STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ARTHUR D. BONDS, Complainant, vs. PORT OF TACOMA, Respondent.	)	CASE 8702-U-90-1898 DECISION 4626 - PECB
E. A. STEVENS, Complainant, vs. PORT OF TACOMA, Respondent.	)	CASE 8812-U-90-1931 DECISION 4627 - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hoag, Vick, Tarantino and Garrettson, by James M. Cline, Attorney at Law, appeared on behalf of the complainants.

Lane, Powell, Spears and Lubersky, by Matthew E. Swaya, Attorney at Law, appeared on behalf of the respondent.

On July 20, 1990, Arthur Bonds and E. A. Stevens filed a complaint charging unfair labor practices with the Public Employment Relations Commission.[1] The complainants alleged that the Port of Tacoma violated RCW 41.56.140(1) and (2), by interfering with their rights guaranteed by the Public Employees' Collective Bargaining Act and by dominating the bargaining representative.[2]

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1 Two separate cases were docketed, consistent with the Commission's docketing procedures for cases filed by separate individuals.

2 The union has not made any appearance herein, and has not sought to either join or supplant Bonds and Stevens as the complainants against the employer.

Attached to the complaints was a 17-page typed statement of facts. The opening paragraph of the statement of facts referred to "actions over the past 12 months", and the numbered paragraphs which followed recited some transactions that had occurred more than six months prior to the filing of the complaint. Under RCW 41.56.160, a violation could be found and a remedy ordered only for actions that occurred within six months of the filing of the complaint or, in this case, on or after January 20, 1990. The earlier materials may be considered as foundation or background.

Given the statute of limitations cited above, the preliminary ruling on these complaints found only three distinct allegations to state a cause of action that would be subject to a formal hearing:

1. Discrimination in regard to promotion (on or about January 22 and 23, 1990);

2. Discrimination in regard to work opportunities (by hiring of extra personnel in March of 1990, by limiting the complainants' hours in July of 1990, by refusing to call out complainant Stevens for overtime work on various dates in May and July of 1990 and by scheduling of complainants in opposition to scheduled bargaining sessions); and

3. Interference with protected rights by interrogation of employees concerning their union activities.

The matter came on for hearing before Examiner Katrina I. Boedecker on February 4 and 5, March 12 and 13, November 18, 19 and 20, 1992, in Tacoma, Washington. The parties filed post-hearing briefs by April 16, 1993.[3]

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[3] Any fact in the record or argument in the legal briefs which is not referenced in this decision was deemed to be of little or no probative value.

BACKGROUND

The Port of Tacoma and the International Longshoremen's and Warehousemen's Union, Local 28 (ILWU) had a collective bargaining agreement in effect from April 1, 1987 until March 31, 1990, and "... from year to year thereafter unless either party shall, at least sixty (60) days prior to any anniversary date, notify the other party ..." of proposed changes. The agreement covered three classifications of employees: "security officer"; "part-time flexible security officer"; and "relief security officer". Article X of the contract defined the three classes of security personnel as follows:

> A. A regular employee is one who is paid at the monthly rate, shall be entitled to holidays and health and welfare benefits as stipulated herein, and assigned to a regular watch shift shown on the Security Watch Schedule.
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> B. Part-time Flexible employees shall be paid the hourly rate, shall be entitled to holidays and health and welfare benefits, and not assigned to a regular watch shift. They will be guaranteed 90 hours per month for five consecutive months each calendar year; can be used to cover any shift or working hours; and when openings become available in regular full-time positions, due consideration will be given to flexible employees. There is no set time limit on how long a person can remain in this classification; however, the number of flexible part-time security officers will be no more than the equivalent number of regular security officers.[4]
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> C. Relief employees shall be paid at the hourly rate, shall not be entitled to holidays and health and welfare benefits except that they will be eligible to join the Group Health Cooperative medical program on a self-pay basis, and not be assigned to a regular watch shift. They shall have fulfilled the proba-

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[4] The guarantee of 90 hours of work per month minimum would allow the employee to be eligible for retirement benefits.

> tionary requirements as stipulated by the Employer in Appendix A.

All three classifications received the same hourly rate of pay.[5] Appendix A also detailed:

> Employer security personnel will perform roving patrol duties, pertinent to Employer security, of properties designated by the Employer excluding leased property unless desired by the lessee.

At the time of the hearing, regular security officers worked 14 days on duty followed by 7 days off duty. When a relief security officer was promoted to the part-time flexible classification, he or she was put on the 14/7 schedule and therefore, in reality, became full-time.

Arthur Bonds was hired by the port in 1981, as a relief security officer. Originally, he worked two to five days per month.

Arnold Johnson was promoted from relief security officer to regular security officer in the early 1980's. In 1984, he was promoted to chief of security. During or about this time, the port also hired Joe Swan, Don Hare and Bill Hammond as relief security officers.

Sometime in 1985, Johnson was demoted to regular security officer. Hare was promoted to chief of security.

In 1987, Hammond was promoted to regular security officer. When the port filled the new part-time flexible security officer

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[5] A cover letter on the labor contract indicates that the "part-time flexible" classification was agreed upon in May 1988. Also at that time modifications appear to have been made in starting wages: "New" employees were paid at 80% of the regular wage; after one year they received 90% of the regular wage; after two years they received 100% of the regular wage.

classification in 1988, it promoted Swan over two other more senior employees, Bonds and Gerald Specht. Specht was hired two weeks before Bonds. Specht also was technically more senior than Hammond, but during or about this time, and for a nine-month period, he was not telephoning in or responding to letters asking that he come in to work. Bonds had just transferred back into the security bargaining unit after working several years in the watchman bargaining unit.[6]

In mid-1987, at the request of Maersk, a large tenant, the port began to provide, on a provisional basis, security coverage to the North Intermodal Yard, a rail facility that is straddled by marine terminals on both sides. Consequently, the port assigned security officers to that location around-the-clock. The demand for relief security officers increased to the point that they began working as many hours as regular officers, at times working up to 28 days per month.

Stevens started as a relief security officer at the port in August, 1988. Prior to working for the port, his career included military service and 16 years in the law enforcement department of the City of Puyallup, where he rose to the rank of sergeant in charge of administrative services. Stevens considered that he had an excellent working relationship with Chief of Security Hare, and that Hare was instrumental in getting him hired by the port. Hare would seek Stevens' input to help in the overall operation of the Security Department. Hare told Stevens that if he "played his cards right", in the future he could be chief of security.

Lou Paulsen became the port's director of risk management in December, 1988. He is responsible for the port's Security Depart-

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[6] At some point, Bonds transferred to a "watchman" position. Three watchmen at the port (including Bonds) had previously been represented by ILWU Local 23, which had merged with ILWU Local 28 on May 10, 1987.

ment. Paulsen reported to Donald Meyer, deputy executive director for finance and development.[7] Chief of Security Hare reported to Paulsen.

Sometime in 1988, Meyer made a commitment to the union that the port would not hire more part-time, non-benefitted employees than it had full-time, benefitted, employees. At this time, the security staffing consisted of eight full-time security officers receiving benefits and eight relief security officers not receiving benefits. The full-time officers received $2,616 per month (or an hourly rate of $15.09). The relief officers rate of pay was $15.09 per hour.

Two relief officers had worked for the port in excess of seven years. Seven of them worked an average of 1,832 hours per year. In 1989, Bonds worked 2,388 hours as a relief officer.

April, 1989 Promotions

In early 1989, a security officer retired. Swan moved from the flexible security officer classification into a regular security officer position. Therefore, applications were sought for the vacant flexible security officer position. Relief security officers Specht, Bonds, Stevens, Liz Casper, Divina French, Theresa Patton, and Don Carn all applied.[8]

In April, 1989, the port interviewed the applicants. The interview team consisted of Paulsen, Hare, Ovena, and Equal Employment Opportunity Manager Ray Turner. Twenty-seven questions were listed

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[7] Between July 1989 and February 1990, an organizational change at the port resulted in Paulsen reporting to Greg Nelson, senior director of finance and administration, instead of Meyer.

[8] Patton worked for the port from July 1987 to July 1991. On August 25, 1987, she filed a complaint with Director of Human Resources Lorna Ovena, alleging that Hare was sexually harassing her.

on the Selection Committee Questions form. The first four were designed as "icebreakers" such as:

* Please describe what you can offer the Port relative to this position?
* What aspects of your background concerning your previous places of employment would you like to share with the panel?

Nine questions sought short, specific technical answers to job related knowledge. Examples are:

* What is the radio frequency of the Fife Police Department?
* What does 10-85 mean to you as an officer on duty?
* When is a neck hold permissible for use?

Six questions described incidents and asked for a narrative response. For example:

* Imagine you are on gate duty and several tractors are preparing to leave when you hear an "officer in distress" call on your radio. What is your response and why?
* You discover what appears to be a major oil spill at Pierce County Terminal. What actions do you take?
* You have been instructed by someone of authority outside of your chain of command that surveillance is required on a certain employee. You are instructed that because of the sensitive nature of the investigation, you are to inform no one except the person who is giving you instructions. What actions do you take, if any, and why?

The remaining questions related to general employment conditions (e.g., What causes you stress? Any problem working overtime?).

Ovena testified that the purpose of the interview questions was two-fold: To see if the applicant had the technical skills claimed and to see how his/her approach to issues might fit into the port's organizational culture. Questions for interviews are developed by someone in the Human Resources Department, working from the job description and by the supervisor of the department. Ovena asserted that this same process for filling positions in Local 23 and Local 28 had been used since 1983.

Paulsen testified that Bonds and Specht scored exactly the same or very close in the initial interview. It was the only occasion Paulsen was aware of where the selection panel was unable to reach a quick consensus with respect to who should be hired. As a consequence, the panel opted to re-interview the two men. Specht answered technically better to a question concerning an officer's conduct upon seeing a shotgun in a pick-up truck that an individual drives onto port property. He was promoted. Hare told Bonds that both he and Specht were highly competent and trained, but since the port could only choose one person, Specht got the promotion because he had 14 more days seniority. Hare also told Patton that Specht received the job because of his seniority.

Out of the seven applicants, Bonds placed second and Stevens placed third in their overall interview/application scores.

Expanded Service

In May of 1989, the port determined that it would continue to provide security coverage at the North Intermodal Yard for Maersk. Staffing for this coverage began to be a problem. Relief officers were not required to be available 24 hours a day for call-in. Since relief officer work was considered to be part-time, some relief officers had other employment and some were attending school. Consequently, the entire compliment of relief officers were not always available all the time for immediate reporting to

work. The port began experiencing difficulty meeting operational needs. Overtime costs became 18 percent of the non-benefitted employee gross payroll.

Addendum Negotiations

In the summer of 1989, Paulsen was authorized to propose opening negotiations with Local 28, to amend the collective bargaining agreement to create a new "entry control officer" classification. The port wanted to convert three relief security officer positions and a "customer service clerk" position,[9] into the new classification, which was to be full-time with full benefits. The port proposed that the new position would be stationed at the entry points (gates), and would not patrol port property. The port also proposed that the new job pay $10.00 to $11.00 per hour (approximately 70 percent of the wage rate of full-time security officers) and receive medical, dental and life insurance benefits as well as be placed in the retirement system. The use of the new classification would reduce the number of hours that the port needed relief security officers, and the port would also be able to expand the pool of relief security officers since there would be more full-time officers employed.

Negotiations began August 16, 1989. The union bargaining team was Bonds and ILWU Local 28 Shop Steward Bill Emerson.[10] Bonds was on the negotiation team in his capacity as assistant shop steward, which position he held from March 1989 through February 1990. The

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[9] The record is silent as to what, if any, bargaining unit the customer service clerk was in.

[10] Emerson receives a pension from previous employment through the Public Employees Retirement System (PERS). The port is also a PERS participant. PERS regulations do not allow a pensioner who works for a PERS employer over 90 hours per month, to receive a pension. Emerson has thus chosen to remain a relief security officer since 1982, and to not work over 90 hours per month.

management bargaining team consisted of Meyer, Paulsen and Ovena.[11] Over the next few months, at least seven more meetings were held.

The parties discussed the job description, position qualifications/ specifications, rate of pay, hiring criteria, benefits offered and their cost, number of positions to be filled, scheduling, and the participation of a union representative on the interview team.[12]

The employer proposed that the position specifications contain the following:

> 1. Education: Minimum education required for satisfactory performance of the position's duties and responsibilities is as follows: A high school diploma, or equivalent (GED), and graduation from an acceptable law enforcement academy, either military or civilian.
>
> 2. Experience: Previous job experience required should include a minimum of two years' experience in industrial security, or related military security experience. The person in this position must be eligible for commissioning by City Police and the County Sheriff's Departments. Background and experience in industrial security, traffic control/investigation, special weapons and tactics training, crisis intervention, conflict management, crime scene investigation, traffic service, basic and advanced criminal justice and community relations are highly desirable. One year is required to become proficient in the position's duties.

The union argued that 14 of the duties contained in the job description were exactly the same or very close to the duties listed for a security officer. A security officer would perform

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[11] A representative of ILWU Local 23 attended the later meetings, because of a work jurisdiction concern.

[12] The union proposed changing the title of the new job classification to "provisional security officer". The employer agreed.

only three duties that the new classification would not: Drive-by surveillance; report of all vessel traffic; and assistance to other law enforcement agencies when requested. The newly created job would restrict egress of cargo not fully documented for clearance, and maintain and operate visual communications systems in support of port security and communications activities. Neither duty was currently performed by the security officer.

The union contended it should have the same rate of pay that the security officer received -- $15.09 per hour. The employer first proposed that the pay should be 70 percent of the security officer rate (i.e., $10.56 per hour).

The union wanted five people hired. The port maintained that it could have 24-hour coverage with only four new full-time employees supplemented by relief security officers.

Bonds reported to management during bargaining that hiring by seniority was a "hot" issue for the union, so much so that an addendum might not be ratified if seniority was not the primary consideration in hiring for the future positions.

The union proposed that a union representative attend the interviews of the applicants, to verify what information management was giving applicants.[13] Management insisted that the union representative on the interview board have full interviewing, grading and voting authority. The union expressed displeasure with having a bargaining unit member rate other bargaining unit members. Bonds reported that it was a highly contested issue at a union meeting. Some people thought that a union representative could sway the team

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[13] Previously, relief security officers Casper and Patton had reported that they were given certain assurances when they were hired about a minimum number of hours they would be assigned, and about when they would become full-time. Neither had come to pass.

to use seniority as the selection criteria; others believed it to be too divisive to have one bargaining unit member rating other bargaining unit members. In the end, the management plan was used.

Bonds reported at a negotiations meeting that the union membership believed that the present system for advancement lacked objectivity. He proposed having oral boards comprised of persons from outside the port, or assigning a point value to such things as education, job experience and seniority to establish advancement rankings. The port assured the union it would use the same type of selection procedure it had used previously, but maintained that it would continue to establish the criteria for advancement.[14]

There seemed to be confusion about the selection process, so the parties agreed to have port management explain the process to all interested persons on September 25, 1989. Only Meyer, Paulsen, Ovena, Bonds, Stevens, Patton, and one other relief security officer attended. Since so few bargaining unit employees were at the meeting, the port paid people to attend a required training session on October 11, 1989, where the same information was explained. The management officials assured the employees that performance, attendance, appearance, conduct, and seniority would be considered, but their focus was on "team building". Paulsen and

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[14] The parties' collective bargaining agreement contains the following language at Article 6 Personnel Practices:

> 6.4 The authority to promote or make changes in employee classifications rests with the employer. The union will be informed of these changes in advance.
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> 6.5 Qualified Port employees will have preference on job openings within their own union jurisdiction. Management of the Port of Tacoma will be the sole judge of the qualifications of the employee for advancement and due consideration will be given to the recommendations of union representatives and a form letter of notification will be sent to each unsuccessful applicant.

Ovena stressed that the port wanted people that could get along with each other in the new positions.[15]

The "official" minutes of the bargaining sessions kept by the port record that Bonds did the majority of the talking for the union team. Bonds also authored several memoranda expressing the union's positions, and those were presented to the management team in the negotiations. In meetings in August and September, Bonds had questioned why the employer was proposing the new classification at that time, instead of waiting until collective bargaining opened for the entire agreement in less than a year. Several times, Bonds submitted corrections to the port's minutes, to address what he believed to be errors or omissions that were detrimental to the union's true position. At one time, Meyer told Emerson at a

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[15] From the transcript of the unfair labor practice hearing:

> Q. [By Mr. Cline] Was any discussion of the role of team-building in the selection process discussed at this meeting?
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> A. [By Ms. Ovena] That we needed to build a team in the security department, because based on our experience in '87 -- no '88, '89 we were seeing a lot of grievances being filed which, to me, is a symptom of something deeper than the actual grievance that's being written out. ...
>
> Q. And what would the role of team building be in the selection process and --
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> A. Well, in my -- from my perspective, I would like to choose those individuals that would foster this concept of building teams, rather than pulling teams down or trying to build barriers.
>
> I would rather have those people that have those particular skills, have more opportunity to be exposed to others. Being a full-time position, they'll have more opportunity to interact with one another.
>
> A part-timer, as we have described, would have less interaction with individuals. So from that standpoint, I wanted to be able to limit -- well, choose those people that have the better skills and getting along with one another, for fostering that concept.

"coffee pot meeting", that he did not appreciate the way the negotiations were going, especially Bonds' style. He asked if Emerson, as the shop steward, could have Bonds "water it down a little bit".

The parties did not reach a tentative agreement though bargaining on the new classification. Nevertheless, the port requested that the union team present the port's final offer on the addendum to the union membership for ratification.

Activities Concurrent with Addendum Negotiations

At about the time of the port's final offer on the addendum, Hare had a casual conversation with Stevens, while Stevens was on duty. Stevens told Hare that he opposed the addendum, and did not think he should have to sacrifice his present wages to gain benefits.

Two factions were beginning to emerge in the security officer bargaining unit. One, led by Bonds, wanted the officers to be more proactive and increase their visibility to help deter crime; the other, lead by Emerson and Johnson, wanted to be reactive only. The proactive faction was comprised of the part-time employees; the reactive faction was made up of the full-time employees.

Bonds became a vigorous assistant shop steward. From 1989 to 1990, 13 grievances were filed, which was the highest number ever in the history of the port. Ovena was aware that Bonds filed more than two. She viewed most of the grievances as being meritless.[16]

At some point during the summer of 1989, Casper asked Bonds to represent her in grievance meetings about her work schedule. She

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16 It is unclear how many grievances actually proceeded to arbitration. The record establishes that, at least in some areas, management changed its positions and the grievances were withdrawn.

preferred Bonds over Shop Steward Emerson. Since the ILWU constitution allows any union member to be represented by any other ILWU member, Bonds agreed. There were several meetings. In the later part of July, Paulsen asked Bonds why he was there, quipping, "Sacrificing yourself to help other people?"

On one of his work shifts in July or August, Bonds received a request from Paulsen to meet. Bonds drove the patrol car to the administration building and picked up Paulsen. Paulsen stated that he wanted to give Bonds feedback regarding his April 1989 interview. Paulsen told Bonds that the port needed to have team players, and that this would be the port's focus in the future. Paulsen mentioned that there were going to be some new full-time positions created, and the port was definitely looking for team players. Bonds took this as a reference to the negotiations on the addendum, and he asked Paulsen what he meant. Paulsen asked Bonds what a team player meant to him. Bonds responded that it could be someone who gets along well with others, or someone who does not rock the boat. Paulsen told him it meant people who work well together and asked him how he fit that team concept. Bonds said he would fit in "great" and reported how the relief officers frequently socialized together. They drove around for about 30 minutes. At the end of the trip, Paulsen brought up Casper's grievance and Bonds reiterated his view that the grievance had merit.

During that summer, Ovena was attempting to convince senior management that the port had

> [I]ssues here that needed to be addressed, but they were not allocating the funds or the time to address them, i.e., there wasn't enough people in either my staff or enough focus within department heads to say "we need to communicate with our people, we need to let them know what we are doing."

Ovena brought in a private attorney, Margaret Barbier, to conduct a personnel practices audit. Barbier interviewed security officers for the purposes of the audit from August 15th to October 31st.

Also during this time, a coalition of part-time officers had initiated consultations with two separate attorneys who were involved with lawsuits brought by part-time employees regarding the obligations of public employers to make contributions to the retirement system for part-time employees. The coalition was exploring whether the Port of Tacoma had a similar obligation to its part-time employees.

While the addendum negotiations were occurring, port management told different security officers that it could use private contracted security personnel.

Defeat of the Addendum

The union ratification meeting was scheduled for October 18, 1989. Bonds authored a nine-page review of the negotiations for the union membership. Besides being an analysis of the employer's proposal, it purported to supply comments and questions which Bonds had gathered from other bargaining unit members. It stated, in part:

> It was heartening that Mr. Meyer finally recognized what we had been stating all along. It has always been our position that the Port needed additional security officers to staff the positions that have been necessitated by the ever expanding commerce generated at the Port.
>
> Our version of more positions was to simply add more security officers to the Regular employee classification. However, instead of talking about hiring on more security officers, the Port's approach to solving the above stated staffing problems was to create an entirely new classification of employee within the Security Department. ... Our reply, summarized, is that the job description that

> was presented to us is that of a Security Officer, and what the Port wanted is a Security Officer (with a different title) at less wages.

Bonds distributed a copy of his analysis to everyone at the meeting. On or about that same day, Bonds gave a copy to Paulsen and others in port management. Emerson thought that Bonds should have given him the analysis before he gave it to management. Emerson testified that he would have "toned it down". During the union ratification meeting, Bonds emphasized his belief that the union would be in a stronger position to negotiate for what it wanted involving the new classification when the entire contract was opened for bargaining.

Stevens made the motion to reject the addendum. He believed the port was having the employees pay for their benefits by reducing the hourly wage rate. The vote was conducted by a "show of hands" of bargaining unit members present. The addendum was rejected.

On October 19, 1989, Bonds and Emerson both signed a letter to the port, advising that the union membership had rejected the addendum by "a majority vote". The letter concluded with a reference to possible further discussions of the addendum at the upcoming contract negotiations.

In a November 2, 1989 letter to Emerson and Bonds, Paulsen wrote that the timing of the proposed contract amendment was due to the current "staffing problem". The port anticipated that negotiations on the renewal of the entire contract would not be completed until the summer of 1990.

Repercussions of Addendum Rejection

In the days following the defeat of the addendum, Paulsen and Hare called Bonds into a meeting and told him they were not happy with

the analysis he had written on the addendum. The port officials stated that they would have rather seen Bonds vote for the addendum.

After the addendum was rejected, Hare told Stevens that he was not conducting himself to meet Hare's expectations, because of the role that Stevens had in opposing the addendum process and the influence he had over other members in the part-time group. Hare indicated that, due to Stevens' activity and stance regarding the addendum, Hare would not recommend that Stevens be promoted to a full-time officer's position in the upcoming process. Hare emphasized that Stevens should use his experience, training and position within the bargaining unit to influence the others to have a more compatible position with management as far as the addendum was concerned. Hare asserted that Stevens should be conveying management's position to the bargaining unit. When Stevens left the meeting, he believed that he would be retaliated against, and that Hare had put him on notice that he would not be considered for one of the provisional security officer positions.[17]

During this same time period, other security employees were also contacted by port officials. Jones, Miller and Hammond told Stevens that they had each been engaged in conversations by port management officials who were unhappy that the addendum had been voted down, and wanted to sway it the other way. Casper, French and Orgeles all told Bonds that they were receiving pressure from management officials Hare, Paulsen, and Meyer to change their vote. Patton confirmed that two or three security employees stated that port officials had approached them, and tried to talk with them about the addendum.

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[17] Although not directly attributed to the management, Bonds was also cautioned during this time frame that he would be denied a full-time position if he opposed the management. This came from Clive Hebery, a full-time security officer who had been with the port about 20 years.

Pass-on Book Incidents

When the chief of security wanted to communicate information to security officers, he would write it down in a "pass-on book" kept at the main administration building. Each officer was to review the pass-on book daily, and initial any new entries. From time to time, officers would skip reviewing the book.

In August of 1989, all officers were reminded to sign the pass-on book. On October 2, 1989 and again on October 24, 1989, all officers were again reminded to sign the pass-on book. Sometime in October of 1989, Stevens objected to having to use his break time to go to the main building to sign the pass-on book. He suggested that Hare make copies of the entries and place them in the security officers' post at the gate entry. Stevens' idea was rejected, and he was told to sign the pass-on book or he would receive a counseling statement.

Stevens' Meeting with Turner

After his meeting with Hare about the pass-on book, Stevens became alarmed and sought help from Turner. Stevens believed this to be an equal employment opportunity issue, and he requested that the conference with Turner be held away from port property. When they met, Turner explained some options that Stevens had, and advised Stevens that he could have until the beginning of the following week to decide what option to select.

Turner apparently told Paulsen of the off-site meeting, and that Stevens had reported being pressured by Hare. Paulsen immediately wrote Stevens that he wanted to address the issue, but was then out of town for a time. Stevens testified that he had understood that his meeting with Turner was to be held in confidence, and was surprised that Paulsen was aware of it. Additionally, he was still trying to decide which of the options outlined by Turner to pursue.

The week following Paulsen's letter to Stevens, Paulsen and Turner came to Stevens' work station. Paulsen asked to see any notes that Stevens had taken in relation to Hare's conversation. Stevens gave Paulsen an oral accounting of the meeting, but refused to let Paulsen copy his notes. At that time, Stevens believed that he was getting into something "too deep", and decided to bow out of the situation. Thus, he made only vague allegations about what Hare had said to him.

After his meetings with Turner, Stevens noticed that Hare's behavior toward him became formal, not friendly. Stevens' scheduling to cover work shifts decreased. Stevens was afraid that Hare had learned of the meetings.

Although Paulsen had written Stevens saying the port had a duty to take action where an employee feared reprisal for raising concerns, Stevens did not believe that Paulsen could insure that there would be no retaliations. In this same letter, Paulsen agreed to adopt Stevens' suggestion about having a duplicate pass-on book at the gate entry.

Second Addendum Offer

Between October 18th and October 30th, the port made another offer in the negotiations on the addendum, this time outlining a clear career progression for security officers from "part-time" to "provisional" to "flexible" to "regular". The port increased its offer of a monthly payment to cover health benefits from $122.88 to $129.28, if everyone in the bargaining unit chose Group Health as the only benefit provider. Current employees who became successful applicants were to be grandfathered at 80 percent of the security officer rate of pay, if Group Health became the sole medical benefits provider. Lastly, it committed that "provisional" officers would not be regularly assigned patrol duties, and that

they would be paid at the regular security officer wage rate if they were required to do patrol work.

Somewhere around this time, Bonds received a copy of a confidential management memorandum. The document, which pre-dated the first vote on the addendum, was from Paulsen to his immediate supervisor. It stated that the port's bottom line for the provisional security officer would be 80 percent of the pay of a regular security officer and benefits. Bonds felt the union bargaining team had been deceived.

The debate within the bargaining unit on the second addendum was very intense. Some employees were worried about "paybacks" if it was rejected again; some were concerned about the amount of political muscle that was being applied to change the vote. Emerson and Johnson spoke in favor of the addendum. Emerson advanced that at least it created some full-time positions. Bonds pushed to reject it, and to negotiate for an overall better situation when the entire contract was open for negotiations in a few more months.

The vote on the second addendum was conducted by secret ballot during or about the end of October. The ballots were sent to the union's headquarters in Portland, Oregon. The union notified the local that the addendum had been ratified by a nine to seven vote.

Shop Steward Elections and Performance

During the autumn of 1989, elections were held for shop steward for the bargaining unit for calendar year 1990. The two opposing candidates were Bonds and Johnson.

Bonds wanted more aggressive union action. Previously, the port had unilaterally issued a smoking policy without any challenge from the union. Bonds believed that Johnson was easily manipulated, and

readily went along with whatever the port wanted. Some security officers told Patton that they were afraid of retaliation by management, and felt they had to vote for someone that management wanted. Johnson was elected. Bonds maintained his position as assistant shop steward.

Bonds, Stevens, Casper, and several others had filed grievances during this time. Bonds found Johnson retyping the grievances to make the wording weaker, less aggressive. Bonds contacted the president of Local 28, Frank Griffis, at the union office in Portland. Griffis told Bonds to bypass Johnson, and to file grievances under Griffis' direct authority.

Stevens filed charges against Johnson with the union in October or November of 1989. Griffis came to Tacoma in December, and held a fact-finding session. Johnson knew that Bonds had drafted the charges.

When negotiations began on the successor collective bargaining agreement, Bonds and Stevens thought Johnson was counterproductive. They thought Johnson undercut the bargaining team, by rewriting proposals without letting others on the team know, and by stating at the bargaining table that the union was not going to go for a proposal that Bonds or Stevens had just advanced. For his part, Johnson thought Bonds used rough language at the bargaining table, for example, one time Bonds told the management team, "You are bargaining in bad faith."

Other Union Activity

On January 16, 1990, two grievances were filed. The first one alleged that the employer unilaterally designated the District 1 (or "Zone 1") officer as a supervisor, i.e., the "officer-in-charge", during the absence of the chief of security, but that the collective bargaining agreement did not have a classification for

supervisory personnel. That grievance signed by Bonds, Stevens, Casper, French, Patton, and Orgeles requested that the designation be rescinded.

The second grievance alleged that relief security officers were being worked out of their classification as flexible part-time security officers. It further alleged that the port was engaged in illegal conduct, by working the relief employees full-time hours for four months and then deliberately scheduling that employee less than 90 hours in the fifth month to avoid having to place the employee in the retirement system and to avoid the port resolution which required benefits to be paid an employee if he or she was in the state retirement system. The grievance alleged that if a mistake in the schedule was made, so that an employee worked over 90 hours in the fifth month, the extra hours would be transferred to the sixth month. This grievance was signed by Bonds, Stevens, Casper, French, Patton, Orgeles, and Carn. Hare told Bonds the grievance was "ill-timed".

Hare asked Stevens to develop a training course on "officer survival" for the other security officers. The port had previously sent Stevens to a class on that subject, but Stevens refused to do the work on his own time, without compensation. He told Johnson that the contract did not have a field training officer position in the unit, and that he would not become one without compensation.

During or about this time, the port changed its position regarding Casper's work schedule. Its earlier position had caused Casper to file the grievance wherein she sought assistance from Bonds during the summer. Therefore, Casper withdrew her grievance.

January 1990 Promotions

Interviews were held on or about January 22 and 23, 1990, for the four newly created positions of provisional security officer. The

applicants were Casper, Patton, Bonds, French, Orgeles, Stevens, and Woods. Another applicant, David Lanier, was disqualified by the port as not meeting the minimum qualifications since he did not have two years experience. Neither French nor Stevens submitted updated applications, choosing instead to rely on their applications from the April, 1989, process for flexible security officer. The interview board was composed of Paulsen, Ovena, Hare, and Johnson.[18]

The record establishes that the questions used by the interview team were drafted by Turner and the "security supervisor".[19] The purpose of each question was listed parenthetically after the question for the benefit of the interviewers. Twenty-eight questions were listed.[20]

Eleven were generic to the workplace or general to security operations. For example:

> * Please define and discuss with us your philosophy concerning Comparable Worth. Is it a viable option? Why or why not? (PURPOSE: To examine understanding of current critical issue in the workplace.)
>
> * What is your understanding of the position you are applying for? (PURPOSE: To examine applicant's understanding of the position.)

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18 Stevens had wanted an outside board to do the interviews for the provisional security officer position. He did not believe that anyone from the port would be neutral after the addendum was rejected.

19 It is unclear whether the security supervisor referred to was Hare or Paulsen.

20 There was testimony that not all 28 questions were asked of each applicant. However, there was no clarity among the interview team witnesses as to which questions were not asked.

* How do you envision yourself fitting in with the present full-time work force and in meeting department needs? (PURPOSE: To analyze self-evaluation.)

* What is your evaluation of the present full-time work force? (PURPOSE: To examine perceptions and relationships.)

* In what ways can the overall effectiveness of the Security Department be improved? (PURPOSE: To examine applicant thought processes in relationship to department operations.)

Nine sought responses to specific situations. For example:

* What, if any, responsibility do you have to a fellow employee and the port in the following situations [six situations were listed of which these are three]: (PURPOSE: Examination of judgement, integrity and team-building.)

  A fellow employee reports for work unshaven and sloppy in appearance.

  A fellow employee reports late for work, or leaves work early.

  A fellow employee who is unresponsive and argumentative in their relations with you and other employees.

* In the Chief's absence, which officer is in the position of authority as officer-in-charge? (PURPOSE: To analyze knowledge of chain of authority.)

* Please put yourself in this situation: While on duty during a peak operational time and while distracted by the tasks at hand, your supervisor approaches you to advise you of an unrelated procedural change. You have no problem with what you are instructed to do but you are upset with the manner in which the issue was presented. As a Port of Tacoma security officer and a member of ILWU 28, what are the various avenues available to you to resolve your concerns? What are the relative advantages and disadvantages of each? What method would you choose, and why? (PURPOSE: Examination of judgement and logic.)

Three of the questions dealt with driving qualifications. For example:

> * Please produce your driver's license and commission card. (PURPOSE: To review current documents.)
>
> * Have you completed the Information Request/Liability Release and the Motor Vehicle Records Request form that Jan Taylor had for you in the Personnel Department? If not, why not? (PURPOSE: To aid in determining qualifications.)

Five of the questions involved aspects of "team building". For example:

> * What have you done to support team-building since becoming employed here at the port? Please give details. (PURPOSE: Self-explanatory.)
>
> * In what areas have you fallen short of our team-building goal, and what do you plan to do to improve in this area? (PURPOSE: To examine applicant's self-evaluation as it relates to team-building.)

Each interviewer was given a rating sheet to record the points they awarded to applicants. The rating sheet allotted 50 points to team building answers, 25 points to technical skills, and 25 points to initiative and motivation. Ovena viewed the rating sheet as just a guideline, however, and she awarded all 100 points based on the candidates' answers to the team building questions.

Casper was the first applicant interviewed. When she entered the room, Hare asked her to turn around, so that the interview team could see how her uniform was tailored. After the interview was over, Paulsen counseled Hare not to do this with any other candidates.

During her interview, Patton was specifically asked if she had a lawsuit filed against the port.

Stevens went into the interview not expecting to get the job, because of his meeting with Hare a week to 10 days after the addendum was defeated, and because of his later meetings with Turner and Paulsen regarding Hare. Stevens believed that he would have had a better chance in the selection process if what he had thought was a confidential talk with the EEO officer could have laid dormant.

During his interview, Bonds was asked if he thought there should be lead workers in the Security Department. When he answered affirmatively, Hare started to ask, "Well, why did you file...". Hare was stopped by someone else on the port's interview team.

In response to the interviewers' questions, both Bonds and Stevens made reference to the position not being "desirable". Bonds cited that the port had made it less desirable than a security officer position, because the provisional security officer would be doing about the same work for 80 percent of the pay. Stevens indicated he would rather be doing more patrolling than to be stationary and assigned to cover just one gate of the port.

Paulsen testified that he brought with him to the interview impressions of candidates from the work place, and that he considered those impressions when he rated the applicants.[21] He asserted that Stevens had a recent history of insubordinate behavior, citing

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[21] For example, in Paulsen's interview rating sheets on the candidates he wrote about Steven's: "'Textbook' responses were often not indicative of true behavior as reflected in follow up questions and recent activities." Of Patton, he wrote: "Has made improvements in human relations but views technical training as solution. Recent behavioral examples run contrary to preferred responses." Of Bonds, he wrote: "Refuses to accept/comply with reasonable management directives."

the pass-on book incident. Paulsen referred to Bonds as having a negative attitude, speaking critically of himself and other security officers.

Paulsen testified that Stevens did an outstanding job of describing the role of the Security Department, but that Stevens stated that he should be more involved with law enforcement than industrial security. Paulsen was concerned about Stevens' remarks that he would have a hard time fitting in with the current full-time employees because the security officers were a "stagnant group".

Each candidate's interview incorporated planned "interruptions". At the end of the interview, the candidate was asked to describe the individual who entered the room, provide a detailed report of the subject of one conversation and summarize the people's demeanor. Stevens was rated as having excellent recall; Bonds was listed as reasonable recall of the individuals.

After the interviews were completed, the interviewers rated the applicants. Ovena ranked Bonds and Stevens as tied for last place. Ovena cited Bonds' remarks regarding the desirability of the position, and that he appeared to be in an unpressed shirt. Ovena also referred specifically to Bonds' answer to the question about who was in charge in the absence of the chief, stating that she thought Bonds' answer showed that he understood the concept of the patrol Zone 1 person being in charge, but he did not agree with it.[22] Ovena rated Stevens low because he refused to answer the question about management's philosophy with respect to the department, because he brought a note pad into the interview, and because of his statements about the desirability of the job.

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22 The automatic appointment of the patrol zone 1 person as acting chief was the subject of a grievance filed one week earlier. The port later agreed to rescind Hare's memo, and to bargain the matter at the next contract negotiations.

Johnson ranked Stevens at the bottom because, in response to the question regarding who is in charge in the chief's absence, Stevens answered that he had no idea. Johnson did acknowledge that he scored Bonds and Stevens based on information that he already had before the interview, i.e., the pass-on book incident; problems with Hare; and Stevens' declining to do training as a part-time relief officer.

The interviewers' summations and recommendations ranked the applicants as follows:

1st Casper
2nd Woods
3rd French
4th Orgeles
5th Patton
6th Bonds
7th Stevens

In making those ratings, the port deviated from the requirements set forth in the job posting. Although the job posting listed one year to become proficient in the position's duties, Woods and Orgeles each had only six to nine months experience at the port. Although the posting directed that successful applicants "must be eligible for commissioning by City Police and the County Sheriff's Departments", the port changed that requirement to "either/or". Bonds and Stevens held both commissions; other applicants did not.

All of the candidates were requested to sign a release to allow the port to search motor vehicle records. Stevens' counsel had advised him that if he had no traffic violations and possessed a valid driver's license (a requirement for the position), that would be sufficient for employment purposes, so he did not sign the release.

Team concept -
During cross-examination, Ovena was questioned why the team concept was so important at these interviews. Ovena explained that labor-

management cooperation is a proven commodity for attracting and retaining customers and building the port:

> A. [By Ms. Ovena] Starting in the late 70's with Tote, a large shipping line. When we brought SeaLand in, in the Tote -- moving Tote from Seattle to Tacoma, it was the longshore that really brought them down here, because they had proven to Tote management that they could get things done faster here. They can load the -- what's called railroad ship -- faster in Tacoma than they can in Seattle. That reputation was built at that point and that's why SeaLand came in. And when SeaLand came in here and said, hey, it's the port labor cooperation that's provided here, Maersk came in here, which then brought Evergreen in, and may bring in other larger companies to this area.
>
> ...
> Labor cooperation with management in trying to avoid labor disruptions so that the port is competitive; [we] include top labor leaders in overseas marketing calls as well as national marketing calls to new or existing customers;
>
> Q. [By Mr. Cline] And adversarial labor relations can cause a loss of business, you feel?
>
> A. That's the message that's been given to us clearly.
>
> Q. That's been a message that's been given to you or brought to you by your customers?
>
> A. I don't know about the customers, but it's certainly a concept or a theme that is very loud and clear for management people and hopefully, for all employees of the port.
>
> Q. How did you know they [Bonds and Stevens] were deficient in team-building at all?
>
> A. By the symptoms, by the symptoms of distrust. By the symptoms of all the grievances that were being filed with appeared confusion to me [sic].

Ovena asserted that the port's big clients such as Tote, SeaLand and Maersk came because of the representation of cooperation and team-building.

Bonds, Stevens and Patton all testified that their awareness of the team concept before going through the interviews was that the two area patrol officers and the gate officer would be on the same team, and would always be scheduled together on the same shifts to work as a unit. Bonds, Stevens and Patton were the only applicants who testified.[23]

After the interview, Bonds felt that the team concept was procedural, (i.e., to go along with management). He believed the interviewers wanted responses that would show the applicant would go to management with job concerns, not to the union. Bonds was disturbed that the questions were so different from the ones used nine months previously, and that they no longer related to the practicalities of the job.

When asked why the focus of the questions had changed from April of 1989 to January of 1990, Ovena testified:

> A. [By Ms. Ovena] At the time that we were looking at the flexible security officer, the issue of distrust and employee relations problems and concerns were not as vital or as -- the magnitude wasn't the same.
>
> But by the time it got to the provisional security officer, it was an issue that we needed to address and really put a lot of energy into. So there's that different focus.
>
> ...

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[23] Bonds stated that he had approached others, but they had "begged" him not to subpoena them for "fear of retaliation from the port." The port did not call any of the other applicants as witnesses.

> Q. [By Mr. Cline] And you don't think this would give any concern to the employees that team work was being valued so highly over technical skill?
>
> A. I think they would understand that interpersonal skills are going to be of equal part to the technical compensation, is the message they would be receiving.
>
> Q. Are they actually getting a message that team work is more important than seniority, experience and technical qualification?
>
> A. That's exactly the message we are trying to send.

Patton thought the team building questions were seeking answers that showed the person could get along with others and would be pro-management on things. She came away with the impression that the interviewers thought that if an employee was filing grievances, he or she was not in support of the port team.

Stevens believed the question about how the applicant has fallen short of team building was "a pit for me to fall into", because he had filed grievances and opposed the addendum. Stevens testified:

> [A] lot of the questions, the way they were asked and by the people they were asked by, to me reflected they were clearly sending us a signal that because we had been involved in what we had been involved in versus the wishes of the port management that they were going to circumvent us in this process [selection for provisional officer].

After the interview, Stevens concluded that playing an active role in the union was contrary to team building.

Port Feedback

Immediately after Stevens' interview, Hare and Johnson took Stevens out in the hall and gave him a disciplinary letter for failing to

sign the pass-on book. Stevens asked Paulsen to join them, and complained that he had never received a performance counseling statement which was referenced in the disciplinary letter. After checking, the port officials acknowledged that Stevens was correct, and a counseling statement was issued in exchange for the disciplinary letter.

Ovena subsequently told Patton that she did not get the provisional security officer job because of her attitude. Patton believed that meant her EEOC complaint, her sexual harassment lawsuit, and the grievances Bond had helped her file. Shop Steward Emerson told Patton to keep quiet, and not to stir things up.

Beginning in February of 1990, Bonds and Stevens were on the union's negotiating team for the successor collective bargaining agreement.

At Bonds' request, Paulsen and Hare met with Bonds March 30, 1990, to explain why Bonds was not selected for a provisional security officer position. Paulsen explained that all of the candidates were technically equal, so the interviewers looked for something else on which to base their decision. The ability to get along with other port employees and to work in a harmonious manner in the team concept became paramount. Bonds stated he worked well with all the security employees. Paulsen acknowledged this, but stated that Bonds was "iconoclastic". Bonds questioned the meaning of the word, so they checked a dictionary. The definition was along the lines of "One who challenges established or existing ways or means; somebody that was trying to change things." Bonds registered that he had filed grievances, spoken against the addendum and had bargained hard to get more than four full-time officers. Bonds decided that Paulsen was telling him that he was bucking the system. Bonds asked Paulsen if he was being discriminated against for being a union activist. Paulsen responded "No", and turned the dictionary to the word "argumentative". Bonds suggested that their

only dealings where Paulsen might have seen Bonds as "argumentative" was when Bonds was acting as a union negotiator or assistant shop steward. Paulsen said he was argumentative in other areas as well, but did not cite any examples.

Scheduling of Part-time Hours

After the four new full-time positions were filled, the port immediately hired four new part-time employees to supplement the relief security officer workforce. Bonds testified that a new part time employee goes through a training period where he or she is scheduled to work with a full-time security officer for the entire two months. He therefore contended that the incumbent relief security officers, Bonds, Stevens, Patton and Emerson, should have been filling all of the relief shifts until the four new relief security officers completed their training.[24]

Bonds testified that the four senior relief officers worked only 9 to 10 shifts per month, and that the port brought in regular security officers to work overtime to cover other relief shifts during the time the new employees were being trained.

Stevens also noticed that, after the selection process, he was not being called in, as he had been previously, for "short time responses" (e.g., to report immediately to the port when a security officer phoned in sick at the beginning of a shift).

Post-complaint Activity

In its defense, the port submitted the testimony of Carl Miller, a full-time security officer, to show that another employee who engaged in actions adverse to the port was not negatively impacted.

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[24] Bonds expected that there would be a reduction in the work hours available to him after that time.

Miller established that he gave a statement that was unfavorable to the port during the discovery proceedings in a sexual harassment suit filed by Ellen Teed against the port. The port eventually settled the lawsuit prior to going to trial. Subsequent to giving his statement, Miller was selected by management as a lead worker with a 5 percent improvement in pay. Miller testified against the port in Patton's sexual harassment lawsuit after being made a lead worker, but retained his promotional position.

Donald Carn, a former relief security officer currently working as a corrections officer for Pierce County, was called as a rebuttal witness for the complainants. He testified that he found Bonds to be a sociable person who got along well with others during nearly two years that they worked together. Carn testified that Bonds was very involved in union issues. He did not see Bonds as critical of his co-workers, although Bonds did criticize management for the way it circumvented the retirement system by manipulating the part-time employees' work schedules. Carn testified of the proactive and reactive factions within the bargaining unit, placing Bonds in the proactive group wanting to "... be around and be seen to deter things" versus the reactive "... we'll just watch them and call in and let them [Tacoma police or Pierce County Deputy Sheriffs] handle it".

After the training of the new employees was completed, all of the relief officers were being scheduled for approximately the same number of hours.

In August of 1990, Stevens was summoned to the main administration building. Stevens asked Johnson to attend the meeting with him, as shop steward. Johnson declined, stating that management had not asked for him to be there. Paulsen, Turner, Hare, and port attorney James Mason questioned Stevens regarding a lawsuit that had been filed by Patton against Hare and the Port of Tacoma. Stevens believed the questions were inappropriate, because he was

not employed by the port when the incidents at issue in Patton's lawsuit occurred, and he felt that participating would be:

> [A] complete violation of my position as a contract negotiator to the port to divulge the type of things that they were asking me that had been brought about in light of the bargaining process.

Stevens was ordered to take a psychological examination; he refused. The port terminated his employment on October 4, 1990. His termination was grieved. The arbitrator held that the collective bargaining agreement gave the employer the unconditional right to order a psychological examination at any time. The arbitrator sustained the discharge.

Patton was discharged on July 31, 1991, for errors made in her daily log entries and statements made at her pre-termination hearing. Her discharge was also grieved. An arbitrator sustained the grievance and ordered Patton reinstated with full back pay and benefits.

Bonds was discharged on October 10, 1991, for "serious acts of misconduct, failing to safeguard port assets and involvement in theft". The arbitrator who heard Bonds' grievance found that Bonds had received confidential port documents in his mailbox at the security office,[25] and that Bonds had removed the documents from port premises. The arbitrator sustained the discharge.

By the end of the hearing, Shop Steward Johnson was again promoted to acting chief of security, and Hare was a security officer back in the bargaining unit.

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[25] The documents were from an anonymous source.

POSITIONS OF THE PARTIES

The complainants argue that the port committed unfair labor practices, because it interfered with and discriminated against them in the exercise of their rights guaranteed by Chapter 41.56 RCW. They base their claim of interference on employer conduct that can be "reasonably perceived" by employees to violate their statutory rights. The complainants claim that the charge of unlawful discrimination should be sustained, because they have demonstrated that the discrimination was a "substantial factor" in the employer's actions. Finally, the complainants assert that, as leaders of a dissident faction within the union, Bonds and Stevens were not supported by the party that ought to be taking action in a case of this sort -- the union. They contend that an award of attorney fees is appropriate here, because the unwillingness of an employer-dominated union to protect the rights of its members made it necessary for them to retain private counsel.

The employer contends that it had legitimate non-discriminatory business reasons for not promoting the complainants. It asserts that its selection process is inherently fair and non-discriminatory, and that seniority is only one of several selection criteria to be considered. The port concludes that the complainants did not demonstrate that any interview questions could reasonably be perceived as stifling the exercise of statutory rights. The port argues that it did not discriminate when it reduced relief security officer hours and hired additional relief officers, because it had fully disclosed its intent during the addendum negotiations.

DISCUSSION

Throughout its history, the Commission has sent a clear message that it will not tolerate discrimination against public employees who are exercising their statutorily protected right to engage in

union activities. Under RCW 53.18.015, the Port of Tacoma and its employees are subject to the unfair labor practice provisions of Chapter 41.56 RCW.[26]

The Test for "Discrimination" Cases

The Supreme Court of the State of Washington has stated a new analysis to be used to determine causation under two discrimination statutes which parallel RCW 41.56.040 and .140. Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) arose from an allegation of discrimination against an employee in reprisal for filing a worker's compensation claim.[27] Allison v. Housing Authority of the City of Seattle, 118 Wn.2d 79 (1991) involved allegations of discrimination

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[26] The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW includes:

> **RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE.** No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.
>
> ...
>
> **RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED.** It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; ...

[27] Title 51 RCW, dealing with industrial insurance, provides at RCW 51.48.025(1):

> No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title.

against an employee in reprisal for filing a claim under the state "law against discrimination", Chapter 49.60 RCW.[28]

Establishing the Prima Facie Case -

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

> (1) The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
>
> (2) That he or she was discriminated against; and
>
> (3) That there was a causal connection between the exercise of the legal right and the discriminatory action.[29]

The Court wrote that if the plaintiff meets this standard, a rebuttable presumption is created in favor of the employee:

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

Wilmot, page 70, emphasis in the original.

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[28] RCW 49.60.210 provides:

> It is an unfair practice for any employer, employment agency, labor union or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

[29] As to the third element of the prima facie case, the Supreme Court endorsed that, specifically for an action under Title 51 RCW, a plaintiff may establish the required case by showing that the worker filed a worker's compensation claim, that the employer had knowledge of the claim, and that the employee was discharged.

The Supreme Court agreement with this approach recognized that proof of the employer's motivation may be difficult for the employee to obtain.

The Employer's Defense -

While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions. The employer must produce relevant and admissible evidence of another motivation, but need not do so by the preponderance of evidence necessary to sustain the burden of persuasion.[30] If the employer fails to produce any evidence of other motivation for the discharge, however, the complainant will prevail.

The Complainant's Ultimate Burden -

If the employer produces evidence of a legitimate basis for the discharge, the complainant may attempt to establish that the employer's articulated reason is pretextual. It is the ultimate burden on the alleged discriminatee to show that protected activity was "a substantial motivating factor" distinguishes the Wilmot/ Allison test from the standard used under Chapter 41.56 RCW in the past.[31]

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30 Wilmot at page 70.

31 In City of Olympia, Decision 1208-A (PECB, 1982), the Commission cited Wright Line, 251 NLRB 1083 (1980), where the National Labor Relations Board had embraced the two-part test for "dual motive" discrimination cases announced by the Supreme Court of the United States in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Once a complainant showed that protected conduct was a "motivating" factor in the action taken, the burden of proof shifted to the employer to demonstrate that it would have taken the same action for reasons unrelated to the employee's protected conduct. This is characterized below as the "determinative factor" or "but for" test.

In Wilmot/Allison the Supreme Court clarified the plaintiff's burden, "in the context of the public policy mandate with which we are here concerned". The Court discussed both the "determinative factor" ("but for") test and the "substantial factor" test, under which the employee must prove that retaliation for protected activity was a substantial or important factor motivating the discharge. Although the court found neither test perfect, it concluded that the **substantial factor test is preferable**, in the context of retaliation for exercise of worker rights:

> An employer is simply not entitled to discharge employees because of their assertion of statutory rights. An employee who fires an employee in substantial part because of assertion of those statutory rights must be held accountable, else the great quid pro quo compromise of the [statute] is altered unfairly in the employer's favor. It must be kept in mind that the employer controls his or her own conduct.
>
> ... if the pursuit of [protected rights] was a significant or substantial factor in the firing decision, the employer could be liable, even if the employee's conduct otherwise did not entirely meet the employer's standards.

Wilmot, at page 71.

In discussing why it was going to diverge from the Mt. Healthy test, the Supreme Court advanced:

> [W]e find that federal law does not give such clear support for the adoption of a "but for" standard of causation. Because federal case law is not unequivocal, and is only persuasive authority, we adopt a standard that best corresponds with the language and policies contained in this state's anti-discrimination law.

Allison, at page 91.

The court noted a practical concern in Wilmot that the "but for" test worked a hardship on the complainant because:

> [T]he employee must prove the wrongful conduct, and must do so without the benefit of the employer's own knowledge of the reason for the discharge, and generally without the access to the proof which the employer has.

Wilmot at page 72.

Noting that proof of the employer's motivation may be difficult for the employee to obtain, the Supreme Court cited 1 L. Larsen, Unjust Dismissal, Sec. 6.05[5] at 6-51 (1988) for the proposition that, "Ordinarily the prima facie case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as its motive."

In Allison the Supreme Court stated additional reasons for adopting the "substantial factor" over the "but for" test. The Court first reiterated that the "but for" standard hampered enforcement of discrimination statutes, contrary to the legislative intent, and placed "too harsh a burden on the plaintiff/employee". Second, the Court noted that the enforcement of the state's anti-discrimination laws depended on employees willing to step forward and file charges in the capacity of "'a private attorney general', and vindicating a policy 'of the highest priority'". Allison at page 86. Third, the Court concluded that in a mixed-motive case where the evidence presented both legitimate and illegitimate reasons for the employer action, the "but for" standard placed an "unrealistic burden" on the employee. Allison at page 87. The Court then pointed out that the statute at issue in that case contained a provision which required "liberal construction for the accomplishment of its purposes", and that the liberal construction requirement called for a more lenient burden of proof on causation. Allison at page 88. Finally, the Court ruled that the tort standard of "substantial factor" for proving causation was a more just standard in a mixed motive case. Allison at pages 93-94. Discrimination is an intentional tort, not a tort of negligence for which the "but for" standard was developed.

As stated by the Examiner in City of Federal Way, Decision 4088 (PECB, 1993), the "substantial motivating factor" standard:

> [I]s not as high as in the past decade. The charging party must only establish that union animus was a "substantial factor" in the employer's decision to take action adverse to the employee.

With the adoption of the "substantial factor" test as the appropriate standard by which an employee must ultimately prove his or her claim, the employee may respond to the employer's articulated reasons in one of two ways:

1. By showing that the employer's reason is pretextual; or
2. By showing that, although the employer's stated reason is legitimate, the employee's pursuit of rights was nevertheless a substantial factor motivating the employer to act discriminately.[32]

Allegation 1 - Discrimination in Denial of Promotions

Prima Facie Case -

The haunting question in this case is: "What changed in nine months?" Bonds and Stevens went from the top of the promotion list in April, to the bottom of the list the following January. The one consistent answer is that they became strong, vocal and visible participants in union activities.

During this nine month period, Bonds was a member of the union bargaining team during negotiations concerning an addendum which the port strongly desired to have instituted. Bonds vocally resisted the employer's proposal at the bargaining table, to the point that the port sought out another member of the union team to have Bonds modify his behavior. When the parties could not come to an agreement on the addendum, and the employer insisted that its

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[32] Wilmot, at page 73.

"last and final" offer be presented to the bargaining unit members for a vote, Bonds authored an analysis of the offer and recommended that it be rejected. Paulsen and Hare were aware of Bond's analysis, and were unhappy with it. After the addendum was initially voted down, port officials contacted employees to change their vote.

Bonds was active and visible in assisting other bargaining unit members in pursuing grievances. Paulsen suggested to Bonds that he might be considered for one of the new job openings, if he was "a team player". Although Paulsen denied Bonds' suggestion that this meant one who did not rock the boat with union activities, Paulsen did not adequately explain what he did mean by his "team player" reference. Paulsen told Bonds that he was not promoted because he was "iconoclastic", "argumentative" and disrespectful of institutions. Given the totality of the circumstances, these are suspicious references.

Stevens had been told at one time that he would be considered for promotion, and he had a bright future prior to the first vote on the addendum. However, his fortunes plummeted after he came out against the contract addendum. During the talks between Hare and Stevens, the employer was attempting to dangle a carrot in front of Stevens -- the promise of future promotions -- to encourage him to take a leadership role in piloting other voters in a direction consistent with management objectives. Stevens failed to cooperate with that approach. The employer was aware that Stevens thought that Hare was harassing him.

Ovena's professed justification for Stevens's drop in the promotional list during these nine months is utterly damning. She cites his complaint to Turner about Hare, and his complaint about having to sign the pass-on book, but Hare was later demoted and even Ovena agreed that requiring the employees to sign the pass-on book during uncompensated break time would be in violation of the Fair Labor

Standards Act [FLSA]. In fact, the employer eventually agreed with Stevens' suggestion of how to handle the pass-on book.

Paulsen and Hare admitted that they were influenced by the applicants' actions outside of the promotional interview as well as their performance during the interview. In the cases of Bonds and Stevens, their outside actions included protected union activity, and there is ample evidence from which to infer that the port relied on attitudinal pretexts of the type found illegal in City of Olympia, supra.

The conduct and conversations of port officials in connection with Bonds and Stevens prove interference with their statutory rights. From employer statements, bargaining unit employees could reasonably perceive that Bonds and Stevens were being discriminated against because of their union activities. Additionally, by dealing directly with bargaining unit employees, the port created an environment meant to undermine the union. The port also interfered with bargaining unit employees' rights when it intervened in the union's ratification process on the addendum, and pressured employees to vote in favor of the addendum.

Prima Facie Case - The Promotion Process -
Every step of the promotion process conducted by the port in January of 1990 was rigged to weed out union activists:

The qualifications were rigged. The port changed the requirements to allow commissioning by either the city or county, thus allowing applicants who would previously have been eliminated to qualify. The port deviated from its own stated requirement for experience in industrial or military security, when it found "very qualified" an applicant with a police department background.[33]

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[33] It is comical that, in its haste to formulate a pretextual defense for its illegal action, the employer criticizes Bonds and Stevens for wanting the Security Department to be more police-like.

The composition of the interview panel was rigged. First, the port assigned Arnold Johnson to serve as a voting member on the panel, when Johnson had been Bonds' opponent in a contested election for local union president. During the election campaign, the focus was on how the local union should be operated. In King County, Decision 2955 (PECB, 1988), it was found to be unlawful for the employer to rely on reports from employees in one union faction to discipline the leader of another union faction. Second, Hare was an evaluator on the panel during the interview of Patton, an employee who had filed a sexual harassment compliant against him. Reasonable employees could interpret his inclusion on that panel as a way to seek reprisal.

The interview questions were rigged. First, the candidates were asked questions about "team building" and "team approach" to weed out "attitudinal problems". Such questions were found to be pretexts designed to conceal an unlawful search for union activists in City of Olympia, supra. Second, candidates were baited by questions regarding their "philosophy" regarding comparable worth, and the advantages and disadvantages of utilizing the union grievance process. In a blatant violation of Commission precedent, candidates were asked their impression of a specific situation on which a union grievance was pending at the time.[34]

The rating system was rigged. The process was designed to be highly subjective, with little relationship to the candidate's ability to do the job. The rating form gave 25 percent of the score to "technical skills" and divided the other 75 percent between "team building" and "initiative/motivation", but Ovena testified that she totally disregarded the technical qualifications in her ratings, and rated entirely on "team building".

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[34] In Kitsap County Fire District, Decision 3105 (PECB, 1989), the employer asked the union president his views on a matter which had been the subject of a recent grievance dispute. The Examiner found the question was unlawful interference, because it put the candidate in a "Catch 22" situation between his role as a union official and his seeking promotion in a paramilitary operation.

The employer advances that the promotional process was the same one used since 1983, but the record does not support that contention. A close examination of the questions asked shows a dramatic change in emphasis from searching for a high level of technical skill to seeking subjectively determined "attitudinally-correct" candidates. The signal was clear that it was more important to be a "team player" than to be technically competent. The port promoted candidates based on illegal and irrelevant considerations. The port so dramatically altered its questions and rating process from what had occurred just nine months previously, that the employees could reasonably perceive that the port was on a search-and-destroy mission against union activists.

The port's explanation for the change of its promotional process is quite telling: "The issue of distrusting employee relations problems and concerns were not as vital [before]".[35] In the period between the two promotional interviews, the port decided that "this was an issue that we needed to address and really put a lot of energy into", thus emphasizing "inter-personnel skills building, team building, getting along with one another, building a better climate so the distrust could dissipate." Ironically, the extreme subjectivity of the "team building" concept was demonstrated by the management witnesses, who were unable to consistently define "team building". Ovena's answers demonstrate that she wanted "team building" to reduce the number of grievances that were being filed.

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[35] During the hearing, a significant amount of time and energy was devoted to the union's attempt to have exhibits regarding the so-called "Barbier study" admitted into evidence. The employer sought to keep the exhibits out of the record, based on an asserted attorney/client privilege. In admitting the exhibit in evidence, the Examiner ruled that the employer had eroded any privilege by its circulation of the study itself, as well as by the compilation and circulation of a summary of the study. Nevertheless, the "Barbier study" proved to be of no probative value, and this decision is based on the record developed by the parties, without consideration of the "Barbier study".

Paulsen wanted team players, in order to end the schism between the part-time (union activist) and full-time (non-activist) employees in the Security Department.

The employer gives lip service to the assertion that it did not discriminate against union activists, but its officials clearly cannot separate union representation from job performance. Given their vague and inconsistent understanding of "team building", their unfailing testimony that they all gave great weight to "team building", and their many oblique references to protected union activities, the record supports an inference that the port desired to squash the union activities that had become visible since the previous promotional process. This is precisely the type of employer conduct which was proscribed in Port of Seattle, Decision 1624 (PECB, 1983).[36]

Prima Facie Case - Need for a "Quiet" Union -
Ovena made it clear that the port wanted a "cooperative" union, and the evidence indicates that was the previous relationship between the port and this union. On the witness stand, shop stewards Arnold Johnson and Bill Emerson did not appear to be anywhere near as assertive as Bonds. Johnson was extremely evasive and equivocating. His vague, uncertain, ambiguous, and non-responsive testimony consists of generalities and somersaults. He was not a credible witness.[37] Johnson's heart is clearly dedicated to management. It is telling that he had been a member of management

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[36] The examiner in that case condemned the employer practice of disregarding objective examination results in favor of subjective inquiries which blur the distinction between "an individual's actions in performance of job duties and actions of the same employee engaged in protected union activities".

[37] This is not a finding that Johnson was intentionally lying. Rather, he appeared to be intentionally trying to say nothing, or at least nothing that would get him in trouble. The latter interpretation bolsters an inference that security officers feared retaliation.

when he was chief of security, and that the management anointed him to be on its team again after Hare was demoted. Johnson even refused to represent bargaining unit members as a union steward, unless **requested by management**!

It is apparent that the port would have found Bonds and Stevens to be threatening, and would have wanted to discourage their rise within the union. The evidence shows that Bonds and Johnson had conflicts because of Johnson's laxness, to the degree that the president of the local authorized Bonds to bypass Johnson in processing grievances. Bonds took a much more aggressive posture in dealing with the addendum, and Stevens also showed more backbone than the port was accustomed to facing. Punishment of Bonds and Stevens, by refusing to promote them, would have communicated to all members of the bargaining unit that aggressive union advocacy would result in a loss of benefits and opportunities.

The Employer's Defenses -
The port claims that it cannot be found guilty of discrimination against Bonds and Stevens, because the employees who were promoted were unanimously considered the best candidates. The argument begs the question. Nine months earlier, Bonds and Stevens had been among the "best" candidates. After nine months of vociferous union advocacy, they were no longer the "best".

The employer advances that three successful candidates also signed a grievance. This does not negate a finding that the port discriminated against Bonds and Stevens, who were clearly identifiable leaders in advancing a strong pro-union approach.

The employer inaccurately characterizes Bonds as wanting only seniority to control for promotions. A study of the entire record shows that Bonds wanted performance-based criteria, not subjective standards which defy consistent application. The employer's argument that "... complainants' case is a transparent attempt to

rewrite the labor contract and to change the port's promotion decision" is valid only insofar as the complainants wanted the decisions to be free of unlawful discriminatory considerations.

The employer would explain away the plummeting drop in the ranking of Bonds and Stevens as:

> Their relatively high placement nearly one year earlier did not excuse them of their duty to perform in a satisfactory manner in 1990. There was no guarantee they would win the next promotion. Their performance deteriorated, and they did not meet the port's legitimate expectations in 1990.

The "deterioration" of their performance was their participation in protected union activities.

The employer claims it had no knowledge of how the vote went on the addendum. Such a claim is hard to believe. Hare and Paulsen were aware of Bonds analysis of the employer's offer. The first vote on the addendum was by a show of hands. Any employee with pro-management sentiments could have volunteered who voted which way,[38] or the employer could have obtained such information from any of the bargaining unit members that it interrogated and pressured to vote in the affirmative at the second vote on the addendum.

The port claims that Bonds was not promoted because he was critical of his co-workers, but the evidence does not support that claim. Donald Carn testified that Bonds got along well with the others,

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[38] As noted above, Johnson clearly had pro-management sentiments. Although the employer writes in its brief "[I]t also strains credulity to believe that the Union representative [Johnson] would discriminate against his elected constituency because of their protected activities", Johnson's behavior on the witness stand completely refutes this. It is very easy to see how Johnson could be led by management to do what the management wanted.

and that Bonds was no more critical than anyone else. This is analogous to the situation in Port of Seattle, supra, where the record established "that criticism of fellow employees or supervisors and making derogatory remarks are common to the department". No evaluations were submitted; there is no documentation that Bonds acted negatively to others. Although the port criticizes Bonds for "putting down" fellow employees, its own questions asked him to address a number of scenarios involving poor performance by others.

The port gives great weight to its contention that Bonds and Stevens revealed a "bad attitude" toward the position during the interview, and that they thought the position was undesirable. This is a distortion of the statements made during the interviews. The employer's argument on this point is disingenuous, in that it was apparent that Bonds and Stevens were referring to the events regarding the negotiations over the addendum. Their statements that the position was undesirable was a reflection of what they had wanted to achieve in bargaining, NOT a refusal to seek the promotion. When Ovena explored this during the promotional interview, she recounted, "Some people have stated that this job was of less worth or maybe not as nice as or desirable as the patrol position." Bonds responded that the port had said it was worth less than the patrol position, by establishing the pay rate at 80 percent of the patrol rate.

Any deficiency in Stevens' attitude during the interview can be directly attributed to unlawful discrimination which had already occurred. The port's contention that Stevens was not selected because of "insubordination" regarding the pass-on book and the Zone 1 officer procedure is incriminating to the employer. Both edicts were eventually withdrawn by the employer. The employer's own witness acknowledged that the procedure the port was attempting to impose regarding the pass-on book was of questionable legality under the FLSA, and the employer ultimately adopted Stevens' suggestion concerning the pass-on book.

Stevens' refusal to sign a release for information about his driving record was based on advice of his legal counsel, and there is a substantial question about the relevancy of the driving record of an existing employee who is applying for a job that did not regularly involve driving. Stevens's refusal to answer the question about the mission of the department is a reflection of his frustration with the earlier discrimination against him. The port cannot rely solely on what occurred in the interview, when it was so tainted by previous incidents of discrimination.

Application of the Substantial Motivating Factor Test -
The record indicates that the employer did not produce evidence of a legitimate basis for the denial of the complainants' promotions. The employer's articulated reasons were pretextual.

However, assuming arguendo, that the employer had advanced some legitimate reasons for its actions, the complainants clearly proved by a preponderance of the evidence, as outlined above, that their union activities were a substantial or important factor motivating the employer's action.

Allegation 2 - Discrimination in Regard to Work Opportunities

The Hiring of Additional Personnel -
The employer's hiring of extra personnel in March of 1990 has been cited by the complainants as another form of discrimination against them, but the evidence does not sustain that claim. The employer clearly communicated its legitimate concerns, about both overtime costs and obtaining a better call-in response, during the bargaining of the addendum. This allegation must be dismissed.

Training of New Personnel -
Bonds gave unrefuted testimony regarding the employer's past practice regarding the training of new Security Department employees. One purpose of creating the full time promotional

positions was to allow the employer to hire more relief officers because it was experiencing substantial overtime costs and scheduling difficulties. By expanding the pool of relief officers, the port could then utilize those officers as truly "relief" workers. Until the pool was expanded, though, the port should have been continuing to work the relief positions at full-time -- or near full-time -- hours. The practice, as described, would have allowed Bonds and Stevens more work opportunities than they actually received, even if they had been promoted. Given the thinly veiled hunt by the port against union activists, it is credible that the employer was purposely and discriminatorily limiting the complainants' hours during the training period for the newly hired relief security officers.

The employer did not deny calling in regular patrol officers for overtime, and did not justify its deviation from past practice. An unfair labor practice violation must be found on this allegation.

Refusal of Overtime Opportunities -
The record regarding alleged employer discrimination by refusing to call out complainant Stevens for "last minute notice" coverage for any absent security officer on various dates in May and July of 1990 is too vague to sustain a violation.

Retaliatory Scheduling of Bargaining Sessions -
The complainants did not submit proof to establish, by a preponderance of evidence, that bargaining sessions were scheduled by the employer in a retaliatory manner, to deny them work opportunities.

Allegation 3 - Interference by Interrogation of Employees

The port unlawfully interfered with employee's protected rights in two ways. First, when port officials put pressure on the complainants and other bargaining unit members to change their vote on the addendum. Second, when the questions asked by its officials during

the promotional interviews in January of 1990 placed applicants in conflict with their statutory rights regarding pending grievances or union privileges. The complaints demonstrated that they reasonably perceived this questioning was directed toward stifling the exercise of their statutory rights.

Conclusion

The chilling effect of the employer's discrimination on other employees is easy to see. Several employees in the bargaining unit informed Bonds that he was not selected for promotion because of his union activities. Even though those employees did not have access to the employer's decision making process, their interpretation of the action is very telltale. Bonds and Stevens might be contentious individuals, but they still have statutory rights. The message about union activism that invades the bargaining unit after discrimination occurs must be reversed.

The employer's conduct could create the perception among reasonable employees, and did create such a perception for Bonds and Stevens, that the complainants were not being promoted because of their lawful union activities.

REMEDY

The complainants are entitled to a full "make whole" remedy tailored to their particular circumstances:

Promotion Wages - The complainants are to be paid the difference between what they were paid for the hours they were scheduled, and the amount of money they would have earned had they worked full-time hours at the hourly rate for the promotional position. The "back pay period" is to be calculated in each case starting from the time the first bargaining unit employee who was promoted from

the January interviews worked in the new position, and continuing until the time of each complainant's termination.

Since the "relief" jobs that Bonds and Stevens held with the port assumed that employees could have other jobs, the offset of other wages referred to in WAC 391-45-410 will not be automatic. If either complainant had other employment prior to the time he was discriminatorily denied the promotion at the port, and he can prove he would have been be able to maintain that outside income while working in the promotional position, no offset will be required.

The complainants are to each receive payment for each overtime hour paid to regular patrol officers in July 1990, and any other time that work opportunities went to other bargaining unit employees while the employees who were hired as a result of the January 1990 promotions were being trained.

Retirement and Contracted Benefits - Bonds and Stevens are entitled to payment in cash for the amount the employer would have contributed for their retirement benefits, based on their employment in the promotional position.

If the complainants can show that they would have received any other benefit under the contract by becoming permanent full-time employees (e.g., vacation pay, sick leave cash out, etc.), the employer shall make such payments to Bonds and Stevens.

Insurance Coverage - The main fruit of the "promotion" sought by Bonds and Stevens was the insurance benefits which accompanied the positions they sought. Fashioning a remedy for lost insurance benefits is a difficult proposition, because insurance coverage cannot be put in place retroactively. Where an employer unlawfully reduced the insurance coverage of already-covered employees in Spokane County, Decision 2167-A (PECB, 1985), the Commission ruled that the employer itself was liable "out-of-pocket" for the health

care costs incurred by the affected employees.[39] This case distinguished factually from Spokane, however, by the fact that the employees never were given insurance coverage under employer-sponsored group plans. Thus, these discriminatees were left with the Hobson's choice of buying insurance at "individual plan" rates, or making health care decisions from an "out-of-pocket" base.[40]

The complainants will thus be permitted to choose one of three alternatives:

1. If either complainant paid for insurance coverage of the type provided by the employer to the promoted employees, the employee may choose to have the employer reimburse him for the cost of those premiums during the period for which back pay is or would be payable.

2. If either complainant incurred any expenses during the back pay period which would have been covered by the insurance plan offered to the promoted employees, the employee can choose to have the employer reimburse them "out-of-pocket" for those medical expenses.

3. The complainant(s) may elect to have the employer make a cash payment to the complainant of an amount equal to the premiums paid by the employer during the backpay period for insurance benefits for promoted employees.

The rule does not contemplate, and the Examiner does not order, any tolling of the interest liability for any period of time. Although there were several continuances of the hearing on these complain-

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39 That such an open-ended liability could be an extreme financial burden on an employer should give employers pause for concern before discontinuing employee insurance coverage or benefits.

40 As is often the case, the hearing on this unfair labor practice case was limited to the existence of a violation, and the record made to this point does not contain detailed evidence concerning any insurance premiums paid or health care costs incurred by Bonds or Stevens.

ants, as can be seen from the hearing dates listed in the beginning of this decision, the employer requested some of those continuances and the unavailability of employer witnesses caused some of the delays.

Attorney fees - As an extraordinary remedy in selected cases, the Commission has ordered payment of the attorney fees incurred by a successful complainant in an unfair labor practice case. See, Public Utility District 1 of Clark County, Decision 3815-A (PECB, 1992); Spokane County Fire District 9, Decision 3773-A (PECB, 1992). The conduct of the Port of Tacoma in this case is beyond the pale of garden-variety unfair labor practices, to the degree that it is unlikely that a conventional remedy (e.g., backpay and posting of notices) will be sufficient to restore an environment in which employee rights can be freely exercised. A remedy ordered here must also thaw the chilling effects that the port's conduct has had on bargaining unit members, who have incurred substantial legal costs to pursue claims that should have been litigated by what has become a "cooperative" union at the hands of port officials. To deter future misconduct by the port, and to ensure employees that the Commission protects their statutory rights, the extraordinary remedy of attorney fees is appropriate in these cases.

Interest - Make-whole calculations are set out in WAC 391-45-410. WAC 391-45-410(3) states:

> Money amounts due shall be subject to interest at the rate which would accrue on a civil judgment of the Washington state courts, from the date of the violation to the date of payment.

Therefore, the employer is required to pay interest on all money amounts, including the attorney fees.

FINDINGS OF FACT

1. The Port of Tacoma is a public employer within the meaning of RCW 41.56.030(1). At times pertinent hereto Donald Meyer was deputy executive director for finance and development. Lou Paulsen was the director of risk management. Lorna Ovena was director of human resources. Ray Turner was the equal employment opportunity manager. Don Hare was chief of security, later replaced by Arnold Johnson.

2. At times pertinent hereto, Arthur Bonds and E. A. Stevens were employees of the Port of Tacoma. They were in a bargaining unit represented by the International Longshoremen's and Warehousemen's Union, Local 28. In 1990, the bargaining unit consisted of three classifications of employees: Security officer; part-time flexible security officer; and relief security officer. The collective bargaining agreement was in effect for the duration of April 1, 1987 through March 31, 1990. From March 1989 through February 1990, Bonds was assistant shop steward.

3. In April 1989, the port opened applications for a flexible security officer position. The interview questions were designed to determine candidates' knowledge of technical skill areas. Out of seven applicants, Bonds placed second and Stevens placed third in their overall interview/application scores. The top scoring candidate was given the position.

4. As assistant shop stewart, Bonds filed more grievances than had ever been initiated in the parties' history. Another bargaining unit member asked Bonds to represent her in her grievance meeting with management instead of then-Shop Steward Bill Emerson.

5. During 1989, a schism developed in the bargaining unit between employees who wanted to be proactive in security work (generally the relief officers) and employees who wanted to be reactive in security work (generally the full-time security officers). Employer officials knew of this schism.

6. In July or August 1989, Paulsen had a "drive around" meeting in a port patrol vehicle with Bonds. Paulsen told Bonds that the port was looking for team players to fill some new full-time positions that would be coming up.

7. In August 1989, the port invited the union to bargain an addendum to the collective bargaining agreement to establish the wages, hours and working conditions for a new security job classification of "entry control officer". The management bargaining team consisted of Meyer, Paulsen and Ovena. The union bargaining team was Emerson and Bonds. During negotiations, Bonds wrote a memorandum which summarized the union's position for the management team; he did most of the talking for the union team; he submitted corrections to bargaining minutes recorded by the management team. At one point, away from the bargaining table, Meyer asked Emerson to temper down Bonds. The parties did not reach agreement on the addendum. The management team asked that the addendum, as proposed by the employer, be presented to the membership for ratification, nevertheless.

8. During the negotiations for the addendum, Stevens told Hare that he opposed the addendum.

9. In presenting the addendum to the membership, Bonds wrote an analysis that was distributed to all bargaining unit members present. It was also given to Paulsen and other management personnel. The analysis recommended that the addendum be rejected.

10. The ratification meeting for the addendum was held October 18, 1989. Stevens made the motion to reject the addendum. The addendum was rejected. The vote was conducted by a "show of hands" of bargaining unit members present.

11. Within days of the defeat of the addendum, Paulsen and Hare met with Bonds and told him that they were not happy with his analysis and that they would have rather seen Bonds vote for the addendum.

12. Within days of the defeat of the addendum, Hare met with Stevens and told him that he was not conducting himself to meet Hare's expectations specifically citing the role that Stevens had in opposing the addendum. Hare told Stevens that he should use his influence with others to have a more compatible position with management.

13. Stevens met with Turner to express concerns that Hare was pressuring him. Paulsen learned of the meeting.

14. Between October 18 and 30, 1989, the port enhanced its offer concerning the addendum. There was an intense debate in the bargaining unit. Emerson and Johnson spoke in favor of the addendum. Bonds pushed to reject it and negotiate for an overall better situation when the entire contract was to be reopened in a few months.

15. At the end of October 1989, a vote on the second addendum was conducted by secret ballot. The addendum was ratified by a nine to seven vote.

16. During the autumn of 1989, Bonds and Johnson were opposing candidates for shop steward. Johnson was elected; Bonds remained assistant shop steward. Bonds found that Johnson was retyping and weakening the wording of some grievances that

Bonds filed. Bonds contacted the president of the local, Frank Griffis. Griffis authorized Bonds to file a grievance under his authority and by-pass Johnson.

17. Stevens filed charges against Johnson with the local in October or November 1989. Johnson knew that Bonds had drafted the charges.

18. During early 1990, negotiations began on the replacement for the expiring collective bargaining agreement. Johnson, Bonds and Stevens served on the union bargaining team. Johnson would undercut Bonds and Stevens during the bargaining.

19. On January 16, 1990, Bonds, Stevens and other relief security officers filed two grievances. Hare told Bonds the grievance filing was ill-timed.

20. On January 22 and 23, 1990, interviews were held for the promotional positions created by the addendum. The interview team consisted of Paulsen, Ovena, Hare, and Johnson. Candidates were asked about their attitudes concerning team building and about a matter on which there was a pending grievance. Bonds and Stevens were both applicants for the promotions. At the completion of the interviews, out of seven applicants, they were ranked sixth and seventh respectively.

21. After the four new full-time positions were filled, the port hired four new part-time relief security officers.

22. Previous to the 1990 hiring of the part-time security officers, a new part-time employee would be put on a two-month training schedule working with a full-time security officer and the port would continue to use incumbent relief security officers. After January 1990, the port brought in regular security officers to work overtime for the other relief shifts

that needed to be covered while the new part-time employees were being trained.

23. The respondent employer had knowledge of the complainants' union activities.

24. The complainants' union activities were a substantial factor in the employer's decision to deny the complainants promotions.

CONCLUSIONS OF LAW

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

2. By considering his union activities as a substantial factor in the denial of a promotion for complainant Bonds, the Port of Tacoma has interfered with, restrained and coerced Arthur Bonds in the exercise of his rights guaranteed by RCW 41.56-.040 and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

3. By considering his union activities as a substantial factor in the denial of a promotion for complainant Stevens, the Port of Tacoma has interfered with, restrained and coerced E. A. Stevens in the exercise of his rights guaranteed by RCW 41.56.040 and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

4. By considering his union activities as a substantial factor in the denial of work opportunities for complainant Bonds during 1990, when newly hired relief security officers were being trained, the Port of Tacoma has interfered with, restrained

and coerced Arthur Bonds in the exercise of his rights guaranteed by RCW 41.56.040 and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

5. By considering his union activities as a substantial factor in the denial of work opportunities for complainant Stevens during 1990, when newly hired relief security officers were being trained, the respondent Port of Tacoma has interfered with, restrained and coerced E. A. Stevens in the exercise of his rights guaranteed by RCW 41.56.040 and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

6. By interrogating complainant Bonds concerning his union activities, the respondent Port of Tacoma has interfered with, restrained and coerced Arthur Bonds in the exercise of his rights guaranteed by RCW 41.56.040 and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

7. By interrogating complainant Stevens concerning his union activities, the respondent Port of Tacoma has interfered with, restrained and coerced E. A. Stevens in the exercise of his rights guaranteed by RCW 41.56.040 and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

8. Since the conduct of the respondent Port of Tacoma in discriminating against the complainants because of their union activities is so egregious, and since the discriminatory conduct would cause reasonable employees of the port to believe they would be discriminated against if they exercised their rights guaranteed in Chapter 41.56 RCW, the imposition of a make-whole remedy and an extraordinary remedy is appropriate.

ORDER

The Port of Tacoma, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Discriminatorily denying promotions to an employee because of the employee's union activities.

   b. Discriminatorily denying work opportunities to an employee because of the employee's union activities.

   c. Unlawfully interrogating employees concerning their union activities.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Make each complainant whole by paying the salary he was denied by not being promoted to full-time work hours.

   b. Make each complainant whole by paying cash for the amount contributed for retirement benefits for promoted employees, for the time period the first bargaining unit employee who was promoted from the January interviews worked in the new position until the time each complainant was terminated.

   c. Make each complainant whole by paying cash for any other contract benefit the complainants would have received under the collective bargaining agreement as permanent, full-time employees in the bargaining unit, for the time period the first bargaining unit employee who was

promoted from the January interviews worked in the new position until the time each complainant was terminated.

d. Make each complainant whole by allowing him to elect from three alternatives regarding health insurance compensation: First, if either complainant incurred any medical expenses which would have been covered by the insurance that the promoted employees were provided, the employer shall pay for the medical expenses. Or second, if either complainant paid for insurance coverage on his own, the employer shall reimburse the complainant for the cost of the premiums for the time period from the time the first bargaining unit employee who was promoted from the January interviews worked in the new position until the time of the complainant's termination. Or third, either complainant may elect to have the employer pay the complainant cash for the amount contributed for health insurance benefits for promoted employees for the time period from the time the first bargaining unit employee who was promoted from the January interviews worked in the new position until the time of each complainant's termination.

e. Make each complainant whole by paying for each overtime hour paid to regular patrol officers in July 1990, and any other time that work opportunities went to other bargaining unit employees while the employees who were hired as a result of the January 1990 promotions were being trained.

f. Reimburse the complainants for reasonable attorney's fees and other costs associated with the prosecution of this unfair labor practice case, upon presentation of a sworn and itemized statement of such costs and fees.

g. Pay interest on all money amounts due.

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

i. Notify the complainants, individually, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainants with a signed copy of the notice required by the preceding paragraph.

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

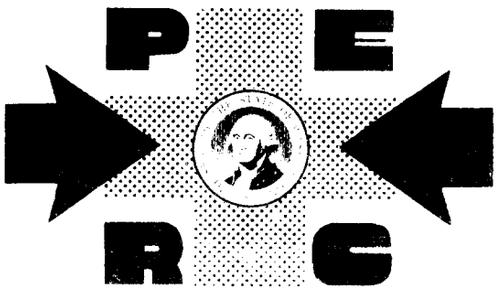
ENTERED at Olympia, Washington, on the 8th day of March, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina I. Boedecker

KATRINA I. BOEDECKER, Examiner

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



PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

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

WE WILL NOT deny promotions to an employee because he or she is active in union affairs.

WE WILL NOT schedule fewer hours for an employee to work because he or she is active in union affairs.

WE WILL NOT ask employees questions about their union activities.

WE WILL NOT discriminate against any employee because of his or her union activities.

WE WILL pay Arthur Bonds and E. A. Stevens the amount of money, with interest, they would have earned if they had worked a full time schedule.

WE WILL pay Arthur Bonds and E. A. Stevens the amount of money, with interest, equal to each overtime hour paid to regular patrol officers in July of 1990, and any other time that work opportunities went to other bargaining unit employees while the employees who were hired as a result of the January 1990 promotions were being trained.

WE WILL pay Arthur Bonds and E. A. Stevens the amount of money, with interest, equal to the amount we paid for retirement contributions for other employees who were promoted.

WE WILL compensate Arthur Bonds and E. A. Stevens for health insurance benefits.

WE WILL reimburse Arthur Bonds and E. A. Stevens for their attorney's fees and other costs, with interest, associated with the prosecution of their unfair labor practice cases.

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

DATED: _____

PORT OF TACOMA

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.