

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 OPENING BRIEF

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STATEMENT OF THE CASE

¶1 Cardest James (“James”) was terminated by the Pinal County Sheriff’s Office (“PCSO”) on May 11, 2009, following four separate incidents that resulted in 10 disciplinary charges.

¶2 James appealed his termination to the Pinal County Merit Commission (the “Commission”). The Commission hearing took place over three days and on January 25, 2010, the Commission issued its Findings of Fact and Conclusions of Law, voting 5-0 that James be reinstated with full back pay. (Appendix 5)¹

¶3 On February 4, 2010, PCSO filed its Complaint before the Pinal County Superior Court for Judicial Review of the Commission’s Decision pursuant A.R.S. § 12-905, Rule 62(b), Ariz. R. Civ. P. and Rule 3, Ariz. R. P. Admin. Dec. Following oral argument in the Pinal County Superior Court, the Hon. William O’Neil reversed the Commission’s decision by his Order dated November 22, 2010, and reinstated the disciplinary action imposed by PCSO. (Appendix 6) The Superior Court held that all back pay awards in favor of the deputy were reversed. (Appendix 6, p. 5)

¹ Following the Merit Commission Hearing on Remand and Appeal thereof to the Pinal County Superior Court in March 2012, the Commission did not certify its Record on Appeal or transmit its Record to the Superior Court as required under A.R.S. § 12-904(B). Therefore, PCSO has attached certain exhibits, findings, and transcripts as an Appendix to its Opening Brief. Pursuant to Rule 11, Ariz. R. Civ. App. P., the certified transcript is attached hereto as follows: citations to Merit Commission Hearing Transcripts of the 2009 Hearing are identified as Appendix 10, and the 2012 Hearing are identified as Appendix 11.

¶4 James filed a Notice of Appeal with this Court on or about December 17, 2010. On October 19, 2011, as a result of several legal errors committed by the Commission, the Court of Appeals vacated Judge O’Neil’s previous order and remanded the case to the Commission with specific instructions for assessing the evidence in its redetermination on nine of the ten charges. (Appendix 7, pg. 14, ¶ 26).

¶5 On December 2, 2011, the Commission held a hearing for a redetermination of the nine charges. (Appendix 11). This hearing consisted only of oral arguments by the parties. Two of the Commission members, James Robison and Tom Ramsdell, were Commission members at the first Commission hearing. (Appendix 11, transcript p. 3: 1-13). Commissioners Ralph Varela and Bob Clark were also present but were not part of the 2009 Commission. *Id.* On March 2, 2012, the Commission signed its written Amended on Remand Findings of Fact and Conclusions of Law. (Appendix 8). In its Findings, the Commission again overturned the Sheriff’s termination of James, reinstated him as a PCSO employee and awarded full back pay. *Id.*

¶6 PCSO appealed to the Pinal County Superior Court for Judicial Review of the Commission’s Decision pursuant A.R.S. § 12-905, Rule 62(b), Ariz. R. Civ. P. and Rule 3, Ariz. R. P. Admin. Dec. On November 22, 2012, the Hon. Joseph R.

Georgini affirmed the Commission's Decision on Remand. (Appendix 9) It appears that the Commission failed to transmit its Record on Remand to the Superior Court. As a result, that Court had only the parties' briefs when it issued its decision.

¶7 PCSO now appeals to this Court on the basis that the Commission failed to comply with this Court's orders on remand and has once again, abused its discretion, acted illegally, arbitrarily and capriciously, and substituted its judgment for that of the Sheriff.

¶8 This Court has jurisdiction pursuant to A.R.S. § 12-120.21(A)(1).

STATEMENT OF FACTS

¶9 PCSO terminated James on May 11, 2009, at the conclusion of investigations of four separate incidents that took place between June and October of 2008, namely: 1) James failed to perform Quality Assurance Testing on an intoxilyzer machine used in DUI investigations resulting in the dismissal of seven DUI prosecutions; 2) James provided a loaded PCSO shotgun to a civilian observer or "ride-along" and directed him to be his backup at the scene of a domestic violence incident; 3) James harassed a daycare worker while off-duty; and 4) James was not truthful about the reason he failed a polygraph examination while employed as an officer with the Holbrook Police Department. (Appendix 1, Statement of Charges)

I. JAMES ADMITS THAT HE WAS ASSIGNED YET FAILED TO PERFORM QAS TESTING ON INTOXILYZER MACHINES.

¶10 During the relevant time, James was fully certified by the Arizona Department of Public Safety (“DPS”) as a Quality Assurance Specialist (“QAS”) officer. (Appendix 10, transcript p. 259:23-25; *Id.* at p. 259: 23-25; *Id.* at p. 315: 6-12; *Id.* at p. 470:10; *Id.* at p. 565:1-4) Before James joined PCSO, he worked as a QAS officer for the Florence Police Department (“FPD”). (*Id.* at p. 260: 1-6; *Id.* at p.259:16-18; *Id.* at p. 315:10-19) James used his familiarity with QAS standards to create FPD’s QAS policy to mirror the DPS policy. (*Id.* at p. 470:10-16; *Id.* at p.565:16-20).

¶11 Beginning in June or July 2007 and while at PCSO, James took over QAS responsibility for the maintenance of two intoxilyzer machines. (Appendix 10, transcript p. 262:1-10; *Id.* at p. 270:4-9). James was certified by DPS on the machines that PCSO assigned to him. (*Id.* at p. 565: 5-11) He was responsible for those machines from June or July 2007 through June 2008. (*Id.* at p. 270:4-14) During that time, PCSO followed DPS procedures as it was required to do, on the maintenance and calibration of its intoxilyzer machines, (*Id.* at pp. 254:20 – 255:13) just as certified QAS officers, like James, are required to follow the testing procedures mandated by DPS. (*Id.* at p. 255:11-13; *Id.* at p. 571:9-13) ¶19

According to DPS procedures, QAS tests must be performed on intoxilyzer machines every 31 days with a more extensive test every 90 days. (Appendix 10, transcript pp. 255:11- 256:13; *Id.* at pp. 565:21 – 566:4) Between June 2007 and June 2008, James performed only one 90-day calibration procedure on the assigned machine and failed to perform four 30-day calibration checks. (*Id.* at p. 571:4-8) Because James failed to perform all of the required calibration checks (Appendix 10, transcript p. 474:9-11), the prosecutor for Pinal County could not establish that the intoxilyzer machines were operating properly. (*Id.* at p. 273:11-23; *Id.* at p. 274: 3-16) As a result, the State was forced to dismiss seven DUI cases. (*Id.* at p. 280:4-25) Because 76 DUI cases were processed on both instruments during that time, the majority of which were on the machine at issue, there was the potential that after the conclusion of the investigation, more cases would be dismissed for the same reason. (*Id.* at p. 281: 6-19)

¶12 James initially shared the QAS responsibility with his PCSO Sergeant, Robert Monashefsky (“Monashefsky”), but James eventually volunteered to takeover that responsibility. (Appendix 10, transcript p. 276:8-13; *Id.* at pp. 370:23 - 371:2; *Id.* at p. 409:17-23; *Id.* at pp. 469:24 - 470:1; *Id.* at p. 473:11-16) James knew Monashefsky did not want to handle QAS any longer and wanted someone else to take over. (*Id.* at p. 469:19-23) Monashefsky and James both agreed that James would take over, (*Id.* at p. 417:18-20) and James was officially assigned

responsibility for the intoxilyzer machine by Monashefsky. (*Id.* at pp. 311:21-312:3) According to Monashefsky, James was fully in charge of the QAS duties with the sole caveat that Monashefsky would back James up if James was going on vacation. (*Id.* at p. 311:12-20) Monashefsky spoke to PCSO Lieutenant William Haigh, his lieutenant at that time, and emailed the assigned Deputy Pinal County Attorney Mike Larson to advise him that he was no longer in charge of QAS duties. (*Id.* at pp. 417:21 - 418:4)

¶13 During his testimony, James, however, claimed that the only QAS testing for which he had sole responsibility was the 31-day testing. (Appendix 10, transcript p. 570:4-9) James admitted that he failed to conduct all required 31-day tests. (*Id.* at p. 474:9-11; *Id.* at pp. 274:22 - 275:3; *Id.* at p. 275:10-15; *Id.* at p. 503:9-16) In fact, between August 2007 and March 2008, the dates that James admits responsibility for, he only conducted four out of eight required 31-day tests. (Appendix 12, Exhibit R7). Even according to James' version of the events, he still failed to perform his assigned duties as outlined in the corresponding disciplinary charges.

¶14 According to former PCSO Deputy Chief, Clint Lee, Sheriff Vasquez agreed that James should be disciplined for his failure to conduct QAS testing. (Appendix 10, transcript p. 434:17-19; *Id.* at p. 510:21-25) Eight days later, James was involved in the shooting incident described in paragraph II below. Sheriff Vasquez

never imposed the proposed discipline on James for failing to conduct the QAS testing because he agreed to halt any pending discipline for all employees and leave it for the Pinal County Sheriff-Elect (Paul Babeu) to handle. (*Id.* at p. 439:10-19) PCSO, under Sheriff Babeu, disciplined James based on two disciplinary charges related to his failure to perform QAS testing, namely, Charge 1: Failing to demonstrate sufficient competency to perform assigned duties, and Charge 2: Engaging in conduct, on or off duty that is of such a nature that it would tend to bring discredit to the County. (Appendix 1, Statement of Charges)

II. JAMES VIOLATED PCSO POLICY WHEN HE ARMED A CIVILIAN RIDE-ALONG WITH A LOADED PCSO SHOTGUN AND TOOK HIM INTO AN ARMED CONFRONTATION AS A PARTICIPANT.

¶15 On October 18, 2008, James armed a “civilian observer,” Bryan Moore (“Moore” or “ride-along”), with a loaded PCSO shotgun (Appendix 10, transcript p. 563:12-19) and directed him to act as his backup (*Id.* at p. 97:11-19) at the scene of a domestic violence incident that ended with James shooting the suspect. (Appendix 12, Exhibit R4). Under PCSO policy, citizen observers are prohibited from carrying weapons (Appendix 1; Appendix 10, transcript p. 88:10-16; Appendix 12, Exhibit R4) and deputies are responsible for the safety of their observers. (Appendix 1; Appendix 12, Exhibit R4) James took his friend, Moore (Appendix 10, transcript p. 531:15-23), with him on duty as a ride-along. (*Id.* at p. 531:9-12) On the night in question, PCSO Dispatch broadcast a non-emergency

call over the radio at 23:41 (11:41 p.m.) of “shots fired” in a residential area. (*Id.* p. 34:3-6; *Id.* at p. 535: 12-15; Appendix 12, Exhibit R1) At 23:41 (11:41 p.m.) (Appendix 10, transcript p. 591:2-5) James advised Dispatch that he would respond. (*Id.* at p. 34:11-13) Thirty seconds to a minute later, Deputy Brad Buysee advised Dispatch that he would also respond. (*Id.* at p. 35:3-4; *Id.* at p.65:1-8; *Id.* at p.535:20-23) James arrived in the neighborhood of the “shots fired” location at 23:51. (11:51 p.m.) (*Id.* at p. 591:12-19; Appendix 12, Exhibit R1).

¶16 When James was in the neighborhood, and while Buysee was 1 - 1 ½ miles away (Appendix 10, transcript p. 35:13-25), PCSO Dispatch directed James (*Id.* at p. 536:11-13), and then Buysee (*Id.* at pp. 37:24 – 38:5), to contact Dispatch by phone. During their respective calls with Dispatch, the operator advised each deputy that he was responding to a possible domestic violence matter regarding PCSO Public Information Officer Vanessa White (“White”), stated the address of the incident (*Id.* at p. 38:8-15; *Id.* at pp. 536:11 - 537:1), and advised that the suspect was White’s boyfriend, who was suicidal and had fled the area with a gun. (*Id.* at p. 38:8-15; *Id.* at p. 558:13-16) Buysee immediately began trying to reach James to coordinate a unified response. (Appendix 10, transcript pp. 38:21 – 39:4) Buysee radioed Dispatch to direct James to contact him on a separate channel and when James didn’t respond, Buysee called James on his cell phone – again, with no answer. (*Id.* at pp. 38:23 –39:9; *Id.* at pp. 39:25 – 40:5; *Id.* at p. 40:6-8) James

did not make any attempt to contact Buysee. James claimed that he did not have time to hang up the phone with Dispatch and try to reach Buysee on the radio to confirm Buysee's location (*Id.* at pp. 561: 23 - 562:16) despite knowing that Buysee was en route. (*Id.* at p. 93:6-11) Instead, James guessed about how far away Buysee was from him and did not bother to confirm it. (*Id.* at p. 562:12-16) Unable to reach James, Buysee began to look in the neighborhood for the suspect on his own. (*Id.* at p. 40:16-21)

¶17 When James received the incident address from Dispatch he was in front of the incident location. (Appendix 10, transcript p. 537:1-6) At that point, James set in motion a series of events demonstrating exceedingly poor judgment that put his "ride-along" observer, himself, PCSO personnel, and others in a dangerous and volatile situation.

¶18 James directed Moore to accompany him into White's residence. (*Id.* at p. 538:11-18) As James and Moore approached the front door together, Moore asked James if he (Moore) should have the shotgun with him and James instructed Moore to retrieve it. (*Id.* at p. 94:10-21; *Id.* at p. 104:18-23; *Id.* at pp. 562:21 - 563:1-6) James knew that PCSO Policy prohibited civilian observers from carrying weapons (*Id.* at pp. 547: 23- 548:3) yet James violated that policy and armed Moore with a loaded PCSO shotgun. (*Id.* at p. 94:10- 23; *Id.* at p. 538:16-18) James then

instructed Moore to be his backup. (*Id.* at p.97:11-19; *Id.* at p. 538:11-18; *Id.* at p. 557:5-10)

¶19 White answered her door and told James and Moore that the suspect might be in the backyard. (Appendix 10, transcript p. 95:1-6; *Id.* at p. 542:1-2) James went into the backyard where Moore provided cover to James by aiming the shotgun at the suspect and chambering a shotgun round. (*Id.* at pp. 95:23 –96:1) Both James and Moore aimed their loaded weapons at the suspect. (*Id.* at pp. 104:25 – 105:4) At one point, the suspect pointed the muzzle of the suspect’s gun at James. (*Id.* at p. 103: 2-6; *Id.* at p. 545:6-8) James fired one shot at the suspect, striking him. (*Id.* at p. 103: 6-8).

¶20 Buysee was at the end of the street where White lives when he heard James “998” call (officer involved shooting) over the radio (Appendix 10, transcript p. 43:13-18) and arrived at James’s location less than one minute later. (*Id.* at p. 44:4-7; *Id.* at p. 560:1-9) When Buysee entered White’s backyard, James was kneeling over a male subject and another male, later identified to Buysee as Moore, was standing holding a rifle or shotgun. (*Id.* at pp. 45: 22 – 46:6) Buysee immediately thought of the “worst case scenario” (*Id.* at p. 47:1-8) and began to un-holster his weapon, preparing to take aim on Moore. (*Id.* at p. 47:12-22) If James had not responded in time to tell Buysee that Moore was with him, Buysee testified he

would have drawn his weapon and aimed it at Moore. (*Id.* at pp. 47:23- 48:5) A second deputy, Poe, arrived at the scene right after Buysee. (*Id.* at p. 560:10-25)

¶21 Then James allowed Moore, a civilian, to pick up the suspect's revolver which was fully loaded and ready to fire, and put it into his (Moore's) back pocket. (*Id.* at pp. 49:17- 50:16). When Buysee learned that Moore had the suspect's weapon in his back pocket, he took it from Moore and properly secured it. (*Id.* at p. 50:17-24). Compounding James errors in judgment, when James picked up Moore for the ride along, he gave Moore the required PCSO Civilian Observer Liability Waiver, (Appendix 10, transcript p. 532:21-23) but did not have Moore sign the form until after the shooting took place. (*Id.* at p. 533:15-18; *Id.* at p. 87:18-24).

¶22 Following a complete investigation, PCSO disciplined James for violating two PCSO policies as outlined in disciplinary Charge 3 which states that no firearms or other weapon may be carried by any observer, and Charge 4 which states that the Deputy is responsible for the safety of the civilian observer. (Appendix 1, Statement of Charges).

III. WHILE OFF-DUTY, JAMES INTIMIDATED A LOCAL DAYCARE OWNER REGARDING A PERSONAL MATTER AND IN DOING SO, BROUGHT DISCREDIT TO PCSO AND PINAL COUNTY.

¶23 While James was under investigation for arming a civilian as described above, PCSO received a complaint about James from a citizen named Marlene

Manwell (“Manwell”) (Appendix 1, Statement of Charges p. 2; Appendix 12, Exhibit R10 p.2), a woman who runs an in-home daycare center. (Appendix 10, transcript p. 330:3-8) James showed up at Manwell’s home at 9:30 p.m. (*Id.* at pp. 330:20 – 331:1) Manwell heard a loud knock at her door (*Id.* at p. 338:8-13) and described finding James there: loud, aggressive, and appearing angry. (*Id.* at p. 334:6-13) James identified himself as a sheriff’s deputy but was dressed in civilian “biker clothes” rather than in uniform. (*Id.* at pp. 331:16 - 332:4; *Id.* at p. 332:17-22; *Id.* at p. 335:22-25)

¶24 James demanded to see Manwell’s license. (Appendix 10, transcript p. 338:18-24) and said he was there to investigate why Manwell wouldn’t provide daycare for James’ grandchildren. (*Id.* at pp. 340:6 - 341:6) It later came to light that the children weren’t James’ grandchildren but rather his neighbor’s children. (*Id.* at pp. 403:25 – 404:3; *Id.* at pp. 524:24 – 525:5) When James arrived at Manwell’s door, she was on the telephone with her daughter who had just left Manwell’s residence and stayed on the phone with Manwell just in case there was an issue with James. (*Id.* at p. 333:8-14) Manwell’s daughter was concerned about what she overheard between Manwell and James on the phone such that she turned her car around and came back to Manwell’s house. (*Id.* at p. 333:15-25; *Id.* at p. 577:15-25) When Manwell’s daughter returned to Manwell’s house, James told

Manwell's grandson that he (James) was a "big, bad monster," thereby scaring the boy. (*Id.* at p. 340: 3-6)

¶25 Manwell also told PCSO Sergeant Phil LeBlanc, who later investigated this incident, that she never invited James inside her home because she was afraid. (Appendix 10, transcript p. 341:12-13) Manwell felt James was trying to intimidate and scare her (*Id.* at p. 339:21-22) so Manwell told James she would give him the license number so he would leave. (*Id.* at p. 341:15 – 19) Then James told Manwell she was lucky it was him that came over rather than his wife because his wife was very irate. (*Id.* at p. 341:13-25 ¶26) When James finally left, Manwell called the police to report the incident. (Appendix 10, transcript p. 334:21 - 335:5) Deputy Julio Avilez responded to Manwell's home at 10:30 p.m. (*Id.* at p. 403:5-7) Manwell told Deputy Avilez that James was trying to scare her. (*Id.* at p. 405:5-11) Manwell wanted to make a report but Avilez said that it wasn't a crime. (*Id.* at pp. 406:9 - 407:1) Manwell complained that James was rude, loud, aggressive, and appeared angry, and that he demanded her license. (*Id.* at p. 334: 9-15) Manwell later complained to PCSO about Deputy Avilez' lack of response because she did not have any confidence that anything would be done about her complaint. (Appendix 12, Exhibit R10 p. 2).

¶26 When interviewed by Sergeant LeBlanc, James admitted that he could tell that Manwell was scared (Appendix 12, Exhibit R10 p. 30 ¶ 1) and when James

testified at the Merit Commission hearing he altered his statement to say that he could see that Manwell was uncomfortable. (Appendix 10, transcript p. 576:21 – 577:7)

¶27 At the conclusion of the investigation James was disciplined based on three charges that included: Charge 8: Conduct on or off duty that would bring discredit to the County; Charge 9: Failing to conduct himself in a manner that does not bring discredit to the County; and Charge 10: Any other improper conduct or performance of such a severity as to constitute cause for discipline. (Appendix 1, Statement of Charges)

IV. GLOBAL CHARGES

¶28 In addition to the specific policy or conduct related disciplinary charges described above, James was disciplined for violating PCSO policy as outlined in Charges 6 and 7 because he repeatedly failed to conform to the standards of his position as a deputy sheriff and made repeated infractions of PCSO policies and procedures. (Appendix 1, Statement of Charges).²

STATEMENT OF ISSUES

1. Did the Commission abuse its discretion in overturning PCSO's discipline of James when it applied the incorrect standard of review,

² James was also disciplined after PCSO learned that James failed a polygraph while employed at another police agency because he intentionally tried to beat it. This resulted in James resigning from that agency in lieu of termination. The Commission's ruling regarding this incident is not on appeal before this Court.

ignored uncontroverted evidence, and incorrectly added elements of proof that do not exist in the disciplinary charges?

2. Did the Superior Court err when it failed to find that the Commission abused its discretion?
3. Did the Commission properly apply the Court of Appeals instructions when it decided the case on Remand?

ARGUMENT

I. STANDARD OF REVIEW

¶29 The Appellate Court reviews *de novo* a superior court's judgment in reviewing an administrative agency's decision reaching the same underlying issue as the superior court: whether the administrative action was not supported by substantial evidence or was illegal, arbitrary and capricious, or involved an abuse of discretion. *Carlson v. Arizona State Personnel Bd.*, 214 Ariz. 426, 430, 153 P.3d 1055, 1059 (App. 2007). Pursuant to A.R.S. § 12-910(E), the court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion. *Carlson v. Arizona State Personnel Board*, 214 Ariz. 426, 430, 153 P.3d 1055, 1059 (App. 2007).

¶30 When reviewing a superior court judgment regarding an administrative agency's decision, the Court of Appeals independently reviews the record to assess whether substantial evidence supports the agency's action. *Golob v. Arizona Medical Bd. of State of Arizona*, 217 Ariz. 505, 509, 176 P.3d 703, 707 (App. 2008); *Carlson v. Arizona State Personnel Bd.*, 214 Ariz. 426, 430, 153 P.3d 1055, 1059 (App. 2007). Whether substantial evidence supports the Merit Commission's findings is a legal question that this Court independently answers. *Golob v. Arizona Medical Bd. of State of Ariz.*, 217 Ariz. 505, 176 P.3d 703, 707 (App. 2008); *Havasu Heights Ranch and Dev. Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990).

¶31 Because this Court reviews the Commission's decision *de novo*, it is important to discuss the Commission's proper standard of review. Under Pinal County Merit Rule 13.4(Q), if after the hearing, a majority of the Commission determines that the appealed action was arbitrary or taken without reasonable cause, the disciplinary action shall be revoked or modified. Otherwise the action shall be affirmed. *Id.* "Arbitrary" and "without reasonable cause" are defined under Arizona law as an unreasoning action without consideration and in disregard of the facts and circumstances. *Maricopa County Sheriff's Office v. Maricopa County Employee Merit Sys. Comm'n*, 211 Ariz. 219, 222, 119 P.3d 1022, 1025 (2005). More specifically, an "Arbitrary" action is one that is taken "capriciously

or at pleasure, or an action without adequate determining principle.” *Id.* “Without reasonable cause” indicates a lack of evidence sufficiently strong to justify a reasonable person in the belief that the acts charged are true. *Id.* If there is credible evidence in the record, either by admission or sufficient proof that the employee committed acts warranting some discipline, then “it can scarcely be said that the discipline within the permissible range was taken without reasonable cause.” *Maricopa County Sheriff’s Office*, 211 Ariz. at 223, 119 P.3d at 1026.

¶32 The Arizona Supreme Court has held that the “arbitrary or taken without reasonable cause” standard of review for disciplinary actions reviewed by county merit systems is a highly deferential, objective standard. *Maricopa County Sheriff’s Office*, 211 Ariz. at 222, 119 P.3d at 1025. The Commission may not use a subjective standard or substitute its independent judgment for that of the appointing authority. *Id.* The reviewing court will not apply its own weight to the evidence but “[t]he question whether substantial evidence supports the ... [Commission’s] order does not raise material issues of fact; it presents a question of law. This Court independently reviews questions of law.” *Havasu Heights Ranch and Dev. Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 387, 807 P.2d 1119, 1123(App. 1990).

¶33 The discipline imposed by PCSO is supported not only by substantial evidence, but more importantly, in some instances the evidence is undisputed.

PCSO was only required to present to the Commission the essential facts warranting discipline by a preponderance of evidence. Rule 9(B), Pinal County Merit Commission R. P. on Appeal (Appendix 3); *Maricopa County Sheriff's Office v. Maricopa County Employee Merit Sys. Comm'n*, 211 Ariz. 219, 222, 119 P.3d 1022, 1025 (2005). In rendering its decision, for the second time, the Merit Commission made numerous errors of fact and law and substituted its judgment for that of PCSO, all of which necessitates this Court reversing the Merit Commission's decision and upholding PCSO's termination of James.

II. THE COMMISSION ABUSED ITS DISCRETION BY RULING IN CONTRADICTION TO JAMES' ADMISSIONS THAT HE WAS ASSIGNED QAS DUTIES AND THAT HE FAILED TO PERFORM THOSE DUTIES.

¶34 James was a DPS certified, fully trained QAS officer (Appendix 10, transcript pp. 259:23-29; 565:5-11) who had set up the QAS policy for Florence PD to mirror that of DPS. (Appendix 10, transcript pp. 260:1-6; 470:10-16; 565:16-20). In its findings on Remand, the Commission acknowledged that James was doing the QAS tests and that James said he was doing the QAS tests (Appendix 11, transcript p. 54; 15-17) and that James failed to perform four (4) out of eight (8) required 31-day calibration tests (Appendix 8, p. 6 C4); (Appendix 12, Exhibit R7).

¶35 But instead of ruling as such, the Commission once again, refused to hold James accountable on the basis that he initially volunteered for the QAS assignment. “He really did it as a favor . . . and it sort of just transpired that’s going to be one of his jobs.” (Appendix 11, transcript p. 53:14-15)

“. . . [H]e conducted the—the 30 day tests as he was required to do or as he was told to do or as he volunteered to do, I should say as he volunteered to do, and that he was never given any formal instruction to do anything else, . . .” (Appendix 11, p. 82:19-22)

The Commission found that PSCO never gave James an assignment because James initially volunteered for the job. (Appendix 11, transcript p 53: 16; p. 54: 15-20). This reasoning is irrelevant, as the undisputed testimony before the Commission was that a duty assignment is valid whether it is made in writing , or if a deputy volunteers to do it. (Appendix 10, transcript p. 260:17-21; Appendix 8, p. 7 (D)(5).

¶36 More disturbing, the Commission instituted a defense on behalf of James which they termed “reasonable potential for confusion.” (Appendix 8, p. 7 E6) A reasonable potential for confusion does not exist where James admitted to the Commission that he knew he was responsible for the 31 day testing, yet failed to do his job. Despite the fact that James initially volunteered for the QAS assignment he still had an obligation to perform the duties of that assignment. (Appendix 10, transcript p. 260:17-21) Even James’ own witness, Clint Lee, who

was in a command position under Sheriff Vasquez at the time of this incident, agreed that James should be subject to at least some discipline for his failure to conduct QAS testing. (Appendix 10, transcript, p. 432: 10-12).

¶37 It is outside the scope of the Commission's authority to dictate PSCO policy or dictate how assignments are given. *Maricopa County Sheriff's Office v. Maricopa County Employee Merit Sys. Comm'n*, 211 Ariz. 219, 222, 119 P.3d 1022, 1026 (2005). Here, the Court of Appeals specifically instructed the Commission to not consider, as a pivotal factor, the lack of a written policy for assigning quality assurance duties (Appendix 7) yet the Commission still considered the lack of written policy as a factor in its decision. (Appendix 8, p. 6 C4; Appendix 11, p. 53:1-2). In short, the Commission has chosen to completely disregard this Court's instructions. (Appendix 11, transcript p. 49: 16-18). The Commission abused its discretion and substituted its opinion for that of PSCO by requiring PCSO to assign duties in a particular fashion, wholly disregarding James' own admissions of responsibility and injecting a "reasonableness of confusion" justification.

¶38 The uncontroverted testimony before the Commission was that James was a DPS certified QAS operator (Appendix 10, transcript pp. 259:23-25; 315:6-12; 470:10; 565:1-4) and that PCSO and James were required to follow DPS protocol in all QAS testing. (Appendix 10, transcript pp. 254:20 – 255:13; 571:9-13).

Therefore, the Commission further abused its discretion when it based its decision on the “lack of formal instruction on Appellant’s job duties associated with QAS.” (Appendix 8, p. 7 E(4)) This finding demonstrates that the Commission still requires a written PCSO policy on QAS duties, which is beyond the scope of its authority and in contradiction to this Court’s direction.

¶39 Additionally, all credible evidence before the Commission clearly illustrated that James knew he was assigned the 90-day QAS testing. (Appendix 10, transcript pp. 276:8-13; 370:23 – 371:2; *Id.* at 409:17-23; *Id.* at 469:24 – 470:1; *Id.* at 473:11-16). Sergeant Monashefsky and James both agreed that James would take over those duties. (Appendix 10, transcript p. 417:18-20). Sergeant Monashefsky had officially assigned James the responsibility for the Intoxilyzer machine. (Appendix 10, transcript pp. 311:21 – 312:3). Sergeant Monashefsky informed his Lieutenant at the time, and e-mailed the assigned Deputy County Attorney that he no longer had the QAS assignment. (Appendix 12, Exhibit R8). By November 2007 Sergeant Monashefsky definitely made the assignment clear by an e-mail to James that he had completely passed the QAS duties on to James. (Appendix 7, p. 8 footnote 2; Appendix 12, Exhibit R8). And when the prosecutor was searching for proof of the QAS testing, James and Monashefsky responded that James was in charge. (Appendix 10, transcript pp. 570:10-21; 570:22 – 517:2;

Appendix 12, Exhibit R8). Based on these facts, the Commission abused its discretion when it ignored this uncontroverted evidence and admissions by James.

¶40 In addition, the Commission also went beyond the scope of its deferential role and substituted its opinion for that of the Sheriff when it found that there were insufficient facts to justify a reasonable belief that the charged acts were true. The Commission specifically found James' failure to do the appropriate amount of QAS tests directly led to the dismissal of seven DUI cases. (Appendix 8, p. 6, Charge 1, ¶ 4). The dismissal of seven DUI cases as a result of James' conduct is clear and uncontroverted evidence of the discredit James brought to PCSO. The Commission acted capriciously, arbitrarily and abused its discretion when, in contradiction to its findings, found that PCSO did not present sufficient facts to find that James' conduct was of such a nature that it would tend to discredit the County.

III. THE COMMISSION ABUSED ITS DISCRETION WHEN IT RULED IN CONTRADICTION TO ITS OWN FINDINGS THAT JAMES VIOLATED THE NO-WEAPONS POLICY AND JAMES FAILED TO MEET HIS BURDEN TO JUSTIFY A DEVIATION.

¶41 It was undisputed that James violated PCSO policy that no firearms or other weapons may be carried by any observer. (Appendix 1, Disciplinary Charge 3; Appendix 8, p. 8 (C)(3)). Under PCSO policy it is the Deputy who has the burden of establishing that a deviation from policy is in the obvious best interest of PCSO.

(Appendix 4) Commander for the Criminal Investigation Bureau, Lieutenant William Haigh, testified that a deviation from policy was not justified and it was absolutely not in the best interests of PCSO for James to arm Moore and bring him into a hostile situation. (Appendix 10, transcript, pp. 156:23 – 157:11; *Id.* at 158:21 – 159:3; *Id.* at 164: 2-10). The investigating internal affairs officer, Detective Guemes, also testified that James was not justified in arming Moore with a loaded PCSO weapon or in using him as backup. (Appendix 10, transcript, pp. 100: 10 - 101:3)

¶42 James failed to meet his burden of proof to justify a deviation from the policy. The only evidence that James put forth to meet his burden is the testimony from two witnesses, neither of whom can provide a basis for supporting a policy deviation. The Commission’s reliance on Lee’s testimony regarding deviation from policy was not justified because by his own testimony, former PCSO Chief Deputy Lee was not involved in the investigation and Lee could “only go by what I was – the few details I did have and the ones that I have learned since.” (Appendix 10, transcript p. 436:4-8) Lee also testified that he intentionally disassociated himself from investigations regarding James because of his personal relation with James. (*Id.* at p. 432:20-22; *Id.* at p.433:7-10; *Id.* at pp. 434:24- 435: 5). But even based on what Lee knew, he actually advocated disciplining James to Sheriff Vasquez (*Id.* at p.440:14-19). The only other witness, Aubrey Keck, was not in a

position to issue an opinion because he was not James' supervisor and was not involved in the IA investigation of James. (Appendix 10, transcript p. 233:12-13). That aside, Keck did not testify that James conduct was justified or in the best interests of PCSO, he merely said it was reasonable. (*Id.* at p. 221:7-12). Reasonableness isn't the standard under PCSO policy; rather, a deviation must be in the obvious best interest of PCSO. (Appendix 4, *emphasis added*). Here, there was no "obvious" best interest of PCSO in evidence. As such, the Commission abused its discretion when it found that James' actions were justified where no supporting evidence was presented. (Appendix 8, p. 8, (C)(6)). The Commission also abused its discretion by finding that PSCO did not meet its burden by a preponderance of evidence to sustain this disciplinary charge, when PCSO clearly established that James violated policy and James did not meet his burden. (Appendix 8, p. 9 (D)).

¶43 The Commission also committed error when it relied on evidence that Moore was a trained Department of Corrections officer (Appendix 10, transcript pp. 680; 24 –681: 4) and that he was recently weapon certified with a shot gun. (Appendix 8, p. 8, Charge 3 ¶ 5) As this Court previously addressed, Moore's qualifications and actions were not at issue because they were not a basis for James termination and therefore, should not have been a determining factor in whether or not PCSO had a reasonable basis to discipline James. (Appendix 7, p.10 ¶ 19).

Additionally, it was undisputed that Moore’s weapon’s training does not exempt James from the policy that prohibits him from giving a weapon to Moore. (Appendix 10, transcript pp. 156; 23 – 157: 11; *Id.* at pp. 158: 21 – 159, 7; *Id.* at pp. 173: 19 –174: 25).

¶44 The Commission further abused its discretion by requiring that PCSO prove that the civilian observer was harmed before it would uphold James violation of the PCSO policy that makes the Deputy responsible for the safety of the observer. (Appendix 1, Charge 4).

“ . . . if the ride-along, the observer, had been harmed in some way, shot or injured in one fashion or another, then I would expect to see this charge here. . . .” (Appendix 11, transcript p. 88: 10-16) “. . . basically this is to me a non-applicable charge. . . .”

Id. These comments were incorporated by the entire Commission when they based their decision on the fact that the observer, under James supervision, was not harmed. (Appendix 8, p. 9 ¶ E3). By doing so, the Commission has added an element of proof, and in essence created a “no harm no foul policy” that does not exist in PCSO policy and is outside the scope of the Commission’s authority. This is a clear abuse of discretion justifying reversal.

¶45 The Commission's role is strictly an objective one. *Maricopa County Sheriff's Office*, 211 Ariz. at 222, 119 P.3d at 1025. Deciding what is and is not an appropriate policy is outside of the Commission's authority and constitutes the Commission substituting its opinion for that of the Sheriff. (Appendix 7, p. 8, ¶ 13; *Maricopa County Sheriff's Office*, 211 Ariz. at 223, 119 P.3d at 1026). Likewise, deciding who else should and should not be subject to discipline is outside the scope of these proceedings and the Commission's authority and is not a proper basis to refuse to impose discipline in this case. Yet the Commission continues to improperly take the focus off of James' conduct and issue its findings in contradiction to credible evidence in its attempt to justify an otherwise non-existent basis to deviate from policy. Commissioner Ramsdell's comments illustrate this point:

“...[B]ut I found it reprehensible that a police officer would find himself in a dangerous situation with a civilian because policy wasn't followed by - you know, he's getting busted for not following policy, but the reason he's there is because policy wasn't followed.”

(Appendix 11, transcript p. 46: 6-10). The Commission is basically saying that it is not going to hold James accountable for policy violations because other employees may have also violated policy, and that it's not fair to discipline James. This is another example of the Commission's continuing refusal to give deference to the appointing authority's decision in all cases in which the appointing authority has

complied with its standard under the merit rules. *Maricopa County Sheriff's Office*, 211 Ariz. at 222, 119 P.3d at 1025.

IV. THE COMMISSION ABUSED ITS DISCRETION WHEN IT RULED CONTRARY TO ITS OWN FINDINGS REGARDING JAMES' OFF-DUTY INTERACTION WITH A DAYCARE OWNER AND REQUIRED PCSO TO PROVE THAT JAMES INTENDED TO DISCREDIT PCSO.

¶46 James was disciplined for engaging in a confrontation with a member of the public over an entirely personal matter while identifying himself as a Sheriff's Deputy. (Appendix 1, Charge 8) The Commission made the following related findings based on undisputed evidence:

- James went to the home of a day care operator, Manwell;
- Regarding an entirely personal matter;
- James was off duty;
- James identified himself as a sheriff's deputy;
- James asked for Manwell's daycare license number;
- Manwell complained to PCSO about James' interaction with her; and
- Marlene said that James was loud and threatening.

(Appendix 8, p. 12 (C)(4 a-h)) Because the Commission's own findings are the same as the basis for Charge 8, the Commission abused its discretion and substituted itself for that of PCSO when it ruled in contradiction to those findings.

The Commission's findings acknowledge that PSCO demonstrated not only substantial evidence, but undisputed evidence, that PCSO satisfied its burden of proof.

¶47 The Commission further abused its discretion by patently ignoring testimony and evidence before it on the basis that such evidence was not live testimony. The Commission stated that it only relied on Avilez and James' testimony because they testified in person at the Commission hearing. (Appendix 11, transcript p. 122: 1-12; *Id.* at 137: 17-19). At the same time, the Commission also appears to ignore LeBlanc's testimony and flatly disregards his investigative report as evidence. (Appendix 11, transcript p. 122:2-8) As such, the Commission is effectively requiring live witness testimony, wholly disregarding this Court's direction and the applicable rules of procedure, resulting in an abuse of discretion.

¶48 The Commission likewise abused its discretion and substituted its opinion for that of PCSO by ignoring evidence that directly contradicts its findings and improperly focusing on the type of discipline imposed by PCSO. Avilez testified that Manwell wanted to file a report against James but Avilez told Manwell that he would not make a report (Appendix 10, transcript p. 405: 9-10). Yet, in contradiction to this testimony, the Commission bolstered its findings by stating that, according to Avilez, Manwell did not want to file charges. (Appendix 11, transcript p. 137: 8-9.) The Commission also ignored the fact that Manwell

complained about Avilez because he did not take her concerns about James seriously. (Appendix 10, transcript p. 363: 12-21; Appendix 12, Exhibit R10, p. 33) The only part of Manwell's testimony that the Commission repeatedly relies on is that Manwell did not want James to lose his job. (Appendix 11, transcript p. 93: 22-24) This pattern demonstrates that the Commission is improperly focused on the fact that James was terminated and is seeking to justify James' action in an attempt to avoid imposing that discipline on him.

¶49 The Commission attempts to justify its decision by saying that Manwell was not that upset because it took her three hours to make a complaint to PCSO (Appendix 11, transcript p. 101: 17-19) Even more confusing is that the Commission also found that Manwell over-reacted (Appendix 11, transcript p. 100: 18-20), suggesting that she was upset but unjustifiably so, even though James acknowledged that he made Manwell upset. (Appendix 11, transcript p. 136: 24-25) But, as this Court pointed out, whether or not Manwell was upset when the investigating officers arrived does not address the allegation that James identified himself as a sheriff's deputy in the context of a personal matter. (Appendix 7, p. 13 ¶ 24)

¶50 Another abuse of discretion occurred when the Commission refused to even consider Charge 9 or the facts as applied to it. (Appendix 11, transcript p. 103: 5-20) The Commission further abused its discretion by requiring PCSO to prove that

James intended to violate policy under Disciplinary Charge 10. “There was bad judgment. However, you know, I have to balance that with was there ill intent?” (Appendix 11, transcript pp. 141: 6-8 – 142: 3-5). Charge 10 is for “any other improper conduct or performance of such severity as to constitute cause for disciplinary action.” (Appendix 1) Intent is not an element in any of the disciplinary charges. The fact that several Commission members found that James’ interaction with the daycare owner constituted “bad judgment” (Appendix 11, transcript p. 141: 6-10; *Id.* at p. 142: 3-5; *Id.* at p. 142: 23-24) is sufficient evidence to warrant discipline under Charge 10. *See Maricopa County Sheriff’s Office v. Maricopa County Employee Merit Sys. Comm’n*, 211 Ariz. 219, 224, 119 P.3d 1022, 1027 (2005) (finding that the employer has discretion to impose discipline when an officer is unwilling or unable to use sound judgment concerning a level of force required).

V. GLOBAL CHARGES

¶51 Because the Commission abused its discretion by applying incorrect standards of review and non-existent standards of proof throughout its findings, the Commission also erred in its findings related to James’ repeated infractions as outlined under Disciplinary Charges 6 and 7. (Appendix 1)

VI. THE COMMISSION FAILED TO CONDUCT A MEANINGFUL HEARING ON REMAND TO CONSIDER THE DIRECTIVES FROM THE COURT OF APPEALS.

¶52 This Court gave several specific instructions to the Commission when it found that the Commission committed several legal errors in reaching its initial Findings of Fact. (Appendix 7, pp. 7-8 ¶ 13; *Id.* at p. 8 ¶ 14; *Id.* at p. 11 ¶ 19) Inherent in this Court's instructions is the understanding that the Commission will conduct a meaningful hearing and apply all relevant facts to the disciplinary charges under the appropriate criteria while removing all erroneous considerations from its decision. (Appendix 7, p. 14 ¶ 26) Surprisingly, the Commission appears to merely strike the offending provisions from its findings of fact without any real consideration of how removal of those factors impacted its findings. (Appendix 11, transcript p. 77:10-12; *Id.* at p. 72:18-24; *Id.* at p. 77:10-12; *Id.* at p. 78:13-20) As discussed above, both the discussions between Commission members and comments by Commission members indicate that the Commission continued to use erroneous criteria and committed legal error in reaching its Decision on Remand.

¶53 The Commission's failure to meaningfully reconsider the facts as applied under the appropriate criteria in the absence of its previous legal errors is an abuse of discretion and done in disregard of this Court's instructions on remand.

CONCLUSION

¶54 James repeatedly violated PCSO policy, failed to perform the duties of his job, demonstrated poor judgment, and as a result brought continued discredit to PCSO and himself. The Commission abused its discretion and substituted itself for PCSO by holding PCSO to a standard of proof that does not exist and by refusing to give any deference to the Sheriff. The Commission cannot substitute its view for that of the Sheriff where there is evidence and a rational basis to support the Sheriff's decision. The Commission's failure to uphold PCSO's disciplinary decision was "capricious at best, arbitrary or worse, a direct abuse of discretion." (Appendix 6, p. 5, quoting the Hon. William J. O'Neil). And yet on Remand, remains the same. Likewise, the Superior Court erred when it failed to overturn the Commission's decision based on the Commission's substantial and repetitive abuse of discretion.

¶55 PCSO respectfully requests that this Court affirm PCSO's discipline of James, and thereby reverse the Commission's Decision and all awards of back pay. PCSO also asks this Court to remand 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 13th day of May, 2013.

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s/ Gina Gutierrez

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, I certify that the attached 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 7,609 words.

CERTIFICATE OF SERVICE

I certify that on May 13, 2103, the foregoing was e-filed with:

Clerk of the Court of Appeals
State of Arizona – Division Two
State Office Building
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I further certify that on May 13, 2013, TWO COPIES of the foregoing Opening Brief were served by depositing the same in the United States mail with postage prepaid thereon and addressed to:

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APPENDIX TO APPELLANT'S OPENING BRIEF

1. Statement of Charges Notice of Intent to Take Disciplinary Action
2. Pinal County Uniform Merit Rules, Rule 13
3. Pinal County Employee Merit System Commission Rules of Procedure on Appeal, Rule 9
4. Pinal County Sheriff's Office Policy and Procedure, Policy no. 1.4.2.1.1
5. Pinal County Employee Merit System Commission Findings of Fact, Conclusions of Law and Order Regarding Appeal of Termination by Appellant Cardest James, dated January 28, 2010
6. Pinal County Superior Court ruling in CV2010-000456, dated November 22, 2010
7. Memorandum Decision, Arizona Court of Appeals, Division Two, Pinal County Sheriff's Department v. Cardest James, case no. CV2011-0013
8. Amended on Remand Pinal County Employee Merit System Commission Findings of Fact, Conclusions of Law and Order Regarding Appeal of Termination by Appellant Cardest James, dated March 2, 2012
9. Pinal County Superior Court Ruling in CV2012-000718, dated December 21, 2012
10. Merit Commission Hearing Transcript of Proceedings: October 30, 2009, November 2, 2009, and November 25, 2009
11. Merit Commission Hearing Transcript of Proceedings, December 2, 2011
12. Merit Commission Hearing Exhibits
 - Exhibit R1 Call Log
 - Exhibit R2 Map
 - Exhibit R3 Internal Investigation Report by Det. Guemes
 - Exhibit R4 PCSO Ride Along Policy

Exhibit R5 James Transcript

Exhibit R6 Transcript of Bryan Moore

Exhibit R7 Internal Investigation Report by Lt. Elliot

Exhibit R8 Emails

Exhibit R9 September 2008 Polygraph

Exhibit R10 Internal Investigation Report by Sgt. LeBlanc

Exhibit A1 A.R.S. § 13-2403

Exhibit A2 Policy 1.4.2.1.1

Exhibit A3 Moore Training Record

Exhibit A4 Jeff Burchfield Investigation

Exhibit A5 Intox SMR July 2008

Exhibit A6 October 2008 Polygraph

Exhibit A7 James Background Application

Exhibit A8 Burton Polygraph

Exhibit A9 October 2010 Letter

Exhibit A10 Newspaper Article

Exhibit A11 James Evaluation 3/07 – 9/07

Exhibit A12 James Evaluation 1/07 – 12/08

Exhibit A13 James Evaluation December 2008

Exhibit A14 James Application