

No. 64396-7-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CITY OF SEATTLE and SEATTLE FIRE DEPARTMENT,

*Respondent,*

vs.

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

and

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,  
LOCAL 2898,

*Appellant,*

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

The King County Superior Court issued a decision reversing the ruling of the Public Employment Relations Commission (PERC) on the basis of the well-reasoned decision of the hearing examiner, and dismissing the complaint. CP 9-10. The lower court correctly concluded that the record did not support an order that effectively required the City of Seattle Fire Department to permit its organized supervisory fire chiefs to decline to cooperate with the department in preparing for grievance-arbitration. Even though it concluded that there was no evidence that the City's interviews of its chiefs had interfered with bargaining rights, PERC opted to impose on the Fire Department the requirements of the National Labor Relations Board (NLRB) that a private employer interferes with collective bargaining rights if it requires its organized employees to cooperate with management in preparing for grievance arbitration or hearings before the NLRB on alleged violations of the statute.

PERC's decision is based solely on a 45 year old decision of the National Labor Relations Board, enforcing federal labor law that does not, unlike Washington State law, allow for the organization of supervisors. In so doing, PERC engaged in an erroneous interpretation of the statute that exceeded its remedial authority and which was properly corrected by the lower court. The Union does not cite to a single court decision that applies

the *Johnnie's Poultry* case to an employer's interviews of bargaining unit employees to prepare for grievance-arbitration.

The Union's own precedent undercut its rationale for applying *Johnnie's Poultry* to supervisory employees. "Given the significant difference in which the two acts treat supervisors, we do not find the federal approach persuasive." *Firefighters Local 1052 v. PERC*, 45 Wn. App. 686, 687, 726 P.2d 1260 (1986).<sup>1</sup> The NLRB may not impose a *per se* rule that an employer may not use threats of discipline to compel employees to answer questions concerning an upcoming arbitration proceeding. *Cook Paint & Varnish v. NLRB*, 648 F.2d 712 (D.C. Cir. 1981) (Edwards, J.).

In addition, the lower court reversed PERC's finding that the City violated its obligation to disclose information to the Union because it refused to turn over interview notes and other material prepared by the City's attorneys in preparing for the arbitration. *Id.* The lower court again agreed with the hearing examiner's decision holding that the materials were exempt from disclosure by virtue of the privilege covering attorney client communications and attorney work product. PERC misread the record that shows that the City satisfied its obligations to disclose all information to the Union *prior* to the imposition of discipline. If allowed to become law,

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<sup>1</sup> The Union relied on this case in the lower court but does not cite it in its opening brief.

PERC's decision could erroneously extend the disclosure requirement to invade the privilege for information gathered by the City's attorneys in preparation for the arbitration hearing. Since both sides have equal access to relevant employee witnesses, no disclosure of information gathered by the attorneys *subsequent* to the imposition of discipline is needed. The Union is fully aware of the basis for the discipline because it received all of the City's pre-disciplinary information.

## **II. STATEMENT OF THE CASE**

### **A. Facts**

#### **1. The Douce discipline**

Battalion Chief Molly Douce received a one day suspension from her employer, the City of Seattle Fire Department. Her bargaining representative, International Association of Firefighters, Union Local No. 2898, grieved the suspension to arbitration. The Union succeeded in overturning the discipline and the employer complied with the arbitrator's award. Certification of Supplemental Index, Exh. 7.<sup>2</sup>

Prior to the imposition of the discipline, the Fire Department provided Local 2898 with all of the documents in its possession that formed

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<sup>2</sup> There are two indexes: A Certification of Record filed on April 13, 2009 and a Supplemental Certification filed on July 15. Unless otherwise noted, citations are to the exhibits listed in the Certification of Supplemental Index.

the basis for the discipline or otherwise related to the events at issue.

Subsequent to providing the information, Douce received a *Loudermill* hearing at which time Local 2898 responded to the disciplinary recommendation. The purpose of a *Loudermill* hearing is to provide an employee who has a property interest in public employment with the opportunity to respond to the charges against the employee and the proposed discipline. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Following the *Loudermill* hearing, Fire Chief Gregory Dean imposed discipline. The Union submitted the discipline to arbitration asserting that the discipline lacked good cause.

## **2. Pre-arbitration proceedings**

Due to concerns about a possible conflict of interest rising from the City Attorney's previous representation of Douce who had been named as a defendant in an earlier lawsuit involving this incident, the City Attorney retained outside counsel Reba Weiss to represent the Fire Department. Ms. Weiss arranged to interview relevant witnesses to prepare the Department's case for hearing. Some of the witnesses she sought to interview were members of the chiefs' bargaining unit represented by Local 2898. Exhs. 12 and 15. The bargaining agreement defines the bargaining unit "...as the exclusive bargaining representative of the bargaining unit of *all supervisory uniformed personnel* of the Fire Department including the rank of Battalion

Chief and Deputy Chief. (Emphasis added). Exh. 1, p. 1, article 1.

On May 13, 2005, the Union reacted to the interviews. Its attorney, James Webster, sent an email to the City claiming that the City was engaged in “direct dealing” by interviewing members of the bargaining unit without the Union’s consent or participation. The Union asked that the interviews cease unless consented to by the Union and that Ms. Weiss make “full disclosure” to the Union “...all interviewees, questions asked and information provided, and copies of all notes and statements.” Exh. 3.

The City Attorney’s office responded to the Union’s request on May 17, 2005, stating that it was legal for the City to prepare witnesses who were members of the bargaining unit to testify in a grievance-arbitration. Exh. 4. The City referred the Union to the City’s previous correspondence, dated April 14, 2004, in response to a similar demand by the same attorney on behalf of another firefighters’ union, Firefighters Union Local 27, in which the City had explained its position that it did not violate bargaining rights for the City to interview witnesses to prepare for an arbitration. Attachment to Exh. 4. The City cited *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984) for the proposition that it had the right to interview witnesses in order to prepare for the hearing. Despite the invitation in the 2004 letter for “any authority for the assertion” that interviews of bargaining unit personnel were unlawful, Mr. Webster did not respond to the earlier

letter, dated April 14, 2004 until May 2005. Exh. 4, attachment, and Exh. 5

On May 18, 2005, the Union sent a letter that purported to summarize the City's position on the Union's request. Exh. 5 (misdated in the Reporter's index as 5/18/06). First, the Union stated that the City's refusal to make clear to its chiefs that they had no obligation to cooperate with their employer was a "flagrant violation of the principles laid down by the NLRB in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), cited with approval by PERC in *City of Vancouver*, Decision 6732-A (PECB 1999)." The Union failed to point out that PERC's decision in the *City of Vancouver* case had been reversed. *City of Vancouver v. PERC*, 107 Wn. App. 694, 33 P.3d 74 (2001). Second, the Union opined that the City's refusal to turn over the substance of the information obtained as the result of Ms. Weiss's interviews "...plainly violates the disclosure obligations affirmed in *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and adopted by PERC in *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, 119 Wn.2d 373 (1992), and further elucidated in *Snohomish County PUD No. 1*, Decision 7657-A (PECB 2003)."

On June 3, 2005, the City Attorney responded to Local 2898's letter, explaining why the NLRB's decision in *Johnnie's Poultry Co.* did not apply and distinguishing PERC's decision in the *City of Vancouver* case. Exh. 6. The City's Attorney explained that there was no reasonable basis to believe

that Ms. Weiss's interviewing of prospective witnesses to prepare for the arbitration intimidated or interfered with any employee's bargaining rights:

There is no reason to believe that any of the bargaining unit members who have been interviewed by Ms. Weiss were coerced in any way. Interviews are being conducted to find out what the member would say if called to testify. I understand that each member has been willing to cooperate. We have no reason to believe that any member believes that he or she will be subject to reprisal "should he or she support the union." Attorneys representing the City in this case will assure witnesses that they will not suffer any adverse action as a result of their testimony. In six years of preparing arbitrations with the Fire Department, I would be hard pressed to think of any employee who has expressed concern about reprisal for testimony that he or she might give.

Exh. 6, p. 2.

The City's attorney also explained why it was not required to turn over to the Union any of the notes of the interviews of relevant witnesses conducted by Ms. Weiss after the discipline was determined and for the sole purpose of preparing to arbitrate the dispute. The Union's PERC authority was distinguished, as follows:

These PERC decisions have no bearing on the issue at hand: whether Seattle is required to turn over notes of interviews which are conducted *after* the events in question for the purpose of preparing for trial. The City has provided you with all documents leading to the decision to discipline Chief Douce. It has not placed any restraints on the Union's ability to prepare its case. Presumably the Union has access to relevant witnesses as does the City and the same opportunity to evaluate the "strengths and weaknesses" of the discipline to determine whether it

should proceed to arbitration. The City is not required to disclose this information to the Union.

Exh. 6, p. 3.

### 3. PERC complaint

Two days before it received the City's June 3 response, the Union filed a complaint with PERC alleging that the City had engaged in unfair labor practices in violation of RCW 41.56 by interfering with employee rights and refusing to bargain. The Union claimed that the City's interviews of witnesses constituted an unfair labor practice, as follows from the complaint:

9. The Respondents continue to assert that they can interview bargaining unit employees, without the Union's consent and without advising them, in advance of the interview, that they have no obligation to participate in the interview and are free to do so without fear of reprisal.
10. The Respondents' conduct violates the principles laid down by the NLRB in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), cited with approval by PERC in *City of Vancouver*, Decision 6732-A (PECB 1999); such conduct coerces employees in the exercise of rights guaranteed by Chapter 41.56 RCW and violates RCW 41.56.140(1).

The Union also alleged that the refusal of the City to disclose the information obtained by its attorney in her witness interviews violated the statute, as follows:

11. The Respondents continue to refuse to share with the union the substance of the information obtained as the result of the interviews that may be relevant to the strength or weakness of the City's position with respect to issues in the arbitration proceeding.
12. The Respondent's conduct violates the disclosure obligations affirmed in *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and adopted by PERC in *City of Bellevue*, Decision 3085-A (PECB, 1989), aff'd, 119 Wn.2d 373 (1992), and further elucidated in *Snohomish County PUD No. 1*, Decision 7657-A (PECB 2003); such conduct violates Respondents' duty to bargain collectively in violation of RCW 41.56.100 and .140(4); such conduct also derivatively coerces employees in the exercise of rights guaranteed by Chapter 41.56 RCW and violates RCW 41.56.140(1).

As relief, the Union pled for an order that prohibited the City and its attorneys from interviewing bargaining unit employees (chiefs) in order to prepare for arbitration "...without making it clear to the chiefs that they can refuse to participate in the interviews without any fear of reprisal." Additionally, the Union sought an order requiring the City and its attorneys to provide the "substance of the information obtained as a result of the interviews with bargaining unit employees that may be relevant to issues in any arbitration proceedings." The Union asked for an order requiring the City and its attorneys to disclose "unredacted copies of all notes of the interviews" and a complete statement of the substance of all interviews with the chiefs. Certification of Record, Index 1.

**B. Proceedings Below**

**1. PERC proceedings – the Hearing Examiner’s decision**

The ULP allegations went to trial on May 9, 2006. The Union presented two chiefs as live witnesses whose testimony consumed four pages of transcript. The parties stipulated that two other witnesses, another chief and a lieutenant, would testify consistent with the live testimony if called. The Union called as its major witness Assistant City Attorney Fritz Wollett, who represented the City in the PERC proceeding. His testimony took up 23 pages. The City did not present any witnesses and did not ask a single question. Total exhibits numbered 15. Certification of Record, Index 11. The brevity of the proceedings reflected the lack of disputed facts, as well as the lack of any evidence of coercion or interference with bargaining rights.

On December 29, 2006, Hearing Examiner Christy L. Yoshitomi issued her decision dismissing the allegations in their entirety. The hearing examiner found that “the employer did not interfere with employee rights in violation of RCW 41.56.140(1) by interviewing employees bargaining unit members in preparation for a grievance arbitration” and that “the employer did not refuse to bargain in violation of RCW 41.56.140(4) by refusing to provide privileged information that

the union had the ability to obtain through other sources.” Certification of Record, Index 15, Examiner’s Decision, p. 12.

The hearing examiner concluded that the City’s interviews of its supervisory employees did not constitute interference with employee rights and that *Johnnie’s Poultry* was distinguishable. The examiner noted that the employer in that case interviewed employees as to their union adherence and activities. This type of questioning was unlawful. *Id.*, pp. 4-5. The NLRB held that in that circumstance, before interviewing the employee, the employer must (1) inform the employee of the purpose of the interview; (2) assure the employee that no reprisals will be taken against the employee and (3) give the employee to be interviewed the opportunity to decline to participate in the interview without fear of reprisal. *Johnnie’s Poultry, supra*, 146 NLRB at p. 775. In contrast here, no statutory rights were violated by the questioning. The City was engaged legitimately in the interview of employees “...about their knowledge of facts in an arbitration case to prepare for witnesses and the employer’s defenses.” Decision, p. 7. The City’s questioning was drastically different from the kinds of questions and the purpose of the interrogation taking place in *Johnnie’s Poultry*.

The hearing examiner rejected the Union’s contentions as to the applicability of the *Johnnie’s Poultry* doctrine:

Conclusion

The union did not prove that any statutory rights were exercised by the interviewees. There was no showing that the questions asked interfered with statutory rights nor was there any indication that the interviewees represented the grievant, as a steward or union president, for the arbitration. The employer, as well as the union, has the right to interview potential witnesses for examination and cross-examination in preparation of an arbitration. Membership in a union alone does not preclude members from being interviewed by the employer when the interview is performed in preparation for arbitration and where the interviewees are not a representative of the union. The mere fact that the arbitration involves a bargaining unit member does not show an exercise of statutory rights. This membership does not immunize employees from being questioned in preparation of the employer's defense without "*Johnnie's Poultry*" safeguards. The interviewees did not exercise rights solely by being a member of the same bargaining unit as a grievant in an arbitration matter. Therefore, no violation of exercised rights under 41.56.140(1) occurred and the complaint is dismissed.

Decision, pp 7-8.

As to the allegation that the City's refusal to provide the Union with information about its interviews constituted a breach of its bargaining obligations, the Examiner was equally unimpressed with the Union's argument. The Examiner held that the City was not required to disclose information about the interviews because the interviews were prepared in anticipation of litigation and therefore privileged under the attorney work product doctrine. *Id.*, p. 10. While the documents could be released on a showing of substantial need, the Union's request fell far short of meeting

that burden. The Examiner noted that the *City of Bellevue* case relied upon by the Union's precedent was distinguishable because it involved the employer's preparation of "basic evidence," a list of comparable employers to be used in interest arbitration. *Id.* In contrast, the information sought by the Union, attorney interviews of potential witnesses to be used in preparing the employer's case for arbitration, was information that was equally accessible to the Union. The Union was not entitled to discover the City's presentation for hearing and its request "...went far beyond a need for the information to properly perform its duties in the representational process." *Id.*

The Union appealed and after 23 months, the Commission issued its decision, partially overturning the Hearing Examiner's decision.

## **2. PERC's decision**

### **a. Interference with employee rights**

The Commission held that the Union "...failed to demonstrate" by a preponderance of the evidence that the employer had interfered with any employee rights guaranteed by RCW 41.56 when the City "...interviewed bargaining unit employees in preparation for an arbitration hearing." Notwithstanding this finding, the Commission held that "... the rights enunciated in *Johnnie's Poultry*, 146 NLRB 770 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965), apply to employees covered by this

state's collective bargaining laws." The Commission made this ruling even while conceding that (1) the question of whether an employer's questioning of an employee constitutes unlawful interference must be decided by looking at the context of the questioning and (2) "the standards that apply to pre-disciplinary investigatory interviews conducted by an employer are not the same as the standards that apply to post-disciplinary interviews that are used to support an employer's case." Certification of Record, Index 19, Commission's Decision, p. 4.

The Commission noted that even though the 8th Circuit refused to enforce the NLRB's order in *Johnnie's Poultry*, the NLRB had followed the decision for "over 40 years." *Id.*, p. 4, n.2. The Commission's rationale for its mechanical application of the *Johnnie's Poultry* doctrine appears below:

The situation presented is clearly post-disciplinary, and the employer is seeking to vindicate its decision to discipline an employee. The union and employer were involved in an adversarial arbitration hearing. In such a proceeding the employer should treat bargaining unit members as adverse witnesses. If an employer wishes to question a bargaining unit employee concerning subject matter that relates to the grievance, the employer has an obligation to advise that employee of his or her *Johnnie's Poultry* rights. Specifically, prior to the interview, the employer must: 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. If the employee agrees to participate, the questioning must not be itself coercive in nature. [3]

[3] Johnnie's Poultry rights only apply to pre-litigation interviews of bargaining unit employees. The employer may subpoena an employee for trial or hearing even if that employee declined to participate in earlier questioning. The employee would be treated as an adverse witness and would be obligated to comply with the subpoena.

Decision, pp. 6-7.

The Commission did not cite any authority for its statement that the City must treat all members of the bargaining unit as adverse witnesses once the grievance is filed. Nor did the Commission explain how an employer, such as the Seattle Fire Department, can competently defend its disciplinary decision in arbitration without the ability to meet with its "supervisory uniformed personnel" (bargaining agreement, p. 1) prior to offering their testimony in the arbitration. Likewise, the Commission did not discuss whether "*Johnnie's Poultry*" rights, developed under the NLRA which does not allow organization of supervisors, should as a matter of policy be applied wholesale to public collective bargaining in Washington State, which allows both fire chiefs and police chiefs to organize. The Commission did remind the City that, as with any witness, it had the right to subpoena its chiefs to a hearing, including chiefs who refuse to cooperate in pre arbitration interviews with counsel. Commission's Decision, pp. 6-7 n. 3.

In its conclusion, the Commission declined to find a *Johnnie's Poultry* interference violation due to the Union's failure to "...prove that the

employer asked employees questions relating to the grievance to be arbitrated or prove that questions were otherwise coercive.” *Id.*, p. 7. The Commission dismissed the interference allegation. The Commission did not explain why it found it necessary to reach any conclusions regarding the applicability of *Johnnie’s Poultry* to this case given the lack of evidence of interference or coercion in violation of the statute.

**b. Failure to provide information**

It is undisputed that the City provided the Union with all of the information it requested prior to the *Loudermill* hearing and the Fire Chief’s decision to impose discipline on Molly Douce. It is also undisputed that the information requested by the Union post-discipline would come directly from the interviews conducted by the City’s attorneys in preparation for the arbitration.

The Commission concluded that the City had violated its obligation to provide the Union with information in two respects:

The employer committed a violation of RCW 41.56.140(4) by not informing the union of the reasons for not providing the requested information. The employer also violated RCW 41.56.140(4) by refusing to provide the union with requested information that was relevant to collective bargaining and contract enforcement. Specifically, the employer should provide the union with the names of all interviewees who were members of the bargaining unit, copies of bargaining unit employees’ statements, and redacted copies of the employer attorney’s notes from

interviews with bargaining unit employees that occurred prior to the arbitration hearing.

Decision, p. 15.

The Commission's discussion of the issue is divided into two segments: "Information that must be Disclosed" (p. 13) and "Information that Need not be Disclosed" (p. 14). In the discussion of the information that the City must disclose, the Commission characterized the Union's request for "full disclosure of all interviewees, questions asked and information provided" as a request for all of the employees the City interviewed. The Commission went on to say: "the names of employee witnesses are not attorney work product" and the employer had an obligation to provide the names of witnesses to the union. The Commission did not discuss the likelihood that the names of all of the persons interviewed is not the same as the names of persons the City intends to call as employee witnesses to testify at the hearing. The Union did not ask for the latter group.<sup>3</sup>

The Commission next turned to the obligation of the City to turn over "any information collected by Ms. Weiss leading up to the imposition of discipline." This obligation was not an issue raised by the Union or presented by the facts or the pleadings. Neither Ms. Weiss nor any other

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<sup>3</sup> As with any hearing, it is the practice at the City Fire Department for the parties to an arbitration to disclose the names of likely witnesses prior to the hearing.

attorney was involved in the proceeding until *after* the discipline was imposed and the Union demanded arbitration. Likewise, the Commission's discussion of a party's duty not to try to hide "legitimately disclosable collective bargaining information from the opposing party" appears to refer to information gathered *prior* to the *Loudermill* and imposition of discipline, again a subject that is not relevant to the Union's allegations. There is no dispute that the City disclosed all information to the Union prior to the *Loudermill* and the disciplinary action.

In its discussion of "Information that need not be Disclosed," the Commission drew the same distinction that the City and the Hearing Examiner drew at trial – that information gathered from attorney questioning of witnesses in preparation for the hearing, after imposition of the discipline, is protected by the attorney work product privilege, and need not be disclosed. Likewise, the employer's notes are privileged from disclosure absent a showing of substantial need. The Commission wrote that:

...[Q]uestions asked to witnesses in preparation for an arbitration hearing, *after* imposition of the challenged discipline, are not relevant to collective bargaining, and in a collective bargaining context are protected by attorney work product privilege. Additionally, the notes taken by the employer's attorney are distinct from signed witness statements....absent satisfaction of showing both a substantial need for the information and that the request party is unable to obtain the substantial equivalent of the information by other means, there is no obligation for

disclosure of information that is protected by the attorney work product privilege.

Commission's decision, pp. 14-15.

The Commission concludes by holding that the employer violated the statute by "refusing to provide the union with requested information that was relevant to collective bargaining and contract enforcement." (p. 15).

The Commission also concludes that:

[T]he employer should provide the union with the names of all interviewees who were members of the bargaining unit, copies of bargaining unit employees' statements, and redacted copies of the employer's attorney's notes from interviews with bargaining unit employees that occurred *prior* to the arbitration hearing.

*Id.*, p. 15 (emphasis added).

The City disclosed all relevant information to the Union prior to the discipline. The Union has never contended otherwise. The City did not retain an attorney to represent it until after the discipline was decided and the Union grieved the discipline to arbitration. The complaint arose when the City declined to disclose questions, notes and other information gathered "...after imposition of the challenged discipline." Decision, p.14.

The Commission also concludes that the City violated the statute by "...not informing the union of the reasons for not providing the requested information." (p. 15). The Commission does not cite the City's letters dated May 17, 2005, April 14, 2004 and June 3, 2005, all of which are exhibits in

the proceeding before the Hearing Examiner. The June 3 letter explains in detail why the City is not required to turn over the notes of its attorney and distinguishes the PERC precedent cited by the Union's attorney in his letter of May 18, 2005. *See pp. 7-8, supra*. The facts show that the City did in fact inform the Union of its reasons for not providing the requested information. The Union did not respond.

### **III. ARGUMENT**

#### **A. The Standard of Review**

The Court should apply the standard of review provided by the Washington Administrative Procedure Act, "...which provides for relief when an agency has erroneously interpreted and applied the law or from an agency order that is unsupported by substantial evidence." *City of Vancouver v. PERC*, 107 Wn. App. 694, 702, 33 P.3d 74 (2001). The Court may substitute its determination for PERC's, although PERC's decision is entitled to "...great weight and substantial deference." While PERC's findings are the relevant findings for purposes of appellate review, the Examiner's findings "...are part of the record, however, and we review them along with other opposing evidence against the evidence opposing PERC's decision." *Id.* at 704. The APA does not permit the full Commission to substitute its own findings of fact for the Examiner's if such substitution would be arbitrary or capricious. A decision is arbitrary and capricious when

the administrative agency reaches its decision “willfully and unreasonably, without consideration and in disregard of facts or circumstances.” *Id.*

**B. The Lower Court’s Ruling Overturning the Commission’s Imposition of the *Johnnie’s Poultry* Ruling on the Fire Department Is Correct**

The Commission found no interference violation but imposed a requirement that the City give *Johnnie’s Poultry* warnings to its bargaining unit members when preparing for grievance-arbitration. For the reasons stated by the Hearing Examiner, and to preserve the Fire Department’s ability to manage and defend its personnel decisions, the Commission’s decision to impose the NLRB’s decision in *Johnnie’s Poultry* on the City was erroneous. Fire Department “supervisory uniformed personnel” should not have the discretion to decide to refuse to cooperate in the Department’s preparation of its defense of its disciplinary actions in grievance-arbitration. As discussed below, the Superior Court’s decision reversing the Commission is correct and should be affirmed.

**1. *Johnnie’s Poultry* lacks precedential value where supervisors cannot organize under federal law**

In this circumstance, NLRB precedent should carry little if any weight because, unlike the Washington statute, the National Labor Relations Act does not allow for the organization of supervisors. *Compare* RCW 41.56.030(2) *with* 29 U.S.C. § 152(3). *See also, Firefighters Union Local*

*No. 169 v. City of Yakima*, 91 Wn.2d 101, 587 P.2d 165 (1978). Hence, the NLRB has never considered the implications of requiring an employer to let organized supervisory uniformed personnel decide whether they will cooperate in the employer's preparation of its defense of a disciplinary decision in grievance-arbitration.<sup>4</sup>

Because *Johnnie's Poultry* is concerned only with the bargaining rights of non-supervisory employees, it carries little precedential value. Decisions construing the NLRA are persuasive only when construing "...similar provisions of chapter 41.56 RCW." *City of Vancouver, supra*, at 703; *Firefighters Local 1052 v. PERC, supra*, 45 Wn. App. at 687 ("Given the significant difference in which the two acts treat supervisors, we do not find the federal approach persuasive."). The difference between the organizational rights of employees under federal law and employees under Washington law is substantial because federal law excludes supervisors from the exercise of bargaining rights. Board precedent has no applicability to the question of whether supervisors, organized under Washington law, are entitled to "*Johnnie's Poultry* rights." PERC did not consider the difference in the statutes or the impact on the employer if its managers could decline to participate in the types of interviews at issue here. Its decision is erroneous.

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<sup>4</sup> This argument was raised by the City below and ignored by PERC. Certification of Record, Index 18, Respondent's Brief, p. 8.

**2. *Johnnie's Poultry* did not involve arbitration interviews**

The Examiner declined to follow *Johnnie's Poultry* because it did not concern the right of the employer to interview its witnesses to prepare for grievance-arbitration. Rather, *Johnnie's Poultry* decided the issue of whether an employer who did not believe that the union held a majority status had the right to compel its employees to cooperate in interviews designed to determine the employees' union adherence and activities. Because this question touched directly upon protected rights, unlike the City's interviews of its chiefs, the examiner decided that *Johnnie's Poultry* was distinguishable and did not apply the holding here. The lower court's decision to adopt the examiner's distinction is logical and should be approved. Its distinction is also supported by *Cook Paint & Varnish v. NLRB*, 648 F.2d 712 (D.C. Cir. 1981), apparently the only reported federal case deciding this issue, as follows:

The Board in the present case has established a per se rule that an employer may never use a threat of discipline to compel employees to respond to questions relating to a grievance proceeding that has been scheduled for arbitration. Upon a careful examination of the record, we are unable to find substantial evidence to support this finding. As set forth more fully below, pre-arbitration interviews are a matter of routine practice in many sectors of industrial relations. In these sectors, investigatory interviews are conducted by advocates in preparation for a pending arbitration without any infringement of protected employee rights. Indeed, although the Board has been in existence for nearly a half century, and

private arbitration for almost as long, we are unaware of any prior Board or judicial decision even suggesting that *all* pre-arbitration interviews are *per se* coercive of employee rights under the Act.

The Court went on to conclude that the Board's rule "unnecessarily and impermissibly interferes" with the contractual right of the parties to structure the arbitration process. *Id.* at 719-20 (emphasis in original).

Virtually all of the Union's case authority (Opening brief, p. 22-24) imposing the *Johnnie's Poultry* standards does not involve the legality of the employer or its attorney performing the routine function of interviewing bargaining unit members to prepare for arbitration. The Union's authority resolves allegations that the employer or its attorneys engaged in unfair labor practices by engaging in unlawful interrogation and other activities designed to discourage employees from exercising organizing and other collective bargaining rights guaranteed by federal law. The Union's cases are distinguishable for the reasons stated by the lower court in its adoption of the reasoning of the hearing examiner. They do not apply to pre-litigation interviews.

**3. Several federal courts have declined to apply *Johnnie's Poultry* in the absence of real evidence of coercion**

PERC's statement that the NLRB has required *Johnnie's Poultry* warnings for "over 40 years" omits any mention of the negative reception the

requirement has received from the federal courts. Citing *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964), many courts have declined to automatically find the employer guilty of coercion merely because it failed to give the three warnings at issue, instead insisting upon real evidence of coercion. “We again admonish the Board for refusing to comply with Fifth Circuit precedent by failing to apply the *Bourne* standards.” *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1256 (5th Cir. 1972). The Union has failed to demonstrate any actual evidence of coercion that would satisfy the *Bourne* standards.

In *NLRB v. Lorben Corp.*, 345 F.2d 346 (2nd Cir. 1965), the Court refused to enforce a cease and desist order issued by the NLRB, instead insisting upon actual evidence of coercion applying the factors set forth in *Bourne v. NLRB*, supra. *Dayton Typographical Service, Inc. v. NLRB*, 778 F.2d 1188 (6th Cir. 1985) refused to enforce an Board order finding a violation of the NLRA because no *Johnnie’s Poultry* warnings were given. The Court found that there was no coercion because the employee who provided the statement wanted to cooperate. *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 735 (7th Cir. 1983) refused “...to defer to the Board’s attempts to require employers to give *Johnnie’s Poultry* warnings regardless of context.” Instead, the Court stated that the “absence of warnings is significant only when the Board can show, not merely an employer’s

questioning of an employee, but also a context of coercive conduct.”

In *A & R Transport, Inc. v. NLRB*, 601 F.2d 311 (7th Cir. 1979), the Board challenged the employer attorney’s ambiguous statement to an employee expected to be a witness in a claim that another employee had been discharged in violation of the NLRA that the witness would not be subject to reprisal. While the attorney did not strictly follow the *Johnnie’s Poultry* standards, the Court concluded that the “...interview in the case at bar, undertaken by an attorney for the proper purpose of preparing for a hearing and accompanied by assurances that would, as a practical matter, allay any fear of retaliation, was not coercive.” 601 F.2d at 313. The NLRB failed in its efforts to enforce the *Johnnie’s Poultry’s* order. *NLRB v. Johnnie’s Poultry Co.*, 344 F.2d 617 (8th Cir. 1965).

In the lower court, the Union relied on *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979) where the court stated that “interrogation of employees about union activities is inherently suspect.” 604 F.2d at 599 n. 1. Subsequently, the Circuit opted for the more flexible standard. *Rossmore House*, 269 NLRB No. 198, 116 LRRM 1025 (1984), *enf. sub nom., Hotel Employees v. NLRB*, 760 F.2d 1006, 1009 (9th Cir. 1985). (“A standard which considers the totality of the circumstances surrounding an employee interrogation is a realistic approach to the enforcement of section 8(a)(1). It is a standard that is consistent with the Act

because the Board and the administrative law judges can determine, on a case-by-case basis, whether all the facts demonstrate coercive behavior.”).

While not citing *Bourne*, the Ninth Circuit’s approach appears to be consistent with that test and supports the lower court’s ruling that the rigidity of the *per se* approach should not be imposed on the City in its dealings with its supervisory fire chiefs.

**C. Division Two’s Holding in *City of Vancouver* Should Be Applied Here**

In *City of Vancouver, supra*, PERC made errors in its analysis of the legality of the City’s interrogation of bargaining unit employees similar to those PERC has made here, and was reversed by the Court of Appeals. The Court’s analysis is precedential. Vancouver received a credible report that Police Guild members had made threatening statements toward an employee who had testified in a police internal affairs investigation. It had concerns about the employee’s safety and possible violations of federal civil rights laws. Vancouver investigated. It interviewed 26 Guild members. Guild members faced disciplinary proceedings if they failed to cooperate with Vancouver’s investigation. The Guild filed unfair labor practice charges with PERC.

The hearing examiner found that no reasonable person could believe that the City was interfering with that person’s bargaining rights by requiring

the employee to cooperate in an interview with the City. The examiner upheld the City's right to question employees present at the union meeting regarding alleged harassment, discriminatory and retaliatory comments made about the employee at the union meeting. As here, PERC reversed the examiner, holding that the employer's questioning of the Guild members about statements made at the meeting constituted unlawful coercive interrogation in violation of bargaining rights. *City of Vancouver*, Decision No. 6732-A (PECB, 1999). The City appealed, the trial court affirmed, but the Court of Appeals reversed PERC, effectively reinstating the hearing examiner's order of dismissal.

Division Two rejected the union's contention that the right to collectively bargain includes the right to be free from any employer questioning regarding activities at union meetings. The Court of Appeals held that an employer's interrogation of its employees is not per se unlawful. *City of Vancouver v. PERC*, 107 Wn. App. at 706. Under federal law, an employer with a reasonable basis for doing so may interrogate its employees on matters that pertain to their collective bargaining rights without incurring liability. *Id.* The Court concluded that based on the "totality of the circumstances in this case, we hold that substantial evidence does not support PERC's finding that a reasonable employee would perceive that the employer was interfering with his or her collective

bargaining rights.” *Id.* at 709.

To determine if coercion had occurred, Division Two applied the 8 prong test in *Bourne v. NLRB*, *supra*, 332 F.2d at 48, consisting of the following: (1) the 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) the validity of the employer’s reasons for obtaining the information; (7) whether the employer communicated the reasons to the employee; (8) whether the employer communicated to the employee that no reprisals would be forthcoming should the employee support the union. 107 Wn. App. at 706, 709.

*City of Vancouver* did not assign any importance to the undisputed fact that the employer did not give the employee the option not to cooperate in the pre-disciplinary interviews. Vancouver told the employees that they must cooperate on penalty of discipline. 107 Wn. App. at 701 (“Guild members faced disciplinary proceedings if they failed to answer the questions.”). *City of Vancouver* analyzed the union’s claims of coercion based on the *Bourne* factors, not on whether *Johnnie’s Poultry* warnings were given.

The Court should follow the *Vancouver* case which requires real evidence of coercion in the interview process. As in *Vancouver*, the

interviews by the City's attorney in this case were conducted in a manner such that "no reasonable employee would perceive that the City ... was interfering with collective bargaining rights." *Id.* at 698; Union brief at 30. PERC failed to realize that *Johnnie's Poultry's* imposition of a strict liability standard on the employer has rejected by most courts in favor of a more flexible test that considers the totality of the circumstances and evidence of actual wrongdoing. Both the Superior Court and the hearing examiner properly applied the more flexible test.

**D. PERC Erroneously Concluded That *Johnnie's Poultry* Warnings Should Be Given Because of an Alleged Adversarial Relationship Between the City and Its Chiefs' Bargaining Unit**

PERC prefaced its decision to impose *Johnnie's Poultry* holding on the City on its statement that: "The union and the employer were involved in adversarial arbitration hearing. In such a proceeding the employer should treat bargaining unit employees as adverse witnesses." Index , 19, p.6. PERC's statement is unsupported by precedent, including *City of Vancouver*. It is hard to imagine any principle of labor law that places an employer in an adversarial relationship with every member of its bargaining unit merely because the employer seeks to defend a discipline against a single member of the unit. Presumably, if an employee commits a disciplinable offense, other bargaining unit employees have an interest in seeing that the offense is

addressed so that it does not reoccur. For example, would PERC conclude that an employer who seeks to defend the discipline of an employee who brings a loaded firearm to work has an adversarial relationship with all of the unit members, including the vast majority who presumably would object to that behavior? Moreover, PERC's decision elevates the Union to a position where it can control the City's ability to prepare for hearing merely by counseling its members not to cooperate.

The notion that the City must treat all of its chiefs as adversarial witnesses is contrary to common sense and undermines the legitimate expectations of the Fire Department in the chiefs' exercise of their fiduciary obligations to their employer. The Fire Department has a right to expect loyalty from its chiefs, while at the same time recognizing their bargaining rights and responsibilities. PERC has acknowledged that supervisors owe a fiduciary responsibility to their employer. *Public School Employees of Granite Falls*, Decision No. 7719 (PECB, 2002). Disciplinary proceedings often involve members of the same bargaining unit. The employee who may be the subject of discipline may well be in the same bargaining unit as the employees who initiate or support discipline.

Indeed, review of the arbitration award in this case demonstrates why blind application of the *per se* rule could jeopardize the ability of the Fire Department to prepare its cases for arbitration. The Fire Department

disciplined Battalion Chief Douce for allegedly mishandling a training exercise in hot weather, result in an injury to a firefighter. The discipline was based on an investigation and report carried out and prepared by Battalion Chief John Gablehouse. Exh. 7, Award, p. 3. A recommendation regarding the appropriateness of discipline was made by Deputy Chief Angelo Duggins, the grievant's direct supervisor. Gablehouse's investigation was a major factor in the decision to discipline Douce. *Id.*, p. 15.

The *per se* rule announced in *Johnnie's Poultry* would potentially limit, if not prevent, the City's attorneys from interviewing both Gablehouse and Duggins to prepare for the arbitration. Contrary to the Union's arguments in the lower court, rigid application of *Johnnie's Poultry* to this situation would risk placing "unworkable" restrictions on the City's ability to prepare to defend its disciplinary decisions.

The City's expectation in the cooperation of its chiefs is legitimate and does not invade any collective bargaining rights. PERC's sweeping pronouncement as to the adversarial relationship between the unit and the employer merely because of the filing of a grievance is nonsensical, bad law and should be corrected.

**E. The City Compiled with Its Obligations to Disclose Information to the Union**

In the context of the investigation and determination as to whether

Molly Douce should receive discipline, the Fire Department provided the Union with all of the information that was relevant to the final decision. The City provided the information prior to the *Loudermill* hearing. That information allowed the Union to exercise an informed decision as to whether it should grieve the discipline to arbitration. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). However, following the decision to go to arbitration, the Union demanded that the City provide all of the information gathered by the City's attorneys in the process of preparing for arbitration. The City rightfully declined to do so. The City has already complied with its duty to disclose information, the information sought by the Union is privileged and the Union has equal access to the members of the bargaining unit who provided that information. This was explained to the Union's attorney. The Superior Court correctly reversed the Commission's decision to the contrary.

- 1. The City did not violate the statute by failing to provide the Union with an explanation as to why it was not providing the requested information**

The Commission held that the City violated the statute when it failed to disclose to the Union the reasons for not providing the information requested by the Union. The Union requested information that the City's attorney gathered in interviewing employee witnesses in preparation for the

hearing. The interviews were conducted by the City's attorney. The information was therefore privileged from disclosure as attorney work product. The hearing examiner correctly concluded that the information need not be disclosed because the Union failed to show that it had no other way to obtain this information. Bargaining unit employees interviewed by the City were equally available to the Union for interview. The lower court properly agreed with the hearing examiner.

The City made clear to the Union that the City's attorney would continue to interview bargaining unit members and would not turn over information gathered during those interviews since the City regarded that information as privileged. Supplemental Certification of Record, Exh. 4, May 17, 2005 letter. The Union then sent a responsive letter dated May 18, 2005 for the first time citing authority for its position that the City was obliged to turn over information gathered in preparation for arbitration. Exh. 5. The Union did not discuss any of its authorities. However, the City researched the Union's cases and provided a detailed written response to the Union on June 3, 2005, distinguishing each of the cases the Union cited. Exh. 6. Prior to receiving the City's response, the Union filed its complaint with PERC on June 1, 2005. Exh. 1.

The City's June 3 letter distinguished the cases relied upon the Union based on one very important distinction – the difference between the

obligation to provide information prior to the grievance and thereafter. *Id.*, p. 3. The Union's cases were based solely on the obligation to provide the information before the discipline was imposed. Thus, they did not support the Union's argument that the City should turn over the privileged notes and other records arising from its attorneys preparation of the case for arbitration. The lower court and the hearing examiner correctly reached that conclusion.

This exchange of information occurred as both sides prepared for the Douce arbitration. The Union failed to respond on two different occasions to the City's efforts to resolve the information request. The City's May 17, 2005 letter pointed out that the Union's attorney had made a similar request in a prior dispute in April 2004 involving the other firefighters union represented by the same attorney. On that occasion, the Union failed to respond to the City's request for authorities to support the Union's position. On June 3, 2005, two days after the ULP complaint was filed, the City sent the Union a letter explaining why its authorities were not persuasive and inviting the Union to respond. The Union did not do so, indicating again that it had no interest in resolving the matter but only in pushing the issues to a hearing.

The Union has not explained why it waited until May 18, 2005 to provide the authorities the City requested in April 2004 and again on May 17, 2005, and why it never answered the City's June 2005 letter. The

Union's failure to comply with its bargaining obligations suggests that it was more interested in manipulating itself into a favorable position in the litigation rather than continuing to attempt to obtain information that the Union was well aware was likely privileged and of little value to it in the arbitration of the Douce grievance.

The Commission's decision appears to be based on the City's failure to provide an explanation along with its initial refusal to provide the information. Of course, the Union had failed to provide any explanation for its entitlement to the information in its initial request. Whatever, if any, oversight occurred was corrected by the City's June 3 letter which explained in detail why the City was declining to release the information. The Union could have dismissed the "failure to disclose" allegation once the June 3 letter was received if that was the only issue. However, the Union's real complaint focused on the City's failure to release post-discipline information gathered by the City's attorney from interviews of bargaining unit chiefs. The case proceeded so that the Union could get a ruling on this unprecedented issue.

The Commission erred when it based a violation on the simple fact that the City did not respond to the Union's May 18 letter until after the filing of the PERC complaint. The finding of violation is unreasonable and disregards the timely matter in which the City responded, without regard to

the intervening event of complaint-filing,. *City of Vancouver, supra*, 107 Wn. App. at 704, setting forth the test for arbitrary and capricious agency action. The lower court correctly concluded that the City did not breach its bargaining duties.

**2. The City did not violate its bargaining obligation to turn over requested information to the Union**

As it did with the *Johnnie's Poultry* argument, the Union provides the Court with a number of cases bearing on an employer's duty to provide information to the union. The City does not question the obligation. However, the Union has failed to show that the information it sought was necessary to its preparation of the grievance for arbitration. The Union's claims to the contrary are little more than an excuse to obtain privileged information and to interfere with the City's arbitration preparation.

The Union states correctly that an employer is obligated to produce "relevant and necessary information requested by the union." Union Brief, pp. 32-34. The Union argues that the City violated the statute by "refusing to provide the Union with requested information about the City's interviews with the bargaining unit employees." Union Brief, p. 39. The Union does not explain why the information sought is "necessary" for its

representation of the grievant. But the cases the Union cites require it to make that showing, which it has not done.

In deciding whether information is necessary, particular circumstances sometimes warrant a refusal to disclose information or the imposition of conditions upon its disclosure. *Oil, Chemical & Atomic Workers v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983) (Edwards, J.) (Union Brief, p. 28:20). The Supreme Court has rejected the “proposition that union interests in arguably relevant information must always predominate over all other interests however legitimate.” *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979). It is frequently necessary “...to strike an appropriate balance between the legitimate interests of employers and unions.” *Oil, Chemical & Atomic Workers, supra*, at 360, citing *Detroit Edison Co.*

The information was not necessary to the Union to process the grievance because the City had already provided all of the information on which the Fire Chief based his discipline of the grievant. This encompassed the evidence enumerated in the arbitrator’s award, including the report prepared by Battalion Chief Gablehouse, a member of the grievant’s bargaining unit. That report included Gablehouse’s interviews of “all crew members who participated in the drill, the grievant, other Battalion Chiefs who had performing training on the day in question, a

review of State of Washington Department of Labor and Industries (L & I) policies, a review of Fire Department Regulations and a consideration of Fire Department general practice.” The almost 300 page document was placed in evidence. Exh. 7, p. 4. The Fire Chief’s disciplinary action against Douce was based on the events of the day in question summarized by Gablehouse’s in his report. *Id.*, p. 8.

It cannot be disputed that the Union had all of this information at the time it notified the City of its intent to arbitrate the discipline. The hearing examiner correctly concluded that the sole purpose of the Union’s subsequent request for the “full disclosure of all interviewees, questions asked and information provided, and copies of all notes and statements” was to obtain privileged materials and communications prepared by counsel for the City. The Superior Court agreed. The Union does not cite a single case where a court or agency has ordered the employer to produce privileged materials generated as part of an attorney’s preparation for arbitration. Nor is there precedent to support its argument that the City should have attempted to dissuade the Union from invading the privilege protecting this information.<sup>5</sup>

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<sup>5</sup> The Union makes the point that the “work product doctrine does not protect documents an employer has considered in making a disciplinary decision,” p. 42. The City agrees. No pre-disciplinary documents were withheld for any reason.

The information sought by the Union was not necessary for it to process the grievance because of the information the City provided the Union prior to the discipline. *Northern Indiana Public Service Company*, 347 NLRB No. 17 (2006) (employer's refusal to disclose investigative notes of interviews of persons promised confidentiality did not violate duty to provide information because union was aware of names of persons interviewed, the union had information as to the handling of the complaint that led to discipline and union had access to complaining employee). As here, the union in the NLRB proceeding had all of the information it needed to determine contract compliance without violating the employer's confidentiality interest.<sup>6</sup>

The Commission's explanation for finding a violation for failure to provide information is contradictory. On the one hand, the Commission held that the City should provide the Union with the names of all interviewees

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<sup>6</sup> The Union makes two separate but futile attempts to gather facts to try to persuade the Court that the City is guilty of coercion. Union Brief, p. 31 n. 9; p. 39. It argues that by asking the employees she interviewed to keep the conversation confidential, the City's attorney caused Union members to "reasonably believe that they were not permitted to provide complete information to the Union." *Id.*, p. 39. But the Union did not provide any evidence of that perception at the hearing when it was obligated to do so. Instead, the Union quotes the City's Attorney who testified at the hearing. But his speculations are no substitute for real evidence of coercion provided by the testimony of interviewed Fire Department employees. Moreover, attorney Weiss, not Wollett, conducted the interviews and there is no evidence that she told any person she interviewed that "there could well be repercussions," or made any statements that could form the basis for a claim of coercion. *Id.*, p. 39. The Union cannot prove coercion by relying on the testimony of an attorney who did not conduct any of the interviews. Even PERC refused to make the finding the Union seeks here.

that were members of the bargaining unit, copies of their statements, and redacted copies of the employer attorney's notes from interviews that occurred before the arbitration hearing. Index 18, p. 15. But the Commission also stated as part of its discussion regarding information that need not be disclosed that the City's questions of witnesses in preparing for the arbitration, as well as the attorney notes, do not have to be shared. *Id.*, *Compare* Conclusion, p. 15 to discussion, pp. 14-15.

Moreover, the Commission stated that: "With respect to any information collected by Weiss leading up to the imposition of discipline, this information is relevant to grievance processing and contract enforcement." *Id.*, p. 14. This is a correct statement of the law but does not reflect the facts of the case. Neither Weiss or any other attorney were involved in the events leading up to the imposition of discipline. The Union does not contend otherwise. The Commission's misapprehension of the facts undermines the validity of its findings.

PERC's holding as to what information should be disclosed is confusing. The hearing examiner properly summarized the law. Index 15, Examiner's Order, p. 10. The lower court properly reversed the Commission's rulings, in reliance upon the law as correctly applied by the examiner. The examiner's ruling is clear as to the City's post disciplinary obligations and properly takes into account the relevant "facts and

circumstances.” The Commission’s decision, predicated upon a significant misunderstanding of the record, is not supported by substantial evidence. *City of Vancouver*, at 704. The Commission’s decision also misapplies the applicable law, which requires disclosure of information prior to the imposition of discipline, not thereafter, and was properly reversed on that basis as well. *Id.*<sup>7</sup> The lower court rightly concluded that the City had provided the Union all of the information to which it was entitled and that it had no obligation to turn over information from post-discipline interviews gathered by the City’s attorneys to prepare for the arbitration.

#### IV. CONCLUSION

The Superior Court’s decision reversing the decision of the Public Employment Relations Commission and dismissing the complaint was correct and should be affirmed.

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<sup>7</sup> The Union argues that PERC properly ordered the City to produce employee statements, witness identity and “redacted notes, if any, from the City’s *pre-disciplinary* investigation.” Brief, p. 39 (emphasis added). All such documents were produced and the Union’s PERC complaint did not contend that the City had failed to satisfy this obligation.

DATED this 18th day of February, 2010.

PETER S. HOLMES  
Seattle City Attorney

By:   
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Assistant City Attorney

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this date, I caused a true and correct copy of the foregoing to be served on the following in the manner(s) indicated:

Kathleen Phair Barnard James H. Webster Schwerin, Campbell Barnard, et al. 18 W. Mercer St., Suite 400 Seattle, WA 98119	<input type="checkbox"/> U.S. MAIL <input checked="" type="checkbox"/> LEGAL MESSENGER <input type="checkbox"/> FACSIMILE <input type="checkbox"/> E-MAIL <input type="checkbox"/> OTHER:
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DATED this 18th day of February, 2010, at Seattle, King County,  
Washington.

  
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ANGELICA M. GERMANI

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