IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PINAL COUNTY SHERIFF'S OFFICE,
Plaintiff/Appellant,

v.

PINAL COUNTY EMPLOYEE MERIT COMMISSION;
WILLIAM WOOD, JOE ROBISON, TOM RAMSDELL,
DAVID HERNANDEZ, AND JOE DOWNEY,
IN THEIR OFFICIAL CAPACITIES AS MEMBERS;
CARDEST JAMES,
Defendants/Appellees.

No. 2 CA-CV 2013-0008
Filed December 13, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pinal County
No. S1100CV201200718
The Honorable Joseph R. Georgini, Judge

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART

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MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Kelly and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Appellant Pinal County Sheriff's Office (PCSO) appeals from the superior court's order upholding the decision of the Pinal County Employee Merit Commission (hereafter "the Commission") in favor of former deputy Cardest James, reinstating his employment and awarding him back pay. For the following reasons, we affirm the commission's action and the superior court's decision on charges one and two, but reverse as to charges three, four, and six through ten, and remand for consideration of whether the discipline imposed was arbitrary and without reasonable cause.

Factual and Procedural Background

¶2 In May of 2009, PCSO terminated James's employment, specifying ten charges that were the basis for termination. James appealed his termination to the Commission, which held a three-day evidentiary hearing. In its January 2010 order, the Commission concluded that PCSO had not presented sufficient facts or evidence to support the charges against James. PCSO filed a complaint in superior court seeking review of the Commission's decision, and the superior court reversed the Commission and upheld James's termination. James appealed that decision to this court, which

found that both the trial court and Commission had based their decision on several erroneous considerations and therefore remanded the case to the Commission for further proceedings. *Pinal Cnty. Sheriff's Dep't v. James*, No. 2 CA-CV 2011-0013, ¶ 26 (memorandum decision filed Oct. 19, 2011).

¶3 Upon remand, the Commission again overturned James's termination. PCSO appealed this determination to the superior court, which upheld the Commission's decision. PCSO now appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-913.

Discussion

¶4 Merit commissions must follow local rules when deciding employees' appeals from disciplinary actions. *See Maricopa Cnty. Sheriff's Office v. Maricopa Cnty. Emp. Merit Sys. Comm'n* (*Juarez*), 211 Ariz. 219, ¶¶ 9-11, 119 P.3d 1022, 1024 (2005). Pinal County imposes a fairly high burden on the Commission, requiring a majority of the Commission to "determine[] that the appealed action was arbitrary or taken without reasonable cause" in order to revoke or modify the appointing authority's decision. Pinal County Uniform Merit System Rule 13.4(Q).[1] On the other hand, Rule 9(A)(1) and (B) of the Pinal County Employee Merit System Commission Rules of Procedure on Appeals provide that the burden is on the appointing agency to show "by a preponderance of the

[1]We recognize that in 2010, the Arizona legislature enacted A.R.S. § 38-1103 (now A.R.S. § 38-1104), which provides that law enforcement officers may not be disciplined or dismissed without "just cause," a standard that might be different from "reasonable cause." 2010 Ariz. Sess. Laws, ch. 75, § 1. However, because the statute does not expressly apply retroactively and is not merely procedural, it is not given retroactive effect, and we need not consider it in this case. *See* A.R.S. § 1-244 ("No statute is retroactive unless expressly declared therein."); *Aranda v. Indus. Comm'n*, 198 Ariz. 467, ¶ 11, 11 P.3d 1006, 1009 (2000) ("Enactments that are procedural only . . . may be applied retroactively.").

evidence that the disciplinary measure applied . . . was taken for reasonable cause, and was neither arbitrary nor capricious."

¶5 In explaining the Commission's role in relation to the employer, our supreme court has described the Commission as a "neutral fact-finder . . . not bound by the facts asserted by the employer, but . . . required to independently find the facts warranting discipline." *Pima County v. Pima Cnty. Law Enforcement Merit Sys. Council* (*Harvey*), 211 Ariz. 224, ¶ 21, 119 P.3d 1027, 1031 (2005); *see also Juarez*, 211 Ariz. 219, ¶ 13, 119 P.3d at 1025 (noting "Commission's initial task is to create a record and to ascertain the facts" by preponderance of evidence). However, the Commission may not substitute its judgment for that of the employer. *Juarez*, 211 Ariz. 219, ¶ 15, 119 P.3d at 1025. Considering the "arbitrary or taken without reasonable cause" standard, the court has explained, "'arbitrary action' has been characterized as 'unreasoning action, without consideration and in disregard of the facts and circumstances.'" *Id.* ¶ 14, *quoting Pima County v. Pima Cnty. Merit Sys. Comm'n* (*Mathis*), 189 Ariz. 566, 568, 944 P.2d 508, 510 (App. 1997). "Similarly, the phrase 'without reasonable cause' indicates the lack of evidence sufficiently strong to justify a reasonable person in the belief that the acts charged are true." *Id.*

> The role of the Commission is thus limited as a matter of law. The Rule [13.4(Q)][2] standard does not permit the Commission to substitute its independent judgment simply on the belief that a reduced level of discipline would be more appropriate to the offense.

Id. ¶ 15.

[2]In *Juarez*, the supreme court noted that the "arbitrary or taken without reasonable cause" standard in the Pinal County merit rules was similar to that of the Maricopa County standard at issue in that case. 211 Ariz. 219, n.7, 119 P.3d at 1026 n.7.

¶6 County merit commission decisions involving an employee's dismissal, suspension, or reduction in rank or compensation are themselves reviewable pursuant to A.R.S. § 11-356(G), which states, "The findings and decision of the commission shall be final and shall be subject to administrative review as provided in [the Administrative Review Act, A.R.S. §§ 12-901 through 12-914]." Judicial review of the Commission's decision is therefore limited by the standard set forth in § 12-910. We will uphold its action unless it "is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion."[3] § 12-910(E); *accord Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, ¶ 13, 153 P.3d 1055, 1059 (App. 2007).

¶7 We do not reweigh evidence but defer instead to the factual findings reached by the Commission. *See Taylor v. Ariz. Law Enforcement Merit Sys. Council*, 152 Ariz. 200, 202, 731 P.2d 95, 97 (App. 1986); *Petras v. Ariz. State Liquor Bd.*, 129 Ariz. 449, 451, 631 P.2d 1107, 1109 (App. 1981). Questions of law, on the other hand, are subject to our independent review, including whether substantial evidence supports the merit commission's determinations. *See, e.g., Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, ¶ 7, 48 P.3d 505, 507 (App. 2002); *Mathis*, 189 Ariz. at 569, 944 P.2d at 511. Consequently, when reviewing the Commission's findings on appeal, we remain mindful of the narrow standard it was required to apply to PCSO's decision to terminate James. To the extent the Commission substituted its own judgment for that of PCSO without diverging from PCSO's factual findings relating to the charged conduct, such action would be contrary to law. *See Juarez*, 211 Ariz. 219, ¶¶ 9-12, 119 P.3d at 1024-25 ("arbitrary or without reasonable cause" is objective standard that does not

[3]The same standard set forth in § 12-910(E) governs in superior court and in a subsequent appeal. *See Mathis*, 189 Ariz. at 569, 944 P.2d at 511 (absent trial de novo in superior court, "same standards of review apply on appeal from superior court to this court"). In conducting our review, we may independently examine the record to determine whether the evidence supports the superior court's judgment. *Id.*

permit commission to engage in determination of appropriateness of disciplinary measure); *see also Pinal County v. Pinal Cnty. Employee Merit Sys. Comm'n* (*Serb*), 211 Ariz. 12, ¶¶ 11-12, 116 P.3d 624, 628 (App. 2005), *partially disapproved on other grounds by Juarez*, 211 Ariz. 219, ¶¶ 20-21 & n.7, 119 P.3d at 1026-27 & n.7.[4] We review each set of charges based on the same incident together.

Failure to Maintain Quality Assurance Standards: Charges One and Two

¶8 Charges one and two against James relate to his alleged failure to perform certain maintenance on county equipment, specifically the thirty-one-day calibration checks and ninety-day tests on the Intoxilyzer 8000 breath alcohol testing device. PCSO alleges that James's failure to perform this maintenance led to the dismissal of a number of driving under the influence (DUI) cases for lack of evidence. James admitted that he had not performed some of the required maintenance, but asserted he did not know he had been assigned the responsibility for doing so and thought he was merely assisting another officer. The Commission found that PCSO had not shown, by a preponderance of the evidence, that James had failed to complete his assigned duties regarding maintenance of the Intoxilyzer 8000.

¶9 On appeal, PCSO argues that because James admitted both that he was responsible for performing the maintenance and that he had not done so, there was insufficient evidence to support the Commission's conclusion. However, while James admitted he

[4]The "shocking to one's sense of fairness" standard applied in *Serb*, 211 Ariz. 12, ¶ 15, 116 P.3d at 629, to analyze alleged disproportionality of the employer's disciplinary action subsequently was rejected in *Juarez*, 211 Ariz. 219, ¶ 21, 119 P.3d at 1026-27. However, the *Serb* court also independently analyzed the commission's action under an "arbitrary or without reasonable cause" standard, 211 Ariz. 12, ¶¶ 11-12, 116 P.3d at 628, and is cited with approval in *Juarez*, 211 Ariz. 219, n.7, 119 P.3d at 1026 n.7. Accordingly, *Serb* is supportive of the supreme court's interpretation of that standard in *Juarez.*

had volunteered to assist another officer with the Intoxilyzer maintenance, he also denied knowledge that he was solely responsible for maintenance. James testified that he conducted the thirty-one day checks, and evidence was produced at the hearing that had he not completed them, the machine had a fail-safe system that would have prevented further use until the test was completed. Although written records establishing that James had conducted some of these checks appear to have been lost, he never admitted responsibility for keeping these records and in fact testified that when he asked about record keeping, he was told "there was no records keeping policy in place."

¶10 Regarding the ninety-day tests, James testified he believed his supervising officer was performing those tests. Accordingly, we cannot agree James admitted that it was his responsibility to conduct maintenance tests and that he had failed to complete them. Furthermore, in addition to James's own testimony that he was uncertain of the scope of his responsibility, his supervising officer conceded that James's assignment "may not have been effectively and clearly communicated to him." We therefore disagree with PCSO's contention that the undisputed facts were sufficient to support discipline. And because the Commission's resolutions of factual disputes are entitled to deference, *see Taylor*, 152 Ariz. at 202, 731 P.2d at 97, we must affirm its findings with respect to charges one and two.

¶11 One additional concern raised by PCSO bears noting. In our previous memorandum decision in this case, we observed that the Commission relied on the fact that PCSO "did not have a written policy regarding the assignment or maintenance of [quality assurance specialist] records" in concluding that no discipline was warranted. *James*, No. 2 CA-CV 2011-0013, ¶ 12. We stated, "To the extent the Commission found that discipline was unwarranted because there was no written policy in place, the Commission exceeded the scope of its authority." *Id.* ¶ 13. We so concluded because it was beyond the Commission's purview to decide matters of PCSO policy such as whether it was wise for PCSO to "assign duties to their deputies verbally." *Id.* We directed the Commission, upon remand, to reconsider their determination without treating the

lack of a written policy as a dispositive factor. *Id.* ¶¶ 13-14. PCSO argues the Commission ignored this directive and improperly considered the lack of a written policy upon remand.

¶12 The record demonstrates that the Commission did again consider the lack of a written policy as one factor in its decision on charges one and two. However, our previous decision did not forbid the Commission from any such consideration. It merely held that the Commission could not require PCSO to show a *written policy in order to prove* charges one and two. *Id*. No language in our prior decision forbade the Commission from considering that James had not received a written directive to the extent relevant in assessing James's knowledge of his assigned duties. In the Commission's list of findings related to charge one, it stated it had "considered the lack of written policy as just one consideration in its decision making process." Likewise, for charge two, "[t]he Commission acknowledged that there is no requirement that [PCSO] assign duties in writing." Finally, given that the written policy was mentioned in conjunction with other factors that may have caused James to be confused, it appears the Commission considered the lack of a written policy only for the appropriate purpose. The record, therefore, does not support the contention that the Commission disregarded our directive or exceeded the scope of its authority.

Arming a Civilian Observer and Exposing Him to Danger: Charges Three and Four

¶13 During a shift in which James was accompanied on patrol by a civilian observer, PCSO dispatch officers broadcast a call over the radio that shots had been fired in a neighborhood. James advised the dispatch center that he would respond to the call. Within one minute of James's response, Deputy Brad Buysse also responded that he would go to the scene, and James knew he was on his way. Buysse attempted to contact James by radio and cellular telephone to coordinate their approach, but James did not respond. James arrived in the neighborhood and was told to contact the dispatch center for more details. James was then informed he was responding to a potential domestic violence situation involving PCSO's Public Information Officer, Vanessa W.; her boyfriend was suicidal; he had left the house with a shotgun and a handgun.

Because the situation involved a member of PCSO staff, the dispatch operators instructed James to call in to get the information rather than broadcast it over the general radio channel.

¶14 When James received the address from dispatch, he immediately parked his vehicle in front. James testified that because he had not known when his backup would arrive, he decided to give a department-issued shotgun to his civilian observer, Bryan M., and use him as "backup." Bryan was a corrections officer who James knew was trained in firearm use. Vanessa answered the door and said that her boyfriend might be in the backyard and that he had left the shotgun by the back door. James and Bryan went into the backyard and found the boyfriend crouched in a corner with a gun in his hand. At one point, suspecting the boyfriend was going to shoot either himself or James, James shot him in the leg to disarm him. Officers arrived on the scene shortly thereafter. The first officer to arrive initially did not know the identity of Bryan or why he was holding a shotgun.

¶15 Following an investigation of the incident, PCSO charged James with violating two policies relating to civilian observers. Specifically, James was charged with violating PCSO's policies that "[n]o firearms or other weapon may be carried by any observer," and "[t]he Deputy is responsible for the safety of the observer." The Commission found that PCSO had not met its burden of proof on these charges and that James had acted reasonably in arming Bryan and using him as emergency backup pursuant to PCSO's deviation policy. That policy allows a deputy to "deviate from established PCSO policies and procedures when it is in the obvious best interests of PCSO."

¶16 On appeal, this court found the Commission had improperly considered a criminal statute, A.R.S. § 13-2403, which makes it a misdemeanor offense to refuse to obey an officer's reasonable request for assistance. *James*, No. 2 CA-CV 2011-0013, ¶¶ 18-19. On remand, we instructed the Commission to reconsider its findings without regard to this statute. *Id.* ¶ 19. The Commission again found James's actions justified under the deviation policy.

¶17 PCSO argues the Commission improperly considered issues other than James's conduct in determining whether the deviation policy should apply. The record does suggest that this played a role in the Commission's deliberations. During the hearing, one commissioner questioned whether dispatch operators properly handled the situation and then stated:

> I found it reprehensible that a police officer would find himself in a dangerous situation with a civilian because policy wasn't followed by—you know, he's getting busted for not following policy, but the reason he's there is because policy wasn't followed. . . . I'm just saying that's how I was basing my decision, and so I'm going to have a hard time getting over that as we discuss this.

Essentially, the commissioner concluded it was inappropriate for James to be disciplined when other people involved may have violated policy as well. Such reasoning, if used as a basis for the Commission's decision, would go beyond the confines of the standard specified in Rule 13.4(Q), Pinal County Uniform Merit System Rules. James maintains, however, that one commissioner's comments during deliberations do not constitute any part of the Commission's factual findings. Because we reverse the Commission's findings as to charges three and four on other grounds, we need not resolve this question.

¶18 PCSO asserts the Commission improperly focused on the fact that Bryan had not been harmed in determining whether James had violated the policy requiring deputies to be responsible for the safety of civilian observers. The record reflects that the Commission did indeed consider this an important factor. During the hearing, one commissioner stated:

> It would appear to me on this charge, if the ride-along, the observer, had been harmed in some way, shot or injured in one fashion or another, then I would expect to see this

> charge here . . . , but . . . basically this is to me a nonapplicable charge in the—the list of charges.

Further, in its factual findings, the Commission stated it "considered that the observer . . . was not harmed."

¶19 We agree with PCSO that this factor was not relevant to the question of whether James had violated the policy of requiring that the deputy be responsible for the civilian observer's safety. *See Mathis*, 189 Ariz. at 571, 944 P.2d at 513 (public employee's violation of agency policy prohibiting use of profanity in public not excused on grounds others not affected); *cf. Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, ¶ 13, 153 P.3d 1064, 1067 (App. 2007) (negligent conduct and causation of injury are distinct and separate analyses). Because both the pre-existing department policy and the charge against James focus exclusively on the officer's duty to ensure the observer's safety, the relevant inquiry is whether James's actions endangered the observer, not whether the observer was ultimately harmed.

¶20 Furthermore, the undisputed facts show that James's actions did endanger the observer. James asked Bryan to accompany him to confront a suspect who was known to be armed with a deadly weapon. James allowed Bryan to pick up the suspect's weapon, a loaded and cocked revolver, and place it in his back pocket. And James armed Bryan with a shotgun, even though he was wearing civilian clothes and would not be immediately recognized as associated with law enforcement upon the arrival of other deputies. Indeed, when Deputy Buysse arrived on the scene, he did not know Bryan was a civilian observer and, seeing him holding a shotgun, his initial impression was that Bryan was holding James at gunpoint. Buysse testified he was "getting ready to unholster [his] weapon . . . and start taking aim on the subject." We therefore conclude that the Commission abused its discretion in considering the lack of harm to the observer in determining whether James had violated his duty to protect the safety of the observer.

¶21 Although the Commission found facts supporting that James had indeed violated PCSO's policies that ride-along observers are not allowed to carry weapons and that officers are responsible

for the safety of the ride-along observer,[5] the Commission nonetheless found that the charges were not supported because James's actions were justified under the deviation policy. But the deviation policy requires that an officer's actions be "in the obvious best interests of PCSO." Whether an action taken by an employee is in the best interests of an agency is not a factual question to be determined by the Commission, but a policy judgment the agency is entitled to make. *See Maricopa County v. Gottsponer*, 150 Ariz. 367, 372, 723 P.2d 716, 721 (App. 1986) (commission may not "substitute its own opinion for that of the agency"), *disapproved on other grounds by Juarez*, 211 Ariz. 219, ¶ 21, 119 P.3d at 1026-27; *cf. Blake v. City of Phoenix*, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App. 1988) (in administrative action, court may not substitute its judgment for that of agency making decision). Accordingly, we conclude the Commission abused its discretion by substituting its judgment for that of PCSO and reverse as to charges three and four.

Off-Duty Conduct Bringing Discredit to the County: Charges Eight, Nine, and Ten

¶22 While being investigated regarding charges one through four, James went in the evening to the home of Marlene M., who operated a day-care facility there, and confronted her about her decision to terminate the care of his friend's children. James, who is a "big guy," was dressed in clothing that said "felony" and "sinner" on it. He asked for her day-care license number and told her he was a member of the sheriff's department. When he left, Marlene was upset and called the sheriff's department to report the interaction with James, and two officers responded. One of the officers testified Marlene "seem[ed] okay" by the time they arrived, but she told him she felt James had been trying to scare and harass her. She later told an internal affairs investigator that James had been loud and

[5]Neither James nor the Commission disputed that James gave a weapon to Bryan, thereby violating PCSO's policy. And, although James suggested during oral argument that he armed Bryan to protect Bryan's safety, his subsequent decision to enlist Bryan as "back-up" cannot plausibly be explained on that same basis.

threatening during the encounter, but said she did not want him to lose his job as a result of her complaint.

¶23 James testified before the Commission that he had not raised his voice to Marlene and had identified himself as a law enforcement officer only to reassure her that he posed no threat. However, Marlene was sufficiently alarmed to immediately report the incident to the sheriff's department. And Marlene's daughter-in-law, who had left Marlene's home before James arrived and had been talking to Marlene on the phone when James came to her door, overheard parts of the encounter and was sufficiently concerned by what she heard to return to Marlene's home that night.

¶24 Based on this incident, PCSO alleged James "ha[d] engaged in conduct . . . off duty that is of such a nature that it would tend to bring discredit to the County" or to himself, by "confront[ing] . . . a member of the public over an entirely personal matter while identifying himself as a Sheriff's Deputy." After the initial hearing, the Commission determined that insufficient evidence supported the charges related to the incident because PCSO "did not present witness testimony to support these charges and Deputy A[vil]ez testified that the reporting civilian did not appear to be upset when he arrived [at] the scene."

¶25 In the first appeal, this court noted that the finding that PCSO had not presented any testimony to support the charges was clearly erroneous because although Marlene had not testified at the hearing, Sergeant LeBlanc, the internal affairs investigating officer, had testified about Marlene's version of events. *James*, No. 2 CA-CV 2011-0013, ¶ 23. We further noted that live testimony from every witness was not required to prove the charges. *Id.* In addition, we stated that whether Marlene was upset when investigating officers arrived at the scene did not "address squarely" the essence of the allegations—that "James's actions tended to bring discredit to himself or his employer." *Id.* ¶ 24. Indeed, Marlene's perception was relevant only to the extent it provided factual evidence that James's conduct was as she described it. *See Mathis*, 189 Ariz. at 571, 944 P.2d at 513 (that others were not adversely affected did not justify violation of agency's public deportment policy). We

instructed the Commission to consider, on remand, "all of the evidence presented and . . . determine both whether the PCSO allegations were accurate and whether James's actions tended to bring discredit to himself or his employer." *James*, No. 2 CA-CV 2011-0013, ¶ 24. However, we did not intend to imply it was the Commission's role to define what type of conduct should be discrediting to the agency.

¶26 On remand, the Commission once again found PCSO had not met its burden of proving these charges by a preponderance of the evidence. However, the following facts, as articulated by the Commission, were undisputed:

> a. [James] went to a day care facility;
>
> b. the care facility was in the home of Marlene M. who was a day care provider;
>
> c. [James] had an interaction with Marlene M.;
>
> d. the day care facility had terminated care for the child or children of one of [James]'s friends;
>
> e. during [James]'s interaction with Marlene M., [he] identified himself as a Sheriff's Deputy;
>
> f. [James] was off duty and dressed in jeans and a shirt that said "felony" and "sinner";
>
> g. [James] asked for Marlene's day care license number; and
>
> h. Marlene M. called the Sheriff's Department to complain about the interaction including statements that [James] had been loud and threatening.

In addition, the undisputed facts showed that James's visit to Marlene's house took place in the evening, apparently after business hours, and the confrontation took place at Marlene's front door. PCSO asserts that these facts alone are sufficient evidence to support charges eight and nine, namely, that James had engaged in conduct while off duty that would bring discredit to the county. We agree.

¶27 Notwithstanding the Commission's contrary conclusion, there was evidence to support the agency's determination that its policy on interactions with the public had been violated. As the court stated in *Juarez*, "'where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.'" 211 Ariz. 219, ¶ 17, 119 P.3d at 1026, *quoting Gottsponer*, 150 Ariz. at 372, 723 P.2d at 721. Moreover, a determination that certain employee actions reflect poorly on a public law enforcement agency amounts to a policy decision that should be entrusted to that agency. *See Pima County v. Pima Cnty. Merit Sys. Comm'n*, 186 Ariz. 379, 382, 923 P.2d 845, 848 (App. 1996) ("[I]t [i]s not the Commission's prerogative, nor is it the courts', to merely substitute its opinion for that of the Department, which alone 'must justify to the public the integrity and efficiency of its operations.'"), *quoting Bishop v. Law Enforcement Merit Sys. Council*, 119 Ariz. 417, 421, 581 P.2d 262, 266 (App. 1978); *cf. Mathis*, 189 Ariz. at 571, 944 P.2d at 513 (finding of misconduct may be based on violation of implicit standard of good behavior imposed upon one "'who maintains a special position in the public eye'"), *quoting City of Tucson v. Mills*, 114 Ariz. 107, 111, 559 P.2d 663, 667 (App. 1976). Because the Commission was not at liberty to determine that the charged conduct, if true, did not violate PCSO's policies, and because it is clear the undisputed facts support the conduct underlying charges eight and nine,[6] we conclude the Commission abused its discretion in finding otherwise.

[6]Although the Commission did not discuss charge nine, the basis for charge nine was the same as that of charge eight: one was a violation of a Pinal County Employee Uniform Merit Rule and the other was a violation of a Pinal County Sheriff's Office Policy. The

¶28 PCSO also asserts that the Commission improperly "requir[ed] PCSO to prove that James had intended to violate policy under Disciplinary Charge 10." This charge concerned whether James's conduct as a whole regarding the day-care incident was improper to an extent that warranted disciplinary action. The record demonstrates that the Commission did, indeed, consider James's intent as a key factor in making that decision. When addressing James's evening visit to Marlene's home, one commissioner stated: "I don't think Cardest James went there with any ill intent." Another commissioner later stated: "I believe there was—there was bad judgment. However, . . . I have to balance that with was there ill intent[?] . . . And I believe it's poor judgment versus ill intent." After that statement was made, a third commissioner added: "I'm with you. I'm not sure it was the best judgment . . . but that's a judgment call."

¶29 Although bad intentions certainly could have established a violation, intent was not an element PCSO was required to prove. Improper conduct also may be established by an objective standard. *See, e.g.*, *In re Lockwood*, 167 Ariz. 9, 14, 804 P.2d 738, 743 (1990) ("'conduct taken in good faith but which would appear to an objective observer to be unjudicial'" was improper under Code of Judicial Conduct and punishable under state constitution), *quoting In re Walker*, 153 Ariz. 307, 311, 736 P.2d 790, 794 (1987); *Wright v. Hills*, 161 Ariz. 583, 589, 780 P.2d 416, 422 (App. 1989) (whether attorneys' conduct warrants sanctions under Rule 11, Ariz. R. Civ. P., judged by objective standard; subjective good faith not a defense), *abrogated on other grounds as recognized by James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319, 868 P.2d 329, 332 (App. 1993). Thus, poor judgment alone is a sufficient justification for discipline, and the Commission erred to the extent it attempted to supplant the existing PCSO policy with its own notion of sanctionable conduct by imposing an intent requirement. *See Juarez*, 211 Ariz. 219, ¶ 22, 119 P.3d at 1027 ("When

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language of the two rules is nearly identical. Neither PCSO nor the Commission asserts there is any difference between the two. Therefore, our findings on charge eight dictate our result as to charge nine.

an officer is unwilling or unable to use sound judgment . . . the employer has discretion to impose discipline and to select the appropriate level."). We therefore reverse the Commission as to charge ten.

Repeated Infractions: Charges Six and Seven

¶30 Based on the totality of the charges against him, PCSO alleged James "ha[d] repeatedly failed to conform to standards set for his position" and "ha[d] engaged in a course of conduct marked by repeated infraction of PCSO policies and procedures," in violation of two of PCSO's policies. The Commission found that PCSO had not sustained its burden on these charges because it had failed to prove the specific charges, as set forth above. However, based on our reversal of the Commission's findings on charges three, four, eight, nine, and ten, we agree with PCSO that it met its burden with respect to charges six and seven.

Hearing on Remand

¶31 PCSO also claims the Commission failed to conduct a meaningful hearing on remand, and instead "merely str[uck] the offending provisions from its findings of fact without any real consideration of how removal of those factors impacted its findings." The Commission conducted a hearing that lasted approximately six hours, and it requested that counsel for both sides address how this court's decision should affect the Commission's findings of fact. The Commission did not hold a new evidentiary hearing, but this was neither requested by any party nor required by our prior decision. In fact, PCSO acknowledged that in having the transcripts and exhibits from the previous hearing, "th[e] Commission does have before it everything it needs to make a decision." However, while we do not find the Commission abused its discretion by failing to conduct a meaningful hearing on remand, we agree with PCSO that it committed legal error by failing to apply the correct standard to the appointing agency's underlying decision regarding certain charges, as discussed above.

Disposition

¶32 For the foregoing reasons, we affirm the Commission's findings on charges one and two but reverse its findings that PCSO failed to support charges three, four, and six through ten. Typically, a determination that the Commission abused its discretion by assigning weight to immaterial factors and by applying an incorrect standard of review might compel remand, as has already occurred in this case. However, we believe these considerations not only played a critical role in the Commission's findings on the charges discussed earlier, but also reflect its application of precisely the type of subjective analysis that was expressly rejected by our supreme court in *Juarez*. Moreover, because the undisputed facts provide an appropriate factual foundation for PCSO to exercise its judgment in disciplining James, we reverse the findings on these charges. We remand to the Commission solely for a determination of whether, in light of the violations articulated in charges three, four, and six through ten, the level of discipline imposed was arbitrary and without reasonable cause.

¶33 On remand, the only question for the Commission to consider is whether PCSO's termination of James was arbitrary and imposed without reasonable cause. *See Juarez*, 211 Ariz. 219, ¶¶ 21-22, 119 P.3d at 1026-27. In deciding this issue, the Commission should consider whether the discipline imposed "fell within the permissible range set by [PCSO's] disciplinary policy," was different from that imposed on similarly situated employees, or was unreasonably disproportionate. *Id.* ¶ 22. Unless the Commission, using these factors, finds that the discipline imposed was arbitrary or without reason, it must uphold James's termination.

¶34 PCSO has requested its costs of litigation pursuant to A.R.S. § 12-912. However, by the plain language of that statute, an agency is only entitled to an award when it is the appellee. PCSO does not argue that this statute should also apply when, as here, the agency is the appellant. Accordingly, PCSO is ineligible for fees under this provision, and we deny its request.

¶35 James has likewise requested costs and attorney fees pursuant to Rule 21, Ariz. R. Civ. App. P., and A.R.S. § 12-348(A)(2).

But § 12-348(A) requires that a party prevail to be entitled to an award of attorney fees and costs. Because James has not prevailed, we deny his request.