

1 **BEFORE THE CITY OF SEATTLE CIVIL SERVICE COMMISSION**  
2

**David Hemmelgarn,  
Appellant**

**V.**

**City of Seattle, Fleets and Facilities,  
Respondent**

**ORDER  
On City's Motion to Dismiss  
For Lack of Jurisdiction**

**CSC No. 10-01-004**

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4  
5 **I. Procedural Background**  
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7 Appellant Hemmelgarn received a one-day suspension for failure to notify his supervisor  
8 he would be late or absent from work. Hemmelgarn appealed his suspension to the Civil  
9 Service Commission (CSC) alleging the City suspended him without just cause and  
10 failed to accommodate his disability. Specifically he alleges the City failed to follow  
11 procedures related to progressive discipline and Loudermill, and failed to notify him of  
12 disability accommodation information for 5 months after he disclosed he had a disability.  
13 (Hemmelgarn's Appeal, February 12, 2010)  
14

15 The City moves to dismiss Hemmelgarn's appeal, arguing the CSC lacks jurisdiction  
16 over the subject matter because appellant's challenge to his disciplinary action is based  
17 upon disability discrimination and failure to accommodate a disability. The City argues  
18 that the CSC is required to refer Discrimination issues to the City's Office of Civil Rights  
19 (OCR) which has jurisdiction over Seattle's Fair Employment Practices Ordinance, SMC  
20 14.04. Respondent Hemmelgarn argues that the City has the burden of proving just  
21 cause, and the CSC has jurisdiction over disciplinary suspensions, therefore the matter  
22 should not be dismissed.  
23

24 **II. Issue**  
25

26 The parties agree that the OCR has jurisdiction over allegations based upon  
27 discrimination. The issue for determination here is whether the disciplinary just cause  
28 issue is distinguishable from the disability discrimination issue. If the issues are not  
29 distinguishable, the OCR would be the sole agency with jurisdiction to review the  
30 subject of this appeal, but if the issues are severable, then the CSC would retain  
31 jurisdiction over that portion of the just cause issue that is not based upon an allegation  
32 of discrimination.  
33

34 **III. Factual Background**  
35

36 Both the City and Mr. Hemmelgarn through his attorney, represented to the CSC that  
37 Hemmelgarn was on a performance improvement plan requiring regular attendance and

1 sufficient advance notice when he was not going to be at work on time. Hemmelgarn  
2 argued that he had a medical condition that required accommodation of his work  
3 schedule. The basis of his appeal is that the City failed to accommodate his disability  
4 and therefore the suspension that was imposed on him was unwarranted. The City  
5 asserts Hemmelgarn had failed to cooperate in the interactive accommodation process  
6 thus far. (Riese Letter March 3, 2010; Mauden letter March 3, 2010)

7  
8 The CSC accepted Hemmelgarn's appeal after requesting clarification of his issues,  
9 referring the portion of the appeal that was covered by SMC 14.04, Seattle's law  
10 prohibiting discrimination, to the Seattle Office of Civil Rights (OCR).

11  
12 The parties agreed at the first CSC Pre-hearing conference that the disciplinary issue  
13 was "inextricably intertwined" with the disability discrimination issue. In addition, the  
14 parties entered a formal stipulation on March 14, 2011 that:

15  
16 "The sole basis for Mr. Hemmelgarn's appeal to the Dept. of  
17 Finance and Administrative Services' (formerly, Fleets and  
18 Facilities Dept.) decision to suspend him for one day on  
19 January 20, 2010, is his allegation that the suspension  
20 resulted from the dept's failure to accommodate this  
21 disability. Mr. Hemmelgarn does not allege any other  
22 violation of the just cause standard in this appeal. The  
23 department denies Mr. Hemmelgarn's allegation and  
24 contends that it complied with its legal obligations with  
25 respect to Mr. Hemmelgarn's disability."

26  
27 Since March 2010 the portion of the case that remained with the CSC has been held in  
28 abeyance while the Seattle Office of Civil Rights reviews the portion of the appeal that is  
29 covered by SMC 14.04, Seattle's Fair Employment Practices Ordinance.

#### 30 31 **IV. Discussion**

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33 The City of Seattle Personnel Rules [1.3.3 (C)] sets forth the relevant factors for a just  
34 cause analysis:

35  
36 "A regular employee may be suspended, demoted or discharged only for justifiable  
37 cause. This standard requires that:

- 38  
39 1. The employee was informed of or reasonably should have known the  
40 consequences of his or her conduct;  
41 2. The rule, policy or procedure the employee has violated is reasonably related to  
42 the employing unit's safe and efficient operations;  
43 3. A fair and objective investigation produced evidence of the employee's violation  
44 of the rule, policy or procedure;  
45 4. The rule, policy or procedure and penalties for the violation thereof are applied  
46 consistently; and

1 5. The suspension or discharge is reasonably related to the seriousness of the  
2 employee's conduct and his or her previous disciplinary history."  
3

4 The parties disagree over the interpretation of SMC 4.04.260(D) which reads:  
5

6 "A complaint alleging discrimination in violation of the City's  
7 Fair Employment Practices Ordinance shall be referred by  
8 the Commission to the rights agency of the City having  
9 jurisdiction over such complaints for its recommendation as  
10 to appropriate settlement of the case."<sup>1</sup>  
11

12 The contested language is the last phrase, "for its recommendation as to appropriate  
13 settlement of the case." The City acknowledges that the language is awkward, but that  
14 the overall statutory scheme requires an interpretation that provides the OCR with sole  
15 jurisdiction over discrimination issues because any other interpretation creates a conflict  
16 among ordinances. *Am. Legion Post #149 v. Wash. State Dept. of Health*, 164 W.2d  
17 570, 585, 192 P.3d 306 (2008). Hemmelgarn argues that these confusing words must  
18 be given meaning according to the rules of statutory interpretation, and that such  
19 meaning must be that a recommendation be made back to the CSC, so that it would  
20 play a role in a discrimination issue as it analyzed the just cause factors.  
21

22 SMC 14.04.060(A) provides the OCR with the power to investigate, hold hearings, and  
23 engage in settlements in cases fitting the definition of discrimination under this chapter:

24 A. The Office for Civil Rights shall receive, investigate,  
25 and pass upon charges alleging unfair practices as  
26 defined by this chapter, conciliate and settle the same by  
27 agreement, and monitor and enforce any agreements or  
28 orders resulting therefrom or from a subsequent hearing  
29 thereon under and pursuant to the terms of this chapter;  
30 and shall have such powers and duties in the  
31 performance of these functions as are defined in this  
32 chapter and otherwise necessary and proper in the

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<sup>1</sup> The City's Fair Employment Practices Ordinance is found in SMC 14.04.040(A), and states as follows:  
It is unfair employment practice within the City for any:

A. Employer to discriminate against any person with respect to hiring,  
tenure, promotion, terms, conditions, wages or privileges of employment, or  
with respect to any matter related to employment . . . .

Discrimination is defined in Title 14 at SMC 14.014.030(I):

I. "Discrimination," "discriminate," and/or "discriminatory act" means any  
act, by itself or as part of a practice, which is intended to or results in  
different treatment or differentiates between or among individuals or groups  
of individuals by reason of race, color, age, sex, marital status, sexual  
orientation, gender identity, genetic information, political ideology,  
creed, religion, ancestry, national origin, honorably discharged veteran or  
military status, or the presence of any disability.

1 performance of the same and provided for by law. The  
2 Department shall further assist the Commission and  
3 other City agencies and departments upon request in  
4 effectuating and promoting the purposes of this chapter.

5 [Author's note: reference to Commission in this paragraph is to the Civil  
6 Rights Commission, not the CSC).]

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8 **V. Analysis**  
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10 The procedures of the OCR differ from the CSC in that they are an investigatory  
11 agency, with a focus on reaching resolutions via written agreements before holding  
12 hearings, with fact finding hearings being a last resort if agreements cannot be reached.  
13 This scheme that puts the primary focus on resolution rather than fact finding hearings  
14 provides the best potential explanation for, and interpretation of, the language in SMC  
15 4.04.060(A) concerning "recommendations." The OCR makes recommendations to the  
16 parties based on its investigation. Such recommendations may result in settlement  
17 agreements or ultimately provide the agency with a basis for holding a hearing which  
18 could result in orders that the OCR then has the authority to enforce.

19 The "recommendations" language does not impact the overall jurisdictional scheme  
20 whereby the OCR has jurisdiction over discrimination issues, and the CSC does not.

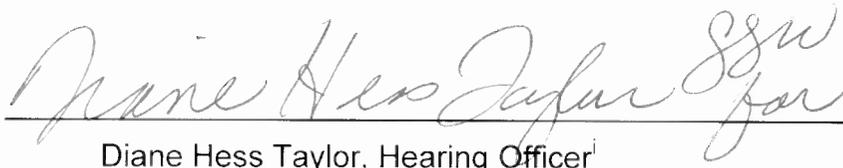
21 Here the parties have stipulated that the only just cause violation is the City's failure to  
22 accommodate Hemmelgarn's disability, which is a discrimination issue under the  
23 jurisdiction of the OCR. While there might be factual situations where there are just  
24 cause factors that are severable from a discrimination analysis, that is not the case  
25 here.  
26

27 **VI. Order**  
28

29 Hemmelgarn's appeal is hereby dismissed because the City's Office of Civil Rights has  
30 sole jurisdiction over the subject matter of his appeal.  
31

32 Dated this *2nd* day of *May* 2011,

33 FOR THE CITY OF SEATTLE CIVIL SERVICE COMMISSION

34   
35  
36

37 Diane Hess Taylor, Hearing Officer<sup>1</sup>  
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<sup>1</sup> The decision of the Hearing Officer in this case is subject to review by the Civil Service Commission. Parties may also request that the Commission review the decision, by filing a Petition for Review of the Hearing Officer's Decision and asking the Commission to consider specific issues and fact. To be timely, the Petition for Review must be filed with the Civil Service Commission no later than ten (10) days following the date of issuance of this decision, as provided in Civil Service Commission Rules.

CITY OF SEATTLE  
CIVIL SERVICE COMMISSION

Affidavit of Service  
By Mailing

STATE OF WASHINGTON }  
COUNTY OF KING }

TERESA R. JACOBS, deposes and states as follows:

That on the 3rd day of May, 2011, I sent via electronic mail a copy of **ORDER ON**

**CITY'S MOTION TO DISMISS FOR LACK OF JURISDICTION TO:**

**Mitchell A. Riese, Attorney (for Appellant)**  
**Law Offices of Judith A. Lonquist, P.S.**

And copies of same via US mail, interoffice mail and U.S. mail addressed to:

**Darwyn Anderson, Acting Personnel Director**  
**Zahraa Wilkinson, Assistant City Attorney**  
**Diane Hess Taylor, CSC Hearing Officer**

In the appeal of:

**David C. Hemmelgarn v. Fleets and Facilities**

**CSC Appeal No. 10-01-004**

DATED this 3rd day of May, 2011

  
TERESA R. JACOBS  
ADMINISTRATIVE STAFF ASSISTANT