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No. 37865-5-II

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

**YAKIMA POLICE PATROLMEN'S)
ASSOCIATION,)
)
Appellants,)
)
v.)
)
**CITY OF YAKIMA,)
)
Respondent.)****

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ORIGINAL

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I. INTRODUCTION

This case involves a Petition for Review under the Administrative Procedures Act (APA) filed by the Yakima Police Patrolman's Association. The Association had filed an "unfair labor practice complaint" against the City of Yakima with the Public Employment Relations Commission (PERC). A PERC Hearing Examiner upheld the Association's complaint, finding that the City's Police Chief had unlawfully discharged one of the Association's members in an act of retaliation against the Association. But this determination was later overturned by the Commission.

The Association filed an APA Petition for Review in Thurston County Superior Court asserting several errors in the Commission's reversal order. Chief among these errors was the failure of the Commission to enter complete findings: The Commission had stricken some of the Examiner's key findings on motive and retaliation but made no substitute findings to replace the ones stricken.

The Association contends the revised Commission order violates a number of procedural and substantive requirements of the APA, including the requirement to provide due regard to the hearing officer's fact-finding and the right to complete findings of fact based upon the administrative hearing record. Although the Superior Court acknowledged the

Commission's failure to make certain findings, it forgave it reasoning that the absence of a finding was a finding. Still contending that this other aspects of the Commission's reversal order contain nonwaivable errors, the Association presents this appeal.

II. ASSIGNMENT OF ERRORS

A. Errors Assigned

Assignment of Error Number 1: Appellant assigns error to the Superior Court Order Enforcing the Commission Decision and Dismissing the Appeal and each of the six findings and conclusions therein.

B. Issues Presented

Issue Number 1: Whether the Commission decision violates the Administrative Procedures Act when it struck findings by the Examiner without replacing those findings?

Issue Number 2: Whether the Commission decision finding against unlawful union "interference" was in error when even the evidence in the light most favorable to the City revealed that the Police Chief had asserted the Association's pending unfair labor practice Complaint as the justification for the discharge of Officer Mike Rummel?

Issue Number 3: Whether the Commission erred by not ruling upon the Association's motion to strike post hearing evidence submitted by the City that had not been admitted during the adjudicatory hearing?

Issue Number 4: Whether the Commission erred by misapplying the law concerning discrimination when it failed to enter or apply findings concerning the discharging official's motivation in entering the discharge where the record demonstrates discrimination was a substantial factor in the discharge decision?

Issue Number 5: Whether the Commission violated the APA by altering the findings of the hearing officer who was the eyewitness to the testimony when RCW 34.05.464 mandates that reviewing agencies must accord "due regard" to hearing officer credibility findings?

III. FACTS¹

In 2003 the City of Yakima hired a new police Chief, Sam Granato.² Previously, Granato had been a police manager for departments in Texas.³ Upon his arrival, Granato professed knowledge about collective bargaining laws. It soon became apparent to the Association, though, that Granato was familiar, possibly, with Texas collective bargaining law, but not at all with Washington collective bargaining law.⁴

¹ The citations below to "Exhibits" are references to the hearing exhibits at 1 through 31 in the working notebook (from 497 through 667 of the Administrative Record.) References to the Transcript are to the hearing transcripts set out at 41 and 42 of the Notebook (14-496 of the Administrative Record). No Clerk Paper Numbers were assigned for these documents. *See* CP 36-37 (Index to Agency Record).

² Transcript at 401.

³ *Id.* at 399.

⁴ Transcript at 197.

Virtually at the outset, the Association and Granato had conflict over his Washington law obligation to negotiate issues.⁵

During Granato's tenure, the parties fought over number of issues. The relationship became even more strained in early 2005 when the Association elected a new president, Bob Hester. Hester took on an even more aggressive role than his predecessor in asserting the Association's collective bargaining rights.⁶

Prior to Hester's appointment as Chairman, the relationship between the Chief and the Association was such that while they were able to discuss matters, agreements were not really being reached.⁷ Officer Mike Lindgren related one of the Associations first confrontations with Granato, well before Hester's appointment as Chairman. Shortly after his arrival in the fall of 2003, Granato explained to the Association that he planned to implement a new work schedule.⁸ Granato was initially adamant that he could implement the change without completing collective bargaining.⁹ It took the Association a month to a month and a half to convince him that he had to negotiate the work schedule.¹⁰

⁵ Transcript at 194-96.

⁶ Transcript at 198-99.

⁷ See Transcript at 57.

⁸ Transcript at 194-95.

⁹ Transcript at 196.

¹⁰ Transcript at 196.

As Hester characterized the relationship: “Chief Granato, as we would discuss these things and try to look for change or answers, would say, ‘these are the things that we do in Texas and this is why,’ and we didn’t seem to move past that.”¹¹ And as Officer Lindgren related, the subject of the Texas way of doing things came up “probably at every meeting.”¹²

It is not disputed that after Bob Hester became President in early 2005, the relationship turned more contentious. Almost immediately upon his appointment, Hester was subject to an internal investigation.¹³ Hester had gone from a long (26-year) career without ever being subject to an investigation to having two sustained internal investigations during his first year as YPPA Chairman.¹⁴

In August 2004 Granato had ordered one of the Association's members, Brian Dahl, to submit to a random drug test.¹⁵ The Association opposed the drug test largely because it was unilaterally imposed rather than as a part of an agreed back to work order which raised both constitutional and collective bargaining issues.¹⁶ The Association also had some concerns about the existing City drug testing policy and proposed a

¹¹ Transcript at 162.

¹² Transcript at 197.

¹³ Exhibit 7; Transcript at 59.

¹⁴ *Id.*

¹⁵ See Exhibit 11 and PERC Examiner Order in Decision 9062-A PECB.

revised policy to address those concerns. Granato would never sit down with the Association to negotiate over its drug testing proposal.¹⁷ Granato's refusal as well as his unilateral order to impose random testing on Dahl caused the Association to file its February 2005 ULP complaint.¹⁸

Shortly after the Random Drug Testing ULP complaint was filed, the Association indicated a willingness to discuss settling the ULP but also wanted to discuss the underlying issues.¹⁹ The Association's perception of the meeting was substantially different than the Chief's. It never intended to abandon the ULP without having the issues resolved. The Association viewed the Chief as being flip about the complaint, laughing that it was filed untimely and would soon be dismissed.²⁰ But the Complaint was not untimely and it was *not* dismissed. Soon a preliminary ruling was issued,²¹ a hearing examiner was assigned and the matter was set for a hearing.²² *Granato then would have to come before PERC and explain his actions.*

On May 27, the Association and the Chief had scheduled a labor-management meeting. When the discussion turned to pending discipline

¹⁶ Ex. 11.

¹⁷ *Id.*

¹⁸ *Id.* That complaint was sustained in part, dismissed in part and pending before the Commission on cross-appeals by both parties. See PERC Decision 9062-A PECB.

¹⁹ Transcript at 67.

²⁰ *Id.*

²¹ Ex. 8.

cases, the pending case involving Mike Rummel came up. According to the Association, the discussion was both brief and stunning — the Chief told the Association representatives that *because the Union had not dropped the drug testing ULP, he was going to fire Mike Rummel.*²³

Even though the Union’s version of the meeting is well documented, the Chief was later to offer a different and somewhat more convoluted explanation of his statements. But even the Chief’s version includes an admission that he brought up the Union’s failure to drop the ULP in his explanation that he was going to fire Mike Rummel.²⁴ The Chief claimed that he had authority under a “last chance agreement” to fire Rummel and was going to exercise that authority.

The YPPA did not stand down in the face of the Chief’s threats and did not drop the Random Drug Testing ULP. By July 2005 the Chief in fact fired Mike Rummel.²⁵ In his termination letter, the Chief cited two minor violations and the existence of the last chance agreement. His letter made no written reference to the pending drug testing ULP.²⁶

The issues involving Rummel concerned some discipline problems unrelated to the Random Drug Testing ULP that—until the Chief’s

²² Ex. 10.

²³ Transcript at 71, 208.

²⁴ Transcript at 446-51.

²⁵ Exhibit 15.

²⁶ *Id.*

threats—the parties appear to have been addressing. In 2002, Officer Mike Rummel was involved in an off-duty incident involving drinking and driving. As a result he was charged with a DUI but it reduced to and resulted in a plea to a Negligent driving charge.²⁷ As a result of this 2002 off-duty conduct, the Department intended to discipline him. Ultimately, the Association and the City were able to arrive at a “last chance agreement” that returned Rummel to duty on certain conditions.²⁸

By the fall of 2004, Rummel began to have mental health problems which, in turn, led to some further binge drinking.²⁹ These issues further led to his having some off-duty episodes involving a girlfriend. The girlfriend, Stacy Unglesby, worked for the City as a 911 dispatcher. The Police Department believed the squabbles were disrupting Unglesby's work at the 911 center. As a result, Rummel was given an order not to call Unglesby at work.³⁰

Rummel did comply with the directive. On one occasion, however, *in response to a call that Unglesby placed to him*, Rummel did call Unglesby at work.³¹ When the department learned of the phone call, it

²⁷ Transcript at 238.

²⁸ Ex. 17.

²⁹ Exhibit 23.

³⁰ Transcript at 242.

³¹ Transcript at 244.

investigated. The investigation concluded that Rummel had violated the department directive against calling Unglesby at work.³²

Because of the various incidents, the department had a concern about Rummel's mental health. It ordered him to see the department psychologist. That psychologist determined that Rummel was suffering from depression and that his alcohol problems were a result of the depression.³³ He was found fit for duty on condition that he continue his treatment for depression, abstain from alcohol, and that his abstinence from alcohol be monitored through an alcohol test.³⁴

By March 2005, the parties worked out an agreement in principle to return Rummel to work.³⁵ The agreement involved Rummel receiving minor discipline for the phone call incident³⁶ and an agreement that he would be monitored through random alcohol tests as suggested by the psychologist.³⁷ The Chief acknowledged the minor nature of the incident and committed to returning Rummel to duty.³⁸ Before Rummel could be

³² Exhibit 27.

³³ Exhibit 23.

³⁴ Exhibit 23; Transcript at 249-50.

³⁵ Exhibit 4; Transcript at 35-41.

³⁶ Exhibit 4.

³⁷ *Id.*

³⁸ Transcript at 254-55.

returned, however, he suffered an injury involving a broken hand and his return to duty was delayed.³⁹

One night in early April, Rummel went to a nightclub in downtown Yakima. The purpose of the trip was to pick up friends at the club who had consumed too much alcohol and needed a ride home.⁴⁰ When Rummel arrived at the club, he had difficulty making contact with the individuals.⁴¹ He spoke with the bouncers of the club, which was made difficult because of the music blaring from the club.⁴² He attempted to explain that he simply needed to go into the club for a few minutes and pick up these individuals and, having no desire to stay, wanted to be able to make his brief entry without paying the cover charge.⁴³ A brief discussion ensued. According to Rummel, the bouncers had been advised by someone else that he was a police officer, and they asked him to confirm that.⁴⁴ He did by displaying his badge.⁴⁵ He was then allowed entry and left almost immediately.

Later this innocuous entry came to the attention of the department. At some point, a dispute arose as to who mentioned Rummel's status as an

³⁹ Transcript at 254-55.

⁴⁰ Transcript at 255-56.

⁴¹ *Id.* at 257.

⁴² *Id.* at 257-58.

⁴³ *Id.* at 258.

⁴⁴ *Id.* at 259.

⁴⁵ *Id.*

officer first. Although Rummel contended he was asked about his status, some of the bouncers later reported that it was Rummel that mentioned it up first. As a result the Department conducted an investigation into whether Rummel's flashing of the badge was a "gratuity." The investigator assigned assured Rummel and the YPPA representative that this was a minor matter and that he did not think Rummel had done anything wrong.⁴⁶ But as other events developed, Rummel was fired.

After Rummel was fired, the Association promptly filed a ULP. In March 2005, PERC Hearing Examiner Carlos Carrion-Crespo conducted a hearing into the allegations. He concluded that the Chief had retaliated against Rummel and ordered Rummel reinstated.⁴⁷

At the hearing the City contended that the last chance agreement gave it independent authority to fire Rummel. The Examiner rejected this claim, finding that the agreement was invoked *after* the Chief decided to fire Rummel for retaliatory reasons:

Since the employer offered to reinstate Rummel in March 2005, the Examiner infers that the employer did not believe at the time that the violations were serious enough to warrant a discharge under the "last chance employment agreement." The interviewer's assurance that the unauthorized use of the badge in April 2005 was a minor issue supports the inference that the employer did not consider such conduct a violation of the agreement. It was

⁴⁶ Transcript at 261-62.

⁴⁷ Decision 9451-A.

certainly a less serious matter than the domestic violence and insubordination charges filed on December 2004, which could have resulted in an injury to himself or another employee.

But the employer's attitude changed after the following two events which occurred in April 2005:

- The union did not agree to a comprehensive drug testing plan, nor to withdraw the first unfair labor practice complaint as a condition to allow Rummel to resume work;
- The Commission issued a preliminary ruling on the first complaint.

In May 2005, the employer decided to use the agreement to discharge Rummel, and announced it soon after the critical discussion of May 27, 2005.⁴⁸

The City appealed and the Commissioner reversed. The Commission acknowledged that the Chief “expressed frustration” about the Association’s failure to abandon the initial ULP.⁴⁹ The Commission cited testimony that a Captain had “independently recommended” that Rummel be fired.⁵⁰ In fact, the Captain had made a recommendation but *only after meeting Granato*.⁵¹ Nowhere in the Commission Decision did it discuss the statements by the investigating Lieutenant that it was a minor matter and that Rummel had done nothing wrong.

⁴⁸ Corrected Examiner Decision (Decision 9451-A) at 11.

⁴⁹ Commission Decision (Decision 9451-B) at 8.

⁵⁰ *Id.*

⁵¹ Transcript at 314-15.

The Commission struck out two of the Examiner's findings. One of the findings concerned what had occurred at the May 27 meeting in which the status of the initial ULP had been discussed jointly with Rummel's tenure. The Commission made no replacement findings, nor did the Commission make *any* findings as to what occurred at the May 27 meeting.⁵² The Commission then concluded that no unfair labor practice was committed and dismissed the complaint. The Association timely filed a Petition to Superior Court. The Commission Decision was enforced and the Petition dismissed by order of The Honorable Chris Wickham⁵³ This timely appeal followed.

IV. SUMMARY OF ARGUMENT

Due process is at the heart of administrative law. And one of the most important due process rights is the right of a petitioner to a government agency to have *all* the presented issues resolved.

Central to the Association's Petition is its claim that PERC, by striking the facts as found by the Examiner without making its own fact findings, entered a legal conclusion that could only be reached through leaps of logic. In short, because the Commission made no determination

⁵² See Commission Decision.

⁵³ CP 13-16.

about “what happened” there was *no way* it could logically conclude that whatever *did happen* was lawful.

The YPPA witnesses strongly testified that the Chief’s threats were clear and unmistakable. Their testimony was backed by clear and contemporaneous corroborative evidence. The Chief attempted to explain this evidence away but his efforts were at best convoluted and essentially admitted that *some* type of threat was made. The Commission’s written explanation of its conclusions are unclear but it seems to acknowledge that some type of inappropriate statement was made yet entered no formal finding as to exactly what was said. The Commission’s failure is fatal to the legitimacy of its Order.

The YPPA claim is filed under the Public Employees Collective Bargaining Act (PECBA).⁵⁴ Unlawful discrimination under PECBA occurs when the employer deprives an employee of a right or benefit and that denial is based at least in substantial part on a retaliatory motive. When a prima facie case of discrimination is established, the burden of production shifts to the employer to reveal a nondiscriminatory motive for the action. In a mixed motive case (when there may be multiple reasons for the action) the employer is liable unless it can be established that the unlawful motive played *no* substantial role in the action.

In this case, the substantial evidence indicates that the Chief told the YPPA representatives that Rummel was going to be fired because the YPPA would not drop a pending ULP complaint. The YPPA still did not drop the complaint. Rummel was then fired. The reasonable inference is that Rummel was fired because the YPPA did not drop the complaint.

But even if the City's *own version* of May 27 is offered up, it still establishes discrimination. By his own admission, the Chief had indicated to the Union that he wanted the ULP complaint dropped. He also admitted that on May 27 he raised the Union's failure to drop the complaint *during his discussions about Rummel's tenure*.

"Interference" under PECBA occurs whenever an employee "reasonably perceives" an employer statement as a threat even where there is a lack of intent to discriminate. Even if the City could have established that Granato lacked the intent to discriminate, his statements still would have constituted interference under PECBA. The statements were reasonably capable of being perceived and, in fact, were perceived as threats.

⁵⁴ RCW Chapter 41.56.

V. ARGUMENT

A. **This Review of an Administrative Adjudicatory Proceeding is Subject to Review under Administrative Procedures Act (APA) Provisions in RCW 34.05.570.**

This case involves a Petition for Review of an administrative decision in an adjudicative proceeding. As such, it is governed by the review procedures of the APA defined in RCW 34.05.570(3):

Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under *RCW 34.05.425* or *34.12.050* was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating

facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

The standard of judicial review varies as to each of the alleged violations of RCW 34.05.574. The Appellant discusses those relevant standards below in reference to the particular alleged violation. The Superior Court ruling entitled to no deference or presumptions of correctness. As indicated in *Cascade Nursery Services v. Employment Security Department*:⁵⁵ “In reviewing an administrative decision, the appellate court stands in the same position as the Superior Court.”⁵⁶

B. The Public Employment Relations Commission (PERC) Order Contravenes the APA and should be Reversed and Remanded.

RCW 34.05.574(1) defines the judicial role in reviewing an agency action:

(1) In a review under *RCW 34.05.570*, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters

⁵⁵ 71 Wn. App. 23, 29, 856 P.2d 421 (1993), *review denied*, 123 Wn. 2d 1013, 871 P.2d 599 (1994).

⁵⁶ See also *Penick v. Employment Security Department*, 82 Wn.App. 30, 37, 917 P.2d 136 (1996).

within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

If the Court concludes that the facts are clear as a matter of law and that unlawful discrimination did occur as a matter of law, the Court has the discretion to immediately enter an order to that effect. Alternatively, the Court has the discretion to remand to the agency to make required findings.

- 1. The order should be reversed because PERC has failed to decide all issues it was required to decide.**
 - a) Agencies orders which fail to address all issues the agency was required to decide are subject to reversal.**

RCW 34.05.570(3)(f) specifically defines as a basis for judicial relief the failure of an agency to decide “all issues requiring resolution by the agency.”

- b) PERC failed to decide all issues it was required to decide.**
 - i. PERC failed to enter factual findings as to the employer’s motivation making it impossible for it to conclude whether or not the City of Yakima’s discharge of Officer Mike Rummel was unlawful.**

By failing to completing findings on the contested issue, PERC makes it impossible to determine if its legal conclusion is valid. It is a long established principle that administrative agencies *must* make *complete* findings in adjudicative proceedings. As summarized in the Washington Administrative Practice Manual:

Administrative findings of fact are subject to the same requirements as judicial findings. Their purpose is to ensure that the decisionmaker has dealt fully and properly with all of the issues in a matter before deciding it. The findings and conclusions should reveal the decision process.

.....

However, formal findings of fact serve an important function for meaningful judicial review. [Citation omitted.] The absence of clearly stated findings of fact and conclusions of law in an administrative decision or the inclusion of findings within conclusions give the reviewing court the responsibility to determine what facts actually were found by the agency.

The rationale for detailed findings is that meaningful review cannot be had without them. As the State Supreme Court explained in *Weyerhaeuser v. Pierce Co.*:

The purpose of findings of fact is to ensure that the decisionmaker "has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved" and the appellate court "may be fully informed as to the bases of his [or her] decision when it is

made." (Quotation marks and citations omitted.) *In re LaBelle*, 107 Wn.2d 196, 218-19, 728 P.2d 138 (1986). Findings must be made on matters "which establish the existence or nonexistence of determinative factual matters . . . " *In re LaBelle*, at 219. The process used by the decisionmaker should be revealed by findings of fact and conclusions of law.⁵⁷

In this case, the Commission reversed the Examiner's legal conclusion that unlawful discrimination occurred. It vacated his findings from which he built that conclusion. Fatal to the Commission's decision is that *it entered no findings of its own to replace the ones it vacated*. Without such findings, it is *impossible* to know what the Commission determined as to the nature of the Chief's threats or how that motivated his decision to fire Mike Rummel.

Unequivocal testimony was presented that the Chief made threats to discharge Rummel. If true, there can be no question that the City committed an unfair labor practice. But the Commission's decision never finds the testimony is or is not true. Nor does it discuss the Chief's own story which ironically also supports a conclusion that threats were made. The Commission's failure to address these highly material issues is fatal to the validity of its Decision.

⁵⁷ 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994).

The City cited to the Superior Court *Ellerman v. Centerpoint Prepress, Inc.*⁵⁸ for the proposition that the failure to enter findings can be forgiven because it can be assumed that the absence of a finding of fact is the equivalent of a ruling against the party with the burden of proof on that fact. This principle or case has not been cited as valid authority as to administrative agencies subject to the APA nor should it.

Agencies are subject to specific and detailed finding requirements under the APA⁵⁹ and meaningful judicial review cannot be had without such findings. As is discussed below, *this is especially true where the reviewing commission has overturned the findings of the eyewitness hearing examiner.* Where an agency simply strikes essential findings made by the eyewitness hearing examiner without proffering their own explanation on pivotal facts, *there is simply no way to ensure that the agency has, as required by RCW 34.05.464 extended “due regard” to the eyewitness hearing examiner findings.* Where essential facts are hotly contested and those have been resolved by the hearing examiner, it simply will not do to *assume* that a reviewing panel which strikes contested findings is correctly applying the law. Where resolution of the contested facts is necessary to properly apply the law to the facts, it

⁵⁸ 143 Wn.2d 514, 22 P.3d 795 (2001).

⁵⁹ See RCW 34.05.461(4).

violates the APA for an agency to leave and void and then jump to conclusions especially where its reasoning process cannot be ascertained from the face of the revised order.

ii. PERC failed to squarely decide the Association's labor interference charges.

The Association's complaint not only charged "discrimination," it *also* charged "interference." The Examiner did not need to reach the Association's alternative interference theory because he found "derivative" interference as a result of his discrimination conclusion.

Even if the City established no intent to discriminate, it would still be guilty of an unfair labor practice. An interference violation can be found if complainant shows that the employer's conduct could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, deterring them from the pursuit of lawful union activity.⁶⁰ The complainant is *not* required to make a showing of intent or motivation on behalf of the employer, nor is it necessary to show that employees were actually interfered with or coerced.⁶¹ *The key question in an interference*

⁶⁰ *City of Mercer Island*, Decision 1580 (PECB, 1983); *City of Seattle*, Decision 2134 (PECB, 1985); *King County*, Decision 2955 (PECB, 1988).

⁶¹ *City of Olympia*, Decision 1208 (PECB, 1981); *City of Seattle*, Decision 2134 (PECB, 1985); *Metropolitan Park District of Tacoma*, Decision 2272 (PECB, 1986); *Spokane County*, Decision 2674 (PECB, 1987); *City of Seattle*, Decision 2773 (PECB, 1987).

*violation is whether the employees could reasonably perceive the employer conduct to be attempting to interfere with their statutory rights.*⁶²

The Chief raised the ULP in the context of Rummel's job tenure. The Chief's statements were capable of being construed and, in fact, *were construed*, as a threat. Given the context and the subsequent follow-through, taking his statements as a threat was reasonable. Because the statements could be reasonably perceived as a threat to the Association's statutory rights, an interference violation has occurred.

The City argued below that the Commission is free to ignore an interference violation when it has dismissed the discrimination violation. The City argues in support of the Commission's footnote in which it indicates that since it did not find discrimination, it can ignore the interference charge. The Commission has no such discretion and is ignoring its own case law. Discrimination and interference have separate elements and are contained in separate prongs of the statute.⁶³ Frequently PERC has found proof of discrimination lacking yet has sustained parallel allegations of interference. The attached cases are merely two

⁶² *City of Mercer Island, supra.*

⁶³ RCW 41.56.140 (1) versus RCW 41.56.140(3).

examples of this.⁶⁴ True, PERC has dismissed the dual charges *where a common factual element was found not proven*⁶⁵ But to categorically apply the dismissal of one charge to the dismissal of others would involve an utter absence of logic.

iii. Although PERC never apparently relied upon it, it erred by not granting the Association's motion to strike post hearing materials filed by the City.

After losing before the Examiner, the City attempted to supplement the record on appeal by interjecting declarations of witnesses *never subject to cross examination*.⁶⁶ The Association moved in its Reply Brief to strike these improper declarations and the attached papers.⁶⁷ Although PERC never apparently relied upon these papers, it should have preserved the record by granting the Association's request to strike. RCW 34.05.461(4) mandates that adjudicative proceedings be decided strictly on the formal adjudicative record:

Findings of fact shall be based *exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding*. Findings shall be

⁶⁴ See *City of Omak*, Decision 5579-B (PECB), Decision 5580-B (PECB), Decision 5581-B (PECB), Decision 5583-B (PECB), (1998). *City of Mill Creek*, Decision 5699 (PECB). (1996).

⁶⁵ See, e.g., *City of Seattle*, Decision 9439-A (2006) (both interference and discrimination charges dismissed when complainant could not prove she was engaged in protected activity).

⁶⁶ See Administrative Record 804-867.

⁶⁷ See Association Reply Brief at 42-43.

based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

PERC's own agency rules prohibit such pleadings.⁶⁸ In *Towle v. Department of Fish and Wildlife*,⁶⁹ the court confirmed that this statute means what it says — reviewing officers are not permitted to consider evidence not properly admitted into the hearing record. And in *U.S. West v. Utilities and Transportation Commission*,⁷⁰ the State Supreme Court confirmed that the only appropriate action in the face of efforts to interject such documents into the hearing is a ruling to strike.⁷¹ Fundamental due process would require nothing less.

By not addressing the Association's motion to strike improperly presented post hearing "evidence" the Commission failed to address all the issues requiring resolution. It should have addressed the motion and it

⁶⁸ WAC 391-45-270 allows reopening *only* in exceptional circumstances *and not at all on appeal*. WAC 291-445-270 (2) provides: "Once a hearing has been declared closed, it may be reopened only upon the timely motion of a party upon discovery of new evidence which could not with reasonable diligence have been discovered and produced at the hearing."

⁶⁹ 94 Wn.App. 196, 205971 P.2d 591 (1999).

⁷⁰ 134 Wn.2d 48, 72, 949 P.2d 1321 (1997).

⁷¹ See also Washington Administrative Law Manual, supra, §9.06[a].

should have granted it. On remand, it should be directed to strike all post hearing papers filed in violation of RCW 34.05.461(4).

2. The order should be reversed because PERC has erroneously interpreted and applied the law.

a) Agencies orders which erroneously interpret or apply the law are subject to reversal.

RCW 34.05.570(3)(d) specifically allows this Court to grant relief from any agency decision which has “erroneously interpreted or applied the law.”

b) PERC erroneously interpreted and applied the law.

i. Washington law — which PERC has previously applied — requires a finding of unlawful discrimination whenever an employer’s adverse employment action is substantially motivated by anti-union animus.

In the *City of Federal Way*, the Commission set forth the basic elements of a PECBA discrimination charge:

To make out a prima facie case, the complainant claiming unlawful discrimination needs to show: 1) That the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an attempt to do so; 2) that the employee was discriminatorily deprived of some ascertainable right, benefit or status; and 3) that there was a causal connection between the exercise of the legal right and discriminatory action.⁷²

⁷² See Decision 5183-A.

A difficulty often arises where a nondiscriminatory reason has been proffered by the employer. Whereas sometimes the reason may be obviously pretextual, on many other occasions the articulated legitimate reason may, in fact, be a *part* of what was motivating the employer. It then becomes the chore of PERC to sort out the employer's intent in these "mixed motive" cases. *City of Federal Way* clarified how to evaluate mixed motive cases. Prior to *City of Federal Way*, PERC had followed the stricter standards of the NLRB's *Wright Line* decision.⁷³

The Commission's adoption of the "substantial factor" test and rejection of the *Wright Line* test was anticipated because of a pair of 1991 State Supreme Court decisions. The Washington Supreme Court rejected the "but for" standard of causation in two 1991 cases decided the same day—*Wilmot v. Kaiser Aluminum*⁷⁴ and *Allison v. Housing Authority*.⁷⁵ In *Wilmot*, a class of employees alleged that they had been fired because they filed claims for workers' compensation. The court examined the relative merits of the "but for" and "substantial factor" causation tests. The court noted that the "but for" test was under-inclusive because "an employer could clearly contravene the public policy mandate of RCW 51.48.025,

⁷³ 251 NLRB 1083 (1980).

⁷⁴ 118 Wn.2d 46 (1991).

⁷⁵ 118 Wn.2d 79 (1991).

yet not be liable for wrongful discharge." It ultimately determined that the public policy goals of the anti-discrimination statute were best served by the "substantial factor" standard:

The mandate in RCW 51.48.025 is that retaliatory discharge or discrimination founded on an employee's assertion of statutory rights to benefits violates sound public policy. An employer is simply not allowed to discharge employees because of their assertion of their statutory rights. An employer who fires an employee in substantial part because of assertion of those statutory rights must be accountable. . . .⁷⁶

- ii. **PERC failed to properly apply facts found by the Examiner which amply demonstrated anti-union animus was a motivating factor.**

Prior to Hester's appointment as Association Chairman, the relationship between the Chief and the Association was such that while they were able to discuss matters, agreements were not really being reached.⁷⁷ The Association had been frustrated because the Chief had come from a "right to work state" and did not seem to have good grasp of collective bargaining as practiced in Washington State.⁷⁸ It is not disputed that, when Bob Hester became President, the relationship turned more contentious. Almost immediately upon his appointment, Hester was

⁷⁶ *Id.*, at 71.

⁷⁷ *See* Transcript at 57.

⁷⁸ Transcript at 57.

subject to an internal investigation.⁷⁹ *Hester had gone from a long (26-year) career without ever being subject to an investigation to having two sustained internal investigations during his first year as Association Chairman.*⁸⁰

Although the Brian Dahl drug testing situation occurred in late August 2004, the ULP was not actually filed until February 2005, after Hester had taken over as the Chairman.⁸¹ The ULP was discussed at the next labor management meeting. The Association indicated that it was still willing to sit down with the Chief and work out the issues but had to file the complaint to preserve its position.⁸² At that time, the Chief did not appear to be taking the ULP seriously, claiming that it was not going anywhere as it was “untimely” because of some supposed service issue.⁸³ But over time the ULP did not go away, and in fact, later preceded to a hearing.⁸⁴

As time passed the Chief began to seem *increasingly irritated* with the Association culminating in the May 27 threats. As Bob Hester recalled the May 27 meeting, the parties were discussing the status of discipline matters and the subject of Mike Rummel came up. The Chief

⁷⁹ Exhibit 7, Transcript at 59.

⁸⁰ *Id.*

⁸¹ See Exhibit 8.

⁸² Transcript at 67.

⁸³ Transcript at 67-68.

then stated: “We’re going to have to fire Rummel if you don’t drop the ULP.”⁸⁵ Hester recalls being shocked by the statement and seeing that the other Board members were shocked as well.⁸⁶ Immediately after leaving the meeting, the three Board members present discussed how they were shocked at the Chief’s statements.⁸⁷ Mike Lindgren has a nearly identical recollection. He recalls that the Chief “said that since we didn’t drop the ULP, he was going to exercise Rummel’s Last Chance Agreement and then fire him.”⁸⁸ Lindgren also noted that the other board members appeared shocked at the comment.⁸⁹

Contemporaneous records support their recollection. Hester took notes *during* the meeting and those meeting notes reveal a compelling margin entry: “Fire Rummel, Didn’t drop ULP.”⁹⁰ The following day recognizing the seriousness of the issue, Hester sat down and made further

⁸⁴ See Hearing Transcript at Exhibit 11.

⁸⁵ Transcript at 71.

⁸⁶ Transcript at 72-73.

⁸⁷ Transcript at 105-06.

⁸⁸ Transcript at 208.

⁸⁹ *Id.* The third member in attendance. Jay Seeley, freely told at least five individuals of a similar account in the immediate aftermath of the meeting. See Testimony of Hester, Lindgreen, Rummel, Benjamin Hensley and Bruce Rogers. But Seeley, concerned over his status as a probationary Sargeant told a new and conflicting account at the hearing. Yet even his new and revised account conflicted with the Chief’s story. See Transcript at 348-49. He later said he could not remember who he had “talked with about it: and could not even recall his later conversation with Rummel [Transcript at 349, 364] even asking the Association Attorney to “help me out [with] who I talked to.” Transcript at 364. His testimony reviewed as a whole is simply not credible and neither the Examiner or the Commission either credited or commented on it.

⁹⁰ Exhibit 13.

notes of the Chief's comments. Those May 28 notes confirm that during the preceding day Granato had indicated that "he was going to have to terminate Rummel since we (the Association) did not drop the ULP issue."⁹¹

The Chief had a somewhat different version of the meeting but he admitted jointly discussing both the ULP and Rummel's situation. The Chief explained that he thought he had reached an agreement with the Association that the ULP would be dropped and we could return Rummel to work."⁹² He later determined that "they weren't living up to their word when they did not drop the ULP."⁹³ He then explained that, even though (the Association representatives) they had been untruthful, their untruthfulness did not cause him irritation.⁹⁴ He said instead he was merely "disappointed."⁹⁵ He also discussed not "sticking his neck out" in the context of waiting for the Association to come back with language that he thought was going to result in the ULPs going away.⁹⁶ He then added: "We finally got something. You all didn't drop the ULP, that's fine. But then Rummel hurts his hand and then goes and gets in trouble again."⁹⁷

⁹¹ Exhibit 14.

⁹² Transcript at 448.

⁹³ *Id.*

⁹⁴ Transcript at 449.

⁹⁵ *Id.*

⁹⁶ Transcript at 423.

⁹⁷ *Id.*

Most telling though is that when he was then asked if he *told the Association that he was going to fire Rummel if they did not drop the ULP, the Chief never actually directly answered the question.*⁹⁸

Because the Commission failed to enter necessary findings, it is not clear what it thought had occurred. But even the Chief's version would suggest unlawful discrimination had occurred. By not making findings and not engaging in any "substantial factor" analysis, the Commission failed to apply its own case law.

3. The order should be reversed because it is not support by substantial evidence and — contrary to APA mandates — PERC failed to give due regard to the Hearing Examiner's opportunity to observe the witnesses.

a) Agency orders not supported by substantial evidence are subject to reversal.

Under the APA, court review of agency decisionmaking is subject to a "substantial evidence" standard. Under that standard:

Findings of fact must be supported by substantial evidence. *RCW 34.05.570(3)*. Substantial evidence is evidence sufficient to persuade a reasonable person that the declared premise is true. *Albertson's, Inc. v. Employment Sec. Dep't*, 102 Wn. App. 29, 15 P.3d 153 (2000). *Accord DOT v. Inlandboatmen's Union*, 103 Wn. App. 573, 13 P.3d 663 (2000); *Valentine v. Department of Licensing*, 77 Wn. App. 838, 894 P.2d 1352 (1995). Substantial evidence is evidence that would convince an unprejudiced thinking mind of the truth of the declared premise. *Aponte v. Dep't*

⁹⁸ See Transcript at 423.

*of Social & Health Servs., 92 Wn. App. 604, 965 P.2d 626 (1998).*⁹⁹

The decision to be reviewed is the final agency action and, under RCW 34.05.464, the agency has some authority to substitute its judgment in place of the hearing examiner. *But this authority is not unlimited.* The hearing examiner findings are clearly relevant during a court review.¹⁰⁰ An agency does *not* have unfettered discretion to substitute its own findings, *especially when the issues involve witness credibility.*¹⁰¹

In fact, PERC's overreaching to reverse its examiners' findings has specifically been limited by this court. In *PERC v. City of Vancouver*,¹⁰² this Court overturned PERC's revisions of examiner findings. It explained:

Because PERC is entitled to substitute its findings for those of the Examiner, PERC's findings are the relevant findings for appellate review. The Examiner's findings are part of the record, however, and we weigh them along with other opposing evidence against the evidence supporting PERC's decision. While the APA provides that the reviewing agency can substitute its own findings of fact for that of the hearing examiner's where they are supported by substantial evidence, "such substitutions cannot be arbitrary and capricious.

⁹⁹ Washington Administrative Law Practice Manual §9.06[3][a].

¹⁰⁰ Washington Administrative Law Practice Manual §10.05[3].

¹⁰¹ *Id.*

¹⁰² 107 Wn.App. 694, 33 P.2d 74 (2001). [Citations omitted.]

In *City of Vancouver*, this Court evaluated the Examiner's analysis and PERC's analysis and then concluded that PERC had erred when it substituted its findings for the Examiner's. The Court reasoned that PERC was arbitrary and capricious in making its reversal decision when it had not considered "the totality of the circumstances" and had erroneously keyed in on only certain facts in the record to the disregard of others.¹⁰³

- b) RCW 34.05.464(4) specifically mandates reviewing agencies give "due regard" to the Hearing Examiner's opportunity to observe witnesses.**

PERC utterly breached the APA mandates concerning eyewitness testimony. RCW 34.05.461(4) provides:

Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefore, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. *Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified.* Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial

¹⁰³ 107 Wn.App at 709.

order, without further notice, may become a final order.
(Emphasis supplied.)

Under RCW 34.05.464, such findings are subject to further review but that review *must* accord due deference to the opportunity of the hearing examiner to directly observe the witnesses:

The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. *In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.*¹⁰⁴

- c) Substantial evidence in light of the hearing examiners findings does not support a conclusion that anti-union animus was not a factor in the Chief's discharge of Mike Rummel.**

All the above evidence strongly indicates that the union's pursuit of its ULP complaint was a consideration—if not the sole consideration—in the Chief's decision to discharge Rummel. Substantial evidence does not support a conclusion that it was not a factor at all. Even if the last chance agreement and Rummel's conduct played some role in the Chief's

¹⁰⁴ RCW 34.05.464(4). (Emphasis supplied.)

decisionmaking process, his consideration of the pending ULP makes his actions unlawful. The Commission erred by not properly applying the “substantial factor” test.

The Commission’s decision involves leaps of logic that cannot withstand scrutiny. Such scrutiny is complicated by the Commission’s failures to enter complete findings.

The test in this review is *not* the mere “sufficiency” standard appellate courts apply to trial court findings. Instead, the “substantial evidence” standard allows a review of the entire record to assess the logic of the findings and an examination of whether “an unprejudiced thinking mind” would have come to the Commission’s conclusion. It is not enough to argue that some evidence *might* support a given conclusion; *the conclusion must be supported by substantial evidence that a fair minded person would find persuasive.* In this case, a thorough, fair minded and logical review of the entire record would *not* support a conclusion that retaliation did not play *any* substantial role in the discharge decision.

Among the errors in the Commission’s analysis is that apparently it mistakenly believed that the parties had not reached any agreement regarding whether or how Mike Rummel would be subject to an alcohol test upon return to work. In the Commission’s decision, it specifically

claimed that this disagreement delayed Rummel's return to work.¹⁰⁵ But later in the Decision the Commission seems to recognize that there was a previous offer made to return to duty.¹⁰⁶ The Commission apparently was confused by this discrepancy. It seemed not to understand that although it was true that there was some delay as the parties worked out the details for an agreement to allow his return, it is *not* true that the parties had a *continued* disagreement. *The record was uncontroverted that the Association and the City had worked out an agreement that would have permitted Rummel's return.* It was critical to the Examiner's analysis that there was such a mutual understanding: When he reached his conclusion that the Association's intervening pursuit of the Drug Testing ULP aggravated the Chief to the point that he invoked a last chance agreement *he relied upon evidence that the Chief had previously never before intended to invoke that agreement.*

Another error was the Commission's claim that *the Examiner* erred by overlooking that a Captain had "independently recommended" Rummel's discharge. First, it was the *Commission* that was mistaken that the recommendation was independent; this recommendation was only

¹⁰⁵ Commission Decision at 6.

¹⁰⁶ Commission Decision at 8.

made *after* the Captain discussed the matter with the Chief.¹⁰⁷ Second, the Commission missed the much larger point found by the Examiner — that the investigating Lieutenant had already determined that the issue was minor and that Rummel had not really done anything wrong in the second nightclub incident. The Examiner correctly reasoned that if the employer agreed the first offense was minor and did not warrant discharge, then this second offense, which was never really proven, was so trite *as to only be invoked as a reason for discharge by someone looking for a pretext*.

Furthermore, the Commission's consideration of what the Captain did or did not believe was entirely besides the point: The issue is what was affecting the mind *of the Chief*. There was simply no need to delve into what the Captain was thinking. And even if one did one would have to wonder how much his "independent" conclusion was in deference to the angry Chief.

The Commission's criticism of the Examiner's reasoning regarding the employer's treatment of the two charges involved further errors of logic. The Examiner properly reasoned that if the first offense was not serious enough to warrant discharge, then neither could the *less serious* second offense. The Commission disagreed citing that the second offense occurred after the offer to reinstate. But this is entirely beside the point.

¹⁰⁷ Transcript at 314-15.

The real point, and the one the Examiner seemed to comprehend (even if the Commission did not), is that *the employer's argument that any violation, no matter how minor, would require termination simply was untrue and contradicted by their handling of the first offense.*

Substantial evidence supports the Examiner's conclusions but does not support the Commission's. A "reasonable person" would not have leapt to the conclusions that the Commission seemed to have leapt to. Determining how the Commission came to its conclusions is not possible in light of its failure to enter full findings but from what can be ascertained, the Commission's reasoning does not withstand scrutiny.

4. The order should be reversed because for all the foregoing reasons, PERC's actions are arbitrary and capricious.

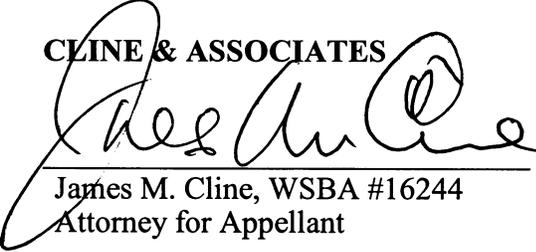
In this case, the Commissioner's decision reflects a series of errors. It failed to make required rulings, it decided on the legality of conduct without determining what the conduct was and, it failed to apply its own established case law. Its reasoning often missed the point and cannot be followed. Cumulatively, these errors make the decision "arbitrary and capricious."

VI. CONCLUSION

For the foregoing reasons, the Commission should be reversed and the matter should be remanded to the Examiner for appropriate findings and orders.

RESPECTFULLY SUBMITTED this 3rd day of December, 2008, at Seattle, Washington.

CLINE & ASSOCIATES



James M. Cline, WSBA #16244
Attorney for Appellant

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CERTIFICATE OF SERVICE

I, Debora G. Pettersen, Legal Assistant at Cline & Associates, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct:

On December 3, 2008, I caused to be filed with the Clerk of Court and served the foregoing Appellant Brief in the foregoing referenced matter in the following manner to the entities below listed.

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5 of 7 DOCUMENTS

SEAN ISAAC, Complainant, DON EDDY, Complainant, MIKE MARSHALL, Complainant, RICHARD WATERS, Complainant, vs. CITY OF OMAK, Respondent

Case 12378-U-96-2937 (PECB), Case 12506-U-96-2967 (PECB), Case 12507-U-96-2968 (PECB), Case 12509-U-96-2970 (PECB)

Public Employment Relations Commission
State of Washington

1998 WA PERC LEXIS 1; Decision 5579-B (PECB), Decision 5580-B (PECB), Decision 5581-B (PECB), Decision 5583-B (PECB)

June 10, 1998

OPINIONBY: MARILYN GLENN SAYAN, Chairperson; SAM KINVILLE, Commissioner; JOSEPH W. DUFFY, Commissioner

OPINION:
[*1] DECISION OF COMMISSION

This case comes before the Commission on a petition for review filed by the complainants, seeking to overturn a decision issued by J. Martin Smith. n1

BACKGROUND

The Bargaining History

These cases concern controversies in the Omak Police Department during a period of time when Ron Bailey was the chief of police, Mikael W. Cramer was the assistant chief of police, and Frank Rogers was the patrol sergeant. Oversight of the police department was provided by a mayor and city council. A "police committee" made up of members of the city council worked with the chief of police on issues of concern, and a "personnel committee" within the city council worked separately on personnel matters.

For many years, police officers were represented for the purpose of collective bargaining by Teamsters Union, Local 760. Officer Sean Isaac served on the negotiating team for the last three collective bargaining contracts. A collective bargaining agreement was in effect between the employer and Local 760 from January 1, 1995 through December 31, 1995. In approximately May of 1995, Isaac filed a grievance concerning a sick leave issue relating to a Labor and Industries [*2] claim. The employer and Local 760 commenced negotiations, but did not reach agreement on a successor contract.

Early in 1996 the Omak Police Guild (OPG) filed a petition for investigation of a question concerning representation with the Commission, seeking to replace Local 760 as exclusive bargaining representative of the police officers. Local 760 disclaimed the unit. A cross-check was conducted, and the OPG was certified as exclusive bargaining representative on May 7, 1996. n2 During the time of the controversies at issue in these cases, the bargaining unit consisted of approximately 16 members, including approximately 12 police officers, the police sergeant, a secretary, a records clerk, and an animal control officer. The police chief and assistant police chief were excluded from the bargaining unit.

The Assigned Car and K-9 Programs

The K-9 Programs -

The employer operated two K-9 programs, one with a "patrol dog", and the other with a "drug dog" that was trained to locate narcotics. Isaac handled the patrol dog; Officer Mike Marshall handled the drug dog. Costs to maintain and insure the dogs were borne by the employer, at least recently. Employer officials had [*3] periodically considered whether to continue the K-9 program.

The Take-Home Car Program -

Under a program instituted in 1992 on the suggestion of Chief Bailey, police officers were allowed to use patrol vehicles for commuting to and from their jobs. Some city council members opposed this program from its onset, and Bailey was required to review its cost/effectiveness each year.

In approximately October of 1994, Isaac moved about 15 miles outside the city limits of Omak. Bailey and city council members closely scrutinized Isaac's move, and drove out to his new house to check the mileage. On October 4, 1994, Isaac was given temporary authorization to use his assigned vehicle for travel to and from his residence. n3 That authorization was "subject to cancellation, review and/or change at any time".

At least as far back as February 24, 1995, officers assigned a department vehicle were generally required to live within a six mile radius of a mid-point in the city of Omak.

Programs Reviews in 1995 -

In approximately June of 1995, Chief Bailey asked Assistant Chief Cramer to review cost and usage of the K-9 programs. It was found that the annual cost of the K-9 program had [*4] increased from \$ 2500 to \$ 7000-\$ 10,000, and that the dogs had not been used as much as expected. In July or August of 1995, Cramer recommended to the chief that the K-9 programs be canceled because the cost did not justify the few callouts of the prior year.

Sean Isaac's Accident and Grievance

On August 21, 1995, Isaac was involved in a two-vehicle accident while driving a patrol vehicle near the city of Okanogan. The accident caused injury to the other driver, and damage estimates to both cars totaled over \$ 10,000. The Okanogan County Sheriff's Office investigated the accident, and concluded Isaac had violated traffic codes. By letter of September 8, 1995, Bailey suspended Isaac from duty for two days, effective October 5 and 6, 1995. Bailey advised Isaac that he would be able to use two days vacation for the two days of suspension.

When Bailey met with Isaac concerning the discipline, Isaac warned Bailey that he would file a grievance. Bailey responded that "It's going to become very personal". On September 12, 1995, Don Eddy, a police officer who was then shop steward for Teamsters Local 760, filed a grievance claiming that the employer used excessive discipline by [*5] suspending Isaac for two days, failed to follow progressive discipline procedures, and failed to properly train its officers. On September 22, 1995, Chief Bailey denied the grievance. By letter of October 18, 1995, the city council upheld the chief's action.

By letter of October 26, 1995, Bailey informed Isaac that he had learned it was an error to allow vacation time for the suspension, and retracted that authorization. After Local 760 wrote to the employer's attorney, the employer changed its position again, and allowed Isaac to use vacation leave for the two days. In a letter to Local 760, the employer stated that use of such leave to replace time for a suspension would not be allowed in the future.

Discontinuation of the Car and K-9 Programs

In the autumn of 1995, Bailey reviewed the advantages and disadvantages of the car program. He found that officers were not able to perform minor repairs or maintenance on a vehicle anymore, because of the Fair Labor Standards Act. Callouts in emergency situations were not extensive, and the only officers responding to callouts had been the chief, assistant chief, and sergeant. Bailey concluded there had been no callouts since the [*6] program started where the responding officer could not have driven safely to the police department parking area and picked up a patrol vehicle before proceeding to the scene. Out of 12 police officers, only three lived in town. The chief showed the Police Committee the distance each officer was traveling, the number of days they worked, and the mileage cost. In October of 1995, Bailey recommended to the police committee that the car program be eliminated.

By a November 29, 1995 letter addressed to Bailey, the Cities Insurance Association of Washington advised, "Nationally lawsuits from dog bites are becoming a major concern of the insurance carrier[s]" regarding K-9 programs. n4 The letter indicated the K-9 program had not cost the city any significant dollars at present, but it was anticipated that would change drastically at the time of the next renewal. The letter encouraged Bailey to reevaluate the usage of the dogs as the liability exposure was becoming more and more difficult to insure, and stated "I would anticipate at our next renewal the carrier will either ask us for a K-9 exclusion, or charge a premium of \$ 10,000 to \$ 15,000 per dog for coverage".

In November of 1995, [*7] Bailey presented a budget proposal to the full city council, and recommended that both the car and the K-9 programs be discontinued.

Bailey's Efforts to "Regain Control"

For some time, Bailey and Cramer routinely sent electronic mail (e-mail) messages to individual police officers, groups of officers, or the entire staff, to communicate various directives. The following are examples of e-mail messages sent to all police officers during the first part of 1995:

- . A January 14, 1995 e-mail reminded staff to keep dishes and food items picked up because "the kitchen was a mess."
- . A January 25, 1995 e-mail directed police officers on night shifts to do bar checks every night in all the bars in town, and to ask bartenders if everything was OK.
- . A January 27, 1995 e-mail directed police officers to not remove anything from Bailey's office without his approval.
- . By a February 14, 1995 e-mail, Cramer provided specific directions to police officers for mailing citations. In that memo, Cramer also told the staff he was finding the office a "pig sty" and asked them to clean up after themselves.
- . A February 24, 1995 message from Cramer to police officers referred to having [*8] provided them with the policy concerning assigned vehicles and mileage/distance restrictions, and advised them that the policy took effect immediately.
- . On April 11, 1995, the chief sent a memo giving police officers direction on the procedure for turning in reports. He stated, "There will be no excuses".
- . Also on April 11, 1995, the chief concluded a directive to officers on picking up and dropping off paperwork with, "There are no exceptions".
- . By an August 28, 1995 e-mail, the chief asked if anyone knew about a television set left on the kitchen table.

At some point during the autumn of 1995, Sergeant Rogers became concerned about an issue he had discussed with the chief many times over the previous two years. Rogers went to Bailey and told him that he had lost control of the department, mainly in relation to Isaac, and that he needed to regain control. Around October of 1995, the chief told Rogers that "it was time". Rogers, who served as the night shift supervisor, told Bailey in October that he was concerned about leaving for a hunting vacation, because the night shift may take advantage of his absence and spend their time in the office playing computer games instead [*9] of working. Bailey advised him not to worry, that he would take care of things.

During Rogers' absence, Bailey sat outside the office in his patrol vehicle and watched while Isaac, Marshall and Police Officer Joe Somday talked for about an hour. Bailey then set up a call, advising dispatch that a citizen locked keys in a car nearby. After Bailey waited 15 minutes, he called dispatch again, and then Somday and Marshall responded. Bailey informed the two officers that the lack of an immediate response should not have occurred, and that he may be testing them again for a better response.

After the grievance was filed concerning the discipline of Isaac, Bailey and Cramer issued more directives by e-mail:

. On October 4, 1995, Cramer reminded the staff of the need to notify the dispatcher, by radio, when going on duty, and of the need to be careful of confidential information relating to gang activity. The memo told the police officers they had done a good job on a murder case.

. On October 17, 1995, Cramer advised officers to stay out of the secretary's work area, stated "if misuse of the computer continues, the computer will be removed . . .", and stated "violation shall be cause [*10] for disciplinary action".

. On October 18, 1995, Cramer banned smoking in front of the building, banned responding to calls outside the city except in certain instances, reminded officers that discussion of departmental activity with other agencies, people or citizens violated department policy, and encouraged more foot patrol. That e-mail ended with a statement that "All of the above are to be considered direct orders from the chief", and "Violation shall be cause for disciplinary action".

. An October 19, 1995 message from Bailey covered "response to calls" and reminded officers that "all calls coming into the police department are important and will be responded to as soon as is possible".

. On October 19, 1995, Cramer sent a memo to all staff stating his office would be locked when he was not on duty, reports were to be placed in an "in" file at his door, and they were not to leave any unapproved reports with the clerical staff.

. In an October 20, 1995 e-mail referred to as the "Woe is me" message, Bailey commented on a "complacent, unprofessional work attitude and habits" among the police officers, and advised them to only blame themselves, to not walk around saying [*11] woe is me. It stated, "The problems of complacent, lazy, slothful work have to end" and "It is time for self evaluations and corrects before any other action has to be taken by the administration".

. An October 26, 1995 memo from Cramer stated, among other things, that "We will start using the officer daily logs until further notice . . . logs shall be turned in daily to my office and shall be complete and accurate . . . by order of the chief".

. In an October 28, 1995 message, Bailey limited the use of the police dogs in bars and restaurants to only occasional use.

. On November 11, 1995, the chief reminded the staff to log their foot patrols and bar checks in calls for service.

. On November 13, 1995, the assistant chief sent a reminder that all logs were to be turned in at the end of each shift.

. On November 13, 1995, the assistant chief sent a notice that cases are not to be left lying around the office or left out at the end of a shift.

Around October or November of 1995, a part-time parking enforcement and community relations employee expressed her concerns to Bailey about work matters. That employee testified in this proceeding that Bailey told her he had a little [*12] bit of "stomping" left to do, and that things would get back to normal soon. Bailey testified he did not recall using the "stomping" term.

On November 28, 1995, Bailey issued an e-mail to the staff, stating that there would no longer be an assigned (take-home) car program, effective January 1, 1996, and on December 1, 1995, Bailey sent a message to the police officers, stating that both of the K-9 programs would also end effective January 1, 1996.

On December 4, 1995, Bailey sent a memo to the mayor, advising that the assigned patrol vehicle program and the K-9 programs would end on December 31, 1995. n5

Bailey held a mandatory staff meeting on December 15, 1995. The chief told the police officers that the disgruntled attitudes and discontent needed to end, that it would be necessary to follow the disciplinary policy and procedure if the problems did not stop, that a final decision had been made on the car and K-9 programs, and that those subjects were not open for discussion.

At a meeting of the city council on December 18, 1995, Isaac presented a history of the K-9 programs, maintained that the benefits outweighed the costs, and asked that the council reconsider its decision [*13] to end the programs. Isaac suggested alternative ways to cut costs. Marshall also spoke in favor of maintaining the programs. Eddy presented a petition supporting the K-9 programs, on which the police officers had gathered 120 signatures. Citizens spoke in favor of maintaining the programs. Bailey spoke in favor of ending the programs. The council agreed to support the decision of the chief to discontinue the K-9 and car programs.

The Complaint Allegations on Appeal

On March 11, 1996, Sean Isaac, Mike Marshall, Don Eddy, Joe Somday and Richard Waters filed a complaint charging unfair labor practices, alleging that the employer imposed policy changes in response to the grievance protesting the suspension of Isaac, that the employer had unlawfully discontinued the take-home car and K-9 programs, and that the reasons given by the employer were pretexts designed to conceal the employer's attempt to undermine Isaac's union activity. The complainants requested restoration of the take-home vehicle and K-9 programs, payment to all officers for personal mileage used during the period in which the car privileges were displaced, and attorney fees and costs.

Examiner J. Martin Smith [*14] held a hearing, during which Somday requested that his complaint be withdrawn. In his decision on the remaining cases issued December 29, 1997, Examiner Smith concluded that the actions of the chief and assistant chief in issuing e-mail messages designed to "stomp on" bargaining unit employees after and in response to the exercise of grievance rights protected by Chapter 41.56 RCW, constituted an unfair labor practice under RCW 41.56.140(1). Examiner Smith held that the complainants failed to sustain their burden of proof as to discrimination in relation to the discontinuation of the assigned cars and K-9 programs.

On January 20, 1998, the employees petitioned for review, and the employer filed a timely cross-petition for review, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

As to the discrimination issues, the complainants argue that the Examiner erred in arriving at the facts, that incorrect facts led to incorrect conclusions, and that the Examiner failed to apply the substantial factor test. The complainants contend that the employer discriminated against them by canceling assigned car and K-9 programs in reprisal for their filing and/or support [*15] of the Isaac grievance. The complainants argue that cancellation of those programs was detrimental to them, and that the employer's reasons for the canceling the programs were pretextual, as evidenced by the timing of their termination. The complainants agree with the Examiner's conclusions as to interference charge, but urge the Commission to overturn the Examiner's decision on the discrimination issue, restore the car and K-9 programs on a bargaining-unit wide basis, and assess the costs of the attorneys fees to the employer.

The employer argues that the Examiner erred in finding an interference violation. It claims that the memos or conduct of the police chief and assistant chief were standard operating procedure. The employer urges the Commission to reverse the Examiner's conclusion as to the interference charge, but made no comment on the discrimination issue.

DISCUSSION

The Legal Standards

Chapter 41.56 RCW prohibits employers from discriminating against public employees who exercise the rights secured by the collective bargaining statute and interfering with the exercise of those rights:

RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES [*16] WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

[Emphasis by bold supplied.]

Enforcement of those statutory rights is through the unfair labor practice provisions of Chapter 41.56 RCW:

**RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER
ENUMERATED. It shall be an unfair labor practice for a public employer:**

- (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
- (2) To control, dominate or interfere with a bargaining representative;**
- (3) To discriminate against a public employee who has filed an unfair labor practice charge;**
- (4) To refuse to engage in collective bargaining.**

[Emphasis by bold supplied.]

Authority to hear, determine and remedy unfair labor practices is vested in the Commission by RCW 41.56.160.

The [*17] Discrimination Allegations

A discrimination violation occurs under Chapter 41.56 RCW when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. See, Educational Service District 114, Decision 4361-A (PECB, 1994) and Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996).

The Supreme Court of the State of Washington has established the standard of proof for "discrimination" cases. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A complainant has the burden to establish a prima facie case of discrimination, including that:

- (1) the employee has participated in protected activity or communicated to the employer an intent to do so; (2) the employee has been deprived of some ascertainable right, benefit or status; and (3) there is a causal connection between those events. If that burden is met, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. The burden remains on the complainant to prove, by a preponderance of [*18] the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that: (1) the reasons given by the employer were pretextual; or (2) union animus was nevertheless a substantial motivating factor behind the employer's action.

The Prima Facie Case - Exercise of Protected Right -

Isaac participated on the negotiating team for the last three contracts, and urged the filing of a grievance on his behalf. Eddy served as the shop steward, was a member of the negotiation team, and filed the grievance protesting the suspension of Isaac. Other officers supported the grievance, and we can infer that their views were well-known to the employer.

The Prima Facie Case - Discriminatory Deprivation -

The discontinuance of the car program deprived several officers of a valuable employer-paid commuting privilege that had been in effect for years. Employees are now required to provide their own transportation to and from the work place. n7

Both components of the K-9 program were eliminated. Both Isaac, who handled the patrol dog, and Marshall, who handled the drug dog, were directly affected by the change: They lost a pay [*19] premium of one hour per day for handling the dogs. There is also evidence in the record that the removal of the dogs had indirect effect on the safety and working conditions of every officer, since the dogs had provided protection and were a public relations aid.

The Uniform Treatment Defense asserted by the employer in its brief to the Examiner is not persuasive. The employer argued that all employees in the bargaining unit were treated equally by being denied continued participation in the take-home car program, and that neither of the two employees involved with the K-9 program were singled out for disparate treatment. In Wellpinit School District, Decision 3625-A (PECB, 1991), the employer's notification to the union that it would no longer deduct union dues from bargaining unit employees' pay, and in announcing that employees who skipped the chain of command would be disciplined or have their contracts non-renewed, supported a finding of anti-union animus and a prima facie case of discrimination. There, as here, adverse actions applied to a group.

The case at hand is also comparable to National Labor Relations Board (NLRB) decisions holding that terminating operations [*20] at one facility and relocating to another for the purpose of retaliating against employees for selecting a union to represent them unlawfully *discriminates against the employees as a group*, in violation of their statutory rights. n8 The NLRB held an employer *discriminated against a group of employees* who walked out of a meeting after authorizing a shop steward to act on their behalf and the steward led a protest at the meeting. n9 An employer can even be held liable for discrimination without a finding of disparate treatment, where a closure and discharge of unit employees occurs and the employer is not even a direct participant to the discrimination. n10

Inherently destructive actions support a finding of discriminatory deprivation in federal precedents. The federal courts have defined that concept, as follows:

Inherently destructive conduct is that conduct which has "far reaching effects which would hinder future bargaining," i.e., that conduct which "creates visible and continuing obstacles to the future exercise of employee rights. . . ." the two types of recognized inherently destructive conduct are actions distinguishing among workers based on participation [*21] (or lack of participation) in a protected activity, and those acts which do not divide the work force, but rather discourage collective bargaining by making it appear as a futile exercise in the eyes of employees.

NLRB v. Centra, Inc., 954 F.2d 366 CA 6, 1992). n11

The need to prove anti-union animus has even been minimized where employer conduct "inherently destructive" of employee interests is found, since such conduct carries with it "unavoidable consequences which the employer not only foresaw but which [it] must have intended" so that the conduct bears "its own indicia of intent". *NLRB v. Centra, Inc.*, *supra*, citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). See, also, *Harvey Manufacturing, Inc.*, 309 NLRB 465 (1992).

The timing of the employer's actions here created visible obstacles to the future exercise of employee rights. Isaac testified that he clearly associated the termination of the car and K-9 programs with the filing of the grievance protesting his suspension. Because of the employer's actions, employees would think twice about [*22] filing a grievance, so that the employer's actions deterred any future filing of grievances. In addition, employees would consider exercise of their rights to be futile. The changes of working conditions imposed by the employer on several employees could be said to be inherently destructive of employer-union relations. If the employer treated employees adversely because of union activity, discrimination could have occurred. The complainants have satisfied this element of their prima facie case.

The Prima Facie Case - Causal Connection -

The record in this case lacks the blatant anti-union animus that has been found in other cases. n12 The record contains no comments by Bailey that can be clearly categorized as anti-union animus, and we give the employer credit for its interest in maintaining the rights of employees to file grievances. n13 The timing of adverse actions in relation to pro-

tected union activity can, however, serve as circumstantial evidence of a causal connection between protected activity and adverse action. n14 The Examiner concluded that these complainants had made out a prima facie case for discrimination in violation of RCW 41.56.140(1), based on the timing [*23] of events. We agree.

Isaac filed a grievance on September 12, 1995. By November 2nd, Bailey had the go-ahead from the police committee to eliminate the K-9 program; on December 1st, Bailey issued his e-mail message stating that both K-9 programs would end January 1, 1996; on December 15th, Bailey issued his memo stating that the assigned vehicle program would end December 31st. The timing and context of the employer's actions here provide a sufficient basis to infer that the removal of the K-9 and car programs could have been designed to deter, diminish, or discourage union activity. n15

Finally, these complainants and other department employees endured threats and harassment by means of the e-mail campaign during the interim between the Isaac grievance and the announcements ending the K-9 and car programs. Even though those messages designed to "stomp on" the employees did not materialize into actual deprivations of rights, status or benefits, they can be considered as retaliation against Isaac's and Eddy's union activity, and of the support by other officers for that union activity. n16

The Employer's Defense -

Since we agree that the complainants made out a prima facie [*24] case of discrimination, we turn to the reasons articulated by the employer for its actions. To avoid finding a violation at this point, there must be legitimate and nonretaliatory reasons for its actions.

In its brief to the Examiner, the employer made the following arguments:

- . It had legitimate business reasons to eliminate the K-9 programs: Costs had increased substantially; the programs were underutilized; there had not been as many callouts as expected; and the liability was a concern.

- . It had legitimate business reasons to terminate the assigned car program: The costs could not be justified any longer, with more officers living outside Omak.

- . The car program and the K-9 program were of concern prior to the Isaac grievance. From the time of his arrival, Bailey opposed the K-9 programs. From the beginning of the take-home car program, it had been a concern to the city council, with the program being approved by only a 4-3 margin. Discussions between Bailey and the police committee about the car program began in the spring or early summer of 1995, and discussions about the viability of the K-9 program had been going on for a couple years prior to Isaac's grievance. On [*25] August 28, 1995, the employer communicated to police staff concerns about the car program and the K-9 programs, and the need to gather statistics and justify costs.

- . There is no basis for a belief that Bailey would choose to retaliate on Isaac's grievance, when he did not do so when Isaac previously filed a grievance in May of 1995, or while Isaac had threatened lawsuits as far back as 1992.

- . An anti-union bias cannot be established, except on the part of the employees.

- . The termination of the programs is justified by paragraph 3.2 of the last collective bargaining agreement. The employer has thus articulated legitimate, nonretaliatory reasons for its actions. The burden remains on the complainants to prove that the employer's actions were in retaliation for the exercise of statutory rights.

Substantial Motivating Factor/Pretext Analysis -

The complainants contend the timing of the grievance and employer actions constitute circumstantial evidence of discrimination, and they appear to argue that some of Bailey's comments should be construed as evidence of anti-union animus. They claim Bailey made it clear, "that he was viewing Isaac's grievance in 'personal' terms"; [*26] that Bailey issued a discipline letter in response to the grievance that accused Isaac of "incompetency, inattention and dereliction of duty"; and that Bailey told Isaac, in rejecting the use of vacation days for the suspension, "When you lead the charge, you are going to get wounded".

The comments cited by the complainants are insufficient to sustain their burden of proof. There is no evidence that any employer official made any remarks deprecating a union, such as were found in Mansfield, supra, where a school super-

intendent exhibited anti-union sentiments from the beginning of his tenure, told a union activist he would break her in order to break the union, and made other anti-union remarks. See, also, Winlock, supra, where the employer vigorously opposed a representation petition, an employer official told a union activist that the mayor was "crazy with this union thing", and the mayor complained to others about "union problems". In the case at hand, the closest Bailey came to showing anti-union animus was his testimony that he thought it would have been much simpler if Isaac accepted the two-day suspension. Even then, that goes at least as much to the substantive outcome [*27] as to the process protected by the collective bargaining statute.

Nor do we find a basis to infer pretext. It appears the employer dealt openly with its employees. The chief and assistant chief maintained open communications through the prolific use of e-mail and memos. We infer from the tone of those messages that they stated what was on their mind. n17 None contain direct anti-union animus. With this record, it is difficult to detect hidden messages or underlying meanings from the employer, such as would provide the basis for an inference of pretext.

We agree with the Examiner that the employer's stated reasons for termination of the K-9 and car programs have not been discredited. The viability of both programs had been under debate and review for years. The cost of both programs had increased, for various reasons, and were expected to increase further in the future; the stated purposes of the programs were no longer being achieved:

. The car program was instituted at the discretion of the chief, but council members had opposed it from the outset. Council members and the chief had continuing concerns because many of the police officers lived away from the center of town. The [*28] record suggests the privilege had been abused and the mileage restriction ignored, providing a basis to infer that the program was not satisfying its original intent, and was out of control. The Examiner noted that the chief's testimony evidenced exasperation with the cars program, but not with the employees or any union activity. We agree.

. There had been changes to the K-9 program since its inception, and changes were not unusual. At its outset, the police officers maintained the dogs. Due to later concerns arising under the Fair Labor Standards Act, the employer began paying the police officers for their care and feeding of the dogs. Changes also occurred as dogs were retired and new dogs were procured, depending a great deal on the temperaments and abilities of the dogs. The chief requested cost figures and the assistant chief provided that information before Isaac's accident and grievance. The projected increase in insurance costs was significant. Like the Examiner, we do not find the employer's business concerns to be pretextual.

We are not persuaded that anti-union animus was a substantial motivating factor in the decision to end the programs. With this record, and without [*29] more anti-union animus, we conclude that the complainants have not met their burden to show that the employer's actions were in reprisal for employee activity protected by Chapter 41.56 RCW, so that the employer has not discriminated against employees in violation of RCW 41.56.140(1).

The Interference Charge

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, but the test for deciding such cases is relatively simple. To establish an interference violation under RCW 41.56.140(1), a complainant need only establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. See, Mansfield School District, supra; Kennewick School District, supra; and cases cited in those decisions. A showing that the employer acted with intent or motivation to interfere is not required. Nor is it necessary to show that the employees concerned were actually interfered with or coerced. n18

In this case, the employer disputes the Examiner's finding of an interference violation concerning the e-mail campaign [*30] of messages and the "stomping" comment.

Timing -

The employer notes that no retaliation is claimed to have occurred on the day the Isaac grievance was filed, or immediately following that grievance. The employer claims that three and one-half months passed between the filing of the

grievance and the alleged actions, and it insinuates that no interference violation should be found because of that time lapse.

The Commission has previously found an interference violation based solely on the timing of events, n19 but the timing does not have to be immediate. In *Mansfield, supra*, an interference violation was found on the basis of protected activity (in the form of testimony at an unfair labor practice hearing) which occurred four months prior to the employer advising the employee that adverse action was being taken against her husband, and five months prior to the employer advising the employee that adverse action was being taken against her. Additionally, the interference violation in that case was based on protected activity in the form of service as a union negotiator ending six to seven months before the adverse actions. In *Kennewick, supra*, an interference violation [*31] was based partially on a reprimand of the employee that occurred three months after the protected activity.

The e-mail messages at issue in this case and the "stomping" comment came well within a time period in which the actions could be perceived by employees as retaliatory.

The "Stomping" Issue -

The employer takes issue with the Examiner's conclusion that e-mail messages were designed to "stomp on" bargaining unit employees in response to the exercise of protected rights.

The Examiner credited the testimony of a union witness who testified that Chief Bailey told her he had more "stomping" to do. Bailey did not acknowledge having used the word "stomping", but his testimony and the record concerning the surrounding circumstances indicate that he was attempting to gain control of the department. n20 We find no error in the Examiner's crediting of the union's witness or of his repetition of her "stomping" term, and we defer to the Examiner's observation of the witnesses. As the Commission has previously noted:

We attach considerable weight to the factual findings and inferences therefrom made by our Examiners. They have had the opportunity to personally observe the [*32] demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commission members are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every appeal, is even more appropriate of a "fact oriented" appeal . .

City of Pasco, Decision 3307-A (PECB, 1990), citing Asotin County Housing Authority, Decision 2471-A (PECB, 1987); Educational Service District 114, Decision 4361-A (PECB, 1994). See, also, Seattle School District, Decision 5237-B (PECB, 1996).

Bailey's comments applied to the entire unit. He did not directly invoke union activity in his comments, and he used the term in a general way, but employees could, considering the record as a whole, reasonably perceive that the "stomping" was in response to their union activities.

Content -

While e-mail messages were commonplace in the normal course of business, the record supports an inference that their number escalated after the Isaac grievance, that they took on a more ominous tone, and that there were more frequent references to disciplinary action. [*33] The record shows that in October of 1995 alone, there were eight memos, two specifically threatening disciplinary action. This is contrasted with the first part of 1995 up to October, where the record contains eight memos in nine months, none suggesting disciplinary action in the event of violations. n21

Employees' Actual Perception is Reasonable -

The employer argues that the employees must establish that they had a reasonable perception that their rights were being interfered with, and that without factual basis for their beliefs, the perception cannot be considered reasonable. Contrary to the employer's contention, however, actual perception of the employees does not need to be shown. See, *Kennewick School District, supra*, and *City of Pasco, supra*. n22 In this case, however, the actual perception is overwhelm-

ing, is reasonable in light of the timing of events, and supports the conclusion reached on the basis of timing. The evidence that the complainants provided at hearing persuades us that employees did in fact perceive that many of the employer's actions were precipitated by Isaac's grievance:

. Officer Eddy, who was the shop steward while Local 760 represented [*34] the employees, testified that there was a consensus among officers that the "woe is me" memo was sent to officers because of Isaac's grievance.

. Eddy also testified that he felt his job security was threatened when Bailey told him he had "overstepped his bounds" at a time when Eddy was faxing a request for information to the union. n23

. Officer Marshall testified that, in his opinion, Bailey put out threatening memos and set up a fake callout after Isaac's grievance was filed, and that Bailey was unhappy because of the Isaac grievance and the support of other officers for that grievance.

. Officer Joseph Somday also testified of a belief that he was targeted because he supported Isaac.

The employer did not significantly rebut the general perception of employees as shown by the complainants, and we conclude that the employees' perception was reasonable in light of the record as a whole.

Employer's Arguments Regarding "Surveillance" -

The employer takes issue with the Examiner's use of the term "surveillance", citing City of Seattle, Decision 3066 (PECB, 1988), n24 and Toutle Lake School District, Decision 2474 (PECB, 1987). n25 We reach the same result, albeit [*35] based on different precedent.

There was no surveillance of union activity here, as was found unlawful in City of Longview, Decision 4702 (PECB, 1994). We are changing paragraph 14 of the Examiner's Findings of Fact to delete reference to creating an impression of surveillance.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

. The City of Omak is a "public employer" within the meaning of RCW 41.56.030(1).

. Sean Isaac was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).

. Don Eddy was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).

. Mike Marshall was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).

. Richard Waters was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).

. Teamsters Union, Local 760, was the [*36] exclusive bargaining representative of law enforcement officers at Omak until May 7, 1996. Fred Meiner was the business representative assigned to represent the bargaining unit at Omak in 1995. Sean Isaac was a member of the union's negotiating team for the latest three contracts. Don Eddy was the shop steward for Local 760 during 1995.

. During 1995, the City of Omak and Local 760 were parties to a collective bargaining agreement. That contract contained a procedure for resolution of grievances. Officers Isaac, Eddy, Marshall, and Waters were all members of the bargaining unit and were covered by that contract during the period relevant to this case.

. A "K-9 Patrol" program was begun in the Omak Police Department at the behest of Sean Isaac, who also served as handler for the dogs used in the program. The first dog used in the program was a friendly and effective patrol dog, but

had to be medically retired. The next dog was more aggressive, caused concerns about potential liability for dog bites, and eventually had to be replaced. The latest dog was less aggressive than the second dog, but an employee of another law enforcement agency nevertheless characterized the animal as [*37] "too hard" and as a risk for serious bites. Additionally, the effectiveness of the K-9 Patrol Program was limited by the fact that Isaac's residence was a substantial distance from Omak.

. A "K-9 Drug Search" program was begun in the Omak Police Department with the support of Chief Bailey. The dog used in that program was effective. After the employee who first served as handler for the dog used in this program left the department, Mike Marshall received training as the handler for the drug dog. The effectiveness of the program was adversely affected by Marshall being on disability leave for a period in 1994 and 1995.

. An "assigned cars program", which allowed some police officers to keep patrol cars at their residences and to use them commuting to and from work, was begun at Omak at the behest of Chief Ron Bailey shortly after his arrival. The program was opposed from its outset by three of the seven members of the Omak City Council, and faced continuing opposition from council members in connection with the adoption of budgets for 1993 through 1995. Cost savings to the employer were not demonstrated for any of those years, and the City Council remained divided as to the wisdom [*38] of retaining the cars program.

. In February of 1995, the "assigned cars program" was revised to clearly indicate that it was limited to employees who resided within six miles of a fixed point in downtown Omak, and to clearly indicate that the continuation of the program was at the discretion of the chief of police. An exception was made for employees who served as K-9 handlers, so Isaac retained the use of his patrol car for commuting even though he resided more than 6 miles outside of Omak.

. In August of 1995, Isaac was disciplined for his involvement in an automobile accident while on duty.

. In September of 1995, Isaac filed a grievance protesting the discipline imposed upon him in connection with the earlier automobile accident. Eddy represented Isaac in his capacity as shop steward for Local 760.

. From October through November of 1995, Chief Bailey and Assistant Chief Cramer issued a series of e-mail messages to police officers. Unlike previous messages during 1995, some of those messages threatened (and others strongly implied) discipline for noncompliance. The tone of those messages left an impression that the police officers were to remain silent in the face of violations [*39] of their rights under the collective bargaining agreement. Coming so soon after the filing of Isaac's grievance, such messages were reasonably perceived by the employees as related to the exercise of grievance processing rights protected by Chapter 41.56 RCW.

. The chief's recommendation and the resulting Omak City Council action to terminate the "assigned cars program" in November and December of 1995 were consistent with previous criticisms of that program, as well as with estimates of the current and continuing costs of that program. The evidence in this record fails to sustain a conclusion that the elimination of the program was substantially motivated by the employees' exercise of rights protected by Chapter 41.56 RCW.

. The chief's recommendation and the resulting Omak City Council action to terminate the "K-9" programs in November and December of 1995 were consistent with previous concerns about those programs, as well as with concerns about potential liability for dog bites and a current estimate of greatly increased premiums for the employer's liability insurance coverage on the dogs. The evidence in this record fails to sustain a conclusion that the elimination of the [*40] program was substantially motivated by the employees' exercise of rights protected by Chapter 41.56 RCW.

CONCLUSIONS OF LAW

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

. By the actions of the chief of police and assistant chief in issuing e-mail messages designed to "stomp on" bargaining unit employees after and in response to the exercise of grievance rights protected by Chapter 41.56 RCW, the City of Omak has violated RCW 41.56.140(1).

. The complainants have failed to sustain their burden of proof as to their allegation that the employer's discontinuance, in the autumn of 1995, of the "assigned cars program" theretofore applicable to police officers constituted discrimination in violation of RCW 41.56.140(1).

. The complainants have failed to sustain their burden of proof as to their allegation that the employer's discontinuance, in the autumn of 1995, of the "K-9" Patrol Programs theretofore operated with police officers in the bargaining unit constituted discrimination in violation of RCW 41.56.140(1).

Based on the foregoing amended findings of fact and conclusions of law, the Commission [*41] makes the following:

AMENDED ORDER

The City of Omak, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

. Threatening employees with changes of their wages, hours and working conditions in response to their exercise of their right to file and pursue grievances.

. In any other 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.

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

. 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.

. Have the notice required by the preceding paragraph read aloud at a public meeting of [*42] the Omak City Council, and attach a copy of said notice to the official minutes of the meeting where it is read.

. Notify the above-named complainant, in writing, within 30 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.

. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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 the preceding paragraph.

Issued at Olympia, Washington, on the day of ____, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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 [*43] LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT threaten our employees with changes of their wages, hours and working conditions of its employees in response to their exercise of their right to file and pursue grievances.

WE WILL NOT, in any other manner, interfere with, restrain or coerce our employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

WE WILL have this notice read aloud at a public meeting of the Omak City Council, and will attach a copy of this notice to the official minutes of the meeting where it is read.

DATED: ____

CITY OF OMAK

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 issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: [*44] (360) 753-3444.

FOOTNOTES: Return to Opinion

FOOTNOTES:

n1 City of Omak, Decision 5579-A (PECB, 1997).

n2 Notice is taken of the docket records of the Commission for Case 12315-E-96-2053.

n3 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n4 The letter was sent on Bailey's request.

n5 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n6 The case filed by Officer Somday was closed by City of Omak, Decision 5582-A (PECB, 1997).

n7 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n8 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n9 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n10 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n11 In Centra, inherently destructive conduct was found in the termination of a contract with a company without notification to the union representing the other company's employees, or allowing for negotiations. The employer had deceptively continued operations and treated former employees of the other company as new hires.

n12 See, e.g., Mansfield School District, Decision 5238-A (EDUC, 1996), and City of Winlock, Decision 4784-A (PECB, 1995).

n13 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n14 Winlock, supra; Mansfield, supra; and Kennewick School District, Decision 5632-A (PECB, 1996).

n15 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n16 We defer to the Examiner's use of the word "stomping", and his crediting of the union's witness over the chief's non-denial denial on this point.

[*45]

n17 As noted in the discussion of the interference claim, below, they may sometimes have been too forthright for their own good. That does not, however, prove intent.

n18 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n19 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n20 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n21 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n22 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

n23 The request was addressed to Bailey and Cramer, and concerned documentation used to decide on the elimination of the car and K-9 programs.

n24 An allegation concerning a supervisor's search of an employee's desk was dismissed, because the supervisor had a legitimate business purpose to obtain case file data.

n25 [FOOTNOTE NOT AVAILABLE ON ORIGINAL]

19 of 19 DOCUMENTS

Mill Creek Police Guild v. City of Mill Creek

Decision 5699 (PECB)

Public Employment Relations Commission
State of Washington

1996 WA PERC LEXIS 114; Decision 5699 (PECB)

October 10, 1996

OPINION BY: MARTHA M. NICOLOFF, Examiner**OPINION:****[*1] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

On September 13, 1994, the Mill Creek Police Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the City of Mill Creek (employer) had interfered with and discriminated against police officer Rex Britton in connection with actions arising out of a "fitness for duty" evaluation. On January 23, 1995, the union filed additional allegations, claiming that the employer had interfered with Britton's rights, and had discriminated and retaliated against him for engaging in protected activity and for filing an unfair labor practice complaint. A hearing was held in the matter on March 15 and 16, May 8, 9, 10, and 11, June 7, and November 14, 1995, before Examiner Martha M. Nicoloff. n1 The parties filed post-hearing briefs.

GENERAL BACKGROUND

The city of Mill Creek is located in Snohomish County, Washington. John Klei has been its police chief since 1988. Commander Scott Drown reports directly to Klei, and supervises day shift patrol operations. n2 Bob Crannell, who has been a sergeant since 1989, and Ken Neaville, who became a sergeant [*2] in 1992, supervise swing and graveyard patrol shifts and report to Drown.

Rex Britton began work as a police officer in Mill Creek in about October of 1990, after an 11-year career with the Wyoming State Patrol. Britton has a condition known as "acquired cold urticaria", a hypersensitivity to anything cold. He first experienced the condition while serving in the military, and was medically discharged as a result. By late 1974 or early 1975, the condition was in remission, and remained so until it flared up late in 1993. In mid-November 1993, at his physician's behest, Britton took a medical leave of absence from employment. His physician released him to return to work in February 1994. The employer then sent him to another physician for evaluation. That physician agreed that Britton could return to work, and he did so.

*THE "FITNESS FOR DUTY" ALLEGATIONS**Decision to Send Britton to a Psychologist*

Britton was supervised by each of the shift supervisors at some point during his employment. Neaville supervised him for most of the period germane to this proceeding. n3 During the spring and early summer of 1994, the employer became concerned about Britton's performance. Klei [*3] and Drown conferred about Britton with psychologist David Smith during that period, both by telephone and in person. Klei discussed Smith's input with department supervisors, in which he became aware for the first time of the breadth of the supervisors' concerns. Klei noted that "pieces started coming together" during those discussions, and he decided to refer Britton to Smith for a "fitness for duty" evaluation.

Klei considered a number of issues in making that decision:

Citizen complaints; reports from other employees that Britton had become somewhat "standoffish" since his return from leave of absence; certain lapses by Britton in investigation of accidents or crime scenes; and concerns about Britton's interaction with women. It was Klei's hope that by sending Britton to Smith:

... we could come up with the underlying cause for what we saw as a drop in performance and the change in behavior, and put together a path of correction to bring him back in and improve his performance.

Klei asked Drown and the two sergeants to put into writing the issues about Britton which they had addressed in their discussions. Sergeant Crannell prepared documents dated June 16, July 8, [*4] July 23, and July 24, 1994. Sergeant Neville prepared documents dated June 29 and July 22, 1994, and Commander Drown prepared a memorandum dated July 1, 1994.

In a July 8, 1994 letter to Dr. Smith, Klei officially requested the fitness for duty evaluation: n4

This request is based on my concern that Rex Britton is exhibiting signs of inability to due [*sic*] his job effectively and behavior inconsistent with his years of experience.

The purpose of this evaluation is to determine:

1. Whether Rex Britton presently meets the standards to perform as a Patrol Officer.
2. What long-range issues are involved, if any.
3. Whether there are considerations of which we are unaware which are pertinent to Rex Britton's ability to perform his duties.
4. A prognosis and recommendations regarding Rex Britton's condition as to whether he is fit for duty or not.

I have enclosed for your reference memorandums from the supervisory staff which describe some recent behavior which have [*sic*] lead to my concern. Because it may be relevant, you should also be aware that with in [*sic*] the last year Rex Britton has been off duty for a medical ailment which adversely impacted his ability [*5] to perform this job of Patrol Officer.

Smith also received information about Britton from Larry Davis, the president of the Mill Creek Police Guild, who had shared living quarters with Britton for a short period. n5 Around July 8 or 9, 1994, Drown officially informed Davis that the department had decided to send Britton to Smith.

Informing Britton of Evaluation - On July 9, Drown telephoned Britton at home, and directed him to come to the police department for a meeting. At that meeting, Drown informed Britton that he would be sent for the "fitness for duty" evaluation. Drown told Britton that some concerns about his performance had arisen since Britton returned from disability leave. Britton testified:

They were worried about my previous divorce. They were worried about the problems I'd had with my girlfriend for about a month. They were worried about when a lady backed into me in a parking lot. . . . They were worried about a security on a rape scene that I was doing an interview on. They were worried about an investigation of an accident. They were worried about my disability. . . . And they were concerned about inconsistencies on my initial report. . . . He said [*6] that they couldn't understand how my followups were so good and my initial reports were so bad.

Britton also testified that Drown told him that some officers were concerned about Britton's ability to perform his job because of his cold urticaria. Britton told Drown of his own concerns about that possibility, but testified that Drown was not worried because of Britton's having worked in Wyoming. Britton "objected a little bit" about being sent to the psychologist, and told Drown that the employer had not raised any concerns during his recent performance evaluation. Drown told Britton that he had no option other than to report for the evaluation. n6

Drown recalled telling Britton that he could not advise Britton to contact an attorney, but Britton might wish to do so. Britton recalled that Drown had said "we will not advise you not to seek legal counsel". According to Drown, Britton then told him that he would contact guild president Davis. Drown encouraged him to do so, and advised him that the employer had already informed Davis of the planned examination.

Drown directed Britton to sign an "evaluation understanding" form, which he witnessed. That form noted:

I hereby acknowledge [*7] that at the directive of my Department I am undertaking the present psychological evaluation with the clear understanding that the Department which referred me to Dr. David H. Smith will receive a report based on my responses. Hence, I understand that the usual confidentiality between a psychologist and a client does not exist between Dr. Smith and myself during this evaluation process. The purpose of the evaluation is to help the Department determine my fitness to perform all the duties of a law enforcement officer. I am aware that Dr. Smith may talk with appropriate Department personnel and review agency files to obtain information about my performance or to clarify Department concerns about me. Only the client, the Department in this instance, will receive a copy of any report. I also understand that some or all of this information may be used for purposes of psychological research on law enforcement officers. All information for research purposes will be kept completely anonymous [and] will have no bearing on my tenure in this department. I acknowledge that my failure to cooperate in this Fit-For-Duty Psychological Examination may result in discipline.

The form came from a [*8] protocol established by the Psychological Services Committee of the Washington Association of Sheriffs and Police Chiefs. The employer used the same form when it previously sent another employee for evaluation, but the union and the employer had never discussed the wording of that form.

At some point on or about July 9, Britton spoke to officers of the Mill Creek Police Guild, and asked for the union's assistance. The guild's secretary-treasurer, Jim Deanne, testified that the three voting guild officers decided to hire an attorney on Britton's behalf. At some unspecified point thereafter, Britton was advised that "they [the guild] had retained [attorney] Chris Vick to represent the Guild and me in this issue." n7

Initial Day of Evaluation

Britton had his initial appointment with Dr. Smith on July 11, 1994. n8 Britton recalled spending the entire day there, taking psychological tests and being interviewed by Smith. In a letter dated that same day, Smith wrote to Klei:

Officer Britton completed his fitness-for-duty evaluation this date. The evaluation included 4 hours of directed, clinical interviewing and psychological testing [names of tests omitted] and a review [*9] of file materials provided by you. He was completely cooperative and responsive to the concerns of the evaluation, which he acknowledged. Tests have been scored, reviewed and results discussed with Commander Drown and Officer Britton.

Conclusion: Officer Britton has no major or substantive personality or psychological problems. He can be returned to duty this evening, per schedule, without restriction. A long, more detailed report will be generated this week but I thought you might like to have this brief summary.

[Emphasis by bold and *underlining* in original.]

Just before they left his office, Smith gave Drown and Britton essentially the same information as that contained in the letter to Klei. Britton believed from Smith's remarks that the evaluation had been completed. He worked his previously-scheduled graveyard shift that evening.

The Second Evaluation

At some point after July 11, Smith telephoned Drown and said that he wished to do some additional evaluation of Britton. On July 13, Drown telephoned Britton at his home, and advised Britton of Smith's request. An appointment was made for Britton to have a second interview with Smith on the afternoon [*10] of July 14. n9 Britton noted, "I was really worried, now. The fact that Doctor Smith said I didn't have any problems, and now they want to ask more questions about stuff, I was a little scared."

Contact with Union Attorney - After Drown's call, Britton left a voicemail message for attorney Vick, to the effect that he was very concerned about being ordered to go for further evaluation when he thought he had been told after his evaluation on July 11 that there were no problems. He asked Vick to call him. He recalled leaving a second voicemail message at Vick's office about 8:00 a.m. on July 14. n10

Vick returned Britton's call at approximately 9:00 a.m. to 9:30 a.m. on July 14, at which time they discussed the "evaluation understanding" form. At some unspecified time later on the same day, Britton apparently had another telephone conversation with Vick. During a telephone conversation with Vick's secretary at approximately 2:00 p.m. on the same day, the secretary told Britton that Vick had said to go to the appointment with Smith and to be cooperative, but to give Smith a letter which revoked the evaluation understanding. It appears that Vick's secretary may have dictated the [*11] wording of such a letter to Britton over the telephone, and that Britton typed the letter himself.

Revocation of Waiver - Neither the guild nor Britton reported any concerns about the original waiver to Klei or any other department supervisors, prior to Britton's appointment with Smith. When he arrived for his second evaluation session at approximately 4:00 p.m. on July 14, Britton gave Dr. Smith the following document:

This letter shall serve as revoking any prior releases of information and I specifically revoke any authorization I may have given Dr. Smith to release any more information to my employer than is allowed pursuant [*sic*] to the Americans with Disabilities act [*sic*].

Britton testified that he knew nothing about the Americans With Disabilities Act (ADA) before talking to Vick, and had "no idea" at that point what information could have been released under the terms of the letter he was presenting to Smith.

Britton did not discuss the revocation with Smith, nor did he tell Smith that he was prepared to proceed with the evaluation in some manner. Britton testified that Smith read the note and said "this put a whole new light on everything". He asked [*12] Britton to wait while he telephoned Klei.

Klei was in a meeting with Drown at the time the call came in from Dr. Smith, and the employer officials listened to the call on a speakerphone. Klei asked Smith about the implications of the revocation. He testified that Smith said he could continue with the evaluation, but:

He couldn't give me any of the answers I was looking for, because without the evaluation understanding I was no longer the client. And I said, if indeed that was the case, then I wasn't paying his bill. The conversation went up a little bit. That's when Scott [Drown] stepped in, and he said that he should probably talk to the doctor instead of me before I did something stupid.

Klei acknowledged that he was upset, "... that we'd put together a process and a path and all of a sudden this came in and knocked us off course."

Klei asked Smith to send Britton back to the police department, and also requested that Smith send him a copy of the "revocation" document. Britton testified that Smith told him to go back to see the chief, and that "I would probably be suspended". Klei did not recall making any comment about suspension to Smith.

Smith sent a letter to [*13] Klei by telefacsimile on July 14, which read, in part:

Officer Britton arrived for his 1600 appointment, per his instructions, to complete the interview process of his "fit-for-duty" evaluation. He told me right off that he had consulted an attorney who suggested that he give me a letter revoking his prior "release of information" which he did (copy accompanying).
... Given Officer Britton's reluctance to complete the interview, I am now unable, per state law, to give you any further information about his evaluation. Given the unfinished nature of the evaluation, I am also not able to maintain that he is "fit-for-duty" at this time and hereby revoke my recommendation that he be returned to active patrol duty. ...

Smith's telefacsimile to Klei included the "revocation" document which Britton had given to Smith.

Predisciplinary Notice - Britton returned to the police department after leaving Smith's office on July 14, and observed that Klei, Drown, and City Manager John Simms were meeting in Klei's office. Britton was heading for Klei's office to tell them that he had arrived, when Crannell told him to wait outside, that "they didn't want me inside the Mill Creek Police [*14] Department".

Drown remained with Klei while Klei conferred with the employer's attorney, Scott Missall, by telephone. At some point during those deliberations, Klei drafted a "predisciplinary notice" which he gave to Britton in the early evening of July 14, as follows:

On July 10, 1994 you were ordered to see David H. Smith Ph.D. to participate in a fit for duty evaluation. Part of this evaluation was a follow up consultation on July 14, 1994. On July 10, 1994 you signed an Evaluation Understanding indicating that you were aware that the city needed this information to be able to assess your ability to perform the functions of your job. This waiver also indicated that your failure to comply could result in disciplinary action. At the beginning of the July 14, 1994 consultation, you presented a notice to David H. Smith Ph.D. revoking your permission to release the information from the evaluation to the city. Because of your revocation notice, the city is unable to make this determination. Chapter 04.03 of the Department Policy and Procedure Manual states that you must follow direct orders. Your failure to follow through with the completion of this examination is a failure to [*15] obey a direct order.

You are hereby suspended from duty with pay pending a disciplinary hearing on Tuesday July 19, 1994 at 1000 hours. You are also ordered to turn in your service weapon, badge, commission card, and city issued keys. Further you are ordered to complete the fit for duty evaluation with David Smith Ph.D. at 1500 hours on July 15, 1994 at his office and allow David Smith Ph.D. to release any information needed by the city to evaluate your fitness for duty. Your failure to complete this examination may result in further discipline, up to and including termination.

Klei spent only a few minutes with Britton when that notice was presented, and did not discuss the events of that day with him.

Resolution of Waiver Matter Between Attorneys Employer attorney Missall and guild attorney Vick discussed the "waiver revocation" matter during a telephone conversation some time on July 15, 1994, and were able to resolve that issue. In a letter to Smith dated July 15, 1994, Missall wrote:

At this time, Chief Klei requests that you provide to the City of Mill Creek only as much information as is necessary to answer the question whether Officer Britton is fit for duty, [*16] and/or, if some accommodation is needed on the City's part so that he can be fit for duty, what that accommodation must be. This inquiry is intended to be consistent with the four questions you were previously asked to answer in Chief Klei's letter of July 8, 1994 . . .

The discussions leading to that agreement and letter are not at issue before the Examiner in this proceeding.

Further Fitness for Duty Evaluation - Britton met with Smith on two more occasions. n11 Following those meetings, Smith advised Klei that Britton met the standards to perform as a patrol officer. Smith's undated letter was received by the employer on August 9, 1994, and Klei sent a memorandum on that same day, telling Britton that Smith had cleared him as fit for duty. That letter said, however, that Britton would be required to take certain steps to "improve your performance". Britton was returned to duty on August 10, 1994.

Predisciplinary Meeting

The predisciplinary meeting originally scheduled for July 19, 1994, was postponed by the employer, because Britton's employment status was uncertain pending the results of the fit for duty evaluation. n12

A predisciplinary meeting was held on [*17] August 19, 1994. The employer officials present were Klei, Neaville, and Missall. Britton was accompanied by union official Deanne and a different guild attorney, Brian Fresonke. n13 Klei began to ask questions after people introduced themselves and sat down, and that Missall also asked some questions. Britton testified on direct examination:

Q: [By Mr. Fresonke] Were you ever questioned about any conversations you'd had with Mr. Chris Vick?

A: [By Britton] Yes, I was.

Q: What do you recollect about that questioning?

A: They asked me if I'd had some contact with Chris Vick earlier on, which I'd had.

Q: Did they ask you anything further about your conversations with Chris Vick?

A: They might have, I can't remember.

Q: Was there any discussion or any questions asked of you with respect to why you didn't contact or discuss things with John Klei?

A: Yes.

Q: What do you recollect about what was -- what those questions were?

A: Chief Klei asked me why I -- if I'd considered consulting him first before retaining the Guild attorney and complaining to the Guild about how I felt.

Q: Do you remember anything else that Chief Klei said about that?

A: He asked me why I didn't consult him first.

[*18] Q: Was there -- did I say anything at this point?

A: Yes, you did.

Q: What do you recall me saying?

A: You objected to the question, and you said -- I'm trying to think here -- you objected to the question that Chief Klei asked.

Q: Did you nonetheless answer the question at some point?

A: Yes, I did.

Q: What did you say?

A: I told him that, by the time I got ahold of an attorney I didn't have enough time to consult with the Chief about going down to Doctor Smith.

Britton testified that he felt intimidated, that "I had the distinct feeling the Chief did not want me to go to the Guild with my problems or seek legal advice. . . . I needed to come talk to him rather than go to the Guild."

Britton gave somewhat different testimony on cross-examination, when he testified:

Q: [By Mr. Breskin] You said [Klei] started asking you questions. Tell me what he said to the best of your recollection at that point in time. He was the first person to speak in terms of substance, if I understand it.

A: [By Mr. Britton] I can't remember if it was Chief Klei or the City Attorney.

Q: Okay.

A: But one of them said that just -- you know, he had had some conversation with Chris Vick during this time.

[*19] Q: So that statement could have been made by Mr. Missall?

A: Yes.

Q: Then what was the next thing that happened?

...

A: The Chief asked me if I had ever considered consulting him first before I went to the Guild. . . . Mr. Fresonke objected to that. The Chief asked a question again. Mr. Fresonke objected again. The Chief asked the question, have you ever thought of consulting me first about this issue. Mr. Fresonke objected again. The City Attorney and the Chief both said something at the same time about they needed to know the answer. . . . The Chief then asked the question again. I told him, no, that I didn't have time because I had just recently got ahold of the attorney before I went in to see Doctor Smith.

...

Q: Do you recall Chief Klei starting the session by stating that the disciplinary hearing stemmed from the July 14 visit to Doctor Smith where you revoked your permission to release information to the city?

A: He may have. I don't remember. It has been quite a while.

...

Q: So before any discussion whatever about your visiting an attorney or the Guild, Chief Klei may have opened the session by telling you that the disciplinary hearing stemmed from your revocation of [*20] permission to release information to the city, correct?

A: He may have.

Q: With regard to the comment concerning your contact with the attorney, is it possible that you may have raised the issue about contacting the attorney before anyone on behalf of the city raised that?

A: I may have. I can't remember.

...

Q: Do you recall during the August 19, 1994 meeting, Mr. Britton, that Chief Klei asked you why, if you had a problem with the release of information that you didn't talk to him first about it?

A: Yes.

Q: Do you recall that Chief Klei mentioned that he was concerned about why you had arrived at the doctor's office if you had a problem with the release of information without talking to him about it?

A: I believe he said something like that. It has been quite a while.

Under further cross-examination, Britton testified that he did not believe he had an obligation to communicate with the chief about his concerns. Britton testified that his intent was, "That I didn't care if they evaluated me. I just wanted that whatever information was given back to the city . . . conform with the Americans with Disabilities Act." He reiterated that he did not understand the chief's comments [*21] at the August 19 meeting to be an attempt to encourage him to communicate his concerns, but rather believed that the chief was trying to intimidate him and keep him from exercising his right to speak to the guild and to retain legal representation.

Klei's recollection of the August 19 meeting was that he asked why Britton didn't come to him instead of going to Smith with his concerns. According to Klei, Britton said he had spoken with the attorney early that morning, that he had been very tired at that point, and that he had then gone to bed. Klei testified that he then asked whether Britton would have continued with the evaluation if Smith had been prepared to proceed.

Q: [By Mr. Breskin] Why did you want to know that?

A: [By Mr. Klei] Because I was looking for his intent. I mean, was it his intent to go down there and disobey the direct order, or was his intent to actually go through with it and Doctor Smith is the one who screwed it up and decided not to continue the evaluation process.

Q: Okay. Why would that have made any difference in your consideration?

A: Well, because if his intent was to not follow through with the direct order, then that would have substantiated the [*22] charge of failure to obey a direct order. But if his intent was different than that and that was just the outcome of it, then it would cause -- would give me different evidence on whether or not there was a violation of a policy and procedure or not.

Notes which Klei wrote shortly after the meeting ended were identified as an exhibit in this record, but the employer never moved that they be admitted into evidence.

Neaville's recollection of the predisciplinary meeting was as follows:

Q: [By Mr. Breskin] . . . Can you relate what occurred from your observations there?

A: [By Mr. Neaville] Basically what occurred is, Officer Britton was present. I believe another Guild member, Officer Jim Deanne, was present -- Chief Klei, and myself, and possibly some other members. I did not keep notes during that meeting. And it basically came down to, Chief Klei asked why Mr. Britton didn't keep his appointment, there at the meeting.

Q: Keep his appointment with Doctor Smith?

A: Correct.

Q: Okay. And what occurred then?

A: Basically I think there was a side bar with Officer Britton and Mr. Fresonke, and then there was just a brief response. Like I say, I didn't keep notes. I believe Officer [*23] Britton's response was either "I don't know," or "I'm not sure."

Deanne's sole function at the meeting was to take notes on behalf of the guild. While he testified that his notes were an effort to make a record of what was said at the meeting "in a manner which would allow for recall at a later time", he had virtually no independent recollection of what occurred at that meeting. He did recall that the primary participants in the discussion were Klei, Britton and the two attorneys. His impression of the meeting was that the employer was concerned that Britton had been ordered to report to Smith, but essentially had not done so because of the revocation. Deanne thought that Klei's demeanor was "normal demeanor for the Chief", but that he was upset that Britton hadn't dealt directly with him.

Deanne's contemporaneous notes first list the meeting attendees and then continue:

JK [Klei]: Stems from the visit to Smith. Rex revoked permission to release info to city.

RB [Britton]: Rex consulted with atty. Drafted note to Smith. Told by Smith he would be suspended.

JK: What happened on arrival to Drs office, what happened next?

RB: Smith Scott said city would not recommend getting [*24] atty. n14 Went 2d time & gave Dr. note. Smith said "changes things." [illegible] to talk to your chief right away, probably be suspended.

JK: If Smith wanted you to continue would you.

RB: On advice of atty yes, under protest

JK: After signing under protest would you?

RB: Yes.

SCOTT: Clarification re: scope of waiver letter of 7/15/94 from Scott Missal [sic]. SM [Missall]: Did speak w Chris Vick in July re ADA problems

SCOTT BF: Objection not relevant ADA.

JK: Why didn't you consult me?

SCOTT BF: What order did RB disobey? (to JK)

SM: Clarification of JK's?

RB: On advice of atty

JK: Never occurred to you to consult me first?

RB: [illegible] short warning, was contacted early a.m.

The indicated alterations to Deanne's notes occurred at some point subsequent to their original writing. n15

Deanne's notes record another exchange concerning the exact nature of the charge against Britton:

[illegible as to speaker]: What is charge?

JK: Failure to go to Dr. and be evaluated [illegible as to speaker]: What facts alleged

SM: Fundamentally RB was ordered to go to Smith, RB didn't.

It is clear that there was also some discussion about obtaining documents and the expected timing [*25] of the chief's response to the meeting.

Discipline Imposed

On August 29, 1994, Klei personally delivered a notice of written reprimand to Britton. The notice began with a recitation of the chronology surrounding the fitness for duty evaluation. It continued:

Information from the predisciplinary meeting and investigation indicates the following:

- * You were ordered to go and participate in a fit for duty evaluation with David Smith Ph.D. and did complete one evaluation session.
 - * You were ready and willing to follow through with the second evaluation meeting provided that David Smith Ph.D. complied with ADA requirements.
 - * You also were willing to sign a second waiver, under protest, and proceed with the evaluation.
 - * Neither of these options were communicated by you to David Smith Ph.D.
 - * David Smith Ph.D. terminated the evaluation session and directed you to return to city hall. You did so.
 - * The notice which you delivered to David Smith Ph.D. before the second evaluation session was ambiguous, internally contradictory, and poorly written. Thus the notice failed to communicate your willingness to continue with the evaluation provided that your rights under the ADA were [*26] satisfied.
 - * David Smith Ph.D. appears to have acted very conservatively in this situation when he canceled the interview session. However, that reaction is understandable because the ADA is new and complex legislation, and has not yet been extensively tested in or interpreted by the courts. Attorneys are struggling with the meaning and consistent application of the law. Particularly untested is the interplay of fitness for duty evaluation and privacy requirements of the ADA.
- ... These facts lead to the conclusion that you exercised poor judgement by not clearly stating your concerns to David Smith Ph.D. and by not attempting to resolve your concerns directly with your superiors. Your poor judgement lead [sic] to a "crisis situation" upon delivery of your revocation notice, resulting in significant waste of departmental resources, imposing hardships on other personnel required to cover for your absence, and interference with other criminal justice agencies. Given David Smith's inability to timely evaluate you, the city had little choice but to place you on administrative leave until all the issues

were resolved. I hereby find that you displayed poor judgement and communication [*27] abilities that negatively impacted the operations of the Police Department.

Klei testified that, after hearing Britton's side of the story at the predisciplinary meeting:

I realized that while technically he probably violated or failed to obey a direct order, by the spirit of that direct order, no, that he had some issues with it. And if he had brought the issues to me, they could have been resolved, which they were, with a short phone call between two attorneys afterwards. . . . The conclusion was he used poor judgment.

Klei also noted:

If he would have communicated directly with me, if he would have come to me after he found out or after he had that language for that revocation and said, Chief, I have a problem with the meeting that you've scheduled me for at 4:00 o'clock today I'm scheduled to attend, we could have worked it out. He would have never had to be removed from duty. He wouldn't have had to sit home for a month on city pay. We wouldn't have had to realign work schedules. We wouldn't have had to delay cases in prosecution. And he would have continued working. Smith would not have pulled his okay to go to work.

This was offered to explain the variance [*28] from the predisciplinary notice, which had accused Britton of failure to follow a direct order.

Britton testified about his reaction to discipline being imposed for the exercise of poor judgment, as follows:

I was upset. Really confused because, except for discipline, it was not what we talked about in the predisciplinary meeting. I was being accused of something here that the Chief here on his conclusions said that I'd exercised poor judgment by not going to my supervisor. I thought this was trying [*sic*] intimidate me into the next time I had any concerns I'd need to go to my supervisors first regardless of what it was over. I felt that the whole thing was derogatory towards me, and I don't think that I deserved it.

On cross-examination, Britton testified that he had no facts which would lead him to believe that Klei's conclusions about poor judgment were based on anything other than the confusion which resulted from Britton's revocation of the original waiver. Britton testified that he disagreed with Klei's characterization that he had failed to communicate; he believed "I didn't fail to communicate. I wasn't asked to continue."

Britton recalled that Klei said the [*29] matter was concluded when the chief gave him the reprimand, and that Klei also made some comments to the effect that the evaluation had been completed, that they didn't find anything wrong, and that they hadn't expected to. Britton also recalled a few comments on his part about the "process of what had happened", including saying that he didn't think that he deserved the discipline, and was bitter about it. n16 The reprimand was placed in Britton's personnel file.

Discussion

The City of Mill Creek and its employees are subject to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which includes the following provisions:

RCW 41.56.040 *Right of employees to organize and designate representatives without interference.* No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

* * *

RCW 41.56.140 *Unfair labor practices for public employer* [*30] *enumerated.* It shall be an unfair labor practice for a public employer:

- (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
- (2) To control, dominate or interfere with a bargaining representative;
- (3) To discriminate against a public employee who has filed an unfair labor practice charge;
- (4) To refuse to engage in collective bargaining.

It has long been settled law that motive is not a critical element in making determinations of employer interference with employees' statutory rights in violation of RCW 41.56.140(1). *City of Bremerton*, Decision 2994 (PECB, 1988); *City of Seattle*, Decision 3066, 3066-A (PECB, 1989); *Kitsap County Fire District 7*, Decision 3105 (PECB, 1989); *City of Longview*, Decision 4702 (PECB, 1994). Nor does finding a violation turn on the success or failure of the action. The test is whether the employer's conduct may reasonably be said to interfere with the free exercise of employee rights. Commission precedent on this general proposition is consistent with decisions by the National Labor Relations Board (NLRB) under the similar "interference" provision found [*31] in Section 8(a)(1) of the National Labor Relations Act.

The Commission adopted a new standard in 1994 for determining whether an employee has been discriminated against for the exercise of rights guaranteed by Chapter 41.56 RCW. The standard adopted in *Educational Service District 114*, Decision 4631-A (PECB, 1994) and *City of Federal Way*, Decisions 4088-B and 4495-A (PECB, 1994) is based on decisions by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991), and applies whether the matter is a "mixed motive" or a "pre-text" case. In delineating its new position, the Commission noted:

Under the Wilmot/Allison test, the first step in the processing of a "discrimination" claim is for the injured party to make out a prima facie case showing retaliat[ion]. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
2. That he or she was discriminated against;
3. That there was a causal connection between the exercise of the legal [*32] right and the discriminatory action.

If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee. . . .

While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions.

. . . the employee may respond to an employer's defense in one of two ways:

1. By showing that the employer's reason is pretextual; or

2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Educational Service District 114, supra.

In *Port of Tacoma*, Decision 4626-A and 4627-A (PECB, 1995), the Commission noted that a discrimination violation requires a showing that an employee was deprived of "some ascertainable right, benefit, or status". See, also, *Mansfield School District*, Decision 5238-A and 5239-A (EDUC, 1996).

The Predisciplinary Meeting - [*33] The guild alleges that the employer violated RCW 41.56.140(1) by Klei's questioning Britton at the predisciplinary meeting, and asserts that Britton reasonably perceived the questions to be a threat. It also claims that Klei's testimony regarding the meeting was fabricated after the unfair labor practice complaint was filed, and was belied by other evidence.

The employer asserts that the record regarding the predisciplinary meeting, including testimony from guild witnesses, establishes that Klei's questions went to Britton's reasons for not raising his concerns about the release form with Klei before he went to the second appointment with Smith. In addition, the employer argues that no rights secured under Chapter 41.56 RCW were at issue in Britton's contact with Vick or in revoking the release, and that the allegation with respect to this issue is based on the coincidence that Vick was "on the guild's payroll", when the facts show that Vick was acting as Britton's personal attorney concerned with his ADA rights.

The burden of proving an allegation of unlawful interference rests with the complaining party, and must be established by a preponderance of the evidence. *Lyle School* [*34] *District*, Decision 2736 (PECB, 1987); *Bellingham Housing Authority*, Decision 2335 (PECB, 1985); *City of Pasco*, Decision 3804-A (PECB, 1992), and citations therein. The Commission has found interference violations where an employer created the impression of surveillance [*City of Westport*, Decision 1194 (PECB, 1981); *Town of Granite Falls*, Decision 2692 (PECB, 1987)], where an employer asked what amounted to questions regarding union bargaining positions during the course of a promotional interview [*Kitsap County Fire District 7, supra*; *Port of Tacoma*, Decision 4626-A and 4627-A (1995)], and where an employer interfered with grievance processing *Valley General Hospital*, Decision 1195-A (PECB, 1980); *City of Seattle*, Decision 3429 (PECB, 1990); *Clallam Transit System*, Decision 4597 (PECB, 1994).

With respect to the interrogation of employees (particularly as it relates to union sympathies in a representation setting), the NLRB standard has fluctuated. Its most recent position requires an evaluation of all of the circumstances surrounding an interrogation, including the background, the nature of the information sought, the identity of the questioner, [*35] and the place of interrogation. *Rossmore House*, 269 NLRB 198 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 131 (1985); *Emery Worldwide*, 309 NLRB 19 (1992). The Courts have tended to apply a slightly different approach, but one which also considers the specific circumstances in making a determination as to whether interference has occurred. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990); *Midland Transportation Co. v NLRB*, 962 F.2d 1323 (8th Cir. 1992).

Whether an interference violation occurred in the course of the predisciplinary meeting turns on the specific wording of Klei's questions of Britton. If the complainant were to prove that Klei asked why Britton did not contact him before he contacted the guild, there is no question that it would prevail on the interference allegation under Commission precedent. The complainant did not, however, meet its burden.

The record regarding the wording of the questions themselves does not clearly indicate precisely what was said. Britton first testified, on both direct and cross-examination, [*36] that Klei asked why Britton did not consult him before talking to the guild or its attorney. Britton's further testimony during both direct and cross reflects that Klei said "have you thought of contacting me first", or words to that effect, without any reference to the guild or guild attorney. Klei's testimony was that he questioned why Britton didn't come to him after he knew he had a problem with the release, that is, after he spoke to the attorney. Deanne's notes reflect Klei saying "why didn't you consult me?", but Deanne himself could recall no specifics. Neville recalled only that Klei asked Britton why he didn't keep his appointment with Smith.

In a situation such as this, where the participants recall different versions of the conversation, and where it does not appear any are being deliberately deceptive, the Examiner must look to other clues in the record which might reveal what actually occurred. In this case, the primary clue lies in Britton's answer to the contested question. Deanne's notes and testimony by Britton and Klei all indicate that Britton responded that he did not contact Klei because by the time he had talked to Vick, there was not enough time to talk [*37] to Klei before he went to his evaluation appointment. Further support that Klei's question concerned Britton's failure to contact the chief after talking to Vick is found in Deanne's notes, which indicate that Britton at one point apparently responded to Klei's "why didn't you consult me?" by saying "on advice of atty". n18 Logic dictates that the answer to a question about consulting the chief before consulting an attorney would not be "I didn't have time to consult you after I consulted the attorney." Britton's answer makes sense only in response to questioning about why he did not consult his employer after he had talked to the guild attorney and knew he had a problem with the waiver. n19

The Examiner does not find the chief's questioning should reasonably be perceived as interfering with Britton's right to contact his bargaining representative or its legal counsel. n20

Imposition of Discipline - The guild alleges that the discipline issued Britton constituted both interference with and discrimination against Britton in violation of RCW 41.56.140(1). It claims that it has made out a prima facie case of discrimination with respect to that discipline, and [*38] that any nondiscriminatory reasons given for the discipline are pretextual. The employer again argues that the only rights which Britton sought to protect were those under the ADA, not rights under Chapter 41.56 RCW, and that there is no evidence that the chief desired to interfere with any such rights. With respect to the retaliation allegation, the employer asserts that Britton was at most asserting an ADA right in revoking his prior release without advising the employer, so that the first element of the retaliation test has not been met. The employer asserts that the retaliation charge cannot be sustained, because Klei's discipline of Britton was motivated by the problems which resulted from Britton's actions. It also claims that no adverse employment action exists, because the chief ultimately withdrew the disciplinary notice.

The Interference Allegation - Because the complainant did not sustain its burden of proving that Klei actually asked the offensive questions which were alleged, it cannot be said that the employer's discipline of Britton was based on improper questions. The wording of the discipline notice gives rise to some concerns, however.

When Klei issued the [*39] discipline, he included the following statement in the document:

- * The notice which you delivered to David Smith Ph.D. before the second evaluation session was ambiguous, internally contradictory, and poorly written. Thus the notice failed to communicate your willingness to continue with the evaluation provided that your rights under the ADA were satisfied.
- * David Smith . . . appears to have acted very conservatively . . . when he canceled the interview session. However, that reaction is understandable because the ADA is new and complex legislation . . . Attorneys are struggling with the meaning and consistent application of the law.
- . . . These facts lead to the conclusion that you exercised poor judgement by not clearly stating your concerns to David Smith . . .

An interference violation was found in *City of Seattle*, Decision 2773 (PECB, 1987), when that employer's standard predisciplinary memo could reasonably have been interpreted by an employee to preclude having union representation. That decision noted:

- [The employee] was advised in a standard form disciplinary memo that "ou may have an attorney or some other representative assist you at your own expense."
- [*40] . . . Referencing an attorney as a possible representative does not, on its face, exclude union representation. Some union representatives may be attorneys, or a union may retain an attorney to represent employees in processing grievances. . . .

On the other hand, the employer's form letter language is so general as to be capable of carrying the implications imputed by the union. [The employee] was, in fact, confused by the language. The record shows that she had earlier been advised by a supervisor to seek union assistance. The letter from the department head makes no reference to the possibility of union representation. The phrase "at your own expense" only tends to add to the potential for employee confusion. . . . an employee could reasonably imply that the department head was suggesting that someone other than the union should be representing them.

However intended, it is concluded that the employer's incomplete statement of rights could reasonably have been taken by [the employee] in a manner which interfered with her exercise of right to representation under Chapter 41.56 RCW, and so violated RCW 41.56.140(1).

When he issued the reprimand in this matter, Klei was aware that [*41] Britton had consulted his exclusive bargaining representative, and that Britton was acting on advice from the attorney who represents the union when he reported to Smith on July 14 and gave him the revocation document. The comments in the reprimand that the waiver revocation notice (based on Vick's advice) "failed to communicate", and that Britton himself exercised poor judgment by "not clearly stating his concerns", cross the line. This is particularly so, when those comments are coupled with the employer's willingness to excuse Smith's actions because they resulted from "understandable" confusion about the ADA. The employer's reprimand so intertwines Britton's actions at Smith's office with his protected quest for union assistance, that Britton could reasonably have believed that the employer was attempting to interfere with his rights. Regardless of its intent, and even though the employer was correct that the revocation document was "ambiguous, internally inconsistent, and poorly written", the aggregate of the comments could reasonably have been interpreted by Britton to be an attempt to interfere with his exercise of a right to representation, and therefore violated RCW 41.56.140(1).

[*42]

The Discrimination Allegation - The employer argues that Britton's contact with his exclusive bargaining representative and attorney Vick are outside the protection of Chapter 41.56 RCW, because Vick's advice had to do with Britton's rights under the ADA. The Examiner does not agree. As an exclusive bargaining representative under the statute, the Mill Creek Police Guild has a right and obligation to represent bargaining unit "employees in their employment relations with employers." RCW 41.56.030(4). Nothing is closer to the heart of the employment relationship than the retention of one's job. Britton had reason to contact the guild when he learned he was to be sent for a "fit for duty" evaluation. He had even more reason to do so when, after thinking the evaluation was completed with a positive result, he was told to report for additional questions.

Uncontroverted testimony by both Britton and Deanne leaves no doubt that Vick was acting as the guild's attorney, rather than as Britton's personal attorney, at the time Britton contacted him. The guild clearly authorized the contact, and paid Vick's bill. The employer would have the determination as to whether contacts are protected [*43] activity depend on the nature of the advice given by an attorney, but such an approach would land the Commission squarely within the forbidden territory of privileged communications between bargaining representative and employee. *Port of Tacoma, supra*. The fact that part of Vick's advice may have involved rights under the ADA does not mean that the contact itself was outside the protection of Chapter 41.56 RCW.

The Examiner still does not conclude that the employer discriminated against Britton in issuing the warning document, because the union has not sustained its burden of proof on the question of intent. Klei credibly testified that considerable confusion and cost to the police department resulted from having to place Britton on administrative leave after Dr. Smith withdrew his "fit for duty" assessment. n21 The chief also credibly explained that the cost and confusion might have been avoided by a postponement of Britton's appointment with the psychologist, if Britton had notified the employer of the issues between talking to Vick and appearing at Smith's office. Although the employer was willing to excuse Smith while unwilling to completely excuse Britton for the results [*44] of that appointment, Klei also credibly testified that his questions as to Britton's intentions upon reporting to Smith were meant to determine Smith's role in the matter, as well as to determine Britton's perspective. The record does not support a finding that the employer intended to discriminate or retaliate against Britton in issuing the reprimand. The question of whether there was "just cause" for the discipline is not before the Examiner.

THE "GRIEVANCE" AND "PERSONNEL FILE" ALLEGATIONS

The Filing of the Grievance

On September 9, 1994, Britton filed a grievance contending that the employer lacked cause to discipline him. He requested that the reprimand and any references to it be removed from his personnel file, and that the employer provide a written acknowledgement that it had no cause to discipline him. Although the grievance document was signed only by Britton, it was prepared by Fresonke in the course of a meeting with Britton. The reprimand was listed as an attachment, but was not actually attached to the grievance.

The grievance was filed with Drown, and noted that Neaville was not on duty that day. Britton did not discuss the grievance with Neaville before [*45] filing it, because "he was unavailable". He also did not believe that he needed to talk to Neaville or to any other supervisor before filing a grievance. n22

The chief and Drown discussed the grievance within a day or two after it was filed. Klei told Drown to respond to the grievance, because it had been filed with him. Drown noted that Klei told him to do whatever he thought was appropriate. Klei did not discuss the grievance with Neaville, n23 nor did he ask Drown to tell Neaville to discuss with Britton the necessity of talking to his supervisor before filing a grievance. Drown recalled telling Neaville that he might want to talk to Britton about not having discussed his concerns with Neaville before filing his grievance.

Performance Expectations Plan

Concurrent with the preparation and filing of the grievance, the employer had begun developing a plan by which it would, in the words of the reprimand given to Britton, establish "performance goals and an evaluation period on which to address your deficiencies in communications as well as other areas delineated by David Smith's report and your supervisors". Klei had given Smith's report to Drown, and directed him to "put [*46] together a method of addressing these issues in Rex's performance". Klei directed that Britton be involved in formulating that plan, because "it had to work for him". Drown and Neaville subsequently prepared a "performance expectations" memorandum. n24

The completed plan, dated September 6, 1994, included three areas of "concern", with suggested methods for correction:

Inconsistent communication, report writing/data entry, and failing to follow up on investigative leads. The plan noted that Britton and his supervisor would meet weekly to discuss "needed improvement and successes", and that a written evaluation of Britton's progress would be completed monthly over the following six months. Britton recalled feeling concerned when he received the performance plan:

I was thinking that they're still trying to intimidate me, trying to punish me for going to the Guild, for exercising my rights. I didn't know if these things were true or not. I had seen nothing from the Doctor or from anybody else saying that this stuff that was in the performance expectation was actually valid concerns.

At some point presumably after September 6, the monthly written evaluations referenced in [*47] the plan became weekly. Neaville could not recall precisely how that change occurred; he thought that he may have spoken with Drown and "we agreed, a weekly may be appropriate".

The Performance Plan Meetings - Neaville held his first "performance plan" meeting with Britton on September 10, 1994, at some time after being told by Drown that Britton had filed a grievance. Neaville reported the results of that meeting to Klei and Drown in a computer "e-mail" note sent on September 12, 1994, where he wrote: "Rex never gave me any indication that he was displeased or planned to greive [*sic*] this discipline." Neaville indicated that he would discuss the matter with Britton at their next meeting. He also noted that he had discussed training and communications issues with Britton, including some areas in which he noticed improvement.

Neaville sent another "e-mail" to Drown and Klei on September 21, 1994, following a second "performance plan" meeting with Britton. n25 Neaville wrote:

We also discussed the filing of the grievance without my knowledge and not having the needed attachments to make the grievance clear. Rex indicated *[sic]* that I was not working when he filed [*48] the grievance. *[sic]* Again I emphasized that he make me aware of any such concerns he had even if it means calling me at home. Rex agreed to communicate with me more personally in the future even though we may disagree on different issues, we should be able to discuss the differences. *[sic]*

In that document, Neville noted that Britton had told him that he was unaware of the contents of the report from Smith, and was therefore concerned about the performance plan and could not completely agree with it.

With respect to the connection between the performance plan and Britton's filing a grievance, Neville testified:

Q: [By Mr. Fresonke] And after he filed the grievance, what work performance issues did you correlate with the filing or the processing of Rex's grievance?

[objection and ruling omitted]

A: [By Mr. Neville] Well, in my mind, you know, it was consistent with some prior-identified problems with communication that were noted in the performance expectations.

Q: And what specifically were those communication issues?

A: I think, just, you know, speaking to his supervisors if there is a problem and whatnot.

Neville noted that Britton tended to avoid talking [*49] to a supervisor if he perceived a conflict. He also noted that he was concerned if an employee under his supervision was having problems, and believed that, if an employee came to him prior to filing a grievance, maybe "we can help them with those problems". He acknowledged he could not have removed the discipline meted out by Klei, but felt that he and Britton could at least have discussed the matter, and he might have been able to pass Britton's concerns on to the chief. He testified that he had no problem with the union processing a grievance, or with an individual going to the union to discuss filing a grievance. Neville testified further:

Q: [By Mr. Fresonke] What's wrong with him just going to the Union to find out if he wants to file a grievance or not?

A: [By Mr. Neville] Well, he certainly can.

Q: Has that been the practice in Mill Creek?

A: I'm not sure how many grievances have been filed.

Q: Not a whole lot.

A: Right. So I'd say there's not a lot of past history for it. And they certainly can, but it certainly doesn't go to the side of improving communication and whatnot if you don't try to work problems out first.

Q: Is there any reason why an officer would have [*50] to tell you they are displeased before they file a grievance or before the Union files a grievance?

A: No, they wouldn't have to.

Klei believed the language of the collective bargaining agreement required that an employee speak to a supervisor about an issue before that employee can file a grievance. He testified:

Q: [By Mr. Fresonke] So in your opinion if the employee and his Guild, the Mill Creek Police Guild, decided to file a grievance and they didn't talk to a supervisor first, it's your opinion that the labor agreement is somehow violated? Is that your opinion? [objection and ruling omitted]

A: [By Mr. Klei] I don't think the Guild sitting down and discussing whether they want to file a grievance or not is in violation of it, but I think the employee going through that without trying to resolve the problem before it gets to that stage is in violation of this, yes.

Britton testified that he perceived Neville's comments about talking to him before filing a grievance as intimidation.

I interpreted them as trying to intimidate me in not seeking the assistance of the Guild or legal representation. The way it came across to me is, that before I did any type of grievance [*51] or anything else I needed to contact him and tell him I was going to do it first. I was being criticized because I exercised my rights to do that, and he was -- he told me that I had agreed to get ahold of him before I did anything like that.

The record does not indicate there were any further "performance plan" meetings between Neville and Britton.

Employer Response to Grievance

Drown responded to the grievance in a letter to Britton dated September 15, 1994. Although he did not send a copy of that response to the guild, Drown had previously informed guild president Larry Davis of the response he intended to make. n26

Drown wrote that the grievance "... was timely, filed in accordance to the labor contract, and is a subject which appears to be grievable ...", but he believed that the discipline was justified because of Britton's failure to inform the department about the revocation. In addition to denying the grievance, Drown wrote:

I would like to point out to you that when you delivered your Grievance letter to me on September 9th, the Notice of Discipline was referenced as an attachment. However, there was no attachment. This oversight further demonstrates [*52] the problems addressed in the fit for duty evaluation. It is my expectation that you will work with Sgt. Neville on a weekly basis to address the performance problems that have been identified, including the problem with communications, and attention to detail.

Drown did not recall telling Britton he should have dealt with Neville on the grievance, but he testified it was his belief that the grievance procedure of the contract was an attempt to foster open communication, and that "employees should follow the contract and try to resolve it at the lowest level, as the contract says".

By letter dated September 23, 1994, the guild moved the grievance to the next level, informing the chief that the guild's attorney had prepared the original grievance, and that the guild had not directly received a copy of Drown's response.

Klei replied in an undated letter, noting that Drown's response had gone to Britton because Britton had filed the grievance, and asserting that the employer had no intention of bypassing "any appropriate recipient of our communications."

Documents Placed in Britton's Personnel File

Klei was aware from Neville's "e-mail" notes and other comments from [*53] supervisors that Britton had concerns about the performance plan, "that he wasn't happy with what was going on", and "didn't understand why we're doing all this". At some point in September, he began consideration of how to address the issue.

Klei was aware that Britton's concerns resulted, at least in part, from Britton's not knowing what documents had been sent to Smith or the nature of Smith's recommendations to the employer. After consultation with Drown and Missall, Klei decided that Britton should have copies of the documents which had been supplied to Smith and Smith's reports. Klei testified that memoranda relating to performance issues are commonly placed in personnel files, and that he believed that placement of the documents into Britton's personnel file was appropriate because the documents involved performance issues.

By late September or early October of 1994, Drown was about to become Britton's direct supervisor. n27 On September 30, 1994, Drown generated a memorandum to Britton in which he noted, in part:

I have read Sgt. Neaville's notes [of the "performance plan" meetings] and I would like to address one issue that you have raised, in that you could not agree [*54] with the entire agreement document because you were unaware of what was in the report from Dr. Smith. Since Dr. Smith's report is a part of the basis for the performance expectation agreement, attached is a copy of not only that report but also all of the supporting documents which were provided to Dr. Smith. This memo, along with the attached listed documents, will be a part of your personnel file.

Drown gave that memorandum to Britton on October 1, together with copies of all of the documents which had been sent to Smith and received from Smith. Drown reiterated that the information would be placed in his personnel file. Drown testified that Britton made no objection to placing the documents in his file at that time.

According to Britton, he had wanted to see the documentation, but had not ever asked for it. He also testified that Drown did not tell him why the documents were going in his file, nor did he ask, because he was "shocked that they had all this paper on me". Britton felt that the action was retaliatory:

I never asked them to be in my personnel file. I never asked to see them. I just would not agree to the performance expectation. They, on their own, decided, [*55] well, we know you would agree with it, so here it is on your file now. Read them and let us know what's going on. These were placed in my file a short time after I had filed my grievance, my EEOC complaint, and because of the timing that they put them in, and they just chucked them in there. They didn't tell me why. They just said here, they're in your file now.

Drown acknowledged that Britton had not requested that the documents be placed in his personnel file.

The employer had not placed documents into the personnel files of another Mill Creek police officer who was sent for a fit for duty examination. In that regard, Klei noted:

Q: [By Mr. Breskin] With regard to the other officer who was sent specifically to Doctor Smith, were there -- did Doctor Smith recommend a performance improvement program similar to what he recommended for Rex Britton?

A: [By Mr. Klei] No, he did not.

Q: With regard then to why his evaluation from Doctor Smith was not in his personnel file, why was that?

A: Well, two reasons. One is, I don't remember ever actually getting a report back from Doctor Smith at this time. But the reason it wasn't moved over there is, he continued to see Doctor Smith [*56] and resolved whatever issues there were, and his performance came back up and he's a good contributing member of the organization.

No claim is made here that the materials which were placed in Britton's personnel file have been referred to subsequently.

Discussion

The "Grievance Processing" Issues - The guild claims that Neaville's written and oral admonishments to Britton to discuss grievances with his immediate supervisor are an independent interference violation, as well as retaliation and discrimination against Britton for filing the unfair labor practice complaint. It asserts that the collective bargaining agree-

ment does not require an employee or the union to notify a supervisor prior to filing a grievance, and it contends the employer's argument that the contractual grievance procedure contains a waiver of the right to pursue a grievance until after discussion with a supervisor is completely without merit under established case law. It argues that the timing of Neaville's remarks, as well as the lack of any legitimate basis for the employer's actions, expose the discriminatory intent.

The employer asserts that, in order to establish an interference violation, [*57] the guild would have to establish that Britton had a statutorily protected right to ignore any obligations which he might have had under the contract. It argues that *Prudential Insurance Company of America v. NLRB*, 661 F.2d 398 (5th Cir. 1981) supports a finding that the guild contractually waived any right for an employee to refuse to discuss a grievance with his supervisor. Citing *NLRB v. Cameron Iron Works, Inc.*, 591 F.2d 1 (5th Cir. 1979), the employer notes that it is not an unfair labor practice to urge employees to comply with a labor agreement. It notes that the performance expectations plan and the regular meetings with supervisors were formulated before Britton ever filed his grievance, and that Neaville's comments to Britton were made in the context of the communications aspects of that plan. It asserts that no adverse employment action was taken against Britton after he filed the grievance, and that Neaville's comments cannot be taken to constitute adverse action within the meaning of the law.

The collective bargaining agreement in effect between the parties at the time germane to this proceeding included [*58] a grievance procedure with "purpose" and "step one" provisions as follows:

SECTION 1. PURPOSE

The grievance procedure is established to further good employee-employer relations by providing employees with a means for airing problems or complaints regarding their employment with the City. It is the City's policy to provide appropriate avenues of communication to meet a variety of needs and to encourage honest and open communication in the employee-supervisor relationship.

Employees and supervisors are encouraged to resolve problems and pursue solutions through an informal process of communication and problem-solving. It is in the interests of the organization that problems be resolved at the lowest level possible. If, however, an employee feels that, after working with his/her supervisor, a satisfactory solution to his/her complaint has not been reached, he/she may file a formal grievance. No retaliation, disciplinary action or discrimination shall occur because of the filing of a grievance, nor shall such filing prevent the City from taking appropriate personnel actions.

...

SECTION 3. PROCEDURE

A grievance shall be handled in the following manner:

- a. *Step 1.* [*59] The officer will present the complaint to his/her supervisor, in written form within ten (10) calendar days of its alleged occurrence or when the officer should reasonably have discovered the alleged occurrence. The supervisor shall respond in writing to the complaint within ten (10) calendar days of receiving the complaint.

The balance of the grievance procedure consisted of three steps, culminating in mediation.

It is clear from the record that Britton did not discuss the grievance with Neaville before filing it, nor did he believe he had any obligation to do so. The guild impliedly acknowledged some deviation from the contractual grievance procedure when Fresonke wrote into the grievance an explanation of why it was being filed with Drown, rather than with Neaville. For its part, the employer appears to have contributed to any procedural irregularities: Klei told Drown, rather than Neaville, to respond to the grievance, which was not the contractual order of things; Drown's response noted that the grievance was timely and filed in accordance with the agreement; although Neaville spoke to Britton about the need to contact him before filing a grievance, at no point during [*60] the processing of the grievance did the employer ever assert that Britton was in violation of the contract. n28 The issue here does not, however, turn on whether Britton fol-

lowed the contract or whether the employer had the right to insist that he speak to his supervisor before filing a grievance.

Rather than respond to procedural concerns within the context of the grievance process, the employer dealt with Britton's grievance in the context of performance expectations meetings which were clearly a forum concerned with Britton's on-the-job behavior. Britton's standing as a police officer was potentially an issue in the performance expectations meetings. Neaville placed the method by which Britton filed his grievance squarely into job-related activity when he testified that he saw it as "consistent with . . . problems with communication that were noted in the performance expectations."

Filing and processing a grievance is clearly a protected activity. *Valley General Hospital, supra; City of Seattle, supra.* An employer which blurs the distinctions between its employees' job-related activity and their protected activity does so at its peril. *Port [*61] of Seattle, Decision 1624 (PECB, 1983). Kitsap County Fire District 7, supra.* By Neaville's actions, the employer interfered with Britton's statutory rights, and violated RCW 41.56.140(1). n29

There is not, however, sufficient evidence to determine that Neaville's actions constituted discrimination. n30 Certainly, it is clear that the employer knew that Britton was engaging in protected activity by filing a grievance. While there is no direct evidence in the record to indicate that Neaville was informed of the filing of the unfair labor practice complaint, the "small shop doctrine" would apply to impute such knowledge to him in this case. *Port of Pasco, Decision 3307 (PECB, 1989).* As noted in *Mansfield School District, supra,* and *Port of Tacoma, supra,* however, a complainant must show that an employee was deprived of some ascertainable right, benefit, or status in order to prove discrimination. The fact that Neaville spoke to Britton and memorialized that conversation in a memorandum to his superiors did not, of itself, deprive Britton of any benefit or status. The employer's actions will be considered, however, in evaluating the allegation regarding the placement [*62] of documents in his personnel file.

The "Personnel File" Issue - The guild claims that Drown's reading of the September 30 memorandum and placing that memorandum and a number of other documents into Britton's personnel file were acts of discrimination against Britton for his having engaged in protected activity in general, and were also in retaliation for filing the unfair labor practice complaint. The guild argues that Drown's actions closely followed the filing of the grievance and unfair labor practice, and lacked any legitimate non-discriminatory reason. The employer asserts that there is no evidence that placing the documents sent to Dr. Smith in Britton's personnel file was motivated by any desire to retaliate against Britton. It notes, further, that Britton has never asked to have those documents removed from his file.

Employers routinely place documents relating to an employee's performance into that employee's personnel file, and use those documents in evaluating that employee's performance and in determining appropriate discipline. In case after case involving allegations of discriminatory action, documents (both laudatory and critical) placed into an employee's [*63] personnel file are considered in determining the efficacy of an employment action. *City of Pasco, Decision 3804-A (PECB, 1992); Clallam County, Decision 4011 (PECB, 1992); City of Federal Way, Decision 5183-A (PECB, 1995).*

In this matter, the employer gathered and generated a number of documents to be used in a determination of whether Britton was "fit for duty", and used those documents in developing a plan for improving his performance. Those documents clearly had the potential to be used in an adverse employment action. Most of those documents had not been placed in Britton's file until shortly after the grievance and unfair labor practice complaint had been filed. The timing of that action is inherently suspect, and the Examiner can reasonably infer that there is a causal connection between Britton's protected activities and the placement of the documents into his personnel file. *Mansfield School District, supra; City of Winlock, Decision 4784-A (PECB, 1995).*

The employer asserts that its action was routine, and in fact in response to Britton's concerns about the background of the performance plan. Even if the Examiner were to accept those explanations, there [*64] is no reason that the employer could not simply have shown the documents to Britton or provided copies to him without placing the documents in his file.

In evaluating the employer's motivation, it is of concern to the Examiner that Drown testified he was unaware of Britton's contact with the guild until the day Britton filed his grievance. That testimony is simply not credible. The record shows that Drown was with Klei when the call came in from Dr. Smith on July 14, and that a speakerphone was in use.

Drown stayed with Klei throughout the deliberations about Britton on that day, when Smith's letter made reference to Britton having consulted an attorney. Soon thereafter, Klei was made aware that the attorney involved was the guild's attorney, Christopher Vick. It is not supportable that the person second in command in this small department then went two months without knowing that the attorney in question was the guild attorney. Drown's testimony gives rise to an inference that he believed there was a reason for him to hide his knowledge of the guild's involvement, which places his motivation in question.

The record supports a finding that Britton's protected activity was a substantial [*65] motivating factor in the employer's decision to place the documents in the file. By that action, the employer violated RCW 41.56.140(1) and (3).

ALLEGED COUNTERCLAIM

In its brief, the employer asserts that it has filed and established a counterclaim alleging bad faith on the part of the guild. It asserts that the evidence at the hearing established that the reason for the complaint was to enable the guild to obtain information in support of Britton's ADA claim, and to secure more favorable language in upcoming collective bargaining negotiations between the parties.

The Commission's rules do not contain any procedures for the filing of counterclaims. Any claim by the employer against the union should have been advanced in a timely filed complaint charging unfair labor practices under Chapter 391-45 WAC. n31 The claims advanced by the employer are not before the Examiner.

REMEDY

The guild asserts that a remedy awarding attorney's fees is appropriate in this matter, because the employer has engaged in an extended campaign of deliberate disregard for the law, including the development of a series of "specious and contrived" defenses to the allegations.

An award of [*66] attorney's fees remains an extraordinary remedy before the Commission, used only in situations "where it is necessary to effectuate the order of the Commission, or where defenses are frivolous or without merit." *City of Bremerton*, Decision 5079 (PECB, 1995); *Public Utility District of Clark County*, Decision 4563 (PECB, 1993). The Examiner does not find such an award appropriate in this case.

The union has failed to sustain the burden of proof on some of its allegations, and the employer's defenses have been found sufficient on other allegations. There is no claim or evidence of general repetition of violations beyond this situation. n32

FINDINGS OF FACT

1. The City of Mill Creek is a public employer within the meaning of RCW 41.56.030(1). At all times germane to this proceeding, John Klei was the chief of police, Scott Drown was the police commander, and Ken Neville and Bob Crannell were the police sergeants for the employer.
2. The Mill Creek Police Guild is a bargaining representative within the meaning of RCW 41.56.030(3), and is the exclusive bargaining representative of an appropriate bargaining unit consisting of approximately 10 commissioned rank-and-file [*67] police officers of the City of Mill Creek.
3. Rex Britton was employed by the City of Mill Creek as a commissioned police officer from approximately October 1990 through February 1995, and was a member of the bargaining unit described in finding of fact 2.
4. On July 9, 1994, Commander Drown met with Officer Britton and directed him to report to David Smith, Ph.D, for a "fitness for duty" evaluation. At that time, Britton was directed to and did sign an "evaluation understanding", by which he acknowledged that the results of the evaluation would be provided to the employer, rather than to him, and that the usual confidentiality between a psychologist and a client would not exist. The document noted that Britton could be disciplined if he failed to cooperate in the evaluation process.

5. At some point on or about July 9, 1994, after his meeting with Drown, Britton contacted the Mill Creek Police Guild for assistance in the "fitness for duty" matter. Shortly thereafter, the guild informed Britton that it had retained attorney Christopher Vick to represent Britton and the guild.
6. On July 11, 1994, Britton reported to Smith for evaluation. At the end of the day, Smith sent a [*68] letter to Chief Klei, notifying him that Britton had no major or substantive personality or psychological problems, and that he could be returned to duty that evening without restriction. Smith imparted essentially the same information in person to Britton and Drown.
7. On July 13, 1994, Drown informed Britton that Smith wished to evaluate him further. An appointment was made for Britton to report to Smith on the afternoon of July 14, 1994.
8. After learning that he was to be evaluated further by Smith, Britton made several telephone calls to attorney Vick's office. At approximately 2:00 p.m. on July 14, 1994, Britton had a conversation with Vick's secretary, in which he was informed that Vick had said that Britton should go to his appointment, be cooperative, but give Smith a letter which revoked the evaluation understanding which Britton had previously signed. Vick's secretary apparently dictated the wording of that letter to Britton. Neither Britton nor any guild officers informed the employer of any concerns about the evaluation understanding at that time.
9. Britton reported to Smith for his appointment at approximately 4:00 p.m. on July 14, 1994, and gave Smith a document [*69] which revoked "any prior releases of information", and also specifically revoked any authorization for Smith to release any more information to the employer than was allowed under the Americans with Disabilities Act (ADA). Britton did not discuss the revocation with Smith, nor did he tell him that he would proceed with the evaluation.
10. After giving Smith the document described in finding of fact 9, Britton waited in Smith's office while Smith telephoned Klei. Smith told Klei that he could not give him any information about Britton under the terms of the new letter. Klei asked Smith to send him the revocation letter by telefacsimile, and to send Britton back to the police department in Mill Creek. Smith promptly "faxed" the revocation and an accompanying letter to Klei. In the letter, Smith informed Klei that Britton had consulted an attorney who suggested that he revoke his prior release. Smith also told Klei that he could not maintain that Britton was fit for duty under the circumstances.
11. After Britton returned to the police department on the afternoon of July 14, 1994, Klei gave him a predisciplinary notice, in which he informed Britton that his failure to complete the [*70] fitness for duty evaluation constituted a failure to obey a direct order. The notice also informed Britton that he was being suspended with pay pending a disciplinary hearing, and required him to turn in his weapon, badge, keys, and commission card. He was ordered to complete the evaluation with Smith.
12. The city's attorney, Scott Missall, and guild attorney Vick resolved the "waiver" issues in a telephone call on July 15, 1994. In a letter to Smith on that same date, Missall noted that Klei requested from Smith only as much information as was necessary to answer whether Britton was fit for duty, or whether some accommodation by the employer was required so that he could be fit for duty. Missall noted that inquiry was intended to be consistent with Klei's prior request.
13. Britton was subsequently evaluated by Smith in two additional sessions. In a letter received by the employer on August 9, 1994, Smith advised that Britton was "fit for duty" as a patrol officer, but recommended actions to resolve certain performance issues. Klei returned Britton to duty effective August 10, 1994.
14. As a result of Britton's absence from duty between July 14 and August 9, 1994, the employer [*71] was required to rearrange employee work schedules and court dates, resulting in considerable cost and inconvenience.
15. Britton's predisciplinary meeting was convened on August 19, 1994. Employer officials in attendance were Klei, Sergeant Neville, and Missall. Britton was accompanied by union officer Jim Deanne and guild attorney Brian Fresonke. The employer asked Britton why he did not contact Klei rather than Smith once Britton realized that he had a problem with the original waiver contained in the "evaluation understanding" document. Britton answered that he did not have time to contact Klei because by the time he talked to the attorney there was not enough time to talk to Klei

before reporting to Smith for the evaluation appointment. Klei also asked Britton whether he would have continued with the evaluation if Smith had been prepared to do so, and Britton indicated that he would have proceeded under protest.

16. On August 29, 1994, Klei issued a written reprimand to Britton, concluding that Britton "exercised poor judgment by not clearly stating your concerns" to Smith, and "by not attempting to resolve your concerns directly with your superiors." The reprimand noted [*72] that the revocation notice was "internally contradictory, poorly written, and failed to communicate" Britton's willingness to continue with the evaluation as long as his rights under the Americans with Disabilities Act (ADA) were satisfied. It also noted that Smith acted "very conservatively" in canceling the evaluation session, but that Smith's reaction was understandable because of confusion about the ADA.

17. The aggregate of the employer's comments in the discipline notice could reasonably have been interpreted by Britton to be an attempt by the employer to interfere with his exercise of a right to representation. In issuing that discipline, the employer did not intend to discriminate against Britton for having sought the assistance of the union.

18. The collective bargaining agreement in effect between the parties in 1994 encouraged employees to resolve problems through an informal communication process, but noted "if . . . an employee feels that, after working with his/her supervisor, a satisfactory solution has not been reached . . ." the employee could file a formal grievance. Step 1 of the grievance procedure involved presenting a written grievance to the supervisor.

[*73]

19. On September 9, 1994, Britton filed a grievance contending that the employer lacked cause to discipline him. The grievance noted that it was being filed with Drown because Neaville was not on duty that day. Britton did not discuss the grievance with Neaville before its filing. The grievance was signed by Britton, but prepared by the union attorney. The reprimand was referenced as an attachment to the grievance, but was not attached.

20. Drown asserted that he first learned of Britton's contact with the union when the grievance was filed, but that assertion is not credible given Drown's command status, his involvement in the fit for duty process, and the size of the department.

21. In approximately early September 1994, the employer developed a "performance plan" for Britton, based on Klei's direction to Drown to put together a method by which to address performance issues identified in Smith's August 9 report. The completed plan, prepared by Drown and Neaville, was dated September 6, 1994. It noted that Britton and his supervisor would meet weekly, and that a written evaluation of his progress would be completed on a monthly basis. At some point after September 6, 1994, the [*74] planned monthly evaluations became weekly.

22. Pursuant to the performance plan, Neaville met with Britton on September 10 and September 21, 1994. After each of those meetings, Neaville sent a report to Klei and Drown by computer "e-mail". In an e-mail note dated September 12, 1994, Neaville noted that Britton had never told him that he planned to grieve the discipline. In an e-mail note dated September 21, 1994, Neaville noted that he had discussed with Britton "the filing of the grievance without my knowledge and not having the needed attachments to make the grievance clear."

23. By responding to procedural concerns about the grievance in the context of performance plan meetings, Neaville improperly mixed Britton's protected activity with job performance issues.

24. The Mill Creek Police Guild filed its original complaint charging unfair labor practices in this matter on September 13, 1994. Klei informed Drown when he became aware that a complaint had been filed.

25. Klei told Drown to respond to Britton's grievance, although he testified that Britton's filing a grievance without talking to his immediate supervisor was a violation of the collective bargaining agreement between [*75] the parties. Drown also testified that he believed an employee should "follow the contract" and try to resolve matters at the lowest level. In spite of that, Drown's denial of the grievance, dated September 15, 1994, did not reference Britton's failure to talk to Neaville before filing the grievance, nor did Drown speak to Britton about that. Drown's response noted that the grievance was timely and filed in accordance with the labor contract.

26. Drown's grievance response noted that the discipline notice was not attached to the grievance. He pointed out that "this oversight further demonstrates the problems addressed in the fit for duty evaluation", and noted that he expected

Britton to continue to work with Neville on performance problems, including communications and attention to detail. Drown's response improperly mixed Britton's protected activity with his job performance.

27. Britton told Neville at some time on or about September 21, 1994, that he was unaware of the contents of the report from Smith, and was therefore concerned about the performance plan. After learning of Britton's comments, Klei determined that Britton should have copies of documents which had been [*76] supplied to Smith and copies of Smith's reports to the employer. Klei placed those documents in Britton's personnel file. He asserted that he did so because documents relating to performance issues are normally placed in personnel files.

28. As of late September or early October 1994, Drown was about to become Britton's direct supervisor. On September 30, 1994, Drown wrote a memorandum to Britton in which he noted that the documents referenced in finding of fact 27 would be placed in Britton's personnel file. On October 1, 1994, Drown met with Britton, told him the documents would be placed in his personnel file, and gave him the memorandum and copies of all of the documents.

29. Placement of those documents into Britton's personnel file constitutes an adverse employment action. The timing of the action gives rise to an inference that a causal connection exists between Britton's protected activities and the placement of the documents into his file.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. By its questioning of Britton in the predisciplinary meeting of August 19, 1994, described in [*77] finding of fact 15, the employer did not interfere with Britton's rights, and did not violate RCW 41.56.140(1).
3. By the wording of its August 29, 1994 discipline notice to Britton, the employer interfered with Britton's rights in violation of RCW 41.56.140(1).
4. By its August 29, 1994 discipline of Britton, the employer did not discriminate against him in violation of RCW 41.56.140(1).
5. By making the manner of filing of Britton's grievance a component of Britton's performance plan, as described in finding of fact 21, the employer interfered with Britton's rights in violation of RCW 41.56.140(1).
6. By its actions described in finding of fact 21, the employer did not discriminate against Britton for filing an unfair labor practice complaint in violation of RCW 41.56.140(3).
7. By its placement of Smith's reports and documents sent to Smith in Britton's personnel file, and by its communication to Britton of that action, the employer violated RCW 41.56.140(1) and (3).

ORDER

THE CITY OF MILL CREEK, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

- a. interfering with, discriminating [*78] against, restraining, or coercing Rex Britton in the exercise of his collective bargaining rights secured by the laws of the State of Washington.
- b. In any other manner interfering with, discriminating against, restraining, or coercing any other employee in the exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

- a. Remove any copies which may remain of the July 14, 1994 predisciplinary notice and the August 29, 1994 discipline notice, and any and all references to those documents, from any and all files maintained by the employer.
- b. Remove the reports received from psychologist David Smith and the documents sent to Smith in connection with the July and August 1994 evaluation of Rex Britton from Britton's personnel file.
- c. 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 [*79] steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.
- d. 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.
- e. 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.

Dated at Olympia, Washington, on the *10th* day of October, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARTHA M. NICOLOFF, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN [*80] 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 interfere with, discriminate against, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL remove any copies which may remain of the July 14, 1994 predisciplinary notice and the August 29, 1994 discipline notice involving Rex Britton, and any and all references to those documents, from any and all files maintained by the employer.

WE WILL remove the reports received from psychologist David Smith and the documents sent to Smith in connection with the July and August 1994 evaluation of Rex Britton from Britton's personnel files.

DATED: ___

CITY OF MILL CREEK

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 [*81] or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.

FOOTNOTES: Return to Opinion

FOOTNOTES:

n1 With the exception of the police chief and the president of the union, who acted as representatives of the parties, witnesses were sequestered.

n2 Drown was hired into the department as commander in early 1992.

n3 Britton was discharged from his employment at Mill Creek in February 1995, but that discharge is not at issue in these proceedings.

n4 Certain of the memoranda written by the supervisors, as well as other documents concerning Britton, were sent to Smith at approximately the same time. Additional documents were compiled and sent to him on at least one subsequent occasion.

n5 Drown recalled that Davis had expressed some concerns about Britton, and Drown then made an appointment for Davis to talk to Smith. Drown did not believe that he had ordered Davis to see Smith, but Davis testified that he had been "instructed" to give input to Smith.

n6 Drown told Britton the employer had no plans to fire him, but the two discussed discharge as a possibility if the result of the evaluation came back as "unfit for duty".

[*82]

n7 Deanne testified that he later wrote a check to Vick from the union's account, for services to Britton in July 1994.

n8 Drown took Britton to Smith's office, and returned later to pick up Britton for the return trip to Mill Creek.

n9 Drown recalled scheduling the appointment, while Britton believed that he had called Smith and scheduled it himself.

n10 Britton's testimony about the timing of these calls was confusing. He initially testified that his first call to Vick was on "July 12 or 13", but he later testified that his first call to Vick was on July 14. Britton also had difficulty recalling the number and timing of the various calls made on July 14.

n11 There was a conflict in the record about the exact dates of these evaluations (Britton recalled having seen Smith on July 19 and July 24 or 25, while a letter from Smith to the employer indicates that he met with Britton on July 19 and 27), but it ultimately makes no difference.

n12 Klei did not recall any objection from either Britton or the union with respect to rescheduling the disciplinary hearing.

n13 While Fresonke was the guild's legal counsel, Britton testified that he had also retained Fresonke as his personal counsel earlier on that day.

[*83]

n14 The notes do not make clear whether "Scott" refers to Commander Scott Drown or one of the meeting attendees.

n15 The attorney in attendance for the employer was Scott Missall. A complicating factor is that Deanne thought Fresonke's first name was also "Scott" at the time he was recording the notes. At a number of points where remarks were initially attributed to a "Scott", that name has been crossed out and replaced by "BF", indicating Brian Fresonke.

n16 Britton recalled the chief saying he was bitter about it too, but Klei did not believe he made any such comment.

n17 *Highline Community College, 45 Wn.App. 803 (1986)*, was cited by the employer as requiring proof of an adverse motive in an interference case. That case, which involved an allegation of discrimination under the standard then applied by the courts, is inapposite here.

n18 The "atty" is taken to be an abbreviation for "attorney".

n19 The Examiner recognizes a possible reading of Britton's testimony is that Klei asked two questions, the first referencing the guild and the latter shortened to omit reference to the guild. The Examiner is convinced that the record as a whole, including the pleadings, Britton's testimony, and the guild's arguments, indicates Britton and the guild understood that the same question was being asked repeatedly. Britton's answer reflects a question that did not include a reference to the guild.

[*84]

n20 It would be troublesome if Klei continued to question Britton after being told that the attorney advised him not to contact the chief, but such a response appears only in Deanne's notes and nowhere else in the record.

n21 Unlike the situation in *Snohomish County*, Decision 4995-A (PECB, 1995), Britton was not placed on administrative leave before he reported for his evaluation. The action to place Britton on leave resulted from the encounter with Smith on the second day.

n22 During cross-examination, Britton expressed a belief that his comments at the time Klei gave him the reprimand constituted an attempt to work with his supervisor before filing a grievance.

n23 Consistent with the "chain of command" approach, Klei testified that he recalled no discussion of this unfair labor practice complaint with Neaville after the guild filed its original complaint on September 13, 1994. Klei notified Drown when he became aware of that filing, and also recalled discussing this case with the city manager.

n24 As with other matters in this record, there was a conflict in the testimony: Neaville recalled discussing the plan with Britton, getting some input from him, and making some changes. Britton testified, to the contrary, that he had no input into the content of the performance expectations plan.

[*85]

n25 Britton testified that the "e-mail" documents fairly reflected the content of the meetings.

n26 Drown thought it likely that he and Davis discussed the issue of the level at which Britton filed the grievance, but could recall no specifics.

n27 This was apparently due to a normal shift rotation.

n28 Raising such arguments for the first time at the point of hearing does not lend them credibility.

n29 Although not alleged, Drown's comments in his letter responding to the grievance would also constitute an independent interference violation.

n30 The Examiner finds that the standards enunciated by the Commission with respect to determination of discrimination under RCW 41.56.140(1) apply equally to such charges under RCW 41.56.140(3).

n31 The Commission routinely consolidates proceedings filed by opposing parties on related issues.

n32 Klei responded to the grievance in an October 21, 1994 letter to Fresonke, noting that he had decided to withdraw the notice of discipline issued to Britton. The document was removed from Britton's file. Klei did not issue an "acknowledgement" that the employer lacked cause to discipline Britton, because Klei believed the employer did have such cause. Klei testified it was his belief that removing the reprimand resolved the grievance. While the employer referenced the reprimand in a later evaluation, the grievance was not pursued beyond Klei's level.

[*86]