City of Port Townsend, Decision 6433-A and 6684 (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF PORT TOWNSEND, Employer.	
ELIZABETH JOHNSON, Complainant, vs. TEAMSTERS UNION, LOCAL 589, Respondent.	CASE 13611-U-97-03330 DECISION 6433-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER.
ELIZABETH JOHNSON, Complainant, vs. CITY OF PORT TOWNSEND, Respondent.	CASE 13478-U-97-03289 DECISION 6684 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER.

Elizabeth M. Johnson appeared pro se.

Davies, Roberts & Reid, LLP, by Michael R. McCarthy, Attorney at Law, appeared on behalf of Teamsters Union, Local 589.

Timothy L. McMahan, City Attorney, appeared on behalf of the employer.

On October 16, 1997, Elizabeth Johnson filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Port Townsend (employer) as respondent. Case 13478-U-97-03289. That complaint alleged that the employer terminated Johnson's employment in retaliation for her having filed a previous unfair labor practice complaint.[1] A preliminary ruling was issued under WAC 391-45-110 on December 4, 1997, finding a cause of action to exist.[2] The employer filed an answer in due course.

On December 11, 1997, Johnson filed a complaint charging unfair labor practices with the Commission under Chapter 391-45 WAC, naming Teamsters Union, Local 589 (union), as respondent. Case 13611-U-97-03330. This controversy relates to Johnson being denied union representation in regard to the termination of her employment with the City of Port Townsend. A deficiency notice issued under WAC 391-45-110 on July 8, 1998, pointed out certain problems with the complaint, as filed. Johnson was given a period of 14 days in

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[1] On October 2, 1997, Johnson filed a complaint naming the employer as the respondent and setting forth multiple allegations of contract violations, interference and refusal to bargain. Case 13445-U-97-03282. Those charges were subsequently dismissed as failing to state a cause of action. City of Port Townsend, Decision 6351 (PECB, 1998). Johnson did not file an appeal of the order of dismissal, and that case is now closed.

[2] At this stage of the proceedings, all of the facts alleged in a complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

which to file and serve an amended complaint which stated a cause of action, or face dismissal of this case.

Johnson filed an amended statement of facts in Case 13611-U-97-3330 on July 22, 1998, supported by copies of numerous time sheets dating back to April of 1996. On September 25, 1998, the Executive Director issued an Order of Partial Dismissal on that case.[3] The union filed an answer in due course.

The above-referenced cases were then consolidated for further processing. A hearing was held on January 19 and 20, 1999, before Examiner Walter M. Stuteville. The parties submitted briefs to complete the record.[4]

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[3] City of Port Townsend, Decision 6433 (PECB, 1998). Allegations that the union refused to bargain, in violation of RCW 41.56.150(4), were dismissed. No appeal was filed, and that became the final order of the agency as to those issues.

[4] On March 15, 1999, after all parties had filed their briefs, the employer filed written objections to Johnson's brief. The employer correctly characterized that brief as including, "a number of documentary exhibits which were not previously discussed or admitted into evidence at the hearing" in this matter.

On May 18, 1999, the union filed a motion to strike all materials submitted by Johnson after the close of the hearing, other than post-hearing argument.

The arguments of both respondents are well-taken. Other than published precedents and matters of which official notice can be taken (e.g., the Commission's docket records), the only material which can be considered in making this decision is the testimony given at the hearing (where it was subject to cross-examination by the

The preliminary rulings issued by the Executive Director found causes of action to exist in these consolidated cases for: (1) Interference with employee rights, by agreements or actions to exclude her from the bargaining unit represented by the union; and (2) discrimination in reprisal for her filing of unfair labor practice charges under Chapter 41.56 RCW. Based on the record actually made at the hearing, the Examiner rules that Johnson was unlawfully excluded from the bargaining unit, but that she failed to prove that her discharge constituted unlawful discrimination.

BACKGROUND

Beyond the procedural complications noted above, these cases arise out of a lengthy and complicated set of facts. The Examiner thus deems it appropriate to lay out details of that course of events before embarking on the analysis of either complaint.

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opposing parties) and the exhibits admitted into evidence at that hearing (where they were subject to objections from opposing parties). WAC 391-45-270 precludes the reopening of a hearing except,

> ... upon the timely motion of a party upon discovery of new evidence which could not with reasonable diligence have been discovered and produced at the hearing.

There was no such motion or showing in this case. Thus, the parties' briefs have been considered only to the extent they set forth legal arguments or analysis of the evidence admitted at the hearing.

The Parties

Port Townsend is the county seat of Jefferson County and has a population of approximately 8,330.[5] The employer uses the mayor-council form of city governance. During the period relevant to these cases, Michael Hildt was employed as city administrator, Robert Wheeler headed the public works department, and Charles Simpson was the operations manager for that department. Simpson was responsible for supervising employees engaged in the maintenance and operation of water distribution, street, storm water and sewer systems, rental equipment, the parks department, and the custodial crew. The focus of this case is on the employer's custodial staff, which came under the supervision and direction of the public works department during this course of events.

Teamsters Union, Local 589, is the exclusive bargaining representative for three bargaining units organized among employees of this employer: A unit in the police department; a unit in the fire department; and a unit in the public works department. During the period relevant to these cases, the union business agent responsible for those bargaining units was Dan Treosti.

The bargaining unit in the public works department has existed for more than 20 years, and was described in a recent collective bargaining agreement between the employer and union as follows:

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[5] Population estimate per 1998-1999 Directory of Washington City & Town Officials.

Article 2 - RECOGNITION

2.1 Union as Sole Bargaining Agent. The Employer recognizes the Union as the sole and exclusive bargaining agent for the purpose of establishing salaries, wages, hours, and other conditions of employment, for those employees who are designated as within the Bargaining Unit.

2.2 **Exclusions. The Bargaining Unit for the purposes of this Agreement shall include all City employees, except:**

A. Any elected official;

B. Any managerial or supervisory personnel who have authority to take action in the interest of the employer in such matters as hiring, transferring, suspending, laying-of, recalling, promoting, discharging, rewarding, or disciplining of their personnel;

C. Uniformed Fire Department and uniformed Police Department employees, Library employees and Ferry Traffic Controllers, flaggers, and professional employees limited to Planner I, Planner II, Development engineer, City Clerk, and City Civil Engineer and Public works Manager;

D. **Part-time, seasonal and temporary employees.**

[Emphasis by **bold** supplied]

The "part-time" terminology used in the recognition clause was further defined in the contract, as follows:

ARTICLE 10 - USE OF PART-TIME, SEASONAL & TEMPORARY EMPLOYEES

10.1 **Part-Time employees Excluded from this Agreement. For the purposes of this Agreement, employees who work less than (80) hours per month are considered part-time employees and are excluded from this agreement.**

10.2 Use of More than One Part-Time Employee by a Department. *Except as provided* in Section 10.3, if the Employer requires more than one part-time employee in a single department, the employer then shall make available full-time employment to one of the part-time employees, except separate part-time positions in which the skills required for each cannot reasonably be combined into a full-time position.

10.3 Temporary and Seasonal Employees. Seasonal help shall be defined as those temporary seasonal employees doing bargaining unit work but not included in the bargaining unit. These employees shall not be required to join the union and may work for the City between the dates of May 15th and September 30th and may exceed eighty (80) hours per month; *provided, that* the Parks Department may hire seasonal help from April 1st through October 15th. Nothing in this Agreement shall prohibit the City from hiring temporary employees to meet emergency, short-term or peak work load needs. Prior to the City hiring temporary employees to meet emergency, peak work load, or short-term needs, the City will investigate the possibility of utilizing employees from other departments who work more than eighty (80) hours per month but less than thirty-five (35) hours per week and who perform similar duties.

[Emphasis by **bold** supplied]

Elizabeth Johnson was hired by the employer in May of 1995, as a "substitute" custodian. At least initially, she was not a member of the bargaining unit represented by the union.

At the time she was hired, Johnson was nominally under the supervision of the city treasurer. Johnson testified, however, that she only had regular contact with a full-time custodian, Ken Franklin, and that she had little contact with other city employees or supervisors. Johnson referred to Franklin as her "work leader", and she testified that her work schedule was established verbally between herself and Franklin.

Testifying for the employer, City Administrator Hildt confirmed that the city clerk/treasurer supervised the custodial staff prior to his being made city administrator. He also testified that he personally supervised the custodial staff for about a year after the clerk/treasurer left in 1995, and that he signed Johnson's time sheets during 1995 and the first two months of 1996. The employer then hired another treasurer, and that individual was given responsibility for supervising the custodial staff.[6] Responsibility for supervision of the custodial staff was then shifted to the Maintenance and Operations Division of the Public works department in May or June of 1997. Operations Manager Simpson thus became Johnson's supervisor.

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[6] The merits of an accusation that the change was made because the treasurer was not "exercising sufficient controls" are not before the Examiner for a determination in this proceeding.

Onset of the Hours of Work Controversy

As suggested by the "substitute" label assigned to her position, Johnson was on-call to fill in when other custodial employees were on leave. It is clear, however, that she was also scheduled to work on Saturdays, Sundays, and Mondays.

In 1995, Johnson only worked one eight-hour day per week. She consistently worked between 38.5 hours and 61 hours per month.

Johnson testified that there was more custodial work to be done in 1996, because at least one custodial position had been vacated by a layoff. Johnson apparently took it upon herself to work the additional hours necessary to complete all tasks that she believed needed to be done. Her additional effort was reflected in her reported and paid hours, which were as follows:

March, 1996 .... 53 hours paid
April, 1996 .... 62 hours paid
May, 1996 .... **92 hours paid**
June, 1996 .... 71 hours paid
July, 1996 .... **90 hours paid**
August, 1996 .... **93 hours paid**
September, 1996 .... 74 hours paid
October, 1996 .... 77 hours paid
November, 1996 .... 77 hours paid
December, 1996 .... **105 hours paid**

[Emphasis by **bold** supplied.]

She generally accomplished the greater accumulation of hours by working longer days (as opposed to more days per week), so that she put in 34 eight-hour days and 2 ten-hour days in 1996.

Johnson's increased work schedule continued into 1997. Until September, she was paid for between 65 and 115 hours per month.

By May of 1997, the employer became concerned about what it viewed as custodial costs "running over budget". Simpson testified that he attempted to set up a meeting with Johnson through the crew chief he had assigned, Jim Engle, and through Ken Franklin,[7] but it does not appear that such a meeting was held at that time.

Simpson "ran into" Johnson somewhat later, at the Jefferson County Fair. While it appears they were introduced to one another at that time, and that Simpson asked Johnson to call him for an appointment to meet, no substantive discussion occurred. Other than that brief meeting, they had no contact with each other until August of 1997.

Simpson testified that Johnson became very agitated during a telephone conversation when he talked with her about setting up a meeting. He characterized her as sounding "suspicious" of why he wanted to meet with her, and that she refused to meet him at his office. They then agreed to meet at the city hall on the following

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[7] The perceived cost overruns were not the only potential subject for discussion. Simpson also testified that he originally wanted to talk with Franklin, Engle, and Johnson together, concerning a new building that they would be responsible for cleaning. By the time he was able to set a meeting up with her, Simpson was more concerned about the number of hours Johnson had been working.

Monday. Simpson told Johnson of his intention to present her with a spreadsheet outlining her future custodial responsibilities.[8]

Meetings and Correspondence

The August 25, 1997 Meeting -

Simpson and Johnson met on August 25, 1997. Simpson had arranged for the city clerk, Pam Kolacy and Hildt had arranged for a union representative, Sheila Spears, to be present at that meeting. Simpson immediately placed the focus of the meeting on Johnson's work hours, and he told her that her working any hours in excess of 79 hours per month was unacceptable to him. Simpson also presented Johnson with a copy of the spreadsheet he had mentioned earlier.

After the meeting, Simpson wrote the following account of the meeting:

> Pam Kolacy, Sheila Spears, and I met with Beth [Johnson] to discuss her overall job, hours of work, where time should be spent, look at areas that I had feed back [sic] on from our customers and I wanted to take the opportunity to know this person who now is working for me. The meeting began with a brief explanation of what and why the meeting had been arranged. I proceeded to show her a spread sheet that Engle, Franklin and I developed to show what we thought were the hours spent on each building and items that need to be covered. She

8 On that spreadsheet, which had apparently been prepared earlier, Johnson was to work 7.5 hours on Saturdays and Sundays, and 4 hours on Mondays, for a total of 19 hours per week.

> looked at the sheet and stated that she did not clean the police station on Saturdays. She stated that she cleaned it only Sundays and that the hours in city hall were 4 each day. ... As I was explaining this to her and asking for her input on scheduling she became up set [sic] that I was going to cut her hours of work to less than 80 hours a month. I began to explain to her that she was considered a part-time employee and that only allowed me to work her 79 hours a month. She said according to the Personnel Policy manual she was a full time employee and she should be able to work as many past 80 hours as she wanted or are required for her to complete the job. She became very upset and start [sic] to swear and wanted a pay raise for doing her job cleaning the restrooms and that they were hazardous to work in. She wanted more money per hour if we were going to cut her hours. I tried to refocus on what I would like to accomplish with the time she had to do the work that was laid out. She stood up thru [sic] her keys into my face and said "fuck you buddy, clean this mess up yourself (meaning Pope Marine Building)" and walked out of the meeting leaving us with the impression that she quit.

Johnson sent a letter to the employer. Although she dated it August 24, 1997, it is evident from its content that Johnson wrote it soon after the August 25 confrontation with Simpson:

> Re: Hostile Work Environment
> My dealings over the past few weeks with Charles Simpson has [sic] caused me such a degree of stress that I am prompted to use all of my sick leave. On two separate occasions he has caused me to lose my temper. I don't understand why I am being hassled and threat-

> ened with a reduction in pay. He has caused me a lot of confusion & hurt. I have worked for the city for 2 years & like my job & do good work. I would like this man, Charles Simpson, to leave me alone & just let me do my work at the wage I get now and not make any changes. The only thing I am requesting is a cost of living adjustment which should be due me. He made me so mad I turned my keys into him & walked off the job this morning. Please don't make me have any more meetings with him - he's too mean.

Kolacy and Spears each wrote separate accounts of the meeting. The account written by Kolacy, as well as her testimony, was very similar to Simpson's account. Spears' written account of the meeting was also similar to Simpson's, but also included a recounting of a follow-up conversation that Spears had had with Johnson:

> ...
> In a follow-up telephone conversation with Beth (9:30 a.m.), I requested that another meeting be scheduled. She said "no" that she was sick, under stress and had a doctor's appointment for tomorrow. She said that she is taking sick time off from this job and that if she came back to work, Charlie's offer (79 hours per month) was unacceptable. She also said that if she returned to work she could not work under Charlie's supervision because she felt she was being harassed by him.

Although Spears had been invited to attend the August 25 meeting as a union representative, it does not appear that she took up the

subject matter of the meeting at that time with Treosti or any other member of the union's staff.

Follow-up Contacts -

Kolacy placed a telephone call to Johnson on August 27, 1997, to remind Johnson that she needed to provide the employer with a physician's statement concerning her claim of sick leave. Kolacy's account of that conversation included:

> Ms. Johnson then began to talk about the meeting on Monday morning with Charlie, Sheila Spears and me. She said she didn't know why the meeting was called, why she couldn't have Ken Franklin present, and didn't understand what I was doing there. When I attempted to explain, she cut me off and continued to talk about how upset she was because the city was trying to cut her pay since it was such a small part of the city budget, etc. She went on to express her confusion about why Charlie was being allowed to speak with her, why she needed anyone besides Ken to supervise her, etc. She said she felt uncomfortable at the idea of meeting alone with Charlie on Monday. This was several minutes into her monologue and I at this time told her that I had attended the meeting so that she would not have to meet with Charlie alone, and that it would [sic] appropriate to have another woman present to make the situation less upsetting to her.
>
> Ms. Johnson then hung up on me. About 15 minutes later, I received a voice mail from her stating that it was not acceptable for me to attempt to contact her as I was now causing her excess stress and trauma. She stated that the only people who [she] would speak to from

> now on were Michael Hildt, Julie McCulloch, or Ken Franklin.

Johnson sent a letter to the mayor that same day, stating that she would be taking the next two weekends off, and that she had been very upset by all her contacts with Simpson.[9]

On August 29, 1997, City Administrator Hildt sent the following letter to Johnson:

> I have reviewed your concerns with Charlie Simpson and have reviewed the written reports of Pam Kolacy and Sheila Spears who also attended the meeting on Monday morning.
>
> I am very sorry that you are having difficulties with Charlie's supervision. As you know, the City treasurer has not been able to give much attention to supervising and supporting Ken Franklin and the part-time custodians. This is one of the reasons why the custodial responsibilities have been transferred to Charlie. I can imagine that it might take a bit of adjusting to routine supervision after a period of little or no supervision.
>
> The City provides an Employee assistance Program provided by Green Spring Health Services. They are available to our employees

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[9] In a letter to Spears under date of August 29, 1997, Johnson described her only other contact with Simpson as a telephone call which she placed, and which was "not a pleasant conversation" because she lost her temper and yelled at him. In that same letter, Johnson described another "episode" where she "stormed" into the office of the library director, and turned in her library keys and a note stating she would no longer work in the library.

> 24 hours a day for initial counseling and referral assistance with work or family life issues. I encourage you to make use of their services. ...
>
> As I understand your current status, you have rescinded your resignation and wish to return to work on Saturday, August 13, following a brief period of recuperation under the advice of your doctor.
>
> It appears from my review that your actions on Monday morning, August 25, were quite serious. In addition to your insubordination to your supervisor, you threw your keys at Charlie Simpson with such force that they struck him in the face. Such violent, disorderly conduct cannot be tolerated in the work place and is clearly a violation of the City Personnel Policy Manual. ...
>
> Before Charlie determines what disciplinary action would be appropriate, a predisciplinary hearing will be held to review the events of that meeting and to hear your side of the story. The hearing has been scheduled for 9:00 am, Monday, September 22, ...
>
> I will preside over the hearing which will be conducted informally. Charlie Simpson and Pam Kolacy will be present; you may bring one representative if you like.
>
> You will receive notification of Charlie's decision soon after the hearing, most likely within two days.
>
> In the meantime, Charlie has set your work schedule as follows: [7-1/2 hours on Saturdays and Sundays and 4 hours on Mondays].
>
> Until Charlie returns from vacation on September 15, Jim Engle will be your supervisor. ...

Johnson replied with a 10-page letter dated August 30, 1997. After detailing the job responsibilities historically assigned to her,

Johnson described her current condition as confused and depressed. She requested that the predisciplinary meeting be held in mid-October, when she would be back to a more normal routine. She reiterated that she believed Franklin had been her supervisor, and that she did not understand why she was being introduced to "new" supervisors. She denied that she had either resigned or rescinded any resignation or that she had intentionally thrown her keys at Simpson. She asserted that she had attempted to slide the keys along the table, and that they apparently "brushed up against the side of Mr. Simpson's face". In a second reference to rescheduling of the predisciplinary hearing, Johnson wrote:

> I probably won't be available to waste my time at some silly predisciplinary hearing. If you guys want to fire or lay me off you may do so without these mad hatter Alice in wonderland tactics.

In one-page letter to Hildt, dated September 2, 1997, Johnson reiterated that she would not be available on September 22, 1997:

> You may cancel proposed "disciplinary meeting" scheduled 9 am Sept 22 as paperwork I submitted is "my side of the story." In the future you should contact me prior to arranging meetings to see what fits into my schedule. I plan to continue with my same work schedule when I return to work. Any situation or schedule change that results in a decrease in my monthly pay is not acceptable to me. Attached to my time sheet this month was a request for [sic] cost of living wage increase. I have been at $9 for more than a year. Please see that this request is properly processed.

On September 8, 1997, Public Works Director Wheeler sent a letter to Johnson stating that, in view of her insubordination and her violent, disorderly conduct, it was his intention to terminate her employment. Wheeler scheduled a pre-termination hearing for September 22, 1997, stating:

> I am writing to you on behalf of your regular Supervisor, Charlie Simpson, who is currently on vacation.
>
> City Administrator Michael Hildt has reviewed with me your letter to him dated September 2, as well as your earlier correspondence to Mr. Hildt and the reports of Charlie Simpson, Pam Kolacy and Sheila Spears concerning the meeting on August 25.
>
> As you have requested, I have considered the appropriate disciplinary action based on this evidence and your letters, without benefit of a pre-disciplinary hearing. In view of your insubordination and violent, disorderly conduct I am not comfortable with your returning to work. Consequently, it is my intent to terminate your employment with the City.
>
> Before making a final decision on your termination, I will discuss this with Charlie Simpson upon his return and offer you an opportunity to be heard. Your pre-termination hearing has been scheduled for 9:00 am, Monday, September 22, in my office at 5210 Kuhn Street (three blocks north of the Fairgrounds, next to the Chinese Gardens Lagoon). You may bring one representative, if you like.

Sometime during this time period, Johnson sent Simpson a note which at least started out as an apology:

> Please consider this letter a formal apology. As I stated in my statement which you may not have read I indicated that I felt badly that my work keys accidentally brushed the side of your face as I attempted to toss them on the table. I am telling you now how badly I felt when I saw that the keys had accidentally hit you and am sorry that it occurred. I was attempting to toss them on the table as a token gesture that I did not accept the income reduction you were imposing on me. I think you know I was extremely agitated and I wanted to leave the situation so I did not lose my temper at you. If I had intended to throw them at you with violent intent they would have left a hole in your face with blood dripping down because I would have thrown them very hard at close range, overhand. Unless you have the scars to prove that keys were launched at you face with violent intent then your statements are false. I cannot measure the amount of illness your deceit & petty games have not only caused myself but family as well. Not to mention the waste of other people's time & resources. Not only do I feel stressed about the lies you have been spreading but about losing an income that goes mostly to supporting my daughters artistic endeavors. Now I have to worry about never being able to find gainful employment again because I was terminated for being violent. Thanks a lot. Really appreciate all you have done to me. Hope this note finds you & your loved ones happy & at peace.

On September 15, 1997, Johnson sent a letter to Hildt which she titled "Slanderous, Untrue statement", and in which she reacted to his characterizations of her behavior as insubordinate. Johnson sent a 3-page rebuttal to Wheeler's letter, which was received by the employer on September 16, 1997. In addition, between September

14 and 16, 1997, she sent 4 letters to the mayor, in which she mentioned "discrimination", requested a recommendation for future employment, and requested time to find proper representation. The last of those letters bore a title of, "Call for justice". Johnson also submitted verification from her psychiatrist that she was under medical care, and that he had recommended a two week leave of absence.

Wheeler sent another letter to Johnson on September 23, 1997, as follows:

> The City notified you through my letter of September 9, 1997 that your pre-termination hearing was to be held September 22, 1997 at 9:00 AM at the Public Works Administration office. You were additionally notified by voice mail by Jim Engle on Wednesday, September 17, 1997 that this meeting was still being held. We assembled at that time and place to meet with you and any representative that you desired. You did not make an appearance.
>
> In order to provide an opportunity to hear your side of the situation, we are offering to meet with you October 6, 1997 at 9:00 AM at the Public Works office on Kuhn Street under the same condition lined out in my September 8, 1997 letter. The fact that you did not make an appearance at the September 22, 1997 meeting will be considered.
>
> You are not to report to work before the hearing on the 6th. Until that time, you are on unpaid suspension. The City will make a decision on your employment status after the October 6th hearing.
>
> I regret that your employment with the City has come to such an unfortunate point. Yet, I

> am sure you can understand why the City must insist on employees' respect for normal supervision and protection from violent action in the workplace.
>
> I would appreciate it if you would call my office at 385-7212 to let me know whether or not you plan to attend the pre-termination hearing October 6, 1997.

Union representative Treosti sent the following letter to Johnson on September 24, 1997:

> Per the labor Agreement by and between the City of Port Townsend and Teamsters Union Local 586, you have not been hired into the Bargaining Unit we represent.
>
> Per our telcon [sic] of 9-24, you said to me that you took it upon yourself to work extra hours that contribute to your working over 80 hours per month.
>
> The City did not hire you to work over 80 hours and has not informed us that you are a new employee within the bargaining Unit. Therefore, we have no jurisdiction of representation for you.
>
> If and when the City hires you within the Bargaining Unit, we will be happy to represent your interests in your employment with the City of Port Townsend.

While Johnson's request for union representation can be inferred from that letter, no basis was indicated for Treosti's other statements or conclusions.

Johnson next sent a letter to the mayor, indicating that she was able to return to work. She stated, however, "I am still sensitive and subject to relapse of situational reaction if aggravated", and that Simpson was, "... the main aggravating force that caused my illness". She also described Hildt and Wheeler as "harassing individuals who further caused complications of stress disease".

On October 3, 1997, Johnson sent a hand-written letter to the employer, which she titled "No Meetings":

> If Ken or Jim wants to give me my keys to go back to work just like I did before - SAME HOURS - then it's a go. I have been traumatized by your so called "meetings" & do not wish to attend any more "meetings." I have been sick, I am well now. I am avoiding any situations that will cause me to use prescribed sedatives or make my blood pressure rise. I am not a young woman - your dealings & the way you handle things causes me physical symptoms of a stroke. Please be more considerate & compassionate.

[Emphasis by CAPITALS in original]

The context of that letter is explained by a memo Wheeler wrote for Johnson's file under date of October 8, 1997, summarizing a telephone conversation he had with her on October 3, 1997:

> After a series of calls ... from Beth, I called Beth to discuss the October 6, 9:00 am meeting.
>
> She was wondering why I was using Jim Engle to call her. I said that she often said that she

> wanted to only talk with her "supervisor" Jim, so I thought it best that Jim contact her.
>
> She indicated that she was ready to come back to work on October 4th. I asked her if she had received the letter I sent? She said she had not received it, so I told her that we had set another meeting on October 6 to meet with her. She complained that it was not convenient and that she was not able to go to the meeting. I asked her if she knew what the meeting was for. She never answered but she started to say that we were causing problems for no reason and that she was a good employee. She told me that in no way would she attend the meeting. She then started to elevate the situation by saying she was being harassed and screwed over and that this had made her "Fucking sick for no reason". All of this for $18.00 a month, which she used for her daughters artistic lessons. She asked if I had kids? I told her that was not the point of our conversation. She called me a monster. I told her we had to get back to the point. She finally hung up.

That memo to file was written in the context that Johnson had not appeared for the pre-disciplinary meeting which the employer had scheduled for October 6, 1997.

The Discharge -

On October 8, 1997, Wheeler sent a letter to Johnson in which he noted that she had not appeared at either hearing set by the employer. He went on to state that, without hearing from her directly and with documentation from several city employees, he was "... left with no choice other than to terminate your employment with the City of Port Townsend effective immediately."

Johnson sent an 8-page response to Wheeler on October 9, 1997, in which recounted many of her previous charges against the employer.

On October 11, 1997, Johnson sent a letter to the mayor under a title of "Goodby", in which she again recounted her perspective of the August 25, 1997 meeting and subsequent contacts with the employer's officials.

POSITIONS OF THE PARTIES

Elizabeth Johnson asserts that she was never informed that she was a part-time employee, that she was only supposed to work a limited number of hours, or that she was not a member of the bargaining unit covered by the collective bargaining agreement between the employer and union. She contends that she was discharged because she filed various charges against her employer, including a complaint charging unfair labor practices filed with the Commission, after the employer informed her that she was to work a limited number of hours.

The employer argues that Johnson was discharged for insubordination and for her violent behavior, rather than for filing unfair labor practice charges against the employer. Furthermore, it contends it is impossible for Johnson to prove that the employer discharged her for her filing of the initial charge of unfair labor practices, because she had notice of her impending discharge in a letter dated September 8, 1997, which was one month prior to the filing of the unfair labor practice charge cited as the basis for alleged

discrimination. The employer also asserts that it received a copy of the cited unfair labor practice charge immediately before the discharge letter was mailed to Johnson, without sufficient time for her supervisors to actually find out that the complaint had been filed. The employer argues that Johnson's additional work hours were unauthorized, and thus should not be used to vest her with any legally-enforceable status beyond the 79-hour excluded, at-will status for which she was hired.

The union asserts that the agreement between it and the employer to limit the public works bargaining unit to full-time employees does not constitute an unfair labor practice. It argues that, regardless of the rules which the Commission might use to define a bargaining unit in a contested representational proceeding, an employer and a union may lawfully agree to exclude regular part-time employees from a bargaining unit. It cites Tiffin Enterprise, 258 NLRB No. 12 (1981), where the National Labor Relations Board held that such an agreement between the parties did not contravene Board policy even where the stipulation does not coincide with a unit determination which the Board would have made in the same situation. It also cites Timberland Regional Library, Decision 555-A (PECB, 1978), where parties were held to their stipulation that employees working less than half-time would not be eligible voters in a representation election. Thus, it asserts that parties may in good faith agree to a bargaining unit description which is different from those that either the NLRB or the Commission might prescribe in a contested representation case. Finally, the union asserts that Johnson's charge is a routine duty of fair representa-

tion claim over which the Commission has historically declined to assert jurisdiction.

DISCUSSION

Discrimination for Filing Charges

In Case 13478-U-97-3289, Johnson claims that she was discharged for exercising her statutory right to file unfair labor practice charges. Her claim is based on a specific statute:

> RCW 41.56.140. UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
>
> ...
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge; ....

The standard of proof for "discrimination" claims was summarized in Seattle School District, Decision 5946 (PECB, 1997), as follows:

> The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, protects the right of public employees to organize and designate representatives of their own choosing for the purposes of collective bargaining. Employees also enjoy protection from interference with their statutory collective bargaining rights under RCW 41.56.140(1), and protection from discrimination for filing unfair labor practice complaints under RCW 41.56.140(3).

The standard for enforcing the "interference" and "discrimination" protections has been established by 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), the Court adopted a "substantial factor" test for determining discrimination cases. While a charging party retains the burden of proof at all times, it only needs to establish that the statutorily protected activity was a "substantial" motivating factor in the employer's decision to take adverse action against the employee. As the Court indicated in Wilmot, at page 70:

> If the plaintiff presents a prima facie case, the burden shifts to the employer. To satisfy the burden of production, the employer must articulate a legitimate nonpretextual nonretaliatory reason for the discharge. ... [I]f the employer produces evidence of a legitimate basis for the discharge, the burden shifts back to the plaintiff ... [to] establish [that] the employer's articulated reason is pretextual.

The Commission has embraced a "substantial factor" test. Educational Service District 114, Decision 4361-A (PECB, 1994); City of Federal Way, Decision 4088-B (PECB, 1994). That standard was discussed recently in North Valley Hospital, Decision 5809 (PECB, 1997) and Mukilteo School District, Decision 5899 (PECB, 1997).

The Prima Facie Case

As described in Seattle School District, Decision 5237-B (EDUC, 1996) and North Valley Hospital, supra, the requirements necessary for a complainant to establish a prima facie case of unlawful discrimination are threefold:

> * The exercise of a statutorily protected right, or communication to the employer of an intent to do so;
>
> * The employee must be discriminatorily deprived of some ascertainable right, status or benefit; and
>
> * There must be a causal connection between the exercise of the legal right and the discriminatory action.
>
> Proof of one or two of those elements is not sufficient to shift the burden of production to the employer.

In the instant case, Johnson filed an unfair labor practice complaint alleging discrimination on October 7, 1997, which was prior to her October 8, 1997 discharge, and was her right as specifically protected by the statute. She has not, however, fulfilled one of the requirements of a discrimination charge: She has not provided sufficient evidence to establish a causal connection between her filing of the unfair labor practice complaint and the termination of her employment.

The mere fact that the two events occurred in a particular sequence is not, by itself, sufficient to meet the burden of proof required to establish a prima facie case. As was argued by the employer, Johnson's job was in jeopardy at least a month earlier, when she received the September 8, 1997 letter notifying her of the employer's intent to terminate her employment.

Detailed review of the sequence of events also discredits Johnson's claim that there was any cause-and-effect relationship between her filing of the unfair labor practice complaint and the discharge:

- August 25,1997: Meeting where Johnson used profanity toward supervisor and threw her keys.
- August 29, 1997: Hildt charged Johnson with insubordination and disorderly conduct, and scheduled predisciplinary meeting for September 22.
- September 8, 1997: Wheeler stated his intent to discharge Johnson, and reiterated the September 22 meeting schedule.
- September 22, 1997: Johnson failed to appear for the pre-disciplinary meeting.
- September 23, 1997: Wheeler rescheduled the predisciplinary meeting for October 6, 1997.
- October 2, 1997: Johnson filed her complaint with the Commission in Case 13445-U-97-03282.
- October 6, 1997: Johnson failed to appear for the rescheduled predisciplinary meeting.
- October 8, 1997: Wheeler discharged Johnson.

Interspersed between those major events were numerous letters and telephone contacts, as detailed above. Johnson's September 13 letter provides telling evidence that she already knew, by then, that she was subject to discharge for her conduct at the August 25

meeting. She wrote, in reference to Hildt's scheduling of a predisciplinary meeting:

> A meeting of this type where people are lying **and trying to terminate me** would probably require a representative such as an attorney.

[Emphasis by **bold** supplied.]

And Johnson's September 15, 1997 letter to the mayor anticipated her own discharge:

> I don't really see how it will be possible to stop their termination proceedings against me.

Finally, her letter received by the mayor on September 16, 1997, contained another indication that she anticipated discharge. These facts preclude a reasonable inference that the discharge action of October 8 was in reprisal for an unfair labor practice complaint which was not filed until October 2, 1997.

Johnson has not provided any admissible circumstantial evidence suggesting that her discharge was (or even could have been) motivated by anything other than a reaction to her behavior at the August 25, 1997 meeting. Her subsequent correspondence with the employer was also insubordinate and threatening. She has not established a prima facie case on her claim of discrimination.

Interference With Employee Rights -

In Case 13611-U-97-3330, Johnson's claim that the union interfered with her statutory collective bargaining rights could operate at

either or both of two levels: (1) By attacking the validity of the agreement to exclude part-time employees from the bargaining unit; and (2) by attacking the failure of the union to represent her after she had, in fact, worked sufficient hours to be included in the bargaining unit under the unit description set forth in the collective bargaining agreement.

The "Duty of Fair Representation" -

As described in Castle Rock School District, Decision 4722 (EDUC, 1994), a union's duty of fair representation is, as follows:

> A duty of fair representation arises from the status of "exclusive bargaining representative" that is conferred upon a union under RCW 41.56.090. Under that duty, the union must represent fairly the interests of all bargaining unit members during negotiations, administration, and enforcement of collective bargaining agreements. The standard, set forth by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967), requires that the union deal with all employees without hostility, or discrimination, in a reasonable nonarbitrary manner and in good faith. Pateros School District, Decision 3744 (1991).
>
> All bargaining unit members are protected by the doctrine, even an employee who actively opposes the union or its leadership. Even those who refuse to become members are covered unless they are subject to a lawful union shop or other union security arrangements under the contract. However, the duty extends only to members within the bargaining unit. In Cooper v. General Motors Corp., 651 F.2d 249 (5th Cir., 1981) members of the bargaining unit were moved out of the unit as supervisors and back into the unit as work loads dictated.

> The supervisors alleged a violation of fair representation. In Cooper the court held that because supervisors could not be represented by a union which represented the rank and file, the union owed them no duty of fair representation when they were in their supervisory capacity.

The union correctly notes that the Commission has declined to assert jurisdiction over "duty of fair representation" claims arising exclusively from the processing of contractual grievances.[10] A separate line of precedent holds, however, that the Commission will police its certifications, and will assert jurisdiction over "duty of fair representation" claims which call a union's status as exclusive bargaining representative into question. See, Tacoma School District (Tacoma Education Association), Decision 5465-E (EDUC, 1997); Pe Ell School District, Decision 3801-A (EDUC, 1992); Pateros School District (Pateros Education Association), Decisions 3744 and 3745 (EDUC, 1991); King County, Decision 5889 (PECB, 1997).

The Unfair Labor Practice Forum -

Johnson's filing of a charge of unfair labor practices is also appropriate under Castle Rock School District, supra. In that

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[10] See, Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982) and decisions citing that case. That line of precedent is closely related to the long-established principle that the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. See, City of Walla Walla, Decision 104 (PECB, 1976) and decisions citing that case.

case, an employer and union each denied that an individual employee was included in a bargaining unit or covered by their existing collective bargaining agreement. In affirming an Examiner's ruling that the employer and union interfered with the rights of that employee and committed unfair labor practices, the Commission addressed the issue of unlawfully-created bargaining units, as follows:

> As noted in Washington State Patrol, Decision 2900 (PECB, 1988), one of the primary objects of the NLRA was to protect employees against unlawfully-created bargaining relationships. **An employee who feels that he or she has been improperly included in or excluded from a bargaining unit by agreement of an employer and union has a right to seek relief by filing unfair labor practice charges against those parties.**
>
> ...
>
> If the Commission finds nothing awry, these complaints must be dismissed and the union and employer will be permitted to continue their relationship in its traditional scope. On the other hand, **if the Commission finds that the union and employer have maintained an improper bargaining relationship, they must be found guilty of unfair labor practices ... and must be ordered to rectify the situation** for [that complainant] and future employees.

Castle Rock School District, Decision 4722-B (EDUC, 1995) [Emphasis by **bold** supplied].

Later in the same decision, the Commission fore-ordained rejection of the jurisdictional arguments made in this case:

> It is true that the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976). The Commission does, however, have jurisdiction to determine appropriate bargaining units **and to police its certifications.** City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). See, also, Spokane School District, Decision 718 (EDUC, 1979), which applied the same principles under Chapter 41.59 RCW.
>
> ...
>
> It would be an unlawful interference with employee rights under [the "employer interference" unfair labor practice], as well as an unlawful assistance to the union involved under [the "employer domination" unfair labor practice] for an employer to extend recognition to a union as exclusive bargaining representative for a bargaining unit that it does not lawfully represent. Conversely, **it would be an unlawful interference with employee rights under** [the "union interference" unfair labor practice] **for a union to accept the unlawful assistance of an employer and/or hold itself out as exclusive bargaining representative of a bargaining unit that it does not lawfully represent.** These complaints therefore state a cause of action over which the Commission has jurisdiction.
>
> ...
>
> While the existing unit structure is a matter of agreement between the employer and union, the Commission has ruled that any voluntary recognition agreement made by parties is inherently subject to the statute and to the unit determination authority of the Commission. Thus, South Kitsap School District, Decision 1541 (PECB, 1983), rejected a bi-

> furcation of that employer's office-clerical workforce which created work jurisdiction conflicts. Similarly, Skagit County, Decision 3938 (PECB, 1991), disregarded a years-old agreement of the parties excluding a class of employees from a bargaining unit, where it appeared that the creation of a separate unit for them would lead to work jurisdiction conflicts.

[Emphasis by **bold** supplied; footnotes omitted.]

Contrary to the arguments advanced here, City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981) is controlling precedent. The Commission stated in that case:

> The determination of appropriate bargaining units is a function delegated by the legislature to the Commission. RCW 41.56.060 Unit definition is not a subject for bargaining in the conventional "mandatory/permissive/illegal" sense, although parties may agree on units. Such agreement does not indicate that the unit is or will continue to be appropriate. In this case, we find that unit agreed to by the parties to be inappropriate under current policy.

That fundamental interpretation of Chapter 41.56 RCW is no less binding because it came out of a unit clarification case than it would be if it came out of an unfair labor practice case.

While the Supreme Court of the State of Washington had endorsed use of precedent developed under the National Labor Relations Act as a guide in interpreting similar provisions of state collective

bargaining laws,[11] specific provisions of the laws administered by the Commission support the firm hand asserted by the Commission in the unit determination area generally, as well as assertion of jurisdiction in this case. RCW 41.56.050 uses the mandatory term "shall" in directing that representation disputes between public employers and "public employees" be submitted to the Commission; RCW 41.58.005 directs the Commission to provide "uniform and impartial ... efficient and expert" administration of the state collective bargaining laws delegated to it.

The foregoing dictates rejection of arguments that this case is different from a unit determination case, and that an unfair labor practice forum is not the place to question the "good faith efforts of employer and employees to negotiate reasonable contract provisions, including part-time employee thresholds." Those arguments are additionally deficient in that the employer neither explains what was reasonable or legal about the particular full-time/part-time threshold in question, nor explains why an individual employee should be deprived of the unfair labor practice procedure as a method for questioning their exclusion from collective bargaining rights.[12]

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[11] Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1984).

[12] The unfair practice forum is, in fact, the only way for an individual employee to raise such an issue. Under RCW 41.56.070, a representation petition must have the support of 30% or more of the employees in the bargaining unit; under WAC 391-35-010, an individual employee lacks legal standing to file a unit clarification petition.

Agreements Between the Parties -
Statutory emphasis on agreements does not deprive the Commission of jurisdiction. The employer cites RCW 41.58.040, which imposes a duty on employers and employees to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours and working condition ...". Notably absent from that list, however, is any reference to agreements on bargaining units. Chapter 41.58 RCW created the Commission and establishes some general principles about collective bargaining, but does not overrule the more specific provisions of Chapter 41.56 RCW, including the rights of public employees, in RCW 41.56.040; the Commission's jurisdiction to decide representation and unit determination issues, in RCW 41.56.050 and 41.56.060; and the procedures for certifying exclusive bargaining representatives in appropriate bargaining units, in RCW 41.56.060, 41.56.070 and 41.56.080. Certainly, nothing in Chapter 41.58 RCW authorizes employers and/or unions to deprive public employees of meaningful access to collective bargaining. Even if RCW 41.58.040 emphasizes agreement, RCW 41.56.010 mandates the opposite obligation:

> [To] promote the continued improvement of the relationship between public employers and their employees by **providing a uniform basis for implementing the right of public employees to join organizations and be represented by such organizations** in matters concerning their employment relations with public employers.

[Emphasis by **bold** supplied.]

The only way to achieve a "***uniform***" system is to have the Commission make and police unit determinations, using statutory standards and consistent interpreting policies.

In fact, the Commission applies statutory standards in excluding elected officials, appointed officials and confidential employees, under RCW 41.56.030(2) and IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978), as well as in determining bargaining units, under RCW 41.56.060, Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977) and City of Richland, supra [treating "supervisors" as covered employees but placing them in separate units from their subordinates] and WAC 391-35-310 [codifying precedent placing employees eligible for interest arbitration in separate bargaining units]. In City of Bellevue v. IAFF, Local 1604, 119 Wn.2d 373 (1992), the Supreme Court of the State of Washington noted that certain matters are properly reserved for administrative adjudication processes that are subject to judicial review. That case concerned the Commission's regulation of the bargaining process through its unfair labor practice jurisdiction; unit determination is comparable. To allow contracting parties to exclude an employee or classification merely because of past practice may have no justification in statute, policy or common sense. Such an agreement would be particularly egregious if the agreement effectively strands the employee(s), and denies access to collective bargaining.

Application of Precedent -

The employer and union were parties to a collective bargaining agreement which contained several provisions protecting the job security of bargaining unit employees:

> ARTICLE 6 - EMPLOYEE DISCIPLINE AND TERMINATION
>
> 6.1 Discharge During Probation Period. The Employer hereby reserves the right, subject to the exclusive discretion of the Employer, to discharge any person employed during the six (6)-month probation period ... without warning notice or right of appeal. This probationary period may be extended for an additional period of time up to one year upon written agreement between the Employer, the Union and the employee. The employee shall be notified in writing of any extension.
>
> 6.2 Post-Probation Period Discipline and Discharge. ... [T]he Employer shall provide written warning to the employee when unsatisfactory work or misconduct may lead to disciplinary action such as time off (suspension) without pay or termination. A second offense shall be grounds for termination or time off (suspension) without pay. Misconduct including but not limited to the following shall be subject to immediate disciplinary action without warning:
>
> (a) Misrepresentation or withholding or pertinent facts in securing employment;
>
> (b) **Disorderly conduct** and/or fighting on the premises. Unlawful discrimination, intimidation, coercion, and/or sexual harassment;

(c) Intentional falsification of records/paperwork used in the transaction of the City's business;

(d) Failure to observe safety practices, rules, regulations, and instruction. Negligence that results in injury to others. Failure to wear required safety clothing and equipment;

(e) Failure to promptly report to the immediate supervisor an on-the-job injury or accident involving an employee, equipment, property, or visitor;

(f) Dishonesty or theft, including deliberate destruction, damage, or removal of the City's or other's property from the premises, or any job site. Personal use of City Property or equipment;

(g) Possession, use, sale, or being under the influence of alcohol and/or controlled substances while on the city business (including standby duty). The only exception to this rule shall be for an employee using or possessing a controlled substance prescribed by a doctor if such employee has given his/her supervisor prior notice of such use and/or possession and such use does not impair safe work performance. Refusal or failure of employees required by the Employer to maintain a commercial driver's license (CDL) to comply with mandatory CDL drug and alcohol policies and procedures;

(h) Possession of explosives or weapons on the premises or at any job site; and/or

(i) Conviction of a gross misdemeanor involving moral turpitude (i.e. criminal conduct involving grave infringement of the moral standards and sentiment of the community and potentially negatively affecting public perception of City government and employees) or conviction of a felony.

6.3 Possible Disciplinary Action. In the event that discipline is necessary, the following types of disciplinary actions may be used, depending on the particular situation:

(a) Oral Warning.

(b) Written Reprimand.

(c) Suspension (with or without pay).

(d) Demotion.

(e) Termination.

The choice of the type of discipline to apply in any particular case is solely the Employer's, subject to the grievance procedures stated in Article 7 of this Agreement. A copy of all written disciplinary notices will be sent to the Union. ...

6.4 **Pre-Disciplinary Hearing.**
In the case of a suspension without pay, demotion, or **termination of a non-probationary employee, the City will conduct a pre-disciplinary hearing**. In the event a Department Head desires to suspend without pay, demote, or terminate an employee, **the employee shall be provided with a written notice of the recommendation** for suspension, demotion, or termination. The notice shall include an explanation of the charges on which the recommendation is based, and the time and

> date for a pre-disciplinary hearing. If the employee fails or refuses to appear at the hearing, the suspension, demotion, or termination shall proceed. Pre-suspension, pre-demotion, and pre-termination hearings shall be presided over by the Mayor or a designated representative. **The employee may bring one person to the hearing as a representative.** The Mayor or designated representative shall issue a written decision within a reasonable time following the hearing. ...

[Emphasis by **bold** supplied.]

The contract also contained a grievance procedure ending with final and binding arbitration.

Work Record -

Johnson's work record qualified her for inclusion in the unit under the 80-hour threshold agreed upon by the employer and union. It is clear that Johnson actually worked more than 80 hours in several months prior to the August 25, 1997 meeting. It matters not that the employer may have intended to have her work fewer hours, or that her acquisition of months in excess of 80 hours was due to a lack of adequate supervision. It is the reasonable perception of the bargaining unit employee(s) which is(are) the basis for making determinations on "interference" claims under RCW 41.56.140(1) and 41.56.150(1). In the context of a contract establishing an 80-hour threshold for inclusion in the bargaining unit, Johnson had a reasonable basis to believe that she was included in that unit. Her claim of bargaining unit status during and following the August 25, 1997 meeting is consistent with that perception.

Employer's Response -
Employer actions also imply unit inclusion for Johnson on and after August 25, 1997. It is noteworthy that the employer implemented the "predisciplinary hearing" provisions of Section 6.4 of the collective bargaining agreement, as if Johnson was included in the bargaining unit.[13] Even more compelling is the employer's action to have Sheila Spears attend the August 25, 1997 meeting as a union representative. It is clear that Spears was unknown to Johnson, and was not attending at Johnson's request. These facts support an inference that the employer believed Johnson was in the bargaining unit represented by the union, or at least acknowledged that she had a colorable claim to inclusion in that bargaining unit.

Challenge is possible at either of two levels in this case. In his preliminary ruling on this issue,[14] the Executive Director pointed to a dispute about implementation of the 80-hour threshold agreed upon by the employer and union, stating:

> The custom in drafting remedial orders in unfair labor practice cases is to place the parties back in the same positions they would have occupied if no unfair labor practice had been committed. **In this case, inclusion of**

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13 The employer's action would not appear to be explainable as an implementation of constitutional obligations under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). That due process procedure only applies to employees who have a property right in their job under a statute or contract.

14 The cause of action for the "interference by exclusion from bargaining unit" charge was set forth in Decision 6433-PECB, where other allegations were dismissed.

> **Johnson in the bargaining unit** from the onset of her employment (or even **from the first month she worked more than 79 hours or since July 22, 1997)** could easily have altered the behavior of all parties to this situation.

[Emphasis by **bold** supplied.]

It would have been possible for Johnson, as an excluded employee, to challenge the propriety of the 80-hour threshold itself, but the Executive Director only alluded to such an alternate theory in a footnote in that preliminary ruling:

> Improper exclusion of an employee from the bargaining unit in which he or she belongs is a basis for an "interference" charge filed by an individual employee against the employer and/or union.

The union's reliance on Tiffin Enterprise, supra, could only be on point if this case exclusively involved a challenge to the propriety of the "80 hours per month" threshold,[15] and is inapposite

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[15] This does not constitute a ruling that Tiffin Enterprises is persuasive support even for the principal for which it is cited. Tiffin was a representation case in which the National Labor Relations Board was enforcing stipulations previously made by the parties to that case. The Examiner does not read Tiffin as adjudicating whether the stipulated unit would interfere with the statutory rights of the excluded part-time employees. Moreover, the Examiner would need to address any differences between the National Labor Relations Act and Chapter 41.56 RCW, as well as any differences of policy and precedent between the National Labor Relations Board and the Public Employment Relations Commission. Commission precedents include both enforcement of parties' stipulations (in Community College District 5, Decision 448 (CCOL, 1978)) and imposing a threshold for "regular part-

to a dispute about application of the threshold agreed upon by the employer and union. Additionally, the employer's mixed actions, as noted above, along with the fact that the employer was not named as a respondent on an "exclusion from unit" claim (which almost imply some sort of conspiracy between the employer and union), dictates that the focus remain on the union's response to Johnson's request for union representation.[16]

The union rejected Johnson's request for representation even though she had actually worked sufficient hours to be included in the bargaining unit. Although a union representative was present at the August 25, 1997 meeting, she was not there at Johnson's invitation, she did not assist or represent Johnson during that crucial meeting, and she apparently did not follow up with the union business agent. When Johnson requested union representation later, the business agent flatly refused to assist her for the stated reason that she was not in the bargaining unit. That response invoking the scope of the bargaining unit clearly brings

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time" status (in Community College District 12, Decision 2374 (CCOL, 1986)), under the same statute.

[16] The union cites Timberland Regional Library, Decision 555-A (PECB, 1978), where the Commission refused to invalidate stipulations made in a representation case, but it was also from the perspective of administering an election, rather than an analysis of an "interference" unfair labor practice. The value of that case as precedent is also affected by its age (1978), as compared to Castle Rock, supra, (1995) and other cited examples of the Commission refusing to give deference to parties' agreements on unit structures which strand employees without a meaningful way to exercise their statutory collective bargaining rights.

this case within the type of fair representation cases involving the Commission policing its certifications. The union interfered with Johnson's statutory rights by refusing to represent her after she had worked sufficient hours to qualify for inclusion in the bargaining unit under the contractual 80-hours test.

REMEDY

To remedy the violation of Johnson's statutory rights, the clock must be turned back to the August 25, 1997 meeting, and the union must now take up Johnson's case from that point. The Examiner expressly declines to rule on the merits of the hours controversy which was the subject of the August 25, 1997 meeting, or on the merits of the insubordination and/or disorderly conduct allegations made by the employer against Johnson following that meeting, as those are matters to be dealt with by the employer and union through their contractual grievance procedure or in arbitration. Should the employer now refuse to process a grievance filed on behalf of Johnson or otherwise deal with the union concerning her hours and status, notwithstanding the employer's hiring of Johnson for regularly-scheduled weekly work hours and the employer's previous actions implying that Johnson was entitled to rights conferred by the collective bargaining agreement, that would be a basis for new unfair labor practice charges which could call the propriety of the employer's contractual 80-hours per month threshold into question.

FINDINGS OF FACT

1. The City of Port Townsend is a public employer within the meaning of 41.56.030(1). During the period pertinent to this controversy, its custodians worked under the general direction of City Administrator Michael Hildt and Public Works Director Robert Wheeler, and under the direct supervision of Operations Manager Charles Simpson.

2. Teamsters Union, Local 589, is a bargaining representative within the meaning of RCW 41.56.030(3). During the period pertinent to this controversy, Dan Treosti was the union business agent responsible for representing public works employees at the City of Port Townsend.

3. The union is the exclusive bargaining representative of a bargaining unit which includes public works employees employed by the City of Port Townsend. During the period pertinent to this controversy, the employer and union were parties to a collective bargaining agreement which covered the classification of custodian, but specifically excluded part-time employees working less than 80 hours per month.

4. Elizabeth Johnson was hired by the City of Port Townsend in May of 1995. Although the term "substitute custodian" was used in regard to her position, she was regularly assigned to work 6 to 8 hours per day on Saturday, Sunday and Monday of each week. Johnson was also assigned, from time to time, to

substitute for employees who were absent from work due to leaves or other reasons.

5. At the time Johnson was hired, the custodians were under the supervision of the employer's clerk/treasurer. Johnson's contacts with the employer were through, and her work assignments were made by, Ken Franklin, a full-time custodian included in the bargaining unit represented by the union.

6. In at least May, July, August, and December of 1996, and in at least one month in 1997, Johnson actually worked in excess of the 80-hours per month required for inclusion in the bargaining unit represented by the union.

7. During or about May of 1997, the employer shifted responsibility for supervision of its custodians to the public works department. Simpson thus became the supervisor of Johnson and other custodians employed by the employer.

8. Simpson sought to arrange a meeting with Johnson, and spoke with her by telephone for that purpose. Simpson intended to limit Johnson's work hours and had prepared a spreadsheet for that purpose. He advised Johnson that that was a purpose of the meeting. Simpson recognized that Johnson's responses to his request for a meeting indicated suspicion on her part. Simpson arranged for City Clerk Pam Kolacy to attend the meeting as an employer official, and Administrator Hildt arranged for Sheila Spears to attend as a representative of the union.

9. Simpson, Kolacy, and Spears met with Johnson on August 25, 1997. Simpson presented the spreadsheet he had previously prepared and mentioned, and advised Johnson that her work hours would thereafter be limited to less than 79 hours per month. Spears was unknown to Johnson, and she neither represented nor assisted Johnson at that time. Johnson became upset at what she perceived and claimed to be a cut of her work hours. Johnson threw her keys at Simpson and walked out of the meeting.

10. Johnson put herself under the care of a psychiatrist after the August 25, 1997 meeting with Simpson, Kolacy, and Spears, and she informed the employer that she was claiming sick leave.

11. So far as it appears from this record, Spears did not take any steps to represent or assist Johnson after the August 25, 1997 meeting, and did not notify other union officials of what transpired at that meeting or of her participation as a union representative in that meeting.

12. On August 29, 1997, City Administrator Hildt sent a letter to Johnson in which he set forth allegations of insubordination and disorderly conduct against her. Hildt also notified Johnson of the scheduling, for September 22, 1997, of a predisciplinary hearing which conformed to the procedure required by the collective bargaining agreement between the employer and union.

13. On August 30, 1997, Johnson sent a 10-page letter to the employer in which she stated, among other things, that she

would not be available for the predisciplinary hearing set for September 22, 1997.

14. On September 8, 1997, Public Works Director Wheeler sent a letter to Johnson stating that, in view of her insubordination and disorderly conduct, it would be his recommendation that her employment with the employer be terminated. Wheeler also notified Johnson of the scheduling, for September 22, 1997, of a predisciplinary hearing which conformed to the procedure required by the collective bargaining agreement between the employer and union.

15. Johnson subsequently sent a letter to Simpson which began with an apology, but then devolved into an angry description of what she could have done if she had intended to throw her keys at him with violent force. Johnson closed that letter with a reference to Simpson's family.

16. Johnson did not appear on September 22, 1997, at the time and place specified for the predisciplinary hearing. Between September 15 and September 23, 1997, Johnson had sent at least six different letters to employer officials, concerning her employment status and responding to the charges against her.

17. On September 23, 1997, Wheeler sent a letter to Johnson, offering her another opportunity to present her side of the story at a rescheduled predisciplinary hearing on October 6, 1997.

18. On or before September 24, 1997, Johnson made a request to the union for representation. On September 24, 1997, Business Agent Treosti sent a letter to Johnson, rejecting her request for union representation on the basis that she had not been hired to work over 80 hours per month, and that she was not a member of the bargaining unit represented by the union.

19. On October 2, 1997, Johnson filed a complaint charging unfair labor practices with the Public Employment Relations Commission, setting forth multiple allegations against the employer including violation of the collective bargaining agreement, interference with employee rights, and refusal to bargain concerning the cut of her work hours.

20. Johnson did not appear on October 6, 1997, at the time and place specified for the predisciplinary hearing.

21. On October 8, 1997, Wheeler terminated Johnson's employment with the City of Port Townsend.

22. On October 16, 1997, Johnson filed a second complaint charging unfair labor practices with the Commission, this time alleging the employer discharged her in reprisal for her having filed the unfair labor practice complaint on October 2, 1997. At the hearing in that matter, Johnson failed to establish a prima facie case that there was a causal connection between her filing of the unfair labor practice complaint on October 2, 1997 and the employer's October 8, 1997 action terminating

her employment on the basis of allegations first advanced against her in August and September of 1997.

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. Elizabeth Johnson became a member of the bargaining unit represented by the union when she actually worked more than 80 hours in various months, and thereupon became eligible for all rights and representation conferred upon bargaining unit employees under RCW 41.56.080.

3. Elizabeth Johnson failed to sustain her burden of proof to establish a violation of RCW 41.56.140(3) in regard to the termination of her employment on October 8, 1997.

4. By failing and refusing to represent Elizabeth Johnson as a member of the bargaining unit which it represents at the City of Port Townsend, Teamsters Union, Local 589, interfered with her rights under RCW 41.56.040, and thereby committed an unfair labor practice under RCW 41.56.150(1).

ORDER

1. [Case 13478-U-97-03289; Decision 6684 - PECB] The complaint charging unfair labor practices filed by Elizabeth Johnson against the City of Port Townsend is DISMISSED.

2. [Case 13611-U-97-03330; Decision 6433-A - PECB] Teamsters Union, Local 589, its officers and agents; shall immediately:

   a. CEASE AND DESIST from:

      i) Failing and refusing to represent Elizabeth Johnson as a part-time employee covered by the collective bargaining agreement between the union and the City of Port Townsend.

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      ii) in any other manner, interfering with, restraining or coercing employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

      i) Represent Elizabeth Johnson, as a regular part-time employee included in the bargaining unit and covered by the collective bargaining agreement, in regard to the controversy concerning her work hours discussed at the meeting held on August 25, 1997, and thereafter.

ii) Represent Elizabeth Johnson, as a regular part-time employee included in the bargaining unit and covered by the collective bargaining agreement, in regard to her discipline and discharge following or resulting from the August 25, 1997 meeting.

iii) If Elizabeth Johnson is reinstated to employment with the City of Port Townsend, represent her in all matters pertaining to her wages, hours and working conditions so long as she remains a member of the bargaining unit.

iv) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of Teamsters Union, Local 589, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

v) Request permission from the above-named employer to read the notice attached hereto into the record at an open, public meeting of the City Council of the City of Port Townsend and to permanently attach a copy of that notice to the minutes of that meeting and, if that permission is granted, read and attach

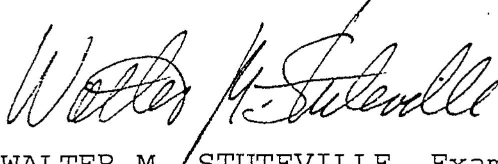
the notice to make a permanent public record of the unfair labor practice.

vi) Notify Elizabeth Johnson, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide her with a signed copy of the notice required by the preceding paragraph.

vii) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

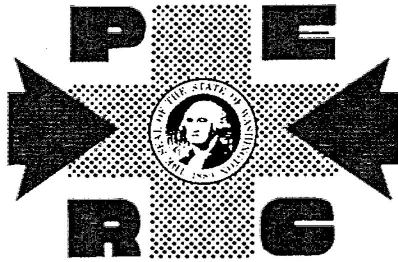
Issued at Olympia, Washington, this 18th day of May, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, 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.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE WILL provide representation to Elizabeth Johnson as a regular part-time employee of the City of Port Townsend, based on her having actually worked in excess of the 80 hours per month required for status as a member of the bargaining unit.

WE WILL represent Elizabeth Johnson in regard to her hours of work, as discussed on August 25, 1997.

WE WILL represent Elizabeth Johnson in regard to her discharge based on her comments and actions taken on August 25, 1997, without proper union representation.

WE WILL NOT interfere with, restrain or coerce employees of the City of Port Townsend in the exercise of their rights under the collective bargaining laws of the State of Washington.

DATED: ____________________

TEAMSTERS UNION, LOCAL 589

BY: ____________________________
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444,