STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VANCOUVER POLICE OFFICERS GUILD, Complainant, vs. CITY OF VANCOUVER, Respondent.	CASE 22840-U-09-5829 DECISION 10621-B - PECB DECISION OF COMMISSION

Snyder & Hoag, by *Daniel A. Snyder*, Attorney at Law, for the union.

Office of the City Attorney, by *Terry M. Weiner*, Assistant City Attorney, for the employer.

On November 6, 2009, the Vancouver Police Officers Guild (union) filed an unfair labor practice complaint alleging that the City of Vancouver (employer) discriminated against Officer Ryan Martin (Martin) in retaliation for Martin's union activity.[1] The union alleged that Vancouver Police Chief Clifford Cook's decision to not select Martin for the department's "Motors Unit" was based upon the union animus of several members of the interview committee who screened potential candidates and made recommendations to Cook on which employees to select. Examiner Charity Atchison conducted a hearing and held that the evidence demonstrated that Assistant Chief Chris Sutter's (Sutter) recommendation to Cook about which officer should be selected to the Motors Unit was tainted by union animus. However, the Examiner held that Cook

[1] The union's original complaint also alleged that the employer attempted to dominate the union. RCW 41.56.140(2). Unfair Labor Practice Manager David I. Gedrose found that the union's complaint failed to state a cause of action under RCW 41.56.140(2), and issued a deficiency notice which gave the union 21 days to cure the defects in that allegation. The union did not cure the stated defects, and the domination allegation was dismissed. *City of Vancouver*, Decision 10621-A (PECB, 2009).

himself did not display any union animus in his decision making.[2] The Examiner ordered the employer to immediately offer Martin a position in the Motors Unit to remedy its unfair labor practice.

The employer filed a timely appeal contesting the Examiner's factual findings and legal conclusions. In its appeal, the employer argues Cook had legitimate independent reasons for not offering Martin a position in the Motors Unit. The employer also argues that the evidence fails to support the conclusion that the selection process was tainted by the union animus of certain members of the interview panel. The employer urges this Commission to reverse the Examiner's decision and dismiss the complaint.

The union filed a timely cross-appeal challenging certain findings and conclusions made by the Examiner. Although the union supports the Examiner's conclusion that Sutter's recommendation to Cook was tainted by union animus, the union argues that the record supports a finding that Cook's decision also demonstrated union animus. The union also argues that the Examiner failed to give proper consideration to all of Martin's union activity, failed to take into consideration Martin's superior qualifications, failed to consider the employer refusal to select employees for the Motors Unit by seniority, and failed to consider the employer's decision to not follow its internal Selection Guidelines. The union also urges the Commission to reverse the Examiner's conclusion that Lieutenant Amy Foster (Foster), another member of the interview committee, did not display union animus in her recommendation.

For the reasons set forth below, the Examiner's conclusion that the employer discriminated against Martin in the selection process for the Motors Unit is affirmed. Substantial evidence in the record supports the Examiner's findings and conclusion that Sutter's recommendation to Cook was tainted by union animus.[3] However, the Examiner's conclusion that Cook did not

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2 *City of Vancouver*, Decision 10621-A (PECB, 2010).

3 This Commission reviews conclusions and applications of law, as well as interpretations of statutes, *de novo*. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision

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

DISCUSSION

A recitation of the facts is necessary to place our decision in its proper context. The command structure of the employer's police department is divided into two bureaus, Police Services and Administrative Services.

Assistant Chief Nanette Kistler (Kistler) commands Police Services. Commander Marla Schuman (Schuman) oversees the Operating Support Division, which is within Police Services. Schuman reports directly to Kistler. Also within Police Services are the Special Weapons and Tactics Unit, the Traffic Unit, the K-9 Unit, the Explosives Disposal Unit, and the Civil Disturbance Team. Foster oversees these units.

The Administrative Services Bureau provides the support functions of the police department. Sutter commands this bureau. Human Resources Analyst Lee Knottnerus (Knottnerus) works within the Administrative Services Bureau.

Martin's Union Activities

In November 2008, Martin was elected union president. Martin testified that he aggressively asserted the bargaining unit's rights and changed the way the union interacted with management. For example, in January 2009, Martin informed Cook by e-mail that the union's Executive Board had decided to cancel monthly meetings that had previously been held between the union president and the chief of police. Martin's e-mail explained that the union felt that all

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7088-B. The Commission attaches considerable weight to the factual findings and inferences made by agency examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001). Credibility determinations will not be disturbed unless those determinations are not supported by substantial evidence. *Snohomish County*, Decision 9834-B (PECB, 2008).

communications needed to be in writing to "ensure that both entities are communicating effectively, fairly, and without misinterpretation."

Martin filed several grievances on behalf of the union and challenged several employer policies. These included a November 2008 grievance concerning stand-by pay of the Civil Disturbance Team and a February 2009 grievance challenging the use of vacation leave during the July 4th holiday.

Martin also challenged the employer's desire to change certain policies. For example, the employer approached the union with a proposal that would allow the employer to search employee lockers in a manner contrary to the process contained within the negotiated collective bargaining agreement. The union rejected the employer's proposal and the employer dropped the matter at that time.

Martin publicly challenged the employer's leadership on behalf of the union. On March 27, 2009, Martin issued a "Statement of Guild Concerns" (statement) that criticized Cook's and Kistler's leadership as well as certain decisions made by management. For example, the statement made negative comments about the employer's practice of "changing the rules" for the selection of specialty positions.[4] The letter also criticized the employer's tendency to change its policies to allow favored individuals to apply for positions. The statement specifically cited Foster's application for the lieutenant's position that she was ultimately granted, and noted that Foster did not meet the educational requirements for the position at the time she took the lieutenant's examination. The statement also brought up the fact that Foster and Kistler are in a domestic relationship, and that the decision to promote Foster could be viewed as favoritism.

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[4] The Examiner admitted the statement into evidence, but declined to admit an anonymous letter that was attached to the statement because the letter could not be authenticated. The Examiner specifically found that without authentication, the letter offered little probative value. The Examiner concluded that the record supports a finding that Martin delivered the letter as part of the Statement of Guild Concerns, and it was not necessary to admit the letter into evidence. The union recognizes that the letter cannot be admitted for the truth of the matter asserted, but nevertheless claims that the letter should have been admitted. We find the Examiner's decision to reject the admission of the letter sound. Without authentication, the prejudicial nature of the letter far outweighs its probative value and, as the Examiner succinctly stated, the record supports a finding that the letter was delivered as part of Martin's union activities.

Cook responded to the union by stating that the statement's attacks upon the assistant chiefs were "untrue, unnecessary, and unproductive." Cook also expressed disappointment about the union's decision to cease its monthly meetings with the chief. Martin responded to Cook's criticism by labeling it "insulting and inflammatory."

Sutter shared with Foster a copy of the statement. Foster testified that she was aware of the allegations made by the union and that the statements bothered her, but she had not reviewed the entirety of the statement until the hearing in this matter.

On April 23, 2009, Martin filed a formal complaint with the employer on behalf of the union alleging Kistler's and Foster's domestic relationship violated the employer's anti-nepotism policy. The union ultimately dropped its complaint.

On June 15, 2009, Martin sent an e-mail to Cook objecting to the employer's plan to post information about internal investigations of bargaining unit employees on the internet. Martin stated that the parties' current collective bargaining agreement specifically governs the disclosure of investigative information, and that the matter would be discussed in upcoming negotiations. On June 17, 2009, *The Columbian* newspaper published an article describing the employer's interest in posting investigative information on the web as a way to promote transparency within the department, as well as the union's opposition to the employer's plan. The article also referenced the union's March 27, 2009 statement.

The Motors Unit

Prior to 2008, the police force operated a Motors Unit of six to eight patrol officers who patrolled by motorcycle rather than sedan. The Motors Unit specifically focused on traffic enforcement. Martin served as a member of the Motors Unit between 2002 and 2008.

In 2008, Cook disbanded the Motors Unit due to budget constraints. The employer reassigned Martin to the regular patrol unit. When the Motors Unit disbanded, there was some discussion among its members that if the unit was ever to be reformed, seniority should determine which officers are selected for the unit. No evidence exists in this record demonstrating that the

employer and union bargained the conditions for assigning employees to the Motors Unit should it be reformed.

Re-creation of the Motors Unit

In early 2009, Cook decided to reform the Motors Unit. The employer decided that the new Motors Unit would be smaller than the original, and consist of one sergeant, one corporal, and two officers. Cook directed Foster to formulate and implement a plan to revive the unit. Foster consulted with Corporal Bob Schoene (Schoene) in the planning process because Schoene had been the acting supervisor when the Motors Unit was disbanded and because Schoene was the only certified motorcycle instructor within the department. The employer selected Schoene for the Motors Unit without the need of an interview because of his instructor's certificate.

In May 2009, Martin approached Foster to inform her that he was also a motorcycle instructor and offered to provide her his teaching certificate. Martin questioned Foster about the employer's decision to automatically select Schoene. Foster stated that she was under the impression that Schoene was the only certified instructor. Foster testified that although Martin had taken motorcycle instructor courses, he had not completed the training and obtained his instructor's certificate.[5]

Originally, the employer planned to open applications for the Motors Unit to all employees of the department. However, Schoene recommended that the employer consider only those officers who were certified motorcycle officers so the Motors Unit could immediately begin operations. Schoene also testified that Foster and Schuman asked him which officers would be chosen if the selection process was made by seniority. Schoene stated that Martin and Officer Scott Neill (Neill) would be the two officers selected if seniority were the only consideration.

On May 29, 2009, Knottnerus posted the job announcement for the two officer positions in the Motors Unit. Shortly thereafter, Martin contacted Knottnernus and asked why the job was being limited to those employees who were certified motorcycle officers. Martin stated that he was under the impression that the Motors Unit positions were specialty positions and, consistent with

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[5] The complainant submitted no evidence demonstrating that Martin actually had an instructor's certificate.

employer policies, would be open to all employees. Knottnerus explained the certificate requirement was necessary so that the employees assigned to the Motors Unit could immediately start their new work. Knottnerus also stated that the selection process would be similar to the process used for other specialty positions.

The Selection Guidelines

When the employer filled a specialty position in its workforce, the process for filling that position was governed by the protocols established in the "Guidelines for Selecting Personnel to Fill Specialty Assignments" document. The guidelines reserve to the chief of police the ultimate authority in selecting an employee for a specialty position. The guidelines also state that there are no requirements that the guidelines be used as part of the hiring process. However, if the guidelines were used, the interview committee would include assistant chiefs, the commander or lieutenant from the position's division, a supervisor from the unit or other subject matter expert, and the human resources manager.

The guidelines require that each candidate's personnel file, attendance history, internal affairs history, and performance evaluations are provided to the interview committee. The guidelines require that once the interviews are completed, the interview panel should report the strengths and weaknesses of each candidate to the chief along with a recommendation as to which candidate to select.

The Selection Process

On June 17, 2009, the panel interviewed the four candidates who applied for the two officer positions in the Motors Units: Martin, Neill, Officer John Davis, and Officer Ken Suvada. Although Sutter, Kistler, Foster, Schoene and Knottnerus should have composed the interview panel, Kistler and Knottnerus were absent due to other conflicts. Sutter decided to proceed with the interviews despite the absence of two members because all of the candidates were available that day. Cook was not aware that Sutter conducted the interviews without the full panel.

Prior to the actual interviews, Sutter, Foster, and Schoene reviewed the application packet of each candidate. Each packet included a cover sheet for the panel member to rate the candidate, a

letter of interest authored by the candidate, and the 2007 and 2008 evaluations of the candidate. Each packet also contained a spreadsheet containing the amount of leave each candidate used in the previous year as required by the guidelines. The interview panel discussed among themselves the interview process, including which panel member would ask certain questions of the candidates. Each interview lasted approximately 30 minutes, and each candidate was asked the same five questions.

After the interviews were completed, the panel members discussed their recommendations. All three panel members selected Neill. Additionally, the panel unanimously decided not to select Suvada. The panel was not united in their choice for the second officer position. Sutter and Foster selected Davis, while Schoene selected Martin.

Leave Use by the Candidates

During the deliberations, the interview panel discussed the amount of leave used by each candidate.

In 2008, Neill used 434 hours of vacation leave, and 306.5 hours of sick leave. In 2009, Neill used 93 hours of vacation leave as of the time of the interview, and no other leave. The testimony demonstrates that the panel was not concerned with Neill's leave use because his 2008 use fell under the Family Medical Leave Act.

In 2008, Martin used 187 hours of vacation leave, 258.75 hours of compensatory time, 82.5 hours of sick leave, and 18 hours of other leave. In 2009, Martin used 170 hours of vacation leave, 54.48 hours of compensatory time, 6 hours of sick leave, and 14.5 hours of other leave as of the date of the interview.

Martin's 2007 and 2008 evaluations expressed some concern about his leave. For example, Sergeant Steve Neal (Neal), who authored Martin's 2007 evaluation, wrote that Martin "takes advantage of available leave time as permitted by department guidelines" but also noted that Martin's co-workers "ribbed" Martin about his absences. Neal also commented that Martin's "collateral duties" required his absence from the unit. Martin's 2008 evaluation, written by

Sergeant Patrick Johns (Johns), also identified Martin's use of leave as a concern, but also noted that Martin's use of leave as a peer support volunteer and as an Emergency Vehicle Operator (EVOC) instructor added value to the workforce. The record shows that Martin also used vacation or union release time to attend Law Enforcement Officer and Fire Fighter Pension Plan II meetings as a public trustee appointed by the Governor.

In 2008, Davis used 228 hours of vacation leave, 127 hours of sick leave, and 2 hours of compensatory leave. In 2009, Davis used 53.75 hours of vacation leave, 10. 5 hours of sick leave, and 21 hours of bereavement leave. There is no evidence that the panel considered Davis's leave use. However, the record demonstrates that Davis is also an EVOC instructor.

The interview panel had some concern with Martin's attendance. For example, Sutter's interview notes state that Martin was "gone more than average" and that this "may be an issue for a small team." Schoene's notes also indicate Martin's weakness as a candidate was his "extended time off potentially/availability." Foster testified that Martin's leave use was a constant issue in his evaluations, and also testified that Martin's leave use as well as his duties as an EVOC instructor and with Peer Support took time away from his normal patrol duties. However, there is no evidence to indicate that this leave was not approved by management.

Sutter's Statements During the Interview Debrief

Schoene testified that during the interview debriefing, Sutter stated that the most qualified candidate is not always the best "fit" for a position, and that "we're looking for someone that is – supports the Chief's vision and the Chief's direction." Sutter wrote on his rating sheet that Schoene recommended Neill, but did not write a similar comment regarding Schoene's recommendation of Martin.

Sutter's First Meeting with Cook

On the afternoon of June 17, 2009, Sutter met with Cook to discuss the interview process. Sutter explained the strengths and weaknesses of each candidate, as well as the recommendations of each of the panel members. Cook testified that Sutter provided an explanation of all of the application qualifications and certifications. Cook also testified that Sutter provided the reasons

for each panel member's preference. Cook stated that Sutter was concerned about Martin's attendance record, as well as Martin's planned leave, and the impact that this leave might have on a small unit.

Sutter's Meeting With Sergeant Johns

On June 18, 2009, the employer interviewed candidates for the sergeant position in the Motors Unit. The employer informed Johns that he was selected as the sergeant of the Motors Unit.

Sutter, still in his capacity as an interview panel member, spoke with Johns that same day to discuss the candidates for the motors position. Sutter asked Johns who he would recommend for the position. Johns stated that he would recommend Neill and Martin. Johns also stated that Martin's drug recognition training would be beneficial for the Motors Unit.

Johns testified that Sutter mentioned to him that leave had been an issue with Martin. Johns testified that he was not aware of any excessive leave use by Martin, and Johns informed Sutter that he did not envision any conflicts with Martin. Johns testified that even after his conversation with Sutter, he continued to recommend Martin and Neill. Sutter and Foster each testified that after the leave issue was discussed, Johns then recommended Davis over Martin. Cook testified that he was aware that Johns selected Martin over Davis.

Cook's Decision

Cook did not immediately make a selection. Rather, he reviewed the interview notes from each of the panel members. Cook testified that prior to a meeting he had with Sutter and Kistler, he intended to select Davis because Davis did not have the leave issues that Martin had. On June 18, the employer informed Martin that he was not selected.

Schoene testified that he discussed the selection process with Cook. At this meeting, Schoene asked Cook how the decision was made. Schoene testified that Cook drew squares on a piece of paper, assigned votes based upon the recommendations of each of the panel members, and then counted the total votes to determine that Davis should be selected. Although Cook stated that

leave was not a factor in his decision, Schoene testified that during this conversation Cook reiterated his concern about Martin's leave use.

Applicable Legal Standard

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in employer discrimination cases. To prove discrimination, the complainant must first make a *prima facie* case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. The employer deprived the employee of some ascertainable right, benefit, or status; and

3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, a complainant may use circumstantial evidence to establish the *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007).

To prove discriminatory motivation, the complainant must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. Circumstantial evidence consists of proof of facts or circumstances which according to the common experience gives rise to a reasonable inference of the truth of the facts sought to be proved. *See Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

In response to a *prima facie* case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of

proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant to prove either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Application of Standard

The first step in the analysis is to determine if the union established its *prima facie* case of discrimination. The Examiner held that Martin engaged in the protected activity outlined above, that Martin was deprived of a benefit when the employer declined to offer Martin a position with the Motors Unit, and a casual connection existed between Martin's protected activity and the employer's adverse act.

The employer has not specifically challenged the Examiner's conclusion that the union established its *prima facie* case. Therefore, this conclusion stands on appeal. *See Brinnon School District*, Decision 7210-A (PECB, 2001).

The Examiner also concluded that the employer articulated non-discriminatory reasons for making its decision. Specifically, the Examiner found that Cook selected Davis over Martin because Cook "felt [Davis] was going to be there with the team on a more regular basis."

The union has not specifically challenged the Examiner's finding that the employer articulated non-discriminatory reasons for actions. Therefore, this conclusion stands on appeal. *See Brinnon School District.*

Union's Ultimate Burden

The Examiner concluded that the union sustained its ultimate burden of proving the employer had a discriminatory motive for not selecting Martin for the Motors Unit. In reaching her decision, the Examiner found that Sutter improperly considered Martin's union activity and authorized leave for union related matters as factors against his selection. The Examiner also found that statements made by Sutter demonstrated union animus that tainted his recommendation to Cook.

On appeal, the employer challenges the Examiner's conclusions that Sutter's recommendation was tainted by union animus. The employer asserts that no evidence supports a finding that demonstrates the members of the interview panel were aware of Martin's June 15, 2009 union activity when they made their recommendations. The employer also asserts that certain statements made by Sutter about selecting a candidate that shared the "Chief's vision" were not only taken out of context, but the statements themselves represent a sound hiring approach.

The union's cross-appeal argues that the decision failed to consider Martin's superior qualification and failed to find that the employer's decision to not select the employees for the Motors Unit by seniority was a discriminatory decision. The union also claims that the record supports a finding that Foster's recommendation and the chief's ultimate decision were also tainted by union animus.

Turning first to the union's cross-appeal, the Examiner properly declined to enter a finding regarding Martin's qualifications. As the Examiner accurately expressed, this Commission's role is to determine if discrimination occurred under Chapter 41.56 RCW. In this case, it was unnecessary to determine whether Martin's qualifications made him the superior candidate because other evidence supported a conclusion that the employer's decision was discriminatory.

We also disagree with the union that the employer was required to fill the Motors Unit vacancies by seniority. The record supports a finding that when the Motors Unit was initially disbanded in 2008, the members of the unit discussed the possibility of re-creating the Motors Unit by seniority. However, substantial evidence supports the Examiner's conclusion that the employer did not enter into a binding agreement with the union that would require the employer to reform the unit by seniority. Thus, substantial evidence supports the Examiner's conclusion that the employer's existing policies did not require it to fill the Motors Unit by seniority.

Similarly, we agree with the Examiner that the employer's failure to follow its Selection Guideline criteria was not discriminatory. Substantial evidence supports the conclusion that Cook remained the final decision maker and the employer was not required to follow the criteria.

Finally, the union's claim that Foster's recommendation was tainted is not supported by the record. The Examiner declined to find that Foster discriminated against Martin because Foster attempted to be fair in the hiring process. The Examiner reached this conclusion despite the fact that she found that Foster considered Martin's EVOC leave to be a detriment.

The record demonstrates that Davis also accrued EVOC leave, and the Examiner was troubled by the fact that Foster did not give Davis's EVOC leave the same consideration she did to Martin's. The Examiner also noted that Foster was at times elusive in testifying about her knowledge of the union's criticism about her and her promotion. The Examiner did not enter a finding that Foster properly or improperly considered Martin's union leave in her deliberations.

Despite these concerns, the Examiner nevertheless held that although an inference could be made that the union's, and therefore Martin's, statements about Foster's promotion could have impacted her recommendation to Cook, the evidence failed to demonstrate that Foster exhibited union animus.

Substantial evidence supports the Examiner's conclusion that Foster attempted to be fair and that there is no clear indication that Foster's recommendation was based upon union animus. Furthermore, the Examiner's inferences are supported by substantial evidence, and we will not disturb those findings and conclusions in light of the substantial support existing within the record.

Record Supports a Finding that Sutter's Recommendation was Tainted by Animus

The Examiner held that Sutter's recommendation to Cook was tainted by union animus. In reaching this conclusion, the Examiner found Sutter's statements and actions as they related to Martin demonstrated pretext. This pretext included improperly considering Martin's union leave time in his recommendation to Cook and by making negative statements and inferences about Martin's protected activities. We agree.

An employer may not consider an employee's use of union leave when making an employment decision. An employer that does so violates Chapter 41.56 RCW because the employer has

taken into consideration an employee's protected activity when making an adverse employment decision. Here, the evidence supports a finding that Sutter adversely considered *all* of Martin's leave, and no evidence exists demonstrating that Sutter separated Martin's union leave when making his decision.

Furthermore, substantial evidence supports the Examiner's finding and conclusions that Sutter's statements to Schoene about selecting a candidate that supports the "Chief's vision and the Chief's direction" supports a finding of union animus. The record clearly demonstrates that Martin and Cook had an antagonistic relationship in the months leading up to the Motors Unit interview and selection process, and states that relationship was well known to Sutter.

In sum, the totality of the evidence demonstrates that Sutter's decision was tainted by a pattern of union animus. While the employer disagrees with the Examiner's conclusions, and disagrees with the weight given by the Examiner to the evidence as a whole, substantial evidence supports the Examiner's findings and conclusion.

Cook's Decision was Tainted by Animus

The Examiner concluded that Cook did not demonstrate animus in his decision making. In reaching this conclusion, the Examiner found that although Cook provided somewhat different reasons for his decision at different times, he attempted to make a review of the candidates and attempted to formulate a decision free from animus. However, the Examiner also found that Cook's reliance on Sutter's recommendation nevertheless colored the decision making process and therefore the decision to not select Martin was discriminatory.

The employer argues that the employer had a legitimate business reason for not selecting Martin, and also points out that the chief retained final decision making authority of the hiring decision. The union argues that the evidence supports a finding that Cook displayed his own animus in the decision making process. For the following reasons, we affirm the Examiner's findings and conclusion that Cook did not display animus on his own, but clarify that under Chapter 41.56 RCW, a decision maker may be found to have committed a discriminatory act if the decision

maker makes a decision that was influenced by the animus of his subordinate. This holds true even if the decision maker displayed no animus on her or his own part.

In *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (March 11, 2011), the United States Supreme Court held that an employer may be held liable for discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision. The facts presented by *Staub* are illustrative for the case before us.

The plaintiff employee worked at a hospital and was a member of the United States Army Reserves. During the course of his employment, the department head who supervised the plaintiff found the plaintiff's military obligations to be a strain on the department, and the department head was openly hostile to the plaintiff. The hospital placed the plaintiff on a corrective action notice for his attendance approximately two weeks after the plaintiff was called by the military to report to readiness processing in anticipation for a deployment. However, other employees continued to complain about the plaintiff's absence from work.

The hospital directed its Vice President of Human Resources and the plaintiff's department head to formulate a plan to deal with the plaintiff's availability. That plan was never formulated, and the Vice President of Human Resources fired the plaintiff for violating the corrective action notice. The plaintiff sued, and a jury awarded the plaintiff damages pursuant to the Uniformed Service Employment and Reemployment Rights Act (USERRA) under the theory that an employer could be held liable for the discriminatory acts of those who influence a decision. The Seventh Circuit Court of Appeals reversed the decision, and the Supreme Court granted review.

In reaching its conclusion that the hospital discriminated against the plaintiff in violation of the USERRA, the Supreme Court stated that its conclusion was based upon traditional agency and tort principles. The Court found then that the USERRA prohibited employers from taking certain employment actions where the employee's military obligations are the motivating factor in the employer's actions. The Court then held that a motivating factor exists in an employment action even where the decision making official has no discriminatory animus, but is influenced by an action that is the product of a subordinate's animus. According to the Court, the

discriminatory animus of the non-decision maker can be considered the proximate cause of the ultimate employment action and, therefore, of the injury suffered.

Finally, the Supreme Court noted that its holding was not a "hard and fast rule," and that the possibility exists for an employer to conduct an independent investigation free from discriminatory animus to reach the same conclusion.

We find the Supreme Court's reasoning in *Staub* to be sound and appropriate for application to discrimination cases under Washington's labor laws. Thus, where an employment decision is influenced by the union animus of a subordinate or advisor to the decision maker, the decision will be found discriminatory, and a remedial order will be issued unless the respondent can demonstrate that the decision maker independently reached the same conclusion free from union animus.

In cases such as this, a respondent will not be found in violation of Chapter 41.56 RCW if it demonstrates that the decision was made completely free from the recommendation of the subordinates who displayed union animus. However, once a subordinate has made a recommendation to a decision maker that has been tainted by animus, it is not enough for the decision maker to say the decision was made independently. Credible evidence must exist that demonstrates that the decision maker purged from the decision making process the discriminatory recommendation.

Applying these principles to the case before us, the record clearly demonstrates that Cook relied upon the tainted recommendation of Sutter when making his decision. Although Cook testified that he considered selecting Davis over Martin, Schoene testified that Cook stated he simply counted the votes of the members of the interview panel to make his final decision. The Examiner found Schoene's testimony credible. Furthermore, the record demonstrates that Cook reviewed the notes of the interview panel, but did not conduct an independent review of the applicants.

Because Cook relied upon the recommendation of Sutter and failed to conduct an independent review free from union animus, Cook, as the final decision maker, is held liable under Chapter 41.56 RCW.[6] The Examiner's decision is affirmed.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusion of Law, and Order issued by Examiner Charity Atchison are AFFIRMED as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 11th day of April, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

[6] A review of the Examiner's Findings of Fact and Conclusions of Law demonstrates that the Examiner reached a substantially similar conclusion without relying upon the *Staub* decision. Therefore, it is not necessary to amend the underlying Findings of Fact and Conclusions of Law.