STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 252, Complainant, vs. CITY OF WINLOCK, Respondent.	CASES 9581-U-92-2146 9827-U-92-2239 DECISIONS 4783 - PECB 4784 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Davies, Roberts & Reid, by Kenneth J. Pedersen, Attorney at Law, appeared on behalf of the union.

Davies, Pearson, by Peter T. Petrich, Attorney at Law, appeared on behalf of the employer.

On January 16, 1992 and June 3, 1992, Teamsters Union, Local 252, filed complaints charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Winlock had violated RCW 41.56.140(1) and (4). Specifically, the union alleged that the employer discharged police department employees Terry Williams and Forrest McPherson in reprisal for their exercise of the right to be represented by the union, pursuant to Chapter 41.56 RCW. The two matters were consolidated for a hearing held at Winlock, Washington, on October 22, 23 and 26, and November 2, 1992, before Examiner Rex L. Lacy. The parties submitted post-hearing briefs to complete the record.

BACKGROUND

The City of Winlock is an incorporated municipality, located in Lewis County. Operating under the Optional Municipal Code, Title 35A RCW, the city is governed by an elected mayor and a five-member city council. Kenneth Crocker was elected as mayor in the general

election held in the autumn of 1989, and commenced his term of office in January of 1990.

The employer maintains and operates a police department. Pursuant to the Optional Municipal Code, the mayor is the statutory head of the police department. At the time relevant here, the department had two full-time police officers, and volunteers were used to supplement that workforce.[1]

Terry Williams commenced working for the Winlock Police Department in October of 1979, as a reserve police officer. In March of 1984, he was hired to fill a vacant full-time position as a patrolman in the police department. Prior to the events involved in this proceeding, Williams normally worked the evening shift.

Forrest McPherson was hired in 1983, as "chief of police" in the Winlock Police Department. McPherson had previous law enforcement experience in San Fernando, California, and Castle Rock, Washington. Prior to the events involved in this proceeding, McPherson normally worked the day shift.

Commencing about September of 1991, Crocker ended McPherson's involvement in the hiring and termination of police department employees. Crocker assumed those functions at that time, and also commenced preparing work schedules for the police department. Crocker put McPherson on a split shift, and required him to spend most of his work day patrolling the streets of Winlock. McPherson was told that he was "chief patrolman" of the police department. Williams' work week, duties and title were not altered.

In the autumn of 1991, Teamsters Local 252 conducted an organizing drive among employees of the City of Winlock. The record in this

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[1] The employer has had additional patrol officers in the past, when its budget would allow.

matter indicates that concern about health insurance was the primary reason for the employees' seeking union representation. The union filed a representation petition with the Public Employment Relations Commission on November 15, 1991, seeking a wall-to-wall bargaining unit of City of Winlock employees that included McPherson's position. The employer objected to the inclusion of nearly all of the employee classifications sought by the union in the petitioned-for bargaining unit, citing various reasons.[2] A hearing was thus necessary in the representation case.

The topic of employee insurance benefits was placed on the agenda for a meeting of the employer's city council to be held on December 2, 1991. A representative of the Association of Washington Cities spoke on behalf of its insurance plan; a representative of Teamsters Local 252 spoke on behalf of the union's insurance plan. After those two spokespersons had departed from the meeting, Williams and another employee voiced their preference for the Teamsters plan.[3] They also indicated a belief that all of the other employees preferred the Teamsters insurance plan.

Crocker and McPherson had a meeting on January 10, 1992, while the representation case remained pending. They discussed McPherson's work performance, and Crocker indicated his displeasure about the "rumor mill", the "insurance problems", and the "union problem". Crocker indicated a general unhappiness with what he described as McPherson's lack of visibility in the community.

On January 11, 1992, Crocker discharged McPherson. Crocker did not present McPherson with any written notice of termination, nor did he offer McPherson any pretermination hearing.

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[2] The employer did not seek exclusion of the patrolman classification held by Williams.

[3] The other employee who spoke to the city council on the subject was Leroy Zwiefelhofer.

The city council held an executive session during its regular meeting on January 13, 1992. Crocker was asked to indicate the reasons for his discharge of McPherson. The record does not indicate any written report on the subject was presented to the city council. Several council members indicated a preference for having Crocker present McPherson with the reasons he was discharged and, further, to see "if they could work their differences out". Finally, there was a suggestion that McPherson should continue as police chief at that time. On January 14, 1992, City Attorney William Hillier scheduled a "clear the air and mend fences" meeting with McPherson and Crocker, to be held at his law office in Centralia, Washington.

During the course of the meeting held in Hillier's office on January 16, Crocker indicated areas of concern, for himself and the city council, with McPherson's performance. McPherson agreed to affirmatively address the indicated matters. Thereafter, Hillier drafted a document setting forth the parties' agreements.

The union filed the first of these cases on January 16, 1992. It alleged that the employer had committed unfair labor practices by changing McPherson's work shifts, by demoting him from police chief to chief patrolman, by stripping him of his police car, and by terminating his employment, all alleged to be discrimination against his engaging in protected activities.

The participants signed the agreement document drafted by Hillier on January 20, 1992. At about the same time, an article appearing in a local newspaper supposedly misquoted McPherson about the results of the meeting at Hillier's office.[4]

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[4] The newspaper article was offered in evidence in this proceeding. The contents of the article were disputed. The Examiner refused to accept the article as evidence of McPherson's statements, finding the report of the incident to be vague and lacking in probative value.

On January 27, 1992, Crocker placed a written disciplinary notice in McPherson's personnel file, citing McPherson for having a "poor attitude".

On or about February 7, 1992, Crocker had McPherson's office moved from the police department area to a space adjacent to the city clerk's office. The move was made on McPherson's day off, and without his knowledge. Crocker asserted that his reason for moving McPherson's office was to make it easier for citizens to have access to the chief of police.

A hearing was held in the representation case on February 20 and 26, 1992.

On April 27, 1992, Williams was directed to appear at a city council meeting that was in session while Williams was on duty. Upon arriving at the meeting, Williams was questioned about long distance telephone calls to his father's residence in Mossyrock, Washington, that had been charged to the employer's telephone number. Williams acknowledged that he had made the calls, and that some calls that started out as business calls turned into personal calls. Williams asked if he should pay the telephone charges, totaling about $75.00. The evidence indicates that the council agreed to the repayment, and left the matter of discipline up to Crocker. At the conclusion of the city council meeting, Williams and McPherson were directed to appear at Hillier's office in Centralia the following day.

On April 28, 1992, Williams and McPherson appeared at Hillier's office as ordered. During the meeting, Williams was placed on administrative leave while charges concerning the telephone calls were being investigated, and Hillier informed Williams that he would be provided a pretermination hearing "if it went that far". Several days later, Williams filed a written request for a formal pretermination hearing with the city clerk.

On April 29, 1992, the Executive Director issued his decision on the representation case, finding the petitioned-for bargaining unit to be appropriate and directing a cross-check to determine the question concerning representation.[5] While ruling that the city clerk/treasurer was properly excluded as a "confidential" employee, and that a court clerk was properly excluded under RCW 41.56-.030(2)(d) as the personal assistant to the judge, the Executive Director rejected the employer's exclusionary arguments concerning McPherson and other claimed supervisors.

Approximately one week after Williams was placed on administrative leave, Mayor Pro Tem Cy Meyers directed McPherson to solicit a written resignation from Williams. In exchange for a resignation, Meyers offered to provide Williams with a favorable recommendation when he sought employment in law enforcement. Williams refused to resign, and contacted the union for assistance.

On May 8, 1992, Williams was summoned to a meeting with Crocker and Meyers. Crocker discharged Williams during that meeting. Williams' request for a pretermination hearing was denied.

The union prevailed in the cross-check conducted by a member of the Commission staff on May 15, 1992. On June 3, 1992, the union filed unfair labor practice charges with the Commission, alleging that Williams was discharged for engaging in protected activities.

On June 8, 1992, Crocker discharged McPherson for a second time. Council member Erik Nyberg was present at the termination meeting. Attached to the written termination notice given to McPherson was a list of 10 reasons for Crocker's action.

On June 17, 1992, the Commission issued an interim certification designating Teamsters Local 252 as the exclusive bargaining

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[5] City of Winlock, Decision 4056 (PECB, 1992).

representative of the bargaining unit. The representation proceeding remained open to consider the employer's appeal on the eligibility issues, which were insufficient in number to affect the union's majority status.[6]

The union filed an amendment to it's original unfair labor practice complaint on June 24, 1992, adding the second discharge of McPherson as an alleged violation.

In January of 1993, the Commission affirmed the Executive Director's ruling concerning McPherson's eligibility for inclusion in the bargaining unit. City of Winlock, Decision 4056-B (PECB, 1993). The employer petitioned for judicial review of the Commission's decision.[7]

POSITION OF THE PARTIES

The union contends that the employer's reasons for discharging Williams and McPherson from their jobs were pretextual cover-ups designed to conceal the employer's true anti-union animus. The union asserts that both Williams and McPherson were discharged for engaging in protected activities under Chapter 41.56 RCW.

The employer contends that neither McPherson or Williams were discharged for their union activities. The employer asserts that Williams was discharged for making unauthorized long distance

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[6] City of Winlock, Decision 4056-A (PECB, 1992). The employer filed what amounted to a premature appeal of the Executive Director's eligibility rulings on May 8, 1992, but the cross-check proceeded as ordered.

[7] The Thurston County Superior Court recently affirmed the Commission's ruling. City of Winlock v. PERC, Thurston County Superior Court (#93-2-00388-6, August 12, 1994).

telephone calls, and that McPherson was discharged for the reasons set forth in Crocker's termination letter.

DISCUSSION

The Right of Public Employees to Organize

As a municipality of the State of Washington, the City of Winlock and its employees are subject to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which 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.**
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> ...
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> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
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> (2) To control, dominate or interfere with a bargaining representative;
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> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
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> (4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

The Commission conducts representation proceedings under RCW 41.56.060 through 41.56.090. The representation and unfair labor practice provisions of Chapter 41.56 RCW are generally similar to

provisions of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947.

Standards for Determination of Dispute

To establish "interference" with protected rights, a complainant need only establish that a party engaged in conduct which employees reasonably perceived as a threat of reprisal or force or promise of benefit associated with their union activity. The actual intent is not a factor or defense. City of Seattle, Decision 3066 (PECB, 1989), affirmed Decision 3066-A (PECB, 1989).

The union alleges that the reasons advanced by the employer for the discharges of Williams and McPherson were pretextual, and that their participation in protected activities formed the actual basis for a discriminatory decision to terminate their employment. The employer responds by asserting that it had legitimate reasons for the discharges. In deciding such disputes in the past, the Commission followed National Labor Relations Board (NLRB) precedents which shifted the burden of proof in a two-stage analysis.[8] The burden of proof was initially on the employee or union, to establish a prima facie case. If that was accomplished, the burden of proof shifted to the employer to establish valid reasons for its action. In formulating that approach, the NLRB had placed heavy reliance on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

In 1991, the Supreme Court of the State of Washington issued two decisions which reject reliance upon Mt. Healthy in discrimination cases under state law. In Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority 118 Wn.2d 79 (1991), the Court adopted a "substantial motivating factor" test

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[8] See, City of Olympia, Decision 1208-A (PECB, 1982), citing Wright Line, 251 NLRB 1083 (1980).

for the determination of causation under two discrimination statutes which parallel RCW 41.56.140.[9] The Commission recently embraced that new test: In Educational Service District 114, Decision 4631-A (PECB, July 25, 1994), the Commission ruled that the discharges of two employees were motivated in substantial part by their union activity; in City of Federal Way, Decisions 4088-B, 4495-A (PECB, July 25, 1994), the Commission found that the stated reasons for the discharges of two employees were not pretextual.

Under the "substantial motivating factor" test, the burden of proof does not shift. The complainant must still make out a prima facie case of discrimination, but the employer then only has a burden of production to articulate non-discriminatory reasons for its actions. The complainant must now prove, by a preponderance of the evidence, that the discharge was in retaliation for the employee's exercise of statutory rights. That may be accomplished, however, in either of two ways: (1) by demonstrating that the reasons asserted by the employer were pretextual; or (2) by demonstrating that union animus was a substantial motivating factor behind the

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[9] In Wilmot, a discharge was alleged to be in retaliation for pursuing worker's compensation benefits. In Allison, an employee filed a lawsuit claiming employer retaliation against her for her earlier filing of an age discrimination claim. The Supreme Court held in Allison:

> On balance, the language of RCW 49.60 supports a more liberal standard of causation than the "but for" standard .... Washington's law against discrimination contains a sweeping policy statement strongly condemning many forms of discrimination. RCW 49.60.010. It also requires that "this chapter shall be construed liberally for the accomplishment of the purposes thereof". RCW 49.60.020. This language suggests that a rigorous "but for" causation requirement is too harsh a burden to place upon a plaintiff in a retaliation case. This is particularly true, because enforcement of this State's antidiscrimination laws depends in large measure on employees' willingness to come forth and file charges or testify in discrimination cases.
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> ...
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> Rejecting both the "to any degree" and the "but for" standard of causation, **this court instead requires plaintiff to prove that retaliation was a substantial factor behind the decision.**

[Emphasis by **bold** supplied.]

employer's action, notwithstanding the reasons asserted by the employer.[10] Thus, our Commission and Supreme Court continue to require a higher standard of proof to establish employer "discrimination" than is required for an "interference" violation, but that standard is not as high as in the past decade.

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[10] The Supreme Court stated in Wilmot:

> In Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 134 ... (1989), the court stated that in statutory discrimination cases, once the employee established the prima facie case, **the burden of production shifted to the employer to show a legal excuse for the termination, but the burden of persuasion remains at all times with the employee.** Baldwin, at page 134. The court said that the same rule applies in the context of breach of employment contract cases where termination is allegedly in violation of the contract ("common law termination claims"): ...
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> The first step, therefore, is for plaintiff to make out a prima facie case for retaliatory discharge. To do this, plaintiff must show (1) that he or she exercised the statutory right to pursue workers' compensation benefits under RCW Title 51 or communicated to the employer an intent to do so or exercise any other right under RCW Title 51; (2) that he or she was discharged; and (3) that there is a causal connection between the exercise or intent to exercise the statutory right. ...
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> Therefore, in establishing the prima facie case, the employee need not attempt to prove the employer's sole motivation was retaliation for discrimination based upon the worker's exercise of benefits under the IIA. Instead, the employee must produce evidence that pursuit of a workers' compensation case claim **was a cause of the firing,** and may do so by circumstantial evidence as described above.
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> If the plaintiff presents a prima facie case, the burden shifts to the employer.
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> To satisfy the burden of production, the employer must articulate a legitimate nonpretextual nonretaliatory reason for the discharge. ... **The employer must produce relevant admissible evidence of another motivation, but need not do so by the preponderance of evidence necessary to sustain the burden of persuasion, because the employer does not have that burden.** Baldwin, at 136.
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> ...
> Because the substantial factor test is the appropriate standard by which plaintiff must ultimately prove his or her claim by a preponderance of the evidence, the plaintiff may respond to the employer's articulated reason either by showing that the reason is pretextual, or by showing that although the employer's stated reason is legitimate, the worker's pursuit of or intent to pursue worker's compensation benefits was nevertheless a substantial factor motivating the employer to discharge the worker.

[Emphasis by **bold** supplied.]

Application of Standard - The Prima Facie Case

Under the Wilmot/Allison test, the first step in the processing of a "discrimination" claim is for the injured party to make out a prima facie case showing a retaliatory discharge.

> [I]n establishing the prima facie case, the employee need not attempt to prove the employer's sole motivation was retaliation or discrimination based on the worker's exercise of [protected rights]. Instead, the employee must produce evidence that pursuit of a [protected right] was a cause of the firing, and may do so by circumstantial evidence ....
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> Wilmot, page 70 [emphasis in the original].

The focus on circumstantial evidence recognizes that employers are not in the habit of announcing retaliatory motives. Rather, a complainant need only show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
2. That he or she was discriminated against; and
3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

Union Activity and Visibility -

A finding of employer intent inherently requires proof that the employer had the knowledge necessary to form such an intent. A prima facie case is easily made where an alleged discriminatee is clearly identified as a union supporter, and has previously confronted the management on employer-employee issues.[11]

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[11] In City of Olympia, supra, the employee was the union's observer at a representation election; in Valley General Hospital, Decision 1195-A (PECB, 1981), the employee had filed grievances challenging the employer on various issues; in Wellpinit School District, Decision 3625 (PECB, 1990), the employees were union officers who had represented individual employees and the bargaining unit before the school board.

Despite the employer's arguments to the contrary in this case, the union has proved that Williams and McPherson were particularly visible in its organizing effort. Both employees were present at the initial organizing meeting, and both employees identified themselves to other employees as being pro-union. Williams was the individual who arranged for the union's representative, Mike Mauermann, to speak about the Teamsters' insurance plans at the city council meeting in December of 1991. Williams himself then spoke in support of the union's insurance program at that city council meeting. There is clear evidence that both of the affected employees had been publicly identified as being "pro-union" in a very public organizing campaign,[12] and the union insisted upon the inclusion of McPherson's position in the bargaining unit. It is inferred that the employer could also have imputed union sympathies to Williams and McPherson because of their association with the employee who initiated the organizational effort, and from the "rumor mill" in a relatively small workforce.

Indications of Employer Animus -
Crocker disclosed his anti-union feelings expressly, shortly after the representation petition was filed and the employees expressed interest in the insurance plans offered by the Teamsters Union. He specifically cited the "union problem" among his reasons for his first discharge of McPherson, in January of 1992.

The Timing of the Discharges -
The Examiner cannot ignore the timing of the incidents in the total context in which these discharges occurred. While an employer has "free speech" rights, its opposition to union activity specifically protected by the statute cannot rise to the level of interference

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[12] The union activities of McPherson and Williams in this case are clearly "collective" in nature, and are thus distinguished from pursuit of individual grievances as in City of Seattle, Decision 489 (PECB, 1977), City of Bellevue, Decisions 4242 et seq. (PECB, 1992), and Pierce County Fire District, Decision 4063 (PECB, 1992).

with or discrimination against employees for engaging in protected activities. In this case, the City of Winlock opposed the union's organizing campaign among its employees from the beginning:

* The employer's initial response to the Commission questioned the sufficiency of the union's showing of interest. This was done without regard to the fact that such determinations are excluded from litigation by the Commission's rules,[13] by appellate court precedent,[14] and by the Administrative Procedure Act.[15]

* The employer offered resistance to the size and description of the petitioned-for bargaining unit. It proposed exclusions of more persons as supervisors and/or confidential employees than would have remained as rank-and-file workers, and sought, in fact, to reduce its workforce to a one-person unit in which collective bargaining would be impossible.[16]

* The employer attempted to exclude McPherson's position from the bargaining unit less than three months after Crocker's actions to take charge of the police department seriously undermined any possible claim of supervisory conflict.[17] Given the long-standing and well-established precedents providing that "supervisors" are employees having collective bargaining rights

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[13] WAC 391-25-210 expressly precludes litigation of the sufficiency of a showing of interest at any hearing.

[14] Public Service Employees Local 674 v. King County Public Hospital District 2, ___ Wn.App. ___ (1979), WPERR CD-52.

[15] Determinations on sufficiency of a showing of interest are expressly excluded from the definition of "agency action" under the APA, at RCW 35.05.010(3).

[16] Similar arguments were rejected by the Commission in Town of Fircrest, Decision 248-A (PECB, 1977).

[17] Under City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), the exclusion of supervisors from bargaining units is based on avoidance of conflicts of interest arising from the supervisors' exercise of substantial authority on behalf of the employer.

under Chapter 41.56 RCW,[18] a very limited exclusion of "supervisors" from rank-and-file bargaining units based on potential for conflicts of interest,[19] and providing an even narrower exclusion of "confidential employees" from collective bargaining rights,[20] the exclusionary claims advanced by the employer in the representation case raise a serious question as to its motivation.

The Examiner infers that the employer was actually attempting to avoid unionization of its workforce, and that union animus could have been a motivating factor in its actions against Williams and McPherson. The burden of production is thus shifted to the employer in this case.

The Employer's Burden of Production

While the complainant carries the burden of proof throughout the entire matter, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions, by producing relevant and admissible evidence of another motivation.[21] If the employer fails to produce evidence of other motivation for the discharge, the complainant will prevail.

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[18] Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977) held that "supervisors" are public employees within the coverage of Chapter 41.56 RCW.

[19] City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

[20] IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978) held that a labor nexus is required to justify exclusion as a "confidential employee", such that general supervisory authority is not sufficient.

[21] The employer need not do so by the preponderance of evidence necessary to sustain the burden of persuasion. Wilmot, at page 70.

The First Discharge of McPherson -

Crocker and McPherson were on speaking terms during the political campaign before Crocker was elected mayor, although McPherson indicated to some citizens that he was fearful Crocker would discharge him. The relationship between Crocker and McPherson deteriorated dramatically shortly after Crocker assumed office. They hardly communicated with each other directly between January of 1991 and June of 1992, preferring to exchange written and oral messages through the city clerk.

Crocker did not present any written reasons for his first discharge of McPherson, on January 11, 1992. Among the reasons Crocker stated orally, however, at least the "insurance problems" and "union problem" are so closely related to the organizational activity that they cannot be accepted as articulation of non-discriminatory reasons under the Wilmot/Allison test. Further, Crocker's reasons for his first discharge of McPherson were so vague that even city council was unsupportive. Thus, McPherson was reinstated to his job on January 16, 1992.

The Examiner is hardly in a position to put stock in reasons which were rejected by the employer's own governing body, and concludes that the employer has not articulated any valid defense to the union's complaint concerning the first discharge of McPherson.

The Discharge of Williams -

Williams was informed that he was being investigated for making unauthorized personal long distance telephone calls at the employer's expense. Williams did not deny making the telephone calls in question, but stated that the calls originated as business calls in connection with his father's role in search and rescue operations. Initially, Williams acknowledged that the business calls had digressed into personal matters, and he offered to reimburse the employer for the personal portion of the calls. While that was apparently acceptable to the employer, Williams

later changed his position to claim that the calls were entirely business calls. The employer then proceeded to discharge Williams for making personal telephone calls at its expense.

Personal telephone calls are not an activity protected by the collective bargaining statute. The employer's stated reasons for its discharge of Williams are sufficient to sustain its burden of production.

The Second Discharge of McPherson -

When McPherson's second discharge occurred on June 3, 1992, Crocker presented a written statement setting forth 10 reasons for the discharge, as follows:

1. Allowing a six year old to be victimized for a period of nine months.
2. Down grading [sic] crime.
3. Constant inconsistencies of job duties.
4. Failing to provide security for records.
5. Complete lack of trust.
6. Failing to provide logs for blocks of time.
7. Slow and incomplete performance of duties.
8. In officially [sic] administering police department.
9. Allowing persons to drive one full year with expired plates.
10. Attempting to drop charges on assault case.

Chapter 41.56 RCW does not protect employees from the consequences of their own misconduct, so these charges are sufficient to meet the employer's burden of production.

The Substantial Factor Analysis

With adoption of the "substantial factor" test, the burden is ultimately on the alleged discriminatees to show that protected activity was "a substantial motivating factor". Some of the

arguments advanced by the union in this case have merit, while others do not.

Omission of Pretermination Hearings -
The union makes much of the fact that the employer did not offer Williams or McPherson "pretermination hearings" pursuant to Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), but the Commission has declined to extend the collective bargaining process and its unfair labor practice procedures to enforce the constitutional "due process" rights on which Loudermill is based. City of Bellevue, Decision 4324-A (PECB, 1994).

The Discharge of Williams -
Terry Williams worked for the City of Winlock for approximately 13 years, as a reserve police officer and full-time patrolman. The record in this case does not indicate that Williams had been disciplined for any reason until the issue arose concerning unauthorized telephone calls. He was involved in community service programs beyond his duties as a police officer. Along with his father, Harold "Beef" Williams, Terry Williams participated in Lewis County Search and Rescue operations and the "Hug-a-Tree" program.[22]

When Terry Williams was first confronted with the allegations of telephone misuse at a city council meeting on April 27, 1992, he admitted having engaged in the wrongdoing cited by the employer as the basis for his discharge. Acknowledging that he had made telephone calls to the Beef Williams residence at Mossyrock, Washington, Terry Williams responded to Crocker's question regarding the long distance calls as follows:

> I say, well, no, they're business calls; they start out as business calls, but then I'm sure

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[22] Both programs are designed to find persons who are lost in the wilderness.

> they turn into personal calls. I say, how can I talk to my father without it turning into a personal call.
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> Then he says, do you think this is your personal phone. I said, no, sir. And in the same breath he said, What do you have to say for yourself; what do you think we should do about this. I said, I don't have anything to say; what do you want me to say, what do you want me to do, do I owe you for some phone calls or what.

The telephone billings were available at that time, and the amount at issue was calculated as being less than $75.00. It even appears that payment of that amount might have been sufficient to satisfy the city council.

The union argues that Terry Williams' employment was terminated based on the employer's mistaken belief that Williams had changed his story to assert that all of the questioned telephone calls were business-related. The union also argues that the city council knew and approved of Williams' involvement in the search and rescue and Hug-a-Tree community service programs, so that Williams did not violate the employer's personnel policies. The union claims that a city council member had allowed Williams to make a telephone call on a mobile phone belonging to the employer on at least one occasion. The evidence establishes, however, that Terry Williams disavowed his initial acknowledgement of "personal" conversations that he made in the exchange quoted above, and that he later sought to evade paying for any of the calls by characterizing all of the questioned calls as business-related.[23]

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[23] McPherson also became involved, testifying that he had made some long distance calls to the Beef Williams residence when he was trying to contact Terry Williams regarding police department matters that occurred on Williams' shift.

The union argues that the employer did not have "just cause" for that discharge, and it thus asserts that the reasons stated by the employer "must have been" pretextual. The "just cause" standard normally found in collective bargaining agreements between unions and employers is not the standard of proof to be applied in this case, however, and the discharge of Terry Williams must be evaluated in relation to the statutory rights of employees involved in protected activities.[24]

The employer never resisted inclusion of Williams' position in a bargaining unit, and its reason for terminating Williams' employment does not relate to any protected activity.[25] That discharge was based on Williams' unauthorized use of the employer's telephone. Although termination may seem to be a harsh punishment for an incident involving an employee with long service and no previous record of discipline, it is within the employer's management rights to take such action in a situation involving employee dishonesty. The National Labor Relations Board has stated:

> An employee can be discharged for a good reason, a bad reason, or no reason at all where an anti-union motivation has not been established by substantial evidence.
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> Bob White Target Company v. NLRB, 466 F.2d (10th Cir. 1972).

Under the Wilmot test, the employer is not required to meet a "just cause" test for these discharges. The Examiner concludes that the employees' protected union activities were not a "substantial

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[24] City of Federal Way, Decision 4088-B, supra. There is no evidence that the employer's personnel policies include any procedure for appeal of a discharge decision.

[25] Williams' most visible union activity was related to the insurance presentations at the city council meeting some five months before his discharge. During the hearing in this matter, Crocker and all five councilpersons testified that they preferred to deal with the union, rather than the employees, regarding such an emotional issue.

motivating factor" and the employer's reasons for discharge were not pretextual. It follows that the complaint charging unfair labor practices which the union filed on behalf of Williams must be dismissed. City of Federal Way, supra.

The Discharges of McPherson -

There is some suggestion of a "chicken and egg" question in this case: It is unlawful for an employer to discharge or otherwise discriminate against an employee because the employee has sought union representation; an employee who already knows that his or her job is in jeopardy because of past misconduct or a poor working relationship with the boss cannot be immunized from the consequences of his or her own misconduct merely because the employee has sought union representation. It is clear that there was no love lost between Crocker and McPherson, and Crocker's actions after becoming mayor tend to validate the fear expressed by McPherson during the political campaign which preceded Crocker's election. The relationship between the two men was reduced to almost childish note-passing behavior long before the union organizing effort was commenced in Winlock. Had the issue remained purely political, it would have left open the possibility that the true motivation was unrelated to union activity. As in Town of Granite Falls, Decision 2692 (PECB, 1987), it could be very difficult to find an unfair labor practice violation under such circumstances.

As noted above, the employer has not articulated legitimate, non-retaliatory reasons for its first discharge of McPherson. The union contends that the 10 reasons presented by Crocker for the second discharge of McPherson are pretextual, and that the evidence clearly establishes the incorrectness of those allegations. The union contends the employer acted only on perceived "possibilities", and that there was no real basis for McPherson's discharge in the absence of an investigation into the reasons stated. The employer must rise or fall on those reasons.

Reason 1: Accusation that McPherson allowed a six-year-old boy to be victimized for a period of nine months.

This incident involved an older boy, who took indecent liberties with the victim. The molestation took place on McPherson's day off, so he did not learn of the incident until he returned to work the following day. Crocker's allegation of a long-term problem and the testimony of the employer's current chief of police, Kenneth Davidson,[26] were refuted by the victim's father, who testified in this proceeding. According to the father, the molestation was a single event, and he did not believe his son had been victimized for nine months. The father further testified that McPherson had contacted him at home, had taken the accused into custody, and had turned the accused over to Child Protective Services. In the father's mind, the matter was properly handled and the incident was concluded.

If not pretextual, this allegation is certainly unfounded. Nothing in this record indicates that McPherson or any city employee, other than Crocker and Davidson, were aware the victim was being harassed or had been molested. That Crocker's allegation would not be borne out by the facts could easily have been discovered by the employer.

Reason 2 - Accusation that McPherson had "down graded" crime in the City of Winlock.

Crocker pointed out inadequacies with the size and qualifications of the employer's reserve officer staff. It was his belief that crime had increased in the community, and it was his perception that McPherson was not sufficiently visible or accessible to the citizens of the community.

The size of the reserve officer cadre appears to be a smoke screen, rather than a smoking gun. The employer had two reserve officers at the time of McPherson's second discharge, but both of them were

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[26] Davidson was hired to replace Williams. After McPherson was discharged, Davidson was appointed chief of police.

discharged by Davidson approximately two weeks prior to the hearing in this matter.[27] Thus, the employer had no commissioned reserve police officers active at the time of the hearing.

The allegation of increased crime not only appears unfounded, but is apparently related to the elimination of what there was of a reserve force. During his nine years of employment as a reserve police officer in Winlock, Figueroa served as the "Uniformed Crime Report" officer for the police department.[28] Figueroa testified that crime in Winlock was approximately the same for several years, except for one specific statistic where the city had experienced an increase. When Figueroa and Korpi met with Crocker, Davidson and council member Eric Nyberg to discuss the reserve program on July 18, 1992,[29] Figueroa was asked if crime figures for the city had been altered or "fudged". He replied in the negative. After that meeting, Korpi and Figueroa were required to take physical and written examinations to retain their positions. Davidson later informed them they had not passed the tests.

A finding of pretext is warranted here, where the employer has acted in direct contravention of its stated defense. Crocker and Davidson are far more responsible for the inadequate reserve force than was McPherson. Their actions in terminating Figueroa and Korpi without having obtained more or better-qualified reserve officers contradicts the stated reason for discharging McPherson.

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[27] Paul Figueroa was a Weyerhaeuser Corporation employee; Dennis Korpi was the spouse of the city clerk.

[28] As such, he was responsible for reporting crimes within the city to the Washington State Association of Sheriffs and Police Chiefs, which compiles statewide statistics and sends them to the Federal Bureau of Investigation for inclusion in national crime statistics.

[29] This meeting took place a month after Crocker's second discharge of McPherson.

Reasons 3, 5, 6, 7, and 8 - Alleged deficiencies in McPherson's work performance.

All of these allegations involve Crocker's subjective observations of McPherson's work: Reason 3 deals with inconsistencies of job duties; reason 5 relates to a lack of trust; reason 6 involves failing to provide logs; reason 7 regards slow and incomplete performance of duties; and reason 8 involves administration of the police department. Crocker's testimony on each of these allegations was vague as to pertinent details, and was generally unsupported by any documentation to substantiate the allegations.

The allegation concerning failure to maintain daily logs is unfounded. At the hearing, McPherson produced volumes of logs of the type maintained by most police departments. They were obtained from the area in the department office where such records are kept, and appear to be complete. Crocker testified that he did not know the logs existed, and that they were not what he desired. He maintained that a simple note tablet that would fit in a shirt pocket was sufficient for his purposes.

The allegation concerning administration of the police department is directly contradicted by Crocker's action in taking control of the department.[30] Further, this issue was resolved in a meeting attended by Meyers, Crocker, and McPherson in November of 1991, so it is difficult to comprehend why it was again stated as a reason for discharge 18 months later.

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[30] When Crocker assumed responsibility for employee work shifts, he assigned McPherson to work a split shift consisting of four hours on duty, a period of time off, and then finishing out his work day. Such a schedule is unquestionably detrimental to any employee's quality of life, and an inference is available that it was imposed in an effort to cause McPherson to resign. Had this occurred after the union filed its representation petition, it would be a basis for finding an "interference" violation under RCW 41.56.140(1).

It is difficult to attach any credibility to Crocker's testimony with regard to the other reasons for discharge. All five reasons seem to be constructed in order to announce multiple reasons for the discharge action. In truth, several of the asserted reasons were the direct result of Crocker's own actions.

Reason 4 - Failing to provide security for police department records.

Crocker's testimony with regard to this reason was vague and confusing. Other witnesses indicated that the records were located "where they have always been kept". The location is not easily accessible to the public, because it is within the area assigned to the police chief and patrolmen. Additionally, no one could establish that unauthorized personnel were allowed to roam about through the police department. The one cited example involved a person who was programming the police department computer while police department personnel were present.

As with many other of the reasons for McPherson's termination, this reason is certainly unfounded, if not pretextual. The Examiner is persuaded to accept the "pretextual" interpretation, because there was a valid business reason for the presence of the outsider.

Reason 9 - Allowing a citizen to drive on expired license plates for a year.

Under questioning, Crocker could not provide details to substantiate this allegation. As with much of his testimony, Crocker referred to nameless and faceless citizens as the source of the issue. The Examiner is without enough information to attach any probative value of the testimony of this reason for discharge.

Reason 10 - Alleged attempt to drop charges in an assault case.

Crocker's final reason for discharging McPherson involved another allegation where the parties' views are at opposite ends of the spectrum. The evidence indicates the allegation is unfounded. The

accused person was tried and convicted of assault, a strong indication that justice prevailed.[31]

Regardless of their personal feelings toward one another, the issue in this case is whether Crocker's discharge of McPherson was in retaliation for McPherson's protected activities under Chapter 41.56 RCW. All of the testimony about the reasons given to McPherson for his second discharge indicates that the matters seem to have been handled under standard police operating procedures. Other actions by the employer's officials bring down a certain amount of adverse inference about their credibility.[32]

Putting a "purely political" spin on the discredited reasons for McPherson's second discharge is virtually impossible, given what else has transpired in this case. Crocker had made the "union problem", as well as the "insurance problem" which was the primary focus of the union activity, announced reasons for his first discharge of McPherson. Crocker never presented explanations sufficient to convince the city council of the merits of that

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[31] The record made during the course of several days of hearing in this matter includes reference to another situation involving McPherson's investigation of charges involving Crocker's neighbor, who was the superintendent of schools at the time of the incident. McPherson testified that Crocker ordered him to halt his investigation of the matter, and that he refused. Crocker did not refute that testimony.

[32] Testimony was received during the course of the hearing about an incident which led to the resignation of the employee who initiated the union organizing effort. When the state Department of Ecology determined that the water used by Winlock residents needed to be chlorinated in order to meet water quality standards, City Council member Allen and others were upset. Allen "spiked" a water sample from his residence, and presented it to the employee responsible for water quality. That employee was the one who held the union organizing meeting at his home. The employee's bitterness over the incident led to him obtaining employment elsewhere.

discharge, let alone sufficient to constitute a defense to the original complaint in the unfair labor practice proceeding commenced on McPherson's behalf. With the unclean hands of one violation on its record, the employer's unfounded and/or pretextual reasons for McPherson's second discharge fail to deter a conclusion that the union activity was a substantial motivating factor in the second discharge as well. A violation of RCW 41.56.140(1) has been established, and the employer will be ordered to remedy its unlawful acts.

FINDINGS OF FACT

1. The City of Winlock, a "public employer" within the meaning of RCW 41.56 030(1), is governed by an elected city council and mayor. Kenneth Crocker was elected to office as mayor in November of 1990, and took office in January of 1991.

2. Teamsters Union, Local 252, is a "bargaining representative" within the meaning of RCW 41.56.030(3). In the autumn of 1991, the union conducted an organizing drive among the employees of the City of Winlock. Insurance benefits were identified as the primary reason for the employees' seeking union representation.

3. Terry Williams was employed by the City of Winlock beginning in 1979. In 1991 and early 1992, Williams was a full-time police officer.

4. Forrest McPherson was employed by the City of Winlock beginning in 1983, as chief of police. In September of 1991, Mayor Crocker took over administration of employee work schedules and other personnel matters in the police department, and notified McPherson his status was reduced to that of "chief patrolman".

5. On November 15, 1991, Teamsters Union, Local 252, filed a representation petition with the Public Employment Relations Commission, seeking to represent a "wall-to-wall" bargaining unit of City of Winlock employees which included the position held by McPherson. Williams and McPherson had participated in meetings concerning the organizational effort, and were openly supportive of the union. The employer responded with assertion that nearly all of the employees sought by the union, including McPherson, should be excluded as "supervisors" or "confidential employees".

6. The agenda for a meeting of the employer's city council held on December 2, 1991 included a discussion about employee insurance benefits. A representative of the Association of Washington Cities spoke on behalf of the insurance plan offered by that organization; a representative of Teamsters Local 252, spoke on behalf of the union's insurance plan. Williams addressed the city council after the two insurance plan spokespersons had departed, and indicated his belief that all of the employer's employees preferred the union's insurance plan. McPherson and other employees who attended that meeting also indicated a preference for the union's plan.

7. Crocker discharged McPherson on January 11, 1992. During the course of their conversation, the reasons indicated by Crocker for his action against McPherson included "the insurance problem" and "the union problem". The employer's city council declined to support the mayor's action to discharge McPherson. On January 16, 1992, McPherson and Crocker attended a meeting convened by the city attorney to "mend fences", and McPherson was reinstated as chief of police at the end of that meeting. On January 20, 1992, McPherson and Crocker signed a reinstatement agreement which set forth several conditions that each person had to perform in the future.

8. On January 16, 1992, the union filed a complaint charging unfair labor practices with the Commission, alleging that McPherson was discharged and otherwise discriminated against for engaging in union activities protected by Chapter 41.56 RCW.

9. On January 27, 1992, Crocker placed a written disciplinary notice in McPherson's personnel file, citing McPherson for having a "poor attitude".

10. On or about February 7, 1992, Crocker had McPherson's office moved from the police department area to an area adjacent to the city clerk's office. The move was made on McPherson's day off and without his knowledge. Crocker asserted that his reason for moving McPherson's office was to make it easier for citizens to have access to the chief of police.

11. On April 27, 1992, Williams was directed to appear at a city council meeting where he was questioned about certain long distance telephone calls that had been charged to the employer's telephone number. Williams acknowledged that he had made the calls to his father's residence in Mossyrock, Washington, and that some calls which started out as business calls had turned into personal calls. Williams asked if he should pay the telephone charges that totaled about $75.00, and the evidence indicates that the city council agreed to accept such a repayment while leaving the matter of discipline up to Crocker. Williams subsequently altered his position to deny liability for any personal telephone calls charged to the employer's telephone.

12. At a meeting held in the city attorney's office on April 28, 1992, Williams and McPherson were informed that Williams was under investigation for the long distance telephone calls, and that the employer would provide Williams with a pretermination

hearing "if it went that far". Williams was placed on administrative leave while the charges were being investigated. Several days later, Williams filed a written formal petition for a formal pretermination hearing.

13. On April 28, 1992, the Executive Director issued a decision on the representation case, concluding that the position held by McPherson was properly included in the bargaining unit sought by the union, and ordering a cross-check to determine the question concerning representation. The cross-check was conducted, and an interim certification was issued designating Teamsters Local 252 as exclusive bargaining representative of the employer's employees. The employer sought review by the Commission of the Executive Director's decision to include McPherson's position in the bargaining unit.

14. Approximately one week after Williams was placed on administrative leave, McPherson was directed by Mayor Pro Tem Cy Meyers to solicit a written resignation from Williams. In exchange for his resignation, Meyers offered to provide Williams with a favorable recommendation when he sought employment in law enforcement. Williams refused to resign, and contacted the union for assistance.

15. On May 8, 1992, Williams was summoned to a meeting with Crocker and Meyers. During that meeting, Crocker discharged Williams based on his perceived change of position concerning liability for personal telephone calls charged to the employer's telephone number. Williams' request for a pretermination hearing was denied.

16. On June 3, 1992, the union filed a complaint charging unfair labor practices with the Commission, alleging that Williams was discharged for engaging in union activities protected by Chapter 41.56 RCW.

17. On June 8, 1992, Crocker discharged McPherson for the second time. Attached to the written notice was a list of 10 reasons for McPherson's termination. The reasons asserted by the employer were so unfounded that they could have been cleared up by any reasonable investigation by the employer, or were pretexts in contravention of the employer's own actions.

18. On June 24, 1992, the union filed an amended complaint charging unfair labor practices with the Commission, alleging that the second discharge of McPherson was also in reprisal for his engaging in union activities protected by Chapter 41.56 RCW.

CONCLUSIONS OF LAW

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

2. The City of Winlock has failed to articulate legitimate, non-discriminatory reasons for its action to discharge Forrest McPherson in January of 1992, and the record supports a conclusion that McPherson's involvement in union activities protected by Chapter 41.56 RCW was a substantial motivating factor in the employer's decision to discharge him, so that the employer's action was an unfair labor practice under RCW 41.56.140(1).

3. The City of Winlock has articulated legitimate, non-discriminatory reasons for its action to discharge Terry Williams, and the record fails to sustain a conclusion that Williams' involvement in union activities protected by Chapter 41.56 RCW was a substantial motivating factor in the employer's decision to discharge, so that the employer's action to discharge him was not an unfair labor practice under RCW 41.56.140(1).

4. The reasons articulated by the City of Winlock for its second discharge of Forrest McPherson in June of 1992 are found to have been pretexts designed to conceal the employer's true motivation, and that McPherson's union activities protected by Chapter 41.56 RCW were a substantial motivating factor in the employer's decision to discharge him, so that the employer's action to discharge him was an unfair labor practice under RCW 41.56.140(1).

ORDER

1. [Case 9827-U-92-2239, Decision 4784] The complaint charging unfair labor practices filed concerning the discharge of Terry Williams is DISMISSED on the merits.

2. [Case 9581-U-92-2146, Decision 4783] The City of Winlock, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

   A. CEASE AND DESIST from:

      (1) Discharging or otherwise discriminating against Forrest McPherson or any other employee of the City of Winlock, in reprisal for the pursuit of union activities protected by Chapter 41.56 RCW.

      (2) In any other 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.

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

(1) Offer Forrest McPherson immediate and full reinstatement as an employee in good standing of the City of Winlock, and make him whole by payment of back pay and benefits, for the period from January 11, 1992 to the date of the unconditional offer of reinstatement made pursuant to this order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410, and shall exclude the period when McPherson was reinstated between January of 1992 and June of 1992.

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

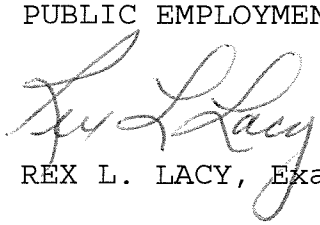
(3) Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

(4) 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.

ISSUED at Olympia, Washington, this 29th day of September, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



REX L. LACY, 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

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 offer Forrest McPherson immediate and full reinstatement as a employee in good standing of the City of Winlock, and will make him whole by payment of back pay and benefits, less any interim earnings and unemployment compensation, for the period from January 11, 1992 to the date of the unconditional offer of reinstatement made pursuant to this Order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410, and shall exclude the period of time while he was reinstated to employment from January of 1992 to June of 1992.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights under the Public Employees Collective Bargaining Act, Chapter 41.56 RCW.

DATED:_____

CITY OF WINLOCK

BY:_____
AUTHORIZED REPRESENTATIVE

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

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.