IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PINAL COUNTY SHERIFF'S OFFICE, Appellant, v. CARDEST JAMES, Appellee.	2 CA-CV 2013-0008 DEPARTMENT A Pinal County Superior Court Cause No. CV201200718

APPELLANT'S REPLY BRIEF

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ISSUES PRESENTED

I. REPLY: CHARGES 1 AND 2

¶1 Appellee Cardest James ("James"), in his Response Brief, asserts that the Pinal County Employee Merit Commission ("Commission") did follow the directives provided by the Court of Appeals which apply to charges 1 and 2. James further stated that the Commission applied the appropriate standard with respect to charges 1 and 2.

¶2 Appellant Pinal County Sheriff's Office ("PCSO/Appellant") replies that the Commission did not follow this Court's directives, nor did they properly apply the appropriate standard of review. By not following the directives or appropriate standard of review, the Commission's action to reverse PCSO's disciplinary decision concerning the Quality Assurance Specialist ("QAS") testing and duties lacked substantial supporting evidence.

¶3 James claims in his Response Brief that it is improper for facts and issues outside of this Court's directive to be covered in Appellant's Opening Brief for any of the charges. In reply, PCSO contends that all of the evidence and issues are subject to being reviewed given the directives by the Court of Appeals.

¶4 The Court of Appeals' directed that the lack of written policy as to QAS assignments or maintenance of QAS records by PCSO could not be a pivotal factor that discipline was not warranted based on the QAS charges. (Appendix 7, p.7-8.)

¶5 The Court of Appeals instructed that a redetermination would have to be in conformity and within the appropriate scope of their authority. (*Id.)* In other words, the Commission would have to look at whether, by preponderance of the evidence presented, there were sufficient facts to justify a reasonable belief that charged acts 1 and 2 were true. Thus, one must look at the entire record to see if the evidence presented provided sufficient facts to justify a reasonable belief that charges 1 and 2 were true.

¶6 Upon rehearing, the Commission supplied additional findings of facts to support PCSO's disciplinary decision concerning charges 1 and 2. For instance, the Commission noted that James did not perform four required 31-day calibration tests and performed only one required 90-day test for the intoxilyzer machine. (Appendix 8, p. 6-7.) The Commission also noted James' failure to do the appropriate amount of tests directly led to the dismissal of seven DUI cases. (*Id.*) The Commission went on to acknowledge that Sgt. Monashefsky assigned the QAS duties to James. (*Id.*) The Commission also mentioned that there is a lack of written policy for assignment of QAS duties and how to perform those duties. These additional findings of facts are substantial evidence to sustain rather than reverse PCSO's decision for charges 1 and 2.

¶7 In addition, the Commission presented a new theory upon which they based their action to reverse PCSO on charges 1 and 2. The Commission believed based

on the contact and communication between James and Sgt. Monashefsky on the QAS assignment and duties, there was either "reasonableness of confusion" or a "reasonable potential for confusion" of the transfer of all QAS duties. (*Id.* at p. 7.) In short, the Commission was unsure of their theory given the two different ways it was presented in their Findings of Facts.

¶8 The "reasonableness of confusion" theory was now being used by the Commission as the pivotal factor to support the conclusion that discipline was unwarranted given the charges. The "reasonableness of confusion" theory appears based on Sgt. Monashefsky agreeing that he felt that James' assignment as QAS instructor may not have been effectively and clearly communicated to him. (Appendix 10, transcript p. 417:10-13.) However, Sgt. Monashefsky agreed only to the possibility, not that it was definitely the case, that the QAS assignment was not effectively and clearly communicated to Appellee. (*Id.*) Such a statement does not support the view that there was definitely reasonableness of confusion as to the assignment of QAS duties.

¶9 On the contrary, the record demonstrates that the transfer of QAS duties was effectively and clearly communicated to James and that he knew the QAS duties were assigned to him and he had accepted responsibility of the duties as early as June or July 2007. As previously noted in the opening brief, James was a QAS specialist and was certified by the Arizona Department of Public Safety ("DPS")

on how to operate these types of machines. (Appendix 10, transcript p. 259:23-25; *Id.* at p. 315: 6-12, 10-19; *Id.* at p. 565: 5-11.) The record in this area is undisputed. There was no "reasonableness of confusion" on James' responsibilities.

¶10 Additional support for this conclusion is found in the evidence submitted at the first hearing. For example, this Court acknowledged a November 2007 e-mail from Sgt. Monashefsky to James, stating he had completely passed the QAS duties on to James. (Appendix 7, p. 7.) Likewise, in a November 29, 2007 e-mail from James to Deputy County Attorney Larsen, James stated "I will give you the QAS stuff since I took over." (Appendix 12, Exhibit R8.) A March 23, 2008 e-mail from James to Deputy County Attorney Larsen stated James would get all of the QAS records he was responsible for since he got to Pinal County. (*Id.*) James thought that the date since he got to Pinal County was either July or August of 2007. (*Id.*) A May 13, 2008 e-mail from James to Sgt. Monashefsky stated he did not take over the "intox" until August or September 2007. (*Id.*) These e-mails establish James' had the primary responsibility for the 31-day tests and he had taken over the "intox" either in August or September 2007. (Appendix 10, p. 570:1-7, 18-21.) Finally, Sgt. Monashefsky's testimony is also consistent that the QAS duties were unquestionably transferred over to James. Specifically, Sgt. Monashefsky stated that he switched from doing QAS sometime around May or

June of 2007. (Appendix 10, transcript p. 409:17-22.) He stated that James volunteered and took over the QAS duties. (*Id.* p. 409:21-25, p. 410:1-4.) Outside of being on vacation, James solely had the responsibility of the QAS duties. (*Id*. p. 414:12-15.) He was not sharing the QAS duties with James during the summer months of 2007. (*Id.* p. 415:18-20.)

¶11 Despite the evidence clearly showing the transfer of QAS duties to James', his knowledge of the transfer and his failure to conduct the necessary maintenance and tests, the Commission bases their reversal of PCSO's discipline on alleged confusion which did not exist.

¶12 The Commission's action to reverse based on the "reasonableness of confusion" theory was arbitrary without consideration and in disregard of the facts and circumstances. *Pima County v. Pima County Merit Systems*, 189 Ariz. 566, 568, 944 P.2d 508, 510 ("Mathis") (Ariz. App. Div. 2, 1997). Pinal County Merit ("PCMR") Rule 13 requires employer discipline to be upheld unless the disciplinary decision was arbitrary or taken without reasonable cause. PCMR 13 restricts the Commission's remedial powers to cases in which the action appealed from was arbitrary or taken without reasonable cause.

¶13 In this case, the Commission's role was an objective one. Under this role, the Commission was required to give deference to the appointing authority's decision when that decision has complied with PCMR 13 standards. PCMR 13

standard does not permit the Commission to substitute its judgment by finding no evidence to support PCSO's charges 1 and 2 when there is clear evidence.

¶14 By relying on the "reasonableness of confusion" theory, the Commission substituted its independent judgment for that of PCSO's. There was clear evidence from the record such as e-mails and testimony of James and Sgt. Monashefsky that the QAS duties had been transferred. Furthermore, evidence was presented that James had the knowledge and experience to properly maintain and test the QAS machines. Finally, evidence was presented which clearly demonstrated by James' own admission that he did not perform a number of required tests. The Commission simply disregarded this evidence and instead relied on the "reasonableness of confusion" theory. To disregard such substantial evidence the Commission disregarded its duties and acted outside of their authority. Similarly, by ruling there was substantial evidence to support the Commission's decision to reverse for charges 1 and 2, the lower court committed reversible error.

II. REPLY CHARGES 3 AND 4

¶15 Substantial evidence did not exist to support the Commission's decision on charges 3 and 4. Despite the Appellate Court's statement that if there is some evidence supporting the Commission's decision they would generally affirm it, the Appellate Court did not affirm, but remanded charges 3 and 4 with new instructions. The Appellate Court instructed to the Commission to only consider

evidence on whether James violated PCSO policies and whether he appropriately deviated from those policies. The requirement of some evidence to support the administrative decision also requires that it be credible evidence. *Pingitore v. Town of Cave Creek*, 194 Ariz. 261, 264 ¶ 18, 981 P.2d 129, 132 (App. 1998), *Lambert, Ltd. v. City of Tucson Dept. of Procurement*, 223 Ariz. 184, 186, 221 P.3d 375 (Ariz. App. Div. 2, 2009).

¶16 PCSO contends that credible evidence was not presented to support the Commission's decisions on charges 3 and 4. There was no credible evidence presented by any witness to the Commission that James properly deviated from policy by arming a civilian. Former Sgt. Aubrey Keck's ("Keck") opinion that James properly deviated from policy was based on a false premise. Keck's testimony was based on his belief that James was the only one aware of the incident he was responding to. (Appendix 10, transcript p. 221:20-23.) This was incorrect. Keck did not know and consider that Deputy Buysee was en route to the incident location and that James knew about this. (*Id.* at p. 35:10-9; *Id.* at p. 93:2-11.) More importantly, the Commission knew from the record that Keck's opinion was not credible because it was based on the mis-information concerning Deputy Buysee.

¶17 Thus, to rely on Keck's testimony as support was an error. Likewise, the testimony by PCSO Chief Deputy Lee ("Lee") was not credible in this area. Lee was not involved in the investigation and he had few details to base his opinion on.

(*Id.* at p. 436:4-8.) Lee also had to intentionally disassociate himself from investigations regarding James because of his personal relationship with James. (*Id.* at p. 432:20-22; *Id.* at p. 433:7-10; *Id.* at p. 434:24-435:5.) Thus, any reliance on Lee's testimony by the Commission that arming a civilian was not a deviation of policy was in error.

¶18 In addition, the Commission appears to rely upon civilian Moore's training, actions, and the fact that he was not injured to support their decisions; such reliance is misplaced. There is no requirement that a violation of a PCSO civilian observer policy requires an injury to the civilian. (Appendix 12, Exhibit R4.) Thus, giving the proper weight and credence to Keck and Lee's testimony, and the inappropriateness of Moore's testimony, there was a lack of evidence for the lower court to reach the factual conclusion that James was able to deviate from any policy concerning civilian observers.

III. <u>REPLY: CHARGES 8, 9 AND 10</u>

¶19 Contrary to the view of James, the Commission failed to follow any of the Court of Appeals directives concerning charges 8, 9 and 10. The Appellate Court stated it was improper for the Commission to require live testimony from every one of PCSO's potential witnesses to support the charges concerning James' off-duty conduct. Although the Commission no longer included in their Findings of Facts the failure of PCSO to present testimony to support charges 8, 9 and 10,

some of their comments during the remand hearing revealed their intent was that live testimony under oath would be required to support their decision. By example, Commissioner Ramsdell did not follow this instruction when he stated, "I'm just basically going with testimony that was under oath, you know?" (Appendix 11, p. 122:7-8.) Such a statement disregards Sgt. LeBlanc's testimony of what the daycare provider, Marlene Manwell ("Manwell"), had stated in an interview because Manwell was not under oath. Shortly after that exchange Commissioner Robison stated that credibility lies in James and Deputy Avilez who both happened to be live witnesses under oath. (*Id.* at p. 137:17-19.)

¶20 Marlene Manwell's version of events was much different than James' version. Manwell noted that James, during the encounter, was rude, loud, aggressive and angry. (Appendix 10, transcript p. 334:9-10.) Manwell did not let James into the house because she was afraid of him. (*Id.* at p. 333:8-11.) Based on Manwell's statements, James identified himself as a PCSO deputy not to reassure her, but instead to intimidate her to change a business decision she made, which was purely a personal matter. Implicitly, James' behavior brought discredit to Pinal County and PCSO. It appears the Commission's rejection of Manwell's statement was because she did not appear to give live sworn testimony. By ignoring Manwell's statements because it was not provided by live testimony, the Commission ignored the directive of the Court.

¶21 The Commission also made another error by stating in their Findings of Facts that Manwell was no longer upset when the investigating officers arrived on the scene. (Appendix 8, p. 12.) The Court of Appeals had already noted the irrelevance because Manwell's demeanor when Deputy Avilez arrived did not address squarely PCSO's allegation that James had identified himself as a PCSO deputy in the context of a personal matter. (Appendix 7, p. 13.) This is another example of how the Commission abused its discretion by not following the Court of Appeals' directives and properly considering all evidence, both live and non-live.

¶22 Although James contends, that the Commission did consider all of the evidence and properly determined the credibility of witnesses and sufficiently weighed the evidence by following the directives from the Court of Appeals, that was not the case. The Commission failed to properly factor in Sgt. LeBlanc's testimony of what Manwell had to say that night. By not following the directives, the Commission abused its discretion and acted arbitrarily. The lower court committed error by not recognizing the Commission's failure to follow the directives in charges 8, 9 and 10.

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CONCLUSION

¶23 For the reasons stated above, Appellant respectfully renews its request that this Court affirm the Pinal County Sheriff's Office discipline of Apellee Cardest James, and thereby reverse the Commission's decision and all awards of back-pay. The Pinal County Sheriff's Office also requests this Court to remand this matter to the Superior Court for a determination of a judgment against James and in favor of PCSO for all back-pay and costs expended throughout the course of this litigation pursuant to A.R.S. § 12-912.

RESPECTFULLY SUBMITTED this 16th day of July, 2013.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, I certify that the foregoing reply brief:

1. Uses proportionately spaced Times New Roman type of 14 points or more;

2. Is double spaced except for quotations that exceed two lines, headings, and footnotes, which are single spaced; and

3. Contains approximately 2,407 words.

CERTIFICATE OF SERVICE

I certify that on July 16, 2103, the foregoing was e-filed with:

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I further certify that on July 16, 2013, TWO COPIES of the foregoing Reply Brief were served by depositing the same in the United States mail with postage prepaid thereon and addressed to:

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