

NO. 43641-8-II

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

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CITY OF VANCOUVER, a municipality,

Petitioner,

v.

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

Respondents.

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**BRIEF OF RESPONDENT  
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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ROBERT M. MCKENNA  
Attorney General

SPENCER W. DANIELS  
Assistant Attorney General  
WSBA No. 6831  
7141 Cleanwater Dr. SW  
Olympia, WA 98504-0108  
(360) 753-6238

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## I. INTRODUCTION

This is an appeal, under the Administrative Procedure Act, RCW 34.05, of the Public Employment Relations Commission's decision in an unfair labor practice complaint brought by the Vancouver Police Officers Guild against the City of Vancouver. The Commission ruled that the City committed an unfair labor practice by passing over for appointment an employee who was an official of the Union. The City's decision was based on a recommendation to the decision-maker by a subordinate manager, whom the Commission found was motivated by anti-union animus against the applicant. The Commission concluded that, even though the decision-maker did not have anti-union animus of his own, the tainted recommendation by the subordinate manager made the City responsible for an unfair labor practice.

This Court accepted direct review of the City's petition for judicial review, pursuant to RCW 34.05.518. The City challenges certain of the Commission's findings of fact, the Commission's legal determination that the City committed an unfair labor practice, and the Commission's processing of the complaint through its adjudicative process, without engaging in rule-making.

The Commission submits this brief in response to the challenge that it was required to adopt a rule. The Commission is not addressing the

City's assertions that the Commission's findings of fact are not supported by substantial evidence or that the Commission committed an error of law in concluding that the City had committed an unfair labor practice.<sup>1</sup>

## II. COUNTERSTATEMENT OF THE CASE

For this brief, the Commission relies on the facts as found by the Commission's examiner, AR 1202-37, and by the Commission, AR 1380-98.<sup>2</sup> A copy of the decisions of the examiner and the Commission are attached as appendices.

These facts are as follows: Ryan Martin, a police officer employed by the City of Vancouver, applied for a new position in the motor unit of the police department. Officer Ryan was the president of the union that represented police officers and in that capacity had taken various positions at odds with Police Chief Clifford Cook, who had the ultimate responsibility for selecting the officers for the motor unit. Officer Ryan was interviewed by a three-member panel, which was chaired by Assistant Chief Chris Sutter. Assistant Chief Sutter recommended another applicant over Officer Ryan and also reported the recommendations of the other

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<sup>1</sup> An agency acting in an adjudicative capacity may not advocate in support of the "merits" of its decision, but may respond to challenges to its procedures for processing a matter. *See Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993).

<sup>2</sup> The administrative record (AR) certified to the court by the Commission is numbered sequentially from the filing of the unfair labor practice complaint to the issuance of the Commission's decision.

interview panel members to Chief Cook. Chief Cook selected an applicant other than Officer Martin.

The Union filed an unfair labor practice complaint with the Commission, AR 1-4, which assigned it to one of its examiners to conduct a hearing and make findings of fact, conclusions of law, and an order. The examiner found that Assistant Chief Sutter's recommendation to Chief Cook was influenced by anti-union animus against Officer Martin. The examiner did not find that Chief Cook himself had anti-union animus or that he knew that Assistant Chief Sutter's recommendation was so influenced. Regardless, based on the tainted recommendation to Chief Cook, the examiner concluded that the City committed an unfair labor practice by not appointing Officer Martin to the motor unit position. AR 1202-37.

In affirming the examiner's decision on appeal, AR 1380-98, the Commission noted the United States Supreme Court decision in *Staub v. Proctor Hospital*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1186, \_\_\_ L. Ed. 3d \_\_\_ (2011), which was issued after the examiner issued her decision. *Staub*, involved a statute that prohibited discrimination against employees based on their military service. The Court held that if a supervisor is motivated by anti-military animus against an employee and recommends action against the employee, the employer has violated the act, even though the

ultimate decision-maker was not motivated by anti-military animus against the employee. AR 1395-96. The Commission found “the Supreme Court’s ruling in *Staub* to be sound and appropriate for application to discrimination cases under Washington’s labor laws.” AR 1396.

Contrary to the City’s characterization of the Commission’s order, the Commission did not find Chief Cook to be “personally” liable and did not impose any liability or remedy specifically against Chief Cook. Rather, the decision recited the Commission’s standard language that “[t]he City of Vancouver, its officers and agents” shall take the following steps to remedy the unfair labor practice. These steps included offering Officer Martin a position in the motor unit, posting of a notice that the City had been found guilty of an unfair labor practice, and reading a copy of that notice at a meeting of the city council. AR 1234-36.

The City sought judicial review of the Commission’s decision under the Administrative Procedure Act (APA). CP 1-62. Pursuant to RCW 34.05.518, the superior court certified the case for direct review by this Court, CP 76-77, which accepted review.

### **III. STANDARD OF REVIEW**

Decisions of the Commission in unfair labor practice proceedings are reviewed under the APA. RCW 41.56.165; *Pub. Sch. Empl. of Quincy v. Pub. Empl. Relations Comm’n*, 77 Wn. App. 741, 744,

893 P.2d 1132, *review denied*, 127 Wn.2d 1019 (1995). The standards for judicial review of an agency order under the APA are set forth in RCW 34.05.570(3)(a)-(i). Of these, only subsections (b), (c), and (d) are possibly implicated by the City's allegation that the Commission was required to adopt a rule, rather than proceed to resolve the unfair labor practice complaint through adjudication. These subsections permit the court to overturn the administrative decision only if the court finds:

(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; . . .

RCW 34.05.570(3)(b)-(d). "The burden of demonstrating invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a).

"When reviewing questions of law, an appellate court may substitute its determination for that of the agency, although PERC's interpretation of the collective bargaining statutes is entitled to substantial weight and great deference." *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 382, 831 P.2d 738 (1992). *Accord*,

*Quincy*, 77 Wn. App. at 745 (recognizing the Commission’s “expertise in the area of collective bargaining”).

#### IV. ARGUMENT

##### A. **The Commission’s Interpreting the Unfair Labor Practice Statutes Through Adjudications Does Not Constitute Improper Rule-Making**

In its decision, the Commission made the not surprising ruling that where an employment decision is motivated by anti-union animus, the employer is not shielded from an unfair labor practice charge by the fact that the anti-union animus was manifested in a recommendation to the ultimate decision-maker, who was unaware of the animus and held no animus of his own. So long as the decision-maker based the employment decision on the tainted recommendation, the employer has committed an unfair labor practice.

The City contends that in arriving at its decision, the Commission should have engaged in rule-making under the APA. The City’s contention is incorrect. The Commission was not engaged in rule-making but rather was applying the unfair labor practice statutes to the facts before it.<sup>3</sup> Both our Supreme Court and this Court have held that an agency’s

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<sup>3</sup> Although the Commission cited to the United States Supreme Court’s recently announced decision in *Staub*, the Commission noted that its examiner had reached the same result prior to *Staub* being issued. AR 1397 n.6.

interpreting a statute through adjudication does not constitute improper rule-making.

In *Budget Rent a Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 31 P.3d 1174 (2001), the Supreme Court rejected the argument that the agency had engaged in improper rule-making when it interpreted certain statutory phrases in the course of an adjudication. *Id.* at 895-98. The court agreed with the agency that it was not creating any new standard, formula, or requirement but was simply applying and interpreting the statute. As the court noted:

[W]e are not unmindful of the consequences were we to adopt a very broad interpretation of "rule" . . . and the fact that it would all but eliminate the ability of agencies to act in any manner during the course of an adjudication. The simplest and most rudimentary interpretation of a statute or regulation would require an agency to go through formal rule making procedures.

*Id.* at 898.

Likewise, in *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 54-55, 121 P.3d 731 (2005), *review denied*, 157 Wn.2d 1013 (2006), this Court followed *Budget* when it held that the agency's did not engage in improper rule-making when it interpreted two statutory phrases in the course of an adjudication.

As in *Budget* and *Regan*, the Commission here was applying very broad statutory language to a set of facts before it. The Legislature has

charged the Commission with administering and enforcing the statutory prohibitions against unfair labor practices involving counties, cities, and other political subdivisions. *See* RCW 41.56.160(1) (“[t]he commission is empowered and directed to prevent any unfair labor practice”).<sup>4</sup>

The Legislature has enumerated unfair labor practices broadly. RCW 41.56.140 provides:

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.<sup>5</sup>

*See also* RCW 41.56.150 (unfair labor practices for bargaining representatives).<sup>6</sup>

Applying this broad statutory language to the facts of a particular complaint has always been done through adjudication, not through rule-making. Because it would be virtually impossible to describe, in rule form the myriad factors that could be at play in any given situation in which an

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<sup>4</sup> Similar language appears in RCW 41.59.150(1), covering employees of school districts, and RCW 41.80.120(1), covering state employees.

<sup>5</sup> The Union here contended that the City violated subsection (1) (employer interference with employee rights) and subsection (2) (employer domination or assistance of union). AR 1. The Commission’s examiner concluded that the City had violated RCW 41.56.140(1), AR 1233, which the Commission affirmed.

<sup>6</sup> Parallel provisions for school districts and their unions are found in RCW 41.59.140, and for state agencies and their unions in RCW 41.80.110.

unfair labor practice is alleged, the Commission has never attempted to make any substantive rules to define what constitutes an unfair labor practice.<sup>7</sup> As this Court has recognized in reviewing decisions of the Commission in unfair labor practice cases, the legal standards to be applied to the facts in those cases are developed largely, if not exclusively, through prior case law. *See, e.g., Pub. Employees Relations Comm'n v. City of Vancouver*, 107 Wn. App. 694, 33 P.3d 74 (2001), *review denied*, 145 Wn.2d 1021 (2002) (test and factors in determining whether an employer's interrogation or employees with respect to union activities is unlawful or not); *Vancouver Sch. Dist. 37 v. Serv. Employees Int'l Union, Local 92*, 79 Wn. App. 905, 906 P.2d 946 (1995), *review denied*, 129 Wn.2d 1019 (1996) (standards for union activities in conducting investigations in support of grievances); *Clallam Cnty. v. Wash. State Pub. Empl. Relations Comm'n*, 43 Wn. App. 589, 719 P.2d 140 (1986) (standards for determining whether filing grievances is protected activity); *see also, City of Seattle v. Pub. Empl. Relations Comm'n*, 160 Wn. App. 382, 249 P.3d 650 (2011) (standards for employer interviewing bargaining unit members in preparation for pending grievance arbitration).

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<sup>7</sup> The Commission has adopted procedural rules dealing with the filing and processing unfair labor practice complaints pursuant to its rule-making authority in RCW 41.56.090. *See* WAC 391-45.

These cases illustrate how impractical it would be for the Commission to try to define in advance through rule-making what actions might constitute an unfair labor practice, as the City urges the Court to require the Commission to do here.

Other courts have recognized that it is permissible for an agency adjudicating labor relations disputes, like the Commission, to proceed through adjudication, not rule-making. *See, e.g., N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S. Ct. 1757, 40 L. Ed. 2d 134 (1974) (“[I]t is doubtful whether any generalized standard could be framed which would have more than marginal utility”);<sup>8</sup> *N.L.R.B. v. Beech-Nut Life Savers Inc.*, 406 F.2d 253, 257 (2d Cir. 1968) (“the Board has the authority to use either of two procedures in dealing with the specialized problems it encounters in the administration of federal labor laws . . . either by quasilegislativ promulgation of general rules . . . or in quasi-judicial proceedings when the problem arises as an issue in a case before the Board”); *Stardyne, Inc. v. N.L.R.B.*, 41 F.3d 141, 147-48 (3d Cir. 1994) (“the Board’s alter ego policy is properly viewed as a gap-filling measure, adopted through case-by-case adjudication to flesh out the concept of an ‘employer’ under the relevant provisions of the Act”);

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<sup>8</sup> Decisions construing the National Labor Relations Act may be looked to in construing the Washington state statutes. *See City of Vancouver*, 107 Wn. App. at 703, and cases cited therein.

*Hamilton Cnty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio*, 46 Ohio St. 3d 147, 545 N.E.2d 1260, 1265 (1989) (state employment relations board “has the authority to use either quasi-legislative promulgation of general rules designed to address a general issue or to use a quasi-judicial proceeding when a specific dispute arises as a case before the board”).

Thus, it is entirely permissible and appropriate for labor law agencies like the Commission to flesh out the broad statutory description of unfair labor practices through case-by-case adjudication. The APA does not require the Commission to engage in formal rule-making, as the City contends.<sup>9</sup>

**B. The City Is Not Entitled to Attorneys’ Fees From the Commission**

In its brief to this Court, the City asks the Court to award the City its attorneys’ fees and costs. Brief of Appellant at 46. It is not clear on what basis or against what entity the City is seeking fees and costs. To the

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<sup>9</sup> The City cites RCW 34.05.070(1), which provides that an administrative agency may convert one type of proceeding, such as an adjudication, to another type of proceeding, such as rule-making, “[i]f it becomes apparent during the course of . . . [a] proceeding . . . that another form of proceeding is necessary.” Brief of Appellant at 30. The City’s reliance on this statute is misplaced. As stated in the comment to Section 1-107 of the Model State Administrative Procedure Act, on which RCW 34.05.070(1) is based, this provision “is not intended to disturb the existing body of law allowing agencies, in certain situations, to make determinations through adjudicatory procedures that have the effect of denying persons opportunities they might otherwise be afforded if rule-making procedures were used instead.” *Comment to, Uniform Law Commissioners’ Model State Administrative Proc. Act 1981*, §1-107 (2000).

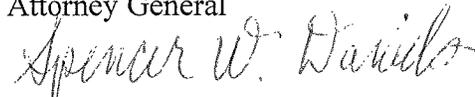
extent that the City is requesting attorneys' fees and costs against the Commission, such request is not well taken. Under the Equal Access to Justice Act, RCW 4.84.340-.360, fees and costs are not available against an agency acting in a quasi-judicial capacity. *See Duwamish Valley Neighborhood Pres. Coal. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 97 Wn. App. 98, 982 P.2d 668 (1999).

#### V. CONCLUSION

For the reasons set forth above, this Court should reject the City of Vancouver's challenge to the Commission's proceeding by adjudication, rather than rule-making, in this matter.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of January, 2013.

ROBERT M. MCKENNA  
Attorney General



SPENCER W. DANIELS  
Assistant Attorney General  
WSBA No. 6831

Attorneys for Respondent  
Public Employment Relations Commission

CERTIFICATE OF SERVICE

I certify that on the 8th day of January 2013, I caused a copy of the *Brief of Respondent Public Employment Relations Commission* to be served on the following by placing the documents in the U.S. mail, postage prepaid:

Terry M. Weiner  
Assistant City Attorney  
City of Vancouver  
415 West 6<sup>th</sup> St. 4<sup>th</sup> Floor  
Vancouver, WA 98668-1995

David A. Snyder  
Snyder & Hoag, LLC  
3759 NE MLK Jr. Blvd  
Portland, OR 97212-1112

I certify that on the 8th day of January 2013, I caused a copy of the *Brief of Respondent Public Employment Relations Commission* to be filed with Division II of the Washington State Court of Appeals by e-filing service.

Signed this 8th day of January, 2013, in Olympia, Washington.

  
BECKY MITCHELL  
Legal Assistant

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VANCOUVER POLICE OFFICERS  
GUILD,

Complainant,

vs.

CITY OF VANCOUVER,

Respondent.

CASE 22840-U-09-5829

DECISION 10621-A - PECB

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

Snyder & Hoag by *David A. Snyder*, Attorney at Law, for the union.

Office of the City Attorney by *Terry Weiner*, Attorney at Law, for the employer.

On November 6, 2009, the Vancouver Police Officers Guild (union) filed an unfair labor practice complaint with the Public Employment Relations Commission against the City of Vancouver (employer) alleging employer interference, discrimination, and domination. On November 12, 2009, Unfair Labor Practice Manager David Gedrose issued a deficiency notice. The union did not respond to the deficiency notice. On December 14, 2009, the Unfair Labor Practice Manager issued Decision 10621 (PECB, 2009) dismissing the union's domination allegation and finding a cause of action for employer interference with employee rights and discrimination in violation of RCW 41.56.140(1). The employer filed an answer on December 31, 2009. Charity Atchison was assigned as the Examiner. The Examiner conducted a hearing on April 20 and 21, and June 2 and 3, 2010. The parties filed post-hearing briefs to complete the record.

ISSUES

1. Should the Examiner admit Exhibit 35 in its entirety?

2. Whether the employer interfered with employee rights and discriminated in violation of RCW 41.56.140(1) when it did not select Ryan Martin for assignment to the Traffic Officer (Motors) position?

The Examiner declines to reverse her ruling excluding the portion of Exhibit 35 referred to as "the Letter." The Letter cannot be authenticated.

The employer interfered with employee rights and discriminated when it failed to select Ryan Martin for assignment to the Traffic Officer (Motors) position. The employer is ordered to assign Ryan Martin to the Traffic Officer (Motors) position within 30 days from the date of this decision.

#### BACKGROUND

The union represents a bargaining unit of Officers, Corporals, and Sergeants of the Vancouver Police Department (VPD). Officer Ryan Martin was elected President of the union in November 2008, and assumed office in January 2009. According to Martin, the union membership wanted more aggressive leadership. Both parties agree that Martin engaged in protected activity in 2009.

Chief Clifford Cook has been the VPD Chief of Police since 2007. VPD is divided into two bureaus: Police Services and Administrative Services. The Police Services Bureau is under the command of Assistant Chief Nanette Kistler. Within the Police Services Bureau Commander Marla Schuman reports to Kistler and oversees the Operations Support Division. Lieutenant Amy Foster reports to Schuman and oversees: SWAT; the Traffic Unit; the explosive disposal unit; the K-9 unit; and the civil disturbance team. The Administrative Services Bureau, which is responsible for the support functions of the department including training, background, professional standards, finance and logistics, evidence, research and development, and long term projects, is under the command of Assistant Chief Chris Sutter. Lee Knottnerus is the Human Resources Analyst, also known as the Human Resources Manager, for VPD. The employer also has a separate human resources department.

When the employer hired Cook, it tasked him with improving the relationship between the union and the employer. Cook understood the relationship to be contentious. Cook and the former union president met monthly. Cook perceived his relationship with the former union president to be positive. The union executive board perceived that Cook was misconstruing the conversations with the union and began to lose trust. After Martin's election, Cook contacted Martin to set up monthly meetings. Martin decided that all communication with the Chief would be in writing, and the union ceased the monthly meetings. Martin informed Cook that the reasons for ceasing the meetings would be provided in writing. Throughout the beginning of 2009, Cook requested the reasons, and Martin informed Cook that they were working on a written document detailing why they would not meet with the Chief.

#### Motors Unit

The employer's Traffic Unit is comprised of the motors (motorcycles) unit, a commercial vehicle enforcement officer, and a collision investigator. Historically, the Traffic Unit also included a cars unit, but currently the unit only has one car, used by the collision investigator. In July 2008, due to budgetary constraints, the employer disbanded the Motors section of the Traffic Unit. At the time the employer disbanded the motors unit, one corporal and four officers comprised the motors unit. When the unit disbanded, the commander in charge at the time asked the members of the unit how they would like to see the unit reformed. The group decided that seniority should be used. Corporal Bob Schoene communicated that decision to the command staff.

In the spring of 2009, the employer decided to reform the Motors Unit. Commander Schuman tasked Lieutenant Foster with putting together a plan. Foster asked Schoene who in the department were motorcycle instructors. Schoene informed Schuman and Foster that he was the only certified motorcycle instructor and that Martin had completed instructor training, but that the employer disbanded the motors unit before Martin could complete his certification. Schoene informed Foster about the prior unit's decision that the unit should be brought back by seniority and who the most senior members of the motorcycle unit were. Foster informed Schuman that the former motors officers wanted the unit reformed based on seniority; ultimately, Schuman informed Foster the employer would use a selection panel.

The employer decided the Motors Unit would be smaller and consist of a sergeant, a corporal, and two officers. The employer decided to appoint Schoene to the corporal position and have a selection panel to select two officers and the sergeant for the unit. Initially, the employer planned to open the positions to all officers. In the end, the employer decided that the criteria to be selected for the motor officer position would include having a valid motorcycle endorsement and having successfully completed "80 hour PPB/VPD Basic Motorcycle School."

In May 2009, Martin had a conversation with Foster about the Motors Unit. Martin informed Foster that he was a motorcycle instructor and could provide documentation of the certification. Martin questioned Foster about the employer's decision to select Schoene as the corporal and not use a selection panel. Foster explained that she understood Martin was not a motorcycle instructor and why the employer had appointed Schoene.

Knottnerus e-mailed the position posting to all employees. Martin responded, asking Knottnerus why the posting was only open to officers who had taken the 80 hour Basic Motor School when he had been told the position was open to all officers to be consistent with other specialty assignment selections. Knottnerus responded, explaining the need to include the Motor School requirement and confirming that the employer was using the same selection process it used for other specialty positions.

ISSUE 1: Should the Examiner should admit Exhibit 35 in its entirety?

On the first day of hearing, the union offered Exhibit 35, which consisted of: a 9 page letter to Chief Cook, dated March 27, 2009, titled "Statement of Guild Concerns" (Statement), and signed by the union's executive board; a cover letter sheet titled "Anonymous Complaint Letter"; and a 10 page anonymous complaint addressed "To: The E-Board members of the Vancouver Police Officers Guild" with the subject "Actions of Command Staff Members during the investigation of Lt. Doug Luse" (Letter).

Prior to offering the exhibit, union counsel Dave Snyder questioned Martin about it. Employer counsel Terry Weiner objected to testimony about the Anonymous Letter on the grounds that the

letter was anonymous and hearsay. Snyder argued that the letter was being offered to show Martin's protected activity on behalf of the union, not to show the truthfulness of the allegations contained in the Letter or in the Statement. He argued that the subjects of the criticism, Cook, Kistler, Sutter, and Foster, would have a strong negative reaction to being criticized in such a manner, and that the union was presenting evidence to prove a causal connection between the employer denying Martin the Motors Officer position and Martin's protected activity. Weiner countered that the letter was an attempt to collaterally attack the integrity of Cook, Kistler, Sutter, and Foster and to impeach through a source that he was unable to cross-examine. Snyder offered to stipulate that the document was not being offered for the truth of the statements. Weiner added that under evidence "Rule 403, the prejudicial value far outweighs any appropriate [sic] value the document has."

The Examiner sustained the objection to the testimony and prohibited questions about the Letter and the excerpts of the letter contained within the Statement.

Subsequently, the union moved for admission of Exhibit 35. Weiner objected: (1) to the Statement to the extent to which it was being offered for the truthfulness of the assertions contained therein; (2) to the admission of the excerpts of the Letter contained in the Statement; and (3) to the admission of the Letter for the reasons stated earlier. Snyder argued that: (1) Exhibit 35 was being offered to show Martin's protected activity, not for the truthfulness of the matter asserted; (2) the evidence was critical because the decision-makers were not expected to testify that they denied Martin the position based on union activity; (3) the union needed to rely on circumstantial evidence; (4) the nature of the criticisms contained in the Letter likely caused the accused to be angry and direct their anger toward Martin; and (5) the Exhibit was offered to show the extent of protected activity and the likely response. Weiner asserted the same objections to the letter as he had to the testimony about the letter. The Examiner reserved ruling until the hearing resumed the next morning.

The Examiner admitted Exhibit 35 in part, admitting the Statement in its entirety and excluding the Letter. The union stipulated that the exhibit was not admitted for the truth of the matter asserted therein. The Examiner's ruling about testimony stood, so that excerpts of the

anonymous complaint were not allowed. The agency has preserved the Letter as a rejected exhibit as part of the official record.

In its brief, the union renewed its motion to admit Exhibit 35 in its entirety for the reasons argued in the hearing. The union asserted that the record established Exhibit 35 is a critical document "because of its high confrontational, public nature" and the document is the only evidence of union criticisms of Sutter.

Under RCW 34.05.452(1), hearsay evidence "is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." Although hearsay evidence is admissible in hearings before this agency, such evidence, standing by itself, has little probative value. *Port of Tacoma*, Decision 4626-A (PECB, 1995).

In this instance, the employer objected to the admission of Exhibit 35 on the grounds that the Letter was hearsay. The union stipulated that Exhibit 35 was not being offered for the truth of the matter asserted therein. Normally, hearsay evidence is admissible. However, in this matter the Letter is not merely hearsay. The Letter is a document created by a person unknown to the union. There was no possible way for either party to call the author to testify. Additionally, there is no way to know when the document was created. In sum, the Letter could not be authenticated.

Martin delivered the Letter as part of the Statement to Cook on March 30, 2009. Martin's protected activity was the act of delivering the Statement and Letter, not the act of drafting the Letter. The record supports finding that Martin delivered the Letter without the necessity of admitting the Letter.

#### Conclusion

The Examiner declines to reverse her ruling. The Letter is excluded.

ISSUE 2: Whether the employer interfered with employee rights and discriminated in violation of RCW 41.56.140(1) when it did not select Ryan Martin for assignment to the Traffic Officer (Motors) position?

#### APPLICABLE LEGAL STANDARDS

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.

Under RCW 41.56.140(1), it is an unfair labor practice for an employer “to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by” Chapter 41.56 RCW.

The burden of proving unlawful interference rests with the complaining party. An interference violation exists when an employee could reasonably perceive the employer’s actions as a threat of reprisal or force, or promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate the employer’s intent or motivation was to interfere, nor is it necessary for the complainant to demonstrate that the employee involved was actually coerced or that the employer had union animus. *City of Tacoma*, Decision 6793-A (PECB, 2000). An independent interference violation cannot be sustained under the same set of facts that failed to constitute a discrimination violation. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

An employer will be found to have unlawfully discriminated against an employee when it takes action in reprisal for the employee’s exercise of rights protected by Chapter 41.56 RCW. *Tacoma Pierce County Training Consortium*, Decision 10280-A (PECB, 2010), *citing Educational Service District 114*, Decision 4361-A (PECB, 1994).

In order to prove a discrimination allegation, the employee must first establish a *prima facie* case by showing:

1. The employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;
2. That the employee was discriminatorily deprived of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the *prima facie* case because parties do not typically announce a discriminatory motive. *Clark County*, Decision 9127-A (PECB, 2007).

Once an employee establishes a *prima facie* case of discrimination, the employer must articulate its legitimate, non-discriminatory reasons for its action. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A and 4627-A (PECB, 1995). If the employer does not meet its burden of production, a violation will be found. *Mansfield School District*, Decision 5238-A and 5239-A (EDUC, 1996).

If the employer meets its burden of production, the burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. The employee meets the burden by proving either the employer's reasons were pretextual or union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

## ANALYSIS

### Selection Panel Guidelines

The document "Guidelines for Selecting Personnel to Fill Specialty Assignments" (Guidelines) outlines the procedure for filling specialty assignments if the decision is made to use a selection panel. The Guidelines reserve the ultimate decision for the Chief.

“All transfers and assignments are the sole prerogative of the Chief of Police and do not require a selection process. Similarly, there are no requirements that specific components be used as part of a selection process.” (emphasis added).

The Guidelines make clear that the ultimate authority rests with the Chief and there is no requirement that any part of the guidelines be used as part of the selection process. If the Guidelines are used, the interview committee will include two Assistant Chiefs; the Commander or Lieutenant from the division in which the vacancy occurs; a supervisor from the unit with the vacancy or other subject matter expert; and the VPD HR Manager. The committee chair will be the Assistant Chief commanding the Bureau in which there is a vacancy. There is no requirement that the panel include all five members outlined in the Guidelines.

The Guidelines require that the Interview Committee Chair report the strengths/weaknesses of each candidate to the Chief of Police along with a recommendation as to the most qualified candidate for the position. The Chief will make the final decision.

#### Selection Panel Process

On June 17, 2009, the employer held a selection panel for two Traffic Officer (Motors) positions. Four candidates applied, including Martin, Officer Scott Neill, Officer John Davis, and Officer Ken Suvada. In accordance with the Guidelines, Assistant Chiefs Sutter and Kistler, Lieutenant Foster, Corporal Schoene, and HR Manager Knottnerus were scheduled to serve as the selection panel. On the date of the panel, one of Kistler and Foster's children was ill; as a result, Kistler stayed home and did not participate in the panel. Additionally, one of Knottnerus's children was ill; she left work early and did not participate in the panel. Sutter, the Committee Chair, decided to proceed with the interviews despite the absence of two of the panel members outlined in the Guidelines. Sutter explained that he wanted to accommodate the employees who were ready for their interviews, and the other employees who were waiting to see which positions would be available for the upcoming shift change. Chief Cook did not learn that the panel proceeded without full membership until later in the day of the interviews. The selection panel interviewed all four applicants.

When Sutter, Foster, and Schoene arrived at the interview room, they discussed how to conduct the interviews and who would ask what questions. There were no pre-interview discussions about the candidates between the members of the panel or between the members of the panel and the Chief. The panel began reviewing the interview packets. Each interview packet contained the candidate's letter of interest, 2008 performance evaluation, 2007 performance evaluation, and an interviewer rater packet including a cover sheet for rater comments and two pages of questions with space to record the candidate's answers.<sup>1</sup> In addition to the interview packet for each candidate, human resources provided the panel with a spreadsheet detailing the amount of leave each candidate used.

The interviews took approximately 30 minutes; each candidate used their allotted time. The panel asked each candidate the same five questions. The panel did not ask questions that were not in the interview packet. Following each interview, the panel had a few minutes to write notes on the rater sheet and prepare for the next interview.

#### Debrief and Panel Recommendation

Following the final interview, the panel members had an opportunity to debrief and discuss their recommendations. The panel debriefed for approximately half an hour.

The panel members discussed each candidate and identified their top two choices for the positions. The panel members very quickly identified one candidate they agreed on. Schoene selected Neill and Martin. Foster selected Neill and Davis. Sutter selected Neill and Davis. The panel realized they had consensus on Neill as a choice and decided to recommend Neill. The panel agreed that Suvada would do better if the unit were larger and agreed not to select him. The conversation then turned to a discussion of Martin and Davis. Sutter asked Schoene why he selected Martin. Schoene explained that Martin had the most traffic related skills, had connections with the prosecutor's office, and had been an expert witness. Sutter brought up reasons for selecting Davis. The panel discussed the leave used by the candidates. Schoene informed the panel that Martin maintained the same work product as officers who weren't gone

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<sup>1</sup> The Examiner admitted exhibit 6, Martin's 2004-2006 evaluation, over the employer's objection. Upon review, exhibit 6 is not relevant. The Examiner did not rely on exhibit 6 in reaching her conclusion.

as much and worked twice as hard when he was at work to make up for the time he was not at work. At some point during this discussion, Schoene realized he would not change Sutter's mind about Martin; he testified that "at his level" he did not feel he would change Sutter's mind. Schoene then told the panel that both Martin and Davis could do the job. Schoene testified that Sutter later apologized to him if Schoene felt pressured. In the end, Sutter informed Schoene that he would communicate to Cook that Schoene recommended Neill and Martin.

Panel members filled in the rater cover sheet following the specific interview, after all of the interviews, during the debrief, and a combination of all of the above. The testimony and rater sheets indicate that some of the notes reflect the group's discussion and not just the opinion of the rater. This is true in Sutter's case, as he testified, "Those were reflections of a discussion I was having with Lieutenant Foster and Corporal Schoene. Those were my own thoughts, but I would have to tell you I received some of those thoughts from discussion with Corporal Schoene...this encapsulates a discussion that we were having regarding each of the candidates." The notes reflected a combination of the panel members' individual opinions and what the panel discussed.

Ultimately, the panel could not reach consensus on whether to recommend Davis or Martin. Sutter took the panel's recommendation to select Neill and each panel member's top two choices to Cook.

#### Initial Meeting between Sutter and Cook

Consistent with the Guidelines, Sutter met with Cook. Sutter testified that his conversations with Cook occurred 24 to 48 hours after the selection panel convened. According to Cook, the first meeting occurred the afternoon of the selection panel on June 17. I credit Cook's chronology of events; it is consistent with the amount of time that elapsed between the initial panel on June 17 and Martin's notification on June 18 that he had not been selected.

During the first meeting between Cook and Sutter, Sutter explained the results of the selection panel: the panel unanimously recommended Neill; and the panel was split with Foster and Sutter recommending Davis and Schoene recommending Martin. Sutter provided Cook with the

strengths and weaknesses of each candidate, the reasons for each panel member's recommendation, the concerns about leave, and why he and Foster selected Neill and Davis. According to Cook, Sutter provided the reasons for each panel members' preference. Cook recalled Sutter explaining some of the certifications held by the candidates. The reason Sutter provided for not selecting Martin that stood out for Cook was "Officer Martin's propensity to be gone from the unit when previously assigned there. And his planned use of leave time over the next several months to the end of the year."

Cook recalled Sutter explaining the concern that in a small unit, having one member of the unit absent could have a detrimental impact on the unit. For Cook, the potential for officer safety issues, the goal for the unit to work as a team, and visibility being a factor of the team's effectiveness were factors he weighed toward assigning someone to the team who would be there on a regular basis.

Following that meeting, the Chief did not make a selection. Cook wanted to review the notes from the interview to "see for myself the various panel members' opinions and what they documented." When asked why he wanted to look at the notes, Cook responded, "Just for verification."

#### Decision

Following his review of the rater interview notes, Cook met with Sutter and Kistler to discuss the issues and finalize his decision. Prior to the meeting, Cook formed an opinion to select Davis. Cook's primary reason for selecting Davis over Martin was that Davis did not have the same issues regarding leave. Cook viewed Davis as having different strengths than Martin and some similarities.

Q [by Weiner]: What is the primary reason you selected Officer Davis?

A [Cook]: I felt he was going to be there with the team on a more regular basis. And that therefore, those other concerns that I had about officer safety and effectiveness of a small unit would be alleviated.

...

Q [by Snyder]: Any other reason, other than your concern about attendance and leave usage, that made Officer Martin not more qualified than Officer Davis?

A [Cook]: It was primarily his attendance issues that my decision was based upon.

Q: Anything else, Chief?

A: No, sir.

#### The Union's *Prima Facie* Case

In order to prove a *prima facie* case of discrimination, the union must first establish that Ryan Martin engaged in activity protected by Chapter 41.56 RCW or communicated to the employer an intent to engage in protected activity. The union alleges Martin engaged in protected activity, not limited to the following:

- filing grievances on behalf of the union and its members,
- filing a complaint with the employer's Human Resources Department alleging a violation of an employer policy against nepotism (a VPD reorganization placed Foster in the chain-of-command reporting to Kistler, who is her domestic partner),
- filing a grievance on behalf of the civil disturbance team,
- filing a grievance about vacation bidding,
- delivering the Statement of Guild Concerns,
- writing a letter requesting an officer be returned from administrative leave,
- objecting to the search of officers' lockers, and
- objecting to the posting of internal affairs investigations on the internet.

The employer concedes that Martin engaged in protected activity, but does not agree that all of the examples cited by the union are activities protected by Chapter 41.56 RCW.

The Examiner finds that Martin engaged in protected activity and that the union established the first prong of its *prima facie* case. It is unnecessary to make a determination about whether each

of the claimed actions are protected because the employer admits that Martin engaged in protected activity and the record establishes that Martin engaged in protected activity.<sup>2</sup>

The employer deprived Martin of an ascertainable right, benefit, or status when it did not select Martin to fill one of the vacant Motors Officer positions. The Motors Officer position is a specialty assignment. While there is not a pay premium for specialty positions, status can be associated with a specialty assignment and specialty assignments may be considered in promotions. Benefits associated with assignment to the Motors Unit include: a take home BMW motorcycle, a 4-10 Monday through Thursday or Tuesday through Friday day shift work schedule, and the potential of overtime. The record reflects that the Motors Officer position is a desirable assignment. The union satisfied the second prong of its *prima facie* case.

Martin engaged in protected activity from at least late fall 2008, when he filed a grievance on behalf of the Civil Disturbance Team, and his protected activity continued, even during the week of the selection panel. On June 15, 2009, two days prior to the interview for the Motors position, Martin, as union president, sent an e-mail to Cook stating that the union objected to the posting of internal affairs investigations on the internet. In the e-mail Martin stated that the union would file a grievance, and Martin testified that he did file a grievance.

Timing alone is not enough to prove a causal connection and establish a *prima facie* case; however, a causal connection can be inferred from close timing between protected activity and an adverse action. *Mansfield School District*, Decision 5238-A and 5239-A. The proximity of Martin's objection on June 15 to his non-selection for one of the motors officer positions on June 18 is sufficient to establish a causal connection and for the union to make its *prima facie* case.

The union established its *prima facie* case by showing that Martin engaged in protected activity; that the employer deprived Martin of an ascertainable right, benefit, or status; and that a causal connection exists between Martin's protected activity and the employer not selecting Martin for one of the two Motors Officer positions in the Traffic Division.

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<sup>2</sup> The Examiner admitted exhibits 44, 45, and 46 without objection. While these exhibits pre-date the complaint, they post-date the alleged discriminatory incident.

The Employer's Non-Discriminatory Reason

According to Cook, he did not select Martin because Martin used more leave than the other candidates. The primary reason Cook selected Davis was that Cook "felt he was going to be there with the team on a more regular basis," which alleviated Cook's concerns about officer safety and effectiveness. During his testimony, Cook did not raise any concern with Martin performing other duties within the police department. In fact, Cook wanted to be sure that Martin's contractually guaranteed union leave was not being considered. The employer articulated a legitimate non-discriminatory reason for not selecting Martin for one of the two Motors Officers positions: the amount of leave Martin uses. The burden remains with the union to prove the employer's legitimate non-discriminatory reason was either pretextual or substantially motivated by union animus.

Pretextual

The union asserts the employer's decision was discriminatory because: (1) Martin had superior qualifications to any of the other candidates and should have been selected; (2) the employer failed to follow the Guidelines for Selecting Personnel to Fill Specialty Assignments; (3) the employer failed to re-deploy the Motors Unit by seniority; and (4) the employer's non-discriminatory reason is pretextual.

Three of the union's arguments are not persuasive to the Examiner. First, it is not the role of the Examiner to determine the most qualified candidate in this matter; rather, the Examiner's role is to determine whether discrimination occurred. Second, as discussed above, the Guidelines reserve the final decision to the chief and do not require that specific components of the Guidelines be used in the selection. The employer's failure to follow the Guidelines to the letter does not persuade the Examiner that the employer's non-discriminatory reason is pretext. Third, the employer is not required to fill Specialty positions by seniority.

The Examiner finds that the employer's decision not to select Martin was pretextual. Of significance is the employer's stated reason, Martin's use of leave. As will be discussed further below, the stated reason was the one given by Cook; however, two of the panel members testified to Martin's pattern of being away from his regular assignment as a factor in their

decision. Leave is a very discrete issue that involves an employee being absent from work. Other work related assignments are distinguishable from leave because the employer benefits from the employee's presence in the work place when the employee is performing secondary assignments. Additionally, Sutter's conduct and statements lead the Examiner to conclude that the decision was pretextual.

#### Leave

A review of the amount of leave used by each candidate reveals that Neill, the panel's unanimous choice, used the most leave. That fact alone gives rise to the question of whether the reason given for not selecting Martin is pretextual. In 2008, Neill used 434 hours of vacation leave and 306.5 hours of sick leave for a combined total of 740.50 hours. Up to the interview in 2009, Neill used 93 hours of vacation leave and no leave of any other kind. In 2008, Martin used 187 hours of vacation leave, 258.75 hours of compensatory time, 82.5 hours of sick leave, and 18 hours of "other" leave for a combined total of 546.25 hours. Up to the interview in 2009, Martin used 170.77 hours of vacation leave, 54.48 hours of compensatory time, 6 hours of sick leave, and 14.5 hours of "other" leave for a combined total of 245.75 hours. Neill used 41.5 hours more leave than Martin when Martin's "other" leave is included and 74 more leave hours when Martin's "other" leave is excluded. Despite Neill's using the most leave of any candidate, the panel unanimously recommended Neill be selected. Martin was the only officer who used any leave designated as "other."

At some point, the panel addressed the issue of the amount of leave used by Neill. All three panel members had personal knowledge of why Neill used what Sutter described as an "excessive" amount of leave in 2008. Schoene explained Neill's leave use involved medical issues. Sutter testified that the reason for Neill's leave use was FMLA, which came out in the panel's discussion. The panel considered sick leave use, but, according to Sutter, it was not a detractor for a candidate. The panel understood, and gave consideration to, the reason for Neill's sick leave usage was resolved. According to Sutter, the discussion about leave centered around how leave use impacted the unit.

The candidates' performance evaluations were available to the panel for review. In Martin's 2007 and 2008 evaluations, the raters comment on Martin's use of leave and time away from the

unit. The evaluations identify that Martin had a number of collateral duties, including being a peer support volunteer and EVOC (Emergency Vehicle Operations) instructor, affecting his presence at his primary assignment. The rater for Martin's 2008 evaluation was Sergeant Patrick Johns. In the 2008 evaluation, Johns states, "While Officer Martin's attendance is less than his peers it is usually do [sic] to his performing the other duties assigned to him such as EVOC and Peer support. However this value adds to the organization as he is still a solid work performer." In the 2007 evaluation, then Sergeant Steve Neal rated Martin's attendance as average and added, "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. Additionally, he performs several collateral duties for the Département which sometimes take him away from his traffic duties for short periods of time as well." Martin's evaluations reveal average attendance ratings and comments about the time he spent away from his assignment.

In addition to his work-related duties, Martin used vacation, sick, and compensatory leave available to him. Martin serves on the Law Enforcement Officer and Firefighter Pension Plan II as a public trustee appointed by the Governor. Martin uses vacation time or union time to attend those monthly meetings.

In Neill's 2008 evaluation, the evaluators, Sergeants Neal and Huberty, somewhat inconsistently comment that Neill was on extended leave, while also commenting that Neill does not take excessive sick time or leave. In Neill's 2007 evaluation, Neill's attendance was rated as average. In Davis's 2008 evaluation, the evaluator comments "[h]e has no excessive or pattern use of sick time." In Davis's 2007 evaluation, Sergeant Neal rated his attendance as "sup"<sup>3</sup> [sic] and stated "[h]is attendance is solid and he rarely uses sick time." As noted in his 2008 evaluation, Davis attended EVOC instructor training twice a year and trained other officers three to four weeks a year.

Davis and Martin are both EVOC instructors. An EVOC instructor could be gone from the unit up to three weeks per year. EVOC duties are scheduled with the supervisor.

<sup>3</sup> The 2007 evaluations listed the following categories: sup, abv av, av, bel av, not app, not obv. The Examiner infers that sup means superior; abv av means above average; av means average; and bel av means below average.

Both Martin and Neill received comments about their leave use. Only Martin's evaluations consistently note his time away from the unit. Other than the statements made in his evaluations, the employer never counseled Martin about the amount of vacation leave, compensatory time, or sick leave he used. The collective bargaining agreement between the union and employer requires bargaining unit members to take ten ten-hour shifts of vacation leave per year.

Martin's 2008 evaluation noted that he was recently elected union president. Any consideration given to the time Martin spends in duties as the union president, whether in an evaluation or in the selection process, would be illegal. Cook did not want Martin's time spent performing union business to figure into the decision. Sutter testified the panel did not consider Martin's role as union president. Troubling, the "other" leave category was included in the leave totals and included union leave. The leave records submitted in evidence show that Martin used 10 hours of union leave in 2008 and 14.5 hours of union leave in up to the time of the interviews in 2009. The Examiner concludes that the 14.5 hours of union leave accounts for the 14.5 hours of "other" leave included in the leave total in Exhibit 27. Martin was the only candidate who used "other" leave and was the only candidate who served on the union's executive board. The inclusion of the union leave in the total, when leave was the articulated reason for not selecting Martin, lends itself to a conclusion that the decision was discriminatory.

Schoene is the only one of the panel members who raised Martin's leave use as an issue. Despite knowing that Martin would potentially continue to use his leave, Schoene continued to recommend Martin. This leads the Examiner to conclude that from the perspective of the Motors Unit assistant supervisor, Martin's leave would not be an issue.

#### Foster's Recommendation

Foster's role in the selection process included participating in the interview panel, making her recommendation at the panel, and informing the candidates of the panel's selection. Foster was not involved in the final decision making process. During the debrief, Foster raised reconciling Neill's leave use with Martin's leave use. Her raising this issue indicates that Foster attempted to look at leave use objectively.

Foster recommended Neill and Davis for the Motors Officers positions. On the rater sheets, Foster did not list a weakness for Neill, Martin, or Davis. The record is not clear why Foster selected Davis over Martin.

On direct examination, Foster testified that Martin's evaluations consistently noted his use of leave. On cross examination, Foster testified that the statements in Martin's evaluations about being out of the unit at EVOC and Peer Support support a pattern of Martin not being at his primary assignment. Foster considered both Martin's leave use and his work duties that took him away from his primary assignment. Both Davis and Martin were EVOC instructors. This theoretically should have been an equal factor in rating these two candidates. The fact that Foster apparently considered EVOC as a detriment for Martin, but not for Davis, raises questions of pretext, and the comingling of work duties and leave undercuts the employer's non-discriminatory reason that Martin was not selected because of his leave use. The Examiner concludes that Foster's reasons for not recommending Martin included reasons other than the amount of leave he used.

Sometime prior to the convening of selection panel, Sutter showed Foster the sections of the Statement in which the union alleged that her promotion was based on favoritism. Based on the Guidelines, once the employer decided to use a selection process to fill the Motors Officer positions, it would have been clear to Sutter that Foster was likely to have been on the selection panel because she is the lieutenant supervising the Motors Unit. The Examiner infers that Sutter showing Foster the excerpt of the Statement pertaining to her was a deliberate act to influence Foster. Foster discussed the portion of the Statement criticizing her promotion with her partner Kistler. According to Foster, she had conversations with others in the department, but she could not recall with whom. While she had not read the Statement, she was aware of the general "themes." Foster did not see the entire Statement until the hearing in this matter. Foster credibly testified that throughout her career she has been subject to criticism. Foster admitted that the accusations in the Statement bothered her.

Foster's testimony about what she knew about the Statement and with whom she spoke was elusive and, at times, not specific. Foster's action of trying to reconcile the amount of leave

Neill used with the amount of leave Martin used is evidence that she attempted to be fair in the process, but her testimony around her knowledge of the Statement raised questions for the Examiner. Despite these concerns, the record does not clearly support an inference that Foster's recommendation was based on union animus.

#### Sutter's Actions and Statements

Sutter's initial selections were Neill and Davis. Sutter had worked personally with these two officers in various assignments over the years, but knew all of the candidates from work.

Sutter took actions and made statements that support finding that Martin's use of leave was pretext for Sutter's recommendation and that Sutter was motivated by union animus.

The testimony revealed that during the debrief Sutter made certain statements which support a finding of pretext. Schoene testified that Sutter stated that the person with the most qualifications is not always the best "fit." Schoene recalled that Sutter then went on to say "in addition to these qualifications, we're looking for someone that is – supports the Chief's vision and the Chief's direction." Sutter recalled making a statement similar to that and explained,

A [Sutter]: ...I was talking about 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 [By Snyder]: And you had no reason to question Officer Martin's commitment to community policing or territorial command, did you?

A [Sutter]: My only concern, Mr. Snyder, was if Officer Martin would be available to fill the functions on a – more than an average basis. But on a daily basis of the unit and, that was – 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.

On June 15, in his capacity as union president, Martin objected to posting internal affairs information on the internet. On June 16, Cook released his 2009 Action Plan to VPD. A core element of that action plan was increased transparency, a component of which was the posting of internal affairs information.

In light of the timing of the union's objection, the announcement of the 2009 Action Plan, and the timing of the interview panel, Sutter's statement and subsequent explanation are not enough to overcome the Examiner's inference that Sutter's statement suggests that by looking for someone who shared the Chief's vision, Sutter was looking for someone who did not oppose the Chief. As union president, Martin publicly opposed the Chief at a Command staff meeting in March 2009, in the local newspaper, and by filing grievances. Further, if Sutter's only concern about selecting Martin was his use of leave, Sutter would not have brought up selecting a candidate that supported the Chief's vision. The quality of supporting the Chief's vision is unrelated to the amount of leave the candidates use. Sutter's statement contributes to a conclusion that Sutter did not recommend Martin in substantial part because he engaged in protected activity as union president.

At the outset of the panel, Sutter told Schoene he was relying on Schoene's expertise. On Sutter's rating sheet for Neill, Sutter wrote, "Recommended by Schoene." Sutter testified:

Corporal Schoene had supervised Officer Neill. Corporal Schoene had been an acting sergeant or supervisor of that team, the motor team, during a period of absence when there was – there was no sergeant, when the sergeant left. And so he – he was very supportive of Officer Neill and – and that had some weight for me, yes.

Sutter gave Schoene's opinion weight when it supported Sutter's opinion to select Neill, but was not persuaded when Schoene's recommendation did not match Sutter's recommendation. This also supports a conclusion that Sutter's stated reasons for rejection of Martin were pretextual.

On his rater sheet for Martin, Sutter wrote "Stats good but works twice as hard when he is there. Gone more than average. May be an issue for a small team." Sutter testified that the comments were:

reflective of a discussion I was having with Lieutenant Foster and Corporal Schoene. Those were my own thoughts, but I would have to tell you that I received some of those thoughts from the discussion with Corporal Schoene. Because I would not have known, based on my own knowledge of Officer Martin, that he works twice as hard when he's there, and so that was information that Schoene provided to me. But obviously there was a black and white piece of

paper that did show leave for 2008/2009, and I could see that he was gone more than average, but this - - this encapsulates a discussion that we were having regarding each of the candidates.

When Sutter met with Cook, Sutter explained the panel's recommendation and discussed the strengths and weaknesses of the candidates. After that meeting, Cook wanted to review the rater sheets to verify what Sutter reported. The problem with this verification is that the comments on the rater sheets were not necessarily each rater's independent conclusions, and the record does not indicate whether Cook knew when the rater comments were written. Schoene credibly testified that he raised the issue of Martin's leave use. Schoene is the only rater who independently identified a weakness for Martin. Sutter would not have known that Martin works twice as hard when he is there if Schoene had not told him.

Sutter's reasons for not recommending Martin were not limited to Martin's use of leave. Sutter comingled Martin's other duties which could involve time away from the Motors Unit with his use of leave. When questioned about comments in Martin's evaluations relating to leave, Sutter stated:

I was also aware that, you know, Ryan has a number of collateral duties that take him away, so his total leave may not be reflected as vacation days or comp days. He may actually be on the clock, but just not able to be at the motor unit because he is elsewhere serving in the department. So there's an availability issue.

The "availability issue" leads the Examiner to conclude that Sutter's recommendation was based in part on Martin's total time away from his primary assignment, which included EVOC training time similar to that used by Davis as well as time that Martin may need to conduct union business while he is scheduled to work. Sutter's disparate application of "availability" and "leave" standards contributes to the finding that the employer's non-discriminatory reason was pretext.

At some point in time following the interview, Sutter requested and received information about Martin's scheduled time off between June and December 2009. Sutter wanted that information to determine whether leave would be an ongoing issue "for the motors unit, as far as Ryan

Martin's availability to work as a team." The record does not establish that Sutter sought similar information for any other candidate. Sutter's action supports finding the employer's non-discriminatory reason was pretext.

#### Sutter's Conversation with Sergeant Johns

On June 18, the day after the Motors Officer selection panel, the employer conducted a selection panel to fill the Motors Sergeant position. That same day, Foster called Johns and informed him that the employer selected him to fill the position.

Prior to the final decision on which two officers would be selected to fill the Motors Officer positions, Sutter called Johns to determine whom Johns would recommend for the two Motors Officer positions. Johns did not recall Foster participating in this phone call, but Sutter and Foster testified that Foster was on the call. According to Foster, she didn't speak, but it was not a secret that she was on the call.

Johns previously worked as the sergeant in the Motors Unit. Johns also supervised Martin on patrol after the Motors Unit disbanded in July 2008. Johns recommended Martin and Neill. According to Johns, all of the candidates were qualified and they "would be splitting hairs." Johns explained to Sutter that he would select Martin because Martin was a Drug Recognition Expert and that would be beneficial to the team.

Johns recalled Sutter mentioning that leave had been an issue for Martin. Johns agreed that leave use could be an issue for the unit, but Johns was not aware of any excessive leave use by Martin. Johns explained that Martin had a conflict with Sergeant Yates, the prior Motors Unit Sergeant. Johns told Sutter that while leave may have been a problem for Martin and Yates, Johns did not think it would be an issue for him and Martin. Johns is especially credible on this point because Johns began supervising Martin when the employer disbanded the Motors Unit in 2008, Johns evaluated Martin for 2008, and Johns previously worked in the Motors Unit.

Johns's and Sutter's testimony conflicts as to Johns's final recommendation. According to Johns, he continued to recommend Martin and Neill. Sutter and Foster testified that after Sutter

brought up the leave issue, Johns recommended Davis over Martin. The Examiner finds Johns's account more credible. Johns's account is supported by Cook's testimony that he later learned that Johns recommend Martin. The record is not clear as to when Cook received this information. Sutter's testimony indicates that Sutter told Cook Johns's recommendation during the initial meeting; however, this is impossible, as Sutter did not contact Johns until June 18, and the initial meeting with Cook was June 17.

The Examiner concludes that Sutter was seeking information from Johns to support Sutter's position of not recommending Martin. Sutter tried to persuade Johns that Martin's leave use would be an issue.

#### Sharing the Statement with Foster

As discussed above, Foster testified that Sutter showed her the sections of the Statement that pertained to her. Cook credibly testified that he did not direct Sutter to share the Statement with Foster. Cook was not aware that Sutter shared the sections of the Statement with Foster. Sutter's action leads the Examiner to infer that Sutter was actively seeking to color Foster's perspective on the union and Martin, which would have the result of preventing Martin from being selected to the Motors Officer position.

The Examiner concludes that Sutter's recommendation to Cook was pretextual, based on:

- Sutter's statements during the debrief.
- Sutter disregarded Schoene's input.
- Sutter represented on the rating sheet information he received from Schoene as his own thoughts.
- Sutter improperly considered Martin's collateral duties, including his use of union leave.
- Sutter sought out information about Martin's planned use of leave, but did not seek out similar information for other candidates.
- Sutter solicited input from Johns about who he would select for the Motors Officers positions, but then failed to rely on that information.

- Sutter shared excerpts of the Statement of Guild Concerns with Foster in an attempt to influence her against Martin.
- Sutter's memory and account of events are unreliable and contradictory to the testimony of other witnesses.

Based on all of these factors, the Examiner concludes that the record supports a finding that Sutter's analysis about Martin, and his recommendation to Cook, were based on animus and were pretextual.

#### Cook's Analysis and Selection

In 2009, the union and the employer had a relationship filled with limited communication, grievances, and disputes played out in the local media. Despite the contentious relationship, Cook's decision not to select Martin was not substantially based on union animus. Cook was frustrated with the deterioration in the relationship between the union and the employer. Cook admitted he was not pleased with the intent of the union's action regarding the Statement and he was disappointed the accusations were coming from police officers, from whom he expected more. Frustration or anger do not always equate with a discriminatory motive. The union was not successful in proving that union animus was a substantial motivating factor in Cook's decision.

Cook sought to ensure that the decision he was making was based on accurate and appropriate information. Cook reviewed the interview rating sheets to confirm the information he had been given. His concern about verifying the interview rating sheets suggests to the Examiner that Cook did not trust the report he was receiving, and that he may have had questions as to Sutter's veracity.

Cook was clear that Martin's union leave should not be considered in the selection process. Cook's reason for selecting Davis to fill one of the Motors Officers positions was that "I felt he was going to be there with the team on a more regular basis. And that therefore, those other concerns that I had about officer safety and effectiveness of a small unit would be alleviated."

Cook was not fully aware when he made his selection of Davis that others had considered Martin's union leave in making their ratings and recommendations.

Cook did not know that Foster had seen excerpts of the Statement. I find credible Cook's testimony that he did not know Foster had seen the excerpts and that he did not direct Sutter to show Foster the document. Cook testified in a forthright manner and appeared surprised when asked about Foster's knowledge on cross-examination. Cook's follow-up question seeking more information on that issue from the union's attorney, on the record, further supports the Examiner's conclusion that Cook was surprised and concerned.

Following the selection, Schoene had an opportunity to discuss the selection with Cook. There is a discrepancy about where the meeting took place; Schoene recalled the meeting happened at the East Precinct, while Cook recalled the meeting happened at Headquarters. Schoene asked Cook why he selected Martin.

Q [By Snyder]: What happened?

A [Schoene]: I just sat down. I told him some of the comments I was getting.

Q: Which comments?

A [Schoene]: Reference the selection process and how it occurred. As soon as I sat down and mentioned that's what I wanted to talk about, he said, I wanted to be clear that the selection had nothing to do with Officer Martin's Guild involvement or anything like that. That he heard my opinion was voiced to him. He confirmed with me, he said, You had selected Officer Neill and Officer Martin. I said, Yes, that's correct. He said, Yes, that's what I received. He then said, The way I made my selection was I simply - - he had a napkin or a piece of paper in front of him there and I think he drew some squares or some marks on the paper - - he said that I basically took the votes from each person. He marked for Chief Sutter, Lieutenant Foster, and myself - - wrote the selection that each of us made. He said, I simply took those recommendations, counted the votes for each person, and that's how I made my decision. I think he - he counted out right there, there were three votes for Officer Neill and two votes for Officer Davis and one vote for Martin and that was how he determined that.

According to Cook, the discussion happened at headquarters and included a number of things. Cook testified that he asked Schoene about "his expressed concern in regards to Ryan's use of

leave. And he said he was of the same - - he had the same concerns, he did feel like it would be an issue for the unit." The Examiner credits Schoene's statement that Cook told him the number of votes for each candidate was a consideration in how Cook made his decision. During the same conversation, however, Cook reiterated his concern about Martin's leave use. That, at some point, Cook explained his decision-making as tallying votes raises a question for the Examiner as to whether his stated nondiscriminatory reason is pretextual. An employer may, however, have multiple reasons for selecting one candidate over another. In this case, the fact that Cook provided somewhat different reasons for his decision at different points in time raises questions, but does not tip the balance toward finding that Cook based his own decision on union animus.

#### Conclusion

The employer asserts that the reason Martin was not selected for the Motors Officer position was the amount of leave that he used. However, the testimony reveals that Sutter and Foster considered the total time Martin was away from his primary assignment. The lack of consistent explanation for the reason the employer did not select Martin lends itself to a conclusion that, for panel members Sutter and Foster, the claimed reason for Martin's nonselection was pretextual. Further, the information used in assessing the candidates' leave use included Martin's union leave.

While the final decision was reserved to Cook, who did not substantially base his decision on union animus, the recommendation presented to Cook by Sutter was tainted. Cook's review of the interview notes might have provided an untainted opinion had the interview notes reflected what each panel member thought; however, that was not the case. Sutter represented the conversation of the panel as his own thoughts on his rater sheet. Sutter selectively relied on Motors Unit supervisors for input, giving weight to Schoene's recommendation of Neill, but not Martin, and sought out opinions to support his recommendations. Without direction from the Chief, Sutter provided Foster with the excerpts of the Statement pertaining to her. Further, Cook continued to meet with Assistant Chiefs Sutter and Kistler, who notably was not on the interview panel, prior to finalizing his decision. The linchpin in this case is Cook's reliance on the recommendation he received from Sutter. Although Cook took steps to verify the

information he was being provided, his ultimate decision was colored by Sutter's representation of the facts. Thus, the decision not to offer Martin one of the two Motors Officers positions was discriminatory.

#### FINDINGS OF FACT

1. The City of Vancouver (employer) is a public employer within the meaning of RCW 41.56.030(13). The employer operates the Vancouver Police Department.
2. The Vancouver Police Officers Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2). The union represents a bargaining unit of Officers, Corporals, and Sergeants of the Vancouver Police Department.
3. Chief Clifford Cook has been the Chief of Police since 2007. The Vancouver Police Department is divided into two bureaus: Police Services and Administrative Services. The Police Services Bureau is under the command of Assistant Chief Nanette Kistler. Within the Police Services Bureau Commander Marla Schuman reports to Kistler and oversees the Operations Support Division. Lieutenant Amy Foster reports to Schuman and oversees: SWAT; the Traffic Unit, which includes the motors unit; the explosive disposal unit; the K-9 unit; and the civil disturbance team. Assistant Chief Chris Sutter oversees the Administrative Services Bureau, which is responsible for the support functions of the department including training, background, professional standards, finance and logistics, evidence, research and development, and long term projects.
4. The employer's Traffic Unit is comprised of the motors (motorcycles) unit, a commercial vehicle enforcement officer, and a collision investigator. In July 2008, due to budgetary constraints, the employer disbanded the Motors section of the Traffic Unit. In the spring of 2009, the employer decided to reform the Motors Unit.
5. The employer decided the Motors Unit would be smaller and consist of a sergeant, a corporal, and two officers. The employer appointed Corporal Bob Schoene to the

corporal position and held a selection panel to select two officers and the sergeant for the unit. The criteria to be selected for the motor officer position included having a valid motorcycle endorsement and having successfully completed "80 hour PPB/VPD Basic Motorcycle School."

6. The Motors Officer position is a specialty assignment. There is not a pay premium for specialty positions. Specialty assignments may be considered in promotions. Benefits associated with assignment to the Motors Unit include: a take home BMW motorcycle, a 4-10 Monday through Thursday or Tuesday through Friday day shift work schedule, and the potential of overtime.
7. The "Guidelines for Selecting Personnel to Fill Specialty Assignments" (Guidelines) outlines the procedure for filling specialty assignments if the decision is made to use a selection panel. The Guidelines reserve the ultimate decision for the Chief. In accordance with the Guidelines, Sutter, Kistler, Foster, Schoene, and Human Resources Manager Lee Knottnerus were scheduled to serve as the selection panel.
8. Ryan Martin was elected President of the union in the fall of 2008 and began serving as president in January 2009. As president, Martin is the spokesperson for the union.
9. Martin engaged in protected activity from at least late fall 2008, when he filed a grievance on behalf of the Civil Disturbance Team, and his protected activity continued, even during the week of the selection panel.
10. On June 15, 2009, Martin sent an e-mail to Cook objecting to the posting of closed internal affairs investigations on the web. In the e-mail Martin stated that the union would file a grievance, and Martin testified that he did file a grievance.
11. On June 16, 2009, Cook released his 2009 Action Plan. A core element of that action plan was increased transparency, a component of which was the posting of internal affairs information.

12. On June 17, 2009, the employer held a selection panel for two Traffic Officer (Motors) positions. Four candidates applied, including Martin, Officer Scott Neill, Officer John Davis, and Officer Ken Suvada.
13. Sutter, the Committee Chair, decided to proceed with the interviews despite the absence of two of the panel members outlined in the Guidelines. Sutter, Lieutenant Amy Foster, and Corporal Bob Schoene were the interview panel. The interview panel interviewed all four applicants.
14. Sutter recommended Neill and Davis for the positions. Foster recommended Neill and Davis. Schoene recommended Neill and Martin. The panel reached consensus on recommending Neill.
15. Martin is the only candidate who served on the union's executive board.
16. The Human Resources Department provided the interview panel with a spreadsheet detailing the amount and type of leave each candidate for the motors officer position used. The leave category "other" was included in the spread sheet. Neill, the panel's unanimous choice, used the most leave of any candidate.
17. Martin is the only candidate who used leave categorized as "other." Martin used 18 hours of "other" leave in 2008 and 14.5 hours of "other" leave up to the time of the interview in 2009. In 2008, Martin used 10 hours of union leave. Up to the time of the interview in 2009, Martin used 14.5 hours of union leave. The 14.5 hours of "other" leave listed in Exhibit 27 is union leave.
18. On June 17, 2009, Sutter took the panel's recommendations to Cook. Sutter explained the results of the selection panel: the panel recommended Neill; and the panel was split with Foster and Sutter recommending Davis and Schoene recommending Martin. Sutter provided Cook with the strengths and weaknesses of each candidate, the reasons for each panel member's recommendation, the concerns about leave, and why he and Foster

selected Neill and Davis. According to Cook, Sutter provided the reasons for each panel members' preference. Cook recalled Sutter explaining some of the certifications held by the candidates. Following the meeting, Cook requested a copy of the interview notes from human resources and reviewed the interview notes. Sutter did not make Cook aware that some of the information represented as Sutter's thoughts on his rating sheets actually came from Schoene.

19. On June 18, the employer selected Sergeant Patrick Johns to be the Sergeant of the motors unit. Foster called Johns to inform him of his selection.
20. Prior to the final decision on which two officers would be selected to fill the Motors Officer positions, Sutter called Johns to determine whom Johns would recommend for the two Motors Officer positions. Johns recommended Neill and Martin.
21. On June 18, Cook met with Kistler and Sutter to finalize his decision for the motors officer selection. Cook selected Neill and Davis.
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.
23. Foster considered the amount of time Martin spent in secondary duties away from his primary assignment. Davis and Martin were both EVOC instructors, a secondary assignment that consumed about three weeks per year. Foster considered EVOC a detriment for Martin, but not for Davis.
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.

25. Sutter gave weight to Schoene's recommendation when it supported Sutter's to select Neill, but did not give it the same weight when Schoene recommended selecting Martin.
26. Sutter's recommendation was based in part on Martin's total time away from his primary assignment, which included EVOC training time similar to that used by Davis, as well as time Martin used for union leave. Sutter's disparate application of "availability" and "leave" standards contributes to a finding that the employer's non-discriminatory reason was pretext.
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.
28. On June 18, Foster called Martin and informed him that the employer had not selected him to fill one of the motors officer positions.
29. By failing to select Martin for one of the motors officer positions, the employer deprived Martin of an ascertainable right, benefit, or status.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.
2. By failing to select Ryan Martin to fill one of the vacant Motors Officer positions as described in Findings of Fact 17, 18, and 21-29, the employer discriminated against Martin because of his protected activities and interfered with employee rights in violation of RCW 41.56.140(1).

ORDER

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

1. CEASE AND DESIST from:
  - a. Discriminating against and interfering with employee rights by not selecting Ryan Martin to fill a vacant Motors Officer position because he engaged in activity protected by Chapter 41.56 RCW.
  - b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under 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. Within 30 days of this order, offer Ryan Martin an unconditional offer of employment to the position of Motors Officer. Afford Ryan Martin the rights and privileges of a Motors Officer as if the employer had not discriminated against him, and he held the position effective the date of the Motors Officer assignment.
  - b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

- c. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Vancouver, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.
- d. Notify the 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 complainant with a signed copy of the notice provided by the Compliance Officer.
- e. Notify the Compliance Officer 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 Compliance Officer with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 23rd day of December, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CHARITY L. ATCHISON, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.



**PUBLIC EMPLOYMENT RELATIONS COMMISSION**

# NOTICE

**THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE CITY OF VANCOUVER COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE UNLAWFULLY discriminated against and interfered with employee rights by not selecting Ryan Martin to fill a vacant Motors Officer position because he engaged in activity protected by Chapter 41.56 RCW.

**TO REMEDY OUR UNFAIR LABOR PRACTICES:**

WE WILL offer Ryan Martin an unconditional offer of employment to the position of Motors Officer.

WE WILL afford Ryan Martin the rights and privileges of a Motors Officer as if the employer had not discriminated against him, and he held the position effective the date of the Motors Officer assignment.

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

**DO NOT POST OR PUBLICLY READ THIS NOTICE.**

**AN OFFICIAL NOTICE FOR POSTING AND READING  
WILL BE PROVIDED BY THE COMPLIANCE OFFICER.**

The full decision is published on PERC's website, [www.perc.wa.gov](http://www.perc.wa.gov).



## PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300  
PO BOX 40919  
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON  
PAMELA G. BRADBURN, COMMISSIONER  
THOMAS W. McLANE, COMMISSIONER  
CATHLEEN CALLAHAN, EXECUTIVE DIRECTOR

### RECORD OF SERVICE - ISSUED 12/23/2010

The attached document identified as: **DECISION 10621-A - PECB** has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
BY/S/ ROBBY BUFFIELD

CASE NUMBER: 22840-U-09-05829 FILED: 11/06/2009 FILED BY: PARTY 2  
DISPUTE: ER DISCRIMINATE  
BAR UNIT: LAW ENFORCE  
DETAILS: Nonselection of Ryan Martin  
COMMENTS:

EMPLOYER: CITY OF VANCOUVER  
ATTN: PAT MCDONNELL  
210 E 13TH ST  
PO BOX 1995  
VANCOUVER, WA 98668-1995  
Ph1: 360-487-8602 Ph2: 360-487-8600

REP BY: TERRY WEINER  
CITY OF VANCOUVER  
PO BOX 1995  
VANCOUVER, WA 98668-1995  
Ph1: 360-487-8500

PARTY 2: VANCOUVER POLICE OFFICERS GLD  
ATTN: JEFF KIPP  
PO BOX 1201  
VANCOUVER, WA 98666  
Ph1: 360-904-3652

REP BY: DAVID SNYDER  
SNYDER & HOAG  
PO BOX 12737  
PORTLAND, OR 97212  
Ph1: 503-222-9290 Ph2: 360-906-8700

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VANCOUVER POLICE OFFICERS  
GUILD,

Complainant,

vs.

CITY OF VANCOUVER,

Respondent.

CASE 22840-U-09-5829

DECISION 10621-B - PECB

DECISION OF COMMISSION

Snyder & Hoag, by *Daniel A. Snyder*, Attorney at Law, for the union.

Office of the City Attorney, by *Terry M. Weiner*, Assistant City Attorney, for the employer.

On November 6, 2009, the Vancouver Police Officers Guild (union) filed an unfair labor practice complaint alleging that the City of Vancouver (employer) discriminated against Officer Ryan Martin (Martin) in retaliation for Martin's union activity.<sup>1</sup> The union alleged that Vancouver Police Chief Clifford Cook's decision to not select Martin for the department's "Motors Unit" was based upon the union animus of several members of the interview committee who screened potential candidates and made recommendations to Cook on which employees to select. Examiner Charity Atchison conducted a hearing and held that the evidence demonstrated that Assistant Chief Chris Sutter's (Sutter) recommendation to Cook about which officer should be selected to the Motors Unit was tainted by union animus. However, the Examiner held that Cook

<sup>1</sup> The union's original complaint also alleged that the employer attempted to dominate the union. RCW 41.56.140(2). Unfair Labor Practice Manager David I. Gedrose found that the union's complaint failed to state a cause of action under RCW 41.56.140(2), and issued a deficiency notice which gave the union 21 days to cure the defects in that allegation. The union did not cure the stated defects, and the domination allegation was dismissed. *City of Vancouver*, Decision 10621-A (PECB, 2009).

himself did not display any union animus in his decision making.<sup>2</sup> The Examiner ordered the employer to immediately offer Martin a position in the Motors Unit to remedy its unfair labor practice.

The employer filed a timely appeal contesting the Examiner's factual findings and legal conclusions. In its appeal, the employer argues Cook had legitimate independent reasons for not offering Martin a position in the Motors Unit. The employer also argues that the evidence fails to support the conclusion that the selection process was tainted by the union animus of certain members of the interview panel. The employer urges this Commission to reverse the Examiner's decision and dismiss the complaint.

The union filed a timely cross-appeal challenging certain findings and conclusions made by the Examiner. Although the union supports the Examiner's conclusion that Sutter's recommendation to Cook was tainted by union animus, the union argues that the record supports a finding that Cook's decision also demonstrated union animus. The union also argues that the Examiner failed to give proper consideration to all of Martin's union activity, failed to take into consideration Martin's superior qualifications, failed to consider the employer refusal to select employees for the Motors Unit by seniority, and failed to consider the employer's decision to not follow its internal Selection Guidelines. The union also urges the Commission to reverse the Examiner's conclusion that Lieutenant Amy Foster (Foster), another member of the interview committee, did not display union animus in her recommendation.

For the reasons set forth below, the Examiner's conclusion that the employer discriminated against Martin in the selection process for the Motors Unit is affirmed. Substantial evidence in the record supports the Examiner's findings and conclusion that Sutter's recommendation to Cook was tainted by union animus.<sup>3</sup> However, the Examiner's conclusion that Cook did not

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<sup>2</sup> *City of Vancouver*, Decision 10621-A (PECB, 2010).

<sup>3</sup> This Commission reviews conclusions and applications of law, as well as interpretations of statutes, *de novo*. We review 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 7088-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). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision

display union animus in his decision making process is reversed. Under Chapter 41.56 RCW, a decision maker will be strictly liable for discrimination based upon union animus where a lower level supervisor's discriminatory actions against an employee cause a decision maker to take adverse action against the employee.

### DISCUSSION

A recitation of the facts is necessary to place our decision in its proper context. The command structure of the employer's police department is divided into two bureaus, Police Services and Administrative Services.

Assistant Chief Nanette Kistler (Kistler) commands Police Services. Commander Marla Schuman (Schuman) oversees the Operating Support Division, which is within Police Services. Schuman reports directly to Kistler. Also within Police Services are the Special Weapons and Tactics Unit, the Traffic Unit, the K-9 Unit, the Explosives Disposal Unit, and the Civil Disturbance Team. Foster oversees these units.

The Administrative Services Bureau provides the support functions of the police department. Sutter commands this bureau. Human Resources Analyst Lee Knottnerus (Knottnerus) works within the Administrative Services Bureau.

### Martin's Union Activities

In November 2008, Martin was elected union president. Martin testified that he aggressively asserted the bargaining unit's rights and changed the way the union interacted with management. For example, in January 2009, Martin informed Cook by e-mail that the union's Executive Board had decided to cancel monthly meetings that had previously been held between the union president and the chief of police. Martin's e-mail explained that the union felt that all

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7088-B. The Commission attaches considerable weight to the factual findings and inferences made by agency examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001). Credibility determinations will not be disturbed unless those determinations are not supported by substantial evidence. *Snohomish County*, Decision 9834-B (PECB, 2008).

communications needed to be in writing to “ensure that both entities are communicating effectively, fairly, and without misinterpretation.”

Martin filed several grievances on behalf of the union and challenged several employer policies. These included a November 2008 grievance concerning stand-by pay of the Civil Disturbance Team and a February 2009 grievance challenging the use of vacation leave during the July 4<sup>th</sup> holiday.

Martin also challenged the employer’s desire to change certain policies. For example, the employer approached the union with a proposal that would allow the employer to search employee lockers in a manner contrary to the process contained within the negotiated collective bargaining agreement. The union rejected the employer’s proposal and the employer dropped the matter at that time.

Martin publicly challenged the employer’s leadership on behalf of the union. On March 27, 2009, Martin issued a “Statement of Guild Concerns” (statement) that criticized Cook’s and Kistler’s leadership as well as certain decisions made by management. For example, the statement made negative comments about the employer’s practice of “changing the rules” for the selection of specialty positions.<sup>4</sup> The letter also criticized the employer’s tendency to change its policies to allow favored individuals to apply for positions. The statement specifically cited Foster’s application for the lieutenant’s position that she was ultimately granted, and noted that Foster did not meet the educational requirements for the position at the time she took the lieutenant’s examination. The statement also brought up the fact that Foster and Kistler are in a domestic relationship, and that the decision to promote Foster could be viewed as favoritism.

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<sup>4</sup> The Examiner admitted the statement into evidence, but declined to admit an anonymous letter that was attached to the statement because the letter could not be authenticated. The Examiner specifically found that without authentication, the letter offered little probative value. The Examiner concluded that the record supports a finding that Martin delivered the letter as part of the Statement of Guild Concerns, and it was not necessary to admit the letter into evidence. The union recognizes that the letter cannot be admitted for the truth of the matter asserted, but nevertheless claims that the letter should have been admitted. We find the Examiner’s decision to reject the admission of the letter sound. Without authentication, the prejudicial nature of the letter far outweighs its probative value and, as the Examiner succinctly stated, the record supports a finding that the letter was delivered as part of Martin’s union activities.

Cook responded to the union by stating that the statement's attacks upon the assistant chiefs were "untrue, unnecessary, and unproductive." Cook also expressed disappointment about the union's decision to cease its monthly meetings with the chief. Martin responded to Cook's criticism by labeling it "insulting and inflammatory."

Sutter shared with Foster a copy of the statement. Foster testified that she was aware of the allegations made by the union and that the statements bothered her, but she had not reviewed the entirety of the statement until the hearing in this matter.

On April 23, 2009, Martin filed a formal complaint with the employer on behalf of the union alleging Kistler's and Foster's domestic relationship violated the employer's anti-nepotism policy. The union ultimately dropped its complaint.

On June 15, 2009, Martin sent an e-mail to Cook objecting to the employer's plan to post information about internal investigations of bargaining unit employees on the internet. Martin stated that the parties' current collective bargaining agreement specifically governs the disclosure of investigative information, and that the matter would be discussed in upcoming negotiations. On June 17, 2009, *The Columbian* newspaper published an article describing the employer's interest in posting investigative information on the web as a way to promote transparency within the department, as well as the union's opposition to the employer's plan. The article also referenced the union's March 27, 2009 statement.

#### The Motors Unit

Prior to 2008, the police force operated a Motors Unit of six to eight patrol officers who patrolled by motorcycle rather than sedan. The Motors Unit specifically focused on traffic enforcement. Martin served as a member of the Motors Unit between 2002 and 2008.

In 2008, Cook disbanded the Motors Unit due to budget constraints. The employer reassigned Martin to the regular patrol unit. When the Motors Unit disbanded, there was some discussion among its members that if the unit was ever to be reformed, seniority should determine which officers are selected for the unit. No evidence exists in this record demonstrating that the

employer and union bargained the conditions for assigning employees to the Motors Unit should it be reformed.

#### Re-creation of the Motors Unit

In early 2009, Cook decided to reform the Motors Unit. The employer decided that the new Motors Unit would be smaller than the original, and consist of one sergeant, one corporal, and two officers. Cook directed Foster to formulate and implement a plan to revive the unit. Foster consulted with Corporal Bob Schoene (Schoene) in the planning process because Schoene had been the acting supervisor when the Motors Unit was disbanded and because Schoene was the only certified motorcycle instructor within the department. The employer selected Schoene for the Motors Unit without the need of an interview because of his instructor's certificate.

In May 2009, Martin approached Foster to inform her that he was also a motorcycle instructor and offered to provide her his teaching certificate. Martin questioned Foster about the employer's decision to automatically select Schoene. Foster stated that she was under the impression that Schoene was the only certified instructor. Foster testified that although Martin had taken motorcycle instructor courses, he had not completed the training and obtained his instructor's certificate.<sup>5</sup>

Originally, the employer planned to open applications for the Motors Unit to all employees of the department. However, Schoene recommended that the employer consider only those officers who were certified motorcycle officers so the Motors Unit could immediately begin operations. Schoene also testified that Foster and Schuman asked him which officers would be chosen if the selection process was made by seniority. Schoene stated that Martin and Officer Scott Neill (Neill) would be the two officers selected if seniority were the only consideration.

On May 29, 2009, Knottnerus posted the job announcement for the two officer positions in the Motors Unit. Shortly thereafter, Martin contacted Knottnerus and asked why the job was being limited to those employees who were certified motorcycle officers. Martin stated that he was under the impression that the Motors Unit positions were specialty positions and, consistent with

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<sup>5</sup> The complainant submitted no evidence demonstrating that Martin actually had an instructor's certificate.

employer policies, would be open to all employees. Knottnerus explained the certificate requirement was necessary so that the employees assigned to the Motors Unit could immediately start their new work. Knottnerus also stated that the selection process would be similar to the process used for other specialty positions.

#### The Selection Guidelines

When the employer filled a specialty position in its workforce, the process for filling that position was governed by the protocols established in the “Guidelines for Selecting Personnel to Fill Specialty Assignments” document. The guidelines reserve to the chief of police the ultimate authority in selecting an employee for a specialty position. The guidelines also state that there are no requirements that the guidelines be used as part of the hiring process. However, if the guidelines were used, the interview committee would include assistant chiefs, the commander or lieutenant from the position’s division, a supervisor from the unit or other subject matter expert, and the human resources manager.

The guidelines require that each candidate’s personnel file, attendance history, internal affairs history, and performance evaluations are provided to the interview committee. The guidelines require that once the interviews are completed, the interview panel should report the strengths and weaknesses of each candidate to the chief along with a recommendation as to which candidate to select.

#### The Selection Process

On June 17, 2009, the panel interviewed the four candidates who applied for the two officer positions in the Motors Units: Martin, Neill, Officer John Davis, and Officer Ken Suvada. Although Sutter, Kistler, Foster, Schoene and Knottnerus should have composed the interview panel, Kistler and Knottnerus were absent due to other conflicts. Sutter decided to proceed with the interviews despite the absence of two members because all of the candidates were available that day. Cook was not aware that Sutter conducted the interviews without the full panel.

Prior to the actual interviews, Sutter, Foster, and Schoene reviewed the application packet of each candidate. Each packet included a cover sheet for the panel member to rate the candidate, a

letter of interest authored by the candidate, and the 2007 and 2008 evaluations of the candidate. Each packet also contained a spreadsheet containing the amount of leave each candidate used in the previous year as required by the guidelines. The interview panel discussed among themselves the interview process, including which panel member would ask certain questions of the candidates. Each interview lasted approximately 30 minutes, and each candidate was asked the same five questions.

After the interviews were completed, the panel members discussed their recommendations. All three panel members selected Neill. Additionally, the panel unanimously decided not to select Suvada. The panel was not united in their choice for the second officer position. Sutter and Foster selected Davis, while Schoene selected Martin.

#### Leave Use by the Candidates

During the deliberations, the interview panel discussed the amount of leave used by each candidate.

In 2008, Neill used 434 hours of vacation leave, and 306.5 hours of sick leave. In 2009, Neill used 93 hours of vacation leave as of the time of the interview, and no other leave. The testimony demonstrates that the panel was not concerned with Neill's leave use because his 2008 use fell under the Family Medical Leave Act.

In 2008, Martin used 187 hours of vacation leave, 258.75 hours of compensatory time, 82.5 hours of sick leave, and 18 hours of other leave. In 2009, Martin used 170 hours of vacation leave, 54.48 hours of compensatory time, 6 hours of sick leave, and 14.5 hours of other leave as of the date of the interview.

Martin's 2007 and 2008 evaluations expressed some concern about his leave. For example, Sergeant Steve Neal (Neal), who authored Martin's 2007 evaluation, wrote that Martin "takes advantage of available leave time as permitted by department guidelines" but also noted that Martin's co-workers "ribbed" Martin about his absences. Neal also commented that Martin's "collateral duties" required his absence from the unit. Martin's 2008 evaluation, written by

Sergeant Patrick Johns (Johns), also identified Martin's use of leave as a concern, but also noted that Martin's use of leave as a peer support volunteer and as an Emergency Vehicle Operator (EVOC) instructor added value to the workforce. 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.

In 2008, Davis used 228 hours of vacation leave, 127 hours of sick leave, and 2 hours of compensatory leave. In 2009, Davis used 53.75 hours of vacation leave, 10.5 hours of sick leave, and 21 hours of bereavement leave. There is no evidence that the panel considered Davis's leave use. However, the record demonstrates that Davis is also an EVOC instructor.

The interview panel had some concern with Martin's attendance. For example, Sutter's interview notes state that Martin was "gone more than average" and that this "may be an issue for a small team." Schoene's notes also indicate Martin's weakness as a candidate was his "extended time off potentially/availability." Foster testified that Martin's leave use was a constant issue in his evaluations, and also testified that Martin's leave use as well as his duties as an EVOC instructor and with Peer Support took time away from his normal patrol duties. However, there is no evidence to indicate that this leave was not approved by management.

#### Sutter's Statements During the Interview Debrief

Schoene testified that during the interview debriefing, Sutter stated that the most qualified candidate is not always the best "fit" for a position, and that "we're looking for someone that is – supports the Chief's vision and the Chief's direction." Sutter wrote on his rating sheet that Schoene recommended Neill, but did not write a similar comment regarding Schoene's recommendation of Martin.

#### Sutter's First Meeting with Cook

On the afternoon of June 17, 2009, Sutter met with Cook to discuss the interview process. Sutter explained the strengths and weaknesses of each candidate, as well as the recommendations of each of the panel members. Cook testified that Sutter provided an explanation of all of the application qualifications and certifications. Cook also testified that Sutter provided the reasons

for each panel member's preference. Cook stated that Sutter was concerned about Martin's attendance record, as well as Martin's planned leave, and the impact that this leave might have on a small unit.

#### Sutter's Meeting With Sergeant Johns

On June 18, 2009, the employer interviewed candidates for the sergeant position in the Motors Unit. The employer informed Johns that he was selected as the sergeant of the Motors Unit.

Sutter, still in his capacity as an interview panel member, spoke with Johns that same day to discuss the candidates for the motors position. Sutter asked Johns who he would recommend for the position. Johns stated that he would recommend Neill and Martin. Johns also stated that Martin's drug recognition training would be beneficial for the Motors Unit.

Johns testified that Sutter mentioned to him that leave had been an issue with Martin. Johns testified that he was not aware of any excessive leave use by Martin, and Johns informed Sutter that he did not envision any conflicts with Martin. Johns testified that even after his conversation with Sutter, he continued to recommend Martin and Neill. Sutter and Foster each testified that after the leave issue was discussed, Johns then recommended Davis over Martin. Cook testified that he was aware that Johns selected Martin over Davis.

#### Cook's Decision

Cook did not immediately make a selection. Rather, he reviewed the interview notes from each of the panel members. Cook testified that prior to a meeting he had with Sutter and Kistler, he intended to select Davis because Davis did not have the leave issues that Martin had. On June 18, the employer informed Martin that he was not selected.

Schoene testified that he discussed the selection process with Cook. At this meeting, Schoene asked Cook how the decision was made. Schoene testified that Cook drew squares on a piece of paper, assigned votes based upon the recommendations of each of the panel members, and then counted the total votes to determine that Davis should be selected. Although Cook stated that

leave was not a factor in his decision, Schoene testified that during this conversation Cook reiterated his concern about Martin's leave use.

#### Applicable Legal Standard

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in employer discrimination cases. To prove discrimination, the complainant must first make a *prima facie* case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;
2. The employer deprived the employee of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, a complainant may use circumstantial evidence to establish the *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007).

To prove discriminatory motivation, the complainant must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. Circumstantial evidence consists of proof of facts or circumstances which according to the common experience gives rise to a reasonable inference of the truth of the facts sought to be proved. *See Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

In response to a *prima facie* case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of

proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant to prove either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

#### Application of Standard

The first step in the analysis is to determine if the union established its *prima facie* case of discrimination. The Examiner held that Martin engaged in the protected activity outlined above, that Martin was deprived of a benefit when the employer declined to offer Martin a position with the Motors Unit, and a casual connection existed between Martin's protected activity and the employer's adverse act.

The employer has not specifically challenged the Examiner's conclusion that the union established its *prima facie* case. Therefore, this conclusion stands on appeal. *See Brinnon School District*, Decision 7210-A (PECB, 2001).

The Examiner also concluded that the employer articulated non-discriminatory reasons for making its decision. Specifically, the Examiner found that Cook selected Davis over Martin because Cook "felt [Davis] was going to be there with the team on a more regular basis."

The union has not specifically challenged the Examiner's finding that the employer articulated non-discriminatory reasons for actions. Therefore, this conclusion stands on appeal. *See Brinnon School District*.

#### Union's Ultimate Burden

The Examiner concluded that the union sustained its ultimate burden of proving the employer had a discriminatory motive for not selecting Martin for the Motors Unit. In reaching her decision, the Examiner found that Sutter improperly considered Martin's union activity and authorized leave for union related matters as factors against his selection. The Examiner also found that statements made by Sutter demonstrated union animus that tainted his recommendation to Cook.

On appeal, the employer challenges the Examiner's conclusions that Sutter's recommendation was tainted by union animus. The employer asserts that no evidence supports a finding that demonstrates the members of the interview panel were aware of Martin's June 15, 2009 union activity when they made their recommendations. The employer also asserts that certain statements made by Sutter about selecting a candidate that shared the "Chief's vision" were not only taken out of context, but the statements themselves represent a sound hiring approach.

The union's cross-appeal argues that the decision failed to consider Martin's superior qualification and failed to find that the employer's decision to not select the employees for the Motors Unit by seniority was a discriminatory decision. The union also claims that the record supports a finding that Foster's recommendation and the chief's ultimate decision were also tainted by union animus.

Turning first to the union's cross-appeal, the Examiner properly declined to enter a finding regarding Martin's qualifications. As the Examiner accurately expressed, this Commission's role is to determine if discrimination occurred under Chapter 41.56 RCW. In this case, it was unnecessary to determine whether Martin's qualifications made him the superior candidate because other evidence supported a conclusion that the employer's decision was discriminatory.

We also disagree with the union that the employer was required to fill the Motors Unit vacancies by seniority. The record supports a finding that when the Motors Unit was initially disbanded in 2008, the members of the unit discussed the possibility of re-creating the Motors Unit by seniority. However, substantial evidence supports the Examiner's conclusion that the employer did not enter into a binding agreement with the union that would require the employer to reform the unit by seniority. Thus, substantial evidence supports the Examiner's conclusion that the employer's existing policies did not require it to fill the Motors Unit by seniority.

Similarly, we agree with the Examiner that the employer's failure to follow its Selection Guideline criteria was not discriminatory. Substantial evidence supports the conclusion that Cook remained the final decision maker and the employer was not required to follow the criteria.

Finally, the union's claim that Foster's recommendation was tainted is not supported by the record. The Examiner declined to find that Foster discriminated against Martin because Foster attempted to be fair in the hiring process. The Examiner reached this conclusion despite the fact that she found that Foster considered Martin's EVOC leave to be a detriment.

The record demonstrates that Davis also accrued EVOC leave, and the Examiner was troubled by the fact that Foster did not give Davis's EVOC leave the same consideration she did to Martin's. The Examiner also noted that Foster was at times elusive in testifying about her knowledge of the union's criticism about her and her promotion. The Examiner did not enter a finding that Foster properly or improperly considered Martin's union leave in her deliberations.

Despite these concerns, the Examiner nevertheless held that although an inference could be made that the union's, and therefore Martin's, statements about Foster's promotion could have impacted her recommendation to Cook, the evidence failed to demonstrate that Foster exhibited union animus.

Substantial evidence supports the Examiner's conclusion that Foster attempted to be fair and that there is no clear indication that Foster's recommendation was based upon union animus. Furthermore, the Examiner's inferences are supported by substantial evidence, and we will not disturb those findings and conclusions in light of the substantial support existing within the record.

#### Record Supports a Finding that Sutter's Recommendation was Tainted by Animus

The Examiner held that Sutter's recommendation to Cook was tainted by union animus. In reaching this conclusion, the Examiner found Sutter's statements and actions as they related to Martin demonstrated pretext. This pretext included improperly considering Martin's union leave time in his recommendation to Cook and by making negative statements and inferences about Martin's protected activities. We agree.

An employer may not consider an employee's use of union leave when making an employment decision. An employer that does so violates Chapter 41.56 RCW because the employer has

taken into consideration an employee's protected activity when making an adverse employment decision. Here, 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.

Furthermore, substantial evidence supports the Examiner's finding and conclusions that Sutter's statements to Schoene about selecting a candidate that supports the "Chief's vision and the Chief's direction" supports a finding of union animus. 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.

In sum, the totality of the evidence demonstrates that Sutter's decision was tainted by a pattern of union animus. While the employer disagrees with the Examiner's conclusions, and disagrees with the weight given by the Examiner to the evidence as a whole, substantial evidence supports the Examiner's findings and conclusion.

#### Cook's Decision was Tainted by Animus

The Examiner concluded that Cook did not demonstrate animus in his decision making. In reaching this conclusion, the Examiner found that although Cook provided somewhat different reasons for his decision at different times, he attempted to make a review of the candidates and attempted to formulate a decision free from animus. However, the Examiner also found that Cook's reliance on Sutter's recommendation nevertheless colored the decision making process and therefore the decision to not select Martin was discriminatory.

The employer argues that the employer had a legitimate business reason for not selecting Martin, and also points out that the chief retained final decision making authority of the hiring decision. The union argues that the evidence supports a finding that Cook displayed his own animus in the decision making process. For the following reasons, we affirm the Examiner's findings and conclusion that Cook did not display animus on his own, but 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.

In *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (March 11, 2011), the United States Supreme Court held that an employer may be held liable for discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision. The facts presented by *Staub* are illustrative for the case before us.

The plaintiff employee worked at a hospital and was a member of the United States Army Reserves. During the course of his employment, the department head who supervised the plaintiff found the plaintiff's military obligations to be a strain on the department, and the department head was openly hostile to the plaintiff. The hospital placed the plaintiff on a corrective action notice for his attendance approximately two weeks after the plaintiff was called by the military to report to readiness processing in anticipation for a deployment. However, other employees continued to complain about the plaintiff's absence from work.

The hospital directed its Vice President of Human Resources and the plaintiff's department head to formulate a plan to deal with the plaintiff's availability. That plan was never formulated, and the Vice President of Human Resources fired the plaintiff for violating the corrective action notice. The plaintiff sued, and a jury awarded the plaintiff damages pursuant to the Uniformed Service Employment and Reemployment Rights Act (USERRA) under the theory that an employer could be held liable for the discriminatory acts of those who influence a decision. The Seventh Circuit Court of Appeals reversed the decision, and the Supreme Court granted review.

In reaching its conclusion that the hospital discriminated against the plaintiff in violation of the USERRA, the Supreme Court stated that its conclusion was based upon traditional agency and tort principles. The Court found then that the USERRA prohibited employers from taking certain employment actions where the employee's military obligations are the motivating factor in the employer's actions. The Court then held that 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. According to the Court, the

discriminatory animus of the non-decision maker can be considered the proximate cause of the ultimate employment action and, therefore, of the injury suffered.

Finally, the Supreme Court noted that its holding was not a “hard and fast rule,” and that the possibility exists for an employer to conduct an independent investigation free from discriminatory animus to reach the same conclusion.

We find the Supreme Court’s reasoning in *Staub* to be sound and appropriate for application to discrimination cases under Washington’s labor laws. Thus, where an employment decision is influenced by the union animus of a subordinate or advisor to the decision maker, the decision will be found discriminatory, and a remedial order will be issued unless the respondent can demonstrate that the decision maker independently reached the same conclusion free from union animus.

In cases such as this, a respondent will not be found in violation of Chapter 41.56 RCW if it demonstrates that the decision was made completely free from the recommendation of the subordinates who displayed union animus. However, once a subordinate has made a recommendation to a decision maker that has been tainted by animus, it is not enough for the decision maker to say the decision was made independently. Credible evidence must exist that demonstrates that the decision maker purged from the decision making process the discriminatory recommendation.

Applying these principles to the case before us, the record clearly demonstrates that Cook relied upon the tainted recommendation of Sutter when making his decision. Although Cook testified that he considered selecting Davis over Martin, Schoene testified that Cook stated he simply counted the votes of the members of the interview panel to make his final decision. The Examiner found Schoene’s testimony credible. Furthermore, the record demonstrates that Cook reviewed the notes of the interview panel, but did not conduct an independent review of the applicants.

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.<sup>6</sup> The Examiner's decision is affirmed.

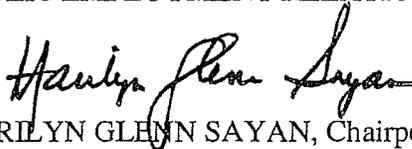
NOW, THEREFORE, it is

ORDERED

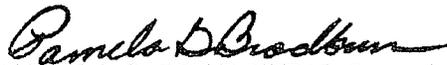
The Findings of Fact, Conclusion of Law, and Order issued by Examiner Charity Atchison are AFFIRMED as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 11th day of April, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



PAMELA G. BRADBURN, Commissioner



THOMAS W. McLANE, Commissioner

<sup>6</sup> A review of the Examiner's Findings of Fact and Conclusions of Law demonstrates that the Examiner reached a substantially similar conclusion without relying upon the *Staub* decision. Therefore, it is not necessary to amend the underlying Findings of Fact and Conclusions of Law.



## PUBLIC EMPLOYMENT RELATIONS COMMISSION

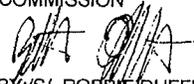
112 HENRY STREET NE SUITE 300  
PO BOX 40919  
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON  
PAMELA G. BRADBURN, COMMISSIONER  
THOMAS W. McLANE, COMMISSIONER  
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PUBLIC EMPLOYMENT RELATIONS  
COMMISSION

  
BY: /S/ ROBBIE DUFFIELD

CASE NUMBER: 22840-U-09-05829 FILED: 11/06/2009 FILED BY: PARTY 2  
DISPUTE: ER DISCRIMINATE  
BAR UNIT: LAW ENFORCE  
DETAILS: Nonselection of Ryan Martin  
COMMENTS:

EMPLOYER: CITY OF VANCOUVER  
ATTN: ERIC HOLMES  
210 E 13TH ST  
PO BOX 1995  
VANCOUVER, WA 98668-1995  
Ph1: 360-487-8602 Ph2: 360-487-8600

REP BY: TERRY M WEINER  
CITY OF VANCOUVER  
PO BOX 1995  
VANCOUVER, WA 98668-1995  
Ph1: 360-487-8500

PARTY 2: VANCOUVER POLICE OFFICERS GLD  
ATTN: JEFF KIPP  
PO BOX 1201  
VANCOUVER, WA 98666  
Ph1: 360-904-3652

REP BY: DAVID SNYDER  
SNYDER & HOAG  
3759 NE MLK JR BLVD  
PORTLAND, OR 97212-1112  
Ph1: 503-222-9290 Ph2: 360-906-8700

# WASHINGTON STATE ATTORNEY GENERAL

January 08, 2013 - 3:46 PM

## Transmittal Letter

Document Uploaded: 436418-Respondent's Brief.pdf

Case Name: City of Vancouver v. State of Washington Public Employment Relations Commission and the Vancouver Police Guild

Court of Appeals Case Number: 43641-8

Is this a Personal Restraint Petition?  Yes  No

### The document being Filed is:

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- Statement of Arrangements
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- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
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### Comments:

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[beckym@atg.wa.gov](mailto:beckym@atg.wa.gov)  
[spencerd@atg.wa.gov](mailto:spencerd@atg.wa.gov)