

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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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**
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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**

32
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."¹
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

¹ 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).]

7
8 **V. Analysis**
9

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.

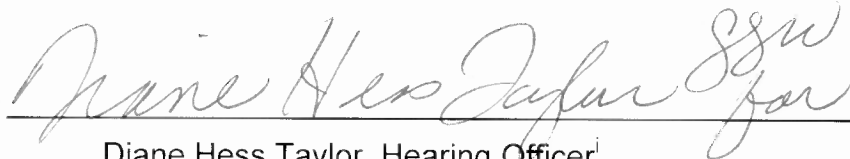
21 Here the parties have stipulated that the only just cause violation is the City's failure to
22 accommodate Hemmelgarn's disability, which is a discrimination issue under the
23 jurisdiction of the OCR. While there might be factual situations where there are just
24 cause factors that are severable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

26
27 **VI. Order**
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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

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37 Diane Hess Taylor, Hearing Officer¹
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¹ 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:

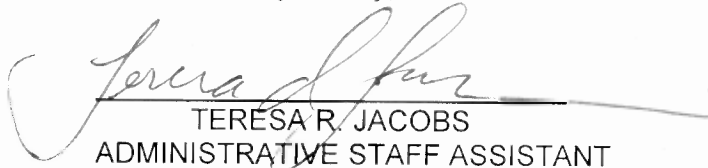
Darwyn Anderson, Acting Personnel Director
Zahraa Wilkinson, Assistant City Attorney
Diane Hess Taylor, CSC Hearing Officer

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