employees. *(Exhibit C Attached).* The email stated as follows:

> *Newsletter*
>
> *The May newsletter celebrates a fresh look and a new logo. This is our new patch design and comes in a couple of different variations. Another design for more casual use, similar to the one in the Classifieds, will be introduced soon.*

SPOKANE VALLEY
FIRE DEPARTMENT

Est. 1940

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This month, we'll be reading what the Bible says about taking supplements. What? Yes, Peter actually talked about supplements in his second epistle, so read on and stock up now.

We're also continuing with our series on suicide, which will, in part, answer last month's question, "Are the Darwin awards only given out in hell?" *In other words, if you die as a result of your own foolish actions, what effect does that have on your eternal salvation? When the Apostle Paul says,* "whether we live or whether we die we are the Lord's", *is he speaking conditionally or affirming our security in Christ? We all like simple answers to difficult questions, but the questions we ask may not fully represent the truths behind them.*

Activities

The SFD breakfast is coming up mid-month and a dinner barbecue at the Bowl and Picture on the 19th. Bring your bikes for a nice after dinner spin. (Gotta' burn off that homemade ice cream!)

Be watchful for some kayaking on the Little Spokane. The water is still very high, so we may have to hike the boats in, again, if we want to do another early spring run. Dates for the 2012 Biruka will be out soon.

As always, check out the website or facebook page for more info about what's up, or give me a call.

Jon

CONCLUSION

Captain Sprague, the direction given has been clear, and yet your unacceptable, insubordinate behavior continues. You have been directed to cease posting religious messages; religious symbols and using the SVFD email system for personal use.

This Letter of Reprimand will serve as your final warning. Any additional violations and you will be subject to disciplinary action, up to and including termination of your employment.

Signature of Andrew D. Hail, Deputy Chief — Date: 5/2/2012

Signature of Captain Sprague — Date: 5/2/2012

Exhibit A – 4/20/2012 – Letter of Counseling
Exhibit B – 4/24/2012 – Email to SVFD employees with attachment
Exhibit C – 4/30/2012 – Email to SVFD employees with SCCFF newsletter/Bulletin Board Posting

SPOKANE VALLEY
FIRE DEPARTMENT

Est. 1940

Mike Thompson, Fire Chief
2120 N. Wilbur
Spokane Valley, WA 99206
Phone (509) 928-1700
FAX (509) 892-4125
www.spokanevalleyfire.com

June 13, 2012

Re: Notice of Proposed Disciplinary Action Pursuant to Current Local 876 Collective Bargaining Agreement Article 4 – Discipline Procedure, Section 1, Subsection (b)

Captain Jon Sprague:

You are being given official notice of proposed disciplinary action of a suspension for 2 shifts without pay. The proposed discipline is being recommended to the Board of Fire Commissioner at their meeting on June 25, 2012. You may appear at the meeting and may present any evidence that bears upon the contemplated disciplinary action which you wish the Board of Fire Commissioners to consider in making their decision.

7.2 Causes for Discipline

7.2A Has engaged in conduct unbecoming an officer or employee of the Spokane Valley Fire Department.

7.2D Has violated any reasonable direction made and given by their superior officer, where such violation or failure to obey amounts to an act of insubordination or a serious breach of proper discipline, or resulted or might reasonably be expected to result in loss of injury to the Spokane Valley Fire Department or to the public.

7.2N Any willful violation of these rules, any written personnel policies, written departmental rules or procedures.

Facts

On May 29, 2012, you violated a lawful order, several sections in the Civil Service Rules and of the Safety and Operations Manual (S&O) Rules by sending an email message with inappropriate content while on duty using the Spokane Valley Fire Department (SVFD) electronic mail system hardware and posting the same material on the SVFD electronic bulletin board. The inappropriate and prohibited behavior involved written content that was of a religious nature. (See Attached) You actions were in violation of the following S&O Rules:

S&O 120 Chain of Command, Section III. Conflict of Orders, Subsection C; *No employee of the department shall refuse to obey any reasonable order or direction given by a superior officer.*

S&O 201 Employee Conduct, Section IX. Personal Conduct, Subsection A; *All employees shall acquaint themselves with, and conform to all laws, ordinances, policies, best practices, rules and procedures governing the Spokane Valley Fire Department.*

EXHIBIT 4

S&O 171 Computers and Electronics, Section II. Email, Subsection A; *The electronic mail system hardware is SVFD property and all messages composed, sent, or received on the system are SVFD property. Therefore, the use of the electronic mail system is reserved solely for SVFD business and should not be used for personal business.* Section III. Appropriate Messages and Material, Subsection A; *No employee will send offensive or discriminatory computer electronic or voice mail messages. Employees will be subject to corrective action and/or discipline, up and including discharge for violating this rule. All employees must keep in mind that computer and electronic voice mail messages can usually be printed, saved and/or forwarded to anyone else in the office or elsewhere.* Section IV. Computer and Internet Usage, Subsection A; *The use of SVFD's computer network, electronic mail, and Internet access must be in support of research, education and the service, consistent with the values, mission, and policies of the Department. All computer system and network use must be in accordance with SVFD policies and procedures*

On May 2, 2012, you were given a Letter of Reprimand for your actions on April 24 and again on April 30, 2012, for continued inappropriate and prohibited behavior, through written communication involving the use of the SVFD electronic mail system hardware and SVFD electronic bulletin board. The inappropriate and prohibited behavior involved written content that was of a religious nature, including religious symbols. You were in violation of a lawful order, Civil Service Rules 7.2 A and B, and S&O 120 and 171.

On April 20, 2012, you were given a Letter of Counseling for your actions since February 2012, for continued inappropriate and prohibited behavior, through written communication involving the use of the SVFD electronic bulletin board. The inappropriate and prohibited behavior involved the use of language and written content that was of a religious nature, specifically the quotation of scripture. You were in violation of a lawful order, Civil Service Rules 7.2A and B, and S&O 120 and 171.

On January 9, 2012, you were given a letter signed by Monte Nesbitt, Chairman of the Spokane Valley Board of Fire Commissioners which stated:

> *(1) You may not use department email for any purpose except official business. You may not use department email for personal use.*
>
> You may not use department email to post, discuss, or in any way disseminate communications that are sent of any purpose other than official SVFD business. This means you cannot send messages using you official SVFD email which discuss the Fellowship or any other private purpose. SVFD email my only be used to disseminate communications concerning official SVFD business.
>
> If you wish to send personal emails while on duty (if otherwise permitted under SVFD policy), you may do so using a personal e-mail account (such as Hotmail, Gmail, Yahoo or Comcast account). Using a personal email account, you may only send messages to other personal email accounts. You may not use a personal email account to send messages or solicitations on official SVFD accounts.

Please note that all such emails sent via SVFD equipment or network connections are the property of the SVFD. All such emails are subject to public disclosure upon request, unless a statutory exemption applies.

At each step of the corrective action process, you have been told your behavior was unacceptable and given clear direction to stop sending emails or posting anything on the bulletin board that contained content of a religious nature. You were also informed at each of these sessions that any additional violations of the Civil Service Rules, S&O's or to follow direction you would be subject to disciplinary action, up to and including termination. Your recent behavior and actions on May 29th, demonstrates a complete disregard to comply with multiple directives.

Conclusion

I expect a company officer to lead by example especially when it comes to following department rules and directives from superiors. Your pattern of behavior and actions over the past few months are not demonstrating leadership in your current position as a captain. You have continued to violate numerous department rules and be insubordinate. This is unacceptable behavior for any employee with the Spokane Valley Fire Department especially, a company officer and will not be tolerated. It is for these reasons I am recommending to the Board of Fire Commissioners you receive a suspension for two shifts without pay.

Mike Thompson — 6/13/2012
Mike Thompson — Date

Jon Sprague — Date

SPOKANE VALLEY
FIRE DEPARTMENT

Est. 1940

Mike Thompson, Fire Chief
2129 N. Wilbur
Spokane Valley, WA 99206
Phone (509) 928-1700
FAX (509) 892-4125
www.spokanevalleyfire.com

September 6, 2012

Spraguej@spokanevalleyfire.com

EXHIBIT 5

Via Registered Mail, Return Receipt Requested

Jon Sprague
6723 N. Wall St.
Spokane, WA 99208

Re: Notice of Proposed Disciplinary Action Pursuant to Current Local 876 Collective Bargaining Agreement Article 4 – Discipline Procedure, Section 1, Subsection (b)

Captain Jon Sprague:

You are being given official notice of proposed disciplinary action of discharge (termination) per the Spokane Valley Fire Department Civil Rules. The proposed discipline is being recommended to the Board of Fire Commissioner at their meeting on September 24, 2012 at 4:00 p.m. You may appear at the meeting and may present any evidence that bears upon the contemplated disciplinary action which you wish the Board of Fire Commissioners to consider in making their decision.

7.2 Causes for Discipline

7.2C Has engaged in conduct unbecoming an officer or employee of the Spokane Valley Fire Department.

7.2D Has violated any reasonable direction made and given by their superior officer, where such violation or failure to obey amounts to an act of insubordination or a serious breach of proper discipline, or resulted or might reasonably be expected to result in loss of injury to the Spokane Valley Fire Department or to the public.

7.2N Any willful violation of these rules, any written personnel policies, written departmental rules or procedures.

Facts

On July 16, 2012, July 31, 2012 and September 1, 2012 you have again violated a lawful order, Civil Service Rules, and Safety and Operations Manual (S&O) Rules by sending additional email messages with inappropriate content both on and off duty using the Spokane Valley Fire Department (SVFD) electronic mail system and posting the July 16, 2012 material on the SVFD electronic bulletin board prior to it being shutdown. The inappropriate and prohibited behavior

involved negative comments about the leadership of SVFD and written content that was of a religious nature. Your actions were in violation of the following S&O Rules:

S&O 120 Chain of Command, Section III. Conflict of Orders, Subsection C; *No employee of the department shall refuse to obey any reasonable order or direction given by a superior officer.*

S&O 201 Employee Conduct, Section IX. Personal Conduct, Subsection A; *All employees shall acquaint themselves with, and conform to all laws, ordinances, policies, best practices, rules and procedures governing the Spokane Valley Fire Department.*

S&O 171 Computers and Electronics, Section II. Email, Subsection A; *The electronic mail system hardware is SVFD property and all messages composed, sent, or received on the system are SVFD property. Therefore, the use of the electronic mail system is reserved solely for SVFD business and should not be used for personal business.* Section III. Appropriate Messages and Material, Subsection A; *No employee will send offensive or discriminatory computer electronic or voice mail messages. Employees will be subject to corrective action and/or discipline, up and including discharge for violating this rule. All employees must keep in mind that computer and electronic voice mail messages can usually be printed, saved and/or forwarded to anyone else in the office or elsewhere.* Section IV. Computer and Internet Usage, Subsection A; *The use of SVFD's computer network, electronic mail, and Internet access must be in support of research, education and the service, consistent with the values, mission, and policies of the Department. All computer system and network use must be in accordance with SVFD policies and procedures.*

On June 13, 2012 you were given a Notice of Disciplinary Action for a proposed 2 shifts suspension without pay for violating a lawful order, several sections in the Civil Service Rules, and S&Os by sending an email message with inappropriate content while on duty using the SVFD electronic mail system hardware and posting the same material on the SVFD electronic bulletin board on May 29, 2012. The inappropriate and prohibited behavior involved written content that was of a religious nature. The Board elected to hold the 2 shifts suspension in abeyance pending the outcome of the EEOC mediation. The mediation was unsuccessful and on August 24, 2012 the Board upheld their decision of 2 shifts suspension without pay to be taken at the Department's discretion.

On May 2, 2012, you were given a Letter of Reprimand for your actions on April 24 and again on April 30, 2012, for continued inappropriate and prohibited behavior, through written communication involving the use of the SVFD electronic mail system hardware and SVFD electronic bulletin board. The inappropriate and prohibited behavior involved written content that was of a religious nature, including religious symbols. You were in violation of a lawful order, Civil Service Rules 7.2 A and B, and S&O 120 and 171.

On April 20, 2012, you were given a Letter of Counseling for your actions since February 2012, for continued inappropriate and prohibited behavior, through written communication involving the use of the SVFD electronic bulletin board. The inappropriate and prohibited behavior involved the use of language and written content that was of a religious nature, specifically the quotation of scripture. You were in violation of a lawful order, Civil Service Rules 7.2A and B, and S&O 120 and 171.

Notice of Disciplinary Action
Capt Jon Sprague
September 6, 2012

On January 9, 2012, you were given a letter signed by Monte Nesbitt, Chairman of the Spokane Valley Board of Fire Commissioners which stated:

> *(1) You may not use department email for any purpose except official business. You may not use department email for personal use.*
>
> You may not use department email to post, discuss, or in any way disseminate communications that are sent of any purpose other than official SVFD business. This means you cannot send messages using you official SVFD email which discuss the Fellowship or any other private purpose. SVFD email my only be used to disseminate communications concerning official SVFD business.
>
> If you wish to send personal emails while on duty (if otherwise permitted under SVFD policy), you may do so using a personal e-mail account (such as Hotmail, Gmail, Yahoo or Comcast account). Using a personal email account, you may only send messages to other personal email accounts. You may not use a personal email account to send messages or solicitations on official SVFD accounts.
>
> Please note that all such emails sent via SVFD equipment or network connections are the property of the SVFD. All such emails are subject to public disclosure upon request, unless a statutory exemption applies.

At each step of the corrective action process, you have been told your behavior was unacceptable and given clear direction to stop sending emails or posting anything on the bulletin board that contained content of a religious nature. In your most recent email and posting, you have now started minimizing the leadership of the Spokane Valley Fire Department. You have been informed at the end of each session in writing that any additional violations of the Civil Service Rules, S&O's or to follow direction you would be subject to disciplinary action, up to and including termination. Your recent actions on July 16th, while on duty, again demonstrate a complete disregard to comply with multiple directives.

Conclusion

Your complete disregard to follow orders and the disrespect shown for the leadership of the Spokane Valley Fire Department is unacceptable. Even after the Board of Fire Commissioners at your June 25, 2012 disciplinary hearing held your suspension in abeyance pending mediation with the EEOC, you have continued to exhibit contempt for following department rules, demonstrate continued insubordination, and a cavalier attitude about everything that's transpired to-date. The rules your have continued to violate include SOG# 120, #171 and #201. Each of these rules in place and related to efficient and safe operations of the Department. Management's investigation has been ongoing since October 2011 when you filed to claim of religious discrimination with the Board of Fire Commissioners. Since that time you have continued to violate these rules on an almost monthly basis and you have received written notices explaining the consequences if the behavior continued. The investigation was conducted by a third party, outside the department and was fair and objective and found you were not discriminated against but in fact guilty, by your own admission, several times in open public

meetings of failing to follow an order. The rules are applied evenly throughout the department and without discrimination. The penalty is reasonable. With each violation the progressive discipline was followed. You have received a letter from the Board of Fire Commissioner dated January 9, 2012 responding to your claims of discrimination and outlining expectations going forward; a letter of counseling (April 20, 2012); a letter of reprimand (May 2, 2012); a letter of reprimand with 2 shifts suspension unpaid (June13, 2012). In each of these instances you were advised that if your behavior and actions continued you would be subject to further discipline up to and including termination.

As the Chief of this department, I see your continued behavior as undermining the mission and values of SVFD which cannot be tolerated. I am recommending to the Board of Fire Commissioners you be discharged (terminated) from employment with the Spokane Valley Fire Department.

Mike Thompson

Mike Thompson

9/06/2012
Date

CC: Don Kresse, Local 876, President via KresseD@spokanevalleyfire.com
Richard Bruce, Local 876, Vice-President via BruceR@spokanevalleyfire.com

More discussion about leadership and suicide prevention

Sprague, Jonathan

Sent: Monday, July 16, 2012 5:56 PM

To: Bellefeuille, Todd; Bennett, Gregory; Burke, Brendan; Cantrell, Karl; Cooke, Stan; Core, Darrell; Coulter, Michael; Crawford, Scott; Cruger, Tim; Decker, Joel; deputyfiredog@hotmail.com; Duarte, Marcus; Fields, Michael; Freier, Rick; Gese, Terry; Goodwin, Craig; Grable, Brian; Hammersley, Paul; Hamner, Bruce; Helt, Kevin; Howerton, Wayne; James, Ben; Jon Sprague (firemansvfd@comcast.net) ; Kast, Ethan; Kimball, Paul; Kresse, Donald; Lange, Marc; Loftin, Joshua; Mallery, Todd; Miller, Kevin; Nelson, John; Neumann, Chris; Nisbet, Abraham; Normington, Mark [NormingtM@SpokaneValleyFire.com]; Parr, Carson; Patterson, Dan; Riddle, Ben; Salmon, Doug; Schaffer, Pat; Schindler, Joseph; Sprague, Jonathan; Spuler, Steven; Strawn, Monte; Turcotte, Paul; Tuttle, Wayne; Ward, Daniel; Watkins, John; Willits, Jeff

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"The difference between followers and leaders is that followers need leaders to help them follow what leaders themselves are following. This relationship takes the form of a shared response-ability to a shared calling. Both find each other in a true fellowship to create the world responsibly." James Maroosis - Fordham Graduate School of Business

But what if your leaders are themselves are following the wrong path?

That is the question everyone faces at some point. Little doubt why trust is such a critical factor in effective leadership-followership relationships, especially when the leader has not given you what you need to know in order to be convinced of the plan yourself.

The answers to these questions can be found by studying the leadership-followership paradigm we see in Jesus as detailed in the Bible, as He interacts with His Father above and His disciples below. What was it, or who was it, that Jesus wanted His followers to follow and why? How might that impact your own leadership or followership? There are certainly differences in the world's understanding of followership and that of Christians. This article may stimulate some reflections along those lines as we continue to look at leadership from a Biblical viewpoint.

We're also looking to discover what type of impact holding a religious belief has on suicide. Are some faiths better or worse in this regard? If so, why? And, which ones? The answers might help you to better understand others who may be heading down a dangerous path. Check it out, here. You might be surprised.

There is an ice cream social at my house on the 21st, where I'd love to discuss these ideas and "sharpen swords" on some of the finer points.

As I've said before, if you do not wish to receive these emails, please let me know and I'll remove you from the list. If you would rather get them at a different email address, I'd be happy to send them there instead. Even though they deal with fire service topics, nothing in these emails is endorsed by the department anymore than other such discussions on similar topics, as should be abundantly clear by this time.

West's Revised Code of Washington Annotated
Title 41. Public Employment, Civil Service, and Pensions (Refs & Annos)
Chapter 41.08. Civil Service for City Firefighters (Refs & Annos)

West's RCWA 41.08.090

41.08.090. Procedure for removal, suspension, demotion or discharge--Investigation--Hearing--Appeal

Effective: July 22, 2007
Currentness

No person in the classified civil service who shall have been permanently appointed or inducted into civil service under provisions of this chapter, shall be removed, suspended, demoted or discharged except for cause, and only upon the written accusation of the appointing power, or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. Any person so removed, suspended, demoted or discharged may within ten days from the time of his or her removal, suspension, demotion or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such removal, suspension, demotion or discharge was or was not made for political or religious reasons and was or was not made in good faith for cause. After such investigation the commission may affirm the removal, or if it shall find that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such person was removed, suspended, demoted or discharged, which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of such removal, suspension, demotion or discharge. The commission upon such investigation, in lieu of affirming the removal, suspension, demotion or discharge may modify the order of removal, suspension, demotion or discharge by directing a suspension, without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay; the findings of the commission shall be certified, in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after reasonable notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his or her defense. If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom to the court of original and unlimited jurisdiction in civil suits of the county wherein he or she resides. Such appeal shall be taken by serving the commission, within thirty days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court. The commission shall, within ten days after the filing of such notice, make, certify and file such transcript with such court. The court of original and unlimited jurisdiction in civil suits shall thereupon proceed to hear and determine such appeal in a summary manner: PROVIDED, HOWEVER, That such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

Credits
[2007 c 218 § 6, eff. July 22, 2007; 1935 c 31 § 9; RRS § 9558-9.]

West's RCWA 41.08.090, WA ST 41.08.090

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

End of Document

More discussion about leadership and suicide prevention

Sprague, Jonathan

Sent: Monday, July 16, 2012 5:56 PM

To: Bellefeuille, Todd; Bennett, Gregory; Burke, Brendan; Cantrell, Karl; Cooke, Stan; Core, Darrell; Coulter, Michael; Crawford, Scott; Cruger, Tim; Decker, Joel; deputyfiredog@hotmail.com; Duarte, Marcus; Fields, Michael; Freier, Rick; Gese, Terry; Goodwin, Craig; Grable, Brian; Hammersley, Paul; Hamner, Bruce; Helt, Kevin; Howerton, Wayne; James, Ben; Jon Sprague [firemansvfd@comcast.net] ; Kast, Ethan; Kimball, Paul; Kresse, Donald; Lange, Marc; Loftin, Joshua; Mallery, Todd; Miller, Kevin; Nelson, John; Neumann, Chris; Nisbet, Abraham; Normington, Mark [NormingtM@SpokaneValleyFire.com]; Parr, Carson; Patterson, Dan; Riddle, Ben; Salmon, Doug; Schaffer, Pat; Schindler, Joseph; Sprague, Jonathan; Spuler, Steven; Strawn, Monte; Turcotte, Paul; Tuttle, Wayne; Ward, Daniel; Watkins, John; Willits, Jeff

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