

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION,	)	
	)	
Complainant,	)	CASE 9501-U-91-2120
	)	
vs.	)	DECISION 4597 - PECB
	)	
CLALLAM TRANSIT SYSTEM,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

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Frank and Rosen, by Clifford Freed and Nora McDermott,  
Attorneys at Law, appeared on behalf of the complainant.

Johnson, Miller and Richardson, by Craig T. Miller,  
Attorney at Law, appeared on behalf of the respondent.

On November 21, 1991, Gerald W. Morris filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Clallam Transit System violated RCW 41.56.140(1), by discrimination in regard to hiring, in reprisal for Morris's outspoken union advocacy. A hearing was held on July 14, August 25, and October 29 and 30, 1992, before Examiner Jack T. Cowan. The Amalgamated Transit Union took over the prosecution of the case at the hearing. The hearing was re-opened on April 12, 1993, on a motion to admit newly-discovered evidence. The parties submitted post-hearing briefs to complete the record.

BACKGROUND

The Clallam Transit System (CTS) is a publicly-owned passenger transportation system providing bus service in Clallam County, Washington. CTS is based in Port Angeles, Washington, and is governed by an elected board of directors. General Manager Timothy Frederickson has been the administrative head of CTS since October

of 1983. Terry Weed has served as the operations manager of CTS since 1984, overseeing the day-to-day operation of the system and acting as the principal management official responsible for staffing and employee relations.

CTS commenced operations in 1980, and hired Gerald Morris as a part-time transit operator in September of 1980. Morris became a full-time employee about three months later. Morris had been employed previously as a transit operator in Oakland, California.

#### Union Activity

CTS employees were considering union representation when Morris commenced his employment there. Dispatcher Billie Hutchison and some other CTS employees promoted representation by the Teamsters union. Morris had been a member of the Amalgamated Transit Union (ATU), and he supported selection of the ATU as the exclusive bargaining representative of the CTS employees. Morris contacted the ATU about representation.

In November of 1980, a representation petition was filed with the Public Employment Relations Commission, concerning the CTS employees.<sup>1</sup> CTS employed 2 dispatchers and approximately 22 drivers at that time. The employer took the position that the dispatchers were supervisors who should not be included in the same bargaining unit as the bus operators, and the dispute concerning their eligibility for inclusion in the bargaining unit was reserved for a post-election determination by the Commission. The ATU prevailed in the representation election, and was certified by the Commission January 22, 1981.<sup>2</sup> The Executive Director subsequently

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<sup>1</sup> Notice is taken of the Commission's docket records for Case 3154-E-80-613, which disclose that Teamsters Local 589 filed a petition with the Commission on November 14, 1980. Amalgamated Transit Union, Local 587, intervened in the matter.

<sup>2</sup> Clallam Transit System, Decision 1079 (PECB, 1981).

determined that the dispatchers did not have sufficient supervisory authority to warrant their separation from the bargaining unit.<sup>3</sup>

Morris had an ongoing role in union matters, as both a union member and union officer. He was a member of the union committee assembled to negotiate the first collective bargaining agreement with the employer. Those negotiations resulted in a contract that became effective on June 1, 1981. Morris then served as the ranking union officer at CTS, and as a member of the union's executive board,<sup>4</sup> from 1982 to about 1984, and again from 1986 to 1988.

Morris testified that his relationship with management was stormy after he was seated on the union's executive board. He had several confrontations with General Manager Frederickson, some of which turned into shouting matches. Morris attributed these difficulties to his belief that, as a union official, he was obligated to be an assertive advocate for the interests of the membership. Morris also testified that he thought Frederickson was difficult to talk to, and very opinionated.

Morris had a particularly turbulent relationship with the dispatchers. Morris viewed the dispatcher positions as being promotional opportunities along a career path and, as the ATU representative, he opposed the employer's efforts to have the dispatchers removed from the bargaining unit. The employer nevertheless assigned increasingly greater responsibilities to the dispatchers, and changed their job title to "service coordinator" in 1982. Morris strongly opposed the management's desire to increase the authority

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<sup>3</sup> Clallam Transit System, Decision 1079-A (PECB, 1981). The employer did not seek Commission review of the Executive Director's decision concerning the dispatchers.

<sup>4</sup> ATU Local 587 has its headquarters in Seattle, Washington. The record does not reflect the number of bargaining units that it represents, its geographic boundaries, or the composition of its executive board.

of the service coordinators.<sup>5</sup> The service coordinators themselves repeatedly requested the union to release them from the bargaining unit, and there were frequent and heated discussions at union meetings regarding them. A letter signed by all of the service coordinators, under date of September 23, 1985, advised the ATU of their desire to withdraw from the union because of what they described as probable conflicts with the operators. The service coordinators notified General Manager Frederickson of their desire, but the union again declined to release them.

In addition to meetings directly regarding labor relations matters, Morris attended "employee advisory council" meetings held between the management and employees to discuss contemporary matters. He spoke up at those meetings, addressing controversial matters that were of interest to the union. Morris recalled particularly contentious relations when he and a fellow employee negotiated with the management concerning the text of an employee manual.

Morris wrote a letter to a local newspaper in 1985, criticizing the manner in which CTS extended its service. Morris was reprimanded by Frederickson for publicly expressing his opposition to the CTS management. Morris was told that he had gone too far, and that he should quit if didn't like it at CTS. On one occasion, the local ATU president advised Morris that Frederickson resented Morris's practice of posting union meeting notices that contained inflammatory statements.

#### Morris's Work Record

Morris received several commendations while employed at CTS. One of those was a memorandum dated June 12, 1981, which stated:

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<sup>5</sup> Further background concerning the "service coordinators" is set forth in Clallam Transit System, Decision 3831 (PECB, 1991).

Super driver, super polite, observant, lets cars pass that get behind the bus, passengers do not worry about not being picked up.

That commendation was apparently the result of a letter to the general manager from a customer, who complimented Morris and another driver for their courtesy, friendliness, and attitude.

Frederickson also commended Morris in a letter dated January 20, 1984, stating:

This letter is to thank you for the time you spent with me on the afternoon of January 18, 1984 to exchange ideas and concerns related to Clallam Transit System.

The initiative and willingness you showed to discuss your concerns and hopes for CTS speaks highly of your interest in our organizational success. You are to be commended for your sense of professionalism and leadership.

You are encouraged to continue your good efforts in this regard. Feel free to bring your concerns to me in the future.

On October 2, 1986, Morris was chosen the employee of the quarter. The accompanying commendation stated:

We are pleased to announce that Clallam Transit System has chosen the Employee of the Quarter for the third quarter of 1986.

This award is given to the most outstanding employee in the recognition of his or her overall job performance, behavior, and attendance.

A sincere congratulations from all of us at CTS to Transit Operator, Jerry Morris, Employee of the Quarter, for his loyalty and dedication to the system, his excellent attendance record, and his ability to foster a positive public image of CTS by maintaining an excellent attitude. Jerry's positive attitude toward his work and his fellow employees is outstanding.

CTS received a letter from a customer in September of 1987, complimenting the service provided by Morris and another driver. General Manager Frederickson notified Morris of the compliment in a letter dated September 25, 1987, stating in relevant part:

I just wanted to take the time to express my appreciation to you for doing an excellent job.

When CTS gets letters like this it makes it all worthwhile for all of us. Thank you for your commitment to professionalism and your public service attitude.

Morris was also commended by memorandum dated September 29, 1988:

It was brought to my attention by maintenance that, due to your exceptionally thorough pre-op, you spotted a small leak underneath bus 581 which could have developed into an engine threatening large leak.

I would like to commend you for your attention to detail and knowledge of your equipment. This is a perfect example of why a complete pre-op is so important.

There is no evidence in the record of any complaints against Morris by CTS customers.

Morris received periodic performance evaluations which indicated that other employer officials also had a positive impression of his work. A report dated November 16, 1983 addressed passenger courtesy, grooming, cooperation with other staff, exercise of good driving judgement, and compliance with applicable laws. Morris was affirmatively rated in all categories, and Hutchison gave him an overall rating of "above standard". Morris's performance was evaluated again on June 28, 1984, using the same criteria used in 1983, and Hutchison again rated him as "above standard". Hutchison also noted that Morris was an "excellent driver".

Morris's Resignation

In 1989, Morris resigned his job at CTS, to pursue other employment interests. Frederickson acknowledged the resignation by letter dated March 10, 1989, which stated:

This letter is difficult to write. I learned a few days ago that you had submitted your letter of resignation. This comes as a surprise to me because I know how much CTS means to you.

I feel that you and I could have been better friends except that at times we both misunderstood each other. That is unfortunate and I regret it.

I want to thank you for your contributions to the success of CTS. We may have disagreed at times but I truly respect and appreciate the fact that you cared about CTS and its employees.

Please accept my personal regards and wishes for your success and happiness.

Frederickson's kind view of Morris was not shared by Weed, who testified in this proceeding that he disagreed at the time with the comment that Morris cared about CTS.

For an undisclosed, but apparently brief, period after Morris resigned his job at CTS, Morris served as a liaison between the ATU and CTS. This was done at Frederickson's request. Morris recalled two or three meetings held at his residence with Frederickson and union representatives Linda King and Curt Stacy in attendance.

Within a month after Morris left CTS, the service coordinators were again involved in an attempt to have themselves removed from the ATU bargaining unit. A letter dated March 22, 1989, signed by all of the service coordinators, advised the ATU that they were withdrawing from the union because of conflicts with the operators. The union again declined to release them.

On October 5, 1989, Hutchison wrote to the international president of the ATU, stating that she was insulted by local ATU officers and had no confidence in them. She renewed the request of the service coordinators to withdraw from the ATU.

On more than one occasion, the employer notified the union that it wanted the service coordinators removed from the bargaining unit. A unit clarification petition filed by the employer in 1990 was dismissed due to procedural defects. Clallam Transit System, Decision 3831 (PECB, 1991). In the course of bargaining a successor agreement in 1991, the ATU finally agreed to remove the service coordinators from its bargaining unit.

#### Hiring for New Positions

In 1991, CTS determined that it would soon have some openings for transit operators. Weed initiated the steps to develop a roster of qualified applicants to fill immediate openings or be placed on what CTS refers to as its "next to hire" roster. Morris noticed a newspaper advertisement announcing that CTS was seeking applicants. Morris's personal circumstances had changed by that time, and he submitted an application for employment to CTS in July of 1991.

The hiring process used by CTS rates applicants on three separate factors: Initial scores are obtained by evaluating applications; a second score is based on a psychological test report from an outside consultant; the third component is an interview conducted by a three-person panel. The scoring process assigns the least weight to the employment application, and the greatest weight to the personal interview. The combined total of all three scores determines placement on the applicant roster.

#### The Application -

The CTS "application for employment" form requests information regarding the applicants' personal circumstances, education,

references, past employment history, driving record, physical/medical history, tardiness/absence record, experience with handling cash, and special skills related to the position sought. Morris's score of 112 was the highest among the top 13 applicants, with the next highest score being only 93.

#### Psychological Analysis -

The psychological examination is conducted by a consulting firm identified as The Personnel Laboratory (TPL). The written examination is composed of several segments that focus on the job description of the position to be filled. The examination is administered at a local community college, by a member of the CTS staff, and takes approximately four hours to complete. Completed examinations are returned to TPL for evaluation. TPL then sends a written report to CTS, based on the applicants' responses to the questions. TPL gave Morris and some others a "good risk" rating; other applicants were rated lower or were not rated by TPL.

#### Personal Interview -

Weed and Hutchison were members of the interview panel, along with another of the current service coordinators, Robert Barber. The panel members discussed the applicants in advance of the interviews, but were to rate each applicant separately on a form filled out after the interview. Hutchison and Barber then submitted their scores to Weed. The interviews were conducted on September 11 and 12, 1991. Morris was ranked 11th out of the 13 finalists on the interview, with a score of 83.33. Those with higher scores ranged from two at 83.67 to a 97.

#### Tally of Scores -

Weed compiled the scores on the three parts of the hiring process. He applied a weighting factor to the raw scores on the three components, and then issued a final, composite rating of the 13 finalists, as follows:

<u>FINALIST</u>	<u>APPLICATION</u>	<u>TEST</u>	<u>INTERVIEW</u>	<u>TOTAL</u>
"1"	86	98	97	670
"2"	91	95	96.67	667.67
"3"	81	94	94.67	647.67
"4"	82	95	92.67	642.67
"5"	84	93	92.67	640.67
<b>Morris</b>	<b>112</b>	<b>91</b>	<b>83.33</b>	<b>627.33</b>
"7"	93	88	87.00	617
"8"	93	87	87.33	616.33
"9"	93	84	85	601
"10"	85	90	83.67	599.67
"11"	85	84	83.67	587.67
"12"	91	82	82.67	585.67
"13"	93	81	81	579

Applicant "1" was already working for CTS as a temporary employee, and was hired immediately to fill an available position. Weed then determined that the "next to hire roster" would be limited to the next four top-ranking applicants. Morris was notified, by letter dated September 13, 1991, that he did not score high enough to be hired or placed on the roster.

Morris was disappointed with Weed's decision. He felt his qualifications were such that he should have been hired, or at least placed on the "next to hire" list. After considering the matter, Morris filed the instant unfair labor practice complaint in November of 1991. He also made a written request that the employer preserve its records of the hiring process.

Finalist "2" was hired by CTS in late September or early October of 1991. About April of 1992, finalists "3" and "4" declined offers of employment from CTS. Finalist "5" was then offered, and accepted, a position with CTS.

#### POSITIONS OF THE PARTIES

The ATU and Morris charge that the Clallam Transit System violated the Public Employees' Collective Bargaining Act, by ranking Morris

as ineligible for employment. They maintain that Morris was well qualified to have been hired and/or placed on the "next to hire" roster. It is alleged that CTS discriminated against Morris because of his past union advocacy, and his strong opposition to releasing the dispatchers / service coordinators from the ATU bargaining unit; that employer officials conspired to manipulate the finalists' scores; and that the reasons advanced by the employer for limiting eligibility for hire to the top five applicants were pretextual.

The employer denies that it engaged in any form of reprisal against Morris. It defends that Morris was not offered a job because of his poor showing at the interview, which resulted in uniformly poor ratings by the three interviewers. It maintains that Morris's interview reduced his total score to a level below that which the employer believed to be a reasonable cut-off point for employment eligibility. It is the employer's position that the complaint should be dismissed in its entirety.

#### DISCUSSION

As a public entity, the Clallam Transit System and its employees are subject to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. That statute includes:

**RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE.** No public employer or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

...

**RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED.** It shall be an unfair labor practice for a public employer:

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

It is unlawful for a public employer to reject an applicant for employment because of that person's past involvement with union activity protected by the statute. Auburn School District, Decision 2291 (PECB, 1985); Toutle Lake School District, Decision 2659 (PECB, 1987); and Educational Service District 114, Decision 4361 (PECB, 1993).<sup>6</sup>

#### Standards for Determining Allegations of Discrimination

The Commission and the courts of this state have given consideration to federal precedent in labor relations matters, where it is consistent with Chapter 41.56 RCW. Nucleonics Alliance v. PERC, 101 Wn.2d 24 (1984); Public Employees v. Community College, 31 Wn.App. 203 (Division II, 1982). Accordingly, the Commission and the courts embraced the principles set forth Wright Line, 251 NLRB 1083 (1980), where the National Labor Relations Board established a test for balancing the rights of the employee with those of the employer in determining "discrimination" claims. City of Olympia, Decision 1208-A (PECB, 1982); Clallam County v. Public Employment Relations Commission, 43 Wn.App. 589 (Div. II, 1986), review denied 106 Wn.2d 1013 (1986). In Wright Line, the NLRB had relied on the decision of the Supreme Court of the United States in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

More recently, the Supreme Court of the State of Washington rejected the Mt. Healthy approach in two cases applying state "anti-discrimination" statutes similar to RCW 41.56.140(1). In

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<sup>6</sup> The same is true under federal law. Phelps Dodge Corporation v. NLRB, 313 U.S. 177 (1941).

both Wilmot v. Kaiser Aluminum, 118 Wn. 2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn. 2d 79 (1991), our Supreme Court instead adopted a **"substantial motivating factor" test** for determining discrimination claims under state law. The new test was embraced in City of Federal Way, Decision 4495, 4496 (PECB, 1993), based on an extensive legal analysis which need not be repeated here. Under that test, the complainant must ultimately establish, by a preponderance of the evidence, that participation in protected activity was a "substantial motivating factor" giving rise to the complained-of personnel action. The complainant must initially **establish a prima facie case** (*i.e.*, provide evidence which, if not explained or contradicted, is sufficient to sustain a judgement in its favor). If such a showing is made, the **burden of production shifts** to the employer, to show a lawful basis for its decision (*i.e.*, produce evidence of non-discriminatory reasons for its actions). The burden of persuasion remains with the complainant, who may respond with evidence showing that the reasons advanced by the employer are pretextual.

The Examiner, the Commission, and the courts all recognize that circumstantial evidence is often the principal source of proof in discrimination cases. Port of Seattle, Decision 3064-A (PECB, 1989); Auburn School District, *supra*. Only rarely is there a "smoking gun", as in Clallam County, *supra*.<sup>7</sup>

#### Morris's Prima Facie Case

##### Union Activity -

Morris was a well-known union activist during his entire period of employment at CTS, starting with the organizing campaign in 1980. The record reflects that he was a vocal proponent for the ATU, and

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<sup>7</sup> In Clallam County, the evidence included a tape recording of a hearing before the county commissioners, in which a supervisor stated that the employee was discharged, in part, for his collective bargaining activity.

that he was instrumental in that organization prevailing over an organization that had been preferred by some other employees. Morris then served on the ATU's bargaining committee, and was a principal representative of that union during two terms of office.

The record is clear that Morris had an adversarial relationship, as a union official, with the top management of CTS.<sup>8</sup> Some measure of mutual respect is indicated, however, in Frederickson's letter acknowledging Morris's resignation, and in Frederickson's effort to obtain Morris's continued involvement as a liaison between CTS and the ATU even after Morris resigned.

Morris had a troubled history of dealings with the dispatchers / service coordinators. Their status was a central focus of Morris's union activity, as he opposed releasing them from the bargaining unit. Morris viewed their attempts to withdraw from the union as malicious, and an erosion of the union's bargaining strength.

Morris had particularly strained relations with Hutchison, who was a supporter of the Teamsters during the initial organizing campaign. Morris felt she was later instrumental in promoting a cooperative effort between the employer and the service coordinators to obtain their removal from the bargaining unit. Morris openly voiced his displeasure with Hutchison's attitude at union meetings. As an example of earlier discrimination against him, Morris cited what he felt was a failure by Hutchison to adequately investigate, follow up on, or provide administrative support concerning a minor traffic accident at Sequim, Washington. Morris also recalled Hutchison's negative reaction to a grievance filed by

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<sup>8</sup> Curt Stacy, who has been employed by CTS for approximately eight years and is currently the union executive board member, recalled the relationship as "adversarial", particularly because of the intensity of some of the issues that were being discussed.

the union under his stewardship in 1985, on behalf of a discharged driver.<sup>9</sup>

The strained relations between Morris and the employer were well-known to other members of the bargaining unit. Current union official Stacy witnessed frequent acrimonious exchanges between Morris and Hutchison at union meetings, usually over the service coordinators' inclusion in the ATU bargaining unit, and he testified that the conflict between Hutchison and Morris continued even after Morris stepped down from the union's executive board. Former union executive board member Linda King also corroborated the testimony of Morris and Stacy. King witnessed confrontations between Morris and Hutchison at union meetings, felt Hutchison was "down on the union", and felt Hutchison directed her dissatisfaction at Morris.

The employer does not dispute having knowledge of Morris's union activity. Frederickson acknowledged that the employer was aware of Morris's union advocacy, and recognized him as a valid spokesman. Frederickson recalled that he and Morris disagreed on a number of matters and that they had difficulty communicating. Weed recalled that he heard of Morris promoting union issues with the other employees on more than one occasion. Weed affirmed that Morris had a lot of ideas regarding CTS organization, service, and approaches to issues, and felt that Morris's ideas frequently conflicted with those of management. It was Weed's view that Morris had difficulty

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<sup>9</sup> As part of a plan for the individual's reinstatement, Morris arranged, with the permission of the management, for a trainer from another transit system to work with the employee in an attempt to improve his driving skills and obtain reinstatement for him. Hutchison, who was then supervising CTS driver training, was particularly angry with Morris, and she wrote a letter to Operations Manager Weed in which she claimed that CTS trainers were well qualified to perform all training, and complaining that Morris's instigation of the use of the outside trainer was an insult to the CTS trainers.

reconciling differences of opinion regarding how management should respond to different matters, and that Morris intruded into management's area of responsibility. Although Weed testified that Morris had frustrations which affected the way he dealt with co-workers, that Morris was not "open", and that Morris did not volunteer information, Weed could not recall any specifics where Morris had failed to communicate adequately with a supervisor. In fact, Weed recalled that Morris did his work in an acceptable manner, and that he could work effectively with all of the employees.

Incriminating Statements by Employer Officials -

The record contains evidence of two conversations which directly indicate the existence of a supervisory animus against Morris, related to his union activity. Both of those incidents involved early reactions of employer officials to the news that Morris was applying for re-employment with CTS in 1991; both rise to the level of being a "smoking gun" in this case.

The task of screening applications at the initial step in the hiring process was assigned to Linda Beal, along with Hutchison and Weed. Beal serves as information officer / clerk for the employer, reporting to Weed.<sup>10</sup> Called as a witness by the union, Beal testified on direct examination as follows:

- Q. [By Mr. Freed] Did [Weed] indicate to you what his attitude was towards Jerry Morris reapplying?
- A. [By Ms. Beal] **[Weed] seemed to think that it was quite funny; he treated it as a joke.**
- Q. Did [Weed] explain in any way what the prior relationship was between Jerry Morris and Clallam Transit management?
- A. He made mention of the fact that he thought it was kind of odd that Jerry was applying to Clallam Transit again because

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<sup>10</sup> Beal's position is included in the ATU bargaining unit.

**in the past there had been disagreements with management** and because management had not changed during the time that Jerry had been gone he didn't understand why Jerry wanted to come back.

TR. 409-410 [emphasis by **bold** supplied].

Since Morris had a commendable work record during his previous employment with CTS, the "disagreements with management" that were cited by Weed as a basis for his "joke" statement could only refer to controversies related to Morris's union activity.

Stacy and Hutchison discussed Morris after they heard that he had applied for re-employment at CTS. Stacy testified that Hutchison told him she was glad that Morris had left CTS, that she felt morale had improved because Morris was no longer involved in union business, that she was surprised Morris wanted to return, that she was unhappy about the prospects of Morris's return, and that she thought Morris's return would lead to renewed conflict between her and the union. Hutchison did not deny Stacy's testimony on this point, claiming only that she could not remember. Hutchison did acknowledge that she personally believed Morris's return would be bad for morale.

#### The Initial Application Rating -

The employer's rejection of Morris is highly suspect in light of the initial ratings made by Beal, Weed and Hutchison. Each of them placed Morris above all of the other finalists.<sup>11</sup> The total score of 112 assigned to Morris was 120% of the next-highest score given,

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<sup>11</sup> Beal assigned a score of 29 to Morris, and scores of 24, 23, 21, 17, and 16 to the other finalists. Hutchison assigned a score of 28 to Morris, and scores of 21, 20, 19, 19 and 18 to the other finalists. Weed assigned a score of 31 to Morris and scores of 27, 26, 25 and 20 to the other finalists. For unexplained reasons, Weed's worksheet on one of the applicants was not offered in evidence.

and was 123% to 138% of the scores given to those who became the "top five" candidates.

The employer does not explain away the vastly superior initial ratings given to Morris. It provided testimony that it places special emphasis on customer service in considering applicants, that it prefers experience in dealing with the public over commercial driving experience, and that it believes that bus driving skills can be taught. Morris had customer service skills, however, as evidenced by the several commendations given to him during his previous employment with CTS.

The Psychological Test -

The employer's rejection of Morris comes under additional suspicion when considered in light of the fact that Morris was rated as a "good risk" by the psychological testing firm. Further doubts then arise about the employer's hiring process when details concerning the scoring of the "psychological" ratings are fully explored.

The employer offered testimony that it believes an applicant's personality and psychological make-up determine interpersonal skills, that inherent personality characteristics are not amenable to change, and that interpersonal skills cannot be taught. Against that background, it goes to the trouble and expense of having job applicants evaluated by the TPL firm. Involving an outside consultant can certainly lend an air of sophistication and fairness to a hiring process.

The reports provided by TPL consisted of a brief essay on each of the applicants examined. The analysis for the five favored finalists and Morris stated, in relevant part:

Finalist "1" -

[1] likes what [1 is] doing now and [1] hopes to continue to operate a public transit vehicle for the balance of [1's] time at work.

... we are inclined to doubt that [1] requires any reminders to be courteous and attentive ... [1] usually exercises sound judgement on [1's] own.

Finalist "2" -

[2's] pleasant manner, careful work habits and strong desire to be of service to those around [2] are all positive indicators. **A good risk.**

Finalist "3" -

[3's] outgoing manner, desire to be helpful to others and strong organizational skills are all positive indicators. ... you will keep in mind however, in working with [3] is that its not too palatable for [3] to have to admit that something is not beyond [3] and [3] may not be willing to ask you to review some steps in [3's] training or to offer an expanded explanation. With the reservation that [3] will have to be readier to ask for help when [3] encounters a tricky situation, **[3] is considered a good risk.**

Finalist "4" -

[4 is] a well organized and hard working individual ... is well aware that [4] must operate well within the guidelines established and ask for counsel when [4] encounters a situation for which there is no precedent. **[4] is considered a good risk.**

Finalist "5" -

[5] looks like a team-oriented and conscientious person who cares deeply about [5's] ability to meet expectations of the job. ... If you decide to take [5] on, it should be with the understanding that [5] will require lengthy preparation and probably close supervision for some time to come. **[5] is considered a fair risk.**

Morris -

Morris is looking forward to coming back to work for you and he will aim to put his know-how to good use in this assignment. There is no doubt that he is an alert, well-organized and hardworking individual. We continue to see him as someone who **enjoys being of service to others** and he's certainly aware that he must be **attentive and courteous** in his dealing with passengers. What he **does become impatient with** is what he describes as "bureaucracy" or **changes being made in the way things are done without asking for input from those**

**who are on the firing line.** He tells us he really enjoyed his time with Clallam as a Transit Operator and the only reason he left was because he wanted to take a stab at running his own business. As you are probably aware this did not work out, but he makes it quite clear that he really liked the excitement of trying to put his own ideas into action. Right now, however, his goal is to get back to something he feels he can do well and perform a valuable service for the public.  
**A good risk.**

[Emphasis by **bold** supplied.]

In this case, however, the role and actions of Operations Manager Terry Weed must be given close scrutiny. The employer did not establish Weed as an expert witness on the evaluation or scoring of psychological tests, let alone that he has any formal education or background in that field.<sup>12</sup> The record establishes that it was Weed, not TPL, who assigned numeric scores to the ratings given by TPL. Further, the record establishes that Weed tampered with the results of the TPL assessments.

Some of the point values assigned by Weed do appear to be logical and consistent. He assigned scores in the 70's to the applicants TPL labeled as "poor risks", he generally assigned scores in the 80's to those TPL labeled as "fair risks", and he generally reserved scores in the 90's for those TPL identified as "good risks". Other point values assigned by Weed on the psychological test portion of the total score are indefensible, however.

Weed testified that he "disagreed" with portions of the analysis provided by TPL, and that he issued scores to the applicants based

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<sup>12</sup> Indeed, the record indicates that Weed had been with this employer for more than a dozen years prior to the hearing in this matter, first as a dispatcher and then as operations manager. Even if he had a degree or experience in psychology, there would have been little recent opportunity for him to practice in that field.

on his personal perception of their desirability as employees. Thus:

Weed gave finalist "1" the top score of 98 without benefit of any "risk" rating of that individual from TPL.<sup>13</sup> Nothing in the TPL essay identified this applicant as vastly superior to others. Rather, **Weed acted on the basis of his own familiarity with the person**, who was already employed by CTS as a part-time driver.

A score of 95 was given to "good risk" applicant "2", because **Weed felt** that applicant demonstrated character, personality, and public relations skills superior to those demonstrated by Morris. The TPL essays did not use Morris as a benchmark for others.

Scores of 94 and 95 were given to "good risk" applicants "3" and "4", respectively, because **Weed felt** they were more qualified than Morris.

A score of 93 was given to "fair risk" applicant "5", when other "fair risk" applicants were rated up to 10 points lower. In this case, **Weed felt** that the individual was more likely than Morris to succeed at CTS, based on information that Weed obtained while conversing with the applicant and from a former employer of the individual.

The score of 91 given to "good risk" Morris was explained on the basis that **Weed was displeased with the TPL analysis** of Morris's personality, particularly the part that stated:

... [Morris] does become impatient with is what he describes as "bureaucracy" or changes being made in the way things are done without asking for input from those who are on the firing line. ...

Weed viewed that portion of the appraisal as reflective of a serious shortcoming, and as an undesirable personality characteristic consistent with what he believed Morris displayed and was unable to control while previously employed by CTS. In that all of

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<sup>13</sup> The omission of a "good risk", "fair risk" or "poor risk" rating from TPL on finalist "1" remains unexplained.

the controversial aspects of Morris's former employment with CTS are closely tied to Morris's union activity, Weed's testimony on this issue also borders on being a "smoking gun": The only term missing is "union activity".

The impression of legitimacy continues only so long as the process used by an outside consultant is conducted **and implemented** in a fair and impartial manner. Weed's actions of interposing his own views of the applicants, and of using additional information obtained outside of the psychological testing process, completely undermines any appearance of sophistication and fairness that might otherwise be associated with the employer's use of TPL in its hiring process. A revised set of point values which corrects for Weed's highly subjective adjustments would actually change the overall placement of the top six applicants:

Reduction of applicant "1" to the average of the points given to "good risk" applicants "2", "3" and "4" (94.67), would have reduced "1" to second place among the applicants.<sup>14</sup>

Reduction of applicant "5" to a point value consistent with the scores given to other "fair risk" applicants would have lowered the total score for that person below the score Weed assigned to Morris.<sup>15</sup>

Increase of the psychological test points for "good risk" Morris to the average of "good risk" applicants "2", "3" and "4" (94.67), would have pushed Morris well into fifth place among the applicants.<sup>16</sup>

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<sup>14</sup> Finalist "1" would then have had scores of  $86 + 189.33$  (at  $2 \times 94.67$ ) +  $388$  (at  $4 \times 97$ ) =  $663.33$ , which would have placed second to Finalist "2" with  $667.67$  points.

<sup>15</sup> Finalist "5" would then have had scores of  $84 + 170$  (at  $2 \times 85$ ) +  $370.67$  (at  $4 \times 92.67$ ) =  $624.67$ , which would have placed sixth behind Morris with  $627.33$  points.

<sup>16</sup> Morris would then have had scores of  $112 + 189.33$  (at  $2 \times 94.67$ ) +  $333.33$  (at  $4 \times 83.33$ ) =  $634.67$ , which would have been 98.75% of the total score for applicant "4".

The "Stacked" Interview Panel -

There is substantial evidence from which to infer that the interview panel was stacked against Morris from its outset. It is clear that both Weed and Hutchison had long histories of controversial dealings with Morris in his capacity as a union official, and that both of them had already spoken out against Morris's quest for re-employment. Further, Beal was replaced by an employee holding one of the "service coordinator" positions that had been a source of conflict between union activist Morris and the employer.<sup>17</sup>

The employer sought to counter the inference of union animus with a claim that the interview panel was fairly composed, but the evidence does not support that defense. Weed acknowledged that he determined who would be on the interview panel. While he denied making special appointments, he also denied being aware of hostility between Hutchison and Morris. Weed's testimony is not creditable. There is ample evidence from which to conclude that Weed knew or should have known of the open and notorious strained relations that had existed between Hutchison and Morris. Weed's explanation that he replaced Beal to provide greater "diversity" on the interview panel is also unconvincing. Indeed, Weed's action of removing an administrative employee and adding another service coordinator had the opposite effect, and lends credence to the union's claim that the revised panel permitted Weed a better opportunity to influence the scores and to avoid having to offer Morris employment.

Hutchison testified that the employer's practice is to rotate the panelist assignments among the service coordinators, that it was her turn to serve in that capacity, and that she did not request the assignment. Even if it was her turn to serve on an interview panel, Hutchison did not take steps to disqualify herself after

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<sup>17</sup> The record reflects that the interview panelists are normally the same individuals who screen and rate the employment applications.

telling Stacy of her union-related prejudices against re-hiring Morris.<sup>18</sup>

The record also supports a finding that the composition of the interview panel actually affected Morris. He testified that he was surprised to find Hutchison as a member of the interview panel, and that her presence made him uncomfortable. He believed that she was prejudiced against him, because of their past conflicts, and that he was not facing an impartial interviewer. In view of their history of disputes concerning union affairs, it is possible to conclude that Morris's reactions were typical of those of a reasonable employee similarly situated.

#### The Interview Scores -

The interview scores are fundamentally suspect, because of what appears to be substantial changes made to them. Close examination of the documents which are available shows evidence of erasures and changes made on the summary worksheet. While some minor adjustments might be explainable as part of the process, it appears that significant changes were made here in a rather simplistic attempt to alter the numbers that were originally entered: A score of 91 appears to have been changed to 98; a score of 93 appears to have been a result of a partial erasure of a score of 98; a score of 91 appears to have been altered to reflect a score of 99. It is also interesting to note that the modified interview scores all appear to be to the detriment of Morris.

#### The Weighting of Scores -

The weighting factor used by Weed for the interview segment in the computation of final scores must be considered suspect. The record indicates that the psychological test and interview segments had been given "double" and "triple" weightings, respectively, in the

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<sup>18</sup> There was ample time available for her to do so. Hutchison testified that she was notified of the assignment about one week before the interviews were conducted.

past. In this case, however, the value of the high score given to Morris on the initial screening of the applications was watered down, and the moderately high score arbitrarily given Morris on the psychological test was further watered down, when Weed applied a "double" weighting to the psychological test and a "quadruple" weighting to the interview score.<sup>19</sup>

Weed testified that he increased the weighting for the interview, because he considers it to be the most important element in the evaluation of applicants. He could not remember the specific date of the change, however, and he produced no documentary evidence to corroborate his assertion that the weighting change was made before the summer of 1991. In particular, there is no evidence that the "quadruple" weighting of the interview had ever been used prior to the recruitment under scrutiny here.

Recomputing the total scores with correction for both Weed's tampering with the psychological test results and with a "triple" rating for the interview would have significantly changed the results:

<u>ADJUSTED RATINGS - PSYCHOLOGICAL + 1X/2X/3X WEIGHTING</u>				
<u>FINALIST</u>	<u>APPLICATION</u>	<u>TEST</u>	<u>INTERVIEW</u>	<u>TOTAL</u>
"2"	91	95	96.67	571
"1"	86	<b>94.67</b>	97	566.33
"3"	81	94	94.67	553
<b>Morris</b>	<b>112</b>	<b>94.67</b>	<b>83.33</b>	<b>551.33</b>
"4"	82	95	92.67	550
"5"	84	<b>85</b>	92.67	532

Even without the adjustment of the psychological test scores, use of the historical "triple" weighting of the interview score would

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<sup>19</sup> The 627.33 rating given to Morris was computed as: 112 (application) + 182 (psychological test at 2 x 91) + 333.33 (interview at 83.33 x 4) = 627.33.

have left only a meaningless difference between finalist "5" and Morris.

The Next to Hire Roster -

Simple mathematics lends support to the claim that the "next to hire" roster was artificially limited to avoid any possibility of offering employment to Morris.

Weed explained that he normally attempts to place between four and six individuals on the list. Morris met that standard. Using the highly questionable scores and weighting assigned by Weed, the total points awarded to Morris put him in sixth place overall (fifth place on the "next-to-hire" list after one vacancy was immediately filled), with 93.6% of the highest total score given, and 97.9% of the score given to applicant "5". The next lower applicants, "7" and "8", also had total scores greater than 90% of the top score. It would have required dipping down to the ninth-ranked applicant to find a total score that dropped below 90% of the top score given. If only Weed's tampering with the psychological test scores is neutralized, Morris moves up to fifth place overall (fourth place on the "next to hire" list), and would have been entitled to a job offer from the employer when a position was given to applicant "5" in April of 1992.

Weed's second explanation of the "next to hire" roster is similarly unconvincing. He testified to an objective of providing the employer with approximately one year's worth of employment candidates. Given that the word was out concerning two or more openings at CTS, it does not ring true that Weed limited the roster to the minimum size (four) indicated by his own testimony.

The Alleged Cover-up -

The disappearance of Hutchison's interview notes and summary sheet is certainly "suspicious". It is very troublesome that this was the first occasion when the employer relinquished custody of

interview notes and summaries, and that the documents were returned to Hutchison by Weed notwithstanding a written request by Morris that no documents related to the recruitment be destroyed.<sup>20</sup> Indeed, the record indicates that interview notes from all subsequent recruitments have been retained by the employer.

Other evidence makes it unnecessary to adopt the complainant-suggested inferences that Hutchison's notes would reveal that Morris interviewed far better than the employer has claimed, and that the employer has engaged in a coverup to suppress evidence adverse to its defense. The reasons given by Hutchison for her loss of the documentation are plausible.<sup>21</sup> These circumstances do nothing to enhance the employer's credibility, but will not be the basis for a specific finding against it here.

Conclusions on Prima Facie Showing -

Morris has amply met the burden of establishing a prima facie case that he has been unlawfully discriminated against by CTS. Although Morris's own testimony sometimes lacked specificity, the record contains substantial evidence that Morris had the ability to maintain positive customer service and public relations, that he had received respectable performance evaluations, and that he had

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<sup>20</sup> In a letter dated September 24, 1991, Morris notified the employer that he was considering challenging the selection process. He specifically referred to preserving the interview notes taken by Barber, Hutchison and Weed. Finance and administration manager David Olexer explained that he changed CTS procedure regarding retention of interview in about October of 1990, after attending a seminar where it was recommended that interview notes be treated as the personal property of (and be returned to) the interviewer at the completion of the hiring process. Olexer was aware of Morris's request before the notes were returned to the panelists, but he doubted Morris's right to such information and disregarded it.

<sup>21</sup> Hutchison accepted an offer of employment with a different transit system within a few days after the interview. She testified that she has moved several times since her resignation from CTS, and could not locate her notes.

commendations on several occasions for good customer service. After getting far and away the best rating on the initial screening of applications and a "good risk" by the outside consultant on the basis of the psychological examination, Morris fell on hard times in the hands of Weed and Hutchison, who were openly opposed to the return of an individual with a long record of controversial labor-management relations. The evidence thus supports an inference that Morris's past union activity was a substantial motivating factor in the employer's rejection of his application for re-employment, and that he has been unlawfully deprived of his right to a non-biased consideration of his application for employment.

#### The Employer's Defenses

With the shifting of the burden of production, it was incumbent on the employer to establish that its decision to reject Morris's application for employment was based on legitimate business reasons, and that Morris's past protected union activity was not a substantial motivating factor in its decision.

#### The Interview -

Weed testified that the interviewers met prior to the interviews, to briefly review the applications and psychological reports,<sup>22</sup> and to discuss the applicants among themselves. The agenda for the interview was controlled by a five-page questionnaire and a pre-arranged division of the questions among the three interviewers. They alternated asking questions during the course of the interview. The interview form contains sufficient space for the panelists to make contemporaneous notes regarding the applicant's response to questions, and any other observations. Each interview lasted between 15 and 30 minutes.

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<sup>22</sup> Hutchison contradicted this, in claiming that she did not know the results of the psychological testing at the time of the interviews.

Morris acknowledged that he may have approached the interview in a reserved manner, and that he felt the familiarity between the participants made it unnecessary for him to aggressively promote his qualifications. His behavior at the interview must also be considered, however, in light of his past history of conflict with these same individuals,<sup>23</sup> and his particular surprise at finding Hutchison on the interview panel.

Use of a Loaded Question -

During the interview of Morris, Weed departed from the prepared interview questions. Weed knew that Morris had difficulty acquiescing to the way the CTS management wanted to operate the system, and he acknowledged wanting to know if Morris's attitude in that regard had changed. He first commented that word had spread of Morris's possible re-employment, and that some employees had expressed concern that Morris had problems with the management in the past. Following up on this, Weed asked Morris to comment.

In Kitsap County Fire District 7, Decision 3105 (PECB, 1989), an employer was found guilty of an "interference" unfair labor practice under RCW 41.56.140(1) when its interviewers asked a known union adherent a loaded question related to his union activity. The comments and questions of Weed in this case are no less offensive. It should have been clear to all present that the past controversy between Morris and the employer had to do with unit determination and collective bargaining matters, where Morris was acting in the capacity of a union official. The employer was not in a position to condition its hiring decisions on an assessment of whether Morris would forego union activity in the future. Morris could reasonably have felt he was being threatened or coerced to

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<sup>23</sup> After the service coordinators' failed attempt to withdraw from the union in 1985, Morris made it a practice to speak to Hutchison and Weed only when necessary, because of their differences on union issues.

forego union activity in the future. An independent violation of RCW 41.56.140(1) will be found here.

The Interview Scores -

Contrary to testimony giving the impression that the ratings were established by the interview panelists independent of one another, the record establishes that the panelists conferred privately among themselves after the interview, and before completing a second interview document that summarized their assessments. That interview summary consists of 10 inquiries to be answered "yes" or "no", as follows:

1. Does the applicant display a strong interest in making application and a well developed understanding of what a public transit bus operator is?
2. Is the applicant likely to be industrious, dependable, and steady?
3. Is the applicant likely to do his/her job day by day in an efficient and attentive manner?
4. Does the applicant display a strong desire to do this type of work, to be satisfied with this work, to be properly motivated for this work?
5. Is the applicant neat, well mannered and likely to make a good impression on passengers?
6. Is the applicant courteous, friendly, congenial and likely to get along with fellow workers, supervisors, and passengers?
7. Is the applicant mature, stable, realistic, and likely to remain calm, level-headed, and even-tempered in the face of emergencies or annoying situations?
8. Is she/he mentally alert, teachable? Can she/he grasp instructions quickly? Can she/he learn to do, with speed, skill, and self-control, the movements required in operating a commercial passenger vehicle?

9. Is she/he likely to be a careful and safe operator after she/he has learned the job?
10. Is his/her personality characterized by specific traits which make him/her unsuited to the job? i.e.:
  - a. Tendency toward impatience or anger?
  - b. Tendency toward worry, nervousness, or fear?
  - c. Tendency toward outspoken independence or obstinateness?
  - d. Other limitations which make the applicant unsuited for the job?

The preferred response was "yes" for items one through nine, and "no" for item 10. After the panelists entered a "yes" or "no" assessment to each question, they entered a final score. At the conclusion of all of the interviews, the panelists were to review their scores, and adjust them to reflect the panelist's overall preference.

Weed assigned a raw score of 80 points to Morris. Weed rated Morris as having above average ability to maneuver a bus and keep a schedule and average ability to get along with passengers, but below average ability to get along with his peers and management.<sup>24</sup> Weed judged Morris unfavorably on items 4 and 10 of the second rating sheet, assessing him as failing to display satisfaction with and motivation to perform as an operator,<sup>25</sup> as having a tendency toward outspoken independence or obstinateness, and as having

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<sup>24</sup> Weed testified that he was not concerned prior to the interview about poor communication or a lack of openness on the part of Morris, and that his only concern then was the reference in the TPL report to Morris's dislike for bureaucracy.

<sup>25</sup> Contrary to his own rating, however, Weed recalled Morris's comment at the interview that he would work toward a service coordinator position. Weed did view that as an indication of positive motivation.

limitations on his availability for work.<sup>26</sup> Weed did not consider Morris to be very outgoing, and felt that Morris was unable to communicate effectively. Although Morris did not give incorrect answers, Weed felt the responses were too vague in comparison to those of other applicants. Weed's assessment of Morris was based, in part, on his past observations of Morris and comments received from others.<sup>27</sup> In all of this, however, Weed never separated Morris's history of controversy from his history of union activity.

Barber's testimony and scores are a maze of contradictions. Undermining the employer's claim of having a clearly defined policy and purpose in hiring, Barber recalled that he was given **NO** advance instruction regarding what attributes he was to look for at the interview. He testified that he determined, on his own, to look for someone who liked people, was friendly, and easy to get along with. Barber emphasized interpersonal relations over experience as a driver, because he felt that driving had nothing to do with the interview.<sup>28</sup> Barber's interview summary indicates that he gave Morris favorable ratings in all categories, and gave him the highest possible assessment. There were **NO** negative indications on Barber's interview notes concerning Morris, but Barber nevertheless assigned Morris a rather low score of 86. Barber testified at the hearing that Morris did not portray himself as friendly or sell himself at the interview, and did not seem genuinely interested in employment at CTS, but Barber had indicated on his rating form that Morris displayed an interest in returning to work at CTS, and that

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<sup>26</sup> The question of Morris's availability is discussed separately, below.

<sup>27</sup> Weed recalled that some drivers and supervisors had remarked to him that Morris was not working for CTS in the past, but had his own plans for a transit system and would push them without trying to cooperate.

<sup>28</sup> Barber's testimony suggests that he thought driving skills would be assessed by some other portion of the hiring process.

he saw no characteristics making Morris unsuitable for the job. Barber was not impressed with Morris's response that his objective in seeking a job as a driver was to earn money, at least in comparison to other applicants' responses to the same question.<sup>29</sup> Barber gave other testimony in which he was impressed that Morris was a good driver, and he could not recall any problems Morris had with passenger relations.

Testifying without her interview notes, Hutchison could not recall the interview score that she assigned to Morris, but thought she had rated him medium-high.<sup>30</sup> Hutchison recalled that Morris was a good driver. Hutchison recalled feeling Morris interviewed poorly, because he tended to use one-word answers, displayed poor body language, was somewhat arrogant, did not attempt to sell himself, and acted as if the interview was an unnecessary formality. Hutchison also gave contradictory testimony, however, denying on the one hand that her strained relationship with Morris had anything to do with the score that she assigned him, yet stating that she considered Morris to be deficient in people skills based on her personal (*i.e.*, union-related) controversies with him. Hutchison viewed him as being quiet and occasionally unable to get along with his co-workers, but she was unable to recall any specific complaints about his skills in working with people.

#### Erasures and Adjustments of Scores -

Weed denied altering the scores assigned by the other panelists, but questions remain about what actually did occur. It is known that Weed went into the interview process with a preference to hire applicants who scored in the 90's. He considered those who scored

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<sup>29</sup> The Examiner notes that Barber observed while testifying, that "we all work for money". The Examiner infers that Barber viewed Morris's response as being honest, but not necessarily prudent.

<sup>30</sup> By a process of deduction, the Examiner concludes that Hutchison must have assigned a score of 84 to Morris.

in the 80's to be only fair risks, and did not want to hire any applicant who scored lower. All three interview panelists rated Morris in the 80's, yet Morris was still excluded from the "next to hire" roster.

Weed rated the other finalists at 98, 97, 96, 96, and 93. He recalled that the score of finalist "5" was increased as part of the balancing process, and that some other scores may have been changed to reflect variations between the finalists. Weed denied attempting to influence the other panelists regarding a desired outcome.

Barber rated the other finalists at 99, 98, 95, 92, and 90. Barber maintained that he fairly ranked Morris in comparison to the other applicants, and that nobody from CTS attempted to influence his decision or indicated that there was a desired result. Barber recalls changing some of the scores that he initially assigned, so as to more accurately reflect the comparative qualities of the finalists. In examining the documents, Barber acknowledged that it appeared possible that he reduced Morris's rating from 87 to 86, but he could not recall why, other than he wanted a different score assigned to each of the finalists. Barber also acknowledged that other scores appeared to be changed, but he could not recall why.<sup>31</sup>

By deductive arithmetic, the Examiner concludes that Hutchison must have rated the other finalists at 95, 94, 93, 93, and 92. She also denied having any discussions with management regarding who would be hired.

The effect of the post-interview discussion among the interviewers cannot be discounted, given the similarities among their scores and stories. Rather than three independent assessments, the interview-

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<sup>31</sup> Barber was unable to determine whether scores were changed before or after the panelists turned their interview material over to the management.

ers seem to have agreed (or at least influenced one another) that Morris did not present himself in a positive and outgoing manner, failed to portray himself as being friendly, failed to sell himself, and/or did not seem to want the job. When the post-interview discussion is taken into account, it is particularly difficult to square the score given to Morris with the near-perfect ratings listed by Barber on his interview sheet.

Conclusions on Interview Process -

The Examiner is not persuaded that the interview process relied upon by the employer provides it a valid defense. The format and loaded question asked of Morris undermine the employer's claim of legitimacy. None of the interviewers took issue with Morris's work record or his passenger relations skills, which was their announced focus at the interview. The only logical explanation of their negative reactions and ratings concerning Morris was that they recalled the controversies connected with Morris's lawful union activities, and wanted to avoid the possibility of repetition which might accompany his re-employment.

Backlash of Tainted Interviews on Psychological Test Score -

Confirming the inferences drawn above with respect to the existence of a prima facie case, it is clear that Weed used the results of the tainted interview process in arranging the scores given on the psychological test segment. In looking for applicants who would be cooperative with the management, Weed ignored the generally favorable comments of the outside consultant about the prognosis for Morris's future at CTS. The TPL comments (including that Morris looked forward to returning, was alert, was hardworking, enjoyed being of service to others, and was aware that he must be attentive and courteous with passengers) directly contradict the reasons offered by the employer for rejecting Morris's application for re-employment.

Limitations on Morris's Availability -

An additional reason cited by the employer for its decision to pass over Morris for employment was that he was not readily available for work. Again, however, the evidence of what actually transpired does not square with the employer's actions.

At the time of the interviews and the creation of the "next-to-hire" list, Morris understood that CTS would be hiring two people, the first one soon and the second one in three or four months. At one point, Weed testified to understanding that Morris did not want to accept employment at CTS until about December of 1991 or January of 1992. In other testimony, Weed recalled Morris as indicating he did not want the first opening, because he still had commitments with his current employer. According to Barber, Morris never said that he didn't want a job with CTS, but rather that he would be ready in about three or four months, which would come out in the same timeframe cited by Weed. Morris acknowledged that he expressed a preference for a future starting date for employment with CTS, in order to wind up his current pursuits, but he also claims to have informed the employer that he would do whatever was necessary to accommodate the employer if he was selected to fill the first vacancy.

The employer's argument based on Morris's limited availability would be much more persuasive if Morris had declined a job offer actually made, but those are not the facts. The first position was filled immediately, as Morris anticipated. A second position was filled sooner than Morris anticipated, in October of 1991. Rather, than letting Morris disqualify himself by rejecting such a job offer, the employer told him in September of 1991 that he was excluded from the "next-to-hire" list that would remain in effect far beyond the period when Morris was otherwise committed. Even if Morris were deemed to have waived both of the positions filled in 1991, he could have been on the "next to hire" roster for the third position that was filled the following April, some seven months

after the interviews. The Examiner is left with the impression that Weed took steps to avoid any possibility of Morris accepting a job offer over the next year.

#### Conclusions

Morris has a proven track record of sound customer skills, as evidenced by his past performance evaluations and customer service commendations. He was the top-scoring candidate on the initial screening of applications, and was rated a "good risk" by the consultant on the psychological test. At least Barber gave Morris uniformly high marks on the specific questions in the interview summary concerning an ability to maintain positive customer relations.

Morris also had a record of being a thorn in the side of the management in his statutorily-protected capacity as a union activist and official. The animus of employer officials against Morris is clear. Given their particular history, it is impossible to separate Hutchison's voiced concern that "problems" would recur if Morris were to return from Morris's past union activity. Weed's attitude was even more transparent. He had disagreed with the complimentary comments of his superior when Morris departed from CTS in 1989, and he gave his subordinate the impression in 1991 that he regarded Morris's application to return as "a joke".

The record offers no reasonable explanation as to why Morris survived the initial screening process with the highest rating given, survived the psychological test with a "good risk" rating from the outside consultant, and survived Barber's interview notes with unblemished ratings, yet was eventually rejected because of alleged poor communication skills. Rather, the evidence shows that the interview panel was loaded against Morris, that the interviewers came up with uniformly low ratings which are at odds with the written record made by one of them, that Weed then tampered with

the consultant's ratings on the psychological test, that Weed then altered the weighting factors to minimize the good ratings given to Morris, and that Weed artificially limited the "next to hire" roster to preclude the rehire of the known union adherent. The Examiner concludes that Morris has demonstrated that his past union activity was a substantial factor in the employer's decision to deny him re-employment.

#### REMEDY

There is ample evidence to justify a conclusion that Morris should have been placed above the finalist identified above as "5". It is clear that finalist "5" was offered employment in March or April, 1992. Morris would have been available by that time, even under his stated preference for a delayed hiring date with CTS. Thus, an appropriate remedial order in this case would be to require CTS to offer Morris immediate employment at CTS, with status and back pay relating to the date on which the position offered to finalist "5". Morris will be allowed a reasonable amount of time to arrange his personal circumstances in order to make an orderly transition to employment at CTS. The back pay shall be computed in conformity with WAC 391-45-410.

The use of an earlier date for establishing back pay and status has been considered, but is not adopted. Although it is clear that the total score assigned to Morris should have been higher than that assigned to finalist "5", it is not as clear that it should have been higher than both finalist "1" and finalist "2".<sup>32</sup> Further, both of the positions given to finalists "1" and "2" were filled prior to the time that Morris indicated he was readily available for employment at CTS.

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<sup>32</sup> For remedy purposes, comparisons to finalists "3" and "4" are irrelevant, since they declined the position that was given to finalist "5".

FINDINGS OF FACT

1. Clallam Transit System (CTS) is a public employer within the meaning of RCW 41.56.030(1). During the period relevant to these proceedings, Timothy J. Frederickson was the general manager of CTS, Terry Weed was the operations manager of CTS, and Billie Hutchison and Robert Barber were supervisors acting on behalf of the employer within the scope of their authority.
2. Gerald W. Morris was an applicant for employment at CTS in response to a recruitment conducted by the employer in the summer and early autumn of 1991. Morris had previously been employed by CTS from 1980 to 1989.
3. Amalgamated Transit Union, Local 587 (ATU), a bargaining representative within the meaning of RCW 41.56.030(3), has been the exclusive bargaining representative of transit operators employed by CTS since 1981.
4. When CTS employees organized for the purposes of collective bargaining in 1980, Morris was a proponent of representation by the ATU, and he actively campaigned for that organization. Hutchison was a proponent of representation by another organization.
5. During the processing of a representation case before the Public Employment Relations Commission in 1980 and 1981, CTS sought to have Hutchison and other employees in a "dispatcher" classification excluded from the bargaining unit. The ATU resisted that exclusion. The Executive Director of the Commission later issued an order including the dispatchers in the bargaining unit.
6. In 1981, Morris served on the union committee that negotiated the first collective bargaining agreement with CTS.

7. During periods from approximately 1982 to 1984 and 1986 to 1988, Morris served as an ATU executive board member, and was the ranking union officer at CTS. Morris was recognized by the employer as a bona fide union spokesperson.
8. Morris also remained active in union affairs during those periods of time that he was not serving as a union official.
9. As a union spokesperson, Gerald Morris had a contentious relationship with the CTS management. Operations Manager Weed felt that Morris had difficulty acquiescing to the management directives. General Manager Frederickson acknowledged that he felt that he and Morris had difficulty communicating.
10. The bargaining unit status of the dispatchers was an ongoing subject of controversy between the ATU and CTS during the entire time that Morris was active in union affairs at CTS. CTS changed the job title from "dispatcher" to "service coordinator" in about 1982, and again sought to have the union release them from the bargaining unit. The service coordinators themselves sought to have the union release them from the bargaining unit. Morris actively opposed the release of the service coordinators from the bargaining unit, and a particularly strained relationship developed between Morris and Hutchison as a result of that dispute.
11. Morris's performance was evaluated by CTS in 1983 and 1984, and was rated as being "above standard".
12. Morris received commendations from CTS for professionalism and/or good customer service in 1981, 1983, 1984, 1985, 1986, 1987, and 1988.
13. In 1989, Morris resigned from employment at CTS. Frederickson issued a letter in which he acknowledged past controversies

between Morris and CTS, but indicated respect for Morris's pursuit of union objectives. Weed disagreed, and did not share Frederickson's high regard for Morris.

14. For a brief period of time after his resignation from CTS, Morris served at Frederickson's request as a liaison between CTS and the ATU, hosting two or three meetings between union representatives and Frederickson, at his residence.
15. In about July of 1991, CTS advertised for applicants to fill transit operator positions that were then open or were anticipated over the next year. Morris became aware that CTS was seeking applicants for transit operator positions, and he submitted an application.
16. When informed that Morris had applied for re-employment at CTS, Weed made a statement to a bargaining unit employee, to the effect that Morris's application was "a joke", based on a history of conflict between Morris and CTS.
17. When informed that Morris had applied for re-employment at CTS, Hutchison made a statement to a bargaining unit employee, to the effect that she was happy when Morris had left CTS, and that she feared a renewal of hostilities between herself and the union if Morris was again employed by CTS.
18. The initial screening of applications was conducted on or about August 12, 1991, by Weed, Hutchison and bargaining unit employee Linda Beal. Each of the raters gave Morris the highest rating among all of the candidates. The composite score of 112 given to Morris was more than 20 percent greater than the next-highest score given.
19. The employer required all applicants found to be qualified after the initial review of applications to submit to a

- psychological examination evaluated by an outside consultant. Morris took the test on August 28 or 29, 1991. The evaluation returned to CTS by the psychological consulting firm indicated that Morris was a "good risk" for employment.
20. The employer required finalist applicants to be interviewed by a panel consisting of Weed, Hutchison and another of the service coordinators, Robert Barber. The interviewers met and discussed the applicants prior to the interviews, and then worked from a standard set of interview questions.
  21. Morris was interviewed on September 11, 1991. Based on the past history of union-related conflict between them, Morris was concerned about the presence of Hutchison on the interview panel, and reasonably concluded that the interview panel was unfairly biased against him. During the course of the interview, Weed deviated from the standard set of interview questions to ask Morris about his ability to get along with the employer. In light of the past history of union-related conflict between Morris and the employer, Morris could reasonably have interpreted this inquiry as a threat of reprisal if he failed to forego future union activity and/or as a promise of benefit if he disassociated himself from lawful union activities.
  22. The interviewers met again after the interviews. The scores prepared by the interviewers show uniformly low scores for Morris and changes detrimental to Morris, notwithstanding that the answers to objective questions and written comments prepared by at least Barber were uniformly favorable to Morris.
  23. Following the interviews, Weed assigned point scores to the psychological evaluations submitted by the outside consultant. In doing so, Weed substituted his own judgment for that of the

- outside consultant, and based his scores on information outside of the psychological examinations. The highest score assigned by Weed was arbitrarily high in relation to the unrated evaluation provided by the outside consultant and the ratings given to other "good risk" applicants. The score assigned by Weed to Morris was artificially low in relation to other "good risk" applicants. The score assigned by Weed to one "fair risk" applicant was artificially high in relation to other "fair risk" applicants and to Morris.
24. In computing final scores for the applicants, Weed gave greater weight to the interview segment than had been used in hiring procedures conducted prior to the summer of 1991. Weed placed Morris sixth among the finalists.
  25. The applicant given the highest composite score by Weed was hired immediately. Weed then artificially limited the "next to hire" roster of applicants eligible for hire to four additional candidates, thereby excluding Morris from consideration for hiring over the next year.
  26. On or about September 13, 1991, Morris was notified by CTS that his application for employment was rejected.
  27. During or about the last week of September or the first week of October, 1991, CTS hired the applicant who had been given the second-highest composite score by Weed, and was then at the top of the "next to hire" roster.
  28. During his interview, Morris had expressed a preference that he not start work with CTS until January or February of 1992.
  29. In about March or April of 1992, CTS offered a position to two applicants who were then at the top of the "next to hire" roster. Upon each of those persons declining the offer of

employment, CTS hired the applicant who had been placed ahead of Morris on the basis of the artificial ratings made by Weed on the psychological segment.

30. The actions of the employer, as described in paragraphs 16, 17, 20, 21, 22, 23, 24, 25, 26 and 29 of these findings of fact, were substantially motivated in reprisal for the lawful union activities engaged in by Morris while he was formerly an employee of CTS.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. By interrogating Gerald Morris during his interview concerning his relationship with the employer, Clallam Transit System interfered with, restrained and coerced Morris in the exercise of his rights under Chapter 41.56 RCW, and thereby committed unfair labor practices under RCW 41.56.140(1).
3. By discriminating against Gerald Morris in regard to hire, in reprisal for his lawful union activities protected by Chapter 41.56 RCW, the Clallam Transit System has committed, and is committing, unfair labor practices under RCW 41.56.140(1).

#### ORDER

Clallam Transit System, its officers and agents shall immediately take the following actions to remedy its unfair labor practices:

1. Cease and desist from:
  - a. Interrogating employees in a manner which threatens employees with reprisal if they engage or continue to

engage in union activities protected by Chapter 41.56 RCW and/or in a manner which promises benefit to employees if they forego union activity protected by Chapter 41.56 RCW.

- b. Discriminating against Gerald W. Morris in retaliation for his exercise of his collective bargaining rights under Chapter 41.56 RCW.
  - b. In any like or related manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:
- a. Offer Gerald W. Morris immediate and full employment as an employee in good standing of Clallam Transit System, and make him whole for all loss of income and other benefits suffered by him commencing from the date in March or April of 1992 when the person identified in this decision as "finalist '5'" was offered employment. Such back pay shall be in conformity with WAC 391-45-410.
  - b. Post, in conspicuous places on the employer's premises where notices to employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.
  - c. Notify the above-named complainants, in writing, within 20 days following the date of this order, as to what

steps have been taken to comply with this order, and at the same time provide the above-named complainants with a signed copy of the notice required by the preceding paragraph.

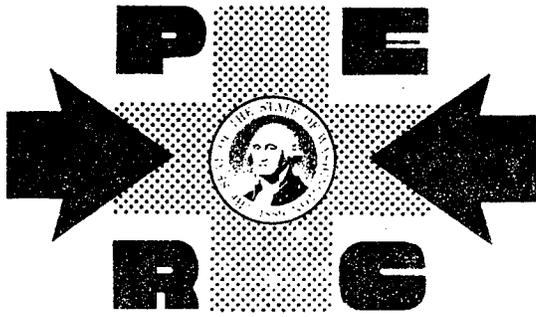
- d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this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

Entered at Olympia, Washington, on the 7th day of March, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
JACK T. COWAN, Examiner

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



# PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

# NOTICE

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

WE WILL NOT retaliate and/or discriminate against applicants for employment because of their exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL NOT interrogate employees in a manner which threatens reprisal or force or promises benefit in relation to their exercise or non-exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL offer Gerald W. Morris immediate and full employment as an employee in good standing of Clallam Transit System, and make him whole for all loss of income and other benefits for the period from when Peter Christensen was offered employment until employment commences in conformity with this order.

DATED: \_\_\_\_\_

CLALLAM TRANSIT SYSTEM

BY: \_\_\_\_\_  
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, P.O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.