

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 37865-5-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

YAKIMA POLICE PATROLMEN'S ASSOCIATION,

Appellant,

v.

CITY OF YAKIMA,

Respondent.

**RESPONSE BRIEF OF
RESPONDENT CITY OF YAKIMA**

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I. INTRODUCTION

This proceeding arises from the City of Yakima's decision to terminate a police officer, Mike Rummel, after Rummel engaged in repeated acts of misconduct. Rummel's employment was on very thin ice due to his own actions, which included a criminal driving-under-the-influence charge and combative behavior towards the arresting officers. As a result of his misconduct, Rummel was subject to a Last Chance Agreement under which he (and his union) agreed that he would be terminated for any further misconduct. Unfortunately, Rummel could not stay out of trouble, and he had troubling interactions with a female co-worker, experienced alcohol addiction issues, engaged in insubordination by violating a direct order, and improperly used his police badge to get into a nightclub. Mike Rummel's employment was ultimately terminated because his actions unequivocally violated his Last Chance Agreement. The Yakima Police Patrolmen's Association (the "YPPA") grieved the termination. Division III of the Washington Court of Appeals recently upheld the termination decision. *City of Yakima v. Yakima Police Patrolmans Association*, --- P.3d ----, 2009 WL 37202 (January 8, 2009).

YPPA has also sought to shield Rummel from the consequences of his own actions by pursuing an unfair labor practice charge alleging that the City's decision to terminate Mike Rummel was really an effort to discriminate against and interfere with the YPPA.

Following a comprehensive appeal process, the Washington Public Employment Relations Commission (“PERC” or the “Commission”) rejected the YPPA’s unfair labor practice charge. Drawing on its wealth of experience analyzing unfair labor practice allegations, the PERC considered the extensive factual record and properly found that the YPPA failed to sustain its burden, dismissing the charge in its entirety.

YPPA appealed that decision to Thurston County Superior Court, where the Honorable Judge Chris Wickham rejected YPPA’s appeal and found that the PERC’s decision was both substantively and procedurally sound. The same result is warranted here, and the City respectfully requests the Court affirm the decision of the PERC and Judge Wickham, and dismiss YPPA’s appeal.

II. COUNTER-STATEMENT OF THE ISSUES

1. **Whether the PERC's Decision to dismiss YPPA's discrimination charge should be affirmed because it is based upon substantial evidence, there is no dispute Rummel violated the terms of the Last Chance Agreement, and YPPA failed to establish that union animus was a substantial factor in the termination decision?**
2. **Whether the PERC complied with the Administrative Procedures Act in striking findings of the hearing examiner, which were clearly erroneous, not supported by the record, and on critical issues on which YPPA bears the burden of proof?**
3. **Whether the PERC correctly dismissed YPPA's interference charge where it was derivative of the failed discrimination charge and YPPA failed to preserve for appeal the argument that the interference charge was based upon separate facts?**
4. **Whether the PERC's decision not to formally grant YPPA's motion to strike is reversible error where it is undisputed that the PERC did not consider the materials, and YPPA suffered no prejudice?**

III. STATEMENT OF THE CASE

A. **The Brian Dahl Matter and Related Unfair Labor Practice Charge Regarding Drug Testing.**

Although the unfair labor practice proceeding underlying this action arose from a disciplinary situation involving Officer Mike Rummel, this matter has its roots in a prior personnel matter involving Officer Brian Dahl. In 2004, Officer Dahl disclosed to the Yakima Police Department that he was struggling with an addiction to prescription drugs. RP 562

(Hearing Exhibit (“H.Ex.”) 11 at 16).¹ The psychiatrist who evaluated Dahl’s fitness for duty, Dr. Kathleen Decker, expressed “severe reservations” regarding Dahl’s long-term prognosis for recovery, and concluded that he should be subject to random urinalysis for opiates and other drugs for six months as a condition for returning to police duty. RP 600-01 (H.Ex. 11 at 168-72).

The City met with YPPA representatives to go over the return-to-work order incorporating Dr. Decker’s conditions. RP 563, 570 (H.Ex. 11 at 18, 46-47). Although YPPA representatives had no objections to the order and openly acknowledged that the conditions were necessary for Brian Dahl, they did not want to set a precedent regarding drug testing for all officers and wanted to negotiate a policy for future situations. RP 585-86, 591-92 (H.Ex. 11 at 108-112, 133-34). Yakima Police Chief Sam Granato told the YPPA representatives it was not his intention to use the Dahl return-to-work order against the YPPA as precedent to implement unit-wide random drug testing. RP 571, 578 (H.Ex. 11 at 52, 78). Chief Granato was also interested in negotiating a policy, but understood the parties would be addressing the issue during upcoming contract negotiations given that a drug testing policy could implicate other terms of employment (i.e., discipline). RP 591-92, 597 (H.Ex. 11 at 131-35, 155-56). Almost six months later, on February 16, 2005, the YPPA surprised

¹ In this brief, citations to the official Record of Proceedings (as certified by PERC and page numbered pursuant to the index provided by PERC) shall be in the form of “RP [page number], followed by a parenthetical identifying the cited document and the cited page(s).

the City by filing an unfair labor practice charge against the City challenging the Dahl return-to-work order, and alleging the City engaged in direct dealing with Dahl and refused to bargain. *See* RP 550 (H.Ex. 8).

B. Mike Rummel's Disciplinary History.

While the Brian Dahl matter was playing out, there were several issues involving another officer, Mike Rummel. Officer Rummel's performance problems began back in 2002, but came to a head in late 2004 and early 2005.

1. The 2002 Last Chance Agreement After Rummel Was Charged With Driving Under the Influence.

In August 2002, Officer Mike Rummel was stopped by the Yakima Police after he was observed speeding. *See* RP 630 (H.Ex. 17 at 1). Rummel was non-compliant toward his fellow officers, who transported him home and warned him not to operate a vehicle under his current state of intoxication. *Id.* That same evening, Yakima officers again observed Rummel driving. When stopped once again, Rummel was hostile and non-compliant, and later faced criminal charges of driving under the influence. *Id.*; RP 188, 251 (Tr. 175, 238).

While Rummel's conduct could have been grounds for termination from employment, the YPPA and the Department instead entered into a Last Chance Agreement to preserve Rummel's employment. RP 399, 409 (Tr. 386, 396); RP 630 (H.Ex. 17). Under that Agreement, Rummel agreed to undergo evaluation and treatment for substance abuse as a condition of retaining his employment, and also agreed he would "comply

with any and all Yakima Police Department Policy and Procedures and Yakima Police Civil Service Rules". RP 631 (H.Ex. 17 at 2) (emphasis added). The term of the Last Chance Agreement was three years. RP 632. The Last Chance Agreement provided clear notice that Officer Rummel would face termination if any condition of the Last Chance Agreement was violated, stating as follows:

Consequences of Violation of Terms and Conditions.

It is expressly understood and agreed by the City, Employee, and the YPPA that should Employee fail to fully comply with any of the terms and conditions stated herein, his employment with the City of Yakima shall be terminated.

RP 632 (H.Ex. 17 at 3) (emphasis in original).

- 2. Further Issues Lead to a Fitness-For-Duty Evaluation.**
 - a. The Halloween Incident Involving Stacy Unglesby.**

In the latter part of 2004, while the Last Chance Agreement was still in effect, Officer Rummel's behavior demonstrated he was still potentially struggling with alcohol and other personal issues. In particular, Rummel appeared to be having difficulty with a dating relationship he had been engaged in with Stacy Unglesby, who was employed by the City as a 911 call taker. After learning on October 8, 2004, that Rummel had been calling Ms. Unglesby repeatedly at work, and that his calls were upsetting to her and possibly suicidal, the Department took steps to pursue a mental health evaluation. RP 312-14 (Tr. 299-301).

There was a further development on October 31, 2004, when Captain Copeland received a call at his home at 1:30 a.m. regarding some kind of domestic violence off-duty incident between Officer Rummel and Ms. Unglesby. Captain Copeland was advised that Rummel and Unglesby had attended a Halloween party together that night, but had had a disagreement and Rummel was refusing to allow Unglesby into the apartment to retrieve her keys. RP 314-15 (Tr. 301-02). Sergeant Wentz of the Department accompanied Ms. Unglesby into Rummel's apartment through an open slider door and observed Rummel in his bedroom loading a shotgun. *Id.* They quickly exited the apartment. When Captain Copeland arrived, he spoke with Rummel by telephone and could tell that Rummel was intoxicated; fortunately, Copeland was able to diffuse the situation that night. RP 316 (Tr. 303). During a meeting with Officer Rummel the next day, Captain Copeland gave Rummel a direct order not to have any contact with Unglesby while she was at work. RP 316-17 (Tr. 303-04).

b. Rummel Violates The No-Contact Order.

Unfortunately, Officer Rummel disobeyed the order not to contact Stacy Unglesby little more than a month later by calling Ms. Unglesby at work. This violation came to the Department's attention as it was following up on yet another report of inappropriate conduct involving Officer Rummel. When Captain Copeland interviewed Stacy Unglesby on December 7 to follow up on this report, she also disclosed that Officer Rummel had called her at work the day before. Captain Copeland

obtained the tape of that call, which indicated Rummel initiated a call to Unglesby and persisted in talking to her even after she reminded him that he was not supposed to call her at work. *See* RP 661 (H.Ex. 27).

Before Captain Copeland could interview Rummel and complete his investigation of Rummel's violation of the no-contact order, Rummel's doctor contacted the Department to say that Rummel needed time off work. Given this, as well as the rash of recent incidents involving Officer Rummel, Chief Granato and Captain Copeland were very concerned about Rummel. RP 319, 423 (Tr. 306, 410).

c. Officer Rummel's Fitness-for-Duty Evaluation.

Chief Granato testified that his immediate interest on December 10, 2004 was in getting Officer Rummel some immediate help. RP 426 (Tr. 413). The City arranged for Rummel to see Dr. Decker, a board-certified psychiatrist who has extensive experience working with law enforcement officers, for a thorough fitness-for-duty assessment. *See* RP 558-609 (H.Ex. 11 at 163-64); RP 654 (H.Ex. 23 at 1).²

After her initial meeting with Officer Rummel, Dr. Decker advised that he was not fit for duty as he was suffering from major depression and alcohol abuse, and had experienced recent suicidal ideation, disrupted sleep and severe ruminations. *See* 654-57 (H.Ex. 23). She recommended he remain off work for 4-6 weeks, continue with antidepressant

² The internal investigation into Rummel's violation of a direct order in calling Ms. Unglesby was postponed until after Rummel was in a more psychiatrically stable condition. RP 318 (Tr. 305).

medication, abstain from alcohol usage, and be re-evaluated at the end of the leave period. *Id.* When Dr. Decker re-evaluated Rummel on February 17, 2005, she was more optimistic about his return to police work. *Id.* As a return-to-work condition, however, Dr. Decker indicated that Rummel should continue on his antidepressant medication and undergo random urinalysis for alcohol for up to 90 days to ensure that Rummel was continuing to abstain from alcohol. *Id.*

d. Rummel Again Violates the Last Chance Agreement Before the Parties Work Out A Return-To-Work Agreement.

Following the City's receipt of Dr. Decker's conditions for Officer Rummel's return to work, City and YPPA representatives discussed how to put Dr. Decker's recommendations into effect. RP 320 (Tr. 307). By this point in time in February 2005, the YPPA had just filed an unfair labor practice challenging the City's efforts to implement a return-to-work order for Officer Brian Dahl following his leave of absence due to drug addiction issues. *See* Section III.A above. At this time, the City was willing to bring Officer Rummel back to work under conditions that would ensure his fitness for duty, but it did not want to face another unfair labor practice charge from the YPPA in following Dr. Decker's instructions regarding post-return alcohol testing. RP 321, 429 (Tr. 308, 416). The City explained its position to YPPA representatives, who expressed a willingness to work on an agreement that would accomplish these purposes. RP 321 (Tr. 308). Chief Granato recalls that YPPA representative Shawn Boyle offered as part of these discussions that if the

City would agree not to use the individual return to work arrangements against the YPPA as some kind of precedent in bargaining, the YPPA would drop its unfair labor practice charge. RP 429 (Tr. 416). Chief Granato subsequently asked YPPA to provide some language memorializing the YPPA's proposal. RP 429-30, 493-94 (Tr. 416-17; 480-81).

Several weeks passed before the YPPA got back to the City with some proposed language regarding Officer Rummel's return to work. RP 49-51, 430 (Tr. 36-38, 417); *see* RP 539 (H.Ex. 3). Chief Granato was facing pressure from the City Manager regarding the length of time that Rummel had remained on paid administrative leave, and urged the YPPA to follow up with language satisfactory to the YPPA. RP 430 (Tr. 417). YPPA President Bob Hester recalls that he delivered the proposed language (*see* RP 540 (H.Ex. 4)) on April 4. RP 53 (Tr. 40).

When he received the YPPA's proposed language, Chief Granato felt it was inconsistent with what the parties had discussed. He understood the parties would be bargaining a global drug testing policy in the next round of contract negotiations, and that if the City agreed in writing not to use the instances of random drug testing for Officers Dahl and Rummel against the YPPA as precedent, the YPPA would drop the unfair labor practice charge regarding the Dahl situation and would not file a charge over Rummel's post-return alcohol testing. RP 431 (Tr. 418). However, the YPPA's proposed language recited that it had no impact on the pending unfair labor practice charge or any bargaining regarding drug

testing. *See* RP 540 (H.Ex. 4). While Chief Granato felt the more complete resolution initially proposed by YPPA would have been in everyone's best interest, he nevertheless forwarded the proposed language to the City's legal office for review. RP 431-32 (Tr. 418-19).

Unfortunately, there were a couple of intervening events that would preclude Officer Rummel's return to work. First, before the YPPA and City had worked out language implementing the recommended drug testing for Rummel, Captain Copeland interviewed Officer Rummel as part of his investigation into Rummel's alleged violation of an order not to contact Stacy Unglesby at work, and sustained this violation. RP 318 (Tr. 305); RP 661 (H.Ex. 27).

Second, a complaint was made against Officer Rummel alleging he improperly used his police badge a few days earlier to get into a nightclub called Johnny's. RP 432 (Tr. 419). The Department initiated an internal investigation to determine what had happened at Johnny's, assigning Lieutenant Nolan Wentz to conduct that investigation. RP 324-25, 432 (Tr. 311-12, 419).³

According to Lt. Wentz's investigation, Officer Rummel acknowledged he had used his police badge to gain entrance to Johnny's Nightclub to avoid paying a cover charge. RP 615-21 (H.Ex. 15).

³ The record reflects that while Nolan Wentz is a good investigator, he was a relatively new lieutenant at the time he was assigned to investigate the Johnny's Nightclub incident and had little experience with cases involving potential termination. RP 353 (Tr. 340). There is no evidence that when Lt. Wentz investigated the Johnny's incident, he was even aware that Mike Rummel was subject to a Last Chance Agreement or that Rummel had discipline pending for the issues surrounding his interactions with Stacy Unglesby.

Rummel claimed he used the badge merely to enter the club so he could locate two friends who had called him seeking a ride home. *Id.* At the hearing, he testified that he went with a male friend, who remained outside the club while Rummel went inside to retrieve two other male friends. RP 272, 294 (Tr. 259, 281). Witnesses interviewed by Lt. Wentz, however, did not recall Rummel indicating that he just needed to pick up some intoxicated friends. *See* RP 618-19 (H.Ex. 15 at 4-5). In fact, a security officer at the nightclub recalled Rummel stating that he just wanted to go in and meet a couple of girls. *Id.* The security officer also recalled that after Rummel displayed his police badge, Rummel and his friend entered the nightclub and later departed with two girls. *Id.* Based on the investigative findings, the Department concluded that Officer Rummel had violated Department policy as well as applicable civil service rules. *Id.*

Once Lt. Wentz completed his initial investigation, the investigative file was forwarded to management for review and assessment. RP 325 (Tr. 312). Captain Copeland reviewed the file first, then discussed his impressions with Chief Granato. RP 325-27 (Tr. 312-14). Captain Copeland's recommendation was that Rummel should be terminated, based on the Last Chance Agreement coupled with the sustained findings that Rummel had subsequently disobeyed a direct order (in calling Stacey Unglesby) and had thereafter violated Department policy in improperly using his police badge. RP 327-28 (Tr. 314-15); *see*

also RP 662 (H.Ex. 28).⁴ Captain Copeland made this recommendation on May 2, 2005, and discussed the matter with Chief Granato the same day. RP 327-28 (Tr. 314-15); RP 662 (H.Ex. 28). Chief Granato reviewed the investigative file, and concurred with Captain Copeland's finding on May 2. RP 433 (Tr. 420); RP 662 (H.Ex. 28). Both Captain Copeland and Chief Granato were unequivocal that the YPPA's failure to withdraw the unfair labor practice charge over the Dahl matter never came up in their discussions regarding the appropriate discipline for Rummel. RP 327-28, 433 (Tr. 314-15, 420). Rather, Chief Granato explained, the Johnny's Nightclub situation was simply "the straw that broke the camel's back". RP 433 (Tr. 420).

C. The May 27, 2005 Labor-Management Meeting.

Although the initial reaction of Captain Copeland and Chief Granato as of May 2 was that termination was appropriate, Chief Granato testified he did not move forward immediately to recommend termination as the City had requested further investigation into the Johnny's Club incident. RP 435-36 (Tr. 422-23). In the meantime, the Chief met with YPPA representatives on May 27, 2005 for a regular labor-management meeting. RP 433-34 (Tr. 420-21). The Chief was the only management representative present, while YPPA representatives included YPPA

⁴ Under the Yakima City Charter and the Yakima Municipal Code, the City Manager is the individual vested with the authority to terminate City employees. See City Charter, Article II, Section 9 (<http://www.ci.yakima.wa.us/council/charter/>); Yakima Municipal Code, Chapter 1.18.010 (<http://www.ci.yakima.wa.us/citycode>). This is why Captain Copeland's and Chief Granato's review of the Rummel investigation file culminated in a "recommendation" (see RP 326, 433 (Tr. 313, 420)); it is a recommendation that is made to the City Manager, who ultimately makes the decision.

President Bob Hester, Vice President Michael Lindgren and Sergeant at Arms Jay Seely. RP 225 (Tr. 211).

During the course of this meeting, Sgt. Hester inquired about the status of internal investigations that were pending, including the one involving Mike Rummel. RP 84, 434-35 (Tr. 71, 421-22). Chief Granato was uncomfortable discussing that matter, given he was leaning toward recommending termination pending some additional information that the City was waiting to receive. RP 435 (Tr. 422). The Chief attempted to explain why it had taken so long to address Rummel's status. In response to Hester's point that Dr. Decker had released Rummel to return to work back in February, the Chief reminded the YPPA representatives that they had promised back in February to propose language incorporating Dr. Decker's recommendation for alcohol testing without triggering another unfair labor practice charge and to address the outstanding charge. RP 435-36 (Tr. 422-23). Chief Granato explained that he had stuck his neck out to keep Rummel on while waiting for the YPPA's proposed language, despite pressure from the City Manager. He added that when he finally did receive the YPPA's proposal in April, it didn't reflect the global resolution the YPPA initially proposed. Nonetheless, the Chief went ahead and forwarded the proposal to the legal office for review. But the Chief reminded the YPPA representatives that Rummel had hurt his hand and then "goes and gets in trouble again." So the Chief explained his feeling that he had already been sticking his neck out for Rummel, and that he was "not going to keep sticking it out there." RP 436 (Tr. 423); *see*

also RP 372-73 (Tr. 359-60). Chief Granato did not at that point disclose that he was leaning toward recommending Rummel's termination, but he told the YPPA representatives that it was not looking good for Rummel based on the information Granato had at that point. RP 436, 372 (Tr. 423, 359).⁵

D. The City's Termination of Mike Rummel.

After completing its investigation, the City provided notice of its intent to terminate Mike Rummel's employment and scheduled a pre-termination hearing on June 16, 2005. *See* RP 634-40 (H.Exs. 18, 19). Based on points raised by the YPPA during the pre-termination meeting, Chief Granato directed the investigator, Lt. Wentz, to conduct further interviews. RP 438 (Tr. 425); *see also* RP 640 (H.Ex. 19 at 2). Ultimately, however, that additional investigation provided no basis to change the City's assessment and the City issued a termination notice dated July 5, 2005. RP 439 (Tr. 426); RP 615-21 (H.Ex. 15). The basis for the termination decision was that Officer Rummel was under a Last Chance Agreement, under which he (and the YPPA) had agreed that he would be terminated for failure to comply with Yakima Police Department policies and civil service rules. Rummel's actions in disobeying a direct order in contacting Ms. Unglesby, then using his police badge inappropriately to get into a bar without paying a cover charge, constituted

⁵ While two of the three YPPA witnesses offered a somewhat different account of this May 27 meeting, neither the Hearing Examiner nor the full Commission adopted the YPPA's account. *See* RP 780-81, 786-87, 792 (Decision 9451-A, at 6-7, 12-13, 18); RP 929-32 (Decision 9451-B, at 6-9).

clear violations of policy and the Last Chance Agreement, warranting his termination. *See id.*⁶

E. The PERC Dismissed YPPA's Discrimination and Interference Charges.

After Mike Rummel's termination, the YPPA filed an unfair labor practice complaint alleging the City engaged in unlawful domination of the YPPA, and engaged in discrimination and interference. Hearing Examiner Carlos Carrion-Crespo rejected the YPPA's contention that the City attempted to dominate the union, but found the City had discriminated against Rummel and, in turn, had committed a "derivative" interference with collective bargaining rights. *See* RP 787, 789 (Decision 9451-A (PECB, 2006) at 13, 15). These conclusions were premised on the Examiner's finding that the YPPA's refusal to withdraw the first unfair labor practice charge substantially motivated the City's decision to discharge Mike Rummel. Because that finding was not supported by substantial evidence, and because the Examiner's decision was riddled with errors, the City of Yakima appealed to the full PERC. After its thorough review of the case, the Commission reversed the Examiner and

⁶ As noted above, YPPA grieved Rummel's termination under the parties' bargaining agreement in addition to filing this action with the PERC. The Arbitrator initially sustained the grievance, and the City appealed. Despite the deferential standard often given to arbitrators, the trial court set aside the arbitrator's decision and held that the City acted within its rights in terminating Rummel's employment. On January 8, 2009, Division III of the Washington Court of Appeals affirmed the trial court, and upheld the City's termination decision under the terms of the Last Chance Agreement. *City of Yakima v. Yakima Police Patrolmans Association*, --- P.3d ----, 2009 WL 37202 (January 8, 2009).

found there was not substantial evidence to support the YPPA's charges.

See RP 924-34 (Decision 9451-B (PECB, 2007)).

F. The Trial Court Affirmed the PERC's Decision, and Rejected YPPA's Appeal Under the APA.

YPPA appealed the Commission's Decision dismissing its discrimination and interference charge to Thurston County Superior Court. After reviewing the record before the Commission, the briefing of the parties and oral argument by counsel, Thurston County Superior Court Judge Chris Wickham affirmed the PERC's Decision. CP 13-16 (Wickham Order). Specifically, the Court found:

The PERC correctly applied the law governing discrimination claims whereby once a complainant establishes a prima facie case of discrimination, the employer must articulate non-discriminatory reasons for its actions. The employer does not have the burden of proof to establish those matters. The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's actions. CP 14-15 (Wickham Order, ¶ 1).

Substantial evidence supports the PERC's finding that the YPPA failed to meet its burden and demonstrate that anti-union animus played a substantial factor in the City of Yakima's decision to terminate Officer Rummel under the Last Chance Agreement. CP 15 (Wickham Order, ¶ 2).

The Court rejects YPPA's challenge to the adequacy of the PERC's Findings of Fact under the requirements of the Administrative Procedures Act. The Court finds that the Findings of Fact comply with the APA, and notes that certain findings of fact may be inferred from the body of the Commission's analysis and reading of the decision as a whole. This is far different than

inferring factual findings from the result, which the Court did not do. In addition, while YPPA argues the PERC should have made specific findings of fact regarding the Chief of Police's statements during the May 27 meeting and motive in terminating Rummel, the Court notes that YPPA had the burden of proof on these issues. It is well recognized that the absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against that party on that issue. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001). CP 15 (Wickham Order, ¶ 3).

The Court further rejects YPPA's request to infer a discriminatory motive because the Dahl unfair labor practice charge was discussed during the same meeting in which Rummel's employment was discussed. While it is unfortunate the two issues were discussed in the same conversation, this fact does not establish a discriminatory motive. The two issues are connected. The presence of the unfair labor practice charge involving Dahl made it difficult, if not impossible, for the Department to subject Officer Rummel to some type of random monitoring. The parties understood the two issues were connected as demonstrated by the conversations they had related to the two situations. CP 15-16 (Wickham Order, ¶ 4).

The Court finds that an independent investigation concluded Rummel twice violated the Last Chance Agreement. Captain Copeland independently recommended Rummel be terminated for his violation of the Last Chance Agreement. *See* H.Ex. 28. Substantial evidence supports the PERC's finding that Rummel was terminated for his violations of the Last Chance Agreement, and the YPPA did not meet its burden in demonstrating that anti-union animus played a substantial factor in his termination. CP 16 (Wickham Order, ¶ 5).

The Court also finds that there is substantial evidence supporting the Commission's finding that there was not sufficient independent evidence to support a separate interference claim. CP 16 (Wickham Order, ¶ 6).

IV. LEGAL ARGUMENT

The YPPA's appeal levels both substantive and procedural challenges to the PERC's decision. As Thurston County Judge Chris Wickham correctly found, however, none of YPPA's arguments is sufficient to demonstrate reversible error or overcome the PERC's reasoned conclusion that the YPPA's complaint was not supported by substantial evidence.

A. YPPA Did Not Appeal Critical PERC Findings, Rendering Them Verities on this Appeal.

Washington courts give "great deference to PERC's expertise in interpreting labor relations law." *Maple Valley Prof'l Fire Fighters v. King Co. Fire Prot. Dist. No. 43*, 135 Wn. App. 749, 759, 145 P.3d 1247 (2006).⁷ Indeed, YPPA's appeal carries a heavy burden. The Commission's decision must be affirmed unless it is "not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(e). "Substantial evidence" is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *Chandler v. State*, 141 Wn. App. 639, 648, 173 P.3d 275 (2007). Factual findings will not be overturned unless they are "clearly erroneous." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004). The relevant factual findings upon judicial review are those that were made by the agency as

⁷ See also *Bellevue v. Int'l Ass'n of Fire Fighters*, 119 Wn.2d 373, 381, 831 P.2d 738 (1992) ("Because of the expertise of PERC's members in labor relations, ... the courts of this state give 'great deference' to PERC's decisions and interpretations of the collective bargaining statutes."); *City of Pasco v. PERC*, 119 Wn.2d 504, 506, 833 P.2d 381 (1992).

part of its final agency action. *City of Federal Way v. PERC*, 93 Wn. App. 509, 970 P.2d 752 (1998). Thus, the relevant findings of fact are those made by the PERC in Decision 9451-B.

The YPPA did not assign error to any specific Findings of Fact by the Commission. Rather, as discussed below, the YPPA's primary challenge to the Commission's Decision is that it did not make additional findings that the YPPA believes were warranted. Because the YPPA did not assign error to the Commission's findings, they are verities for purposes of this appeal. *Eidson v. State*, 108 Wn. App. 712, 32 P.3d 1039 (2001); *McEntyre v. Employment Security Dep't*, 114 Wn. App. 1074, 2002 WL 31863476 (2002). Thus, the following relevant Findings of Fact must be accepted:

5. On November 18, 2002, Rummel and the City of Yakima signed an agreement stipulating that the employer would suspend Rummel from duty for 350 hours and that Rummel would comply with any and all employer policies, under penalty of discharge.
6. On October 31, 2004, Rummel was involved in an incident that caused the City of Yakima to investigate Rummel for domestic violence, a violation of employer policies, and to order Rummel to abstain from contacting a co-worker. On December 6, 2004, and April 1, 2005, Rummel was involved in separate incidents that the City of Yakima found to constitute insubordination and unauthorized use of the police badge, both violations of employer policies.
7. The City of Yakima placed Rummel on administrative leave on December 10, 2004, pending investigation of the October and December 2004 incidents described in paragraph 6 of these findings of fact. On December 20, 2004, a mental health professional appointed by the City of

Yakima determined that Rummel suffered from major depression and was not fit for duty, but cleared him to resume working on February 17, 2005. The professional recommended random alcohol testing for a period of no longer than 90 days.

8. During the first months of 2005, Granato sought authority to file grievances against the union for abusing the grievance procedure to compel the employer to discharge him.
12. On July 7, 2005, the City of Yakima discharged Rummel for violating the terms of the agreement described in paragraph 5 of these findings of fact. On July 22, 2005, the union filed a grievance to overturn the discharge. At the time of the hearing on this case, the union had filed the grievance before an arbitrator.

RP 790-92 (Decision 9451-A at 16-18); RP 932 (Decision 9451-B at 9).

**B. The Commission Correctly Dismissed YPPA's
Discrimination Charge.**

As held by Judge Wickham, the Commission correctly stated and applied the legal standard applicable to discrimination retaliation claims as follows:

A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. *See Educational Service District 114, Decision 4361-A (PECB, 1994)*, where the Commission embraced the standard established by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 46 (1991). . . .

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory

reasons for its actions. It does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

See RP 924-25 (Decision 9451-B at 2-3); CP 14-15 (Wickham Order, ¶ 1).⁸ The YPPA's disagreement with the Commission Decision stems not from the legal standard applied by the PERC, but from the PERC's assessment that the evidence was insufficient to meet the requisite legal standard. Thus, the YPPA devotes much of its brief to spinning and emphasizing certain facts (to the noted exclusion of central facts). But this Court is to determine whether PERC's decision is supported by evidence that is substantial "when viewed in light of the whole record before the court." *HEAL v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999). As stated below, the entire evidentiary record clearly supports the Commission's conclusion that Mike Rummel was terminated because his ongoing misconduct violated his Last Chance Agreement. The YPPA did not meet its burden of establishing the termination was substantially motivated by union animus.

⁸ See also *Grant County Public Hospital Dist. 1*, Decision 6673-A, (PECB, 1999) (noting that an employer engages in unlawful discrimination where it "takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW.>").

1. The Record Clearly Establishes Mike Rummel Was Terminated For Misconduct That Violated His Last Chance Agreement.

Washington labor law precedent makes clear that it is not an unfair labor practice for an employer to take disciplinary action or discharge an employee where that employee has engaged in misconduct. *See, e.g., City of Federal Way*, Decisions 4088-A, 4495, 4496 (PECB, 1993), *aff'd*, 4088-B, 4495-A, 4496-A (1994) (rejecting discrimination charge arising from termination of two employees who were involved in union organizing campaign, based on evidence that employees had improper interactions with contractors they were supposed to be regulating as part of their job duties; explaining that existence of protected union activity does not immunize employees from consequences of misconduct).⁹

If anything, the City of Yakima gave Officer Mike Rummel too many chances to preserve his employment. But despite the City's efforts to salvage his career, Rummel proved that he should not continue to serve as a law enforcement officer. Rummel could well have been discharged for the incidents in which he was stopped twice for driving under the influence, and was hostile and non-compliant with the responding officers. *See* RP 630 (H.Ex. 17 at 1); RP 399, 409 (Tr. 386, 396). Instead, the City decided to give him a chance to save his job, conditioned on a Last

⁹ *See also City of Omak*, Decisions 5579-A, 5580-A, 5581-A and 5583-A (PECB, 1997) (rejecting charge that suspension of employee for causing traffic accident was motivated by discrimination, where there was no dispute that the employee had in fact caused an accident involving considerable damages); *Aberdeen School District*, Decision 6424 (PECB, 1998) (rejecting charge that employee's discharge was discriminatory where employee had admittedly falsified his employment application)

Chance Agreement under which Rummel agreed to seek help for substance abuse and acknowledged that his employment “shall be terminated” for failing to comply with any and all Police Department rules and procedures. RP 631 (H.Ex. 17 at 2).

Regrettably, Rummel proved himself incapable of avoiding further problems. There was an October 2004 complaint from a supervisor in the City’s 911 call center that Rummel was repeatedly calling his girlfriend, 911 call taker Stacy Unglesby, at work and was upsetting her and possibly suicidal. RP 312-14 (Tr. 299-301). On the heels of that complaint, there was a domestic violence incident involving Unglesby and an intoxicated Rummel loading a shotgun, to which the Yakima police responded. RP 314-16 (Tr. 301-03). Barely a month later, in early December 2004, after a frightening off-duty altercation between Rummel and Unglesby and an acquaintance of hers (a City firefighter) in a store parking lot, the City learned that Rummel also violated a direct order from his superior officer by contacting Unglesby. RP 660 (H.Ex. 26). Specifically, despite being ordered to have no contact with Unglesby while she was at work, the City received notice that Rummel had called her at work and persisted in talking to her even after she reminded him that he was not supposed to contact her. See RP 661 (H.Ex. 27). Rummel later admitted violating this direct order. RP 635 (H.Ex. 18 at 2); *See also* Appeal Brief at 8.

Before the City could fully investigate this latest incident, Rummel’s doctor advised the City that Rummel needed time off due to some emotional issues. RP 319 (Tr. 306). Following a fitness-for-duty

assessment, the City accommodated Rummel's need for time off from early December 2004 into February 2005, putting him on paid administrative leave and postponing the internal investigation into his latest misconduct. RP 259, 319 (Tr. 246, 306).

Then came the final straw. After being released to return to work but before actually returning, Rummel improperly used his police badge to enter a nightclub to avoid paying the cover charge. RP 615-621 (H.Ex. 15).¹⁰ An internal investigation found that his conduct violated Police Department policies and civil rules. RP 618-19 (H.Ex. 15 at 4-5).

In short, it is undisputed that Rummel violated his Last Chance Agreement. *City of Yakima v. Yakima Police Patrolmans Association*, --- P.3d ----, 2009 WL 37202 (January 8, 2009)**Error! Bookmark not defined.** As noted, that Agreement provided that Rummel "shall" be terminated for any further misconduct. If the City can be faulted, it is only for not moving swiftly to termination based on the flurry of incidents involving Rummel as 2004 came to a close. The YPPA's effort to attach a discriminatory intent to the termination decision ignores the elephant in the room: Mike Rummel's own misconduct. The evidence is overwhelming that Mike Rummel engaged in misconduct while under a Last Chance Agreement providing for termination, and that this misconduct was the reason for his discharge. The Public Employment

¹⁰ Although Rummel claimed he had simply used his badge to enter the club to retrieve two intoxicated friends who needed a ride home, a witness at the scene stated that Rummel said he wanted to go in and meet some girls, Rummel then entered the club with a friend after flashing his badge, and Rummel later departed with two girls. RP 618-19 (H.Ex. 15 at 4-5).

Relations Commission so found, and there is no basis to overturn that conclusion.

2. The PERC Properly Found That The YPPA Failed To Satisfy Its Burden Of Proving That Union Animus Was A Substantial Motivating Factor In the Decision To Discharge Mike Rummel.

In its effort to shift the focus away from Rummel's ongoing misconduct, the YPPA frantically points to anything it can think of to suggest that Rummel's termination was substantially motivated by union animus. None of the YPPA's assertions overcome the significant evidence of misconduct appropriately relied upon by the City and adopted by both the PERC and Thurston County Superior Court. CP 15 (Wickham Order, ¶ 2).

a. Alleged conflicts with Police Chief Sam Granato fail to establish that the City's termination of Mike Rummel was substantially motivated by union animus.

The YPPA goes to great lengths to paint a picture of an extremely hostile relationship between the YPPA and Police Chief Sam Granato to divert the Court's attention away from the misconduct that caused Rummel's termination. The argument does not withstand scrutiny. The parties had worked through a number of labor issues successfully, as evidenced by their discussion and resolution of issues ranging from shift scheduling, to creation of an Honor Guard, to a change in firearms. RP 229-30, 415-17 (Tr. 216-17, 402-04); *see also* RP 175-76 (Tr. 162-63). While both parties expressed frustration over labor issues, such differences

are to be expected in labor-management relations. And, yet this “frustration” is the crux of the YPPA’s evidence of discrimination. According to the YPPA, “there is little reason to believe this (frustration) did not encompass threats.” RP 106. YPPA’s speculative and conclusory assertion cannot act as a substitute for evidence. Indeed, as YPPA argues, if one could assume a discriminatory intent whenever parties to the bargaining process were frustrated, it is difficult to imagine any case where discrimination could not be said to exist. The PERC properly rejected the YPPA’s assumptions, and reasoned that frustration with the bargaining process cannot by itself constitute evidence of the City’s intent to discriminate against Mike Rummel. This is particularly the case here, given the undisputed evidence that Rummel violated the Last Chance Agreement.¹¹ RP 932 (Decision 9451-B at 8-9). YPPA bears the burden of proof of this issue, and cannot simply rely on subjective beliefs.

The YPPA’s attempt to imply that YPPA President Bob Hester was unfairly targeted for discipline is improper and unsubstantiated. The City objected to such evidence at and after the hearing in this case as it was never part of the YPPA’s discrimination charge (*see* RP 729-30 (Post-Hearing Brief at 21-22)), and neither the Hearing Examiner nor the full Commission relied on this objectionable evidence. Even if this evidence were admissible, it is devoid of substance based on Hester’s own

¹¹ Pursuant to the YPPA’s reasoning, the City would essentially be precluded from disciplining or discharging any YPPA member as long as the YPPA could allege tension in the bargaining relationship between the City and the YPPA. For obvious reasons, this is not the law.

admissions.¹² For these reasons, the YPPA’s proof fails to support a finding that Mike Rummel’s termination for violation of his Last Chance Agreement was substantially motivated by union animus.

b. The YPPA’s self-serving account of the May 27 labor-management meeting is insufficient to meet its burden of proving that Mike Rummel’s termination was substantially motivated by union animus.

The YPPA relies heavily on its version of what occurred at a May 27 labor-management, asserting that Chief Sam Granato “threatened” to terminate Mike Rummel because the YPPA refused to drop the unfair labor practice charge relating to the Dahl matter. There are multiple problems with this argument, and neither the Hearing Examiner nor the full Commission adopted the YPPA’s account of that meeting.

As detailed extensively in the City’s post-hearing brief (RP 733-42 (at pp. 25-34)), the evidence fails to support the YPPA’s oft-repeated contention that Chief Granato “threatened” to discharge Rummel over the YPPA’s failure to withdraw its unfair labor practice charge. Two of the four individuals present at that meeting – including one who attended as a YPPA officer – provided sworn testimony refuting the YPPA assertion

¹² In attempting to show union animus, Bob Hester testified about his “suspicions” and his “feeling” that he received a verbal warning and a written reprimand because of his union activities. RP 97-98 (Tr. 84-85). But Hester conceded that he made no effort to challenge either action through a grievance or unfair labor practice charge. RP 152-53 (Tr. 139-40). Indeed, Hester acknowledged that he consulted with counsel and was advised that an arbitrator would likely have found the Department’s actions reasonable under the labor contract. *Id.* Hester further acknowledged that two other individuals who had no role in union business also received verbal warnings for one of these incidents, which certainly undermines his claimed suspicion that he was singled out due to his union role. RP 153-54 (Tr. 140-41).

that Chief Granato made the threatening comment attributed to him. RP 435-36, 463-64 (Tr. 422-23, 450-51).

The Hearing Examiner and PERC apparently found the City's two witnesses credible, as neither adopted the YPPA's version of the May 27 meeting. *See* RP 780-81, 786-87, 792 (Decision 9451-A, at 6-7, 12-13, 18); RP 929-32 (Decision 9451-B, at 6-9).¹³ Moreover, if the Chief had made the threat attributed to him, it is inconceivable that the YPPA representatives would not have filed an unfair labor practice charge immediately. And yet the YPPA witnesses said they made no response to this alleged threat, either at the meeting, following the meeting, or at Mike Rummel's pre-termination hearing many weeks later, or even in its grievance of Rummel's discharge. RP 170-72, 438 (Tr. 157-59, 425); RP 658 (H.Ex. 24). Additionally, if Chief Granato intended to terminate Mike Rummel due to the YPPA's failure to drop an unfair labor practice charge, it is illogical that the Chief would have ordered additional investigation into the Johnny's Nightclub incident following Rummel's pre-termination hearing. RP 131, 136, 139 (Tr. 118, 123, 126). Chief Granato's careful consideration of the points raised by the YPPA at that hearing, and his directive that additional interviews be conducted (in the presence of YPPA representative, no less), reflect his genuine interest in determining whether Mike Rummel had engaged in misconduct. That additional investigation

¹³ This fact negates the YPPA's argument that the Commission failed to give "due regard" to the Hearing Examiner's opportunity to observe witnesses. *See* Pet. Brief at 20-21. Not even the Hearing Examiner adopted the YPPA's factual allegations. *See* RP 780-81, 786-87, 792 (Decision 9451-A, at 6-7, 12-13, 18). Thus, requiring deference to the Examiner's findings would do nothing to rescue the YPPA's case.

confirmed that Rummel had engaged in this misconduct, however, adding to the pattern of misconduct he committed in just six short months and causing the City to proceed with the termination decision.

For all of these reasons, the YPPA failed to establish that Chief Granato made the threatening statement on which the YPPA exclusively relies. As the YPPA bore the burden of proof in pursuing its charge, this evidentiary failure defeats the YPPA's case as a matter of law.

c. The fact both the Dahl and Rummel matters were discussed at the same meeting does not demonstrate discrimination.

As a final attempt to find some evidence to substantiate its speculative belief of discrimination, YPPA argues that the very fact the Chief and YPPA discussed both the Dahl ULP and Rummel's employment in the same meeting can only mean that the Chief acted with a discriminatory intent. According to the YPPA, there was no reason for the Chief to even discuss Rummel at this meeting unless he intended to discriminate against Rummel if the Dahl ULP was not dropped. As demonstrated by the leaps in logic inherent in this argument, the YPPA's apparent desire to ignore Rummel's misconduct knows no bounds.

As found by Judge Wickham, the pending Dahl ULP was directly relevant to the circumstances surrounding Mike Rummel's status. The unfair labor practice charge filed by the YPPA on February 16, 2005 related to a return-to-work order involving another officer, Brian Dahl. That return-to-work order had incorporated recommendations of health

care professionals that Dahl be subject to random drug testing following his return to work to ensure that he did not relapse into prescription drug addiction. The YPPA subsequently filed the February 16, 2006 charge alleging that the return-to-work order amounted to direct dealing with Dahl, and that the City had failed to bargain the order and a unit-wide drug testing policy. *See* RP 550-51 (H.Ex. 8).

As this matter was proceeding through the PERC, the City and the YPPA were attempting to address Mike Rummel's status. As with Officer Dahl, the City had received input from a health care professional that Officer Rummel should not be returned to police duty unless he was subject to random testing to ensure that he did not relapse. *See* RP 654-57 (H.Ex. 23). Since the City's incorporation of such a requirement for Officer Dahl had triggered an unfair labor practice charge filed on February 16 (merely a week before the City received the fitness-for-duty assessment for Rummel), the City initially¹⁴ wanted to work with the YPPA to bring Rummel back to work under conditions that would not generate another charge. RP 321, 429 (Tr. 308, 416).

Given the obvious parallels between the Dahl and Rummel situations, it was hardly surprising that Chief Granato would be cognizant of and even reference the February 16 unfair labor practice charge relating

¹⁴ This was the City's initial mindset when it received Dr. Decker's assessment of Rummel's fitness for duty, but the City's willingness to return Mike Rummel to work changed after completion of the investigation into Rummel's violation of the no-contact order and he engaged in yet another act of misconduct in violation of his Last Chance Agreement in early April.

to the Dahl matter in navigating the issues surrounding Mike Rummel's status.

Judge Wickham correctly found as such:

The Court further rejects YPPA's request to infer a discriminatory motive because the Dahl unfair labor practice charge was discussed during the same meeting in which Rummel's employment was discussed. While it is unfortunate the two issues were discussed in the same conversation, this fact does not establish a discriminatory motive. The two issues are connected. The presence of the unfair labor practice charge involving Dahl made it difficult, if not impossible, for the Department to subject Officer Rummel to some type of random monitoring. The parties understood the two issues were connected as demonstrated by the conversations they had related to the two situations.

CP 15-16 (Wickham Order, ¶ 4).

C. The YPPA's Remaining Challenges to the PERC's Substantive Analysis of the Evidence are Unavailing.

The YPPA argues that the Commission made several errors in reviewing and weighing the evidence, but, as Judge Wickham correctly found, these arguments are without merit and fail to resurrect its fatally flawed discrimination claim. CP 15-16 (Wickham Order at 2-3).

1. PERC Correctly Applied the Substantial Factor Test.

The YPPA claims that the PERC did not apply the "substantial factor" test. This is untrue, as the PERC cited the correct standard that the complainant must prove that union animus was "a substantial motivating

factor behind the employer's actions." RP 777 (Decision 9451-B, at 3). The Commission then concluded the YPPA had not met its burden of proof, and its charge should be dismissed. *Id.* at 9.

In reality, it is the YPPA that repeatedly misstates the legal standard in suggesting, for example, that "[s]ubstantial evidence does not support a conclusion that [the YPPA's unfair labor practice charge] was not a factor at all" in Rummel's termination. *See* Pet. Brief at 14, 35. It is not the City's burden to show that union activity was "not a factor at all". It is the YPPA's burden to show that the union activity was a "substantial motivating factor" in the decision to discharge Rummel. The PERC correctly found that the YPPA did not meet its burden.

2. The PERC Correctly Found The Parties Had Not Yet Agreed to All of the Terms Regarding Rummel's Tentative Return to Work.

The YPPA then argues the Commission mistakenly believed the parties had not reached an agreement regarding whether and how Mike Rummel would be subject to alcohol testing upon his return to work. Pet. Brief at 28-32. The YPPA's point is lost on the City. Consistent with the un rebutted evidence, the Commission noted that discussions between the City and the YPPA over Rummel's post-return alcohol testing delayed Rummel's return to work. RP 929 (Decision 9451-B, at 6). Also consistent with the un rebutted evidence, the Commission found there was a tentative agreement by the City to bring Rummel back to work, but the parties had not finalized the terms regarding follow up drug testing *Id.* at 8; RP 897. The Commission was not "confused" as suggested by the

YPPA. Rather, the undisputed sequence of events demonstrates that the conclusion of the investigation into Rummel's violation of the no contact order, and Rummel's improper use of his badge at Johnny's nightclub occurred after the City had expressed its willingness to bring Rummel back to work. *Id.* at 8. Thus, the PERC reasoned, the Hearing Examiner's inference that the City did not consider these violations to provide a basis to invoke the Last Chance Agreement was wrong, as the badge incident and violation of the no-contact order clearly caused the termination. *Id.* at 8.

3. The PERC Correctly Dismissed YPPA's Unsubstantiated Theories of Bias and Noted That Captain Copeland Independently Recommended Termination.

YPPA's entire discrimination case hinges on its unsubstantiated belief that Chief Granato acted with a discriminatory intent in terminating Rummel. Given this, YPPA tries to ignore the fact that Captain Copeland independently recommended Rummel be terminated for violating his Last Chance Agreement. Unable to ignore the independent recommendation, YPPA calls foul, claiming that Captain Copeland's recommendation could not have been independent because he discussed the case with Chief Granato before making his recommendation. But Captain Copeland testified unequivocally that Chief Granato did not encourage him to recommend termination because the YPPA would not withdraw its unfair labor practice charge; rather, Captain Copeland testified that he reviewed the entire matter and that there was no disagreement between him and the

Chief that termination was warranted based on Rummel's poor record and violation of the Last Chance Agreement. RP 325-28 (Tr. 312-15). The Commission's reference to Captain Copeland's assessment (as a supervising officer) that Rummel should be terminated under the Last Chance Agreement hardly reflects error by the PERC. Indeed, Judge Wickham correctly dismissed YPPA's argument in this regard, finding:

The Court finds that an independent investigation concluded Rummel twice violated the Last Chance Agreement. Captain Copeland independently recommended Rummel be terminated for his violation of the Last Chance Agreement. See Ex. 28. Substantial evidence supports the PERC's finding that Rummel was terminated for his violations of the Last Chance Agreement, and the YPPA did not meet its burden in demonstrating that anti-union animus played a substantial factor in his termination.

CP 16 (Wickham Order, ¶ 5).

4. The PERC Correctly Rejected YPPA's Remaining Challenges to the Adequacy of the Evidence.

The YPPA also faults the PERC for not treating as dispositive the alleged evidence that the lieutenant who investigated the Johnny's Nightclub incident viewed it as a minor matter.¹⁵ But as the Commission and trial court recognized, such evidence falls far short of establishing

¹⁵ As noted above, this is at most hearsay "evidence." It is worth noting that although YPPA now characterizes this incident as "minor", it introduced evidence that such a violation would result in a 20-30 hour suspension. RP 902. Whether this incident alone would result in a significant suspension is really besides the point as it followed on the heels of repeated misconduct by Rummel and violation of the Last Chance Agreement.

pretext. As a starting point, the investigating officer, Lieutenant Wentz, did not testify and Rummel merely provided hearsay testimony that Wentz supposedly thought the badge incident was minor. RP 274-75 (Tr. 261-62). Even if Lt. Wentz did make such a comment, Lt. Wentz's assessment of the situation should not bind the City where: (i) Lt. Wentz was a relatively new lieutenant with little experience with termination matters; (ii) there is no evidence suggesting that Lt. Wentz had any idea that Mike Rummel was subject to a Last Chance Agreement and/or that Rummel had already engaged in misconduct violating that Agreement; and (iii) Lt. Wentz was not a decision-maker with regard to the seriousness of Rummel's misconduct. *See* RP 353 (Tr. 340). What might be viewed as a minor incident in isolation looks far more substantial when seen in the context of a last chance agreement and repeated acts of misconduct, and Lt. Wentz did not have the benefit of the big picture – in contrast to Captain Copeland, who most certainly did have the complete picture. The YPPA's attempt to fault the PERC for giving weight to Captain Copeland's testimony fails to support the YPPA's appeal.

Finally, the YPPA argues that the Commission erred in finding that the City was entitled to terminate Mike Rummel under the Last Chance Agreement because violation of the non-contact order and the Johnny's Nightclub badge incident were allegedly less serious violations than Rummel's other admitted misconduct. The YPPA's apparent argument is that since Rummel had not been terminated for those prior, more serious incidents, the City would not have terminated him for these latter two

violations unless the City also had a retaliatory motive. The glaring problem with this reasoning is that it completely ignores the cumulative nature of Mike Rummel's misconduct.¹⁶

The City would not likely have terminated Mike Rummel (or any officer) over the nightclub incident alone. But that misconduct did not occur in a vacuum. Mike Rummel had been under a Last Chance Agreement due to very serious misconduct involving criminal charges. While subject to that agreement, the domestic violence and insubordination incidents arose. By the first part of 2005, Rummel certainly had to understand that his employment rested on thin ice. And yet, before the City even had an opportunity to conclude the insubordination incident, Rummel committed a further act of misconduct by improperly using his police badge. This additional misconduct was effectively "the straw that broke the camel's back" given Mike Rummel's disciplinary record. As Chief Granato explained, he could not keep sticking his neck out to protect Rummel.

By simply comparing the seriousness of Rummel's final act of misconduct with the seriousness of other misconduct for which he was not terminated, the YPPA mischaracterizes the nature of the City's

¹⁶ The YPPA refers to the City's explanation for its discharge decision as "trite", which is nothing short of incredible given Mike Rummel's pattern of misconduct. The YPPA apparently fails to understand the expression regarding the "straw that broke the camel's back", which is applicable here. The expression reflects the notion that a single straw may itself be light, but when added to an existing load, at some point the burden is too great. Here, even if the final incident involving Rummel's improper use of his badge was not sufficient to warrant termination, it followed an extensive pattern of misconduct. The City was certainly entitled to say "enough is enough".

termination decision. Rummel's violation of the no-contact order and misuse of his police badge must be viewed as part of a pattern of misconduct by an employee already subject to a Last Chance Agreement. Viewed through this appropriate lens, substantial evidence supports the PERC's conclusion that the City's termination of Mike Rummel was amply and legitimately justified.

D. YPPA's Procedural Challenges To PERC's Decision Are Without Merit.

There is no legitimate basis to appeal the Commission's decision dismissing YPPA's discrimination charge: the Commission correctly applied the law, its decision is based upon substantial evidence, and is clearly not arbitrary and capricious.¹⁷ Unable to challenge the Commission's decision to dismiss the discrimination charge, YPPA brings this appeal under RCW 34.05.570(3)(f) claiming the Commission did not decide all issues before it. This argument too must fail as the Commission correctly resolved all issues preserved on appeal.

Pursuant to RCW 34.05.570(3)(f), the Court will reverse an agency decision only (1) if the issues allegedly not resolved required resolution by the PERC, and (2) the union was substantially prejudiced by the failure of the PERC to resolve the issue. *Chevron U.S.A., Inc. v. Central Puget*

¹⁷ YPPA's reliance on *PERC v. City of Vancouver*, 107 Wn. App. 694, 33 P.3d 74 (2001), is misplaced. In that case, the court reversed the PERC's decision because it misapplied the law and failed to examine the totality of circumstances, resulting in arbitrary and capricious findings. *Id.* at 710. Here, the PERC's decision was based on well-established precedent regarding the union's burden to establish discrimination, the overwhelming evidence of Rummel's misconduct that caused his termination, and the absence of any "threats" of discrimination.

Sound Growth Management Hearings Bd., 121 Wn. App. 1064, *aff'd*, 156 Wn.2d 131, 124 P.3d 640 (2005). As correctly found by Judge Wickham, neither criteria is established here. CP 15-16 (Wickham Order at 3).

1. The Commission's Findings of Fact Comply with the APA.

Because the YPPA cannot demonstrate the PERC erred in striking the Hearing Examiner's unsupported and erroneous findings, YPPA argues that it is entitled to reversal because the PERC failed to include a specific Finding of Fact as to the statement made by Chief Granato at the May 27 meeting. According to YPPA, the Court cannot conclude the City's actions were lawful unless it makes a finding regarding the Chief's statement. Pet. Brief at 18-22. As correctly found by the trial court, YPPA's argument is without merit for several reasons.

First, it is important to note that even the Hearing Examiner did not adopt YPPA's repeated allegation that Chief Granato made "threats" during the May meeting. *See* RP 780-81, 786-87, 792 (Decision 9451-A, at 6-7, 12-13, 18). However, the Hearing Examiner incorrectly relied on Granato's frustration with the process to infer that he retaliated against Rummel. The Commission correctly reversed the Examiner on this point, and found that this frustration did not establish that Rummel's termination under the Last Chance Agreement was pretext for discrimination:

Finally, although the Examiner found that Granato expressed frustration regarding the union's failure to withdraw its unfair labor practice complaint regarding a policy for random drug testing for bargaining unit members, that frustration does not by itself constitute evidence of the employer's intent

to discriminate against Rummel. The frustration expressed was more closely associated with the bargaining process, and not an intent to discriminate against protected employee rights.

RP 931-32 (Decision 9451-B, at 8-9). Based upon the overwhelming evidence in the record regarding Rummel's misconduct, the Commission correctly adopted the Hearing Examiner's finding that: "On July 7, 2005, the City of Yakima discharged Rummel for violating the terms of the agreement described in paragraph 5 of these findings of fact." *Id.*; see RP 792 (Decision 9451-A, at 18). This finding was not challenged by YPPA and therefore must be accepted as true.¹⁸ Rummel's repeated disregard for workplace rules caused his termination—nothing else.

Second, contrary to YPPA's suggestion, the PERC did not leave its findings to speculation as the YPPA claims. Reviewing the decision as a whole, it is clear the PERC found that YPPA failed to meet its prima facie burden of discrimination. Judge Wickham explained this as follows:

The Court rejects YPPA's challenge to the adequacy of the PERC's Findings of Fact under the requirements of the Administrative Procedures Act. The Court finds that the Findings of Fact comply with the APA, and notes that certain findings of fact may be inferred from the body of the Commission's analysis and reading of the decision as a whole. This is far different

¹⁸ Even assuming, *arguendo*, the Commission should have made more detailed findings of fact, the appropriate remedy is to remand the case to the Commission to decide these issues. *Low Income Housing Inst. v. City of Lakewood*, 118 Wn. App. 1033, 2003 WL 22080227 (2003) (remanding case to Central Puget Sound Growth Management Hearings Board to decide unresolved issues).

than inferring factual findings from the result, which the Court did not do.

CP 15 (Wickham Order, ¶ 3).

YPPA's challenge to the adequacy of the PERC's findings must also fail because it ignores the fact that it bore the burden of proof with respect to whether Rummel's termination was discriminatory. As Judge Wickham correctly found, "It is well recognized that the absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against that party on that issue. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001)." CP 15 (Wickham Order, ¶ 3).

In *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001), the Supreme Court was asked to decide whether the defendant was personally liable for wrongful withholding of wages under RCW 49.48 as a "vice principal" or "agent". In affirming the trial court's decision dismissing the complaint, the Supreme Court stated that the trial judge's findings which were set forth in a "truncated version of the letter opinion" supported the "implicit, if not explicit, conclusion of law that Handly was not an "agent" or "vice principal." The Supreme Court held:

Although the trial court's findings say little about Handly's involvement, if any, in decision making over payment of wages, we observe that Ellerman, the plaintiff, had the burden of proof at trial. That being the case, the absence of a finding of fact is to be interpreted as a finding against him.

Id. at 524. See also *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 526, 844 P.2d 389 (1993) (The absence of a finding on an issue is construed against the party having the burden of proof on that issue); *City of SeaTac v. Cassan*, 93 Wn. App. 357, 967 P.2d 1274 (1998) (same); *City of Spokane v. Department of Labor and Industries*, 34 Wn. App. 581, 589, 663 P.2d 843 (1983) (same). Because YPPA bore the burden of proof on whether a threatening statement was made and whether the termination decision was substantially motivated by a retaliatory intent, the absence of a finding must be construed against it on these issues.

YPPA claims *Ellerman* and the above cited rule regarding findings of fact with respect to issues on which the party carries the burden of proof do not apply to cases decided under the APA. YPPA cites no authority for this proposition, and there is none. In fact, the APA draws its requirements regarding findings of fact from Civil Rule 52. "Findings of fact by an administrative agency are subject to the same requirement as are findings of fact drawn by a trial court." *State ex rel. Bohan v. Department of Pub. Serv.*, 6 Wn.2d 676, 694 (1940). YPPA had the burden of proving that a threat was made at the May 27 meeting, and that retaliation played a substantial factor in Chief Granato's termination recommendation. The fact the PERC did not make a specific finding as to what was said at the May 27 meeting means that YPPA did not carry its burden in demonstrating a threat was made. If the rule were otherwise, it would improperly shift the burden of proof onto the City to prove what was not said. This is not the law. YPPA bears the burden of proof on its

discrimination claim. It must prove the Chief made a threat to salvage its discrimination claim. As the PERC and trial court correctly found, YPPA did not sustain its burden.

2. The Commission Correctly Dismissed the Interference Charge.

The YPPA next claims the Commission erred in not deciding its alleged interference charge. This is false. It is well established that “where an allegation of discrimination has been dismissed, an independent interference allegation cannot be found for the same facts.” RP 925 (Decision 9451-B at n.2). Having dismissed the discrimination charge, the PERC correctly held that the interference charge, which was based upon the same facts, was moot. *Id. See Clark County*, Decisions 9127-A and 9127-B (PECB, 2007); *Reardan-Edwall Sch. Dist.*, Decision 6205-A (1998).

Moreover, the Hearing Examiner previously ruled the YPPA’s interference charge was derivative of the discrimination charge. RP 776 (Decision 9451-A, at 2). Dismissal of the discrimination charge necessarily resolved the interference charge. If, YPPA felt, as it now claims, that the interference charge stood on its own, it was required to appeal the Examiner’s decision that the interference charge was derivative only. It failed to do so, thus waiving the issue. RCW 34.05.554 (providing that, subject to limited exceptions not applicable here, issues not raised before an administrative agency may not be raised on appeal).

3. YPPA Admits That PERC Did not Rely Upon Post-Hearing Materials Offered by the City.

The YPPA acknowledges the PERC did not rely upon additional materials filed by the City after the hearing. Appeal Brief at 24. It nonetheless claims the Commission's decision was erroneous because it did not formally strike the materials from the record. There are no grounds to reverse an agency action where no prejudice has resulted. *Chevron*, 121 Wn. App. 1064 (denying request to reverse Board's decision under RCW 34.05.570(3)(f) because, even if Board should have resolved the notice issue, its failure to do so did not substantially prejudice the petitioner).

V. CONCLUSION

Based on a review of the entire record before the Court, it is easy to understand why the PERC dismissed the YPPA's charges. The evidence overwhelmingly establishes that Mike Rummel repeatedly engaged in misconduct, even after he was subject to a Last Change Agreement. In light of this evidence, the PERC properly concluded that the YPPA failed to satisfy its burden of proving that union animus was a

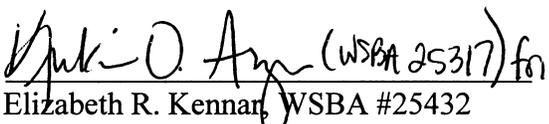
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substantial motivating factor in the City's decision to terminate Rummel's employment. The City of Yakima respectfully urges this Court to affirm the PERC's order dismissing the YPPA's case.

DATED this 16th day of January, 2009.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

Adina Davis declares under penalty of perjury of the laws of the State of Washington as follows:

That she is an employee with Summit Law Group, 315 Fifth Avenue South, Suite 1000, Seattle, Washington 98104; that on the 16th day of January, 2009, she caused to be served upon counsel of record by e-mail and U.S. mail at the address shown below, the following document:

- **Response Brief of Respondent City of Yakima**

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09 JAN 16 PM 3:45
STATE OF WASHINGTON
BY _____ DEPUTY
COURT OF APPEALS
DIVISION II

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of January, 2009 at Seattle, Washington.



Adina Davis