STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ARTHUR D. BONDS,	)	
	)	
Complainant,	)	CASE 8702-U-90-1898
	)	
vs.	)	DECISION 4626-A - PECB
	)	
PORT OF TACOMA,	)	
	)	
Respondent.	)	
	)	
E. A. STEVENS,	)	
	)	
Complainant,	)	CASE 8812-U-90-1931
	)	
vs.	)	DECISION 4627-A - PECB
	)	
PORT OF TACOMA,	)	
	)	
Respondent.	)	DECISION OF COMMISSION
	)	

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.

This matter comes before the Commission on a petition for review filed by the Port of Tacoma, seeking to overturn a decision issued by Examiner Katrina I. Boedecker.[1]

BACKGROUND

The Port of Tacoma (employer) and the International Longshoremen's and Warehousemen's Union, Local 28 (union) had a collective

[1] Port of Tacoma, Decision 4626, 4627 (PECB, 1994).

bargaining agreement in effect from April 1, 1987 to March 31, 1990, covering a bargaining unit of security personnel, excluding the chief of security. The agreement covered three classifications of employees: (1) Regular security officers, who were assigned fixed shifts, paid at a monthly rate, and entitled to benefits; (2) flexible security officers, who were not assigned a regular shift and were paid at an hourly rate, but were still entitled to benefits; and (3) relief security officers, who were paid at an hourly rate when called in, and were not entitled to benefits.[2]

In mid-1987, at the request of a large tenant, the employer began providing security coverage at the North Intermodal Yard, a rail facility straddled by marine terminals on both sides. The employer assigned security officers to that location around-the-clock. The use of relief security officers increased to the point they were working as many hours as the regular security officers or more, but without the benefits. When it began the increased coverage, the employer was not sure how long this need would continue. In 1988, the employer made a commitment to the union that the number of relief officers would not exceed the number of full-time employees.

By May of 1989, the employer decided to continue providing security at the North Intermodal Yard, and it consummated a lease agreement with its tenant. By memo to his superior dated July 2, 1989, Paulsen proposed a new staffing plan that would increase the number of security officers and reduce overtime costs, as well as allow a career progression for security officers. The recommendation included a new "entry control officer" classification,[3] and Paulsen asked that the contract between the union and employer be re-opened

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[2] The regular officers were being paid a monthly salary of $2616, which equates to an hourly rate of $15.09. The pay rate for the flexible officers and relief officers at that time was also $15.09 per hour.

[3] Security officers had previously been used for both patrol on the employer's premises and at the entry gates.

to negotiate. Meyer presented the recommendation to the port commission in early August of 1989, and gained approval to negotiate its implementation with the union. This dispute arose out of the implementation of that recommendation.

The Complainants -

Arthur Bonds and E.A. Stevens were both working for the employer as relief security officers in 1989. Bonds had been so employed since 1981; Stevens was hired in 1988.

When Bonds and Stevens applied for a vacant flexible security officer position in April of 1989, Bonds rated second (with an average score of 89), while Stevens ranked third (with an average score of 88) out of seven candidates.[4] The employer chose the candidate with the highest score. Although there is evidence that the hiring decision was based in part on Bonds' inappropriate response to a technical question, Bonds was told he was highly competent and that he was not hired because the chosen individual had slightly more seniority.

Negotiations on the Addendum -

Negotiations on a contract addendum began in August of 1989. The union's bargaining team included Shop Steward Bill Emerson and Bonds, who was then assistant shop steward. The employer's team consisted of Ovena, Paulsen, and Meyer, with Hare brought in as necessary. Several issues were framed:

* The employer proposed four new positions that would be stationed at the entry gates, and proposed a pay rate which was approximately 70% of the wage rate of the security officers. The

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[4] On that occasion, the employer's interview team consisted of Louis Paulsen, who was its director of risk management; Donald Meyer, the deputy executive director for finance and development; Don Hare, the chief of security; and Lorna Ovena, the director of human resources. The interview process consisted of technical and situational questions.

union wanted five people hired, and argued for the same rate of pay that was received by the security officers.

* Bonds urged that seniority be the primary consideration in hiring for the new positions. The employer opposed making seniority the primary consideration.

* The union proposed that a union representative attend the interviews. Despite objections from the union, the management wanted to give any union representative on the interview panel full authority to question, grade and vote on applicants.

* The employer initially proposed the title "entry control officer", but later acceded to the union's request that the new classification be titled "provisional security officer".

To alleviate confusion that had arisen, the employer explained the selection process for the new positions at a union meeting held on September 25, 1989. The employer later allowed paid time off for employees to attend another session on October 11, 1989. The employer explained that its focus in the selection process was on "team building" and the need to select people who could get along with each other.

The employer requested that its offer of four positions paid at the reduced rate be presented to the union membership for a vote. Bonds led a faction within the union which wanted to defeat the addendum. He opposed the reduction in wages, and he thought it would be best for the membership to wait until negotiations for a successor contract early in the next year, when more trade-offs could be made. Bonds wrote a nine-page analysis of the employer's proposal, with the aim of trying to convince his fellow bargaining unit members to vote against the addendum. Bonds presented his analysis at the union meeting on October 18, 1989, and emphasized that the union would be in a stronger position to negotiate the new classification when the entire contract was being bargained. Stevens made a motion to reject the addendum. The vote was

conducted by a show of hands, and the addendum was rejected by a majority of the bargaining unit members present.

After the defeat of the addendum, Paulsen and Hare told Bonds they were not happy with the analysis he had written, and that they would have rather seen him vote in favor of the addendum. Hare told Stevens that he was unhappy with Stevens' opposition to the addendum, and that Stevens should work to influence others in favor of the management position. During this same period, the employer contacted other employees, and attempted to influence them to change their votes.

The Pass-on Book -
In August, and then again at least twice in October of 1989, the security officers were reminded to sign the "pass-on book", which Hare used to communicate information to the security officers. Stevens objected to the requirement, and refused to follow it.

A note was placed in Stevens' mail slot on October 26, 1989, questioning his failure to sign the pass-on book. On October 30, 1989, Stevens was again told to comply with the order. Stevens did not comply.

Resubmission of the Addendum -
In October of 1989, the employer made a new offer regarding the provisional security officer classification. This offer included creation of a clear career progression for security officers, and an increase of the employer's payments covering health benefits if Group Health was chosen as the only provider. The pay rate proposed by the employer for the provisional security officer class was improved to 80% of the pay rate of the security officers.

Bonds again pushed to reject the addendum, while employees Emerson and Johnson spoke in favor of the addendum as proposed by the

employer. A second vote was conducted by secret ballot near the end of October, and that vote ratified the addendum.

Ongoing Disputes and Grievances -
Stevens signed the pass-on book only part of the time, and was given a series of counseling sessions by the employer. When Stevens again failed to sign the pass-on book for January 2 and January 3, 1990, he was directed to provide a written explanation by January 15, 1990. He also failed to respond to that directive.

Bonds, Stevens, and other employees signed grievances that were filed on January 16, 1990. One grievance alleged the employer unilaterally designated the Zone 1 officer as a supervisor in the absence of the chief of security, notwithstanding that the collective bargaining agreement did not have a supervisory classification. The other grievance alleged the relief officers were being worked out of their classification, and that the employer was manipulating the hours of relief officers to avoid placement of their positions in the state retirement system.

Filling the New Positions -
Interviews for the four provisional security officer positions were held about January 22 and 23, 1990. The interview panel consisted of Ovena, Paulsen, Hare, and Johnson. Interviewees were asked to respond to questions about general workplace operations, specific situations, driving qualifications, team building, subjects of pending grievances, and union privileges.

A rating sheet given to each interviewer for use as a guideline allotted 50 points to team building, 25 points to technical skills, and 25 points to initiative and motivation. Interviewers also used their general knowledge of the candidates through their experience at the workplace. Bonds scored 60 and was rated sixth out of seven candidates; Stevens scored 50, and was rated seventh. The new provisional positions were give to other candidates.

After the new jobs were filled, the employer hired four new employees to supplement the relief officer workforce, and reduced the hours of other relief officers, including Bonds and Stevens.

Written Warning to Stevens -
On January 23, 1990, Stevens was issued a warning letter concerning his failure to follow instructions and insubordination. This was replaced, on January 26, 1990, with a performance counseling statement which documented a series of events between August and January in which Stevens refused to initial the "pass-on book".

Employer Characterizations of Bonds -
On March 30, 1990, Bonds met with Paulsen regarding why he was not selected for promotion. Paulsen advised Bonds that since all candidates were technically equal, the employer based its decision on the ability to work in harmony as part of a team. Paulsen also told Bonds that he was "iconoclastic" and "argumentative".

The Unfair Labor Practice Proceedings -
Bonds and Stevens filed unfair labor practices charges on July 20, 1990, alleging the employer had violated RCW 41.56.040 and 41.56.140, by refusing to hire them into the new positions in retaliation for their free exercise of statutorily protected rights. In a preliminary ruling letter issued pursuant to WAC 391-45-110, Executive Director Marvin L. Schurke wrote:

> [T]he allegations of the complaints concern:
>
> Discrimination in regards to promotion ... discrimination in regards to work opportunities ..., as well as interference with protected rights by interrogation of employees concerning their union activities.

Examiner Katrina Boedecker was designated to conduct further proceedings in the matters, and she held a hearing on February 4 and 5, March 12 and 13, and November 18, 19, and 20, 1992. In a

decision issued March 8, 1994, the Examiner found both "interference" and "discrimination" violations, and ordered that Bonds and Stevens be made whole for the pay and benefits they would have earned in the promotional positions, as well as for lost work opportunities when their hours were reduced. Relying in part on the employer's interrogation of Bonds and Stevens concerning their union activities, the Examiner ruled that the employer's conduct was sufficiently "egregious" to order that the employer pay the attorney fees incurred by Bonds and Stevens. The Examiner also suggested that those attorney fees would have been incurred by the union, but for its inordinately close relationship with the employer. The employer filed a petition for review.

POSITIONS OF THE PARTIES

The employer seeks review on five general grounds: (1) That the Examiner violated her own ruling bifurcating the liability and remedy questions; (2) that the Examiner's award of attorney fees was based on a domination finding, in violation of her own ruling excluding a domination theory from the case; (3) that the Examiner made prejudicial and erroneous evidentiary rulings and improperly relied on hearsay to draw her conclusions; (4) that the Examiner disregarded the Executive Director's ruling that events predating the 6-month statute of limitations could not give rise to statutory violations; and (5) that the Examiner demonstrated extra-ordinary bias in disregarding the employer's entire defense. The employer contends that the Examiner applied the wrong test to determine the discrimination allegations, but that it did not discriminate against the complainants under either the test it supports or the "substantial motivating factor" test used by the Examiner. It claims the Examiner's findings are unsupported in the record, and asks the Commission to reverse the Examiner's findings of fact, conclusions of law and order.

In their cross-petition for review, Bonds and Stevens agree with the Examiner's application of the "substantial motivating factor" test. They contend the record supports the ruling that discrimination was a substantial factor in their non-selection, and that the reasons given by management for not promoting them were pretextual. They contend that substantial evidence exists that the employer interfered with their statutory rights, and that the Examiner properly awarded attorney fees, given what they call the deliberate and serious nature of the employer's violations. The complainants also argue that their pretrial motion for default should have been granted.

In opposition to the cross-petition for review, the employer argues that the complainants were not entitled to a default judgment, and that the Examiner properly denied the motion for default. The employer also argues that the brief in support of the cross-petition for review should be stricken as untimely filed.

DISCUSSION

The Motion for Default

Bonds and Stevens filed their unfair labor practice complaints on July 20, 1990. The Examiner issued notices of hearing on June 19, 1991, setting July 7, 1991 as the date for answering Bonds' complaint, and setting July 12, 1991 as the date for answering Stevens' complaint. The employer did not file its answer until July 23, 1991.

On July 30, 1991, the complainants moved for a default judgment, on the basis that the employer failed to file a timely answer. WAC 391-45-190 provides:

> WAC 391-45-190 ANSWER--FILING AND SERVICE. The respondent(s) shall, on or before the date specified therefor in the notice of hearing, file with the examiner the original and three copies of its answer to the complaint, and shall serve a copy on the complainant.

The effects of a failure to answer are set forth in WAC 391-45-210, which includes:

> WAC 391-45-210 ANSWER--CONTENTS AND EFFECT OF FAILURE TO ANSWER. ... The failure of a respondent to file an answer ... shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of the respondent of a hearing as to the facts so admitted.

Commission precedents make it clear that a failure to file a timely answer constitutes an admission, except where default is excused for good cause. See, City of Benton City, Decision 436-A (PECB, 1978), affirmed, WPERR CD-343 (Benton County Superior Court, 1979); Battle Ground School District, Decision 2449-A (PECB, 1986).

The employer argued that Bonds waived the answer filing deadline on July 16, 1991. It contended that Bonds' agreement to reschedule the hearing in these matters, made on the same date, further demonstrated acquiescence in waiving the answer filing deadline. Consistent with those contentions, the cover letter transmitting the employer's answer indicated that Bonds had been contacted and that Bonds, representing both himself and Stevens, had no problem with the timing of the employer's answers. The employer also argued the complainants could not demonstrate any prejudice arising from the late answer, whereas the employer would be harmed if it were denied an opportunity to present its case on liability.

After receiving argument from counsel on both sides during a telephonic prehearing conference held August 20, 1991, Examiner Boedecker accepted the employer's answer. She ruled that the respondent had made a showing of good cause for the late filing.

We affirm the Examiner's ruling on this default motion. Our rules include the following:

> WAC 391-08-180 SERVICE OF PROCESS--CONTINUANCES. (1) Postponements, continuances, extensions of time, and adjournments may be ordered by the presiding officer on his or her own motion or may be granted on timely request of any party, with notice to all other parties, showing good and sufficient cause therefor.
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> (2) A request for a continuance made prior to the hearing date may be oral or in writing and shall state that the party seeking the continuance has notified all other parties of the request and that either all other parties agree to the continuance or that all parties do not agree to the continuance. If all parties do not agree to the continuance, the presiding officer shall promptly schedule a prehearing conference to receive argument and to rule on the request.

Both Bonds and Stevens were sent copies of the letter in which the employer transmitted its answer and asserted that Bonds had no problem with the timing of the employer's answer. Having received that letter, and having taken no timely action to correct any misstatement in that letter, the complainants cannot now complain.

Even if the default motion is taken as an attempt to controvert the concurrence claimed by the employer in its cover letter, the presiding officer had the authority under WAC 391-08-003 to waive any requirement of the rules, in the absence of a showing of prejudice:

> WAC 391-08-003 POLICY--CONSTRUCTION--WAIVER. The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency, and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver.

Bonds and Stevens have not offered any evidence of prejudice on which we could base a default. Even though it was late in relation to the date originally set, the answer was filed months in advance of the first day of hearing in this case. Where there was no evidence of prejudice to complainants, it was not an abuse of discretion for the Examiner to excuse the employer's late answer.

Timeliness of Complainant's Appeal Brief

The employer notes that the Executive Director set the deadline for briefs in support of the petition for review and cross-petition for review as May 9, 1994, and that the complainants did not file their brief in support of their cross-petition for review until May 23, 1994. The employer argues that the brief was two weeks late, and should be stricken as untimely.

As noted above, WAC 391-08-003 requires a liberal construction of the rules and allows us to waive requirements, unless a party shows prejudice by the waiver. We see no evidence that the employer would be prejudiced by such a wavier in this case. Our decisions must be based on the full record established at the hearing, not only on the parties' briefs. The brief in support of the cross-petition for review will not be stricken.

Admission of the Personnel Practices Audit

The employer asserts that the Examiner erred in admitting a "personnel practices audit" report dated December 1, 1989, which was offered in evidence as Exhibit 34. In her decision, the Examiner indicated the audit report had been given no weight in reaching her conclusions. We nevertheless choose to address the issue because: (1) We view the matter as one of some importance, and (2) whether the document becomes a public record as an admitted exhibit depends on our ruling. We conclude the document should have been excluded on the basis of attorney-client privilege.

Factual Background -

At the employer's request, attorney Margaret Barbier reviewed the employer's personnel practices in preparation for expected employment litigation, and prepared a report which included confidential and privileged information provided by the employer. Circulation of the report was limited to the following members of the employer's executive staff:

Donald Meyer (deputy director for finance and development)
Chuck Doan (deputy director for trade and operations)
Greg Nelson (senior director of finance and administration)
John Bush (senior director of operations and maintenance)
Lorna Ovena (director of human resources)
Ray Turner (equal employment opportunities manager)

The document was given to the employer's general counsel, James Mason, for safekeeping. No additional copies were to be made, and the document was to be kept under lock and key or in personal briefcases.

When the complainants sought to have a copy of the report admitted in evidence in this case, the employer vigorously objected on the basis of the attorney-client privilege. The employer argued that the document was, by its nature, privileged and confidential, and that it was prepared by an attorney in anticipation of litigation.

The complainants argued that Bonds had received the offered copy from an unknown source.[5]

The Examiner initially admitted the report based on several factors: (1) That the impeachment purpose for which the complainants were offering the document was a relevant basis for its admission; (2) that RCW 34.05.452 and WAC 10-08-140 show a preference for receiving evidence of probative value into the record; and (3) that the burden to establish a privilege under RCW 34.05.452 is on the party asserting the privilege, and the employer did not show enough to exclude the document on the basis of privilege. In a supplemental ruling, the Examiner added that the privilege had been destroyed by: (4) the nature of the internal distribution of the audit report; (5) the employer's distribution of a "summary" of the report to employees other than the executive staff members who received the document itself; and (6) the lack of specific evidence supporting the employer's assertion that the audit had been found privileged by a court.

The Legal Standards -

RCW 34.05.452 directs administrative agencies to exclude evidence on the basis of evidentiary privileges recognized in the courts of this state. The attorney-client privilege is a recognized basis for exclusion under the Washington Rules of Evidence.[6]

The purpose of the attorney-client privilege "is to encourage free and open attorney-client communication by assuring the client that his communications will be neither directly nor indirectly

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[5] In a separate case, Bonds was found to have improperly converted the document to his own use in a way that amounted to theft. Port of Tacoma and International Longshoremen's and Warehousemen's Union, Local 28, PERC Cases 9353-A-91-872 and 9435-A-91-887 (Arbitrator Rosenberry, 1992).

[6] Washington Rules of Evidence, ER, Title V, Rule 501(a), and RCW 5.60.06(2).

disclosed to others."[7] The privilege exists in relation to documents prepared by lawyers,[8] when they are prepared in anticipation of litigation.[9] The burden of proof falls on the party asserting the privilege.

Audit Report is Privileged -
The report at issue was prepared by an attorney retained by the employer under circumstances indicating an intent to keep the results confidential. The report would thus be a privileged attorney-client communication, unless the privilege was waived.

The internal distribution to the executive staff did not destroy the privilege. Whether waiver of the attorney-client privilege has occurred is a qualitative, not a quantitative judgment. The analysis should be based upon the scope of a corporate official's duties, not just upon the number of officials to whom a document is circulated. Under the "control group test", the privilege applies to disclosures by an employee to a corporate attorney if the employee is "in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney ...."[10] Considering the titles of the individuals to whom the audit report was circulated, we find they meet the "control group" test. In certain instances, the

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7 Pappas v. Holloway, 112 Wn.2d 198, 203 (1990); State ex rel. Sowers v. Olwell, 64 Wn.2d 836 (1964); Dike v. Dike, 75 Wn.2d 1 (1968).

8 The privilege does not apply to documents prepared by non-lawyers. Kammerer v. Western Gear Corporation, 96 Wn.2d 416 (1981); Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982)

9 Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982); Port of Seattle v. Rio, 16 Wn.App. 718 (Div. I, 1977).

10 Upjohn Company v. United States, 449 U.S. 383, 390 (1981).

privilege may even extend to lower level employees not in a "control group".[11]

The Examiner appears to have credited Stevens' assertion that he was given a copy of the audit report by the employer's general counsel at a meeting in August of 1990. There is no corroboration for Stevens' claim, however. Mason unequivocally denied that assertion, and his denial is corroborated by Paulsen, Turner and Hare, who were all present at the meeting and did not see Mason give Stevens a copy of the audit.[12] The transcript of the tape of that meeting does not show any reference was made to the audit report during the meeting.[13] In addition, it is not plausible that Mason would have shown Stevens the audit report, in that Mason would have had no reason to do so.

The security officers were given a briefing on February 7, 1990, regarding the employer's conclusions resulting from the audit report, and actions taken up to that date. On February 12, Ovena issued a memo to Bonds, Stevens, and other security officers under the title: "Request for Copy of Personnel Practices Audit", denying their request for a copy of the audit report on the basis it was protected under the attorney-client privilege. Attached to Ovena's memo was a summary of recommendations made in the report, which also showed the employer's conclusions and the current status of actions taken by the employer as of that date. A comparison of

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[11] Wright v. Group Health Hospital, 103 Wn.2d 192 (1984), citing Upjohn Company, supra.

[12] Transcript, pp. 732, 751, 765, and 767.

[13] In his own words, Stevens was "not in a real clear frame of mind" at that meeting. Exhibit 38, page 4. The tape transcript somewhat corroborates Stevens' testimony about that meeting that he was "upset", was not "given the opportunity to think clearly", that "there were several things on [his] mind at the time", that he did not like being questioned, and that he refused to answer questions until he got legal advice. Transcript, pp. 776-779.

to the audit report suggests that the "summary" actually represented the employer's reaction to the audit report, and was not a summary of the audit report itself. Neither a memo describing the steps a client decides to take after receiving the advice of counsel nor an action checklist describing the status of the client's remedial response should, in our view, be treated as waiving the attorney-client privilege as to the underlying material authored by the attorney. A contrary ruling would discourage employers from sharing information with their employees regarding problem areas they have identified. We find no public policy that benefits from such a ruling.

The conclusion of the Superior Court for Pierce County that there had been no waiver of the attorney-client privilege as to the audit report should have been given stare decisis effect. When the employer first claimed that the audit had been found privileged in Theresa M. Patton v. Port of Tacoma, Cause 90-2-609-2-1, the Examiner interpreted that ruling as having excluded the document on relevance grounds, and not as privileged material. The transcript of the superior court's ruling appears to have been incomplete, however, at the time of the Examiner's November 6, 1992 ruling. The employer's motion for reconsideration contains a more complete transcript which shows the court ruling as follows:

> Basically if the audit as I understand it were had from threats of a lawsuit in this very case. The Port took the normal steps, more than normal steps for confidentiality. If the audit, what I think it is, is loaded with conclusions and legal advice, that means no, doesn't come into evidence.
>
> I wish we could solve all of the problems that easy and I will find there is no wviere [sic]. That is to conclude there is no waiver of any privilege.

The Court then went on to find that, in contrast to the audit report itself, the document which we have referred to as the

"summary" was admissible. Based on the more complete transcript which was provided to her on November 16, 1992, the Examiner should have reconsidered her prior ruling.

Conclusions on Audit Report -

Admission of the audit report is not consistent with good public policy. A lawyer and client should be able to predict with some degree of certainty whether confidential information furnished to the lawyer will be protected.[14] The audit report was found privileged by prior judicial ruling, and also by the arbitrator who denied Bonds' grievance protesting his discharge for theft of that report. Any other decision here would sanction and reward theft, and would disregard legal precedent that theft does not destroy privilege. Admission of reports of this nature would penalize employer efforts to identify problematic personnel practices in preparation for taking corrective action. The Barbier audit report should have been excluded under the attorney-client privilege.

The Applicable Legal Standards

The employer is subject to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which includes:

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

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[14] See, State v. Rinaldo, 36 Wn.App. 86 (1983), citing Upjohn Co., supra, for the proposition that an uncertain privilege is little better than no privilege, and ruling that a reporter and reporter's source should be able to pre-dict with some degree of certainty whether confidential information furnished to the reporter can be protected.

> **tive bargaining, or in the free exercise of any other right under this chapter.**
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> . . .
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> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
>
> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
>
> (4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

An interference violation occurs under RCW 41.56.140(1) when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with their union activity. City of Pasco, Decision 3804-A (PECB, 1992); City of Seattle, Decision 3566-A (PECB, 1991); City of Seattle, Decision 3066-A (PECB, 1988).

A "discrimination" violation under RCW 41.56.040 and RCW 41.56.140-(1) involves an intentional action by an employer based on protected union activity, and so requires a higher standard of proof than an "interference" violation. In Educational Service District 114, Decision 4631-A (PECB, 1994), the Commission explicitly rejected continued reliance on the Wright Line test,[15] and adopted the "substantial motivating factor" test set forth in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v.

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[15] Under Wright Line, 251 NLRB 1083 (1980), cited in City of Olympia, Decision 1208-A (PECB, 1982), the burden of proof shifted in a two-stage analysis: If a prima facie case of discrimination was made out, the employer had the burden to establish valid reasons for its action. In formulating that approach, the NLRB had specifically relied on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

Seattle Housing Authority 118 Wn.2d 79 (1991).[16] Under that new test, the burden of proof does not shift.

To make out a prima facie case, a complainant claiming unlawful discrimination needs to show:

1. That the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. That the employee was discriminatorily deprived of some ascertainable right, benefit or status; and

3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. It does not have the burden of proof to establish those matters.

The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's action.

The Interference Violation

The employer argues that the Examiner's finding of interference violations based on conversations port officials had with Bonds and Stevens, as well as her conclusion that bargaining unit employees

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[16] Wilmot and Allison involved statutes that parallel Chapter 41.56 RCW in making employer retaliation illegal where employees exercise statutory rights. Allison specifically rejected continued reliance on Mt. Healthy City School District Board of Education v. Doyle.

could reasonably have perceived that Bonds and Stevens were being discriminated against because of their union activities, were based on unsupported hearsay and conjecture, as well as events predating the six-month statute of limitations period. It argues the Examiner's finding that the employer interfered with the rights of bargaining unit employees when it "intervened in the union's ratification process" and "pressured employees to vote in favor of the addendum" was flawed, and unfairly shifted the burden of proof to the employer.

Bonds and Stevens argue that the case law justifies finding interference violations based on reasonable perceptions, and that the employer's conduct in this case created a reasonable perception among employees that Bonds and Stevens were being denied promotion due to their union activities. They cite the questions used in the 1990 promotional interviews, the failure to define "team building", the deviation from past practice of evaluating applicants on objective standards, discussions between Hare and Stevens which linked Stevens' promotability to his role in the bargaining unit, conversations between employer officials and Bonds concerning the addendum, and the pressure by employer officials on bargaining unit employees to vote in favor of the addendum.

The employer aptly argues that events predating the six-month statute of limitations should not be used to find an interference violation,[17] but we still find some instances of employer conduct after January 20, 1990 which support an interference violation.

During the promotional interviews conducted on January 22 and 23, 1990, employer officials asked questions involving subjects of pending grievances and union privileges. The employees could reasonably have perceived those questions as directed toward

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[17] The same instances can, however, be relied upon to show the existence of union animus in establishing a prima facie case of discrimination.

stifling union activity. A similar violation was found in Kitsap County Fire District 7, Decision 3105 (PECB, 1989), based on a "loaded question" asked during a promotional interview.

In a conversation between Paulsen and Bonds on March 30, 1990, Paulsen described Bonds as "iconoclastic" or "argumentative". Paulsen was speaking to a union activist during a period of union activity. Since the very nature of the collective bargaining process puts union leaders in a position to promote employee interests that may be in conflict with an employer's concerns, this type of remark could easily be interpreted as indicating that the employer had a problem with lawful union activity. Thus, such a characterization could reasonably have been perceived by Bonds as indicating that the management would retaliate against him.

The employer actions on which we base the interference violation are not substantially disputed, and are not based on hearsay, as the employer argues. The interference violation is not based on the actual perception of employees, but rather on our finding that an employee could reasonably perceive the employer's actions as a threat of reprisal associated with their union activity.

Discrimination Allegations Concerning Promotions

The Prima Facie Case - Union Activities and Union Animus - The employer takes issue with numerous findings by the Examiner, arguing they predate the six-month statute of limitations period set forth in RCW 41.56.160. It is, however, only the discriminatory action for which a remedy is being found that must have occurred within the six-month period preceding the filing of the complaint.

The complainants may rely on events predating the six-month period to show union activity and union animus. If we were limited to an analysis of the alleged discriminatory action in isolation, we would not be able to understand the total context in which it took

place. Our review of the record indicates that the Examiner generally used events predating the six-month limitations period only to find the existence of union activity or union animus. For example, her reliance on Bond's testimony concerning a meeting he had with Paulsen in July or August of 1989, in which Paulsen advised that the employer was looking for team players, is only background information to the finding of union animus. Likewise, her conclusion that "the Port cannot rely solely on what occurred in the interview, when it was so tainted by previous incidents of discrimination",[18] is only used in finding union animus.

The record contains a number of instances that demonstrate the employer knew of Bonds' and Stevens' union activity, and that they exhibited some animosity toward union activism during the period leading up to the 1990 promotional process:

* Bonds had assumed a very strong role in the union. As the assistant shop steward from 1989 to 1990, he played an active role representing security officers in grievances and at arbitrations, and he was one of the union's negotiators for the controversial addendum. During those negotiations, he urged waiting until negotiations for a successor collective bargaining agreement in the spring of 1990,[19] and he expressed concern over the reduced wage proposed by the employer for the new classification. He prepared a detailed analysis which was presented to the union membership at the meeting where the first vote on the addendum was taken.[20] Bonds' approach was proactive, and very different from Shop Steward Arnold Johnson. Bonds ran unsuccessfully against Johnson for the office of shop steward after the negotiations on the addendum.

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[18] Examiner's decision at page 52.

[19] Bonds felt the union would have more leverage with more items on the table, and would be in a better position to negotiate for its interests than in separate negotiations on the addendum.

[20] Bonds appears to have been persuasive, as the membership voted to reject the addendum as then proposed.

* Stevens participated in negotiation sessions regarding the addendum, and he told Hare that he opposed the addendum. At the union membership meeting where the first vote was taken, Stevens made the motion to reject the addendum.[21] In January of 1990, Stevens worked with Bonds in filing a group grievance regarding the employer's implementation of the new classification, and that grievance had reached the management by the time of the promotional interviews.

The record as a whole supports the Examiner's conclusion that the employer expressed union animus during the time period leading up to the promotional interviews. Employer officials pressured at least Bonds and Stevens to change their votes on the addendum.[22] Hare told Stevens he had a problem with Stevens' activity and stance regarding the addendum, and his position in the union. Hare's suggestion that Stevens should influence other bargaining unit members to become more compatible with management was part of the same conversation in which Hare stated that Stevens would not be recommended for promotion in the upcoming process. After Bonds had been particularly active in negotiations for the addendum, Paulsen and Bonds went for a ride around the terminal. During that ride, Paulsen advised Bonds that the management was looking for team players in the upcoming promotional process. It is clear that the employer was displeased with Bonds' opposition to the contract addendum. The conversation also clearly linked the employer's union animus to the upcoming promotional process.

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[21] The union members voted to inform the employer that the union did not wish to accept the offer.

[22] The record contains some indication that the employer applied similar pressure to other employees. Although testimony on this subject by Stevens (transcript at p. 77) and by former bargaining unit employee Patton (transcript at p. 214) came in over a "hearsay" objection, it was consistent with the non-hearsay evidence.

The record contains numerous references to other instances which demonstrate that lawful union activity was not a way to gain favor with this management. One example is Ovena's testimony that some grievances that had been filed did not have merit in her view. It is clear that Ovena felt grievances were a symptom of a problem they were trying to overcome. Theresa Patton testified that she felt that if she filed grievances, she was not supporting the employer. Another example relates to the employer's focus on "team building". Ovena testified that the employer wanted to choose individuals in the promotional process that would foster the team building concept, rather than trying to build barriers.

The Prima Facie Case - Discriminatory Action -
The statutory prohibition against "discrimination" has previously been applied to denials of hiring. Toutle Lake School District, Decision 2659 (PECB, 1987); Auburn School District, Decision 2291 (PECB, 1985); and Clallam Transit, Decision 4597 (PECB, 1994). It was applied to a denial of promotion in Port of Seattle, Decision 1624 (PECB, 1983).

The denial of promotions to Bonds and Stevens is the type of action on which an unfair labor practice violation could be found. In the interview process conducted in 1989, Bonds and Stevens were ranked second and third out of seven candidates considered for promotion. Their ratings plummeted, however, in the interview process conducted in 1990, when Bonds and Stevens received the two lowest scores and were denied promotion to the new positions.

The Prima Facie Case - Causal Connection -
An employee may establish the requisite causal connection by showing that adverse action followed the employee's known exercise of a protected right under circumstances from which one can reasonably infer a connection. Employers are not in the habit of announcing retaliatory motives, so circumstantial evidence of a causal connection can be relied upon. Wilmot, p. 70.

In this case, the employer's change of emphasis to "team building" and the marked change of the ratings given to Bonds and Stevens came after a year in which Bonds and Stevens were visible union activists. The evidence indicates that union animus could have been a motivating factor in the employer's actions against Bonds and Stevens.

The Employer's Burden of Production

The burden of production is properly shifted to the employer. At this stage, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. A violation will be found if the employer does not meet its burden of production.[23]

The employer asserts that Bonds was not selected because he stated the job was undesirable, he criticized co-workers, he came to the interview with poor appearance,[24] and he stated that he would not recognize a Zone 1 officer as a supervisor. The employer must rise or fall on those stated reasons in this case limited to the denial of promotion.[25]

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[23] In City of Winlock, Decision 4783 (PECB, 1994), an Examiner sustained a "discrimination" allegation on the first of two discharges of an employee, because the reasons asserted by the employer for that discharge were patently unlawful.

[24] Bonds' clothing was described as wrinkled and unpressed.

[25] The employer took issue with the Examiner's precluding cross-examination of Bonds concerning his unauthorized possession of documents and his perceptions of the negotiation process. That information is, however, irrelevant to the case before us. At the time of the actions complained of, the employer had no knowledge that Bonds possessed privileged and confidential employer documents. His perceptions of the negotiation process are irrelevant to the employer's asserted reasons for denying him promotion. A review of the record shows the employer had full opportunity to probe Bonds' credibility concerning evidence relevant to the issues before us.

The employer contends that Stevens was not selected for multiple reasons. As to the interview process, it cites Stevens' statement that the job was undesirable, his statement that he did not fit in with the security department, his statement that he would not recognize the Zone 1 officer as a supervisor, his refusal to answer questions, his refusal to sign a release for his driving record, and his generally unsatisfactory presentation of himself. The employer also asserts that Stevens was insubordinate in refusing to sign the pass-on book.

The Substantial Factor Analysis

The remaining issues concern whether the employer's stated reasons were the real reasons for its denial of promotions to Bonds and Stevens. Statutory violations will be found if a retaliatory motive played a substantial role in the employer's decision, but Bonds and Stevens have the burden of proof on these issues.

The employer argues that the Examiner was too heavily influenced by hearsay testimony, and that she erred in other evidentiary rulings. Our review of the record indicates the Examiner erred in weighing some evidence, including the following:

* The Examiner does appear to have placed too much reliance on hearsay testimony. Our examiners have the discretion to allow hearsay evidence under the Administrative Procedure Act, Chapter 34.05 RCW, but they must still carefully consider whether the hearsay nature of that evidence detracts from its probative value. In this case, the Examiner's decision made frequent reference to hearsay evidence without any indication as to why that evidence was entitled to the weight being accorded to it.

* The Examiner's decision emphasized that the union was employer-dominated, despite the Examiner's acknowledgement at the outset of the hearing that union domination was neither alleged in the unfair labor practice complaint nor a cause of action sent to

hearing by the Executive Director.[26] In finding a prima facie case for discrimination, the Examiner found: That the employer wanted a "cooperative" union; that Shop Steward Johnson appeared to be intentionally trying to say nothing that would get him in trouble, and that his heart was clearly dedicated to management; that Johnson refused to represent bargaining unit members as union steward, unless requested by management; and that punishment of Bonds and Stevens (i.e., by refusing to promote them) would have communicated to all members of the bargaining unit that aggressive union advocacy would result in loss of benefits and opportunities.[27] Although Bonds and Stevens took more aggressive stances in union activities and union advocacy, Johnson's tactics may have had more to do with his personal approach than with employer domination. We are reluctant to attribute characteristics of employer domination to facts that could merely reflect personal style differences, particularly when the issue was not one before the Examiner. After expressly reassuring the employer that she would not be making a finding or legal conclusion on this allegation, the Examiner should not have made "domination" conclusions, and should not have used perceived domination as a basis for imposing an extraordinary remedy to recoup legal costs "to pursue claims that should have been litigated by what has become a 'cooperative' union at the hands of port officials".[28]

* In the course of her decision, the Examiner made unnecessary remarks disparaging the employer's defenses. The temptation to resort to such comments is often hard to resist, after becoming skeptical about a party's position, but gratuitous remarks are ill-advised. At best, they rub salt into the wounds of a losing party. They inevitably raise questions as to whether that side's evidence and arguments were fairly considered.

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[26] Transcript at p. 27.

[27] Examiner's decision at p. 48-49.

[28] Examiner's decision at p. 57.

Analysis Regarding Bonds -
Even if the evidence challenged by the employer is excluded from consideration or reduced in importance, that is not conclusive. We still find sufficient credible evidence to support the Examiner's conclusion that union animus was a substantial motivating factor in denying the promotion to Bonds in 1990.

The change in the nature of the questions used in the interviewing process causes us some concern. Whereas the 1989 interview process was technical in nature, the 1990 process relied heavily on highly subjective criteria with many interview questions related to team building. While the employer had been emphasizing the "team" among its employees for some time, the employer's desire to put together a dream team must be scrutinized for whether the employer was using its team building emphasis as a guise for weeding out union activists. Where an outspoken union activist does not share management's view, it could be too easy for an employer to claim its reason for adverse action was the employee's inability to share the view of the team.

The employer provided inconsistent explanations of its team building criteria. It referred to protected union activities (e.g., the filing of grievances) as being a problem necessitating "team building". Ovena knew that Bonds had filed grievances, and admitted that she thought a lot of the grievances were meritless. The interview panel asked questions that involved other pending grievances.[29] These facts support an inference that the management interviewers thought an employee who was filing grievances and questioning management action was not being part of the "team". When pressured, the employer was unable to identify other specific occurrences where Bonds violated the tenets of its "team building" ideal between 1989 and the interview procedure in 1990. The employer asserts error in the Examiner's reliance on Port of

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[29] See, Kitsap County Fire District 7, supra.

Seattle, Decision 1624 (PECB, 1983), which the Examiner used to show that the employer's vague and inconsistent understanding of "team building" and the great weight given to "team building" in the promotion process supports an inference that the employer desired to squash the visible union activities. The record supports the Examiner's conclusion.

We find no support in the record for the employer's claim that Bonds was not promoted because he was critical of his co-workers. Even if he may have been unduly critical of co-workers, no written documentation supports the claim that it was a reason for his non-selection. See, Port of Seattle, supra.

When asked what explained the difference in Bonds' scores from April of 1989 to January of 1990, Ovena responded that Bonds was compared to Jerry Specht in 1989, but was compared to six other candidates in 1990. Ovena admitted, however, that the other candidates wanted the position, and her statement that Bonds was against the position from the beginning (i.e., because he rejected the addendum the first time) points to a conclusion that the employer's ratings were rooted in union animus.

The dramatic change from Bonds' prior ranking was not persuasively attributed to legitimate considerations. We are not persuaded that Bonds' appearance at the interview, his tendency to run down other employees, or his statement that he was applying for the job for economic reasons were sufficient justification for a 25% decline of point values (i.e., from "80" to "60"), or for refusing to promote a long-time employee.

The statements made to Bonds by Paulsen on March 30, 1990, in the presence of Hare, further contradict the reasons asserted by Ovena for denying Bonds the promotion. Paulsen's telling Bonds he was "iconoclastic" and "argumentative" provides further support for our conclusion that the raters were bothered by Bonds' challenges to

their authority. Since Bonds had been very vocal and active in lawful union endeavors up to that time, we relate the comments about why he was not selected to his union activity. We affirm the Examiner's decision that the employer's denial of a promotion to Bonds was an unfair labor practice.

Substantial Factor Analysis - Stevens -
The employer articulated non-discriminatory reasons why Stevens was not selected for promotion. In finding that union animus was a substantial factor in Stevens' case, the Examiner too readily made inappropriate and unsupported inferences from the testimony, without giving due consideration to the entire record.

During the interview, Stevens stated that he found the position he was supposedly seeking to be undesirable. All the witnesses who were on the interview panel testified to that. The Examiner found this was a distortion of the statements made during the interviews, however, and inferred that Stevens' statement regarding the job being undesirable was a reflection of his desired outcome in bargaining, NOT a refusal to seek the promotion.[30] In regard to Stevens, we find no justification for such a view. He was being interviewed for a gate position, but stated that he liked patrol better.[31] We credit the employer's wisdom in denying a promotion to an individual who expressed no enthusiasm for the job.

The Examiner attributed any deficiency in Stevens' attitude during the interview, as well as his refusal to answer some of the interview questions, to frustration with unlawful discrimination which had already occurred. We do not find support for such an inference in any incidents for which the complaint was timely. Regardless of any frustrations an employee takes into an interview,

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[30] Examiner's decision at page 51.

[31] In contrast, Bonds' focus seems to have been on the pay for the new gatehouse jobs, rather than on the duties.

he or she has an obligation to attempt to answer the questions asked in such a setting.

Stevens had a responsibility to do his best in the interview. The evidence shows that he did not do well. His responses to some of the interview questions were not good. He asserted that, even before the interview, he did not think he was going to go far because of the past. His past involved more than just union activities, however.

The Examiner excused Stevens' insubordination in refusing to sign the pass-on book, justifying her conclusion by noting that the employer ultimately adopted Stevens' suggestion regarding that procedure. We cannot so readily negate an employer's need, responsibility, and liability to direct its employees. The fact that procedures were changed at some later point did not excuse Stevens' acts of insubordination. In the absence of clear evidence that the requirement was illegal,[32] the Examiner's assertion that the requirement was of questionable legality cannot be used to justify the insubordination.

Stevens challenged the management in other ways that verge on insubordination. He refused to help train others, he challenged the directions given by the management, he influenced another employee to not sign the pass-on book, and he assigned overtime to someone without checking first with the chief.[33] None of those incidents involved any protected activity.

The Examiner asserted a relevancy question in regard to Stevens' refusal to sign the driving record release as requested by the

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[32] It appears it **could have been** illegal if imposed on off-duty time, but the evidence shows Stevens was not required to sign the pass-on book on off-duty time.

[33] Transcript, pp. 1100-1110.

employer in the promotional interview process. The Examiner reasoned that the gate job did not regularly involve driving. We find sufficient evidence that driving may be required at times. Considering an employer's potential liability, and its interest is having a safe work environment for all employees and the public, checking driving records or abilities is justified when an employer anticipates that an employee will need to drive on the job, even if only occasionally. Stevens was the only applicant who refused to sign the waiver. He did not sufficiently justify this failure to cooperate with the employer, so that we find it an additional act on his part which the employer could properly use to refuse to promote him.

The Examiner credited Stevens' testimony too readily, without considering portions of the record showing his credibility to be in question. His testimony that he was not counseled about his performance as a security officer between the 1989 and 1990 interview processes is contradicted by the record. On January 26, 1990, within the week following the interviews, he was given a statement detailing instances of his misconduct and the counseling given to him between August of 1989 and January 15, 1990. Stevens' credibility also comes into question with regard to his claim that he received a copy of the audit report during a meeting in August of 1990, since four other witnesses contradicted his testimony and the transcript of the tape recording does not support his claim.

We do not find the reasons asserted by the employer to have been pretextual. Stevens had been employed for only eight months prior to the interviews conducted in 1989, so the employer did not know him as well then as it knew him at the disputed interview in 1990. By the time of the decision at issue here, the employer had experience with Stevens' insubordinate behavior. Considering Stevens' record and his less than satisfactory responses to questions in the interviews, the employer was justified in giving him a lower ranking than others.

We also conclude that union animus was not a substantial motivating factor in the non-selection of Stevens. While the evidence was sufficient to indicate union animus may have been present, we also find the record persuasive that any such animus was a far less influential factor than legitimate, nonretaliatory reasons the employer had to select others for promotion over Stevens. Stevens was less active in the union than was Bonds, and there is a lack of affirmative evidence that union activity was a substantial motivating factor for the employer's actions. The "refusal to promote" allegation should have been dismissed as to Stevens.

Work Opportunities Discrimination

When the selection process for the new positions was completed, four relief security officers other than Bonds and Stevens were promoted to the provisional security officer positions. The employer then followed through on its announced intentions by hiring four new relief officers. The complaints contained several allegations concerning discrimination against Bonds and Stevens in regard to limitation of their work opportunities after they were denied promotion to the provisional security officer positions. Paragraph 2.a. of the complaint concerned a reduction of work opportunities resulting from the hiring of the new relief officers, while other allegations concerned specific overtime opportunities claimed by Stevens and an alleged scheduling of Bonds and/or Stevens in conflict with collective bargaining sessions.

The Examiner dismissed the allegation regarding the hiring of the new relief officers, and the complainants did not appeal from that ruling. The Examiner did find the employer deviated from a past practice during the two-month period when the new relief officers were in training, and that Bonds and Stevens should have been given work hours to provide coverage in that period. The Examiner thus found an independent "discrimination" violation with respect to the alleged reduction of work opportunities for both Bonds and Stevens.

We address this issue separately, because of the unusual posture of the remedy questions in this case.

The Examiner's basic theory, i.e., that RCW 41.56.140(1) prohibits a discriminatory reduction of work opportunities, is sound.[34] There are fundamental problems with applying that theory to Bonds, however. The conventional remedy for unlawful discrimination affecting promotions is an order making the affected employees whole for their losses, measured by the difference between the pay and benefits they would have received in the promotional position and what they actually received in the absence of the promotion. Logically, that eliminates the need to delve into Bonds' relief officer work in the period for which he was entitled to the provisional officer job. Thus, only Stevens could be entitled to a remedy for loss of work opportunities in this case.

The Prima Facie Case - Union Activity -
The facts set forth above concerning Stevens' union activities would be equally applicable to this "discrimination" allegation.

The Prima Facie Case - Discriminatory Action -
To base a finding of discrimination, the burden of proof is initially on the claimant to establish some deprivation of an ascertainable right. We concur with the Examiner's dismissal of the allegation that the hiring of extra relief officers was discriminatory, but take that analysis a step farther.

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[34] In Municipality of Metropolitan Seattle, Decision 2746-B and 3151 (PECB, 1990), a union interference violation was found where individuals were entitled to bid on the basis of seniority, but the union had denied the right of a part-time transit driver to bid for certain assignments. In that case, the right to select established routes by seniority was protected by the applicable collective bargaining agreement.

There is no evidence that union animus formed any part of the motivation for the new staffing plan developed by employer officials in 1989. The hiring of more full-time personnel was planned far in advance, and one of the aims of the new classification was to reduce the hours of relief security officers so they were not working nearly full-time. The employer made that clear to employees ahead of time, so employees who were not promoted should have anticipated that their hours would be reduced. All relief officers who were not promoted were affected in the same way. As the employer asserted, it merely effectuated what it initially set out to do when it reduced the hours of the relief officers, and its business justification for that action was well-documented and clearly articulated. Stevens had no ascertainable right to preservation of the work opportunities for the relief officers once the creation of the new classification was negotiated with and accepted by the union.

The "step farther" relates to the limited training period. Bonds testified that new relief officers hired in the past worked full-time in the company of others for a two-month training period, and the complainants reason that relief officers should have been used to cover the schedule. That may have been true in the context of having only eight full-time employees and an agreed maximum of eight relief officers, so that the employer had to rely on the "relief" force for all assignments not covered by the eight scheduled employees. The facts changed, however, with the creation of the "provisional" positions. The new employees could now be paired with 12 regularly-scheduled employees before it was necessary to call in relief personnel. The facts concerning use of scheduled employees on an overtime basis are vague. We thus reverse the Examiner's conclusion that Stevens suffered any discrimination in regard to his work opportunities as a relief security officer after the new positions were filled.

Appropriate Remedy

On the first day of the hearing, the Examiner granted a union motion to bifurcate the proceedings and announced that she would just rule regarding the merits of the unfair labor practice complaint. We find no indication that a reversal of that ruling was made and communicated to the parties during the remainder of the hearing. The Examiner thus erred in going beyond the merits of the case in her decision.

Because the remedies ordered, including the extraordinary remedy of attorney fees, ignores the prior ruling, we are vacating the entire remedial order and are remanding these cases to the Executive Director for assignment of a different Examiner to conduct further proceedings on the remedy issues, consistent with this decision.

NOW, THEREFORE, the Commission makes and enters the following:

AMENDED 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, and Don Hare was chief of security.

2. Arthur Bonds became an employee of the Port of Tacoma in 1981, and remained an employee as a relief security officer at all times pertinent hereto.

3. E.A. Stevens became an employee of the Port of Tacoma in 1988, and remained an employee as a relief security officer at all times pertinent hereto.

4. International Longshoremen's and Warehousemen's Union, Local 28, is the exclusive bargaining representative of security officers employed by the Port of Tacoma. As of 1989, the bargaining unit included three classifications of employees designated as: "Regular security officer", "flexible security officer", and "relief security officer". From March of 1989 through February of 1990, Arthur Bonds was the assistant shop steward for the union.

5. The employer and union were parties to a collective bargaining agreement which was in effect for the period from April 1, 1987 through March 31, 1990.

6. In 1987, the employer began providing security coverage at the North Intermodal Yard. This increased the usage of the relief security officers.

7. During or about 1988, the employer made a commitment to the union that the number of relief security officers on the employer's roster would not exceed the number of full-time security officers. The limited number of security officers were thus being called upon to work nearly full-time.

8. In April of 1989, the employer opened applications for a flexible security officer position. The interview questions used in filling that vacancy were designed to determine the candidates' knowledge of technical skill areas. Out of seven applicants, Bonds placed second and Stevens placed third in their overall interview/application scores. The position was given to the candidate who received the highest score.

9. As assistant shop steward, Bonds filed more grievances than had ever been initiated in the parties' history. Bonds was more pro-active in his union activity than was the incumbent shop steward, Bill Emerson.

10. During the spring and summer of 1989, employer officials developed a revised staffing plan which called for the creation of additional full-time positions, and for reduced reliance on the use of relief security officers. That plan was based on the operational needs of the employer, and was not motivated by any union animus.

11. In July or August of 1989, Paulsen told Bonds that the employer was looking for team players to fill some new full-time positions that would be opening up.

12. In August of 1989, the employer invited the union to bargain an addendum to the parties' collective bargaining agreement, to establish the wages, hours and working conditions for a new security job classification. The management bargaining team consisted of Meyer, Paulsen and Ovena. The union bargaining team was Emerson and Bonds.

13. In August of 1989, and again at least twice in October of 1989, security officers were reminded to sign the "pass-on book", which the chief of security kept to communicate information to the security officers. Stevens objected to the requirement, and refused to follow the directions.

14. During the negotiations, the parties debated issues concerning at least the title of the positions, the number of positions, the wages for the positions, the weight to be given seniority in filling the positions, and the presence and authority of a union representative on the interview committee. Bonds wrote a memorandum which summarized the union's position for the management team, and did most of the talking for the union. Bonds submitted corrections to bargaining minutes recorded by the management team. In conversations away from the bargaining table, Meyer asked Emerson to temper Bonds' behavior, and Stevens told Hare that he opposed the addendum.

15. The employer and union did not reach agreement on the addendum, and the management team asked that its proposal be presented to the union membership for a vote. Bonds wrote an analysis that was distributed to all bargaining unit members, recommending that the addendum be rejected. Copies of that memo were also given to Paulsen and other management personnel. The analysis recommended that the addendum be rejected.

16. The addendum proposal was considered by the union membership at a union meeting held on October 18, 1989. Bonds spoke in opposition to the addendum. Stevens made a motion to reject the addendum, and that motion was adopted.

17. Within days following the union's rejection of the proposed addendum, Paulsen and Hare told Bonds that they were not happy with his analysis, and that they would have rather seen Bonds vote for the addendum.

18. Within days following the union's rejection of the proposed addendum, Hare told Stevens 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. Stevens met with Turner, to express concerns that Hare was pressuring him, and Paulsen learned of the meeting.

19. A note was placed in Stevens' mail slot on October 26, 1989, questioning his failure to sign the pass-on book. On October 30, 1989, Stevens was again told to comply with the order to sign the book. Stevens did not comply.

20. Between October 18 and October 30, 1989, the employer improved at least the wages and benefits offered in its proposal for a new bargaining unit classification. By that time, it was

clear that the work of employees in the new classification primarily involved staffing of entry gates, rather than patrol, and that the "provisional security officer" title preferred by the union would be used. There was an intense debate in the bargaining unit, with Emerson and others speaking in favor of the addendum while Bonds argued against it.

21. At the end of October, 1989, the employer's second addendum proposal was voted upon by the union membership. The addendum was accepted by a nine to seven margin on a secret ballot.

22. During the autumn of 1989, Bonds and Arnold Johnson were opposing candidates for the office of union shop steward. Johnson was elected; Bonds remained the assistant shop steward.

23. After a series of counseling sessions with the employer, Stevens failed to sign the pass-on book for January 2 and January 3, 1990. He did not respond to a direction to provide a written explanation for his actions by January 15, 1990.

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

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

26. Bonds and Stevens each applied for promotion to the provisional security officer classification created by the addendum. Interviews for those promotions were held on January 22 and 23, 1990, by an interview team consisting of Paulsen, Ovena, Hare, and Johnson. Candidates were asked about their atti-

tudes concerning team building, and about a matter which was the subject of a pending grievance.

27. As part of the interviewing process for the promotional positions, the employer requested each candidate to sign a release for the employer to obtain the candidate's driving record. Stevens refused to sign the release.

28. During the promotional interview process, Stevens stated that he found the position to be undesirable or unacceptable. Stevens refused to answer some questions and answered some questions unsatisfactorily.

29. At the completion of the interviews, Bonds and Stevens were ranked sixth and seventh, respectively, out of seven applicants. Four other employees were promoted.

30. On January 23, 1990, the employer issued a warning letter to Stevens concerning his failure to follow instructions and insubordination. On January 26, 1990, the employer replaced the January 23, 1990 warning letter with a performance counseling statement regarding past incidents when he refused to sign the "pass-on" book.

31. After the provisional security officer positions were filled, the employer hired four new relief security officers. That action was consistent with the staffing plan generated by employer officials in 1989 based on legitimate business needs, and was not based on union animus.

32. Consistent with past practice, the relief security officers hired in 1990 were put through a two-month training program in which they worked in company with a full-time security officer. Different from the situation which existed previous to the filling of the provisional security officer classifica-

tions, however, the employer had a reduced need to rely on relief security officers to cover its security needs during the period those new employees were being trained. The record is insufficient to support a conclusion that E.A. Stevens was deprived of work opportunities to which he was entitled during that period.

33. On March 30, 1990, during a discussion of the reasons Bonds was not promoted, Paulsen told Bonds that he was "iconoclastic" or "argumentative".

AMENDED 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. Questions involving subjects of pending grievances and union privileges which the employer asked during promotional interviews could reasonably have been perceived by employees as directed toward stifling union activity, so that the Port of Tacoma has engaged in interference with, restraint of and coercion of employees in the exercise of their rights guaranteed by RCW 41.56.040, and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

4. The employer's description of Bonds as "iconoclastic" or "argumentative" could reasonably be perceived by Bonds as

indicating that the employer would retaliate against his union activity, so that the Port of Tacoma has engaged in interference with, restraint of, and coercion of employees in the exercise of their rights guaranteed by RCW 41.56.040 and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

5. Based on the insubordination of E. A. Stevens in regard to the signing of the pass-on book, his performance at the promotional interview, and his failure or refusal to authorize a check of his driving record, the reasons asserted by the employer for its action have not been shown to be pretextual or substantially motivated by union animus, so that the Port of Tacoma did not commit unfair labor practices under RCW 41.56.140 when it denied Stevens promotion to provisional security officer.

6. The record does not sustain a conclusion that E.A. Stevens was deprived of work opportunities to which he was entitled during the period when the employer was training newly-hired relief security officers, so that the Port of Tacoma did not commit unfair labor practices under RCW 41.56.140 in that regard.

AMENDED ORDER

1. The Examiner's ruling admitting the "audit report" prepared for the Port of Tacoma by Attorney Margaret Barbier is reversed on the basis of attorney-client privilege, and a protective order is hereby imposed to preclude inspection or copying of that confidential document from the Commission's files.

2. The remedial order issued by the Examiner is vacated.

3. These matters are remanded to the Executive Director for assignment of an Examiner to conduct further proceedings on the appropriate remedies for the unfair labor practice violations affirmed in this order.

ENTERED at Olympia, Washington, on the 20th day of June, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

SAM KINVILLE, Commissioner

Commissioner Joseph Duffy did not take part in the consideration or decision of this case.