

No. 436418-8-II

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

CITY OF VANCOUVER, a municipality,
Appellant

v.

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

Appellees.

BRIEF OF APPELLANT

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I. INTRODUCTION

This proceeding arises from an unlawful labor practice (“ULP”) complaint filed by the Vancouver Police Officers Guild (“the VPOG”), a union representing public employees, against the City of Vancouver (“the City”). The ULP alleged that the VPOG President, Ryan Martin, was not selected for a specialty assignment to the position of motorcycle officer by the Vancouver Police Department (“VPD”) because union animus by the assistant police chief “tainted” the selection process. The PERC hearing examiner concluded that the City had committed a ULP under Chapter 41.56 RCW and had engaged in union discrimination as alleged by the VPOG and ordered the City to remedy its unlawful labor practices.

The hearing examiner’s decision was appealed by the City to the full three-person Commission of the PERC, which affirmed the ruling. Decision 10621-B (PECB, 2012); AR 1380. The PERC relied primarily on two areas of testimony from the examiner hearing to conclude that Assistant Chief Sutter demonstrated union animus which “tainted” the recommendation for selection of two motorcycle officers made to Police Chief Clifford Cook. The inferences drawn by the PERC in these two areas are not supported by substantial evidence.

In addition, the PERC created a new rule of individual supervisor liability under Washington collective bargaining law, in excess of its

statutory authority and without following Washington Administrative Procedures Act requirements for issuance of its new rule. The PERC also erroneously interpreted and applied new United States Supreme Court case law when it created its new theory of “cat’s paw” liability for decision-makers (supervisors and managers) in Washington.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error by the Public Employment Relations Commission.

1. Assignment of Error No. 1.

The PERC engaged in rule-making without adhering to the requirements of the Washington Administrative Procedure Act (Chapter 34.05 RCW)(“the APA”), in violation of RCW 34.05.570 (3)(c) and RCW 41.58.050, when it issued Decision 10621-B, which created personal liability under Ch. 41.56 RCW for managers based on the discriminatory acts of their subordinates.

2. Assignment of Error No. 2.

The PERC made an error of law in Decision 10621-B by wrongly interpreting and applying case law from the United States Supreme Court in Staub v. Proctor, 131 S. Ct. 1186, 562 U.S. ____ (2011), in violation of RCW 34.05.570 (3)(d).

3. Assignment of Error No. 3.

The PERC erred by adopting the Hearing Examiner's Findings of Fact Nos. 22, 24 and 27 when there was not substantial evidence to support those, in violation of RCW 34.05.570 (3)(e).

B. Issue Pertaining to Assignment of Error No. 1 – Defective Rulemaking.

No. 1: Did the PERC's decision create a generally applicable and new unfair labor practice, constituting a "rule" as defined by the Administrative Procedure Act?

No. 2: Did the PERC exceed its statutory authority when it created through an adjudicatory process a new rule which extended personal liability for union discrimination to individual managers who were not themselves engaged in such unlawful practices?

C. Issues Pertaining to Assignment of Error No. 2 – Error of Law Regarding "Cat's Paw" Theory of Liability.

No. 3: Did the PERC erroneously interpret and apply United States Supreme Court case law by adopting the "cat's paw" theory of liability in this case?

No. 4: Did the PERC erroneously apply the "cat's paw" theory of liability from an employment case concerned with disciplinary action to this case, which involved a non-disciplinary specialty assignment?

D. Issue Pertaining to Assignment of Error No. 3 –Unsupported Findings of Fact.

No. 5: Did the PERC erroneously find that the selection process at issue in this case “tainted” by union animus in the form of consideration of union leave and an isolated statement reflecting a desire to select a candidate who supported the Police Chief’s vision which was made during the process when there was not substantial evidence to support the PERC’s Decision?

III. STATEMENT OF THE CASE

A. The Role of the PERC in Washington Collective Bargaining Matters.

The Washington State Legislature created the PERC in 1975 to enforce and administer five labor relations statutes. Jane Wilkinson, Practice and Procedure before the Washington State Public Employment Relations Commission, 24 Gonz. L. Rev. 213 (1989). The PERC consists of three citizens appointed by the Governor who serve five-year terms while primarily engaged in other occupations. Id.; see RCW 41.58.010 et seq. Day-to-day operations are conducted by an executive director and staff who perform services such as mediation, fact-finding, arbitration, unit determinations, election support, and unfair labor practice determinations. Id. The PERC performed a quasi-adjudicatory function

of hearing and deciding appeals from the decisions of staff hearing examiners. Id.

One of the five labor relations statutes enforced by the PERC is the Public Employees' Collective Bargaining Act ("PECBA" or "Act"), Ch. 41.56 RCW. The PECBA applies to county and municipal corporations and political subdivisions of the state such as police, sheriff and fire departments, the Washington State Patrol, public school districts, municipal transit systems, public libraries, and public utility districts. Id. Part of the PERC's jurisdiction includes the adjudication of ULP's filed by labor unions and employers, such as in this case. See RCW 41.56.140; RCW 41.58.015 (2).

When reviewing determinations by the PERC hearing examiners, the full Commission of the PERC reviews conclusions and applications of law, as well as interpretations of statutes, de novo. It reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. C-TRAN, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Renton Technical College, Decision 7441-A (CCOL, 2002).

B. Facts.

1. VPD and the Motors Unit.

At all times relevant to this matter, the VPOG and the City were parties to a collective bargaining agreement (“CBA”) effective from January 1, 2007 to December 31, 2009. AR 20.¹ The VPOG is the exclusive bargaining representative for all full-time police officers, corporals and sergeants employed by the City. AR 22, Article 1. Article 3.1.3 of the CBA provides that the employer has the exclusive right to determine the qualification of employees and assign their work. AR 23.

The Vancouver Police Department (“VPD”) is the law enforcement agency for the City of Vancouver, employing approximately 194 sworn officers. AR 963:7² At all times material, the police chief was Clifford Cook (“Cook”), who assumed command of VPD in 2007. AR 948:16-20. Assistant Chief Sutter (“Sutter”) had responsibility over the Administrative Services Bureau. AR 721:18 – 722:10. VPD also maintains other organizational Units, including Special Operations, which includes a Traffic Unit. AR 724:08. Lieutenant Amy Foster (“Foster”)

¹ “AR” refers to the Administrative Record in this case.

² References to “AR:XX” denote the page and line numbers in the hearing transcript per the Administrative Record.

was the supervisor of the Special Operations division, including the Traffic Unit. AR 859:11-16.

Up until 2008, the Traffic Unit included officers patrolling in motor vehicles and on motorcycles. The size of the “Motors Unit” (i.e., motorcycle officers) typically consisted of between six to eight officers, including a line level supervisor. Officers in the Motors Unit specifically focused on traffic enforcement – including driving under the influence, speeding and other infractions. The Motors Unit officers frequently worked in pairs in order to maintain officer safety and high visibility, and thereby a deterrent effect. AR 367:22 – 369:6; 758:17-18; 771:14-23; 1013:16-23.

In July 2008, Cook was forced to cut a number of specialty assignments and disband the Motors Unit for budgetary reasons, returning those officers to patrol duty. AR 725:18-24; 1000:21 – 1001:10. He later authorized resurrecting the Motors Unit because of its effectiveness, although budget constraints and limited resources required the size of the resurrected Motors Unit be limited to four members: a sergeant, a corporal and two officers. AR 1003:5-13; see also, AR 730:11 – 731:11. The Chief’s principal goal in bringing the Motors Unit back was to create a more effective “presence” – a key component of the community policing model of law enforcement. AR 1004:8 – 1005:8.

2. The Selection of new Officers for the Motors Unit.

Cook directed there be selection process, including interviews of officers applying to fill the Motors Unit assignments, to ensure that all qualified officers had an equal opportunity to serve. AR 1007:1-7. The process was based on upon written Selection Guidelines, agreed to by VPD and the VPOG. AR 313-315. The Selection Guidelines reserved the authority to the Police Chief for filling specialty assignments: “All transfers and assignments are the sole prerogative of the Chief of Police and do not require a selection process.” AR 313.

Four officers applied for the two open motorcycle officer positions: Officers Scott Neill (“Neill”), Ken Suvada (“Suvada”), John Schultz (“Schultz”) and Ryan Martin (“Martin”). They were interviewed on June 17, 2009 by Sutter, Foster and Corporal Bob Schoene (“Schoene”). AR 435:17. The panel received the interview questions and applicant packets before the interviews, which included letters of interests, résumés, performance evaluations for the prior two years and leave usage statistics for 2008-09. AR 697:12 – 699:14; 737:13-20. The leave usage information was provided in a spreadsheet with each candidate’s name and their corresponding leave hours for “vacation,” “sick,” “comp”

(compensatory time off) “ber” (bereavement) and “other.” AR 194 (Ex. 27)³.

Each interview packet included space below the interview questions to record the applicant’s response during the interviews. See e.g. AR 97; AR 651:1-18; 739:10-21. The panel members also completed a rating sheet listing each candidate’s strengths and weakness, and whether the panel member recommended them for the position. Id.; AR 894:21 – 895:3.

3. The Selection Panel Debrief Following Interviews.

After completion of the interviews, the three panel members met to discuss which two of the four officers would be recommended to Cook. Consensus was reached almost immediately that Suvada should not be considered further. AR 658:1-4; 753:2-7; 900:5-11. Next, the panel agreed to unanimously recommend Neill to Cook for the first open position. That left two candidates – Davis and Martin – left to discuss as to the second open position. AR 752:18-753:18; 932:15-933:8.

Schoene had initially recommended Martin as his second overall choice (behind Neill), while Foster and Sutter both listed Martin as their third choice. AR 900:12-17. The panel members listed several

³ Exhibit numbers refer to exhibits entered into evidence during the ULP hearing in this case.

“strengths” for both officers. Schoene noted for Martin that he had issues for “Extended time off potentially/ unavailability;” Martin’s weaknesses were noted by Sutter as “Gone more than average, may be an issue for a small team.” AR 97 (Ex. 7), 103 (Ex. 9).

While discussing the candidates, the panel members reviewed the spreadsheet with leave information, AR 194 (Ex. 27), which was compiled by VPD’s Financial Analyst and included with the interview packets provided to the panel members. Schoene (Martin’s previous supervisor and fellow VPOG member) then raised an issue that there had been concerns that Officer Martin uses “quite a bit” of discretionary leave, which created “some availability issues.” AR 901:17-22.

The panel members then discussed the supervisors’ comments that appeared in Martin’s evaluations regarding his use of leave. In 2007 (while in the Motors Unit), he was only marked “average” in his attendance. His supervising sergeant (also a fellow VPOG member) noted that, “He also takes advantage of available leave time as permitted by department guidelines and is occasionally ribbed by coworkers/peers regarding his absence every few weeks.” AR 93. Similarly, his next evaluation for 2008 noted his “attendance is less than his peers [but] it is usually do [sic] to his performing the other duties assigned to him such as EVOC and Peer Support.” AR 86.

Likewise, Martin's 2004-06 evaluation, written by Schoene likewise rated Martin's attendance as only "average." Schoene noted, "His busy schedule sometimes prohibits him from being available as often as others," which led him to give Martin only an "average" attendance rating. AR 674:4-13; AR 40. Martin testified that he worked overtime specifically to accrue compensatory time which he then combined with vacation leave to take blocks of time off every month. AR 377:18 – 379:1.

Finally, Schoene also testified he told his fellow panel members that, "There has been a history of Martin taking quite a bit of leave time because he has children in another state that he leaves to visit." Although he also noted that Martin keeps up his statistics by working hard when he is at work, Schoene still noted that, ". . . he may not be available as often for a call-out for a fatal collision or something that isn't planned. He could maybe not be available as often as another person in that sense if he was away on vacation." AR 655:15-24 (emphasis added). Schoene's concern was reflected in the comment on his rating sheet that a weakness for Martin was, "Extended time off potentially/availability." AR 103.

By contrast, Davis' 2007 and 2008 evaluations do not mention any concerns with his use of leave, and he was rated "superior" in attendance, and noted to be an officer whose "attendance is solid and he rarely uses

sick leave.” AR 146, 149. Likewise, in 2008, his sergeant specifically noted that, “He has no excessive or pattern use of sick leave.” AR 139.

The evidence presented at hearing established that Martin’s use of discretionary vacation and comp time leave was a concern not just for Foster and Sutter, but for Schoene as well. Schoene, not Sutter, first raised the issue with the selection panel regarding Martin’s leave usage, and then “mentioned that a weakness of Martin’s would be the potential unavailability or his time off.” AR 677:2-3.

Martin’s leave usage was concerning because, as mentioned earlier, unlike the old Motors Unit, the new unit would be a very small team of only four officers, including two supervisors. The new unit would primarily focus on daytime traffic enforcement because patrol officers have limited time available for that type of work. In addition, traffic enforcement and high visibility – “presence” – were priorities for VPD as part of its community policing philosophy. AR 728:24 – 729:23; 747:4 – 748:11. Even Martin agreed that the smaller size and configuration of the unit – about half its previous size – would create greater responsibility for the two officers being primarily responsible for enforcement duties. AR 388:25 – 389:3. Also, the schedule of working either Monday through Thursday or Tuesday through Friday meant there would potentially be

only one non-supervisory officer on duty 40% of the time (Mondays and Fridays), also posing a challenge for the unit. Tr. AR 592:19 – 593:5.

Foster and Sutter felt the leave information and comments in Martin's evaluations concerning attendance issues supported recommending Davis for the second position rather than Martin. AR 758:6 – 760:17; 902:15 – 903:9. Schoene seemed indecisive during this discussion, but remained supportive of Martin's selection because of his concern over how Martin would react if he were not selected. AR 754:2-6; 903:10-15.

The next day, Sutter solicited input from Sergeant Pat Johns ("Johns"), who had been selected as the Motors Unit supervisor. AR 762:16-22. During the telephone conversation, which Foster listened to on the speakerphone in Sutter's office, Johns was asked for his opinion on the candidates since he had previously worked with all four. AR 904:11 – 905:23.

During the telephone conversation, Johns initially recommended Neill and Martin. Sutter then asked Johns about the concern that had been expressed during their panel debrief (initiated by Schoene) over Martin's availability. Johns agreed with this concern and indicated that it could be an issue for the smaller unit, but felt he could work with Martin regarding leave usage. AR 767:18-22; 905:11-23; 906:23 – 907:8. Nonetheless, he

admitted on cross-examination that Sutter's concern was legitimate and inordinate leave usage could be detrimental to the team. AR 635:17 – 636:3. With that in mind, Johns agreed that Neill and Davis would be better suited for the unit. AR 676:18-22. Foster, who listened to the conversation, testified that she had no doubt that Sgt. Johns changed his mind after being informed of the leave issue and supported choosing Davis instead of Martin. AR 905:11-23; 906:23 – 907:8.

4. Chief Cook's Selection Based on Information from the Selection Panel.

Sutter met with Cook twice to discuss the interview panel's recommendations. AR 768:15-22. He explained to Cook that while the panel unanimously agreed on recommending Neill's selection, there was a split regarding whether to recommend Davis or Martin for selection. AR 768:23 – 769:21; 1009:25 – 1010:12. He also accurately recounted to Cook that although Schoene supported Martin's selection, he had also expressed concern over his availability because of vacation and compensatory time leave use. AR 769:2-3. Finally, he told Cook of his discussion with Johns wherein he (Johns) had agreed that despite initial support for selecting Martin, Davis would be better suited for the unit because of Martin's leave usage issues. AR 769:22 – 770:7.

Following Cook's discussion with Sutter, and consistent with the selection process, he took additional time to obtain and review the panel's rating sheets for all the applicants, not just Davis and Martin. AR 1013:6 – 1016:13. In particular, Cook confirmed that information concerning the panel's discussion was reflected in the documents. AR 1016:14-19.

A second meeting was then held with Cook, Sutter and Assistant Chief Nannette Kistler. Cook informed them that he had selected Davis over Martin primarily because of the concerns with Martin's use of leave. AR 1018:7-22. He explained that in his opinion, Davis had demonstrated strengths in similar areas as Martin, although not the same areas because they had different attributes. *Id.*; AR 1024:11-17. He noted that Davis, for example, was more mechanically inclined, was a productive officer, AR 132, and had actually been a motorcycle officer longer than Martin. AR 1018:7-17. In the end, Cook selected Davis because he would be present in the unit on a more consistent basis and therefore be a more effective member for the smaller team. *Id.*; AR 1032:1-6.

C. Proceedings Below.

1. PERC Hearing Examiner Decision.

The hearing examiner's decision was issued on December 23, 2010 (Decision 10621-A (PECB, 2012)), AR 1202, and concluded that although neither Foster nor Cook were motivated by union animus, AR 1228, 1233

(Finding of Fact No. 27), Cook’s final decision was “tainted” by Sutter’s desire to retaliate against Martin for his union activities, resulting in discrimination and interference with Martin’s protected rights in violation of RCW 41.56.140 (1). Id.

The hearing examiner’s opinion included the following findings of fact relevant to this appeal:

22. The employer asserted that it did not select Martin for the motors officer position because of the amount of leave time he used. The inclusion of union leave in consideration, as well as the fact that the panel’s unanimous choice used more leave than any candidate, lends itself to a conclusion that the employer's stated reason was pretextual.

24. Sutter asserted that his only concern with selecting Martin to the motors position was his leave use. However, Sutter testified that he wanted someone for the position who shared the Chief’s “vision.” Sutter’s statement suggests that by looking for someone who shared the Chief’s vision, he wanted someone who did not make statements or engage in activities in opposition to the Chief, as Martin did in his capacity as union president.

27. Although Cook’s decision not to select Martin was not substantially based on union animus, he relied in making that decision on a tainted recommendation from Sutter.

AR 1232-33.

The hearing examiner’s finding that the City considered Martin’s union leave relied upon the aforementioned inclusion of a leave spreadsheet in the materials reviewed by the selection panel. AR 194 (Ex. 27). The spreadsheet included a column labeled “other,” which was

later shown (at the time of the PERC hearing) to include hours Martin used for union-related activities. No evidence was presented that panel members were aware of the accounting of hours in the “other” column.

In addition, the hearing examiner found the employer’s stated reason for not selecting Martin was pretextual because of a statement made by Sutter during the selection process. Finding of Fact No. 24 stated, in part:

Sutter asserted that his only concern with selecting Martin to the motors position was his leave use. However, Sutter testified that he wanted someone for the position who shared the Chief’s “vision.” Sutter’s statement suggests that by looking for someone who shared the Chief’s vision, he wanted someone who did not make statements or engage in activities in opposition to the Chief, as Martin did in his capacity as union president.

AR 1221.

As argued infra, in Section IV.D., the PERC’s adoption of these findings was not supported by substantial evidence.

2. The PERC’s Decision.

The PERC hearing examiner’s decision was appealed by the City on January 12, 2011; the VPOG filed a cross-appeal on January 18, 2011. AR 1238, 1247. Following briefing by the parties, the PERC issued its ruling, Decision 10621-B (PECB, 2012) on April 11, 2012. The decision affirmed the hearing examiner’s decision that Cook’s selection was “tainted” because of union animus on the part of Sutter. In doing so, the

PERC focused on two areas of alleged animus as determined by the hearing examiner. The first was that Sutter improperly considered Martin's authorized leave for union related matters as a factor against his selection. In addition, the hearing examiner concluded that Sutter had made statements during the interview debrief that demonstrated union animus. AR 1392; AR 1393-94.

The PERC agreed, however, with that portion of the hearing examiner's finding (No. 27, AR 1233) that determined Cook was not personally motivated by union animus when he decided not to select Officer Martin. AR 1394. Nonetheless, the PERC affirmed that the City committed a ULP a result of Cook's "tainted" decision and went on to:

. . . clarify that under Chapter 41.56 RCW, *a decision maker may be found to have committed a discriminatory act* if the decision maker makes a decision that was influenced by the animus of his subordinate. This holds true even if the decision maker displayed no animus on her or his own part.

AR 1394-95 (emphasis added). The PERC reached this conclusion through the application of Staub, *supra*. In Staub (decided March 1, 2011), the United States Supreme Court recognized, for the first time, the "cat's paw" theory of liability in case involving a claim of employment discrimination brought under the Uniformed Services Employment and

Reemployment Rights Act of 1994 (USERRA), 38 U.S.C.S. § 4301 et seq.

The PERC described the Staub decision as holding:

“[T]hat a motivating factor exists in an employment action even where the decision making official has no discriminatory animus, but is influenced by an action that is the product of a subordinate’s animus whereby a decision maker’s adverse action based on information from a supervisor motivated by discriminatory animus can result in vicarious liability for the employer even where the final decision-maker was not motivated by such animus.

AR 1395-96.⁴

The PERC concluded that the reasoning of the court in Staub should be applied to “discrimination cases under Washington’s labor laws.” AR 1396. Thus, the PERC determined that where an “employment decision” is influenced by union animus by a subordinate or advisor, the decision will be found discriminatory “unless the respondent can demonstrate that the decision maker independently reached the same conclusion free from union animus.” Id. In other words, “Credible evidence must exist that demonstrates that the decision maker purged from the decision making process the discriminatory recommendation.” Id.

Applying this newly announced rule of liability to this case, the PERC held that:

⁴ The Staub decision is discussed in greater detail in Section IV.C, infra.

“Because Cook relied upon the recommendation of Sutter and *failed to conduct an independent review* free from union animus, *Cook*, as the final decision maker, *is held liable* under Chapter 41.56 RCW.”

AR 1397 (emphasis added).

IV. ARGUMENT

A. Standard of Review.

Appellate courts sit in the same position as the superior court and apply directly to the record before the administrative agency the standards of review under the Washington Administrative Procedures Act (APA), Chapter 34.05 RCW. Mader v. Health Care Auth., 149 Wn.2d 458, 470, 70 P.3d 931 (2003). The APA provides different standards of judicial review depending on whether the agency action is a rule or an adjudicative proceeding. Hillis v. Department of Ecology, 131 Wn.2d 373, 381, 932 P.2d 139 (1997).

Judicial review of a contention that an agency’s action amounts to a rule that must comply with rule-making procedures is governed by the standard for reviewing a rule. Hillis, 131 Wn.2d at 398. Agency orders in adjudicative proceedings are reviewed pursuant to RCW 34.05.570 (3). Under this standard, and of relevance to this case, a petitioner is entitled to relief if (1) the agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; (2) the

agency erroneously interpreted or applied the law; (3) the order is not supported by evidence that is substantial when viewed in light of the whole record before the court. RCW 34.05.570 (3)(c), (d) and (e).

B. The PERC Issued a Rule Without Complying with Statutory Rule-Making Procedures.

1. The PECBA does not Hold Supervisors Strictly Liable for the Discriminatory Animus of Subordinates.

Washington employers may be determined to have committed violations of the state collective bargaining law. For instance, RCW 41.56.140 provides that:

It shall be an unlawful labor practice for a *public employer* to:

- (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; or
- (4) To refuse to engage in collective bargaining with the certified exclusive bargaining representative.

(Emphasis added).

The plain meaning of this section of the PECBA is that only an *employer* can be held responsible an unlawful labor practice. Where, as here, the statutory language is clear:

The court's duty in statutory interpretation is to discern and implement the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing State v. Landrum, 66 Wn. App. 791, 795, 832 P.2d 1359 (1992)). Where the plain language of a statute is unambiguous and legislative intent is apparent, we will not construe the statute otherwise. Id. Plain meaning may be gleaned 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.' Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

Lowy v. PeaceHealth, 174 Wn.2d 769, 778-779, 280 P.3d 1078 (2012).

Here, the legislature's intent is expressed the "Declaration of Purpose" stated in RCW 41.56.010:

The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

The clear intent of the legislature's purpose is to promote the continued improvement of labor relations between public employers and their employees. Nothing in Ch. 41.56 RCW speaks to holding individual managers or supervisors ("decision maker," to use the PERC's terminology), acting in the course and scope of their employment, responsible under the PECBA for the unknowing discriminatory acts of subordinates.

The PERC has long held that, for example, “An *employer* unlawfully discriminates against an employee when it takes action in reprisal for the employee’s exercise of statutorily protected rights.” Educational Service District 114, Decision 4361-A (PECB, 1994) (emphasis added); Community College District 13 (Lower Columbia), Decision 9171-A (PSRA, 2007). Despite this long-standing rule, the PERC in this case announced a new and completely different standard: “Under Chapter 41.56 RCW, *a decision maker will be strictly liable for discrimination based upon union animus where a lower level supervisor’s discriminatory actions against an employee cause a decision maker to take adverse action against the employee.*” AR 1382 (emphasis added).

The City has been unable to find any previous PERC or appellate decision holding that an individual “decision maker” is “strictly liable” under Ch. 41.56 RCW for the decision or actions of a lower-level subordinate. Thus, this pronouncement by the PERC is tantamount to a new rule of legal responsibility for non-discriminating managerial personnel (or “decision makers,” to use the PERC’s term). In essence, the PERC has applied the principles of agency responsibility for employers set forth in Ch. 41.56 RCW and created a appears to have established new rule creating a principal-agent relationship between a supervisor and

subordinate by which the supervisor is *individually liable* under the statute.

2. A Generally Applicable Order Creating a New Retrospectively Applied Unfair Labor Practice Is a Rule.

The Washington Supreme Court has been “vigilant in insisting that administrative agencies treat policies of general applicability as rules and comply with necessary APA procedures.” McGee Guest Home, Inc. v. DSHS, 142 Wn.2d 316, 322, 12 P.3d 144 (2000). “An agency cannot avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication.” Yesler Terrace Community Council v. Cisneros, 37 F.3d 442, 449 (9th Cir. 1994).

Under the APA, a rule is defined as:

[A]ny agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. . . .

RCW 34.05.010 (16). An action is of “general applicability” if it applies uniformly to all members of a class. Failor’s Pharmacy v. Department of Social and Health Services, 125 Wn.2d 488, 495, 886 P.2d 147 (1994).

In Hillis, the Washington Supreme Court held that policies and procedures regarding processing of water-rights applications adopted by

the Department of Ecology were subject to the rule-making requirements of the APA. Hillis, 131 Wn.2d at 397. In response to severe budget cuts and a growing backlog of water-rights applications, the Department established criteria for deciding which applications to process first. Id. at 379. The Court concluded that the policies were new requirements or qualifications relating to the benefit of having a water-right application investigated and therefore qualified as a rule. Id. at 400. Thus, the Department had to engage in rule-making prior to using the new criteria. Id.

Similarly, in Failor's Pharmacy, the Washington Supreme Court struck down payment schedules modified by the Department of Social and Health Services that were adopted without compliance with APA rule-making procedures. Failor's Pharmacy, 125 Wn.2d at 497. The Court held that prescription drug reimbursement schedules applied uniformly to all members of the class of Medicaid prescription providers and were thus "generally applicable." Id. at 495-496. Further, the new schedules altered the benefits enjoyed by Medicaid patients. Id. at 497. Under those facts, the Court found the schedules qualified as a "rule" and were therefore procedurally invalid under the APA. Id.

In its Decision 10621-B, the PERC described its new rule of law as follows:

“[U]nder Chapter 41.56 RCW, a *decision maker* may be found to have committed a discriminatory act if the decision maker makes a decision that was influenced by the animus of his subordinate. *This holds true even if the decision maker displayed no animus on her or his own part.*”

AR 1394-95 (emphasis added).

The PERC’s action meets the definition of a rule under the APA as set forth in RCW 34.05.010 (16)(a). Subsection (a) defines a rule as a directive “the violation of which subjects a person to a penalty or administrative sanction.” In Simpson Tacoma Kraft Co. v. Department of Ecology, 119 Wn.2d 640, 647, 835 P.2d 1030 (1992), the court concluded that a numeric standard for the discharge of pollutants was a rule under the APA where it was “an agency directive which would subject the respondents to punishment if they do not comply with the standard.” This is exactly what happened here: a supervisor who does not comply with the PERC’s change in the law may be punished by a penalty or administrative sanction.

The effect of the PERCs pronouncement is that a manager will now be held to have violated the PECBA for making a “tainted” employment decision based on information from a subordinate. As a result, that person may potentially be assessed monetary damages. RCW 41.56.160 (2) provides that:

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

(Emphasis added). Prior to the PERC's decision, only the employer could be held responsible for violating the PECBA. In effect, the PERC has created a new unlawful labor practice applicable only to management personnel of an employer. This newly created rule impacts all management personnel working for public employers in Washington.

The PERC has now extended liability for damages that can be assessed against a person (i.e., supervisor) pursuant to RCW 41.56.160 (2) to a manager who, as in this case, was not personally motivated by union animus. Indeed, the PERC's stated intention is to hold "decisions makers" personally liable for the discriminatory actions of his or her subordinates even when that person has no knowledge of such actions. This is unquestionably a directive "the violation of which subjects a person to a penalty or administrative sanction."

The PERC's attempt to describe this rule as merely "clarify[ing]" existing law is disingenuous and misleading. As noted, the PECBA does not provide that a "decision maker" can be held liable for having

“committed a discriminatory act” when he or she relied upon a subordinate whose actions may have been motivated by animus. The PERC’s ruling makes a significant change to the substantive law regarding employer – and supervisor – liability under the PECBA.

Washington law provides that changes to rules which affect the substantive rights of persons should not be applied retrospectively. Averill v. Farmers Insurance Company of Washington, 155 Wn. App. 106, 229 P.3d 830 (2010). In Averill, the trial court granted summary judgment to the insured on a contract claim against her insurer, Farmers, based on amendments to the “make whole” regulations of the Office of the Insurance Commissioner (OIC).⁵ The OIC’s amendments were made based on its interpretation of in Thiringer v. American Motors Insurance Co., 91 Wn.2d 215, 588 P.2d 191 (1978).

The court in Averill noted that *amendments* to rules apply retroactively if either (1) the agency intended the amendment to apply retroactively, (2) the effect of the amendment is remedial or curative, or (3) the amendment serves to clarify the purpose of the existing rule. Averill, 155 Wn. App. at 115, citing Champagne v. Thurston County, 163 Wn.2d 69, 79, 178 P.3d 936 (2008). The OIC’s changes to the “make

⁵ “Make whole” refers to OIC regulations regarding when an insured has received full reimbursement for damages payable under a contract of insurance.

whole” regulation were struck down, in part, because they changed the obligations, i.e., liability, of an insurer from the previous rules. Averill, 155 Wn. App. at 116.

Similar to the issue in Averill, the PERC in this case has changed the obligations and liability of supervisors and managers working for public employers. Previously, only public employers could be held responsible for union discrimination against their employees under the PECBA. See e.g., Yakima Police Patrolmen’s Ass’n. v. City of Yakima, 153 Wn. App. 541, 553, 222 P.3d 1217 (2009). Now, however, the PERC has declared a new rule that individual supervisors or managers can be held liable even when they have not directly engaged in any discrimination against union members.

Administrative agencies often create binding *precedent* through adjudication. However, an argument that the PERC did so here completely ignores the fact that the PERC in this case created a new unfair labor practice to be applied to “decision makers,” and thus was not merely a change to binding precedent because such liability did not exist prior to the PERC’s decision. In so doing, the PERC engaged in rule-making, as distinct from adjudication.

The APA contains a mechanism in the event an agency decides a change in the law is warranted. That mechanism is found in RCW 34.05.070(1):

If it becomes apparent during the course of an adjudication or rule-making proceeding undertaken pursuant to this chapter that another form of proceeding under this chapter is necessary, is in the public interest, or is more appropriate to resolve issues affecting the participants, on his or her own motion or on the motion of any party, the presiding officer or other official responsible for the original proceeding shall advise the parties of necessary steps for conversion and, if within the official's power, commence the new proceeding.

An agency may not ignore this statutory process and simply announce a change in the law which creates new liability for a party (managers/decision makers) as "clarification" in an adjudicatory decision. The inequity of this result is even clearer because the Staub case, which provided the sole justification for the PERC to announce this change in the law, was not even decided until *after* both the hearing and all briefing in the case had already been submitted to the PERC.

For the reasons stated above, the PERC's action creating a new unfair labor practice should be invalidated as a rule adopted in violation of the APA pursuant to RCW 34.05.570 (2)(c) and RCW 41.58.050.

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3. The PERC did not Follow the Statutory Rule-Making Procedures.

Rules are invalid unless adopted in compliance with the APA. Hillis, 131 Wn.2d at 398. The purpose of rule-making procedures is to provide the public with notice of proposed rules so that interested parties have the opportunity to comment. See Hillis, 131 Wn.2d at 399. Rule-making procedures ensure that all members of the public can participate meaningfully in the development of agency policies that affect them. Id. Public input does not dictate an agency's ultimate decision; however, it allows all interested parties to have a voice. Id. at 400. When an agency makes a decision that should have followed rule-making procedures, but did not do so, the remedy is invalidation of the action. Id. at 399.

There is no evidence in the record that the PERC complied with statutory rule-making requirements. It is undisputed that the City has standing to challenge the action as a rule pursuant to RCW 34.05.570 (2)(a).⁶ Therefore, the only issue is whether the PERC's action qualifies as a rule under the APA.

⁶“Where an agency refuses to provide a procedure required by statute or the Constitution, the United States Supreme Court ‘routinely grants standing to a party’ despite the fact that ‘any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative.’ Seattle Bldg. and Construction Trades Council v. Apprenticeship and Training Council, 129 Wn.2d 787, 794, 920 P.2d 581 (1996) (citations omitted). The City alleges that the PERC failed to engage in a statutorily mandated procedure, i.e., rule-making. Therefore, the City has standing to challenge the PERC's failure to comply with rule making requirements.

4. The New Rule is Beyond the PERC's Statutory Authority.

The new rule of “strict liability” for decision makers announced in the PERC’s decision should also be stricken because it was beyond the PERC’s statutory authority. The PERC’s interpretation would be entitled to great deference if it had engaged in an interpretation of its own properly promulgated regulations. Silverstreak, Inc. v. Dep’t of Labor & Indus., 159 Wn.2d 868, 885, 154 P.3d 891 (2007). In addition, PERC’s responsibility to prevent unfair labor practices by an employer is limited by RCW 41.56.140 to only those rights protected by statute. Local 2916, IAFF v. Public Employment Relations Commission, 128 Wn.2d 375, 382; 907 P.2d 1204 (1995).

Here, the issue is not one of interpretation of a regulation issued by the PERC, but of United States Supreme Court case law (the Staub case), which is the province of the courts to interpret and apply. Int’l Longshoremen’s Ass’n v. Nat’l Labor Relations Bd., 56 F.3d 205, 212 (D.C. Cir. 1995).

As argued infra, the PERC wrongly interpreted and applied the Staub case. First, because it inappropriately applied a theory of liability from an employment discrimination case involving an adverse decision (termination) to the present case which involves a “positive” or at least

neutral decision to assign an employee to a specialty assignment. In addition, the PERC compounded its erroneous interpretation of Staub by also adding a requirement that a decision must conduct an independent investigation and “purge” his or her decision of any discriminatory recommendation.

C. PERC wrongly interpreted and applied inapplicable case law from the United States Supreme Court Staub case.

Under the error of law standard, a court may substitute its interpretation of the law for that of PERC. RCW 34.05.570(3)(d); Pasco Police Officers’ Ass’n v. City of Pasco; 132 Wn.2d 450, 458, 938 P.2d 827 (1997). This Court should not adopt the PERC’s interpretation of how the Staub case should apply to unlawful labor practices, as it ignores fundamental distinctions between the types of claims brought in each case and rests upon a misreading of Staub.

The legal focus of the PERC’s decision in this case was its interpretation and application of Staub, supra, which was decided by United States Supreme Court on March 11, 2011. As noted above, Staub involved a claim by a member of the United States Army Reserves against his employer, Proctor, for violations of USERRA. Staub, who was employed as an angiography technician, claimed that his immediate supervisor (Mulally) and Mulally’s supervisor (Korenchuk) were hostile to

his military obligations. Before being fired, Mulally gave Staub a “Corrective Action” disciplinary warning that required him to inform his supervisor when he left his desk and report to Mulally or Korenchuk when he completed cases. *Id.* at 1189. Three months later, Korenchuk reported that Staub had violated the Corrective Action by leaving his desk without informing his supervisor.

After reviewing Korenchuk’s report, Proctor’s vice president of human resources (Buck) reviewed Staub’s personnel file and decided to fire him. Staub filed a grievance, claiming that Mulally had fabricated the allegation underlying the warning out of hostility toward his military obligations. Buck nevertheless adhered to her decision, and Staub sued Proctor under USERRA, which forbids an employer to deny “employment, reemployment, retention in employment, promotion, or any benefit of employment” based on a person’s “membership” in or “obligation to perform service in a uniformed service,” and provides that liability is established “if the person's membership . . . is a motivating factor in the employer's action.” *Id.* at 1190-91 (quoting 38 U.S.C. § 4311 (a), (c)).

Staub sought to hold his employer liable on the grounds that Mulally and Korenchuk were motivated by hostility to his military obligations and that their actions influenced Buck’s (Proctor’s agent)

decision. *Id.* at 1191. After a jury found in favor of Staub, the district court denied Proctor's motion for judgment as a matter of law. The Seventh Circuit reversed, holding that the Proctor was entitled to judgment as a matter of law. *Id.* at 1191. On appeal, the Supreme Court reversed and remanded, holding that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Id.* at 1194 (footnote omitted).

In support of its holding, the Supreme Court applied traditional tort law principles of proximate cause and declined to hold that an employer is required under USERRA to conduct an independent investigation and further noted with regard to an employer's investigation:

[I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of "fault." *The employer is at fault because one of its agents committed an action based on discriminatory*

animus that was intended to cause, and did in fact cause, an adverse employment decision.

Id. at 1193 (emphasis added).

By its terms, Staub restated, in part, an unsurprising and long-held tenant of agency law: an employer can be held responsible for the discriminatory acts of its agents (supervisors, co-workers, etc.). Staub extended that concept, however, to situations where an unknowing supervisor relies on information from a subordinate who harbors discriminatory animus and intends the employee to suffer an adverse employment decision.

Where, as here, candidates are being evaluated for a lateral transfer, but no grievance or allegation has been filed or made know to management, the decision maker (Cook) would have no reason to question the integrity of the interview process triggering a need to conduct his own “independent investigation.” Despite the impracticality of this requirement, the PERC determined that “Credible evidence must exist that demonstrates that the decision maker purged from the decision making process the discriminatory recommendation.” AR 1396. Again, the PERC’s decision offers no guidance as to how a decision-maker contemplating a promotion or lateral assignment, relying on recommendations from an interview panel, would have any basis to

question that the recommendation may be “tainted,” thereby triggering a requirement to conduct an “investigation free from discriminatory animus.” Id.

In this case, the simple job assignment decision is in no way comparable to the issue in Staub, where the plaintiff filed a grievance of the decision to terminate his employment, claiming that Mulally fabricated evidence to support the decision. Thus, the decision-maker, Buck, had ample notice of plaintiff’s claim of discrimination, which should have triggered heightened scrutiny of Mulally’s recommendation. In stark contrast to Staub, Cook’s first notice of any claim by Martin of union animus during the selection process was when the VPOG filed its ULP almost six months after Cook’s decision had been made. Thus, Cook had to reason to question the integrity of the process or conduct any additional “investigation” despite the PERC’s determination that he was under an affirmative obligation to do so in this case. AR 1396.

Without question, a manager may be held accountable for the actions of a subordinate when he or she knew or should have known of that employee’s discriminatory conduct. Brown v. Scott Paper Worldwide Co., 98 Wn. App. 349, 989 P.2d 1187 (1999). In this context, the Staub court correctly held that a supervisor reviewing a recommendation to terminate an employee has a greater obligation to review the

recommendation and ensure it is free of any discriminatory motive. The “knew or should have known” standard (i.e., duty to investigate), however, is inapplicable in situations where, as here, the manager has no reason to suspect discriminatory animus because the type of personnel matter at issue does not involve an “adverse decision.”

The holding in Staub should also not be extended to this case because the decision on whether to laterally transfer an employee to another unit is a management right, not a tangible job detriment. See e.g., Johnson v. Miles, 2011 U.S. Dist. LEXIS 99578, * 14 (E.D. Kentucky 2011) (intra-office transfer does not constitute a tangible job detriment). Similarly in this case, the selection of the motors officers did not result in any additional benefits to those officers, or any detriment to the officers who were not selected because they did not lose either rank or seniority. See e.g., Humphrey v. Napolitano, 847 F. Supp. 2d 1349, 1355 (S.D. Fla. 2012).

Finally, the PERC took the holding from Staub – a case concerned with *employer* liability – and wrongly applied to this case in such a way so as hold *employees* (managers/decision makers) personally liable under the PECBA. The Supreme Court’s holding in Staub did not reach individual liability of the decision maker. Instead, the court held that:

[I]f a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then *the employer* is liable under USERRA.

Staub, 131 S. Ct. at 1194 (emphasis added).

In contrast, the PERC stated its holding that, “Under Chapter 41.56 RCW, *a decision maker will be strictly liable for discrimination* based upon union animus where a lower level supervisor's discriminatory actions against an employee cause a decision maker to take adverse action against the employee.” AR 1382 (emphasis added). This pronouncement of individual liability was not just an injudicious statement by the PERC because it was repeated at the end of its decision: “Cook, as the final decision maker, is held liable under Chapter 41.56 RCW.” AR 1397. The PERC clearly misapplied Staub in this context and its interpretation of the case should be accorded no deference whatsoever.

D. PERC erred by adopting the Hearing Examiner’s Findings of Fact, Conclusions of Law, and Order when there was not substantial evidence to support PERC’s Decision.

1. There is No Evidence that Sutter “Considered” Martin’s Union Leave.

The PERC erred when it concluded there was substantial evidence that Sutter took into consideration Martin’s use of union leave, which established Sutter’s union animus. AR 1394. The leave information that

the interview panel (not just Sutter) reviewed was a one-page spreadsheet included in their packet titled, “Leaves Used.” AR 194 (Ex. 27). This document included columns for different categories of leave, including vacation, sick, compensatory time, military and “other.” As the panel reviewed this information, Schoene (Martin’s fellow VPOG member) raised the issue of Martin’s use of vacation leave:

* * * There had been a history of Officer Martin taking quite a bit of leave because he has children in another state that he leaves to visit. In the discussions back and forth, I told the panel that in the past, it’s – whatever time he’s gone, he still maintains the same work production as the officers who aren’t gone enough – he seems to work twice as hard at the time that he is there to make up for time that he isn’t there. I said the only way – the only aspect that you could look at that is maybe it could – the unit at some point would be – *he may not be available as often as for a call-out for a fatal collision or something that isn’t planned. He could maybe not be available as often as another person in that sense if he was away on vacation.*

AR 336:15-24 (emphasis added).

The panel was concerned with the candidates’ use of discretionary leave, including vacation, sick (to the extent it was not protected by state or federal leave law) and compensatory time. Their review of this information was consistent with the inclusion of a candidate’s “attendance” as a value to be considered in the Selection Guidelines for specialty assignments. AR 313 (Paragraph No. 2 – Work Habits); AR 314

(Section 6). There was not, however any discussion of the hours listed in the “other” column.

The PERC’s finding that Sutter “tainted” Cook’s decision was based, in part, on its agreement with the PERC hearing examiner that, “the evidence supports a finding that Sutter adversely considered all of Martin’s leave, and no evidence exists demonstrating that Sutter separated Martin’s union leave when making his decision.” AR 1394. The record, however, establishes that not only is this finding not supported by substantial evidence, but the exact opposite is true.

This documentary evidence which purportedly supports PERC finding was presented for the first time *at the ULP hearing*. Thus, it was not part of the information reviewed by the selection panel. The PERC, however, seized upon this evidence and noted, “The record shows that Martin also used vacation or union release time to attend Law Enforcement Officer and Fire Fighter Pension Plan II meetings as a public trustee appointed by the Governor.” AR 1388. That evidence is completely irrelevant because the panel members did not know this column represented hour spent by Martin at pension meetings.

Likewise, Sutter testified during the ULP hearing that there was no discussion of the “other” column or Martin’s use of union leave. Instead, Sutter and the panel were “looking at vacation and comp, not the other”

forms of leave. Although Sutter realized the “other” column was likely Guild leave, “that was not taken into our consideration when analyzing or discussing [Martin’s] leave.” AR 786:25 – 787:3; see also AR 787:12-19. Nor was any evidence introduced that this information played any part in his recommendation to Cook.

In fact, Cook, while discussion with Sutter the panel’s recommendations, also wanted to ensure that Martin’s use of union leave was not included as part of their consideration – which it was not. AR 773:4-11; AR 787:9-10. Sutter confirmed, “And that’s where I was relying on the other categories, other than the other [union leave] column.” AR 787:10-11.

Despite clear evidence to the contrary, the PERC erroneously concluded that Sutter considered Martin’s union leave “and no evidence exists demonstrating that Sutter separated Martin’s union leave when making his decision.” AR 1394. The PERC’s not only improperly reversed the burden of proof to the City, it also stands in stark contrast to Sutter’s *unchallenged* testimony, reviewed above, that Martin’s union leave was never considered or reviewed by any of the interview panelists.

It is also worth noting that the PERC also distorted and misstated the record by referring to Sutter “making his decision” based on

consideration of Martin's union leave. Id. The record clearly establishes that Sutter, along with Foster and Schoene, were only empowered to make recommendations to Cook, the police chief. See AR 1231-32 (Finding of Fact Nos. 14, 18). Sutter, in fact, presented the recommendations of *all three* selection panel members, not just his own. AR 768:23 – 769:21; AR 1009:25 – 1010:7.

The PERC repeated this error when it again stated, “In sum, the totality of the evidence demonstrates that Sutter’s decision was tainted by a pattern of union animus.” AR 1394. The PERC’s description of Sutter’s role clearly establishes its erroneous judgment in labeling Sutter as harboring “union animus” without regard to the actual record established by the evidence. There is simply no evidence, much less substantial evidence, that Sutter’s recommendation to Cook was based on any consideration of Martin’s union leave.

2. An Isolated Statement by Sutter is not Substantial Evidence of Union Animus.

The PERC’s found that a short, isolated statement by Sutter during the selection panel deliberations as substantial evidence of Sutter’s union animus. AR 1394; AR 1233 (Finding of Fact No. 24). While discussing the relative merits of the candidates, Schoene testified that Sutter stated that “the most qualified or the person with the most qualifications or skills

isn't necessarily the best fit for the unit." AR 654:6-7. Schoene agreed with Sutter: "I said, that's true. That's not always the case." AR 654:7-8. During cross-examination by the VPOG's attorney, Sutter explained his statement:

. . . I was talking about was the community of policing philosophy, the territorial command, the presence, the outreach to the community. All those philosophical issues that I share in common with Chief Cook is an officer quality that I was looking for too.

Q. And you had no reason to question Officer Martin's commitment to community policing or territorial command, did you?

A. My only concern, Mr. Snyder, was if Officer Martin would be available to fill the function on a -- more than an average basis. But on a daily basis of the unit and, that was -- and that goes to the community policing, the philosophy of being in the neighborhoods and in the school zones. And that was my only concern with Officer Martin.

AR 816:10-23.

In addition, Sutter's statement was not specifically directed at Martin, and is not evidence of discriminatory animus towards him. See Hicks v. Tech Indus., 512 F. Supp.2d 338, 349 (W.D. Pa. 2007) (stray comments allegedly reflecting age bias do not create an inference of discriminatory motive where the comments did not relate in any way to Plaintiff or Plaintiff's performance and there was no evidence that any of

the individuals about whom the comments were made were discriminated against).

Sutter's statement was consistent with Cook's later testimony that the "presence" of officers in the community is an extremely important component of his community policing philosophy, particularly in regards to the operation of the Motors Unit. AR 1004:8 – 1005:8. Nonetheless, the PERC ignored Sutter's explanation of his statement without any analysis. Instead, it commented that, "The record clearly demonstrates that Martin and Cook had an antagonistic relationship in the months leading up to the Motors Unit interview and selection process, and states that relationship was well known to Sutter." AR 1394.

This conclusion, even if it were supported by substantial evidence, is irrelevant to whether Sutter's statement about supporting the Chief's vision of community policing showed union animus on Sutter's part. Even if it were, isolated statements, alone, are not evidence of pretext or discrimination. Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 90 at n. 53 (citations omitted), 98 P.3d 1222 (2004).

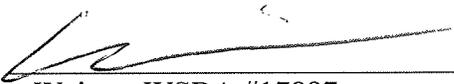
V. CONCLUSION

For the reasons discussed above, the City respectfully requests that this Court invalidate those portions of the PERC's Decision 10621-B in which it pronounced a change in the law and found there was substantial

evidence to support the hearing examiners findings, and award the City its attorneys' fees and costs.

Respectfully submitted this 8th day of November, 2012

TED H. GATHE, CITY ATTORNEY
VANCOUVER, WASHINGTON

By: 
Terry Weiner, WSBA #17887
Assistant City Attorney
Of Attorneys for Appellant City of Vancouver

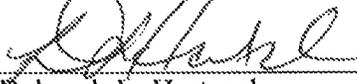
I hereby certify that I caused the foregoing BRIEF OF APPELLANT to be served on the following counsel of record:

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By U.S. Mail, First Class, postage prepaid, a true copy and by Electronic Filing on November 8th, 2012.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

By: 

Deborah L. Hartsoch,
Legal Assistant,
City of Vancouver

VANCOUVER CITY ATTORNEY

November 08, 2012 - 4:27 PM

Transmittal Letter

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Court of Appeals Case Number: 43641-8

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