

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CLALLAM COUNTY DEPUTY SHERIFF'S GUILD,	)	
	)	
	)	CASES 8205-U-89-1778
Complainant,	)	8543-U-90-1847
	)	
vs.	)	DECISION 4011 - PECB
	)	
	)	
CLALLAM COUNTY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

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Aitchison & Hoag, by William J. Gibbons, Attorney at Law, appeared on behalf of the complainant.

Lane, Powell, Spears & Lubersky, by C. Akin Blitz, Attorney at Law, appeared on behalf of respondent.

On October 5, 1989, the Clallam County Deputy Sheriff's Guild filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Clallam County had violated RCW 41.56.140(1) by the suspension of Peter Vanderhoof, a union officer, in retaliation for protected activities.<sup>1</sup> A preliminary ruling issued by the Executive Director on November 14, 1989, pursuant to WAC 391-45-110, concluded that the complaint stated a cause of action.

On April 16, 1990, the Clallam County Deputy Sheriff's Guild filed another complaint charging unfair labor practices with the Commission, this time alleging another suspension of Vanderhoof in retaliation for appealing the earlier discipline and for filing the October 5, 1989 unfair labor practice complaint with the Commis-

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<sup>1</sup> Case 8205-U-89-1778.

sion.<sup>2</sup> A preliminary ruling issued by the Executive Director in that matter on May 2, 1990, concluded that complaint also stated a cause of action.

On September 27, 1990, the Clallam County Deputy Sheriff's Guild filed an amended complaint alleging the discharge of Vanderhoof in retaliation for his engaging in protected activities. A preliminary ruling issued by the Executive Director on October 15, 1990, concluded that the amended complaint also stated a cause of action.

All of the allegations described above, along with certain others,<sup>3</sup> were consolidated for hearing before Examiner William A. Lang. Continuances were granted and the hearing was rescheduled on four occasions prior to being held on March 5, 6, and 7, 1991. During

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<sup>2</sup> Case 8543-U-90-1847.

<sup>3</sup> Also consolidated for hearing before the Examiner were unfair labor practice complaints filed by the union on June 26, 1989 and December 31, 1990. The complaint in Case 8048-U-89-1743 had alleged that the employer had unlawfully disciplined the union's president, Charles Fuchser, for drawing a cartoon and posting it on a bulletin board designated for union material. [The cartoon was drawn on a questionnaire entitled "Taking Your Department's Temperature" that had been distributed by the employer to solicit comments from employees on the department's operation. The cartoon depicted a deputy sheriff bent over with his trousers dropped, receiving a rectal thermometer administered by an arm wearing the insignia of the sergeant rank. Fuchser was suspended for five days on December 27, 1988.] The complaint in Case 8961-U-90-1975 had alleged that the employer gave Fuchser an "unsatisfactory" evaluation in retaliation for his union activity. [Fuchser's performance had been criticized in the areas of "grooming" because of body odor, overweight, and appearance; "care of equipment" because a leaky trunk of his assigned vehicle corroded bullets which misfired at the firing range; and "compliance with rules" because of a one day suspension for doing union business on department time. Fuchser also was thought to need improvement in initiative, planning, volume of work and in public contacts.] Both of the complaints concerning Fuchser were resolved by the parties and withdrawn by the union on February 20, 1991.

the course of the hearing before the Examiner, the parties stipulated the admission in evidence of the transcript of seven days of hearing before the Clallam County Civil Service Commission (consisting of approximately 1600 pages), three volumes of exhibits from the civil service proceedings (consisting of approximately 1100 pages), and the briefs filed in proceedings for judicial review of the civil service proceedings (consisting of approximately 90 pages). The parties filed post-hearing briefs on June 17, 1991, and the Examiner thereafter commenced work on the decision. The parties were notified on November 18, 1991 that the issuance of a decision would be delayed due to an illness of the Examiner, and neither party raised any objection to that procedure.

#### BACKGROUND

During the period of time relevant to these proceedings, Steven T. Kernes was the elected sheriff of Clallam County. Undersheriff Dan Engelbertson reported directly to the elected sheriff. Major Fred DeFrang was the chief criminal deputy, and was in charge of the operations (patrol) division of the department. Sergeants within the department included Daniel Gates, Don Kelly, Monty Martin, and Nicholas Turner.

These proceedings concern an employment relationship which commenced on July 5, 1983. Peter Vanderhoof was initially hired by Clallam County as a corrections officer. In mid-1984, he was placed in the position of "projects coordinator (planning and development)" under the direct supervision of Sheriff Kernes. Vanderhoof was promoted to deputy sheriff in December, 1985,<sup>4</sup> and

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<sup>4</sup> Vanderhoof was assigned to the State Basic Law Enforcement Academy from December 3, 1985 through February 26, 1986, graduating 7th out of a class of 18. Vanderhoof successfully completed the Field Training Officer (FTO) program during March through June, 1986.

was assigned to full patrol duties on July 1, 1986. Vanderhoof was laid off from the deputy sheriff position in November of 1986, and was reassigned to corrections duties. He was nevertheless considered to have completed his probation as a deputy sheriff, and was given his "end of probation" performance evaluation report on November 20, 1986. Vanderhoof was returned to the deputy sheriff position in November, 1987.

By the summer of 1987, Vanderhoof had become the secretary of the union. He later became the vice-president of the union.

During the years 1987, 1988, and the first four months of 1989, the union and employer were engaged in collective bargaining negotiations for a successor contract. Both Vanderhoof and the union's president, Charles Fuchser, were members of the union's bargaining team in those negotiations. During 1988, various reports appeared in the local news media regarding the protracted negotiations and certain personal problems encountered by Sheriff Kernes.<sup>5</sup>

In August of 1988, a controversy arose concerning a grant of job security to the undersheriff, the chief criminal deputy, the jail superintendent, and six other top administrators in the department. On August 23, 1988, the Clallam County Civil Service Commission adopted a resolution which placed nine administrative positions previously exempt from civil service under the control of the Clallam County Personnel System. On the following day, the news media reported that union officers Fuchser and Vanderhoof were upset with the adoption of that resolution, and Fuchser was quoted as saying that "A new sheriff will lose the ability to clean house when he gets into office." The article also commented on the fact

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In May, 1988, the sheriff was arrested for simple assault after his wife filed a domestic violence complaint against him. Protesters picketed the courthouse, calling for the sheriff's suspension from duties because of the arrest. There was talk of a recall effort.

the union had declared an impasse in the contract negotiations, that the union had been without a contract since the end of 1986, and that the employees had recently suffered a pay cut when the Board of County Commissioners decided not to pay increased medical insurance premiums. On August 25, the local newspaper reported that the Fuchser and Vanderhoof had alleged that the resolution would "further entrench the bureaucracy responsible for problems plaguing the department", and that Vanderhoof and Fuchser attributed morale problems to short-staffing, increased workloads and schedule changes. Vanderhoof was reported to have called the bureaucracy a small feudal empire. The newspaper reported that Engelbertson and DeFrang had labeled the charges as the result of contract frustrations, and that they vehemently disagreed with Vanderhoof's charge that employees do not speak out because of "a real fear of retribution". Vanderhoof attempted to initiate a referendum petition for voter repeal of the resolution, but he failed to obtain sufficient signatures on that petition.

The parties signed a successor collective bargaining agreement on April 28, 1989.

Vanderhoof was given a disciplinary suspension for the period from September 20, 1989 through September 25, 1989. The reasons given by the employer for that suspension were Vanderhoof's alleged failure to complete certain case updates prior to taking vacation, and his alleged failure to receive certain training in accordance with a memo issued in May of 1989.

Vanderhoof was given a second disciplinary suspension for the period from November 21, 1989 through November 24, 1989. The reasons given by the employer for that suspension were Vanderhoof's alleged "incompetence", as shown by 15 case files found stored in a file drawer, and Vanderhoof's alleged "dishonesty".

On February 15, 1990, DeFrang wrote a letter to Vanderhoof that consisted of five, single-spaced pages. That letter cited Vanderhoof's alleged mishandling of three particular situations: [R], [K] and [H].<sup>6</sup> DeFrang concluded that the handling of these incidents raised a serious question concerning Vanderhoof's competency and ability to improve or perform at an acceptable level and reflected extremely poor judgment. DeFrang listed 12 categories of violations, including dishonesty, insubordination, violation of department policy, failure to perform duties in a competent manner, dereliction of duty, and failure to perform work plan. DeFrang wrote that he believed Vanderhoof to be unsuitable for police work, and that he would recommend Vanderhoof's release from employment.

In a letter to DeFrang dated March 6, 1990, the union's attorney, Mark S. McCarty, wrote that the three incidents relied upon in the February 15 memo were unsupported, and not worthy of discipline or discharge. McCarty found it "curious" that Vanderhoof was informed by memo on February 9 that no discipline would result from a vehicle accident, and that it now was being used as a basis for discipline. McCarty observed that a policy concerning referrals to the State Patrol relied upon by DeFrang came out after the [R] incident. McCarty questioned why the department had waited over three months to pursue the [R] case if it believed that Vanderhoof did not handle the arrest properly. McCarty asserted that the [H] arrest was handled properly, according to the state troopers who were at the scene.

DeFrang responded in a letter to McCarty dated March 15, 1991. He denied that he was relying only on the three incidents as a basis for the proposed discharge, asserting instead that he was relying on Vanderhoof's entire record of employment. DeFrang stated that

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<sup>6</sup> Although the parties did not take steps to do so, the Examiner deems it appropriate to use symbols so that the names of the accused will not be improperly disclosed.

Vanderhoof's performance showed incompetence, poor judgment and conscious disregard for policy. DeFrang indicated that he was convinced that Vanderhoof could not perform his duties at a "level of minimal acceptable competence".

A pre-disciplinary meeting was held on March 27, 1990. The list of attendees is not clear, although it appears Vanderhoof was present, and was assisted by the union's attorney, McCarty, and the union's president, Fuchser.

Vanderhoof's employment was terminated on April 18, 1990, by Engelbertson. In that letter, Engelbertson stated that he had reviewed recommendations submitted by Turner, Martin, Kelly, and DeFrang. Engelbertson also recounted that he had investigated the concerns raised at the pre-disciplinary meeting. He summarized the reasons for Vanderhoof's discharge as:

During my deliberations, I have based my decision on both the incidents included in Major DeFrang's letter dated February 15, 1990, as well as the totality of your work history with the department.

On at least three demonstrated occasions, including the recent DWI cases and the [K] incident in 1989, you have demonstrated your inability to properly control confrontive and dangerous situations. Although the [K] incident was treated as a training scenario rather than a disciplinary incident, the facts surrounding the case clearly indicate that your actions were improper and had it not been for the actions of an arriving supervisor, may very well have resulted in injury or death to either the victims or yourself in the incident. ...

Your file also includes numerous other documented incidents of inattention to duty and incompetence ... including your inability to write reports which include sufficient data and investigative steps to result in successful identification of the roles of witnesses and suspects resulting in successful prosecution. ...

It is clear to me that while many of these incidents appear, by themselves, to be minor, the decision by the supervisors to begin documentation was proper. ...

Attention to detail in police work is critical. Continued incorrect and incomplete information, including wrong dates, wrong times, wrong case numbers, failure to complete reports in a timely manner, failure to provide sufficient information, failure to complete documents, is not acceptable. ...

As a result of the review of all work documentation contained in your history of employment with the Department, specifically, those incidents related in my letter of November 15, 1989 regarding an order of suspension, your total performance commitment and work plan dated 26 October 1989, and the recommendation of Major DeFrang and the patrol sergeants dated 15 February 1990, I have determined that sufficient grounds do exist for termination pursuant to RCW 41.14.110, specifically, incompetency, dishonesty, inefficiency, and inattention to duty. ...

The discharge was made effective immediately.

Vanderhoof appealed his discharge to the Clallam County Civil Service Commission, pursuant to RCW 41.14.120. In a decision rendered on July 23, 1990, the civil service commission found sufficient cause existed for the suspensions and discharge of Vanderhoof, and affirmed the employer's actions.

On January 10, 1991, Vanderhoof appealed the decision of the Clallam County Civil Service Commission to the Superior Court for Clallam County. In his appeal brief to that court, Vanderhoof argued that the decision of the civil service commission failed to meet the appearance of fairness doctrine, because two of the three commission members have a history of financial dealings with the sheriff and undersheriff, and that the decision itself was arbitrary and capricious and not supported by substantial evidence. The appeal also claimed that the civil service decision was issued



before the transcript of the hearing was prepared. In its brief to the court, the employer argued that the alleged financial interests were too remote to implicate the appearance of fairness doctrine, and that the appeal failed to identify even one finding or conclusion which was not supported by substantial evidence.

#### POSITION OF THE PARTIES

The union argues that Vanderhoof had a good work record prior to August 24, 1988, and had been selected by Kernes to work as the planning coordinator for the department under the direct supervision of the sheriff. The union contends that Vanderhoof's troubles began after he commenced working on the union's negotiation team in the summer of 1988 and vigorously opposed a personnel resolution granting protected status to Engelbertson and DeFrang. The union alleges that Vanderhoof was almost immediately reprimanded, and that he was placed under the supervision of Turner, with Martin and Kelly as backup, in January, 1989, for the purpose of "training in order to bring him up to standards". The union argues that the employer then embarked on a "blizzard of petty criticisms" in the form of work documentation. The union argues that Vanderhoof was suspended for dishonesty and "not meeting deadlines", even though Vanderhoof had not been disciplined in six years of service. The union contends that Vanderhoof was the most productive and least delinquent deputy in the department, and that no other employee had been disciplined for delinquent reports. The union asserts that there is no evidence that the 15 "derelict" files relied upon by the employer as a basis for suspension were, in fact, "derelict". It cites the fact that DeFrang showed no concern over nine felony files which had disappeared for nine months as demonstrating that the charges were contrived and pretextual. The union argues that the charges used to terminate Vanderhoof's employment that he "failed to control" are not supported by the record. The union argues that it has met the Wright Line test, by showing that

Vanderhoof was engaged in protected activity, and that the employer's discipline of him was motivated by animus, because of his union activity. The union claims that the employer's failure to demote Vanderhoof back to the jail (as was done in the case of another deputy who was charged with identical shortcomings) is further evidence of animus. The union contends that the employer has not met its burden of showing that it would have disciplined Vanderhoof even in the absence of protected conduct, because it introduced no evidence that it ever disciplined other employees for delinquent reports, or that it even investigated other instances of "derelict" or lost files.

The employer contends that Vanderhoof was disciplined for cause, and that the discipline did not relate to his protected activity. The employer argues that the union has not shown evidence of animus, or that protected conduct was a motivating factor. Further, the employer argues that the union is collaterally estopped, by the civil service decision, from challenging the employer's contention that it would have taken the same action in the absence of protected conduct. The employer asserts that the Public Employment Relations Commission should refrain from exercising jurisdiction in this case, reasoning that the Superior Court has exclusive jurisdiction following the decision of the Civil Service Commission.

## DISCUSSION

### The Jurisdiction of the Commission

The employer's "jurisdiction" argument is predicated on the "primary jurisdiction doctrine". The employer cites Kringle v. Department of Social and Health Services, 47 Wn.App. 51 (1987), where the court held that courts should refrain from exercising jurisdiction in deference to an administrative agency with special

competence over the subject matter. The employer holds up the Clallam County Civil Service Commission as being such an administrative agency. According to this contention, the Public Employment Relations Commission should defer to the civil service proceedings now on appeal before the superior court.

The employer's argument distorts the "primary jurisdiction doctrine", which was developed for an entirely different set of circumstances than are present in this case. It also ignores the most recent judicial precedent on the subject, City of Yakima v. International Association of Fire Fighters, 117 Wn.2d 655 (1991).

The "primary jurisdiction doctrine" deals with which forum should proceed when the same cause of action has been initiated in two or more forums. In Yakima, supra, the Supreme Court admonished the courts to avoid making fine distinctions within the class of conduct regulated as "unfair labor practices". The doctrine becomes operative when the venue controversy is concerned with the choice between an administrative agency and a court. The doctrine is not appropriately applied to the Public Employment Relations Commission when the proceeding before the Superior Court concerns judicial review of the decision of another agency.

The "primary jurisdiction doctrine" is not applicable to the processing of separate causes of action being brought in entirely different forums. The jurisdiction of the Public Employment Relations Commission in this matter flows from RCW 41.56.140 through .190. RCW 41.56.140 and RCW 41.56.150 prohibit employers and unions, respectively, from interfering with or discriminating with respect to the exercise of employee rights secured by the Public Employees' Collective Bargaining Act. The jurisdiction of a civil service commission under Chapter 41.14 RCW is to determine, inter alia, whether there is "cause" for the discharge of an

employee. Two entirely separate sources of employee rights are provided by the collective bargaining and civil service statutes.

As to a particular employee who has been discharged from a job covered by a civil service system, the jurisdiction of the Public Employment Relations Commission and that of a civil service commission can be "concurrent". Allegations that the discharge was unlawful discrimination, in violation of Chapter 41.56 RCW, are properly brought before the Public Employment Relations Commission. Allegations that the employer lacked sufficient "cause", in violation of Chapter 41.14 RCW, are properly brought before the civil service commission. Thus, the civil service and collective bargaining statutes are not mutually exclusive, as the employer contends. Even if the civil service and collective bargaining jurisdictions were not concurrent, the Supreme Court of the State of Washington has ruled that Chapter 41.56 RCW prevails over Chapter 41.14 RCW. Rose v. Erickson, 106 Wn.2d 420 (1986).

#### The Standards for Decision in Discrimination Cases

Where discrimination is alleged under RCW 41.56.140(1) or RCW 41.56.150(2), and the respondent defends that it had legitimate reasons for its action, the situation is evaluated under the "dual motivation" standard adopted by the Commission in City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980). The use of that test was affirmed by the court in Clallam County vs. PERC, 43 Wn.App. 589, 599 (1986), affirming the Commission's finding of an unfair labor practice concerning the discharge of an employee in another of this employer's departments. Clallam County, Decision 1405-A (PECB, 1984).

Under the Wright Line analysis, the complainant initially has the burden of making a prima facie showing sufficient to support an inference that union discrimination was a motivating factor in the decision or action being challenged. In this case, the union must

show that the employer was angry with the union officers, and so acted against Vanderhoof out of animus related to his protected union activities.

If the complainant establishes its prima facie case under the Wright Line analysis, the burden shifts to the respondent(s), to prove that the same action would have occurred without regard to the employees' protected activity. This evidence usually consists of evidence of a "legitimate business purpose".

#### The Credibility of Witnesses

The record before the Examiner is replete with contradictory testimony. The testimony of Vanderhoof and Fuchser, on the one hand, conflicts directly with the testimony of employer witnesses on many points. For example: Fuchser testified that he and Vanderhoof met with Prosecuting Attorney David Bruneau at the courthouse one or two weeks after a particular incident, that Bruneau expressed a belief that nobody could second-guess Vanderhoof's decision concerning use of force in that situation, and that Bruneau commended Vanderhoof's performance. Bruneau testified that he did not recall meeting either Vanderhoof or Fuchser at the courthouse, and denied commending Vanderhoof on his handling of the situation. Furthering the difference of view among the witnesses, Bruneau testified that he discussed the situation with DeFrang at the time, that he thought that a greater use of force was justified, and that he actually believed that the incident was a poor example of police work.

DeFrang's testimony before the Examiner appeared to be evasive, and at times contradictory to other witnesses. On the basis of the following, the Examiner believes that DeFrang was not a credible witness, and will construe unverified statements against him:

DeFrang testified that Martin and other sergeants were frustrated with Vanderhoof's work product late in 1988, that Martin

particularly complained to DeFrang on a weekly basis that Vanderhoof wasn't getting anything done, that he told Martin to do a time management study, and that he told the other sergeants to document the deficiencies. This testimony is contradicted, however, by a performance evaluation which DeFrang signed on October 11, 1988, wherein DeFrang concurred with Martin's conclusion that Vanderhoof's case closure rate of 34% for felonies and 87% for misdemeanors "reflected a job well done" and that Vanderhoof would be an excellent investigator.

DeFrang strongly asserted in testimony that neither he nor Kernes would be anti-union, that Kernes would not have been so angry at Fuchser as to call him "scum bag", and that Kernes would not have told the union president that he wouldn't be in a position to get close to what's going on. Contradicting his own testimony, DeFrang reluctantly admitted elsewhere in the record that he and Sheriff Kernes were "hurt" and upset by Vanderhoof's and Fuchser's attack on Kernes in the newspapers, and he conceded that "I can't say I've never seen Sheriff Kernes act that way ...".

DeFrang testified of his belief that Kernes would not lose his cool. Contradicting that testimony, the video tape of a May 5, 1989 meeting between Kernes and the deputies graphically shows Kernes slamming his fist down on the lectern in anger at what he claimed were a few unnamed deputies who are passing misinformation.

The newspaper articles which reported on the union calling for Kernes' ouster were posted by DeFrang on the wall of his office. When asked why he had done so, he replied:

A Well, it has the same purpose that I put anything on my wall, its to reflect on, to view, make available to refer to. I had a lot of the things on my wall from schedules to meeting notices, news articles regarding sporting events, and to **answer your question truthfully** I can recall a couple of articles regarding the union that were also up there for some period of time. [emphasis by **bold** supplied]

Transcript at pages 504-5.

DeFrang was under oath, of course, and was obligated to answer truthfully before the Examiner.

DeFrang was evasive in later testimony, when the same subject was revisited on redirect examination:

Q Why would you put up articles concerning the Guild on your wall, newspaper articles?

A Well, I think that the article that the question was referring to is the one, I haven't seen it here in these exhibits but I've seen it before, is one that the union attacks me specifically, essentially calls for my ouster along with Kernes, and that was on my bulletin for some period of time, as a matter of reflection. I was hurt by that, I was concerned about it. It caused me to do some soul searching. ...

PERC Transcript at page 559.

After vigorous cross-examination, DeFrang could not recall being at a middle-management seminar in the autumn of 1990, but he did remember a training session in the Emergency Operation Center that was management-related. DeFrang was asked:

Q At that session were the various participants asked to name -- what they considered to be their outstanding achievement during the past year?

A I don't recall.

Q Or do you recall participants being asked what they felt the most good about in terms of their performance in the past year?

A No.

Q Do you remember any meeting held on or about that time, any seminar held on or about that time where you stated that the achievement that you were most proud of in the past year is that you were able to use the system to terminate a union officer? Did you ever make that statement public?

A Absolutely not.

PERC Transcript at pages 557-8.

Later, DeFrang was asked on redirect examination if he recalled any public statement in front of a class at any time concerning the supervision of Vanderhoof. DeFrang responded:

A My recollection is that at some point during this week-long seminar we were asked to relay our -- I believe at that time it was broken into work groups. I think it was about -- it was a question - - I can't remember the exact question and I've tried hard since Counsel posed it to me but it was about your major management time consuming or difficult task from the past year as a topic of discussion for your work group and my response was that we had recently completed a very lengthy, very trying, very difficult termination of a Deputy Sheriff and that process was made increasingly difficult by the fact that he was a union representative.

PERC Transcript at pages 571-2.

Contradicting DeFrang was Chris Borchers, a public health nurse who had attended the middle-management conference in the autumn of 1990 along with DeFrang and about 20 other Clallam County employees. She testified that each participant was asked to name something that they were particularly proud about accomplishing during the past year. Although she did not claim to remember DeFrang's exact words, she was clear in her impression that:

A ... the thing he was most proud of was being instrumental in the firing of a union official.

Q Did that provoke a reaction from the audience?

A I remember there was some teetering or just a little giggling.

PERC Transcript at pages 652-3.



DeFrang testified in a clear and forceful way that he had a very strong policy against deputies being untruthful, describing a "bright line rule" under which he would suspend the deputy on the first lie and terminate on the second. DeFrang was less certain, however, when asked if he would apply a higher standard of honesty to his sergeants. After a great deal of hedging, DeFrang seemed reluctant to even apply the same rule to the sergeants.

The union also challenged the credibility of Sergeant Turner. The union claimed that Turner was evasive when he denied he had anything to do with the discharge of another employee, and that he later admitted that he passed along information on that employee. The union also asserts that Turner was evasive when asked who assigned the mission to him to bring Vanderhoof up to standards. The Examiner has carefully considered the testimony of Turner in these two examples, and his testimony as a whole. There is confusion in the transcript on the nature of the questions asked. Turner appeared reluctant to answer anything but the narrow question asked. Turner was an adverse witness who would not volunteer more information than the question deserved. The Examiner concludes that Turner was a credible witness.

The union also challenged the credibility of Sergeant Martin. As the union points out, there were times in the course of Martin's testimony when he was barely audible. The union points to Martin's denial of making statements to Fuchser that the department administration was out to get Vanderhoof, theorizing that Martin's own job was at risk. The Examiner has carefully reviewed the disputed testimony. Martin was under considerable stress when he testified. Like Turner, Martin was called as an adverse witness, and he appeared to answer only the questions directly asked of him. The Examiner is not willing to speculate that Martin felt his job was in jeopardy if testified against the employer's interests. The Examiner believes Martin to be credible.

There are further difficulties in the transcript of civil service proceedings placed in evidence before the Examiner. A substantial amount of the testimony from employer witnesses in that proceeding was in response to leading questions posed by the employer's attorney. The Examiner is left with the impression that the employer carefully crafted a scenario which it wanted in the record of the civil service proceedings, and that it deliberately sought to leave nothing (not even testimony of its own witnesses) to chance. With the exception of Martin and Turner, both of whom resisted the manipulation and testified directly on the events, the employer's witnesses generally accepted the attorney's spin on the facts in the civil service hearing. The attorney was not under oath, and his characterizations of the facts do not constitute probative evidence. Absent opportunity to observe the demeanor of the witnesses, or to have any clarifying questions asked or answered, the Examiner is left with uncertainty as to whether the witnesses were agreeing to the attorney's interpretation based on their own knowledge, or were simply agreeing to those interpretations out of deference. See, Lyle School District, Decision 2736-A (PECB, 1988) at page 9.

The employer called two "expert" witnesses to give opinions before the civil service commission on the ultimate question of whether there was "cause" for the discharge of Vanderhoof. The civil service commission inexplicably allowed that highly irregular procedure. That Examiner concludes that the testimony of those witnesses has no probative value in this proceeding.

#### Evidence of Animus

##### The Protracted Contract Negotiations -

The union believes that this controversy had its beginnings in 1988, as a result of the prolonged negotiations on a successor collective bargaining agreement. During this period, various reports appeared in the news media regarding the negotiations

between the union and county. On July 27, 1988, the Peninsula Daily News, a local newspaper, reported that negotiations between the union and the Sheriff's Department had broken down, and that the parties were at an impasse. Similarly, the newspaper reported on August 24, 1988, that the union had declared an impasse in the contract negotiations, that the union had been without a contract since the end of 1986, and that the employees had recently suffered a \$88 per month salary cut when the Board of County Commissioners decided not to pay the increased medical insurance premiums.

Union Resistance to the Civil Service Resolution -

On August 23, 1988, the Clallam County Civil Service Commission adopted the resolution placing nine exempt administrators under the control of the Clallam County Personnel System. This action was described as insuring "all rights and privileges afforded employees under the personnel system". Engelbertson and DeFrang were direct beneficiaries of that action.

On August 24, 1988, the news media reported that union officers Fuchser and Vanderhoof were upset about the resolution adopted by the civil service commission. Fuchser is quoted as saying that "A new sheriff will lose the ability to clean house when he gets into office." County Personnel Director Marge Upham was reported to have stated that the resolution put the nine administrators under the personnel system, so that they could not be fired without due process, and that the measure gave the affected employees "some measure of job security". She also observed that the county charter encourages that all positions not covered by collective bargaining be placed under the personnel system.<sup>7</sup>

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Upham gave a different version of the facts in testimony before the Examiner, claiming that the resolution was prepared to place the administrators on the county's five-step pay plan. She indicated no concern about their job security under the charter, and noted that Kernes had not implemented charter provisions permitting him to annually designate one exempt "political" position.

The Confluence of "Bargaining" and "Resolution" Issues -

On August 25, 1988, the Peninsula Daily News reported that Fuchser and Vanderhoof had alleged that the move to place the sheriff's top administrators under the personnel system would "further entrench the bureaucracy responsible for problems plaguing the department". Vanderhoof and Fuchser charged that morale problems resulted from short-staffing, which in turn caused increased workloads and schedule changes. The two deputies also believed that the low morale occurred because employees had been "stepped on so many times". Vanderhoof was reported to have called the bureaucracy a small feudal empire, and to have charged that the administration used internal staff investigations to "suppress internal dissent".

Undersheriff Dan Engelbertson and Major Fred DeFrang labeled the charges made by Vanderhoof as the result of contract frustrations. They vehemently disagreed with Vanderhoof's charge that employees do not speak out because of "a real fear of retribution".

At about this time, Sergeant Kelly angrily told Vanderhoof and Fuchser that they were hurting good people. Vanderhoof testified that Kelly was apparently so upset that he would not speak with Vanderhoof directly, and instead would ask someone standing nearby to give Vanderhoof the message. Vanderhoof thought Kelly's actions a little bizarre. Vanderhoof admired Kelly, however, and believed that Kelly had high standards.

On August 28, 1988, the newspaper headlined that the union and employer were resuming contract talks with a state-appointed mediator. Fuchser was quoted as threatening to file unfair labor practices charges alleging that the employer was engaged in regressive bargaining.

On August 31, 1988, the newspaper reported that Kernes was under fire from the union. Fuchser was quoted as stating that union

members were ready to "go public", to make sure that Kernes was not re-elected. The union also challenged the makeup of the Clallam County Civil Service Commission. Vanderhoof said he expected retribution, because of the public stance he and Fuchser had taken. A large-print inset in the article quoted Vanderhoof as saying, "We spend a lot of time looking over our shoulders". Engelbertson was again quoted as blaming frustrations over the stalled contract negotiations and staff shortages.

On September 3, 1988, the union wrote a letter to the sheriff, requesting that a study be conducted by an outside consultant on the responsibilities and pay of all positions in the department, with a report due by July 1, 1989. The request was signed by Fuchser, Vanderhoof and several other union officers.

Kernes returned from military leave on September 9, 1988. He is quoted in the newspaper as having characterized the union's criticism as, "It's kind of like children act up when mom and dad are away". Kernes was said to have had an unspecified plan to deal with the complaints. The article mentions a meeting between Kernes and Fuchser, and of Kernes characterizing the meeting as "good". The report quoted Fuchser as being unsure the meeting "went good", and as complaining that the sheriff didn't accept the idea that there were problems.<sup>8</sup> The article mentions an agreement between the employer and union to create a committee to discuss and resolve internal problems.

Vanderhoof testified that he met with Engelbertson in early September of 1988, to explain the union's position on the personnel resolution. Engelbertson was personally in favor of being insulated from politics, and he admitted that he was angry and hurt at the criticism. Engelbertson assured Vanderhoof that he did not

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<sup>8</sup> At the hearing before the Examiner, Fuchser testified that Kernes was very angry during that meeting, and that Kernes cursed him as a "scumbag" and "scum of the earth".

hold grudges, but cautioned that others would remember. It was also at about this time that Vanderhoof attempted to initiate, but then abandoned, a referendum petition for voter repeal of the personnel resolution.

Employer Interference in Union Affairs -

During a conversation with Fuchser on an unspecified date in the autumn of 1988, Engelbertson suggested that Vanderhoof's excessive preoccupation with detail was a stumbling block in the contract negotiations, and that Vanderhoof should be removed from the union's bargaining team. Fuchser declined to act on that suggestion, because he thought the union needed someone to look at the details.

Employer Response to Union Criticism -

Also in the autumn of 1988, copies of a statement appeared on bulletin boards normally used for management notices to employees, as follows:

LOYALTY

IF -- You work for a man, in Heaven's name work for him! Speak well of him and stand by the institution that he represents.

REMEMBER -- An ounce of loyalty is worth a pound of cleverness.

IF -- You must growl, condemn and eternally find fault, why -- resign your position and when you are on the outside, damn to your heart's content -- but not as long as you are part of the institution. DO NOT condemn it, for if you do, the first high wind that comes along will blow you away, and probably you will never know why.

Elbert Hubbard<sup>9</sup>

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<sup>9</sup> The record does not identify this individual, or the original source of the quoted material.

DeFrang recalled that Chaplain Bill Klink had brought a copy of that document to a management staff meeting within the previous two or three years, and that copies were "floating around". He had one on his wall. DeFrang interpreted the statement as saying one should be loyal to Kernes, as head of the department.

DeFrang also posted news articles in which the union was critical of the department on his office wall. DeFrang testified that he put the articles on the wall to do some soul searching. DeFrang and Kernes admitted they were angry and hurt by the criticism.

Bargaining Dispute on Internal Investigations -

During subsequent contract negotiations, DeFrang and Vanderhoof engaged in heated discussions concerning the employer's proposal to permit the employer to tape record internal investigation conferences with bargaining unit employees. Vanderhoof accused DeFrang of coercion and threats during their interview over the cartoon which had been posted by Fuchser.<sup>10</sup> DeFrang testified that he angrily stopped Vanderhoof, and called him a liar.<sup>11</sup>

Further Employer Interference in Union Affairs -

On April 17, 1989, Kernes spoke to Deputy Darrel Spidell about the possibility that a "no confidence" vote against him would be considered at the next union meeting. After talking about the possibility of promotional opportunities within the department, Kernes asked Spidell to go to the meeting and speak against a "no confidence" resolution. Kernes explained how to stop the vote, by recalling how a similar vote against the county treasurer had

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<sup>10</sup> That cartoon was the subject of a separate unfair labor practice case which was resolved by the parties. See footnote 3, above.

<sup>11</sup> Contradicting DeFrang's testimony before the Examiner, DeFrang had testified at the civil service hearing that he did not remember calling Vanderhoof a liar during the 1988 contract negotiations. See the CSC transcript at page 849, and again at page 894.

backfired. Spidell told Kernes that he could not attend the union meeting because of other plans. Spidell mentioned the conversation to Fuchser shortly after it occurred.

The May 5, 1989 Staff Meeting -

On May 5, 1989, Kernes conducted a meeting with all of the deputies in the department. The meeting lasted approximately one hour. The meeting was videotaped, and a copy of that record is in evidence before the Examiner. Kernes was very angry and frequently derided a few unnamed deputies for spreading rumors and misinformation. Kernes considered that a disservice to the department and to the community. At one point during the meeting, Kernes slammed his fist on the lectern and angrily complained about a few officers misinforming other deputies. Kernes was also upset about the poor performance of the deputies, and lazy attitudes and habits. In more than one instance, Kernes talked about loyalty to the department and the awarding of "perks" for quality and loyalty. Kernes then asked the deputies what they would do as supervisors in five actual incidents involving employees of the department. One of the examples used closely paralleled the facts of an incident in which Vanderhoof had been involved. Kernes characterized the situation as the deputy running away from an armed confrontation, leaving two people to their own devices, and he then asked if the deputies would want that officer as their back-up.<sup>12</sup>

Further Employer Interference in Union Affairs -

The possibility of unfair labor practice charges was a subject of conversation in the department during this time period. During a conversation between Spidell and DeFrang on May 16, 1989, Spidell

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<sup>12</sup> This was an obvious criticism of Vanderhoof's handling of the incident. The inquiry about wanting such a deputy as a backup was repeated to almost every witness in the civil service hearing. The sergeants testified before the civil service commission that they would not want Vanderhoof as their backup, while none of the deputies expressed such objections.



indicated concern that he might be called to testify against Kernes at an unfair labor practice hearing. DeFrang advised Spidell to talk to Kernes. Spidell testified that DeFrang made a further remark to the effect that Spidell had voted for Fuchser and Vanderhoof, and was stuck with them.

Employer Scrutiny of Vanderhoof -

Fuchser testified that, in July or August of 1989, Martin told him, "They're out to get Vanderhoof." Vanderhoof testified of Martin telling him, "No one can survive the scrutiny that you're under", and that Martin "felt like a prostitute by doing what they wanted when he wrote an unsatisfactory evaluation in October, 1989".

Martin denied making such statements to Fuchser or Vanderhoof. Martin testified that he considered Vanderhoof as a friend, and felt bad about having to discipline him for poor work performance.

Employer Suggestion that Vanderhoof Cease Union Activity -

Vanderhoof met with Kernes on September 29, 1989, shortly after returning from the first of his two disciplinary suspensions. One subject of that meeting was Vanderhoof's concern about an atmosphere of harsh criticism from the sergeants. Vanderhoof testified that Kernes said that was not his style, and that he would look into Vanderhoof's claims. Vanderhoof testified that Kernes advised him to "narrow the playing field", which Vanderhoof took to be a suggestion that he should resign from union activities. Vanderhoof testified that he was puzzled by the remark, because he did not pursue union activities while on duty. According to Vanderhoof, Kernes referred favorably to another deputy who had fought fair, by staying within the system and not going outside. Vanderhoof did not ask for an explanation of that statement, however.

Employer Mindset Preceding Discharge -

On October 26, 1989, Deputy Kirst complained to Sergeant Kelly that it was obvious that Sergeant Turner was working full time to get

Vanderhoof, and he and the other deputies did not like it. Kirst testified that Kelly told him to mind his own business, and that Vanderhoof was a danger to the department.

Conclusions -

The employer and union were engaged in protracted contract negotiations which continued through April 24, 1989. Vanderhoof was an officer of the union and one of its negotiators. His strong pursuit of those roles were clearly the subject of an inappropriate suggestion from Engelbertson to Fuchser, in which the employer sought Vanderhoof's removal from the union's bargaining team. Vanderhoof's bargaining activities were clearly protected by RCW 41.56.040.

The record confirms that the employer again attempted to exert improper influence on union affairs on April 17, 1989, when Kernes sought to recruit Spidell to squelch a "no confidence" vote against Kernes and offered instruction to Spidell on how to accomplish that task.

The record of this case clearly establishes that both Sheriff Kernes and Chief Deputy DeFrang were angry in 1988, when Vanderhoof and Fuchser "went public" with the problems facing the department during collective bargaining, and when they openly opposed the resolution benefitting the administrators within the department. Indeed, the record shows the union officers made public, derogatory remarks about the administration. In particular, the union officers were quoted in the media as saying that the department was being operated as a feudal empire, and that internal dissent was being suppressed. It is easy to infer that the union officers favored leaving room for a new sheriff to clean house among the administrators. Apart from the fact that the statements attributed by the news media to Fuchser and Vanderhoof were clearly related to the interests of bargaining unit employees, employer officials made public statements relating them to the bargaining impasse which

existed at that time. The statements made by Vanderhoof are thus found to have been protected by RCW 41.56.040.

Whether the union's observations on the legal effect of the resolution were inaccurate (as the employer contends) is irrelevant. The remarks made good copy in the local press, and embarrassed the administration. Kernes berated Fuchser and called him names at their meeting in September of 1988. It was thus clear that there was animus against the union leadership at the highest level in the department.

DeFrang and other supervisors also evidenced their dislike of the public criticism. DeFrang put the newspaper articles on the wall of his office, to remind himself of the criticism. DeFrang also posted the "Loyalty" statement on the wall of his office. In the same time frame, the "Loyalty" statement appeared on bulletin boards throughout the department. It is clear that DeFrang defined loyalty to the department as loyalty to the sheriff. The record also shows that the public controversy alienated at least one of the sergeants, to the degree that Kelly wouldn't talk directly to Vanderhoof. The sergeants were included in the bargaining unit represented by the union at that time,<sup>13</sup> and there was some testimony that the sergeants did not believe that Fuchser and Vanderhoof represented the views of the rank-and-file members. Apart from the fact that the May 16, 1989 conversation between DeFrang and Spidell constitutes evidence of an ongoing effort by the employer to involve itself in internal union affairs, DeFrang's statement that Spidell was "stuck with" Fuchser and Vanderhoof evidences DeFrang's animus toward those union officers.

It is clear to the Examiner that Kernes' conduct at the May 5, 1989 meeting clearly indicates animus against Vanderhoof. Although

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<sup>13</sup> It appears that the sergeants are no longer included in the bargaining unit. The exact circumstances of their removal from the unit are not disclosed in the record.

Kernes did not name the employees that he repeatedly and angrily denounced for spreading misinformation and lies, it was obvious from the context of that meeting and from the example situations used that Kernes was making a thinly-veiled reference to Vanderhoof and Fuchser. Kernes also spoke of loyalty to the department. It is clear that Kernes' remarks on "running away" were designed to embarrass and discredit Vanderhoof in the eyes of the other deputies. Against that background, Vanderhoof's testimony of his September 29, 1989 conversation with Kernes has credibility. Vanderhoof could reasonably have interpreted the suggestion to "narrow the playing field" and the sheriff's citation of an employee who played fair by staying in system as threats against making any further public statements in opposition to the sheriff or his administration.

Kernes and DeFrang clearly had knowledge of Vanderhoof's protected activity. The conclusion that Vanderhoof's union activity influenced or played a significant role in the employer's decisions is based on a series of incidents over the period from the autumn of 1988 through 1989.<sup>14</sup> Those employer officials were in a position to influence or make the decisions to discipline. DeFrang ordered the scrutiny and extensive documentation on Vanderhoof shortly after signing a complimentary evaluation of Vanderhoof, and he played a significant role in the discharge decision. The union has sufficiently established a prima facie case showing an inference that union discrimination was a motivating factor in the scrutiny and subsequent discipline of Vanderhoof.

#### The Employer's Defense

The employer alleges that Vanderhoof was suspended and then discharged because of his entire work record. That record includes

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<sup>14</sup> See, United States Postal Service v. Vega, 282 NLRB 686 (1987).

several formal evaluations conducted by employer officials, as well as the three incidents addressed in the letters issued at the time his employment was terminated.

The Early Evaluations -

On September 10, 1986, Vanderhoof was evaluated for his work performance for the first six months of 1986. In rating Vanderhoof's performance, Sergeant Daniel Gates complimented Vanderhoof on "his vigor and thoroughness for which he tackles each assignment" and his acceptance of direction. Gates noted Vanderhoof's ability to work with peers and supervisors and to deal with tasks that require in-depth research. Under deficiencies, Gates observed safety concerns over leaving a loaded shot gun unattended in the squad room, other areas of forgetfulness, some difficulties in completing reports on time, and inaccuracies in the content of reports, but Gates also indicated a record of consistent self-improvement. Gates was "extremely pleased with the positive, self-motivated attitude."

In the evaluation report issued at the end of his probationary period, Vanderhoof was considered to have excelled in public relations, with mention of citizen comments that Vanderhoof's judgment and common sense was a delight. Vanderhoof was rated high on accepting responsibility and direction. The evaluator noted that Vanderhoof clearly listened and felt "open enough to discuss the concerns I had", whenever problems were brought to his attention. Vanderhoof was thought to have shown marked improvement in planning, work knowledge, meeting deadlines and coordination, but still required improvement. He was deficient in meeting deadlines but did maintain caseloads of 10 active cases. Vanderhoof was favorably observed handling domestic violence situations "where he took command and displayed control over the entire situation". Concern was expressed about his forgetting minor details because of his focus on safety.

On August 16, 1987, Vanderhoof received an "Effective Meets Standards" rating on his next annual evaluation. The report covered his performance as a corrections officer, where he was thought to have done a very competent job.

On January 5, 1988, Vanderhoof was again evaluated to cover his work in the jail up to his November, 1987, transfer back to patrol duties. Vanderhoof was again rated as effective, but was believed forgetful and disorganized in some of his assignments.

On October 11, 1988, Vanderhoof received his annual evaluation as a deputy sheriff. Sergeant Monty Martin evaluated Vanderhoof to be effective and to meet standards. The report noted that Vanderhoof had been assigned to the corrections division, and had less than two years as a deputy. Vanderhoof needed improvement in planning, meeting deadlines and in coordination of work. Martin concluded:

During this evaluation period employee was assigned 457 calls for service resulting in 103 reports. Employee investigated 49 felony cases, closing 17, resulting in a 34% felony case closure. He investigated 54 misdemeanor cases, closing 47, resulting in an 87% case closure. Although at times it doesn't appear that the employee is "on track", his case closure reflects a job well done.

It is the rater's opinion that, in time, employee will develop into an excellent investigator.

Martin's evaluation of Vanderhoof was approved by DeFrang prior to being given to Vanderhoof.

#### The First Reprimand -

On October 13, 1988, just two days after receiving a positive evaluation, Vanderhoof was reprimanded by Captain Jim Newton for hesitancy to accept responsibility, for a history of failure to follow direction, and for failure to meet deadlines. This

reprimand concerned a report which Vanderhoof had filed involving a domestic violence situation involving a captain in the department and the captain's wife. Newton had asked Sergeant Kelly to speak with Vanderhoof regarding several typographical errors, poorly worded paragraphs and inappropriate content. Kelly had done so on August 24, 1988. Newton believed that Kelly had directed Vanderhoof to make the changes by the end of his next shift, and reprimanded Vanderhoof for his failure to do so.

On October 21, 1988, Vanderhoof filed a grievance with DeFrang, protesting the October 13 reprimand. Vanderhoof claimed that Kelly had neither directed him to make corrections to the report, nor given him a deadline to complete it. Vanderhoof believed the reprimand contained an inaccurate portrayal of the meeting with Kelly. Vanderhoof claimed that Kelly told him to ask Fuchser to look at the report, that he took the report to Fuchser, and that Fuchser's reaction was he would have written it differently but it was OK. Fuchser testified that Kelly had later confirmed that he asked Vanderhoof to take the report to Fuchser for review.

It appears that the sergeants in the department meet together on a regular basis to discuss issues. The claims made by Vanderhoof in support of his grievance were taken by Sergeant Turner as raising questions as to Vanderhoof's veracity.

DeFrang denied Vanderhoof's grievance, because it did not show that the union had authorized its filing, and because DeFrang believed that the issue was not subject to the grievance procedure.<sup>15</sup>

The "Time Study" -

In late 1988, Sergeant Martin complained that Vanderhoof seemed to be very busy, but was not accomplishing much. DeFrang recommended

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DeFrang believed the contractual grievance procedure was limited to issues relating to termination of employment.

to Martin that he do a time study on Vanderhoof. Martin required Vanderhoof to log his activity in 15 minute increments. Based on that time study, Martin concluded that Vanderhoof was not managing his time properly, and that he was spending too much time on cases which were not productive.

The "Paper Trail" -

DeFrang also testified that Martin and other sergeants were complaining, at the end of 1988, about Vanderhoof's work product. According to DeFrang, he

... essentially told them to stop complaining or concentrate on a program to fix the problem. The initial plan was to continue to train him but at that time I told them to start documenting the training and guidance so we could find the areas that were most significantly deficient and try and get him up to an acceptable level of performance and that if he failed that the same documentation would be in place to evaluate a total planning for discipline."

PERC Transcript page 477.

Such documentation is made on a department form numbered "010", which is entitled: "Work Performance Documentation". The purpose of the "010 form" is to record work performance which is observed, and which is worthy of consideration in the next employee evaluation or requires corrective action. Over the next year or so, many "010" forms were filed on Vanderhoof. DeFrang acknowledged that much of that documentation was trivial.

In January, 1989, DeFrang placed Vanderhoof under the supervision of Sergeant Turner. There was apparently no work performance documentation noted from the time of that transfer until the March 25, 1989 incident described below.



The [K] Incident -

On the night of March 25, 1989, a woman telephoned the crisis hot line from a neighbor's house, to report that her husband, [K], was "quite intoxicated" and having a nervous breakdown. Vanderhoof was acquainted with [K] from high school, but was not socially involved with him. [K] is an amputee, who wears a prosthetic device in place of one of his hands.

Vanderhoof, Deputy Kirst and Sergeant Martin responded to call, with Vanderhoof parking his patrol car in the driveway of the [K] home, behind the family's automobile. Vanderhoof escorted the woman and her son,<sup>16</sup> back to their home. It appeared that [K] had fled in his pickup truck before Vanderhoof and the other deputies arrived on the scene, and the woman thought that her husband may have taken a pistol and shotgun with him. Vanderhoof searched the house and property, and put out an all-points bulletin (APB). The other deputies left the scene when it appeared all was under control. Vanderhoof advised the woman and her son to spend the night elsewhere, and he remained at the scene while she packed a few things.

[K] returned, coming around the house armed with a shotgun and yelling, "We're all going to die." [K] appeared very intoxicated. The woman sought cover behind Vanderhoof's patrol car, while her son hid beside the family's car. Vanderhoof radioed for assistance. Vanderhoof drew his weapon and shined his halogen flashlight in [K]'s eyes, warning him to stop.

[K] continued to approach Vanderhoof, and Vanderhoof continued to shine the powerful flashlight in his eyes while warning [K] to drop the shotgun. [K] was initially 25 feet away from Vanderhoof, but continued to approach in spite repeated warnings to drop his gun. Both the employer and union appear to acknowledge that the

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<sup>16</sup> The boy was approximately 15 - 16 years old.

situation escalated to the point that use of deadly force would have been justified.

Vanderhoof told the woman to stay down, and he retreated from his cover behind the patrol car. Vanderhoof first ran to a shallow ditch about 15 feet away from the patrol car, and then to a camper which was parked at the side of the house another 10 to 15 feet away, all the while shining the flashlight in [K]'s eyes and commanding [K] to drop his gun. The woman remained behind the patrol car. She testified before the civil service commission that she did not feel unprotected, that she believed Vanderhoof was drawing her husband's attention away from her and her son, and that Vanderhoof was not running away.

[K] reached the side of the patrol car, where the woman was hiding. The boy moved to the other side of the family car. [K] appeared to Vanderhoof to have calmed down, and asked to speak to his wife. Vanderhoof told [K] he could not do that. [K] laid his gun down on the corner of the patrol car, and asked Vanderhoof to turn off his flashlight. Vanderhoof turned off the flashlight for a few minutes.<sup>17</sup>

Martin responded to the call for assistance by quietly driving near the residence, and then creeping up behind [K]. Vanderhoof knew someone was coming, because he heard a car and the family's dog was barking. Martin radioed Vanderhoof to tell the boy to stop the dog from barking, and Vanderhoof yelled to the boy to quiet the dog. Martin attempted to subdue [K] using a stun gun, but the device shorted on a steel wire attached to [K]'s prosthesis. Martin readjusted the stun gun, and dropped [K] on a second attempt.

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<sup>17</sup> Vanderhoof testified before the civil service commission that the flashlight creates a curtain of light through which the suspect cannot see, and that turning the flashlight off for a few minutes would not enable a person to regain his vision.

Subsequent investigation disclosed that [K] had been hiding behind a clump of trees while Vanderhoof was searching the property. [K] later testified that he would have shot himself had he not lost the pistol while climbing over a fence, and then was unable to shoot himself with the shotgun because his arms were too short. [K] then intended to force the police to shoot him.<sup>18</sup> Vanderhoof thought he twice came close to shooting [K], but that his gut feeling was to wait till help arrived.<sup>19</sup> Vanderhoof was prepared to shoot [K], however, if he had moved toward where the woman was hiding. Martin said that [K] was so drunk that he could have driven a truck up behind [K] without him noticing it.

DeFrang later had some misgivings, concluding that Vanderhoof had jeopardized the woman and child by leaving cover. When DeFrang asked him about the incident, Martin responded that Vanderhoof did a good job, because no one was killed even though it would have been "a righteous shooting". On April 24, 1989, DeFrang gave Vanderhoof a memorandum of record, documenting a failure to follow safety practices in a life-threatening situation. The [K] incident was said to show poor work judgment, and a loss of effectiveness under stress.

Vanderhoof responded by a hand-written note on a copy of DeFrang's April 24 memo, which he returned to DeFrang, as follows:

I acknowledge receipt. I have some concerns that this does not reflect adequately the totality of the circumstances of the actual event itself. I knew, and know that I had legal authority to shoot to kill [K]. I

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<sup>18</sup> [K] testified at the civil service hearing that he had since put his life back together through mental health counseling.

<sup>19</sup> Vanderhoof testified that he did not believe the incident reached the point of "justifiable use of deadly force", and thought his delay had enabled Martin to subdue [K] without killing him.

believe that the situation had not quite crossed the threshold of the need to enact deadly force, although it was very close several times, one the [woman and child] and I had reached concealment behind my squad car and the parked [family car].

DeFrang characterized Vanderhoof's response to the memo as "flippant", and DeFrang interpreted it as a refusal by Vanderhoof to accept responsibility for his actions.

In a May 2, 1989 memo to Engelbertson, DeFrang expressed concern over Vanderhoof's response to the April 24 memo, and requested that a Board of Inquiry / Deadly Force Review Board be convened to further investigate the incident and make recommendations on whether training is adequate and discipline action necessary. Kernes refused to convene the requested procedure.<sup>20</sup>

DeFrang next decided to treat the [K] incident as training, and not as a basis to discipline Vanderhoof. DeFrang directed Vanderhoof to establish a plan for further training on handling these kinds of situations. DeFrang wanted Vanderhoof to view videos on safety, reread policy and attend Fire Arms Training System (FATS).

The department's "range officer", Spidell, later reviewed the [K] incident with Vanderhoof and three other deputies. Spidell testified before the civil service commission that it was difficult to say what is the correct way to handle such situations, and that it depends on one's gut feeling, training and laws. Spidell

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There seems to have been room for reasonable debate on the issue. A retired police chief called as an expert witness by the employer in the civil service hearing recounted an incident in which an intoxicated man was shooting at him. The employer's own expert did not believe that shooting the man would have been justified, because the individual was drunk. The witness simply counted the bullets, and disarmed the suspect when he was out of bullets.

expressed the belief before the civil service commission that Vanderhoof made a mistake by leaving his concealment, and by turning off his flashlight. Spidell thought he would have fired his weapon four times in a similar circumstance. Vanderhoof acknowledged that the woman and child would have been in jeopardy if he had been shot when he left his cover, and he also acknowledged that he made a mistake by turning off his flashlight.

Training Assignment -

On May 19, 1989, Vanderhoof received another memorandum from DeFrang, complaining that Vanderhoof had failed to meet the deadline to establish a plan for training in the area of safety and the use of deadly force. Vanderhoof testified before the civil service commission that he had written DeFrang's instructions in his notebook, but so much was happening that he forgot it. DeFrang instructed Vanderhoof to review policy and video tapes on the use of force, to attend the next available officer survival course, and to arrange through Turner a video "shoot don't shoot" (FATS) training session. DeFrang told Vanderhoof to arrange a timetable for the training through Turner, and to deliver it to him by May 31, 1989. Although Vanderhoof took some steps to obey that directive, he did not complete the assignment at that time.

Second Reprimand -

On May 20, 1989, Sergeant Turner reprimanded Vanderhoof for failing to remain in his assigned duty post during an escape incident. Vanderhoof was the only deputy covering the east end of the county, and Turner wanted him close-by in case of an emergency response. Vanderhoof had traveled six miles further west than directed. Vanderhoof acknowledged his error.

Productivity Concerns -

Concerns about Vanderhoof's productivity were again a subject of discussion in the spring of 1989, approximately six months after the "time study" conducted by Martin. The reports issued and

actions taken within the span of little more than one month indicate a wide range of performance by Vanderhoof:

On May 6, 1989, Turner wrote a report on several case conferences with Vanderhoof. Turner noted that Vanderhoof had been assigned 82 calls for service, and wrote 23 reports. Turner considered this a very high percentage of overall activity, and he complimented Vanderhoof on doing a good job as a result of solving a high number of felonies.

On May 22, 1989, Turner conducted another case conference with Vanderhoof. Turner wrote that three felony cases were inactivated, because of investigative delays, while four others could be prosecuted if the reports were written. Turner noted that there had been "no follow up" on 11 felonies for over 30 days, and that five cases had "no activity" for two months. Turner characterized Vanderhoof's work habits as spending massive amounts of time following up without writing reports, creating a backlog of "seeming" unfinished work, and then spending days catching up while falling behind on current work. Turner concluded that Vanderhoof understood that his plans for a June vacation were in jeopardy if he was not caught up.

On June 6, 1989, Turner reported that Vanderhoof was assigned 52 calls and wrote 11 reports.

The department was changing to a new, pro-active patrol system in July, 1989, under which patrol deputies were to make the initial reports and detectives were to be assigned to do the investigative follow up. Patrol deputies were thus to be relieved of a follow-up function which they had performed in the past. Vanderhoof was selected, with several other deputies, to pilot the new program. Turner thought that Vanderhoof would do well under the new plan, because he would not have investigative follow-up to worry about.

#### The Vacation Incident -

Vanderhoof was scheduled to go on vacation on June 21, 1989. Turner was concerned that Vanderhoof had 16 cases which required updating, and so directed him to get caught up with his reports in

order to begin the pilot test of the new system with a clean slate when he returned from vacation. Turner closed four of the cases, and told Vanderhoof to go into the interview room to finish the remaining cases.

The updating of cases generally required the filing of a supplemental report containing the current information on the case. In some instances where the case was in the hands of the prosecutor, a statement to that effect was all that was necessary. The procedure to update cases was to dictate the supplemental report and give the tape to Records Clerk Alice Hoffman for transcription. At the end of the shift, Vanderhoof told Turner that he had completed the updates on all but one of the cases, and that he would need his notebook to finish the remaining case. Vanderhoof said that his notebook was at home, and that he would come in from vacation to finish the report, since he was staying in town. Turner told Vanderhoof that the Fair Labor Standards Act prevented him from working on his own time, and that he should come in the next day to complete the case, and then start his vacation.

Turner and Vanderhoof had a conversation during a union meeting held on June 24, 1989. According to Turner, Vanderhoof stated that he had not yet completed the update on the one case, but would have the tape by that evening. Vanderhoof recalled talking with Turner on June 24, but did not recall a conversation about the report.

On June 27, 1989, Hoffman told Turner she had not yet received the tape from Vanderhoof. Vanderhoof did not turn in the tape until July 13, 1989. Although it does not appear that Vanderhoof's excuses were communicated to the employer at the time, he testified later that his notes on the case were in an old log which he could not locate at home because things had been moved around to accommodate a visit from his daughter and her husband. Vanderhoof explained that his daughter was having a very difficult and life-threatening pregnancy and had moved back home because his wife was

a registered nurse. Vanderhoof had put the tape in a drawer, intending to complete it, and had forgotten that six other case supplements were also on the tape.

Ongoing Productivity Concerns -

On July 11, 1989, the department issued Training Bulletin 89-6 on the use of re-designed incident reporting forms. The purpose of the re-designed form was stated as follows:

Because under the new reorganized patrol structure, patrol officers will no longer involve themselves in extensive follow-up investigations, it becomes **critical that preliminary investigations and reports be completed by the end of the officer's shift** and forwarded to the Detective Section for review and follow-up assignment. Initially, and effective immediately for those Deputies testing the reports, **all reports taken by patrol officers shall be hand written and completed no later than end of shift.** [emphasis by bold supplied]

The new form related to the new, pro-active patrol system being adopted by the employer.

On July 21, 1989, Turner taped an interview with Vanderhoof regarding Vanderhoof's failure to complete his reports. Turner expressed concern that no initial report had been completed in a particular case where a suspect had been arrested, so there was no documentation to understand why he was arrested. Vanderhoof filed the report 40 days after the arrest, thereby violating the "speedy trial" guidelines which require a trial within 30 days. Vanderhoof said that the incident had happened a half hour before the end of his shift, and he had not had the time to read the witness statements, because of their volume. Vanderhoof believed he had called the prosecutor's office for a release of the suspect, because the matter needed more investigation. Vanderhoof was reminded to keep Turner informed of the status of his work load.



On August 21, 1989, DeFrang submitted a memorandum to Vanderhoof, with a copy to Vanderhoof's personnel file, expressing concern about Vanderhoof's "failure to comply" with Training Bulletin 89-6. DeFrang wrote that Vanderhoof's handling of an assault and burglary arrest on August 20 was of great concern. DeFrang believed the investigation to be unorganized and ineffective, and that the report did not comply with the training bulletin. DeFrang concluded that:

Because we are in a training and orientation phase of the report writing changes, I want to help you get a grasp of what is going on as quickly as possible. **Your work at present is not satisfactory.** You are directed to review your report ... and be prepared to discuss how it complies and does not comply with Training Bulletin 89-6. ... Enclosed is a re-written report from the information extracted from your report, which was written following the guidance from the training bulletin. It is provided to you as further example of what is expected. . [emphasis by **bold** supplied]

DeFrang told Vanderhoof to be prepared for a shift change no later than September 1, 1989, in order to be assigned to a shift with more supervision and the possible assistance of a field training officer. DeFrang directed Vanderhoof to have a supervisor review and sign any report involving custody before completing his shift, and to finish other reports by the end of his shift.

On August 22, 1989, Turner alleged that Vanderhoof submitted a report that did not meet department guidelines, despite a training session. Vanderhoof was told to rewrite the report, and have it back by the end of the month. Turner made a written request to DeFrang that Vanderhoof be suspended for failing to update the cases before taking his vacation on June 21, 1989, and for failure to follow orders. Turner thought Vanderhoof dishonest, because of his assurances that the work was completed before going on vacation, and because of his assurances that the initial report had

been filed on the case that was the subject of their July 21 meeting, when in fact it was not completed.

Turner wrote to DeFrang again on August 23, 1989, this time reporting that Vanderhoof had turned in an insufficient report less than 10 minutes after completing a two-hour training session on report writing. Turner asked whether additional discipline was in order, and whether unsatisfactory work product was an indication of fitness for duty.

On August 25, 1989, DeFrang informed Vanderhoof of his intention to suspend Vanderhoof for five days. DeFrang cited the August 22 memo from Turner, as well as Vanderhoof's failure to comply with the May 19, 1989 training directive.<sup>21</sup> DeFrang gave Vanderhoof an opportunity to explain why he should not be disciplined.<sup>22</sup>

On September 2, 1989, Sergeant Kelly placed a note on the "Hot Log", advising all deputies to utilize the new report forms, and to discard the old forms. Vanderhoof was on duty on that day, and he initialed the log.

On September 3, 1989, Vanderhoof submitted a report using the old report form.

On September 4, 1989, Vanderhoof resubmitted the report which Turner had given back to him on August 22. Vanderhoof was four days late under the September 1 deadline established by Turner.

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<sup>21</sup> At some point, Turner informed DeFrang that, while he talked to Vanderhoof before May 31 on the video training, Vanderhoof had not contacted him regarding the FATS. Turner also told DeFrang that he spoke to Vanderhoof on July 21 regarding the officer survival training, and still had not received a request.

<sup>22</sup> A handwritten notation indicated that the memos were given to Vanderhoof on September 13.

On September 5, 1989, Vanderhoof replied to DeFrang's August 21 memo, saying:

I object to the charge of "failure to comply." That implies some willful intent on my part to not follow and perfectly satisfy the directions of Training Bulletin 89-6. There is not, and has not been any such intention on my part.

Vanderhoof then explained that he had been on vacation until the middle of July, that he had been given a 10-minute explanation of the new format by Turner, and that he had been promised a later introductory training session which was given to others. Instead of the promised training, Vanderhoof observed that he had received only the August 21 critique of his report. Vanderhoof wrote that he had read the bulletin several times and, while admitting that the report was not well-managed, he contended that the charge was "excessive and inappropriate" under these circumstances.

On September 7 and 11, 1989, Vanderhoof was called back to work to rewrite 10 reports that contained errors. Work performance documentation were submitted on these incidents.

A report written on September 14, 1989 noted that Vanderhoof was "continuing to search for the real reason he is receiving individual training." Vanderhoof observed that other deputies had the same problems, but weren't treated the same.

In a report dated September 19, 1989, Turner wrote that Vanderhoof was unaware that witnesses and suspects were to be referred to by their last names, and that reports involving juveniles were automatically to be sent to the Youth Center. Turner directed Vanderhoof to submit a request for overtime pay for time spent correcting his reports.

The First Suspension -

Vanderhoof was suspended from September 20 through September 25, 1989. The reasons given by DeFrang included Vanderhoof's failure to complete his case updates prior to going on vacation, and his failure to get the training in accordance with the May 19 memo.

Procedural Errors in Arrests -

On September 27, 1989, Vanderhoof was told to interview two juvenile suspects. Vanderhoof read each of them their rights but, contrary to case law, he did so outside the presence of the parents. He then interviewed them together, which is not the best procedure.

Vanderhoof and two other deputies were also written up for arresting a suspect in his home, without a warrant. The charges had to be dismissed as a result of the illegal search.

The 15 Cases Found in a File Drawer -

On September 29, 1989, Turner taped a counseling conference with Vanderhoof concerning 15 incomplete case files which had been found stored in the back of an active file drawer. The cases did not appear on the computerized case management docket, and several of the case files had no investigative follow up or documentation. Several problems were noted, as follows:

Original copies of statements and letters that should have been in an active file, in a different file, or with the prosecutor were still in these case files, without supplemental reports for their disposition.

Vanderhoof had closed the file in one case without supervisory approval.

Vanderhoof left an unprocessed latent fingerprint in another file, thereby, breaking the chain of evidence.

In another case, Vanderhoof failed to tell the drug task force about information which he obtained from a copy of a confession. The information linked stolen property in possession of Mexican

drug dealers arrested in Cowlitz County. Vanderhoof thought he may have verbally given the information to them but had no record of whether he did so or of what he said.

One of the files contained a letter from the victim of a theft,<sup>23</sup> asking that the matter not be prosecuted. Vanderhoof had failed to either forward the letter or tell the prosecutor to withdraw the warrant for the son's arrest, thereby opening the county to possible litigation for his negligence.

In a case concerning the theft of a pull-tab series, Vanderhoof had failed to officially reopen the case as requested by the State Gambling Commission over a year earlier, on September 9, 1988. Nor had Vanderhoof provided the name of a Gambling Commission agent, as the prosecutor had requested in writing. Vanderhoof apparently forgot about the case.

In a case involving a stolen truck, Turner had put a report dated August 19, 1989, in Vanderhoof's mailbox for corrections. Vanderhoof filed a supplemental report indicating that the suspect had been arrested in Jefferson County on September 1, 1989. The original corrected report was not filed until September 29, 1989.<sup>24</sup> Vanderhoof explained that the report had gotten buried in his mail box, which he was going through as time allowed.

Turner was upset that the 15 cases were not on the computer, and had not been mentioned at case conferences when Vanderhoof was routinely asked if there were other cases. Turner observed that notes on at least one of the cases showed that Vanderhoof was aware of them in June, 1989. Turner felt Vanderhoof was being dishonest when he failed to mention them at case conferences. The tape of

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<sup>23</sup> The victim was the mother of the suspect on whom a warrant had been issued.

<sup>24</sup> It came out later that the suspect was placed on work release four days later and that, while on work release, the suspect committed a burglary in which an 83-year-old woman died from stress. Had the report been filed timely, there would have been a felony case pending and the suspect would not have been put on work release.

the conference discloses that the following conversation took place between Turner (T) and Vanderhoof (V) at the end of the session:

T: That's the end of the stack and I'm not quite sure how many we went through.

V: 12 or 15, maybe.

T: 12 or 15.

V: It's like Steve told me today, is like I need to cut the playing field down that I'm operating on. And he was making reference to some of - you know - like the Guild activities and stuff - to might help. I'll maintain ...

T: Steve?

V: Kernes. ... the same thing I've talked to you before. Is one of my strengths and one of my weakness being deputy is trying to follow up something, see if I can get some place. But as a consequence of doing that, is I don't have the time or haven't had the time that maybe I should have had to do some other stuff, and I got behind. Bad time management I suppose.

T: Yeah. In fact your evaluation is going to be coming up and you're going to - you have demonstrated, and it's no surprise - you've demonstrated problems in time management, organizing and work coordination. And it's something that we've got to - with the new system I think that is pretty well going to handle itself. Because we're not going to have to coordinate for the follow ups, but hopefully it won't - it'll be easier for you to work under new guidelines, new criteria.

V: Well, I'd like to do a good job. I try.

T: I know that you want to do a good job. There's no doubt in my mind that you want to do a good job. I think we all want to do a good job. When we are getting behind we can't allow things to keep piling up and just sit there on the back shelf,

because the more time goes by the more behind we get.

V: Boy I understand that.

T: You've got a whole stack of things here that cause me great concern. That's all I need to address at this point. Do you have any questions or comments? ...

V: Well, I regret it, you know, some of those I had dropped out of my active life, because there just wasn't time for everything. I sure regret that.

T: I want to reinforce and remind you that when you are behind, or you've got some problems, bring it to my attention so we can deal with it immediately.

Vanderhoof testified in the civil service proceedings that all but two of the 15 cases were inactive, and that he had stored them in the back of the file drawer in order to work on them from time to time as other duties allowed.

#### The Sex Abuse Case -

On October 12, 1989, Turner wrote a report on Vanderhoof's failure to follow up on a sex abuse complaint in which an 11-year-old female had alleged an uncle forced her to perform fellatio on him in June, 1986. Deputy Michael Hoff had initially investigated the complaint on June 9, 1988, but the juvenile would not cooperate. Vanderhoof was told to follow up on the case, but the girl again refused to talk when he did so on August 20, 1988. Vanderhoof had asked her to think it over, and she gave him a statement when he met with her again on October 9, 1988. Vanderhoof had filed a supplemental report on October 10, 1988. In the meanwhile, the girl's parents had split up, and she was being moved around. Vanderhoof heard that the uncle was in Goldendale, and requested the Klickitat County Sheriff Department to interview him. On April 27, 1989, Vanderhoof received a letter from the Klickitat Sheriff, stating that the uncle had hired an attorney and would not talk.

Vanderhoof had filed a supplemental report on the letter, on May 28, 1989. On July 21, 1989, Prosecuting Attorney David Bruneau sent a memo to the department, commenting on Vanderhoof's incomplete case referral and the 10-month time lapse, which made him wonder why the case was referred to him in the first place.

Errors in Case Handling -

In an October 12, 1989 memo to DeFrang, Turner wrote of having talked to Deputy Prosecutor Deborah Kelly five months earlier, on May 23, 1989, regarding several cases involving charges resulting from investigations conducted by Vanderhoof. Kelly stated that she was forced to accept a plea on one case, and to dismiss another, due to discovery problems. Vanderhoof had handed her his supplemental reports on those cases on the day of the trials. Vanderhoof initially told Turner that Deputy Byse had failed to forward his supplementals. When asked to put that explanation in writing, Vanderhoof added that he had been in filing his supplemental reports late because of workload. Turner noted that he had reprimanded Vanderhoof on May 24, 1989, for failing to disclose information when asked by a supervisor and for not keeping supervisors apprised of problems in case management.

On October 15, 1989, Vanderhoof wrote a long account of a meeting with Turner. The subject of the meeting was Vanderhoof's alleged mishandling of a "container law" violation. Turner is alleged to have slowed down Vanderhoof's report by misinformation and harassment.

Evaluation and Work Plan Efforts -

On October 18, 1989, Turner submitted a memorandum to DeFrang, requesting that Vanderhoof be discharged, or at least suspended. The reasons given by Turner were the discovery of the 15 incomplete files discussed with Vanderhoof on September 29, the submission of an initial report 40 days after an arrest discussed with Vanderhoof on July 21, 1989, and for Vanderhoof being untruthful.



On October 26, 1989, DeFrang placed Vanderhoof on a "Total Performance Commitment and Work Plan", as a result of an unsatisfactory performance evaluation. Among the specific abilities and goals which Vanderhoof was told to improve are to recognize dangerous situations, to cope with stress, to prioritize and handle multiple tasks, to communicate clearly, and to function with little supervision. Vanderhoof was also directed to be current and accurate in his reports and activity log and citations.

On October 27, 1989, Engelbertson and DeFrang gave Vanderhoof written notice of their intent to suspend him for 10 days, on the basis of the Turner memoranda of October 12 and 18 regarding the 15 cases. Engelbertson and DeFrang expressed a belief that the 10-day suspension was warranted, because they thought Vanderhoof dishonest on two documented occasions. They expressed an intent to put the aggregate discipline at a level, which together with the September suspension, would constitute a level of discipline that would have been warranted by all of the facts, had they been aware of them at that time. They also gave notice to Vanderhoof that they would be willing to meet with him for an explanation.

On October 31, 1989, Turner rated Vanderhoof's performance "unsatisfactory" in his annual evaluation for the period July 31, 1988 to October 26, 1989. Vanderhoof was marked "unsatisfactory" in compliance with rules, safety practices, work judgements, planning, accepting direction, effectiveness under stress, and work coordination. He was found to need improvement in work knowledge, job skill, quality and volume of work, accepting change, and training. Vanderhoof was thought to meet standards of grooming, attendance, appearance of work station, and initiative. Turner documented his deficiencies in a four-page, single-spaced addendum which noted many of the work performance memoranda requiring correction. Further, Turner noted that the department had paid overtime pay of 25-1/2 hours to supervisors and 18-1/2 hours to Vanderhoof, for training in areas where Vanderhoof was not

performing satisfactorily. Vanderhoof was placed on a work plan to correct his deficiencies. The plan called for monthly evaluations of Vanderhoof's performance and meeting of the goals.

Additional Case Handling Errors -

On November 1, 1989, Turner submitted a report regarding drug paraphernalia found by telephone workers. The case was initially given to Deputy Lowell, who could not get to it. It was then given to Vanderhoof, who sent the case to the drug task force. Turner criticized Vanderhoof for unnecessarily sending the case to the drug task force, and also noted an error of two hours time not logged on Vanderhoof's time sheet.<sup>25</sup>

Change of Supervision -

As a result of Vanderhoof's complaint over his perceived harassment by Turner, DeFrang placed Vanderhoof under the supervision of Martin, effective November 1, 1989. Martin told Vanderhoof that he was to come in off patrol after seven hours, in order to have an hour in the office to write his reports. Vanderhoof was also directed to call Martin before going off shift, to bring Martin up to date on his activities.

Vanderhoof's Response to Criticism -

On November 6, 1989, Vanderhoof wrote DeFrang regarding Turner's October 18 request that Vanderhoof be disciplined. Vanderhoof acknowledged that there was incomplete and late investigative

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Months later, on March 1, 1990, Vanderhoof wrote a memorandum to his personnel file in which he termed this a "curious" work performance documentation. Vanderhoof complained that he was being held liable for another deputy's case, and that he could not understand why Turner was upset about his forwarding of the information to the drug task force. Vanderhoof acknowledged an error on his time card, but attributed it to Turner's harassment. Vanderhoof described his contacts with Turner as hostile, and forwarded the memo to DeFrang and Kernes, with a copy noted to the union attorney.

reports, but he asserted that he was not the only deputy with late reports. Vanderhoof attributed the situation to the case load, and to a lack of "constructive and careful supervision" by Turner. Vanderhoof blamed a lack of clear direction and added work while he was struggling with Turner's deadlines and threats of discipline.

Attached to his November 6 memo to Defrang was Vanderhoof's response to the "Performance Commitment and Work Plan". Vanderhoof stated that his failure to follow written direction for training following the [K] situation was a result of destructive criticism and stress that it caused, and an apparent lack of interest that Vanderhoof tried alternatives and did not shoot [K]. Vanderhoof indicated that he did not consider himself deficient in the first five abilities listed, but would try to improve. Vanderhoof also indicated he would work to correct deficiencies in the other five areas, where he had not shown consistent performance. Vanderhoof felt he was doing the best he could, but believed Turner was more interested in documenting than in providing assistance to him in several instances which he cites. Vanderhoof denied that he was dishonest or was trying to protect himself, noting that he would not have saved all the paperwork. He blames extensive follow-ups for putting him behind. While admitting he was not doing well with the new report format, Vanderhoof claimed that he was not given constructive training by Turner or Kelly, but instead received comments designed to raise his stress. Vanderhoof concluded with listing the steps he would take to improve.

#### The [R] Incident -

During the evening of November 13, 1989, Vanderhoof was flagged down by a female motorist, [R]. Vanderhoof pulled his squad car over and went over to [R]'s car, to give assistance. According to Vanderhoof's contemporaneous police report, he could see that [R] was very intoxicated when he talked to her. Vanderhoof asked [R] to step out of her car and perform some field coordination tests on the sidewalk. While initially cooperative, [R] later refused to

continue the tests. When Vanderhoof informed [R] that she was under arrest for driving while intoxicated (DWI), she ran back to her car. Vanderhoof followed and removed the car keys. Although the exact moment is not certain, it is clear that Vanderhoof radioed for assistance from the Washington State Patrol (WSP). Vanderhoof attempted to remove [R] from her car by use of a "wrist hold", but did not have the suspect completely under his control. [R] continued to struggle after Vanderhoof got her out of her car. Detective Randy Pieper arrived at the scene, and put [R] in a "hair hold" so Vanderhoof could handcuff her. They initially put her in Vanderhoof's squad car. Washington State Patrol Trooper Helpenst-ill arrived, and [R] was transferred to the WSP patrol car.

On November 14, 1989, Martin wrote a memo which informed Vanderhoof that turning over a DWI case to the WSP was, absent unusual circumstances (e.g., injury accidents, etc.), contrary to accepted department practice. Martin also told Vanderhoof that using the term "smell of alcohol" in his report (rather than "intoxicants") would subject him to embarrassing cross-examination at trial, because alcohol is odorless.

#### Additional Errors by Vanderhoof -

The November 14, 1989 memo concerning the [R] situation also touched on other matters. Martin noted Vanderhoof's filing of a report which failed to indicate why a juvenile runaway refused to go home, and Vanderhoof's failure to telephone Martin at 11:00 p.m., as directed. It does not appear that Vanderhoof explained his conduct at that time.<sup>26</sup>

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<sup>26</sup> In March of 1990, Vanderhoof filed rebuttals to this criticism. Vanderhoof explained that he had written reports the same way in the past, and acknowledged that he should have stated that no crime had been committed. Vanderhoof acknowledged he should have noted the type of domestic dispute, but claimed that Turner had instructed him differently in the past. Vanderhoof stated that he missed calling Martin because of being involved in a time-consuming runaway case.

The Second Suspension -

On November 15, 1989, DeFrang wrote to Vanderhoof, noting that Vanderhoof had received a memorandum notifying him of pending discipline on October 27, and that Vanderhoof's November 6, 1989 response had been received. DeFrang indicated that a review of Vanderhoof's work performance history showed a consistent pattern of deficiencies in:

... work coordination, meeting deadlines, disorganization, knowledge of work, misplaced work, disorganized work place and failure to keep your supervisor advised of problems.

DeFrang expressed a belief that Vanderhoof's response to the discipline raised questions of his veracity, in that his written responses differed from his taped interviews. Vanderhoof was placed on a disciplinary suspension for four days, November 21 through November 24, 1989. Vanderhoof was cited for incompetence, as shown by the 15 case files found stored in the file drawer, and for dishonesty.

DeFrang's letter concluded with a statement that it was the consensus of management that Vanderhoof not be disciplined at this time for his unsatisfactory performance relating to the changeover to pro-active patrol, as documented by the work performance memos, but that Vanderhoof should be given "a clear warning and a last chance to improve". DeFrang informed Vanderhoof that further inadequate performance would not be tolerated, and that he would be discharged if he did not attain competency.

The FATS Training and Related Error -

Vanderhoof arranged to have the recommended FATS training on November 28, 1989, in Tacoma. The record does not establish the reason for the time lag between the directive given to Vanderhoof in May and the scheduling of that training, although there is indication that Vanderhoof "forgot" about it at an earlier time.

On November 17, 1989, Martin documented Vanderhoof's failure to notify a supervisor of a subpoena for his court appearance in Jefferson County. The subpoena was for a day which conflicted with Vanderhoof' FATS training. The failure was thought to have been potentially embarrassing to the department.<sup>27</sup>

Vanderhoof took the FATS training under Officer Holmes who, according to Vanderhoof, told him he had done well. Kelly went with Vanderhoof to the FATS training, and testified he believed that Vanderhoof was occasionally hesitant when responding to "armed-men" scenarios. The FATS training was not rated or scored.

Further Errors -

On November 29, 1989, Vanderhoof received another work performance documentation, this time regarding the manner in which he filled out new traffic violation forms.<sup>28</sup>

On December 12, 1989, Martin documented the manner in which Vanderhoof handled a stalled automobile incident. Vanderhoof had told two boys they could pull the car off the road, and retrieve it the next day. Martin believed that Vanderhoof had failed to properly advise the two youths where to park the car, in terms of the type of road and its fog markings. Vanderhoof stated that he had received a priority call in the midst of giving assistance to the two boys, and had to leave. Vanderhoof also replied that there would not have been a problem, had the youths moved the car by 11:00 a.m. the next day, when a county crew started paving the road.

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<sup>27</sup> Vanderhoof wrote in March of 1990 that he had not realized that the subpoena was in Jefferson County, and that DeFrang had taken over his attempts to reach the county prosecutor.

<sup>28</sup> In March of 1990, Vanderhoof acknowledged that he did not do well his first time, and said he would try harder.

Revisiting the [R] Incident -

Vanderhoof's handling of the [R] situation apparently became a subject of further controversy after stories about the incident had passed by word of mouth within the department. At Turner's request, Pieper wrote a memo on December 21, 1989, describing what he had observed.

According to Pieper's memo, he had heard Vanderhoof call for the WSP and was driving by, when he saw Vanderhoof had a wrist hold of a lady sitting in her car. Pieper reported looking for a place to park his van, but saw Vanderhoof struggling in the street with [R] when he looked in his rear mirror. Vanderhoof had [R] by the wrist, but she was trying to kick him. Pieper recounted that he immediately pulled his van to the curb and went to assist Vanderhoof, who by this time was struggling with [R] on the sidewalk. Pieper recalled that he put [R] in a hair hold, grabbing her left wrist and pinning her to the car. Vanderhoof let go of her right wrist and she grabbed the luggage rack. It took both deputies to pry [R]'s right hand from the luggage rack and put it behind her, so she could be handcuffed. Pieper helped the trooper to transfer [R] to the WSP car. Pieper remembered that she was very belligerent and it took both of them to subdue her.

Further Reporting Errors -

On December 21, 1989, Turner issued two memos which documented errors by Vanderhoof. The first memo written on that date concerned Vanderhoof's failure to number pages correctly, and his failure to mark boxes on a report accurately.<sup>29</sup> The second memo written on that date concerned Vanderhoof's failure to complete several reports. Turner noted that Vanderhoof had not submitted a

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<sup>29</sup> In a January 28, 1990 memo to his personnel file, Vanderhoof indicated that Deputy Dunn had only asked him to provide descriptive information, and that he did not mark the code violation because it would not be in line with the explanation.

damage report on an accident in which one car had been damaged. Turner also observed that Vanderhoof had not stated why he failed to go to the scene of a malicious mischief complaint or complete a property damage report. Vanderhoof had also numbered some pages incorrectly, and left his patrol car's spotlight turned on while returning to the station after issuing a traffic ticket.<sup>30</sup>

The [H] Incident -

While making a call at a roadside telephone booth on the evening of December 26, 1989, Vanderhoof heard the squeal of tires. He responded in his patrol car. When he came around a corner, he saw a pickup truck stopped in the center turn lane of the highway, as if preparing to make a turn into a tavern without signaling. Vanderhoof put on his blue lights and the subject vehicle pulled into the tavern parking lot. Vanderhoof stopped his patrol car behind the subject vehicle.

According to Vanderhoof's incident report, WSP Troopers Michael Grall and Dave Sue arrived at the same time, parking their patrol car in front of the subject vehicle. The male driver of the subject vehicle, [H], got out of his truck and was shouting at his female passenger. [H] would not calm down, so Vanderhoof, Grall and Sue secured him in Vanderhoof's patrol car. Grall told Vanderhoof that he had been watching [H], since his truck was stopped in the turn lane, and Sue told Vanderhoof that [H] was DWI. Vanderhoof turned the arrest over to the WSP to process. Vander-

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Vanderhoof wrote on January 29, 1990, that he discussed the case and had disagreed with Turner, but changed the disposition to "cleared exceptionally" even though that suggested elements of a crime that were not present. Vanderhoof stated that he should have re-read the report and added a property damage, since the closure was changed. Vanderhoof claimed the reason he did not go to the scene of the malicious mischief was because that would have conflicted with other directions. Vanderhoof acknowledged he misnumbered pages, and that he inadvertently left his spotlight turned on.



hoof then tried to interview the female passenger, but she was too intoxicated. Deputy Ellefson arrived to assist, and Vanderhoof left the female passenger with Ellefson to arrange a ride home.

According to Grall's report of the incident, [H] was unsteady on his feet when he got out of the pickup truck, and Grall could smell a very strong odor of intoxicants coming from him. [H]'s speech was slurred, and his eyes were extremely bloodshot and glassy. Grall noted that [H] was upset with his passenger, and that all three law enforcement officers attempted to calm [H] down. Grall reported Vanderhoof's telling him of having another call pending, and of stating that Grall could handle [H]. Grall reported that Ellefson helped Grall and Sue subdue [H], handcuff him, and put him in the WSP patrol car.

#### Another Erroneous Report -

On December 27, 1989, Martin submitted a work performance report on a theft of a credit card. Vanderhoof's incident report had listed the incident as a "theft II", rather than the correct "theft III", and the card's number was not included. Martin thought the report was otherwise good.<sup>31</sup>

#### The January, 1990 Performance Evaluation -

On January 3, 1990, Martin issued a performance rating on Vanderhoof, for the period October 26 to November 30, 1989. That evaluation raised Vanderhoof's overall performance from "unsatisfactory" to "needing improvement". He was rated as being unsatisfactory in only "work judgments". The evaluation noted that Vanderhoof received five performance documentation reports. The summary indicated that Vanderhoof had demonstrated his ability to satisfactorily complete a basic crime report which meets department standards on a routine basis.

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A response written by Vanderhoof in March of 1990 acknowledged that he had erred on the classification, but he believed he asked the victim to call in the number.

Further Errors in Case Handling -

On January 18, 1990, Kelly wrote a report on three incidents. Kelly stated that Vanderhoof had not reported on a connection between two dead rabbits and a prowler, that Vanderhoof had followed incorrect procedure in submitting notice of a transient camp on the river "as information", and that Vanderhoof had failed to follow up on a complaint of rocks being thrown at a dog.<sup>32</sup>

The Damage to the Patrol Car -

While backing his patrol car out of a driveway on January 31, 1990, Vanderhoof drove his vehicle into a telephone terminal box. The damage to the rear bumper of the patrol car was \$236.00 - \$285.00, while the damage to the terminal was unknown. Vanderhoof stated that the structure was not visible through the rear view mirror. Turner believed most deputies would not have backed into the terminal, because it was next to a transformer tower.

DeFrang wrote Vanderhoof on February 9, 1990, stating that the incident showed "overall inattentiveness which tends to render you unsuitable for a law enforcement profession". DeFrang did not impose discipline, but felt compelled to communicate his sense of frustration over Vanderhoof's failure to improve.

The February Performance Evaluation -

On February 7, 1990, Martin gave Vanderhoof an overall rating of "unsatisfactory" in his job performance for the period December 1, 1989 through January 31, 1990. Vanderhoof was unsatisfactory in compliance with rules, safety, work judgments, and effectiveness

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In March of 1990, Vanderhoof submitted a memo to his file on these incidents. Referring to the dog incident, he stated that he had been confused by a new reporting system, and that he would tell his supervisor when unable to contact a complainant. Referring to the camp, he recalled harsh orders from Turner to report all information, and not evaluate it first, so he reported the camp. Vanderhoof recalled his investigation of the dead rabbits was inconclusive.

under stress. He was also found to need improvement in work knowledge, planning, job skill, quality and volume of work, accepting direction, care of equipment, and work coordination. Vanderhoof met standards for meeting deadlines, accepting responsibility, initiative, and appearance. The sergeant listed several incidents where Vanderhoof did not control DWI suspects, leading to the conclusion that Vanderhoof did not perform effectively under stress. Martin indicated that Vanderhoof would have received an "unsatisfactory" rating on his previous evaluation, had the [R] incident been known during the writing of that evaluation. The sergeant stated that he would recommend Vanderhoof's discharge if asked for a recommendation.

Vanderhoof later put an unsigned note in Martin's mailbox stating, "Et tu Brute." Martin recognized Vanderhoof's handwriting.

#### The Discharge Recommendation -

On February 15, 1990, DeFrang wrote the five-page letter to Vanderhoof, stating that he believed Vanderhoof to be unsuitable for police work and would recommend Vanderhoof's discharge. DeFrang made specific mention of the [R] and [H] incidents, and listed 12 problem areas, including dishonesty, insubordination, violation of department policy, failure to perform duties in a competent manner, dereliction of duty, and failure to perform work plan. As noted above, that letter set in motion the termination of Vanderhoof's employment.

As indicated in footnotes above, Vanderhoof submitted rebuttals on March 1 and 2, 1990, to a number of the memos documenting his work performance problems.

The March 6, 1990 response from the union's attorney asserted that the [R] and [H] incidents were unsupported, and not worthy of discipline or discharge. McCarty also disputed the employer's reliance on the vehicle accident, after having stated that no

discipline would result from that incident, and he asserted that the policy not to permit the State Patrol to handle DWI cases came out after the [R] incident. McCarty questioned the department's three-month delay in pursuing the claim that Vanderhoof did not handle the [R] arrest properly, and he expressed a belief that the [H] arrest was handled properly according to the State Troopers who were at the scene.

The [H] Incident Revisited -

Turner and Martin re-interviewed WSP Trooper Grall and Trooper Sue on March 11, 1990. Grall thought Vanderhoof was closer to [H] than was he, and that Vanderhoof should have been able to see the classic signs of intoxication that he had observed. Sue also believed that Vanderhoof should have been able to observe that [H] was intoxicated. Sue also said that he stepped into the situation because Vanderhoof was not exhibiting an adequate level of control. Both Grall and Sue reported having had prior dealings with [H], and knew him to be violent.<sup>33</sup>

The Discharge -

DeFrang responded to McCarty of March 15, 1991, asserting that he was relying on Vanderhoof's entire employment record, not just the [K], [R] and [H] incidents. DeFrang stated his belief that Vanderhoof could not perform his duties at a "level of minimal acceptable competence".

The pre-disciplinary meeting followed, on March 27, 1990, at which Vanderhoof was represented by the union.

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At the civil service hearing, Grall testified that Vanderhoof did not act out of line with police procedure, but that he would have handled the situation differently. In his view, no one was in charge of the situation. Sue testified that he did not observe Vanderhoof doing anything wrong. Martin testified before the civil service commission that both troopers had previously told him that Vanderhoof appeared unsure, and that they had changed their stories.

On April 18, 1990, Engelbertson issued the letter terminating Vanderhoof's employment. Engelbertson stated that he had reviewed the recommendations submitted by Turner, Martin, Kelly, and DeFrang. He also recounted that he investigated the concerns raised by the union's attorney and by Fuchser at the pre-disciplinary meeting held on March 27, 1990.<sup>34</sup>

Conclusions -

The union having established animus as a potential motivating factor in the employer's discipline and ultimate discharge of Vanderhoof, the burden shifts to the employer to show that its action would have occurred without regard to Vanderhoof's union activity.

One difficulty for the employer is that there were a number of instances when employer supervisors, particularly DeFrang and Turner, officially recognized and complimented Vanderhoof's achievements. This was particularly the case early in Vanderhoof's employment with Clallam County.

One difficulty for the union is that there was a long history of reports documenting deficient performance, and acknowledgements by Vanderhoof of his errors. This is not a case in which the alleged discriminatee appears to have been "set up" by the employer on entirely pretextual charges of misconduct.

Another difficulty for the union is the timing of the criticism and deficiencies in relation to Vanderhoof's union activity. Vanderhoof was given a good evaluation by Martin and DeFrang on October 11, 1988, within two months after there had been considerable union criticism of the department in the news media. If the admitted hurt and anger triggered animus, DeFrang would surely have toned

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The text of the discharge letter is quoted extensively at page 7-8, supra.

down the evaluation before he approved it. Instead, that evaluation complimented Vanderhoof on his case closure rate, and predicted that Vanderhoof would develop into an excellent investigator.<sup>35</sup> In the eight months that elapsed after the public comments on the contract negotiations and personnel resolution, the only items on Vanderhoof's work record consist of two instances when he was complimented for good performance and two instances of reprimands which, on their face, appear to have been explainable.

The October 13, 1988 reprimand was the first step in the chain of discipline that led to Vanderhoof's discharge, and the Examiner has carefully considered whether there was a valid reason for its issuance. The reprimand came soon after the favorable performance evaluation, and the union believes that the timing supports the inference of a causal relationship with animus. That reprimand was not issued by one of the evaluators, however. Captain Newton was upset that Vanderhoof's report on a domestic violence incident involving another captain wasn't rewritten as Newton had directed. Newton had given Kelly instructions on the matter. The record shows that there was some mis-communication between Kelly and Vanderhoof on whether the report needed editing, which resulted in the report not being rewritten. While the union contends that Kelly was angry at Vanderhoof,<sup>36</sup> and therefore reprimanded him out of animus, the record shows that there were conversations between Vanderhoof and Kelly on this subject. Moreover, Newton relied on Kelly's assurance that he told Vanderhoof to correct the report, and Vanderhoof testified that he believed Kelly to be honest. In this instance, it is more probable that the reprimand was issued because it left standing a report that was embarrassing to a captain in the department than because the administration or Kelly

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<sup>35</sup> Even at that, however, "planning", "meeting deadlines" and "coordination of work" were listed as problem areas.

<sup>36</sup> The union cites that Kelly would not deal directly with Vanderhoof.

was upset with Vanderhoof's union activities. While the record does not establish that the reprimand was issued "for cause", that is not the test before the Examiner. The Examiner concludes there is no evidence that this reprimand was motivated by union animus.

Citing that Turner was the sergeant who documented the deficiencies of another deputy who was disciplined, the union alleges that DeFrang's selection of Turner to supervise Vanderhoof is further evidence that the department was setting Vanderhoof up because of animus. If this were true, one would expect that Turner would have begun immediately to document criticism of Vanderhoof. That did not happen, however. Turner was assigned as Vanderhoof's supervisor on January 1, 1989. The first documentation by Turner did not occur until four months later, on May 6, 1989, and then complimented Vanderhoof for doing a good job. In fact, the first negative action taken by Turner took place on May 20, 1989, when he reprimanded Vanderhoof for failing to be at his assigned duty post during an escape incident. Vanderhoof acknowledged his error in this case. The next documentation by Turner took place on May 22, 1989. It concerned investigative delays and lack of follow up, and indicated that Turner had been attempting since April to get Vanderhoof current in his reports and investigations. It seems to the Examiner that, had Kernes and DeFrang been motivated to retaliate through Turner, there would be more in the way of substantiation than is found in this record.

The [K] incident appears to have been a turning point in Vanderhoof's employment with Clallam County. That March 25, 1989 incident did not involve discipline, but appeared to trigger a management uneasiness about Vanderhoof's ability under stress. Although Martin concluded that Vanderhoof had done a good job by not shooting [K], DeFrang expressed reservations. Kernes turned down DeFrang's request that a "Deadly Force Review Board" be convened to look into the situation, even though Kernes later characterized Vanderhoof as running away. DeFrang was forced to

treat the matter as a training opportunity, and he directed Vanderhoof to obtain appropriate training. Against that background, the union argues that DeFrang was acting out of malice when he documented Vanderhoof's failure to follow safety practices in the handling of the [K] case. The Examiner has carefully studied the testimony and exhibits concerning the incident, and concludes that the employer had legitimate business reasons for its concerns:

Spidell critiqued the incident with Vanderhoof and several other deputies, and concluded that Vanderhoof made mistakes when he left concealment and turned out the flashlight he had been using to blind [K].

Vanderhoof acknowledged what may have been errors on his part, admitting that he put the woman and child at risk had he been shot when he left his cover. Vanderhoof also agreed that when he turned his flashlight off it indicated a loss of control. In spite of the acknowledged errors, Vanderhoof was not disciplined.

Although Vanderhoof may well have been correct in not shooting [K],<sup>37</sup> the record supports DeFrang's concern over the officer's safety. It was reasonable, in these circumstances, for DeFrang to document Vanderhoof's failure to follow safety practices, and for DeFrang to direct Vanderhoof to view training videos, department policy and to attend FATS training.

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Reasonable minds could differ on the point. The record showed that [K] was visibly intoxicated, with slurred speech patterns and uncertain walk. Vanderhoof knew [K], and could reasonably have believed that [K] would not pull the trigger because he was talking and had not done so at the first opportunity. Spidell testified it was difficult to say what was the right way to handle the situation, and that it depended on one's gut feeling. Vanderhoof felt in his gut that the use of deadly force was not necessary, absent [K] moving towards his wife. Chief Landon testified that he did not believe it was justifiable to kill an intoxicated man who was firing a gun. Interestingly, neither DeFrang nor Vanderhoof mentioned the fact that [K] was visibly impaired by intoxicants as a factor in their analysis or either of their respective decisions.



As appears to have been the case with other incidents, Vanderhoof wrote the training directive in his notebook, but did not take steps to implement it. Vanderhoof was appropriately documented for his failure to follow up on the directed training. The Examiner does not find animus in the aftermath of the [K] affair.

Vanderhoof's failure to complete his reports prior to going on vacation was the basis for the first disciplinary suspension and the first of these unfair labor practice complaints. The union argues that other deputies more delinquent than Vanderhoof were not disciplined, and that the basis of that discipline was animus. The Examiner has made a careful review of the record, and concludes that it more than supports the discipline imposed:

On May 22, 1989, Turner had a case conference with Vanderhoof in which Turner was forced to inactivate three felony cases, because of investigative delay. Turner noted there were 11 other cases which showed no follow-up activity.

Immediately before his scheduled vacation, Vanderhoof was given a full day of dedicated time, in order to complete the updates. When he failed to complete all the cases because the information was in a log at home, Vanderhoof was directed to complete the remaining update on the first day of his vacation. Vanderhoof again failed to do so.

The Examiner concludes that Vanderhoof failed to update his files before going on vacation, in spite of clear direction and opportunity to do so. The record fails to indicate any legitimate basis for his disregard of orders. The Examiner does not find there was any union animus involved in this matter.

The discovery of the 15 case files was the basis for the second disciplinary suspension. The union argues that the facts underlying the suspension were known by Turner and DeFrang before the first suspension was imposed, and it claims that the employer's separate treatment of that incident shows animus. The union also

claims disparate treatment, because other deputies lost files and were not disciplined. The Examiner disagrees. Turner explained that he needed time to investigate the matter of the 15 case files. That explanation is plausible, in light of the extensive investigation. While the record does show, as the union claims, that many case files were "lost" during the transition to pro-active patrol, Vanderhoof was not suspended for having "lost" the 15 files. Rather, he was suspended for bad case management, and for not keeping his supervisors informed.

The record shows that as 1989 wore on Vanderhoof was unable to complete reports accurately. At his case conference on September 29, 1989, Vanderhoof apologized for letting things pile up, and admitted bad time management. The transcript of the conference indicates that there was no animus, but a genuine concern by Turner and a corresponding regret by Vanderhoof. These incidents are also signposts marking an increase in supervisory skepticism on Vanderhoof's ability as a competent deputy. Vanderhoof was not disciplined, but there appears to have been an increasing supervisory disenchantment on his work in the record. The sergeants were concerned over the lack of progress, and overtime was authorized in order to enable Vanderhoof to get his reports current. Martin then cut Vanderhoof's patrol to seven hours during his shift, so he could use the remaining hour to get current. The record shows that the problems continued, however. As late as November, 1989, DeFrang told Vanderhoof that the consensus of the sergeants was not to discipline him for deficiencies relating to the changeover to pro-active patrol some four months earlier. The Examiner's careful review of the record fails to support a conclusion that the criticisms of Vanderhoof were rooted in union animus.

According to the supervisors' analysis of the [R] and [H] incidents, Vanderhoof showed an inability to respond under stress. Martin believed that Vanderhoof should have transported [R] to the jail, which was only five blocks away. Martin was concerned that

struggling with [R] in the traffic lane without proper control created liability, from the risk of her being run over.<sup>38</sup> There was also liability from the unnecessary transfer of [R] to the State Patrol automobile. Vanderhoof offered inconsistent defenses, testifying on the one hand that he called the State Patrol to take the DWI, because he was the only deputy on patrol and he believed that more important, and complaining on the other hand that the transfer of [R] to the State Patrol vehicle was made by other officers at their request. Both arguments miss the point. Had Vanderhoof made the arrest, or at least driven his patrol car to the courthouse five blocks away, it would not have been necessary to transfer [R] from one car to another. There was legitimate concern over the handling of [R].

Similarly, a reasonable person could conclude that Vanderhoof evaded his responsibility in the [H] incident. The other law enforcement officers at the scene took the suspect to Vanderhoof's patrol car, as if they understood it to be his arrest. Vanderhoof claims that he did not notice signs of intoxication that were clear to the other officers. Vanderhoof then arranged to have the State Patrol process the DWI, contrary to the policy of his own department. The Examiner concludes that there was a legitimate business concern in this matter.

It is clear that Vanderhoof has a history of forgetfulness and disorganization. From his earliest evaluations in 1986 his supervisors noted Vanderhoof had left a loaded shot gun in the

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Pieper testified in the civil service proceeding that he did not think Vanderhoof was being very effective, and was not in total control of [R], even though she was a small woman. On cross-examination, Pieper observed that officers are trained to change control techniques if one technique doesn't work, and that the hair hold is a step up from the wrist hold. He testified that Vanderhoof did not show a serious lack of control, however. Bystanders reported that [R] had been thrown out of a tavern for assaulting a male patron, and they believed the deputies were too easy on her. Vanderhoof did not cite her for resisting arrest.

squad room and was deficient in meeting deadlines. In 1988 evaluators continued to find Vanderhoof forgetful and disorganized. The record clearly shows that Vanderhoof never was able to overcome either his forgetfulness or his deficiency in honoring deadlines. Kelly recalled instances when Vanderhoof locked himself out of his car twice on the same shift. There were remembered occasions when Vanderhoof reported to work on off duty days, and when he failed to report on his duty days. On some occasions, Vanderhoof reported for work without buttons, notebook or tie. There were four instances when he wore his hat backwards. There were other times when he did not remember to put his portable radio in its charger after his shift. The excuse that other officers also forgot or failed to meet deadlines cannot serve him. There may have been other deputies who on occasion forgot similar things, but not to the extent of the record built up by Vanderhoof, whose forgetfulness approached legendary proportions.

Vanderhoof's employment was terminated not only because of his perceived ineffectual response under stress in the [K], [R] and [H] incidents, but also for his proven inability to write reports with sufficient data and detail to result in successful prosecution and his failure to complete them in a timely manner. The Examiner concludes that Vanderhoof's work history contains sufficient grounds supporting his termination.

The union believes that the fact that Vanderhoof was not demoted back to the jail is further evidence that the entire purpose of the discipline was to get rid of the union officer. The Examiner agrees that the record shows that another deputy with similar deficiencies was, in fact, demoted from the patrol division to the jail.<sup>39</sup> Further, the Examiner recognizes that Vanderhoof had a competent record as a corrections officer. There is no evidence of a vacant position in the corrections division, or of a denial of

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That individual was not a union officer.

requested transfer of Vanderhoof to the corrections division. The single incident cited by the union does not constitute a basis for finding that the employer is obligated to demote unsatisfactory employees from the patrol division to its jail staff. The inquiry is not into whether there was "just cause", but is limited to whether there was a legitimate business reason for the suspensions and discharge. The Examiner finds that there were. The complaints must be dismissed.

Kernes' bid for re-election failed in the primary election held in September, 1990, when another candidate won nomination as the nominee of the Democratic party for sheriff. There is no claim or evidence that the newly-elected sheriff was motivated by union animus in his dealings. Nevertheless, while the newly-elected sheriff settled the unfair labor practice complaints concerning Fuchser, the employer continued to defend Vanderhoof's complaints on the basis of his unsatisfactory employment record.

#### FINDINGS OF FACT

1. Clallam County is a "public employer" within the meaning of RCW 41.56.030(1). During the period relevant to these proceedings, Steven Kernes was the elected sheriff of Clallam County, Dan Engelbertson was undersheriff, and Major Fred DeFrang was the chief criminal deputy sheriff and head of the patrol division.
2. Clallam County Deputy Sheriff Guild is a labor organization and a bargaining representative within the meaning of RCW 41.56.030(3). During the period relevant to these proceedings, Charles Fuchser was president of the union.
3. The guild is the exclusive representative of certain employees of the Clallam County Sheriff's Department.

4. Peter Vanderhoof was an employee of the Clallam County Sheriff's Department, within the bargaining unit represented by the union, from the time of his hiring in 1983 until his discharge on April 18, 1990. Vanderhoof was initially hired as a corrections officer, but was later promoted to a deputy sheriff position working under DeFrang. During the period of his employment, Vanderhoof served as secretary and vice-president of the union. Vanderhoof received satisfactory, and even complimentary, performance evaluations as late as October, 1988.
5. The employer and union were parties to a collective bargaining agreement which expired on December 31, 1987. The employer and union entered into collective bargaining negotiations on a successor contract in 1987, and those negotiations continued throughout 1988 and up to April 24, 1989. They then signed a new collective bargaining agreement effective for the period January 1, 1989 through December 31, 1990.
6. In August of 1988, Sheriff Kernes and Major DeFrang were angry that Vanderhoof and Fuchser created a public controversy concerning problems facing the department during collective bargaining, and when they opposed a personnel resolution which provided certain of the department's exempt administrators a measure of job security and placement on the five step pay plan. The union officers made public, derogatory remarks about the administration in opposing the re-election of Kernes. The union officers were quoted in the media as stating that the department was a feudal empire, and that internal dissent was being suppressed.
7. Undersheriff Engelbertson demonstrated animus against the union activities of Vanderhoof during a discussion with Fuchser held in the autumn of 1988, when Engelbertson expressed the view that Vanderhoof was an impediment to the

negotiations, and solicited the removal of Vanderhoof from the union's bargaining committee.

8. Sheriff Kernes demonstrated animus against the union officers at a meeting in September of 1988, when he berated Fuchser.
9. The record also shows that the public controversy alienated at least one sergeant, Kelly, to the point that he would not talk directly to Vanderhoof.
10. Major DeFrang demonstrated animus against the union officers, by posting the newspaper articles concerning the personnel resolution on the wall of his office, to remind himself of criticism which hurt him. DeFrang also posted a "Statement on Loyalty" on the wall of his office. In the same time frame, the loyalty statement appeared on the bulletin boards throughout the department. DeFrang believed that loyalty to the department meant loyalty to the sheriff.
11. Sheriff Kernes attempted to interfere in the internal affairs of the union on April 17, 1989, when he asked Deputy Spidell, a union member, to squelch a no confidence vote against Kernes, and instructed him on how to do it. The request and advice were advanced by Kernes during a conversation in which opportunity for promotion within the department was also a subject of conversation.
12. Kernes demonstrated animus against the union officers at a meeting with all deputies on May 5, 1989, when he spoke of loyalty to the department, and repeatedly and angrily denounced several unnamed deputies for spreading misinformation and lies. It was clear from the context of Kernes' remarks, however, that he was making thinly-veiled references to Vanderhoof and Fuchser.

13. DeFrang demonstrated animus against Fuchser and Vanderhoof on May 16, 1989, by telling Spidell that he was stuck with them as union officers.
14. On September 29, 1989, Kernes told Vanderhoof that he should "narrow the playing field", and he made favorable reference to another employee who had "played fair" by staying within system and not going outside. Vanderhoof reasonably understood these statements as a reference to Vanderhoof's public statements a year earlier, and as a warning to discontinue his union activity.
15. Kernes and DeFrang were in a position to influence or make the decisions concerning discipline of employees. In October of 1988, shortly after Vanderhoof was given a complimentary performance evaluation, DeFrang ordered close scrutiny and extensive documentation on Vanderhoof's performance. DeFrang thereafter played a significant role in the decisions to discipline Vanderhoof.
16. A reprimand of Vanderhoof dated October 13, 1988, was issued on the basis of Sergeant Kelly's assurance that he had told Vanderhoof to correct a domestic violence report involving a captain in the department. In this instance, it appears that the reprimand was issued because Vanderhoof's report contained inaccurate or embarrassing information on a captain in the department, rather than because the administration was upset with Vanderhoof's public statements or other union activity.
17. Placement of Vanderhoof under the supervision of Sergeant Turner, effective January 1, 1989, did not result in any immediate documentation of deficiencies on the part of Vanderhoof. On May 6, 1989, Turner complimented Vanderhoof for doing a good job in writing 23 reports out of 82 calls.



18. Vanderhoof was reprimanded on May 20, 1989, for failing to be at his assigned duty post during an escape incident. Vanderhoof acknowledged his error in this case.
19. Vanderhoof was criticized on May 22, 1989, concerning investigative delays and lack of follow up. Turner had been working since April, attempting to get Vanderhoof current in his reports and investigations.
20. DeFrang was legitimately concerned about safety after Vanderhoof's handling of the [K] incident brought into question the officer's safety and ability to function under stress. It was reasonable in these circumstances for DeFrang to document Vanderhoof's failure to follow safety practices, and to direct him to view training videos, read department policy and to attend FATS training. Vanderhoof wrote those instructions in his notebook, but then apparently disregarded or forgot about them. Vanderhoof was appropriately disciplined thereafter for his failure to follow up on the directed training.
21. On May 22, 1989, Turner was forced to inactivate three felony cases, because of investigative delays by Vanderhoof. At a case conference held on that date, Turner noted there were 11 other cases which showed no follow-up activity, and directed Vanderhoof to update those cases prior to taking a scheduled vacation. Vanderhoof was given a full day of dedicated time to complete the task, but failed to update his files before going on vacation, in spite of clear direction and opportunity to do so. When he failed to complete all the cases because the information was in a log at home, Vanderhoof was given direction to complete the remaining update the first day of his vacation. Vanderhoof again failed to do so.
22. The employer's first suspension of Vanderhoof, in September of 1989, was based on his failure to update his cases when given

direction and opportunity, and to the failure to obtain training as directed by DeFrang.

23. At a case conference held on September 29, 1989, Vanderhoof apologized for letting things pile up, and admitted bad time management. The transcript of that conference indicates that there was no animus, but rather a genuine concern by Turner based on the discovery by the employer of 15 case files which Vanderhoof had stored in a file drawer, and a corresponding regret by Vanderhoof.
24. The employer's second suspension of Vanderhoof, in November of 1989, was for bad case management and for failing to keep his supervisors informed. The facts underlying the second suspension were known by Turner and DeFrang before the imposition of the first suspension, but were seen by the employer officials as a separate matter and as a separate basis for discipline. Turner's explanation that he needed time to investigate the matter of the 15 cases is plausible, in light of the extensive investigation.
25. As 1989 wore on, Vanderhoof was unable to complete reports accurately. Vanderhoof was not disciplined, but there appears to have been increasing supervisory disenchantment with his work performance. The sergeants documented concerns about the lack of progress. Overtime was authorized in order to enable Vanderhoof to get his reports current and Vanderhoof's patrol was limited to seven hours during his shift so he could use the remaining hour to keep his reports current. The record shows that the problems continued, however.
26. As late as November, 1989, DeFrang told Vanderhoof that the consensus of the sergeants was not to discipline him for deficiencies relating to the changeover to pro-active patrol

some four months earlier. Vanderhoof did not deny his deficiencies at that time.

27. According to the supervisors' analysis of the [R] and [H] incidents, Vanderhoof showed an inability to respond under stress. There was legitimate concern over the handling of [R], and a reasonable person could conclude that Vanderhoof evaded his responsibility in the [H] incident. Vanderhoof denied that conclusion, and argued that he was being disciplined for a transfer of [R] from his vehicle when the transfer was actually made by other officers at the request of one of them.
28. Throughout his employment with Clallam County, Vanderhoof had a history of forgetfulness and disorganization. In his earliest evaluation in 1986, his supervisor noted that he had left a loaded shot gun in the squad room, and was deficient in meeting deadlines. In 1988, evaluators continued to find Vanderhoof forgetful and disorganized. The record clearly shows that Vanderhoof never was able to overcome either his forgetfulness or his deficiency in honoring deadlines.
29. The employer's discharge of Vanderhoof, on April 18, 1990, was based on his employment record, including his forgetfulness and his ongoing failure to update his cases, as well as his inability to control people in confrontation situations such as the [K], [R] and [H] incidents. The employer reached its decision to discharge on the basis of legitimate business considerations.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The evidence, as described in paragraphs 6 through 15 of the foregoing findings of fact, sufficiently establishes a prima facie case sufficient to support an inference that union animus was a motivating factor in the scrutiny and subsequent discipline and discharge of Peter Vanderhoof.
  
3. The evidence, as described in paragraph 16 through 29 of the foregoing findings of fact, sufficiently establishes that the employer had legitimate business reasons for its scrutiny and documentation of the work performance of Peter Vanderhoof, as well as for its discipline and discharge of Vanderhoof, so that those actions did not constitute unfair labor practices under RCW 41.56.140.

ORDER

The complaints charging unfair labor practices filed in these matters shall be, and hereby are, DISMISSED.

ENTERED at Olympia, Washington on the 13th day of March, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
WILLIAM A. LANG, Examiner

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