

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS, LOCAL 2819,)	
)	
Complainant,)	CASE 7471-U-88-1557
)	
vs.)	DECISION 3610 - PECB
)	
KITSAP COUNTY FIRE PROTECTION)	
DISTRICT NO. 7,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
Respondent.)	AND ORDER
)	
)	

Griffin, Imperiale, Bobman & Verhey, P.S., by James F. Imperiale, Attorney at Law, appeared on behalf of the union.

Perkins Coie, by Lawrence B. Hannah, Attorney at Law, appeared on behalf of the employer.

On July 5, 1988, International Association of Fire Fighters, Local 2819, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Kitsap County Fire Protection District No. 7 violated RCW 41.56.140(1), by its decision that Miche Eslava had failed to successfully complete his probationary period as a lieutenant. A hearing was held in Port Orchard, Washington, before Examiner Mark S. Downing, on September 26, 27 and 28, and December 11, 12, 13, 14 and 15, 1989. Both parties filed post-hearing briefs.

BACKGROUND

Kitsap County Fire Protection District No. 7 provides fire suppression, fire prevention and emergency medical services to a population of approximately 50,000 in the southern portion of Kitsap County. A three-member board of commissioners governs the

employer's operations, with day-to-day responsibilities in the hands of Fire Chief C. V. "Bill" Meigs. During the relevant period, other administrative personnel included Fire Marshal Ed Boucher, Assistant Chief Gary Larson and Administrative Assistant Victoria Battermann. Larson supervised firefighting employees, in addition to performing various training responsibilities.

The employer maintains ten fire stations. At the beginning of the relevant period, only its headquarters station located in Port Orchard, Washington,¹ was manned by paid firefighters. In addition to its paid firefighters, the employer has a volunteer force.

International Association of Fire Fighters, Local 2819, is the exclusive bargaining representative of the non-supervisory paid firefighters. The bargaining relationship dates from 1982. The bargaining unit included three lieutenants, six firefighter/paramedics and six firefighters.² Gary Faucett was president of the local union in 1986.

Early Labor/Management Conflicts and Concurrent Events

The employer and union were signatories to a collective bargaining agreement that expired December 31, 1986, and they engaged in collective bargaining negotiations during the latter part of 1986 and early 1987. In addition to Faucett, the union negotiating team

¹ Also known as Station 3.

² These employees were organized into three crews, designated as "A", "B" and "C". A crew typically consisted of one lieutenant, two paramedics and two firefighters. The crews were scheduled on the basis of 24 hours on duty with 48 hours off between shifts. This would result in a 56-hour work week for employees, so additional days off, known as "K days", were received by employees under the parties' collective bargaining agreement, to reduce the actual average work week of employees to 53 hours. The number of personnel on duty at any time was affected by annual leave, sick leave and "K days".

consisted of James McPherson as chief negotiator, and Gary Nugent as "scribe". The parties reached a tentative agreement in late November, 1986, and scheduled a meeting for January 9, 1987, to sign the successor agreement. Several events then occurred that postponed the signing of the agreement.

On December 5, 1986, Chief Meigs issued a memo inviting interested parties to give their input on proposed resolutions concerning tobacco use and residency which were to be considered at a January 15, 1987 meeting of the employer's board of commissioners.³

On December 10, 1986, the union filed with the employer a demand to bargain the tobacco use and residency issues.

Another issue affecting the signing of the new contract was interjected on December 31, 1986, when Chief Meigs issued a memo rescinding Standard Operating Procedure (SOP) 1-11, which controlled the subject of shift trades.⁴ That SOP had generally

³ As more fully described below, the employer's actions on the "tobacco use and residency" issues led to unfair labor practice proceedings before the Public Employment Relations Commission. An Examiner found a violation. Kitsap County Fire District 7, Decision 2872 (PECB, 1988). An affirming decision by the Commission, Kitsap County Fire District 7, Decision 2872-A (PECB, 1988), became the final order in the case. Some of the facts recited here are drawn from those decisions, which are authoritative on the matters covered.

⁴ As more fully described below, the employer's actions on the "shift trades" issue became a subject of controversy between the parties. Unfair labor practice proceedings resulted before the Public Employment Relations Commission, when the employer was alleged to have denied a promotion to union official McPherson based on an interview question concerning shift trades. An Examiner decision finding a violation, Kitsap County Fire District 7, Decision 3105 (PECB, 1989), became the final order in the case. Some of the facts recited here are drawn from that decision, which is authoritative on those facts.

permitted up to five shift trades per year per employee, so long as certain conditions were met.

On January 8, 1987, union president Faucett informed the employer that the union was withholding its signature from the recently negotiated 1987-88 collective bargaining agreement, due to the unresolved issues of tobacco use, residency and shift trades. The union requested additional negotiations with the employer to resolve those matters.

On January 12, 1987, the employer announced the commencement of an examination process for the "lieutenant" classification.⁵ This was done as part of the process of staffing a second station with paid firefighters.⁶ Planned to be completed in July, 1987, this change necessitated the filling of three additional lieutenant positions. The testing process was to consist of three parts: (1) an assessment lab exercise, (2) a psychological examination, and (3) a hiring authority interview.

On January 20, 1987, Faucett was informed by the chairman of the employer's board that, although union input was welcome at board meetings, the tobacco use and residency resolutions were matters of district policies and were "not items in the contract."

Applications for the new "lieutenant" positions were received from four bargaining unit employees: Miche Eslava, Gary Faucett, James McPherson, and Tim Salters. On January 30, 1987, all four applicants successfully passed the assessment lab exercise. In early February, 1987, the applicants underwent and passed a psychological examination.

⁵ The "lieutenant" is a promotional position, paid according to Article 2, Section 1 of the parties' 1987-88 collective bargaining agreement at 112% of the salary of a top step firefighter.

⁶ Station 1, located in Gorst, Washington.

The shift trade issue was resolved on February 5, 1987, when Chief Meigs reinstated SOP 1-11.

The hiring authority interview on the new "lieutenant" positions was conducted in mid-February, 1987. The interview team consisted of Boucher, Larson and Battermann. All of the applicants except McPherson passed this portion of the testing process. The final ranking of the successful lieutenant applicants was: (1) Salters, (2) Faucett, and (3) Eslava. Salters was immediately promoted to lieutenant at the headquarters station, to replace Brant Culley, who was off work on disability leave.⁷

On February 16, 1987, four IAFF affiliates in Kitsap County consolidated into one local union, known as Local 2819.⁸ The executive board of the new organization consisted of a president, a secretary-treasurer and one vice-president from each of the four fire districts involved. The vice-presidents essentially acted as shop stewards in their respective bargaining units. Faucett became president of the merged local, while McPherson became secretary-treasurer. Aaron Espy was elected as vice-president for the District 7 bargaining unit.

The board of commissioners of District 7 adopted tobacco use and residency resolutions on February 19, 1987.

⁷ While the exact date of this promotion was not placed in evidence, it must have occurred on or before February 19, 1987. Salters was announced as a new lieutenant at a board of commissioners meeting held on that date. See Decision 2872, supra. Salters had been filling the position on an acting basis under the provisions of Article 7, Section 4 of the parties' collective bargaining agreement, which specifies that vacant positions are to be filled by on-duty employees on the basis of seniority in the event no eligibility list exists.

⁸ Local unions representing employees of Kitsap County Fire District Nos. 1, 7, 15, and 18, were affected by this action. The local union representing the employees involved here had previously been known as Local 2876.

Faucett filed an unfair labor practice complaint with the Commission on February 23, 1987, challenging the actions on tobacco use and residency as unilateral changes and a "refusal to bargain".

The parties were able to resolve their differences regarding a successor collective bargaining agreement, and signed the 1987-88 agreement on March 19, 1987.

In late March or early April, 1987, Eslava was informed by Chief Meigs that he would be promoted to "lieutenant" when Station 1 was staffed with paid personnel.

On April 7, 1987, Faucett filed an unfair labor practice complaint with the Commission, alleging that McPherson was denied a promotion to the rank of lieutenant because of his union activities.

The "tobacco use and residency" unfair labor practice charges were heard before Examiner William A. Lang on June 15, 1987. Faucett represented the union in that proceeding.

The Promotion of Eslava

On July 1, 1987, the employer commenced operating Station 1 with paid personnel. On that date, Eslava and Faucett were promoted to the rank of lieutenant, subject to a 12-month probationary period, and were assigned to Station 1. Eslava was assigned to the "C" crew, with Firefighter/Paramedic McPherson and Firefighter George Roller as his subordinates. Lieutenant Bill Daly was transferred to Station 1 from the headquarters station and Dan Olson was assigned as acting lieutenant at the headquarters station.

At about this same time, Assistant Chief Larson assigned work projects to all of the lieutenants, to be completed by them individually or with the assistance of their crews. Eslava was assigned to a project involving the "tarps", or salvage covers,

used to protect merchandise or household goods during a fire.⁹ Larson wrote a memo to Eslava on August 25, 1987, detailing certain objectives that he saw as important for the "tarps" project. Those objectives included: (1) an accurate inventory of tarps by station and apparatus,¹⁰ (2) a rotation and inspection schedule to maintain all tarps in a serviceable manner, (3) recommendations on the purchase of new tarps in order to maintain an adequate supply, and (4) a training program for all district personnel.

Eslava was on vacation during the last two weeks of August and the first two weeks of September, so he did not receive Larson's memo until he returned to work on or about September 20, 1987. On the latter date, Eslava met with Larson to review the memo on the "tarps" assignment. They agreed to meet again on October 8, to review Eslava's progress on the assignment.

The firefighter employees are required to complete an Emergency Medical System (EMS) report when emergency medical services are rendered. On September 22, 1987, Acting Lieutenant Olson wrote a memo to Administrative Assistant Battermann, complaining about a missing report.¹¹ It appeared that McPherson had not filled out a report for an aid call that he responded to at 6:15 a.m. on September 21, shortly before he was relieved by the next crew at 8:00 a.m. Olson suggested in his memo that a written reprimand would be an appropriate disciplinary penalty for this infraction. As Eslava was McPherson's direct superior officer, Olson telephoned

⁹ The tarps are approximately 14 feet by 18 feet in size and are carried on all fire engines. When tarps become worn, they are often converted to hall runners, which are smaller tarps utilized to protect halls or walkways from dirt and other debris.

¹⁰ Apparatus refers to a fire department vehicle, such as a fire engine, aid car, etc.

¹¹ As a lieutenant at the headquarters station, Olson was responsible for all reports filed from midnight to midnight of the previous day.

Eslava at his home on September 22. Eslava replied that McPherson was responsible for the report, and he assumed it had been placed "on the counter". Eslava offered to call McPherson, but Olson indicated that he would handle the matter himself.

Eslava was called to the headquarters station during his next shift, to meet with Chief Meigs. At that point, Eslava learned that McPherson's report on the EMS response made on September 21 was missing or had not been completed. Chief Meigs showed Eslava a copy of Olson's September 22 memo, and asked Eslava what he was going to do about the matter. Eslava responded that he would prepare a written reprimand. On September 24, 1987, Eslava issued a written reprimand to McPherson.

On October 1, 1987, Eslava received a letter from Chief Meigs, commending him for his action concerning the missing EMS report. Meigs commented that: "... willingness to guide the behavior of those in your command is obviously not a problem for you."

The October, 1987 Evaluations

The employer had an established procedure for evaluation of its employees. The grading codes used in evaluations were:

- "E" for "exceeds requirements"
- "M" for "meets requirements"
- "B" for "below requirements"
- "U" for "unsatisfactory"
- "X" for "not observed"

The ratings were entered on a pre-printed form promulgated by the employer for that purpose. Evaluations were normally performed on a semi-annual basis, in January and July.

Due to the reassignments of staff in connection with the July, 1987 opening of the station at Gorst, the evaluations normally due at that time were delayed. The initial evaluations of the probationary and acting lieutenants were thus issued by Larson on October 5, 1987, covering the July-August-September time period.

October, 1987 Ratings of Eslava -

In the area of emergency work, Eslava received grades of "M", except for the sub-category of "aggressive leadership", where he receive an "E". Larson commented:

Miche needs to "temper" some of his decisions on the fire ground with a little more thought before action.

In the area of supervisory/administrative ability covering topics such as oral and written communications, leadership, problem-solving, planning, interpersonal sensitivity and tolerance to stress, Eslava received grades of "M". Eslava was also rated "M" in the areas of training and general performance. Larson indicated that Eslava would continue as a lieutenant for the next three months, thus completing a "six month" probationary period.

Chief Meigs reviewed the evaluation, commenting that he did not understand why some pre-fire planning had not occurred, as Eslava had been assigned to a new area.

October, 1987 Ratings of Faucett -

In the area of emergency work, Faucett received a grade of "M" for the sub-categories of "stress tolerance" and "adaptability/flexibility", and grades of "X" for all other sub-categories. In the area of supervisory/administrative ability, Faucett received grades of "M+", and Larson commented that he had "shown good ability" in this area. In regards to training and general performance, Faucett received grades of "M", except for the sub-category of "ability to instruct", where he received a grade of

"E", and the sub-category of "improved by counseling", where he received an "X". Larson commented that "Lt. Faucett is a very good instructor." He indicated that Faucett would continue his probation for the next three months, but made no mention as to the duration of the probationary period.

Chief Meigs' review of the evaluation contained a statement similar to the one he had made in Eslava's evaluation regarding the lack of pre-fire plans.

October, 1987 Ratings of Salters -

In the areas of emergency work and supervisory/administrative ability, Salters received "M" grades, except for the sub-categories of "leadership" and "problem-solving/decision-making", where he received "M+" grades. Salters received grades of "M" in the area of training, except for the sub-categories of "ability to instruct" and "conducts realistic, situational training sessions", where he received an "X" rating. He also received grades of "M" in the general performance area, except for the sub-categories of "appearance" and "physically able to perform", where he received "M-" grades, and "improved by counseling" where he received an "X" grade. Larson commented that he was concerned about Salters' weight and endurance, suggesting that he enroll in a weight reduction program. Larson recommended that Salters continue in his present probationary position.¹²

Chief Meigs' reviewed the evaluation, commenting on Salters' time commitment to his fire science studies.

October, 1987 Ratings of Olson -

Olson's evaluation indicated that he was on acting status. In the area of emergency work, he received the grade of "M", except for

¹² Larson marked the box for "probationary" status, although Salters had already completed over seven months of probation by this point in time.

the sub-categories of "aggressive leadership" and "completes assignments", where he received an "E". Larson commented:

[A]ll observed behavior has been excellent [sic], he takes charge and continually turns out high quality work.

Olson received grades of "M+" and "E" in the area of supervisory/administrative ability, prompting Larson to comment: "Lt. Olson is doing an excellent [sic] job." Olson received grades of "M" for his training and general performance, except for the sub-categories of "ability to instruct" and "participates with interest", where he received grades of "E". He received an "X" for the general performance sub-category of "improved by counseling".

In Chief Meigs' review of the evaluation, he commented that Olson "has really shown he is capable in all necessary areas ...".

Events Between October and December, 1987

By early October, 1987, Eslava had prepared a five-page handwritten report on the "tarps" project. That report contained a station-by-station inventory of tarps, outlined a plan for purchase of new tarps, and detailed a maintenance schedule for the tarps. Larson failed to appear for his scheduled October 8 meeting with Eslava concerning the "tarps" assignment. When seen by Eslava later that day at Station 1, Larson indicated that he would contact Eslava on the next day. Larson failed to do so.

Eslava showed his handwritten "tarps" report to Larson one evening later in October or November, 1987, while Larson was getting into his car. Larson looked at the report briefly, and said he would get together with Eslava to discuss the project. Larson told Eslava to obtain a cost estimate for the new tarps, and indicated that he would have the report typed up after the cost estimate was received.

Faucett and Espy resigned their respective positions of president and vice-president of the local union in late December, 1987. Faucett's resignation ended five and one-half years of continuous service as president, dating back to the formation of the union as Local 2876 in June, 1982. McPherson became the new president of the local union. Faucett defeated Eslava in an election for the office of vice-president for the District 7 bargaining unit.

On December 30, 1987, the board of commissioners reduced the written reprimand given McPherson for the missing EMS report to an oral admonishment.

During this same period of time, the employer began the process to fill a "captain" position, so that Larson could concentrate more on his training responsibilities. Though the rank had not been filled since at least 1983,¹³ the parties' collective bargaining agreement continued to list the "captain" rank with a salary at 125% of that of a top step firefighter. The employer's job announcement said that employees performing the work of a lieutenant would be eligible, and a dispute arose immediately as to which employees should be eligible to take the examination for "captain". At a meeting of the lieutenants, only Craig Haugen felt that an employee performing lieutenant work in an acting or probationary status should be eligible to take the exam.¹⁴ By that standard, only Daly, Haugen and (possibly) Salters would have been eligible.¹⁵ Eslava testified that he announced this "decision" to Olson at the meeting.

¹³ Chief Meigs testified that there were no captains or lieutenants when he was hired as fire chief in 1983.

¹⁴ Haugen worked as a lieutenant at the headquarters station throughout the relevant period.

¹⁵ As noted below, Salters' January 19, 1988 evaluation indicated that he was no longer on probation by that time. However, his 12-month probationary period should have not been completed until mid-February, 1988.

The employer decided to give the examination for "captain" under its announced qualifying criteria. All six employees performing the work of a lieutenant applied and took the test. No results from the exam were revealed, however, as the union filed a grievance on January 4, 1988, challenging the employer's actions in establishing the eligibility qualifications for the position.

The January, 1988 Evaluations

The evaluation process returned to its normal semi-annual cycle in January, 1988, when Larson prepared evaluations on the lieutenants.

January, 1988 Ratings of Eslava -

Eslava's evaluation showed grades of "M" in the area of emergency work, except for the "aggressive leadership" sub-category, where he received a "M+" grade, and the "adaptability/flexibility" sub-category, where he received a grade of "M-". Larson commented:

[Eslava] needs to be more open to suggestions.
Many times it appears its his way or no way.

In the area of supervisory/administrative ability, Eslava received grades of "M", except for the sub-categories of "planning/organization", "interpersonal sensitivity" and "management control", where he received a grade of "M-". Larson commented:

Miche has not completed his salvage cover assignment. He needs to become more self-assured, not be threatened by others. He has shown a tendency [sic] to act hastily in recommending discipline [sic], when counseling would probably work as well.

Eslava received grades of "M" for the training sub-categories of "knowledge of drills", "ability to instruct" and "participates with interest", but received the grade of "M-" for "performance of

drills" and "conducts realistic, situational training sessions". Larson commented:

Miche's shift had the lowest number of recorded hours of drill for the whole career roster. I will be monitoring his reports carefully during the next eval. period.

Larson gave Eslava an "M" in the area of general performance, commenting:

Miche is progressing toward becoming a good officer. He needs to study situations before making decisions or passing judgement.

Larson recommended that Eslava's probation be continued, with no mention of a six-month probation period.

Chief Meigs reviewed the evaluation without comment.

January, 1988 Ratings of Faucett -

Faucett received grades of "M" in the areas of emergency work and supervisory/administrative ability, except for grades of "M+" in the sub-categories of "written communications", "problem-solving/decision-making", "planning/organization" and "management control". Larson commented, as follows:

Gary has shown good ability in providing his new firefighter with guidelines and time lines. His oral and written communication skills are at a very good level.

In the area of training, Faucett received grades of "M+" for the sub-categories of "ability to instruct", "participates with interest" and "conducts realistic, situational training sessions." In grading Faucett's performance with a grade of "M" for the sub-categories of "knowledge of drills" and "performance of drills", Larson commented:

Gary needs to broaden his knowledge base. Areas of interest [sic] to him have been thoroughly [sic] learned [while] others have not.

In the general performance area, Faucett received grades of "M", and Larson added the following comment:

In my day to day supervision of Gary he has done well in separating [sic] his "union hat" from that of "fire lt." He is motivated toward doing a better than adequate job.

Larson recommended that Faucett's probation continue.

Chief Meigs approved the recommendation, without comment.

January, 1988 Ratings of Salters -

When Larson completed his evaluation of Salters, he checked the "semi-annual" box on the form, rather than the box indicating "probationary" status. Salters received grades of "M" in the area of emergency work, except for the sub-categories of "adaptability/flexibility" and "aggressive leadership", where he received "M+" grades. Larson commented that:

Tim has shown a good understanding of fire ground procedures and controls his crew quite well. He is quick to size up situations and makes good decisions.

Salters received grades of "M" in the area of supervisory/administrative ability, except for grades of "M-" in the sub-category of "written communications" and "M+" in the sub-categories of "leadership", "planning/organization" and "management control". Larson commented:

Tim manages his assignments well, he has taken the radio-minitor [sic] duties and gotten that program in good working order.

Though his "knowledge of drills" was rated with a grade of "M", he received "M-" grades in "performance of drills" and "participates with interest". In grading Salters with an "X" for "ability to instruct" and "conducts realistic, situational training sessions", Larson commented that though he had not actually observed him as an instructor, "the visual impression he leaves is one of less than enthusiastic. His training hours were about average for the career personnel." Salters received grades of "M" in the area of general performance, except for the sub-category of "improved by counseling" where a grade of "M+" was received. Larson's comments indicated this higher grade was in relation to the good progress Salters was making in becoming more physically fit. Larson also commented that: "Tim is always willing to 'get the job done'. He organizes his duties and delegates well."

Salters' evaluation was approved by Chief Meigs, without comment.

January, 1988 Ratings of Olson -

In the area of emergency work, Olson received grades of "M+", except for the "aggressive leadership" sub-category, where he received a grade of "E". Larson commented as follows:

Dan is a very capable leader - he sets goals, communicates ideas and provides leadership by example in all aspects of the work place.

Olson received "M+" grades in regards to supervisory/administrative ability, except for the sub-categories of "leadership", "problem-solving/decision-making", "planning/organization", and "administrative stress tolerance", where Larson gave "E" grades and noted:

Dan continues to produce quality results under duress (union pressure).

Olson also received high grades in the training area. In the "ability to instruct" and "conducts realistic, situational training

sessions" sub-categories, his performance was graded as "M", while he was given an "M+" for "knowledge of drills" and "performance of drills", and was given a grade of "E" in the sub-category of "participates with interest". Larson rated Olson's general performance with the grade of "M+", commenting:

Dan's overall performance is outstanding. He is learning how to temper his delivery when instructing volunteers and achieve the goals he sets. He has delegated responsibility and authority to his crew which has caused them to grow.

Chief Meigs' comment in review was simply: "Good job".

Additional Transactions and Disputes in Early 1988

When they met at Station 1 on January 21, 1988, to discuss Eslava's evaluation, Eslava showed Larson his five-page handwritten report on the "tarps" project, and told Larson that the project was completed except for receipt of the cost estimates. Eslava testified that Larson replied that everything looked fine to him, and that he would have the office staff type up the notes when Eslava provided the cost estimates.

On February 17, 1988, Examiner Lang issued his decision on the union's "refusal to bargain" unfair labor practice charges concerning the tobacco use and residency issues. The Examiner held that the subjects of tobacco use and residency were mandatory subjects of bargaining, and that the employer had violated RCW 41.56.140(4) and (1) by its unilateral actions.¹⁶

On March 1, 1988, Examiner Lacy issued a notice of hearing on the unfair labor practice complaint involving McPherson.

¹⁶ Decision 2872, supra.

The parties' attention returned to the "captain" position on March 3, 1988, when the board of commissioners appointed Olson to that rank, based upon the recommendation of Chief Meigs. Olson assumed Larson's supervisory duties over the lieutenants, and received his assignments directly from Meigs. Although the parties' collective bargaining agreement called for a probationary wage rate for the first 12 months in the captain rank, Olson was appointed to the position at the full "permanent" rate for the position. Until at least the end of March, 1988, Olson continued working the same schedule as he had while classified as a lieutenant. As no lieutenant was appointed to replace Olson during that time period, he remained responsible for his crew, as well as taking on his new responsibility of overseeing the other five lieutenants. Eslava and Faucett were the only lieutenants remaining on probation at that time.

Olson's appointment as captain was challenged by the union on March 15, 1988, when McPherson filed a grievance claiming that the parties' collective bargaining agreement had been violated. The union alleged that there was a past practice of competitive examinations for all promotions, and that the employer's action was in retaliation for the McPherson unfair labor practice charge and the union's recent grievance challenging the qualification criteria for the captain position.

After his appointment as captain, Olson met with Larson to discuss the lieutenants' progress on their assigned projects. At that meeting, Olson received a copy of Larson's August 25, 1987 memo detailing the four objectives given Eslava for his "tarps" project.

Eslava received a cost estimate concerning the replacement of tarps on or about March 18, 1988. No evidence was presented concerning when he made that information available to Olson.

On March 27, 1988, Eslava was involved in an accident while driving a fire engine out of Station 1. Two compartment doors on the engine had been left open, and were destroyed. Damage was also suffered by the station's bay door. Olson wrote to Eslava on March 28, requesting a detailed statement concerning the accident.¹⁷

Having reviewed the matter with Meigs and Larson, Olson directed a memo to Eslava on March 31, instructing him to appear on April 5 for a disciplinary hearing concerning the compartment doors incident. That memo indicated that the hearing might include "remedial actions up to and including dismissal."¹⁸

Another incident that led to disciplinary action was discovered by Olson on April 3, 1988. Olson wrote a memo to Eslava on that date, requesting a description as to what had happened two weeks earlier, when Eslava allegedly burned a cooking pan at Station 1. Olson requested this information by the end of Eslava's next shift.

Faucett represented Eslava at the disciplinary hearing on April 5, 1988. Larson and Olson were in attendance for the employer. Olson issued a written reprimand to Eslava on that same date, noting the following deficiencies in his conduct: (1) Eslava had not given

¹⁷ Station 1's logbook indicates that Olson met with Eslava in that station for 18 minutes on March 30, 1988. No testimony was presented as to the nature of this meeting. The meeting ended when Eslava and his crew left to respond to an aid call. Logbooks are maintained by the lieutenant or other person in charge of a station, and contain information on the date, time and personnel involved in all activities at the station.

¹⁸ Article 26, section 3 of the parties' collective bargaining agreement provides, in the case of a suspension or discharge, for written notice to the employee of the charge and disciplinary action within seven days from the date of discovery of the alleged infraction.

his crew any apparatus assignments prior to the incident,¹⁹ (2) crew members should have kept their protective clothing on the duty pegs in the apparatus bay, rather than in the apparatus itself, and (3) Eslava's inattention to detail, by not making certain that all compartment doors were closed before driving the engine out of the bay. The employer's safety committee also reviewed the accident and, on April 11, 1988, found it to have been "preventable".

Olson did not hear from Eslava about the burned cooking pan, and he sent a second memo to Eslava on April 6, again requesting the report by the end of his next shift.

Eslava responded to Olson's request concerning the burned cooking pan on April 12, 1988. Eslava indicated that he had worked at the headquarters station on April 5, and was not at work on April 8 due to a shift trade, so had just received Olson's memos on April 12.²⁰ Eslava explained that he had gone to the bathroom while cooking on the stove on March 24. A fire call was received while he was in the bathroom, and he responded to that call. When he returned from the fire call, he found the kitchen a little smoky and the pan burned.

The April 14, 1988 "Planning Meeting"

After his appointment as captain, Olson began having monthly planning meetings with the lieutenants. His first such meeting with Eslava occurred on April 14, 1988. A variety of topics were discussed at that meeting, as described below:

¹⁹ This was especially critical, because Firefighter Arns had replaced Firefighter Roller on the crew. Olson indicated that Arns should have driven the engine, as opposed to Eslava, who was an officer.

²⁰ Eslava's "C" shift would have been getting off work at 8:00 a.m. on April 12, 1988.

The Burned Pan Incident -

Olson also used the "planning" meeting to give Eslava an oral reprimand for the burned pan incident. That reprimand was not for burning the pan, but for failing to report an accident involving a piece of employer-owned equipment, in accordance with SOP 1-6.

Inaccurate and Incomplete Reports -

In addition to the previously described EMS reports, lieutenants are expected to complete Washington Fire Incident Report (WAFIR) forms on fire responses. During their April, 1988 planning meeting, Olson called attention to an EMS report of April 11, 1988, in which Eslava indicated that two pieces of apparatus responded to an aid call, but failed to detail which personnel were involved. Olson also referred to an April 11, 1988 report in which Eslava failed to indicate how the fire started, which personnel responded, what they did, and who investigated the incident. They also discussed Eslava's failure to complete a WAFIR report and accompanying news release form regarding a March 31, 1988 structure fire.

Quarterly Training Report -

The lieutenants were expected to file a quarterly report detailing the training or drill hours that they had taught or supervised for their crew during the particular quarter. Discussion concerning quarterly training reports at the April "planning meeting" between Olson and Eslava was prompted by an April 11, 1988 memo from Larson to Olson, indicating that Olson was the only officer who had complied with the department's requirement that such reports be turned in by the first week of April.

Low Training Hours -

Training hour totals for individual employees were maintained by Larson on the basis of daily training reports filled out by the officers for their crews. Larson compiled this information on a quarterly basis, listing totals for individual employees and for each crew. During the April, 1988 planning meeting, Eslava was

singled out for having low training hours during the first quarter of 1988, both as an individual and for his crew.

As an individual, Eslava had completed only eight hours of training for the quarter, the lowest total for any employee in the bargaining unit.²¹

When total training hours per crew were averaged on a per-employee basis,²² the crew headed by Eslava was at the bottom of the list:

Olson	-	125.2
Daly	-	63.5
Haugen	-	49.2
Salters	-	45.3
Faucett	-	25.1
Eslava	-	19.8

Olson told Eslava that his training hours needed to be increased, especially in the areas of hose, ladders and SCBA (self-contained breathing apparatus).

The "Tarps" Assignment -

Olson and Eslava also discussed the tarps assignment. Eslava said the project was completed, and was at his home. Olson instructed Eslava to turn in the report, including all required objectives, by April 20, 1988.

Further Incidents - April through June, 1988

On the same day that Olson held his "planning meeting" with Eslava at Station 1, Eslava testified before Examiner Lacy in the

²¹ Faucett had the second lowest total for individual training, with nine hours.

²² The "A" crew at the headquarters station included Lt. Culley, but his totals were deleted for the purpose of these calculations. Olson was filling in for Culley on acting status for most of this time period.

McPherson unfair labor practice hearing held at the headquarters station. Eslava's testimony focused on the meeting he had with Chief Meigs in late September of 1987 concerning McPherson's missing EMS report. Eslava testified that he felt he had to issue a written reprimand to McPherson after Meigs showed him Olson's memo recommending a written reprimand, though he could not recall whether Meigs had told him to do so. Eslava testified that, in hindsight, he should have investigated the matter further to verify that the report was never filed. He indicated that he was shocked when he received a letter of commendation from Meigs for having disciplined McPherson. Faucett and Espy also testified at the hearing on April 14. The hearing continued on April 15 with testimony from McPherson and others. Olson testified in this proceeding that he did not know that Eslava gave testimony at the hearing before Examiner Lacy, and that he did not remember whether his meeting with Eslava occurred before or after Eslava's testimony at that hearing.

The logbook for Station 1 indicates that on April 20, 1988,²³ Eslava spent an undisclosed period of time counting tarps.²⁴

Olson met with Eslava for 30 minutes on April 26, 1988. Eslava had neither turned in his "tarps" report, nor notified Olson that he was having problems accomplishing the "tarps" objectives. Eslava promised that the report would be turned in the next day.

Olson met with Eslava again on April 29 at Station 1. Eslava turned in his handwritten "tarps" report during that meeting. The

²³ April 20 was the deadline established by Olson at the April 14 planning meeting for Eslava to turn in his report on the "tarps" project.

²⁴ Firefighter/paramedic Kirk Bugg replaced McPherson on Eslava's crew in January, 1988. He testified that he had numbered and distributed tarps to various stations during late April or May, 1988, upon Eslava's request.

document handed over during that 15-minute meeting was identical to the one Eslava had shown Larson in the fall of 1987, and lacked any information concerning a training program for district personnel. Olson extended the deadline for the "tarps" project to May 6, to provide time for Eslava to type up the report.

Eslava turned in his typewritten "tarps" report during a meeting with Olson on May 6, 1988. That report included a proposed training schedule for district employees. Olson reviewed the report and suggested several changes in its contents. He instructed Eslava to complete several additional objectives by June 7, including: (1) numbering all of the tarps, (2) placing one tarp and one hall runner on each fire engine, and (3) developing a more detailed training program. While Olson expected that the "tarps" project would be completed by June 7, he was not expecting any more written materials from Eslava on the project. Olson informed Eslava at this time that he was concerned about his performance deficiencies and how they could affect his probation, but never told Eslava that he was in jeopardy of not passing his probation.

The third and final day of the hearing on the McPherson unfair labor practice case was held on May 9, 1988. Eslava was called as a witness as part of the union's rebuttal case. Eslava testified that Chief Meigs had called him to request their meeting on the EMS report, and that Battermann was not present at the meeting. His testimony was in response to apparently contrary testimony provided by Battermann. In answer to a question as to why he reprimanded McPherson, Eslava suggested that he was possibly intimidated into doing so by Meigs. Contradicting the testimony of other witnesses, Eslava related that the test results from his 1984 lieutenant exam were in his personnel file the last time he looked, which was just after the January, 1987 lieutenant testing process.²⁵ Eslava also

²⁵ Eslava had placed fifth on the 1984 lieutenant exam. All employees above him on that list had been promoted when openings became available.

testified that the oral interview team asked him a question concerning shift trades that was different from the question they asked of McPherson.²⁶

On May 11, 1988, Eslava met with Olson at headquarters for an undisclosed period of time. No testimony was offered as to what topics were discussed at this meeting.

Olson raised the issue of "inventories" in a May 19, 1988 memo to Eslava. The memo referred an earlier request by Olson that Eslava complete an inventory for engine 721 by May 1, 1988.²⁷ The memo instructed Eslava to complete an inventory for engines 701 and 721 by June 1, 1988.²⁸

On May 20, Eslava met with Olson at headquarters. On that date, Eslava purchased one tarp and one hall runner for engine 737 and three rolls of duct tape, apparently for use in repairing tarps.

The logbook for Station 1 indicates that Firefighter Roller, a member of Eslava's crew, was working on "701 & 721 surveys" on May 26, an apparent reference to the inventory assignment.

The June 7, 1988 deadline for the "tarps" project came and went without completion of the project, and without contact from Eslava to Olson on the status of the project.

On June 9, Olson wrote to Eslava, instructing him to turn in the inventories by noon of that date, and scheduling a planning session

²⁶ A question asked of McPherson during his "lieutenant" interview became the basis for finding an unfair labor practice violation. See Decision 3105, supra.

²⁷ An inventory lists all pieces of equipment on an apparatus. Engine 721 is a tanker housed at Station 1.

²⁸ Engine 701 is a pumper housed at Station 1.

with him for that same time. Eslava turned in the inventories and the planning meeting was started, but Eslava was called out on an alarm shortly thereafter.

In early June, a dispute arose concerning responsibility for the WAFIR report on a fatality car fire accident. Personnel from several stations had responded to the call on June 5. Two EMS reports concerning the accident were filled out by a firefighter/paramedic assigned at the headquarters station. Olson discovered that no WAFIR report had been filled out for the accident, and told Eslava to do so. Olson's instruction to Eslava was based on a departmental policy assigning responsibility for filling out reports by certain geographic areas. Eslava indicated that only headquarters and Station 8 were "toned" for the call, but that he and his crew from Station 1 had responded because of their proximity to the accident. Eslava nevertheless filled out a WAFIR report for the accident on his next work shift, June 7, 1988. Olson found several inaccuracies in the report and noted that Eslava had failed to fill out a required Civilian Casualty Report. Eslava completed the additional form on June 7.

The Decision on Eslava's Probationary Status

On June 13, 1988, Olson, Meigs and Larson met to discuss the work performances of Eslava and Faucett. Olson recommended that neither employee pass their probationary period, due to several deficiencies. After reviewing the recommendation, Meigs decided Eslava would be returned to the rank of firefighter, while Faucett's probationary period would be extended indefinitely.²⁹

²⁹ Olson wrote to Faucett on June 13, noting numerous deficiencies, including low training hours, lateness and incompleteness on a project that had been given to him at the same time the "tarps" project was given to Eslava, failure to turn in a quarterly training report, and six inaccurate or incomplete reports in the last two months.

Eslava was not informed of Meigs' decision until June 28, when Olson and Larson came to Station 1 to meet with Eslava.³⁰ After asking whether the meeting had something to do with his probation and receiving an affirmative answer, Eslava requested union representation. Olson stated that Eslava did not have any right to union representation, because the employer's action had to do with a failure to pass probation, rather than a disciplinary measure. When Eslava pressed the issue, Olson and Larson agreed that he could have union representation. Firefighter/paramedic Bugg was the only other employee on duty at the station at that time, so he sat in on the meeting. Olson gave Eslava a letter dated June 28, indicating deficient performance in several areas:

Failure to perform and complete assignments -

Olson indicated that Eslava had turned in his "tarps" assignment 22 days late, after two reminders. Olson also noted that Eslava had not completed the tarps numbering system, nor had he distributed one tarp and one hall runner to each engine by the deadline of June 7 or the date of this meeting. In regards to the inventory assignments, Olson stated that the 701 inventory was turned in 10 days late, while the 721 inventory was 40 days late.

Negligent performance of training -

Olson stated that, despite warnings to increase his training hours, Eslava had only completed eight hours of training during the last quarter of 1987, and the same amount during the first quarter of 1988. Olson indicated that Eslava's four hours of training during May, 1988, was again below departmental requirements.

Reports -

Olson stated that Eslava had failed to turn in his quarterly training report for the first quarter of 1988, had failed to fill

³⁰ Olson was attending a 2-week hazardous materials class in Seattle during the interim period.

out a fire report for the fatality car fire accident and had argued about accepting responsibility for his mistake, and had turned in nine incomplete or inaccurate reports during the last two months.

"In attention" [sic] to detail -

Olson referred to the previous section regarding inaccurate reports, as well as to the written reprimand Eslava had received for the bay door accident.

Eslava's Immediate Response -

Eslava was not asked for a response at the meeting, which lasted only 10 minutes. When asked whether he had any questions, Eslava replied in the negative. Station 1's logbook indicated that, after Olson and Larson left Station 1, Eslava and/or his crew performed tarp work at five other stations on that same date. Eslava also testified that he reviewed the Station 1 logbook on June 28, and compiled a record of his training hours since January 1, 1988.

Events after Determination of Eslava's Probation

Acting in his capacity as union president, McPherson filed two unfair labor practice charges against the employer on July 5, 1988. One of those complaints alleged that Faucett's probation was extended in reprisal for his testimony and role as representative for the union at the McPherson unfair labor practice hearing.³¹ The second of those complaints is the case now before the Examiner, and alleged that Eslava was demoted from the rank of lieutenant because of his testimony at the McPherson hearing.

³¹

Faucett testified that the complaint was filed without his knowledge, while he was on vacation. He further testified that he felt the extension of his probation had no connection to his pursuit of union activities. The complaint was withdrawn, at his request, in the fall of 1988.

The July, 1988 Evaluations

Semi-annual evaluations were completed by Olson for Salters and Faucett in early July, 1988.

July, 1988 Ratings of Salters -

Salters received "M" grades for the emergency work sub-categories of "enforces safety procedures" and "follows safety procedures", and the grade of "X" for the remaining sub-categories. Salters was graded "M" for supervisory/administrative ability, except for lower grades of "M-" and "B" given on "inter-personal sensitivity" and "written communications", respectively.³² Salters received grades of "M+" and "E" for "problem-solving/decision-making" and "planning/organization", respectively. Olson indicated he had not observed Salters as an instructor during the rating period, but Salters was graded "M" in the remaining training sub-categories. In the general performance area, Salters received grades of "M" and "M+", and Olson noted that Salters was "always willing to listen [to advice] and then act upon it." Olson concluded:

Lt. Salters continue doing a good job. Keep his training hours up to at least 20 hours a month. Start a study and exercise [sic] program. Tim needs to be more attentive to detail when reviewing reports during his next 6 months. He needs to keep discrepancies [sic] down to 3 a rating period.

Chief Meigs did not sign Salters' evaluation, nor is there any indication that he reviewed the form.

July, 1988 Ratings on Faucett -

Faucett received grades of "M" for emergency work, except for an "X" in the sub-category of "aggressive leadership". He received

³² The grade for "written communications" related to his having had 12 reports returned for inaccuracy in the previous 3 months.

several lower grades in the area of supervisory/administrative ability. Grades of "B" were received for the sub-categories of "written communications" and "planning/organization", with Olson stating that Faucett had seven reports returned in the past two months, and that this needed to decrease to three per rating period.³³ The low rating for "planning/organization" was due, in part, to Faucett's low training hour totals.³⁴ Faucett was given grades of "M-" in the sub-categories of "adherence to fire departments S.O.P.'s" and "administrative stress tolerance". Grades of "M" were given for all other sub-categories of supervisory/administrative ability, except for "oral communications", where he received the higher grade of "E". Olson indicated that he had not observed Faucett conducting training sessions during the rating period. Faucett received a grade of "M" for the sub-category of "participates with interest", and a grade of "M+" for his "ability to instruct", based upon positive feedback from a class he had taught. Faucett received the lower grade of "M-" for the sub-categories of "knowledge of drills" and "performance of drills". Olson noted that Faucett needed to increase his technical knowledge, especially in the area of pumps, and that his training hours were below average. Faucett received grades of "M" in the general performance area, except for two sub-categories. In "improved by counseling", he was graded as "M-", with Olson commenting that he "has difficulty at times accepting criticism." In "compatibility (cooperativeness)", Faucett received the higher grade of "M+".

The evaluation form utilized by the employer contains a space for employee comments. On July 29, Faucett submitted four pages of typed comments concerning his evaluation. In response to the "B" grade for "written communications", Faucett explained that the

³³ This was one more report than Olson had noted in his June 13, 1988 letter to Faucett.

³⁴ He had completed only 34 hours for the second quarter of 1988, while the departmental average was 62.5 hours.

"standard" of three returned reports per rating period had never been communicated to employees before. He contrasted that grade with a "M+" grade he received from Larson in the same sub-category in his January, 1988 evaluation. Faucett explained that his low training hour totals were caused by several factors, including three weeks off for his mother's funeral,³⁵ McPherson's absence for five weeks on disability leave, and assignment of Firefighter Pappuleas to the headquarters station for one-third of the rating period. Faucett agreed that he needed to increase his technical knowledge in the area of training. He concluded his comments:

To view my past evaluations from Assistant Chief Larson and this one together, one would wonder if we're grading the same individual. I am having difficulty understanding just what it is the Department does want as it's [sic] priorities (I've never seen them). I do believe however that with continued communications with Captain Olson that we can build a mutual trust for each other that would not cause this type of doubt of his Officers [sic] work ethics and performance.

As in the case of Salters, Chief Meigs did not sign the evaluation.

On August 23, 1988, Olson informed Faucett that he was removed from probation. Reasons for his change to "permanent" status as a lieutenant included his improved performance in the areas of timely completion of assignments, full performance of duties, and willingness to accept criticism and respond appropriately.³⁶

³⁵ Station 1's logbook indicates that Faucett was off during the month of February, 1988 for funeral leave.

³⁶ The record indicates that Faucett was appointed to the non-bargaining unit position of battalion chief, effective November 1, 1989, and was given responsibilities for operations.

Events after August of 1988

The union's grievance challenging Olson's appointment as captain was settled on October 10, 1988, when the employer agreed to return Olson to the rank of firefighter, and to leave the captain position vacant unless and until it tested for the position.

The unfair labor practice complaint protesting the extension of Faucett's probation was withdrawn on November 22, 1988 by Faucett, acting in his role as vice-president of the union.

Olson was appointed to the rank of lieutenant in December, 1988, after placing first through the testing process.³⁷

On January 3, 1989, Eslava wrote to Chief Meigs, informing him that he had succeeded Faucett as vice-president of the union for District 7 employees, effective January 1.

On January 26, 1989, Examiner Lacy issued his decision on the McPherson case, finding the employer guilty of an interference violation, based on the interview team's interrogation of McPherson concerning the shift trades dispute then in existence between the parties. The allegation of discrimination against McPherson was dismissed, on a conclusion that the employer would have denied McPherson promotion in any case, based on his admission that he was a recovering alcoholic still undergoing treatment.

POSITIONS OF THE PARTIES

The union claims the employer's decision on Eslava's probation as a lieutenant was made because of testimony Eslava presented on the

³⁷ The record indicates Olson was appointed as "battalion chief", outside of the bargaining unit, effective August 1, 1989, and was given the responsibility for training.

union's behalf at the McPherson unfair labor practice hearing. The union believes that the reasons given by the employer were pretextual, and not substantiated by the facts. The union claims that Eslava's "due process" rights were violated, alleging that he was not given notice of the charges against him, an explanation of the evidence, and a realistic opportunity to respond. The union also alleges that Eslava's Weingarten rights were violated at the June 28, 1988 meeting with Captain Olson and Assistant Chief Larson.

The employer contends that the union failed to establish a prima facie case of discrimination, citing that the union did not prove that the employer had knowledge of Eslava's protected activities, and did not show any nexus between Eslava's testimony at the McPherson hearing and the employer's decision concerning his probationary period. Assuming for purposes of argument that a prima facie case was established, the employer argues that Eslava's performance as a probationary lieutenant was deficient in numerous respects, and that it would have taken the same action even if he had not engaged in protected activities.

DISCUSSION

The Applicable Statute

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, grants public employees the right to organize for the purposes of collective bargaining, without threat of interference or restraint from a public employer. RCW 41.56.040 provides:

No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bar-

gaining, or in the free exercise of any other right under this chapter.

Public employers commit unfair labor practices when they engage in the following types of conduct:

(1) ... interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;

...

(3) ... discriminate against a public employee who has filed an unfair labor practice charge;

RCW 41.56.140.

The Public Employment Relations Commission is empowered and directed by RCW 41.56.160 to prevent unfair labor practices by both employers and unions. Complaints charging unfair labor practices filed by employees, unions or employers are decided by examiners and the Commission pursuant to Chapter 391-45 WAC.

Commission decisions have protected the rights of employees who have given testimony at proceedings conducted by the Commission. Seattle Public Health Hospital, Decision 1911-C (PECB, 1984); Toutle Lake School District, Decision 2659 (PECB, 1987). As discrimination for pursuit of collective bargaining rights is prohibited by RCW 41.56.040, these cases hold that discrimination against an individual for testifying at a Commission proceeding is a derivative interference violation pursuant to RCW 41.56.140(1).

The "Prima Facie Case" Test

Allegations of anti-union discrimination are analyzed under a causation test adopted by the Commission in City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251

NLRB 1083 (1980), and now well-settled law in this state.³⁸ Under that test, the burden of proof falls initially on the employee, to show that he or she was engaged in conduct protected by the collective bargaining statute, and that such conduct was a substantial or motivating factor in the employer decision or action at issue. Once such a showing is made, the burden shifts to the employer, to establish that it would have taken the same action even in the absence of the protected conduct.

Eslava's Participation in Protected Activities

Although Eslava did not take as visible a role as a union activist as did Faucett and McPherson,³⁹ the record establishes that he did participate in various protected activities. Those included helping in the union's organizing drive in 1982, acting as a shop steward in 1984-85, and testifying at the McPherson unfair labor practice hearings.

Employer Knowledge of Eslava's Protected Activities

The union indicated a belief that Eslava's troubles began in March, 1988, when he met with Faucett to prepare for the McPherson hearing, but the evidence does not bear out that allegation. While Eslava claimed that Faucett told him he would probably be subpoenaed to testify at the hearing, and that Faucett told him he had already informed both Chief Meigs and Captain Olson that Eslava would be testifying, Faucett rebutted that testimony. Faucett denied that he had ever informed employer officials about who the union might call as witnesses at the McPherson hearing. Eslava

³⁸ See, Clallam County, Decision 1405-A (PECB, 1982), aff. 43 Wn.App. 589 (Division II, 1986).

³⁹ Eslava never served on the union negotiating committee, and his first term as a union officer commenced in January, 1989, after the events complained of in this complaint.

admitted that he never told Larson, Meigs or Olson that he would be testifying at the hearing.

At the opposite end of the spectrum, the record also fails to support the employer's argument that the union failed to prove that the employer was aware of Eslava's protected activities. Although Chief Meigs could not recall any of Eslava's activities as a shop steward, Meigs was present for all of the hearing on the McPherson unfair labor practice charges. He recalled Eslava testifying about the oral interview questions, retention of the 1984 test scores, and the written reprimand letter to McPherson. The employer thus had actual knowledge of Eslava's protected activity of serving as a witness at the McPherson hearing.

Employer knowledge of protected activities can be inferred from circumstantial evidence. City of Seattle, Decision 3066 (PECB, 1988). The test is whether there is a rational connection between the facts proved and the fact that is to be inferred. NLRB v. Wal-Mart Stores, Inc., 488 F.2d 114 (8th Cir. 1973); Asotin County Housing Authority, Decision 2471 (PECB, 1986). Under the "small plant doctrine", employer knowledge of union activities is inferred where such activities are conducted in a relatively small work environment, and are carried on in such a manner or at such times that it may be presumed that the employer must have noticed them. See, Housing Authority of the City of Bremerton, Decision 3168 (PECB, 1989); Morris, The Developing Labor Law, (Second Edition, 1983), pages 194-5.

Although Olson claimed that he first became aware of Eslava's testimony in the McPherson case when the instant complaint was filed on July 5, 1988, the hearings on the McPherson case were held at the employer's headquarters station, where Olson's office was located. With a workforce of only 20 employees, it is inconceivable that Olson was unaware of the McPherson hearings or who was participating in them. Rather, it is only reasonable to infer that

Olson was aware of not only Eslava's participation as a witness, but also the substance of his testimony at the hearings.

Application of the "prima facie" Burden

In the union's view, the fact pattern supports an inference that Eslava was singled out for his participation in union activities. The union notes that union activist McPherson was disqualified during the testing process, and that union activist Faucett had his probation extended indefinitely. The union alleges a correlation between the fact that Salters was the only one among the applicants who was not active in the union, and the fact that Salters was the only applicant from the 1987 lieutenant testing process who successfully completed the probationary process without delay.

The union characterizes Eslava's testimony as "extremely adverse" to the employer in four areas. The first involves Eslava's belief that he was intimidated by Chief Meigs into issuing a written reprimand to McPherson. The second area of testimony dealt with Battermann's claim that she, as opposed to Meigs, gave directions to Eslava concerning the written reprimand.⁴⁰ The third area concerned Eslava's contradiction of Battermann's testimony that the same questions were asked of all applicants at the oral interviews. The fourth was Eslava's testimony that his test results from the 1984 lieutenant exam were in his personnel file just after the January, 1987 testing procedure.⁴¹ The union presented testimony from several union officials to buttress this theory. McPherson testified of his belief that Eslava's testimony had a definite bearing on his not passing probation. In his mind, the union was tolerated by the administration, so long as it stayed within

⁴⁰ Eslava testified that Battermann was not even present during the conversations he had with Meigs.

⁴¹ McPherson had been told by the employer that the test results for the January, 1987 exam had been destroyed.

certain bounds. If an employee attempted to exert his rights as guaranteed by state law, and that was not to the liking of the administration, then things were done to keep you in line.

Jim Hill, seventh district vice-president for the International Association of Fire Fighters,⁴² related that Faucett told him that he thought Eslava's failure to complete the probationary period was due to Eslava's union activities, and specifically his testimony at the McPherson hearings. That was hearsay as to the matters asserted, but it evidences the beliefs and attitudes current among the employees at that time.

The union further alleges that Eslava was treated differently by the employer after Olson became his supervisor. According to the union, Eslava's first evaluation by Larson indicated that he met or exceeded employer requirements for a probationary lieutenant. The union believes that Larson's second evaluation of Eslava showed that none of his ratings were unsatisfactory or below departmental requirements. Larson even commented that: "Miche is progressing toward becoming a good officer." After Olson became his supervisor, Eslava received several disciplinary actions and, based on Olson's recommendation, Chief Meigs decided not to pass Eslava at the end of his probationary period.

Statements by the employer do not defeat an inference of anti-union motivation. In response to the union assertions on the critical nature of Eslava's testimony, Chief Meigs commented that: "His testimony didn't hurt the Fire District in my opinion." To the contrary, Chief Meigs observed that:

A union, as a matter of fact, is life with the fire districts. There are a lot of people - I was a union officer myself. It doesn't make

⁴²

The Seventh District includes Alaska, Idaho, Montana, and Washington.

any difference whether we're union, whether we're not.

An employer's anti-union motivation is rarely publicly broadcasted. City of Seattle, supra. The Examiner must consider:

... timing of the discharge, disparate treatment of other employees, whether established procedures (including contract procedures) were followed, the reasons given for the discharge, whether those reasons were given to the employee, any shift in those reasons on the part of the employer, and evidence from prior unfair labor practice proceedings.

Seattle Public Health Hospital, Decision 1911-C (PECB, 1984).

When an employee is discharged shortly after engaging in union activity, it can be inferred that the employer's asserted justifications are pretextual and that the discharge was discriminatorily motivated. Asotin County Housing Authority, supra; Morris, supra, page 214. Eslava testified at the McPherson hearings on April 14 and May 9, 1988. His testimony, especially on May 9, was diametrically opposed to that of several employer witnesses in certain key areas. The employer's decision to fail him at the end of his probationary period was made on June 13, one short month later. The timing of the employer's action, following Eslava's adverse testimony, is sufficient to infer that protected conduct was at least a motivating factor in the employer's decision.

Employer's Burden of Proof

The burden now shifts to the employer, to establish that it would have taken the same action, even in the absence of protected conduct. The employer asserts that Eslava failed his probationary period because of numerous deficiencies in his performance.

The "Tarps" Project -

The first problem area referenced in the employer's June 28, 1988 letter was Eslava's failure to perform and complete duties and assignments. The primary criticism in this area concerned Eslava's tardiness in completing the "tarps" project.

Eslava claims that he was never given a specific time for completion of the project, but Larson gave Eslava a grade of "M-" in several sub-categories in his January, 1988 evaluation because the "tarps" project was not completed. When Olson held his first planning meeting with Eslava on April 14, Eslava told him the project was completed and was at his home. Olson instructed Eslava to turn in the report by April 20, but Eslava spent time counting tarps on that date and did not submit his report until April 29. The report did not contain a training program, and it was not until May 6 that Eslava turned in a report addressing that area.

The June 28 letter alleges that the tarps assignment was turned in 22 days late. While that exact number of days appears to be slightly inaccurate,⁴³ the evidence is indisputable that Eslava was tardy in completing this assignment. Eslava failed to complete several additional "tarps" objectives that were assigned to him on May 6, and he or his crew spent time performing "tarps" work after the June 28 meeting with Larson and Olson.

The "Inventory" Assignments -

The employer also claimed in its June 28 letter that Eslava was late in turning in his inventory assignments for engines 701 and 721 by 10 and 40 days, respectively.

⁴³ Eslava was nine days late from the April 20 deadline in turning in his first handwritten tarps report and 16 days late from the deadline in turning in a report that addressed all four assigned objectives, including training.

Eslava indicated that, as in the tarps assignment, he was never given specific dates for the completion of this assignment. But Olson produced a memo supporting his testimony that such a deadline was given to Eslava. The evidence showed that Eslava was late by a substantial amount of time in the completion of this assignment.

Low Training Hours -

The June 28 letter cited Eslava's low training hours. While the employer had no ironclad requirements as to the completion of training hours, employees were expected to strive for the completion of 60 training or drill hours per quarter.

Eslava had received grades of "M-" in several training sub-categories on his January, 1988 evaluation, as his crew had the lowest number of training hours in the department for the fourth quarter of 1987. Eslava was notified by Olson in their April 14, 1988 planning meeting to increase his training hours, as his crew again had the lowest training totals during the first quarter of 1988 and Eslava individually recorded the lowest number of training hours by any employee during that time period.

Eslava disputed the employer's claims that he only trained for eight hours during the first quarter of 1988 and four hours during May, 1988. Based on his June 28 review of the Station 1 logbook, Eslava alleges that he drilled for 46.5 hours during the first six months of 1988. While the employer disputed whether some of those hours were legitimately spent in training, the Examiner finds evidence in the record to support a total of 35 training hours during this time period. Nevertheless, this total is contrasted with the department-wide average of 62.5 hours for only the second quarter of 1988. Other employees were complying with the goal of 60 training hours per quarter. Eslava's totals were substantially below average in this area.

Inaccurate Reports -

Eslava's performance in the area of reporting was also singled out in the employer's June 28 letter.

Eslava was criticized for failing to fill out his quarterly training report, which was due on March 31, 1988. However, all of the lieutenants, except Olson, were tardy in turning in this report.

The letter alleged that Eslava failed to fill out a fire report for a fatality car fire accident, and that he argued and refused to accept responsibility for his mistake. This allegation concerned the June 5 accident where personnel from several stations responded to the call. Two EMS aid reports for this accident were completed by personnel from headquarters. Eslava filled out the WAFIR fire report on June 7, his next work shift. There was insufficient evidence to support the employer's claims regarding this accident.

Eslava was also criticized in the June 28 letter for having nine reports returned during the previous two months as being incomplete or inaccurate. Olson admitted that he was having this same problem with other lieutenants. The employer failed to establish that Eslava's numbers were substantially different than other lieutenants during this same time period.

Inattention to Detail -

The final performance deficiency cited in the employer's June 28 letter concerned Eslava's inattention to detail. In addition to the inaccurate and incomplete report problems, the employer referenced the written reprimand Eslava received for the bay door accident. Eslava alleges that he was treated differently than other employees for this accident, his first as an employee. Eslava claims that other employees were not reprimanded for their first accident, and that Olson, as a probationary firefighter, was

not disciplined for two accidents that tore off compartment doors. The seriousness of Eslava's accident, in Olson's mind, was that Eslava had not been in control of his crew, as opposed to the actual accident itself. Eslava was disciplined for the disorganized nature of the work environment.

Change of Supervisors -

In response to Eslava's allegation that he was treated differently after Olson became his supervisor, the evidence showed that Olson was, generally speaking, a stricter grader than Larson. When Larson's October, 1987 and January, 1988 evaluations are compared to Olson's evaluations of July, 1988, a definite pattern emerges. For example, Faucett's October, 1987 evaluation contained a generous smattering of "M+" grades, especially in the area of supervisory ability. When Olson evaluated him in July, 1988, his superior ratings in supervisory ability plunged to generally below-acceptable ratings. The same pattern, though not as dramatic, can be seen in Salters' evaluations. He had received higher than average grades in supervisory ability for his October, 1987 and January, 1988 evaluations, but his July, 1988 evaluation showed, on an average, lower grades in this area. After Olson was appointed captain, Chief Meigs told Olson that he wanted closer supervision of the lieutenants and their crews. The evidence shows that Olson was harder on all of the lieutenants, not just Eslava. Evaluations of Olson's own performance, conducted by Larson in October, 1987 and January, 1988, showed that he was consistently rated significantly higher than Eslava, Faucett and Salters during this same time period. The evidence merely supports the proposition that Olson was a tough taskmaster.

Eslava's case is weakened by the multiple explanations he used to specify the time when his difficulties began. He initially claimed that he got an oral admonishment, oral reprimand and written reprimand after he testified in the McPherson hearings of April-May, 1988. But all of these events took place either before or on

the first day of that hearing. The oral admonishment referred to the McPherson missing report incident of September, 1987, the written reprimand for the bay door accident was given on April 5 and the oral reprimand was received on April 14 for his failure to report the burned pan incident. Eslava's second explanation was that all three of these disciplinary actions took place after he was subpoenaed to testify by the union attorney during the first week of April, 1988. However, Eslava admitted that he received his April 5 written reprimand before receipt of the subpoena. Eslava's third explanation was that his difficulties began after he knew he was going to be subpoenaed for the McPherson hearing. He learned of this fact on March 10 in a conversation with Faucett. Eslava's final explanation was that his troubles started after the January, 1988 lieutenant's meeting, where he had told Olson that he should not be eligible to take the captain's exam. However, four of the five remaining lieutenants agreed with this position taken by Eslava.

Conclusions -

The issue in this matter is not whether the employer had "just cause" to terminate Eslava's employment or to fail him at the end of his probationary period. Whatcom County, Decision 1886 (PECB, 1984). Probationary periods are utilized by employers to evaluate employees to see if they can competently and efficiently perform the duties of a particular position. So long as an employer does not base its decision on unlawful criteria, such as consideration of union activities, it has wide discretion to select those employees it wishes to keep on a permanent basis in leadership positions. The key becomes the motivation of the employer in making its decision. Motivation is a factual determination which must be supported by substantial evidence, either circumstantial or direct. Whatcom County, supra, quoting NLRB v. Gogin, 575 F.2d 596 (7th Cir. 1978).

The lieutenant classification is a leadership position, as individuals holding this rank are in charge of a crew of firefighting employees. Employees in this position work most of the time with very little supervision, and must possess planning, delegating, initiating, and organizational skills. Eslava has been associated with District 7 for over 20 years, having served as a volunteer firefighter for 10 years and as a paid firefighter for the last 11 years. He had served as an acting lieutenant, filling in for short periods of time during periods of vacation and sick leave. There is no doubt that Eslava met the minimum qualifications to be a lieutenant. He passed the lieutenant exam in both 1984 and 1987. However, being qualified and selected for a position does not assure that an employee can successfully perform all of the functions of a job.

In Olson's mind, the most important parts of the June 28 letter were Eslava's failures on the tarp and inventories assignments. Olson felt that these performance deficiencies showed an inability to take initiative, and to organize, plan and delegate properly. Olson saw the role of a supervisor in the following manner:

A manager of people, number one, is to accomplish things through others. He is given objectives to complete, and he accomplishes them through the resources that are allocated to him; and that is through others.

And so he is to plan and organize and implement and evaluate those programs and projects in order to assure that they're completed, and to try to use his personnel in the most efficient manner.

Transcript, at page 932.

Olson also felt that a supervisor needed to show these abilities on his own during his probationary period. In response to a question as to why he had not informed Eslava that he was in jeopardy of not passing his probation, Olson commented as follows:

. . . when you're on probation, an individual needs to perform in a very proficient level, because, again, it is part of the selection process.

We're looking at having a leader within the Fire District for the next 30 years, for the rest of his career. And this organization's community needs to have excellent individuals. During probation, a person needs to apply himself the best that he knows how and continue that on, of course, after probation.

But during probation, if an individual does not perform proficiently, I made the decision that I would not want to do that. Because if I had to use coercive-type power on him while he was on probation to complete these tasks or objectives, then what would I have to do with him once he was off probation? And so I chose not to do that.

Transcript, pages 803-04.

Olson did tell Eslava at their May 6 meeting that he was concerned about his performance deficiencies and how they could affect his probation. But after this meeting, Eslava failed to complete the additional tarp objectives that Olson had assigned and missed the deadlines for completion of the inventories. Eslava's training hour totals also remained low after the May 6 meeting. The employer sustained its burden of proof that it would have failed Eslava at the end of his probationary period, even in the absence of protected activities.

The union has failed to show that Eslava was subjected to different treatment than others. Faucett placed second during the lieutenant testing process of January, 1987, although he was president of the union and actively involved in contract negotiations with the employer. Olson recommended that Faucett fail his probation, at the same time of his recommendation concerning Eslava. Although Faucett had relinquished his union presidency by this time, he was still serving as vice-president of the District 7 bargaining unit, a highly visible union position. While Chief Meigs concluded that

Eslava had failed his probationary period, Faucett's probation was indefinitely extended due to several extenuating circumstances. Those circumstances, including having a probationary firefighter on his crew, a more complicated project, and time off for sick leave and funeral leave, appear to be reasonable distinguishing factors from Eslava's situation, and were all supported by the record in this matter.

"Weingarten" Right to Union Representation

A basic right of employees was succinctly set forth in City of Seattle, Decision 3198 (PECB, 1989), in the following manner:

An employer commits an unfair labor practice by denying an employee's request to have union representation present in an investigatory meeting which the employee reasonably believes might result in disciplinary action. NLRB v. Weingarten, Inc., 420 U.S. 251 (1975); Okano-gan County, Decision 2252-A (PECB, 1986). If the meeting is called, however, for the limited purpose of announcing the discipline that is to be imposed, and the affected employee is not interrogated, a union representative need not be present. Mercer Island, Decision 1460 (1982).

The union alleges that Eslava's Weingarten rights were violated at the June 28 meeting with Olson and Larson.

The purpose of the June 28 meeting was not investigatory, but to inform Eslava of a decision that had already been made. No investigatory questions were asked of Eslava concerning the events referred to in the letter. Under such circumstances, no right to representation existed. See, City of Seattle, supra; Pierce County Fire District 9, Decision 3334 (PECB, 1989); City of Tacoma, Decision 3346-A (PECB, 1990).

Due Process ("Loudermill") Rights

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the U.S. Supreme Court held that the due process clause of the Fourteenth Amendment requires a pre-determination hearing before a tenured public employee is deprived of any property interests. The union claims that Eslava's "due process" rights were violated when the employer failed to give him notice of the charges against him, an explanation of the evidence and a realistic opportunity to respond to it. The employer argues that the Public Employment Relations Commission is without jurisdiction to decide this particular issue.

The Commission has ruled that it does not assert jurisdiction through the unfair labor practice provisions of Chapter 41.56 RCW to enforce "due process" rights emanating from the federal and/or state constitutions. City of Tacoma, supra.

FINDINGS OF FACT

1. Kitsap County Fire Protection District No. 7 is a public employer within the meaning of RCW 41.56.030(1). C. V. "Bill" Meigs serves as fire chief for the employer.
2. International Association of Fire Fighters (IAFF), Local 2819, is the exclusive bargaining representative for a unit of non-supervisory paid firefighting employees of the employer. That bargaining relationship has existed since 1982.
3. The docket records of the Commission, Decision 2872 (PECB, 1988) and Decision 2872-A (PECB, 1988) indicate that the employer and union have had a previous dispute concerning the unilateral adoption of tobacco use and residency policies.

4. During January and February, 1987, the employer conducted a testing process for the "lieutenant" classification. All applicants except James McPherson passed that process. The docket records of the Commission and Decision 3105 (PECB, 1989) indicate that McPherson's disqualification from the testing process was the subject of an unfair labor practice case filed by the union against the employer. The final ranking of the successful lieutenant applicants was: (1) Tim Salters, (2) Gary Faucett, and (3) Miche Eslava.
5. Salters was promoted to lieutenant at the headquarters station (Station 3) in mid-February, 1987.
6. On February 16, 1987, four IAFF affiliates in Kitsap County consolidated into one local union, known as Local 2819. Faucett became president of the merged local, while McPherson became secretary-treasurer.
7. On March 19, 1987, the employer and union signed a successor collective bargaining agreement for the period of January 1, 1987 through December 31, 1988.
8. On July 1, 1987, the employer commenced operating Station 1 in Gorst, Washington, with paid firefighting personnel. Eslava and Faucett were promoted to the rank of lieutenant and were assigned to Station 1. Dan Olson was designated to fill a lieutenant vacancy at the headquarters station on an acting basis.
9. On August 25, 1987, Assistant Chief Gary Larson wrote a memo to Eslava assigning him to the "tarps" project. Eslava received the memo in a meeting with Larson on September 20, after Eslava returned from vacation.

10. Initial evaluations of probationary and acting lieutenants Eslava, Faucett, Salters, and Olson were conducted by Larson in early October, 1987.
11. Eslava showed Larson a five-page handwritten report on the "tarps" project in October or November, 1987. Larson indicated that after Eslava presented cost estimates for replacement tarps, Larson would have the report typed up.
12. In late December, 1987, Faucett resigned as union president and was replaced by McPherson. Faucett defeated Eslava in an election for vice-president of the District 7 bargaining unit.
13. On or about late December, 1987, the employer announced an opening for a "captain" position, with employees performing the work of a lieutenant being eligible to apply. At a meeting of all of the lieutenants, four of the five (excluding Craig Haugen) felt that employees performing the work of a lieutenant in an acting or probationary status should not be eligible to take the exam. Eslava announced this "decision" to Olson at the meeting. The employer gave a captain's examination under its announced criteria and all six employees performing the work of a lieutenant applied and took the test. No results from the exam were revealed, however, as the union filed a grievance on January 4, 1988, challenging the employer's actions in establishing the eligibility qualifications for the position.
14. Larson prepared evaluations for Eslava, Faucett, Salters and Olson in January, 1988. Eslava's evaluation showed several grades below the "meets requirements" standard.
15. When Larson met with Eslava on January 21, 1988 to review the evaluation, Eslava showed Larson his five-page handwritten report on the "tarps" project and told Larson the project was

completed, except for receipt of the cost estimates. Larson told Eslava that he would have the report typed up when Eslava provided the cost estimates.

16. On March 3, 1988, Olson was appointed to the rank of captain on a permanent basis by the employer's board of commissioners. Olson assumed supervisory responsibilities over the lieutenants. The union filed a grievance on March 15, 1988, challenging this appointment.
17. On March 27, 1988, Eslava had an accident while driving a fire engine out of Station 1. After a disciplinary hearing, Olson issued a written reprimand to Eslava on April 5, 1988, for his conduct during the accident.
18. Olson conducted a planning meeting with Eslava on April 14, 1988. Topics discussed at the meeting included inaccurate and incomplete reports, failure to file a quarterly training report, low training hours, and the "tarps" assignment. Eslava indicated that the "tarps" project was completed and was at his home. Olson instructed Eslava to turn in his report by April 20, 1988. Olson also issued an oral reprimand to Eslava at this meeting for failing to report an accident involving employer-owned equipment. This incident occurred on March 24, 1988, when Eslava burned a cooking pan at Station 1.
19. On April 14 and May 9, 1988, Eslava testified in the McPherson unfair labor practice hearing. Eslava's testimony was adverse to that of testimony presented by certain employer witnesses. Eslava's participation in protected activities, in addition to testifying at the McPherson hearing, included helping in the union's organizing drive in 1982 and acting as a shop steward in 1984-85.

20. Eslava failed to turn in his "tarps" project on April 20, 1988. On April 29, Eslava gave Olson the same handwritten report he had shown Larson in the fall of 1987 and in January, 1988. As the report lacked any information concerning a training program, Olson extended the report deadline to May 6. Eslava turned in a typewritten "tarps" report on May 6, including a proposed training schedule for district personnel. Olson instructed Eslava to complete several additional "tarps" objectives by June 7. Eslava failed to complete those additional objectives.
21. Eslava was instructed by Olson to complete an inventory of engine 721 by May 1, 1988. When Eslava failed to meet that deadline, Olson ordered Eslava to complete an inventory for engines 701 and 721 by June 1, 1988. Eslava turned in the inventories on June 9, 1988.
22. On June 13, 1988, Olson, Meigs and Larson met to discuss the work performances of Eslava and Faucett. While Olson recommended that neither employee pass their probationary period, Meigs decided that Faucett's probationary period would be extended indefinitely, due to several extenuating circumstances. Those circumstances included having a probationary firefighter on his crew, a more complicated work project, and time off for sick leave and funeral leave. Meigs concurred with Olson's recommendation that Eslava should be returned to the rank of firefighter.
23. Olson and Larson met with Eslava on June 28, 1988 to inform him of Chief Meigs' decision.
24. Evaluations were completed by Olson for lieutenants Faucett and Salters in early July, 1988. On July 29, 1988, Faucett submitted four pages of comments concerning his evaluation.

25. Faucett was removed from probation and given permanent status as a lieutenant on August 23, 1988.
26. On January 1, 1989, Eslava succeeded Faucett as union vice-president for District 7 employees.
27. Chief Meigs was present for all of the McPherson hearing and had actual knowledge of Eslava's testimony. Knowledge of such testimony is inferred to Olson under the "small plant doctrine".

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. The timing of the employer's decision to fail Eslava at the end of his probationary period, following his adverse testimony at the McPherson hearing, is sufficient to infer that protected conduct was at least a motivating factor in the employer's decision, so that a violation of RCW 41.56.140(1) could have occurred.
3. The employer established that it would have taken the same action, even in the absence of protected conduct, due to several performance deficiencies by Eslava. Those deficiencies included incomplete and tardy work on the "tarps" project, tardy performance on the inventories assignment, low training hours, and the disorganized nature of his crew at the time of a vehicular accident. The employer's showing proved that no violation of RCW 41.56.140(1) was committed.
4. As the purpose of the June 28, 1988 meeting between employer representatives and Eslava was to inform Eslava of a decision

that had already been made, and no investigatory questions were asked, Eslava was not entitled to union representation at such meeting, and no violation of RCW 41.56.140(1) occurred.

5. The Public Employment Relations Commission does not assert jurisdiction through the unfair labor practice provisions of Chapter 41.56 RCW to enforce "due process" rights emanating from the federal and/or state constitutions.

NOW THEREFORE, IT IS

ORDERED

The complaint charging unfair labor practices filed in this matter is hereby dismissed.

DATED at Olympia, Washington, this 26th day of October, 1990.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION


MARK S. DOWNING
Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.