IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROGER L. SKINNER, Appellant, v. CIVIL SERVICE COMMISSION of The City of Medina, THE CITY OF MEDINA, a municipal corporation, MEDINA POLICE DEPARTMENT, Respondents.	)	No. 66120-5-I DIVISION ONE UNPUBLISHED OPINION FILED: November 14, 2011

Schindler, J. — Absent an adequate factual record of the civil service commission hearing, the court cannot determine whether the commission's decision to affirm a police officer's discharge is "made in good faith for cause" under RCW 41.12.090. Roger L. Skinner appealed the decision of the City of Medina Civil Service Commission affirming the decision to terminate his employment with the Medina Police Department. Because the unchallenged findings establish that the record of the evidentiary hearing before the civil service commission is inadequate to determine whether the discharge was made in good faith for cause, we reject Skinner's argument that the superior court erred in remanding to the commission to conduct a new hearing, and affirm.

FACTS

Roger L. Skinner was a lieutenant with the Medina Police Department (Department). Following an internal investigation in February 2006, Medina City Manager Douglas Schulze discharged Skinner.

Skinner appealed his termination from the Department to the Medina Civil Service Commission (Commission). The hearing was electronically recorded. A number of witnesses testified at the hearing including Skinner, Schulze, and Brianna Beckley.

The Commission affirmed the Department's decision to terminate Skinner. The Commission ruled that the City had complied with due process and discharged Skinner in good faith for cause. On September 1, 2006, the Commission entered written "Findings, Conclusions and Order." The Commission denied Skinner's motion for reconsideration.

In October 2006, Skinner filed a petition for review in superior court seeking reversal of the Commission's decision and reinstatement. After the Commission filed an incomplete certified transcript of the hearing, the court ordered the court reporter to file a declaration "setting forth in detail, the reporter's actions and efforts" in preparing a certified copy of the transcript.[1]

[1] The order states, in pertinent part:

> The court reporter for the City of Medina Civil Service Commission shall prepare and file with this court . . . a sworn declaration setting forth in detail, the reporter's actions and efforts to the date of the declaration to prepare a certified transcript of the proceedings at issue in this case; a detailed description of the portions of the official record that are missing; a detailed description of the portions of the official record that are incomplete; and a detailed description of the court reporter's actions and efforts, if any, to the date of the declaration to reconstruct the record from alternate sources,

The declaration filed by the court reporter describes the difficulties in transcribing the record and attaches an index of the unintelligible or missing gaps. The declaration states, in pertinent part:

> 2. At the request of the Medina Civil Service Commission, I transcribed from an audio CD presented to me by the Medina Civil Service Commission ("Commission"), an August 4, 2006 civil service hearing of the Commission in the matter of the appeal of Roger L. Skinner.
> . . . .
> 4. My first efforts at transcription of the audio CD provided by the Commission was on my equipment. In order to further confirm the completeness of the recording, I later went to Medina City Hall to listen to the audio CD on the City's electronic recording system.
> 5. The transcript that I prepared from the above-described actions was the best effort to transcribe from the audio CD the record of proceedings before the Commission on August 4, 2006. Each portion of the hearing that appears incomplete from my transcription efforts has been identified in the body of the transcript. An index of the gaps and reference to page numbers is attached as Exhibit 2 to this declaration.

Before the hearing on his petition for review, Skinner filed a motion to strike a number of exhibits he claimed were improperly admitted at the hearing, Exhibits 1 through 20. The City opposed the motion to strike the exhibits. The City argued the record showed that Skinner's attorney stipulated to the admission of 18 of the 20 exhibits and stated an "objection to only two exhibits, Exhibit 12 and Exhibit 13." The City also cited to the findings of the Commission sustaining Skinner's objection to the admission of Exhibits 12 and 13. The findings state, in pertinent part:

> We have taken under advisement particular offers of testimony and documentary evidence not otherwise admitted at the hearing. See Commission Rule 18.23. Exhibits 12 and 13, offered by Department, but objected to by Employee, are not admitted because (a) the documents appear to be inappropriate under ER 408, (b) evidence is repetitive to that presented otherwise in the course of the proceedings (see e.g., Ex. 14), and (c) the exhibits do not generally add to our ability to assess the

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describing such alternate sources in detail.

> issues before the Commission. All other exhibits and testimony have been considered and given weight as judged by the Commission.

The court denied the motion to strike the exhibits admitted at the hearing.

At the hearing on his petition for review, Skinner argued that the court should reverse the decision of the Commission and reinstate him. Skinner asserted the transcript of the hearing did not support the Commission's findings and conclusions, and showed that the City violated his due process rights by failing to impose progressive discipline, and failing to administer an oath to key witnesses. Skinner also asserted the court should reverse because the Commission did not confine its investigation to the allegations that were the basis of his termination. In addition, Skinner argued that the court could not decide whether the Commission's decision was in good faith for cause as required by RCW 41.12.090 because the certified transcript of the hearing was incomplete and inadequate.

In response, the City argued the transcript of the proceedings provided an adequate record for review and supported the Commission's findings and conclusions. The City also argued the findings did not exceed the scope of charges against Skinner, Skinner's due process rights were not violated, and it complied with the rules for progressive discipline. The City asserted that even if the transcript was inadequate, the remedy was not reinstatement but, rather, remand for a new hearing.

The court reviewed the transcript and concluded the record was inadequate for review because of significant gaps in the testimony of key witnesses. The court's written findings state, in pertinent part:

> 1.1 The court has carefully reviewed the record of the testimony of the witnesses and the exhibits admitted into evidence at the hearing

> before the Civil Service Commission of the City of Medina. According to the Verbatim Report of Proceedings (VRP), the hearing commenced 9:07 a.m. on August 4, 2006 (VRP p.5) and concluded at 5:09 p.m. that same date (VRP p.184).
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> . . . .
>
> 1.3 According to Exhibit 2 to the declaration of the certified court reporter, Shelly Hoyt, which is referenced above and incorporated by reference herein, the pause at page 89 lasted from 12:29:30-1:13:10, or for approximately 43 minutes. She states: "(this might have included lunch, but there is no way for me to tell when and for how long.)". Per that same exhibit, the pause at page 127 is of very short duration: 2:23:22-2:23:28.
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> 1.4 There are significant gaps in the record involving the testimony of 3 key witnesses: Brianna Beckley, Doug Schultz[e], and Petitioner Roger Skinner.
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> 1.5 Ms. Beckley was one of the complainants in the underlying internal investigation conducted by Mr. Doug Schultz[e] under the direction of the Medina Chief of Police Jeffrey Chen. She was the first witness called at the hearing before the Civil Service Commission. It is not possible to determine how much of the 36 minute gap reported at VRP p.15 is attributable to opening statements by counsel or her actual testimony on direct examination.
>
> 1.6 There is a 49 minute 49 second gap in the record of the testimony of Mr. Doug Schultz[e], city manager for the city of Medina who undertook the investigation into the allegations which resulted in the termination of employment of Petitioner Roger Skinner (See VRP p.85, p.87, p.90, p.93, p.97, p.100).
>
> 1.7 The record of Mr. Skinner's testimony reveals gaps of 50 minutes, 30 seconds. (See VRP p.154, p.157, p.164, p.167, p.175, p.176, p.178, p.179). As with Ms. Beckley, it is not possible to determine how much of the 30 minute gap appearing at VRP 179 is attributable to actual testimony of Mr. Skinner or closing arguments of counsel.

Based on the finding that the incomplete transcript of the evidentiary portion of the hearing precluded a meaningful review, the court ruled the appropriate remedy was to remand for new proceedings.

> Where, as in the case before this court, one of the challenges is to the sufficiency of the evidence to support the Findings of Fact and Conclusions of Law of the Civil Service Commission and the decision to discharge Petitioner Skinner, it is important to have a complete and accurate record. It would be inappropriate for this court to speculate as to the importance of the missing testimony when such significant interests

> are at stake. The record before this court is inadequate for this court to conduct a meaningful review of the proceedings below.
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> The issue becomes then one of what remedy is appropriate. While counsel for Petitioner has argued that the appropriate remedy is to order the reinstatement of Mr. Skinner, the court does not agree. The appropriate remedy is to remand the matter so that a full and completely recorded hearing may occur.

In his motion for reconsideration, Skinner argued for the first time that the court did not have the authority to remand for a new hearing. Skinner claimed that even if the transcript of the evidentiary hearing was incomplete and inadequate, the statute requires the court to determine whether the decision to terminate was made in good faith for cause. The court denied the motion for reconsideration.

Skinner appeals the superior court's "Memorandum Opinion Ordering Remand of these Proceedings to the Civil Service Commission of the City of Medina for a New Hearing Due to the Inadequacy of the Record Presented for Review" and the order denying reconsideration.[2]

ANALYSIS

Skinner contends that the superior court does not have authority to remand for a new hearing under RCW 41.12.090. Regardless of whether the transcript for the evidentiary record of the proceedings is inadequate, Skinner asserts the statute requires the court to determine whether discharge was in good faith for cause.

We review the court's findings of fact for substantial evidence and, in turn, whether the findings support the conclusions of law. Snyder v. Haynes, 152 Wn. App. 774, 779, 217 P.3d 787 (2009). Where, as here, the findings of fact are not

[2] Skinner does not appeal the order denying his motion to strike Exhibits 1-20.

challenged, the findings are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). We review questions of law and the meaning of a statute de novo. City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009); Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

In determining the meaning of a statute, our primary objective is to ascertain and carry out the intent of the legislature. Arborwood Idaho, L.L.C. v. City of Kennewick, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). If the plain language of the statute is unambiguous, we must give effect to that language as an expression of legislative intent. Dep't of Ecology, 146 Wn.2d at 9-10. In giving effect to the language of the statute, we must not render any portion meaningless. Prison Legal News, Inc. v. Dep't of Corr., 154 Wn.2d 628, 644, 115 P.3d 316 (2005). We also avoid an interpretation that would produce an unlikely, absurd, or strained result. Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). If a statute is unambiguous, we do not inquire further. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526-27, 243 P.3d 1283 (2010).

RCW 41.12.090 provides, in pertinent part:

> **Procedure for removal, suspension, demotion or discharge—Investigation—Hearing—Appeal.**
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> . . . [T]he accused may appeal [from the commission's judgment or order] to the court of original and unlimited jurisdiction in civil suits of the county wherein he or she resides. Such appeal shall be taken by serving the commission, within thirty days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court. The commission shall, within ten days after the filing of such notice, make, certify and file such

> transcript with such court. The court of original and unlimited jurisdiction in civil suits shall thereupon proceed to hear and determine such appeal in a summary manner: PROVIDED, HOWEVER, That such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

In arguing that the superior court must decide whether the Commission decision was made in good faith for cause under RCW 41.12.090, without regard to whether the factual record is adequate, Skinner ignores the plain language of the statute and the court's unchallenged findings.

RCW 41.12.090 sets forth the procedure for an appeal of the decision of a civil service commission affirming discharge. RCW 41.12.090 expressly states that an appeal of the decision of a civil service commission must include a "demand[] that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with [the] court." The statute then requires the Commission to "make, certify and file such transcript with such court." RCW 41.12.090. After a certified transcript of the hearing is filed:

> The court . . . shall thereupon proceed to hear and determine such appeal in a summary manner: PROVIDED, HOWEVER, That such hearing shall be confined to the determination of whether the judgment or order of . . . discharge . . . made by the commission, was or was not made in good faith for cause.

RCW 41.12.090. Under the plain language of the statute, a certified transcript of the hearing must be provided before the court can "hear and determine" whether discharge was in good faith for cause. The supreme court's decision in Pierce County Sheriff v.

Civil Service Commission for Sheriff's Employees of Pierce County, 98 Wn.2d 690, 658 P.2d 648 (1983), supports the conclusion that RCW 41.12.090 requires the court to have an adequate transcript of the testimony of witnesses in order to conduct a meaningful review and determine whether Skinner's discharge was in good faith for cause.[3]

In Pierce County, the sheriff argued the court should reverse the civil service commission's decision because the record did not contain the argument the attorney made before the commission. Pierce County, 98 Wn.2d at 697. The court rejected the sheriff's argument, holding that the rationale for requiring a record is to provide the superior court with an adequate factual record for review. Pierce County, 98 Wn.2d at 698.

> In Barrie v. Kitsap Cy., 84 Wn.2d 579, 527 P.2d 1377 (1974), we held that any quasi-judicial decision for which a verbatim record of proceedings was not available must be reversed and remanded for new proceedings. The Sheriff argues that Barrie requires reversal of the Commission's decision here (and presumably remand for new proceedings) because of the absence of a verbatim record of counsel's argument at the second hearing.
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> This argument has little merit. While Barrie does not expressly exempt any part of the proceedings from the record requirement, its rationale does. The sole reason for requiring a record is to provide the appellate court with a factual record within which to set its decision. See Barrie, at 587 ("[t]he very purpose for requiring a record is to provide an adequate *factual* accounting which will enable a reviewing court to resolve the issues before it in a given case" (italics ours)); Loveless v. Yantis, 82 Wn.2d 754, 763, 513 P.2d 1023 (1973) (judicial review not possible " 'unless all the essential *evidentiary* material . . . is in the record' " (italics ours)).

Pierce County, 98 Wn.2d at 697-98.[4] Accordingly, the court concluded the record was

[3] The commission proceedings at issue in Pierce County took place under RCW 41.14.120, the civil service statute governing discharge of sheriffs. That statute is nearly identical to RCW 41.12.090.

[4] (Brackets and ellipses in original) (footnote omitted).

adequate because it contained all of the "factual aspects" of the commission's proceedings. Pierce County, 98 Wn.2d at 698.

Here, unlike in Pierce County, the unchallenged findings establish that the certified transcript of the record contains significant gaps in the testimony of critical witnesses, ranging from 36 minutes to 50:30 minutes. The unchallenged superior court findings support the conclusion that the record was inadequate for meaningful review.

Skinner also claims that even if the record of the proceedings is incomplete and inadequate for review, the superior court does not have the authority to remand for a new hearing. In support, Skinner cites Guillen v. Contreras, 169 Wn.2d 769, 238 P.3d 1168 (2010), and the provisions in the Administrative Procedure Act, chapter 34.05 RCW and the Land Use Petition Act, chapter 36.70C RCW that allow remand for new proceedings if the record is inadequate. See RCW 34.05.562(2)(a), (c); RCW 36.70C.120(2)–(4).[5]

[5] RCW 34.05.562(2)(a) and (c) state:

> (2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:
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> (a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;
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> . . . .
>
> (c) The agency improperly excluded or omitted evidence from the record.

RCW 36.70C.120(2)–(4) state:

> (2) For [land use] decisions [of a quasi-judicial body or officer who made findings of fact in a proceeding where parties had an opportunity to make a factual record], the record may be supplemented by additional evidence only if the additional evidence relates to:
>
> (a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;
>
> (b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding; or
>
> (c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

Guillen does not support Skinner's argument. In Guillen, the court addressed whether different phrases used in the same statute refer to different things. Guillen, 169 Wn.2d at 776–77. The court held that where the legislature uses two different terms in the same statute, courts presume the legislature intends a different meaning for each term. See also Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 219, 173 P.3d 885 (2007). But unlike in Guillen, Skinner attempts to rely on provisions located in three different statutes, not in the same statute.

Skinner also claims that "[t]he Courts of this state have consistently held that reversal and reinstatement, not remand for a de novo commission hearing, is the appropriate remedy when the City or the Commission violates RCW 41.12.090." None of the cases Skinner cites address the appropriate remedy if there is an inadequate record to determine whether the termination was made in good faith for cause under RCW 41.12.090. See In re Smith, 30 Wn. App. 943, 948, 639 P.2d 779 (1982) (the commission must confine its investigation to the reasons set forth as grounds for discharge); Nirk v. City of Kent Civil Serv. Comm'n, 30 Wn. App. 214, 220-21, 633 P.2d 118 (1981) (RCW 41.12.090 requires the commission to swear witnesses because "[i]n the case of unsworn testimony, . . . the evidence cannot be given the traditional presumption of truthfulness and we are, therefore, unable to perform our appellate review function."); Eiden v. Snohomish County Civil Serv. Comm'n, 13 Wn. App. 32, 42, 533 P.2d 426 (1975) (the evidence in the record did not establish that the sheriff was

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(3) For [other types of] land use decisions . . . , the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

(4) The court may require or permit corrections of ministerial errors or inadvertent omissions in the preparation of the record.

incompetent); Reynolds v. Kirkland Police Comm'n, 62 Wn.2d 720, 731, 384 P.2d 819 (1963) (the commission erred when it performed the tasks of the police department—investigating, formulating accusations, and recommending suspension—before sitting as the appeal board for its own actions).

Further, contrary to Skinner's assertion, the court in Nirk did not order reversal and reinstatement. The court held that because the factual record was inadequate and the testimony was not under oath, the appropriate remedy was to reverse and remand. Nirk, 30 Wn. App. at 221. Here, as in Nirk, because there is no dispute that the record is inadequate for review, the court correctly remanded for new proceedings—"so that a full and completely recorded hearing may occur."

Next, Skinner claims that regardless of the incomplete transcript, the court must reverse and order the Commission to reinstate him because 1) the transcribed testimony does not support the Commission's findings and conclusions, 2) there is no evidence the City imposed progressive discipline, 3) the transcript contains no evidence that the Commission administered an oath to Beckley, and 4) the findings demonstrate the Commission relied on allegations other than those relied on by the City as the basis for discharge. But as the superior court correctly concluded, absent an adequate factual record of the hearing before the Commission, a court cannot meaningfully address these arguments.

Finally, Skinner asserts that the Commission violated RCW 41.12.090 by using an electronic recording system instead of arranging to have a court reporter transcribe the hearing. Contrary to Skinner's assertion, neither Pool v. City of Omak, 36 Wn. App.

844, 678 P.2d 343 (1984) nor Benavides v. Civil Service Commission of the City of Selah, 26 Wn. App. 531, 613 P.2d 807 (1980), hold that under RCW 41.12.090, the City must employ a court reporter instead of electronically recording the hearing. See Pool, 36 Wn. App. at 848 (denying part of the city's request for costs because "[t]he City is responsible for the court reporter's attendance fee for the civil service hearings")[6]; Benavides, 26 Wn. App. at 536-37 (denying the commission's request for costs as to the court reporter's attendance fee because "[a] court reporter must be present at the civil service commission hearing, regardless of whether an appeal is taken").[7]

We affirm the decision of the superior court and remand to the Commission for new proceedings as ordered.[8]

Schindler, J.

WE CONCUR:

Leach, A.C.J.

Becker, J.

[6] (Emphasis added.)

[7] In addition, Skinner argues that the court erred in denying his motion to strike exhibits admitted by the Commission. Because Skinner did not appeal from the court's order denying his motion to strike, we decline to address his argument. RAP 5.3(a); In re Marriage of Grigsby, 112 Wn. App.1, 17, 57 P.3d 1166 (2002).

[8] We deny the City's request for attorney fees under CR 11.