

CAUSE NO. _____

CITY OF WEST UNIVERSITY PLACE and	§	IN THE DISTRICT COURT OF
CHIEF OF POLICE KEN WALKER,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
	§	
TEXAS COMMISSION on LAW	§	
ENFORCEMENT OFFICER STANDARDS	§	
& EDUCATION and ROSEMARIE VALDES,	§	
	§	
<i>Defendants.</i>	§	_____ JUDICIAL DISTRICT

PLAINTIFFS’ ORIGINAL PETITION

The City of West University Place, Texas and/or the West University Place Police Department (“the City”) and Chief of Police Ken Walker, Plaintiffs in the above entitled and numbered cause, appear to file Plaintiffs’ Original Petition and to complain of Defendants, The Texas Commission on Law Enforcement Officer Standards and Education (hereinafter the “Commission” or “TCLEOSE”) and Rosemarie Valdes (“Valdes”), and would respectfully show this Court as follows:

I.

DISCOVERY LEVEL

1. Plaintiffs intend for the discovery in this case to be conducted under Level 2 as described in TEX. R. CIV. P. 190.3.

II.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action under the Administrative Procedure Act, TEX. GOV’T CODE ANN § 2001.176, TEX. OCC. CODE ANN. § 1701.4525 and 37 TAC § 217.8 governing requests to correct a police officer termination report (known as an F-5 Report of Separation).

3. Under TEX. GOV'T CODE § 2001.176, mandatory venue is in Travis County because this action constitutes a petition for judicial review of the Administrative Law Judge's decision regarding Valdes's request to correct the employment termination report (known as an F-5 Report of Separation) maintained by TCLEOSE. Because the principal office of TCLEOSE is located in Travis County, Texas, venue also is proper in Travis County under TEX. CIV. PRAC. & REM. CODE § 15.002. Additionally, venue is proper as to Defendant Valdes under TEX. CIV. PRAC. & REM. CODE § 15.005.

III.

PARTIES

4. The Plaintiff City is a municipality and law enforcement agency in the State of Texas. Chief Walker is the Chief of Police for the City of West University Place.

5. Defendant TCLEOSE is a state agency created to establish standards for licensing police officers and to require the submission of reports by law enforcement agencies, including municipalities, and may be served with process by serving a copy of this petition on Timothy Braaten, Executive Director, TCLEOSE, 6330 East Highway 290, Ste. 200, Austin, Texas 78723.

6. Defendant, Rosemarie Valdes, a former police officer for the City, is an individual residing in Nacogdoches County, Texas and may be served with process by personal service at her home address, 227 Box Lane, Chireno, Texas 75937-3779.

IV.

EXHAUSTION OF REMEDIES

7. The City and Police Chief Ken Walker seek judicial review of the decision of an Administrative Law Judge ("ALJ") of the State Office of Administrative Hearings ("SOAH"),

following a hearing on March 24, 2010 regarding Valdes' Request for Correction of F-5 Report of Separation issued in Docket No. 407-09-4332, *In the Matter of Rosemarie Valdes for Correction of F-5 Report of Separation*. In compliance with TEX. GOV'T CODE § 2001.171, the City and Chief Walker have exhausted all administrative remedies under the Texas Administrative Procedure Act as required before seeking judicial review of the decision at issue.

8. Specifically, as required by TEX. GOV'T CODE § 2001.145, Plaintiffs timely filed a written motion for rehearing following the ALJ's June 10, 2010 Decision and Order. The ALJ denied the City's motion for rehearing on July 27, 2010. The City, having exhausted all administrative remedies available, is aggrieved by a final decision in a contested case, and therefore, under TEX. GOV'T CODE § 2001.171, the City is entitled to judicial review. As required by TEX. GOV'T CODE § 2001.176, Plaintiffs have filed this petition for judicial review within thirty (30) days after the motion for rehearing was denied.

V.

FACTUAL BACKGROUND

Termination for Untruthfulness and F-5 Report of Separation

9. Valdes, a former patrol officer for the City of West University Place, was terminated on October 15, 2008 specifically because she violated police department General Order 201 § 11 requiring truthfulness and § 10 requiring integrity, after she repeatedly told false and grossly exaggerated versions of an on-duty incident that allegedly occurred while she was directing traffic. Valdes claimed that she was hit by a car while directing traffic away from a felony stop where other police officers were apprehending suspects. Valdes provided statements to her supervisors, her employer, the City's workers' compensation carrier's claims personnel, and the Texas Workforce Commission concerning the manner in which the alleged incident took place. However, the City's

investigation included videotaped evidence taken from an in-dash camera in a City police car, which shows that Valdes was directing traffic without incident on the day she alleges that she was hit by a car and supposedly “thrown onto the hood,” among other factual claims.

10. After the City fully and completely investigated the incident, it concluded that Valdes had made numerous false and exaggerated statements about the events that day, including in a videotaped reenactment, and, therefore, the City terminated her employment for violating the City’s Police Department General Order 201 §§10-11 requiring truthfulness and integrity from police officers. For the convenience of the Court, attached as Exhibit “A” is a list of each of Valdes’s untruthful statements by date, specific section of the truthfulness order that she violated, and the exhibit number in which the statement can be found in the evidence introduced during the hearing before the ALJ.

11. The ability to testify truthfully is an essential function of a police officer’s job given that police officers cannot be effective unless they are in a position to credibly support criminal charges through sworn testimony in court. The City and its Police Chief have an obligation to the public to set high standards for truthfulness for the City’s police officers.^{1/}

12. Chief Walker timely submitted the required F-5 termination report to TCLEOSE on December 16, 2008 following a decision by the City Manager to uphold Valdes’s termination. The

^{1/} Valdes’s statements could have resulted in a criminal prosecution of the car’s driver, an elderly woman. As Chief Walker testified, and as he advised Valdes in the letter terminating her employment, the City originally had initiated an investigation simply “to identify the owner of the automobile that you claimed had hit you and knocked you onto the hood.” He was profoundly troubled that if the City “had been able to identify the vehicle and driver that [Valdes] claimed hit [her], the elderly female driver likely would have been arrested and charged with a crime given [Valdes’] dramatic description of how [she was] supposedly sharply hit, thrown off [her] feet, and knocked onto the hood . . .” *Id.* In other words, as set out in the termination letter, “an innocent person would have been forced to endure a demeaning and traumatic process” because Valdes failed to truthfully report the events. *Id.*

F-5 Report correctly stated that Valdes was “terminated for an administrative violation of truthfulness or insubordination” and included an attached narrative describing Valdes’s statements, the conflicting video evidence, as well as a copy of the departmental orders that Valdes had violated by making repeated false and grossly exaggerated statements. Valdes filed a Request for Correction of the F-5 Report with TCLEOSE. TCLEOSE referred the Request for Correction to SOAH and the parties participated in a hearing before the ALJ on March 24, 2010, submitting post-hearing briefing and closing the evidence on April 27, 2010.

Police Department General Orders Requiring Truthfulness

13. General Order 201, § 11, which applies to all police officers, prohibits police officers from being untruthful as follows:

Upon the order of the Chief of Police or designee, or a supervisor, employees will truthfully answer all questions specifically concerning the scope of employment and operations of this Department, which may be asked of them. No employee shall be untruthful in any official matter. No employee shall knowingly enter or cause to be entered in any City or Department record any false information or misrepresentation of fact; omit pertinent facts; nor make any false statement or verbal report to a superior officer. An employee will not make a knowingly false complaint against any other employees.

General Order 201, § 10 requires the City’s police officers to act with integrity and to report the dishonesty of others, providing:

Departmental employees shall avoid any conduct which might compromise the integrity of themselves, fellow officers, fellow employees, or the Department. All employees shall report the dishonesty of others.^{2/}

^{2/} As Chief Walker and Valdes testified at the hearing on March 24, 2010, Valdes received a copy of these orders and signed an acknowledgment in 2005 confirming that she had reviewed them. Chief Walker also testified that each provision § 11 stands alone and may serve as a separate basis for violation of the order requiring truthfulness.

Valdes's Statements Concerning the Incident

14. On October 20, 2007, Valdes reported to her supervisor on the mobile digital terminal (MDT) in her patrol car that “an old lady hit me with her car. . . in case you were interested she knocked me onto her hood I hope I dented it.” Later that same afternoon, Valdes went to the City’s fire station to be examined by a paramedic/emergency medical technician (“EMT”), Ryan Wagner. According to the EMT report and the testimony from EMT-Paramedic Wagner at the hearing, Valdes stated on the day of the incident that she “was hit by a car . . . and was thrown onto the hood.” Within the first week following the alleged accident, Valdes also provided a sworn statement to her supervisor concerning her version of events and claiming that a “sharp impact from a bumper to the rear of my legs caus[ed] me to lose my balance and fall onto the hood.” In an interview with a representative from the City’s workers’ compensation carrier regarding her workers’ compensation claim, Valdes stated that “the impact from the bumper at the rear of my legs, kinda caus[ed] me to lose my balance and uh, onto the hood . . .and I staggered sideways.” Valdes stated that the impact “took my feet, you know, and it was, it seemed real bad because it knocked me back and when I regained balance I, I stood up and turned to the side of her vehicle.” She continued in the interview with the workers’ compensation carrier’s representative, stating “. . . it knocked me down, got me off balance, it knocked me down and . . . I got back on my feet.” After Valdes returned from an extended medical leave for an unrelated injury, Valdes again repeated this dramatic version of the incident in a videotaped interview/reenactment in which she agreed that she “landed on her [driver of car’s] hood,” her “legs went out from under me” placing “[a]ll my weight on the hood,” and that when the car supposedly hit her it “knocked both feet out” and that “both legs flew up.”

15. What began as an investigation of the driver's conduct for potential criminal prosecution ended up as an internal investigation of Valdes's lack of truthfulness when serious problems appeared with her story.^{3/} The City gathered evidence and reviewed video from various patrol vehicles at the scene in an effort to identify the driver who had allegedly hit and injured Valdes by supposedly "knocking her onto the hood" and "throwing her onto the hood." The video evidence from an in-dash camera in a City police car showed that Valdes was not knocked onto the hood, or thrown onto the hood and, therefore, Valdes's reports concerning the incident were false. The City launched an internal investigation into the incident after a canvas of the area where Valdes had been directing traffic also located no civilian witnesses and statements from law enforcement officers from a neighboring jurisdiction included no corroboration of an automobile-pedestrian accident. The City presented this evidence, including the video evidence and testimony of a forensic video expert, at the administrative hearing before the ALJ.

Valdes's Statements Regarding Her Alleged Injury

16. Valdes was interviewed by the City's workers compensation carrier regarding a claimed injury to her knee that she alleged resulted from the incident. Describing her alleged injury and what she supposedly was told by a paramedic who examined her at the City's fire station, she told the carrier's representative "the paramedics, you know, observed how, how swollen my leg had gotten by this point . . ." When asked her about what the paramedics supposedly had told her,

^{3/} Chief Walker's termination letter described the shift in focus of the investigation as follows: "An investigation into this incident originally was initiated to identify the owner of the automobile that you claimed had hit you and knocked you onto the hood. Such investigation continued but as further facts came to light, it was expanded to include an administrative investigation concerning the circumstances under which you reported the accident and the issue of whether you had been truthful when you reported it." *Id.*

Valdes responded, “Well, that it was swollen . . .” Valdes also emphasized the supposed swelling she claimed to have experienced right after the incident before seeing the paramedic, stating in a sworn affidavit provided to her supervisor, “Sgt. Tobio . . . sent me to see the paramedics. At this point, my knee had become swollen”

17. As established by EMT-Paramedic Ryan Wagner’s testimony at the hearing before the ALJ and his written EMS Report introduced as an exhibit at the hearing, in truth, the paramedics had not seen any swelling at all on her leg, and the paramedics never told Valdes that her leg was swollen — in fact, his written EMS report states there was no swelling. EMT-Paramedic Wagner did not even observe any indication whatsoever that Valdes had been hit by a car.

18. In summary, Valdes made multiple false and/or grossly exaggerated statements concerning an alleged incident in which she was involved while on-duty, which were inconsistent with the City’s internal investigation, including video evidence. As a result, after providing Valdes with notice and an opportunity to respond, the City terminated her employment on October 15, 2008 for untruthfulness in violation of General Order 201 requiring integrity and truthfulness.

Before the ALJ Issued The Decision At Issue, A Judgment Found Valdes Disqualified From Receiving TWC Benefits Based On Her Misconduct

19. Valdes filed a claim for unemployment benefits and by a two-one vote, the Texas Workforce Commission (“TWC”) decided to grant such benefits to her despite evidence that Valdes had been terminated for untruthfulness, which constituted disqualifying misconduct associated with her job. The City filed a petition for judicial review of the TWC’s final decision that Valdes had not been terminated for misconduct in a lawsuit styled Cause No. 2009-31049; *City of West University Place v. Texas Workforce Commission and Rosemarie Valdes*; In the 157th Judicial District Court, Harris County, Texas.

20. On May 7, 2010, the Court in that case reversed the decision of the TWC, granted the City's motion for summary judgment and found that Valdes was disqualified from receiving unemployment benefits. There was no other ground asserted in the City's motion for summary judgment to support the finding that Valdes was disqualified from receiving benefits other than her violation of General Orders relating to truthfulness — again, the very same acts of untruthfulness involved in the F-5 hearing before the ALJ. Given that the substantial evidence test applied in the TWC lawsuit, the City faced an even higher burden of proof in that case than in the hearing before the ALJ on the F-5 issue. The TWC judgment for the City became final on June 8, 2010 after the TWC withdrew its motion for new trial. Both Valdes and the TWC decided not to appeal the judgment. Even before the ALJ issued a decision on the F-5 correction matter and before the judgment in the TWC lawsuit had become final, Plaintiffs advised the ALJ of the judgment, sending the ALJ a letter by fax on June 3, 2010, stating:

To apprise the Court of any potentially-relevant developments relating to the above matter, I am enclosing an Order Granting the City of West University Place's Motion for Summary Judgment in connection with a pending legal action between Ms. Valdes and the City concerning whether Ms. Valdes is disqualified by law from receiving unemployment benefits following her termination by the City due to misconduct associated with her job. The Court ruled that Ms. Valdes was disqualified from receiving unemployment benefits based on her misconduct.

21. The Harris County District Court's Order granting the City's summary judgment precludes a contrary decision on the same issue in this matter as a matter of law and Plaintiffs' counsel had forwarded a copy of this Judgment to the ALJ to apprise her of this development. Nevertheless, the ALJ issued a decision on June 10, 2010 holding that Plaintiffs did not establish misconduct by Valdes by a preponderance of the evidence, an inconsistent finding using a lower

burden of proof. As set out below in further detail, on June 30, 2010, the City's motion for rehearing additionally raised the Court's inconsistent Judgment as a basis for a motion for rehearing.

ALJ's Decision and Order Create Serious Ethical Issue For Plaintiffs

22. In addition to the issues set out in Paragraph IV below, Plaintiffs face a serious ethical problem in complying with the ALJ's decision issued on June 10, 2010. If ultimately required to change the F-5 form as ordered by the ALJ, Chief Walker is required to use a form supplied by TCLEOSE. Such form requires Chief Walker or his designee to sign a sworn verification that is worded as follows:

"I, chief administrator or designee, attests that this is a true and accurate explanation of the circumstances under which this person resigned or was terminated."

Chief Walker is unable to truthfully attest either that Valdes was "Honorably Discharged" as he understands that phrase or that Valdes was terminated due to a "dispute about an on-the-job accident" without himself potentially committing a violation of the law and the City's General Orders regarding truthfulness. Falsification of a government record is a criminal violation,^{4/} which Chief Walker cannot ethically commit and the City cannot ethically, morally or responsibly require him to do so based on its own standards of appropriate conduct.

Motion for Rehearing Filed and Denied

23. Plaintiffs timely filed a written motion for rehearing following the ALJ's June 10, 2010 Decision and Order. The ALJ denied the City's motion for rehearing on July 27, 2010. After Plaintiffs filed a motion for reconsideration on August 12, 2010, which the ALJ denied on August 20, 2010 for lack of jurisdiction, Plaintiffs now, therefore, filed this suit seeking judicial review of

^{4/} Under TEX. PEN. CODE § 37.10(a)(1), it is a violation of Texas criminal law to knowingly make a false entry in a governmental record.

the decision within thirty (30) days after their motion for rehearing was denied as required by TEX. GOV'T CODE § 2001.176.

VI.

CAUSES OF ACTION

Judicial Review Of Decision and Order Under Administrative Procedure Act

24. Plaintiffs file this suit seeking judicial review of the June 10, 2010 Decision and Order that the ALJ issued on behalf of TCLEOSE, which ordered Valdes's F-5 Report to be corrected to read "honorably discharged, terminated at will" with an attached explanation stating, "dispute about an on-the-job accident" and any and all findings and conclusions supporting such orders. Under the Administrative Procedure Act, a party who has exhausted all administrative remedies within a state agency and is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. *See* TEX. GOV'T CODE § 2001.171. The Decision and Order requiring that Chief Walker change Valdes's F-5 Report to reflect that she was honorably discharged was not reasonably supported by substantial evidence as required. *See City of Houston v. Morris*, 23 S.W.3d 505, 507 (Tex. App. – Houston [1st Dist.] 2000, no pet.).

25. Plaintiffs respectfully would show that the Court should reverse and/or remand this case to the applicable state agency and/or SOAH for further proceedings because the substantial rights of Plaintiffs have been prejudiced in that the administrative findings, inferences, conclusions, or decisions in the June 10, 2010 Decision and Order are in violation of a constitutional or statutory provision, in excess of the agency's statutory authority, made through unlawful procedure, affected by other error of law, not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole, and are arbitrary or capricious or characterized by abuse

of discretion or clearly unwarranted exercise of discretion. Accordingly, Plaintiffs request that the Court reverse the decision in its entirety, vacate and/or modify the finding of fact nos. 6, 7, 23-26 and conclusion nos. 7-9, and issue an order stating that the F-5 Report should remain as completed by Chief Walker.

26. The decision to order Chief Walker to change Valdes' F-5 Report was arbitrary and capricious because, among other reasons, it is not supported by the evidence, and disregards credible evidence such as the testimony of Chief Walker, Lt. Olive, and forensic video expert Tony Imel, who concluded based on his review of the in-car video that Valdes "was not thrown onto the hood of any vehicle, knocked onto the hood of any vehicle, did not lose balance. . . ." as she had claimed. Further, in the Decision and Order, the ALJ acknowledged the discrepancy between the video evidence and Valdes's statements but excuses Valdes conduct based on speculation concerning either pain or excitement. *See* Decision and Order, at 9, 14. By way of example, the Decision and Order states that the "video definitely does not show . . . Ms. Valdes being lifted into the air and wholly propelled onto the hood of the car." *Id.* at 9. At the same time, the Decision and Order recognizes that Valdes claimed she had been "thrown" and "knocked" onto the hood, and even had agreed that the car's bumper had "scooped" her off her feet, both legs "flew up," and the car "knocked both feet out." *Id.* at 13, fn. 32. The Decision and Order also excuses inconsistent statements by speculating that "Ms. Valdes was in pain, undoubtedly still excited by the events" *Id.* at 14. The ALJ excuses Valdes's misstatements and the numerous inconsistencies between her claims and the video evidence despite the fact that Valdes was a police officer, whose very job depended on being able to accurately recall facts and report them in an objective manner regardless of outside stimuli such as pain or excitement. For the Decision and Order to concede these inconsistencies while ordering

the Chief of Police to alter the termination report is arbitrary and capricious as a matter of law. The Decision and Order should be reversed and the termination report should be allowed to stand as filed, describing Valdes' termination as a dishonorable discharge for an administrative violation of truthfulness.

Judicial Review Of Decision To Deny Motion for Rehearing

27. Plaintiffs additionally file this suit seeking judicial review of the July 27, 2010 Order Denying their Motion for Rehearing (and subsequent Motion for Reconsideration), including but not limited to the ALJ's failure to consider the defense of collateral estoppel based on the TWC Judgment, and failure to consider new evidence relating to the TWC Judgment and its effect on the matter pending before SOAH. Plaintiffs incorporate by reference the grounds asserted in their Motion for Rehearing as if fully set out herein.

28. Plaintiffs respectfully would show that the Court should reverse and/or remand this case to the applicable state agency and/or SOAH for further proceedings because the substantial rights of Plaintiffs have been prejudiced in that the administrative findings, inferences, conclusions, or decisions in the July 27, 2010 Order Denying their Motion for Rehearing (and subsequent Motion for Reconsideration) are in violation of a constitutional or statutory provision, in excess of the agency's statutory authority, made through unlawful procedure, affected by other error of law, not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole, and are arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

29. As established in Plaintiffs' Motion for Rehearing, the central findings and conclusions in the June 10, 2010 Decision and Order previously were determined in a lawsuit styled

Cause No. 2009-31049; *City of West University Place v. Texas Workforce Commission and Rosemarie Valdes*; In the 157th Judicial District Court, Harris County, Texas (“TWC Judgment”). The doctrine of collateral estoppel precluded the ALJ from issuing the June 10, 2010 Decision and Order and determining issues that were already decided by the 157th District Court in its May 7, 2010 TWC Judgment, which only became final on June 8, 2010. Plaintiffs have established all required elements of doctrine of collateral estoppel. Collateral estoppel precludes the June 10, 2010 Decision and Order from determining issues already decided by the 157th District Court in a Judgment that became final on June 8, 2010.^{5/}

30. Further, the ALJ abused her discretion, acted in an arbitrary and capricious manner, and contrary to law in denying Plaintiff’s Motion for Rehearing (and the related Motion for Reconsideration) based on new evidence and the other grounds set forth therein.

31. The ALJ abused her discretion, acted in an arbitrary and capricious manner, and contrary to law when she failed to reopen the evidence to consider the TWC Judgment and ruled that Plaintiffs waived their collateral estoppel defense. The refusal to consider evidence supporting the collateral estoppel defense constituted an abuse of discretion. The evidentiary decisions of an

^{5/} Specifically, the TWC Judgment found that Valdes was disqualified from receiving unemployment benefits, basing such conclusion on the City’s motion for summary judgment, which established that Valdes violated the police department’s General Orders regarding truthfulness and integrity, the same acts of misconduct at issue in this case involving the F-5 report. Collateral estoppel bars further litigation of issues that were actually litigated and were essential to the judgment in the prior action even if those issues are based on a different cause of action. *See Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818-20 (Tex. 1994). Actual litigation occurs when as in this case, an issue is properly raised by the pleadings or otherwise, is submitted for determination, and is determined. *See Berezoski v. Tex. State Bd. of Med. Examiners*, 2004 Tex. App. LEXIS 6255 *13 (Tex. App. – Austin, July 15, 2004, no pet.). The issue of whether Valdes was terminated for untruthfulness was previously decided by the TWC Judgment, given that this was the sole basis for the City’s motion for summary judgment in that case.

administrative law judge are examined for just this type of abuse of discretion. *See generally Tex. State Sec. Bd. v. Miller*, 2009 Tex. App. LEXIS 5108 *1, 4 (Tex. App. – Austin, July 1, 2009, no pet.). The ALJ purported to reject the City’s collateral estoppel defense because she claimed that Plaintiffs did not earlier request that the ALJ reopen the evidence to consider the TWC Judgment; however, there was no earlier factual or procedural opportunity to assert collateral estoppel. Given the timing of events, making an earlier request to reopen evidence based on the collateral estoppel defense would have been impossible because:

- a. The hearing before the ALJ was held on March 24, 2010, and post-hearing briefing was closed on April 27, 2010. It would have been impossible to raise the collateral estoppel defense prior to the close of the evidence because the TWC Judgment was not even in existence.
- b. The TWC Judgment on which the collateral estoppel defense was based did not become final until June 8, 2010 when the TWC withdrew a motion for new trial that it had previously filed.
- c. The ALJ issued the Decision and Order on June 10, 2010 based on factual findings that necessarily were directly controverted by, and inconsistent with, those underlying the TWC Judgment.
- d. Even before the TWC Judgment had become final, Plaintiffs advised the ALJ about its existence by letter faxed on June 3, 2010. There was not a minimally-adequate window of time to formally file a motion to reopen the evidence after June 8, 2010 when the Judgment became final.
- e. In any event, there was no procedural vehicle available to Plaintiffs prior to their Motion for Rehearing. The SOAH website states that a party shall not provide additional evidence to the ALJ following the hearing.^{6/} Plaintiffs attempted to prompt the ALJ to request additional evidence by sending her a copy of the TWC Judgment on June 3, 2010, but the ALJ neither requested additional evidence, nor sought to reopen the record. The only remaining opportunity Plaintiffs had to introduce the new evidence was when they filed a Motion for Rehearing.

^{6/} “May I provide the ALJ with additional information after the hearing? No, not unless it is requested by the ALJ.” Available at <http://www.soah.state.tx.us/about-us/faq/after-hearing.asp>

- f. Plaintiffs sought to reopen the evidence and pled collateral estoppel at their first available procedural opportunity by timely filing a Motion for Rehearing based in part on the TWC Judgment and record underlying it, which was identified as new evidence. Under the administrative procedures describing an ALJ's powers, the ALJ "shall have the authority and a duty to reopen the record when justice requires." 1 TAC § 155.153(a)(4). In this case, justice required considering this defense, but the ALJ refused to do so.

32. Under TEX. GOV'T CODE § 2001.174(2)(d), the City pleads that the Court should reverse and/or remand this matter to permit SOAH to provide a remedy from the June 10, 2010 Decision and Order, and the Order Denying Plaintiff's Motion for Rehearing. Section 2001.174(2)(d) provides this remedy to a party aggrieved or affected by a legal error other than those described in the other subcategories, and such other error may occur during the administrative proceedings or afterward. *Tex. Dept. of Pub. Safety v. Story*, 115 S.W.3d 588, 594 (Tex. App. — Waco 2003, no pet.); *Tex. Dept. Pub. Safety v. Moore*, 175 S.W.3d 270, 274 fn. 3 (Tex. App. — Houston [1st Dist.] 2004, no pet.). This Court is authorized to reverse a case under TEX. GOV'T CODE § 2001.174(2) if the agency's findings, inferences, conclusions, and decisions are characterized by an abuse of discretion, in violation of a statutory provision, or affected by another error of law. *See Serv. Lloyds Ins. Co. v. Montemayor*, 108 S.W.3d 454, 456 (Tex. App. — Austin 2003, pet. denied).

***Judicial Review Of Order Requiring Plaintiffs to Correct F-5 By Stating
Valdes Honorably Discharged Based on "Dispute Regarding On-The-Job Accident"***

33. Plaintiffs or either of them legally cannot comply with the ALJ's decision issued on June 10, 2010. If ultimately required to change the F-5 form as ordered by the ALJ, Chief Walker is required by law to use a form supplied by TCLEOSE. Such form requires Chief Walker or his designee to sign a sworn verification that is worded as follows:

“I, chief administrator or designee, attests that this is a true and accurate explanation of the circumstances under which this person resigned or was terminated.”

Chief Walker is unable to truthfully attest that Valdes was “Honorably Discharged” as he understands the phrase, or that Valdes was terminated due to a “dispute about an on-the-job accident” because such allegations are untrue. Tampering or falsification of a government record is a crime under TEX. PEN. CODE § 37.10, and is established by proof that a person knowingly makes a false entry in a governmental record. The F-5 form is a governmental record of a state agency. Chief Walker and the City cannot participate in a violation of criminal law, which would result if they complied with the ALJ’s order.

34. The City terminated Valdes’ employment for making false and/or grossly exaggerated statements. Valdes, therefore, was terminated for an administrative violation of truthfulness, and her F-5 report should reflect this by remaining unchanged. Plaintiffs request that the Court reverse the ALJ’s rulings in the Decision and Order to allow the F-5 report to remain unchanged.

Alternatively, Motion for Remand for Additional Evidence

35. Alternatively, Plaintiffs move the Court to remand this matter to the applicable agency to allow them to present additional evidence for inclusion in the record under review as permitted by TEX. GOV’T CODE § 2001.175(c). *See Langford v. Employees Ret. Sys.*, 73 S.W.3d 560, 565 (Tex. App. — Austin 2002, pet. denied). In this case, Plaintiffs seek to present evidence of the City’s Motion for Summary Judgment and the TWC Judgment in the 157th District Court of Harris County, Texas. This Court is authorized to remand cases for consideration of evidence that is material when there were good reasons for failing to present it in the original proceeding before the

agency. TEX. GOV'T CODE § 2001.175(c); *Gulf States Util. v. Coal. of Cities*, 883 S.W.2d 739, 747-48 (Tex. App.— Austin 1994, no writ).

36. Evidence that could have influenced the agency to read a conclusion contrary to the one it reached is considered material. *Smith Motor Sales v. Tex. Motor Veh.*, 809 S.W.2d 268, 270 (Tex. App. – Austin 1991, writ den.); *Tex. Oil & Gas Corp. v. Railroad Comm'n*, 575 S.W.2d 348, 352 (Tex. Civ. App. – Austin 1978, no writ). The TWC Judgment should rightfully form the basis for collateral estoppel defense preventing the ALJ from entering a decision concerning the reason for Valdes's termination that is contrary to the F-5 Report. "Good reasons" for not submitting the evidence at the administrative hearing include — as is the situation in this case — the nonexistence of that evidence at the time of the agency hearing. *Independence Sav. & Loan Ass'n v. Gonzales County Sav. & Loan Ass'n*, 568 S.W.2d 463, 465 (Tex. Civ. App. – Austin 1978, writ ref. n.r.e.). Plaintiffs incorporate by reference herein the allegations set out in Paragraphs 19-21 and 29-31 above.

37. Therefore, Plaintiffs alternatively move the Court to remand this case to the applicable state agency and direct it to consider this additional evidence in any decision, and that such evidence be incorporated into the agency record that is forwarded for review. When ordered by the Court to take additional evidence, the agency may modify its findings and decision by reason of the additional evidence, and it must file such evidence and any modifications, new findings, or decisions with the reviewing court, according to TEX. GOV'T CODE § 2001.175(c).

VIII.

PRAYER

The City respectfully requests that this Court enter a judgment:

1. Reversing the Decision and Order and rendering it in favor of Plaintiffs;
2. Alternatively, reversing the Decision and Order and remanding this matter to the State Office of Administrative Hearings for further proceedings consistent with this Court's judgment;
3. Alternatively, remanding this matter to the State Office of Administrative Hearings and ordering such agency to take additional evidence and make any modifications required to its decision by reason of the additional evidence taken before the agency;
4. Taxing costs against the Defendants; and
5. Granting such other and further relief, at law or in equity, to which Plaintiffs may be justly or equitably entitled.

Respectfully submitted,

ABRAMS SCOTT & BICKLEY, L.L.P.

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ATTORNEYS FOR PLAINTIFFS, THE CITY OF WEST UNIVERSITY PLACE (AND/OR THE WEST UNIVERSITY PLACE POLICE DEPARTMENT), AND CHIEF OF POLICE KEN WALKER

EXHIBIT "A"

ROSEMARIE VALDES' UNTRUTHFUL STATEMENTS

Ex.	Date	Statement by Valdes	Section of General Order No. 201 Violated
4	10/20/07 Chat Log to Sgt. Tobio	“. . . that old lady hit me with her car . . . <u>she knocked me onto her hood.</u> ”	§ 11 Truthfulness - False Statements to Superior Officers
6	10/26/07 Affidavit Requested by Superiors	“. . . when I felt a sharp impact from a bumper to the rear of my legs <u>causing me to loose [sic] my balance and fall onto the hood.</u> ”	§ 11 Truthfulness - False Statements to Superior Officers
6	10/26/07 (same)	“As I <u>staggered sideways</u> . . .”	§ 11 Truthfulness - False Statements to Superior Officers
9	10/20/07 City’s Fire Department EMS Report	“She states that she was hit by a car moving at a slow rate of speed and was <u>thrown onto the hood.</u> ”	§ 11 Truthfulness - Causing False Information or a Misrepresentation of Fact to Be Entered in a City Record
11 p. 3	10/25/07 Statement to Stephanie Kelley, Workers’ Comp Claims Specialist	“that’s when I felt the um, the impact from the bumper at the rear of my legs, kinda causing me to <u>lose my balance and uh, onto the hood and then . . . I staggered sideways.</u> ”	§ 11 Truthfulness Being Untruthful in an Official Matter
11 p. 4	10/25/07 (same)	“it knocked me back cuz it hit me from behind and it knocked me into the, into the hood and . . . the hood of the actual vehicle, the one that hit me.”	§ 11 Truthfulness Being Untruthful in an Official Matter
11 p. 4	10/25/07 (same)	“ And it kinda took my feet, you know, and it was, it <u>seemed real bad because it knocked me back and when I regained balance I, I stood up</u> . . .”	§ 11 Truthfulness Being Untruthful in an Official Matter

Ex.	Date	Statement by Valdes	Section of General Order No. 201 Violated
11 p. 6	10/25/07 (same)	“it <u>knocked me down, got me off balance, it knocked me down</u> and I guess it, to me it seemed like the hood was just the right height that when I hit, <u>I got back on my feet . . .</u> ”	§ 11 Truthfulness Being Untruthful in an Official Matter
11 p. 6	10/25/07 (same)	“And it knocked me, it knocked me off balance . . .”	§ 11 Truthfulness Being Untruthful in an Official Matter
11 p. 7	10/25/07 (same)	“I remember falling back onto the hood”	§ 11 Truthfulness Being Untruthful in an Official Matter
11 p. 8	10/25/07 (same)	“. . . <u>the paramedics, you know, observed how, how swollen</u> my leg had gotten by this point . . .”	§ 11 Truthfulness Being Untruthful in an Official Matter
11 p. 8	10/25/07 (same)	Concerning what the paramedic had supposedly told her, “ <u>Well, that it was swollen . . .</u> ”	§ 11 Truthfulness Being Untruthful in an Official Matter
12 p. 2	09/23/08 Interview with Lt. Olive	“Yeah, yeah because I fit, I mean, I, I landed right on her hood.”	§ 11 Truthfulness - False Statements to Superior Officers
12 p. 2	09/23/08 (same)	“. . . I know that it, I felt it, I felt that, I went under, uh, it, <u>my legs went out from under me . . .</u> ”	§ 11 Truthfulness - False Statements to Superior Officers
12 p. 3	09/23/08 (same)	“. . . I didn’t hit the ground because I hit the hood so <u>my butt cleared to the hood . . .</u> ”	§ 11 Truthfulness - False Statements to Superior Officers
12 p. 3	09/23/08 (same)	In response to question about whether she hit the car hard enough to dent it... “At least a dented hood? . . . I would think so.”	§ 11 Truthfulness - False Statements to Superior Officers
12 p. 5	09/23/08 (same)	“If, if I were to guess, it would have to have a dented hood . . .”	§ 11 Truthfulness - False Statements to Superior Officers
12 p. 5	09/23/08 (same)	“All the weight on the hood, yeah.”	§ 11 Truthfulness - False Statements to Superior Officers

Ex.	Date	Statement by Valdes	Section of General Order No. 201 Violated
12 p. 7	09/23/08 (same)	“ . . . I remember it hitting, <u>it knocking me down like that and hitting . . .</u> ”	§ 11 Truthfulness - False Statements to Superior Officers
All	All of the above	All of the above statements.	§ 11 Truthfulness - Omit Facts