STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TIMOTHY M. WEST, Complainant, vs. CITY OF OLYMPIA, Respondent.	)	CASE NO. 3212-U-80-462 DECISION NO. 1208-PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hafer, Cassidy & Price, by John Burns, Attorney at Law, appeared on behalf of the complainant.

John Sherman, Assistant City Supervisor, appeared on behalf of the respondent.

By a complaint charging unfair labor practices filed with the Public Employment Relations Commission on December 15, 1980, the above-named complainant alleged that he was terminated from employment by the City of Olympia, in violation of RCW 41.56.140(1), for assisting United Food & Commercial Workers, Local 367, in its attempts to organize employees of the Sanitation Department of the City of Olympia. Hearing was held on the complaint on January 28 and February 2, 1981; Marvin L. Schurke, Executive Director of the Commission, sitting as Examiner.

THE FACTS:

The City of Olympia ("city") sanitation department operates a fleet of garbage trucks manned by teams of "refuse collectors". The sanitation department operates on all Mondays through Fridays ("weekdays") throughout the year, with no shutdowns due to traditional holidays.

Administration of the city is vested in the City Supervisor. Reporting to the City Supervisor is the Assistant City Supervisor. The sanitation department is a subdivision of a larger department of utilities, headed by Len Esteb. The Assistant Director of Utilities, Thomas Frare, has direct responsibility for the sanitation operation. Title changes affecting the positions held by Esteb and Frare during the period relevant to this case have no significant impact on the determination of the issues. Since January 1, 1980, Greg Stolz has been foreman of the Sanitation Department.

The city has in effect a resolution of its City Commission, dated March 6, 1979, setting forth its personnel rules and regulations. It is a reason-

able reading of that 42 page resolution that it was intended to be comprehensive, exclusive and binding on the city. That resolution contains the following definitions having a bearing on this case:

> "n. Continuous Service -- Uninterrupted employment with the City. Reasonable absences due to military service or extended leaves approved by the City Supervisor do not constitute a break in continuous employment.
>
> * * *
>
> v. Employee -- Anyone who is salaried for employment with the City of Olympia.
>
> w. Employment Anniversary Date -- One year from date of employment.
>
> ***
>
> y. Full-Time Employee -- An employee who works the normal amount of working hours for the class assigned.
>
> ad. Lay-off -- A separation from employment because of organizational changes, lack of work, lack of funds or other reasons not reflecting discredit upon an employee.
>
> * * *
>
> al. Part-Time Non-Regular Employee -- An employee who regularly works less than 20 hours per week or a position filled on a seasonal basis.
>
> am. Part-Time Regular Employee -- An employee who regularly works less than 40 hours per week but not less than 20 hours per week who normally follows a predetermined fixed pattern of working hours; and who has worked for ten or more consecutive months.
>
> an. Permanent Employee -- An employee who has been retained in his appointed position after the completion of his probationary period.
>
> * * *
>
> bd. Temporary Employee -- An employee who has been appointed for a limited period not to exceed six months for a full-time temporary employee or 1,040 hours of employment in any given calendar year for a part-time temporary employee.
>
> bg. Work Week -- The regularly scheduled work week shall be forty (40) hours per week applied equally over five scheduled work days except for Fire Department employees below the class of Fire Marshal, and other City employees who may be specifically excluded from this provision through City Supervisor approval."

The provisions of Section 2.4, Probationary Period, include a 12 month period during which an employee may be terminated "without appeal". Successful completion of probation gains "regular" status, a term which is

not defined in the resolution. Section 2.6 specifies two 15 minute coffee breaks daily. Section 2.12 provides laid off employees recall rights for one year without the layoff being considered a break in service, although benefits and seniority do not accrue to employees while on layoff. Section 2.23 permits temporary appointments for certain limited reasons and limits temporary appointments to one year in duration.[1/] Section 3.2 provides for disciplinary action, with emphasis on informing employees of what is expected of them, making punishment expressly a secondary concern. Oral warning, written warning, suspension, demotion and dismissal are specified as available forms of discipline. The City Supervisor is the final authority on all disciplinary actions. Section 3.5 contains a detailed grievance procedure which permits appeals to the City Supervisor, whose decision is final. Section 5.1 calls for the adoption of a pay plan with minimum rates, intermediate steps and maximum rates for each classification. The pay plan in effect during the period relevant to this case provided for wage progression of employees based on their length of service, and it was also the practice of the city to make annual wage adjustments. Section 6.1 provides for specified holidays for "regular full-time and part-time regular employees", and makes specific provision for pay for "full-time employees" of the sanitation department who are required to work on holidays. Section 6.3 provides sick leave only to "permanent full time" and "regular part time" employees. Probationary employees are afforded rights under Section 6.4 to sick leave without pay.

Although passing references are made in the city's personnel resolution to "civil service", the city's personnel system is not in any sense a merit system providing employment security protection to city employees. Employees who have completed their probationary period have rights of appeal only to the same City Supervisor who has already acted as the final authority on the discharge action, and there is no "just cause" or similar standard against which discipline or discharge decisions of management are to be compared.

The City Supervisor attempted to implement a performance evaluation system covering the sanitation department as early as 1978, but that effort failed. The Assistant City Supervisor issued a memorandum in August, 1979 calling for a mandatory evaluation of probationary employees after 6 months of service, but compliance with that directive also fell short. Early in 1980, the city started a system under which a payroll clerk notified the City Supervisor and applicable departments, in writing, at or about the first of the month following the month during which a probationary employee completed 6 months of service. Frare testified that he had conducted some performance evaluations, but all of the persons identified were supervisory employees at the time of the evaluation.

1/ The obvious conflict between the six month limitation of definition "bd" above, and Section 2.23's one year limitation could be accommodated only by employment of a succession of two or more temporary employees in the year or by having an employee work back-to-back six month periods in two different calendar years.

Throughout this record are found references to the condition of the city's garbage trucks. Flat tires were a particularly recurrent problem. Problems were noted concerning lubrication, brakes, lights and leaks. One particularly flagrant example concerns "truck 109" which, for a period of two to four months could be started only by having an employee crawl under the truck to hot-wire the starter. The city has mechanics in its overall workforce, but they are employed in a department other than the sanitation department. Services performed by mechanics on sanitation department trucks are billed to the sanitation department through internal billing procedures of the city at rates substantially higher than the wage rates paid by the city to sanitation department employees. No specific reference to such work is made in the city's "refuse collector" job description, which contains, as a desireable knowledge, ability or skill:

> "Some knowledge of the maintenance requirements of assigned equipment.
>
> * * *
>
> Ability to make minor operating adjustments and repairs such as lights, mirrors, etc. and to recognize operating deficiencies in assigned equipment."

Tire changing work was routinely assigned to refuse collectors at their usual rate of pay under the "performs related work as required" catch-all language of the job description.

Tim West was first employed by the city as a refuse collector on August 13, 1979. He was told at the outset of his employment that he would be a "part-time" employee, from which he understood that he would be working one or two days per week as a fill-in employee replacing absent employees. West worked on Monday, August 13, 1979, but did not work during the remainder of the week.

During the week of August 19, 1979, West worked 40 hours. During the following week he worked 32 hours, missing only August 29, 1979. Testimony indicates that the assumptions changed at or about this time, such that West was to report for work each morning unless told otherwise by his supervisor.

During the entire month of September, 1979 and the first week of October, 1979, West worked 40 hours per week. He did not work at all during the week of October 7, 1979, but thereafter worked 8 hours per day on each weekday shift up to and including December 10, 1979. West did not work on Tuesday, December 11, 1979. Thereafter, for the balance of his employment with the city, he worked all available weekday shifts or was on approved leave status.

Frare was extremely pleased with West's work up to late 1979, had given West some indication that he would be made "full-time" around the first of

the year, and had asked West to place his trust in him as to his future with the city. As of December 31, 1979, West had accumulated 727 hours of employment with the city, but no change of employment status was made.

In May, 1980, West was required to fill out a new application and was told that he was being hired as a "full-time" employee. The change of status was implemented effective May 16, 1980, by which time he had accumulated 1503 hours of total employment with the city and 888 hours of employment (111 consecutive weekday shifts worked) since the last incident which could even arguably be called a break in service, to wit: The workday missed on December 11, 1979. The only evident change in West's employment on May 16, 1980 was a change of his payroll number and a change of a status code on his time sheet from "*H*" to "S". West continued doing the same work, at the same rate of pay, as was in effect prior to May 16, 1980. Although the city contends in this proceeding that it considered West a probationary employee for a 12 month period beginning May 16, 1980, it credited him for paid "sick leave" on his time sheets after that date, in apparent conflict with the personnel resolution provisions making paid sick leave applicable only to "permanent" employees.

On July 15, 16, and 17, 1980, West was suspended without pay as a disciplinary measure. The reasons for and legitimacy of that discipline are not at issue here, but the circumstances are set forth because they are enlightening as background to a broader problem. It had been, and for that matter apparently continues to be, the practice of the city to establish garbage collection routes which employees are routinely able to complete within their scheduled eight hour shifts without being pressed for time. It was accepted practice that employees would be paid for eight hours if their route was complete in less than the eight hour period. Employees were allowed to take their coffee breaks at area restaurants. The complainant, working as junior employee on a garbage truck, was observed by Frare while playing pool in a restaurant. Frare conversed with West while both were in the restaurant for a period of 17 minutes, but he gave no order to his subordinate to get back to work or to explain the excess time taken. West and his partner completed their routes on that day within their allotted shift and without customer complaint, so that the city suffered no obligation for overtime compensation as a result of the incident. Nevertheless, both the complainant and his partner were penalized three days' loss of pay. Although the complainant was then, according to any interpretation of the city's personnel resolution, still a probationary employee subject to discharge without appeal, he was not discharged or threatened with discharge, nor was his probationary status used as the basis for any different discipline than that assessed against West's "permanent" employee partner.

As of August 13, 1980, when the complainant's employment relationship with the city spanned one full year, he had worked 1987 hours for the city (more

than 95.5% of a 2080 hour work year). West completed 2080 hours of employment with the city prior to August 31, 1980. He had surpassed the 1040 hour maximum on temporary employment for 1980 by July 2, 1980.

In September, 1980 West was advised that, in connection with a re-arrangement of garbage collection routes, he would be "laid off" effective October 1, 1980 and that he would thereafter revert to being a "part-time" employee. In fact, West was never laid off. He worked 88 and 96 hours during the semi-monthly payroll periods in October, 1980, representing eight hours per day on each weekday shift during the month. Not even his payroll number or status code were changed on the city payroll records submitted in evidence in this record. West performed assignments different from refuse collection routine, but was paid at the same rate he had been earning as a refuse collector.

At about the same time as his purported "layoff", West commenced organizing activities on behalf of the United Food & Commercial Workers, Local 367, AFL-CIO. West contacted the union, made contact with other sanitation department employees on behalf of the union, arranged meetings of city employees for purposes of discussing organizing for collective bargaining, and circulated bargaining authorization cards on behalf of the union. West made no secret of his union organizing efforts, and his role as the prime mover on behalf of the union was well known among the employees in the sanitation department.

During October, 1980, West made a request that he be scheduled off duty on certain forthcoming holidays. Stolz granted the request and noted the information on a calendar maintained in his office for that purpose. When reinstated to "full-time" status on November 1, 1980, West was told that he would have to re-apply for the holiday time off which had previously been granted. When he did so, his request was denied.

On October 17, 1980, United Food & Commercial Workers, Local 367, filed a petition with the Public Employment Relations Commission for investigation of a question concerning representation, claiming as appropriate a unit composed of: "All employees in the City of Olympia Sanitation Department including Foremen, excluding Utilities Department Supervisor and all other employees." Upon learning of the petition and of his inclusion in the bargaining unit, Stolz made statements to other employees in the sanitation department indicating his strong dislike for being included in a bargaining unit or represented by a union. Stolz also posed to other employees a question, perhaps rhetorically, as to what good a union would do them. Stolz and Frare were later excluded from the bargaining unit by an Election Agreement. A representation election was held on December 3, 1980, at which time six employees voted in favor of the union and eight voted for no representation.

The union did not file objections to conduct affecting the results of the election in the representation proceedings, nor did it join as a complainant in this unfair labor practice proceeding, so no allegation is made here regarding interference with employee rights during the pre-election period. However, as part of its defense in this proceeding, the city adduced evidence and made argument concerning its actions in response to a letter directed to the city by an attorney for the union, under date of October 30, 1980. That letter accused the city of threatening employees with loss of benefits, including loss of "cost of living increases" in connection with their organizational activity. Rising to that bait, the city issued a written communication to employees and, through supervisors, made statements to employees at a captive-audience meeting which would constitute interference violations under RCW 41.56.140(1) if such violations had been alleged. Specifically, the Assistant City Supervisor's November 4, 1980 letter, after vigorously denying any unfair labor practice, indicated that a 12% salary increase recommendation being made by the City Supervisor for non-union employees was being omitted for sanitation department employees because of the organizational activity. Silence would have been golden. The letter was ambiguous as to whether incremental increases were also to be frozen. When employees questioned whether the letter and statements made by supervisors were a threat, Esteb refused to deny the existence of a threat and invited the employees to take the city's position any way they wanted to. Intention is not controlling in determining whether statements made by management interfere with rights protected by RCW 41.56.040. Rather, it is the ability of a reasonable employee to perceive a threat from the statements made.

West served as the union's observer at the representation election. Stolz and Frare thereby became aware of West's leadership role on behalf of the union, and Frare so acknowledged in his testimony.

As of December 5, 1980, West had completed 2644 hours of employment with the city (1.27 work years at 2080 hours per year) over a period of 15½ months. He had accumulated 2029 hours of employment (.975 of a 2080 hour work year) since his last absence which was even arguably a break in service, to wit: The workday missed on December 11, 1979. Consistent application of the city's professed procedures would have credited him at that time with slightly more than 5½ months of "full time" employment, taking the October, 1980 reversion to "part time" status into consideration. Inexplicably, then, a clerk in city hall dispatched a notice to the City Supervisor, with copy to Esteb, indicating that, as of December 5, 1980, West and another employee hired on May 16, 1980 had completed "6 months of employment". The city placed a number of such notices in evidence, all of which indicate that such notices are issued after rather than in anticipation of the 6 month anniversary date. Be the inconsistencies as they may, the notice directed to Esteb filtered its way down to Frare and Stolz for action.

On Wednesday, December 10, 1980, West and his partner returned to the city shop at the end of their afternoon route with a flat tire on their truck. This was the second flat tire which they had experienced in that week. Flat tires had been a source of some friction involving West, as West had questioned the city's practice of having sanitation department employees change flat tires. West's partner seated himself at the tire to be changed and West left the necessary tools with his partner, after which West started to walk away from the truck. At that time, West was confronted by Stolz. In a sharp exchange of words, West asserted that tire changing was not within his job description and asked for a direct order that he change the tire. Stolz made such a direct order and West immediately complied. While Stolz observed and assisted, West and his partner completed the change of tires. There was no claim for or payment of overtime in connection with the incident. Stolz did not indicate at the time that any disciplinary action was contemplated or would be forthcoming against West.

At the conclusion of his routes on December 11, 1980, West was directed to report to Frare's office for a "6 month" evaluation conference. So far as it appears from this record, this was the first such evaluation conference ever held by sanitation department management with a non-supervisory employee. Throughout West's employment, no customer complaints or supervisor observations ever called West's workmanship or productivity into consideration. West had no advance notice of the meeting. Frare and Stolz conducted the meeting, but did not operate from an evaluation form or prepared questions in doing so. The meeting lasted for approximately 25 minutes. When questioned during that meeting concerning a change of attitude perceived by the supervisors, and particularly concerning his failure to smile, West responded with statements to the effect that there was no law which required him to smile, but that he would do so if that was expected of him. The incident of the previous afternoon was discussed, but no disciplinary action was indicated during that meeting as to either the tire changing incident or as to the complainant's performance generally.

Following the "evaluation", Stolz and Frare recommended to Esteb that West be terminated. The recommendation was conveyed to Marshall, who concurred. On December 12, 1980, West was notified that he was terminated. During that final conversation, Frare initially attributed the discharge to a change of West's attitude during the preceding two months. When questioned by West as to whether the problem was limited to the previous two months, Frare backed off and asked that his time frame not be taken too literally. On December 15, 1980, Frare prepared a memorandum in which he reviewed West's employment history and concluded: "It was felt it would not be in the best interest of the city to continue Mr. West's employment." A personnel office form completed on the same day lists the reason for discharge as "As a result of the 6 month consultation, it was determined that it was in the best interest of the city to terminate."

POSITIONS OF THE PARTIES:

Complainant contends that he was discharged because of resentment by his supervisors of his role as union organizer and for his willingness to voice personal and group grievances. The allegation of unlawful motivation is directed at Stolz and Frare, coupled with the contention that they made the effective recommendation resulting in the discharge. Complainant contends that this is an appropriate case for application of the National Labor Relations Board's (NLRB) "small shop" rule, and that he has sustained his burden of proof showing a prima facie case of a discharge for union activity. In response to defenses asserted by the city, complainant points to inconsistencies in the city's position and alleges mis-use by the city of its own procedures. The dramatic shift of the city's attitude towards West during the period of the representation campaign is particularly relied upon by West. Independent of his activities on behalf of the union, West claims a violation of protected rights based on a claim that the discharge was tied in part to West's complaints about the condition of trucks, his complaint about maintenance assignments given to refuse collectors and his pursuit to a higher level of his complaint concerning denial of his request for holiday time off.

The city contends that the complainant has not sustained his burden of proof. Describing the evidence adduced by West as surmise, inference or conjecture, the city denies knowledge of West's union activities, characterizing as "ridiculous" any claim that because of the small shop situation, the supervisors knew of West's organizational activities. The city cites a series of cases from 1954 in which the NLRB and the courts dealt with small shop situations, and does not respond to or distinguish the cases cited by the union dating from as recently as 1978. The city asserts that its responses to the letter from the union attorney, in which unfair labor practices were alleged, demonstrates the city's conscientious effort to avoid interference with the unionization, that it was correct in its interpretation and application of its legal responsibilities, and that no interference was intended. The city acknowledges, however, that it became aware of West's leadership role on behalf of the union when he served as observer for the union at the election, and that up to that time it had pegged another employee as the likely union leader. The city acknowledges Stolz's anti-union statements, but contends that those statements should be disregarded because there was no interrogation by Stolz of other employees and because none of Stolz's statements included indications of resentment of the organizational activities of others. The city contends that a deterioration of West's attitude had been going on for longer than the period of the organizational campaign, and dismisses the

relation to the union activity but in relation to important events, the memo triggering the 6 month evaluation and the tire changing incident, which transpired after the union election. The city contends that West's discharge resulted from application of broadly accepted personnel practices maintained by the city. Shifting to the reasons for the discharge, then, the city relies on the previous discipline for the excessive break, on West's refusal to perform a job assignment (without having filed any grievance), and his negative attitude since the suspension.

DISCUSSION:

Prima Facie Showing of Discriminatory Discharge

The city has unilaterally adopted a "grievance" procedure. That West had some reasons to feel aggrieved is an understatement. He had been classified as a "part time" employee long after he commenced working the full time hours in the sanitation department. A reasonable interpretation of the term "full time" as well as of the city's own personnel rules would suggest that West was a full time employee beginning as early as September and certainly no later than November of 1979. The classification had the effects of denying West holiday pay and of postponing his eligibility for incremental wage increases. West had been encouraged to place his trust in Frare concerning his employment status, but then was required to re-apply for his own job more than 4 months after the time frame indicated by Frare. When the city finally accorded him "full-time" status, he saw an impressive record of 888 hours of continuous service erased with changes of a clock number and a status code. The complainant's impressive attendance record is made even more remarkable by the fact that the job consisted of working generally as a "swamper" on a garbage truck, an occupation that would be distasteful for many persons. West found himself working with defective[2/] equipment. He was assigned to perform work at a refuse collector's pay which was not explicitly set forth in the refuse collector job description but which the city assigned to refuse collectors to save money as compared to the cost of repairs made by the city's own mechanics. In the context of a personnel procedure which emphasizes progressive discipline and a routing system which had a built-in flexibility such that employees routinely enjoyed free time at the end of their workday, he was suspended for 3 days as first offense discipline by a supervisor who himself spent more than 15 minutes in the restaurant conversing with West but who shied away from confronting West with the infraction at the time or ordering West to get back to his job. West was told that he was to be laid off, but what really happened was neither a layoff in the usual sense of the term or in accordance with the city's own definition of the term. The alternative terminology used by West's supervisors for "layoff" was that he was to

---

2/ Even life threatening, to wit: Truck 109.

again be "part-time", but he continued to work the full time schedule of hours. A reversion to "temporary" status under the city's personnel resolution would have been prohibited in October, 1980 by the fact that West had long since put in more than 6 months of full time employment or more than 1040 hours in 1980. Had West chosen to pursue grievances through the city's grievance procedure, it is likely that we would not be here today. Absent a "concerted activity" clause in RCW 41.56, activities involving processing of employee grievances under procedures promulgated unilaterally by the employer have been held to be unprotected activities. City of Seattle, Decision 489, 489-A (PECB, 1978). Instead, West pursued his statutory rights under RCW 41.56, to lead an attempt to organize the employees of the sanitation department.

Were the City of Olympia not being found guilty in this case of unfair labor practices, it would most certainly be guilty of abject bad timing. The week following an unsuccessful organizing campaign is not open season on union organizers! In order to sustain the city's position that no prima facie case was made, the Examiner would have to rule against the complainant on a number of inferences available from the evidence, chief among those being the timing of the discharge.

There is no question that West was the prime mover on behalf of the union. The small shop doctrine does not become a key determinant in this case because, regardless of what the city knew or didn't know prior to the election, Frare surmised West's leadership role in the union from the fact that West served as the union's observer at the election. The discharge recommendation came on the day following the exhaustion of the time for filing objections to conduct affecting the results of the election.

There was probably little reason for West to be cheerful when called in without advance notice for the first ever "6 months" interview of a non-supervisory employee of the sanitation department, 15 months after he started work with the city and a week after his organizational efforts had failed. During the period of the organizational campaign he had been bounced back and forth between "part-time" and "full-time" status and had been granted and then denied his request for holiday time off. Once inside the interview room he was interrogated about the reasons for the attitude change perceived by management and pressed for an admission that he had an attitude problem. Even without specific mention of the word "union", such an interrogation under these circumstances clearly invites an inference on the part of the employee that his protected activities were at issue, and then accordingly defensive responses.

The actions taken and words used contemporaneously with events are frequently much more credible than explanations given in testimony months later. Frare's memorandum to the City Supervisor and the personnel form from the city's files do not list insubordination on December 10, 1980 as

the basis for discharge. Rather they emphasize the intervening events of the interview/interrogation of West and "the best interests of the City". The evidence thus strongly points to a conclusion that it was believed to be in the best interests of the city to get rid of a known union adherent. Similarly, when Frare stated and then sought to retract that the "bad attitude" involved a period almost precisely coterminous with the organizational campaign, he let the inference out of the bag. He did not controvert West's testimony on that point, and there is no basis whatever to reject West's version of what went on at that meeting. These things, when coupled with the statements made by Stolz in which he openly expressed his opposition to unionization, indicate that West's immediate supervisors were in a position to effect a discriminatory discharge.

Finally, the explanations given in testimony sometimes disclose motivation and thought process of individuals as to non-controversial matters which contribute to determining whether inferences should be made as to critical matters. Frare testified of his early favorable impression as to West and of his efforts to enlist West's trust. Reading the record, one gets the impression that Frare very much expected his subordinates to work the system as outlined by the city through him. West did not work the system, but went outside the system and sought union representation. When testifying as to his own open door policies and those of the City Supervisor, Frare emphasized that it was not the existence of West's complaints but rather the methods used by West to seek redress. Just as the Examiner finds West's union activity and his attitude virtually inseparable, there is no basis in the record to exclude West's protected activities from the scope of Frare's statements. The inference follows that West's discharge was motivated at least in part in response to his protected activities in seeking union representation for the assertion of his grievances with the city.

The city's "flatly denied" position notwithstanding, it is concluded that West has made a prima facie case demonstrating that his discharge was in violation of RCW 41.56.140(1).

The City's Routine Discharge Defenses

The city contends that it has followed broadly accepted personnel policies, and asks the Examiner to credit its claim that the city's personnel system would have produced the discharge of West without regard to his activities on behalf of the union. While the city cited Wright Lines, 251 NLRB No. 150 (1980), in its brief, it repeatedly asserts that the burden of proof lies entirely with the complainant and appears to ignore that the burden of proof shifts to the employer under Wright Lines after a prima facie case is found to exist. Upon close examination of the city's personnel practices, the Examiner is unable to accord them the credit which the city claims.

The city is a municipal corporation. See Title 35 RCW. As such, it is created by the legislature and can exercise only such powers as the legislature has granted in express words, or those necessary or fairly implied in powers expressly granted. Where a statute which is the source of a municipal corporation's power confers specific functions to particular officers or boards, such functions may not be delegated to others. Roehl v. PUD #1, 32 Wn. 2d 214, 240 (1953); Noe v. Edmonds School District, 83 Wn.2d 97 (1973). The legislative power is vested in the city commission. See: RCW 35.17.180, 35.17.190. The city commission has acted to regulate the personnel affairs of the city, and that resolution is in evidence before the Examiner. However, the conflicting use and even misuse of the city commission's terminology and rules throughout this record by city appointive officials up to and including the City Supervisor, compels a conclusion that the city's personnel affairs are, at best, an elastic system operated by the city as suited to its convenience at any particular point in time. During examination of the City Supervisor, the Assistant City Supervisor brought out that what is done in fact is often different than what has been legislated by the city commission. The entire usage by the city of the terms "part-time" and "full-time" is a mishmash which is contradictory at every turn. For example, City Supervisor Marshall uses "permanent" as contrasted with "temporary", but close examination of the context in which he speaks reveals that his usage of "permanent" includes persons on "probationary" status and is therefore in conflict with the definitions in the personnel resolution. Throughout the hearing, Assistant City Supervisor Sherman repeatedly used "full-time" in contrast to "temporary", without regard to the limitations of the city commission resolution on temporary employment. At the same time he used "part-time" without regard to the number of hours worked or the actual regularity of employment which are the defining criteria in the resolution. Frare, Stolz and Esteb all testified similarly, yielding garbled application of the terms defined in the personnel resolution. This chaos severely undermines the city's claim that it has, and has implemented here, any broadly accepted personnel procedures. The city is asking the Examiner to credit as sound a set of personnel practices which have no bearing to the personnel resolution of its own legislative authority.

Additional examples of the deviation between appearance and practices are to be found in the suspension of West. Contrary to the express provisions of the personnel resolution, there was no counseling of West and his partner, no oral or written warning. The punitive aspect leaped to the fore, and a three day loss of pay was imposed for what was only provable from Frare's testimony as a two-minute extension of a coffee break. On the other hand, contrary to the attitudes expressed by both Marshall and Frare about getting rid of bad probationary employees, discipline imposed on probationary employee West was only equal to that imposed on his "permanent" status partner.

Differences between appearances and practices also are evident with respect to the December 10, 1980 confrontation between Stolz and West. There are a number of bits of evidence in the record about West's complaints about tire-changing and even of his attempt to foist off tire changing work on another employee, but there is no evidence of any previous direct confrontation between West and management on that subject. Stolz asked West where he was going, and West made a reply that tire changing was not in his job description. Stolz replied that it was part of the job. West asked for and was given a direct order. He complied and nothing more was said at the time. While Stolz testified that he felt that his authority was being questioned, his responses at the time did not reflect any urgency. He had given an explanation and then an order. West complied while Stolz watched. Even after the incident was reported to Frare, Frare testified that he went into the "6 months evaluation" session without any conclusion that West was to be disciplined or discharged. Had there been a predisposition to discipline, the city's personnel resolution would have indicated some lesser form of discipline than discharge for another first offense situation. The incident was reviewed during the evaluation meeting, but was evidently not important enough to be listed as the cause for discharge.

Where they exist in the context of collective bargaining relationships, "probationary period" concepts are contractual arrangements between the parties, generally as modifiers of seniority and discharge "for just cause" provisions. RCW 41.56 contains no definition of probationary employee or recognition of probationary status. All public employees have the same rights and protections under RCW 41.56.140 and neither a unilaterally imposed nor a bargained probationary status protects the employer as to discriminatory discharge allegations under RCW 41.56.140(1). Valley General Hospital, Decision 1195 (PECB, 1981).

An employer has a right to adopt a system of performance evaluation. City of Seattle, Decision 359 (PECB, 1978). An employer may defend its personnel actions as being consistent with its previous lawful practices. However, neither initial implementation of personnel evaluation nor implementation of performance evaluation in a manner inconsistent with other practices of the employer lends credence to a claim of consistency. What the evidence clearly establishes in this case is that the city had been attempting, without much success, to get a system of performance evaluation off the ground. There are a lot of notices in the record which prove the existence of a practice of sending notices to department heads when employees have completed 6 months of service, but those notices clearly do not prove implementation of a performance evaluation system in the sanitation department. The absence of any structure to the interview, the absence of the written report called for by the previous directives of the City Supervisor, and the haste to discharge rather than to fulfill the "feedback session" purpose of such conferences stated earlier by the City

Supervisor simultaneously undermine the credibility of what occurred in Frare's office on December 11, 1980 and gives rise to an inference that the supervisors leaped on a convenient (and erroneously timed at that) opportunity to deal with "the best interests of the city" in West's case.

The City has not sustained a burden of proof showing that the discharge of West was lawful. The inconsistencies demonstrated in the defenses asserted in fact support a conclusion that the "best interests of the city" reasons given for the discharge were merely pretextual.

FINDINGS OF FACT

1. The City of Olympia, Washington, is a municipal corporation of the State of Washington, located in Thurston County. George Eldon Marshall is City Supervisor. Leonard Esteb, Thomas Frare and Greg Stolz are supervisory employees of the city acting on its behalf in matters and relationships involving the city and its employees.

2. Timothy M. West was employed by the City of Olympia as a refuse collector in the city's sanitation department, beginning August 13, 1979. West regularly worked the full time schedule of hours in the sanitation department during and after September, 1979, with an excellent attendance record. No complaints were adduced in evidence as to the quality of West's work or productivity.

3. The legislative body of the City of Olympia has promulgated a resolution setting forth personnel rules of the city. The city's classification of West during his employment and his wages, hours and working conditions were established in contravention of the city's personnel resolution.

4. In October, 1980, West undertook organizing efforts to obtain collective bargaining representation to address his grievances concerning the wages, hours and working conditions of his employment with the City of Olympia. He contacted United Food & Commercial Workers, Local 367, contacted other sanitation department employees on behalf of the union, arranged meetings of city employees for the purposes of discussing organizing for collective bargaining and circulated bargaining authorization cards on behalf of the union.

5. On October 17, 1980, United Food & Commercial Workers, Local 367, filed a petition with the Public Employment Relations Commssion seeking certification as exclusive bargaining representative of sanitation department employees of the City of Olympia. Shortly thereafter, upon becoming aware of the petition, Stolz made anti-union statements to sanitation department employees.

6. On December 5, 1980, the Public Employment Relations Commission conducted a representation election in which a majority of the employees of the sanitation department of the city voted against representation by United Food & Commercial Workers, Local 367. West served as observer on behalf of the union at that election and the city thereby became aware of his leadership role on behalf of the union.

7. On December 10, 1980 a confrontation occurred between West and Stolz concerning the assignment of West to perform tire changing work. Tire changing was not within the express provisions of the job description for refuse collectors, and the city's practice of assigning such work to refuse collectors at their usual rate of pay had been one of the wages, hours and working conditions issues which led to West's organizational activities. West asserted to Stolz that the assignment was outside of his job description, to which Stolz replied that it was part of the refuse collectors job. In response to a direct order from Stolz, West performed the tire changing assignment and no disciplinary action was taken at that time.

8. On December 11, 1980, West was directed to report to Frare's office where he was purportedly interviewed by Frare and Stolz for purposes of a "six months" evaluation. During the course of the conversation, Frare and Stolz pressed West for an admission that he had an attitude problem. West responded defensively, denying that he had an attitude problem but indicating his willingness to do whatever was required of him by his supervisors. Thereafter Frare and Stolz recommended to Esteb that West be discharged and Esteb obtained the concurrence of Marshall for the discharge of West.

9. On December 12, 1980, Frare informed West of his discharge, citing a change of West's attitude during the preceding two months. When West sought clarification of the indicated time period, Frare sought to withdraw the reference to the two month period. On December 15, 1980, Frare filed a memorandum with the city wherein the discharge is attributed to "the best interest of the city". A personnel form prepared on the same date indicates the reason for termination as being the best interests of the city.

CONCLUSIONS OF LAW

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

2. The reasons stated by the City of Olympia for the discharge of Tim West were pretextual; West was discharged in reprisal for his activities for and on behalf of United Food & Commercial Workers, Local 367, in violation of

his rights guaranteed by RCW 41.56.040. The City of Olympia has committed unfair labor practices in violation of RCW 41.56.140(1).

ORDER

The City of Olympia, its officers and agents, shall immediately:

1. CEASE AND DESIST from:

   a. Discharging or otherwise discriminating against any employee because of the exercise of the right to organize and designate representatives for the purpose of collective bargaining.

   b. In any other manner interfering with, restraining or coercing employees in the exercise of their right to organize and designate representatives for the purposes of collective bargaining.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION which the Examiner finds will effectuate the policies of the Public Employee Collective Bargaining Act, Chapter 41.56 RCW:

   a. Offer Timothy M. West immediate and full reinstatement to his former position or a substantially equivalent position, without prejudice to his seniority and other rights and benefits.

   b. Make its employee, Timothy M. West, whole for any loss of pay or benefits he may have suffered by reason of his discriminatory discharge, by payment of the amount he would have earned as an employee, from the date of the discriminatory action taken against him until the effective date of an unconditional offer of reinstatement made pursuant to this Order. Deducted from the amount due shall be the amount equal to any earnings such employee may have received during the period of the violation, calculated on a quarterly basis. Also deducted shall be an amount equal to any unemployment compensation benefits such employee may have received during the period of violation, and respondent shall provide evidence to the Commission that such amount has been repaid to the Washington State Department of Employment Security as a credit to the benefit record of the employee. The amount

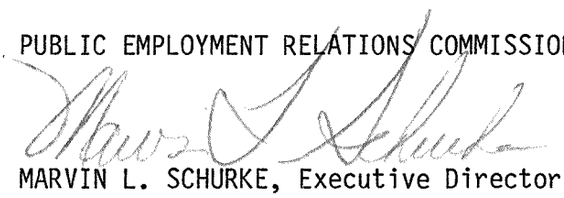
due shall be subject to interest at the rate of eight (8) percent calculated quarterly from the date of the violation to the date of the payment.

c. 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, after being duly signed by the City Supervisor of the City of Olympia be and remain posted for sixty (60) days. Reasonable steps shall be taken by the City of Olympia to ensure that said notices are not removed, altered, defaced or covered by other materials.

d. Notify the Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide a signed copy of the notice required by the preceding paragraph.

DATED at Olympia, Washington, this 24th day of July, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

"Appendix"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, CITY OF OLYMPIA HEREBY NOTIFIES OUR EMPLOYEES THAT:

WE WILL NOT discharge or otherwise discriminate against any employee for seeking to organize and designate representatives for the purposes of collective bargaining.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining.

WE WILL offer our employee, Timothy M. West, immediate and full reinstatement to his former or substantially equivalent position without prejudice to his senority and other rights and privileges.

WE WILL make our employee, Timothy M. West, whole for any loss of pay or benefits he may have suffered by reason of his discriminatory discharge, by payment of the amount he would have earned as an employee, from the date of the discriminatory action taken against his until the effective date of an unconditional offer of reinstatement made pursuant to this Order.

DATED: _____

CITY OF OLYMPIA

By: _____
City Supervisor

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.