*City of Mountlake Terrace*, Decision 11702 (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| MOUNTLAKE TERRACE POLICE GUILD,<br><br>Complainant,<br><br>vs.<br><br>CITY OF MOUNTLAKE TERRACE,<br><br>Respondent. | CASE 24086-U-11-6163<br><br>DECISION 11702 - PECB<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

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On July 1, 2011, the Mountlake Terrace Police Guild (union) filed an unfair labor practice complaint against the City of Mountlake Terrace (employer) alleging the employer refused to bargain and interfered with employee rights. A preliminary ruling was issued stating causes of action exist. The employer filed an answer denying the allegations.

On August 26, 2011, the union filed a motion to amend its complaint. On September 26, 2011, the motion was granted and an amended preliminary ruling was issued. On October 10, 2011, the employer filed an answer to the amended complaint.

On December 6, 2011, the union filed a second motion to amend the complaint. On December 7, 2011, the motion was granted. Examiner Robin A. Romeo held hearings on December 7, 8, and 9, 2011; January 4, 5, and 6, 2012; and March 26 and 27, 2012. The parties filed post-hearing briefs. On June 21, 2012, the employer filed a motion to strike the union's post-hearing brief on the grounds that it exceeded the page limit.

ISSUES

1. Procedural Issues
   a. Should the union's December 6, 2011 motion to amend the complaint be granted?
   b. Should the employer's June 21, 2012 motion to strike the union's brief be granted?

2. Refusal to Bargain
   a. Did the employer refuse to bargain with the union by unilaterally revising the policy to change the positions that make-up the Collision Review Board?
   b. Did the employer refuse to bargain with the union by unilaterally changing the disciplinary procedures related to collisions subject to the Collision Review Board?
   c. Did the employer refuse to bargain by unilaterally changing disciplinary procedures regarding the same infraction through the denial of training requests and step increases?
   d. Did the employer refuse to bargain with the union by unilaterally changing when step increases are granted?
   e. Did the employer refuse to bargain with the union by unilaterally changing the use of the video camera system to monitor employees for discipline?
   f. Did the employer refuse to provide relevant information requested by the union?
   g. Did the employer circumvent the union by communicating directly with bargaining unit members that they could not grieve the denial of their step increases?

3. Interference
   a. Did the employer interfere with employee rights by denying training requests?
   b. Did the employer interfere with employee rights by making statements to union representatives about choosing their legal representation?
   c. Did the employer interfere with employee rights by advising bargaining unit employees that they could not appeal the denial of their step increases?

d. Did the employer interfere with employee rights by:

i. Limiting the role of union representatives at a disciplinary interview?

ii. Refusing to respond to the union attorney's request for clarification of the disciplinary interview?

4. Discrimination

a. Did the employer discriminate against officer Delsin Thomas by imposing two disciplinary penalties?

Based upon the record as a whole, I find that the employer refused to bargain when it made unilateral changes to the positions that make up the Collision Review Board (CRB), changed the discipline procedure, changed when step increases were granted, and used video footage for employee discipline. I find that the employer refused to bargain when it failed to provide relevant requested information concerning the use of video camera footage. I find that the employer interfered with employee rights when it limited the role of the union representative and refused to respond to the union representative for clarification of the disciplinary interview. The remaining interference and refusal to bargain allegations are dismissed. The discrimination allegation is dismissed.

1. PROCEDURAL ISSUES

1a. Motion to amend the complaint

On December 6, 2011, one day before the commencement of the hearing, the union filed a second amended complaint. The amendment added a legal argument, an allegation of discrimination, arising out of the facts described in the first two complaints. On December 7, 2011, during the hearing, the motion to amend was granted. The ruling was not documented on the record. Therefore, I convened the parties for a conference call on December 16, 2011, to confirm that the motion was granted.

Amendment of an unfair labor practice complaint is allowed under the following provisions of WAC 391-45-070:

> WAC 391-45-070 AMENDMENT.
> (1) A complaint may be amended upon motion made by the complainant, if:
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> (a) The proposed amendment only involves the same parties as the original complaint;
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> (b) The proposed amendment is timely under any statutory limitation as to new facts;
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> (c) The subject matter of the proposed amendment is germane to the subject matter of the complaint as originally filed or previously amended; and
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> (d) Granting the amendment will not cause undue delay of the proceedings.
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> (2) Motions to amend complaints shall be subject to the following limitations:
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> (a) Prior to the appointment of an examiner, amendment shall be freely allowed upon motion to the agency official responsible for making preliminary rulings under WAC 391-45-110;
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> (b) After appointment of an examiner but prior to the opening of an evidentiary hearing, and amendment may be allowed upon motion to the examiner and subject to due process requirements;
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> (c) After the opening of an evidentiary hearing, amendment may only be allowed to conform to the pleadings to evidence received without objection, upon motion made prior to the close of the evidentiary hearing.
>
> (3) Where a motion for amendment is denied, the proposed amendment shall be processed as a separate case.

The union's December 6, 2011, request to amend the complaint involves the same parties. The amendment added no new facts so the timeliness of new facts is not an issue. The amendment is germane as it took the facts in the complaint and added an additional alleged legal violation; discrimination. It was filed on December 6, 2011, after the appointment of the Examiner on November 29, 2011, and prior to the opening of the hearing on December 7, 2011. Granting the amendment did not cause any delay in the proceedings. Due process requirements were met as the employer was able to address the elements of the legal argument during the hearing and in its post hearing brief on pages 46-49.

<u>Conclusion</u>

For these reasons, I find that the amendment is permissible under WAC 391-45-070. As stated to the parties at the hearing and on December 16, 2011, the motion is granted.

1b. Should the employer's June 21, 2012, motion to strike the union's brief be granted?

On June 19, 2012, the parties submitted post hearing briefs. Two days later, on June 21, 2012, the employer moved to strike the union's brief in whole on the grounds that it exceeded the page limit. The employer argued that the union exceeded the page limit when it single spaced certain pages in the beginning of its brief. The union countered that the material in question is merely a restatement of the brief's arguments in summary form and that the Commission has made exceptions to the double spacing requirement.

The page limit for post-hearing briefs in unfair labor practice hearings is set forth in WAC 391-45-290 as follows:

> (1) Any party shall be entitled, upon request made before the close of the hearing, to file a brief. The examiner may direct the filing of briefs as to any or all of the issues in a case. Arrangements and due dates for briefs shall be established by the examiner. Any brief shall be filed with the examiner as required by WAC 391-08-120(1), and copies shall be served on all other parties to the proceeding as required by WAC 391-08-120 (3) and (4).
>
> (2) A party filing a brief under this section must limit its total length to twenty-five pages (double-spaced, twelve-point type), unless:
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> (a) It files and serves a motion for permission to file a longer brief in order to address novel or complex legal and/or factual issues raised by the objections;
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> (b) The hearing examiner grants such a motion for good cause shown; and
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> (c)A motion for permission to file a longer brief may be made orally to the hearing examiner at the end of the administrative hearing, and the hearing officer has the authority to orally grant such motion at such time.

At the end of the hearing, the parties requested an extension of the 25 page limit due to the large number of allegations at issue. The request was granted and the page limit was extended to 50 pages. Both parties submitted briefs that were 50 pages long. Both parties included a cover page and table of contents in addition to the 50 page argument. Both parties included numerous single spaced footnotes of varying length and single spaced indented headings. The union's brief

contained single spaced material on pages 1-3, that are a list of the issues and a short statement of the answer after each issue.

The employer argues that while it is accepted practice for block quotes and argument headings to be single spaced, it is not accepted practice for a party to single space issue summaries. *Southwest Snohomish County Public Safety Communications Agency*, Decision 11149-A (PECB, 2011) is distinguishable from the case here. In that case, the employer's brief included new evidence. The Commission found it inappropriate to add new evidence in the brief and remanded the case to the examiner. Here no new evidence was offered in the union's brief. Also, the Commission did not strike the entire brief in that case.

The union argues that the Commission recently created an exception to strictly applying the page limit in post hearing briefs. In *Northshore Utility District,* Decision 11267-A (PECB, 2012), the Commission affirmed the examiner's decision on the issue of whether the post hearing brief was outside of the page limit. There, the employer filed a brief that contained 36 single spaced footnotes on 20 of 24 pages. The union argued that single spaced footnotes lengthened the size of the brief and it should have been stricken in its entirety. The examiner found WAC 391-45-290 silent on the subject of footnotes and declined to strike the footnotes or the brief in its entirety.

*Northshore Utility District,* is not instructive on the question here. In that case, the issue was the inclusion of footnotes at the bottom of the pages in the brief. The question here is a single spaced summary of the issues and the union's short answer to each issue contained within the 50 pages.

I do not find it would be appropriate or in the interests of due process to strike the entire brief for including the single spaced content on pages 1-3. The material merely summarizes the arguments in the brief, akin to a table of contents for the arguments. While the issue of excluding that material may be considered, the employer did not move to strike that material.

Instead, the employer moved to strike the entire brief. No precedent is found for striking the entire brief.

Conclusion

The employer's motion to strike the union's entire brief is denied.

2. REFUSAL TO BARGAIN

The union alleged several refusal to bargain allegations (2a-f below) which are analyzed under the same applicable legal standard.

APPLICABLE LEGAL STANDARDS

Duty to Bargain

To promote the improvement of the relationship between public employers and their employees, the Public Employees Collective Bargaining Act was enacted to provide employees with the right to join a union and be represented by that union in matters concerning their employment relations with the employer. Chapter 41.56 RCW. A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. RCW 41.56.030(4). *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); RCW 41.56.150(4).

The Commission applies a balancing test on a case-by case basis to determine whether an issue is a mandatory subject of bargaining. In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, or working conditions of employees; and (2) the extent to which managerial actions are deemed to be an essential management prerogative. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989) (*City of Richland*). The inquiry focuses on which

characteristic predominates. *City of Richland,* 113 Wn.2d (1989). The Supreme Court in *City of Richland* held that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominately 'managerial prerogatives,' are classified as non-mandatory subjects."

<u>Unilateral Change</u>

An employer violates RCW 41.56.140(4) and (1) if it implements a unilateral change of a mandatory subject of bargaining without having fulfilled its bargaining obligations. As a general rule, an employer has an obligation to refrain from unilaterally changing terms or conditions of employment unless it: (1) gives notice to the union; (2) provides an opportunity for bargaining prior to making a final decision; (3) bargains in good faith, upon request; and (4) bargains to agreement or impasse concerning any mandatory subjects of bargaining. *Skagit County*, Decision 8746-A (PECB, 2006).

Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. If the employer's action has already occurred when the union is given notice, the notice would not be considered timely and the union will be excused from the need to demand bargaining on a *fait accompli*. *City of Edmonds,* Decision 8798-A (PECB, 2005), *citing Washington Public Power Supply System,* Decision 6058-A (PECB, 1998).

The Commission generally finds that any refusal to bargain violation inherently interferes with the rights of bargaining unit employees and is routinely a derivative interference violation. *Skagit County,* Decision 8746-A (PECB, 2006).

<u>2a. Did the employer refuse to bargain with the union by unilaterally revising the policy to change the positions that make-up the Collision Review Board?</u>

Prior to 2008, pursuant to Chapter 28, Vehicles, of the Mountlake Terrace Police Department policies, section 28.1.5, the police chief had discretion to convene an Accident Review Board (ARB) when a police vehicle was involved in an accident. Only the police chief could order the

ARB to convene. The ARB was composed of an Assistant Chief, Sergeant, Traffic Officer, and an officer chosen by the affected employee. The ARB was expected to review the facts and circumstances of the accident and make a written recommendation to the police chief. The recommendation was not binding on the police chief.

On October 8, 2008, the police chief for the employer issued a new policy, 28.5, which replaced section 28.1.5. The policy created a Collision Review Board (CRB) comprised of the assistant chief, a field operations sergeant, a collision investigator from the traffic unit, and an officer chosen by the involved employee. The CRB could be convened by anyone in the review chain, including the affected officer.
The new section 28.5 changed the role of the review board to determine whether the collision was preventable or not. If the CRB concluded that the collision was preventable, the finding went to the police chief who then determined the appropriate level of discipline to impose and whether to commence an internal investigation. If the finding was that the collision was not preventable, the conclusion was sent from the CRB to the police chief and then to the file without discipline. The CRB's conclusion was made by majority vote.

On April 15, 2011, the union submitted a grievance to step three regarding an employee's discipline. At step three of this grievance, the union requested a revision of section 28.5 to include the fifth member on the CRB. Specifically, the union stated: "The Guild would like to see an immediate amendment to the current guideline for the Collision Review Board to include a $5^{th}$ party in order to avoid the issues surrounding a tie vote."

In response to the union's request, on April 27, 2011, the chief issued a revised policy adding himself as a fifth member of the CRB. He also changed the traffic unit officer CRB member to an officer from the office of professional responsibility and, in a later revision, changed the field operations sergeant to sergeant.

<u>Analysis</u>

The union argues the CRB policy is a mandatory subject of bargaining. The union argues the employer changed the CRB policy which affects discipline on April 27, 2011. The union argues

that the employer changed the composition of the CRB by adding the chief as the fifth member as a tie-breaker to the CRB and changed the positions that make-up the CRB. The union argues that these changes were implemented without providing the union with notice and an opportunity to bargain and were a *fait accompli*.

The employer argues that the changes to the CRB are within management's prerogative and not a mandatory subject of bargaining. The employer also argues that since it returned to the old policy, it was not a change that needed to be bargained.

This case is similar to *City of Pasco*, Decision 4197-A (PECB, 1994), where a review board that assigned a system of values to vehicle collisions to determine disciplinary outcomes was held to be a mandatory subject of bargaining. It was found to be a mandatory subject of bargaining because the change directly affected discipline. The employer was found to have committed a unilateral change violation when the police chief abolished the review board.

In this case, the make-up of the CRB calls for an independent group to review the facts of a collision, make a determination on whether the officer could have prevented the collision or not, and, based on the result, binds the police chief on a decision to impose discipline. I find that revising the CRB policy is mandatory because it directly affects discipline and whether the police chief will start an internal investigation. The employer did not make any argument or present evidence that the changes it made to the policy and make-up of the board were an essential management prerogative that only remotely affected personnel matters. Therefore, I find the make-up of the CRB to be a mandatory subject of bargaining.

Here, the employer unilaterally changed the policy and altered the make-up of the CRB when the chief declared himself as a fifth member. The policy clearly states that the assistant chief, a field operations sergeant, a collision investigator from the traffic unit, and an officer chosen by the involved employee make-up the CRB. By adding himself, eliminating the field operation sergeant and traffic unit officer, and adding a sergeant and an officer from the office of

professional responsibility, the employer unilaterally changed the make-up of the CRB which directly impacts discipline.

The employer's defense that the change was merely a return to the old policy does not excuse the fact that a change occurred. Any time that a change occurs affecting a mandatory subject, it must be bargained.

At no time did the employer give the union notice of the changes or an opportunity to bargain over the changes. The fact that the employer changed the policy based on the union's suggestion in the course of the grievance procedure did not fulfill the employer's need to bargain. The employer was required to discuss the details of the union's proposal to add a fifth person to the CRB before unilaterally determining who would fill the position. There was no meeting or discussion of the change. The change was a *fait accompli*, and there was no need for the union to submit a request to bargain after the changes were issued.

Conclusion

The employer revised the policy and unilaterally changed the make-up of the Collision review Board, which is a mandatory subject of bargaining. Therefore, the employer violated RCW 41.56.140 (4) and (1) and refused to bargain.

2b. Did the employer refuse to bargain with the union by unilaterally changing the disciplinary procedure related to collisions subject to the CRB?

On January 12, 2011, the police chief issued police officer Delsin Thomas a pre-disciplinary notice concerning a collision in which he was involved while on duty. The notice contained the statement that the chief was considering a disciplinary penalty of a 48-hour suspension without pay. However, the chief was giving Thomas the opportunity to meet with him to explain his position prior to making the recommendation.

On January 19, 2011, Thomas met with the police chief in response to the notice. At the meeting and in accordance with the policy, Thomas asked the CRB be convened to review the collision.

The chief then split the disciplinary process into two proceedings. During the meeting, he proceeded to question Thomas about any rules he may have violated during the collision and postponed the issue of whether the collision was preventable for the CRB to determine at a later date. On January 21, 2011, the chief issued a disciplinary notification to Thomas of a 36-hour suspension without pay for violating department rules.

On January 27, 2011, the CRB met and reviewed the collision. The four members voted whether it was preventable or not. The result was a tie vote which was forwarded to the chief as the fifth person tie-breaker. The chief then issued a second pre-disciplinary notice to the officer stating that he had found the collision preventable, despite the CRB findings, and imposed an additional 24-hour suspension without pay.

Analysis

The union argues that the disciplinary procedure was altered when the chief bifurcated Thomas' discipline process and imposed two penalties for the same incident. The union argues that discipline is a mandatory subject of bargaining and past practice was altered when the changes were made. There was no notice given to the union or an opportunity to bargain.

The employer argues that the union failed to show that there was a change in practice as no evidence was presented that, in the past, an officer waited to request a CRB review until discipline was imminent. The employer points to the fact that the union did not object to the bifurcation during the interview and did not include the bifurcation in the grievances filed over the discipline.

It is well settled that employee discipline is a mandatory subject of bargaining. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd* 117 Wn.2d 655 (1991). The City of Yakima was found to have violated RCW 41.56.140(1) and (4), by unilaterally implementing amended civil service rules concerning the discipline and promotion of fire fighters and law enforcement officers. As a result, an employer cannot revise existing, or adopt new, disciplinary standards without providing the union notice of the proposed changes and an opportunity to bargain. In *City of Pullman*,

Decision 8086-A (PECB, 2003), the Commission found that an employer failed to bargain over a unilateral change in discipline procedures when it announced that tape recordings would no longer be allowed in internal investigations.

The Washington Supreme Court reviewed discipline procedures as a mandatory subject of bargaining in *City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504 (1992). In that case, the union had proposed a grievance procedure that would give employees the option of appealing disciplinary action through the contractual grievance procedure, rather than through an appeal to the civil service commission. The court held that a proposal for a contractual remedy to parallel and/or replace the civil service forum was a mandatory subject of bargaining.

The union established a past practice that at no time prior to Thomas' discipline was the discipline process bifurcated into two proceedings for one offense or was an employee given two penalties on a single incident. At no time prior was a discipline process split between rule violations and whether a collision was preventable. On January 19, 2011, the employer changed the disciplinary process which directly impacted Thomas' discipline and did not provide the union notice about the change.

Instead of looking at the disciplinary process past practice, the employer looks at the past practice of requesting a CRB review in arguing that there has been no change. The focus here is the decision to create two disciplines for one incident, not the reason for creating two disciplines. Thomas was disciplined twice. That is a change in discipline procedure.

<u>Conclusion</u>

The disciplinary procedure is a mandatory subject of bargaining. The employer changed the disciplinary procedure when it bifurcated the disciplinary process without notice or an opportunity to bargain given to the union. Therefore, the employer violated RCW 41.56.140(4) and (1) and refused to bargain.

2c. Did the employer refuse to bargain by unilaterally changing disciplinary procedures regarding the same infraction through the denial of training requests and step increases?

The parties have a collective bargaining agreement that provides employees a wage increase on the anniversary of their appointment. In January 2011, the chief denied Officer Brian Moss an annual step increase in his salary. The chief's reason for the denial was that it was due to a sustained internal investigation. Also in January 2011, the chief denied an annual step increase for Officer Trent Chapel. The reason he gave for the denial was that it was due to sustained internal investigation(s). In April 2011, the chief denied an annual step increase for Thomas. The reason he gave for denying Thomas was that it was due to a sustained discipline.

Analysis

The union argues that the employer, by using an employee's disciplinary history as a reason not to grant a step increase, implemented a unilateral change. The union points to the past practice of granting an officer's step increase even when they have received disciplinary penalties. The employer argues that the unique disciplinary history of the three officers triggered the chief's ability to deny their step increases.

Section 9.3 of the parties' current collective bargaining agreement provides that officers advance from one pay group to the next on the anniversary of their appointment. The past practice is that a step increase has never been denied for disciplinary reasons. Numerous witnesses for both the employer and the union testified that they could not recall an employee ever having been denied a step increase on their anniversary date for any reason. The two witnesses introduced by the employer who had not received step increases were not bargaining unit members.

The chief denied Moss, Chapel, and Thomas a step increase based on their disciplinary histories. The chief testified that Moss was denied a step increase because he had received disciplinary penalties that year which resulted in 72 hours of suspension without pay. The chief testified that Chapel was denied his step increase because of two incidents for which he received a written reprimand and a 36-hour suspension without pay. The chief testified that Thomas was denied a

step increase because he had received a verbal reprimand, two written reprimands, and two suspensions without pay.

The denial of a wage increase due to an employee's prior disciplinary penalties is an additional penalty for the same incident. A wage increase is a benefit. The benefit is being denied for a prior incident where the employee has already received a disciplinary penalty. The addition of a penalty after the disciplinary procedure has concluded is a change in disciplinary procedures. It changes the procedures by imposing an additional penalty and by imposing a penalty without processing it through the disciplinary procedure.

The employer argues that the union was given notice of the change to deny step increases and an opportunity to bargain. The employer points to meetings where the chief explained to union board members his philosophy of employee performance.

The chief testified that at a meeting with his command staff and supervisors meeting in January of 2009, he explained his philosophy on performance appraisal and discipline. He distributed a 15 page document that generally outlines the subject of guidelines for performance appraisals and the disciplinary process. On one of the pages it states: "Do make sure all compensation decisions are warranted by performance. Don't give raises to motivate people if their performance doesn't warrant it."

Later, on March 30, 2011, the chief met with the new members of the union's executive board. At that meeting, he explained his policy on discipline, which is to be "firm, fair and consistent." He testified that he discussed step increases being tied to performance appraisals.

The chief's statement at the supervisors meeting in January 2009, about tying raises to performance, was too general to give the union notice of a change in past practice in granting step increases. This communication occurred two years prior to the time that the step increases were actually denied and it was not directed towards the union. The meeting in March 2011 occurred after the time that the two officers here did not receive their step increases and the

statement to the union was too general. Moss and Chapel were denied step increases in January 2011. Thomas was denied a step increase the day after the meeting on April 1, 2011. At the meeting, the chief did not say that he was changing the practice, he did not refer to section 9.3 of the contract, and he did not say that he would be denying step increases for poor performance or discipline. The union was not provided sufficient notice of the change. The change was a *fait accompli* and the union did not waive its right to bargain.

Conclusion

Disciplinary procedures are a mandatory subject of bargaining. The employer changed the discipline process when it allowed for the imposition of an additional penalty of denying a step increase. The employer did not give the union notice or an opportunity to bargain. Therefore, the employer violated RCW 41.56.140(4) and (1) and refused to bargain.

The union did not present evidence that training requests were denied for disciplinary reasons. Therefore, the alleged change to the disciplinary procedure through the denial of training requests is dismissed.

2d. Did the employer refuse to bargain with the union by unilaterally changing when step increases are granted?

In January 2011, the chief denied an annual step increase for Moss on his anniversary date. Moss later received the increase in June 2011. In January 2011, the chief denied an annual step increase for Chapel on his anniversary date. Chapel later received the increase in November 2011. In April 2011, the chief denied an annual step increase for Thomas on his anniversary date. Thomas later received the increase in November 2011.

Section 9.3 of the parties' current collective bargaining agreement provides that officers advance from one pay group to the next on the anniversary of their appointment. The advancement is "dependent upon confirmation by the Chief of Police that the employee has demonstrated his ability to satisfactorily perform the requirements of the position." It is referred to as experience

achievement pay or step increases and represents an increase in salary. The language in the contract granting the increases dates back to at least 1985.

Numerous witnesses for both the employer and the union testified that they could not recall an employee ever being denied a step increase on their anniversary date. They testified that even employees who had received discipline received their step increases. The witnesses were current employees who had varying lengths of seniority dating back to 1985 and have knowledge of the practice prior to the appointment of the chief in 2008.

Analysis

The union argues that the denial of step increases to Chapel, Moss, and Thomas on their anniversary dates was a unilateral change in the past practice of automatically granting step increases on an employee's anniversary date.

The employer argues the Commission does not have jurisdiction to enforce a collective bargaining agreement. The employer also argues the union did not prove a change in the status quo, it waived the right to bargain by contract, and it had notice and an opportunity to bargain.

The Commission has long held that the payment of wages is a mandatory subject of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977); *King County*, Decision 10547-A (PECB, 2010). A step increase is an element of wages and is a mandatory subject of bargaining.

The delay of step increases to Moss, Chapel, and Thomas was a change in past practice. The practice of granting an officer a step increase on their anniversary date has been the understood and accepted practice over the past 26 years. Since at least 1985, no bargaining unit member was ever denied a step increase on their anniversary date even when they had previously been disciplined. Delaying a step increase because of previous discipline is a change to the status quo.

The employer also argues that the union waived the right to bargain a change. A union may waive its statutory bargaining rights by contractual language which permits an employer to make

changes on mandatory subjects of bargaining without fulfilling the notice and bargaining obligations that would otherwise be imposed upon it by statute. *City of Yakima,* Decision 3564-A (PECB, 1991), *Seattle School District,* Decision 2079-A (PECB, 1985). Waiver by contract is an affirmative defense and the employer has the burden of proof. *Lakewood School District,* Decision 755-A (PECB, 1980).

The employer has not shown that the union waived its right to bargain the delay of step increases. While the contract gives the chief the discretion to deny an increase, it has not been the practice to delay a step increase because someone had been previously disciplined. That is not a clear and unmistakable waiver by the union of the practice of an automatic step increase on an employee's anniversary date.

The employer also argued that the union was given notice of the change in practice and could have asked to bargain. As discussed in 2(b) above, the chief's presentation to management in 2009 and discussion in March 2011 was not notice. The union was not given notice of the change. It was a *fait accompli* and there was no need for the union to request bargaining.

Additionally, by making this argument, the employer admits there was a mutual understanding between the parties that the step increase was automatic. It is the employer's position that the change was allowed by contract and was not a change in practice. If the employer believed the change was permitted by the contract it would not be giving the union notice of a change.

<u>Conclusion</u>

A step increase in wages is a mandatory subject of bargaining. The employer changed the past practice when it delayed employees step increases on their anniversary date without notice or an opportunity to bargain given to the union. The union did not waive this right under the collective bargaining agreement. Therefore, the employer violated RCW 41.56.140(4) and (1) and refused to bargain.

<u>2e. Did the employer refuse to bargain with the union by unilaterally changing the use of the video camera system to monitor employees for discipline?</u>

In February 2011, the employer issued a policy on the Public Safety Camera System. The policy established guidelines for the operation of cameras, their purpose, and the storage of video materials. The policy explains that the cameras will be used for improving the safety of personnel and the public who visit the department. The policy does not state that it may be used for employee discipline. When the system was installed, the union was told that it would not be used for employee discipline.

On March 28, 2011, an internal investigation was launched in response to incidents that occurred on March 16, 2011, involving Sergeant Mark Connor. Recordings used by the camera system were included in the investigation. The union discovered this when representing Connor during his investigatory interview on March 28, 2011.

Analysis

The union argues that the use of the video camera system to monitor employees for discipline is a unilateral change. The union argues that it is a mandatory subject of bargaining because it impacts discipline which is a mandatory subject of bargaining. The union was not given notice of the change or an opportunity to bargain.

The employer argues that Connor was not singled out and that he received no disciplinary penalty. The employer also argues that surveillance of employees is permitted by the policy.
Using video surveillance for employee discipline is a mandatory subject for bargaining. In *King County,* Decision 9495-A (PECB, 2008) the Commission found that the employer was required to bargain over the installation of video cameras for employee surveillance and/or to bargain a change in the use of video cameras from observing customers to surveillance of employees for purposes of discipline.

The Commission in *King County,* Decision 9495-A, cited *Snohomish County*, Decision 9678 (PECB, 2007), where the examiner ruled that video cameras used to document actions for disciplinary purposes were "investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct" which is a mandatory subject of bargaining. The Commission stated further, a change in these methods has "serious implications

for [the] employees' job security, which in no way touches on the discretionary 'core of entrepreneurial control.'" *Snohomish County*, Decision 9678, (PECB, 2007) quoting *Colgate-Palmolive Co*., 323 NLRB 82 (1997). Thus, the bargaining obligation changes depending on how the surveillance camera is to be used by the employer.

When the employer used the video cameras to investigate whether it should discipline Connor, it unilaterally changed the use of the camera system to monitor employees for discipline. The policy states that the camera system was installed to improve the safety of personnel and the public who visit the department. When the system was installed, the union was told that it would not be used for employee discipline. The first time the union knew that the system was used for potential discipline was during Connor's investigatory interview. Even though Connor wasn't disciplined, it was used in the disciplinary process. This was a change in practice and the union was presented with a *fait accompli*.

Conclusion

The use of video cameras for employee discipline is a mandatory subject of bargaining. The employer changed the use of video cameras by using video footage in the disciplinary process. The employer did not provide the union notice or an opportunity to bargain this change. Therefore, the employer violated RCW 41.56.140(4) and (1) and refused to bargain.

2f. Did the employer refuse to provide relevant information requested by the union?

On March 28, 2011, Connor was questioned during an investigatory interview regarding events that occurred on March 16, 2011. During the interview, images from video recordings were used. On March 30, 2011, during a labor/management meeting, the union asked why and how the video images were being used. In response, the chief stated "When the investigation is closed, and we turn over the file you will - you will know exactly how that came about and what the reasoning behind it was." The investigation closed on or about August 12, 2011. The union never received an explanation as to how or why the video images were discovered.

APPLICABLE LEGAL STANDARD

Failure to provide information

The duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd, City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The obligation extends not only to information that is useful and relevant to the collective bargaining process, but also encompasses information necessary to the administration of the parties' collective bargaining agreement. *City of Redmond,* Decision 8879-A (PECB, 2006), *citing King County*, Decision 6772-A (PECB, 1999). Administration of the collective bargaining agreement includes the ability to review information to assess whether the agreement is being complied with and if a grievance should be filed.

A responding party must reply to the information request in a reasonable and timely manner and may be found responsible for delays caused by its staff's failure to understand the duty to provide information. *Seattle School District*, Decision 8976 (PECB, 2005). Even if the request is too vague or overly burdensome, a request cannot simply be ignored. Instead, the responding party must communicate any objections and allow the requesting party an opportunity to justify or modify the request. *Port of Seattle*, Decision 7000-A (PECB, 2000); *Seattle School District*, Decision 9628-A (PECB, 2008).

Delay in providing necessary information can constitute an unfair labor practice. *City of Seattle*, Decision 10249 (PECB, 2008), *aff'd,* 10249-A (PECB, 2009); *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988). Neither the Commission nor the National Labor Relations Board (NLRB) adopts a bright-line rule defining how quickly a party must respond to a request for information. The examiners in the cases cited above looked to several factors to determine whether a delay in providing information was an unfair labor practice, including the preparation required for response, the impact of the delay to the party requesting the information, and whether the party responding to the request intended to delay or obstruct the process.

Analysis

The union argues that the employer refused to provide it with information about the video camera system and its use for discipline. The union argues that the information was necessary and relevant to enable them to perform their collective bargaining duties by evaluating whether contract violations occurred or whether unilateral changes were made during Connor's investigation. The union also argues that the employer made misleading statements in response to the information request.

The employer argues that the union did not request information and did not establish how the information was relevant to collective bargaining. The employer argues that the information was requested during a *Loudermill* interview and is not relevant.

In *City of Bremerton*, Decision 6006-A (PECB, 1998) the union requested information from the employer in anticipation of an arbitration hearing. In that case, the Commission found that the union identified specific, relevant information necessary to assess whether the discipline imposed upon an employee was proportionate to discipline of others within the bargaining unit. The request pertained to information about other employees in the bargaining unit to compare with the discipline for a grievant in an arbitration. In that request, the union clearly spelled out the relevancy of its request. The Commission found the employer had a duty to provide information relating to any internal investigations of employees thought to have committed similar infractions.

In *State – Social and Health Services*, Decision 11033 (PSRA, 2011), the bargaining representative requested all information in the context of potential disciplinary investigations. The examiner found that the employer had the responsibility to provide the information.

The union clearly asked the employer how the video camera system was being used to investigate Connor for disciplinary purposes. The chief acknowledged this request in his written agenda for the March 30, 2011 labor-management meeting. The employer did not respond to this request when the chief said that the union would receive the information when the investigation was over but never provided the information.

The information is relevant to the union's collective bargaining duties to represent Connor and administer the contract. It was information relevant to the employer's investigation of Connor for disciplinary reasons. Even though it was requested during a "Loudermill," as characterized by the employer, it was still information that should have been disclosed as pertinent to a disciplinary investigation.

The information is also relevant to the union's collective bargaining duties to administer the contract and negotiate over changes to mandatory subjects of bargaining. As analyzed in the issue above, it is a unilateral change to use a video camera system in the disciplinary process. The information the union requested on March 30, 2011, was to determine how the video camera system was being used. Knowing how the video camera system is used by the employer allows the union to evaluate whether its use could be the subject of a grievance under the collective bargaining agreement or an unfair labor practice complaint.

Conclusion

The information sought by the union about the video camera system is relevant to the union's collective bargaining duties. The employer failed to provide the union with the information. Therefore, the employer violated RCW 41.56.140(4) and (1) and refused to bargain.

2g. Did the employer circumvent the union by communicating directly with bargaining unit members that they could not grieve the denial of their step increases?

No testimony or evidence was offered at the hearing on this issue. The officers did not say they were told that they could not file a grievance, nor did any of the officer's supervisors testify that they made such a statement.

Conclusion

The union did not present evidence and therefore, failed to meet its burden of proof. This allegation is dismissed.

3. INTERFERENCE

The union alleged several interference allegations (3a-d below) which are analyzed under the same applicable legal standard.

APPLICABLE LEGAL STANDARD

Employer interference with employee rights will be found where "a typical employee could, in the same circumstances, reasonably perceive the employer's actions as discouraging with [stet] his or her union activities." *City of Wenatchee*, Decision 8802-A (PECB, 2006), *citing Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). Normally, an employer does not need to have an intention to interfere with employee rights; the focus is on the employee's reasonable perception. *Kennewick School District*, Decision 5632-A (PECB, 1996). *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct resulted in harm to employee rights. *City of Wenatchee*, Decision 8802-A.

3a. Did the employer interfere with employee rights by denying training requests?

Following Thomas' meeting with the chief on January 19, 2011, where Thomas requested the CRB to be convened, he submitted a series of requests for training. On February 3, 2011, he submitted a request to attend Collision Investigation - Technical training. He had submitted that request previously on November 29, 2010, which was denied. On February 17, 2011, he submitted a request for Designated Marksman training. On February 22, he submitted a request for Instructor Development training. On March 31, 2011, he submitted a request for Graham Combat Operator training. On April 23, 2011, he submitted a request for Line Employee's Academy. On May 20, 2011, he submitted two new requests, a second request for Instructor Development training and a second request for Collision Investigation - Technical training. All of his requests were denied. In April 2011, the chief denied an annual step increase for Thomas.

Analysis

The employer presented testimony on the reasons for the denial of each of the requests. Thomas' February 3, 2010 and May 20, 2010 requests to attend Collision Investigation-Technical training, were the same requests as one denied prior to the meeting where Thomas requested a CRB review. Thomas' February 17, 2010 request to attend Designated Marksman training was denied due to the cost. Thomas' February 22, 2011 and May 20, 2011 requests for Instructor Development training were denied due to cost and the lack of any need for instructors by the department. Thomas' March 31, 2011 request for Graham Combat Operator training was denied due to the cost. Thomas' April 23, 2011 request to attend Line Employee's Academy was denied due to the cost. The reasons for denying each request were stated on the face of the written request and provided to Thomas.

Based on the employer's explanations provided to Thomas, a reasonable person would not think that he was being discouraged from engaging in union activities. There was no threat of reprisal or force or promise of benefit associated with any potential union activity.

The union did not provide any evidence to show how a typical employee could perceive the employer's actions as discouraging Thomas' union activities because of the denied training, nor did it present any argument in its brief.

Conclusion

The union did not meet its burden of proof to show the employer interfered with employee rights. Therefore, no violation is found and the claim is dismissed.

3b. Did the employer interfere with employee rights by making statements to union representatives about choosing their legal representation?

Assistant Chief of Police Pete Caw and the former union president Pat Lowe had two conversations concerning the union changing its legal representation.

Sometime in January or February 2011, Lowe stated to Caw that the union was unhappy with their legal representation and were considering using Cline and Associates. Union treasurer Pat Hatchel was present for the conversation. Caw stated that he did not know if it would be a good fit because the firm was a little more confrontational than other firms.

Another conversation occurred later in 2011 when Lowe indicated to Caw that the union had made a decision to switch to Cline and Associates. Caw replied "I had some bad experiences during several - in interviews with Mr. Cline's attorneys were either present or influencing how the shop steward represented employees. [I] indicated to him that was not what I was used to. It was very abrasive and argumentative at times." Caw also stated "I was concerned about that. I thought maybe it would change the relationship to something more akin to what I had seen in other places."

Analysis

The Union argues that Caw's statements to Lowe and Hatchel about choosing Cline and Associates as the union's legal representation was unlawful interference. The union argues that a reasonable person could perceive his statements as intimidating and coercive and that the statements were meant to dissuade the union from hiring them.

The employer argues that the statements were not intimidating or coercive. The employer argues that the statements were just an expression of opinion during a casual conversation. The employer argues that Hatchel and Lowe did not testify that they were intimidated or coerced by Caw's statement.

This Commission asks seven questions when determining whether an employer's statements could constitute interference with protected employee rights:

1. Is the communication, in tone, coercive as a whole?
2. Are the employer's comments substantially factual or materially misleading?
3. Has the employer offered new "benefits" to employees outside of the bargaining process?
4. Are there direct dealings or attempts to bargain with the employees?
5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?
6. Did the union object to such communication during prior negotiations?

7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

*Grant County Public Hospital District 1*, Decision 8378-A; *Port of Walla Walla*, Decision 9061-A (PECB, 2006).

When experienced negotiators seek assistance of and share frustrations with an authority beyond the bargaining table, they should not be surprised if the other party shares its frustrations with the process. *State – Office Of Financial Management,* Decision 11084-A (PSRA, 2012).

It is possible that a reasonable person could perceive the statements by Caw as intimidating or coercive. The statements were made by the Assistant Chief, the second in command of the police department and hence, the supervisor of both Lowe and Hatchel. Lowe and Hatchel were the union president and treasurer at the time. The statements could be seen as attempting to influence the union not to hire Cline and Associates.

However, Lowe and Hatchel did not testify that they were affected by the statements in their decision to hire Cline and Associates. The statements were made to experienced union officials as in *State – Office of Financial Management*, Decision 11084-A. Lowe and Hatchel did not state that they were intimidated or coerced. There was no evidence that the conversation was coercive, but rather it had a casual tone. The employer did not disparage, discredit, ridicule, or undermine the union with any comments. There were no threats or promises of benefit associated with the decision. The statements did not place the employer in a position from which it could not retreat. The union was not dissuaded from hiring Cline and Associates, who were in fact hired as the union's legal representative. These circumstances do not rise to the level of unlawful interference.

<u>Conclusion</u>

The union did not meet its burden of proof to show harm. According to their own testimony, the union did not find the statements intimidating. Therefore, no violation is found and the allegation is dismissed.

3c. Did the employer interfere with employee rights by advising bargaining unit employees that they could not appeal the denial of their step increases?

No evidence was offered that the employer told any bargaining unit employee that they could not appeal the denial of their step increase.

Conclusion

The union did not present evidence and therefore failed to meet its burden of proof. This allegation is dismissed.

3d. Did the employer interfere with employee rights by limiting the role of union representatives at a disciplinary interview, and refusing to respond to the union's attorney for clarification of the meeting?

i. Limiting the role of union representation

On March 28, 2011, an internal investigation was launched concerning Sergeant Mark Connor and incidents that occurred on March 16, 2011. On March 30, 2011, the chief held a labor management meeting. The agenda included the chief's procedure for investigatory interviews and pre-disciplinary meetings with an employee. It states the employer and the representative may:

1. speak privately before the interview,
2. assist and/or advise the employee during the interview,
3. interrupt the interview to ask for clarification,
4. object to management intimidation or threats during the interview,
5. be allowed to add supporting information at the conclusion of the interview, and
6. will not be allowed to be disruptive or interrupt the interview.

On August 12, 2011, Connor was given notice of a pre-disciplinary meeting concerning events that occurred on March 16, 2011. In the notice, the chief recommended a penalty of termination. The notice stated that the meeting was not an opportunity for persons joining Connor to act as an advocate.

On August 17, 2011, the union was provided with a copy of the internal investigation report. On that same day, the chief sent Eric Jones, the union president, an e-mail stating that the interview was not intended to be an adversarial or formal hearing. The e-mail explained it was not to accommodate the presentation of testimony or witnesses, was not an opportunity for persons joining Connor to be an advocate and was merely an opportunity for Connor to present his side of the story.

On August 23, 2011, the pre-disciplinary meeting occurred. Connor's union attorney and two union representatives were present. One union representative did not ask any questions because he did not feel that it was within his bounds to do so.

## APPLICABLE LEGAL STANDARD

### *Weingarten* Rights

The United States Supreme Court has held that employees have the right to be accompanied and assisted by the union representatives at an investigatory meeting that the employee reasonably believes may result in disciplinary action. *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975). The rights detailed in *Weingarten* are applicable to employees who exercise collective bargaining rights under Chapter 41.56 RCW. *Okanogan County,* Decision 2252-A (PECB, 1986). An "investigatory" interview is one in which the employer seeks information from an employee or employees. *Cowlitz County*, Decision 6832-A (PECB, 2000).

As examiners explained in *Washington State Patrol,* Decision 4040 (PECB, 1992) and *Seattle School District,* Decision 10066-B (PECB, 2010), to establish a *Weingarten* violation, the complainant must prove that:

(1) the employer compelled an employee to attend an interview;

> (2) a significant purpose of the interview was (or became) investigatory, to obtain facts which might support disciplinary action;
> (3) the employee reasonably believed that discipline might result from the interview;
> (4) the employee requested the presence of a union representative; and
> (5) the employer rejected the employee's request and went ahead with the investigatory interview without a union representative present, or required the union representative to remain a passive or silent observer, so as to prevent the representative from assisting the employee.

The role of the union representative during the investigatory process is not to sit silently by but to ask questions, bring out additional facts, counsel the employee under investigation, and to provide information concerning past employment practices. *King County,* Decision 4299-A (PECB, 1993). The union representative may note when questions are ambiguous or misleading; note when questions invade a statutory privilege that the employee has a right to invoke; or intercede when questions become harassing or intimidating. *City of Bellevue,* Decision 4324-A (PECB, 1994).

The employer was guilty of interference in *Omak School District,* Decision 10761-A (PECB, 2010) when it instructed the union representative not to inform the employee about the nature of the investigatory interview and when it dictated who the representative would be. In *King County,* Decision 4299-A, the Commission found unlawful interference when an employer told the union representative that he could be present for the investigatory interview but that he could not participate. The remedy in that case was to reverse the employee's termination, reinstate him and award back pay.

Analysis

The union argues that Connor's *Weingarten* rights were violated when the chief limited the role of his union representation at his investigatory interview. The union argues that the chief

interfered when he stated that he would not allow anyone to advocate on behalf of Connor and required the union to remain passive at the interview.

The employer argues that there was no *Weingarten* violation as the interview was actually a *Loudermill* interview. The employer also argues that no one was limited because at the end of the interview the chief asked Connor's attorney if she had anything to add.

The chief's actions add up to a *Weingarten* violation. The interview compelled Connor to attend, the purpose of the interview was to obtain Connor's side of the story in proposed disciplinary action, Connor perceived discipline could result, he asked for his union representative to be present, and the chief required the union representative(s) to remain passive or silent observers which prevented them from assisting Connor.

The chief's agenda presented at the March 30, 2011 labor-management meeting and the August 17, 2011 e-mail clearly show that he intended to define the union representative's role at the interview. He wanted the union representatives to remain silent and passive. He informed the union that he would not allow anyone to advocate for Connor.

The union representative remained silent during the interview and believed that he was not allowed to ask any questions. The chief did not cure that defect by asking the union at the end of the interview if they had anything to add.

Conclusion

The employer limited the role of the union representatives at an investigatory interview. The limitation interfered with Connor's *Weingarten* rights. Therefore, the employer violated RCW 41.56.140(1).

ii. Failure to respond to the union attorney's request for clarification

On August 22, 2011, the union's legal representative James Cline sent an e-mail to the chief asking for information about Connor's interview scheduled for August 23, 2011. The e-mail asked for clarification about the interview and whether it was a meeting or a pre-disciplinary

hearing. It asked for clarification about the chief's directive that the meeting would not be an opportunity for persons joining Connor to be an advocate and whether the union's role would be limited.

The chief did not respond to the e-mail. He did make a statement to the union president that he didn't want the attorney speaking on behalf of Connor as he wanted to hear from Connor himself. He also said that he would not be responding to the e-mail and that "he did not work for Cline."

Analysis

The union argues that the employer's failure to respond to Cline's e-mail and the chief's comment about not working for Cline can be perceived as interference with union activity.

The employer argues that the chief responded to the email by having a conversation with the union president. The employer argues that the actions do not rise to the level of unlawful interference.

In *Omak School District,* Decision 10761-A (PECB, 2010) the employer was guilty of unlawful interference when it instructed the union representative not to inform the employee about the nature of the investigatory interview and when it dictated who the representative would be. In that case, the employer informed the local union president and building representative not to inform the employee about the subject of an investigatory interview even though she was aware of what the meeting was about. The employer also refused to honor the employee's request for a union representative other than the local union president.

In *Omak School District*, the commission cited NLRB precedent:

> The NLRB consistently holds that *Weingarten* rights "encompass the rights to prior consultation with the union representative prior to an investigatory interview." *United States Postal Service*, 345 NLRB 426 (2005), *citing United States Postal Service*, 303 NLRB 463, fn. 4 (1991) and *Climax Molybdenum Compan*y, 227 NLRB 1189, 1190 (1977). The NLRB has also held that "[n]othing in the rationale of *Weingarten* suggests that . . . the Supreme Court meant to put blinders on the union representative

> by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview." *Colgate-Palmolive Company*, 257 NLRB 130, 133 (1981). An employer cannot refuse to inform employees, or their union representative, of the nature of the subject matter being investigated prior to an investigatory interview. *King County*, Decision 4299, *aff'd, King County*, Decision 4299-A, *citing Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982). Although an employer must inform the employee and the chosen union representative about the subject matter of the interview, the employer is not required to provide specific details, and a general statement that identifies the misconduct for which discipline may be imposed will suffice. *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048.

The employer cannot pick and choose which union representative it will respond to. The employers' actions violated Connor's rights by not disclosing the nature of the interview, by not responding to Cline, and by stating that he would not respond to Cline. Discussing the questions with the union president did not cure this defect.

Conclusion

The employer failed to respond to the union's legal representative's request for clarification about the nature of the interview and selected the union representative to respond to. These actions violated Connor's *Weingarten* rights. Therefore, the employer violated RCW 41.56.140(1).

4. Did the employer discriminate against employee rights by imposing two disciplinary penalties?

As analyzed above, on January 12, 2011, the police chief issued Thomas a pre-disciplinary notice concerning a collision in which he was involved while on duty. The notice contained the statement that the chief was considering recommending to the City Manager a disciplinary penalty of a 48-hour suspension without pay. On January 19, 2011, Thomas met with the police chief in response to the notice.

At the meeting and in accordance with the policy, Thomas asked that the CRB be convened to review the collision. On January 21, 2011, the chief issued a disciplinary notification to the officer imposing a penalty of a 36-hour suspension without pay for violating department rules.

On January 27, 2011, the CRB met and reviewed the collision. The chief then issued a second pre-disciplinary notice to the officer stating that he had found the collision preventable, despite the CRB findings, and imposed an additional penalty of 24 hours.

## APPLICABLE LEGAL STANDARD

### Discrimination

RCW 41.56.140(1) prohibits an employer from discriminating in reprisal for the exercise of employee rights protected by the collective bargaining statute. The test for discrimination requires the union to set forth a prima facie case showing that:

> (1) one or more employees exercised a protected union activity, or communicated to the employer an intent to do so,
> (2) one or more employees were deprived of some ascertainable right, status, or benefit, and
> (3) a causal connection exists between the protected union activity and the employer's action.

*Educational Service District 114*, Decision 4361-A (PECB, 1994).

If the union makes its prima facie case for discrimination, the employer must articulate non-discriminatory reasons for its actions. If the employer provides non-discriminatory reasons, the union bears the burden of proof to show that the employer's reasons were pretexts to conceal the employer's true motivation, or that the protected activity was a substantial motivating factor for the action. *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A (PECB, 2009).

The Commission in *Dierenger School District,* Decision 8956-A (PECB, 2007) listed examples of protected union activity: filing an unfair labor practice complaint, *Mulkilteo School District*, Decision 5899-A (PECB, 1997); union organizing, *Asotin County Housing Authority*, Decision 2471-A (PECB, 1987); and participating in collective bargaining, *Oroville School District*, Decision 6209-A (PECB, 1998). Other examples include testifying in an interest arbitration

hearing, *City of Yakima,* Decision 10270-A (PECB, 2011) and pursuing grievances, *City of Pasco*, Decision 3804-A (PECB, 1992)

Examples of non-protected activity include: being present when a union survey is presented to management when not acting in any union capacity, *Dierenger School District*, Decision 8956-A; making statements to an employer concerning the denial of leave not submitted in a collective bargaining context, *City of Seattle*, Decision 9439-B (PECB, 2009); criticizing an employer over its search policy and individually bargaining. *Seattle School District*, Decision 11045-A (PECB, 2011).

Analysis

The union argues that the employer discriminated against Thomas for requesting a CRB review when he received two penalties for the same incident. The union points to the 36-hour penalty and the 24-hour penalties that were imposed on Thomas for the same incident. The union notes that the pre-disciplinary notice had a proposed penalty of 48 hours.

The employer argues that there was no protected union activity because invoking a CRB review is not in the collective bargaining agreement, it is merely a policy. The employer notes that Thomas is not a union official. The employer argues that the chief was not angry at Thomas for invoking the CRB review.

The Commission recently ruled on whether an action was protected activity in *University of Washington,* Decision 11149-A (PSRA, 2013). The activity was an e-mail sent by a union shop steward to a supervisor about parking. The Commission examined whether the activity was taken on behalf of the union, *citing City of Seattle*, Decision 10803-B (PECB, 2012) (a letter written by the union president to the employer was protected because the union was working on behalf of one of its members); *Renton Technical College*, Decision 7441-A (CCOL, 2002) (contacting a state legislator to inquire about use of particular funding for employee salaries was protected activity); *Atlantic Steel Co.*, 245 NLRB 814 (1979) (complaint made on plant floor, rather than in company office or across table at formally convened and structured grievance

meeting was protected activity). The Commission explained that the dispute matters and an activity may not be protected if it is not related to union issues.

Asking for a CRB review of one's collision is not the type of activity typically defined as union activity. It is not the processing of a grievance, testifying at an Unfair Labor Practice hearing or participating in collective bargaining. It is not an action relating to union issues. It is an action taken by an employee for his own review process which was provided by department policy. It is not protected union activity.

Engaging in protected union activity is the first element in proving discrimination. Since the union has failed to satisfy the first element of a discrimination claim, the remaining elements need not be discussed.

Conclusion

Thomas did not engage in protected activity. The union failed to satisfy its burden of proof. This allegation is dismissed.

## FINDINGS OF FACT

1. The City of Mountlake Terrace (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. Mountlake Terrace Police Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2), and is the exclusive bargaining representative of a unit of police officers and sergeants employed by the employer.

3. Since 2008, the parties have had a policy and practice of using a Collision Review Board (CRB) to determine whether a collision was preventable or not. If the CRB concluded that the collision was preventable, the finding went to the police chief who then determined the appropriate level of discipline to impose and whether to commence an internal investigation. If the finding was that the collision was not preventable, the

conclusion was sent from the CRB to the police chief and then to the file. The CRB's conclusion was made by majority vote.

4. The policy described in Finding of Fact 3 provides that any person in the review chain, including the officer involved in the collision, can request a review by the CRB to determine whether the collision was preventable or not.

5. Delsin Thomas is a police officer employed by the employer. On January 19, 2011, during a pre-disciplinary interview, he asked for the CRB to review a collision in which he was involved.

6. Following Thomas' request on January 19, 2011, for the CRB to review his collision, the chief bifurcated the discipline procedure. The chief pursued the issue of a policy violation and deferred the decision of the collision being preventable to the CRB.

7. Subsequent to the bifurcation on January 19, 2011, Thomas received two notices of discipline and two disciplinary penalties of 36 hours and 24 hours of suspension without pay, for the same incident; one for a policy violation and one for the collision.

8. From 2008 to April 27, 2011, the CRB was comprised of the assistant chief, a field operations sergeant, a collision investigator from the traffic unit, and an officer chosen by the involved employee.

9. On April 27, 2011, the chief issued a revised policy adding himself as a fifth member of the CRB, changed the traffic unit officer on the CRB to an officer from the office of professional responsibility, and changed the field operations sergeant to sergeant.

10. The parties' collective bargaining agreement allows for employees to receive an annual step increase. The practice of granting an officer a step increase on their anniversary date has been the past practice for over 26 years.

11. Prior to 2011, there was no past practice of denying a bargaining unit member a step increase on his/her anniversary date based on previous discipline.

12. Officer Brian Moss is a police officer employed by the employer. In the 12-month period preceding his anniversary date in 2011, he received disciplinary penalties totaling 72 hours of suspension without pay. In January 2011, the chief denied an annual step increase for Moss on his anniversary date. He later received the increase in June 2011.

13. Officer Trent Chapel is a police officer employed by the employer. In the 12-month period preceding his anniversary date in 2011, he received disciplinary penalties of a written reprimand and a 36-hour suspension without pay. In January 2011, the chief denied an annual step increase for Chapel on his anniversary date. He later received the increase in November 2011.

14. In the 12-month period preceding his anniversary date in 2011, Officer Delsin Thomas received a verbal reprimand, two written reprimands, and a suspension without pay. In April 2011, the chief denied an annual step increase for Thomas on his anniversary date. Thomas later received the increase in November 2011.

15. Officers Moss, Chapel, and Thomas were not told that they could not appeal the denial of their step increases as described in Findings of Fact 12 through 14 above.

16. In February 2011, the chief issued a policy on the public safety camera system. The policy explains that the cameras will be used for improving the safety of personnel and the public who visit the department. The policy does not state that it may be used for employee discipline. When the system was installed, the union was told that it would <u>not</u> be used for employee discipline.

17. Mark Connor is a sergeant employed by the employer.

18. On March 28, 2011, the employer held an investigatory interview of Connor.

19. Recordings used by the camera system were included in the employer's investigation to determine if it Connor should be disciplined.

20. During Connor's interview on March 28, 2011, the union asked why and how the video images were being used.

21. In response to the union's request for information in Finding of Fact 20, the chief stated "when the investigation is closed and we turn over the file you will – you will know exactly how that came about and what the reasoning behind it was." The employer never provided the information to the union.

22. On November 29, 2010, Thomas submitted a request to attend Collision Investigation - Technical training. He resubmitted that request on February 3, 2011. On February 17, 2011, he submitted a request for Designated Marksman training. On February 22, he submitted a request for Instructor Development training. On March 31, 2011, he submitted a request for Graham Combat Operator training. On April 23, 2011, he submitted a request for Line Employee's Academy. On May 20, 2011, he submitted two new requests, a second request for Instructor Development training and a second request for Collision Investigation - Technical training.

23. The employer denied the training requests in Finding of Fact 22 above from Thomas based upon cost and lack of need.

24. On March 30, 2011, the parties engaged in a labor-management meeting. The agenda included the chief's procedure for an investigatory interview and pre-disciplinary meeting with an employee. It restricted the behavior of the representative during these meetings.

25. On August 12, 2011, Connor was given notice of a pre-disciplinary meeting concerning events that occurred on March 16, 2011. In the notice, the chief recommended a penalty

of termination. The notice stated that the meeting was not an opportunity for persons joining Connor to act as an advocate.

26. On August 17, 2011, the union was provided with a copy of the internal investigation report. On that same day, the chief sent the union an e-mail stating that the interview was not intended to be an adversarial or formal hearing, was not to accommodate the presentation of testimony or witnesses, was not an opportunity for persons joining Connor to be an advocate, and was merely an opportunity for Connor to present his side of the story.

27. On August 22, 2011, the union's attorney James Cline sent an e-mail to the chief asking for clarification on Connor's pre-disciplinary meeting. Specifically he asked about the nature of the meeting and the union representative's role at the interview. The chief told Eric Jones, the union president, that he would not respond to Cline and reiterated to Jones the parameters of the interview.

28. On August 23, 2011, the pre-disciplinary meeting occurred. Connor, his union attorney and two union representatives were present. One union representative did not ask any questions.

29. In 2011, Assistant Chief of Police Pete Caw and the former union president Pat Lowe had a two conversations concerning changing the union's legal representation to Cline and Associates. Caw stated "I had some bad experiences during several - in interviews with Mr. Cline's attorneys were either present or influencing how the shop steward represented employees. [I] indicated to him that was not what I was used to. It was very abrasive and argumentative at times." Later Caw stated "I was concerned about that. I thought it would maybe change the relationship to something more akin I had seen in other places." Lowe and Hatchel were not intimidated by Caw's remarks.

## CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By changing the positions that make-up the Collision Review Board as described in Finding of Fact 9, the employer refused to bargain in violation of RCW 41.56.140(4) and (1).

3. By changing the discipline procedure as described in Findings of Fact 6 and 7, the employer refused to bargain in violation of RCW 41.56.140(4) and (1).

4. By denying step increases as described in Findings of Fact 12 through 14, the employer refused to bargain by failing to maintain status quo terms and conditions of employment in violation of RCW 41.56.140(4) and (1).

5. By changing when step increases are granted as described in Findings of Fact 12 through 14, the employer refused to bargain in violation of RCW 41.56.140(4) and (1).

6. By changing the use of the video camera system to monitor employees for discipline as described in Finding of Fact 19, the employer refused to bargain in violation of RCW 41.56.140(4) and (1).

7. By refusing to provide relevant information requested by the union concerning video footage and its use during the discipline of Sergeant Connor as described in Finding of Fact 21, the employer refused to bargain in violation of RCW 41.56.140(4) and (1).

8. By limiting the role of the union representatives at the disciplinary interview of Sergeant Connor as described in Findings of Fact 24 through 26, the employer interfered with employee rights in violation of RCW 41.56.140(1).

9. By refusing to respond to the union's legal representative's request for clarification and selecting the union representative to respond to, as described in Finding of Fact 27, the employer interfered with employee rights in violation of RCW 41.56.140(4) and (1).

10. By not telling Officers Chapel, Moss, and Thomas that they could not appeal the denial of their step increases as described in Finding of Fact 15, the employer did not circumvent the union or interfere with employee rights in violation of RCW 41.56.140(4) and (1).

11. By denying Delsin Thomas' training requests as described in Finding of Fact 23, the employer did not interfere with employee rights in violation of RCW 41.56.140(1).

12. By making statements to union representatives about choosing Cline and Associates as their legal representative as described in Finding of Fact 29, the employer did not interfere with employee rights, in violation of 41.56.140(1).

13. By imposing two disciplinary penalties as described in Finding of Fact 7, the employer did not discriminate against Delsin Thomas in violation of 41.56.140(1).

## ORDER

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

1. CEASE AND DESIST from:

    a. Failing to bargain over changes in positions that make up the Collision Review Board.

    b. Failing to bargain over changes to disciplinary procedures.

    c. Failing to bargain over changes when step increases are granted.

d. Failing to bargain over using a video camera system in the disciplinary process.

e. Refusing to provide the union with information requested concerning the use of a video camera system and its use in employee discipline.

f. Interfering with employee rights by limiting the role of union representatives in disciplinary interviews and failing to provide information concerning the interview.

g. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Restore the *status quo ante* by reinstating the wages, hours and working conditions which existed for the employees in the affected bargaining unit prior to the unilateral changes found unlawful in this order. Specifically:

i. Restore the Collision Review Board policy as it existed, as described in Finding of Fact 3, prior to the changes made on or about April 27, 2011, as described in Finding of Fact 9;

ii. Restore the discipline procedure as it existed prior to the changes made on or about January 19, 2011, as described in Findings of Fact 6.

iii. Delete any and all reference to the two disciplinary penalties imposed upon Delsin Thomas as described in Finding of Fact 7, except for the purpose of compliance with this order.

iv. Reimburse Officer Delsin Thomas for the two disciplinary penalties imposed upon him as described in Finding of Fact 7 by reinstating him with back pay and interest pursuant to WAC 391-45-410(3).

v. Retroactively grant step increases to Officers Chapel, Moss, and Thomas, from their 2011 anniversary dates to the time that they received their step increase in 2011, including back pay and interest pursuant to WAC 391-45-410(3).

vi. Delete any and all reference to video camera images concerning Sergeant Mark Connor, except for the purpose of compliance with this order.

b. Give notice to and, upon request, negotiate in good faith with The Mountlake Terrace Police Guild before making unilateral changes to the Collision Review Board policy, to the method for granting step increases, changes in discipline procedures, and changes in the use of the video camera system for monitoring employee discipline.

c. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Mountlake Terrace City Council and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

f. Notify the Compliance Officer, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 5th day of April, 2013

PUBLIC EMPLOYMENT RELATIONS COMMISSION

ROBIN A. ROMEO, Examiner

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

CASE 24086-U-11-6163
DECISION 11702 - PECB

**PUBLIC EMPLOYMENT RELATIONS COMMISSION**

# NOTICE

**STATE LAW GIVES YOU THE RIGHT TO:**

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

**THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT THE *CITY OF MOUNTLAKE TERRACE* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE UNLAWFULLY failed to bargain over:

- Changes in positions that make up the Collision Review Board.
- Changes to disciplinary procedures.
- Changes when step increases are granted.
- Using a video camera system in the disciplinary process.

WE UNLAWFULLY refused to provide the union with information requested concerning the use of a video camera system and its use in employee discipline.

WE UNLAWFULLY interfered with employee rights by limiting the role of union representatives in disciplinary interviews and failing to provide information concerning the interview.

**TO REMEDY OUR UNFAIR LABOR PRACTICES:**

WE WILL restore the *status quo ante* by reinstating the wages, hours and working conditions which existed for the employees in the affected bargaining unit prior to the unilateral changes found unlawful in this order.

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

## DO NOT POST OR PUBLICLY READ THIS NOTICE.

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

The full decision is published on PERC's website, www.perc.wa.gov.