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3 **PUBLIC SAFETY CIVIL
SERVICE COMMISSION**

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5 **CITY OF SEATTLE**
6 **PUBLIC SAFETY CIVIL SERVICE COMMISSION**

7 IN RE THE APPEAL OF:

8 B.T. ROBERT MAHONEY,

9 Appellant,

10 vs.

11 CITY OF SEATTLE, SEATTLE
12 POLICE DEPARTMENT,

13 Respondent/Employer.

No. 09-001

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

14
15 **I. INTRODUCTION**

16 The Commission heard this matter pursuant to a Notice of Appeal filed by Officer
17 Bernard T. Robert Mahoney appealing disciplinary action imposed by the Seattle Police
18 Department (Department). Chief Kerlikowske suspended Officer Mahoney for 30 days and
19 transferred him out of the Training Unit of the Department.

20 The Commission held a full evidentiary hearing on May 1, 4, and 5, 2009, before
21 Commissioners Joel Nark, Herb Johnson and Terry Carroll, with Commissioner Nark acting as
22 Presiding Officer. The parties submitted briefs on May 29, 2009, which is therefore the date the
23 Commission record closed. The Commission has jurisdiction over this matter pursuant to Article
XVI, Section 3 of the Seattle City Charter and Chapter 4.08 of the Seattle Municipal Code. The
Commission may affirm, reverse or modify the department's decision. SMC 4.08.100.

1 The standard of review is found in SMC 4.08.100 and Commission Rule 6.21. The
2 Department has the burden of showing by a preponderance of evidence that the discipline was
3 “in good faith for cause.” The Commission has the authority to affirm, reverse, or modify the
4 decision of the employing department pursuant to SMC 4.08.100.A.

5 The Commission has utilized several factors in analyzing whether the Department has
6 met its burden. The factors are not exclusive - nor are they elements that each must be proven.
7 As the Commission has repeatedly said in prior decisions, the factors are just that - factors it
8 considers in its analysis.

9 The factors include whether: (1) the employee had notice that his or her conduct would
10 result in disciplinary consequences; (2) the rule was reasonable; (3) the employer investigated to
11 determine whether the rule was in fact violated; (4) the investigation was fair; (5) the employer’s
12 decision-maker had substantial evidence that the employee violated the rule as charged; (6) the
13 employer applies its rules even-handedly; and (7) the discipline administered was fair in relation
14 to the nature of the offense and imposed with regard to the employee’s past work record.¹

14 The Commission analyzes each of the two charges in light of the factors to determine
15 whether the Department had just cause to impose the disciplinary action. After considering the
16 evidence in this case, including testimony, documentary evidence, and arguments of the parties
17 and their representatives, the Commission entered Findings of Fact, Conclusions of Law and
18 Order, as provided in SMC 4.08.100.²

17 The Department and Officer Mahoney each moved for reconsideration of the
18 Commission’s decision. The Commission considered those motions and enters these Amended
19 Findings of Fact, Conclusions of Law, and Order, which replace the original Findings of Fact,
20 Conclusions of Law, and Order dated July 29, 2009.

21 **II. FINDINGS OF FACT**

22 ¹ See PSCSC #07-005 Marcia Kinder v. SFD; PSCSC #06-006 Richard Roberson v. SPD; and PSCSC # 07-007
23 Felton J. Miles III v. SPD

² Unless noted otherwise, individual findings of fact and conclusions of law are unanimously adopted by the
Commission.

1 10. Fairness of Investigation – The OPA conducted an investigation which included
2 interviews with Officer Mahoney, Ms. Newstrom and others associated with the Explorer
3 Program, the Training Unit and the Department. The Commission majority concludes that
4 Officer Mahoney did not introduce evidence to support a nexus between the alleged bias against
5 him in the Department and the investigation the Department conducted in this case. The
6 Commission majority also concludes there is no substantial evidence to support Officer
7 Mahoney’s claim that the investigation of the misconduct charge was either improperly
8 motivated or biased against him. The Commission unanimously concludes that the investigation
9 of the misconduct charge was conducted fairly.

10 11. Chief had Substantial Evidence – The Commission unanimously concludes that
11 Chief Kerlikowske had substantial evidence that Officer Mahoney had inappropriate contact with
12 Ms. Newstrom. The Chief found Ms. Newstrom’s allegation to be credible regarding this
13 incident. Officer Mahoney and Ms. Newstrom told diametrically opposing stories. Based on the
14 investigation and reports, the Chief of Police found there was substantial evidence to support Ms.
15 Newstrom’s version of events and to conclude that Officer Mahoney had engaged in misconduct
16 by subjecting her to an uninvited and unwelcome kiss. The Commission also heard testimony
17 from Ms. Newstrom and Officer Mahoney and concludes that the Chief of Police had ample
18 evidence to believe Ms. Newstrom’s version of the events, based on her immediate and later
19 consistently similar descriptions of the incident and her complete lack of any demonstrated
20 motivation to falsely make such an allegation.

21 12. Evenhandedness of Discipline –The Commission unanimously concludes that
22 Officer Mahoney did not introduce evidence to support a nexus between the alleged bias against
23 him in the Department and the disciplinary decision the Chief of Police made regarding the
misconduct. The Commission majority also concludes that Officer Mahoney did not introduce
any substantial evidence to support his claim that the misconduct discipline was imposed in an
inconsistent or unfair manner.

 13. Proportionality – The Commission majority concludes that a 30-day suspension
and disciplinary transfer was fair because of the serious nature of the misconduct. Although
Officer Mahoney had a good record previous to this incident, he was in a special position trust.
His mentoring role with Ms. Newstrom and his authoritative role in the program made her

1 especially vulnerable to his misconduct. The Commission majority also concludes that Officer
2 Mahoney did not introduce any substantial evidence to support his claim that the degree of
3 discipline for misconduct was disproportional in light of his record and the discipline imposed in
4 other cases.

5 14. The Commission unanimously concludes that the Department had just cause to
6 discipline Officer Mahoney by transferring and suspending him for misconduct. The
7 Commission majority also concludes that the Department had met its burden of showing it had
8 just cause to impose a suspension of 30 days for the misconduct.

9 **The Dishonesty Charge – Lying in the OPA Investigation**

10 15. However, a unanimous Commission has concerns about the application of a
11 dishonesty charge in this case.

12 16. Notice. First, the Commission unanimously concludes that the Department may
13 discipline employees for dishonesty. The SPD manual has for the entire time applicable in this
14 case prohibited dishonesty and therefore put officers on notice that dishonesty may result in
15 discipline.³

16 17. Reasonableness. A rule against dishonesty is also reasonable. The credibility of
17 the Department depends upon the honesty of individual officers, particularly in an OPA
18 investigation.

19 18. Fairness of Investigation. – However, the Commission is concerned about the
20 application of the dishonesty charges under these circumstances. The dishonesty charge was
21 added during the pendency of the OPA investigation based solely on Officer Mahoney’s
22 statements to the investigators.

23 19. Evenhandedness of Discipline – The Commission is unanimously concerned that
the Department has not charged dishonesty in a consistent manner. Rather, the evidence shows
that Department did not charge dishonesty in other misconduct cases in which the Chief resolved
credibility differences against the officer and in favor of another witness.

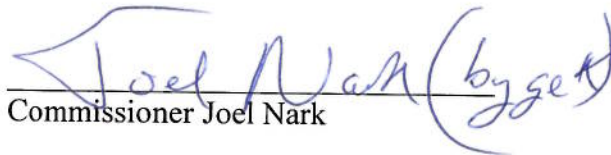
³ A new version of the applicable collective bargaining agreement (CBA) was adopted during the pendency
of the OPA investigation of this case. It included new language regarding terminations in dishonesty cases and the
level of proof required in such cases. The parties disagree about the importance of those changes to this appeal. The
Commission does not have authority to construe ambiguity in a CBA, but also concludes that it need not construe
the CBA, since by its plain language it applies to termination cases. This is a suspension and transfer case – not a
termination case.

1 **PARTIAL DISSENT**

2 I agree with the Commission majority that the Department has shown that Officer
3 Mahoney engaged in serious misconduct. I also agree that the Department had just cause to
4 transfer Officer Mahoney from the Training Unit, and to suspend him for that misconduct.

5 I also agree with the Commission majority that the circumstances surrounding the
6 dishonesty charge are troubling. I am concerned that every case of conflicting statements that
7 the Chief of Police resolves in favor of another witness, whether SPD or civilian, not become a
8 separate dishonesty charge.

9 I do not agree, however, that the Department had just cause to suspend Officer Mahoney
10 for 30 days for this offense. Given his good record before this incident, I would find that the
11 Department had just cause to suspend him for no more than 15 days for this incident of
12 misconduct which, although serious, does not in my opinion justify a 30 day suspension.

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Commissioner Joel Nark (by get) 8/26/09
Date

