

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  
IN RESPONSE TO BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS**

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## I. INTRODUCTION

Respondent Public Employment Relations Commission submits this response to the Brief of Amicus Curiae Washington State Association of Municipal Attorneys (“Association”). The Association challenges the standard applied by the Commission in concluding that the Employer, City of Vancouver, committed an unfair labor practice. The Commission did apply the “substantial factor” test advocated by the Association, as the decisions by the Examiner and the Commission clearly state. The Association’s additional argument, that the Commission was precluded from concluding that the Employer committed an unfair labor practice because the Examiner had found that the Police Chief himself did not have union animus, rests on a selective parsing of the Examiner’s and Commission’s decisions that fails to read the decisions as a whole.

## II. ARGUMENT

### A. **In Their Decisions the Examiner and the Commission Expressly Followed the Standard Applicable to the Unfair Labor Practice Statutes**

The Association notes that, under RCW 41.56.140(1), dealing with unfair labor practices for employers, the union must prove that union animus was a “substantial factor” in the employment action against the employee. Amicus Br. at 7-8. The Commission agrees. *See City of Federal Way v. Pub. Empl. Rel. Comm’n*, 93 Wn. App. 509, 513-14,

970 P.2d 752 (1998). The Association then suggests that the Examiner and the Commission were using a different standard in this case. The Association is incorrect.

The decisions of both the Examiner and the Commission expressly recited the “substantial factor” test. The Examiner stated: “The burden of proving unlawful interference rests with the complaining party.” AR 1208. “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.” AR 1209. This is precisely the formulation that the case law relied on by the Association uses. *See Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 73, 821 P.2d 18 (1991). “The burden remains with the union to prove the employer’s legitimate non-discriminatory reason was either pretextual or substantially motivated by union animus.” AR 1216.

Applying this test, the Examiner found that “the employer’s decision not to select [applicant] Martin was pretextual.” AR 1216. *See also* AR 1228, AR 1233 (Finding of Fact 26). The Examiner carefully reviewed the evidence presented at the hearing and determined that the recommendation to the Police Chief was based on animus and was pretextual. *See* summary at AR 1225-26. The Examiner then determined:

While the final decision was reserved to [Police Chief] Cook, who did not substantially base his decision on union animus, the recommendation presented to Cook by Sutter was tainted. . . . Although Cook took steps to verify the information he was provided, his ultimate decision was colored by Sutter's representation of the facts. Thus, the decision not to offer Martin one of the two Motor Officers positions was discriminatory.

AR 1228-29. From this, the Examiner concluded that "the employer discriminated against Martin because of his protected activities and interfered with employee rights in violation of RCW 41.56.140(1)." AR 1233 (Conclusion of Law 2).

While the Association or the Employer may disagree with the Examiner's analysis of the evidence or her conclusions, the Association is incorrect to argue that the Examiner was not following the applicable legal standard. She was simply applying this standard to a situation in which the union animus came from a subordinate, not from the final decision maker.

Likewise, the Commission followed the the applicable legal standard in its decision, stating: "[T]he 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." AR 1391.

Between the time the Examiner issued her decision and the time the Commission considered the case on appeal, the United States Supreme Court issued its decision in *Staub v. Proctor Hospital*, 562 U.S. \_\_\_, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011). The Commission affirmed the Examiner but, based on the *Staub* decision, amplified the basis for its concluding that the Employer had committed an unfair labor practice. In its decision, the Commission stated:

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

AR 1381-82.<sup>1</sup> The Employer will be found to have committed an unfair labor practice unless it can demonstrate "that the decision was made completely free from the recommendation of the subordinates who displayed union animus." AR 1396. Agreeing with the Examiner that the Employer had not demonstrated this, the Commission agreed that the Employer committed an unfair labor practice and affirmed the Examiner. AR 1397.

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<sup>1</sup> The Commission noted that because the Examiner reached a substantially similar conclusion without benefit of the *Staub* decision, "it is not necessary to amend the underlying Findings of Fact and Conclusions of Law." AR 1397 n.6.

Nothing in either the Examiner's or the Commission's decision supports the Association's contention that they were applying a new legal standard.

**B. The Examiner's Finding That the Police Chief Himself Was Not Motivated by Union Animus Does Not Preclude the Commission From Concluding That the Employer Committed an Unfair Labor Practice**

The Association also argues that the Commission's conclusion that the Employer committed an unfair labor practice is precluded by the Examiner's finding that the ultimate decision maker for the Employer, the Police Chief, did not himself have union animus. Amicus Br. at 3. Again, the Association is incorrect.

In her decision, the Examiner noted: "While the final decision was reserved to [Police Chief] Cook, who did not substantially base his decision on union animus, the recommendation presented to Cook by Sutter was tainted." AR 1228. The Examiner found that the Police Chief's "ultimate decision was colored by Sutter's representation of the facts. Thus, the decision not to offer Martin one of the two Motor Officers positions was discriminatory." AR 1229. The Examiner made findings of fact reflecting this discussion, AR 1233 (Findings of Fact 27, 29).

Both the Examiner and the Commission concluded that the Employer committed an unfair labor practice, despite the decision maker

himself not having union animus. The Association's attempt to cherry-pick portions of the decisions to support its argument should be rejected. As with decisions of the courts,<sup>2</sup> administrative decision should be read as a whole.<sup>3</sup> The Examiner's and Commission's decisions both consider the Employer to have committed an unfair labor practice, even though the decision maker did not himself have union animus.

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<sup>2</sup> See *Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 853, 441 P.2d 128 (1968) (appellate court will read ambiguous finding of trial court "in context with the court's other findings"); *In re Marriage of Smith*, 158 Wn. App. 248, 256, 241 P.3d 449 (2010) (appellate court reads divorce decree "in its entirety and construe it as a whole"); *Callan v. Callan*, 2 Wn. App. 446, 449, 468 P.2d 456 (1970) ("judgment must be read in its entirety").

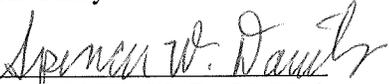
<sup>3</sup> See *Office of Pub. Util. Counsel v. Texas-New Mexico Power Co.*, 344 S.W.3d 446, 450-51 (Tex. App. 2011) ("In construing orders of an administrative agency, we apply the same rules as when we interpret statutes . . . ."); *Philip Morris USA Inc. v. Tolson*, 176 N.C. App. 509, 626 S.E.2d 853, 858 (2006) ("In interpreting an agency order, the order 'should be read as a whole.'"); *Cedar Rapids Steel Transp., Inc. v. Iowa State Commerce Comm'n*, 160 N.W.2d 825, 838 (Iowa 1968) ("in the interpretation of an adjudicatory order the entire instrument must be considered . . . in order to determine its intent and purpose").

### III. CONCLUSION

For the reasons set forth above and in the Commission's Response Brief, this Court should reject any procedural challenges to the Commission's decision.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of March, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of March 2013, I caused a copy of the *Brief of Respondent Public Employment Relations Commission in Response to Brief of Amicus Curiae Washington State Association of Municipal Attorneys* to be served on the following by placing the documents in the U.S. mail, postage prepaid:

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I certify that on the 22nd day of March 2013, I caused a copy of the *Brief of Respondent Public Employment Relations Commission in Response to Brief of Amicus Curiae Washington State Association of Municipal Attorneys* to be filed with Division II of the Washington State Court of Appeals by e-filing service.

Signed this 22nd day of March, 2013, in Olympia, Washington.

  
BECKY MITCHELL  
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# WASHINGTON STATE ATTORNEY GENERAL

**March 22, 2013 - 10:57 AM**

## Transmittal Letter

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