

64396-7

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No. 64396-7-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

CITY OF SEATTLE and SEATTLE FIRE DEPARTMENT, Respondents

v.

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

and

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL 2898, Appellant

BRIEF OF APPELLANT

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1. INTRODUCTION.

This proceeding arises out of a grievance by appellant Seattle Fire Chiefs Association, Local 2898, International Association of Fire Fighters, in which the Union challenged discipline imposed by the Seattle Fire Department on one of the Union's bargaining unit members. The Union contended that, after the grievant was once disciplined for certain conduct, she was unjustly disciplined a second time for the same conduct. The Arbitrator ultimately concluded that this re-discipline violated the parties' labor agreement. Accordingly, he sustained the grievance and issued a remedial order.

This dispute concerns the Union's charge that the City interfered with protected activity of bargaining unit employees and the collective bargaining process during the City's preparation for the arbitration hearing: The City (1) required bargaining unit members to participate in interviews with the City's attorney for the purpose of building the City's case against their Union and fellow employee, (2) expected the employees to treat their communications with the City's attorneys as confidential, and (3) refused to provide information concerning the interviews that the Union needed for further evaluation of the merits of grievance and to prepare for the arbitration hearing.

The Union filed a complaint with the Public Employment Relations Commission (PERC) charging that the City violated (1) RCW 41.56.140(1) by requiring bargaining unit members to participate in the interviews, and (2) RCW 41.56.140(1) and (4) by refusing to provide the Union with information that it needed to prepare for the hearing.

The Commission ruled that public employers must accord their employees the protections against coercive interrogation that apply to employees covered under the National Labor Relations Act, as amended, 29 U.S.C. §§ 141 *et seq.* (“NLRA”), and enunciated in *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), *enf. den. on other grounds*, 344 F.2d 617 (8th Cir. 1965). The Commission held that an employer seeking to interview employees in preparation for a grievance arbitration hearing with their union must: (1) inform the employees of the purpose of the questioning; (2) assure them no reprisal will take place; and (3) inform them that participation in questioning is voluntary. However, because the Commission viewed the record as lacking “direct evidence” concerning the City’s interrogations in the interviews, it declined to find that the City violated the collective bargaining statute when it failed to afford the *Johnnie’s Poultry* protections to the employees interviewed. The Commission also ruled that the City violated its duty to provide the Union with information necessary

and relevant to enforcement of the collective bargaining agreement and not protected by the work product doctrine, such as the identities of employees interviewed and employee statements.

The City sought judicial review under RCW 34.05, contending that the Commission erred as a matter of law when it concluded that public employers must give *Johnnie's Poultry* warnings to employees when interviewing them in preparation for grievance arbitration and tell them that their cooperation in pre-arbitration interviews is voluntary. The City also contended that the Commission erred in finding that the City violated its statutory obligation to provide the Union with information relevant to the arbitration proceeding. The superior court adopted the City's position on both points.

As demonstrated below, the Commission acted within its authority in adopting the *Johnnie's Poultry* doctrine in the context of preparations for grievance arbitration and in determining that the City unlawfully failed to provide the Union with information relevant to the arbitration. Therefore, the City's petition for review should be denied.

2. ASSIGNMENTS OF ERROR.

Assignment of Error No. 1.

The superior court erred in granting the City's petition for review and reversing the decision of PERC that adopted standards for public employers that protect against interference and coercion in conducting interviews of bargaining unit employees in preparation for a grievance arbitration or unfair labor practice hearing.

Assignment of Error No. 2.

The superior court erred in granting the City's petition for review and reversing the decision of PERC that concluded that the City committed in an unfair labor practice in failing to provide the Union with information about such interviews.

Issues Pertaining to Assignments of Error.

1. Did PERC act within its authority to administer and enforce RCW 41.56 in concluding that the City's pre-hearing interviews of employees in a pending grievance arbitration should be subject to the safeguards against interference with protected activity set forth in *Johnnie's Poultry Co., supra*, that require the employer to: (1) inform the employee of the purpose of the questioning; (2) assure the employee that no reprisal will take place regardless of whether or not the employee chooses to participate in the questioning; and (3) inform the employee that participation in questioning is voluntary. (Assignment of Error No. 1.)

2. Does a public employer's duty to provide the union requested information relevant to collective bargaining and contract enforcement, as articulated in *Bellevue v. International Ass'n of Fire Fighters*, 119 Wn.2d 373, 831 P.2d 738 (1992), and *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), include the identity of bargaining unit employees the City's attorney interviewed in preparation for a pending grievance arbitration, copies of witness statements, and the substance of information obtained through witness interviews prior to a decision to impose discipline? (Assignment of Error No. 2.)

3. STATEMENT OF THE CASE.

The Union is the exclusive collective bargaining representative for a bargaining unit of "all supervisory uniformed personnel of the Seattle Fire Department holding the rank of Battalion Chief and Deputy Chief"; uniformed employees of the Department below the rank of battalion chief are represented by a different union.¹

In 2005 the Union processed a grievance on behalf of one of its bargaining unit members, Battalion Chief Molly Douce, asserting that the City lacked just cause as required by the parties' labor agreement when it

¹Complaint, ¶ 1; Answer, ¶ 1; Exhibit 1 (collective bargaining agreement), Article 1; *City of Seattle*, PERC Decision 1797-A (PECB, 1985).

suspended her for one shift without pay and denied her the opportunity to work overtime in the Operations Division. Exhibit 7, pp. 2, 7-9. The dispute was scheduled for arbitration in September 2005 (Complaint, ¶ 4, Answer, ¶ 4), and the arbitration ultimately issued an award for the Union (Ex. 7).

In preparation for the arbitration hearing, the City's attorney Reba Weiss conducted interviews with bargaining unit employees as prospective witnesses.² The interviews occurred between April 26 and May 10, 2005, at the Fire Department offices or at Ms. Weiss's law office (Tr. 22; City's Proposed Stip. ¶ 3), were arranged by the administrative staff of the Fire Department (Tr. 22-23), and concerned the employees' "knowledge of the facts and to prepare the City's defense" in the arbitration³ and "to find out what the member[s] would say if called to testify."⁴

²Complaint ¶ 5; Answer ¶ 5. Ex. 15 (City's proposed prehearing factual stipulation at ¶ 1, attached as Ex. A to Declaration of Fritz E. Wollett in Support of Respondent's Motion to Try Case on Stipulated Facts (hereafter, City's Proposed Stip.). This Exhibit A to Exhibit 15 is included in set of the hearing exhibits that are set forth in Doc. Sub No. 6, entitled Index, of the docket of Superior Court Case No. 09-2-07654-5SEA. Exhibit A is omitted from the same Exhibit 15 in the duplicate set of hearing exhibits that appear in Doc. Sub No. 9, entitled Certification of Supplemental Record.

³Ex. 12 (Declaration of Reba Weiss in Support of Respondent's Motion to Try Case on Stipulated Facts), ¶ 3.

⁴Exhibit 6 (Letter from F. Wollett to James Webster dated June 3, 2005).

The employees were not informed that they had no obligation to participate in the interviews and were free to refuse to do so without fear of reprisal. City's proposed Stip. ¶ 1. As the Examiner found, the City interviewed the employees "about their knowledge of facts in [the] arbitration case to prepare for witnesses and the employer's defenses." Examiner's Decision at 7.

After learning of the interviews, the Union requested from the City the identity of all interviewees, questions asked and information provided, and copies of all notes and statements. Ex. 3. The City refused the Union's requests without explanation, stating "[w]e will not disclose to you or your client any of the information gathered." Ex. 4.

The City asserts that it can interview bargaining unit employees to prepare its case against their union, without advising them, in advance of the interview, that they have no obligation to participate in the interview and are free to refuse to do so without fear of reprisal:

The SFD expects all of its officers, including Battalion Chiefs and Deputy Chiefs, to cooperate with the City Attorney's office, or its designee, in preparing SFD's case in personnel disputes for resolution by an arbitrator, hearing examiner or court. This expectation includes participating in interviews with SFD's attorneys.

City's Proposed Stip., ¶ 5. The City's assertion extends even to lieutenants and captains in the non-supervisory bargaining unit. Tr. 25-26 (Wollett).

Two bargaining unit members testified that they understood the City's expectation to participate in an interview with its attorneys to be a "direct order." Tr. 38, 40. The parties stipulated that, had he been called as a witness in this proceeding, Deputy Chief Angelo Duggins, who was interviewed by Ms. Weiss in preparation for the Douce arbitration hearing (Answer, ¶ 5), would testify consistently with this testimony. (Tr. 40-41).

The City also expects bargaining unit employees to preserve the confidentiality of communications between themselves and the City's attorneys, which the City states is subject to its attorney-client privilege. Tr. 28-29 (Wollett); Ex. 12 (Weiss Declaration), ¶ 3. Thus, if a bargaining unit member should "blurt[] out something that occurred" during an interview with the City's attorney and thereby waive the attorney-client privilege asserted by the City, "there could well be repercussions from doing that. Obviously, [the City] do[es not] want people to waive the privilege." Tr. 28 (Wollett). Thus, the employees are not free to disclose to the Union any such communications between them and attorneys for the City, even if they may wish to provide effective assistance for the Union's case in arbitration.

The Union filed a complaint with PERC charging that the City violated (1) RCW 41.56.140(1) by requiring bargaining unit members to participate in the interviews, and (2) RCW 41.56.140(1) and (4) by refusing to provide the Union with information that it needed to prepare for the hearing. The Examiner dismissed the complaint. According to the Examiner, the Union failed to show that the bargaining unit members were engaging in any protected activity or pursuing their rights under RCW 41.56, and the information sought by the Union was protected as work product and available to the Union through other means. Decision 9226, p. 12.

On appeal from the Examiner's decision, the Commission ruled that public employers must accord employees the protections against coercive interrogation that apply to employees covered under the NLRA and enunciated in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964). The Commission held that an employer seeking to interview employees in preparation for a grievance arbitration hearing with their union must: (1) inform the employees of the purpose of the questioning; (2) assure them no reprisal will take place; and (3) inform them that participation in questioning is voluntary. Decision 9526-A, pp. 4-5. However, because the Commission viewed the record as lacking "direct evidence" concerning the City's

interrogations in the interviews, it affirmed the Examiner's ruling that the City did not violate the collective bargaining statute when it failed to afford the *Johnnie's Poultry* protections to the employees interviewed. *Id.* at 7.

The Commission also ruled that the City violated RCW 41.56.140(4) by not informing the Union of its reasons for refusing to provide requested information concerning the interviews and that the City violated its duty to provide the Union with information necessary and relevant to enforcement of the collective bargaining agreement and not protected by the work product doctrine, such as the identities of employees interviewed and employee statements. *Id.* at 15. Accordingly, it reversed the Examiner's rulings on these issues and entered a remedial order. *Id.* at 17.

The City sought judicial review of the Commission's decision under RCW 34.05. CP 1-8. The superior court ruled that the Commission erred as a matter of law when it concluded that public employers must give *Johnnie's Poultry* warnings to employees when interviewing them in preparation for grievance arbitration and tell them that their cooperation in pre-arbitration interviews is voluntary; it also ruled that the Commission erred in finding that the City violated its collective-bargaining obligation to provide the Union with information relevant to the arbitration proceeding.

The court adopted the reasoning of the Examiner on these issues. CP 9-10.

4. ARGUMENT.

A. Standard of Review.

The decision under review is the decision of the Commission, not that of the hearing examiner or the superior court. *Int'l Ass'n of Fire Fighters, Local 469 v. PERC*, 38 Wn. App. 572, 575-76, 686 P.2d 1122 (1984). Appellate review of a decision of the Public Employment Relations Commission (PERC) in an unfair labor practice case is governed by the Administrative Procedure Act, ch. 34.05 RCW. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

The relevant factual findings for judicial review are those of the Commission. *City of Fed. Way v. PERC*, 93 Wn. App. 509, 511-12, 970 P.2d 752 (1992). The examiner's findings are part of the record, however, and may be weighed in considering the evidence supporting PERC's decision. *Pasco Police*, 132 Wn.2d at 459.

The Court may provide relief from an agency order when the agency erroneously interprets or applies the law or the order is not supported by substantial evidence. RCW 34.05.570(3)(d), (e). The Court may grant relief only if it determines that a person seeking judicial relief has

been substantially prejudiced by the action complained of. RCW 34.05.570(1)(d).⁵ The party challenging the agency action has the burden of demonstrating the invalidity of that action. RCW 34.05.570(1)(a).

The Public Employees' Collective Bargaining Act (PECBA), ch. 41.56 RCW, is remedial. It is to be liberally construed to accomplish its purpose and supersedes other statutes and rules governing public employment. RCW 41.56.905 provides:

The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. . . . [I]f any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.

For the employees in the Union's bargaining unit, who are uniformed personnel, the purpose includes a recognition of the public policy against strikes by such personnel as a means of settling their labor disputes; that the uninterrupted and dedicated service of these employees is vital to the welfare and public safety; and that to promote such dedicated

⁵RCW 34.05.010 provides pertinently:

(3) "Agency action" means . . . the implementation or enforcement of a statute, the adoption or application of an agency rule or order, [or] the imposition of sanctions

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes. RCW 41.56.430.

“Because of the expertise of PERC’s members in labor relations, . . . the courts of this state give ‘great deference’ to PERC’s decisions and interpretation of the collective bargaining statutes.” *Bellevue v. Int’l Ass’n of Fire Fighters*, 119 Wn.2d 373, 381, 831 P.2d 738 (1992); *Maple Valley Prof. Fire Fighters Local 3062 v. King County Fire District No. 43*, 135 Wn. App. 749, 750, 146 P.3d 1247 (Div. 1, 2006); *see also Yakima v. Firefighters*, 117 Wn.2d 655, 671-72, 818 P.2d 1076 (1991).

RCW 41.56 is in many ways similar to the NLRA. Courts take note of federal decisions construing the NLRA, in addition to Washington law, when construing similar provisions of RCW 41.56. Federal precedent is persuasive, but not controlling. *Pasco Police*, 132 Wn.2d at 458; *Nucleonics Alliance, Local Union 1-369 v. Wash. Pub. Power Supply Sys.*, 101 Wn.2d 24, 32-33, 677 P.2d 108 (1984).

B. PERC Properly Concluded that the City’s Pre-Hearing Interviews of Employees in a Pending Grievance Arbitration Should Be Subject to the Safeguards Against Interference with Protected Activity Set Forth in *Johnnie’s Poultry Co.* That Require the Employer To: (1) Inform the Employee of the Purpose of the Questioning; (2) Assure the Employee That No Reprisal Will Take Place Regardless of Whether or Not the Employee Chooses to Participate in the Questioning; and (3) Inform the Employee That Participation Is Voluntary.

In its decision the Commission adopted the standards set forth in *Johnnie’s Poultry* to govern employer interviews of employees in preparation for litigation of grievances or unfair labor practices (Decision at 1):

[W]e find that the rights enunciated in *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), apply to employees covered by this state’s collective bargaining laws. If an employer wishes to question a bargaining unit employee concerning subject matter that relates to the litigation of a grievance or unfair labor practice, the employer has an obligation to: 1) inform the employee of the purpose of the questioning; 2) assure the employee that no reprisal will take place regardless of whether or not they choose to participate in the questioning; and 3) inform the employee that participation in questioning is voluntary.

As demonstrated below, PERC acted within its authority pursuant to RCW 41.56.160 to prevent and remedy unfair labor practices⁶ in adopting these standards to protect against interference and coercion of employees in the

⁶RCW 41.56.160(1) provides: “The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders”

filing and pursuit of grievances and unfair labor practices as the exercise of rights protected by the PECBA.

1. Public employees engage in activity protected by the PECBA when they file or pursue grievances in arbitration or support their union in doing so.

RCW 41.56.040 protects public employees and their unions “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 [chapter 41.56 RCW].” PERC and Washington courts have consistently held that filing and processing grievances are activities protected by Chapter 41.56 RCW from employer interference. *Seattle School Dist.*, Decision 7349-A (PECB, 2001); *Valley General Hospital*, Decision 1195, *aff’d* Decision 1195-A (PECB, 1981); *Clallam County v. PERC*, 43 Wn. App. 589, 599, 719 P.2d 140 (1986).

This conclusion flows from the legislature’s embrace of grievance arbitration as a means to resolve labor disputes involving public employees, specifically including grievance procedures in defining the obligations of employers and unions to bargain collectively (RCW 41.56.030(4)), stating a preference for grievance arbitration (RCW 41.58.020(4)), making agency staff available to arbitrate grievances at state expense (RCW 41.56.125), requiring that a grievance arbitration procedure be deemed part of any

arrangement implemented by an employer following an impasse in negotiations (RCW 41.56.100) (*see Seattle School Dist.*, Decision 7349 (PECB, 2001)), and authorizing (as a mandatory bargaining subject) its imposition through interest arbitration on employers of uniformed personnel and unions representing such personnel (RCW 41.56.430 *et seq.*).

These protections extend beyond the grievant to other employees in a bargaining unit. Employees are protected when they associate with or support a grievant in the grievance procedure. *City of Omak*, Decision 5579-B (PECB, 1998). Constraints on a union's access to the grievance procedures, or on its ability to represent grievants effectively in that process, necessarily interfere with protected rights of represented employees. *Seattle School Dist.*, Decision 7349-A (equating interference with witnesses in grievance arbitration proceedings with interference in unfair labor practice proceedings).

It is an unfair labor practice in violation of RCW 41.56.140(1) for an employer "[t]o interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by [chapter 41.56 RCW]." An interference violation is established where it is demonstrated that employer conduct can reasonably be perceived by employees as a threat of reprisal or promise of benefit to deter their pursuit of lawful union activity. *Port of*

Seattle, Decision 6854-A (PECB, 2001). The legal determination of interference is not based on the actual reaction of the employee involved, but rather on whether a typical employee under similar circumstances reasonably could perceive the employer's actions as an attempt to discourage protected activity. *City of Tacoma*, Decision 6793 (PECB, 1999), *aff'd*, Decision 6793-A (PECB, 2000)..

2. PERC properly adopted the standards of *Johnnie's Poultry* to protect against potentially coercive interviews of employees in preparation for litigation of unfair labor practices and grievances in arbitration.

The NLRB has recognized repeatedly that employer interviews of employees in preparation for litigation can result in unlawful coercive interrogation. "In such a situation there may be pressures, sometimes subtle, sometimes not, placed on the employee to conform the facts to support the employer's case." *Grandview Health Care Center*, 332 NLRB 347, 356 (2000) (Kocol, ALJ), *enf. sub nom. Beverly Health & Rehab. Serv. v. NLRB*, 297 F.3d 468 (6th Cir. 2002).

In *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), *enf. denied on other grounds*, 344 F.2d 617 (8th Cir. 1965), the NLRB held that an employer may interrogate employees about issues raised in an unfair labor practice complaint if it is necessary to prepare a defense for trial of the

case, but only if certain safeguards are observed. Specifically, the employer (1) must communicate the purpose of the questioning to the employee; (2) “assure him that no reprisal will take place,” and (3) “obtain his participation on a voluntary basis.” In addition, the NLRB insisted that “the questioning must occur in a context free from employer hostility to union organization . . . and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters . . . or otherwise interfering with the statutory rights of employees.” *Id.*

“In the context of an unfair labor practice hearing, since *Johnnie’s Poultry*, the NLRB has consistently required an employer to administer three warnings to each employee it interviews: (1) instruct him of ‘the purpose of the questioning; (2) assure him that no reprisal will take place; and (3) obtain his permission on a voluntary basis.’” *PERC v. City of Vancouver*, 107 Wn. App. 694, 707 n.9, 33 P.3d 74 (2001), quoting *L & L Wine & Liquor Corp.*, 323 NLRB 848, 853 (1997), & citing *Dayton Typographic Serv. v. NLRB*, 778 F.2d 1188, 1195 (6th Cir. 1985); *ITT Automotive v. NLRB*, 188 F.3d 375, 379 (6th Cir., 1999).

Even the “mere maintenance” of a rule prohibiting an employee from refusing to cooperate in an investigation is an unlawful interference, because it “tends to chill employee exercise of their protected rights.”

Grandview Health Care Center, 332 NLRB at 349. In *Grandview Health Care Center*, the NLRB found unlawful the employer's rule prohibiting employees from "[r]efusing to cooperate in the investigation of any allegation of patient (resident) neglect or abuse or any other alleged violation of company rules, laws, or government regulations." *Id.* According to the NLRB, the employer's rule applied to the investigation of unfair labor practice charges.

By compelling employees to cooperate in unfair labor practice investigations, or risk discipline, the Respondent's rule violates the longstanding principle, established in *Johnnie's Poultry*, that employees may not be subjected to employer interrogations, relating to Section 7 activity, that reasonably tend to coerce them to make statements adverse to their Section 7 interests, those of a fellow employee, or those of their union. If the employees' Section 7 right of mutual protection is to be safeguarded, cooperation must be voluntary. Failure to inform employees of the voluntary nature of the employer's investigation is "*a clear violation*" of Section 8(a)(1) of the Act.⁷

Id. at 749, citing *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 861 (6th Cir. 1990) (emphasis added).

The NLRB also has held that an employer may not compel its employees to answer questions asked by the employer's counsel relating to

⁷Section 7 of the NLRA, 29 U.S.C. § 157, provides pertinently: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . for the purpose of collective bargaining or other mutual aid or protection"

a pending grievance that is scheduled for arbitration. *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979), *enf. denied*, 648 F.2d 712 (D.C. Cir. 1981). In *Cook Paint*, the NLRB differentiated between a situation where an employer's inquiry was still in the investigative stage and no final discipline had yet been meted out, and the situation once disciplinary action is taken, the grievance machinery is activated, and the dispute is to be submitted to arbitration. Prosecution of grievances being protected activity, the NLRB held the standards of *Johnnie's Poultry* should govern interrogation of witnesses by the employer in preparation for an arbitration hearing. 246 NLRB at 646.

A divided panel of the D.C. Circuit refused to enforce the NLRB order in *Cook Paint*, primarily because, according to the majority, the Board's rule "impermissibly interferes with the manner in which the parties . . . structure the arbitration process," which the majority emphasized "is a matter of contract between the parties" (648 F.2d at 720-721). However, the decision of the NLRB was correct for the reasons articulated in the dissenting opinion by Judge J. Skelly Wright, including both the authority of the Board to prevent and remedy coercion and the important benefits to be derived from the Board's articulation of a rule, which provides much clearer guidance to the parties:

"In the absence of a clear rule, defining their rights, employees may possess no rights effectively enforceable against employers bent on coerced extraction of privileged information" (*id.* at 726), and "a principal virtue of the Board's enunciated rule would lie in its simplicity and enforceability" (*id.* at 733).

Moreover, since unions lack the coercive means invoked by the City; PERC's adoption of the *Johnnie's Poultry* rule in pre-arbitration interviews properly places the parties "in positions of practical as well as theoretical equality."

It seems to be no accident that the company ignored union requests for information in the present case. An employer . . . will, as a practical matter, frequently be able to use the threat of discipline or dismissal to extract information including information to which it has no legal right from an unwilling employee.

Cook Paint, 648 F.2d at 735 (fn. omitted) (dissenting opinion).

The City may contend that the Commission erred in adopting the *Johnnie's Poultry* standards because (1) *Johnnie's Poultry* did not involve pre-arbitration interviews, and (2) some federal courts have declined to apply *Johnnie's Poultry* in the absence of real evidence of coercion. These contentions should be rejected because:

(1) *Johnnie's Poultry* has enjoyed over 40 years of acceptance by the NLRB and courts of appeals; the broad adoption and application of the

Johnnie's Poultry standards in other cases has provided important safeguards as a prophylactic measure; and the standards are easy to apply so that (i) bargaining parties have clear guidance concerning interviews in preparation for litigation, and (ii) PERC when reviewing allegedly unlawful interrogation after the fact can more readily evaluate whether the circumstances should be deemed coercive; and

(2) PERC's statutory directive to prevent and remedy unfair labor practices (RCW 41.56.160) should be interpreted to authorize the Commission to adopt the *Johnnie's Poultry* standards for pre-litigation interviews in both unfair labor practice and grievance arbitration proceedings.

The *Johnnie's Poultry* standards have been applied by the Board and courts many times and provide important safeguards to the protection of employee rights. *E.g., Tamper, Inc.*, 207 NLRB 907, 928 (1973), *enf.*, 522 F.2d 781 (4th Cir. 1975) (employer's counsel advised employees he had "right" to ask them questions in connection with ULP complaint, did not inform them they could decline to answer and failed to assure them their answers would not lead to reprisals); *Pincus Elevator & Elec. Co.*, 1992 WL 1465665 (N.L.R.B. Div. of Judges), *supplemental decision on remand from* 308 NLRB 684, *enf.*, 998 F.3d 1004 (3d Cir. 1993) (employer's counsel failed to give assurance against retaliation before

questioning employees about signing union authorization cards in preparation for election hearing); *Standard-Coosa-Thatcher Carpet Co.*, 257 NLRB 304 (1981), *enf.*, 691 F.2d 1133 (4th Cir. 1982) (employer's counsel failed to give all three warnings to 1 out of 70 employees questioned; partial warning fell short of protections required; compliance with *Johnnie's Poultry* safeguards constitutes "the minimum required to dispel the potential for coercion" in instances of employer questioning of employees in anticipation of litigation); *Dresser Industries, Inc.*, 281 NLRB 132, 135-36 (1986) (employer's labor relations manager failed to give assurances before interview investigating ULP charge regarding filing grievance); *HMY Roomstore, Inc.*, 344 NLRB 963 (2005) (employer's counsel conducted interviews with two employee witnesses, in preparation for ULP proceeding, without assuring the employees that there would be no reprisals resulting from the interview and that participation in the interview was voluntary); *Parkwood Chevrolet*, 262 NLRB 256 (1982) (employer's counsel interrogated employees in service manager's office in preparation for ULP hearing without giving assurances); *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987) (employer's counsel failed to give two out of three assurances before questioning employees in preparation for ULP hearing); *Colacino Industries, Inc.*, 2006 WL 2737247 (NLRB

Div of Judges) (employer's counsel failed to give assurances before questioning employee summoned to conference room in preparation for ULP hearing).

In *Grandview Health Care Center*, the Sixth Circuit rejected the employer's criticism of the NLRB's reliance on *Johnnie's Poultry* on the grounds that the Eighth Circuit denied enforcement of the Board's order and that "numerous courts have declined to follow the *Johnnie's Poultry* approach of requiring affirmative warnings to employees, in favor of examining all of the circumstances to determine if questioning is coercive." The Sixth Circuit observed that "even courts that have followed the 'all the circumstances' approach have not disagreed with the basic premise that [employee] cooperation in such investigation must always be voluntary." 297 F.3d 468, 477.

The NLRB has specifically recognized that "the act of interviewing employees in preparation for litigation" has a "pronounced inhibitory effect" on the exercise of Section 7 rights, and that "the nature and circumstance of employer interviews in preparation for litigation" justify a more formal standard for ensuring that employee rights are protected. *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987). Thus, the specific safeguards

of *Johnnie's Poultry* are “designed to minimize the coercive impact of such interrogations.” *Id.*

Moreover, the NLRB in 1987 recognized the effectiveness of the *Johnnie's Poultry* requirements in protecting employee rights:

In the 21 years since that decision's issuance, the *Johnnie's Poultry* requirements have proved effective as a prophylactic measure to temper the coerciveness of such interviews while permitting employers considerable latitude to question employees in preparation for trial.

Bill Scott Oldsmobile at 1075. Further,

the safeguards are not unduly onerous or hampering and provide employers with clear guidance on how to avoid unfair labor practice liability in pursuing the legitimate interest of preparing an unfair labor practice defense; the benefits of this clarity outweighs any inconvenience to the employer, especially in view of the significant Section 7 rights the Board is seeking to protect.

Colacino at 2006 WL 2737247 (NLRB Div. of Judges).

Courts have recognized that the act of interviewing without giving the *Johnnie's Poultry* warnings is a violation distinct from the coerciveness of the interview itself. Thus, “even after an employer gives *Johnnie's Poultry* warnings, an interview may violate § 8(a)(1) if ‘under all the circumstances the interrogation reasonably tends to restrain, coerce, or

interfere with rights guaranteed by' the NLRA. *ITT Automotive v. NLRB*, 188 F.3d 375, 389 (6th Cir. 1999).⁸

PERC has held that tampering with witnesses in the grievance arbitration process constitutes unlawful interference with protected activity. In *Seattle School Dist.*, Decision 7349-A (PECB, 2001), the employer's assistant general counsel advised a witness in a grievance arbitration proceeding involving that employer not to honor a subpoena issued on behalf of the union involved. In finding an "interference" unfair labor practice, PERC noted that it "historically has been very protective of the dispute resolution processes embodied in collective bargaining statutes." PERC equated interference with witnesses in grievance arbitration with interference with unfair labor practice proceedings and observed,

Any question as to the validity of the subpoena should have been raised with the arbitrator, and should not have been a subject of unilateral action by any employer official.

⁸The Sixth Circuit in *ITT Automotive* explained (188 F.3d at 389 n.10):

In analyzing the legality of employer interrogations, some courts have considered eight factors characterized as the *Bourne* criteria. See, e.g., *Cooper Tire & Rubber*, 957 F.2d at 1255-56 (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir.1964)). The *Bourne* factors include (1) the history of the company's attitude toward its employees; (2) the type of information sought; (3) the rank of the interrogator within the company hierarchy; (4) the place and manner of interrogation; (5) the truthfulness of the employee's response; (6) the validity of the company's purpose in obtaining information about the union; (7) whether the company communicated its purpose to the employee questioned; and (8) whether the company assured the employee no reprisals would result.

Under these principles, PERC would have been justified to find that the City committed a “clear violation” (*Grandview Health Care Center*, 332 NLRB at 349) of RCW 41.56.140(1) by unlawfully interfering with protected activity in the dispute resolution process:

The City required bargaining unit employees to participate in confidential interviews with the City’s attorney to prepare the City’s case against the Union in a grievance arbitration proceeding, and it did not advise them that they were free not to participate and that refusal to participate would not subject them to reprisal. Indeed, bargaining unit members reasonably understood just the opposite.

The requirement to be subjected to a pre-hearing interview by the City’s attorneys was a direct order that will be enforced by superior officers. There is “no option.” Tr. 40. As the NLRB recognized in *Grandview Health Care Center*, such interrogations “reasonably tend to coerce employees to make statements adverse to their [statutory] interests, those of a fellow employee, or those of their union” and that in such a situation “there may be pressures, sometimes subtle, sometimes not, placed on the employee to conform the facts to support the employer’s case.” *Grandview Health Care Center*, 332 NLRB at 356. As in *Grandview*, the City’s

failure to inform employees of the voluntary nature of the employer's investigation is "*a clear violation*" of the law.

Moreover, the City expects bargaining unit members to keep their conversations with the City's attorneys confidential pursuant to the City's claim of attorney-client privilege, and the City concedes there could be "repercussions" if the employees were to disclose (*e.g.*, to their Union) what the City's attorneys tell them or what they tell the City's attorneys based on the City's claim of attorney-client privilege. The employees in the Union's bargaining unit, however, are not clients of the City's attorneys. Indeed, in disputes between the Union and the City within the scope of collective bargaining, the Union is the City's adversary, as are the employees for whom it is the exclusive representative.

While the prearbitral grievance procedure might be considered 'non-adversarial,' once arbitration is invoked the fact is in the fire and the parties are unquestionably 'adversaries.

Cook Paint & Varnish Co., 246 NLRB 646 at 652. Communications by the City attorney with bargaining unit employees who are the City's adversaries are, by definition, neither "confidential" nor with a "client," and the attorney-client privilege cannot apply to such communications.

The City's expectation that employees will maintain the confidentiality of their communications with the City's attorneys directly interferes

with the Union's ability to represent the bargaining unit effectively:

Because "repercussions" may result if a bargaining unit employee discloses to the Union communications between the employee and the City's attorney, employees may feel obligated to withhold pertinent information from the Union they otherwise would want to provide.

Thus, the Union cannot reliably learn from *the employee* whether the employee told the City's attorneys the same thing that he or she is telling the Union. Given *the City's* refusal to disclose either the identity of employees interviewed or any other information concerning the interview, the Union has no way to know how the testimony of an employee the Union may wish to call as a witness may have been affected as a result of a coerced "confidential" interview by the City's attorney or whether the testimony could be impeached by statements that may be attributed to the employee in the interview.

Moreover, as in *Grandview Health Care Center*, 332 NLRB at 349, the City interferes with protected activity by its "mere maintenance" of an "expectation" that bargaining unit members participate in confidential interviews with counsel for the City to prepare the City's case in grievance arbitration or unfair labor practice proceedings. In *Grandview Health Care*, the NLRB found unlawful interference where a rule could be con-

strued as requiring employees to participate in such interviews. Here, the City has expressly stated the same expectation. For these reasons PERC appropriately ruled that the *Johnnie's Poultry* standards for pre-litigation interviews of employees should apply to pre-arbitration interviews such as were conducted by the City in this case.

Finally, the City may claim that the Commission ignored *PERC v. City of Vancouver*, 107 Wn. App. 694, 706, 33 P.3d 74 (2001) (citations omitted), in which the court of appeals opted to follow *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), in deciding whether an employer's interrogation of union members about statements made at a union meeting constituted interference with their rights. But *City of Vancouver* involved *pre-disciplinary* interviews into alleged misconduct, not *post-disciplinary* interviews to prepare the city's case in litigation to which PERC expressly limited its decision. Moreover, the interviews in *City of Vancouver* were conducted in a manner such that "no reasonable employee would perceive that the City . . . was interfering with collective bargaining rights." *Id.* at 698. In reaching this conclusion, the court considered the following factors which have been considered by various courts of appeal:

- (1) [T]he history of the employer's attitude toward its employees;
- (2) the type of information sought;
- (3) the company rank of the questioner;
- (4) the place and manner of

the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer had a valid purpose for obtaining the information; (7) if so, whether the employer communicated it to the employee; and (8) whether the employer assured the employee that no reprisals would be forthcoming should he or she support the union.

Id. at 706. “But a court may still find coercive interrogation to have occurred even if all of these enumerated factors operate in the employer’s favor; the factors provide general guidance, not a per se rule.” *Id.*⁹

Accordingly, the Commission properly analyzed the Union’s allegations that the City coerced employees in pre-arbitration interviews to build a case against a fellow bargaining unit employee and their union in a pending grievance arbitration by determining that such interviews should be subject to the safeguards against interference with protected activity set forth in *Johnnie’s Poultry*.

⁹Even under the eight-factor approach applied to the pre-disciplinary investigation in *City of Vancouver*, the totality of the circumstances show that a reasonable employee would perceive the City was interfering with protected activity: (1) The City has a history of compelling employees to participate in confidential post-disciplinary pre-hearing attorney interviews; (2) the City’s attorney sought their knowledge of the facts relevant to a grievance being pursued by the employees’ union; (3) the questioning was performed by an attorney retained by the City with whom the Fire Department administrative staff ordered them to cooperate; (4) the questioning was formal and conducted at the administrative offices of the Department or the attorney’s office; (5) the employees were required to answer truthfully on threat of discipline and to preserve the confidentiality of the interrogation or face “repercussions”; (6) the City’s attorney interviewed the employees “to prepare the City’s defense” in the grievance arbitration hearing; (7) the purpose must have been obvious from the questioning; and (8) the employees were “expected” to participate and were not assured there would be no reprisal from refusing to be interviewed.

C. PERC Properly Concluded That the City Violated RCW 41.56.140(4) by Not Informing the Union of its Reasons for Refusing to Provide Requested Information and by Refusing to Provide Information That Was Relevant to Collective Bargaining and Contract Enforcement.

1. The duty to bargain includes a duty to provide relevant information needed by the other party for the proper performance of its duties in the collective bargaining process.

The duty to bargain under the PECBA is defined as follows: “Col-
lective bargaining means . . . to confer and negotiate in good faith”
RCW 41.56.030(4), a definition that is patterned after the NLRA.¹⁰ Under
both federal and Washington state precedent, the duty to bargain includes a
duty to provide relevant information needed by the other party for the
proper performance of its duties in the collective bargaining process.
NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); *City of Bellevue*,
Decision 3085-A (PECB, 1989), *aff’d*, *Bellevue v. Int’l Ass’n of Fire*
Fighters, 119 Wn.2d 373 (1992). This obligation extends not only to
information that is useful and relevant for the purpose of contract negotia-
tions, but also to information necessary to the administration of the collec-
tive-bargaining agreement.

¹⁰NLRA Section 8(d), 29 U.S.C. §158(d) provides pertinently that collective bargaining includes the obligation “to meet and confer in good faith”

Employers must provide requested information that is relevant and necessary for processing contractual grievances, including information necessary to decide whether to proceed with a grievance or arbitration. In *Acme Industrial Co.*, 385 U.S. at 438, the Court approved a requirement for the employer to supply information that would aid the union to “sift out unmeritorious claims” in the grievance process. *See also Bellevue v. Int’l Ass’n of Fire Fighters*, 119 Wn.2d 373, 384 (“Collective bargaining is a process of communication, not a game of hide and seek”).

An employer commits an unfair labor practice when it withholds relevant and necessary information requested by the union. *Bellevue v. Int’l Ass’n of Fire Fighters, supra; Snohomish County PUD*, Decision 7656-A (PECB, 2003). A discovery-type standard determines the relevance of the requested information:

[T]he goal of the process of exchanging information is to encourage resolution of disputes, short of arbitration hearings, briefs, and decision so that the arbitration system is not "woefully overburdened."

Pennsylvania Power and Light Company, 301 NLRB 1104, 1105 (1991), *citing Acme Industrial Co.*, 385 US at 438; *see also City of Bellevue, supra.*

Where the circumstances surrounding the union's request are reasonably calculated to put the employer on notice of a relevant purpose, the employer is normally obligated to furnish the requested information. In this case there is no dispute about the relevance of the information the Union requested concerning interviews by the City's attorney of bargaining unit employees about the subject matter of the pending grievance to prepare the City's case in the scheduled arbitration hearing. The request included "disclosure of all interviewees, questions asked and information provided, and copies of all notes and statements." Exhibit 3.

Requests for information that a union might use to sort out meritorious from frivolous grievances are relevant, as are requests for information to assist in "pursuing its pending grievance" and related unfair labor practice claims (*Washington State Patrol*, Decision 8785 (PECB, 2004)). Information pertaining to employees in the bargaining unit is presumptively relevant. *Northwest Publications, Inc.*, 211 NLRB 464 (1974); *City of Bremerton*, Decision 6006-A (PECB, 1998).

2. The City violated RCW 41.56.140(4) by not informing the Union of its reasons for refusing to provide requested information.

A party may not simply refuse a request for information, but is under an obligation to request clarification and/or comply with the request

to the extent it does encompass necessary and relevant information.

Employers and unions must negotiate over any objections to producing requested documents. *City of Bremerton*, Decision 5079 (PECB, 1995); *City of Yakima*, Decision 10270 (PECB, 2009).

A party may refuse to furnish confidential information to the other party in a collective-bargaining relationship only under certain conditions. Initially, the party must show that it has a legitimate and substantial confidentiality interest in the information sought. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). If this showing is made, the party's interest in confidentiality must be weighed against the requester's need for the information, and the balance must favor the party asserting confidentiality. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Finally, even if these conditions are met, the party may not simply refuse to provide the requested information, but must seek an accommodation that would allow the requester to obtain information it needs while protecting the party's interest in confidentiality. *Borgess Medical Center*, 342 NLRB 1105 (2004).

In this case, the Union requested the information to assist it in pursuing its pending grievance, because the substance of the information the City obtained as a result of the coerced interviews with bargaining unit employees could be relevant to the strength or weakness of the City's justi-

fication for the discipline or other issues in the arbitration proceeding. The City's response was simply "[w]e will not disclose to you or your client any of the information gathered." Exhibits 4 and 5. As PERC pointedly observed, "the employer's refusal coupled with its lack of explanation for its denial, left the union with few options aside from filing a complaint." Decision at 11.

Even where requested documents are privileged from disclosure, the privilege does not protect against disclosure of relevant information contained in the documents. *BP Exploration (Alaska), Inc.*, 337 NLRB 887, 888-889 (2002) (attorney-client privilege does not apply to prevent disclosure of factual information). Nor is production excused because the requesting party could obtain the information through its own investigation. *Id.*, citing *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995) ("An employer's obligation to furnish relevant information is not excused merely because a union may have alternative sources for the information").

In *Borgess Medical Center*, *supra*, the employer violated its obligation to bargain collectively in refusing to provide requested incident reports of other medication errors by failing to offer a reasonable accommodation. After finding that the employer established a legitimate confidentiality interest in the requested reports, the NLRB further found that it

failed to satisfy its duty to accommodate its interests and the Union's need for the information.

When an employer demonstrates a substantial confidentiality interest, it cannot simply ignore the Union's request for information. It must still seek an accommodation of its concerns and the Union's need for the requested information. The burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited.

342 NLRB at 1106 (citations omitted).

In this case, the City failed to make any effort to bargain over the union's information request, flatly denying its duty to disclose the requested information and, only after the Union filed the unfair labor practice complaint, asserted protection from disclosure on the basis of attorney-client privilege and the work product doctrine. Thus, the employer completely failed in its bargaining duty. PERC properly concluded that the City violated RCW 41.56.140(4) by not informing the Union of its reasons for refusing to provide requested information.

3. The City violated RCW 41.56.140(4) by refusing to provide the Union with requested information that was relevant to collective bargaining and contract enforcement.

The City contends that its witness interviews with bargaining unit employees were privileged from disclosure and the Union's recourse was

to conduct its own witness interviews to obtain whatever information it needed to prepare for the arbitration, and that an employer has no obligation to supply information . This contention is without merit for at least three reasons.

First, an employer's obligation to furnish relevant information is not excused because the Union may have alternative sources for the information. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995):

An employer's obligation to furnish relevant information is not excused merely because a union may have alternative sources for the information. *New York Times Co.*, 265 NLRB 353 (1982); *Colgate-Palmolive Co.*, 261 NLRB 90, 92 fn. 13 (1982), *enfd. sub nom. Oil Workers Local 5-114 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983); and *Kroger Co.*, 226 NLRB 512, 513 (1976) (a "union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form"). *See also ASARCO, Inc. v. NLRB*, 805 F.2d 194, 198 (6th Cir. 1986) ("availability of the requested information from another source does not alter the employer's duty to provide readily available relevant information to the bargaining representative").

Second, as demonstrated below, the work product doctrine does not excuse a party from disclosing pertinent facts concerning a pending dispute, including employee statements, the identity of witnesses interviewed, and redacted notes, if any, from the City's pre-disciplinary investigation.

Finally, by (1) coercing employees to participate in interviews with the City's attorneys, (2) expecting that employees will preserve the confidentiality of communications between them and the City's attorneys and making known that "there could well be repercussions" from sharing these communications with third parties (Tr. 30 (Wollett)), including the Union, the City impeded the Union's access to the employees' knowledge of pertinent facts, because employees could reasonably believe they were not permitted to provide complete information to the Union.

Therefore, the City violated RCW 41.56.140(1) and (4) by refusing to provide the Union with requested information about the City's interviews with the bargaining unit employees.

4. PERC properly ordered the City to produce (1) employee statements, (2) the identity of witnesses interviewed, and (3) redacted notes, if any, from the City's pre-disciplinary investigation.

PERC properly ordered the City to produce (1) employee statements, (2) the identity of witnesses interviewed, and (3) redacted notes, if any, from the City's pre-disciplinary investigation. PERC correctly ruled that the work product doctrine does not protect this information from disclosure.

The work product doctrine was first articulated in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). It is intended to “preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy” with an eye toward litigation, free from unnecessary intrusion by his adversaries.” *Soter v. Cowles Publishing Co.*, 131 Wn. App. 882, 893, 130 P.2d 840 (2006) (citations omitted). The doctrine is codified at CR 26(b)(4):

[A] party may obtain discovery of documents . . . otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

See also, Heidebrink v. Moriwaki, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). There are two categories of such materials: (1) factual information and (2) attorneys’ mental impressions, research, legal theories, opinions and conclusions. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605-06, 963 P.2d 869 (1998). When production of documents containing such factual information is ordered upon a proper showing of need, the court is to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” CR 23(b)(4).

Disclosure of counsel's memoranda of witnesses' oral statements is "disfavored because it tends to reveal the attorney's mental processes." *Upjohn Co. v. United States*, 449 U.S.383, 399, 101 S. Ct. 677 (1981). Therefore notes of oral statements gathered during preparation for litigation are normally included with mental impressions in the "opinion" work product category. *Firestorm 1991*, 129 Wn.2d 130, 159, 916 P.2d 411 (1996) (Madsen, J., concurring).

From the beginning, however, courts have recognized that the work product doctrine, while protecting against coerced disclosure of "documents . . . prepared in anticipation of litigation" and "mental impressions, conclusions, opinions, or legal theories of an attorney," does *not* protect against disclosure of *facts*. Thus, the Supreme Court in *Hickman v. Taylor*, 329 U.S. at 508-09, declared that responses to interrogatories in civil litigation must include "all pertinent information" obtained during a witness interview. *See also 1991 Firestorm*, 129 Wn.2d 130, 916 P.2d 411 (1996) (citation omitted) ("Facts, as such, remain discoverable, even though they may be embodied in a protected document' or communication.") Similarly, in *City of Bellevue*, Decision 3085-A (PECB, 1989), the Commission rejected the city's contention that it was excused by the work product doctrine from disclosing comparable employers and data the city intended to use in interest arbitration with its firefighters' union "showing

the wages, hours and working conditions of employees who hold comparable positions.”¹¹

As the Commission properly held, in this case the work product doctrine does not protect identities of interviewees, witness statements, or redacted notes from the City’s pre-disciplinary investigation. The doctrine does not prevent discovery of the facts that an interview was performed or the personnel who participated. *1991 Firestorm*, 129 Wn.2d at 141; *see also* CR 26(b)(1) (the identity and location of persons having knowledge of any discoverable matter). Nor are witness statements of bargaining unit members work product. CR 26(b)(4) provides in part:

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party.

The Union, as exclusive representative pursuant to RCW 41.56.080, may request production of any statements by bargaining unit employees.

Finally, the work product doctrine does not protect documents an employer has considered in making a disciplinary decision, which are presumed necessary to a union representing a grievant and must be provided upon request. *State of Washington*, Decision 4710 (PECB, 1994); *City of Bremerton*, Decision 5079 (PECB, 1995); *see also City of Yakima*, Decision 10270 (PECB, 2009) (requiring production, over work

¹¹The Commission “[a]ssum[ed], without deciding, that an attorney’s work product in connection with collective bargaining negotiations (presumably produced in anticipation of interest arbitration) would be exempt from the duty to disclose,” but nevertheless disagreed that the information sought represents “the mental impressions, conclusions opinions and legal theories” of the city’s attorneys.

product objection, of materials relating to pre-disciplinary investigation conducted by attorneys retained as consultants).

In this case, the City did not simply refuse to provide the Union with matters it contended should be protected as work product. As discussed above, it flatly refused to share discoverable information concerning the employee interviews and compounded the offense by neither explaining the grounds for its refusal nor proposing any accommodation. In both ways the City unlawfully failed to bargain collectively. For these reasons, the Court should reject the City's defense that it was immunized in its conduct by the work product doctrine.

5. CONCLUSION.

For the reasons set forth above, the Court of Appeals should affirm the Commission's decision.

Dated: January 19, 2010.

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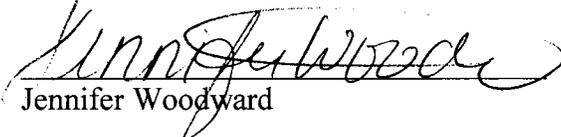
CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2010, I caused the original and one copy of the foregoing Brief of Appellant to be sent via legal messenger to:

Clerk of the Court
Court of Appeals, Division I
600 University St
One Union Square
Seattle, WA 98101-1176

And a true and correct copy of the same to be sent via legal messenger to:

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Jennifer Woodward