STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUYALLUP POLICE OFFICERS ASSOCIATION,	)	CASE 14544-U-99-3632
	)	DECISION 7490 - PECB
Complainant,	)	
	)	CASE 14973-U-00-3779
vs.	)	DECISION 7491 - PECB
	)	
CITY OF PUYALLUP,	)	
	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW
	)	AND ORDER
	)	

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

Mills Meyers Swartling, by *Gretchen Graham Salazar*, Attorney at Law, for the employer.

On April 23, 1999, the Puyallup Police Officers Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Puyallup (employer) as respondent. A preliminary ruling was issued May 24, 1999, finding a cause of action to exist on allegations summarized as follows:

> Interference by the employer with an employee's *Loudermill* rights, by not allowing the employee to have an association representative present during the pre-disciplinary hearing, but instead insisting that only a fellow employee could be present.

The employer filed its answer to that complaint on June 11, 1999. Included in that answer was an assertion that:

> *Loudermill* rights are addressed in the collective bargaining agreement existing between the City and the Union. Claimed contract violations must be pursued through grievance and arbitration processes provided for in the contract and should not be brought before the Public Employee [sic] Relations Commission.

The case was then referred back to the Executive Director for reconsideration of the preliminary ruling. On August 9, 1999, an amended preliminary ruling was issued finding a cause of action for:

> Interference with the employees' right to representation under Chapter 41.56 RCW, by denying the employee's request to have an association representative present during the proceedings and insisting that only a fellow employee could be present.

On December 22, 1999, the union proposed an amendment to the complaint. The motion for amendment was denied, and the allegations were processed separately as Case 14973-U-00-3779. A preliminary ruling was issued, finding a cause of action to exist on allegations summarized as:

> Employer refusal to bargain, in violation of RCW 41.56.140(4) and (1), by failing or refusing to provide information requested by the union in connection with an arbitration proceeding.

The processing of both cases was then suspended, while the parties pursued certain related issues through grievance arbitration.

The Commission was supplied a copy of the arbitration award on August 30, 2000. That award was not dispositive of the allegations in the unfair labor practice complaints. A consolidated hearing

was held February 8, 2001, in Puyallup, Washington. The parties stipulated to a bifurcated process, to first determine if there was any statutory violation, and to determine any appropriate remedy later, if necessary. The parties filed briefs, the last of which was received on April 13, 2001.

The Examiner rules that the employer did not commit an unfair labor practice under the applicable state law by refusing to let Julio Garay have a union representative at a due process hearing conducted under the federal constitution, and that the employer did not commit an unfair labor practice in regard to the manner in which it provided information to the union during the processing of a related grievance.

BACKGROUND

Julio Garay was hired by the Puyallup Police Department in 1992, as a police officer. His position was within a bargaining unit represented by the union.

During his employment, Garay was the subject of certain internal affairs investigations into alleged misconduct and/or violations of departmental policy. Garay received discipline ranging from oral reprimands in 1993 and 1994, to a written reprimand in 1995, to a 12-hour suspension in 1996. His performance evaluations for 1996 and 1997 also contained less-than-satisfactory ratings in two of four areas.

In October 1998, Garay filed a Claim for Damages with the employer, alleging that he had been discriminated against by fellow employees because of his race.

Garay received another less-than-satisfactory performance appraisal for 1998. Thereafter, on December 8, 1998, then-Chief Lockheed Reader called a meeting with Garay to discuss the department's expectations regarding his work performance. When that meeting was held, Officer Lloyd Leppell attended as Garay's chosen union representative; attending on behalf of the employer were Reader, Rodger Cool (who was the patrol commander at the time, and is now the chief of police), Sergeant Dan Fralick (Garay's supervisor at the time), and Sergeant Brian Buchanan (who would become Garay's supervisor beginning January 1, 1999). During that meeting, Reader directed Garay's supervisors to meet with Garay on the last day of Garay's next six work cycles, and to report on Garay's progress and compliance with expectations via "Coaching and Counseling" forms. The entire group was to meet again in early February, to review Garay's performance.

Over the course of the next several weeks, Garay's supervisors reported occurrences demonstrating Garay's failure to comply with department expectations. For example:

- On December 15, 1998, Garay reported to work without his pager. He stated that he "left his pager at home that day." This was a violation of Reader's order that Garay "be at [his] shift briefings at 15 minutes before 6:00, properly attired, equipped and ready to respond."

- On December 17, 1998, Garay's flashlight failed while he was leading a late-night building search for a reported prowler. Garay's failure to have working batteries in the flashlight resulted in a safety risk to himself and the other officers conducting the search.

- On December 24, 1998, Garay failed to acknowledge or respond to calls on his portable police radio. He told his supervisor

that his radio batteries had just "died." Garay's failure to maintain the radio batteries again resulted in a safety risk to himself and others.

- On December 30, 1998, Garay's supervisor received a telephone call advising that Garay had not paid for the department photograph he had purchased. This was a direct violation of Reader's order that Garay "meet [his] financial obligations and agreements."

- On January 15, 1999, the employer received two writs of garnishment for Garay. These were in addition to garnishments previously served on the employer, and were violations of the order that Garay meet his financial obligations.

When Garay was notified of the latest garnishments on January 17, 1999, he stated that "he was too stressed to continue working." He left work and did not return.

On January 27, 1999, Commander Cool received a telephone call from a psychologist, Dr. Melissa Dannelet, who reported a statement made by Garay during a counseling session the previous evening, to the effect that Garay might kill his supervisor. Garay was quoted as having told the psychologist that he was checking in with her in case he shot someone, so that it would be on record. Dannelet advised Cool that she was bound by law to inform the employer of the threat. Cool asked Dannelet if she could provide him with more specific information about the threat, but Dannelet declined to do so, citing doctor-patient confidentiality. When Cool asked if she thought the threat was real, the psychologist responded that she took it seriously and believed the employer should, too. The employer took the reported threat seriously, and immediately notified Garay's past and present supervisors as well as other employees of the police department.

Over the course of the next two weeks, Reader determined that Garay should be discharged, based upon his poor work performance, his failure to meet his financial obligations, and the threat to his supervisor. On February 9, 1999, Reader gave Garay written notice of the preliminary decision to discharge him. Grounds listed in that pre-termination letter were: Garay's continued failure to comply with the department's financial responsibility policy, as illustrated by the most recent garnishments and the call concerning the unpaid bill; Garay's continued failure to show job competency and sound judgment, as illustrated by Garay's missing service calls and failing to maintain equipment; and Garay's threat to kill his supervisor.

The pre-termination letter advised Garay that he could "submit any explanation, either written or oral, about the [listed] violations and mitigation" prior to the proposed termination.[1] He asked that a meeting be held for that purpose on February 17, 1999. Garay asked that the meeting be postponed to February 19, 1999, and Reader agreed.

Prior to the scheduled pre-termination meeting, the union advised Reader that it wanted its attorney, James Cline, to attend with Garay. Reader denied that request, but stated that Garay could bring a fellow employee as a representative, if he desired.

Garay decided not to attend the pre-termination conference. Instead, he submitted a written explanation of mitigating factors.

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[1] This exercise is understood to have been offered by the employer under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in which the Supreme Court of the United States ruled that the due process rights of public employees under the federal constitution include a hearing prior to termination of their employment.

The union's attorney, Cline, also submitted a letter for Reader's consideration. Reader reviewed these letters and re-interviewed Cool, Fralick, and Buchanan about the statements in Garay's letter. Reader concluded that the statements in Garay's letter were not supported by the evidence.

Reader discharged Garay effective February 19, 1999. The union filed a grievance concerning Garay's discharge. Under Step 1 of the grievance procedure, the union was required to "outline the facts upon which the grievance is based" and "reference the section(s) of the Agreement allegedly violated." Thus, in its Step 1 letter the union wrote:

> The grievance is based on the belief that the termination as presented and supported does not reach the level of "Just Cause" for the termination of a police officer's career. In addition we also believe that there were procedural violations of Appendix "B," Officer Bill of Rights when Officer Garay was denied the right to have our attorney with him at the Loudermill hearing. A second violation of Appendix "B" is the failure to produce investigative materials requested.

In subsequent correspondence, the union wrote "In order to clarify the issues being grieved in the termination of Officer Julio Garay, I want to point out that Management Rights, Article 20, section 20.1 is the area that covers 'Just Cause' discharges . . ."

The grievance was processed to arbitration before Arbitrator Gary Axon. The arbitration hearing was scheduled for December 14 and 15, 1999.

On November 3, 1999, the union submitted a request to the employer for documents, as follows: (1) All of Garay's personnel files; (2)

all disciplinary files or internal affairs files concerning Garay; (3) all records of disciplinary actions involving Puyallup police officers for the past 10 years; and (4) the Employee Assistance Program (EAP) policies and rules. The employer produced all of the documents requested in items (1), (2), and (4). The employer promptly responded with some documents, but it objected that the union's request for "all records of disciplinary actions involving Puyallup police officers for the past 10 years" was overly broad.

On November 24, 1999, the union submitted another request for documents, this time requesting: (1) Any and all garnishments filed against Officer Garay; and (2) any and all paperwork associated with Officer Garay's discrimination complaint from 1998, including the employer's investigation and the investigatory conclusion.[2] The employer produced the garnishment documents, as requested by the union on November 24, 1999. With respect to the union's request for paperwork associated with Garay's discrimination claim, the employer explained that two different investigations were conducted:

One was conducted by and through the employer's outside legal counsel, for the purpose of assessing the employer's potential legal liability. The employer declined to produce the documents relating to that investigation, asserting that they constituted attorney work product and were protected through the attorney-client privilege.

The other was conducted by Sergeant Larry Miller of the Auburn Police Department, for the purpose of determining whether any of

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[2] There was no allegation in either of the union's grievance letters, or in the letters from Garay and Cline to Reader, that Garay's discharge was discriminatory or in retaliation for his having complained of racial discrimination. Further, there was no reference in the grievance documents to Article 26 of the collective bargaining agreement, which addresses "discrimination."

the alleged conduct violated department policies. The employer produced the requested documents concerning that investigation, including Miller's chronological investigative notes which documented each step of his investigation, the witnesses he interviewed, the information he obtained from witnesses, and a list of documents obtained.[3] The employer also produced Reader's letter setting forth his findings and conclusions concerning the investigation conducted by Miller,[4] along with the employer's letter denying Garay's claim for damages.

Upon receiving those documents, the union made no further attempt to obtain additional information or documents in response to its November 24, 1999, request.

The union's last request for documents was made on November 30, 1999. At that time, the union requested a copy of the department's Policy and Procedure Manual and any additional EAP documents the employer might have. The employer provided the requested documents.

In a letter dated December 3, 1999, the employer advised the union that it believed it would be unduly burdensome to attempt to produce the discipline files of all officers who may have been disciplined for conduct such as missing service calls, failing to properly maintain equipment, failing to replace lost or stolen equipment, etc., over the past 10 years. Such a response would have required review of the personnel file of each individual police officer that had been employed during the last decade. The

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[3] The subjects of that investigation were the other officers, sergeants, and commanders about whose conduct Garay had complained.

[4] Miller was not asked to make any conclusions.

employer also advised the union, "[W]e have confirmed that there have been no other cases in which an officer has made a threat against a supervisor, either directly or indirectly." It further advised: "[W]e have confirmed that there has been only one other case in which an officer was investigated or disciplined for failing to maintain proper personal financial standing. We will produce a copy of the investigatory report from that investigation, including documentation of the discipline that was given."[5]

After receiving that letter from the employer, the union made no further attempt to obtain additional information or documents based on its request of November 3, 1999.

On the first day of the arbitration hearing, the union made a motion that the arbitrator compel production of the disciplinary records of other employees and additional documents relating to the 1998 investigations into Garay's discrimination claim. The employer objected that reviewing all of the personnel files of all persons employed over the past 10 years was unduly burdensome, but offered to show the union a log of internal affairs investigations as proof that there were no formal investigations into conduct analogous to that of Garay. The arbitrator agreed with the employer, altogether denying the union's motion with regard to the additional investigation documents,[6] and limiting production of the internal investigation log to the past five years. The arbitrator pointed out that the union would have an opportunity to cross-examine Reader regarding discipline of other officers, and that the arbitrator could make decisions at such times about whether the union needed any additional information. The employer produced the

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[5] That report was later given to the union.

[6] The arbitrator stated that the union could renew its motion during the course of the hearing, if necessary.

internal affairs investigation log for the previous five years, as ordered.

After receiving that log, the union did not make any further request for documents concerning discipline of other officers, and it did not renew its motion or make any further requests for investigatory documents.[7]

Reader and others testified before the arbitrator that they were unaware of any formal discipline of other police officers for the competency deficiencies at issue in Garay's discharge.

POSITIONS OF THE PARTIES

The union contends the employer interfered with the its rights by barring the union's selected representative from the *Loudermill* hearing. It also argues that the obligation to engage in collective bargaining includes the obligation to provide timely and complete responses to requests by parties to the collective bargaining relationship for relevant information. Thus, it claims the employer refused to bargain by refusing to provide the information sought by the union. The remedies requested by the union include reinstatement of Garay and reimbursement of the union's attorney fees, as well as the traditional orders for posting and reading of notice.

The employer argues that the union presented no legal authority or evidence sufficient to overturn long-standing precedents under

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[7] During the first day of the arbitration hearing, the union served the employer with the second of these unfair labor practice complaints, alleging the employer refused to provide information requested by the union in connection with an arbitration proceeding.

which the Commission has declined to assert jurisdiction under Chapter 41.56 RCW to enforce constitutional due process rights. Further, it contends the union sought to interfere with the *Loudermill* hearing by insisting that its attorney be present at that time. As to the second complaint, the employer argues that the union did not meet its burden to prove a failure to produce relevant, discoverable documents. Additionally, it contends the union failed to fulfill its own obligation to respond to the employer's objections and to negotiate with the employer toward a resolution of any controversy.

DISCUSSION

The burden of proof in an unfair labor practice proceeding rests with the complaining party, and must be established by a preponderance of the evidence. *Cowlitz County*, Decision 7037 (PECB, 2000).

Right to Representation at *Loudermill* Hearings

Public employees have a right to union representation in investigatory interviews conducted by their employers. In several cases, the Commission has embraced the policy set forth by the Supreme Court of the United States in *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975). It is important to note, however, that both *Weingarten* and the Commission precedents on that subject grow out of the right to representation secured for employees in collective bargaining statutes such as RCW 41.56.040, and out of the provisions of collective bargaining statutes making it an unfair labor practice for employers to "interfere" with the exercise of statutory collective bargaining rights by their employees.

The Commission has been asked several times before to find that a public employee has a right to union representation in hearings held by employers under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Repeatedly, and without exception, the Commission has declined to assert jurisdiction to enforce "due process" rights emanating from the federal and/or state constitutions through the unfair labor provisions of Chapter 41.56 RCW. *See King County*, Decision 5544 (PECB, 1996); *City of Bellevue*, Decision 4324-A (PECB, 1994); *King County Fire District 26*, Decision 3881 (PECB, 1991); *Kitsap County Fire District 7*, Decision 3610 (PECB, 1990); *City of Tacoma*, Decisions 3346, 3346-A (PECB, 1990) and *Okanogan County*, Decision 2252-A (PECB, 1986).[8]

The union claims here that employees should have a right to union representation at *Loudermill* hearings, but the *Loudermill* decision does not support that claim. In fact, the Supreme Court's *Loudermill* decision acknowledged a need to expedite situations:

> The essential requirements of due process . . . are notice and an opportunity to respond. . . . The tenured public employee is entitled oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.*

Loudermill, 470 U.S. at 545-46 (emphasis added).

Noticeably absent from *Loudermill* is any right of employees to any representation at pre-termination hearings.

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[8] The amended preliminary ruling in Case 14544-U-99-3632 omitted an earlier reference to *Loudermill*.

As recently as January of this year, the federal courts have confirmed there is no right to representation under *Loudermill*. In *Krenzel v. Southeastern Pennsylvania Transportation Authority*, 2001 U.S. Dist. LEXIS 194 (E.D. Penn. Jan. 12, 2001), the court expressly rejected an argument that public employees have a right to representation at *Loudermill* hearings.

In *Okanogan County*, *supra*, the Commission stated: "The interests at stake in the *Loudermill* context are not within the realm of the Commission's jurisdiction." Similarly, in *City of Bellevue*, *supra*, the Commission found no unfair labor practice in regard to that employer's refusal to provide a union with documents the union had requested in order to prepare for a *Loudermill* hearing.[9]

Beyond the distinction between their statutory versus constitutional origins, there are a number of practical differences between *Weingarten* situations and *Loudermill* situations:

- One of the basic "ground rules" for application of the right to representation under *Weingarten* is that the employer retains the right to dispense with the conference altogether, if the employee requests union representation.[10] In distinct contrast, *Loudermill* obligates public employers to offer a

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[9] In pursuing its unfair labor practice complaint, that union had asserted it was entitled to the requested information to perform representational functions in any forum, including *Loudermill* hearings. The Commission disagreed, ruling that the Commission does not assert jurisdiction through Chapter 41.56 RCW to enforce constitutional due process rights.

[10] The Supreme Court wrote (420 U.S. at 258) that, "[E]xercise of the right [to union representation] may not interfere with legitimate employer prerogatives. . . . [T]he employer is free to carry on [its] inquiry without interviewing the employee . . ."

public employee who is facing suspension or discharge an opportunity to present his or her version of what happened.

- A second basic "ground rule" for application of the right to representation under *Weingarten* is that the employee's attendance at the meeting must be compelled by the employer, so that the employee faces the possibility of discipline for insubordination upon a refusal to participate.[11] In contrast, employees are under no obligation to accept the employer's offer of a *Loudermill* hearing.

- A third basic "ground rule" for application of the right to representation under *Weingarten* is that the interview must be of an "investigatory" nature, in which the employer is seeking answers to questions and the employee reasonably perceives a risk of being disciplined based on the answers to those questions. In distinct contrast, the due process rights protected by *Loudermill* do not come into play until the employer has made a decision to discharge or adversely affect the employee, and it must then disclose the charges it is ready to make against the employee.[12]

Here, it is undisputed that Garay was not directed or compelled to attend the meeting initially scheduled for February 17, 1999, and later rescheduled for February 19, 1999. The chief's letter gave Garay the options of: (1) presenting his side of the story in

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[11] *Okanogan County*, Decision 2252 (PECB, 1985); *City of Mercer Island*, Decisions 1460 and 1460-A (PECB, 1982).

[12] In fact, the right to representation under *Weingarten* is clearly inapplicable to meetings called for the limited purpose of imposing discipline or explaining previously imposed discipline. *See Certified Grocers of California*, 277 NLRB 1211 (1977) cited in *City of Mercer Island*, Decision 1460 (PECB, 1982).

person; (2) presenting his side of the story in writing; or (3) not responding to the invitation to respond. Garay chose to present his side of the story in writing. Whether Garay had all of the due process to which he was entitled under *Loudermill* would be an issue for a state or federal court to decide.[13] Because the employer did not compel him to attend an investigatory interview, there can be no *Weingarten* violation.

The union nevertheless argues that, independent of *Loudermill*, Chapter 41.56 RCW gives employees a right to union representation in all forums. It cites *City of Seattle*, Decision 3079-A (PECB, 1989), but that decision is distinguishable from this case in many important respects:

First, the *Seattle* decision involved the right of employees to union representation in procedures for investigation of "equal employment opportunity" (EEO) complaints that were of the employer's own creation, which is vastly different from the constitutionally-imposed due process procedure under *Loudermill*.

Second, the Commission emphasized that the EEO procedure in the *Seattle* case invaded the subject area of the collective bargaining process by providing employees with "investigation and pro-active assistance for relief of their employment problems." In contrast, the due process hearings offered by employers under *Loudermill* do not provide public employees with any "investigation and pro-active assistance" that would compete with or conflict with the collective bargaining process. Instead, it only provides a forum for employees to tell a side of the story that they might

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[13] An inference is available that Garay could have had the assistance of the union and its legal counsel in preparing his written response to the employer's charges. The chief also accepted a written submission directly from the union's attorney.

have to repeat in a grievance arbitration proceeding conducted under the applicable collective bargaining agreement.[14]

More analogous to this case is *City of Mercer Island*, Decision 1460 (PECB, 1982), where the Commission found no unfair labor practice when the employer rejected an employee's request for union representation in processing a grievance through a procedure set up in an employee handbook outside of the collective bargaining process. The Commission found that employer "had not undertaken to investigate, or to guarantee the employees any particular set of rights or benefits." The *Loudermill* hearing now at issue before the Examiner originated outside of the collective bargaining process, and did not involve any investigation or guarantee of benefits.

For all of the foregoing reasons, the union's allegation concerning a "violation of the *Weingarten* right" is dismissed.

No Waiver by Proceeding to Arbitration

One employer defense fails in this case. The employer contends the union waived its right to file an unfair labor practice complaint concerning the alleged *Weingarten* violation because it submitted the same issue for determination by the arbitrator in the grievance arbitration proceeding. The record does indicate that

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[14] *See also City of Seattle*, Decision 4851-A (PECB, 1995), where the same employer was found guilty of another unfair labor practice violation in regard to another procedure of its own creation. While the labor agreement expressly allowed employees to appeal discipline through either a contractual grievance procedure or civil service commission procedures, there is no evidence that discipline imposed by a new ethics commission could be appealed through either the grievance procedure or the civil service commission.

the union asked the arbitrator to set aside the discharge of Garay on the basis of the alleged *Weingarten* violation, and that the arbitrator responded to that argument with:

> In the present case, the City did not conduct an investigatory interview of Garay at any point prior to or after the issuance of the pre-termination letter . . . Since there was no investigatory interview of Garay, the *Weingarten* rights simply never had the opportunity to attach to this case.

However, and contrary to the employer's contention that the union is bound by the arbitrator's decision on this issue, the Commission does not "defer" to arbitrators with regard to the interpretation of statutes administered by the Commission. The Commission's policy on deferral to arbitration is codified in WAC 391-45-110(3). "Interference" allegations are not among the types of allegations subject to deferral, and the Commission is certainly not bound by an arbitrator's ruling on a matter over which the Commission has jurisdiction.[15]

Production of Documents

Both parties acknowledge that 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, including information "necessary for processing contractual grievances." *City of Bremerton*, Decision 6006-A (PECB, 1998); *Pullman School District*, Decision 2632 (PECB, 1987).

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[15] Unless there is some contractual provision replicating a statutory policy, an employer could aptly argue (and an arbitrator could aptly rule) that a union wastes the parties' time and money by asking an arbitrator to rule on matters that are within the Commission's jurisdiction.

Here, the employer produced a substantial amount of information and documents in response to the union's requests, including: Garay's personnel files; Garay's disciplinary and internal affairs files; confirmation that no other bargaining unit employees were disciplined for threatening a supervisor; documentation concerning the one other employee who had been disciplined for failing to maintain proper financial standing; the EAP policies and rules; garnishments filed against other employees; Sergeant Miller's chronological notes concerning the investigation he conducted in connection with Garay's discrimination complaint; Chief Reader's findings and conclusions concerning the same investigation; and the department's Policy and Procedure Manual. The union nevertheless argues that the documents provided by the employer were not adequate, and that the employer withheld relevant documents. The union's arguments are not convincing.

Information concerning other bargaining unit employees who have been disciplined for violations of similar rules can be relevant to a union that is pursuing a discipline grievance, under *Tacoma, supra*, but that does not warrant fishing expeditions into matters irrelevant to the grievance at hand. Thus:

- This union's request encompassed all records of disciplinary actions, regardless of the nature of the underlying conduct. This employer properly objected to requests that lacked relevance to Garay's situation, and were unduly burdensome.

- The focus of the employer's response to the union's request for information was on the three bases for discharge: With regard to Garay's financial problems, the employer verified that only one other officer had been investigated or disciplined for failing to maintain proper personal financial standing and it promptly produced documents pertaining to the discipline of that individual; with regard to the threat, the

employer verified that no other employee had been investigated or disciplined for making a threat against a supervisor.[16]

- The union had not alleged discrimination in its grievances or in the early correspondence on those grievances, and never established why the investigations conducted in connection with Garay's earlier discrimination claim were relevant to the arbitration proceeding,[17] but the employer still provided the documents from the investigation conducted by another law enforcement agency on Garay's discrimination claim and the chief's memo related to that investigation. It also provided timely notice of its reasons for withholding other information as attorney work product.

The employer's prompt objections to certain of the union's requests gave rise to a duty on the part of the union to negotiate with the employer toward a resolution satisfactory to both parties. *Pullman, supra; Seattle School District*, Decision 5542-B (PECB, 1997). The union had the burden to show the employer how its requests were reasonable, how it believed the information would be relevant, or how to accommodate its needs, but the evidence supports a conclusion that the union refused to negotiate the "duty to provide information" questions with the employer. The union did

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[16] The union never disputed this. Indeed, the union's president testified at the unfair labor practice hearing that he was aware of no other employee being disciplined for making a threat against a supervisor, and that he had no reason to dispute the employer's claim there were no such situations.

[17] Even if the union alleged that the discharge was retaliatory and therefore, not for just cause, the investigatory documents would not have shown that the discharge occurred because Garay filed a Claim for Damages. This was demonstrated by Miller's Chronological Investigative Notes, which were produced.

not do anything to narrow the scope of what the employer properly perceived as an unduly burdensome request.[18] Indeed, the union did not respond to the employer's objections, or make any further attempt to obtain additional documents, until it filed the unfair labor practice complaint on the day of the arbitration hearing. The union's failure to follow through does not burden the employer with additional obligations. *City of Tacoma*, Decision 5439 (PECB, 1996).

An exclusive bargaining representative has an obligation to make a request for information that is reasonably calculated to put the employer on notice of the relevance of the requested information. *Bremerton, supra; Pullman School District, supra; King County*, Decision 6772-A (PECB, 1999). A union's "bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." *King County, supra*. Here, the events leading up to the discharge began with the meeting held on December 8, 1998, when Chief Reader laid out expectations for Garay's performance. Specifically discussed were his tardiness, his failure to return telephone calls and pages, his failure to notify the department of his address and telephone number changes, the calls the department received from Garay's creditors, and the wage garnishments that were received. No discipline was given at the meeting. The

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[18] The employer believed that the documentation requested by the union concerning "competency" questions could take a variety of forms, including coaching and counseling memos, and notations on performance appraisals. Further, since questions about competency could involve a wide variety of subjects having nothing to do with the conduct for which Garay was disciplined, the employer envisioned that a full response to the union's request would have required it to review the entire personnel file of each and every person it had employed during the past ten years. Such an exhaustive search was unreasonable.

purpose of the meeting was to make sure Garay understood the department's expectations. During the following weeks, there were several occasions on which Garay's conduct fell short of the expectations expressly set forth at the December 8 meeting. On January 27, 1999, the employer was informed of Garay's threat against his supervisor. The cumulation of the performance deficiencies and the threat gave Reader what he believed was "just cause" for Garay's discharge.

Garay was given a pre-termination letter which specifically stated the bases for discharge. These were: (1) failure to comply with the financial responsibility policy as demonstrated by additional garnishments and another creditor call received since the December 8 meeting; (2) failure to show job competency and sound judgment, as demonstrated by missed service calls and a failure to maintain equipment since the December 8 meeting; and (3) threatening to kill a supervisor in January 1999. Prior to the discharge, Garay was invited to submit "any explanation, either written or oral, about the . . . violations and mitigation of the proposed termination." Garay accepted this invitation and submitted a written memorandum responding to the pending termination action. In that memorandum, Garay addressed all of the bases for discipline set forth in the Chief's pre-termination letter and made no allegation that his discharge was in retaliation for filing a Claim for Damages in 1998. Garay had access to (and presumably the assistance of) the union's counsel in drafting his memorandum, and the union's attorney also submitted a separate response to the pre-termination letter. Like Garay's memorandum, the counsel's response made no mention of alleged discrimination or retaliation. The union advised the employer of its decision to file a grievance by correspondence dated March 19, 1999. In that letter, the union stated: "The grievance is based on the belief that the termination as presented and supported does not reach the level of 'Just Cause'

for the termination of a police officer's career." Again, there was no mention of alleged discrimination or retaliation, nor was there even a reference to the prohibition against discrimination found in Article 26 of the parties' collective bargaining agreement.[19] Thus, the employer had no idea that the union would later challenge the discharge on the basis that it was discriminatory or retaliatory.

The request for such documents gave no information regarding the purpose for which the documents were being requested. Until the hearing itself, the employer received no correspondence or other communication from the union putting it on notice that discrimination or retaliation was the basis on which the union was grieving the discharge.

The union not only failed to advise the employer of the purpose for which it requested the investigatory documents, but it also failed to show their relevance. Even if the union wanted to argue that Garay was discharged in retaliation for filing the discrimination complaint, it had no need for the investigatory documents. To make out a case of retaliatory discharge, the complainant must prove three elements: (1) the employee engaged in protected activity; (2) the employer imposed on him some adverse employment action; and (3) the employer took the adverse action because the employee engaged in protected activity (i.e., the employer must have had a retaliatory motive). The employer does not dispute that Garay's filing of a Claim for Damages in 1998 constituted "protected activity." It was also undisputed that the employer imposed on Garay an "adverse employment action" – discharge. However, the union still has to establish that the employer discharged Garay because he filed the

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[19] The contract requires the union to "reference the section(s) of the Agreement allegedly violated" in a grievance.

Claim for Damages. This it failed to do. The union's argument was based solely on the temporal proximity between the filing of the Claim for Damages in October 1998, and the events which began on December 8, 1998. Without more, temporal proximity is insufficient to prove a retaliation claim. *Wrenn v. Ledbetter*, 697 F. Supp. 483 (N.D. Ga. 1988) (summary judgment granted where the only evidence of causal connection was the chronology of the events), *aff'd* , 880 F.2d 420 (11th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990); *Johnson v. University of Wisconsin*, 70 F.3d 469, 480-81 (7th Cir. 1995) (timing alone cannot create a genuine issue of material fact); *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346 (8th Cir.) (mere coincidence in timing does not establish a submissible case of retaliatory discharge; reversing judgment for the plaintiff after trial, where the evidence showed only that the adverse action occurred one month after the plaintiff engaged in protected activity), *cert. denied*, 117 S. Ct. 61 (1996).

The union now argues that it should have received the appendices to Sergeant Miller's chronological investigative notes. However, when the union received the report without the appendices (which are clearly referenced in the report), the union did not make a timely request for the appendices. The union's failure to do so, along with an explanation as to why the union deemed them relevant, bars it from asserting an unfair labor practice complaint for the employer's failure to produce the appendices.

Attorney-Client Privilege and Work Product Doctrine

The investigation conducted by and through the employer's attorney was protected from disclosure by the work product doctrine and attorney-client privilege. Thus, those documents were properly withheld from the union.

The work product doctrine directs that a party may not obtain discovery of documents prepared in anticipation of litigation by or for another party or by or for that other party's representative, unless it proves that it has substantial need of the materials in the preparation of its case and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. *See* Civil Rule 26(b)(4); Federal Rule of Civil Procedure 26(b)(4). Under no circumstances may materials showing the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of the party be disclosed. *Pappus v. Holloway*, 114 Wn.2d 198, 211 (1990). In Washington, privileges are defined by statute. RCW 5.60.060(2) provides: "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."

Upon receiving Garay's claim for damages, the employer anticipated a civil lawsuit from him.[20] The claim for damages was both forwarded to the Auburn Police Department, for investigation, and to the employer's attorney, Deborah Brookings, for evaluation of the employer's legal liability.[21] When Brookings received the claim, she retained Linda Kroner, an employment specialist, to

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[20] Indeed, Garay has since filed such a lawsuit, and it was pending in Pierce County at the time of the hearing.

[21] Under state law, Garay was required to file a claim for damages with the employer before he could initiate a civil lawsuit. RCW 4.96.010. Garay's claim for damages alleged that, over the course of his employment, the police department had subjected Garay to illegal harassment on account of his race and ethnic background. The claim stated that "Mr. Garay would like to inform the [employer] . . . that he is prepared to take it to the next level of litigation which would be the courts."

investigate Garay's allegations and assist in evaluating Garay's potential legal claims. Kroner conducted her investigation under Brookings' instructions and for Brookings' benefit. It was Brookings' intention that Kroner's investigative findings and conclusions be protected by the attorney-client privilege and work product doctrines. Brookings provided legal advice to the employer based on her legal analysis and consideration of all available materials, including Kroner's findings and conclusions. Kroner did not make any direct report to the employer; she only reported to Brookings. Brookings did not forward any documents generated by Kroner to the employer. Reader confirmed in his testimony at the hearing that he has never received or reviewed any documents relating to the investigation conducted by or through Brookings.

Retained to assess the employer's legal liability, Brookings responded with "mental impressions, conclusions, opinions or legal theories" that are the very essence of providing legal advice to the employer. The purpose of the attorney-client privilege is to encourage free and open attorney-client communication, by assuring that such communications will be neither directly nor indirectly disclosed to others. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 404 (1985) (quoting *State v. Chervenell*, 99 Wn.2d 309, 316 (1983)). Here, all communications between Brookings and the employer concerning Garay's allegations are privileged, and not subject to disclosure. Any documents that may have been generated by Kroner and/or Brookings in connection with Garay's claim for damages are protected from disclosure by the work product doctrine and attorney-client privilege. Thus, the union was not entitled to the investigatory documents.

FINDINGS OF FACT

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

2. The Puyallup Police Officers Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of uniformed police officers employed by the City of Puyallup. Julio Garay was an employee in that bargaining unit.

3. Garay filed a claim with the employer in October of 1998, asserting that he was entitled to damages for racial discrimination by the employer. The employer retained an attorney to investigate the matter and advise on the employer's potential liability. The attorney conducted or caused to be conducted an investigation, and rendered legal advice to the employer.

4. On February 9, 1999, Police Chief Lockheed Reader gave Garay written notice of the preliminary decision to discharge him. Grounds listed in that pre-termination letter were: Garay's failure to comply with the department's financial responsibility policy; Garay's continued failure to show job competency and sound judgment; and Garay's threat to kill his supervisor. Garay was invited to submit any explanation prior to the proposed termination, and a meeting to hear Garay's explanation was established for February 19, 1999.

5. Prior to the scheduled meeting, the union advised Reader that it wanted its attorney, James Cline, to attend the pre-termination conference with Garay. Reader denied the union's request.

6. Garay did not attend the pre-termination conference, but both the union's attorney and Garay submitted written explanations of mitigating factors. Reader reviewed these letters and concluded that the statements in Garay's letter were not supported by the evidence.

7. Reader discharged Garay from employment, effective February 19, 1999.

8. The union filed a grievance protesting Garay's discharge. Under the grievance procedure in the parties' collective bargaining agreement, the union was required to reference the section(s) allegedly violated. The union did not allege that Garay was discriminatorily discharged. The grievance was scheduled for an arbitration hearing on December 14 and 15, 1999.

9. On November 3, 1999, the union submitted a request to the employer for certain documents. The employer complied with the requests except for "all records of disciplinary actions involving Puyallup police officers for the past 10 years." It objected that the request was overly broad. The employer confirmed to the union that there were no other cases in which an officer had made a threat against a supervisor, either directly or indirectly. It also advised the union that there had been only one other case in which a bargaining unit employee was investigated or disciplined for failing to maintain proper personal financial standing, and it provided the union with a copy of the documents concerning that investigation and the resulting discipline. The employer also produced its internal affairs investigation log for the previous five years.

10. On November 24, 1999, the union submitted another request for documents, including the employer's investigation and the investigatory conclusion associated with a discrimination claim filed by Garay earlier in 1998. The employer produced the documents requested, except it withheld documents from an investigation of the discrimination claim by its attorney. The employer asserted the attorney-client privilege as to the documents concerning the investigation conducted by its attorney.

11. The union made a further request for documents on November 30, 1999, when it asked for a copy of the department's Policy and Procedure Manual and any additional employee assistance plan documents the employer might have. The employer provided the requested documents.

12. After receiving the documents provided by the employer, as described in paragraphs 8, 9, and 10 of these findings of fact, the union did not make any further, and/or alternative, requests for documents concerning discipline of other officers.

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 its actions denying the union attorney to be present at a pre-termination meeting, as described in paragraphs 4 and 5 of the foregoing findings of fact, the City of Puyallup did not commit an unfair labor practice in violation of RCW 41.56.140(1).

3. Any and all documents prepared by or through the employer's attorney with regard to the discrimination claim filed by Garay against the employer, as described in paragraph 3 of the foregoing findings of fact, was protected by the attorney-client privilege and the attorney work product doctrine, and was not subject to a request for information under RCW 41.56.030(4).

4. By its actions denying the union certain requested documents for preparation for an arbitration hearing, and its explanations of its reasons for the denial, as described in paragraphs 9 through 12 of the foregoing findings of fact, the City of Puyallup did not commit an unfair labor practice in violation of RCW 41.56.140(4) and (1).

ORDER

The complaints charging unfair labor practices filed in the above-reference matters are DISMISSED.

Issued at Olympia, Washington, on the 5th day of September, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina I. Boedecker

KATRINA I. BOEDECKER, 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.