BEFORE THE CITY OF SEATTLE
CIVIL SERVICE COMMISSION

John Cunningham
Appellant,

V.

Seattle Center
City of Seattle, Respondent

MEMORANDUM DECISION AND ORDER ON SEATTLE CENTER'S PETITION FOR REVIEW

CSC No. 06-01-006

I. INTRODUCTION

This matter is before the Civil Service Commission on Respondent Seattle Center's Petition for Review of the Office of the Hearing Examiner's decision (Decision). The Decision reversed the Center's termination of John Cunningham.[1] Seattle Center discharged Cunningham, a Human Resources (HR) manager, on April 3, 2006 based on an investigation that concluded he had sexually harassed one of his employees and permitted language in his work unit that exposed the Seattle Center to potential liability

[1] The Commission considered the following pleadings and submissions, and their attachments: Respondent Seattle Center's Petition for Review of Hearing Examiner's Findings and Conclusions (Petition); Seattle Center's Brief Supporting Petition for Review; Appellant Cunningham's Opposition to Petition for Review (Cunningham's Response); Seattle Center's Amended Brief Supporting Petition for Review (Seattle Center's Brief); Finding[1]s and Decision of the Hearing Examiner (Decision); Transcript of the hearing before the Hearing Examiner and hearing exhibits; Motions, briefs, and declarations regarding the spoliation issue, other pleadings and submittals in the file in this matter.

for a hostile work environment. Cunningham filed a timely appeal to this Commission on April 13, 2006. The Commission has jurisdiction to hear the appeal.

For the reasons stated below, the Commission AFFIRMS the Decision of the Hearing Examiner.

A. Summary of Uncontested Facts

Although the parties presented conflicting evidence concerning several material facts at hearing, many basic facts were uncontested. John Cunningham was manager of the Human Resources unit (HR) at Seattle Center. Virginia Anderson, Robert Nellams, and Tom Israel were the Executive Team at Seattle Center at the time. Cunningham reported directly to Israel.

1. The Complaint

On February 1, 2006, Linda Rogers, a Senior Personnel Specialist in the HR unit, and Kori Alberston, a Personnel Specialist in HR, went out for lunch. Rogers bought up her concerns about Albertson's attendance problems. Albertson said, "you tell me how easy it would be for you to come to work every day when you're being sexually harassed", or words to that effect. Albertson told Rogers that Cunningham had sexually harassed her.

Rogers reported the allegation to Israel. Israel directed Rogers to compile a list of outside consultants with experience investigating harassment claims. Marcella Fleming Reed topped the list. Israel informed Cunningham on February 2 that a complaint had been made against him. Israel also contacted Reed that day.

2. The Investigation

On February 9, the Seattle City Attorney's Office, acting in its capacity as attorneys for Seattle Center, retained Reed to conduct the investigation. During the investigation, Albertson gave Reed a handwritten list of specific allegations against Cunningham, including that he made several crude and explicit sexual propositions and remarks to her and also made sexually suggestive comments.[2]

Reed reviewed documents and conducted a total of about 18 interviews. She interviewed Albertson and Cunningham twice. Reed took notes during the interviews. She testified her notes were neither complete nor entirely accurate, but that she used them to remind her what the witnesses had said (when she later prepared the witness summaries), used the summaries to write her report, and shredded the notes. The summaries were prepared between four and fifteen days after the interviews. Reed did not show either her notes or her summaries to the witnesses.

3. The Report

Reed issued her nine-page report on March 1.[3] She found that there were no witnesses to any of the alleged explicit comments. Credibility of the accuser and the accused was thus crucial. The investigator determined that Albertson was "open, accommodating, and credible"[4], while Cunningham was "less candid" than Albertson.[5]

Reed concluded: 1) It was more likely than not that Cunningham had sexually harassed Albertson; 2) Cunningham had not held Albertson to a higher performance standard than her peers; 3) language permitted in the HR office could cause the work

[2] Exhibit 20.
[3] Exhibit 18.
[4] Id., p. 5.
[5] Id., p. 6.

environment to be hostile; and, 4) Cunningham had taken no action to address employee concerns regarding inappropriate language or the workgroup's poor communications and polarized factions.[6]

4. The Termination

Israel reviewed the Reed report and based upon it recommended on March 6 that Director Anderson terminate Cunningham's employment.[7] Cunningham requested a *Loudermill meeting*, which was held on March 28.[8] After reviewing the record and consulting with Reed, Anderson issued her decision letter on April 3, 2006, terminating Cunningham based upon the Reed report.

> The investigator found that it was more likely than not that you sexually harassed your subordinate and also concluded that language was permitted in the HR department that could cause the work environment to be hostile and that you took no action to address the inappropriate language.[9]

Anderson concluded that Cunningham: 1) committed acts of harassment or discrimination prohibited by law or failed to report harassment [10], and 2) knowingly or intentionally violated City ordinances, Personnel Rules, or the Center's "policies, procedures and workplace expectations".[11]

B. Procedural History of the Case

The City Charter provides that the Commission has the authority to conduct the hearing in an appeal or may delegate that duty to a hearing officer[12], including to the

[6] Id., p. 2.
[7] Notice of Recommended Discipline and Right to Loudermill Hearing, Ex. 21.
[8] *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1984).
[9] Ex. 23.
[10] PR 1.3.4 (16).
[11] PR 1.3.4 (15).
[12] Charter Article XVI, Sec. 6., SMC 4.04.250.L.7.

Seattle Office of the Hearing Examiner.[13] The Commission delegated the fact-finding hearing in this matter to the Hearing Examiner.[14]

The Hearing Examiner heard fifteen witnesses testify at the fact-finding evidentiary hearing held on July 10, 11, 12, and 13, and heard closing arguments on July 21. The Hearing Examiner issued her twenty-page decision on September 29, which included eighty-three (83) Findings of Fact and twenty-five (25) Conclusions.

She concluded that Seattle Center had not met its burden of proof that it had just cause to discharge Cunningham and reversed the termination.[15]

> …the Center has not demonstrated by a preponderance of the evidence that a fair and objective investigation, performed in accordance with the Personnel Rules, produced evidence that Cunningham had committed acts of harassment or discrimination prohibited by law or failed to report harassment (PR 1.3.4 (16)), or that he knowingly or intentionally violated City ordinances, Personnel Rules, or the Center's "policies, procedures and workplace expectations" (PR 1.3.4 (15)).[16]

On October 9, 2006, Respondent Seattle Center filed a timely Petition for Review of the Decision.[17] The Commission must now review the Decision for error.

C. The Burden of Proof and the Standard on Review

The burden of proof on the employer is the same whether the Commission conducts the fact-finding hearing itself or delegates that hearing to a hearing examiner.

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[13] The Office of the Hearing Examiner is a "separate independent office" authorized to conduct a variety of contested City administrative hearings. See SMC 3.02.110.

[14] Appellant John Cunningham is a former member of the Civil Service Commission. Mr. Cunningham filed two previous appeals with the Commission while he was a sitting Commissioner. (Commission Appeals Nos. 04-03-01 and 04-05-004). In order to avoid even an appearance of unfairness, the Commission also delegated both prior appeals to the Office of the Hearing Examiner.

[15] Decision, p. 20.

[16] Decision, Conclusion No. 25, p. 20.

[17] Seattle Center also filed the hearing transcript and an Amended Brief (amended only to include page citations to the transcript) on November 1, 2006, as provided in the Commission's October 26, 2006 Order.

The employer must prove at hearing by a preponderance of the evidence that its disciplinary decision was for justifiable cause.[18]

When the Commission has delegated the hearing, the Commission reviews the hearing examiner's decision under an appellate review standard.[19] The Commission reviews questions of law in the decision *de novo* and reviews factual findings for substantial evidence in the record.[20] The Commission therefore affirms a decision of a hearing examiner unless it either contains errors of law or is not supported by substantial evidence, or it fails to do substantial justice.[21]

D. Summary of Issues on Review

Although Seattle Center's Petition assigns error to most of the Hearing Examiner's findings of fact and conclusions of law,[22] its Brief focuses on four alleged errors in the Decision.

1) The Hearing Examiner erred by substituting her own credibility determinations for those made by the investigator the City retained to investigate the allegations against Cunningham;

2) The Hearing Examiner erred in finding that a wall calendar in Cunningham's office and been spoliated by Seattle Center and that she incorrectly imposed a presumption that the calendar, had it not been spoliated, would have been unfavorable to Seattle Center;

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[18] Seattle City Charter, Article XVI, Sec. 7, and Commission Rule 5.31.
[19] Commission review can occur in one of two ways – as a matter of course under Rule 6.01, or on a party's Petition for Review under Rule 6.02. The Commission originally scheduled review of this decision for its October 25, 2006 monthly meeting under Rule 6.01. Seattle Center timely filed its Petition for Review on October 9, and so the Commission now considers the matter under Rule 6.02.
[20] Commission Rule 6.08.
[21] Id.
[22] Respondent's Petition for Review, p. 1.

3) The Hearing Examiner erred in finding that the investigation was not fair and objective; and,

4) The Hearing Examiner erroneously failed to take into account Seattle Center's potential liability for manager Cunningham's alleged tolerance of sexual language in his work unit.[23]

II. ANALYSIS.

Part of Issue 1, Issue 2, and Issue 4 assert errors of law, and the Commission therefore reviews them *de novo*. Part of Issue 1 and Issue 3 question the sufficiency of the evidence, and the Commission therefore reviews them under the substantial evidence standard.

A. Did the Hearing Examiner Make Erroneous Credibility Determinations?

1. Was it an Error of Law for the Hearing Examiner to Make Credibility Determinations Independent of Those Made by the Investigator?

Seattle Center argues that the appropriate standard for just cause precludes the hearing examiner as a matter of law from making credibility determinations independent from those reached by the investigator retained by Seattle Center. The Center cities B*aldwin v. Sisters of Providence* for the applicable definition of "just cause".

> We hold 'just cause' is a fair and honest cause or reason, regulated by good faith on the party exercising the power. We further hold a discharge for 'just cause' is one which is not arbitrary, capricious, or illegal reason and which is one based on facts 1) reasonably supported by substantial evidence and (2) reasonably believed by the employer to be true. [24]

The Center suggests that that the scope of a Commission just cause hearing then is exclusively on whether the employing department's decision was based upon:

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[23] Respondent's Brief, pp. 1-2.
[24] *Baldwin v. Sisters of Providence in Washington, Inc.* 112 Wn. 2d 127, 139, 769 P.2d 298 (1989).

1) substantial evidence 2) that the employer reasonably believed to be true. The Center argues that the investigator's report met both prongs of that test.

While the *Baldwin* definition of just cause is certainly relevant, the Commission' finds it does not control the scope of a Commission hearing in the manner the Center suggests. *Baldwin* involved civil breach of contract litigation challenging a private sector discharge – it did not involve a civil service system or a civil service commission hearing.

The Commission finds the Charter, City ordinances, and cases involving civil service systems establish that a Commission disciplinary appeal hearing is *de novo*. First, the City Charter provides that no member of the civil service may be suspended or discharged except for justifiable cause, that civil service employees have the right to a public hearing,[25] and that the Commission has the authority to "administer oaths, issue subpoenas, receive relevant evidence, compel the production of documents, question witnesses at hearings it conducts…" [26] Appellants challenging a disciplinary action have the right to "cross examine witnesses, and to ask for the attendance of witnesses and the production of relevant evidence." [27] City ordinances similarly spell out the Commission's authority in hearings.[28]

The deferential standard urged by the Center would reduce the scope of a Commission hearing to appellate review of the employer's investigation and decision.[29]

[25] Charter Article XVI, Sec. 7.
[26] Charter, Article XVI, Sec. 6.
[27] Id.
[28] SMC 4.04.250.
[29] Taking the Center's argument to its logical conclusion, there would be little reason to have witnesses testify at a hearing, other than perhaps the individual who made the disciplinary decision and the departmental witnesses who would lay the foundation for the information the decision-maker relied upon.

The Commission does not agree with that view of its role. Cases involving civil service commissions do not support such a narrow scope for a Commission hearing.

In *Deering v. Seattle*, the Court of Appeals found that similar Seattle City Charter language in effect at the time required the Civil Service Commission to conduct a *de novo* hearing and to exercise independent judgment.

> Similarly, under Seattle's city charter the civil service commission is also required to give a *de novo* hearing and exercise its independent judgment.[30]

The employee in *Deering* alleged flaws in the employer's pre-termination investigation tainted his Civil Service Commission hearing. The Court of Appeals found that the Commission hearing cured alleged flaws in the investigation precisely because it was *de novo* and not deferential to the prior investigation.

In *Perry v Seattle*, the court held that the deferential "arbitrary and capricious" standard did not meet the Charter requirements.

> In construing the civil service provisions of the city charter, the court has held in numerous cases that a charter investigation includes notice of and a hearing, with a full opportunity to be heard, and the taking of competent and substantial evidence to establish the violation of specific charges that support just cause for dismissal. A conclusion by the commission that dismissal by the appointing authority was not "arbitrary and capricious" does not satisfy charter requirements. [31] (internal citations omitted)

In a subsequent case involving the same civil service appeal, the court again stated that the Commission was the final fact-finding body.[32] *Perry II* also establishes that the Commission, or in this case the Hearing Examiner, conducts the hearing *de novo*.

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[30] *Deering v. City of Seattle* 10 Wash. App 832, 835, 520 P.2d 638 (1974).
[31] *Perry v. City of Seattle,* 62 Wn.2d 891, 894, 884-5, P.2d 874 (1963).
[32] *Perry v. City of Seattle* 69 Wn.2d 816, 819, 420 P.2d 704 (1966).

> We conclude that neither the superior court not this court can consider the weight or sufficiency of the evidence. Appellate review is not a trial de novo. That is the province of the civil service commission.[33]

The Commission concludes that the Charter, implementing ordinances, and applicable cases establish that the Commission has the authority to conduct *de novo* fact-finding hearings and the authority to independently weigh the credibility of witnesses at those hearings. In this case, the Commission delegated the *de novo* hearing to the Hearing Examiner, and with it the authority to independently weigh credibility. A hearing examiner's resulting credibility determinations are not errors of laws so long as they are based upon substantial evidence presented at the hearing.

2. Are the Hearing Examiner's Credibility Determinations In this Case Supported by Substantial Evidence?

Since the Hearing Examiner has the legal authority to make independent credibility determinations, the Commission must then consider whether the credibility determinations she made are supported by substantial evidence in the record.

a. Bennett's Testimony regarding the "Chairs/McDonald's Exchange"

Seattle Center agrees there were no witnesses to the "more egregious" allegations.[34] However, the Center criticizes the Hearing Examiner's conclusion that "there are no witnesses to any of the alleged acts of sexual harassment."[35] The Center contends the Hearing Examiner ignored Michelle Bennett's testimony, which they argue corroborates one of Albertson's less egregious allegations.[36] Albertson stated in her

[33] *Id*, at p. 819.
[34] Center Brief, p. 5, fn 4.
[35] Decision, Conclusion No. 7, p. 16-17.
[36] Center's Brief, p. 4.

written allegations "if I ask him for something he replies with 'I don't know, what do I get in return'".[37]

Bennett, the HR Administrative Assistant, testified that she was present during an exchange between Cunningham and Albertson regarding some new chairs for the HR office. Bennett testified on direct examination that Albertson asked Cunningham, "Are you going to put them together for me? Cunningham replied to the effect, "Well, what are you going to do for me"? Bennett interjected "What about lunch?" and testified that Albertson replied, "I can only afford McDonald's." Cunningham replied "Well, that will do for starters."[38]

Bennett testified on direct examination that Cunningham's remarks made her feel uncomfortable because it sounded like "sexual innuendo".[39] Seattle Center argues, "As noted by Reed, Bennett was an important witness because she verified one of Albertson's allegations, even if it was a less egregious allegation".[40]

Referring to the chair/McDonald's exchange, Reed states in her summary of Bennett's interview: "It wasn't a conversation that Bennett would have thought anything about if Albertson hadn't told them that she felt like she was being harassed by Cunningham." [41] Reed also stated in her report that "Ms. Bennett indicated that she would not have thought anything of the banter except that Ms. Albertson had disclosed the week before her belief that Mr. Cunningham was harassing her".[42] Bennett

[37] Exhibit 20, p. 2.
[38] Transcript (TR), July 10, p. 257-59.
[39] TR, July 10, p. 257.
[40] Center's Brief, p. 4.
[41] Ex. 19, Bates page 28.
[42] Exhibit 18, FN No.4, p. 7.

confirmed on cross-examination that she might not have felt uncomfortable if she had not known about Albertson's allegations against Cunningham.[43]

Bennett's testimony was certainly probative that the exchange occurred. The Hearing Examiner entered a specific finding that it did. [44] However, Bennett's later testimony that her discomfort may have been derivative of her knowledge of the allegations is sufficient evidence to support the Hearing Examiner's conclusion that what Cunningham said did not constitute sexual harassment of Albertson.

b. Other Witness's Testimony Regarding the Credibility of Cunningham and Albertson

Other than Bennett's testimony described above, no witness at the hearing testified that they had ever heard Cunningham make any inappropriate sexual remarks. Bennett herself testified that Cunningham had never treated her inappropriately and there were no other incidents that made her feel uncomfortable.[45] Bennett described Cunningham as "professional". [46] Former HR employee Amanda McClure told Reed she had no contact with Cunningham that made her feel uncomfortable, nor had she heard him use profanity.[47] Caroline Smith, another HR employee, told Reed that when a non-HR employee made a crude sexual remark regarding him, Cunningham was speechless, clearly embarrassed, and turned beet red.

Jennifer Brown, a friend of Albertson that frequently talked to her about personal matters, told Reed she was "astounded" at Albertson's allegations; that she not seen anything overt or subtle that she would consider sexually harassing; that "colorful"

[43] TR, July 10, p. 263.
[44] Decision, Finding No. 50, p. 9.
[45] TR, July 10, p. 260.
[46] TR, July 10, p.262.
[47] Ex. 19, Bates p. 00068.

language (including talk about sex) in the HR office was "among the girls"; and that Albertson "does not always have the best judgment about who to say things to".[48] She also told Reed that she and Albertson used profanity in the office, although not with customers.[49]

c. The Skirt Discussion(s)

Seattle Center also contends that the Hearing Examiner confused two separate conversations between Cunningham and Albertson. The first one was in Albertsons' office during which Bennett overheard Albertson say something about "not wanting to wear a skirt and nylons".[50] Bennett assumed the conversation was about possible changes in the office dress code.[51] The second conversation was in Cunningham's office in which Albertson alleged Cunningham said "Why don't you wear a skirt tomorrow with no panties and come back into my office and do that" (meaning put her feet on his desk).[52]

The Center argues the Hearing Examiner confused the two conversations and that the confusion is significant because she concluded that it was possible for Bennett to overhear a conversation in Cunningham's office. That conclusion in turn supported Cunningham's testimony that he did not think it was possible to have a private conversation in his office.[53] The Commission concludes that there was other substantial evidence in the record that Cunningham and other Seattle Center

[48] Ex. 19, Bates p. 00031-2.
[49] Ex. 19, Bates p. 00035.
[50] TR, July 10, p. 255.
[51] Id. p. 255.
[52] Exhibit 20, p. 1.
[53] Center's Brief, p. 5.

employees, including Director Anderson, thought that conversations in the HR offices might not truly be private.[54] The Hearing Examiner's confusion, if any, is harmless.

d. Cunningham's Knowledge of Albertson's History of Abuse

Reed stated in her report that Cunningham "initially denied knowledge of Ms. Albertson's history as childhood sexual abuse victim, but then later admitted to having knowledge of her past, whereupon he claimed it was a detail that had earlier slipped his mind". Reed considered Cunningham's statements "disingenuous".[55]

Cunningham testified that he recalled later in his first interview with Reed that Alberston had told people at a staff meeting four or five years earlier that she had been the victim of childhood sexual abuse, and that he told Reed that in the same interview.[56] Seini Puloka, a HR employee, testified similarly about Albertson's statements at the staff meeting and corroborated Cunningham's testimony.[57]

The Commission concludes that the Hearing Examiner had before her substantial evidence to support her independent credibility determinations, findings, and conclusions regarding Cunningham and Albertson's relative credibility.

B. Does Substantial Evidence Support the Hearing Examiner's Conclusions Regarding the Reed Investigation?

Seattle Center argues that the Hearing Examiner erroneously concluded that the investigation was not "fair and objective".[58] As a preliminary matter, the Commission holds that in order to be fair and objective, any disciplinary investigation must also be reasonably thorough and complete. The personnel rules expressly require that

[54] TR, July 13, p. 45-46.
[55] Exhibit 18, p. 5.
[56] TR, July 13, p 60.
[57] TR, July 12, p. 158.
[58] Center's Brief, p. 8, referring to PR 1.3.3.C.

harassment investigations such as this one be "fair, complete, and impartial".[59] The Hearing Examiner entered several findings and conclusions regarding the fairness, completeness, and impartiality of the investigation.[60] For example, the Hearing Examiner concluded:

> "Although PR (Personnel Rule) 1.1.5.C.3 requires the investigator to maintain records of the investigation, the only records of this investigation are interview summaries that were prepared from cryptic and sometimes inaccurate notes, anywhere from four days to two weeks after the interviews, during which time the investigator had conducted interviews with other witnesses in the matter. The evidence shows that the interview summaries do not constitute an accurate written account, or 'record' of the interview conversations because they are incomplete, and in many cases incorrect due to lack of proper context and misleading characterization of the questions asked and answers given.[61]

The Commission finds this conclusion to be a very serious matter that, if supported by substantial evidence, could by itself support a decision that the investigation was not fair, complete, and impartial. The Commission therefore carefully weighs the evidence supporting this conclusion.

1. Reed's Interview Notes

PR 1.1.5.C.3 requires the investigator to maintain records of the investigation. [62] Reed testified at hearing that her standard practice is to shred her interview notes after she prepares the summaries and the draft report.[63] She also testified that "very often, I,

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[59] PR Rule 1.1.5.C. Investigating Harassment Complaints. "The investigator shall complete his or her investigation as promptly as possible while ensuring that the investigation is fair, complete and impartial".

[60] The investigator shall complete his or her investigation as promptly as possible while ensuring that the investigation is fair, complete and impartial.

[61] Decision, Conclusion No. 19, p. 19.

[62] The investigator shall maintain records of the investigation and shall prepare and provide a report of the investigation to the appointing authority. The appointing authority shall provide a written summary of the allegations and the investigation findings to the complainant and to the alleged harasser.

[63] TR, July 11, p. 57.

through that process, find inaccuracies"[64] She also said that her interview notes "are done in this sort of fast furious fashion, which doesn't make them always the most accurate summaries of the conversation."[65]

2. Reed's Interview Summaries

A comparison of the dates on the summaries with the dates of the summarized interviews reveals that the summaries were prepared from four to fifteen days after the interviews were conducted, and that other witness interviews were conducted in the interim.[66] Reed testified that she does typically not, and did not in this investigation, have witnesses review either her notes or her interview summaries.[67]

Several witnesses were asked at the hearing whether the summaries of their interviews were accurate, and some testified that they were not. For example, Caroline Smith, another HR employee, was asked if she had any specific recollection of Cunningham being involved in sexual joking. She testified she had no such recollection. She also testified she thought, but could not be sure, that she told Reed that in her interview.[68] Reed's summary of Ms. Smith's interview says that "There were passing remarks and innuendos that occurred in HR. Sometimes Cunningham was part of that joking".

Cunningham testified extensively that Reed's summaries of his interviews were incomplete and misleading because they either left out important information entirely, or mischaracterized the questions Reed asked and his answers.[69]

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[64] Id, p. 57.
[65] TR, July 11, p. 202.
[66] Exhibit 19.
[67] TR, July 11, p. 56-58.
[68] TR, July 10, p. 273-4.
[69] TR, July 13, p. 60-75.

Cunningham's Response Brief suggests that the Smith and other summaries are so inaccurate as to evidence bias on the part of Ms. Reed.[70] The Commission does not go that far, but does conclude that the Hearing Examiner had before her substantial evidence to support her conclusions regarding the interview notes, the delays in preparing the summaries, and the accuracy of the summaries.

The Commission also finds it significant that Albertson says the alleged "skirt and no panties" conversation described above took place in Cunningham's office, while Bennett says the conversation she partially overheard took place in Albertson's office. In her report, Reed states that when "Ms Bennett asked Ms Albertson about the discussion in Albertson's office, she told her that Mr. Cunningham just wanted to see her in a skirt and nylons." [71]

If, as the evidence suggests and Seattle Center argues, they were not the same conversation, then what Bennett overheard Albertson say about a skirt and nylons in no way corroborates Albertson's claim regarding the conversation in Cunningham's office in which she alleges he suggested she wear a skirt and no panties.

Reed, however, suggested in her testimony that Bennett's interview supported Albertson's charges.

> … Ms. Bennett says is that she overheard something about skirts. I think – I would have to look at my notes – but she heard something about skirts and she asked Ms. Cunningham – Ms. Albertson about it. Ms. Albertson said, kind of flippantly, 'Oh, he really wants to see me in a skirt and stockings' or something like that, so she was able to verify that allegation around him trying to have her wear more feminine attire to work. Beyond that, I didn't have sort of direct evidence of the allegations, which I would have preferred.[72]

[70] Cunningham Response, p.10,
[71] Ex. 18, p. 6-7.
[72] TR, July 11, p. 76-77.

On cross-examination, Reed again says that Bennett supported two of Albertson's complaints.

> But as to the specific sexual harassment complaints, I have Ms. Bennett who observes two particular instances that Ms. Albertson complains about.[73]

Since the chairs/McDonald's conversation is the only other even potentially harassing conversation Bennett testified hearing, Reed must be referring to the alleged "skirt and no panties" remark. The Commission concludes that Reed may have confused the two conversations, thinking incorrectly that Albertson's comment about a skirt and nylons (in the conversation partially overheard by Bennett) somehow supports Albertson's allegations that Cunningham suggest she wear a "skirt and no panties."

3. Other Records

The Hearing Examiner also entered conclusions regarding Reed's failure to request certain documents, including Cunningham's wall calendar (one record involved in the spoliation dispute), Cunningham's City-issued cell phone records, and notes taken by Albertson's mother during her telephone conversations with her daughter in which Albertson allegedly complained about sexual harassment by Cunningham.

a. Cunningham's Wall Calendar.

Albertson specifically alleged that Cunningham referenced and circled election day on his wall calendar while making a sexual remark to her.[74] Reed was, or should have been, aware early in her investigation that the wall calendar was potentially valuable evidence. The evidence supports the Hearing Examiner's conclusion that the calendar could have been important in assessing Albertson's and/or Cunningham's

[73] TR, July 11, p. 120.
[74] Exhibit 20.

credibility.[75] Reed's failure to request the calendar was a significant inadequacy in her investigation and evidence that it was not complete.[76] The Commission finds that her failure to request the wall calendar supports the Hearing Examiner's conclusion regarding the completeness, and therefore the fairness, of the investigation.

b. Cunningham's Cell Phone Records

Albertson alleged that Cunningham repeatedly called her early in the morning on his City cell phone, although she did not allege the calls themselves were sexually harassing in nature.[77] Reed testified she did not recall hearing about the calls, that no one suggested she review telephone records, and that the cell phone records would not be important because the calls were not part of the alleged harassing behavior.[78] Cunningham testified that he did not recall making any such calls and that he suggested to Reed in his interview that she review his cell phone records.[79] The records, presumably easily obtained form Seattle Center, could have supported either Cunningham's or Albertson's credibility. The Commission concludes that Reed's failure to request the cell phone records supports the Hearing Examiner's conclusions regarding the completeness, and therefore the fairness, of the investigation.

c. Marcella Anthony's Notes

Reed conducted a telephone interview on February 22, 2006 with Albertson's mother, Marcella Anthony. Reed's summary of the interview, dated March 7, states that "Anthony has been having conversations with Albertson for at (sic) approximately a year

[75] Decision, Conclusion 14, p. 18.
[76] Reed's failure to request the calendar and the effect on the fairness of her investigation is a different issue that whether Seattle Center should be held responsible for its spoliation, which is addressed elsewhere.
[77] TR, July 10, p. 44.
[78] TR July 13, p. 177.
[79] TR, July 13, p 74.

to eighteen months (a 'guesstimate') about Albertson's discomfort with John Cunningham's sexually related comments." [80] Anthony could not recall the specific comments, but said Albertson complained at least once a week.[81] Reed cited the Anthony interview in her report as corroborating Albertson's allegations and contributing to Albertson's credibility.[82] Anthony testified she told Reed she had kept notes of her conversations with Albertson, and that Reed never requested them.[83]

The issue for the Commission is whether, under these circumstances, Reed should have requested those notes and whether her failure to do so compromised the completeness of the investigation. By February 22, it was clear that close credibility determinations would determine the outcome of the investigation. Reed's second interview with Cunningham, which she said she conducted after concluding the evidence wasn't "stacking up" either way, was conducted on February 24.

The Commission finds that Anthony's notes might have been important documentary evidence to resolve the issue of Anthony's, and in turn Albertson's, credibility. The Commission finds that Reed's failure to request Anthony's notes indicates the investigation was not complete and supports the Hearing Examiner's conclusions regarding the investigation.

The Commission concludes that in an investigation such as this that is clearly likely to turn on credibility, documentary evidence that could reasonably shed light on the key witness' relative credibility is important to a complete investigation. The Commission further concludes that the Hearing Examiner had before her substantial

[80] Ex. 19, Bates p. 00014.
[81] Ex. 19, Bates p. 00015.
[82] Ex. 18, p. 5.
[83] TR, July 10, p.136.

evidence to support her conclusions regarding the investigation to the extent that the investigation was not reasonably complete, and therefore not fair. The Commission also concludes that the Hearing Examiner's conclusions regarding the investigation are sufficient to support her ultimate decision that the Center had not met its burden of proof. The Commission therefore need not, and does not, address the issue of whether the investigation was biased.

C. Did the Hearing Examiner Err Regarding the Issue of Potential Seattle Center Liability for Manager Cunningham's Alleged Misconduct?

Seattle Center contends that the Hearing Examiner failed to consider one of the Center's grounds for terminating Cunningham – that his alleged tolerance of sexual language in his unit created the potential that Seattle Center could be held liable for a hostile work environment.[84] The Hearing Examiner concluded that the record does not demonstrate that Cunningham permitted a hostile work environment in HR.[85]

Seattle Center assigned error to that conclusion, but they have never justified their disciplinary action on the basis that Cunningham permitted a legally actionable hostile work environment. Rather, Seattle Center argues that the Hearing Examiner failed to consider that Cunningham's conduct created potential Center liability for a hostile work environment.

The Hearing Examiner also addressed the potential hostile work environment issue, concluding that the "record does not disclose the basis for a potential hostile work environment claim in HR".[86] The Hearing Examiner concluded that Cunningham observed but ignored some language with sexual content among his HR staff and that

[84] Respondent's Brief, pp. 1-2.
[85] Decision, Conclusion No. 23, p. 19.
[86] Decision, Conclusion 20, p. 19 (emphasis added).

"other staff members found some of the language unprofessional, but there is no evidence that they were offended by it".[87]

The evidence is clear that there were sexual comments exchanged among some women employees in HR. However, there is no evidence that any of them complained to Cunningham that they found any of the HR employee's comments offensive. The clear weight of the evidence is to the contrary - that HR employees found some language unprofessional but no HR employee complained to Cunningham they found language used by other HR employee's offensive.

The Hearing Examiner found that an employee visiting from another unit made a crude remark regarding Cunningham and a "blow job", and that witness testimony established that Cunningham was "clearly embarrassed" and "speechless" in response.[88] She also concluded that Cunningham had been instructed by the Executive Team not to initiate discipline of employee's outside his HR unit[89], and that he reported the remark to the employee's supervisor.[90]

As discussed above, Reed says in her report that Cunningham occasionally participated in sexual comments, but that is apparently based on her questionable summary of her interview with Smith. The record supports the Hearing Examiner's conclusion that Cunningham did not occasionally participate in the use of foul language or sexual innuendo, and that such language did not occur at HR staff meetings.[91] The Commission finds that those findings and conclusions were supported by substantial evidence, and are not erroneous.

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[87] Decision, Conclusions Nos. 21 and 22.
[88] Decision, Finding No. 65, p. 12.
[89] Decision, Conclusion No. 22, p.19.
[90] Decision, Finding No. 65, p. 12, and Conclusion No. 22, p. 19.
[91] Decision, Conclusion No. 21, p. 19.

The Commission emphasizes that nothing in this decision precludes an employer from disciplining a manager for permitting a potential hostile work environment. The employer need not wait until a legally actionable hostile environment exists before disciplining a manager. However, the Commission does conclude that substantial evidence supports the Hearing Examiner's conclusion that on this record Seattle Center did not prove that Cunningham was responsible for permitting a potential hostile environment to exist.

D. Did the Hearing Examiner Err in Finding that a Wall Calendar in Cunningham's Office and been Spoliated and did she Incorrectly Impose a Presumption that the Calendar Would have been Unfavorable to Seattle Center?

Cunningham kept a large calendar on the wall in his office. Albertson alleged that Cunningham had repeatedly circled election day, November 7, 2006, on the wall calendar and said that "I'll bet you a roll in the hay that he's not out by election day" referring to Albertson's boyfriend.[92] Seattle Center could not locate the calendar.

The Center and Cunningham conducted extensive briefing before the Hearing Examiner on spoliation regarding the calendar and several other categories of documents. The Hearing Examiner concluded that that "Seattle Center's handling of the contents of Cunningham's office during the investigation was shoddy"[93] but that the Center was responsible for spoliation of only the wall calendar.[94]

On April 7, Cunningham's attorney sent Seattle Center's attorney an e-mail stating she had been informed that Cunningham's files, documents, and work papers had been removed from his office and destroyed. She stated that such actions

[92] Exhibit 20.
[93] Decision, Conclusion No. 3, p.16
[94] Decision, Conclusion No. 5, p. 16.

constituted spoliation of evidence and asked the attorney for assurances that Seattle Center would be so advised.[95] On May 24, the Center's attorney responded that she was not aware of any "systemic removal of files for your client's former office" and that Center staff had been instructed not to destroy any materials in Cunningham's office.[96]

On June 5, Cunningham's attorney made a formal discovery request to Seattle Center for various documents, including "all memos, correspondence, notes, recommendations, and other communications generated by John Cunningham at Seattle Center in the previous five years…".[97]

Tom Israel testified that he instructed HR personnel to leave the contents of Cunningham's office intact, but due to a "miscommunication" (Israel's failure to so inform the new person who took over responsibility for HR), Cunningham's office was "cleaned out" and that documents were no longer there when Israel looked for them in response to the June 5 document request.[98]

Seattle Center argued that Cunningham's June 5 discovery request did not cover the wall calendar. The Hearing Examiner disagreed. She concluded that the calendar was within Cunningham's request, that it had been spoliated by Seattle Center, and that a rebuttable presumption should be imposed against the Center regarding the calendar.[99]

The Commission concludes that the Hearing Examiner's findings of fact regarding the calendar are supported by substantial evidence in the record before her, including briefs and attached declarations that were submitted by the parties on the

[95] Dec. of Katrina Kelly Supporting Seattle Center's Opposition to Motion Regarding Spoliation of Evidence, Att. A.
[96] Id., Att.. B.
[97] Id., Att. D
[98] TR, July 13, p. 18.
[99] Decision, Conclusion No. 5, p .16.

spoliation issue.[100] The Commission also concludes that the Hearing Examiner did not commit any error of law in imposing a presumption.

The Commission also concludes that under the circumstances of this case any such error would be harmless. Even if the Hearing Examiner erred in imposing the rebuttable presumption, the Commission concludes that the Hearing Examiner had before her substantial evidence, independent of the presumption regarding the calendar, to support the independent credibility determinations she reached regarding the relative credibility of Albertson and Cunningham.

III. CONCLUSION

The Hearing Examiner clearly did not believe that Cunningham had made the egregious remarks Albertson alleged. The Hearing Examiner heard the witnesses testify under oath, including Albertson and Cunningham, and made a credibility determination that was both within her authority and supported by substantial evidence.

The Hearing Examiner also had substantial evidence before her that the Reed investigation was not complete and therefore not fair, as required by the applicable Personnel Rules.

The Hearing Examiner considered and rejected Seattle Center's claim that Cunningham was responsible for tolerating a potential hostile work environment at Seattle Center. She also had before her substantial evidence to support that conclusion.

The Hearing Examiner did not err in imposing a spoliation presumption regarding the wall calendar, but even if she did, she had substantial evidence independent of the

[100] See Cunningham's Motion on Spoliation of Evidence, Seattle Center's Opposition, and Cunningham's Reply, and attachments.

presumption to support her credibility determinations regarding Albertson and Cunningham.

The Commission concludes that the findings of fact material to the Hearing Examiner's ultimate decision are supported by substantial evidence in the record before her, and that the Decision does not include errors of law that would affect the Decision. The Commission, having concluded that the Decision is not based on a material error of fact, does not misapply the Personnel Ordinance or rules or law, and does substantial justice, concludes that the Decision should be affirmed under Commission Rule 6.

IV. ORDER

1. Seattle Center's Petition for Review is **DENIED**.

2. The Decision of the Hearing Examiner is **AFFIRMED**.

3. REMEDY

The Hearing Examiner Decision does not address remedy. The Commission therefore enters the following order regarding remedy.

A. Reinstatement and back pay. The Commission orders Seattle Center to reinstate John Cunningham with back pay and lost benefits that proximately resulted from his termination. If the parties are unable to reach an agreement regarding the appropriate amount of back pay and lost benefits, the Commission, or by delegation the Hearing Examiner, shall conduct a hearing limited to evidence regarding the proper amount of back pay and lost benefits.

B. Other Relief. In his Response Brief, Cunningham requests additional relief in the form of attorneys' fees and costs "taxed as sanctions". The Commission does not find such additional relief or sanctions appropriate in this case.

Entered this 1st day of December, 2006.

THE SEATTLE CIVIL SERVICE COMMISSION

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Jennifer Schubert
Commission Chair