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64396-7

No. 64396-7-I

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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CITY OF SEATTLE and SEATTLE FIRE DEPARTMENT, Respondents

v.

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

and

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,  
LOCAL 2898, Appellant

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COURT OF APPEALS  
DIVISION 1  
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REPLY BRIEF OF APPELLANT

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## 1. INTRODUCTION.

In the brief of appellant the Union demonstrated that PERC acted within its statutory authority in concluding that a public employer's pre-hearing interviews of bargaining unit employees in a pending grievance arbitration with their union should be subject to the safeguards against interference with protected activity set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), which require that the public employer (1) inform the employees of the purpose of the questioning; (2) assure them no reprisal will take place; and (3) inform them that participation in questioning is voluntary. Union's Brief ("UB") at pp. 17-31. The Union also demonstrated that PERC properly concluded that the City failed to bargain collectively by not informing the Union of its reasons for refusing to provide requested information and by refusing to provide information relevant to collective bargaining and contract enforcement. *Id.* at 32-43.

In its brief the City contends that PERC erred in adopting the *Johnnie's Poultry* standards because that case was decided under the NLRA, which does not protect collective bargaining activities of supervisors. Therefore, according to the City, "[NLRB] precedent has no applicability to the question of whether supervisors, organized under Washington law,

are entitled to *Johnnie's Poultry* rights.” City Brief (“CB”) at 22. In a similar vein the City urges that the Commission erred in characterizing as “adversarial” the relationship between it and the Union’s bargaining unit, because as supervisors they “owe a fiduciary responsibility to their employer” and applying *Johnnie's Poultry* standards in this situation “would risk placing ‘unworkable’ restrictions on the City’s ability to prepare to defend its disciplinary decisions.” *Id.* at 30-32.

The City also contends that because a divided panel of the court in *Cook Paint and Varnish Co. v. NLRB*, 648 F.2d 712 (D.C. Cir. 1981), declined to enforce an NLRB order applying the standards adopted in *Johnnie's Poultry* to interviews to aid an employer’s preparation for grievance arbitration hearings, PERC exceeded its authority by prescribing such standards for public employers in this state. *Id.* at 23-24. The City also points to decisions of “several federal courts” that declined to apply the *Johnnie's Poultry* standards and looked instead to the totality of circumstances of employee interrogation to determine whether they were coercive (*id.* at 24-27), and it urges that PERC improperly failed to follow the approach of Division II in *PERC v. City of Vancouver*, 107 Wn. App. 694, 33 P.3d 74 (2001), which also looked to the circumstances of the

city's interrogations to determine if they were coercive (*id.* at 27-30).

Finally, the City challenges PERC's conclusion that the City violated its collective bargaining obligations by failing to provide the Union with an explanation for not providing it with requested information relevant to the upcoming grievance arbitration proceeding and failing to provide certain relevant information to the Union. Essentially, the City contends that its initial failure to give any explanation for its refusal until after the Union filed the unfair labor practice complaint in this case should be excused, because the Union's counsel did not provide legal authority for the requests (*id.* at 33-37); and the City asserts, without record citation or support, that it earlier provided the Union with all information it was entitled to obtain.

As demonstrated below, PERC properly exercised its statutory authority to prevent unfair labor practices by determining that pre-hearing interviews of employees by public employers in pending grievance arbitration proceedings should be subject to the safeguards against interference with protected activity set forth in *Johnnie's Poultry*. The Commission's exercise of such authority is entitled to "great deference," and in cases such as this where federal law is similar to Washington State law in some

ways and different in others (including its protection of supervisory employees and express prohibition of strikes by uniformed personnel), courts should be especially reluctant to second-guess the Commission's special expertise. Moreover, the City failed to challenge or distinguish the Union's authorities that non-coercive employer pre-litigation interviews must always be voluntary for employees (UB at 24). Nor does the City explain why PERC should be compelled to adopt the analytical approach of Division II in *City of Vancouver* (which dealt with an employer's *pre-disciplinary* investigation) in this case involving pre-litigation interviews that occurred long after the City's investigation was complete, discipline had been imposed, and the parties were preparing for a hearing in which the Union was challenging the discipline.

Also as demonstrated below, PERC properly concluded that the City violated its collective bargaining obligations by failing to provide the Union with an explanation for refusing to provide it with requested information and failing to provide relevant information to which the Union was entitled. PERC properly could assume that the explanation the City provided after the Union filed its unfair labor practice complaint was prompted by the Union's unfair labor practice complaint or was tardy, insuffi-

cient in describing the privileges asserted, or tainted by the City's ongoing refusal to provide information to which the Union was entitled in any event (*e.g.*, identity of witnesses interviewed and employee statements).

Therefore the Court should uphold the Commission's decision.

## 2. ARGUMENT.

### A. **PERC Properly Concluded that a Public Employer's Pre-Hearing Interviews of Employees in a Pending Grievance Arbitration Should Be Subject to the Safeguards Against Interference with Protected Activity Set Forth in *Johnnie's Poultry*.**

Although the Commission declined to find an "interference" violation because it found the record lacked "direct evidence about the content of the interviews" (Decision at 7), the circumstances of this case nevertheless illustrate how "the act of interviewing employees in preparation for litigation" can have a "pronounced inhibitory effect" on the exercise of protected rights; that "the nature and circumstance of employer interviews in preparation for litigation" justify a more formal standard for ensuring that employee rights are protected; and that the specific safeguards of *Johnnie's Poultry* are appropriate "to minimize the coercive impact of such interrogations." *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987). The Commission properly exercised its authority by

adopting the *Johnnie's Poultry* standards for interviews by a public employer of bargaining unit employees to prepare its case in grievance arbitration with their union as a prophylactic measure to minimize the coercive impacts by such interrogations and thereby to prevent unfair labor practices and enhance PERC's ability to issue appropriate remedial orders.

As demonstrated in appellant's brief (at pp. 16-17), it is an unfair labor practice in violation of RCW 41.56.140(1) for an employer "[t]o interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by [chapter 41.56 RCW]" and an interference violation is established where it is demonstrated that employer conduct *can reasonably be perceived by employees* as a threat of reprisal or promise of benefit to deter their pursuit of lawful union activity. *Port of Seattle*, Decision 6854-A (PECB, 2001); *Kennewick School District*, Decision 5632-A (PECB 1996). The legal determination of interference is not based on the subjective reaction of any employee involved; it is determined objectively by evaluating whether *a typical employee* under similar circumstances *reasonably could perceive* the employer's actions as an attempt to discourage protected activity of the employee or other employees. As PERC stated in its decision (at 4),

Nor is it necessary to show that the employee actually was coerced or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A [PECB, 2000].

The City does not challenge or even discuss these well-established principles, which the Commission detailed in its decision at page 4. Instead, the City argues irrelevantly that the Union failed to prove that the employees whom the City interviewed in preparation for the arbitration hearing “reasonably believed that they were not permitted to provide complete information to the Union.” According to the City, there was no proof of coercion without evidence of that perception through “the testimony of interviewed Fire Department employees.” CB at 40, n. 6. As demonstrated above, such individualized or subjective proof is not required.

The City’s attorney testified that the City considers its communications with bargaining unit employees in preparation for defending itself against the Union in grievance arbitration to be protected by the attorney-client privilege and that “there could well be repercussions” if an employee were to “blurt[] out” something that occurred in the interview (Tr. 27-28). On these facts, employees could reasonably believe they were not free to aid the Union by sharing with it the substance of their commun-

ications with the City's attorney in such interviews – a clearly protected activity.

By this standard PERC would have been justified in finding that the City unlawfully interfered with the protected rights of bargaining unit employees to assist the Union, but it chose a more cautious approach, ruling that “the union must prove that the employer asked employees questions relating to the grievance to be arbitrated.” Although the City conceded that its attorney interviewed bargaining unit employees concerning the employees’ “knowledge of the facts and to prepare the City’s defense” in the arbitration<sup>1</sup> and “to find out what the member[s] would say if called to testify,”<sup>2</sup> the Commission found that the record lacked “direct evidence about the content of the interviews,” since the employees interviewed did not testify at the hearing. Decision at 7.

Obviously recognizing, however, that employer interviews of employees in preparation for litigation can result in unlawful coercion,<sup>3</sup> the

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<sup>1</sup>Exhibit 12, p. 2 (Declaration of Reba Weiss in Support of Respondent’s Motion to Try Case on Stipulated Facts).

<sup>2</sup>Exhibit 6, p. 2 (Letter from F. Wollett to James Webster dated June 3, 2005).

<sup>3</sup>“In such a situation there may be pressures, sometimes subtle, sometimes not, placed on the employee to conform the facts to support the employer’s case.” *Grandview Health Care Center*, 332 NLRB 347, 356 (2000) (Kocol, ALJ), *enf’d. sub nom. Beverly Health & Rehab. Serv. v. NLRB*, 297 F.3d 468 (6th Cir. 2002).

Commission adopted the prophylactic measures set forth in *Johnnie's Poultry*, a decision to which the courts owe PERC "great deference."<sup>4</sup> By doing so the Commission enhanced its ability to prevent unfair labor practices and render meaningful remedial orders. *See* UB at 17 - 31.

Unlike the NLRB, PERC does not have the resources or authority to investigate and prosecute alleged violations of the PECBA. Instead, a person aggrieved by alleged unfair labor practices must not only file a complaint, but also must present the evidence, carry the burden of proof to establish the alleged unlawful conduct (*see* WAC 391-45-270), and, as in this case, defend PERC's decision should it be challenged in the courts.

These differences from the federal system make even more important the adoption by PERC of standards like those in *Johnnie's Poultry* that (i) provide bargaining parties with clear guidance concerning interviews in preparation for litigation, and (ii) enable PERC when reviewing allegedly unlawful interrogation after the fact more readily to evaluate whether the circumstances should be deemed coercive. *See* UB at 20-22. If PERC were unable to adopt these standards, and if proof of

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<sup>4</sup> *Bellevue v. Int'l Ass'n of Fire Fighters*, 119 Wn.2d 373, 381, 831 P.2d 738 (1992); *Yakima v. Firefighters*, 117 Wn.2d 655, 671-72, 818 P.2d 1076 (1991); *Maple Valley Prof. Fire Fighters Local 3062 v. King County Fire District No. 43*, 135 Wn. App. 749, 759, 146 P.3d 1247 (Div. 1, 2006).

coercion in such interviews were to depend, as the City urges, on analyses of “all the circumstances” surrounding employee interrogations, then far greater resources would be needed to litigate such issues, employees would face greater uncertainty of outcomes in their petitions for redress of coercive interrogation, and the ability of PERC to prevent unfair labor practices and determine appropriate remedial orders for coercion in pre-litigation interviews would be inappropriately diminished.

**B. PERC Properly Adopted the *Johnnie’s Poultry* Standards to its Analysis of the City’s Interviews of the Supervisory Bargaining Unit Employees in this Case.**

The City contends that PERC erred in applying standards adopted by the NLRB in *Johnnie’s Poultry* to its analysis in this case because, according to the City, PERC failed to recognize differences between organizing rights of employees under federal law, which does not afford to supervisors the right to engage in collective bargaining, and state law which does. City’s Brief at 21-23 and 30-32. The City contends that, while managers and supervisors may organize under RCW 41.56, they “owe a fiduciary responsibility to their employer,” citing *Public School Employees of Granite Falls*, Decision No. 7719 (PECB, 2002), *aff’d*, Decision 7719-A (PECB, 2003). City’s Brief at 31. Because of this “fiduciary

responsibility,” the City reasons, PERC’s adoption of the *Johnnie’s Poultry* standards in interviews involving preparation for grievance arbitration “could jeopardize the ability of the Fire Department to prepare its cases for arbitration.” *Id.*

The City’s position is untenable in view of court decisions interpreting the PECBA, including the Supreme Court’s refusal to incorporate limitations not expressly set forth in the statute on the right of public employees to organize and be represented for collective bargaining by labor organizations of their own choosing. This refusal has resulted from the legislative directive that the PECBA is remedial in nature and is to be liberally construed in order to effectuate its purposes.

In interpreting the [PECBA] we are guided by the legislative directive that the Act is remedial in nature and is to be liberally construed in order to effect its purposes [RCW 41.56.905; *PUD 1 v. Public Empl. Relations Comm’n*, 110 Wn.2d 114, 119, 750 P.2d 1240 (1988); *Roza Irrig. Dist. v. State*, 80 Wn.2d 633, 639, 497 P.2d 166 (1972)]. A policy requiring liberal construction is a command that the coverage of an act’s provisions be liberally construed and that its exceptions be narrowly confined. *Nucleonics Alliance, Local 1-369 v. WPPSS*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984) [*Accord*, *PUD 1*, 110 Wn.2d at 119].

The purpose of the [Act] is to provide public employees with the right to join and be represented by labor organizations of their own choosing [RCW 41.56.010; *Int’l. Ass’n of Firefighters, Local 469 v. Yakima*, 91 Wn.2d 101, 109, 587 P.2d 165 (1978)], and to provide for a uniform basis for implementing that right [*PUD 1* at 116].

*Yakima v. Fire Fighters Local 469*, 117 Wn.2d 655, 670, 818 P.2d 1076 (1991). Following this legislative directive, the Supreme Court has repeatedly refused to import into the PECBA various limitations on these rights that are contained in the NLRA governing private sector employees.<sup>5</sup>

The court has explained the basis of these rejections as follows:

In *Metro* we refused to accept the argument that the Washington State Legislature simply adopted federal criteria for determining which employees should be permitted to bargain collectively. The [NLRA] (29 U.S.C. 152(3)) expressly *excludes* supervisory personnel from its definition of the term employees. Our legislature excluded *only* certain deputies, administrative assistants, and secretaries. This difference evidences rejection of the federal supervisory exclusion. Thus, under our statute the mere presence of supervisory responsibility is insufficient to warrant exclusion from the definition of public employees.

Moreover, in *Metro* we observed that rejection of the federal supervisory exclusion evidenced a legislative differentiation between the *public employee* covered by our statute on the one hand, and the *private industrial employee* covered by the [NLRA] on the other hand. We were of the opinion that the nature of the trust with which public officials are charged led to a legislative judgment that officials should have freedom not only to control, hire, or fire confiden-

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<sup>5</sup>*Municipality of Metropolitan Seattle v. Department of Labor & Indus.*, 88 Wn.2d 925, 568 P.2d 775 (1977) (*Metro*) (rejecting exclusion of supervisory employees from right to self-organization and representation for purposes of collective bargaining); *Nucleonics Alliance, Local 1-369 v. WPPSS*, 101 Wn.2d 24, 677 P.2d 108 (1984) (rejecting limitation in NLRA on representation of guards by a union that admits non-guards to its membership); *International Ass'n of Firefighters, Local 469 v. Yakima*, 91 Wn.2d 101, 109, 587 P.2d 165 (1978) (rejecting exclusion of battalion chiefs as "confidential" employees, where the employer failed to demonstrate that their duties and responsibilities necessarily implied a confidential relationship to the fire chief).

tial employees, but also to work with the confidential employees unrestrained by collective bargaining.

*Firefighters Local 469 v. Yakima*, 91 Wn.2d at 104.

These decisions demonstrate that the City's reliance on *Granite Falls* and differences between the NLRA and the PECBA is misplaced. In *Granite Falls*, the employer contended that a newly created supervisor position should not be included in a bargaining unit of non-supervisory employees. The Executive Director found that the employee exercised sufficient supervisory responsibilities to be excluded from the non-supervisory bargaining unit. The Director explained the rationale for excluding the supervisor from a bargaining unit of non-supervisory employees in order to avoid the potential for a conflict of interest between supervisors and their subordinates if they were in the same unit:

A potential for conflict of interest is inherent in having both supervisors and their subordinates in the same bargaining unit. Accordingly, supervisors have routinely been excluded from bargaining units containing their subordinates under precedents dating back to at least *City of Richland*, Decision 279-A (PECB, 1978), *aff'd* 29 Wn. App. 599 (Division III, 1981), *review denied* 96 Wn.2d 1004 (1981).

*Granite Falls*, Decision 7719. The Director also noted that the supervisor could be included in a bargaining unit with other supervisory employees.

The Union's supervisory bargaining unit was created in order to

avoid just such a conflict of interest by separating them from the bargaining unit for non-supervisory employees. *City of Seattle*, Decision 1797-A (PECB, 1985). The Director certified Local 2898 as the collective bargaining representative of battalion chiefs and deputy chiefs over the objections of the City, *inter alia*, that deputy chiefs should be excluded as “confidential” employees and that inclusion of deputy chiefs in the same unit as battalion chiefs would create “an inherent conflict of interest.” The Director rejected the City’s position because the City did not establish the deputy chiefs to be “confidential” employees as defined in RCW 41.56.030(2)(c), and there were insufficient differences in supervisory function between deputy and battalion chiefs to warrant separating them into different bargaining units. *City of Seattle*, Decision 1797-A.

*Granite Falls* does not suggest that supervisory employees enjoy lesser protections for their own collective bargaining activities than non-supervisory employees. Indeed, the Supreme Court has emphasized the legislative purpose of the PECBA that the right of public employees to join and be represented by labor organizations of their own choosing is to be implemented on a “uniform basis.” *Yakima v. Firefighters*, 117 Wn.2d 655 at 670; *see also Firefighters Local 1052 v. PERC*, 45 Wn. App. 686,

726 P.2d 1260 (Div. III, 1986), *review denied*, 107 Wn.2d 1030 (1987) (“*FF Local 1052 v. PERC- I*”).

In *FF Local 1052 v. PERC- II*, the union was the exclusive bargaining representative of the nonsupervisory firefighters bargaining unit, and PERC, with court approval (*Firefighters Local 1052 v. PERC*, 29 Wn. App. 599, 630 P.2d 470, *review denied*, 96 Wn.2d 1004 (1981) (“*FF Local 1052 v. PERC-I*”), had previously determined that the battalion chiefs, because of their supervisory duties, must be placed in a bargaining unit separate from the nonsupervisory firefighters. Thereafter, Local 1052 filed a petition with PERC to be certified as the exclusive representative of the newly created unit of battalion chiefs. Following a hearing, PERC’s Executive Director found that “Local 1052’s leadership was dominated by supervisors” and as a result was incapable of dealing at arm’s length with the City of Richland as exclusive bargaining representative of both supervisory and nonsupervisory bargaining units and therefore was disqualified from acting as a representative of both units. PERC affirmed the Director’s decision, and on review the court of appeals reversed. 45 Wn. App. at 687.

The court ruled that PERC lacked authority under the PECBA to

determine the appropriateness of a bargaining *representative*. In reaching this conclusion, the court expressly refused to follow the interpretation given the NLRA in deciding the collective bargaining rights of supervisors under the PECBA. The court stated:

[U]nder federal law the participation of supervisors in the internal affairs of the union disqualifies it as a bargaining representative if a "clear and present danger" of a conflict of interest which compromises the labor organization's bargaining integrity is proven. *Sierra Vista Hosp., Inc. v. Calif. Nurses' Ass'n*, 241 NLRB 631 (1979).

However, under our state act, supervisors are recognized as employees and granted the authority not only to belong to a union, but the right to collectively bargain. [*Firefighters Local 469 v. Yakima*, 91 Wn.2d 101; *Metro. Seattle v. Dep't. of Labor & Indus.*, 88 Wn.2d 925]. Consequently, our courts have not followed the interpretation given the federal act in deciding whether supervisors should be denied the right to collectively bargain. *Metro. Seattle, supra*. In fact, the two acts reflect different concerns. The NLRA reflects the concern with the authority a supervisor exercises over other employees and a possible conflict of interest with management, whereas our act focuses on the nature of the relationship between the employee and the employer; only those employees designated "confidential" are subject to exclusion under our act. *Metro. Seattle* at 929-30.

Given the significant difference in which the two acts treat supervisors, we do not find the federal approach persuasive.

45 Wn. App. at 690-91.

Under these decisions supervisory employees enjoy the same protections for their own collective bargaining activities as do the rank and

file employees they supervise, including the protections afforded by PERC's adoption of the *Johnnie's Poultry* standards for employee interviews to assist the City in its preparation for litigation with the supervisory employees' union.

The City asserts that PERC's decision "would risk placing 'unworkable' restrictions on the City's ability to prepare to defend its disciplinary decisions." City's Brief at 32. According to the City:

The discipline was based on an investigation and report carried out by Battalion Chief John Gablehouse. Exh. 7, Award, p. 3. A recommendation regarding the appropriateness of discipline was made by Deputy Chief Angelo Duggins, the grievant's direct supervisor.<sup>6</sup> Gablehouse's investigation was a major factor in the decision to discipline Douce. *Id.* p. 15.

The *per se* rule announced in *Johnnie's Poultry* would potentially limit, if not prevent, the City's attorneys from interviewing both Gablehouse and Duggins to prepare for the arbitration.

*Id.*

The City's assertion that it must rely on the cooperation of bargaining unit employees to establish its case in grievance arbitration with the Union is both without support in the record and contrary to the record developed before PERC when the Union first became exclusive represen-

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<sup>6</sup>Chief Duggins recommended that "no disciplinary action be taken," Award (Ex. 7) at 5.

tative and when the Executive Director ruled that battalion and deputy chiefs are not “confidential” employees: “In the event a battalion chief were to be disciplined or had a grievance, the assistant chief would investigate and act upon it.” *City of Seattle*, Decision 1797-A (PECB, 1985).

The City also ignores the distinction sharply drawn by PERC between pre-disciplinary interviews like those in *City of Vancouver, supra* (to which the *Johnnie’s Poultry* standards do not apply), and post-disciplinary interviews that are used to support an employer’s legal case against the employees’ union (to which they do). Decision at 6. Because of this distinction, the City is free to conduct investigations into its business operations, including whether the work performance of an employee justifies discipline, and it may require employees, as a condition of employment, to submit to interviews necessary or appropriate to such investigations. Only after the employer takes specific action which the union challenges, such as imposing discipline on an employee, and the matter has been submitted to the grievance procedure must the employer provide the *Johnnie’s Poultry* assurances to interviews of employees concerning the dispute.

The City also has failed to demonstrate why exempt employees (*e.g.*, the Fire Chief, the assistant chiefs, and the City’s personnel department)

cannot adequately carry out or oversee pre-disciplinary investigations into alleged misconduct by employees in the Union's bargaining unit or assist in preparation of the City's case in arbitration as the Executive Director found they could when the Union was certified as representative of the bargaining unit. Nor has the City demonstrated why the knowledge of bargaining unit employees cannot be incorporated in written statements or otherwise preserved for use in the City's case in the event discipline is challenged in grievance arbitration with the Union.

Finally, the Union has never asserted that the deputy and battalion chiefs may decline to participate in interviews with the City's litigation representatives when the City is defending against claims by the rank and file employees they supervise or the union representing such employees, and PERC limited its decision in the same way to interviews with *bargaining unit employees*. PERC stated:

The situation presented is clearly post-disciplinary, and the employer is seeking to vindicate its decision to discipline an employee. The union and employer were involved in an adversarial arbitration hearing. In such a proceeding the employer should treat *bargaining unit employees* as adverse witnesses. If an employer wishes to question *a bargaining unit employee* concerning subject matter that relates to the grievance, the employer has an obligation to advise *that employee* of his or her *Johnnie's Poultry* rights.

Decision at 6 (emphasis added).

In sum, the City has not demonstrated that in a case involving discipline of a deputy chief or battalion chief, the lack of protection of supervisors under the NLRA makes the *Johnnie's Poultry* standards inappropriate for PERC's analysis in this case or that application of these standards for supervisory employees would make it "unworkable" for the City to prepare its case for grievance arbitration with the Union. Therefore the Court should uphold the Commission's decision.

**C. PERC Properly Concluded That the City Violated RCW 41.56.140(4) by Not Informing the Union of its Reasons for Refusing to Provide Requested Information and by Refusing to Provide Information That Was Relevant to Collective Bargaining and Contract Enforcement.**

In its email to the City on May 13, 2005, the Union requested, *inter alia*, "full disclosure of all interviewees, questions asked and information provided, and copies of all notes and statements." The City's response was, "We will not disclose to you or your client any of the information gathered," and the City did not provide the Union with any of the information it requested. The Commission concluded that "the employer's refusal coupled with its lack of explanation for its denial left the Union with few options aside from filing a complaint." Decision at 11.

The City does not challenge the principle articulated by the

Commission that an employer faced with an information request from the exclusive representative of its employees “has the duty to explain any objection to the request.” Decision at 9, *citing Port of Seattle*, Decision 7000-A (PECB, 2000). Instead the City states it

made clear that the City’s attorney . . . would not turn over information gathered during those interviews *since the City regarded that information as privileged*. Supplemental Certification of Record, Exh. 4, May 17, 2005 letter.

CB at 34 (emphasis added). The City’s letter, however, did not include the explanation that “the City regarded that information as privileged” or the basis of its privilege claim; nor did the City provide information PERC found not to be privileged, such as the identities of employees interviewed and copies of any employee statements.

Although it was unquestionably the City’s burden to explain its refusal to provide the requested information, it seeks to shift the burden to the Union by contending that it was somehow obligated to come forward with legal authority to support its request:

[In its letter dated May 18, 2005, the Union] for the first time cit[ed] authority for its position that the City was obliged to turn over information gathered in preparation for arbitration.

CB at 34.<sup>7</sup> The City cites no authority that the Union had any such obligation. The Commission properly concluded the City had unlawfully failed to provide an explanation for its refusal to comply with the Union's May 13, 2005, information request.

**D. PERC Properly Ordered the City to Provide the Union with Information Relevant to Collective Bargaining and Contract Enforcement.**

The Commission ordered (Decision at 18) the City to provide the Union, upon request:

the names of all interviewees who were members of the bargaining unit, questions asked to unit employees and copies of unit employees' statements. Should the union request the notes taken during the pre-discipline interviews of bargaining unit employees, the employer will provide the Compliance Officer with a copy of any notes taken. If necessary, the Compliance Officer will conduct an in camera review and will redact information protected by attorney work product privilege. The redacted version will be provided to the union.

The Commission made clear that any information collected by the City's attorneys leading up to the imposition of discipline is relevant to grievance processing and contract enforcement, but that attorney's notes taken following the imposition of discipline and in preparation for an arbitration

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<sup>7</sup>See also CB at 36:

The Commission's decision appears to be based on the City's failure to provide an explanation along with its refusal to provide the information. Of course, the Union had failed to provide any explanation for its entitlement in its initial request.

hearing are protected by the work product doctrine and are subject to in-camera inspection by a compliance officer to determine what information should be redacted to preserve any properly asserted privilege.

The City claims that the Commission did not understand that, according to the City, it had previously produced all information it was required to produce prior to the decision to impose discipline on the grievant. It contends that the Commission's "misapprehension of these facts undermines the validity of its findings." *See e.g.*, City's Brief at 41.

In support of its contention that the Commission "misapprehended]" the facts, the City asserts that it earlier provided the Union with all information it was entitled to obtain. This assertion is contained in several factual statements that do not comply with RAP 10.5 (a) and (b), which require that for the parties' briefs: "Reference to the record must be included for each factual statement."<sup>8</sup> The Court should not credit these

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<sup>8</sup>These ex-record statements include, for example:

- Prior to the imposition of discipline, the Fire Department provided Local 2898 with all of the documents in its possession that formed the basis of the discipline or otherwise related to the events at issue. CB at 3-4.
- It is undisputed that the City provided the Union with all of the information it requested prior to the *Loudermill* hearing and the Fire Chief's decision to impose discipline on Molly Douce. It is also undisputed that the information requested by the Union post-discipline would come directly from the interviews conducted by the City's attorneys in preparation for the arbitration. CB at 16.

unsupported factual statements.

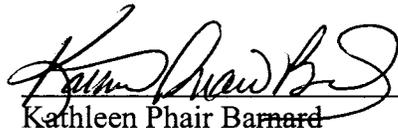
The City having refused without explanation to provide information relevant to the grievance arbitration, including information PERC determined the Union was entitled to receive (*e.g.*, the identity of witnesses interviewed and employee statements) and having failed to establish at the hearing the extent of information it did provide, PERC properly issued its order to produce in the form set forth in the Decision.

**3. CONCLUSION.**

For the reasons set forth above, the Court of Appeals should affirm the Commission's decision.

Dated: March 19, 2010.

SCHWERIN, CAMPBELL, BARNARD,  
IGLITZIN & LAVITT  
KATHLEEN PHAIR BARNARD  
JAMES H. WEBSTER, Of Counsel  
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Kathleen Phair Barnard  
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- Neither Ms. Weiss nor any other attorney was involved in the proceeding until *after* the discipline was imposed and the Union demanded arbitration.  
\* \* \* There is no dispute that the City disclosed all information to the Union prior to the *Loudermill* and the the disciplinary action. CB at 17-18.

Further ex-record statements of a similar nature appear at CB 19, 38, 39 and 41.

CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of March, 2010, I caused the original and one copy of the foregoing Reply Brief of Appellant to be sent via legal messenger to:

Clerk of the Court  
Court of Appeals, Division I  
600 University St  
One Union Square  
Seattle, WA 98101-1176

And a true and correct copy of the same to be sent via legal messenger to:

Fritz E. Wollett  
Assistant City Attorney  
Seattle City Attorney's Office  
600 4th Avenue, 4th Floor  
Seattle, WA 98124-4769

  
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