

2001

Huemiller v. Ogden Police Department, Ogden Civil Service Commision : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANTHONY HUEMILLER,

Grievant,

vs.

OGDEN POLICE DEPARTMENT,

Department.

ANTHONY HUEMILLER,

Petitioner,

vs.

OGDEN CIVIL SERVICE
COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONER

Appeal No. 20010968CA

Petition for Review of Decision of the Ogden Civil Service Commission

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ARGUMENT

I. OCSC FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. OPD's "marshaling" is nothing more than including "everything-but-the-kitchen-sink."

OPD argues that Huemiller has not met his burden of marshaling the evidence and, therefore, OCSC's findings are conclusive. (OPD Brief, p. 18, 53.) To prove this, OPD tells "the rest of the story," regardless of whether it supports OCSC's findings, by simply rearguing the entire 3 day hearing. Utah courts have "caution[ed] strongly" against using this "everything-but-the-kitchen-sink" approach in an effort to marshal evidence.

Beehive Tel. Co. v. PSC of Utah, 2004 UT 18, ¶15. A party must make a determination about which findings are being challenged and include references just to the relevant portions of the record. Id. Here, by "reopening" the hearing and providing testimony disregarded by OCSC, much of which was specifically excluded or not heard by OCSC at all, OPD is doing just what the court cautioned against. For example, OPD claims that Huemiller failed to marshal all of the evidence on the finding that he violated the towing policy, because he did not include certain vague and unreliable and hearsay statements. Yet, none of this "evidence" meets the standard of the residuum rule set forth in Tolman v. Salt Lake County Attorney, 818 P.2d 23, 32 (Utah App. 1991). OPD's marshaling arguments are addressed below. The Court should, as it always has, reject this type of "marshaling."

B. Huemiller did not waive his appeal rights by his actions at the predetermination hearing.

In addition to denying that Huemiller adequately marshaled the relevant evidence, OPD claims that he waived his right to challenge his termination, because he failed to respond to the allegations at his predetermination hearing after OPD refused to give him a Garrity warning. (OPD Brief, p. 57.) OPD cites to Ashcroft v. Industrial Comm’n, 855 P.2d 267, 268-69 (Utah App. 1993) to support this argument. (OPD Brief, p. 59.) Not only is Ashcroft inapplicable to this case, as it addresses an appeal in a worker’s compensation case which is governed by an entirely different set of statutes, but Ashcroft does not stand for the proposition put forth by OPD. Ashcroft merely affirms the well-known principle that one can not raise issues on appeal to this Court that were not raised at the Commission level. Specifically, in Ashcroft, the court held that Ashcroft’s failure to raise issues such as sufficiency of evidence in her appeal from the Administrative Law Judge’s findings of fact and conclusions of law to the Industrial Commission, waived her right to raise those issues for the first time in her appeal to the Court of Appeals. Id. at 268.

OPD’s attempt to apply this principle to predetermination hearings is disingenuous, especially in light of the fact that predetermination hearings (as opposed to post-termination hearings) are not intended to “definitively resolve the propriety of the discharge,” Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985), in part because their informal nature is not well-suited to such determinations. While there are

cases that provide that an employee must be given *an opportunity* to present his/her explanations at a pretermination hearing, Loudermill at 543, there are no cases that hold that an employee must do so. Thus, the fact that Huemiller refused to expand on his denials at the predetermination stage without first receiving his Garrity warning, in no way impacts his right to appeal the OCSC's Decision to this Court.

C. OCSC's credibility determination does not summarily determine the issue of whether Huemiller lied in a Garrity interview.

OPD also claims that because OCSC determined that Huemiller lacked credibility when he testified before it, this Court cannot review OCSC's finding that Huemiller misrepresented the truth in one of two internal affairs ("IA") interviews. (OPD Brief, p. 60. This could be labeled as the "once a liar, always a liar" defense. Notably, OPD does not cite even one case to support this principle. While it is well-established that a trial court, or agency, which hears the actual testimony, is in a better position to judge credibility of a witness than an appellate court is, that should not and will not prevent an appellate court from determining whether there is substantial evidence supporting the findings. For example, Huemiller's testimony before OCSC need not even be considered in determining whether he misrepresented himself at one of the two Garrity interviews. Rather, it is possible simply to compare the transcript of the Stubbs interview with Huemiller in 2000 (R. 1499-1520), with the Greenwood's notes from the interview he conducted with Huemiller in 1996 (R. 1371-76; 1378) along with Greenwood's

testimony, to determine that there is insufficient evidence to conclude that Huemille lied. (Section I E., below.)

OPD further argues that the whole case “hinges on credibility.” (OPD Brief, p. 62.) That statement is overly broad. Although Huemiller’s credibility may have contributed to the conclusions reached by the OCSC, OPD still failed to present substantial evidence to support the charges against Huemiller. Therefore, OPD’s claim that this Court should summarily uphold the finding that Huemiller misrepresented himself during the internal investigations/interviews simply because OCSC found that he lacked credibility in the hearing is faulty.

D. OPD uses inadmissible evidence upon which to base its argument that OCSC findings must be affirmed.

Before addressing the substance of the factual underpinnings of each of OCSC’s findings specifically, it is important to discuss why so many of the “facts” listed in the supplemental OPD’s Statement of Facts (“OPD SOF”) need not be considered by the Court. As mentioned above, many of these facts were not given any weight by OCSC and did not contribute to its findings. They are used by OPD here only to prejudice the Court against Huemiller and attempt to retry the hearing. However, even if it is assumed, *arguendo*, this evidence somehow contributed to OCSC’s decision, much of it is unreliable, not legally competent, and, therefore, cannot provide the foundation for any part of the decision.

In Tolman, 818 P.2d at 27-28, this Court explained that it is “arbitrary and capricious for an [agency] to base its decision upon factual findings that are not supportable by legally competent evidence.” Thus, under the residuum rule, a reviewing court should set aside “all hearsay and other legally inadmissible evidence admitted by an agency.” Id. at 32. Then, to uphold the decision, there must remain some “‘residuum of legal evidence competent in a court of law’ to support the agency’s findings and conclusions of law.” Id. at 32-33 (citations omitted). There are many OPD “facts” which must be set aside due to their inadmissibility.

First, many items cited to in OPD’s Statement of Facts are inadmissible because the witness was not produced to testify and was, therefore, unavailable for cross-examination. Even if in the context of an administrative hearing hearsay evidence is admitted, minimal safeguards are required by due process. Tolman, 818 P.2d at 28-30. Those safeguards include the opportunity to cross-examine witnesses. The court further explains why this concept is crucial:

The more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In not other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding. . . .

Id. at 29.

Here, there is no indication that OCSC relied on hearsay testimony or on statements of witnesses who did not provide live testimony. However, that did not stop OPD from using those statements in its Brief. For example, in finding that Huemiller had violated OPD's towing procedure, OCSC relied only on the fact that Huemiller admitted that when asked he recommended towing companies to citizens. (R. 1561). However, OPD's argument is, for the most part, based upon out-of-court statements by Kelly Zaugg, Ron Van Beekum, and Clair Baur that Huemiller was directing or "probably" directing tows to OAB. (OPD SOF, ¶¶ 57, 59, 61.) Those statements were taken in the course of the internal affairs investigation conducted by Stubbs. Neither Zaugg, Van Beekum, nor Baur were produced to testify at the hearing. Their out-of-court statements are unreliable hearsay and must be excluded, as OCSC did, from this Court's consideration.¹

Second, OPD references witnesses' hearing testimonies regarding the accusations against Huemiller that are too vague to be reliable. At the hearing, OPD elicited testimony from several employees who recited their belief that Huemiller was violating OPD towing policy. However, the testimony from these witnesses is too vague to be

¹ The most egregious example in OPD's Brief of the use of hearsay testimony was OPD's cite to its own Proffer of Eric Young. (OPD SOF ¶ 71.) Officer Young was specifically prohibited from testifying before the Commission. (R. 3159-63.) Yet, OPD includes this proffer of what he would have said if he had been allowed to testify as evidence that showed that Huemiller had violated the towing policy. (OPD Brief, p. 36.) As a statement by a witness that had been specifically excluded by OCSC and not confronted on cross-examination by Huemiller, this was wholly improper to bring the proffer before this Court unless OPD was arguing, on appeal, that OCSC erred in excluding the witness.

considered, and, indeed, OCSC did not use these statements to support its findings. First, OPD claims that B.J. Mills testified that on at least 10 occasions, when Huemiller was on his cell phone, OAB would show up. (OPD SOF ¶ 60.) However, on cross-examination, Mills admitted that he could only recall one of these calls – the call Huemiller made at the drug stop at 29th & Madison, which is addressed in more detail below. (R. 2708-09; 2731.) Mills further admitted that he never actually heard Huemiller calling OAB, rather he only assumed that Huemiller had because OAB would show up. (R. 2708-09; 2731.)

Former Officer Keith Brady was also called to testify against Huemiller at the hearing. Brady said that there was a time while he worked for OPD, between 1983 and 1995, that when asked for a recommendation for a towing company he would suggest OAB. (R. 3133-35.) Brady testified that he thought it was “possible” that Huemiller and others were doing the same thing.² (R. 3135, 3137.) Further, OPD neglects to point out that Brady does nothing more than confirm what Huemiller admits. (Huemiller admitted that before 1995, he did recommend towers to people who asked him.) Brady also knows nothing about towing issues at OPD after he left the force in July 1995. (R. 3145.)

Finally, OPD references Doug Lucero’s testimony, who said that Huemiller approached him to send tows to OAB. (OPD SOF ¶ 68.) However, Lucero could not remember when Huemiller approached him except to say that it was after the Greenwood

² Brady also said that he did not believe that this “recommending” violated any OPD policy, although he thought it was counter to “the way things were done.” (R. 3135.)

investigation. (R. 3169.) This contradicted Lucero's statement to Stubbs during the 2000 investigation, where Lucero said that Huemiller approached him "when the other [Greenwood] internal investigation took place on the same matter." (R. 3179.) Lucero, at the time of the 2000 investigation, could not pinpoint the time Huemiller approached him relative to the Greenwood investigation. (R. 3181.) Lucero further testified that he had no personal knowledge of any officer calling OAB or otherwise circumventing Wrecker Dispatch. (R. 3174.) These statements by Lucero are too indefinite, vague and contradictory to be given any weight.

Hence, the testimony of Mills, Brady, and Lucero should be disregarded by the Court, as it was by OCSC. Further, these statements must be set aside in this review because the testimony would have been excluded in court either for lack of foundation (the witnesses do not adequately describe "who, where, or when"), as too prejudicial to Huemiller (under Utah Rules of Evidence 403), or as inadmissible character evidence (under Rule 404).

Third, OPD includes in its "facts" Tom Baur's, owner of OAB, refusal to testify under Fifth Amendment protection and argues that this refusal should allow for OCSC to draw an adverse inference against both Baur and Huemiller.³ (OPD SOF ¶ 70; OPD Brief, p. 71.) The adverse inference is improper and not admissible evidence.

³ There is nothing in the findings which indicates that OCSC drew such adverse inference.

If the invocation of the Fifth Amendment is to be admissible, it must be invoked “live,” not by deposition or other form of written testimony. See, Banks v. Yokemick, 144 F. Supp. 2d 272, 290 (S.D.N.Y. 2001) (no adverse inference can be drawn merely because witnesses invoke Fifth Amendment rights during depositions as opposed to live at trial). Baur’s invocation of his Fifth Amendment rights through a letter read at the hearing is inadmissible hearsay and inadequate to allow OCSC to draw an adverse inference against him or against Huemiller.⁴

The last category of OPD “facts” that must be disregarded are those that refer to events that, while there was hearing testimony about them, were not relied on by OCSC or even mentioned its findings. For example, in its Brief, OPD claims that a trip Huemiller admitted he took in the early 1990s is evidence that Huemiller had a conflict of interest. (OPD SOF ¶ 3; OPD Brief, p. 71.) However, in OCSC’s decision, this is not cited as contributing to its determination of conflict of interest. (R. 1561-62.) Because the trip was not part of OCSC’s finding, it was improper for OPD to use any facts surrounding the trip in its marshaling.

⁴ Additionally, while some courts have recognized Fifth Amendment claims of privilege asserted by certain witnesses as admissible and competent evidence introduced for their adverse inferential value against a defendant, see LiButti v. United States, 107 F.3d 110, 123 (2nd Cir. 1997), these courts have declined to enunciate a blanket rule governing the drawing of adverse inferences from a nonparty witness’ invocation of the privilege against self-incrimination, preferring instead a case-by-case approach. “[T]he circumstances of a given case, rather than the status of a particular non-party witness, is the admissibility determinant.” Id. at 121.

The same is true for the tow that took place on SR 79, which OPD says is evidence that Huemiller violated the towing policy. (OPD SOF ¶¶ 79-89; OPD Brief, p. 65.) While OPD clearly wants the Court to believe that Huemiller acted improperly during the towing incident on SR 79, OCSC must have found the evidence on the incident provided by OPD unconvincing because it did not include it in its findings. Therefore, it too should be disregarded by this Court.

There are other events in this last category of OPD “facts” that also should be disregarded on the same basis. Specifically, OCSC did not give any weight to: (1) Huemiller’s disciplinary record prior to his termination (OPD SOF ¶2); (2) whether he purchased vehicles from OAB and resold them (OPD SOF ¶¶ 4-6); (3) any connection, real or fictional, between Huemiller and conduct by Officers Zaugg and Van Beekum (OPD SOF ¶¶ 12-16; 57, 59, 63); and (4) a disagreement between Huemiller and McGregor about where to keep a confiscated set of tires and rims (OPD SOF ¶ 62). It raises the question why, if OPD accepts the findings of OCSC as adequate, it needs to raise these incidents that OCSC determined to be inconclusive at best, or at least unworthy of mention in its findings. Whatever the case, these “facts” are nothing more than a smokescreen to confuse the scrutiny of OCSC’s decision.

E. There is no substantial evidence that Huemiller lied during an internal affairs interview.

Huemiller, in his initial Brief, compares what Huemiller supposedly told to Greenwood and what he stated to Stubbs during the 2000 interview to show that there

was no discrepancy between the two. (Huemiller Brief, pp. 2-9.) OPD contends: 1) that the only issue is what OCSC believed at the time of the hearing and 2) that Huemiller lied by not telling Greenwood that he recommended OAB to car owners prior to 1995. All other alleged discrepancies between Greenwood's notes and the Stubbs' interview have apparently been abandoned by OPD. (OPD Brief, pp. 63-65). As to the first contention, the standard of review is not whether the OCSC believed that Huemiller had lied. Such a standard would immunize administrative decisions from any meaningful review. Rather, this Court has held that there must be substantial evidence supporting the charges. Lucas v. Murray City Civil Serv. Comm'n, 949 P.2d 746, 758 (Utah App. 1997). Therefore, what the OCSC believed is not relevant if there is not substantial evidence showing that Huemiller in fact lied during one of the two investigations.

The contention that Huemiller lied to Greenwood in 1996 by not telling him about 'recommending' OAB prior to 1995 is necessarily complicated by the fact that there is no transcript of the interview. All that exists are summary notes made from the original notes taken by Greenwood. Nonetheless, a review of those notes is illuminating. (R. 330-331.) Greenwood details thirteen questions that he apparently asked Huemiller and the order that he asked them in. According to his notes, Greenwood never asked Huemiller if he had ever recommended OAB to a car owner and then put it down as a owner preference.

Greenwood testified at the hearing that he asked the question “I then asked if Tony had any other information about these allegations that I should know. . . .” (R. 3115.) According to Greenwood (and OPD) this vague question should have elicited information from Huemiller about making recommendations to drivers. (R. 3115-6, 3118.) Yet, neither Greenwood’s testimony or his notes ever indicate that he told Huemiller what the “allegations” were that he was investigating,⁵ or that he even told Huemiller what he meant by the term “circumventing,” although according to his notes this was how he started out the interview. (R. 3127, 3130.)

In short, OPD’s argument regarding lying during an IA investigation boils down to this: In 1996 Huemiller was asked “is there any other information I should know” and he replied “no.” In 2000, Huemiller was asked if he had ever recommended OAB to a driver prior to 1995 and he answered “yes.” According to OPD these two answers are inconsistent (and therefore a lie) because Huemiller should have been able to read Greenwood’s mind and known that what Greenwood was really asking was if he had ever recommended OAB to a driver. Such a contention would be laughable if it was not being used to destroy Huemiller’s career. At least in Lucas, the officer had been asked questions which were similar in nature. 949 P.2d 746 (Huemiller Brief, pp. 21-22.) Still,

⁵ Interestingly, at the hearing, Greenwood did recite what allegations he was supposed to investigate: if certain officers were circumventing Wrecker Dispatch and was OAB summoned without going through dispatch. (R. 3109.) Accordingly, even if he had made this explanation to Huemiller, there is nothing which would have alerted Huemiller that recommending a tow company was at issue.

this Court concluded that minor differences in how the officer answered questions (such as whether his gun was still in his holster) did not constitute substantial evidence of lying. Lucas at 761. Here, there is no evidence that Huemiller lied because OPD cannot show that he was asked a question in 1995 which could have reasonably been expected to elicit the same answer as the question Stubbs posed in 2000 about making recommendations to drivers.

OPD tries to bolster its position by referring to “other” evidence showing that Huemiller was lying. (OPD Brief, pp. 64-5.) This “other” evidence is Zaugg and Van Beekum’s statements, Brady and Lucero’s testimony, Hunt and Clair Baur’s statements, and Young’s proffered testimony. It also includes the inference from Tom Baur’s refusal to testify. As discussed in Section I B., above, none of this evidence meets the “residuum rule” standard. Tolman 818 P.2d at 32-33. OPD also refers to that stop at 29th & Madison. Yet, Huemiller never denied his actions on the scene. (Section I F.) Finally, the chart presented by Ms. Ortega on behalf of Huemiller shows nothing other than that very few tows were called in by Huemiller. (R. 1284-88.) OPD also cites as significant that Stubbs, Watts and Greiner thought and testified that Huemiller lied to them. Yet, none of them could give any specifics as to what Huemiller supposedly lied about. Their “feeling that he lied” is of no value without specific evidence and is not competent evidence under Rule 403 of the Rules of Evidence.

F. The admissible evidence does not support that Huemiller lied about the drug impound.

OCSC concluded that Huemiller lied about the 29th & Madison stop because there were “no drugs in the auto and there was no paraphernalia in the car.” (R. 1559.) Of course, in the very next sentence OCSC acknowledges that there was a pipe with drug residue found on the driver of the car, but then asserts that Huemiller could not have seen the pipe.⁶ (R. 1559.) As set forth in Huemiller’s opening Brief, this conclusion (that Huemiller did not see the pipe) is not supported by substantial evidence because Huemiller testified that he saw the pipe, and his testimony was confirmed by Mills who said that Huemiller watched him search the driver and throw the drug pipe away. (Huemiller Brief, p.12.) Although testimony supporting OCSC’s conclusion could be imagined (e.g., Huemiller was on the other side of the house while Mills searched the driver) OPD does not, and cannot, cite to any testimony or other competent evidence which refutes Huemiller’s and Mills’ testimonies or which supports OCSC’s conclusion that “Huemiller could not have seen the pipe.”

⁶ Huemiller admitted at the hearing that during the stop he did call OAB directly instead of summoning them through Wrecker Dispatch. While this was improper, OPD has not asserted that calling directly would warrant termination. Rather, it takes the position that the car should not have been seized under the drug forfeiture laws (because no drugs were found, only paraphernalia) and that doing so violated policy. John Valdez testified that it was proper, pursuant to the Task Force policy, to seize a vehicle if only paraphernalia was present. (R. 2747, 2750.)

Instead, OPD first contends that Huemiller lied because, contrary to his testimony, he handled a lot of traffic accidents between 1995 and 2000. (OPD Brief, p. 66.) Whether Huemiller did or did not handle a lot of traffic accidents has no bearing on whether he watched Mills search the suspect and find the drug pipe. (*Id.*) OPD also uses Greiner's testimony that a vehicle could not be seized for paraphernalia alone. (*Id.*) Again, this does not help support OCSC's finding that Huemiller lied. OPD also cites to Mills' testimony that he saw Huemiller on the phone at other traffic stops many times and that he called Tom Baur many times from his cell phone. As discussed above, Mills testimony is worthless because it is too vague. (Section I D.) As discussed in the next argument, the number of calls Huemiller made to OAB is meaningless as OPD never showed a correlation between these calls and improper tows. Further, neither argument bears on the issue of whether Huemiller actually saw the drug pipe.

OPD also states that Mills' testimony that Huemiller was calling OAB before Mills spoke to Huemiller shows that Huemiller was lying. (OPD Brief, p. 67). Again, this does not refute the testimony that Huemiller watched the driver being searched and saw the drug pipe.⁷ Finally, OPD argues that Huemiller lied because he initially told Stubbs during the IA interview that he called OAB after being told there was drug paraphernalia and then changed his testimony at the hearing to comport with Mills' testimony. (OPD

⁷ Actually, Mills did not testify that Huemiller called before he did the search, as represented by OPD, but that Huemiller made the call after the search had discovered the drug pipe. (R. 2722.)

Brief, p. 67.) This still does not contradict Mills' testimony that Huemiller watched him conduct the search. Further, during the IA investigation, Huemiller did not exactly recall how he learned of the crank pipe. First he said he thought he had been told by another officer, and then he said that he saw the drug pipe, which was his testimony at the hearing. (R. 530.)

In short, there is simply no competent, or admissible, evidence that supports OCSC's conclusion that Huemiller did not see the drug pipe. Without such evidence, the conclusion that Huemiller lied about the stop is not supported by substantial evidence.

G. Huemiller did not lie about other "matters."

OPD next argues that there were several other "matters" that Huemiller lied about. (OPD Brief, pp. 68-9.) It is not clear why this section is included in OPD's Brief as it does not relate to any of the findings of OCSC. Moreover, none of these "matters" show that Huemiller violated OPD's towing policy and/or lied about the 29th & Madison stop.

OPD first argues that Huemiller lied about the stop at SR 79. As discussed above, this was not a finding of OCSC and is, therefore, not at issue. (Section I D.) However, putting that aside for the moment, OPD argument is flawed because it ignores the undisputed testimony of an occupant of the car that was towed, Bulmaro Aparicio. Mr Aparicio testified that he asked Huemiller to have the vehicle, which belonged to his brother who apparently did not speak English very well, towed by OAB. (R. 2676.) As required under the policy, and as testified to by Huemiller, he then called dispatch which

apparently contacted OAB, which then came out and towed the Aparicio vehicle. In short, contrary to OPD's initial assertions, *there was no violation of procedure by Huemiller*. OPD tries to reargue this by referring to a statement by Armando Aparicio. (OPD Brief, p. 68). However, Armando was never called to testify at the hearing.

OPD also makes much of Huemiller having a cell phone that he admits he obtained from OAB, and that he made a lot of phone calls to OAB. First, OPD does not dispute Kelli Huemiller's testimony that she tried to pay OAB for the monthly charge on two occasions but was rebuffed by OAB. (R. 2902, 2907, 2988-89.) Rather, OPD simply ignores it. Granted, Huemiller having the cell phone was not politic. However, the mere fact that he did, is used by OPD to divert attention from the fact that it never found (and never presented evidence to OCSC) that Huemiller had diverted tows to OAB, with or without use of the cell phone, or that he received the cell phone in exchange for directing any tows to OAB.

The 2000 towing investigation started because there was an allegation that officers were directing tows to OAB. (R. 2863-64.) However, in regard to Huemiller, OPD has only ever pointed to two tows, 29th & Madison and SR 79, which it claims violated the towing policy. (R. 77-104, 134, 337-340.) These remarkably scant findings came after OPD had conducted a very intensive and time consuming investigation which included pulling all of Huemiller's cell phone records for a three year period, and carefully comparing them to all of the OPD's accident reports. (R. 2788-89.) The investigation

also involved interviewing numerous drivers who had their vehicles towed, as well as other officers who had been on Traffic duty and were therefore at numerous accident scenes. (R. 2788, 2790.) Notwithstanding these efforts, OPD could not find any correlation, or even evidence of coincidence, between calls to OAB by Huemiller and tows that went to OAB.

In short, SR 79, the cell phone, and the number of calls to OAB do not show wrongdoing. Therefore, those items should not have been marshaled.

H. There is no evidence that Huemiller violated the towing policy.

OCSC found that Huemiller had violated towing policy based on his admission that, prior to 1995, he had made recommendations to drivers if they asked. In its Brief, OPD argues that there is substantial evidence supporting this finding because Huemiller admits that prior to 1995 he made recommendations to drivers.⁸ (OPD Brief, p. 69.) Not only is this argument a tautology, it completely fails to address the point made in Huemiller's opening Brief that prior to 1995 *there was no policy prohibiting an officer from making recommendations*. (Huemiller Brief, pp. 9-12.) It was only after 1995 that OPD had a written, verifiable policy that prohibited such conduct.

OPD ostensibly argues, relying on the testimonies of Lucero, Mills, Brady, Zaugg and Van Beekum, that there is evidence that Huemiller made recommendations after

⁸ It is also significant that OCSC did not find that the 29th & Madison or SR 79 tows violated OPD policy. It ignored the latter and only found, mistakenly, that Huemiller had lied about former.

1995. (OPD Brief, p.69-70.) However, Brady was not there after 1995, and Lucero and Mills could not point to specific instances where this misconduct supposedly occurred. (Section I D.) Zaugg and Van Beekum did not testify at all, but even if they had, based on their IA statements, they too would not have been able to provide any evidence showing that Huemiller had made recommendations after 1995. (R. 435-474, 478-521.) Accordingly, because this testimony must be set aside, there is not a residuum of competent evidence to support OPD hypothesis that Huemiller recommended towing companies after 1995.

Finally, OPD references its list of ‘bad things’ once again, referring to the cell phone, the GEO Tracker, and that Huemiller was a friend of Tom Baur as evidence that Huemiller gave out recommendations after 1995. (OPD Brief, p. 69-70.) What OPD lacks is any evidence that these things induced Huemiller to make recommendations to drivers. If that had occurred, why didn’t OPD produce even one driver, whose car had been towed after 1995, to testify that Huemiller had made such a recommendation. Lastly, OPD refers to the chart presented by Huemiller (through Huemiller’s attorneys’ law clerk, Ortega) which showed that Huemiller called for a tow on all of 6 occasions in a 5 year period and that 4 of those tows went to OAB. Such statistics, without more, are inconclusive. OAB was one of the larger towing companies, had multiple listings with wrecker dispatch, and usually received a large number of tows. (R. 381.) Further, not one of these 4 drivers were called as witnesses to testify about how they ended up being

towed by OAB. All this chart shows is that during the 1995 to 2000 period Huemiller spent most of his time on the Strike Force and simply did not have much involvement with having accident-damaged cars towed.

Again, OPD fails in demonstrating that there is any relevant and competent evidence regarding Huemiller's violation of the towing policy that Huemiller failed to marshal. Because the competent evidence does not support OCSC's finding, there is not substantial evidence supporting the finding that Huemiller violated the towing policy.

I. OCSC does not substantiate Huemiller's conflict of interest.

OPD again fails to show that there is any unmarshaled evidence that Huemiller directed tows to OAB in exchange for favors or money. OPD does not dispute that this is ultimately the key issue. By its own admission, merely being friendly with OAB or with its owners, was not sufficient or a terminable offense. (OPD Brief, p. 70-1.) As discussed above, OPD has not shown that there is any evidence supporting such a *quid pro quo* arrangement. Indeed, OPD cannot show that Huemiller directed tows to OAB, even in the absence of having received anything from OAB.

OPD also cannot show that Huemiller received anything of demonstrative value from OAB. OPD can only point to Huemiller driving a GEO tracker, that he purchased from OAB, for a couple of months without registering it. At least one other officer (Croyle) did the same thing, or arguably even worse, and OPD saw nothing wrong with it. OPD also says that Huemiller received a finder's fee for helping OAB sell cars. Yet,

there is no evidence that those fees were not earned or were extravagant. It also ignores that another officer (Weloth) sold vehicles and received fees from OAB and OPD found nothing amiss. OPD also argues that Huemiller and Baur were friends. Guilt by association is not evidence. Finally, OPD argues that Zaugg and Van Beekum had cell phones from OAB and that they were guilty of directing tows. Again, this evidence is neither admissible nor of any value.⁹ Therefore, OPD can point to no unmarshaled evidence which substantiates a conflict of interest.

J. There is no evidence of conduct unbecoming an officer.

Lastly, OPD argues that Huemiller's call to McGregor is evidence of conduct unbecoming to an officer. (OPD Brief, p. 71-2.) There is no dispute that Huemiller called McGregor after being told not to talk about the investigation. However, OPD does not dispute that this call was made because Huemiller needed someone to cover his shift because he was being suspended. (Huemiller Brief, p. 17.) Perhaps Huemiller should have alerted Stubbs in his IA interview that he needed to make sure that McGregor would cover for him the next day. Failing to do so, and, instead, leaving a message for McGregor (who then called Huemiller back), is no worse than an error in judgment.

OPD tries to make the phone conversation seem unprofessional by referring to the language used by Huemiller in the message ("f—ing rat", for example). However,

⁹ The only connection between Zaugg, Van Beekum and Huemiller is that apparently their ancestors all came from either Holland or the Netherlands.

McGregor testified that this was how he and Huemiller generally talked with each other in private. (R. 2667.) Further, although McGregor knew that Huemiller was angry, he made it clear that he was not at all threatened by the message or their subsequent conversation. (R. 2667.) Since McGregor did not feel coerced, apparently it was the fact that Huemiller expressed his emotions over being suspended, which is unprofessional. Importantly, even according to OPD, there was nothing of substance, i.e., nothing about the underlying investigation, that was discussed, in compliance with Stubbs' order. (OPD Brief, p.71.) The plain language of his order did not forbid all contact between Huemiller and other officers (particularly for necessary purposes) or order that Huemiller could not mention that he had been interviewed. As with Greenwood's open ended question, OPD apparently believes that Huemiller should be punished because he did not understand the full nuance of what Stubbs was apparently trying to say. Such evidence is not supportive of the finding of unbecoming conduct.

The requirement that a decision be supported by substantial evidence must, in the end, mean something. There must be some modicum of evidence which is directly related to and which supports each of the conclusions reached by the OCSC. While there is no question that OPD has recited numerous facts and bits of information that were presented at the hearing, it has utterly failed to show that they are related to, let alone supportive of, the conclusions reached by OCSC. Moreover, OPD had attempted to divert this Court's analysis by digging up evidence which was not presented at the hearing. Although the

allegations made against Huemiller were broad and diverse, the evidence presented actually amounted to very little. OPD simply did not present, nor has it shown in its Brief, that the OCSC findings are supported by admissible evidence.

II. HUEMILLER'S TERMINATION WAS DISPROPORTIONATE AND INCONSISTENT WITH PRIOR DISCIPLINE

As set forth in Huemiller's opening Brief, during the hearing with OCSC, Huemiller presented extensive evidence that the charges against him did not warrant the sanction imposed by Greiner. OPD, in its Brief, does not dispute that OCSC failed to make any specific findings of fact or conclusions of law regarding Huemiller's claim that his termination was both disproportionate and inconsistent with prior discipline given under Greiner.¹⁰ OCSC's failure to address the issues of proportionality and consistency and make findings is itself an abuse of discretion and the decision should be reversed. See Pickett v. Utah Dep't Commerce, 858 P.2d 187, 191-92 (Utah App. 1993).

As set forth below, OPD failed to meet its burden at the hearing regarding the proportionality and consistency of its termination of Huemiller. Thus, OCSC Decision affirming Huemiller's termination must be reversed, especially in light of OCSC's lack of findings on these issues.

¹⁰ Instead, it attempts to skirt this issue by stating that OCSC's final determination affirming Huemiller's termination is sufficient to meet OCSC's requirement to provide specific findings/rulings on this issue. (OPD Brief, n. 22.)

A. OPD does not refute that termination is not proportional to the charges against Huemiller.

OPD has the burden to prove that its termination of Huemiller was proportionate to the alleged offenses. See Lunnen v. Utah Dep't of Transportation, 886 P.2d 70, 73 (Utah App. 1994), cert. denied, 892 P.2d 13 (Utah 1995), and Section III, below. OPD did not meet this burden, and further, OCSC's apparent conclusion to the contrary (no specific finding on proportionality was made) is an abuse of discretion and contrary to the weight of the evidence.

OPD does not dispute that of the four charges against Huemiller sustained by OCSC, only the charges related to misrepresenting the truth and directing tows in exchange for remuneration warrant termination. (Huemiller Brief, p 19.) However, OPD does not dispute that OCSC did *not* find that: that Huemiller had directed tows *in exchange for* gifts/favors. (R. 2836-37.) OCSC did not find that Huemiller had received gifts/favors in exchange for directing tows to OAB, or that he had even violated OPD's policy after 1995. Therefore, the charge of misrepresentation becomes central.

To support the proportionality of Huemiller's termination, OPD contends that "every higher-ranking former or present OCPD officer who was asked, confirms that termination was the proper action." (OPD Brief, p. 76.) Former Chief Greenwood, Gary Heward and Lt. Watt, however, merely testified that officers should not lie, not that Huemiller should have been terminated. (OPD's SOF ¶¶ 122-24.) Hence, this testimony does not show that Huemiller's termination was proportional.

Additionally, Huemiller was not asked the same questions in both the 1996 and 2000 IA interviews. (Huemiller Brief, pp. 20-21; Section I E.) In Lucas this Court held that dismissal upon a charge of dishonesty for giving answers that varied slightly, from one interview to another, was not warranted (i.e., the charge was not supported by substantial evidence). 949 P.2d at 761. If, as in Lucas, inconsistent answers cannot support a charge of dishonesty, Huemiller's different responses to different questions certainly does not either. Therefore, Huemiller's termination is disproportionate, even if he did recommend towers before 1995 or was less than forthcoming in the IA interview.

OPD does not dispute this directly but does reference its arguments pertaining to the issue of inconsistent treatment as support for its contention that Huemiller's termination was proportionate to the offense. As set forth below, however, OPD failed to meet its burden to rebut the evidence that Huemiller's termination was inconsistent with Greiner's prior disciplinary record. Thus, this evidence does not support its proportionality either.

B. OPD did not refute that termination is not consistent with previous sanctions imposed by Greiner.

Huemiller introduced extensive evidence that officers in similar situations had not been terminated by Greiner. This evidence included officers who accepted gifts in exchange for directing tows to OAB; officers who had lied during law enforcement investigations; and officers who had engaged in multiple offenses which included lying, physical altercations and drinking on duty. (Huemiller Brief, pp. 24-28.) Because

Huemiller made a prima facie showing that his termination was inconsistent with prior discipline by Greiner, OPD had the burden to rebut this evidence by explaining this unequal treatment.¹¹ Not only did OPD fail to meet its burden during the hearing, but OCSC abused its discretion in failing to make any findings regarding these issues.

1. OPD misstates facts to try to show consistent treatment.

In its Brief, OPD misstates facts in an attempt to downplay and/or excuse the strikingly similar offenses committed by officers who either were not disciplined at all, or, at worst, were given a letter of caution. (Huemiller Brief, pp. 24-28.)¹²

Another Sergeant, Spence Phillips, admitted that he had recommended OAB to drivers when asked for a personal recommendation or when the drivers were from out of state, yet received no discipline. (R. 373, 379, 1543.) Thus, OPD's contention that Phillips only used OAB without calling dispatch one time is inaccurate. Moreover, Greiner admitted during the hearing that he was aware that Phillips had some extra work done on his car that OAB had not been paid for. (R. 2870.)

OPD also downplays Mills' action of admittedly asking OAB to tow a vehicle when it was already at the scene stating that he only did this on one occasion without

¹¹ This is incorrect. Kelly v. Civil Serv. Comm., 2000 UT App. 235, ¶30 and further discussion in Section III A.

¹² The Court should keep in mind that the standard is "*similarly situated*" employees, Pickett, 858 P.2d at 190, not "identically situated" employees, as it would be virtually impossible to ever point to an employee who had committed an identical offense under identical circumstances.

going through dispatch. Notably, Huemiller was only found to have contacted OAB on one occasion, at 29th & Madison, after 1995. (Huemiller Brief, pp. 12-14; Section I F.) Furthermore, Mills admitted to receiving a free oil change at OAB. Mills received no discipline at all. (R. 1539, 2807-08).

OPD admits that Lucero received free auto repair work from OAB, but states that Lucero “visited OAB twice to pay for the work but OAB refused payment.” This statement misrepresents the facts by making it appear that Lucero made two extra trips to OAB in order to attempt to pay for the repair work. Lucero actually had free work done on his car on two separate occasions at which time he said OAB refused to accept payment and would not give him a bill. (R. 374, 1388.)

Likewise, OPD admits that Felter merely received a letter of caution for violating OPD policy by using OAB to provide free repair work on his police vehicle. (OPD’s SOF ¶ 59; R. 1464, 2874.)

OPD does not dispute the fact that Weloth improperly referred work to OAB, and in turn, OAB referred work to him, and that he purchased and later sold motorcycles from OAB (just as Huemiller did with automobiles). Additionally, Weloth admitted that he recommends OAB to personal friends, which is a violation of OPD’s policy.¹³ Weloth merely received a Letter of Caution. (OPD’s SOF ¶ 60; R. 2875.)

¹³ Chief Greenwood testified that recommending a wrecker to a vehicle owner would be directing tows and would be a violation of OCPD policy. (R. 3118.)

OPD attempts to excuse its failure to discipline Croyle for accepting a car from OAB to drive on dealer plates for several weeks by stating that it was her intent to purchase the car, although she never did. Huemiller, on the other hand, did in fact purchase a car from OAB which he drove for two months before selling it.

OPD also does not dispute that Greenhalgh had his car towed and repaired by OAB for free, or for a minimal charge, and was never disciplined. Neither does it dispute that another officer was merely talked to about having had his patrol car repaired by OAB.

Given that the above officers were either not disciplined at all, or were merely given Letters of Caution, the decision to terminate Huemiller, a long-time, dedicated employee, for violating the same policy or receiving favors from OAB in a similar manner is indefensible.

Further, the salient evidence at the hearing established that others were not terminated for lying. In fact, the harshest discipline handed out to a similarly situated employee was a 2 day suspension for lying about being armed, and a 1 day suspension for an employee who lied about abusing his position to force someone to give up custody of their children.¹⁴ Moreover, OPD has not explained its disparate, more lenient treatment of 3 officers who were found to have violated policy by drinking on duty and then fighting

¹⁴ Notably, during the hearing, Greiner admitted that the incident involving the officer making misrepresentations in order to gain custody of a child was a similar offense to what Huemiller did. (R. 3418.)

at a bar. The more severe discipline handed out was a 2 day suspension, which was given to an employee who had engaged in conduct unbecoming an officer in addition to the above, multiple offenses. This evidence shows Greiner's clear inconsistency in his treatment of Huemiller.

OPD has failed to meet its burden to dispute the prima facie case of inconsistent discipline. The only rebuttal evidence put on by OPD during the hearing was Greiner's self-serving testimony that he considered what Huemiller had done to be of greater severity. (R. 3419-3422.) Notably, Greiner only gave this self-serving testimony with regard to the officers accused of lying and/or getting into a bar fight. Thus, there was no rebuttal testimony presented distinguishing the above officers who violated the towing policy and/or who received gifts or favors from OAB. Further, OCSC abused its discretion in failing to make any findings whatsoever regarding this issue. Thus, the Court should reverse OCSC's decision.

2. OPD's attempt to marshal the evidence regarding consistency is inadequate.

In its Brief, OPD refers to evidence that was never presented during the hearing or considered by OCSC in order to rebut Huemiller's prima facie case of disproportionate and inconsistent discipline. (OPD Brief, pp. 74-77.) These arguments are misplaced as this Court's review "shall be on the record of the commission and shall be for the purpose of determining if the commission has abused its discretion or exceeded its authority." Utah Code Ann. § 10-3-1012.5 (2004). OPD had its chance to present this

evidence during the hearing, and failed to do so. Nonetheless, Huemiller briefly responds to OPD's contentions below.

First, OPD attempts to argue that Huemiller's termination was consistent with Greiner's decision to terminate Officers Zaugg and Van Beekum. However, OPD cites to no evidence presented at the hearing to even support its contention of consistent treatment. Officers Zaugg and Van Beekum did not testify during the hearing and OCSC did not reference their discipline in supporting a finding of consistent treatment. (R. 3425.)

Second, OPD asserts that Huemiller should be estopped from raising the issues of disproportionality/inconsistency. To support this "estoppel" argument, OPD cites to an objection made by Huemiller's counsel during the hearing regarding allowing Greiner to testify to facts which were not disclosed during discovery. During discovery, Huemiller requested from OPD all discipline and terminations imposed under Greiner's tenure as Chief. (R. 76-78.) After Huemiller was successful in compelling this information from OPD, his attorneys reviewed all those disciplinary records. None of the records reviewed identified any officers who were terminated for lying during an IA investigation, as OPD now contends. Thus counsel for Huemiller made an objection to Greiner's testimony during the hearing, which was sustained by OCSC.¹⁵ Thus, this evidence should not be

¹⁵ There is nothing in the record, independent of Greiner's own self-serving statement, to support that: (1) there were in fact other Officers terminated during Greiner's tenure for lying in an IA; or (2) if taking Greiner at his word -- that others had

considered by this Court. In addition, there were no findings made by OCSC supporting that other similarly situated employees were terminated for lying in a IA.¹⁶ This is just another attempt by the OPD to disguise the fact that it clearly treated Huemiller inconsistently when compared to other similarly situated employees.

In a desperate, final attempt to distinguish Huemiller from these other similarly situated officers, OPD argues that they are not similarly situated due to Huemiller's prior "discipline." (OPD Brief, p. 75; OPD SOF ¶ 2.) Notably, OPD did not make this argument to the OCSC; rather, it is merely an attempt by OPD to taint this Court's review. This evidence should be disregarded for several reasons.

First, this evidence does not help OPD meet its burden as it does nothing to show that the other above similarly situated officers had clean records. Second, it is clear from the record that these prior instances, the most recent of which took place almost 6 years prior to Huemiller's termination, had absolutely nothing to do with Huemiller's

been allowed to "resign" after failing polygraph tests -- that these employees were similarly situated to Huemiller. In fact, just based upon Greiner's statement, these employees appear to be easily distinguishable from Huemiller in that they failed polygraph tests before being asked to resign. Huemiller was not asked to take a polygraph test. Greiner was allowed to testify regarding a Sergeant who was apparently terminated for lying during an IA. However, Greiner admitted that this officer was terminated by the previous Chief. Thus, as Huemiller's counsel stated during the hearing, this is irrelevant as to whether Greiner abused his discretion in terminating Huemiller. (R. 3413-15.)

¹⁶ Moreover, Huemiller did not lie during the IA interviews. (Section I E.)

termination in March of 2000.¹⁷ Third, there is simply no indication that the OCSC relied upon this information (as it would have been an error to do so) in determining which employees were “similarly situated” to Huemiller. (See R. 1557-1563.)

Even after presenting the above evidence in an attempt to meet its burden belatedly -- after the hearing -- OPD is unable to “articulate a fair and rational basis for the apparent penalty inconsistencies.” Pickett, 858 P.2d at 192. Perhaps this explains OCSC’s failure to address this issue in its Decision. Regardless, as in Pickett, “this court is unable to evaluate the basis for the apparent disparity between [Huemiller’s] penalty, and the penalties assessed in similar, or even more egregious cases.” Id. The above un-refuted evidence, along with the other independent factors which were outlined in Huemiller’s opening Brief including the length and quality of Huemiller’s service and the nature of the alleged wrongdoing (Huemiller Brief, pp. 18-24), support a finding that Huemiller’s termination was disproportionate and should be reversed.

¹⁷ The first referenced instance took place in 1985, fifteen (15) years before his termination. Additionally, all of the referenced instances occurred *prior* to Huemiller’s promotion to a Sergeant in 1995. Moreover, most of these instances merely record discussions that Huemiller had with his superiors.

III. REQUIRING HUEMILLER DISPROVE THE CHARGES DEPRIVED HIM OF A FULL AND FAIR HEARING

A. OPD's argument on the burden is contrary to the plain language of the Rule and its prior argument.

It is well established that a civil service commission's review of disciplinary matters "involves two inquiries: 1) do the facts support the charges made by the department head, and, if so, 2) do the charges warrant the sanction imposed?" Tolman, 818 P.2d at 25. OCSC's Decision is fatally flawed because OCSC Rule 10-6 puts the burden on Huemiller to disprove OPD's charges, thereby effectively eliminating the first inquiry in its entirety.¹⁸ OPD responds that Rule 10-6 refers only to the second inquiry and is consistent with the holding in Kelly, 2000 UT App 235. (OPD Brief, pp. 80-82.) This ignores the plain language of Rule 10-6 and is contrary both to the position that OPD took when the issue was argued on motion to OCSC and at the evidentiary hearing, and to OCSC's decision, which did not limit the application of Rule 10-6 to just the issue of sanctions. Further, even if, *arguendo*, Rule 10-6 applies only to the sanction query, it still violates the holding of Kelly, which did not place the ultimate burden on the employee of proving that the sanctions were unwarranted, but just required the employee to make a prima facie showing of inconsistency. 2000 UT App 235, ¶30.

¹⁸ The next argument will address why requiring Huemiller disprove the charges against him violates Utah law and Huemiller's right to due process.

It is whimsical to read Rule 10-6 as placing the burden of proof on the employee only on the issue of sanctions. The Rule makes no reference to sanctions but rather unequivocally states that “[t]he procedure at the hearing shall require the appellant first establish the grounds on which he or she relies to disprove the action taken by the appointing authority which he or she considers creates the adverse affects.” OPD contends that the sentence fragment “disprove the action” must refer to the discipline or sanction imposed and not the factual basis for the discipline. If OCSC had meant this, it could have directly stated such in Rule 10-6, or clarified the Rule when the issue was raised by Huemiller in a motion prior to the hearing. That it chose not to do either of these is significant. (R. at 114-15.) Further, if “disprove the action” actually references sanctions, and not the factual basis for the discipline, what then does the rest of the sentence, “creates the adverse affects,” actually reference? OPD’s interpretation of “disprove the action” makes the last part of the Rule duplicative and therefore unnecessary. A reasonable interpretation is that “disprove the action” refers to the factual basis for the discipline, while “creates the adverse affects” is referring to the discipline itself.

OPD’s interpretation of the Rule makes no sense for another reason. The Rule states that the employee must first establish the basis for ‘disproving the action’ taken against him. OPD’s interpretation would mean that the employee must prove that the sanctions levied against him are inconsistent with prior discipline before it is determined

if he did anything wrong. This is contrary to Utah case law which incontrovertibly states that the query regarding sanctions is made only after the factual basis for the charges has been proved. Tolman, 818 P.2d at 25.

OPD's argument is also antithetical to the position it took before OCSC. Before the hearing was convened Huemiller filed a motion seeking to have OSCS change the rule and place the burden on OPD to prove that Huemiller did something wrong. (R. 50-59.) OPD responded by arguing that "the procedure established by the Commission is not, as Mr. Huemiller contends 'directed solely to the first requirement, determining whether the facts support the charges.' *It also permits appellants to establish inconsistency of sanctions.*" (R. 120)(emphasis added). If there is any confusion as to what OPD meant, it is clarified by its Attorney's opening statement at the hearing:

I submit that when you see the entire picture and look at the evidence, you will conclude that Mr. Huemiller has failed in his burden to convince you of the two things that he has to convince you of under the Utah law.

First is that there is no evidence to support the finding . . .

(R. 2575.) For OPD to argue now that the Rule only requires Huemiller to prove that the sanction was unwarranted is disingenuous.

OCSC's Decision does not remove the burden of proof from Huemiller, and the whole tone of the Decision, and in particular its findings regarding the 29th & Madison stop, show that OCSC was requiring Huemiller to disprove the accusations made by OPD. (R. 1557-63.) If the burden of proof had been on OPD, one would have expected the

Decision detail those facts which supported OPD's contention that Huemiller had improperly directed the tow. Instead the discussion is focused on whether Huemiller has proven that there were drugs in the car (thereby justifying towing by OAB and disproving that he did anything wrong). This is best illustrated by the first sentence of the relevant paragraph which concludes that "Huemiller misrepresented the truth in his account [of the seizure]" and makes no mention of any facts supporting the charge. (R. 1559.) In summary, OPD took the position that Huemiller had the burden of proof on both queries, and OCSC adopted that position when it viewed the evidence to determine not if the charges were true, but whether they had been disproved by Huemiller.¹⁹

Even if it is assumed, *arguendo*, that Rule 10-6 really applies only to whether the discipline was proportional and consistent, it is still not consistent with the holding in Kelly and other Utah cases. Kelly does not place the burden on the employee to prove consistency of punishment. Rather, Kelly simply provides that before a civil service commission looks at the issue of consistency, the employee must present some evidence that of inconsistency. Id. at ¶30. The employee's burden is to make out a *prima facie* case of inconsistency and, the ultimate burden of proof remains with the employer, unlike

¹⁹ OCSC left unaddressed the issue of what level of evidence Huemiller had to produce to 'disprove the charges' against him. This Court has previously stated that the agency must prove the charges against the employee by 'substantial evidence.' Lucas, at 758. Was this the standard used to review the evidence presented by Huemiller or was he held to a much higher standard? This in itself is a basis for overturning the findings.

Rule 10-6 which places the ultimate burden on the employee. Kelly at ¶30 (“[t]he burden was on Kelly to establish a prima facie case that the Chief acted inconsistently. . .”).

OPD also argues that Rule 10-6 correctly places the burden on Huemiller to prove that the discipline is proportional to the severity of the charges.²⁰ This too violates Utah law. As set forth above, in Lunnen, this Court held that the agency has the burden of “demonstrating that its sanction is not disproportionate. . .” 886 P.2d at 73. Therefore, even if Rule 10-6 applies only to the question of sanctions, it violated Utah law by requiring Huemiller to bear the ultimate burden of showing that the discipline was either disproportionate or inconsistent.

B. Requiring Huemiller to disprove the charges against him violates Utah law and Huemiller’s right to due process.

OPD argues that even if the burden was on Huemiller to disprove the charges, based on Benavidez v. City of Albuquerque, 101 F.3d 620 (10th Cir. 1996), this was not a violation of due process and therefore, *a priori*, acceptable. This argument fails for two reasons. First, OPD’s argument is based on a federal case, which is not legally controlling and distinguishable factually. Second, regardless of whether there has been a violation of due process, Utah law does not support putting the burden to disprove the charges on Huemiller.

²⁰ The second query – do the charges warrant the sanction imposed – breaks down into two separate queries: proportionality and then, consistency. Kelly, 2000 UT App. 235, ¶21.

First, Benavidez is not a Utah court case and is not controlling authority for this Court. Further, while the employee's due process claim was denied in that case, the 10th Circuit Court acknowledges that it may be improper to place the burden on an employee when the employee has had inadequate opportunity to present his case in the pretermination hearing. Id. at 626; Hulen v. Yates, 322 F. 3d 1229 (10th Cir. 2003). A similar conclusion was reached by the New Mexico Supreme Court in City of Albuquerque v. Chavez, 965 P.2d 928 (N.M. 1998). Using the same three part balancing test used by the 10th Circuit,²¹ the Chavez Court found that the employee did not have an adequate opportunity to present evidence at the pretermination hearing because the employee's attorney was not permitted to question the employee or other witnesses, raise certain affirmative defenses, or allow more than two witnesses to speak. Id. at 931. In concluding that it was a violation of due process to put the burden on the employee at the post-termination hearing, the court found that there was an increased risk that the employee would be erroneously terminated, and that it was a relatively low administrative burden to require the city carry the burden of proof. Id. at 932.

²¹ The three part test involves three factors: 1) the private interest to be affected by the official action; 2) the risk of erroneous deprivation of such interest through the procedures used and the probable value of any additional procedural safeguards; and 3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U. S. 319, 335 (1976).

The situation here is closer to the Chavez situation than the one faced by the 10th Circuit in Benavidez. Contrary to OPD's assertions, Huemiller was not given an opportunity to present his case at the predetermination stage because OPD refused to give him a Garrity warning at the predetermination hearing. (R. 79-81; 98.) At the time of the predetermination meeting there was an ongoing criminal investigation by the Weber County Attorney. Huemiller therefore asked that because the hearing was being tape recorded that he be assured that nothing would be turned over to the County Attorney. (Id.) After consulting with OPD's attorney, Chief Greiner refused to give Huemiller this assurance, and Huemiller told him he would not be able to specifically respond to the allegations. Contrary to OPD's assertions, an employer cannot use an employee's insistence on protecting his Fifth Amendment rights against the employee. See Gardner v. Broderick, 392 U.S. 273 (1968).²²

The complexity of the charges against Huemiller further distinguish this case from Benavidez. In Benavidez, the issue was simply whether the employee had attempted to buy illegal drugs while working. Prior to the pretermination meeting, the employee admitted to the police that he had engaged in such misconduct. Id. at 623. In contrast, the charges against Huemiller were extensive in scope, number of charges, and number of years they covered (the IA Findings and Recommendations lists some 14 charges). (R.

²² Huemiller was also not allowed to cross-examine any witnesses as none were presented by OPD. Instead Greiner simply read from a large notebook, which had not been provided to Huemiller.

337-40.) Yet, prior to the predetermination hearing, OPD had presented almost no factual support for the allegations to Huemiller. The IA Findings and Recommendations referred to the investigative binders which were not provided to Huemiller or his attorneys until part way through the post-termination hearing.²³ Because of the complexity of this case, putting the burden on Huemiller at the post-termination hearing substantially increased the risk of an erroneous decision, which has occurred. Requiring OPD to go first and bear the burden of proof would have not have placed a greater administrative burden on OPD nor would it have increased the costs to OPD or OCSC. Using the Matthews balancing test, Huemiller's due process rights were violated.

However, even if placing the burden of proof on Huemiller does not rise to a constitutional violation, it is still inapposite of Utah law. A review of Utah cases dealing with administrative appeals of discipline cases leaves little doubt that the agency should bear the burden to prove the charges. Gilbert v. Bd. of Police and Fire Comm'rs, 40 P. 264 (Utah 1895)²⁴; Vetterli v. Civil Serv. Comm'n of Salt Lake, 145 P.2d 792 (Utah

²³ At the predetermination stage Greiner read from sections of binders apparently containing investigative materials. However, because of the number of charges, and given that he read only small portions of what was in the binders (and in no discernable order) and that Huemiller and his attorney were not given a copy to read from, it was almost impossible to sort the evidence out. By way of example, the Court is urged to have someone read to it (in a monotone) the transcript of the entire pretermination hearing to see how little sense it makes. (R. 79-103.)

²⁴ In Gilbert, the Utah Supreme Court found for a discharged firefighter when the hearing board placed the burden of proof on the employee:

. . . but at the hearing the board introduced no evidence to

1944); Worrall v. Ogden City Fire Dep't, 616 P.2d 598 (Utah 1980); In re Discharge of Jones, 720 P.2d 1356 (Utah 1986); Tolman, 818 P.2d 23; Lunnen, 886 P.2d 70; Salt Lake City Corp. v. Salt Lake City Civil Serv. Comm'n, 908 P.2d 871 (Utah App. 1995); Lucas, 949 P.2d 746; Kelly, 2000 UT App. 235. First, all of the cases from Vetterli onward state that the first determination a civil service commission must make is whether the facts support the charges. This language evinces a clear intent that there must be an affirmative showing that the employee engaged in the alleged misconduct. None of these cases say that the first inquiry is whether the facts do not support the charges against the employee, which is the inquiry mandated by Rule 10-6 in this case.

Subsequent cases also strongly imply that the evidentiary burden to prove the charges is on the employer. In Tolman, the employee had been fired for certain off-duty conduct which was “inimical to public interest.” 818 P.2d at 31. This court made it clear that the burden was on the employer to prove the nexus between the off-duty conduct and public employment, which necessarily was part of proving the charges against the employee. Id. at n.7. Similarly, in Lunnen, this Court stated that it must decide if the

sustain the charges; the record shows that, according to the evidence of the [firefighter], he was in every way an efficient officer, and that the *onus probandi* was cast upon him to show that there was not sufficient grounds for his removal. An examination of the evidence in detail is unnecessary. Nor is further reference to the record necessary.

Gilbert, 40 P. at 269.

Civil Service Review Board(the hearing body) had correctly determined if UDOT (the employer) had presented “factual support for its allegations. . .” (before getting to the issue of the proportionality of the sanctions). 886 P.2d at 73. Finally, in Lucas, this Court held that it would uphold the decision of a commission, only if there was substantial evidence supporting the charges. 949 P.2d at 758. These three pronouncements make no sense if the burden of disproving the charge was on the employee. That the burden of proving the charges should be placed on the agency is the standard adopted by most states.²⁵

Even in the absence of a constitutional violation, placing the burden on Huemiller is not harmless error. “Harmless errors are those that are sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings.” Jones v. Cyprus Plateau Min. Corp., 944 P.2d 357, 360 (Utah 1997).²⁶ For example, on the charge of lying, OPD’s case was based on the supposed disparity between some 5 year

²⁵ See the following partial list: In Re Dolores San Nicolas, 1 N. Mar. I. 329 (Mariana Islands, 1990); Rocque v. Dep’t of Health, 505 So.2d 726 (La. 1987); Ohio Office of Collective Bargaining v. Ohio Civil Serv. Employees, 572 N.E.2d 71 (Ohio, 1991); Office of Employee Rels. v. Communications Workers of America, 711 A.2d 300 (N.J. 1998); Trackwell v. Nebraska Dep’t of Administrative Services, 591 N.W.2d 95 (Neb. 1999); Thurmond v. Steele, 225 S.E.2d 210 (W.Va. 1976); Commonwealth of Kentucky, Transportation Cabinet v. Woodall, 735 S.W.2d 335 (Ky. 1987); Perkins v. Stewart, 799 S.W.2d 48 (Ky. 1990); Skelly v. State Personnel Bd., 539 P.2d 774 (Calif. 1975); Brownlee v. Williams, 212 S.E.2d 359 (Ga. 1975); Harris v. State Bd. of Agriculture, 968 P.2d 148 (Colo. App. 1998).

²⁶ Indeed, even the OPD does not attempt to argue that such an error would be harmless.

old non-contemporaneously written notes and what Huemiller said in an interview many years later. (Section I E.) Because there was no transcript made of the initial interview, there was virtually no way for Huemiller to show or disprove that the notes were inaccurate. Therefore, he could not disprove the charges against him. Conversely, if the burden had been properly on the police department, it is very likely that the OCSC would have decided that this skimpy evidence was not substantial enough to support the charges. A similar analysis applies to the 29th & Madison stop. (Section I F.) Indeed, how the OCSC viewed each witness might have been different. Because Huemiller entered the hearing with the stigma of being guilty unless he could prove otherwise, it was easier to discount his testimony and assume that he was not telling the truth.

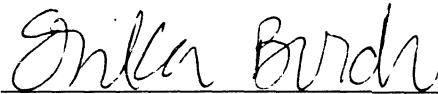
Because there is a 'reasonable likelihood' that the error in placing the burden of proof on Huemiller led to an incorrect outcome, the OCSC decision should be overturned and Huemiller reinstated with full back pay and benefits.

CONCLUSION

Huemiller respectfully requests that the decision of OCSC to uphold his termination be reversed because there is not substantial evidence to support it. Even if there was adequate evidence the penalty of termination is disproportionate and inconsistent with prior discipline. Finally, requiring that Huemiller shoulder the burden of proof deprived him of a full and fair hearing. The decision of OCSC must be reversed, or in the alternative, remanded for a new hearing.

Dated this 27th day of May, 2004.

STRINDBERG SCHOLNICK & CHAMNESS, LLC

A handwritten signature in cursive script, appearing to read "Erik Strindberg", is written above a horizontal line.

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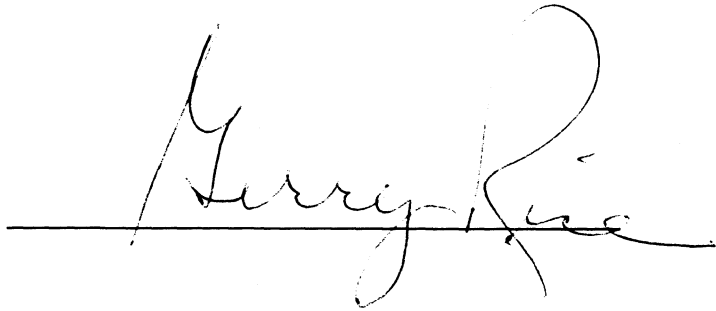
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of **REPLY BRIEF OF PETITIONER** to be hand delivered, this 27th day of May, 2004, to:

Stan Preston
Judith Wolferts
Camille N. Johnson
Snow, Christensen & Martineau
10 Exchange Place, #1100
Salt Lake City, Utah 84111

and to be delivered by U.S. Mail, postage pre-paid, this 27th day of May, 2004, to:

Doug Holmes
274 ½ 25th Street
Ogden, Utah 84401

A handwritten signature in cursive script, appearing to read "Larry Rice", is written over a horizontal line.