

No. 436418-8-II

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

CITY OF VANCOUVER, a municipality,
Petitioner

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS
COMMISSION and the VANCOUVER POLICE OFFICERS GUILD,

Respondents.

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

Respondents¹ Vancouver Police Officers Guild (“the VPOG”) and the Public Employment Relations Commission (“the PERC”)² seek to distinguish, distort and ignore the clear language of the PERC’s Decision³ in this case. The Decision wrongly held a City of Vancouver (“City”) employee personally liable for violation of RCW 41.56.140(1) despite the fact that the PERC hearing examiner had determined the employee’s conduct was not substantially motivated by union animus.

The Decision resulted in unlawful rulemaking in violation of the Washington State Administrative Procedure Act (“APA”) and should also be invalidated because the PERC committed errors of law by misapplying the ruling from a United States Supreme Court case.⁴ The PERC’s error of law also included significantly altering the burden of proof required for an employee to show an employer engaged in unlawful union discrimination.

In addition, Respondents’ own arguments support Petitioner City of Vancouver’s (“the City”) contention that the PERC’s Decision in this

¹ The City’s original brief mistakenly designated the parties as “appellant” and “appellees.” Per RAP 3.4, the designations are corrected to reference “petitioner” and “respondents” in the title page and will be used throughout this brief.

² References to “the PERC” are to the full Commission.

³ References to “Decision” are to Decision 10621-B starting at Administrative Record (“AR”) 1380.

⁴ Staub v. Proctor, 131 S. Ct. 1186, 562 U.S. __ (2011).

case should be invalidated because it did not comply with the requirements of the APA, Ch. 34.05 RCW.

Finally, the VPOG's arguments fail to support that the PERC's Decision was supported by substantial evidence. Instead, the VPOG injects facts and arguments that even the PERC rejected.

II. ARGUMENT

A. **The PERC Clearly Issued a Rule Without Complying with the Rulemaking Requirements of APA.**

1. **The PERC created a new rule imputing subordinate liability to an unknowing supervisor.**

The PERC hearing examiner concluded that although the decision maker in this case, Chief Cook, was not substantially motivated by union animus, his decision not to transfer Officer Ryan Martin into a lateral assignment was "tainted" by the recommendation of Assistant Chief Sutter. AR 1233 (Finding of Fact No. 27). The PERC should have reversed the hearing examiner's decision because she found Cook's decision was not substantially based on union animus. Instead, the PERC upheld the decision, but added:

[T]he Examiner's conclusion that Cook did not display union animus in his decision making process is reversed. Under Chapter 41.56 RCW, *a decision maker will be strictly liable* for discrimination based upon union animus where a lower level supervisor's discriminatory actions against an employee cause a decision maker to take adverse action against the employee.

AR 1381-82 (emphasis added). Thus, not only did the PERC fail to reverse the hearing examiner's decision that the City committed an unlawful labor practice, it compounded the error when it then held that Cook was "strictly liable" for discrimination regardless of the fact that the hearing examiner determined he was not motivated by union animus.

At its heart, the PERC's Decision in this case extended the traditional tort law concept that an employer may be held liable in certain situations for the discriminatory actions of its employees to individual managers and supervisors. Stated another way, under the PERC's new rule first as announced in this case, *a department manager or supervisor* – in addition to the employer – may be held liable for the discriminatory actions of a subordinate even when the manager did not act unlawfully and had no personal knowledge of the discriminatory animus of the subordinate. Such a ruling turns on its head traditional concepts of agency tort liability and ignores clear Washington precedence, and should therefore be invalidated by this Court.

Although the PERC has previously recognized that, for example, the actions of employees or union members can be imputed to their employer or union organization, respectively, in certain circumstances, it has never held that such conduct on behalf of a subordinate should be

imputed to a supervisor. Washington State Council of County and City Employees, Local 275, Decision 6434 (PECB, 1998); Community College Dist. 19, Decision 9211-A (PSRA, 2006).

The PERC's Decision has instead created a rule which holds supervisors who have not committed any act of discrimination personally liable for the unknown actions of their subordinates. This rule ignores the clear, unambiguous language of RCW 41.56.160(2):

If the commission determines that any person has *engaged in or is engaging in* an unfair labor practice, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees.

(Emphasis added). When interpreting a statute, the court begins with an examination of the statute's plain language, according it its ordinary meaning. State v. Kintz, 169 Wn.2d 537, 547 (2010). Here, the plain, ordinary language of the phrase, "engaged in or is engaging in" is to hold responsible only those persons who themselves have committed, or are committing, an unlawful labor practice.

In contrast to the plain meaning of RCW 41.56.160(2), the PERC's new rule is that:

"[A] decision maker may be found to have committed a discriminatory act if *the decision maker makes a decision*

that was influenced by the animus of his subordinate. This holds true even if the decision maker displayed no animus on her or his own part.”

AR 1394-95 (emphasis added). By ignoring the clearly stated meaning of RCW 41.56.160(2), which limits liability to only those persons who actively commit an unlawful labor practice, the PERC has established a new rule of liability under Ch. 41.56 RCW without following the rulemaking requirements of the APA.

While, in general, a court may defer to an agency’s interpretation of a statute it is charged with enforcing, “The meaning of a statute is a question of law.” Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, (2002). Here, the PERC has erroneously imposed personal liability upon individual supervisors who have committed no wrongdoing. Because such an interpretation is anathema to the statute’s plain meaning and seeks to extend liability far beyond the Public Employees’ Collective Bargaining Act’s (“PECBA”) statutory authority, its interpretation should not be afforded any deference and should be rejected by this court.

Although the PERC described its new rule as merely an attempt to “clarify” Ch. 41.56 RCW⁵, its Decision extends far beyond merely explaining the meaning of the statute. Nor did the PERC already have “the authority to hold an individual supervisor liable” where the supervisor

⁵ AR 1394.

did not personally “engage” in an unlawful employment practice. Brief of Respondent VPOG (“BR-VPOG”) at p. 18. The PERC’s Decision created an entirely new basis for liability being assessed against employees under RCW 41.56.160(2) by holding them personally accountable for the actions of their subordinates even if they are unaware of such conduct.

The VPOG argues that the PERC’s application of Staub v. Proctor, 131 S. Ct. 1186, 562 U.S. __ (2011), did not create a new rule because the PERC already has authority to hold an individual liable under the PECBA, RCW 41.56.160(2). BR-VPOG at pp. 17-18. However, at the same time Respondents do not dispute the City’s contention that the PECBA has never before been interpreted to hold supervisors personally liable for the discriminatory actions of their subordinates.⁶

This form of liability falls squarely within the APA’s definition of a rule, which includes an “order, directive, or regulation of general applicability . . . the violation of which *subjects a person to a penalty or administrative sanction.*” RCW 34.05.010(16) (emphasis added). This new rule affects the substantive rights of employees (managers and supervisors), and such, is a “rule.” Averill v. Farmers Insurance Company of Washington, 155 Wn. App. 106 (2010). In fact, at least one of the

⁶ Brief of Petitioner (“BP”) at p. 20.

PERC's own hearing examiners has cited its Decision in this case for that very proposition:

As such, this case is distinguished from City of Vancouver, Decision 10621-B (PECB, April 11, 2012), *where the Commission found a decision maker liable for discrimination* based upon union animus when a lower-level supervisor's discriminatory actions against an employee caused a decision maker to take adverse action against the employee.

WFSE v. UW, Decision 11379 (PSRA, May 24, 2012) (emphasis added).

In WFSE, the union claimed that union work had been skimmed from its members in retaliation for the union having filed an earlier grievance. But for the lack of evidence, the hearing examiner presumably could have imposed monetary damages against the decision maker based on the PERC's action in this case which created a new rule without following the rulemaking requirements of the APA.

The VPOG argues that the PERC's Decision creating liability for both employers *and* employees in light of Staub was not rulemaking because "nothing in the decision of the PERC can be read to subject a supervisor or manager to a penalty or administrative action." BR-VPOG at p. 19. As shown, this assertion is patently wrong. The VPOG's position is apparently premised upon the fact the PERC did not impose any penalty upon the employee, Chief Cook, in this case. Instead, the

PERC relied upon the hearing examiner's determination pre-Staub that the City was liable for the discriminatory animus of Cook's subordinate.

The VPOG's "no harm, no foul" analysis is intellectually dishonest because managers and supervisors are still faced with the prospect of having monetary penalties imposed based solely on the unknown acts of their subordinates. Nor was the PERC's Decision merely applying broad statutory language to the particular facts of this case or "fleshing out" broad statutory description, as suggested by the PERC. Brief of Respondent PERC ("BR-PERC") at pp. 8, 11. The PERC's new rule of personal liability allows for imposition of monetary penalties against individuals who, as with Chief Cook in this case, have not violated RCW 41.56.140(1) in any respect. The PERC's Decision finding Cook liable clearly resulted from unlawful rulemaking – not mere policy-making as Respondents urge – without following APA requirements.

In addition, the PERC adopted the hearing examiner's Findings of Fact, including Number 27, which found that Cook's selection was not substantially motivated by union animus. The City submits that by adopting this finding, the PERC was foreclosed from finding the City liable for unlawful discrimination, much less holding Cook personally liable. Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401 (1985).

In Glasgow, a case where plaintiff alleged sexual harassment, the Washington Supreme Court explained the basis for imputing liability in cases involving allegations of employment discrimination:

Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof. To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment.

Glasgow at p. 407. See also, Davis v. Fred's Appliance, Inc., 171 Wn. App. 348, 362 (2012). There is no evidence in the record that Cook, as the City's agent, was made aware of Sutter's alleged animus. In the absence of such evidence, it was improper for the PERC to have held the City and Cook liable for discrimination under Ch. 41.56 RCW.

2. The PERC's Decision contravenes Washington law by imputing liability to a supervisor who has not committed any wrongdoing.

The VPOG also argues that the PERC did not engage in rulemaking because Cook did not rely on previous PERC policy when he relied on a "tainted" recommendation. BR-VPOG at p. 22. The VPOG's

argument is disingenuous because the PERC found Cook liable for two reasons: 1) he relied on a “tainted” recommendation; and 2) he failed to conduct an “independent review free from union animus.” AR 1397.

Cook did not conduct an “independent review” because, of course, he was not aware union animus allegedly played a role in Assistant Chief Sutter’s recommendation at the time Cook was making his decision. More importantly, the PERC’s requirement for such an “independent review” did not exist at the time Cook was making his decision. Nonetheless, Cook is being held liable for violating a rule that was only first announced over two and one-half years after his decision. Moreover, Cook was reviewing a recommendation for assignment to a specialty unit, and would have no basis upon which to conduct an investigation into whether interview panel members might have shown anti-union bias against a candidate. By contrast, the decision maker in Staub was reviewing a recommendation for termination of an employee which should, in and of itself, result in the highest level of scrutiny. Staub at p. 1189.

The VPOG argues (BR-VPOG at p. 25) that the unlawful recommendation from a supervisor should be imputed to “the employer” regardless of the decision maker’s actual knowledge of such activity. As argued supra, the City disputes this conclusion. Regardless, the VPOG

evades the glaring flaw in the PERC's Decision: the allegedly unlawful recommendation was imputed not just to the City, but to Cook as well.

B. The PERC Committed an Error of Law Because its Decision in this Case Misinterpreted and Wrongly Applied the Staub Case, and Impermissibly Altered the Burden of Proof Required to Prove a Violation of RCW 41.56.140(1).

The PERC committed an error of law in this case by misapplying Staub so as to impermissibly alter existing rules and standards of proof under Ch. 41.56 RCW. As a result, its Decision unlawfully created a new category of subordinate liability for employee-managers. Furthermore, the PERC compounded its error by introducing a new, lowered standard of proof that liability may be imposed on an employee who is merely "influenced" by the animus of a subordinate.

1. Washington law does not impose individual liability upon supervisors for the discriminatory acts of their subordinates.

The foundation for PERC's interpretation of Staub is that the case law pertaining to discrimination under a federal statute lends itself to application with regard to alleged violations of RCW 41.56.140(1).⁷ Careful examination of Staub shows the PERC's assumption to be flawed. Moreover, even if it were appropriate to borrow and apply such reasoning to Washington's labor laws, the PERC did so erroneously.

⁷ "We find the Supreme Court's reasoning in Staub to be sound and appropriate for application to discrimination cases under Washington's labor laws." AR 1396.

In Staub, the United States Supreme Court was concerned with whether, under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C.S. § 4301 et seq., an *employer* could be held vicariously liable for the discriminatory actions of a lower-level supervisory employee. There is nothing in the Staub case supportive of the PERC's conclusion that an *employee* should be held liable for relying on the "tainted" recommendation of a subordinate.

The PERC's distorted interpretation of Staub also flies in the face of longstanding Washington case law. For example, when the Washington Supreme Court extended liability for discrimination under the Washington Law Against Discrimination (WLAD) to individual supervisors, it limited their liability to "the individual supervisor *who discriminates . . .*" Brown v. Scott Paper, 143 Wn.2d 349, 360 (2001) (emphasis added). The decision was premised on the WLAD's definition that "employer" includes any person "*acting in the interest of an employer.*" RCW 49.60.040(3) (emphasis added). Thus, under Washington law, only those individual employees "who discriminate" are held responsible for violations of the WLAD. No Washington case has ever imputed the liability of a subordinate employee to his or her supervisor who did not actually commit any acts of discrimination, much less was unaware of the discriminatory intent of their subordinate.

Conspicuously absent from the Respondents' briefs is any reference to another court or administrative decision interpreting Staub as creating vicarious liability for an individual *employee*. The City has not located any case in Washington or elsewhere interpreting Staub in a similar manner since the case was decided almost two years ago.⁸ Indeed, the Staub court clearly stated the issue it was reviewing did not concern individual employee liability: "Here, however, Staub is seeking to hold liable not Mulally and Korenchuk, *but their employer*." Staub at p. 1191 (emphasis added).

2. The PERC's Decision lowered the burden of proof required to establish union discrimination under RCW 41.56.140(1).

The USERRA requires a plaintiff demonstrate the proscribed bias was a "motivating factor" in the adverse decision. 38 U.S.C.S. § 4311(c). As the Staub court noted, this requirement for liability under the USERRA is the equivalent of the traditional tort law standard of "proximate cause." Staub at p. 1192. However, as the Supreme Court has cautioned, "we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" Gross v. FBL Financial Services, Inc., 557 U.S. 167, 174, 129 S. Ct. 2343, 2350, 174 L.

⁸ The LexisNexis Shepard's® service shows over 280 state and federal cases have cited to Staub since its issuance on March 1, 2011.

Ed. 2d 119 (2009) (quoting Fed. Exp. Corp. v. Holowecki, 552 U.S. 389, 393, 128 S Ct. 1147, 1153, 170 L. Ed. 2d 10 (2008)). The PERC's Decision, however, is devoid of any careful and critical examination of the differing levels of proof required by these separate and distinct workplace anti-discrimination laws.

For over two decades, a complainant seeking to hold an employer responsible for impermissibly discriminating against a union member has had the burden of proving such a claim by showing that union animus was a substantial motivating factor in the employer's action. Yakima Police Patrolmen's Ass'n. v. City of Yakima, 153 Wn. App. 541, 554 (2007), affirming Yakima Police Patrolmen's Ass'n., Decision 9451-B (PECB, 2007); Port of Tacoma, Decision 4626-A (PECB, 1995). In its Decision here, however, the PERC inexplicably ignored this longstanding rule by misreading Staub and erroneously using the standard of proof applicable to claims of discrimination under the USERRA.

The danger of reading Staub too broadly and applying it to all laws prohibiting discrimination in the workplace was demonstrated in a recent case from the Eleventh Circuit. In Sims v. MVM, Inc., 2013 U.S. App. Lexis 1130 (11th Cir., January 17, 2013), the plaintiff claimed his former employer discriminated against him on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.S.

§ 621 et seq. On appeal from summary judgment granted to defendant, the plaintiff argued that the court should adopt the “cat’s paw” theory of proximate cause liability announced in Staub.

The Court of Appeals for the Eleventh Circuit noted that the ADEA requires a “but-for” link between the discriminatory animus and the adverse employment whereas only the lower standard of “proximate cause” or “motivating factor” is required to establish liability under the USERRA. Sims at *20. Therefore, the court refused to extend Staub’s proximate cause cat’s paw standard to ADEA cases.

Despite the distinctions in the quantum of proof required to establish liability under the USERRA as opposed to RCW 41.56.140(1), the PERC’s misapplication of Staub lowered the standard of proof in direct contradiction of prior PERC decisions and Washington Supreme Court case law prohibiting employment discrimination:

Thus, where an employment decision is *influenced* by the union animus of a subordinate or advisor to the decision maker, the decision will be found discriminatory”

AR 1396 (emphasis added).

Although the “substantial motivating factor” test for liability under RCW 41.56.140(1) may be different than the “but-for” test for ADEA liability, it certainly requires greater proof than the “proximate cause” test for USERRA. See, e.g., Allison v. Housing Authority of Seattle, 118

Wn.2d 79, 90-96 (1991) (the substantial factor test is more than “to any degree” but less than “but for”); Meyers v. Chapman, 840 S.W. 2nd 814, 824 (Ky. 1992) (the “but for” test for discrimination is equivalent to the “substantial factor” test). It is therefore perplexing that the PERC ignored these existing standards and instead announced an entirely new standard that only requires proof that a supervisor was “influenced” by a subordinate’s discriminatory animus.

The Sims case demonstrates why the PERC’s misguided borrowing of the Staub court’s analysis of subordinate liability as applied to one form of employment discrimination (under the USERRA) should not be extended to an entirely different set of workplace discrimination laws (under the PECBA, Ch. 41.56 RCW). The PERC’s Decision does not discuss the distinctions between the standard of proof for these vastly different statutory schemes. Instead, the PERC’s error of law in wrongly applying the Staub case is further confused by its creation of a new standard of proof. As a result, this Court should reject the PERC’s abandonment of the “substantial motivating factor” test and reverse the PERC’s Decision.

The confusion caused by the PERC’s ill-considered opinion is evident from the VPOG’s misstatement of the Decision:

Staub does not hold a supervisor personally liable and neither does the PERC's decision. In applying the reasoning of Staub, the PERC found *the decision maker is strictly liable*, meaning the decision maker, as an agent of the employer, is liable *regardless of fault*. * * * The decision of the PERC clarifies that *Cook is strictly liable* for the decision to deny Martin appointment to the Motors Unit.

BR-VPOG at pp. 26-27 (emphasis added). In the same paragraph, the VPOG states that a supervisor is not personally liable under Staub, but is liable under the PERC's Decision interpreting Staub. The legal conundrum the PERC has created through its illogical reasoning can only be rectified by this Court. Furthermore, the PERC's lowering of the burden of proof in this case was an error of law and another reason its Decision should be invalidated.

C. The PERC's Decision is not Supported by Substantial Evidence.

The VPOG includes many "facts" in its opposition brief which have no relevance to the issues presented to this Court. The hearing examiner concluded that Cook's decision was not motivated by union animus. The VPOG did not cross-appeal the PERC's adoption of the hearing examiner's Findings of Fact. Thus, the portions of the record cited ad nauseam by the VPOG pertaining to Cook's alleged conduct,

contempt or anger towards the VPOG (which the City denies) should be ignored by this Court.⁹

1. The City did not “consider” Martin’s union leave.

The PERC concluded that Sutter’s recommendation was pretextual union animus, in part, because he purportedly considered Martin’s union leave when deciding on his “tainted” recommendation to Cook. The issue of Martin’s extraordinary leave use was first raised by his fellow VPOG member, Corporal Schoene. AR 901:17-22¹⁰. Schoene’s comment prompted the panel to review leave information for all four applicants. AR 194. Although not known at the time, Martin’s union leave fell under the “Other” column in a document provided to the interview panel. *Id.* All three interview panel members reviewed this document, yet the PERC singled out Sutter as having “considered” Martin’s union leave in his deliberations merely by reviewing this document.

This same scrutiny, however, was not applied to Lieutenant Foster or Schoene, the other interview panel members. Even though all three panel members reviewed the leave document, the hearing examiner concluded that Foster did not improperly considered Martin’s leave use,

⁹ See, e.g., BR-VPOG at pp. 6-9.

¹⁰ References to “AR:XX” denote the page and line numbers in the hearing transcript per the Administrative Record.

and never even commented on Schoene's review of the same document.

AR 1393.

Moreover, careful examination of the record establishes that Sutter did not testify he knew the "Other" column was union leave. Instead, he was shown exhibits during the hearing indicating that the hours in the "Other" column were attributable to Martin's union leave. Sutter was then asked whether union leave was discussed with Cook, in response to which he testified as follows:

Q. * * * Do you recall any conversation with Chief Cook about whether or not that 14 and a half hours represented guild leave or not?

A. You know, I was looking at vacation and comp, not the other. I -- I suppose the other column was probably guild leave and that was not taken into our consideration when analyzing or discussing Ryan's leave. I -- I concur with your conclusion before even seeing this sheet that that was probably guild leave, but I didn't know for sure.

Q. But there was no discussion after -- on the day of the interviews after the interviews were taken, about excluding that guild leave from the totals, correct?

A. Chief Cook, when briefing him, discussed the leave should not include union leave. And that's where I was relying on the other categories, other than the other column.

AR 786-87.

Clearly, Sutter had little idea *at the time the interview panel was deliberating* that the "Other" column represented union leave. In addition,

he testified that not only did he did not consider that issue in his deliberation, he specifically spoke to Cook afterwards and they agreed Martin's union duties should not be a consideration in the selection process. AR 773:4-11. Lastly, there is no evidence that Sutter or the other panel members discussed or considered "union leave" during their deliberations.¹¹

The PERC Decision shows it failed to carefully review the hearing record with regard to Sutter's alleged consideration of Martin's union leave. The Decision wrongly states that in the context of Sutter's alleged review of union leave, pretextual discrimination was shown by the fact that Sutter improperly considered Martin's union leave and "*by making negative statements and inferences about Martin's protected activities.*" AR 1393 (emphasis added). In fact, the record establishes that no such statements were made by Sutter.

2. Martin's union activity was irrelevant to Sutter's recommendation.

The PERC's second reason for finding Sutter showed union animus was a single, isolated statement made by Sutter during the interview panel's deliberations. In support of the PERC's faulty review of

¹¹ Regardless, the actual amount of union leave, 32.5 hours, was miniscule (less than 5%) when compared to Martin's overall use of vacation leave and compensatory time, which was 671 hours. AR 194.

the record, the VPOG also misstates the record that provides the context for Sutter's statement. The VPOG states that Sutter discussed Martin's union activity and then commented that he may not be a "good fit" for the Motors Unit. BR-VPOG at p. 30. This is simply untrue.

During the interview panel's discussion, Sutter mentioned he felt another applicant, Officer Davis, would be a good choice "as well," and that the person with the most qualifications is not always "the best fit for the unit." AR 654:3-8. Schoene incorrectly assumed Sutter's statement about "fit" referred to Martin's union activity although *he never articulated that assumption to Sutter during the deliberations*. Instead, Schoene merely commented that, "I said that I didn't take that particular aspect into account in my decision because at my level in dealing with Officer Martin, he's always -- in his work, he has always portrayed a positive image of the Department, at my level." AR 654:16-17.

At the PERC hearing months later, however, Schoene was asked by the VPOG attorney what he meant by his statement that he understood why looking for someone who is a good fit might be an issue for someone at Sutter's level. It was in response to this question at the hearing that Schoene discussed Martin's role as the VPOG president and disagreements he had with the police chief. AR 654:22 – 655:3. Thus, there was never any discussion whatsoever of Martin's union role during

the panel's deliberations, and it certainly was never discussed by Sutter.
AR 772:18-21.

In fact, the only person who directly raised the issue of Martin's VPOG duties in the entire selection process was his fellow union member, Sergeant Pat Johns, the Motors Unit supervisor. During his telephone discussion with Sutter regarding the candidates, Johns mentioned that Martin would be a good choice because then "he could represent guild members on duty, and have that opportunity as a day shift motor to representation." Sutter, however, knew the danger of considering Martin's union role in the selection process:

"And I didn't even go down that path with him because I was not interested in bringing the guild into – or guild duties into a selection process."

Sutter therefore "didn't engage him in that conversation." AR 773:12-22. There is simply no credible evidence that Sutter's isolated reference to "fit" supports an inference that he held union animus against Martin.

III. CONCLUSION

For the reasons discussed above, the City respectfully requests that this Court invalidate those portions of the PERC's Decision 10621-B in which it pronounced a change in the law, found there was substantial evidence to support the hearing examiner's findings and concluded that the City had committed an unlawful labor practice.

Respectfully submitted this 6th day of February, 2013.

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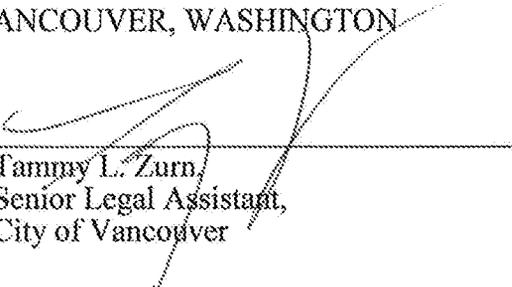
I hereby certify that I caused the foregoing BRIEF OF PETITIONER to be served on the following counsel of record:

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By Electronic Filing on February 6th, 2013.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

By: 

Tammy L. Zurn,
Senior Legal Assistant,
City of Vancouver

VANCOUVER CITY ATTORNEY

February 06, 2013 - 12:58 PM

Transmittal Letter

Document Uploaded: 436418-Reply Brief.pdf

Case Name: City of Vancouver v State of Washington PERC and the Vancouver Police Officers Guild
Court of Appeals Case Number: 43641-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: Reply
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Tammy L Zurn - Email: Tammy.Zurn@cityofvancouver.us

A copy of this document has been emailed to the following addresses:

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