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CIVIL SERVICE COMMISSION

BEFORE THE SEATTLE CIVIL SERVICE COMMISSION

In re the appeal of: **RUSSELL AQUINO,** Appellant v. **SEATTLE DEPARTMENT OF TRANSPORTATION,** Respondent	**No. 06-01-012** **PETITION FOR REVIEW**

The appellant objects to the following findings:

1. On P. 6, the hearing examiner found that "Appellant lied during the investigation when he told Ravert they had only gone to a store. Undoubtedly part of the reason he lied was because the distance and speed of the trip have bearing on whether having an individual in the back was unsafe." This is a finding that was made on an issue that was not relevant to what the appellant was charged with. He was not charged with lying during an investigation, so he did not provide testimony on this point and it is unfair to prejudice his case on unrelated issues he did not provide testimony on. A similar objection is made with respect to the finding on page 8, because the appellant was never charged with being dishonest, and to now base a discipline on that charge is a denial of due process.

2. The appellant objects to a finding based upon hearsay of an unreliable source. In this

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4 case the hearing officer based a finding in part on unsworn testimony of an anonymous person.
5 While it is true that hearsay is admissible in an administrative hearing, the use of it is not
6 unlimited. In **Chmela v. Dept. of Motor Vehicles**, 88 Wn.2d 385, 393, 561 P.2d 1085 the court
7 recognized that hearsay evidence may be inadmissible in some circumstances because it lacks
8 circumstantial guaranties of trustworthiness. In that case the court ruled "A value sought to be
9 protected both by the confrontation clause and the prohibition against the use of hearsay
10 testimony is that the evidence shall be trustworthy" citing **State v. Kreck**, 86 Wash.2d 112, 542
11 P.2d 782 (1975) and generally 2 K. Davis Administrative Law Treatise, ss 14.01—14.17 (1958).
12 While hearsay evidence is not necessarily untrustworthy, the court stated that its use was limited
13 by WAC 1-08-520: "Subject to the other provisions of these rules, all relevant evidence is
14 admissible which, in the opinion of the officer conducting the hearing, is the best evidence
15 reasonably obtainable, having due regard for its necessity, availability and trustworthiness". In
16 **Chmela**, the court allowed the hearsay sworn testimony of a police accident report, as it was
17 uncontroverted and had a minimum level of trustworthiness. The court pointed out that Chmela
18 was free to controvert the testimony either with live testimony by himself, or request a
19 continuance to subpoena the witnesses. Chmela did neither and didn't even bother to show up to
20 the hearing. The hearsay testimony was therefore undisputed and admissible especially since the
21 purpose of the hearing was to determine merely the possibility of a judgment being rendered, and
22 not a finding there was an actual violation of RCW 46.61.235(4) which would determine the
23 ultimate issue of liability. **Chmela** at 392.
24 That is unlike the situation here. Here, the hearsay testimony of an anonymous complaitn
25 that someone was bouncing in the bed of the truck was used to sustain a major finding of fact.
26 There was no other testimony that indicates that the appellant was "bouncing around", and the
27 witnesses that did testify did not say that was an issue. Unlike **Chmela**, the testimony did not
28 come in the form of a declaration from an identifiable person.

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This "evidence" does not have a minimum level of trustworthiness that **Chmela** suggests is required.

3. On page 6 there was insufficient evidence to indicate there was a "standard procedure" that was to "transport individuals in the cab of trucks where there was seat belts." There was no evidence that this unwritten procedure was ever communicated to the appellant or communicated to any level lower than crew chief.

4. On page 6, there is a finding that "No one testified that employees rode in the back of dump trucks as a mode of transportation. The appellant testified that the practice had occurred for years.

5. The City's policies on seatbelts are not relevant to the situation here. As stated on page 5, the policy is "Employees shall comply with all driving laws including using seat belts." Clearly this rule identifies the use of seat belts only in connection with driving laws. There is no driving laws regulating the use of seat belts while riding in the back of a truck. The Examiner claims that it is reasonable for the City to have guidelines that are stricter than State laws, but if they do, then they should clarify their rule to indicate that such as the case, not mislead employees into thinking that the use of seat belts depends on "driving laws." As pointed out in the appellant's brief, there are a myriad of situations where it is legal to be transported in a vehicle without using seat belts, such as riding or standing in a bus or riding in a vehicle that was manufactured before seat belts were required. If employees are now going to be held to this higher standard, then the City should not have issued a regulation that indicates that "driving laws" are the standard.

6. A rule that "everyone take personal responsibility for safety" and "notify supervisors of hazardous conditions" is not relevant or reasonable in the case at hand because it is not of sufficient clarity to define what "safety" is and what a "hazardous" is. While it may be true that these rules might be relevant in cases where there is an obvious

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recognized hazard or safety condition, it is not relevant here where the rule in question indicates that driving laws are the standard and there is no driving law covering riding in the back of a truck. The situation here is no more obvious than the hazards associated with riding or standing in a bus without a seat belt or riding in an older car that does not have seat belts. In those situations the safety or hazard is not obvious because if it were, then the legislature would have addressed the situation with laws.

7. There was insufficient notice to the appellant and other employees who were disciplined here as to what the "standard policy" on assigning people to vehicles was. There was no testimony that this unwritten policy was ever communicated to the appellant or to anyone else below the level of crew chief.

8. The hearing examiner's recommendation on suspension violates that principle of progressive discipline and it is not uniformly applied. There was no notice from management that indicated that this relatively common practice was not to be used. Without notice as to what actions management considers safe, there cannot even be given an oral or written warning, let alone jumping to the most extreme form of punishment which is suspension.

There was testimony that the department had workers shoveling concrete out of the bed of a moving truck in the past. When Mr. Aquino asked Mr. Valentia if a person shoveling the concrete out of the bed of the truck and the trucked stopped suddenly, "Could the worker fall out" Mr. Vantia replied in the affirmative.

Madelene Paloka testified that SDOT Safety Officer, Rodney Maxie, along with concrete manager Paul Jackson came to Haller Lake, he instructed Madelene to stop letting her crew work out of the bed of a moving truck. There was also the following testimony:

Andrade: You indicated in time in perhaps the last six months you've been told to tell your employees not to ride in the back of a truck.

Paloka: Yes

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Andrade: My question. Is it permissible for employees to ride in the back of trucks to do the picking up of; signs, cones and barracades?

Paloka: No. We no longer do that.

Andrade: Is it permissible to have employees ride in the back of trucks to use the curb machine?

Paloka: No. They're no longer allowed to do that either

Andrade: Do you know how the work is getting done?

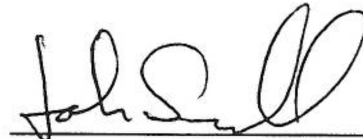
Paloka: Right now there is no work with the curb machine.

Thus the City has acknowledged that it has only decided to enforce the issue after the fact, unfairly disciplining the appellant while letting its more favored employees to get off with instructions to change instead of disciplinary action. The Cities change in policy was not uniformly applied.

CONCLUSION

For the above reasons the appellant request that the findings of the hearing examiner be reversed.

Dated this 7th day of April, 2007,



John Scannell, WSBA #31035

I hereby certify that on 4-7-07, I caused to be served a copy of this document by the method indicated below and addressed to the following:

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P.O. Box 4900
Seattle, Wash., 98124-4996

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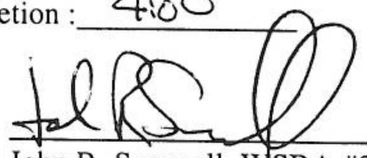

John R. Scannell, WSBA #31035
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