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COURT OF APPEALS  
DIVISION II

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**NO. 41293-4-II**

**COURT OF APPEALS FOR THE STATE OF WASHINGTON**

**DIVISION II**

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**RICHARD GERMEAU,**

**Appellant,**

**v.**

**MASON COUNTY, et al.,**

**Respondents.**

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**On Appeal from Thurston County Superior Court  
Cause No. 10-2-00338-7**

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**RESPONDENTS' BRIEF**

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**January 25, 2011**

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## **I. IDENTITY OF RESPONDENT**

Mason County; Mason County Civil Service Commission, a department of Mason County; and Mason County Sheriff's Office, are the Respondents herein. The Respondents will be referred to generally as "Mason County".

## **II. COUNTER-INTRODUCTION**

This case is not about access to public records. Nor is it about whether a specific record is exempt from disclosure. It is also not about the non-use of a public records request "form". It is, plain and simple, about whether a document can be re-characterized after the fact, into a public records request. The memo in question was not submitted to the County's or Sheriff's Offices' designated public records officer, nor did its wording in any way provide "fair notice" that it was intended to be a public records request.

Regarding the memo, the trial court observed:

I read that memo five times before I realized it could be construed as a public records request, not just because Mr. Germeau represents himself as representing the guild, but the whole point of this request was, look, we think you're about to undertake an investigation of one of our guild members and we want to be kept up to date. It asks for records that don't even exist yet, to the extent you can construe it

as a record request.

VRP p. 16., lines 4-14.

It says a lot that a learned trial judge, who knew *from the complaint* that the memo in question was alleged to be a public records request, had to read it *five times* before he could even begin to grasp the plaintiff's argument. By re-characterizing the memo into something it wasn't, Deputy Germeau, the appellant, seeks to expose Mason County to significant penalties, attorneys fees and costs. The trial court rightly recognized the memo for what it was and granted summary judgment. That judgment should be affirmed.

### **III. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

A. Can Deputy Germeau assert a violation of the Public Records Act when he did not comply with the county's public records procedure by submitting his "memo" to the designated public records officer?

B. Can Deputy Germeau assert a violation of the Public Records Act when he did not give Mason County "fair notice" that his "memo" was intended to be a request for records under the Public Records Act?

C. Can Deputy Germeau assert a violation of the Public Records Act when no records existed at the time the memo was submitted and he was notified of that fact?

D. Does Deputy Germeau lack standing to bring this lawsuit because he did not request records on his own behalf and therefore was not a person denied access to records?

#### **IV. COUNTER-STATEMENT OF THE CASE**

##### **A. Factual History.**

The appellant, Richard Germeau, is a Mason County Sheriff's Deputy. CP 209. Deputy Germeau received a copy of General Order 08-01. CP 214; 217. General Order 08-01 was issued by the Mason County Sheriff on July 14, 2008 and indicated that the Mason County Sheriff's Office had adopted Mason County's "policy on public records entitled "Mason County Public Records Procedures." CP 216. RCW 42.56.040 mandates the adoption and publishing of such procedures. Deputy Germeau signed a "verification of receipt" indicating he had received the General Order 08-01 and agreed to "read and understand it." CP 217. Deputy Germeau was required to comply with the County's Records Procedures because they were published and displayed. RCW

42.56.040(2).

The Mason County Public Records Procedures adopted by Mason County (hereinafter “Records Procedures”) designated a public records officer for the County as well as one for each elected official. CP 187. The Sheriff’s Office’s designated public records officer was identified as Jan Alvord, the Chief Civil Deputy for the office. CP 199; 247. RCW 42.56.040 mandates the designation and publication of a public records officer to “serve as a point of contact for members of the public in requesting disclosure of public records . . .” The Sheriff’s Office’s website also explains the process for submitting a public records request to the Sheriff’s Office and includes a link to a “Public Records Request Form.” CP 200; 202.

The County’s Records Procedures provided that requests for public records “should be in writing and directed to the designated public records officer and should include the following information . . . A clear indication that the document is a “Public Records Request.” CP 187. The form provided by the Sheriff’s Office contains all of the requirements of the County’s Records Procedure, including identifying itself as a “public records request.” CP 202.

Deputy Germeau had, in fact, submitted a public records

request on a County provided form to the designated County public records officer, on Feb 17, 2009. CP 246. Deputy Borcharding, on whose behalf Deputy Germeau claims to have been acting, separately submitted fourteen separate public records requests for records related to the same incident. CP 247-262. Notably, Deputy Borcharding's requests were on a form and submitted to the Sheriff's Office public records officer. CP 247.

On August 13, 2009, six months after submitting a request for records that was in compliance with the County's Records Procedure, Deputy Germeau handed Chief Inspector Dean Byrd a memorandum from Mason County Sheriff's Deputy Rich Germeau. CP 35. The "memo" was not submitted in compliance with Mason County's Records Procedures. It did not identify itself as a public records request and it was not submitted to the Sheriff's Office's designated public records officer. CP 209; 218.

The memo included the following statement:

Upon receipt of this memo understand that ***the guild*** *is requesting* and has the right to be privileged to any work product, or investigative findings regarding any investigation involving Martin [Borcharding]. This

includes any notes, interoffice memo's or emails *that may be related.*

CP 35 (emphasis added).

Inspector Byrd understood that Deputy Germeau was, at the time, the Sheriff's Guild Representative for Deputy Martin Borcharding and that this memo was a request for information in his capacity as a Guild Representative for Mr. Borcharding. He did not understand this to be a public records request made under RCW 42.56. CP 209. Deputy Germeau also delivered a copy of the memo to the Sheriff's Chief Criminal Deputy, Russell Osterhout. CP 218. Chief Osterhout did not understand the memo to be a public records request. *Id.* At no time did Deputy Germeau indicate in writing, or verbally, to anyone at the Sheriff's Office that the memo was a public records request. CP 218.

Inspector Byrd delivered Deputy Germeau's memo to Undersheriff Jim Barrett for follow up, again, believing it was a Guild request. CP 209-10. If he thought it was public records request, he would have provided it to Chief Civil Deputy Jan Alvord, who handles all public records requests for the Sheriff's Office. *Id.*

Undersheriff Barrett also understood that Deputy Germeau

was, at the time, the Sheriff's Guild Representative for Deputy Martin Borcharding and that the Germeau memo was a request for information in his capacity as a Guild Representative for Mr. Borcharding. CP 204-05. When he reviewed the memo, he did not understand it to be a public records request made under RCW 42.56. *Id.* The recipients of the memo did not ask Deputy Germeau to clarify whether it was a public records request because it did not register as even remotely a public records request and thus there was nothing to clarify. CP 214.

The same day Undersheriff Barrett received the memo from Chief Byrd, he went and spoke with Deputy Germeau. CP 205. He explained to Deputy Germeau **that there was no internal affairs** (IA) investigation being conducted regarding Deputy Martin Borcharding at the time and **thus no records to provide to him.** *Id.*

Another Sheriff's Detective was present during this conversation and witnessed Undersheriff Barrett tell Deputy Germeau at least three times that no internal affairs investigation has been ordered as of August 13, 2009. CP 212. This Detective also disputes the Undersheriff's alleged use of a profanity when

talking to Deputy Germeau. *Id.*

Undersheriff Barrett asked Deputy Germeau if he wanted the memo back to resubmit at a later date if an IA was ever conducted. CP 205. Deputy Germeau asked Undersheriff Barrett to hold onto it “on advice of counsel.” He did not claim it was a public records request. *Id.* Undersheriff Barrett made a note of the conversation and stuck it on the memo the same day as the conversation. CP 206.

Six months later, when the lawsuit was served on the County and it was, **for the first time**, alleged that the August 13, 2009 memo was claimed to be a public records request, Chief Civil Deputy Jan Alvord was asked to make available to Deputy Rich Germeau all records that had been provided to Deputy Martin Borcharding in response to the fourteen public records request submitted by *Deputy Borcharding*. CP 207-08; 268. She provided the Prosecutor’s Office with a copy of all documents that were made available to Deputy Borcharding. It is her understanding that those records were provided to Deputy Germeau by the Prosecutor’s Office. *Id.*

The Sheriff’s Office categorically denies the highly reckless

and inflammatory suggestion that it considered destroying evidence, as suggested by Deputy Germeau. His statement is made without any factual basis whatsoever. CP 214.

**B. Procedural History.**

The parties filed cross motions for summary judgment and the trial court granted Mason County's motion in its entirety, dismissing the plaintiff's claims. CP 136-37.

**V. LAW AND ARGUMENT**

**A. Standard of Review.**

In reviewing the grant of summary judgment "the appellate court engages in the same inquiry as the trial court." *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 866 P.2d 1272 (1994).

The purpose of summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73 Wn.2d 880, 886 (1968). Summary judgment should be granted if it appears from the record that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Hudesman*, 73 Wn.2d at 886.

The party moving for summary judgment has the burden of

establishing the absence of any issue of material fact. *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 854 (1988). However, once the moving party has presented competent summary judgment proof, the non-moving party may not rest on mere allegations in its pleadings, but must respond by affidavit or other proper method setting forth specific facts showing there is a genuine issue for trial. *McGough v. Edmonds*, 1 Wn. App. 164, 168 (1969). Broad generalizations and vague conclusions set forth in an affidavit in opposition to a motion for summary judgment are insufficient to successfully resist the motion. *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136 (1977).

Summary judgment does not alter the applicable burden of proof; a moving party need not disprove an essential element of the nonmoving party's case, and may merely point out for the court the absence of any essential element. *Young v. Key Pharmaceuticals*, 112 Wn. 2d 216, 225-27 (1989).

**B. Deputy Germeau Did Not Comply with the County's Public Records Procedure and Therefore Cannot Establish a Violation of the Public Records Act.**

Deputy Germeau's August 13, 2009 memo did not satisfy the County's Records Procedure in any way. CP 35. It was not

submitted to the County's designated public records officer or the Sheriff's Office's designated public records officer. CP 209; 218. It did not state it was a public records request. CP 35. He claims he did not "recall" receiving a copy of the County Public Records Procedure. CP 216-217. However, like the public as a whole, he was put on notice of the County's procedure through its adoption by the County Commissioner and publication. Unlike the public, however, he was actually given a copy of that procedure, signed a document showing he received it, and "agreed to read and understand" it. CP 217.

The Public Records Act requires that agencies publish, for the benefit of the public, descriptions of their organization including the places at which and the employees from whom public records may be requested:

- (1) Each state agency shall separately state and currently publish in the Washington Administrative Code and each local agency shall prominently display and make available for inspection and copying at the central office of such local agency, for guidance of the public:
  - (a) Descriptions of its central and field organization and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain copies of agency decisions;

- (b) Statements of the general course and method by which its operations are channeled and determined, including the nature and requirements of all formal and informal procedures available;
- (c) Rules of procedure;
- (d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
- (e) Each amendment or revision to, or repeal of any of the foregoing.

RCW 42.56.040(1).

The Public Records Act also authorizes agencies to “adopt and enforce reasonable rules and regulations ... to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency.” RCW 42.56.100.

Mason County, pursuant to the Public Records Act, adopted and published its Public Records Procedures, which provides in pertinent part:

Requests for public records should be in writing *and directed to the designated public records officer* and

should include the following . . . [a] clear indication that the document is a ‘Public Records Request.’”

CP 187.

Deputy Germeau acknowledged that he was aware that the Sheriff’s Office had adopted the County’s Policy regarding Public Records Requests. CP 217. He had, in fact, six months prior to the August 13, 2009 memo, submitted a public records request in compliance with the Records Procedure. CP 246.

His August 13, 2009 memo did not comply with the County’s Records Procedure. It was not submitted to either the County Public Records Officer of the Sheriff’s Office’s Public Records Officer. It did not indicate it was a “public records request.”

Deputy Germeau argues that the Public Records Act does not require the use of a specific form or the words “public records request.” *Appellant’s Brief*, pp. 18-19. However, Mason County is entitled to “adopt and enforce reasonable rules and regulations . . . to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency.” RCW 42.56.100. The adopted procedure does not require use of a specific

form, but it does require that it be submitted to a designated public records officer and indicate it is a public records request. These are reasonable rules to prevent excessive interference with other essential functions of the agency and to ensure that requests under the PRA are promptly identified.

For example, in *Parmelee v. Clarke*, 148 Wn. App. 748, 759, 201 P.3d 1022, (2008), *rev. denied*, 166 Wn.2d 1017, 210 P.3d 1019 (2009), the Court rejected a lawsuit based on the State Department of Correction's (DOC) failure to respond to a request for records that was not submitted to the agency's designated public records officer. DOC had adopted and published a WAC provision that provided "requests for any identifiable public record may be initiated at any office of the department during normal business hours." *Id.*, at 754. Parmelee alleged he provided a public records request to a DOC employee where he was incarcerated. *Id.*, at 751. He argued that, because the WAC did not define "office" that the DOC was obligated to "respond to every request for public records delivered to any employee." *Id.*, at 754.

The Court rejected this argument, holding that "it is more reasonable to read" DOC's regulation "as requiring that requests be

submitted to the person designated at each of the Department's locations to be responsible for responding to requests initiated at that location." *Id.*, at 755. The Court additionally held that the DOC's regulation was sufficient to "put the public on notice that a records request should be submitted to a designated public disclosure coordinator" and, in addition, Parmelee had "actual notice" of this requirement. *Id.*, at 757. Because Parmelee did not submit his request to a designated public records officer, DOC could not be penalized for failing to respond to them. *Id.*, at 759.

Like DOC, Mason County has adopted and published a protocol for requesting public records from the County. Mindful of the extraordinary liability accompanying non-compliance with the Public Records Act, the County reasonably required that members of the public direct their requests "to the designated public records officer" and indicate it is a public records request. CP 187. Like Parmelee, Deputy Germeau had actual knowledge of these requirements. CP 217; 246. It is undisputed that Deputy Germeau did not submit the memo to a designated public records officer. Under the holding of *Parmelee v. Clarke*, Mason County cannot be penalized for not responding to the memo, even if were somehow

interpreted to be a public records request.

Deputy Germeau may argue that he was not required to comply with the County's Records Procedure because it uses the word "should" when referring to submitting requests to the public records officer. However, the PRA mandates the appointment of a public records officer to be the "point of contact for members of the public in requesting disclosure of public records." RCW 42.56.580. It mandates the publication of the identity of the public records officer, which the County has done. CP 197-199. Permitting liability against a County that has complied with this statutory obligation because the word "should" was used would render this statute superfluous. Courts should interpret statutes to give effect to all of its language and so that no portion is rendered meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

In *Parmelee* the published WAC provision cited by the Court used the word "may" in reference to the manner in which a request "may be initiated." The Court had no trouble holding that this regulation, in conjunction with others that described the duties of public records officers, mandated submission to the public records

officer. *Parmelee*, 148 Wn. App. At 754-55. Similarly, Mason County's Records Procedure states that the designated public records officer "shall" among other listed responsibilities, "serve as the point of contact for members of the public who request disclosure of public records." CP 187. Delivering a public records request to the designated public records officer should likewise be considered mandatory, as it was in *Parmelee*.

Deputy Germeau was obviously aware that the method of submitting a public records request was to submit it to the public records officer because he had done it before. CP 246. He did not do so in this case because the memo was not a public records request.

Deputy Germeau argues that the fact that County is relying on his failure to comply with the Records Procedure is somehow an admission that the memo was in fact a public records request. This is an example of circular logic that doesn't hold up. By adopting a procedure, as required the Legislature, the County rightly seeks to prevent situations like the one at bar: a claim after the fact that a prior communication was in fact a public records request, despite not complying with the reasonable requirement of delivering it to

the designated and publicized public records officer.

If the Court applies the holding in *Parmelee* to the August 13, 2009 memo, which was admittedly not submitted in compliance with the County's Records Procedure, then it can affirm the summary judgment on that basis and need go no further.

**C. Deputy Germeau Did Not Give Mason County "Fair Notice" That the Memo Was Intended to Be a Request for Records under the Public Records Act.**

In addition to, and as a corollary of, his admitted failure to comply with the County's Records Procedure, Deputy Germeau did not give Mason County unambiguous "fair notice" that the August 13, 2009 memo was intended as a public records request.

RCW 42.56.080 provides in pertinent part:

Public records shall be available for inspection and copying, and agencies shall, **upon request for identifiable public records**, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.

RCW 42.56.550 provides as follows:

(1) Upon the motion of any person having been **denied an opportunity to inspect or copy a public record by an agency**, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it

has refused to allow inspection or copying of a specific public record or class of records.

(2) Upon the motion of any person who believes that an agency **has not made a reasonable estimate of the time that the agency requires to respond to a public record request**, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable.

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(4) Any person who prevails against an agency in any action in the courts **seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time** shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(emphasis added).

Thus, unless and until Deputy Germeau makes a *public records request*, he is not entitled to seek judicial review under the Public Records Act. Summary judgment could be affirmed on this basis alone.

Deputy Germeau essentially argues that any time a citizen communicates with a government employee and, in the course of

that communication, expresses an interest in a document, regardless of the context, it is a public records request and the failure of the government employee to recognize it as such subjects the government to daily penalties, attorneys fees and costs. That is not the law.

In *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000), the Court stated that “the person requesting documents from an agency state the request with sufficient clarity to give the agency **fair notice** that it had received a request for a public record.” (emphasis added) The Public Records Act “only applies when public records have been requested. In other words, public disclosure is not necessary until and unless there has been a specific request for public records.” *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

For example, in *Wood*, the plaintiff submitted a letter to her employer that stated:

We are requesting that you clarify [Ms. Wood's] status with your office. If there is a basis for her termination, we demand that you provide us with written evidence immediately. In that regard, enclosed is a release of information signed by Ms. Wood, *please provide us with a full copy of her personnel file and any other*

*information or documentation that you may have in your custody or under your control that relates to Ms. Wood and her past and current employment with your office and the Prosecutor's Office in general.*

*Id.* at 874-75 (emphasis added).

The Court explained that “a personnel file is not necessarily a public record; the focus is not on how the file is labeled but on the information within the file.” *Id.* at 879. A “personnel file may contain public records, which may, or may not, be subject to public disclosure.” *Compare Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993) (holding prosecutor's performance evaluations were public records but subject to statutory exemption because they “did not discuss specific instances of misconduct or public job performance”) with *Limstrom v. Ladenburg*, 85 Wn. App. 524, 533-34, 933 P.2d 1055 (1997), *aff'd*, 136 Wn.2d 595, 963 P.2d 869 (1998) (holding PDA permits disclosure of prosecutor's personnel documents if they relate to alleged misconduct while in the performance of public duties).

However, as the Court noted, “Ms. Wood was neither an outsider seeking records on agency employees nor an agency employee seeking information on her colleagues; rather, she was a

current, but soon-to-be-terminated, employee seeking access to her file to find out why she was being forced out of her job. And, she authorized release of generally privileged information to effectuate that purpose. Consequently, Ms. Wood's general request for her personnel file was not a request for an identifiable public record as contemplated under the PDA." *Id.* at 880. In other words, "Ms. Wood's letter was ambiguous and failed to adequately notify [her employer] that she was making a public record request." *Id.* at 882.

In *Beal v. City of Seattle*, 150 Wn. App. 865, 870-71, 209 P.3d 872 (2009), a member of the public, at a public meeting, made a verbal request to see specific public records to a City employee:

Ms. Cummings asked to see the written documents containing the specifications about the JTF Site compiled by the Department's engineers-specifically, information regarding the hydrology of the site, the retention pond, and whether or not the pond could fulfill the dual purpose of wildlife habitat and storm/surface water drainage.

The Court noted that such "ambiguous oral requests made during the court of meetings puts agencies in the awkward position of contemporaneously parsing the difference between a request to collaboratively share information and a request that potentially triggers a duty to produce records or pay fines and attorneys fees."

*Id.*, at 875. The Court went on to hold that “the City did not receive fair notice that the request was for specific documents under the PRA.” *Id.* Significantly, the Court noted that the PRA “does require that requests be *recognizable as PRA requests.*” *Id.*, at 876 (emphasis added).

The August 13, 2009 memo was not recognizable as a PRA request. It did not unambiguously provide “fair notice” to Mason County that the Guild was requesting records *under the public records act*. Deputy Germeau references that he was the guild representative for Deputy Borcharding and that “the guild” was requesting “any work product, or investigative findings regarding any investigation involving Martin. This includes any notes, interoffice memo’s or emails that may be *related.*” The request did not come from a member of the public, but from the guild, *made in the context of the guild’s representation of Deputy Borcharding in a potential internal affairs investigation*. The memo did not indicate it was a public records request and was not understood to be a public records request. It was not submitted to the Sheriff’s Office’s designated public records officer. Deputy Germeau did nothing to suggest the memo should be treated as a PRA request in

his subsequent verbal communications with Undersheriff Barret or Inspector Byrd in the six months between submitting it and filing this lawsuit.

Furthermore, the internal affairs materials described in in the memo, like the personnel file in *Wood*, may or may not be public records. An ongoing investigation by a law enforcement agency is not a public record until the matter is referred to the prosecutor for a charging decision. *Newman v. King County*, 133 Wn.2d 565, 575, 947 P.2d 712 (1997). Likewise, even *completed* internal affairs investigations may be redacted under RCW 42.56.240(1). *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988). Also, as in *Wood*, there is an independent statutory basis for the request, namely the collective bargaining statute, RCW 41.56.030(4). *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 383, 831 P.2d 738 (1992) (“As interpreted by PERC, collective bargaining includes the duty to provide relevant information the other party needs to carry out its collective bargaining responsibilities.”) *See, e.g., Bremerton Patrolmen's Assn v. City of Bremerton*, DECISION 3843-A, 4738, 4739 (PECB, 1994) (“The right of an exclusive

bargaining representative to requested information that is necessary to its functions in contract negotiations and grievance processing flows directly from the duty to bargain in good faith under RCW 41.56.030(4)). (Appendix A)

It is clear from *Wood* and *Beal* that not every request for documents communicated in some manner to an agency employee constitutes a *public records request* triggering the obligations and exposure to penalties and attorneys fees of ch. 42.56 RCW. Therefore, the Court should consider the factors in *Wood* and *Beal* that placed those requests outside the public records act.

First, the request in *Wood* was made by an agency employee with an independent reason to receive information from the agency, i.e. she wanted her personnel file in the midst of a personnel investigation. Thus, the context of a request must be considered. Here, the Sheriff's Guild made a request in the context of its representation of Deputy Borcharding in a potential future internal affairs investigation. The Guild has a right to receive information from the Sheriff's Office to enable it to represent its members in internal affairs investigations. CP 214. It was therefore reasonable for the officials who received the memo to view it in that context,

not as a public records request. *Wood* is directly on point.

Deputy Germeau claims he was not aware of the Guild making requests for records outside of a public records request. His personal knowledge is not dispositive. Undersheriff Barrett noted that it was “common for the Guild to request information pertaining to internal affairs investigations.” CP 214. Perhaps Deputy Germeau simply does not “recall” that fact, as he did not “recall” that he had been given a copy of the County’s Records Procedure which required a public records request be submitted to the designated public records officer. *Appellant’s Brief*, pg. 6, n. 1.

Second, in *Beal*, the Court rejected the notion that simply asking for documents from a governmental official is enough to qualify as a public records request. A plaintiff instead, must make “an unambiguous request for identifiable public records.” Here, the August 13, 2009 memo was not an “unambiguous request an identifiable public record.” It mentioned the guild’s belief that a criminal investigation would be used as a pretext for an internal investigation and requested “the right to be privileged to any work product, or investigative findings regarding any investigation involving Martin. This includes any notes, interoffice memos or

emails that may be related.” In other words, since it is undisputed that there was no internal affairs investigation being conducted at the time the memo was submitted, then the memo could simply have been requesting documents that *might* exist in the future. If the request records did not exist at the time of the request they were not “identifiable” at the time.

This case shares all of the hallmarks of the “requests” found to be outside the public records request in *Wood and Beal*. Deputy Germeau never referred to it as a public records request, either in writing or verbally. The memo did not request a specific existing public record. It was submitted on behalf of the guild in the context of representing a guild member. This is in accordance with standard practice by the guild. CP 214. Finally, unlike Deputy Germeau’s actual public records request, submitted six months prior, it was not submitted in compliance with Mason County’s formally adopted policy and procedure and it was not submitted to the County’s or the Sheriff’s Office’s designated public records officer.

Perhaps most telling of all is Deputy Germeau’s decision to wait six months to claim, for the first time in *a lawsuit seeking*

*penalties and attorney fees*, that the memo was, in his opinion, a public records request after all. Why did it take so long for his epiphany when the need for documents was allegedly “time sensitive”? The only logical reason is because it was never a public records request in the first place.

Deputy Germeau argues that the County did not ask him to clarify whether the Guild’s memo was a public records request. The memo was so ambiguous that it did not register with its recipients as even *potentially* being a public records request. There was no reason to seek clarification. That was the case here. CP 214. The trial judge had the same problem. VRP 16.

The public records act should not be reduced to a game of “gotcha” designed to reward someone for slipping one past the goalie. Clearly the context of the memo from Deputy Germeau was a request by the Guild for future internal affairs investigatory materials to be given *to the Guild to enable it to perform its representation function of Deputy Borcharding*. Nothing in the memo unambiguously provides “fair notice” to Mason County that it was a public records request by Deputy Germeau. Nor did it in any way comply with Mason County’s procedure for requesting

public records. Attempting to alter the intent and purpose of the memo (and thereby profit from it) by re-characterizing it *six months later*, is directly contrary to *Parmelee, Wood and Beal*, and the purposes of the public records act.

The August 13, 2009 memo did not give Mason County fair notice that it had received a public records request and thus the summary judgment can and should be affirmed on this basis.

**D. Even If the Memo Was Considered a Public Records Request, After the Fact, No Violation of the Act Was Established Because No Records Existed at the Time of the Request.**

Even if Deputy Germeau's memo was interpreted by the Court as a public records request, it is undisputed that no responsive records existed *at the time of the request* and this fact was communicated verbally to Deputy Germeau by Undersheriff Barrett multiple times. CP 205; 211-212.

An "agency is not required to create a record which is otherwise non-existent." *Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000). Thus, because there was nothing to produce at the time of the request, the public records act was not violated. *See, e.g.*, WAC 44-14-04004(4)(a):

"An agency must only provide access to public records

in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.”

Moreover, the public records act does not require a response be *in writing*. RCW 42.56.520. Thus, Undersheriff Barrett’s verbal response that no records existed suffices. Deputy Germeau argues that Undersheriff Barrett denied his request and therefore he had to provide a written response. The request was not denied - there were no records to provide. *See, e.g., Daines v. Spokane County*, 111 Wn. App. 342, 348, 44 P.3d 909 (2002) (The PRA’s requirement to provide a specific exemption when denying a request for public documents applies to “the situation where the agency has the records but says, ‘we are not going to give them to you’ ... [rather than where the agency says] ‘we do not have these records.’”) *See also Smith v. Okanogan County*, 100 Wn. App. at 13-14 (agency has no duty to create a record in response to a request; only existing records must be provided).

Finally, because no existing records were withheld, no *PAWS* index was necessary. Accordingly, there was “no agency action to

review” under the PRA because Mason County did not deny Deputy Germeau or the guild an opportunity to inspect or copy an existing public record, because the public record he sought “did not exist” and he was so notified. *Sperr v. City of Spokane*, 123 Wn. App. 132, 137, 96 P.3d 1012 (2004).

Deputy Germeau asserts that some documents were created prior to, or on August 13, 2009, that should have been provided to the guild. If the Court reads the memo it is titled “**personnel investigation**” and repeatedly references “any internal affairs investigation or line investigation” of Martin Borcharding and states:

Upon receipt of this memo understand that the guild is requesting and has the right to be privileged to any work product, or investigative findings regarding any investigation involving Martin. This includes any notes, interoffice memo’s or emails that may be related.

CP 35.

Deputy Germeau conveniently quotes from his memo out of context and ignores the subject and context of the memo. It is undisputed in the record that, as of August 13, 2009, no internal affairs investigation had been started regarding Deputy Borcharding. CP 205; 211-212. Thus, there were no records, notes,

interoffice memos or e-mails *of an internal affairs investigation* to release or identify. That fact was communicated verbally to Deputy Germeau **three times** on August 13, 2009. CP 211-212. If Deputy Germeau was referring to something other than a records *of an internal affairs investigation*, he never communicated that to anyone at the Sheriff's Office.

Deputy Germeau tries to turn the fact that Undersheriff Barrett verbally told him that no internal affairs investigation had started is actually proof that the memo was interpreted as a public records request. That is unsupported in the record. The memo indicated that the Guild believed an internal affairs investigation had begun. CP 35. Undersheriff Barrett was responding to that assertion. CP 212. Moreover, it is certainly appropriate to assert in response to the lawsuit that, if the Court agreed that the memo was a public records request, that there was still no violation of the public records act because no records existed at the time of the request.

Specifically, the documents referenced by Deputy Germeau, as existing at the time of his request, are memorandums relating to a "domestic disturbance" in which Deputy Martin Borcharding was

a *party* to, and apparent victim of, violence occurring off-duty. The incident was significant in that it involved a member of the Sheriff's Office injured while off-duty. However, none of the memorandums were from an actual internal investigation of Deputy Borcharding, because one was not begun prior to August 13, 2009.

Deputy Germeau continues to make a game of the public records act. He first waits six months to claim in a lawsuit seeking daily penalties, attorneys fees and costs that the memo was a public records act request. He admits he had a conversation with Undersheriff Barrett the same day in which Undersheriff Barrett clearly expresses his understanding that the guild wants records of a potential future *internal affairs investigation*. Deputy Germeau didn't bother to mention to Undersheriff Barrett at that time or any other, that the memo should be treated as a public records request. And he never informed Undersheriff Barrett that the guild wanted documents in addition to those related to an internal affairs investigation of Deputy Borcharding. An internal affairs investigation was not begun until *after* August 13, 2009. CP 205.

Thus, because there was nothing to produce at the time of the August 13, 2009 memo, the public records act was not violated

even if the memo is *ex post facto* construed as a public records request. Accordingly, there is “no agency action to review” under the PRA where the agency did not deny Deputy Germeau an opportunity to inspect or copy a public record, because the public record he sought “did not exist.” *Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (no violation of the public disclosure act because the agency had “made available all that it could find”); *Smith, supra*, 100 Wn. App. at 22 (when county had nothing to disclose, its failure to do so was proper). *See also Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004) (public disclosure act requires agencies to produce only identifiable public records).

The Court can affirm the Order granting summary judgment because the public records act does not apply to the August 13, 2009 memo and, even if it did, there was no violation established by Deputy Germeau.

**E. Deputy Germeau Lacks Standing to Bring this Lawsuit Because He Was Not Denied Access to Records.**

An alternative ground for affirming summary judgment is the fact that Deputy Germeau lacked standing to bring the lawsuit.

The doctrine of standing requires that a claimant must have a personal stake in the outcome of a case in order to bring suit. *Kleven, supra*, 111 Wn. App at 290. It is a “party's right to make a legal claim or seek judicial enforcement of a duty or right.” *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610, *quoting*, BLACK'S LAW DICTIONARY, at 1442 (8<sup>th</sup> ed. 2004).

RCW 42.56.550 provides:

Upon the motion of *any person having been denied an opportunity to inspect or copy a public record by an agency*, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records. (emphasis added.)

Thus, to have standing under the public records act, you must be a person who was denied access to records. Deputy Germeau did not request records and therefore he cannot claim to have been denied access to records. The August 13, 2009 memorandum states “**the guild is requesting** and has the right to be privileged to any work product, or investigative findings regarding any investigation involving Martin.” (emphasis added).

The memo was submitted on behalf of the Guild and the Guild, not Deputy Germeau, requested access to the future investigation. Deputy Germeau was therefore not a person denied access to records.

Deputy Germeau cites *Kleven, supra*, in support of his argument for standing. However, in that case an attorney submitted a public records request to the City and later filed a public records act lawsuit on behalf of client, Mr. *Kleven*. The Complaint asserted that the attorney had submitted the requests on behalf of *Kleven*. The City had no evidence disputing the attorney's assertion that the public records requests were submitted on behalf of *Kleven*. *Id.* at 291. The Court held that *Kleven* had standing *because the request was submitted on his behalf. Id.*

This case presents the opposite scenario from *Kleven*. The memo from Deputy Germeau stated that "the guild," not Deputy Germeau, wanted internal affairs investigation materials. Unlike *Kleven*, however, the guild is not the party bringing this lawsuit. *Kleven* did not hold that the attorney, who asserted in the complaint that the requests were made on behalf of *Kleven*, also had standing. Under Deputy Germeau's reasoning, any deputy in

the Sheriff's Office could conceivably file a public records act lawsuit using the August 13, 2009 memo as a pretext.

He also cites *Moser v. Kanekoa*, 49 Wn. App. 529, 744 P.2d 364 (1987). That case does not discuss standing under the PRA. Deputy Germeau simply speculates that the newspaper reporter that filed the PRA lawsuit "probably" submitted his original request on behalf of his employer. Nothing in the decision supports this speculation.

Finally, he cites cases interpreting the federal Freedom of Information Act (FOIA) in support of his argument for standing. However, in *Kleven*, the Court refused to apply FOIA cases interpreting standing under Washington law, noting that "[o]ur courts have repeatedly refused to apply FOIA cases when interpreting provisions in the PDA that differ significantly from the parallel provisions in the federal act." *Kleven* specifically noted that in interpreting standing "the applicable FOIA provisions differ from the PDA provisions at issue here. For this reason alone, FOIA does not provide any useful guidance in applying the PDA." *Id.*, at 292-93.

Deputy Germeau may have signed and submitted the memo. However, the only entity that requested internal affairs investigation materials was the Guild. If the Guild felt it had made a public records request and that request was improperly handled, it has standing to bring a lawsuit, not Deputy Germeau, who requested no records on his own behalf.

It is unpersuasive the claim that the County's act of providing Deputy Germeau with records after his lawsuit confers standing. He is the one who filed a lawsuit. It is certainly reasonable of the County to respond to a lawsuit *by Deputy Germeau* claiming that he wanted certain records in the lawsuit by providing records to him. That does not "boot strap" him into standing.

In short, Deputy Germeau did not request access to records on his own behalf. The entity that allegedly did, the Guild, is not a party to this case. Deputy Germeau was therefore not denied access to public records and lacks standing to pursue a public records lawsuit under RCW 42.56.550.

**F. Deputy Germeau is Not Entitled to Attorneys Fees on Appeal.**

Deputy Germeau requests an award of fees on appeal. However, the PRA only permits fees on appeal if Deputy Germeau

establishes that he made a valid public records request *and* records were withheld that should have been disclosed. *See*, RCW 42.56.550(4). Whether a party prevails in a public records act lawsuit is a “legal question of whether the records should have been disclosed on request.” *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 204, 172 P.3d 329 (2007). Deputy Germeau is not entitled to fees on appeal because he cannot establish a valid public records request was submitted to Mason County or that records should have been disclosed, but were not.

**G. Mason County Is Entitled to Attorneys Fees on Appeal.**

RAP 18.9 provides that the Court may award attorneys fees to the opposing party in a frivolous appeal. An appeal is frivolous where no debatable issues exist upon which reasonable minds could differ, and the appeal is so totally devoid of merit that there was no reasonable probability of success. *Streater v. White*, 26 Wn.App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980).

In this case, under the holding of *Parmelee v. Clarke*, the failure of Deputy Germeau to direct his memo to the designated public records officer is a fatal flaw. Deputy Germeau does not even address that case in his opening brief, even though it was argued by

Mason County in the trial court.

Rather than recognizing the lack of merit, Deputy Germeau filed a frivolous appeal that has cost Mason County additional litigation costs in the form of attorneys fees. Mason County should be compensated for having to respond to this frivolous appeal.

#### **VI. CONCLUSION**

For the foregoing reasons, the summary judgment should be affirmed and Mason County should be awarded its attorneys fees on appeal.

DATED this 25<sup>th</sup> day of January, 2011.

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.



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# **APPENDIX A**

Bremerton Patrolmen's Assn v. City of Bremerton

CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW

On December 17, 1990, the Bremerton Patrolman's Association (BPA) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (Case 8948-U-90-1969). The BPA alleged that the City of Bremerton had engaged in a pattern of interference and discrimination in reprisal for union activity among its employees, and that it refused to provide the union with requested information concerning discipline imposed on Robert Waldroop. A preliminary ruling was issued pursuant to WAC 391-45-110 on January 22, 1991, finding a cause of action to exist regarding the employer's failure, or refusal, to provide the union with information necessary for it to carry out its functions as exclusive bargaining representative. The BPA filed amended statements of fact in that case on March 7, March 15 and July 10, 1991. On August 12, 1991, the Executive Director ruled that certain allegations in each of those amendments stated causes of action, but he dismissed other allegations.[1]

On July 11, 1991, the BPA filed a second complaint charging unfair labor practices with the Commission (Case 9248-U-91-2053). That complaint alleged that the employer unlawfully conditioned release of information requested by the union on advance payment of copier charges by the union, and that the employer unilaterally changed the procedures for providing information on discipline matters. A preliminary ruling letter issued in that case on March 27, 1992, found a cause of action to exist.

On July 29, 1991, the BPA filed a third complaint charging unfair labor practices with the Commission (Case 9291-U-91-2063). That complaint alleged that the employer unilaterally changed the procedures for promotions within the bargaining unit. A preliminary ruling issued in that case on September 19, 1991, found a cause of action to exist.

The matters were eventually consolidated for proceedings before Examiner J. Martin Smith. Dates set for hearing were postponed for various reasons.[2] The Examiner wrote to the parties on January 14, 1993, giving them 14 days to take steps to bring the matters on for hearing, or have the complaints dismissed. The BPA responded on January 25, 1993, suggesting dates for a hearing. A hearing was then held at Bremerton, Washington, on May 7, 1993, before the Examiner. Briefs were filed by the parties to complete the record.

## BACKGROUND

Bremerton is the largest city in Kitsap County, in northwest Washington. It offers municipal services to an area which includes one of the nation's largest U.S. Navy facilities. Caroline Marshall was the personnel director at the times relevant here.

The Bremerton Police Department has 49 commissioned police officers working on a regular shift format. Chief of Police Del McNeal has headed the department since 1988. Captain Joe Hatfield is a supervisor within the department.

Since at least 1981, the non-supervisory police officers in the Bremerton Police Department have been represented for purposes of collective bargaining by the Bremerton Patrolmen's Association. Roy Alloway was president of the BPA at the times relevant here.

The issues remaining for decision in these cases involve dealings between the employer, the BPA, and bargaining unit members in three separate situations, as set out below:

### The Waldroop Notice - Case 8948-U-90-1969

Robert Waldroop came to Bremerton as a patrol officer in February of 1980, and he worked in the patrol division until at least January of 1991. Officer Waldroop was involved with the BPA for six years, first as secretary-treasurer and then as vice president. His union activities included representing employees in grievances, and in negotiating labor agreements.

Waldroop's employment was terminated on January 10, 1991. In his discharge letter, Chief McNeal indicated that Waldroop had 10 days in which to "appeal" his discharge to the employer's civil service commission. That letter did not make any reference to, or otherwise

direct Waldroop's attention to, the collective bargaining agree-ment.[3]

#### Refusal to Provide Information - Case 8948-U-90-1969

One of the amendments in this case is framed as a "withdrawal of recognition" or "refusal to provide information". Acting in his capacity as a union official in connection with the processing of Waldroop's grievance, Alloway made a request of Chief McNeal for transcripts and/or tapes of the pre-disciplinary hearing. McNeal declined to provide those materials to the union, unless it provided a written release from Waldroop.[4]

#### Alleged Surveillance - Case 8948-U-90-1969

One of the amendments filed in this case raised an allegation that a supervi-sor, Captain Joe Hatfield, made several comments which created the impression that the BPA and its meetings were "under surveil-lance" by the employer. Two separate incidents are cited:

In February of 1991, the BPA sent a notice to its members that a "no-confidence vote" regarding Chief McNeal would be considered at a union meeting on March 4, 1991. Alloway testified that Hatfield learned of the meeting, and that he asked Alloway if he could attend the meeting, even though he was not a BPA member. Alloway continued:

He then asked that I relay back to him what occurs at the meeting, and I rejected that as well. And he told me that "Well, don't think you don't have people that aren't going to come and tell me," and that ended this partic-u-lar session.

Transcript, at 35.

Alloway characterized Hatfield's demeanor as "semi-sarcastic" or "verbal jousting" in this conversation held in Hatfield's office, as well as in prior ones dealing with labor-management issues.

There was a subsequent comment made by Hatfield after a daily detective unit meeting, to the effect that he wanted to attend the BPA meeting on March 4. Alloway testified that he again denied Hatfield's request, after which Hatfield said he wanted to know the "results" of the meeting. Hatfield testified that he never spied on union meetings, attended them uninvited, or otherwise sought to elicit information about what transpired at union meetings. He recalled his request and Alloway's refusal during the conversation after the detectives' meeting, but characterized his follow-up comment as his having said, in a joking manner, that "Roy can let me know what's going on at the meeting."

#### Pre-payment of Copier Charges - Case 9248-U-91-2053

In March of 1991, a few weeks after the "union meeting" occurrences described above, Chief McNeal required union attorney Christopher Vick to advance a \$70.00 payment to cover the cost of photocopying, prior to releasing internal investigation files that had been requested by the union in the course of its preparation for grievance and/or arbitration hearings involving bargaining unit employees.

#### Unilateral Change of Promotional Policies - Case 9291-U-91-2063

In June of 1991, a bargaining unit member, Detective Dean Dennis, was promoted to the sergeant rank in the department.[5] The detective position left open by that promotion was filled by the promotion of bargaining unit member Luis Olan from the position of patrol officer. There was no posting of the detective position.

Alloway discussed the Olan promotion with Captain Hatfield. In particular, Alloway inquired as to why there was no posting of the detective position as per the 1987 policy written by Chief McNeal's predecessor.[6] Alloway also wondered why Olan was promoted to detective while being on the promotion list for sergeant. Hatfield deferred an answer to Chief McNeal.

Hatfield testified that "review committees" were sometimes appointed when a specialty assignment came open, and that various formats had been used to screen applicants. In some

cases, the employer's personnel director and another captain may have been involved in the promotional decisions on certain positions. Some "special-ty assignments" such as polygraph operator are training assignments, rather than job classifications by them-selves.

## DISCUSSION

The positions of the parties, additional facts and the Examiner's analysis for each of the four topics described above are set forth under separate headings, below.

### Case 8948-U-90-1969 - Interference by Mis-direction

#### Positions of the Parties -

The BPA contends that the discharge letter given to Waldroop was false and misleading, with regard to his appeal rights under the collective bargaining agreement. The BPA argues that this denigrated the union's ability to represent Waldroop for purposes of the grievance procedure.

The employer urges that the advice given to Waldroop was not false or misleading, because it referred him to a civil service procedure that was available to him, and did not say that he was barred from using the grievance and arbitration procedure of the collective bargaining agreement.

#### Analysis -

The Public Employment Relations Commission has set a standard for employers that choose to advise their employees of appeal rights that might be available after an adverse ruling or disciplinary procedure: When an employer chooses to advise an employee regarding such rights, it has an affirmative obligation to give the employee a full and complete explanation which includes their rights under the applicable collective bargaining statute or collective bargaining agreement. In City of Seattle, Decision 2773 (PECB, 1987), the employer had properly advised union-repre-sented employees that they could appeal retention of certain materials in their personnel files, but neglected to inform those employees of their options under another section of

the contract which allowed employees to challenge, grieve or appeal the standards used to measure performance as being unreasonable. A violation of RCW 41.56.140(1) was found. See, also, City of Seattle, Decision 3066 (PECB, 1988).

Here, the BPA correctly contends that the employer's discharge letter to Waldroop failed to mention that he could file a grievance under the collective bargaining agreement. In effect, Waldroop was "steered" to the civil service commission. Until advised otherwise by BPA officials, Waldroop could reasonably have believed that his appeal routes lay only in the civil service commission. Other officers had, in fact, filed contractual grievances rather than appealing through the civil service forum.[7]

Whether McNeal actually believed Waldroop was not entitled to use the contractual grievance procedure is beside the point.[8] An objective test is being applied. As in City of Seattle, supra, the employee could reasonably have believed the employer was asserting (or would assert) procedural defenses to a grievance pursued under the collective bargaining agreement.

The employer is not relieved from having committed an "interference" violation under RCW 41.56.140(1) because Waldroop actually did file a grievance, or even because he was later reinstated by an arbitrator. An employer would be well-advised to leave it to the employee's exclusive bargaining representative to advise bargaining unit employees of their most prudent course of appeal under the collective bargaining agreement they helped negotiate.

Case 8948-U-90-1969 - Withdrawal of Recognition

#### Positions of the Parties -

The BPA argues that Chief McNeal refused to recognize the legal standing of its president as an agent of the exclusive bargaining representative under RCW 41.56.080, because he insisted that Waldroop issue a written authorization or release for information requested by Alloway.

The employer directs attention to its various dealings with the BPA's attorneys as a basis for asserting that a potential "legal ethics" violation excused it from providing the information that was requested directly by the BPA.

Analysis -

The facts on this issue are clear. After Waldroop was discharged and a grievance was filed, Alloway requested the transcript of his civil service appeal hearing. Chief McNeal's written response of March 7, 1991 has been made a part of the record in this case:

Dear President Alloway

RE: Letter 2-27-91 transcript

Your request for all taped and or transcripts of the pre-disciplinary hearing, I will need a signed document showing that Mr. Waldroop is requesting this through you. We only have the transcript as all tapes are turned over to civil service by the rules.

Once I have received the signed authorization, I will be glad to supply copies of the transcripts. As usual, the City will charge for the copies per the normal copy rates of the City. The copies will be supplied upon receipt of payment.

Sincerely,

/s/ DELBERT D. McNEAL, Chief of Police

[Emphasis by bold supplied.]

Again, the BPA makes a valid point. Alloway was the acknowledged leader of this independent union, not merely a fellow employee. He indicated to McNeal that he was appearing "in behalf of Bob Waldroop". Clearly, Alloway had the authority to request the hearing transcripts on behalf of the BPA. Waldroop had every right to rely on his union to file a grievance on his behalf, and to pursue it on his behalf. It is not the employer's responsibility to second-guess that representation. To require that Waldroop sign a "release" for such a document, as McNeal did in this situation, had the effect of calling into question the union's standing to represent Waldroop in the processing of his grievance.

The employer's arguments fit neither the facts nor the law. Chief McNeal was quite prepared to give the requested documents to Alloway upon receiving written authorization from Waldroop, without any reference to the involvement of attorneys or legal ethics. The right of an exclusive bargaining representative to requested information that is necessary to its functions in contract

negotiations and grievance processing flows directly from the duty to bargain in good faith under RCW 41.56.030(4). See, Pullman School District, Decision 2632 (PECB, 1987) and Aberdeen School District, Decision 3063 (PECB, 1988). An employer and union cannot delegate their statutory obligation to communicate with one another. It would make a mockery of the duty to bargain to hold that an employer would be excused from dealing with the union that represents its employees merely because one or both of the parties had retained attorneys on related issues. The employer committed a violation of RCW 41.56.140(4) and (1).

#### Case 8948-U-90-1969 - Surveillance of Union Activity

##### Positions of Parties -

The BPA contends that the employer committed an unfair labor practice because of comments made by Captain Hatfield. It points first to the insinuation made to Alloway in Hatfield's office, to the effect that the management always found out about what went on in union meetings. Second, it points to similar comments at the close of the detectives' meeting. The union argues that Hatfield's statements, standing alone, are sufficient to create an "impression" that the BPA could not effectively conduct its business in a secret, closed meeting. Hatfield's comments are seen as implying that one or more bargaining unit members were spying on behalf of the management.

The employer contends that these events did not constitute unfair labor practices. It asserts that Hatfield was only joking when he suggested to Alloway that he always learned every secret that was being kept at union meetings. Further, the employer argues that Hatfield never demanded information from union officers or members.

##### Analysis -

The BPA cites City of Westport, Decision 1194 (PECB, 1981), where a Commission Examiner wrote:

Since the early days of the National Labor Relations Act, surveillance of employees by an employer, whether with rank and file employees, supervisors, or outsiders, has been held to be violative of the Act. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). The law is equally clear that the employer violates the Act if he creates the impression that he is engaged in surveillance. NLRB v. Grower-Shipper Vegetable Ass'n, 122 F.2d 368 (9th Cir., 1941); Bethlehem Steel Co. v. NLRB, 120 F.2d 641 (DC Cir., 1941). Moreover, the NLRB has found

an interference violation even where supervisors were motivated solely by their own curiosity and were subsequently forbidden by the employer to continue such surveillance. *Intertype Co. v. NLRB*, 371 F.2d 787 (4th Cir., 1967).

The most recent application of those principles by the Commission was in *City of Longview*, Decision 4702 (PECB, 1994), where the Executive Director issued a summary judgment finding a violation on the basis of an employer's answer admitting that its police chief interrogated a union officer and a bargaining unit member about what had transpired behind the closed doors of a union meeting.

There are limits to the "surveillance" doctrine, however. In *City of Seattle*, Decision 3066, 3066-A (PECB, 1988), the Commission ruled that a search of employee desks was not unlawful surveillance, when the supervisor turned out to be pro-union and was not on a mission to disclose the contents of employee files to her superiors. In addition, the supervisor in the Seattle case had a business reason to look in working files of the two employees. Thus, the complainant is required to show that the employer's conduct could reasonably be perceived by employees as a threat to their protected union activities. *Toutle Lake School District*, Decision 2474 (PECB, 1987).

There is no evidence in this record that the employer actually solicited or maintained a "spy" inside the BPA's meetings.[9] Nor was there any demonstration by the employer official of actual knowledge that could only have been gained inside a union meeting, as existed in *Longview*, supra.

In all probability, Hatfield knew a good deal by virtue of simple observation. The BPA conducted its meeting at the city hall, in close proximity to the department's management, so that the employer surely would have known when the meeting began and ended. It would even have been difficult for employer officials not to observe who attended. Further, the announced purpose of the BPA meeting was to consider a "no-confidence" vote that would, like a doomsday device, have had no purpose or political effect unless the results of the meeting were made public.

Based upon the circumstances, and the record as a whole, it cannot be said that Hatfield's comments could reasonably be perceived by bargaining unit members as a threat to their rights under Chapter 41.56 RCW. Hatfield was not a new "player" in the troubles pitting BPA against Chief McNeal and his management. Hatfield's comments were made to a veteran police officer who was the president of the union, not to a rookie employee unfamiliar with the local

labor-management history. Surely, the BPA believed it could hold a secret union meeting regarding sensitive topics, or else it would not have conducted its meeting at the city hall.

#### Case 9248-U-91-2053 - Charges For Documentary Information

#### Positions of the Parties -

The BPA contends the employer unlawfully re-quired, as a precondition, that the BPA tender payment at the rate of \$0.10 per page for photocopying documents requested by the union attorney from disciplinary files of other bargaining unit members. The BPA contends that the employer made it more difficult for the union to represent its member under the grievance/arbitra-tion procedure.

The employer admits demanding the advance payment of photocopying charges, but argues that its long-standing practice has been to charge union officials \$0.10 per page for photocopying employer documents, except that five copies of normal correspondence are supplied free to the union officers. The employer also contends that state law requires that it be compensated for anything it produces or gives away.[10]

#### Analysis -

The BPA's original request for information concerning the Waldroop discharge was made on February 27, 1991, when Alloway wrote to Chief McNeal and requested:

[C]opies of all tapes and/or transcripts of all tapes in this matter. Specifically, the tapes made of the pre-disciplinary hear-ings.

[Emphasis by bold supplied.]

McNeal refused to provide the requested information until:

[A]s usual, the City will charge for the copies per the normal rates for the City. The copies will be supplied upon receipt of pay-ment.

[Emphasis by bold supplied.][11]

The BPA's request for that information was renewed on March 15, 1991, when union attorney Christopher Vick made a written request of the employer's attorney, William Coats, for "reviewer comments" and other correspon-dence within the police department that led to Waldroop's discharge. Transcripts from hearings and interviews were also requested.

Chief McNeal testified that it was "his policy" from his earliest days as chief, in October of 1988, to require payment by the BPA for long-distance telephone calls and burdensome photocopier costs at police headquarters. He said he wrote a memo to the BPA in early 1989, which asked the BPA to pay for any copies of documents other than five copies which the employer routinely provides to the BPA officers and board members, and to pay for all long distance phone calls.[12]

Captain Hatfield was the employer official directly involved in collecting the payment from Vick.[13] Hatfield remembered the free copying of Waldroop's own file as being quite ordinary, but testified that the photocopying of the internal affairs files on other employees was unusual. Hatfield testified that Vick selected several files for copying from what he described as a sizable stack of materi-als.[14] Hatfield told Vick that the BPA must make payment for the addition-al photocopies made on machines at the police depart-ment. The total charge for these copies was \$70.00, which would imply that Vick copied approximately 700 pages of documents.

Alloway insisted that the BPA had never been charged for reproduc-tion costs before this particular incident in 1991. He remembered that Waldroop's investigation file was copied and provided to Waldroop without charge, but that files on other employees copied by Vick were paid for "under protest". The record is clear that Alloway had asked for tapes of the pre-disciplinary hearing and copies of the typed transcripts, if they existed, and that the union attained neither tapes nor transcripts.

The Commission has ruled, as recently as March of 1994, that it is an employer's duty to provide the exclusive bargaining representa-tive with information necessary for grievance processing. City of Bellevue, Decision 4324-A (PECB, 1994). The dismissal of charges concerning a refusal

to provide an internal investigation file in that case needs to be understood in the specific context of that request, (i.e., for a due process hearing under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)), and is not understood by the Examiner as a general exclusion of internal investigation files from the union's right to information. Here, Waldroop had already been disciplined, and the union attorney asked for internal investigation files in connection with the union's processing of a grievance on that discipline.

The issue here is whether the employer can charge the union to recover its cost for photocopies requested by the union under the duty to bargain. The Commission has made no prior ruling on whether the subject of photocopying costs is a mandatory topic for bargaining. Review of National Labor Relations Board (NLRB) precedent reveals few cases, as well.

In *Safeway Stores v. NLRB*, 622 F.2d 425 at 429 (1980), it was held that a union was generally entitled to "discover" information relevant to a grievance proceeding. In *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the Supreme Court of the United States made clear that a union's statutory interest in obtaining relevant information does not always prevail over conflicting interests, (e.g., privacy). In applying this balancing test in *Salt River Valley Water Users' Association v. NLRB*, 769 F.2d 639 (9th Cir., 1985), the court decided that an employer was obligated to provide access to a grievant's personnel file as well as job performance and disciplinary records for similarly-situated employees, but it also stated:

The [NLRB] did not abuse its discretion in limiting the union's access to [the other employ-ee's] personnel file to "all records ... pertaining to disciplinary actions and performance reviews or which it intends to rely on in the grievance or arbitration procedure concerning the termination of [the grievant].-" The Union has not denied that it requested only the information specified in the NLRB order, apparently to save copying costs. ... The modified order therefore provides a reasonable remedy.

Salt River, 120 LRRM at 2268 [emphasis by bold supplied.]

Thus, it went without saying that the union in that case expected to pay for the copies it obtained from the employer's files.

In *Champion Parts Rebuilders v. NLRB*, 717 F.2d 845 (3rd Cir., 1983), the company maintained a clear practice, agreed to by the union, of allowing the union to use company photocopying

machines to copy grievances and minutes of meetings. Although an isolated refusal by the employer to copy certain grievance documents was held to constitute a discriminatory action in violation of sections 8(a)1 and 8(a)3 of the NLRA, it did not stand as a unilateral change in conditions of employment.[15]

The Examiner concludes that the issue of prepayment for copies made pursuant to a union's request for information has only a remote and indirect impact on employee working conditions. The cost of copies demanded by the employer here was not unreasonable or discriminatory under the circumstances, inasmuch as it was the same price charged to citizens for police reports and similar public documents. RCW 42.17.300 indicates:

Charges for copying. No fee shall be charged for the inspection of public records. Agencies may impose a reasonable charge for providing copies of public records and for the use by any person of agency equipment to copy public records, which charges shall not exceed the amount necessary to reimburse the agency for its actual costs incident to such copying.

[1973 c 1 sec. 30, Initiative Measure 276, approved November 7, 1972.]

An organization designated as exclusive bargaining representative under RCW 41.56.080 bears the duty to provide fair representation to all members of the bargaining unit. The costs of negotiation, litigation, and grievance processing are part of the burden that must be assumed by a union. The Examiner determines that the City of Bremerton did not engage in an unfair labor practice when it required a payment by the union for photocopying costs when the union made copies of investigatory files in preparation for taking Officer Waldroop's grievance to arbitration.

Case 9291-U-91-2063 - Unilateral Change in Promotion Policy

#### Positions of Parties -

The BPA contends that the employer altered a long-standing policy, negotiated in 1987, under which vacant positions were to be posted for bids by bargaining unit employees. The union contended that this was a unilateral change in the promotion policy, and hence a failure to bargain in good faith under RCW 41.56.140(4). It particularly cites the detriment to patrol officers on the "graveyard" shift, if they are bypassed by officers from other shifts in the awarding of promotions and shift changes.

The employer contends that the chief was unaware of any practice with respect to how to post, notify, or otherwise promote police officers into vacant positions, job classifications, or special assignments. It asserts that the 1987 policy relied upon by the BPA here was not made known to Chief McNeal when he came to the department in 1988.

#### Analysis -

The parties' collective bargaining agreement includes several provisions which deal with shift assignments for patrol officers, and it is a safe conclusion that their bargaining history included some discussion on whether patrol officers worked the "day", "swing" or "graveyard" shift for their 40-hour workweek. There are no contract provisions dealing directly with re-assignments or promotions, although Article 16 of the contract states that the chief may "appoint" an officer to a position classification on a "provisional" basis at the new salary amount, and states that there is 12-month probationary period when an employee is promoted to "an appointment" at a "higher level position".[16]

No section of the contract refers to appointment or designation of police officers to perform the duties of a detective,[17] but there was a policy which affected assignments to the "detective" role. Drafted by Captain Hatfield and approved by then-Chief Coney in October of 1987, that policy indicated it was intended to ensure "fair and unbiased access to training and job assignments for all Bremerton Police Department employees in their class of employment". The policy continued:

All police department assignment openings will be posted on the department information board (in addition to normal routing procedures) a minimum of ten (10) days prior to noted application closing date ... The assignment announcement shall include the following information:

- The assignment that is open
- the date the assignment is to be filled
- the application closing date,
- All prerequisites (if applicable)
- Instructions on how to make application for the assignment
- Information concerning the selection committee.

The final selection for the transfer/reassignment will be made by the Chief of Police, taking into account recommendations of a selection committee.

The above policy as set forth, will be adhered to in all inter-departmental transfers and reassignments. ...

The Examiner takes particular note that the 1987 policy was in the form of a memorandum addressed to Roy Alloway as president of the Bremerton Patrolmen's Association, with a copy to then-Chief Coney. In two places, Hatfield wrote that the procedure set forth in that document would be the policy "in years to come" and "in the future".

It is well established in countless Commission decisions that an employer must give notice to the exclusive bargaining representative of its employees, and must provide an opportunity for good faith collective bargaining, if requested, prior to implementing any changes of employee wages, hours or working conditions. There is no evidence in this record that the employer gave notice to the BPA at any time since October of 1987 that it was abandoning the policy adopted at that time. This record does not even contain any evidence from which to conclude that the policy was abandoned or ignored during the intervening period.

After Dennis' promotion from detective to sergeant, an opening existed for a detective. Officer Olan was assigned to the vacant job without announcement of that vacancy to the entire bargaining unit. This unfair labor practice charge followed.

The employer's position at the deferral-to-arbitration stage of this proceeding was that Articles 17 and 21 of the parties' collective bargaining agreement allowed it to change the policy with respect to assignments and promotions. Article 17 is a management rights clause which very generally describes the right of management to assign work, direct the work force, etc., but also expressly states it is not a "waiver" by the union of its bargaining rights under Chapter 41.56 RCW. Article 21 is a "zipper" clause which excluded from bargaining those items not addressed within the articles of the contract. Neither of those contract provisions is sufficiently detailed to constitute a waiver of the union's bargaining rights concerning a change of the assignments and promotions policy adopted by the employer in 1987.

The employer suggests that Chief McNeal was not bound to follow the written policy adopted in 1987, because he was not aware of its existence. It follows, according to the employer, that ad hoc promotions were appropriate, and not bargainable. Apart from the inconsistency between this argument and the "waiver by contract" argument initially advanced by the employer, it is clear that Chief McNeal had the capability within the department to learn of the policy adopted

by his predecessor. In particular, Captain Hatfield, who was the author of the 1987 policy document, remained very much a part of the department management.

The employer urges that disregard of the policy adopted in 1987 is a superior result to that sought by the BPA, which would enforce the 1987 policy even if it was unused or sometimes not followed. The employer's argument begs the question of what kind of policy the police officers were interested in obtaining -- namely, one which gave them prior notice when a different assignment or promotional opportunity was available within the police force. That employee interest had, in fact, been served by establishing "review committees" for certain internal transfers and re-assignments within the department. Such committees obviously pre-supposed a notice requirement -- all interested bargaining unit members were encouraged to consider a different position. Even though there may not have been a different rate of pay for work as a detective, an opening in this position could have been of interest to any of the officers, who of course have a right to bargain working conditions, training, promotions, and rates of pay.

Even if the 1987 policy was a side-agreement or a unilateral action, the BPA had a right to rely on it as a binding past practice. The employer never brought the issue to the bargaining table, and the chief's complete disregard of it amounted to an actionable change or abandonment of that practice. Hence, the employer committed an unfair labor practice under RCW 41.56.140(4) and (1) when it assigned Olan to the detective position, and by its abandonment of posting detective vacancies in general. Unless the parties happen to have negotiated changes in the 1987 policy in connection with their most recent collective bargaining agreement, the employer will be obligated to reinstate the 1987 policy and maintain it in effect until such time as it has met its bargaining obligations under Chapter 41.56 RCW.

## FINDINGS OF FACT

1. The City of Bremerton is an employer within the meaning of RCW 41.56.030(1). During the period relevant to this case, Del McNeal and Joe Hatfield were supervisory and/or managerial officials within the Bremerton Police Department.

2. Bremerton Patrolmen's Association (BPA), a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of non-supervisory law

enforcement personnel of the City of Bremerton. During the period relevant to this case, Roy Alloway was president of the organization.

3. On January 10, 1991, Chief McNeal notified bargaining unit member Robert Waldroop of his discharge from employment with the City of Bremerton. The letter to Waldroop volunteered information concerning his right to appeal through the employer's civil service system, but made no mention of the employee's rights under the collective bargaining agreement between the employer and the BPA. The affected employee could reasonably have believed that he had no rights under the collective bargaining agreement, and could have been misled for a critical length of time at prejudice to his rights.

4. On February 27, 1991, Alloway requested certain information from the employer in his capacity as an officer of the BPA, for the purpose of processing a grievance on behalf of Waldroop. Chief McNeal conditioned release of the requested information on obtaining a written authorization directly from Waldroop.

5. The Bremerton Patrolmen's Association scheduled a meeting of its membership to be held on March 4, 1991. The meeting was to be held on the employer's premises, in close proximity to the offices of the police chief and other department managers. The announced purpose of the meeting was to consider a vote of "no confidence" in Chief McNeal.

6. At a meeting held in his office shortly prior to the union meeting described in paragraph 5 of these findings of fact, Captain Hatfield asked Alloway for permission to attend the union meeting. When Alloway declined Hatfield's request, Hatfield made a remark to the effect that he would eventually learn what happened at the union meeting.

7. At a daily detectives' meeting held shortly prior to the union meeting described in paragraph 5 of these findings of fact, Captain Hatfield remarked that he would not be able to attend the union meeting and asked Alloway to report what transpired at the union meeting. When Alloway declined Hatfield's request, Hatfield made a remark to the effect that he would eventually learn what happened at the union meeting.

8. The comments made by Hatfield, as described in paragraphs 6 and 7 of these findings of fact,

were in a jestful and joking manner. Hatfield said nothing which suggested previous or on-going surveillance of internal union affairs and policies. Hatfield said nothing which suggested actual knowledge of what had transpired at any union meeting.

9. In connection with preparing to represent Waldroop in grievance proceedings, the BPA made a request during March of 1991 for copies of documents from internal investigation files concerning other employees disciplined by the Bremerton Police Department. The employer conditioned release of those documents on payment by the BPA of a charge for photocopying the documents. The charge assessed by the employer was at the same rates charged to private citizens for copies of accident reports and other public documents obtained from the employer.

10. In June of 1991, the employer promoted bargaining unit employee Luis Olan to "detective", without posting the vacancy for bids from other bargaining unit members. The employer thereby ignored and abandoned a policy adopted and published to the BPA in October of 1987, under which all future promotions were to be posted for bids from bargaining unit members.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By giving bargaining unit member Robert Waldroop incomplete and misleading advice concerning his appeal rights following his discharge from employment, and specifically by omitting notice of his appeal rights through the collective bargaining process while directing the employee to the employer's civil service process, the City of Bremerton interfered with, restrained and coerced its employees in the exercise of their rights under RCW 41.56.040, and committed an unfair labor practice under RCW 41.56.140(1).

3. By refusing to recognize the status and authority of the Bremerton Patrolmen's Association, to request and obtain information needed by the BPA for its representation of bargaining unit employee Robert Waldroop in a grievance protesting Waldroop's, the City of Bremerton failed and refused to bargain in good faith with the BPA as the exclusive bargaining representative of its employees, and committed an unfair labor practice under RCW 41.56.1-40(4) and (1).

4. Under the circumstances presented on this record, the statements made by Captain Joe Hatfield concerning his learning the outcomes of union meetings were not reasonably perceived by employees as indicating that the employer was engaged in surveillance of the activities of the Bremerton Patrolmen's Association, so that the employer did not commit an unfair labor practice by those statements under RCW 41.56.140-(1).

5. By requiring, in accordance with its past practice, the BPA to pay reasonable and customary charges for photocopying of documents requested by the BPA, the City of Bremerton did not fail or refuse to provide the requested information, and did not commit an unfair labor practice under RCW 41.56-.140(4).

6. By disregarding or abandoning the policy on promotions and re-assignments which it adopted and promulgated to the BPA in October of 1987, with respect to the promotion of Luis Olan to the detective position and any subsequent promotions, the City of Bremerton has unilaterally changed the working conditions of its employees represented by the BPA without notice to the BPA or opportunity for collective bargaining within the meaning of RCW 41.56.030(4), and has committed an unfair labor practice under RCW 41.56.-140(4) and (1).

#### ORDER

1.[Case 8948-U-90-1969]. The complaint charging unfair labor practices is DISMISSED with respect to the allegation concerning surveillance of BPA activities.

2.[Case 9248-U-91-2053]. The complaint charging unfair labor practices filed in this matter is DISMISSED.

3.[Cases 8948-U-90-1969 and 9291-U-91-2063]. The City of Bremerton, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

a. CEASE AND DESIST from:

1. Refusing to bargain in good faith with the Bremerton Patrolmen's Association with respect to the wages, hours and working conditions of its non-supervisory law enforcement employees.;
2. Implementing changes of the wages, hours or working conditions of its non-supervisory law enforcement employees, unless it has given notice of the proposed change to the Bremerton Patrolmen's Association and engages in collective bargaining, if requested.
3. Misleading employees concerning their rights under the collective bargaining process, or engaging in other conduct which frustrates the representation of bargaining unit employees by their exclusive bargaining representative;
4. In any like or related manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

1. Reinstate the policy promulgated in October of 1987 with respect to the promotions and assignments, and maintain that policy in effect unless notice is given and collective bargaining is concluded under the requirements of Chapter 41.56 RCW.
2. Receive and process, without asserting any defenses based on timeliness, any grievances filed within 30 days following the posting of notice required by this Order, with respect to the assignment given to Luis Olan in June of 1991 and any subsequent assignment(s) made in contravention of the policy promulgated in October of 1987.
3. Post, in conspicuous places on the employer's premises where notices to all employees are

usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

4. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

5. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 3rd day of June, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner

This order may be appealed by  
filing a petition for review  
with the Commission pursuant

to WAC 391-45-350.

1

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL not refuse to bargain in good faith with the Bremerton Patrolmen's Association with respect to the handling of grievances, especially by refusing to deal with agents and representatives of the association;

WE WILL not interfere with, restrain or coerce bargaining unit employees in the exercise of their collective bargaining rights, by extending conflicting or misleading advice with respect to their appeal rights under the collective bargaining agreement;

WE WILL not refuse to bargain in good faith with the Bremerton Patrolmen's Association with respect to the issue of promotions to police duty assignments, either to maintain or alter past practice of the department;

WE WILL reinstate the promotions policy announced in October of 1987.

WE WILL offer the opportunity for any bargaining unit member to file, within 30 days following the posting date indicated in this notice, a grievance protesting the promotion of Luis Olan to detective in June of 1991, or any subsequent promotion made in contravention of the policy announced in October of 1987, and will process such grievances in the normal course of business without asserting any timeliness defenses.

Posting Date: \_\_\_\_\_

CITY OF BREMERTON

By: \_\_\_\_\_

Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.

[1]City of Bremerton, Decision 3843 (PECB, 1991). The allegations found NOT to state causes of action were: (1) That the employer improperly used Waldroop's name in the discipline of another employee; and (2) that the employer terminated the union's "tele-phone privileg-es".

[2]A hearing was set for February 11, 1992, but the parties each requested a delay in the proceedings. By September of 1992, it was reported to the Commission that these claims had been settled. No letters withdrawing the complaints were submitted, however, and answers were received from the employer. In late 1992, the parties reached tentative agreement on a successor collective bargaining agreement, and again reported that these matters had been settled.

[3]A grievance was, in fact, filed under the collective bargaining agreement. Arbitrator Gary Axon issued an arbitration award late in 1991, reducing Waldroop's discharge to a 30-day suspension and reinstating him as an employee of the city. At the time of hearing held in this matter (March 23, 1993), Waldroop had been discharged by Chief McNeal for a second time. That termination is also the subject of a grievance.

[4]The BPA eventually obtained the requested materials, although likely as a result of an exchange of telephone calls between counsel, rather than a request by Waldroop.

[5]Chief McNeal apparently promoted Dennis from the civil service register. That action is not at issue here.

[6]The union has voiced concern about an adverse affect on patrol officers working the "graveyard" shift, who might prefer a transfer to detective duty on the "day" shift if informed of a vacant detective's position.

[7]The contract's grievance procedure has a generic definition of "grievance", but specifically refers to both the civil service commission and unfair labor practice procedures under Chapter 41.56 RCW. The contract is not clear about the forum for officer's discharges:

#### 19.1 Definitions:

A. Grievance: A grievance is an allegation of a violation of the terms and conditions of this agreement which is to be resolved through this Grievance Procedure.

B. Civil Service Appeal: An appeal is an allegation of a violation of the Civil Service Rules which is to be resolved through the Civil Service Appeals procedure and not resolvable through this Grievance Procedure.

C. Unfair Labor Practice: An Unfair Labor Practice charge is an allegation of a violation of the Washington State statutes governing public employment labor relations which is to be resolved through the Public Employment Relations Commission's rules and regulations and is not resolvable through this Grievance Procedure.

Although the employer retains the right to "suspend or discharge employees for cause", it is stated in the "probation" and "promotional-probation" sections that appeal is only to the civil service procedure, and not to the grievance procedure. See Article 16.1 (A) and (B).

[8]At the time this case arose, there may have been some doubt about the "interface" between

collective bargaining rights and civil service procedures. Any such doubts have subsequently been resolved, however, by the unanimous decision of the Supreme Court of the State of Washington in *City of Yakima v. IAFF, Local 469*, 117 Wn.2d 655 (1991), holding that matters traditionally delegated to civil service commissions are a mandatory subject of collective bargaining under Chapter 41.56 RCW.

[9] Contrast *Davis-Monthan Air Force Base v. AFGE*, FLRA Case DA-CA-20608 (9/27/93), reported at 31 GERR 1323. Where a U.S. Air Force base commander was asked by a bargaining unit employee, in a moment of jest, whether he would be attending union-sponsored lunch forums, the commander said he wouldn't be in attendance. The commander did send a maintenance supervisor to the meetings, however, and the union eventually had that person removed by security personnel. The FLRA found a "surveillance" violation, because the supervisor was clearly sent to "monitor" the meetings and report back to the base commander. This was inherently coercive.

[10] The employer produced evidence that citizens requesting copies of accident or police reports pay \$0.25 for the first page and \$0.10 for each additional page.

[11] The full text of Chief McNeal's letter is set forth above, in connection with discussion of his insistence that Waldroop authorize release of the information to the exclusive bargaining representative.

[12] McNeal said that the BPA had been billed for telephone use, but he was not certain of billings for photocopying, except for the Waldroop case.

[13] Vick did not testify, but a representation was made to the Examiner that Coats had notified Vick, in advance, that he would be required to make payment at city hall. The union did not dispute this account.

[14] The Examiner's observations of this witness at the hearing include his gestures suggesting a pile of material in the range of 12" to 18" in thickness.

[15] Accord: *Seattle First National Bank v. NLRB*, 444 F.2d 30 at 33 (9th Cir., 1971), where the court held that a change in the manner of copying doctors' excuses was not a mandatory topic for bargaining, because the issue bore only a "remote, indirect and incidental impact" upon conditions of employment. See, also, *King County, Decision 4258-A* (PECB, 1994).

[16] The duration of the probationary period appears to be the same as for a new patrol officer, who passes probation only after 12 months on the job and compliance with the civil service rules and regulations.

[17] The parties' collective bargaining unit contains only two sets of pay scales, for "patrol officer" and "sergeant". There is no pay rate or stipend for "detective". Patrol officers are paid at one of five different levels, depending upon longevity. Base pay for the sergeant rank is higher than the Patrol Officer V, and is also subject to four upgrades based on longevity.

NO. 41293-4-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

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RICHARD GERMEAU,

Appellant,

v.

MASON COUNTY, et al.,

Respondents.

COURT OF APPEALS  
DIVISION II  
11 JAN 26 PM 1:34  
STATE OF WASHINGTON  
BY  DEPUTY

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On Appeal from Thurston County Superior Court  
Cause No. 10-2-00338-7

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DECLARATION OF SERVICE

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John E. Justice, WSBA No. 23042  
Law, Lyman, Daniel, Kamerrer &  
Bogdanovich, P.S.  
P.O. Box 11880  
Olympia, WA 98508-1880  
(360) 754-3480  
Attorneys for Respondents

January 25, 2011

The undersigned declares under penalty of perjury under the laws of the State of

Washington, that on the below date, I served the following documents as follows:

1. Respondent's Brief; and
2. Declaration of Service,

attached hereto, to:

Greg Overstreet

Chris Roslaniec  
Allied Law Group  
2200 Sixth Ave Ste 770  
Seattle, WA 98212

United States Mail, 1<sup>st</sup>  
Class

Legal Messenger

Facsimile

Email (by agreement)

I declare under penalty of perjury under the laws of the State of Washington that

the foregoing is true and correct.

DATED this 25<sup>th</sup> day of January, 2011 at Tumwater, Washington.

  
\_\_\_\_\_  
Toni Allen