UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

DAVID W. BATHKE,

Plaintiff,

vs.

CITY OF OCEAN SHORES, CRYSTAL DINGLER,

Defendants.

Case No. 3:19-cv-05338-BHS

PLAINTIFF DAVID W. BATHKE'S POST TRIAL BRIEF

PLAINTIFFS' DAVID W. BATHKE'S POST TRIAL BRIEF

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INTRODUCTION

The Court has requested briefing on several questions:

1. First, the court requests "specific briefing on the appropriate standard for breach of contract."
2. Second, the court request briefing on whether the "reasons proven to [Mayor Dingler]…as far as she was concerned …met the "for cause" standard."
3. Third, the Court asks for briefing on the "fairness and good faith of the city's process and investigation as well as to what extent possible noncompliance with City policies and/or industry standards informs the question of the presence or lack of good faith."
4. Fourth, the Court asks "[i]f the Court finds that it was not a fair process… [does] this render a termination decision wrongful, even when cause had been otherwise established."
5. Fifth, the court requests that damages be addressed.

ARGUMENT

A. The Appropriate Standard for this Breach of Contract.

The Exempt Employee Agreement prevented termination except for "cause with the grounds therefore the same as those for the union represented employees." (Plt. Ex. 6). Plaintiff has been firm that this qualifying language cannot be ignored and must have meaning. To ignore the language would violate Washington law. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005). Prior to Plaintiff's employment with the City, when Plaintiff expressed his concerns relating to job security to Mayor Dingler [Bathke 15/15-18], rather than providing Plaintiff with his own specific contract, she emailed Plaintiff the Exempt Employees Agreement (Plt. Ex. 3); that the City uses for all exempt employees which she stated was "favorable to them". [Dingler 93/5-9]. Plaintiff has, therefore, also maintained that since the agreement was a standard City agreement provided to

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Plaintiff by the City, then it must be interpreted against the City. *Pierce Cnty. V. State,* 144 Wn. App. 783,813 (2008).

The reason that the qualifying language is so important is that the City's union represented workers have specific disciplinary rights prior to termination of employment not applicable in other employment contexts. This distinction between non-union workers and union workers was acknowledged by the Washington Supreme Court in *Civil Service Com'n of City of Kelso v. City of Kelso* 137 Wash.2d 166, 173 (1999). *Kelso* concerned discipline of a union represented police officer. The issue was whether the determination of cause by the City and Civil Service Commission could be modified by an arbitrator. In ruling that it could, the Washington Supreme Court made this important distinction about the standard applied to unionized workers:

> "Just cause" is a term of art in labor law, and its precise meaning has been established over 30 years of case law. Whether there is just cause for discipline entails much more than a valid reason; it involves such elements as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty. Raymond Hogler, *Just Cause, Judicial Review, and Industrial Justice: An Arbitral Critique,* 40 Lab. L.J. 281, 286 (1989). Seven factors are considered in determining whether there was just cause for discipline, including whether the employer applied its rules even-handedly, and whether the degree of discipline was reasonably related to the seriousness of the infraction given the employee's record of service. Donald S. McPherson, *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process,* 38 Lab. L.J. 387, 403 (1987). *Civil Service Com'n of City of Kelso v. City of Kelso* 137 Wash.2d 166, 173 (1999).

As instructed by the Washington Supreme Court, the type of "cause" applied when dealing with union represented employees "entails much more than a valid reason." It also requires "procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty." The Supreme Court then goes on to cite the seven Daugherty factors as the factors to be used in "determining whether there was just cause for discipline."

There should be no question that the standard of cause that is applied to unionized workers is the standard of cause that should apply to Chief Bathke. Not only does the Exempt Employee

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Agreement expressly state this, but Mayor Dingler herself acknowledged that the standard for cause applicable to Chief Bathke was to be the same applicable to union-represented employees?

Q: Okay. [sic]was it your understanding that the City-when you fired Chief Bathke, was it your understanding that the-- to determine cause, you merely needed to satisfy the standards contained in the personnel manual? [Dingler 192/7-11; 17-19]

A: THE WITNESS: When I fired Chief Bathke, I was aware of the exempt employee agreement and of the clause that you spoke of in there.

Q: Okay. That wasn't my question.

A: Ok.

Q: My question was-- MR. WELLMAN: Read my question back, please

[Reporter read back question—"Okay. [sic] was it your understanding that the City—when you fired Chief Bathke, was it your understanding that the—to determine cause, you merely needed to satisfy the standards contained in the personnel manual?"]

A. No.

Q. Okay. So there was different standards you had to satisfy that weren't contained in the personnel manual; am I right? [Dingler 193/4-10]

A. That's right.

Q. And what standards were those?

A. We just looked at those standards in the exempt employee agreement.

Q. Meaning that not only would you have to satisfy what constitutes cause in the personnel manual, but you would have to satisfy what constitutes cause in the—for—firing a union-represented employee; am I right? [Dingler 193/11-15]

A. This—yes, I believe that's true.

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Q. And he was to be treated as far as being fired the same as a union-represented employee; am I right?

MS. MCINTYRE: I will object to the form.

THE WITNESS: Okay. I believe that's true according to this document, yes.

[Dingler 193/17-25; 194/1; Video clip 3.3]

After acknowledging that standards other than those contained in the Personnel Manuel must be considered, the Mayor was then asked if she looked at any standards other than what was contained in the Personnel Manual to which she answered "no." [Dingler 180/14-22]. The Mayor admitted that to find cause as stated in the Exempt Employee Agreement she needed to look at other standards not contained in the Personnel Manual but then admitted that she never looked at any other standards when deciding to fire Chief Bathke. This is a conflicting, untenable position that cannot be justified.

Even when the Court queried the Mayor, she did not know if the termination was based on the appropriate just cause standard:

> THE COURT: So was it based on the just cause that you made that determination?
>
> THE WITNESS: ***I don't know***. It was everything together. I was aware of the just cause clause. I was aware of what was in the employee manual. [Dingler Trans 204/20-24; emphasis added]

Treatises dealing with just cause are in accord that the standard requires more than a valid reason—it require that important procedural safeguards be employed. (See e.g. *Washington Public Safety Employees Members Handbook, Second Edition,* ["It is a paramount principle of "just cause" (sic) that investigations be both thorough *and* fair." P. 12 (emphasis in original)]. "The overarching requirement of just cause is that people be treated with due process and fundamental fairness." at 17.

This is why the Washington Supreme Court found that in order to find cause there must be "much more than a valid reason"—there must also be "procedural fairness" and other rights afforded

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the accused. *Civil Service Com'n of City of Kelso v. City of Kelso* 137 Wash.2d 166, 173 (1999). This is also why in the context of a union represented employee, the Daugherty factors must be used. It is only by use of this Daugherty standard that the procedural fairness and other safeguards possessed by union represented employees are achieved.

The "procedural fairness" that is inextricably intertwined with the question of whether there is "cause" also includes other rights available to the union represented workers. These include a progressive, corrective disciplinary process, and the right to develop and implement a Personal Improvement Plan. [1] These are provided not only by the City's Personnel Manual (Plt. Ex. 8/67-68, §9.810 (b)(5)), but are also expressly contained in the fire departments directives SOG 2000.00 (Plt. Ex. 21/6-11). the MOU with the City (Plt. Ex: 22) and the union contracts (Plt. Ex.7, Ex. 67, Ex. 68, Ex. 69). These are the same contracts that were provided to Chief Bathke prior to his hiring, so that he could understand the rights he had from being subject to being terminated. [Bathke 19/10-20]. Indeed, both the Mayor and HR Specialist Smith admitted that the City follows a progressive, corrective discipline policy. [Dingler 27/12-15; Smith27/6-10]. This was of paramount important to Chief Bathke, as he was 56 years old and this "was it" for him. [Bathke 14/18-20]. He was being asked to uproot himself and move to Washington to work another ten years. He also knew he was being asked to make multiple changes to a fire department that had three incongruent shifts which had been running itself and set in its ways. He wanted to make sure that if he made the commitment, his job would be secure. [Bathke 24/12/25; 25/1-3]. Chief Bathke understood and relied on the language of the Exempt Employee Agreement that he would have the same rights as other union represented employees. Given this context, the safeguards afforded him from being terminated were

[1] Of course, there are circumstances such as use of physical force (fighting) on the job, drug use on the job, or embezzlement that may allow immediate termination. However, none of these are present here.

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essential and this context must give some meaning to the contractual language. *Berg v. Hudesman,* 115 Wn.2d 657, 666-69 (1990).

The City seems to be suggesting that the specific rights provided to other union represented employees before a finding of cause can be ignored when it comes to the Chief. This makes no sense and would make the language in the Exempt Employee Agreement meaningless. Indeed, it is undisputed that the City applies the seven Daugherty Factors when determining whether there is sufficient "cause" to terminate a union employee. This was made clear by Ms. McIntyre herself in an email to the City (Plt. Ex. 87). The City's attorney, Ms. McIntyre, also informed the City's investigator that the Exempt Employee Agreement "includes a provision that exempt employees will have the same "just cause" standard for termination as unionized employees" (Plt. Ex. 15). It is unclear how the City can admit that the Daugherty Factors are to be applied to all union workers to determine when there is cause, but when there is a contract that specifically states that "cause" is to be determined on the same grounds as that applied to union workers, the Daugherty Factors suddenly do not apply. This makes no sense and is unreasonable.

Given this, the most plausible and credible meaning of the cause language contained in the Exempt Employee Agreement is that the Daugherty factors must apply. However, even if the Court concludes that only the *Baldwin* standard applies, the termination in this case was still wrongful.

If the Court finds that the Daugherty standard applies, it appears undisputed that this standard was violated. The Court is probably well aware of the seven Daugherty Factors, but for the Court's convenience they will be repeated here. These factors are whether,

(1) the employee had notice that his or her conduct would result in disciplinary consequences;

(2) the rule was reasonable;

(3) the employer investigated to determine whether the rule was in fact violated;

(4) the investigation was fair;

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(5) the employer's decision-maker had substantial evidence that the employee violated the rule as charged;

(6) the employer applies its rules even-handedly; and

(7) the discipline administered was fair in relation to the nature of the offense and imposed with regard to the employee's past work record. *City of Seattle, Seattle Police Department v. City of Seattle, Public Civil Service Commission,* 155 Wash.App. 878, 887-888 (2010).

None of these factors were satisfied by the City. No notice was given to Chief Bathke for two months after he was summarily escorted off the City premises. There was no rule provided to him that he supposedly violated. No investigation was done to determine whether the rule was in fact violated. Indeed, the only investigation done by Ms. Nielsen was on January 9, 2019, when she interviewed the administrative assistant and five unionized fire department officers who were described as the "moving force" behind the no confidence vote. The following day, on January 10, 2019, Ms. Nielsen spoke by phone to another union firefighter and two Grays Harbor EMS employees. After her investigation, Ms. Nielsen concluded that there were no grounds to move forward with termination. [Nielsen 13/10-15]. The investigation was patently unfair as neither Chief Bathke nor anyone on his behalf was contacted or allowed to participate in the investigation. The City cannot say that it had substantial evidence as it did nothing to confirm the truth or accuracy of the allegations. Allegations are not evidence. The City did not apply its rules even-handedly as it provided no notice nor opportunity for progressive or corrective discipline even though the City policies require it. Finally, the discipline administered, termination, was not fair given that there had never been even one complaint about Chief Bathke, he had accomplished every goal that he was tasked to do by the Mayor, and he was never provided the opportunity to correct any perceived bad behavior.

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B. Even if the Baldwin Standard Applies Only, the Termination was Wrongful.

The City appears to contend that if the *Baldwin* standard applies it exonerates the City as it provides the City with complete, subjective discretion to decide what constitutes "cause" as well as the facts leading to the "cause." However, the *Baldwin* standard does not allow such unfettered, subjective discretion and, in fact, imposes objective restrictions and responsibilities on the employer. When these restrictions and responsibilities are considered, the City's determination of "cause" cannot be sustained.

In *Baldwin* the Washington Supreme Court defined "just cause" as follows:

> "We hold "just cause" is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for "just cause" is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true. *Baldwin v. Sisters of Providence in Washington, Inc.* 112 Wash.2d 127, 139 (1989).

The definition imposes the following restrictions and responsibilities:

1. The reason must be a fair and honest reason.
2. The City must be acting in good faith.
3. The reason must not be arbitrary, capricious, or illegal.
4. The City must reasonably believe that the evidence and reasons are true.

C. The City did Not Act in Good Faith

The definition under *Baldwin* requires the City to act in good faith and to have acted reasonably. That is, even under *Baldwin* the City violated the "cause" standard unless, at the time Chief Bathke was fired, the City "reasonably, in good faith, and based on substantial evidence believed" Chief Bathke had committed a terminable offense. *Gaglidari v. Deny's Restaurants, Inc.,* 117 Wash. 2d 426, 438 (1991). Here, the City, through the Mayor, did not exercise good faith. It did not perform a "prompt and thorough investigation" as required by the City's policy (Plt. Ex. 8/7 Personnel Manual). Indeed, as discussed below, the City really performed no investigation at all. It didn't even

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speak to Chief Bathke or anyone on his behalf. [Dingler 6/5-25; Dingler 28/9-17; Smith 9/18-25]. The City gathered the union employee complaints and included those complaints in the Summary of Charges provided to Chief Bathke two months after he was placed on administrative leave. [Smith 31/23/25; 21/1-2]. The City had two months to investigate the accuracy of the complaints prior to sending it to Chief Bathke and it did nothing to confirm the accuracy of any of the allegations made. [Smith 5/17-23]. It dismissed the conclusions of its independent investigator that there was no case for harassment or a hostile workplace. [Dingler 15/3-10].

The City demonstrated lack of good faith in other respects as well. Prior to the no confidence vote, the City failed to provide him with a performance evaluation as required by City policy (Plt. 8/26, §5.410(c)). [Dingler 34/25;35 1-6; Bathke 7/18-20]. There were no written complaints about Chief Bathke in the form of a union grievance or otherwise, despite the City's liberal policies regarding harassments (Plt. 8/6, §1.050) and non-retaliatory complaint procedures (Plt. 8/53, §8.765). The City policy required the union firefighters to first attempt to resolve their complaints directly with Chief Bathke, the Department Head. (Plt. 8/53, §8.765, City's Personnel Manual Complaint Procedures). This was never done. Indeed, the procedure states that the employee should first attempt to resolve the problem with the Department Head, and the Department Head will respond to the employee in writing within ten (10) working days after meeting with the employee. Instead of taking their complaints to Chief Bathke, the union members voted No Confidence on December 10, 2018. There was an Officers' Meeting on December 12, 2018 in which Chief Bathke and all officers were present. At this meeting, the union firefighters had a duty to bring their complaint, the no confidence vote, to Chief Bathke, but failed to do so. Instead, the union members met secretly with the Mayor on December 13, 2018 at the police station to notify her of the no confidence vote. On the next day, December 14, 2018, the Mayor placed Chief Bathke on administrative leave without ever giving him an opportunity to address the complaints made by the union members of the fire department.

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The City also failed to provide the Chief with the progressive and corrective discipline that is mandated by the City policies and offered to every other employee. [Dingler 27/12-24]. It allowed the decision maker to also lead the investigation [Smith 5/6-12]. To compound the wrongdoing of the City, the Mayor, contrary to the testimony of HR Specialist Smith, testified that she didn't lead the investigation but left it up to the investigator she hired—however, the investigator found there was no basis for a case of harassment or hostile work environment. [Smith 5/6-12; Dingler 9/22-24; Dingler 12/12-15; Dingler 166/22-24].

The City violated every one of its own policies dealing with discipline. It also failed to recognize that the Chief was hired to make major changes (mandated by the Mayor) that would engender tension with the union employees who had been used to running the department themselves. It knew that Chief Bathke was an aggressive, strong, no nonsense leader when it hired him and then used these personality traits and his responses to essay questions which did not consider the facts and circumstances of the changes that Chief Bathke was tasked with by the Mayor to manufacture a reason to terminate him.

The City cannot be allowed to bypass the reasonable expectations of Chief Bathke by ignoring all of its own policies, as well as policies and practices firmly established in the industry and then maintain that it has acted in good faith:

> "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further; bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance." *Restatement (Second) of Contracts § 205, comment a (1979)* citied by *Best v. U.S. Nat. Bank of Oregon,* 303 Or. 557, 563 (1987).

In accord with this explanation of good faith is *Scribner v. Worldcom, Inc.* 249 F.3d 902, 910 (2001; 9th Cir.). In interpreting Washington in the context of employment contracts, the court in

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Scribner followed the holding of the Oregon Supreme Court in *Best, supra.* The court also found that,

> "Good faith *limits* the authority of a party retaining discretion to interpret contract terms; it does not provide a blank check for that party to define terms however it chooses." *Id.*

Under these authorities, the City's position that Mayor Dingler had the subjective discretion to interpret what constituted "cause" is untenable. She did not have the right to ignore the City's established policies, the standards of the industry, and the expectations that she had imparted to Chief Bathke that he would be treated the same as the other union represented employees. Such a position would relegate these important policies and standards (as well as the express language of the contract itself) to a meaningless position. By doing so, the Mayor (and the City) acted in bad faith.

The City also did not act reasonably in believing the allegations of the complaining unionized fire fighters. In this regard, the allegations were just that—allegations. Allegations are not evidence and certainly do not amount to substantial evidence. However, the City merely documented the allegations of the complainers without ever verifying the accuracy. Without an attempt to verify the allegations, no reasonable person could conclude that the allegations were accurate. If allegations, without confirmation, can be the basis of an important decision such as terminating an individual's career, then the concepts of good faith, fairness, and reasonability would have no meaning.

In addition, during the trial the Mayor never articulated the reasons why she believed she had cause to terminate Chief Bathke. Even when queried by the Court on this issue she responded that she "didn't know" if she had based her decision on just cause. Instead, she testified that it was based on "everything together." [Dingler 204/20-24]. Such an amorphous, vague answer does not amount to a fair and honest reason as required by *Baldwin.* To the contrary it is soaked with subjective arbitrariness and capriciousness which violates the *Baldwin* standard.

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D. Did the Reasons Proven to the Mayor Meet the Cause Standard?

At the outset it is difficult to address this question as the Mayor never articulated during trial the reasons she used to justify her finding of "cause with the grounds therefore the same as those for the union represented employees." Instead, as discussed above, she testified that it was based on "everything together."

However, regardless of the reasons used by the Mayor they could not amount to a finding of cause. This is because, as discussed above, "cause" includes within its definition various procedural safeguards as well as a demonstration of good faith and objective, reasonable conduct. That is, in the context of a union represented employee, no "cause" can be found unless there is an adequate investigation, a proper hearing where the decision maker is not the investigator, a progressive, corrective process is followed, the accused is afforded the opportunity of developing a Personal Improvement Plan *after* he has notice of the allegations, mitigating circumstances (such as Chief Bathke was brought in to make major changes) are taken into account, and whether the penalty is appropriate for the wrongdoing committed. Since none of these were afforded to Chief Bathke, nor even addressed by the City, there can be no finding of cause.

E. Even if the Mayor, in her Mind, had Adequate Reasons (i.e. cause) to Terminate Chief Bathke, the Lack of an Adequate Investigation Renders the City liable for Breach of Contract.

It is well established in Washington that "to the extent an employee has an employment contract requiring specific reasons for dismissal, then the employer must conduct an adequate investigation or be liable for breach of that contact." *Lambert v. Morehouse*, 68 Wn.App. 500, 505 (1993). This was reiterated by the Washington Supreme Court in *Gaglidari v. Denny's Restaurants, Inc.*, 117, Wash.2d 426, 437 (1991) ["[D]efendant must have conducted an adequate investigation prior to

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terminating plaintiff such that it reasonably and in good faith concluded plaintiff had" committed the terminating acts]. As stated by the concurrence in *Gaglidari:*

> "The standard we adopt should be as objective as possible. The appropriate standard should be one of the employer acting in good faith, but what does that mean? It means that an employer should conduct an objectively reasonable investigation to ascertain the facts. It means that the facts must lead a reasonable person to the conclusion that the employee was guilty of committing the prohibited act or not doing the omitted act." *Id.* at 459.

As stated by the court in *Tripoli v. KPMB Peat Marwick* (unpublished), 92 Wash. App. 1014 (1998):

> "Baldwin and Gaglidari require a finding that the employer reached its decision in good faith… good faith "means that an employer should conduct an objectively reasonable investigating to ascertain the facts….

In addition, the City Personnel Manual required that all allegations of improper conduct "be promptly and thoroughly investigated." (Plt. Ex. 8/7; §1.050(e)) as well as the fire department's own Standard Operating Guideline which states that "All complaints or accusations of misconduct involving Fire Department member shall be thoroughly investigated before formal action is taken." (Plt. Ex. 21/3; §5.8). Indeed, both Mayor Dingler and HR Specialist Smith admitted during testimony that their investigation of the allegations made by the union firefighters against Chief Bathke needed to be fair, thorough, and objective. [Dingler 4/7-9; Dingler 5/23-25; Dingler 6/1-4; Smith 7/11-14].

Despite the requirement of a thorough and fair investigation, the evidence revealed that no such investigation occurred. Indeed, Mayor Dingler admitted that she did nothing to confirm the truth of any allegation:

> Q: We can go over this. Did you look at any outside source, any extrinsic evidence, other than talking to those 12 officers, get their side of the story, in coming up with these allegations?
>
> A: I don't believe I did. I honestly don't remember if any of them—some of them may have given us something. I don't remember.
>
> …

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Q: Wasn't it important to you to verify the accuracy of the summary of charges before you sent them to Chief Bathke?

A: I wanted him to know what they were thinking. I wouldn't know how on most of these – I am not a trained investigator. I just gathered information.

Q: Well, that is not my question. You were making some allegations against your fire chief in this, correct?

A: I don't know that I was making allegations. I was documenting allegations that had been made.

Q: Well, is it important to you when you investigated this to determine whether or not these allegations were true?

A: Was it important? Yes. Could I do it? No.

…

Q: Well, for instance, I just gave an example looking at the [officers meetings] minutes, you didn't look at that, correct?

A: Correct.

A: Did you seek to call up Viking and find out about the process of how the bunker gear was measured and manufactured?

A: I did not.

Q: Did you call up Paladin and see if they really went out of business?

A: No.

Q: Did you call up or look at the specification of the generator to see if it cost 5 or $4,000 versus $900?

A: I did not.

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A: Did you look into the minutes of the officers meetings to determine how the decision was made regarding the plastic intubation devices?

A: I did not.

Q: Did you talk to – strike that. Did you seek to find out, other than talking to union members, whether or not Chief Bathke was at the fatality fire before it had cleared?

A: No, I would have no way of knowing that.

[Dingler Trans 39/16-42/11]

As discussed above, allegations are not evidence, and given the fact that Mayor Dingler did nothing to verify the truth or falsity of any of the allegations, no thorough or fair investigation occurred. This failure to verify the truth of the allegations was echoed by HR Specialist Smith. [Dingler 6/5-25; Smith 9/25; 10/1-7].

Indeed, both the Mayor and HR Specialist Smith admitted that other than learning of the allegations from some of the unionized firefighters they not did nothing to verify the truth of the allegations. Moreover, they never talked to Chief Bathke or anyone on his side. *Id.*

Not only did the illusory investigation violate the City's own policies, it also violated all recognized Industry standards. Workplace dispute expert, Ms. Deborah Diamond, said it plainly when she testified that in effect there was no investigation at all. [Diamond 8/25; 9/1 ("What I am seeing is that the investigation actually did not take place")]. Ms. Diamond carefully cited numerous workplace standards and rules as to what a proper investigation and disciplinary process requires. Ms. Diamond has conducted more than 300 such investigations herself. She was clear that no investigation can be considered fair and unbiased unless there is communication with both sides and investigation into both sides. [Diamond 10/3-9]. She also was clear that a workplace investigation is inherently biased and unfair if, as here, the investigator is also the decision maker [Diamond 9/14-23].

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If the Mayor had acted reasonably and in good faith to investigate the allegations, then she would have learned that allegations by union firefighters to support their vote of no confidence were false or over exaggerated. This may have put her on notice that perhaps the other allegations were similarly false or exaggerated. Instead, she took the allegations verbatim and placed them in the summary of charges. Lastly, this may have put her on notice that the motivation behind the union was resistance to the many changes that the Chief was hired to make.

Not only did the City NOT perform an adequate investigation, but when the City was told by its only independent investigator that there was no case for harassment or hostile work environment, the City told the investigation to cease her investigation and declined to have her write a report. Instead, the City, on that very same day (January 16, 2019), told Chief Bathke that it did not see a "path forward for him." The City did this without informing him of what he had apparently done wrong. Under any interpretation, this cannot be considered an "adequate investigation.

The investigation was inadequate for yet another reason—the one conducting the investigation was also the decision maker. The investigator must be different than the decision maker was testified to at length by workplace investigation expert, Ms. Deborah Diamond. Ms. Diamond testified that "there is complete agreement across industry standards, AWI guidelines, SHRM guidelines, learned treatises and the EEOC guidelines" as to certain the standards of conducting a workplace investigation. [Diamond 10/3-9] Two of these fundamental standards is the investigator must talk to both sides and "not to have a person who is going to make the final determination be the person who conducted the investigation." [Diamond 11/10-12]. Indeed, these two errors are included in the literature as the two of the ten most common mistakes made in workplace investigations. [Diamond 12/2-12]. However, both of these fundamental workplace investigation standards were violated by the City.

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In short, because the City failed to conduct an adequate investigation, it is liable for breach of contract regardless of what the Mayor may have subjectively believed.

F. The Loudermill Hearing Cannot Substitute for a Proper Investigation

It is anticipated that the City may argue that the Loudermill hearing somehow substitutes for the failure to investigate the allegations. This cannot be the case for several reasons.

First, the Mayor acknowledged that by January 16, 2019, the day she sent the letter to Chief Bathke stating there "was no way forward" for him as Chief, she had already wrapped up her investigation. [Dingler 4/10-12]. The Loudermill hearing did not until two months later, which is long after the so-called investigation was concluded.

Second, as pointed out by employment dispute expert, Deborah Diamond, the Loudermill should never be the first time that the accused party is heard. This opinion is supported by the recognized authorities and publications in workplace investigations. The guidelines and rules that Ms. Diamond reviewed included the Association of Workplace Investigations, the Society for Human Resource Management, the Equal Employment Opportunity Commission, the Practical Guide entitled Investigating Harassment and Discrimination Complaints, the Essential Guide to Workplace Investigations, and the Municipal Research and Services Center.

The reasons that the Loudermill hearing should not be the first time the accused side of the story is heard are several. First, the rules and guidelines are unwavering that the investigator must be different than the decisionmaker. Indeed, this is known as one of the "Ten Most Common Mistakes" in workplace investigations. *Investigating Harassment and Discrimination Complaints, A Practical Guide, Salisbury and Dominick, 2004 Jossey-Bass/Pfeiffer.* However, if the decisionmaker is the one conducting the Loudermill hearing and the Loudermill is the first time that the accused side is presented, then this would mean that the decisionmaker is forced to act as the investigator as well.

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Second, the Loudermill hearing is not an evidentiary hearing. No witnesses are allowed and no cross-examination is allowed. The City's personnel policies did not allow any witnesses at the pre-termination hearing. It is not an investigatory process. Even if the decisionmaker was allowed to act as the investigator, the Loudermill hearing is not the proper venue to conduct the investigation.

What is so striking about this case is that HR Specialist Smith admitted that she knew these rules but still did not follow them:

Q: Are you aware of the guidelines regarding municipal research and service center relating to workplace investigations"

A: I may have read those. I can't cite those off my mind. I am not sure.

Q: Well, let me ask you this: From your review of the guidelines at the time and your knowledge as an HR specialist, did you have an understanding that the Loudermill hearing should not be the first time that the accused's side of the story is heard?

A: Those are guidelines, so if you follow the guidelines.

Q: Well, so you did not follow this guideline, am I right?

A: I didn't.

[Smith 14/10-22]

How can the City contend that it acted reasonably and in good faith when it admits that it did not follow the basic, and universally accepted, guidelines of workplace investigations? Chief Bathke submits that it cannot. In any event, the City is plainly wrong if it maintains that the Loudermill hearing serves as a substitute for its failure to investigate.

G. <u>Damages</u>

Chief Bathke presented a damage expert, CPA Dave Hanson. The City chose not to present its own damage expert. There is, therefore, no evidence to contradict Mr. Hanson's conclusions. Mr. Hanson's conclusions were admitted as Exhibit 42. The total damages (which are economic only as

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this is a contractual action) are $1,461,514. The breakdown of these damages is contained on Schedule 1 of Exhibit 42.

These damages are based on Mr. Hanson's assumption that the Chief would have stayed at the City for ten years as agreed to during the interviews. (Plt. Ex. 42).

The City's argument is, of course, that Chief Bathke has failed to mitigate his damages by not finding alternative employment in his field. However, Chief Bathke is now 59 years old. He has applied for more than 250 jobs and has not been successful. (Plt. Ex. 70; Plt. Ex.71) He has not limited his search to any geographic area. Although he has reached the interview stage on multiple occasions, after the background search is done, his application is denied. [Bathke 107/11/25; 108/1-11]. In making its "mitigation" argument, the City not only ignores the Chief's age, but also, the fact that the very damaging Maple Valley letter was leaked to the public and is now posted on public Facebook pages. Moreover, the termination was picked up by the various domestic and foreign fire fighter journal and magazines. The prospects of a 59-year-old, white male, with highly disparaging material posted on public websites and media, finding a job are dim at best.

A few weeks ago, Chief Bathke was able to obtain a temporary deployment with the California Medical Assistant Teams (Cal-Mat) to work with a temporary field hospital for Covid-19. However, the field hospital has been decommissioned and the temporary deployment will end on March 22, 2021. Although the Chief has applied for other positions with Cal-Mat Office of Emergency Services, he has been rejected on each occasion. During his temporary deployment he was paid $35.21 per hour with no benefits. This amounts to $1,408.40 per week for fourteen weeks (December 14, 2020 to March 22, 2021). Therefore, the damages should be reduced by $19,718 to $1,441,796.

In addition, if he prevails, Chief Bathke is entitled to reasonable attorney's fees. RCW 49.48.030; *International Ass'n of Fire Fighters, Local 46 v. City of Everett,* 146 Wash.2d 29 (2002)

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[held RC 49.48.030 is to be interpreted liberally and broadly to allow for recover of attorney's fees in a breach of an employment contract]*; Hanson v. City of Tacoma,* 105 Wash.2d 864(1986) [held RCW 49.48.030 allows for recovery of reasonable attorney fees in any action in which a person recovers a judgment for wages or salary owed]. It is anticipated that the City will resist this given the language contained in Section 9 of the Exempt Employee Agreement that each party is to pay their own attorney's fees. No ruling has been made if this supersedes the statutory right to attorney's fees. If the Court rules that attorney's fees are recoverable, then Chief Bathke will submit a post-trial motion for such fees.

Respectfully submitted:

DATED: March 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, under the laws of the United States of America that on this date, I caused to be electronically filed the foregoing document, and this Certificate of ECF Filing & Service, with the Clerk of the Court using the CM/ECF system, who will send notification of such filing to the following party:

Attorney for Defendants

Elizabeth A. McIntyre, emcintyre@lldkb.com
Brent Dille, brent@dillelaw.com

DATED this 12th day of March, 2021, at Laguna Hill, California.

/s/ Kelsey Krueger
Paralegal

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