City of Seattle, Decision 6357 (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS' GUILD, Complainant,	)	CASE 13012-U-97-03140
vs.	)	DECISION 6357 - PECB
CITY OF SEATTLE, Respondent	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Aitchison & Vick, by Christopher K. Vick, Attorney at Law, appeared on behalf of the complainant.

Mark H. Sidran, Seattle City Attorney, by Fritz E. Wollett, Assistant City Attorney, appeared on behalf of the respondent.

The Seattle Police Officers' Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission on February 28, 1997, alleging that the City of Seattle (employer) had: (1) interfered with the rights of employee Kenneth Crow, by refusing to allow him union representation at a performance evaluation appeal; and (2) discriminating against Crow when it effected his transfer to another unit resulting in a loss of speciality pay and overtime opportunities. The Executive Director of the Commission issued a preliminary ruling on April 10, 1997, in which the complaint was found to state a cause of action for both interference and discrimination under RCW 41.56.140. A hearing in this matter was opened on August 24, 1997, before Examiner Jack T. Cowan. At the start of the hearing, the union moved to amend the complaint; the Examiner allowed the union time to perfect its amended complaint, and continued the hearing to November 3, 1997. On September 29, 1997, the union filed its motion to amend its complaint. In a preliminary ruling

letter issued on October 21, 1998, the Executive Director noted that the amended complaint did not raise a new cause of action, but had narrowed the scope of the proceeding by dropping the allegations concerning Crow's transfer and thereby eliminating the "discrimination allegation". The Executive Director wrote:

> The last sentence in paragraph 9 of the amended complaint puts a slightly different spin on the October 9, 1996 response of an employer official to the "appeal" meeting, but still falls within the general scope of employee rights protected by the Weingarten case and its progeny. Allegations concerning a failure to make a required response have been dropped, and the union has substituted an allegation of direct dealing which is within the "right to union representation" theory of the original complaint. [footnote omitted]

The hearing on the amended complaint was held, as scheduled, on November 3, 1997. The parties filed briefs on January 21, 1998.

BACKGROUND

Kenneth Crow has had a 33-year career with the Seattle Police Department. He has been a sergeant for 20 years and, until recently, has been one of two sergeants in the department's Fraud and Explosives Squad (FES).[1] During his tenure in FES, Crow has worked under four supervisors; Lieutenant Al Sorenson has been Crow's immediate supervisor since 1995. As a speciality area which includes regularly-assigned standby, work in the FES is compensated by an additional $1500 to $2000 per year.

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[1] In addition to the two sergeants, the FES workforce also includes five detectives.

On September 24, 1996, Sorenson evaluated Crow's performance for the period from August of 1994 to August of 1996.[2] Crow was given "meets the standards" ratings on all eight of the designated elements of the evaluation.[3] In addition, Sorensen wrote the following comments in the appendix of the evaluation document:

> As an introductory note it is appropriate to start by stating that at the time of the last rating I was trying to work out some personality difficulties between myself and Sgt. Crow. In trying to set a positive mood for change, I was more generous in that rating than I actually felt he deserved, hoping to use that as a springboard to turn our relationship into a more open and candid one. In retrospect, this was an error on my part, so to some degree, this performance rating has now been placed in a harsher light than it needed to be.
>
> RATER'S COMMENTS
> Sgt. Crow has now worked for me over two years. During this time he and I have had many, many talks with him about what I expect. On several occasions things have improved for a short time, and then regressed back to the original state again. He will either agree, or disagree, as the case may be, but in any event, he is completely resistant to accepting any direction whatsoever from me. On at least one occasion he flat out asked me if a project I had asked him to do was just another make work project for me or who really wanted the

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[2] Although normal procedure calls for annual evaluations, there was no evaluation on file for 1994-1995. Sorensen thus changed this evaluation to cover the last two years, from August of 1994 to August of 1996.

[3] The Performance Evaluation Form utilized by the employer includes five rating scales, as follows:

E = Exceeds Standards
PE = Partially Exceeds Standards
M = Meets the Standards
PB = Partially Below Standards
B = Below Standards

> requested information. I have assigned him numerous tasks, most of which are completed only if I keep reminding him of them. At least one project never did get done, even after two years. I have had repeated problems with not being informed of what is happening, and have been met with obvious reluctance even to discuss anything if I should ask. On those occasions wherein I have continued past the initial resistance, my questions are frequently twisted into being accusatory or are "demeaning" to either himself and/or the whole squad. Over the past two years I have reached the conclusion that Sgt. Crow completely resents my presence, is absolutely resistant to change in general, especially if it is a suggestion of mine and is barely tolerant of my authority.
>
> All of these concerns have been discussed at great length. In February 1996, I discussed my concerns with Capt. Caldwell, and at her request, talked again with Sgt. Crow. On 2/16/96 I met with Sgt. Crow and flat out told him that unless we worked out our communications problems and started getting along better that I was going to transfer him. Things were better for a while, but obviously this conversation produced no lasting changes.
>
> Sgt. Crow has all of the talents and abilities to be a very good Sergeant. I do not believe these abilities will be best utilized by his remaining assigned to the Fraud & Explosives Squad.
>
> In the interest of fairness, it should be noted that Sgt. Crow and I apparently have a severe clash in both our management styles and personalities.

Sorensen attached the following memo, which had been sent by Crow to Sorenson on March 14, 1995, to the evaluation:

> I am angry over this memo about Gayle Eversole. This matter has been looked into from former Chief Fitzsimons office down for probably five years. I have answered her inquiries and barage [sic] of complaints verbally and in writing too many times to remember, and I'm tired of it. Particularly when the chain of command should certainly have maintained and

> have access to at least some of the volumes that have been written about this matter, and the responses to outside reviewers and Ms. Eversole herself.
>
> I am particularly surprized [sic] and offended that the Captain would conclude that someone in FES "may have dropped the ball" since nothing but the opposite is true. Dozens of hours have been spent on her trying to work with her to either to [sic] placate her if all these complaints are imaginary, or advise her on how she could help herself and us by coming up with any shred of evidence to corroborate her allegations against Mr. Vitalis.
>
> She has been catered to and codddled, [sic] and I keep getting the brunt of her non-ceasing complaints. The only person that I know, and can prove, is getting harassed here is me.

Sorenson also attached the following memo, which had also been sent to him by Crow on March 14, 1995, to the evaluation:

> This is a matter that has been scrutinized several times within our department and by outside agencies, including the Mayor's, a State senator's office, and the City law Department, over several years. I know that Chief Fitzsimons and Chief Johnson separately looked into this due to Ms. Eversole's unceasing series of complaints and groundless accusations. I have answered her barage [sic] of complaints verbally and in writing too many times to remember. Somewhere, in at least one Chief's office, there must be a file in regard to her and her complaints. There have been volumes of material gathered and responses written regarding her situation.
>
> Due to the passage of time, I thought this had all died a natural death, so I disposed of the extensive file I had on these complaints, but I did find what I believed was the most recent past memo regarding her situation, which is attached. Basically, she has made numerous police reports alleging various crimes, mostly harassment, by the same suspect (her former lover and business partner), but there has

> never been any proof of any of the allegations.
>
> I personally talked with her on several occasions to try to help her understand why we never got charges against the suspect, and to try to help her come up with sone proof to help corroborate her claims. She was very unreasonable and hostile from the first contact we had. Everything that could be done for her was done. No one "dropped the ball" anywhere.

Crow characterized this evaluation as a "hatchet job". He was particularly concerned that the comments under the ratings were harsh enough to warrant a poor performance deficiency rating.

On September 4, 1996, Crow filed an appeal of his performance evaluation with Captain Cindy Caldwell, Sorenson's supervisor. The appeal is 11 pages long, plus "tabs". In the interest of brevity, the Examiner has set forth excerpts here with omission of numerous examples provided by Crow:

> I wish to appeal the performance evaluation of me done by Lt. Al Sorensen, dated 9/24/96. I realize that appeals are supposed to be filed within five working days of the evaluation meeting, but I was not aware that there was an appeal process until consulting with Guild President, Mike Edwards, on October 2, 1996. Despite my expressed dissatisfaction with the evaluation, Lt. Sorensen did not inform me of any appeal available. To further mitigate any question of timeliness, I was off for three days last week, immediately after the evaluation meeting.
>
> This appeal is to the evaluation in its entirety, However I will later respond to each of the categories, appendix A, and the memos that were attached by the Lieutenant (see tab #1).
>
> I protest the entire evaluation based first upon the Lieutenant's own statement in the introductory portion of his Appendix A, in which he states that the only prior evaluation he did on me (for 8/93 to 8/94), copy at-

tached, see tab 2) was more "generous" than it should have been, to effect "a positive mood for change ...", and, "... to use as a springboard to turn our relationship into an more open ... one". He then states that one evaluation cycle was missed, so, "... this performance rating has now been placed in a harsher light than it needed to be."

It is quite clear by the Lieutenants [sic] preface displays [sic] that he has a lack of knowledge or respect for the evaluation process, at best, or an utter contempt for the process, at worst. He alleges that his earlier rating was better than I deserved (although I would disagree), and that he did this with knowledge that it was not an accurate representation of my performance, but was done more harshly, apparently to make up for the overly good rating, and for missing one other evaluation cycle, and apparently to fulfill his own personal agenda. This, alone, should invalidate the evaluation in its entirety.

Considerable time and effort went into creating the evaluation forms now in use, and much of that effort went into trying to insure that raters would be "forced" to give objective reviews. That is precisely why each [sic] the rating scale is explained, and performance anchors, or examples of each level of performance are included in the Performance Evaluation Booklet (see tab 3). However, it is clear from the Lieutenant's own words that he has chosen to disregard this, and to disregard the purpose of the evaluation process, which is to give a fair, honest review of the employee's work performance. The evaluation process was not put in place to be used as a subjective management tool to open lines of communication, or to punish, or for any purpose other then to get an objective review of work done.

However, I realize that, in order to comply with the Appeal Process, I must also be specific in what areas of the evaluation are being appealed, and I will address them item by item:

1. Community Relations: The rating was "M" with a notation that my contacts with the public are generally over the phone, and "are for the most part helpful and polite". Except

for a few occasions, by happenstance, he has never observed my contact with the public, by telephone or otherwise. Actually, I deal with a great number of people in person, including citizens who come in person with inquiries, persons that I go out to as a result of cases that they've filed, to speaking engagements, and during meetings related to either crimes or bomb squad duties.

Due to the very nature of our fraud responsibilities, we get an unusually high number of citizen inquiries about situations they have gotten themselves into, many of which are not criminal. Whether the inquiry is by phone, or in person, I always do whatever possible to help citizens deal with their situation. Frequently, I will take information and make informal inquiries, such as calling others involved in the matter, checking databases, contacting other agencies, or even running scenarios by prosecutors, before deciding what advice to give, or course of action the citizen should pursue. With my years of experience in the Department, and within FES, I have a thorough knowledge of public and private agencies that are available to help resolve peoples problems, and I have personal contacts and excellent rapport in many agencies.

...

There is no doubt that anyone aware of my actual job and level of performance would, objectively and following the performance standards guidelines, have given me an "Exceeds Standards" rating in this category [sic]

2. Decision making: Again, the rating in this category is "M", however, the narrative has no relationship to the standards in the Performance Evaluation Booklet, and completely fails to address the standards of this category [sic] His comments are derogatory and inaccurate, and I must briefly respond.

To say that I function "fairly well" as a detective sergeant is such an understatement of my demonstrated ability as to be insulting. Further, this subjective comment, which is unrelated to the category he is supposed to comment, which is unrelated to the category he is supposed to be rating, is completely uncalled for and inappropriate. ...

> The "Exceeds Standards" rating, as described in the Booklet, looks as if it were written with bomb tech in mind, and I feel accurately reflects my performance. ...
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> 3. Knowledge of department Policy and Procedure: The rating given was "M", but should more appropriately have been "Partially Exceeds". ...
>
> 4. Evaluation of Employee Performance: this rating of "M" is appropriate, given the standards. However, the narrative includes Lieutenant Sorensen's "impression" of how I do the evaluations of the detectives, which is both inappropriate and incorrect. These evaluations and ratings are supposed to be based upon observations and fact, not impressions or personal feelings.
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> ...
> 5. Supervision & Employee Development: This rating of "M" again flies in the face of the standards and my performance. Further, the narrative again is mostly not responsive, is opinionated, inaccurate, and indefensible. ...
>
> I believe that my rating in this category should be "Exceeds", or "partially Exceeds", at least.
>
> 6. Problem Solving Skills: I believe that, following the standards in the Performance Evaluation Booklet, my rating in this category should be "Partially Exceeds", not the rater's standard "Meets". ...
>
> 7. Communication Skills: No rating other than "Exceeds" would be appropriate, given the standards and my record. Again, the Lieutenant's narrative gets away from the standards and is inaccurate. . . .
>
> 8. Leadership Skills: Given the standards, I feel that a "Partially Exceeds" or "Exceeds" would be appropriate. The narrative that Lieutenant Sorensen includes in this category on his evaluation of me is clearly a slap-in-the face personal attack. His two first sentences are obviously intended to be derogatory and antagonistic, and have no place within the evaluation framework. . . .
>
> For Appendix A, the Rater's Comments, it is difficult for me to address this without it seeming like it is as much a personal attack

> by me, at him, as this evaluation and his rater's comments are clearly a personal attack on me. That is not my intention, but in order to defend myself against his unwarranted attack, it is necessary to be blunt. Please try to keep this in context; Lieutenant Sorensen generated this evaluation and the Appendix, and forced by response, which must, by virtue of his comments, be direct. ... [what follows is practically a line-by-line rebuttal of the rater's comments on the evaluation].
>
> Lastly, the Lieutenant suggests that he and I, "apparently have a severe clash in our management styles and personalities". He is probably quite correct in regard to management styles, but that is not relevant to my performance, not to whether or not I should remain in FES. But to try to say that there is a severe personality clash between us is just smoke. How can you even define "personality clash", or prove or disprove that one exists? Further, whatever the problem, it is not just between him and me, it is between him and everyone in FES, at least some members of Felony Warrants, and perhaps more. I received this bad evaluation not because of poor performance, but because my evaluation happened to be due at the wrong time, immediately after a conflict between the Lieutenant and the entire squad (see tab 11). I would welcome an examination of this allegation. ...

In response to this memo, Caldwell set up a meeting between herself and Sorensen. This was done pursuant to "Step I - Appeal To The Reviewer", which is the first step of the Police Department's "Performance Evaluation Appeal Process":

> The reviewer will be responsible for reviewing the appeal and then within ten (10) working days of reviewing the written notice of appeal, the reviser will arrange a meeting with the employee and the rater in order to discuss the disagreement, and any additional information either party has to offer. After the meeting, the reviewer will be responsible for evaluating the available information and within five (5) working days of the meeting

> notify both parties in writing of his/her decision on the disagreement.

Crow requested that the union president, Mike Edwards, accompany him for the appeal meeting. Edwards also made an independent request to be present at that meeting.

Caldwell denied the requests that Crow be permitted union representation, and the meeting proceeded on October 8, 1996, with only Crow, Caldwell, and Sorensen in attendance.

The next day, Crow sent Caldwell a written response which he characterized as proposed "modifications" of the original evaluation, rather than as a rejection of the original evaluation. That document included:

> At our informal meeting yesterday, a part of the appeal process, I agreed to accept your proposed individual category ratings, but expressed that my real concern was with the narratives that went along with the category ratings and, even more, in the "Appendix A". The tentatively agreed upon solution was simply to send forward by appeal memo as rebuttal.
>
> Having had the opportunity to review this, it seems that the above proposed solution to the narratives is no solution at all. ...
>
> A compromise, and a solution that I would find acceptable, would be language in your cover memo that states that at least some of the narratives in the individual category ratings, as well as at least some of the language in Appendix A, are deemed to be unresponsive or inappropriate to the evaluation process, as defined by the Performance Evaluation Booklet, and/or not reflective of the documented performance of the rated employee. ...

After the October 8, 1996 meeting, and after reviewing the documents, Caldwell issued her decision on Crow's appeal.[4] In that memo, she let five of Sorenson's ratings on the performance evaluation stand as marked, but she did make the following changes as a proposed resolution to Crow's concerns:

1. The rating on #2, Decision Making, was raised from "M" to "PE";

2. The rating on #3, Knowledge of Department Policy and Procedures, was raised from "M" to "PE";

3. The rating on #6, Problem Solving Skills, was raised from "M" to "PE"; and

4. The language under Training & Career Development and in Appendix A, under Rater's Comments, was deleted.

The amended document was signed by Caldwell, and by Bureau Commander Jones.

Crow testified that he never heard a response from Caldwell concerning his proposal concerning the evaluation. He did not invoke the next step in the appeal process, which is an appeal board. He testified that he was on disability leave for some time after he sent his last memo on his appeal, and that he believed it

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[4] The parties disagree as to whether Caldwell's October 9, 1996 memo preceded Crow's memo of the same date. The employer asserts that Caldwell received Crow's memo before she issued her step II decision, so that it was the required response to his appeal. Crow appears to believe that he never received an appeal response from Caldwell, and characterized his October 9 memo as a "counter-proposal".

was "not appropriate" to do department-related things while on disability leave.

Approximately October 21, 1996, Crow was involuntarily transferred to patrol duty on the night shift. In his new assignment he receives speciality pay and works on a four-day shift cycle.

POSITIONS OF THE PARTIES

The union argues that the employer interfered with Crow's right to mitigate potential damage resulting from a poor performance evaluation, and with Crow's right to union representation at the evaluation appeal meeting. Specifically, the union alleges the appeal process was the only way Crow could contest a performance appraisal that he reasonably perceived could be used to justify his demotion out of the FES unit. Finally, the union asserts that, by refusing Crow's request for union representation and negotiating a resolution to the evaluation dispute, the employer was engaging in direct dealing with a bargaining unit employee, in violation of its duty to bargain with the exclusive bargaining representative.

The employer argues that it has an inherent right to evaluate its employees, and that the subject area is a permissive subject of bargaining. It would have the appeal process considered part of the evaluation process, so as to also be excluded from the collective bargaining process. It asserts that the "mere possibility" that a performance evaluation may have an adverse impact upon an employee does not elevate such a procedure to one that gives rise to a right to union representation under National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975), and its progeny. Further, the employer asserts that the union waived its right to object to the evaluation process in the parties' collective bargaining agreement, and that Crow and the union waived their

right to proceed to the next level of appeal on this particular performance evaluation, so that there was a waiver by inaction.

DISCUSSION

Right To Union Representation

The union's first argument is that the employer violated the statute by denying Crow union representation at the performance evaluation appeal meeting. In Weingarten, supra, the Supreme Court of the United States held that union-represented employees have a right to the presence and assistance of a union representative when confronting the employer in an investigatory interview where the employee reasonably perceives that discipline could result. That precedent has been embraced by the Public Employment Relations Commission in numerous cases, including City of Seattle, Decision 3593 (PECB, 1989), where the Commission imposed extraordinary remedies against this employer for its repeated assertion of meritless defenses in "right to union representation" situations.

The union asserts here that, because the uses to which an evaluation and the appeal from an evaluation can be put are mandatory subjects of bargaining, the employee has a right to involve the exclusive bargaining representative. While acknowledging that the employer has an inherent right to evaluate its employees, under City of Seattle, Decision 359 (PECB, 1978), the union nevertheless asserts that the Commission has held that an employer must bargain the "effects" of a performance apprisal system on issues such as seniority or discipline/discharge. In so stating, the union is paraphrasing Pierce County Fire District 3, Decision 4146 (PECB, 1992), although that decision was discussing the use of a particular standard in *all* employee evaluations rather than the effects of an individual evaluation. The "bargainable issue" in Fire District

3 was the standards to be used in performance evaluations, not the impact of a particular evaluation on a specific individual.

The "wages, hours and working conditions" mantra which grows out of the definition of "collective bargaining" found in RCW 41.56.030(4) refers to impacts on all or part of a bargaining unit, not just the impact on a single member of the bargaining unit. In what appears to be an attempt to narrow its acknowledgment that the basic performance appraisal process is not a mandatory subject of bargaining, the union asserts that the appeal process and the changes in evaluation ratings that may stem from the appeal process constitute mandatory subjects of bargaining. This union is not, however, alleging that this employer has unilaterally changed its evaluation process, its evaluation standards, or even its process for appeal of evaluation appraisals. Rather, it is only speculating that the evaluation of one bargaining unit member might be used to justify an involuntary transfer that could, itself, be a mandatory subject of bargaining and/or the basis for a grievance.

The effects of an evaluation system, and any appeal process within that system, constitute mandatory subjects of bargaining **to the extent that they impact upon the bargaining unit**, under Pierce County Fire District 3, supra, but the evaluation ratings given to individual bargaining unit members do not rise to that level of statutory obligation. This principle was clearly enunciated in King County, Decision 4893-A (PECB, 1995), where a union argued that the imposition a second probationary period on a single employee was a unilateral change affecting a mandatory subject of bargaining, and the Commission wrote:

> The manner in which a particular employee has previously performed a job is not frozen until any change is bargained to impasse. In response to perceived strengths or weaknesses in the job performance of individual employees, employers routinely direct changes in how particular aspects of one's job are performed.

> In this case, the employer's actions did not represent a change in policies generally applicable to the bargaining unit, but were specific to Officer Scherck's job performance. There was no indication from the facts alleged that the memo was intended to apply, or that it actually applied, to other members of the bargaining unit.
>
> A violation of the duty to bargain can arise from a unilateral change that affects only a small number of employees, but the change must be one which represents a departure from established practice. King County, Decision 4258-A (PECB, 1994).

The ratings given by an employer official on a performance evaluation instrument cannot override the negotiated rights of the bargaining unit employee being evaluated, including any contractual limitations which may exist on involuntary transfers and/or "just cause" for discipline or discharge. In this case, the union's allegations do not support a finding that there has been any material change in the status quo. The complained-of action is limited to an evaluation of the way Crow performed his job. The union's charge that the employer interfered with employee rights guaranteed by Chapter 41.56 RCW has not been sustained.

The union nevertheless asserts that Crow had reason to believe his supervisor was considering transferring him, and that he recognized that he and his supervisor had an on-going communications problem, so that he should have been entitled to union representation in the evaluation appeal process. Further, the union asserts that, after denying Crow union representation at the meeting on his appeal, the employer used the meeting to inquire further into Crow's work performance. Much of the union's argument is, however, based on the perfect vision of hindsight. Crow was transferred after his evaluation and his appeal of that evaluation, but the evidence does not support a finding that Crow was transferred in reprisal for his appeal or in reprisal for his request for union representation. Sorensen mentioned the possibility of a transfer in Crow's

evaluation, before there was either an appeal or a request for union representation. That does not bootstrap the evaluation appeal meeting into an investigatory interview of the type to which Weingarten principles are applicable. In United States Postal Service, 252 NLRB 61 (1980), the Board wrote:

> Thus, while ... the examination might lead to recommendations respecting the employee's future work assignment, there is insufficient evidence establishing that these examinations were calculated to form the basis for taking disciplinary or other job-affecting actions against such employees because of past misconduct. Noteworthy also is the absence of evidence that questions of an investigatory nature were in fact asked at these examinations. In addition these particular medical examinations do not meet with the test set forth in the Weingarten line of cases, or the rationale underlying these tests which envision a "confrontation" between the employee and his employer.

In this case, the evidence does not support a finding that there was an "investigation" of facts at the October 8 meeting which might have led to the subsequent disciplinary action. Neither Caldwell's nor Crow's testimony concerning the evaluation appeal meeting indicated any focus other than the details of his evaluation. Nothing in their testimony indicated an attempt by the employer to discover additional information or facts to justify the subsequent transfer. Nothing in their testimony indicated that the meeting was "investigatory" in any meaning of that word. In fact, Caldwell described the meeting as "fairly pleasant"; hardly either the investigation or confrontation envisioned by the Board in Weingarten, when it described the reasons for the right to union representation. Caldwell's comment was not rebutted by the union. Therefore, the October 8 meeting concerning the appeal of Crow's performance evaluation did not rise to the status of an investigatory interview which would entitle Crow to the protections accorded by Weingarten and its progeny.

The union, as moving party, must sustain its burden of proof in bringing unfair labor practice charges. Spokane County Fire District 9, Decision 3021-A (PECB, 1990); Yelm School District, Decision 2543 (PECB, 1986). That burden cannot be carried by result-oriented analysis. The union has not sustained its burden of proof on this issue.

Direct Dealing

The union charges that the employer negotiated directly with Crow at the evaluation appeal meeting, and so circumvented its obligation to negotiate with the exclusive bargaining representative under RCW 41.56.030(4) and 41.56.140(4). It points particularly to Caldwell's testimony, in which she made several references to "negotiating" changes in the performance appraisal document that would satisfy Crow and be acceptable to Sorensen. In City of Seattle, Decision 3566-A (PECB, 1991), the Commission discussed the circumvention principle, as follows:

> Where employees have exercised their right to organize for the purposes of collective bargaining, their employer is obligated to deal only with the designated exclusive bargaining representative on matters of wages, hours and working conditions. RCW 41.56.100; RCW 41.56-.030(4). Under such circumstances, an employer may not seek to circumvent the exclusive bargaining representative of its employees through direct communications with bargaining unit employees. See, Seattle-King County Health Department, Decision 1458 (PECB, 1982), where an employer was found to have committed an unfair labor practice by negotiating directly with bargaining unit employees concerning possible layoffs, and City of Raymond, Decision 2475 (PECB, 1986), where an employer unlawfully dealt with bargaining unit employees concerning proposed changes in wages and working conditions.

Again, however, the evidence in this case does not support a finding that the employer was negotiating with one member of the bargaining unit concerning issues that would have an impact on anyone else in the bargaining unit.

The issues discussed between Crow and Caldwell were strictly limited to the content of Crow's evaluation. In the City of Seattle case just cited, the Commission went on to state:

> Despite the existence of a bargaining relationship, employers retain the right to communicate directly with their employees who are represented for the purposes of collective bargaining, subject to certain conditions. The "interference" prohibitions or RCW 41.56.-140(1) and (2) circumscribe an employer's right to address its employees, by forbidding communications that those employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. METRO, Decision 3218-A (PECB, 1990); City of Seattle, Decision 3066-A (PECB, 1989). ...

There were no changes to the "wages, hours and working conditions" of Crow or any other bargaining unit employee; there was no surrender by Crow of any right to which he was entitled under the collective bargaining agreement. While the original evaluation and amended evaluation might be probative evidence in a subsequent arbitration that Crow was put on notice of his supervisors' views about him, the evaluation documents neither constitute proof of the matters asserted nor preclude the de novo review of those matters in a subsequent arbitration proceeding.

The union has not sustained its burden of proof that the employer engaged in direct dealing when it discussed and subsequently modified a performance evaluation with one of its employees. Neither matters covered by the collective bargaining agreement nor issues which could be perceived as mandatory subjects of bargaining

were discussed. The discussion between Crow and Caldwell was clearly focused on Crow's performance evaluation, and the employer was not engaged in circumvention of the union merely because it dealt directly with a represented employee about its perceptions of that employee.

Conclusion

The union has not sustained its burden of proof with regard to any of the allegations it advanced at the hearing. The complaint must be dismissed.

FINDINGS OF FACT

1. The City of Seattle is a public employer within the meaning of RCW 41.56.030(1).

2. The Seattle Police Officers' Guild, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of non-supervisory law enforcement officers employed by the City of Seattle, holding ranks up to and including sergeant.

3. Kenneth Crow is a law enforcement officer employed by the Seattle Police Department, within the bargaining unit represented by the Seattle Police Officers' Guild. He has been a sergeant for 20 of those years. For the 10 years up to October of 1996, he was assigned to the Fraud and Explosives Squad. In 1996, Crow's immediate supervisor in the FES unit was Lieutenant Al Sorensen, and Sorensen's immediate supervisor was Captain Cindy Caldwell.

4. On September 24, 1997, Sorenson gave Crow a performance evaluation for a two-year period covering August of 1994 to

August of 1996. Sorensen gave Crow "meets the standards" ratings on eight of the specified evaluation items. In an extensive narrative attached to the evaluation, Sorensen stated his concerns and provided examples of what he perceived as repeated problems which he characterized as a "severe clash in our management styles and personalities".

5. Crow filed an appeal of his performance evaluation under the appeal procedure established by the employer within its performance evaluation system. In an 11-page memo with addenda, Crow asserted that the evaluation displayed Sorensen-'s "... lack of knowledge or respect for the evaluation process, at best, or utter contempt for the process, at worst", and he argued that the ratings given to him were too low on 7 of the 8 elements identified in the evaluation. Crow stated strong objection to the narrative included by Sorenson in the evaluation.

6. In response to Crow's appeal of his evaluation, and following the guidelines in the employer's "Performance Evaluation Appeal Process", Caldwell scheduled a meeting between herself, Sorensen and Crow for October 8, 1996. Prior to that meeting, both Crow and Union President Mike Edwards requested that Edwards be present along with Crow. After consulting with her advisors, Caldwell denied the request.

7. The discussion at the October 8, 1996 meeting was confined to the performance evaluation and Crow's appeal document. Immediately following the meeting, Crow sent Caldwell further proposed "modifications" of the evaluation. On the same date, Caldwell issued her decision on the appeal, in which she allowed five of the challenged ratings to stand as set forth by Sorensen but raised the ratings given by Sorenson on three of the evaluation elements. In addition, Caldwell deleted a reference by Sorenson to a reassignment of Crow and comments

by Sorenson concerning communication and personality conflicts. Although Caldwell used the generic term "negotiating" with respect to that meeting, any such negotiations were limited to the specifics of Crow's performance evaluation.

8. Later in October of 1996, Crow was transferred from the Fraud and Explosives Squad to a night shift patrol unit. The evidence does not, however, sustain a finding that such action was in reprisal for Crow's appeal of his performance evaluation or in reprisal for the request that he be permitted union representation in that appeal process.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The subject matter discussed during an appeal of Crow's performance evaluation did not materially change the status quo concerning the wages, hours and working conditions of employees in the bargaining unit represented by the Seattle Police Officers' Guild, so as to constitute mandatory subjects of collective bargaining under RCW 41.56.030(4).

3. The Seattle Police Officers' Guild has failed to sustain its burden of proof to establish that the subject matter discussed during the appeal of Crow's performance evaluation constituted an investigatory interview, so that the employer's refusal to permit Crow union representation in that meeting was not an unfair labor practice under RCW 41.56.140(1).

4. The Seattle Police Officers' Guild has failed to sustain its burden of proof to establish that the subject matter discussed during the appeal of Crow's performance evaluation constituted

direct dealings with a bargaining unit employee on matters of wages, hours or working conditions in circumvention of the union, so that meeting was not an unfair labor practice under RCW 41.56.140(4).

5. The Seattle Police Officers' Guild has failed to sustain its burden of proof to establish that Crow was discriminated against for his assertion of rights under Chapter 41.56 RCW, so that his transfer was not an unfair labor practice under RCW 41.56.140(1).

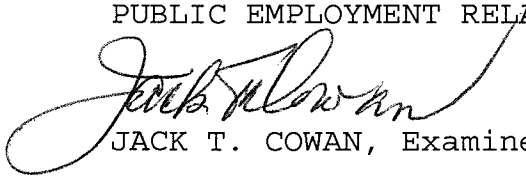
NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

Issued at Olympia, Washington, on the 16th day of July, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JACK T. COWAN, Examiner

This order will be the final order of the agency unless appealed to the Commission pursuant to WAC 391-45-350.