BEFORE THE PUBLIC SAFETY CIVIL SERVICE COMMISSION
OF THE CITY OF SEATTLE

IN RE MATTER OF	)	**OPINION OF**
CHARLES PILLON	)	**COMMISSIONER JOYNER**
APPELLANT	)	**CONCURRING IN PART**
	)	**AND DISSENTING IN PART**

INTRODUCTION

This matter was brought before the City of Seattle Public Safety Civil Service Commission (the Commission) on appeal by the Appellant from the Order of the Seattle Police Department issued February 22, 1988, terminating his employment. 1/

Commissioners O'Neill and Oliver have, after due deliberation, rendered the majority opinion. I undertake to write separately because I feel it is extremely important to set forth and discuss several issues in this case, upon which we disagree.

The Commission was created by City Charter, pursuant to authority delegated from the state. The chief responsibility of the Commission is to implement and maintain the laws, rules and regulations which touch and concern civil service employment (and employees) within the Seattle Police and Fire Departments.

The general purpose of civil service law is to establish and maintain a system of personnel administration based upon merit principles and scientific methods governing the appointment, promotion, transfer, layoff, recruitment, retention,

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1/ Citations to the record will be made in the following manner: the official transcript of the proceedings will be cited as Tr.___:____:___ , indicating volume, page and line, respectively. The Departments exhibits will be cited as D.Ex.___:___:___ , indicating, number, page and line (where applicable) respectively. The Appellants exhibits will be cited as A.Ex.___:___:___ ,indicating number, page and line (where applicable) respectively.

classification and pay plan, removal, discipline and welfare of its civil employees.[2/]

Because our objective is largely administrative, rather than judicial, we must conduct our review of these matters ever mindful of the parameters of our charge. Any determinations we make in this case, must afford a fair, full and honest review of the facts and law as it applies to the Appellant and the circumstances of this case. But just as importantly, we must strive to ensure that our review and actions here promote the maintenance of a fair, orderly and consistent civil service system.

At the core of the disagreement between the majority and myself, in this case, is a fundamental difference in our views of our roles. The majority views its task as purely adjudicative. It has merely reviewed the action here, applying the same standards as a court of limited review. I believe however, that our task is broader, i.e. the maintenance of a orderly system which promotes the goals of the civil service. It is my belief that the Commission's mission and responsibilities differ greatly from the adjudicative role of the courts, and thus our review here must not be constrained by those standards. This fundamental difference has led us to divergent reasoning.

The majority also takes the position that; (1) as the appointing authority, the Chief retains the power and flexibility to exercise his statutory authority in any manner he deems proper, despite explicit procedures which define the manner in which that authority may be utilized, and; (2) since the Department provided the Appellant with the procedural (due process) minimums required by the courts, any deviation from the literal requirements of the Agreement and/or the Manual are insignificant.

I believe the majority opinion, while fairly reviewing the issue of the Appellant's failure to report to his assignment, fails to adequately address several key issues presented by the facts in this case. In my opinion, the facts here raise serious issues of the Department's adherence to its own rules. While I do not find evidence of malfeasance here, I am concerned by the dual standard that the majority opinion sanctions, albeit sub silentio. It is my belief that the majority opinion, by failing to address significant aspects of the Department's actions in this case, fosters the Department's cavalier attitude towards compliance with its own rules. I do not believe that the Department, in a case in which it parades the Appellant's failure to abide by its

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[2/] Yakima v. Yakima Police, 29 Wn. App. 756, 763, 631 P.2d 400 (1981).

rules before us, should be allowed to avoid its own responsibility in that regard.

The rules and procedures of the Department were enacted, at least in part, to promote the fair, orderly, and consistent system which is the goal of our civil service system. While the courts have clearly defined the "minimal due process requirements", the Parties to the Agreement, and the Commission, are clearly free to establish higher standards of operation for the Department. In this case, the Department and the Guild negotiated the procedures to be applied in cases of proposed discipline, and the Department established clear procedures for the evaluation of its employees. No one has seriously challenged the legitimacy or legality of these procedures. The majority has not found (indeed it could not) that the application of these procedures, as written, would in any way interfere with the Department's mission or the goals of the civil service statutes.

The adoption of these procedures and rules provide an orderly framework for the administration of the Department, and ensure fairness and consistency to its employees. The Commission should not minimize their importance by ignoring the Department's failure to adhere to these self-imposed standards. Nor should we, sub silentio, interpret significant negotiated provisions of the collective bargaining agreement between the City of Seattle and the Seattle Police Officers' Guild (the Agreement) out of existence.

I. ISSUES PRESENTED

The issues in this case, distilled to their essence, all revolve around one central question. Did the parties comply with the applicable rules and procedures which govern the various activities discussed herein?

The Department asserts that the Appellant, Charles Pillon (Pillon or the Appellant), failed to comply with the Departmental rule requiring him to report to his assigned duties. Additionally, it asserts, he failed to follow the established procedures regarding evidence handling, informant handling, consensual entries, arrests and post-arrest documentation. Due the Appellant's failure to comply with these requirements, the Department argues, it was justified in transferring and subsequently terminating him.

The Appellant contends, conversely, that the Department failed to adhere to the Departmental and Civil Service rules and procedures, as well as the Constitutional standards (rules) in

the handling of both the transfer and the subsequent termination, (e.g. the "rules" requiring "due process", non-retaliation for protected speech, non-retaliation for "political speech", non-discrimination, and those procedural rules established by the Department covering the imposition of discipline).

Thus the Commission, in order to determine the validity of the Department's actions, is asked to decide whether the parties were required to comply with the various rules and procedures, and whether substantial compliance in fact occurred. 3/

II. FACTS

The Appellant, Charles Pillon, was a police sergeant, employed by the Seattle Police Department (the Department) for a period of over 20 years.

Pillon was a member of the bargaining unit represented by the Seattle Police Officers' Guild, and covered by the Agreement. That agreement includes, inter alia., procedures covering the imposition of discipline.

Prior to the events which give rise to this proceeding, Pillon had been evaluated by his supervising officers as being above satisfactory in most aspects of his performance. At the time that this controversy arose, Pillon was assigned to an experimental task force 4/ operating out of the South Precinct. The mission of the ACT was to suppress street crimes... specifically burglary,

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3/ In this case, I believe Chief Fitzsimons framed the issue correctly when, in speaking about an officer's obligation to adhere to the rules, he stated ;

> **I think we have to send the right signals to our police officers....**
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> **...if I were to go down that road and send those signals to our officers that anyone of them can do what he wants to do when he wants to do it... I'm sending the wrong signals and I'm doing the wrong thing for our public and for our police officers...** (Tr. III-179:11)

Where I differ with my Co-Commissioners is that I believe that this statement applies with equal force to both employee and employer. Both parties here must obey the rules. Not only the rules which they believe are important, but also those with which they may from time to time disagree.

4/ The South Precinct Anti-Crime Team (the ACT).

fencing of stolen property and the proliferation of drug trafficking in that section of the city. Pillon was supervised by Lt. Mary Stowe, who in turn was supervised by Capt. Yumul, the South Precinct commander.

In the course of executing his duties in the ACT, Pillon evidently became dissatisfied with what he perceived was a lack of support and "aggressiveness" by the Department's top command and the Mayor's office. As a result of this dissatisfaction, Pillon became publicly vociferous in his criticism of the Chief of Police, Patrick Fitzsimons (the Chief), the Mayor and the Department's policies on "drug abatement". Pillon's criticism was well known within the Department, and was viewed by at least some of the top commanders as, at the very least, inappropriate. In some cases Pillon was viewed as a disruptive force within the Department.

Pillon's activities were the subject of discussion, on several occasions, by several of the Bureau chiefs during their regularly scheduled meetings.

In July, 1986, Pillon, and several officers under his command, made an arrest of a suspect on a "fugitive warrant". That arrest was subsequently challenged as being a "subterfuge" and violative of the Department's rules. As a result of an investigation, conducted by the Internal Investigation Section (IIS), into this arrest Pillon was recommended for disciplinary action. As part of the disciplinary process, the Chief was notified of the allegations against Pillon. Despite the waiver by Pillon of his right to have the matter referred to and heard by a disciplinary panel, the Chief requested that a Disciplinary Hearing Panel (DHP) be convened, under Appendix A. of the Agreement, and § 1.09 of the Department's Procedural Manual (the Manual), to hold a hearing to determine the merit of the charges against Pillon.

Somehow, during the referral process, one of the allegations against Pillon was omitted from the disciplinary panels authorizing document. As a result, the panel heard and decided only the charge of misuse of authority, one of the two original charges resulting from the IIS investigation.

The Panel, after hearing testimony and considering the record, determined that there was insufficient evidence to sustain the charge against Pillon. However the panel noted, in strong language, its highly negative evaluation of Pillon's performance on the case. Based upon that evaluation, the panel recommended that Pillon be transferred from street duty to a desk job.

After receiving the panel report and consulting with Asst. Chief Grayson and Capt. Joiner, the Chief initiated an independent review of Pillon's performance regarding his adherence to the Departmental requirements on follow-up reports and other related

paperwork. The Chief concluded that Pillon's performance was inadequate in that regard.

Based upon his concern that Pillon had violated department rules in making the arrest and his determination that Pillon's performance in the area of paperwork was inadequate, as well as several other concerns, the Chief transferred Pillon to a supervisory job in the Communications Division of the Department.

Pillon, feeling that the transfer was motivated by his criticism of the Chief and the Department, and based upon his personal dislike of "desk jobs" refused to report to his newly assigned position. Rather he engaged in a series of actions to delay the transfer.

During the period of time that Pillon was attempting to delay or reverse the transfer, he, his representative(s) and several members of the public had several meetings with the Chief. As a result of these meetings the Chief agreed that Pillon's performance in communications would be evaluated at the end of ninety days. At that point, if Pillon was assessed as having performed satisfactorily, he would be able to "request" a transfer back to street duty. This "interim evaluation" process was highly unusual within the Department. The testimony revealed that normally such assignments would be expected to last a period of years. In fact, Assistant Chief Noreen Skagen testified that she believed that it would take about two months to train Pillon in his new position.

Despite the "adjustments" or conditions of the transfer, Pillon did not report for duty. On December 16, 1987, after exhausting his leave, Pillon certified that he was fit for duty. However he refused to report to work. On December 17, 1987, the Department issued the Appellant notification that his continued absence would be cause for termination. Subsequently, on December 22, 1987, when Pillon had failed to report for duty for five days after that notification, the Department initiated his termination.

On February 2, 1988, following a request by the Appellant, the Department convened a DHP to investigate the recommended termination. That panel sustained the allegation that Pillon had been AWOL from duty and recommended his discharge. Pillon was subsequently terminated, by order of the Chief, on February 22, 1988.

Appellant timely appealed his termination to the Commission.

Inherent in the Commission's authority is the power to review all

matters arising from or touching the imposition of discipline in this case [5/]

III. DISCUSSION AND FINDINGS

A. THE REFUSAL TO TRANSFER

The Appellant asserts that the order of the Chief was invalid because it was improperly or illegally motivated. However, the right to transfer employees, and/or to assign work is clearly and unequivocally a management right. The order to transfer, issued by the Chief, was presumptively valid [6/].

Even if Pillon's assessment had been proven accurate, that finding would not have rendered the transfer order invalid. Rather the order would only have been voidable. Therefore, Pillon would still have been obligated to accept and comply with that order until such time as it was declared void by proper authority.

The record in this case is clear. The Appellant simply refused to accept the order to transfer to the Communications Division. Pillon expressed in word and deed, and in no uncertain terms, the fact that he would not accept the transfer.[7/] Pillon's refusal to return to work, after he had exhausted all of his vacation and

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[5/] Yakima v. Yakima Police, Supra., p. 767.

[6/] "It is a well established principle that employees must obey managements orders and carry out their job assignments...then turn to the grievance procedure for relief." ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 713 (4th ed. 2nd printing 1985).

There is, however, a legitimate exception to the above enunciated rule. That is the safety and health exception. ELKOURI articulates the exception as follows;

> An exception to this "obey now - grieve later" doctrine exists where obedience would involve an unusual or abnormal safety or health hazard. (cites omitted) But this exception has been held inapplicable where the hazard is inherent in the employees job. (cites omitted).

The applicability of this "exception" to the instant case is discussed infra.

[7/] D.Exs. 12, 15, 16, 17, 18, 19, and 20.

sick leave, his letters to the Department stating that he would not accept the transfer, and his repeated rejection of the order during conversations with the Department personnel, all made it clear that he was refusing the transfer order.

It must be emphasized here, that no officer can refuse an order of the Department based simply upon his/her personal preference, or his/her belief that the basis of the order may have been improper.

In a public safety department, more than in other areas, the need for discipline and compliance with the legitimate orders of the Department is paramount. The Department simply could not carry out its mission of public protection, if such orders were performed only when and if the employee deemed them proper. Pillon's refusal to report to his assigned function was a direct refusal to carry out a legitimate order of the Department.

The Safety and Health Exception 8/

8/ In its opinion, the majority has declined to define a standard by which to judge the Appellant's claim of the "safety and health" exception to the "obey now - grieve later rule. This decision was based upon the majority's view that "this case surely does not present the facts sufficient to require" such definition.

The majority also casually states that " In the public safety sector, government employees are regularly ordered into situations in which personal health and safety are placed at risk". The inference being that due to the hazardous nature of the job, the safety and health exception may not apply.

The majority's reluctance to define a standard is inexplicable. The Appellant has clearly asserted his claim to this exception. It is clearly a demonstration of cognitive dissonance to say that "we won't enunciate a standard... but that's o.k., you didn't meet it anyway." Further, the casual reference to the hazardous nature of public safety employment is misleading. I believe that this perfunctory observation overlooks the fact that much of a police officers work is not hazardous, but rather takes place in a normal office environment.

An officer who refuses to work in a file room which has asbestos on the ceiling or walls, is entitled to the same protection as any other employee working in a similar situation for another employer. An officer who refuses to use unsafe equipment (e.g. a car with bald tires or defective brakes) is surely entitled to

(continued...)

The Appellant contends that his refusal to report to his new position was allowable, because compliance would have placed him at risk of serious health problems. Where, as here, the safety and health exception is asserted, the standard to be applied is bifurcated. The two prongs of this standard are; (1) whether the appellant actually believed that he would have been seriously impacted and; (2) whether a reasonable person in that situation would fear such impact.

Pillon's course of conduct, as evidenced by the record, does not exhibit an actual fear on his part of serious health concerns.[9/] Pillon initially reported to the position assigned on the effective date of the transfer. He worked one day. Subsequently, Pillon reported for six days of training between March 6th and May 13th 1987. He then took leave for an extended period of time, exhausting both his accrued annual and sick leave. During that period, Pillon stated several times that he would not work in communications. In most cases, when the issue arose, his assertion was based upon his preference for working as a street cop and/or his view that the transfer order was punitive in nature. In fact, Pillon maintained almost from the beginning the his refusal to report stemmed from his perception of his transfer as disciplinary. It appears, from the record, that the Appellant's assertions of health reasons was a pretext, raised when other efforts had failed.

But even accepting, arguendo, Pillon's assertion that he feared a negative impact on his health, the second prong of the applicable standard must also be met, i.e. a reasonable person in similar circumstances would have perceived a risk. As evidence of the

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8/(...continued)
the same protection as any non-police officer would enjoy. In the instant case, there was nothing "inherently hazardous" about the assignment to the Communications Division. A legitimate safety and health concern, would be considered an exception to the rule in such circumstances.

While I believe that the "safety and health" exception should be narrowly construed in situations which are inherently hazardous, due to the very nature of the work, I cannot agree that this recognized exception should remain undeliniated and undefined as it applies to the Department.

9/ Most probative of the pre-textual nature of Pillon's asserted health concerns is the fact that prior to certain statements by the Chief at a City Council meeting on 11-25-87, he had been willing to report to his new assignment, despite his asserted concern. It was only after this incident that his "health concerns" became paramount.

reasonableness of his perception of the risk to his health, Pillon submitted letters from his psychologist and a chiropractor. These letters indicated that he would experience difficulties if he worked as assigned. The documents submitted by his psychologist indicated that the asserted problem was based upon his dislike of the position. The submission of his chiropractor indicated that his assessment was based upon his belief that the job required Pillon to sit for long periods of time.10/ After considering the entire circumstances of this case, and the record as a whole, I find that a reasonable person would not have concluded that there was a significant risk to their health involved in performing the assigned tasks.

In any case, I find the submissions unconvincing due to the fact that none of this evidence was based upon the authors' review of the actual requirements of the assignment, rather it seems to be based entirely upon Pillon's negative description of the jobs requirements.

Based upon the above, I concur with the majority that Pillon failed and refused to report to his assignment as ordered by the Chief. Said failure and refusal was in violation of Department rules and regulations and formed an adequate basis for discipline.

That being said however, there are other issues which also must be addressed. Normally, the Department has an untrammeled right to effectuate an "administrative transfer". However, there is no right to effectuate a punitive transfer, nor a transfer motivated by illegal or discriminatory motives. To put it succinctly, the Chief may not abuse his rights to administer the Department simply because he is vested with the power of administration.

B. THE DISCIPLINARY SYSTEM

In cases where an officer is accused of misconduct, the Department's internal disciplinary procedure is utilized to investigate the issues raised. Allegations of improper conduct are first investigated by the officer's immediate supervisors to determine the "facts" which form the basis of the allegations.

10/ Assistant Chief Noreen Skagen creditably testified that Pillon's physical condition could have been easily accommodated during his assignment to communications. Her testimony was undisputed.

The results of this inquiry are forwarded, up the chain of command, for review. If the facts appear to warrant further action, the matter may be referred to the Department's Internal Investigations Section (IIS) for further investigation. IIS notifies the Chief of the receipt of a complaint, simultaneous to initiating its investigation.

After completing its investigation, IIS forwards its investigatory findings, through the accused officers chain of command, to the Chief. The findings are reviewed by the superior officers in the employee's chain of command. These officers may recommend a proposed disciplinary or corrective action. The accused officer and the Chief are then notified as to the recommendation(s). If the IIS investigation finds the charges meritorious the employee is notified and has the right to request that a Disciplinary Hearing Panel[11/] be convened.

The DHP will investigate the allegations against the officer by conducting an administrative hearing on the matter. The Panel, after conducting the hearing shall make one of four findings;

11/ DHP's convened for the purpose of internal complaints (complaints lodged by persons within the Department) consist of five members with the rank of Lieutenant and above. Four members are assigned by the Chief and one is selected by the accused. The accused officer has the right to challenge the inclusion of any member for cause, and also may exercise one pre-emptory challenge. (The Agreement, A.Ex.3:33)

The DHP is to determine the truth or falsity of allegations made against Department personnel. The hearing is not a judicial trial. (The Agreement, A.Ex.3:33, and the Manual, § 1.09)

During the course of the hearing ;

> The DHP will consider the investigation reports, statements and other documents, testimony of witnesses and other such evidence as it deems appropriate. The panel will hear the plea of any accused who wishes to be heard and, at its discretion, may order the accused or any other employee of the Department to appear.
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> The accused officer will be given an opportunity to present a defense to the accusations presented at the hearing.
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> Upon conclusion of the presentation of evidence by both sides, the hearing panel will reach a verdict by secret ballot...
> (The Agreement, A.Ex.3:33, and the Manual §1.09.)

(1) request further investigation with specific recommendations;

(2) dismissal of the charge;

(3) finding a charge not sustained or;

(4) finding a charge sustained and list their recommendations. 12/

However should the panel, during its investigation, find evidence of other acts of misconduct it may also send a complete report of its findings to the Chief for appropriate action.

C. THE ROLE OF THE CHIEF IN ADMINISTERING DISCIPLINE

The Department contends that the "findings and recommendations" of the DHP regarding the charges presented are only "advisory" to the Chief. According to this assertion, the Chief may either follow or ignore the findings and recommendations of the DHP. However, the position taken by the Department, and embraced by the majority, is simply untenable. If the relevant provisions of the Agreement were interpreted to mean that the Chief could ignore, with or without reason, the findings of the DHP, the whole DHP process becomes little more than a charade.

Moreover, the language of the Agreement is clear on its face. It neither states nor implies that the product of the DHP is merely "advisory". Nor does it make sense for the parties to negotiate such explicit and specific procedures if the Chief could just disregard the findings and recommendations of the DHP at his/her whim. 13/

12/ Agreement, A.Ex.3:34., and the Manual § 1.09.040.

Although substantially similar, the Agreement and the Manual do differ in wording. In such cases, pursuant to Seattle Ordinance 109570, the Agreement controls over the Manual. Danielson v. Seattle, 108 Wn.2d 788 at 794, 742 P.2d 717 (1987).

13/ The Agreement is governed by established principals of contract law. Danielson v. Seattle, supra., 794. Two well established rules of contract interpretation apply here. The first is that contract language which is clear and unambiguous on its face will be enforced as written. ELKOURI, supra., 348, & (continued...)

It is clear that an employee has a right to "notice" and "an opportunity to be heard", prior to the imposition of discipline. Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985); Nickerson v. The City of Anacortes, 45 Wn. App. 432, 725 P.2d 1027 (1986). This right, established by Loudermill and its progeny, is based upon the constitutional right of "due process" prior to the deprivation of certain property interests.14/

13/(...continued)
n.30. As the Court said in Danielson, "Where the intention of the parties is clear from a written contract, the courts have nothing to construe and the contract language controls." Danielson, supra. The second is that "an interpretation which tends to nullify or render meaningless any part of a contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect. (cites omitted)" ELKOURI, supra, 353.

Moreover, the procedures negotiated by the Department are clearly distinguishable from the rules held invalid in the case of State Ex Rel. West v. Seattle, 50 Wn.2d 94 (1957). In that case the Court found that the Civil Service Commission did not have the power to promulgate rules which had the effect of delegating the powers of the appointing authority. In the instant case the Department has of its own volition, through the process of collective bargaining, negotiated procedures which govern the imposition of discipline. While those procedures may burden the exercise of power by the Chief, they clearly do not diminish his authority to impose discipline.

14/ Williams v. City of Seattle, 607 F.Supp 714 (D.C. Wash. 1985).

There is a clear distinction between the procedural "due process" requirements imposed by the Constitution and the "procedural requirements" imposed by the civil service system. Constitutional due process standards are articulated at a minimal level, i.e. the least "due process" that can be given an employee and still survive a constitutional challenge. Christensen v. Terrell, 51 Wn.App. 621, 628 (1988) Danielson v. Seattle, 108 Wn.2d 788, 797 n.3, 742 P.2d 717 (1987). Civil service procedural requirements are articulated at a utilitarian level, i.e. the level of expected performance. I believe that the Commission must act to promote the latter, rather than merely accept the former.

However, nothing in these cases requires that the employee's right to be heard must take any particular form. 15/

However, the procedures which the Department was required to use, prior to imposing discipline here, have already been determined through the collective bargaining process. Those procedures, which encompass the Loudermill requirements, are set forth in specific detail, in the Agreement between the Department and the Guild.16/ The Department is bound by the Agreement to provide the Appellant with a DHP in conformance with the requirements stated therein.17/

The Department is not free to obviate, abridge or constrain those procedures at its discretion. Nor may the Department substitute another forum for the DHP procedures. The Chief cannot simply impose his/her will, after a properly conducted hearing.18/ To

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15/ Williams, supra.

16/ Agreement, A.Ex.3:33.

As noted supra, the Agreement is controlling in cases where there is a conflict between that Agreement and the Department's Procedural Manual.

17/ It is true that in the absence of the specific standards in the Agreement, the Chief would be required to provide only a bare minimum "notice" and "opportunity to be heard" in order to comply with the Loudermill standard. In such circumstances the discretion of the Chief would be virtually unlimited in this regard. In this case, however, the Chief has negotiated a specific procedure which encompasses and enlarges upon the minimal Loudermill rights constitutionally guaranteed to employees. Since the Chief has negotiated away this discretion, he cannot now be allowed to reclaim it under the guise of his administrative authority.

18/ The majority apparently mispercieves the legal significance of the disciplinary procedures specifically set forth in the Agreement. It erroneously equates, and gives equal weight to, the findings and recommendations of the DHP and so-called "recommendations" made by unspecified others.

While the solicitation and consideration of "recommendations" by members of the Department may well be departmental policy (as reflected in the Manual), such "policy" based advice does not rise to the level of administrative rule. As the State Supreme Court stated in Danielson, supra., "We note that as a Seattle

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conclude otherwise would obviate the legitimate purpose of the panel and render meaningless the clear language of the Agreement.

However, the Chief is not obligated to simply rubber stamp the DHP's decisions. He/she retains the right, in appropriate cases, to dismiss the allegations, or to mitigate the recommended punishment where there has been a finding of sustained. However, absent a showing of impropriety, abuse of authority, or other acceptable reason, he/she is bound to accept the findings of a

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18/(...continued)
City Ordinance, see Ordinance 109570, the Guild Agreement language controls over the Manual, which is only a statement of internal departmental policy not having the force of administrative rule." (cites omitted). Thus it is clear that the negotiated DHP procedures are not comparable to the Departments internal "policies.

The "findings and recommendations" of the DHP, which are specified in the Agreement must take precedence over "advice" given to the Chief from other informal consultations. To hold otherwise goes directly contrary to the explicit directions of the Supreme Court as enunciated in Danielson. To state, as does the majority, that the Chief is not bound by the results of the DHP also flies in the face of logic. It assumes that the procedures were intended by the parties to be merely informational, not binding, and legally without significance.

Further, it is clear that the Department is constrained to follow its own rules. As the Court stated in Christensen v. Terrell, 51 Wn.App. 621, 627 (1988); "An administrative body must follow its own rules and regulations when it conducts a proceeding which could result in depriving an individual of some benefit or entitlement. Ritter v. Board of Commissioners, 96 Wn.2d 503, 507, 637 P.2d 940 (1981); Smith v. Greene, 86 Wn.2d 363, 373-74, 545 P.2d 550 (1976)."

While the Court in Christensen sustained the terminations contested therein, it did so based upon its finding that the Defendant in that case had provided the Plaintiff with the "minimal (due process) procedures" required by the federal constitution. I believe that the Commission must act to safeguard and promote, not the minimal standards required by constitutional law, but rather our own well enfranchised utilitarian standards as evidenced by the written procedures, negotiated and agreed to by the parties to the Agreement.

DHP, and would normally be constrained to impose no higher punishment than that recommended by the panel.[19]

D. DHP PROCEEDINGS ON THE TERMINATION

The Appellant has raised one significant issue regarding the proceedings of the DHP convened to review his termination.[20] Appellant contends that the panel's decision to overrule his request to have Chief Fitzsimons testify was harmful error.

At the time of the DHP hearing, Appellant requested to call the Chief as a witness. When asked by panel Chairman Kramer for an offer of proof, Counsel for the Appellant stated, inter alia;

> ...that he first of all, subsequent to his (transfer) order, indicated that it was an improper order and that he was sorry the panel made that recommendation. In addition, that he, by separate agreement, would allow Sgt. Pillon not to have to adhere to this panel's recommendation and his orders, and that he breached that agreement. Third of all that he was barred, that he barred Sgt. Pillon from legally attending his position and, therefore, was not AWOL, and that he said things and created an atmosphere so that Sgt. Pillon could not attend his work, making comments before the city council, before others, charging Sgt. Pillon with violating the law and doing other things."[21]

The Appellant's request was denied. The Chairman ruled; "I would deny that because the Chief is the one who is going to have to make the ultimate decision once this panel is finished and presents him with the testimony provided here." [22]

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[19] Pursuant to the published CBA procedures, the Chief is bound by the DHP's findings of fact, even in cases where it might be argued that the panels recommendations were not appropriate.

[20] While Appellant has raised several other issues regarding the "fairness" of the DHP proceeding, I find that even accepting his assertions as true, any error would have been harmless.

[21] D.Ex. 55:7. Since the Appellants request was denied, upon review, the offer of proof must be accepted as asserted.

[22] D.Ex. 55:80.

The issues raised by Appellant's counsel, in the offer of proof, were substantive. In essence they assert that the Chief had either rescinded the transfer order, or so modified it that it was no longer enforceable. Since the validity of the order was an essential element of the case, the witness should have been heard.[23/] The Chairman's ruling that the Chief need not be heard, since he was the ultimate authority on the determination to terminate the Appellant, did not adequately address this critical issue. Where an employee asserts that an action of the Chief regarding a essential element of the case was improper, illegal or prejudicial, or as here, determinative of the validity of the charge against him[24/] the employee has a right to elicit evidence concerning those acts. [25/]

Moreover, in cases where the involvement of the deciding official in the underlying events and issues has been such that his/her actions may have seriously prejudiced the employee or may have seriously called into question the validity of the underlying order, that official should recuse him/herself from the decision.[26/]

23/ It appears that the "presiding officer" did not have the discretion to refuse to call the Chief in this case. The language of the Agreement is explicit. It states, inter alia., "The presiding officer shall decide any question of procedure or acceptability of evidence, **accepting any evidence which is reasonably relevant to the present charges.**" (emphasis added) The Agreement, A.Ex.3:33. It can hardly be creditably argued that the testimony of the Chief on the issues presented by the Appellants Counsel was not "reasonably relevant".

24/ It goes without saying that if the Chief had voided the underlying transfer, the DHP could not sustain the charges against the Appellant.

25/ Although the transfer order was "presumptively valid", the employee clearly has a right to challenge that presumption. If the employee substantively challenges the validity of the order, the burden of proof on that issue shifts to the Department. Further the employee has the right to adduce evidence that the Department's proof of validity is faulty or fatally flawed.

26/ The Appellant was entitled to a "fair and impartial hearing", before an unbiased tribunal. When the hearing official or the deciding official is the same person who investigated, accused or prosecuted the issues initially, the fairness of the hearing is questionable. See State ex rel. Beam v. Fulwiler, 76 Wn.2d 313 (1969). There is ample evidence in the record here, that the

(continued...)

It is simply not sufficient to say, as was done here, that because the Chief knew what he had done the issue was moot.27/

However, upon appeal to the Commission, the Appellant was given adequate opportunity to present evidence and testimony (including that of the Chief) regarding those issues. Counsel fully availed himself of that opportunity. After a full review of that evidence, I find insufficient evidence to conclude that the Chief either rescinded or amended his order transferring Pillon. Therefore, I find any error committed in this instance to be harmless.

E. THE DEPARTMENT'S ADHERENCE TO APPLICABLE PROCEDURES

1. Initiation of the Investigation Regarding the Arrest of the Fugitive Suspect

On or about August 11, 1986, the Appellant and several officers under his supervision, arrested a suspect on the charge "suspicion of fugitive". Subsequent to this arrest, an IIS investigation was initiated into the circumstances surrounding that event. The charge which the IIS was given to decide was;

> It is alleged that you (Pillon) participated in and screened the felony arrest of a suspect on 8-11-86 for Suspicion of Fugitive; that this arrest was not based upon probable cause that he was a fugitive but rather

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26/(...continued)
Chief was inextricably involved in the investigation and accusations which led up to the issuance of the transfer order which underlay the termination.

There would be no need for the deciding official to testify or recuse himself when the issue raised concerns purely ministerial acts. For example, if the fact contested is simply whether the Chief signed the transfer order, directed the transfer, or approved in the normal course of operations some action taken by other staff. These matters may be verified through the use of the Departments records or other creditable means.

27/ See D.Ex. 55:82:9.

was initiated as a subterfuge to detain and hold him for other reasons.

The IIS investigation and the Department's post-investigation review, resulted in a recommendation for a fifteen (15) day suspension for Pillon.

Pillon contends that the manner in which the investigation was initiated against him was discriminatory. He contends that other officers would have been allowed to attempt to remedy the situation informally, prior to the initiation of a formal investigation.

The evidence presented during the hearing of this matter shows that while in some cases an attempt at informal resolution may be attempted, there is no "right" of informal resolution. The request for an investigation is a discretionary action which may be taken by any individual either within or without the Department. While it is unclear who actually initiated the request for an IIS investigation, for our purposes it simply does not matter. The primary object of the investigation is to determine the truth or falsity of the charges. Moreover, the facts known to the Department at the time were more than adequate to form a legitimate basis for a request for an IIS investigation. The initiation of an investigation in this case did not evidence the filing of a frivolous charge or an attempt to "get Sgt. Pillon".

There is insufficient evidence to conclude that the process and/or procedures utilized by the Department to initiate and conduct the IIS investigation, were in any way inconsistent with its policy, or utilized in an impermissible manner.

2. Pillon's First Disciplinary Hearing [28/]

28/ The Department contends that the Commission should not review the proceedings of this DHP and the events which flowed from it, because Pillon failed to exhaust his administrative remedies. However it is clear that the Commission possesses the inherent power to review the entire circumstances surrounding the termination here in issue. This includes the issues which underlie the order to transfer. Yakima v. Yakima Police, supra.

The Department's internal procedure, allows an employee who is dissatisfied with a transfer order, to appeal that order to the "Employee Relations Panel". That Panel would hear the matter and make a "recommendation" to the Chief. The Chief would then have the option of accepting or rejecting that "recommendation. Manual, §1.10.100. This circular process would have availed the

(continued...)

On January 28, 1987, a DHP was convened, at the direction of the Chief, to hear the charges concerning the arrest referred to above. The DHP was charged to determine the truth of the allegation of "misuse of authority".29/ There was no explanation of the reason that the original IIS charges were not the same as those transmitted to the DHP.

The DHP, after hearing the testimony of witnesses, and reviewing the documents presented, issued a finding of "not sustained" as to the allegation charged. However the DHP, in very strong language, also stated that Pillon's performance in the matter of the arrest was unsatisfactory and recommended that he be transferred away from street duty.30/

28/(...continued)
Appellant little. Since the Chief was the person who initiated the transfer herein issue, such an appeal would have resulted in little more that the Chief "re-reviewing" his own action. There is nothing to show that such a "re-review" would have been anything more than a futile gesture.

Moreover, according to the Department's position, that Panel's recommendation is also not appealable to the Commission, so the process would have gained the Appellant nothing. Finally, the doctrine of "exhaustion of administrative remedies" is normally invoked in cases where the "administrative authority" possesses some special expertise which would benefit the determination of the issue presented. There is no evidence of any such expertise existent here.

29/ The panel apparently decided this matter based upon its belief that it was to investigate whether there was probable cause to arrest the suspect on any charge.

30/ The DHP report stated, inter alia. ;

> On February 3, the panel voted 4 - 1 to recommend a finding of not sustained to the allegation of misuse of authority. The majority feels there were sufficient facts and circumstances known to Pillon at the time of arrest to support a presumption of probable cause. Because lack of probable cause was crucial to the Department's argument, the case against Pillon was insufficient to be sustained in this incident.
>
> This panel unanimously deplores the quality of Pillon's actions....
>
> The panel also finds that Sergeant Pillon, whether
> (continued...)

The record is clear that the DHP was given a specific allegation to investigate (i.e. misuse of authority). However, the DHP made findings of fact and recommendations regarding its assertion that Pillon was "working on a different plane than the rest of us, presumably not bound by the same the Departmental rules and regulations." As a result of these "findings" the DHP recommended that the Appellant be transferred to a non-line unit.

There is no evidence in the record that Pillon was notified of these allegations during the DHP's hearing process.[31/] There is no evidence that he was afforded an opportunity to respond to these assertions.[32/] It is certain that he was not afforded the opportunity to invoke his right under the disciplinary procedures to request a DHP be convened to determine the truth or falsity of the accusation.

The DHP's findings and recommendation were forwarded to the Chief on February 6, 1987 for further action.

3. The DHP's Adherence to the Disciplinary Procedures

30/(...continued)
intentionally or not, **presents himself as working on "a different plane" than the rest of us, presumably not bound by the same departmental rules and regulations.** He says he "nominally" reports to the third watch Lieutenant. ...

We believe whatever positive things he may accomplish are not balanced by the long-term impact of his attitude upon the young and impressionable people now entering the ranks. Therefore we unanimously recommend Sergeant Pillon be reassigned to a non-line unit. (emphasis added) D.Ex 28.

31/ The Appellant was entitled to "notice" which was reasonably calculated to inform as to the nature and substance of the charges. Deering v. Seattle, 10 Wn.App. 832, 837 (1974).

32/ The "opportunity to be heard" includes; (1) the right to know the charges or claims; (2) the right to meet the charges with witnesses and evidence, and (3) the right to have the aid of counsel. Nirk v. Kent Civil Service Commission, 30 Wn.App. 214 (1981). Accord, State ex rel. Perry v. Seattle, 69 Wn.2d 816 (1966).

The Appellant also contends that the findings and "recommendations" of the DHP, regarding the different plane allegation, were a breach of the disciplinary procedures. He asserts that these actions evidence a lack of "due process", as well as disparate treatment.

It is clear, based upon the Agreement and the Manual, that a DHP is the right of the employee. Even in cases, such as the one at issue, where the Chief convenes the DHP, the panel must comply with the procedures explicitly set forth in the Agreement.[33/]

Once the DHP is convened, it is constrained by the published procedures of the Department. The Department's Agreement with the Guild sets forth explicitly the allowable findings which can be made. In this case the DHP went beyond those constraints. The panel found the allegations "not sustained", yet issued a "recommendation" that Pillon be transferred.[34/]

The right of an employee to notice and a chance to defend him/herself against allegations, prior to the imposition of

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33/ Agreement, A.Ex.3:33.

The Agreement specifically deliniates the findings that the DHP is empowered to make, and clearly provides that recommendations will be issued only in relation to two of the four findings authorized.

34/ As noted supra, the panel had the authority to request further investigation of its evaluation of Pillon's conduct. Additionally, the Panel was empowered to report to the Chief any action by Pillon, not the subject of charges therein, which it believed constituted misconduct. However the DHP clearly abused its authority by its actions in charging Pillon, determining that those charges were true, and then recommending disciplinary action, all without giving Pillon either notice or a chance to rebut those charges.

The Department has adequate procedures to handle those rare cases where employee misconduct is discovered which is believed to present such a danger, to either the Department or to the public, that the employee must be removed from duty or from an assignment while an investigation proceeds to a conclusion. Even in such cases, the employee must be given notice, and a chance to defend or contest the charges prior to final disposition being made. It is simply not enough for the department to say, as it has here, that the officer was found guilty of a (unannounced) charge out of his own mouth, during an investigation into another charge.

discipline, is well enfranchised in both the Department's procedures and in law. The procedures by which this was to be accomplished were clear and explicit.

The assertions of the DHP regarding the Appellant were no less serious because they had come as the collective observations of the panel at the end of a hearing. The established procedures required that the Department give Pillon the opportunity to request a hearing on those allegations prior to taking disciplinary action based upon them. Had the DHP report recommended "Further investigation" as allowed by the Agreement, Pillon would have been assured of a chance to request a second DHP on those allegations.35/

Moreover, the findings/allegations of the DHP were vague and ambiguous. They reflect the Panel's distaste for Pillon's attitude, rather than some action or failure to act on his part. Allegations of this type, more than most, deserve close scrutiny. These allegations are purely subjective, and difficult to address or disprove. Yet, such is the nature of these charges that they might well taint an officer's career, or even form the basis for his removal from the force.

Every employee has a vested interest in his reputation for professionalism and competency. An employee subjected to charges of this nature deserves a chance to respond and contest the validity of those assertions, through the Department's established procedures.36/ This is especially true where, as in

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35/ It is also interesting to note that, pursuant to the Agreement, an accused officer, who is required to make a statement during an investigation of alleged misconduct is entitled to notice of the allegations which are being investigated. That document specifically provides "Additional acts, allegations or circumstances may be made the subject of a separate interview or statement." Agreement, A.Ex.3:33. Thus it appears that even in a case where a officer is compelled to give a statement, he/she will be given a separate opportunity to respond to any allegations that might arise as a result of the first statement. Yet the majority would deny the Appellant that right here.

36/ There is a serious danger here that goes well beyond the instant case. The Commissions decision to sanction the imposition of discipline here, based upon these eleventh hour, subjective and untested assertions, most certainly increases the vulnerability of every officer to the most nebulous and subjective type of charges. Any officer, accused of misdeeds, could be found innocent of the specific allegation but punished for a panels perception of his/her demeanor, attitude or beliefs,

(continued...)

the instant case, these allegations form part of the basis of a disciplinary action by the Department.

In this case, the recommendation of the DHP exceeded its authority. The Chief was not free to accept and act upon the recommendation of the Panel that Pillon be transferred. In some cases a transfer may be deemed to be a normal administrative matter, not subject to challenge. Here it can only be viewed as discipline, arising from serious allegations, made in the midst of a disciplinary procedure.[37/] Pillon's transfer resulted in significant part, from the findings and recommendation of the Panel, on a matter they were neither charged with investigating, nor gave the Appellant adequate opportunity to refute.

Even accepting, arguendo, the proposition that the transfer was to simply remove Pillon from the scene of an asserted performance problem, as a matter of policy, I do not believe that the Commission can sanction such action. If the allegations made by

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36/(...continued)
without any real chance to respond.

The accusations here do not accuse Pillon of any act or failure to act. They do not accuse him of any specific violation of rule, regulation or procedure. Rather they focus on the manner in which the Appellant "presents himself". To sanction such allegations would invite a most invidious form of discrimination to become common place. One in which cultural and lifestyle differences may become the basis for perceived attitudinal deficiencies.

37/ The determination that the "transfer" herein issue was in fact a disciplinary action does not rest solely upon the fact that the recommendation was a result of a DHP proceeding. In this case it is clear that the transfer was used as a punishment, (i.e. imposed as a penalty for misbehavior). In plain english Pillon was being transferred (i.e. disciplined), at least in part, because he "presented himself" as being above the law. see Tr. III-177:23.

Moreover, the action of the Panel, and the subsequent ratification of that action by the Chief, was certainly viewed by other members of the Department as discipline resulting from the charges brought against Pillon. It is difficult to conclude, from the record that the Appellant was being subjected only to a normal administrative transfer.

the DHP were true,38/ the Department was obliged to take "corrective" action. Moving an officer who exhibits a disdain for the Departmental rules and regulations to a communications assignment does nothing to remedy the problem. Nor does it address the myriad of other performance problems which were of such concern to the Department.39/

Based upon my finding that the DHP was restricted to the four findings allowed in the Agreement, and my finding that Department was required to adhere to the procedures set forth in the Agreement, and failed to do so, I find that the Department acted in violation of those procedures. 40/ I also find that the procedural violation was substantial.

F. THE PERFORMANCE JUSTIFICATION FOR THE TRANSFER

38/ Pillon was also alleged to be unresponsive to supervision, to submit inadequate documentation regarding arrests and to lack positive leadership abilities. **see D.Ex.28:1.**

39/ At the very least, the Department's reliance on the "transfer" recommendation may be viewed as an attempt to circumvent the employee's right to respond to the allegations fully, by obviating the disciplinary process. I cannot find that the opportunity later given to the employee to discuss these assertions with the Chief, at the time when he was considering action on the recommendation to transfer, in any way cures the denial of the employees right to defend against the new allegations.

An officer, called into the Chief's office, is placed in an inherently more coercive atmosphere than that of the DHP. Additionally, the employee's rights, in such situations, are dependent solely upon the largess of the Chief. In this case it is clear that the Chief did not afford the Appellant the same opportunities that would have been forthcoming in a DHP proceeding. Moreover, since the view of the Department was that the Chief could have imposed a more severe penalty than that recommended by the DHP, the employee was placed in a situation of double jeopardy. One where he/she may, by the very attempt to diffuse the allegations, risk suffering a more severe penalty.

40/ I do not believe however, that the Department's actions rise to the level of a Constitutional deprivation of due process. As the Court stated in Williams, supra.; "Procedural rules which impose substantive limitations on the discretion of the decisionmaker are not themselves "property" interests." (cites omitted), 719, Danielson, supra., 797, n.3.

1. The Performance Evaluation System

The Department maintains an employee evaluation system which is used to evaluate an employees job performance on a yearly basis. Each employee is evaluated by his/her immediate supervisor. That evaluation is reviewed by a higher level reviewing officer. The employee also has a right to respond to the evaluation, orally and in writing.

The purpose of the evaluation is to rate the employee's performance in the functions of their job, and to point out deficiencies which need to be corrected. The evaluation, when completed becomes a part of the officer's personnel file.

2. The Appellant's Performance

After receiving the DHP report the Chief reviewed its findings and recommendation, and spoke several times with Pillon. There was also an exchange of correspondence regarding the issue, raised by the report, of the adequacy of the arrest and/or post-arrest documentation submitted by Pillon to support his arrests. The Chief, sua sponte, then conducted an extensive review of the documentation submitted by Pillon in recent cases. In fact, he went so far as to submit several case files, which Pillon had produced, to the prosecutors office for review of their legal sufficiency. After his review, the Chief concluded that Pillon was performing unsatisfactorily in this area.

In addition to Pillon's performance regarding reports and other the Departmental paperwork, The Chief stated that he had several other concerns with Pillon's performance. These included, but are not limited to; Pillon's approach to the "so-called" confrontational tactics used by the ACT; his handling of evidence; and his handling of informants. Some of these matters, most notably the handling of evidence, had been the subject of concern expressed to Pillon within the normal procedures of the Department, and had apparently been corrected. Others evidently had not, i.e. Pillon's tactics. The Chief testified that all of these matters played a part in his decision to transfer Pillon 41/.

41/ See Tr. III-177:17 - 178:7. Of particular concern here is the fact that the Chief, by his own admission, was acting in part on unconfirmed and uncorroborated statements (published in the 3/1/87 edition of The Seattle Times, D.Ex.25) regarding allegations that Pillon had engaged in serious breaches of

(continued...)

It must be noted however, that Pillon had been issued a performance evaluation for 1986 just a few weeks prior to the Chief's determination that his performance was unacceptable.[42/] That evaluation rated him as exceeding all but one performance standard (the standard was marked unable to observe). The preceding evaluation (for 1985) also evaluated him similarly. Both evaluations had been prepared in conformance with the normal Department policy, and reviewed in accordance with the Department's established procedure.[43/] Neither of these evaluations noted the deficiency which the Chief investigated so thoroughly. [44/]

41/(...continued)
departmental policy.

Although the Chief did initiate an internal "review" of these allegations (D.Ex. 24), there was no evidence that the review process had ever been completed. Further, there was no evidence that the Department had initiated charges (formal or informal) concerning these events, or that Pillon had been notified of the Chief's "concerns" in this regard. Thus this action was taken without a full investigation, and without the providing Pillon notice and an opportunity to respond to the allegations.

42/ D.Ex. 20:3.

43/ Prior to the Chief's investigation into his performance, Pillon had not been notified that his performance was substantially deficient. At no time were his supervisors given the opportunity to attempt to improve Pillon's performance, in keeping with the normal procedure in cases of inadequate or poor performance. Nor was Pillon afforded the opportunity to improve his performance after the completion of the Chief's evaluation and notification of his findings. Rather he was summarily transferred.

44/ It must be noted that the Department, during the Commission hearing, presented multiple assertions, and extensive testimony regarding the performance of Pillon. However, that evidence is directly contradicted and severely undercut by the official Department evaluation of Pillon. That evaluation was issued only weeks prior to the Chief's determination that his performance was unsatisfactory.

I do not believe that it is, or should be, permissible for the Department to evaluate an employee as performing in a satisfactory manner, and then seek to obviate that evaluation
(continued...)

The Chief's direct involvement in investigating, evaluating and acting on the asserted performance deficiencies of Pillon in this case was highly unusual. While there is adequate evidence in the record to indicate that the Sergeants performance may have been a legitimate cause for concern (and in fact may have, at some stage, necessitated disciplinary or corrective action 45/), the manner in which the action was taken here cannot be sustained.

An employee with performance deficiencies is entitled to notice of those deficiencies, and an opportunity to improve his/her performance, prior to being subjected to discipline on that basis.46/

44/(...continued)
through anecdotal testimony given by persons who were not direct supervisors of the Appellant. In some cases, such testimony was given by persons who were not even in a position to observe, first hand, the Appellant's performance.

There was no evidence that the performance of Pillon had substantially changed between the date of his official evaluation, and the date of the Chief's determination that his performance was unacceptable.

In this case I find that the evaluations of record must be credited over such evidence.

45/ The assertions regarding Pillon's performance made by the DHP and by the Seattle Times newspaper article were very serious, and surely merited further investigation. Moreover the pattern of performance deficiencies asserted during the course of this hearing must also be viewed as serious. Should these assertions prove, upon proper investigation, to be true they may well warrant disciplinary action. However, the Commission hearing is not the proper place to determine the validity of these matters, prior to the completion of the proper departmental procedures and investigations.

46/ The Chief stated in his testimony that he relied, in substantial part, upon his own investigation of Pillon's files (at a time when Pillon was already being considered for disciplinary action resulting from the contested arrest) and his "concerns" about a so-called "consensual entry" incident reported in the newspaper. At no time did the Chief either send these performance matters back down the chain of command for proper disposition in accordance with department procedure, or initiate the disciplinary procedure to deal with those matters which he viewed as serious breaches of department policy.

Here too, the Department's procedures (covering performance evaluation) must be adhered to.[47] An employee has a right to rely upon his/her legitimately obtained and properly executed performance evaluations. In this case, Pillon had every right to rely upon his performance evaluations which had been issued by his immediate supervisor and reviewed by that officers superior.[48] There was no reason for Pillon to suspect that the Department was substantially unsatisfied with his performance, prior to incident of the "fugitive arrest".

In this case, the Chief imposed discipline, despite the fact that; (1) Pillon was given little notice, and no chance following that notice to improve the performance deemed unsatisfactory, and; (2) received no notice of perceived performance deficiencies in his execution of the so-called "consensual entrance" to a residence, reported in the newspaper.

The Chief is not free to simply ignore the established the Department performance evaluation system, simply because he feels that it doesn't work satisfactorily.[49] The proper course of action is to fix those procedures and to make them responsive to the needs of the Department.

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[47] This is not to say that the Chief or his subordinate officers must turn a blind eye to performance deficiencies discovered in the normal course of their duties. Such deficiencies should of course be corrected. However absent some indication that such matters pose an immediate threat to the mission of the department, a showing that the deficiency would prevent the officer from performing his/her job in a manner consistent with the law, or a danger to others (within or without the department) performance deficiencies should be handled, procedurally, within the regular framework established to handle such matters.

In such cases the Chief may, at his/her discretion, temporarily transfer or otherwise remove the employee from his/her assigned position in accordance with the appropriate procedures. However the record does not reveal that to be the case in this instance. The deficiencies asserted here were evidently well known to the Department (if not to Pillon), and even tolerated, for at least a period of months, prior to the events which led to the transfer of the Appellant.

[48] If this evaluation was not properly issued or reviewed, the Department should have initiated action to correct that situation, not simply obviated the process.

[49] Tr. III-174:12.

Based upon the above, I find that the Department failed to adhere to the required procedures of its performance evaluation system. That violation was substantive.

G. DISPARATE TREATMENT/RETALIATION

The Appellant contends that he was not required to follow the Department's transfer order because it was issued in retaliation for his "political opinions" and/or his statements on the Department policy regarding drug abatement as well as his criticism of the Mayor and the Chief. He contends that evidence of this retaliation is the fact that he was treated differently than other similarly situated officers in the transfer and the underlying disciplinary matter concerning the arrest.

It is clear that Pillon was outspoken and vociferous in his attacks upon the Department's drug abatement policies in general and the Mayor and Chief in particular.[50/] There is no doubt that the Chief and his subordinates knew of Pillon's public statements.[51/] These statements were widely publicized, and indeed the Chief was directly asked on more than one occasion, to respond to them.

However, there is insufficient evidence to conclude that the Chief's action in ordering the Appellant transferred, and subsequently terminated, was motivated by his desire to retaliate against Sgt. Pillon.[52/] While the record clearly shows that some of the Department's subordinate commanders did feel that Pillon should be dealt with decisively in order to abate his criticism, these officers did not make the final decision regarding the transfer order or termination.

The Chief creditably testified that he made a number of efforts to ensure that Pillon received fair treatment. This testimony was supported by other senior officers who were present when discussions concerning Pillon's activities arose. Moreover, the

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50/ D.Exs. 29 and 25.

51/ D.Exs. 61 and 62.

52/ As was pointed out in the Departments brief, the Appellant did not have to refuse to comply with the transfer order. Had he accepted his new assignment there would have been no basis for a termination.

Chief's actions evidence that he made numerous efforts to fairly assess the circumstances presented to him.[53/]

To some extent the record reveals that Pillon was treated differently due to his notoriety. The Chief's involvement in investigating Pillon's performance resulted at least in part from his efforts to ensure that this sensitive matter was fairly treated. However, Pillon surely has no basis to complain when his own activities resulted in a degree of extra attention on the part of the Chief. Indeed, since many of his statements were accusatory of the Chief, it appears that they were designed to elicit the kind of attention he later received.

As a practical matter, it would be impossible for the Department not to take note of Pillon's activities in this regard. However, there is no requirement that the Department or its top level officers remain blind and mute in the face of the public accusations by an employee.[54/] The Department is only required to take no action which is retaliatory or which would constrain the employees right to voice his/her opinion.

Based upon the above I concur with the majority that there is insufficient evidence to conclude that the Department's actions in this matter were taken in retaliation for the Appellant's exercise of protected speech.

[53/] The fact that I have found substantive violations of the Department's procedural rules and regulations, does not automatically mean that I have concluded that the reason for those violations were retaliatory.

[54/]Pillon's allegations against the Chief and the Department elicited from them criticism of his performance and attitudes. However, Pillon has no right to expect that his repeated and vociferous attacks upon the Department's policies and its personnel would go unanswered. To the extent that the statements of those involved, made in response to the Appellant's criticisms, increased Pillon's "stress" and/or made his work situation uncomfortable, it must be concluded that it was a self inflicted situation.

While the Department is constrained, by law, from retaliating against employees who express honestly held beliefs, it is not retaliation to answer those allegations, even if the answer includes questioning the credibility or judgement of the employee. In this case there appears insufficient evidence to conclude that the personnel actions taken by the Department were designed to retaliate against Pillon.

IV. CONCLUSION

As I stated at the outset of this opinion, I believe this case centers on the parties adherence to the rules and procedures of the Department. The evidence clearly reveals that both parties here failed to conform to significant and important Departmental rules and procedures.

The promotion of a fair, orderly and consistent civil service system, requires that both parties to the employment relationship have clear knowledge and understanding of the rules which govern that relationship. The Chief has the right to expect, and rely on, each officer's adherence to the rules and procedures of the Department. Conversely, each officer also has the right to expect, and rely on, the Department's adherence to those same rules and procedures. When either side of this equation believes that it need not conform to those guidelines, the Department will be unable to effectively and efficiently perform its mission of public protection.

I believe that the Commission only promotes disarray when it sanctions expedient, arbitrary, or inconsistent interpretation and application, of the rules and procedures of the Department. The Commission's holding in this case sanctions the conduct of the Department and the Chief in violating or ignoring significant rules and procedures. The Chief is correct in wanting to send the right signal to his officers regarding compliance to the rules. But he too must get the message. The rules are for everybody, not just those at the bottom.

In this case, the Appellant blatantly refused to report to his assigned duty station. His refusal was a clear violation of his obligation to the Department.

However, the Department too failed to adhere to its own rules and procedures concerning the imposition of discipline and employee evaluation. I find that both of these failures seriously interfere with the establishment and maintenance of an "orderly system of personnel administration and management" and therefore constitute substantive violations.

I further find that the Chief improperly considered the allegations made in the March 1, 1987 edition of the Seattle Times regarding alleged "misconduct" by the Appellant. The Chief's concerns regarding those allegations provided, in substantial part, a basis for his decision to transfer Pillon. Yet Pillon was given neither "notice" nor an "opportunity to be heard" regarding those assertions, and was thereby deprived of the right to request a DHP.

The imposition of discipline requires, not only a rational basis, but also fairness and equity. Therefore, I do not believe that

the Commission can or should, fully uphold the discipline imposed in this case. Accordingly, I recommend that the Order of the Department be modified as stated in the succeeding section.

V. REMEDY

Based upon the record as a whole, and the conclusions and findings stated above, I believe that the Department had sufficient grounds to discipline the Appellant. However, because I have found that the Department engaged in substantial violations of its rules and procedures, I believe the order(s) of the Department relating to the Appellant should be modified as follows;

(1) The order Terminating the Appellant should be modified to reflect a 60 day suspension and a reduction in rank, to the next lowest level.

(2) The transfer order, transferring Pillon to the Communications Division should be voided, and the Appellant returned to work in a line division.

However, the Department may undertake to transfer or otherwise discipline the Appellant if subsequent investigation, conducted in conformance with the Department's procedural requirements, concludes that such action is appropriate.

Dated this 20 day of July, 1988.

Arthur E. Joyner
Commissioner