

No. 436418 - ~~8~~-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CITY OF VANCOUVER, a municipality,
Appellant

v.

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

Appellees.

BRIEF OF APPELLEE VANCOUVER POLICE OFFICERS GUILD

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I. INTRODUCTION

This appeal arises from an unfair labor practices complaint filed with the Washington Public Employment Relations Commission (“PERC”) by Appellee Vancouver Police Officers Guild (the “VPOG” or “Guild”), a labor organization representing public employees, against Appellant City of Vancouver (“City”). The VPOG alleged that the City discriminated against its president, Officer Ryan Martin, by failing to select Martin for assignment to the Vancouver Police Department Motors Unit.

A PERC Hearing Examiner concluded that the City had violated Chapter 41.56 RCW by discriminating against Martin as alleged by the VPOG. She entered an order against the City of Vancouver requiring that it remedy its unfair labor practices. On appeal, the three-member Commission of the PERC affirmed the Examiner’s decision.

Both the Examiner’s decision and the PERC’s decision relied upon long-established PERC precedent, *Educational Service District 114*, Decision 4361-A (PECB 1994). AR 1208, 1390. In that case, the PERC endorsed the “substantial factor” test for discrimination adopted by the Washington Supreme Court in *Wilmot v. Kaiser Aluminum*, 118

Wash. 2d 46, 821 P.2d 18 (1991) and *Allison v. Seattle Housing Authority*, 118 Wash. 2d 79, 821 P.2d 34 (1991).

The City's appeal of the PERC's ruling must be considered in light of both Martin's aggressive representation of the Guild in the months leading up to the Motors Unit selection and his undisputed qualifications for that position. The PERC's conclusion that Assistant Chief Chris Sutter's recommendation to Chief of Police Clifford Cook was tainted by union animus is supported by substantial evidence. The evidence supporting the PERC's conclusion is not limited to Sutter's consideration of Martin's union leave. Standing alone, Sutter's assertion of a "shared vision" selection standard establishes his animus.

The PERC is authorized by RCW 41.56.160(2) to issue a remedial order against any person found to have committed an unfair labor practice—no new liability was created in this dispute. Moreover, Cook was not a party to the dispute and the PERC did not issue an order against him individually. The PERC's interpretation and application of *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 562 U.S. ____ (2011)(hereafter "*Staub*") is a matter within the agency's expertise—the PERC's adoption of the reasoning of *Staub* was not erroneous.

II. ASSIGNMENTS OF ERROR (City's Brief 2-4)

The PERC did not commit error as asserted in Section II of the City's Brief. Appellee VPOG did not cross-appeal.

III. STATEMENT OF THE CASE

A. The Role of the PERC in Washington Collective Bargaining Matters. (City's Brief 4-5)

The VPOG accepts the City's Statement of the Case set forth in Section III.A. of the City's Brief.

B. Facts.

1. VPD and the Motors Unit. (City's Brief 6-7)

The VPOG accepts the City's Statement of the Case set forth in Section III.B.1. of the City's Brief.

2. Martin's Election as VPOG President and His Union Activities.

Vancouver Police Officer Ryan Martin was hired in September 2001. AR 72. In December 2002 he was assigned to work in the Motorcycle Unit. He held this assignment until the Unit was disbanded in July 2008. AR 73. His most recent performance evaluation dated February 2009 described Martin as "a seasoned, well-rounded officer with expertise in Traffic enforcement, investigation and detection of

DUI both alcohol and drug related. He is motivated to accomplish the mission and values of the Vancouver Police Department.” AR 88-89.

The PERC correctly found that Martin was elected VPOG President in November 2008 and immediately commenced aggressively representing the Guild’s interests. His assertion of the Guild’s interests continued through the week of the selection of new officers for the Motors Unit. AR 1382-1384.

1. Shortly after his election as VPOG President in late 2008, Martin filed grievances seeking stand by pay for certain Guild members and challenging the City’s alleged nepotism. AR 467, 477-481, 550.

2. On January 5, 2009 Martin sent Chief of Police Clifford Cook an e-mail message stating that the Guild’s Executive Board had decided that it would no longer meet with Cook on a monthly basis and requiring that all future communication would be in writing. AR 245-246 (Exhibit 31), 473-475. Cook testified that the termination of the monthly meetings was “extremely frustrating”. AR 1089-1090. *See also* AR 83-84 (Exhibit 37). Cook testified that he had been hired to improve the relationship between the Guild and management. AR 958. Cook stated that it was Martin’s choice to “fracture” the relationship

between the VPOG and the City. AR 1095. Assistant Chief Chris Sutter viewed the cancellation as a “mistake” and confirmed the Chief’s frustration. AR 800.

3. In February 2009 Martin filed yet another grievance; this dispute concerned restriction of vacation leave usage over the Fourth of July holiday. AR 481-483.

4. During the months of February and March 2009 a dispute between the Guild and the City arose over searches of officers’ lockers. Martin rejected Cook’s proposed agreement which would have permitted such searches. AR 250-252 (Exhibit 34), 483-491.

5. On March 27, 2009 the VPOG issued its “Statement of Guild Concerns”. AR 253-261 (Exhibit 35). This Statement declared that the Guild had “had little success getting your [Cook’s] attention” and that communications had “seriously deteriorated” since Cook’s appointment. The Guild explained that the monthly meetings were canceled due to a “lack of confidence in the integrity and honesty of specific members of the command staff” and the Chief’s unwillingness to address the issues detailed in the Statement. The Guild charged that the VPD was marked by “mismanagement,” “improprieties” by command staff, a seriously flawed internal affairs system, “favoritism”

in promotions, selective use of administrative leave, conducting a “ridiculous” number of internal affairs investigations, and a lack of accountability. AR 253-261 (Exhibit 35).

Cook was not the sole target of the Guild’s criticism. Lieutenant Amy Foster, who less than three months later would serve as a member of the Motors Unit selection panel, was accused was accused of having benefited from favoritism due to the personal relationship she had with another officer. AR 253-261 (Exhibit 35) at 255. Sutter shared this part of the Statement of Guild Concerns with her prior to the interviews of the Motors Unit candidates. AR 866-867.

Cook angrily responded to the Statement with a letter addressed to Martin in which he expressed “grave concerns regarding your general affront on the integrity and honesty of this department’s command staff” and described the attacks as “untrue, unnecessary, and unproductive.” AR 265-266 (Exhibit 37). Although the Statement was signed by the entire Executive Board, Cook’s response was directed personally to Martin. *Id.* Cook criticized Martin for not continuing the monthly meetings when he was elected President. *Id.* Cook testified that the Guild Statement “troubled” him due to its serious, personal allegations and that he reacted strongly to it. AR 998, 1057.

Martin replied in kind with an equally heated letter declaring that the Chief's attempt to dismiss the Guild Statement was "insulting and inflammatory." AR 267 (Exhibit 38).

In April 2009 the dispute over the Guild Statement of Concerns was reported in a local newspaper under the headline "Vancouver Police Guild Rips Managers." AR 279-281 (Exhibit 41). Martin was quoted as criticizing Cook's response for failing to deal with "issues of favoritism, disparate treatment, cronyism." AR 279 – 280.

6. Also on March 27, 2009 Martin publicly disputed Cook's statements at a Department training meeting. AR 517-528, 1131-1133, 268-274 (Exhibit 39). Cook responded to one of Martin's questions by angrily declaring that "it was none of our damn business". AR 520. Cook testified that it is unusual for him to use profanity in public and admitted that he was offended. AR 1087.

7. On April 23, 2009 Martin filed a complaint charging nepotism at the Vancouver Police Department with the City's Human Resources Director. AR 291-293 (Exhibit 47). This complaint concerned Foster who would serve on the Motors Unit selection panel less than two months later. *Id.* As permitted by City policy, Martin bypassed the Department chain of command. AR 550-559.

8. On that same date, April 23, Martin requested that Sergeant David Henderson be returned to full duty from administrative leave “immediately” and declared that the “continued punishment” was completely unacceptable to the Guild. AR 294 (Exhibit 48), 559-565.

9. On June 15, 2009, only three days before the City selected officers to staff its Motors Unit, Martin objected “vigorously” to Cook’s plan to post information concerning disciplinary (“internal affairs”) investigations of Guild members, AR 302-303 (Exhibit 50).

The Guild’s position, as forcefully asserted by Martin, was in direct opposition to Cook’s publicly declared goal of increased transparency to the public of Police Department operations. On June 15 Cook sent an email message to all Department staff summarizing his action plan for the Department. Increased transparency was his top priority (“critical”). AR 295-301 (Exhibit 49) at 296. Cook was reported to have declared that increased transparency was “the centerpiece” of his action plan. AR 304-306 (Exhibit 51) at 304. Martin testified concerning the importance that Cook placed on increased transparency. AR 565-566. Martin explained that posting information on the Internet would violate existing confidentiality requirements and that Guild members were concerned that they could be identified from

the information posted online. AR 566-578. Cook admitted he was frustrated by Martin's objection. AR 1083.

10. On July 27, 2009 Martin sent a letter to City Council members criticizing a lack of accountability at the Vancouver Police Department's top levels. Cook responded that the allegations were "untrue, unnecessary and unproductive." AR 287-288 (Exhibit 45).¹

3. The Selection of New Officers for the Motors Unit. (City's Brief Pages 8-9)

The VPOG accepts the City's Statement of the Case set forth in Section B.2.

4. The Motors Unit Candidates' Qualifications.

The Department's Guidelines for Selecting Personnel list job skills as the first criterion for evaluating employees. AR 313-315 (Exhibit 56). Relevant certifications and objective standards are of critical import in making employment decisions. AR 395.

The position announcement for the Motors Unit identified enforcement and investigations (hit and run accidents and major collisions) as the purposes of the unit. Officers would also be involved in the Crash Team. AR 67-68 (Exhibit 2). Questions 1, 3 and 4 on the

¹ The PERC has held that evidence of events that occurred after the alleged retaliation is admissible to prove motive. *City of Brier*, Decision 10013-A (PECB, 2009); *Pasco Housing Authority*, Decision 6248-A (PECB, 1998).

form prepared for the selection panel emphasized qualifications as evidenced by certifications and collision investigations. AR 97-99 (Exhibit 7 at 98).

Martin's qualifications are described in his application and evaluations for the period 2004-2008. AR 69-80 (Exhibit 3) and 81-96 (Exhibits 4-6). Not only do his qualifications greatly exceed the minimum standards for the position, they exceeded the qualifications of the other candidates. *Compare* AR 69-96 (Exhibits 3-6) with AR 106-121 (Exhibit 10—Neill), 131-150 (Exhibit 14—Davis) and 160-175 (Exhibit 18—Suvada). Martin's relative qualifications can be summarized as follows:

First, Martin had the most seniority on the Motors Unit. AR 743. Generally, it is reasonable to infer that time served in a specialized position will increase the officer's knowledge, skills and abilities ("great experience" AR 483-484, AR 97 (Exhibit 7)). Martin's evaluations confirm that there is no reason to question that inference in this instance. AR 81-96 (Exhibits 4-6).

Second, Martin was the only applicant certified as a Motorcycle Instructor. AR 417, 78-79 (Exhibit 3).

Third, unlike Martin, neither Neill nor Davis was certified as a Drug Recognition Expert (DRE). Martin's DRE certification was an asset when he served in the Motors Unit from 2002 to 2008. AR 369-370. The Sergeant and Corporal selected to the Motors Unit both agreed that his DRE certification would be a valuable asset for the Unit. AR 631-633, 639, 660-661.

Fourth, unlike Martin neither Neill nor Davis were certified as a Technical Collision Investigator (Neill was certified as an Advanced Collision Investigator, a lower level of certification). AR 419. Given that the responsibilities of the Motors Unit Officers would include "major collision investigations" and that officers would be involved in the Department's Crash Team this certification would be a significant asset to the Unit. AR 371-374, 661. Sutter's notation of candidate Davis' experience investigating serious/fatality crashes confirms that collision investigation skills would be an asset. AR 751, 151-153 (Exhibit 15 at 151).

5. The Selection Panel Debrief Following Interviews. (City's Brief Pages 9-14)

The VPOG accepts in part the City's Statement of the Case set forth in Section B.3. Pages 9-10 of the City's Brief fairly describe the selection panel's initial discussion: Neill was a consensus selection,

Suvada was a consensus non-selection. The discussion then turned to the question of whether Martin or Davis would be the second officer selected for the Unit. Schoene opened a discussion of Martin's leave usage and the panel reviewed the leave usage spreadsheet. AR 194 (Exhibit 27).

Neill was selected to the Motors Unit despite the fact that he had the highest leave usage—the panel did not even consider his leave usage prior to selecting him. AR 194 (Exhibit 27), 656-657. Martin's leave usage was discussed. Exhibit 27 shows that in 2008, Martin's total leave usage was less than Neill's usage: 546.25 compared to 740.5 hours. AR 194 (Exhibit 27). Moreover, in 2008 Martin used the least amount of sick leave of any of the candidates and less than one-third the amount used by Neill. *Id.* For the entire 2008-2009 period purportedly considered by the City, Neill used 41.5 leave hours more than Martin. *Id.* For the 17 month period covered by the leave usage data in Exhibit 27, Neill averaged 31 hours compensatory time and vacation leave per month or three 10 hour shifts per month. Martin averaged 39.4 hours or roughly four 10 hour shifts. *Id.*, AR 1128-1131.

Martin was the only candidate with “OTHER” leave. *Id.* Martin’s union activity was discussed by the panel. AR 654-655. Sutter recognized that this “OTHER” leave included Guild leave. AR 787, 849.

Schoene testified that he consistently recommended that Martin be selected for the Motors Unit.² AR 653, 657-658.

The day after the panel’s interview and discussion of the candidates, Sutter contacted Sergeant Pat Johns to get his recommendation. Johns had been appointed to be the Sergeant of the Motors Unit. AR 762. Johns’ testimony was unwavering: he strongly recommended that Martin be selected. AR 630-633.³

After meeting with Sutter and Assistant Chief Nannette Kistler, Cook selected Davis rather than Martin. AR 1018.

After the Motors Unit selections were made, Schoene received a number of comments from other officers about the selection. He decided to discuss Cook’s decision with him. AR 664-665. When he met with Cook, the Chief made no mention of leave usage. AR 665-667. Instead Cook asserted that he simply counted the votes. AR 666.

² Schoene had no stake in the outcome of this dispute—his account of the panel’s discussion should be given great weight. AR 652-665.

³ As discussed below, pages 46-47, the Examiner correctly rejected Sutter’s and Foster’s testimony to the contrary.

IV. ARGUMENT

A. Standard of Review. (City's Brief 20-21)

The City bears the burden of demonstrating the invalidity of the PERC's decision. RCW 34.05.570(1)(a).

1. Findings of Fact.

With respect to the PERC's findings of fact, the Court may grant relief only if the City establishes that the findings are "not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). Evidence is substantial if the record contains "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash.2d 568, 90 P.3d 659(2004)(citations omitted). The Court should overturn the PERC's findings only if they are clearly erroneous and the Court is definitely and firmly convinced that a mistake has been made. *Id.*

Unchallenged findings of fact are verities on appeal. *Heidgerken v. Department of Natural Resources*, 99 Wash. App. 380, 993 P.2d 934, 937 (2000).

A court should not substitute its judgment of witnesses' credibility or the weight to be given conflicting evidence. *Western*

Ports Transportation, Inc. v. Employment Security Department, 110 Wash. App. 440, 41 P.3d 510, 515 (2002).

2. Conclusions of Law.

With respect to the PERC's conclusions of law, the City must establish that the PERC has erroneously interpreted or applied the law. RCW 34:05.570(3)(d). Substantial weight and deference should be given the PERC's interpretation of Chapter 41.56, RCW, one of the statutes it administers. *St. Francis Extended Health Care v. Department of Social & Health Services*, 115 Wash.2d 690, 691, 801 P.2d 212 (1990). The PERC's interpretation should be upheld if it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent. *Seatoma Convalescent Center v. Department of Social and Health Services*, 82 Wash. App. 495, 518, 919 P.2d 602 (1996).

3. Policy Making Through Adjudication.

Administrative agencies are encouraged, but not required, to set policy through formal rulemaking. RCW 34.05.220(4). Policy making through adjudication is appropriate unless (1) the applicable statute requires formal rulemaking, (2) policy making through adjudication would run counter to the provisions of the Administrative Procedure

Act (“APA”), or (3) creating a policy through adjudication would represent an abuse of the agency’s discretion. *Budget Rent A Car Corp. v. Washington State Department of Licensing*, 100 Wash. App. 381, 386-387, 997 P.2d 420 (2000), *aff’d in part*, 144 Wash. 2d 889, 31 P.3d 1174(2001).

The Washington Supreme Court has cautioned against adoption of a broad interpretation of “rule,” observing that an expansive interpretation “would all but eliminate the ability of agencies to act in any manner during the course of an adjudication” and would require formal rule making procedures for even the simplest interpretation of a statute. *Budget Rent A Car Corp. v. Washington State Department of Licensing*, 144 Wash. 2d 889, 31 P.3d 1174, 1179(2001).

B. The PERC Did Not Issue a Rule and Did Not Fail to Comply With Statutory Rule-Making Procedures. (City’s Brief 21-33)

The decision of the PERC to use the adjudication process to adopt the principles of *Staub* is an appropriate administrative agency action. The policy created by the PERC is not a rule requiring formal rulemaking under the APA. Adjudication is an acceptable forum for an agency to create agency policy.

1. Application of *Staub* Does Not Require Formal Rulemaking.

The policy created by the PERC is not a rule as defined under the APA. The City has argued the application of *Staub* meets the definition of a rule under RCW 34.05.010(16)(a) because the policy subjects an individual to a penalty or administrative action. The City is incorrect. The Commission's policy does not create a liability for a supervisor that did not already exist under RCW 41.56.160(2). Additionally, the agency law theory from *Staub* holds a public employer, rather than a supervisor, accountable for violations of RCW 41.56.140.

The application of *Staub* does not create a new rule under RCW 34.05.010(16)(a) because no individual is subject to penalty or administrative action who was not already subject to such measures. The City has argued the action of the PERC creates a liability on a supervisor where one did not previously exist. The City's argument ignores the provisions of RCW 41.56.160(2):

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

policy of this chapter, such as the payment of damages and the reinstatement of employees.” (Emphasis added).

Chapter 41.56, RCW does not define “person” as used in RCW 41.56.160(2). While the PERC has traditionally applied its remedial measures to public employers, the PERC already had the authority under the statute to hold an individual supervisor liable if doing so would effectuate the purpose and policy of the PECBA. The application of the principles of *Staub* did not create a liability on supervisors where one did not previously exist. Therefore, the Commission’s action did not create a rule as defined by RCW 34.05.010(16)(a).

2. Under Both *Staub* and the PERC’s Decision, the Employer—not the Individual Agent—is Liable.

The City’s assertion that the application of *Staub* subjects individual managers or supervisors to the remedial measures of the PECBA is a misreading of *Staub*. In *Staub*, the United States Supreme Court found the employer is liable if a supervisor commits an act that is intended to cause, and is the proximate cause, of an adverse employment action. *Staub, supra* 131 S. Ct. at 1194. The holding of *Staub* is based on the theory that the supervisor committing the unlawful act is an agent of the employer and the employer is therefore

responsible for the actions of its agent. *Id.* at 1193. Nothing in *Staub* indicates the decision making manager was personally liable for the unlawful act.

The PERC merely adopted the reasoning of *Staub* without changing any individual liability. Specifically, the Commission found Sutter's recommendation to Cook was intended to cause an adverse employment action based on antiunion animus and the recommendation was the proximate cause for the adverse employment action that occurred. The PERC then applied the agency theory from *Staub* and found the City is liable for the actions of its agent, Sutter.

The Examiner's order, as affirmed by the PERC, was entered only against the City of Vancouver. AR 1234. The order directs "The City of Vancouver, its officers and agents" to take action in remedy of the City's unfair labor practices. AR 1234. Her decision—as affirmed by the PERC—did not hold Cook, Sutter, or any other City managers personally liable. AR 1234, 1397. The order is binding on Cook as an agent of the City, but it is also binding on Sutter, Foster, Johns, Schoene and any other of the City's "officers and agents."

Nothing in the decision of the PERC can be read to subject a supervisor or manager to a penalty or administrative action. The

reasoning of *Staub* holds an employer liable for an unlawful act committed by one of its agent-supervisors. The PERC adopted the principles of *Staub* to find the City liable for the unlawful actions of its agent-supervisor, Sutter. While the PERC had pre-existing statutory authority under RCW 41.56.160(2) to hold a supervisor liable, the decision of the PERC did not subject any City supervisors to remedial measures. Therefore, the actions of the PERC do not meet the definition of a rule under RCW 34.05.010(16)(a) and the adoption of the principles of *Staub* through adjudication was appropriate.

3. Adjudication is an Appropriate Method of Creating Agency Policy.

The decision of the PERC to apply the principles of *Staub* is appropriate policy making through adjudication. An administrative agency may properly create policy through adjudication so long as (1) the applicable statute does not require formal rule making, (2) the practice is not used to circumvent the APA, or (3) the agency does not abuse its discretion. *Budget Rent A Car Corp.*, *supra* 100 Wash. App. at 423-424. The Commission's application of *Staub* is an appropriate administrative undertaking by an agency as it does not violate the PECBA, the APA or any standards of discretion.

4. The PECBA Does Not Require Formal Rulemaking.

The Public Employee Collective Bargaining Act (“PECBA”), Chapter 41.56, RCW, does not impose any formal rulemaking requirements on the PERC beyond the standards of the APA. RCW 41.56.165 requires that the PERC comply with the APA. By adopting the principles of *Staub*, the PERC did not violate any provision of the PECBA unless the City can establish that the PERC violated the APA.

5. Creation of Policy Does Not Circumvent the APA.

The PERC did not use the adjudication process as a means of avoiding the provisions of the APA. In *Union Flights, Inc. v. Federal Aviation Administration*, 957 F.2d 685, 689 (1992) the Ninth Circuit discussed examples of an administrative agency circumventing the APA through adjudication. . The analysis of *Union Flights* was specifically adopted into Washington law in *Budget Rent A Car, supra* 100 Wash. App. at 386. In *Union Flights*, the FAA relied on a standard announced through adjudication requiring parties seeking to submit late briefs to show “good cause.” The Court found that the FAA did not attempt to thwart the requirements of the APA either by seeking to amend a recently amended rule or to bypass any pending rulemaking

process. *Union Flights, supra* 957 F.2d at 689. As in *Union Flights*, the PERC was not confronted with any recent or future developments that would give pause to the Commission's decision to adopt a policy through adjudication. The PERC did not attempt to circumvent the requirements of the APA when it adopted the principles of *Staub*.

6. The Adoption of New Policy Is Not an Abuse of Discretion.

The PERC did not abuse its discretion when it adopted the principles of *Staub*. An agency abuses its discretion when the adoption of a new policy creates an undue hardship on a party relying on the previous policy. *See Union Flights, supra* 957 F.2d at 688. By adopting the principles of *Staub*, the PERC has imputed the antiunion animus of Sutter to Cook based on Cook's decision to rely on Sutter's recommendation. No evidence indicates Cook had relied on previous PERC policy when he made the decision to accept Sutter's tainted recommendation. To argue otherwise is to suggest that Cook knew the recommendation was tainted and decided to rely on it anyway. In the absence of any finding of detrimental reliance or other undue hardship, no evidence exists that the City suffered any undue hardship as a result of the adoption of the principles of *Staub* into PERC policy through adjudication.

In *Budget Rent A Car*, the Court found an agency is permitted to develop policy through adjudication provided the agency adheres to the standards of *Union Flights*. *Budget Rent A Car*, *supra* 100 Wash. App. at 387. The PECBA does not require the PERC to engage in formal rulemaking when it creates Commission policy. The PERC did not attempt to circumvent the requirements of the APA by amending a recently amended rule or escaping from an ongoing rulemaking proceeding. Finally, the PERC did not abuse its discretion because the adoption of the principles of *Staub* did not create undue hardship on the City. Therefore, the PERC appropriately created agency policy through adjudication rather than formal rulemaking. *Budget Rent A Car Corp. v. Washington State Department of Licensing*, 144 Wash. 2d 889, 31 P.3d 1174, 1179(2001). Assignment of Error No. 1 as without merit; the Court should reject it.

C. The PERC Correctly Interpreted and Applied *Staub*. (City's Brief 33-39)

In reaching its finding that the City violated RCW 41.56.140, the PERC correctly applied the principles of *Staub* to the facts presented by the VPOG's unfair labor practices complaint. Although the City has argued the PERC wrongly interpreted and applied *Staub* in reaching its conclusion that the City violated RCW 41.56.140, the facts

of this case are analogous to the facts at issue in *Staub* and the Commission was correct in *Staub*'s interpretation and application.

In applying *Staub*, the PERC applied applicable case law to define RCW Chapter 41.56 in accordance with its mandate. RCW 41.56.010(1). While the error of law standard allows the Court to substitute its own judgment for that of the agency, the Court should give substantial weight to the PERC's interpretation of the law within its own expertise. *St. Francis Extended Health Care v. Department of Social & Health Services*, 115 Wash.2d 690, 691, 801 P.2d 212 (1990). Because the PERC acted within its field of expertise by applying law to a statute it is charged with administering, the Court should rely heavily on the PERC's reasoning.

1. The Denial of Martin's Appointment to the Motors Unit Was an Adverse Employment Action.

The Examiner found Martin was deprived of "an ascertainable right, benefit, or status" when he was denied appointment to the Motors Unit. AR 1233 (Finding of Fact No. 29). The Court should reject the City's attempt to distinguish *Staub* by arguing that Martin did not experience a tangible job detriment. The PERC's finding of a tangible job detriment is supported by substantial evidence: a "fair-minded

person” would be convinced that he suffered such detriment. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash.2d 568, 90 P.3d 659(2004)(citations omitted).

The Examiner found that the appointment to the Motors Unit is a specialty assignment similar to a promotion because the position is a desired position carrying extra status and because the position comes with additional benefits such as the right to take home a BMW motorcycle, favorable work schedules and potential overtime. AR 1215. The City’s argument ignores the evidence supporting the Examiner’s finding. AR 131-132, 60-61, 73. Additionally, the City fails to cite any Washington precedent to support its contention that the denial of such a specialty appointment, with its accompanying desirability and benefits, is not an adverse employment action. By denying Martin assignment to the Motors Unit, the City denied him both status and monetary benefits, including overtime work.

2. The Lack of Notice to Cook of Discrimination Is Irrelevant.

An unlawful recommendation from a supervisor, when acting as an agent of the employer, is imputed to the employer regardless of the decision maker’s lack of knowledge of the unlawful activity. The City’s argument that *Staub* is distinguishable because Cook was not put

on notice by a filed grievance in the same manner as the employer in *Staub* both misstates the facts of that case and distorts the reasoning of the U. S. Supreme Court.

In *Staub*, Buck fired Staub. Staub then responded to the termination of his employment by filing a grievance. *Staub, supra* 131 S.Ct. at 1189-1190. Contrary to the City's argument (City's Brief at 37), at the time Buck decided to terminate Staub's employment, she had no notice of Staub's claim of discrimination and no reason to scrutinize Mulally's recommendation.

Moreover, contrary to the City's argument, the U.S. Supreme Court did not find the liability of the employer is tied to the decision maker's knowledge or fault. Instead, the Court held that an employer is liable if a supervisor makes a recommendation that the supervisor intends to cause an adverse employment action and the recommendation is a proximate cause of that adverse employment action. *Id.* at 1194. The question of the knowledge held by the decision maker regarding the recommending supervisor's unlawful purpose was not relevant to the Court's analysis.

The reasoning of *Staub* is grounded in agency law rather than the knowledge or fault of the decision maker. Specifically, the Court

stated “Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a ‘motivating factor in the employer’s action.’” *Id.* at 1193. Nothing in the Court’s reasoning speaks to the decision maker’s knowledge of unlawful behavior or the decision maker’s opportunity to cure the unlawful behavior. In fact, the Court specifically stated the grievance filed in *Staub* was immaterial to the ultimate holding. *Id.* at 1194 n. 4.

The City violated RCW 41.56.140 not because of what Cook knew or did not know, but because Sutter made a recommendation that was motivated by union animus with the intention of causing an adverse employment action to Martin and because Sutter’s action was a proximate cause of the ultimate adverse employment action.

3. The PERC’s Application of *Staub* Did Not Create Individual Liability.

Contrary to the City’s argument, the PERC did not misapply *Staub* by holding an individual supervisor personally liable. The City has attempted to transform the PERC finding that a decision maker is strictly liable into a policy holding the supervisor personally liable. As argued above, *supra* pages 18-20, *Staub* does not hold a supervisor personally liable and neither does the PERC’s decision. In applying the

reasoning of *Staub*, the PERC found the decision maker is strictly liable, meaning the decision maker, as an agent of the employer, is liable regardless of fault. *See Ulmer v. Ford Motor Co.*, 75 Wash. 2d 522, 532, 452 P.2d 729 (1969)(finding a plaintiff is not required to prove a defendant was negligent under a strict liability theory). The decision of the PERC clarifies that Cook is strictly liable for the decision to deny Martin appointment to the Motors Unit. However, the decision does not shift personal responsibility from the City, the principle, to Cook, the agent. The order of the Examiner, as affirmed by the PERC, directs the City to take action in remediation of the City's violation of RCW 41.56.140. The decision of the PERC properly applies the reasoning of *Staub*.

The PERC properly applied the principles of *Staub* to this case. This case is not factually distinguishable from *Staub*. The City's refusal to appoint Martin to the Motors Unit created an adverse employment action as Martin was deprived of the status and benefits that come with such an appointment. The lack of notice to Cook, through a grievance or any other forum, is immaterial as the analysis focuses on Sutter's intention and whether Sutter's actions were the proximate cause of Martin's denial. Finally, the PERC properly

applied *Staub* by holding Cook strictly liable for his decision to deny Martin appointment to the Motors Unit and then holding the City accountable for the unlawful actions of its agents. Therefore, the PERC did not err by adopting the principles of *Staub* and applying those principles to this case. The City's Assignment of Error No. 2 is without merit.

D. Substantial Evidence Supports the PERC's Conclusion that the Record Established Sutter's Union Animus. (City's Brief 39-45)

The PERC correctly concluded that "the totality of the evidence demonstrates that Sutter's decision was tainted by a pattern of union animus." AR 1394. Contrary to the City's argument, the record indicates that Sutter considered Martin's union leave when he made his recommendation and in his discussions with Cook. Sutter's disdain of qualifications and elevation of "shared vision" during the selection panel's discussion of the candidates evidences his union animus and cannot be blithely dismissed as an "isolated statement" of no significance. Finally, the City ignores other substantial evidence of Sutter's union animus described by the Examiner.

1. The PERC Correctly Concluded That Sutter's Recommendation was Based in Part on Martin's Use of Union Leave. (City's Brief 39-43)

The Examiner's conclusion that any consideration of time spent by Martin performing his duties as union president would be illegal has not been disputed. AR 1219. Martin's union activity was discussed by the selection panel. AR 654-655. Martin's "OTHER" leave included 24.5 hours of Guild leave. AR 194 (Exhibit 27), 316 (Exhibit 57), 785-786. Regardless of what the other panel members knew, Sutter's testimony establishes that when he reviewed the leave summary (AR 194) he understood that the "OTHER" leave was probably Guild leave. AR 787, 849. The exhibit offered into evidence at the hearing simply confirmed what Sutter had understood to be the case during the selection process. AR 316 (Exhibit 57).

Sutter denied giving any consideration to Martin's use of "OTHER"/Guild leave. However, there is no contemporaneous documentation supporting his testimony on this issue. As the PERC has recognized, "employers are not in the habit of announcing retaliatory motives." *Educational Service District 114*, Decision 4361 – A (PECB, 1994). Sutter's testimony was not credible. The Examiner refused to accept his testimony on a critical issue when it was contradicted by

another witness. AR 1224-1225. She rejected Sutter's testimony that Sergeant Johns changed his recommendation from Martin to another candidate (AR 449) in the face of Johns' testimony that he never wavered in his recommendation of Martin. AR 630-631, 635-636. Similarly, in light of both the general reticence of employers to announce retaliatory motives and this particular witness' lack of credibility, the Court should not credit his denial that he gave no consideration to Martin's use of "other"/Guild leave.

2. Sutter's Elevation of "Shared Vision" over Objective Qualifications Exposes His Union Animus and Cannot Be Dismissed As an Isolated Comment. (City's Brief 43-45)

Corporal Bob Schoene, one of the selection panel members, testified that during the panel's discussion following the candidates' interviews, Sutter asserted that the person with the most qualifications is not always the best fit. AR 1221, 654. He stated that the discussion then moved to Sutter's expectation that the selected candidates must share the Chief's vision and the Chief's direction. The testimony of this disinterested witness leaves no doubt as to the reason why, in Sutter's mind, qualifications wouldn't matter much in this selection process:

"At some point then he [Sutter] brought up that the most qualified or the person with the most qualifications or

skills isn't necessarily the best fit for the unit. I said, That's true. That's not always the case.

“Q. Who said that the person with the most skills and qualifications is not always the best fit for the unit?”

“A. Chief Sutter.

“Q. Did he elaborate?”

“A. No. He said that he was also looking for in addition to the skills -- I guess he did elaborate because he said that in addition to those qualifications, we're looking for someone that is -- supports the Chief's vision and the Chief's direction. I acknowledged that I understood that. I said that I didn't take that particular aspect into account in my decision because at my level in dealing with Officer Martin, he's always -- in his work, he has always portrayed a positive image of the Department, at my level. I said I can understand if that's an issue at your level in the decision-making but at my level, he portrays that he supports the Chief in his everyday interaction with citizens as we perform our duties.

“Q. Why did you say that you could understand why at his level -- at Chief Sutter's level -- that it might be an issue?”

“A. Well, I know that he has -- with Ryan being the Guild president, he has a lot more interaction at the administrative level with policies and the Chief, and vocalizes his agreement or disagreement with that on the Guild's behalf in a lot of cases. That's what I meant by that portion of that response to the Chief.

“Q. What did Chief Sutter respond to that comment?”

“A. I don't believe that he responded anything to that, no.” AR 654-655.

Sutter admitted that he made a statement to the effect that he was looking for someone who would share Cook's visions and goals for the department. AR 816-817.

Sutter's denigration of qualifications and his introduction of a shared vision requirement during the selection panel's deliberations cannot be minimized as an isolated comment of no significance. Sutter was the highest ranking member of the panel. In a hierarchical organization such as the Vancouver Police Department, rank is significant.

Contrary to the City's assertion that Sutter's comment was not specifically directed at Martin, Schoene's response to Sutter's shared vision standard establishes that everyone in the room understood that Sutter was referring to Martin: As quoted above, Schoene testified that he asserted that he saw no issues with Martin sharing the Chief's vision at the street level (Martin "supports the Chief in his everyday interaction with citizens as we perform our duties"), but that he could understand it if Sutter had issues at his, management, level because Martin "vocalizes his agreement or disagreement with that on the

Guild's behalf in a lot of cases.”⁴ When Schoene expressed this opinion, Sutter did not respond with the exculpatory explanation he offered at the hearing (he was referring to community policing, not disagreements at the management level).

Hicks v. Tech Industries, 512 F.Supp.2d 338, 349 (W.D. Pa. 2007) cited by the City at page 44 of its Brief is readily distinguished. In *Hicks* the remarks at issue were made in the performance evaluations of *other* employees, not the plaintiff. That court rejected plaintiff’s argument that such remarks violated the employer’s policies prohibiting bias and thus evidenced a pattern of age discrimination.

In marked contrast, Sutter declared a new shared vision selection standard to the subordinate law enforcement officers during the very course of the panel’s discussion of which candidates should be recommended. Schoene’s response that he saw no problems with Martin’s performance (sharing of the vision) at the street level, but could understand Sutter’s concerns at a management level based on Martin’s Guild activity indicates that he understood that Sutter’s concern was with Martin’s vision. Sutter did not correct Schoene at the time, or clarify that his (Sutter’s) concern was community policing.

⁴ Sutter did not dispute Schoene’s testimony that during the panel’s deliberations Schoene raised the issue of potential conflict at the management level. AR 817.

The importance of shared vision likely came to Sutter's mind since, just two days earlier, Martin had publicly demonstrated that he in fact did not share Cook's vision. On Monday, June 15, 2009, Officer Martin objected "vigorously" to Cook's decision to post information concerning internal affairs investigations on the internet. AR 302-303 (Exhibit 50). Notwithstanding Martin's objection on behalf of the Guild, the next day Cook released his 2009 Action Plan via e-mail to "VPD-ALL" which listed transparency as his top goal, a goal that included posting internal affairs (PSU or Professional Standards Unit) information on the Department's web page. AR 295-301 (Exhibit 49) at 296.⁵ Such posting was central to one of Cook's top priorities for 2009—increased transparency for the Department. AR 304-305 (Exhibit 51), 984. Cook personally developed the plan. AR 1078-1079.

The Motors Officer candidates were interviewed and the debriefing conversation occurred on Wednesday June, 17. Two days earlier, on Monday June 15, Martin's vigorous objection to posting internal affairs information on the internet established that he didn't share either Cook's vision or his direction. Sutter was aware of

⁵ "VPD All" indicates the message was sent to all Department employees. AR 1077.

Martin's objection to internet posting (he claimed he gave it no consideration). AR 772.

It is well established that the timing of adverse action closely following union activity can give rise to a reasonable inference of a causal connection between the activity and the employer's action. *Wilmot, supra* 118 Wn. 2d at 69; *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A (PECB, 2009). While the Guild submits that the timing all of Martin's Guild activity from his election in late 2008 through mid-June 2009 support the PERC's finding of illegal discrimination, that inference is especially compelling with regard to this internet posting dispute which exploded the very week of the Motors Unit interviews and selection.

Sutter's explanation that by shared vision and goals he meant sharing Cook's commitment to community policing is not credible:

"Q. Chief, during your discussions after the interviews about the various applicants, do you recall making a statement that you were looking for someone for this team that would share the chief's visions and goals for the department?

"A. I -- I believe I did make a statement similar to that and what I was talking about was the community of policing philosophy, the territorial command, the presence, the outreach to the community. All those philosophical issues that I share in common with Chief Cook is an officer quality that I was looking for too.

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

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

“Q. Well, so there was no concern about him sharing the chief's vision with regards to community policing or territorial command, correct?”

“ A. No, if -- if he could be there to do it.” AR 816-817.⁶

Sutter admitted, albeit hesitantly (“a statement similar to that”), that he made the shared vision statement Schoene described in his testimony. However he then testified that his only concern with Martin was his availability. If Sutter's concern was Martin's availability, why raise the issue of sharing the Chief's vision?

The credibility of Sutter's testimony is further impeached by the fact that Sutter declared that he had no concerns regarding community policing with respect to Martin.

Moreover, as stated above, Sutter's failure to respond to Schoene's statements by correcting Schoene and explaining that his

⁶ The Examiner quoted most of this testimony at page 20 of her decision. AR 1221.

concern was with community policing, not discussions that occurred at “his [Sutter’s] level”, suggests that the explanation offered at the hearing was not in fact what he was thinking when the panel was deliberating.

The conclusion that Sutter was actually concerned about Martin’s ongoing activities as Guild President is inescapable.

Contrary to the City’s argument, (City’s Brief at 45) Sutter’s reference to “the presence, the outreach to the community” refers to the Chief’s goal of increased transparency. AR 295-301 (Exhibit 49), 304-305 (Exhibit 51). Martin, as Guild President, was on record as opposing “the presence, the outreach” if that meant publicizing internal affairs information on the internet. Sutter admitted he knew of Martin’s objection. AR 772.

The City’s reliance upon *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 90, 98 P.3d 1222, 1231 (2004) is wholly misplaced (City’s Brief at 45). The comment at issue in *Domingo* had been made three months prior to the plaintiff’s termination, there was no evidence concerning the context of the remark, and the court found it was impossible to know whether the remark was related to plaintiff’s termination. In marked contrast, Sutter’s declaration of a shared vision

standard was made during the panel's discussion of which candidate to select for assignment to the Motors Unit.

In *Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999) the Fifth Circuit stated a four part test to evaluate the significance of workplace comments:

“for comments in the workplace to provide sufficient evidence of discrimination, they must be “1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.”

In this case, the “protected class of persons” is any person engaging in activities protected by RCW 41.56.040. Schoene’s response to Sutter’s declaration that sharing the Chief’s vision was important shows that sharing the Chief’s vision and direction referred to Martin’s protected activity. Sutter did not reply to Schoene with the exculpatory explanation offered at the hearing—I’m not talking about Guild activity, I’m talking about “community policing.” Sutter made this statement proximate in time to the selection of officers to fill the Motors Unit position, Sutter was the senior member of the selection panel and the person who communicated the panel’s recommendations

to Cook, and sharing vision (or not) was related to whether or not Martin was qualified (in Sutter's mind at least) for the position.

3. Qualifications *are* Important.

Schoene's testimony quoted above, *supra* pages 31-32, also highlights one of the dubious foundations of the City's position that it did not discriminate or retaliate against Martin: Qualifications aren't that important.

This position, and the testimony supporting it, is not credible. First, employers generally establish required qualifications as determined by the demands of the assignment. Second, employers generally prefer a candidate with higher qualifications over another candidate with lesser qualifications. Both the position announcement for the Motors Officer position and the Interview Questions form used by the selection panel emphasized qualifications—consistent with common experience. AR 67-68 (Exhibit 2), 97-99 (Exhibit 7).

On cross-examination Sutter readily admitted that training, certification, and reliance on objective qualifications all are important in making personnel decisions. AR 774-778. Foster's suggested questions establish that she thought that experience, qualifications and

certifications were essential. AR 317-319 (Exhibit 59) 1121-1123.

Cook agreed. AR 1032.

Martin's qualifications are described in his application. AR 69-80 (Exhibit 3). As described above, *supra* pages 9 to 11, not only do his qualifications greatly exceed the minimum standards for the position, they greatly exceeded the qualifications of the other applicants.⁷

Sutter's testimony that he was concerned about Martin's scheduled future leave is not credible: Sutter exaggerated the significance of Martin's planned leave. Exhibit 53 shows that Martin took no vacation leave between March 18 and October 14, 2009 and less than four days off on compensatory time between June 1 and the end of 2009. AR 309-310 (Exhibit 53). Martin explained how he decided to schedule his leave each year based on personal needs and concerns. AR 1125-1126. A week off in October and a week over the Christmas holiday cannot reasonably be deemed excessive leave usage. AR 309-310 (Exhibit 53).

If leave usage were truly a bona fide concern to Sutter and he wanted to make a fair, fact based recommendation to Cook, his failure to ask Martin about his leave usage either during or after Martin's

⁷ The Guild argued to the PERC that the City's failure to select Martin despite his vastly superior qualifications supported an inference of union animus. AR 1311-1315.

interview is inexplicable. AR 652, 797, 1038-1039, 1070. On the other hand, if Sutter's intent was to contrive a pretext that might obscure his union animus, his failure to question Martin is easily understood.

The contention that leave usage was a critical concern sufficient to outweigh Martin's experience, training and certifications in light of the small size of the new Motors Unit should be given no weight. Schoene explained that prior to the disbanding of the Motors Unit there had been a practice of "fairly often" working in pairs, but since the Unit re-formed in 2009 more often than not the Motors Officers worked alone. AR 1140. As argued above, Neill had used leave an average of three days per month. If Martin's use of an average of four days per month would adversely impact the unit, so would Neill's use of three days. Leave usage is a fact of life under the Guild's contract which provides for both paid days off and compensatory time off (and Guild leave). Sick leave usage is entirely unpredictable, yet must be granted consistent with the terms of the contract. Reliance on usage of contractually authorized leave usage for in a selection process is highly questionable at best.

Finally, Sutter's union animus is exposed by his willingness to ignore the recommendations of the first level supervisors that would oversee the Motors Unit: Schoene and Johns.

The City selected Sergeant Pat Johns to supervise the Motors Unit in June 2009. AR 628. Presumably Johns' selection reflected the City's confidence in his judgment and ability to supervise this Unit. After the interviews of the candidates, Sutter called Johns to get his views of the candidates. Again, presumably because Sutter valued Johns' opinion. However, Johns was adamant: His first choice was Officer Martin in light of Martin's Drug Recognition Expert certification (a "crucial component"). AR 630-631, 636. Sutter then chose to mis-report Johns' recommendation to Chief Cook.

Corporal Bob Schoene was also appointed to work on the Motors Unit in June 2009. AR 642, 647. Again, presumably the City had confidence in his judgment and ability to supervise the Unit. Schoene testified that Sutter told him he was looking for his advice because he had been in the Motors Unit previously and could help Sutter "understand what kind of skills or needs we need within the [Motors] unit." AR 650.

Corporal Schoene's testimony was equally clear: he recommended Martin because Martin brought the most traffic related skills to the team. AR 653-654. Schoene was not uncritical: he raised Martin's use of leave as a concern. However, he balanced that with his assessment of the strengths Martin would bring to the Unit.

Johns and Schoene, in contrast to Cook, Sutter, and Foster, were disinterested witnesses as far as the outcome of this dispute is concerned. Unlike Cook, Sutter and Foster, both were focused on relevant skills—not on Martin's outspoken union activities. As Schoene explained, "at his level" he didn't take into account whether or not Martin shared the Chief's vision.

4. The PERC Also Relied Upon Substantial Additional Evidence of Sutter's Union Animus.

The Examiner's and the PERC's conclusions that Sutter's recommendation was tainted by union animus was not based solely on the conclusion that Sutter considered Martin's use of union leave and Sutter's "shared vision" selection criterion. AR 1221-1226 (Examiner), 1393-1394 (PERC). While the PERC's decision emphasized these factors, the Commission explained that evidence of pretext "included" improper consideration of union leave and negative statements about

Martin's protected activities. AR 1393. The Examiner's decision described additional evidence supporting her finding of Sutter's union animus.

1. "Sutter disregarded Schoene's [another member of the selection panel's] input." AR 1225. The Examiner found that Sutter's willingness to accept Schoene's recommendation with regard to Neal, but not with regard to Martin evidenced Sutter's union animus. AR 1222, 1225, 748, 753, 657.
2. "Sutter represented on the rating sheet information he received from Schoene as his own thoughts." AR 1225. The Examiner observed that Sutter's comments on his rating sheet for Martin included Schoene's comments—positive and negative—without attribution. AR 1222-1223, 741, 743-744. Sutter discussed the ratings with Cook and Cook reviewed the ratings sheets. AR 1016-1017.
3. "Sutter improperly considered Martin's collateral duties, including his use of union leave." AR 1225. Sutter's consideration of Martin's use of union leave has been discussed above. With respect to Martin's collateral duties the Examiner observed that Sutter's reasons for not recommending Martin were in part the result of his co-mingling of Martin's other duties which could result in time away from the

Motors Unit assignment. AR 1223, 760. Both Martin and Davis were emergency vehicle operator instructors. AR 69, 132. This required time away from their normal assignment, however the Examiner found that this was a negative factor only with respect to Martin. She concluded that Sutter's disparate application of an "availability" standard contributed to her finding that the City's nondiscriminatory reason was pretext. AR 1223.

4. "Sutter sought out information about Martin's planned use of leave, but did not seek out similar information for other candidates." AR 1225. After the selection interviews and initial discussion, Sutter obtained information regarding Martin's planned use of leave in the future, but did not seek this information for the other candidates. AR 766 – 767. Again, the Examiner found that Sutter's inquiry regarding only Martin supported her conclusion that the City's nondiscriminatory reason was pretext. AR 1223 – 1224.

5. "Sutter solicited input from Johns about who he would select for the Motors Officers positions, but then failed to rely on that information." AR 1225. After the interviews, Sutter called Sergeant Pat Johns to determine whom Johns would recommend for the Motors Officer positions. The Examiner rejected Sutter's testimony that at the

end of the conversation Johns no longer supported Martin for the position and found that Johns recommended Martin. AR 1224 – 1225, 630 – 631, 1037. The Examiner concluded that when Sutter called Johns he was seeking support for his position of not recommending Martin and when Johns did not agree with Sutter, Sutter ignored his opinion. AR 1225.

6. “Sutter shared excerpts of the Statement of Guild Concerns [AR 253-261] with Foster in an attempt to influence her against Martin.” AR 1226. The Examiner reasoned that when Sutter showed Foster sections of the Statement of Guild Concerns he 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.” AR 1225, 920.

In addition to this evidence of Sutter’s union animus found by the Examiner and affirmed by the PERC, his animus is also revealed by the fact that Sutter readily conceded that Martin was fully qualified for the position and recognized Martin as a hard worker. AR 788, 806. He testified that he did not consider Martin’s leave usage a weakness, but only “the closest thing” to a weakness. AR 752.

The record includes substantial evidence of union animus. The Court should reject the City's Assignment of Error No. 3.

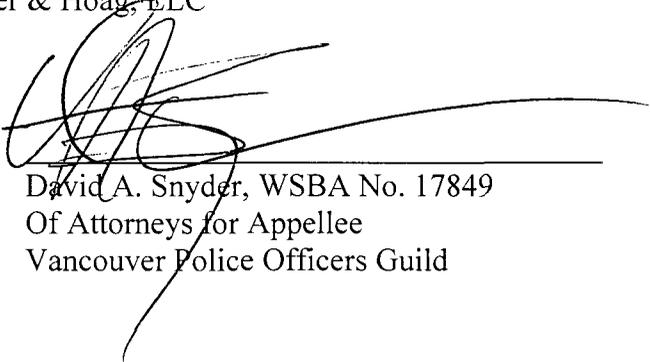
V. CONCLUSION

The VPOG respectfully requests that the Court affirm the PERC's decision and award the Guild its attorneys' fees and costs.

Respectfully submitted this 10th day of December, 2012

Snyder & Hoag, LLC

By:



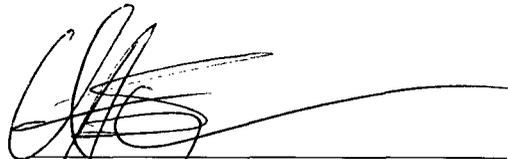
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CERTIFICATE OF SERVICE

I certify that I served a true copy of the Brief of Appellee Vancouver Police Officers Guild on December 10, 2012 by mailing a true copy in a sealed envelope, by United States Postal Service, ordinary first class mail, addressed to:

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