STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

YAKIMA POLICE PATROLMANS ASSOCIATION,	)	
Complainant,	)	CASE 14724-U-99-3699
vs.	)	DECISION 7489 - PECB
CITY OF YAKIMA,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	)	

Cline & Associates, by *James M. Cline*, Attorney at Law, for the complainant.

Paul T. McMurray, Assistant City Attorney; and Menke Jackson Beyer Elofson & Ehlis, by *Anthony F. Menke*, Attorney at Law, for the respondent.

On August 4, 1999, Yakima Police Patrolmans Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Yakima (employer) as respondent. A preliminary ruling was issued under WAC 391-45-110 on August 19, 1999, finding a cause of action to exist under RCW 41.56.140(1) on allegations of:

> Employer retaliation against a bargaining unit employee who filed a grievance through the grievance procedure contained in a collective bargaining agreement.

A hearing was conducted on January 25 and 26, 2001, before Examiner Kenneth J. Latsch. The parties submitted post-hearing briefs on April 10, 2001.

Based on the evidence and arguments presented, the Examiner rules that the employer did not commit any unfair labor practice. The complaint is DISMISSED.

BACKGROUND

The City of Yakima provides municipal services through a number of departments. Law enforcement services are provided by the Yakima Police Department. At all times pertinent to these proceedings, Don Blesio served as Chief of Police.

The employer has collective bargaining relationships with several employee organizations. The Yakima Police Patrolmans Association represents a bargaining unit of non-supervisory law enforcement personnel described in the parties' January 1, 1998, through December 31, 2000, collective bargaining agreement as:

> [A]ll full-time regular police officers, including probationary police officers of the Yakima Police Department except those persons appointed to positions above the rank of Sergeant.

Bargaining unit employees perform a number of duties associated with law enforcement, including anti-drug programs. Several bargaining unit employees serve on the City/County Narcotics Unit (CCNU), a joint task force operated in conjunction with Yakima County. Service on the CCNU is considered to be a "high profile" position within the department, and selection for the CCNU is highly valued. CCNU members are assigned unmarked cars that they can take home. Because much of their work involves under cover operations, CCNU members are allowed to wear civilian clothes and to grow their hair longer than specified in department standards.

CCNU members are issued cellular telephones, and are allowed to keep flexible work hours. In addition, CCNU members receive 20 hours of overtime pay each month.[1]

The instant unfair labor practice involves certain actions taken by Officer Gary Garza, who has been a bargaining unit member at all times pertinent to this proceeding. Garza started his employment with the Yakima Police Department in 1988. He initially worked as a patrol officer, but he later took other assignments including membership in the "Street Crime Attack Team" which emphasized crime prevention in the areas of drug abuse, burglary and auto theft. Garza also served as a detective in the department's auto theft division and worked as a narcotics detective for three years. Garza was aware of the CCNU operation, and desired assignment to that unit because of his experience and his belief that CCNU duty would enhance his career opportunities. Garza was assigned to the CCNU at an unspecified time in 1996. Garza testified that he thought that he would stay in the CCNU for five years, because that was the average length of assignment to that unit.

Events leading to this unfair labor practice can be traced to Garza's dealings with a confidential informant. The CCNU routinely relies on such informants in the investigation of drug-related criminal activity. The record indicates that informants can be used to supply specific information about the time and location of drug sales, and informants have been used in some instances to infiltrate specific drug rings to obtain detailed information about the hierarchy of those operations. Informants are often paid for

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[1] The parties contractually agreed to payment of a regular overtime "stipend" to address the irregular work schedule of employees on CCNU assignments. It was determined that employees assigned to CCNU averaged 20 hours of overtime each month, and they were not required to make actual overtime calculations while on CCNU duty.

their information, and CCNU employees are given funds for such payments. CCNU employees are constantly reminded that they must take care in any dealings with informants, not only to guarantee the informant's safety but also to avoid compromising any ongoing investigation.

On January 7, 1999, Garza was involved in the final stages of a successful drug investigation. Garza was supposed to make a $400 payment to an informant. Against that background:

- Garza waited at the CCNU office for the informant to contact him, but then realized he did not have his pager turned on, and that the informant had no other way to contact him. He then turned on his pager at or near the end of his regular work shift.
- Garza took $400 with him as he went off duty, together with a receipt form for the informant to sign.
- Garza drove an unmarked CCNU vehicle to a local bar, and locked his weapon in the vehicle before entering the bar and ordering a beer.
- The informant paged Garza while he was in the bar. Garza telephoned the informant and told him to come to the bar for the expected payment.
- The informant arrived at the appointed time, and talked with Garza. The payment was made.
- Before the meeting between Garza and the informant was concluded, an altercation ensued. Several bar patrons, including at least one who knew the informant, approached Garza. The situation escalated, and the bar patrons soon surrounded Garza and the informant. Several of the patrons asked Garza if he was a "narc" or a police officer.

- Garza asked the bartender to call for the assistance of Yakima County Sheriff Deputies.[2]

- The informant left the bar, but Garza was still involved in the confrontation. Garza revealed his identity as a police officer, and waited until the sheriff deputies arrived.

At some time shortly after the altercation, Garza informed Sergeant Greg Copeland, who was the CCNU supervisor when this unfair labor practice arose, about the situation.[3]

On January 8, 1999, Sergeant Copeland gave Garza an internal affairs "response request" detailing events at the bar. Copeland told Garza that he was being investigated because of the incident, and that he could be suspended. Garza asked to have a union representative present during any interviews and Copeland agreed that such representation would be appropriate.

Garza complied with Copeland's request for a report on the bar incident. When he turned in that report on January 8, 1999, Captain Jeff Schneider, commander of the department's detective division which included the CCNU unit, informed him that he would be placed on administrative leave during the pendency of the investigation. Garza agreed to have a pre-disciplinary interview conducted the same day.[4]

The investigation conference was conducted later in the day on January 8, 1999, with Garza, Copeland, Schneider, and Detective

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[2] The bar was located outside of the Yakima city limits, and so was in the sheriff department's jurisdiction.

[3] The record does not reveal whether any arrests were made as a result of the altercation at the bar.

[4] Under terms of the department's internal investigation policy, Garza could have asked that the interview take place two days later, but he wanted to proceed immediately.

Ruegsegger in attendance. Ruegsegger attended at Garza's request as a union representative. No specific level of discipline was discussed during the interview, and it appears that the interview was being conducted as a "factfinding" exercise. After the close of the interview, Garza was sent home on administrative leave.

On January 11, 1999, Copeland prepared a "supervisory review/ recommendation" as part of the department's investigation. Copeland commented that:

> While this is a serious offense and is being treated as such, Officer Garza's work history is such that it does not require his removal from the unit. Recommend 10 day suspension, 5 without pay.

Schneider agreed with Copeland's assessment of the situation, and commented that he could not find any "evil intent" in Garza's actions. As a routine matter, the investigation was referred to Chief Blesio, who also concurred with the ten day suspension.

A "Notice of Pre-Disciplinary Hearing and Anticipated Disciplinary Action" was prepared on January 11, 1999, containing a section titled "Anticipated Disciplinary Action," which stated:

> Officers assigned to the City/County Narcotics unit work independently and with little direct supervision. It is expected of them that they will know and adhere to the rules and regulation regarding their specialized work environment.
>
> Many of these specialized rules are designed to prevent injuries to officers, informants, and the general public. These rules also protect the officer from complaints from informants and other[s] you must deal with, by limiting your contact with them to a controlled environment.

> Your failure to follow the above-prescribed rules could have easily resulted in the injury or death of you or some other person. Additionally there can be no justification for drinking and then operating a Department vehicle.
>
> Bearing the above in mind it is anticipated you be suspended from duty without pay for a period of five (5) days (40 hours). Additionally you will lose five (5) days (40 hours) of accrued vacation, holiday or compensatory leave.

Garza received that document on January 13, 1999, at a meeting with Captain Schneider. Garza testified that Schneider acknowledged that Garza was at least "still in the unit," which Garza took to mean that he would still be assigned to the CCNU after the suspension was served.

The department's discipline procedure entitled Garza to a period of notice prior to a disciplinary hearing, but Garza waived that waiting period and the discipline proceeding was scheduled for January 14, 1999.[5] Prior to that hearing, Garza met with union representatives, who counseled him that he should admit that he made a mistake and that he should ask Chief Blesio for forgiveness. Garza considered this advice, but decided that he could not ask to be forgiven because he did not believe that he had violated any departmental policy.

The disciplinary hearing took place at approximately 8:00 AM on January 14, 1999, with Chief Blesio and Captain Schneider in attendance for the employer. Garza was accompanied by a union representative, Officer Lloyd George. During the course of that meeting, Garza spoke with Blesio about the situation and the

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[5] Garza's waiver of the waiting period has no effect on the allegations set forth in this matter.

severity of the proposed discipline. Garza did not admit any wrongdoing, and he told Blesio that his actions were within normal CCNU procedures. Blesio responded to Garza by discussing the advantages of CCNU membership.

Garza was called to Schneider's office at approximately 1:00 PM on January 14, 1999, and presented himself accompanied by Lloyd George as a union representative. Schneider handed Garza a document dated January 14, 1999, and titled "Notice of Disciplinary Action and Right to Appeal." That document specified, in pertinent part:

> Officers assigned to the City/County Narcotics unit work independently and with little direct supervision. It is expected of them that they will know and adhere to the rules and regulation regarding their specialized work environment.
>
> Many of these specialized rules are designed to prevent injuries to officers, informants, and the general public. These rules also protect the officer from complaints from informants and other[s] you must deal with, by limiting your contact with them to a controlled environment.
>
> Your failure to follow the above-prescribed rules could have easily resulted in the injury or death of you or some other person. Additionally there can be no justification for drinking and then operating a Department vehicle.
>
> Bearing the above in mind you will be suspended from duty without pay for a period of three (3) days (24 hours). Additionally you will lose five (5) days (40 hours) of accrued vacation, holiday or compensatory leave.

Garza testified that he was surprised at the severity of the discipline, and he decided to appeal.

On February 5, 1999, Garza sent Blesio a grievance concerning the discipline. In the grievance letter, Garza set forth a number of "mitigating" factors that he wanted the chief to consider, including a concern about the financial impact of the proposed discipline. He wrote:

> I have three boys to raise. My wife doesn't work outside of the home. Taking $600 to $700 from my check is not fair. Every month, I perform many, many hours of overtime beyond the 20 hour cap. To take money out of my check after all I have given the unit and the City, without being paid, is a very substantial stress on my family.

Garza went on to state that he could accept a verbal or written reprimand for the incident, but further discipline would be inappropriate because of his good work record and his belief that he had not violated any departmental rules.

Blesio sent a letter to Garza on February 12, 1999, responding to the contentions made in the grievance. After reaffirming the need for discipline, Blesio concluded his response in the following terms:

> I have read your recommendations and take notice of your history of good evaluations by your supervisors, and that no disciplinary action has been taken against you. For these reasons I am willing to mitigate the disciplinary action taken against you. I do believe, however, that as the senior investigator in the unit you set the example for others to follow. Your failure to know and follow departmental rules and regulations, and your failure to acknowledge rules violations leaves me little choice other than to take some measure of disciplinary action more severe than a written reprimand. Officers assigned to the City/County Narcotics Unit work inde-

> pendently with little direct supervision. They must know and obey the specialized rules they work under. Therefore, I will amend the action taken against you as follows:
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> 1. Your suspension from duty without pay will be fully restored, and removed from your record.
> 2. Your loss of accrued time will be fully restored, and removed from your record.
> 3. Effective 2/22/99 you will be transferred from the City/County Narcotics Unit to the Patrol Division.

Garza sent a letter to City Manager Richard Zais on February 17, 1999, protesting Blesio's disciplinary action. Specifically, Garza alleged that Blesio's decision to remove him from the CCNU amounted to retaliation for filing the original grievance.

Following terms of the grievance procedure, a "grievance review board" was convened on February 26, 1999, to review the original transfer from the CCNU, and to make recommendations about the appropriateness of the proposed discipline.

On March 12, 1999, while the original grievance was still in process, Garza filed a second grievance, claiming that his transfer from the CCNU was retaliation for filing the original grievance.

On March 17, 1999, Chief Blesio sent a letter to Garza, responding to the grievances by taking issue with Garza's depiction of events. The chief noted that Garza's "retaliation" claim was already on record with the February 17 letter to the city manager. Blesio explained his actions in the following terms:

> First, my decision to remove you from CCNU represents a modification of a previous disciplinary action in response to a grievance that

> you filed. It was not retaliation. In fact, as a result of my decision to modify the disciplinary action, five (5) days of accrued vacation, holiday and/or compensatory time was restored and a three (3) day suspension without pay was deleted and the pay restored to you. That does not sound like retaliation to me. However, your failure to acknowledge the rule violations you committed left me little choice but to remove you from CCNU. IF you do not acknowledge these problems, then what expectation can there be that you will not commit similar violations in the future?

Garza sent another letter to Zais on March 25, 1999, expressing dissatisfaction with Blesio's response, and asking that the two grievances be consolidated for further processing.

The grievance committee met to investigate Garza's grievances on April 15, 1999, and that committee issued its recommendations to Zais on April 23, 1999. The committee agreed that Garza should be transferred out of the CCNU, that a written reprimand should be placed in Garza's file concerning the incident at the bar, and that the other allegations concerning the operation of a city vehicle while under the influence of alcohol should be dropped.

Zais sent a letter to Garza on May 10, 1999, in which he expressed support for the committee's findings.

On May 25, 1999, the union informed Zais that it desired to proceed to final and binding grievance arbitration. An arbitration hearing was conducted on February 24 and 25, 2000, before Arbitrator Gary L. Axon. Arbitrator Axon issued his arbitration award on June 2, 2000, wherein he ruled that the employer did not have just cause to issue a written reprimand to Garza and did not have just cause to transfer Garza from the CCNU. The arbitrator ruled, however, that the employer was not required to reinstate Garza to the CCNU.

Instead, the arbitrator directed the employer to change the record to list Garza's transfer as an "operational matter" rather than a disciplinary action.

POSITIONS OF THE PARTIES

The union contends that the employer committed an unfair labor practice by transferring Garza out of the CCNU. The union maintains that this transfer was a retaliatory measure after Garza filed a grievance under the parties's collective bargaining agreement. The union maintains that the employer's actions amounted to discrimination against and interference with protected rights. Noting that interference allegations do not require proof of intent, the union contends that at least an "interference" violation can be sustained in this case based upon the reasonable perception of the affected employee that the employer's action was taken in a retaliatory manner. As a remedy, the union asks that the discipline be removed from Garza's record, that he be returned to the CCNU, that he be made whole for any losses that were incurred as a result of the employer's illegal actions, and that the employer be required to post appropriate notices.

The employer argues that it did not commit any unfair labor practices in the instant matter. The employer maintains that the underlying issues raised in the instant unfair labor practice complaint were disposed of in the arbitrator's award. In addition, the employer argues that it did not act with retaliatory or discriminatory intent in this matter. The employer contends that Blesio's modification of the discipline was actually to Garza's benefit, and that Garza did not suffer any loss. The employer asks that the complaint be dismissed.

DISCUSSION

The Public Employees Collective Bargaining Act, Chapter 41.56 RCW, sets forth the rights and obligations of public employers and exclusive bargaining representatives in their collective bargaining relationship. Of interest to these proceedings, RCW 41.56.140 specifies that a public employer can violate the act in the following terms:

> It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; . . .

The Legislature gave the Public Employment Relations Commission authority to prevent unfair labor practices in RCW 41.56.160, stating in pertinent part:

> (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission. *This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.*

RCW 41.56.160 (emphasis added).

In applying the Commission's remedial authority to the fact situation presented by Garza, three distinct areas of inquiry must be examined:

1. What is the effect of Arbitrator Axon's award on the instant unfair labor practice complaint?

2. Did the employer employer discriminate against Garza because he filed a grievance under the collective bargaining agreement?

3. Did the employer interfere with Garza's collective bargaining rights even if it is not guilty of discrimination?

Effect of the Arbitration Award

The employer is asking that the Commission defer to the arbitrator's award, but the Examiner is not persuaded that this case can be deferred to arbitration.

Early in its history, the Commission ruled that deferral to arbitration is a matter of policy (rather than a matter of law), and that agreements between parties cannot restrict the jurisdiction of the Commission. *City of Seattle*, Decision 809-A (PECB, 1980). The Commission reviewed and restated its policies on deferral to arbitration in *City of Yakima*, Decision 3564-A (PECB, 1991), where the type of case appropriate for deferral was narrowly defined:

> This Commission has taken a conservative approach, limiting "deferral" to situations where an employer's conduct at issue in a "*unilateral change*" case is arguably protected or prohibited by an existing collective bargaining agreement. . . . The goal of "deferral" in such cases is to obtain an arbitrator's interpretation of the labor agreement, to assist this Commission in evaluating a "waiver by contract" defense which has been or may be asserted in the unfair labor practice case.

(emphasis added).

Thus, deferral is only appropriate in "unilateral change" unfair labor practice cases, where the legislative policy favoring arbitration set forth in RCW 41.58.020(4) can be implemented by leaving interpretation of the contract to an arbitrator.[6]

In *City of Yakima*, the Commission stated that deferral is not a method by which respondents can avoid determinations as to whether they committed an unfair labor practice. As a discretionary (rather than mandatory) policy, deferral is ordered only where it can be anticipated that the delay in processing of an unfair labor practice case will yield an answer to the question that is of interest to the Commission in resolving the unfair labor practice case. In addition, the Commission has the authority to refuse to defer to arbitration any unfair labor practice case, and may interpret any collective bargaining agreement to the extent necessary to decide a pending unfair labor practice case. *See City of Wenatchee,* Decision 6517-A (PECB, 1999).

After the deferral policy set forth in *City of Yakima* stood without change for several years, and was cited in numerous cases, the Commission codified that policy in WAC 391-45-110, as follows:

> WAC 391-45-110 DEFICIENCY NOTICE--PRELIMINARY RULING--DEFERRAL TO ARBITRATION. The executive director or a designated staff member shall determine whether the facts alleged in the complaint may constitute an unfair labor practice within the meaning of the applicable statute.
> . . .

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[6] The Commission outlined the following further preconditions for "deferral" in *City of Yakima*: (1) The existence of a contract; (2) an agreement to accept an arbitration award as "final and binding"; and (3) no dispute between the parties concerning arbitrability.

> (3) The agency may defer the processing of allegations which state a cause of action . . . pending the outcome of related contractual dispute resolution procedures, but shall retain jurisdiction over those allegations.
>
> (a) Deferral to arbitration may be ordered where:
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> (i) Employer conduct alleged to constitute an unlawful unilateral change of employee wages, hours or working conditions is arguably protected or prohibited by a collective bargaining agreement in effect between the parties at the time of the alleged unilateral change;
>
> (ii) The parties' collective bargaining agreement provides for final and binding arbitration of grievances concerning its interpretation or application; and
>
> (iii) There are no procedural impediments to a determination on the merits of the contractual issue through proceedings under the contractual dispute resolution procedure.
>
> (b) Processing of the unfair labor practice allegation under this chapter shall be resumed following issuance of an arbitration award or resolution of the grievance, and the contract interpretation made in the contractual proceedings shall be considered binding, except where:
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> (i) The contractual procedures were not conducted in a fair and orderly manner; or
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> (ii) The contractual procedures have reached a result which is repugnant to the purposes and policies of the applicable collective bargaining statute.

Allegations concerning discrimination for union activities are not deferrable. It follows that an arbitration award addressing such issues cannot displace unfair labor practice proceedings on a complaint alleging that an employer has acted in a retaliatory manner.

In this case, Arbitrator Axon issued an award concerning Garza's original grievance. In that award, the arbitrator made some statements about the employer's motivation for certain acts, and

questioned whether the employer was disciplining Garza out of a retaliatory intent, but the arbitrator's authority to issue that award still arose exclusively from the terms of the collective bargaining agreement. The arbitrator did not have authority, either express or implied, to interpret the collective bargaining statute, Chapter 41.56 RCW, as part of the arbitration award.

Allegations of Discrimination

Examination of discrimination allegations under RCW 41.56.140(1) is made under the standard first enunciated by the Commission in *Educational Service District 114*, Decision 4631-A (PECB, 1994), and reiterated in subsequent decisions such as: *City of Federal Way*, Decision 4088-B (PECB, 1994); *City of Mill Creek*, Decision 569 (PECB, 1996); *North Valley Hospital*, Decision 5809-A (PECB, 1997); *City of Port Townsend*, Decision 6433-A (PECB, 1999). That standard is based on decisions of the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991).

Under that standard, a complainant must make a prima facie case showing: (1) the exercise of a statutorily protected right, or communicating an intent to do so; (2) discriminatory deprivation of some ascertainable right, status or benefit; and (3) a causal connection between the exercise of the legal right and the discriminatory action. Once a complainant establishes a prima facie case, the respondent has the opportunity to articulate legitimate, non-retaliatory reasons for its actions. The complainant retains the burden of proof at all times, but may respond to a defense by showing either: The reason(s) given is(are) pretextual, or although some or all of the stated reason is legitimate, the employee's pursuit of a protected right was nevertheless a substantial factor motivating the disputed action.

Application of Precedent - The Prima Facie Case

The Examiner finds the evidence presented insufficient to prove a prima facie case of discrimination.

Protected Activity and Employer Knowledge -
In this case, there is no doubt that Garza was engaged in a statutorily protected activity when he filed grievances under the parties' collective bargaining agreement. The employer was well aware of Garza's actions, and the record demonstrates that employer officials acknowledged the existence of the grievance and its progress through the grievance procedure.

Discriminatory Deprivation -
The complainant appears to have assumed, more than to have proven, that Garza was discriminated against. Garza was originally to have been deprived of pay for five days, but the chief reduced that to a three-day suspension and then eliminated that suspension altogether. Where Garza was originally to have been deprived of leave or compensatory time for five days, the chief eventually eliminated that discipline. Where a subordinate official recommended a suspension instead of a change of Garza's assignment, the chief eventually changed Garza's assignment within the bargaining unit. Garza kept his job with the department, and impliedly kept his rank and rate of pay. Although the record indicates some overtime associated with the CCNU assignment, the record does not support an inference that patrol assignments are without potential for overtime work.[7] Any deprivation was thin, at best.

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[7] Although the Examiner cannot defer to the arbitrator on the question of whether there was unlawful discrimination, it is noteworthy that the arbitrator ultimately allowed the assignment change as "operational" under the applicable contract.

Causal Connection -

While it is clear that the employer modified the discipline from that which it originally announced, the complainant has not proven that the modification was motivated by a discriminatory intent.

It must be remembered that the parties strongly disagreed over the propriety of Garza's conduct with the informant. Garza testified that CCNU employees commonly go to bars and even consume alcoholic beverages while on duty, in order to maintain their "cover" during investigations. Garza acknowledged that CCNU employees were warned to use discretion in the consumption of alcohol, but testified that they were never told to avoid bars or taverns. Copeland and Schneider both testified that CCNU employees were repeatedly cautioned that they should not meet with informants in public settings, and they further testified that CCNU members were not to consume alcoholic beverages while on duty, even if their work took them into bars. The record clearly shows that police management officials believed that some level of discipline was necessary.

When confronted with Garza's arguments concerning the economic loss associated with a suspension, the chief was willing to reconsider the discipline to be imposed. Indeed, the record clearly demonstrates that Garza's transfer came about after Garza successfully complained about the economics of a suspension without yielding on the impropriety of his actions at the bar. While the chief agreed that Garza should not suffer an economic loss, he never yielded on the impropriety of Garza's actions. It is difficult to believe that Blesio had any discriminatory intent, since he modified the recommendations of a sergeant and captain in responding positively to Garza's concerns about the economic impact of a suspension.

Given the circumstances presented in this case, it is clear that Blesio's decision to transfer Garza back to patrol duties arose

from a concern about Garza's ability to work on the narcotics unit. The record demonstrates that Garza had identified himself as a police officer during the altercation in the bar, so that his "cover was blown" with at least some members of the public that the CCNU employees were to investigate in plain clothes. The union has not supplied sufficient evidence for the Examiner to conclude a causal connection between Garza's grievance and Blesio's decision to transfer Garza from the CCNU.

Allegations of Interference

An interference violation will be found under RCW 41.56.140(1), where an employee reasonably perceives actions to be a threat of reprisal or force or promise of benefit associated with the exercise of protected activity, regardless of whether the employer intended such a threat or promise. *City of Tacoma*, Decision 6793 (PECB, 1999), and cases cited therein; *City of Mill Creek*, *supra*, and cases cited therein. As noted in *Tacoma*, the legal determination of interference is based not upon the reaction of the particular employee involved, but rather on whether a typical employee in a similar circumstance reasonably could perceive the actions as attempts to discourage protected activity.

In this case, Garza was involved in a very difficult and emotional situation. He was concerned that his credibility as a narcotics officer was being challenged, and he steadfastly refused to acknowledge that he had violated department policies. Garza characterized his transfer from the narcotics task force as a form of retaliation, but the record is clear that the employer made a good faith effort to reduce its original level of discipline and to use Garza where his skills were best suited. While Garza may not agree with the employer's decision to transfer him, the evidence does not support a conclusion that a reasonable employee would

perceive the employer's actions as associated with Garza's pursuit of protected activity. The "interference" allegation is dismissed.

FINDINGS OF FACT

1. The City of Yakima is a municipal corporation providing a number of services to local residents and is a "public employer" within the meaning of RCW 41.56.030(1).

2. The Yakima Police Patrolmans Association, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of non-supervisory uniformed law enforcement personnel employed by the City of Yakima.

3. Among other law enforcement activities, the City of Yakima participates in a county-wide anti-drug program known as the City/County Narcotics Unit(CCNU). Assignment to the CCNU is sought after and is considered to be a "high profile" position within the bargaining unit represented by the union. Employees assigned to the CCNU drive unmarked cars, wear civilian clothes, wear their hair longer than is permitted for other employees, and keep irregular work hours in their "undercover" anti-drug assignments.

4. Bargaining unit member Gary Garza was assigned to the CCNU in 1996. Garza previously served as a patrol officer.

5. On January 7, 1999, Garza met with an informant to complete a financial transaction arising from the completion of a narcotics investigation. Garza used an employer-owned vehicle

to drive to the meeting place, in a local bar, and consumed an alcoholic beverage while meeting with the informant.

6. During the course of the meeting described in paragraph 6 of these findings of fact, a bar patron recognized the informant and several bar patrons approached Garza and the informant. A confrontation ensued. Garza identified himself as a police officer, and asked the bartender to call for police assistance. Garza submitted a report concerning the incident to the employer.

7. The supervisor of the CCNU unit, Sergeant Greg Copeland, and the commander of the detective division, Captain Jeff Schneider, both expressed concern about Garza's consumption of alcohol on duty, as well as concern about his decision to meet a confidential informant in a public setting.

8. On January 8, 1999, Copeland informed Garza that he was being investigated because of the bar incident. Captain Schneider told Garza that he would be placed on administrative leave while the investigation went forward. Garza waived the time limits for the investigation, and asked that the initial investigatory interview be conducted that day.

9. On January 11, 1999, Copeland prepared a report stating that the matter was serious, and recommended a 10 day suspension, five days of which were to be uncompensated.

10. Schneider agreed with Copeland's recommendation, and the matter was routinely referred to Police Chief Don Blesio.

11. A "pre-disciplinary hearing" was conducted on January 13, 1999. In the notice of the hearing, the employer set forth its "anticipated disciplinary action" as follows:

> Bearing the above in mind it is anticipated you be suspended from duty without pay for a period of five (5) days (40 hours). Additionally you will lose five (5) days (40 hours) of accrued vacation, holiday or compensatory leave.

12. The disciplinary hearing took place on January 14, 1999. During the course of that hearing, Garza spoke about the severity of the proposed discipline. Several hours after the hearing concluded, Garza was given a copy of a document specifying a level of discipline less severe than originally recommended, as follows:

> Bearing the above in mind you will be suspended from duty without pay for a period of three (3) days (24 hours). Additionally you will lose five (5) days (40 hours) of accrued vacation, holiday or compensatory leave.

13. On February 5, 1999, Garza filed a grievance under the collective bargaining agreement, protesting the suspension imposed on January 14, 1999. Attached to the grievance, Garza submitted a number of "mitigating" factors that he wanted Blesio to take into account. Garza went on to suggest that he could accept a verbal or written reprimand but could not accept any other form of discipline without appeal.

14. On February 12, 1999, Blesio sent a letter to Garza in response to the grievance and letter. Blesio stated his willingness to mitigate the discipline, but not to the level of a verbal or written reprimand. Blesio informed Garza that:

> Your suspension from duty without pay will be fully restored, and removed from your record. Your loss of accrued time will be fully restored, and removed from your record. Effective 2/22/99 you will be transferred from the City/County Narcotics Unit to the Patrol Division.

15. Garza protested Blesio's disciplinary decision in a letter sent to City Manager Richard Zais on February 17, 1999. The matter proceeded through the contractual grievance procedure.

16. On March 12, 1999, Garza filed a second grievance contending that Blesio violated the contract by modifying the level of discipline imposed in the original grievance.

17. The union filed the instant unfair labor practice complaint on August 4, 1999.

18. The two grievances were consolidated for further processing. An arbitration hearing was conducted on February 24 and 25, 2000. The arbitrator issued his award on June 2, 2000, ruling that the employer did not have just cause to transfer Garza from the CCNU, but was not required by contract to return Garza to the CCNU.

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 events described in paragraphs 14 through 18 of the foregoing findings of fact, the City of Yakima did not discriminate against Gary Garza because Garza's pursuit of

statutorily protected activities, so that no "discrimination" unfair labor practice has been established under RCW 41.56.140(1).

3. By events described in paragraphs 14 through 18 of the foregoing findings of fact, the City of Yakima did not interfere with, restrain, or coerce Gary Garza in the exercise of his statutory collective bargaining rights, so that no "interference" unfair labor practice has been established under RCW 41.56.140(1).

ORDER

Based on the foregoing and the record as a whole, the complaint charging unfair labor practices filed in the above-captioned matter is hereby DISMISSED.

DATED at Olympia, Washington, this 5th day of September, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

KENNETH J. LATSCH, 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.