

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF)	
COUNTY AND CITY EMPLOYEES and)	
MATTHEW BODHAINE,)	
)	CASE 10931-U-94-2543
Complainants,)	
)	
vs.)	DECISION 5183 - PECB
)	
CITY OF FEDERAL WAY,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
)	
)	

Audrey B. Eide, General Counsel, Washington State Council of County and City Employees, appeared on behalf of the complainants.

Perkins Coie, by Valerie L. Hughes, Attorney at Law, and Londi Lindell, City Attorney, appeared on behalf of the respondent.

On January 28, 1994, the Washington State Council of County and City Employees and Matthew Bodhaine filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Federal Way had committed unfair labor practices under RCW 41.56.140(1). The complaint alleged the layoff of Bodhaine was in retaliation for his activity in support of a union organizing drive. A hearing was held before Examiner William A. Lang on January 30, 1995. This case follows several others arising out of the same organizing effort, and the parties stipulated that the record in the earlier cases be available to the Examiner in this case.¹ The Examiner agreed to take administrative notice of the record and decisions in the earlier cases, where appropriate. Briefs were filed on April 18, 1995.

¹ City of Federal Way, Decisions 4088-A, 4495 and 4496 (PECB, 1993); AFFIRMED, Decisions 4088-B, 4495-A and 4496-A (PECB, 1994).

BACKGROUND

Located in southwestern King County, Federal Way has only recently been incorporated as a municipality. At the time pertinent to this controversy, J. Brent McFall was the city manager.²

Matthew Bodhaine was hired by the City of Federal Way on March 22, 1990, as a building inspector. Allan Locke was the city manager at that time. Community Development Services Manager Greg Moore had authority over both the building division (where Bodhaine was employed) and the land use planners division. Bodhaine worked under Senior Plans Examiner K.C. Ellis, Building Official Bruce Lorentzen (until his retirement), and Dick Mumma (Lorentzen's successor, beginning in September of 1992). This case concerns Bodhaine's layoff, on September 1, 1993.

The Union Organizing Campaign and Elections -

The Washington State Council of County and City Employees (WSCCCE) filed a representation petition with the Commission on February 25, 1992, seeking certification as exclusive bargaining representative of a city-wide bargaining unit at the City of Federal Way. The result of a representation election conducted by the Commission on May 6, 1992 was inconclusive. Both the accuracy of the eligibility list and the employer's campaign tactics were subsequently challenged by the union. The Executive Director of the Commission set aside the election agreement because of the employer's manipulation of the list of eligible voters, and vacated the result of that first election. The results of a new election held on July 1, 1992, were also inconclusive. Two of Bodhaine's co-workers in the building division, Norman Bray and Elizabeth Snyder, were discharged on July 1, 1992. The events up to that time were outlined by the Examiner in City of Federal Way, Decision 4088 (PECB, 1992), as follows:

² McFall was subsequently replaced by Kenneth R. Nyberg.

[The City of Federal Way] vigorously opposed the WSCCCE organizing campaign among its employees. The employer offered resistance in its initial correspondence with the Commission, questioning both the sufficiency of the showing of interest and the size and description of the bargaining unit. Throughout the processing of the representation case and up to the tally in the latest election, the employer engaged in a vigorous campaign against the union. The Executive Director's order vacating the results of the initial election was based on the employer's mischief in connection with the hiring dates and eligibility cut-off dates. ... the Examiner is persuaded that the timing and the context of employer's actions provide sufficient basis to infer that the discharges ... **could have been** designed to scare off the remaining union organizers, just as the organizing campaign approached its climax in the run-off election. The fact the discharges were announced a week before the employer received a full report from its outside investigator also supports an inference that the discharges were strategically timed.

City of Federal Way, supra, at pages 45-6, [emphasis in original].

The WSCCCE and the dischargées filed unfair labor practice charges on July 10, 1992.

In anticipation of a runoff election scheduled for July 16, 1992, Bodhaine wrote a letter dated July 13 addressed to "fellow employees". That letter was sent to each employee eligible to vote in the upcoming runoff election. Bodhaine's letter included:

What circumstances gave the City of Federal Way the right to destroy two people's ability to earn their livelihood in their respective fields after 2-1/2 years of faithful service? The appearance that they might possibly have done something to cast a negative reflection on the City.

Feeling that there must be more to the firing of Norm and Liz than meets the eye, I did my own investigation on my own private time (if there

is such a thing). I have talked with Norm, Liz, the contractor involved, as well as gained unsolicited information from a state inspector and other contractors that have worked for years with, and / or are currently in competition with the contractor involved.

This is what I came up with:

1. Complaints came from anonymous sources, and the fired employees and contractor were not allowed the right to face or know their accusers.

2. Regarding Liz:

a. Liz was dating the contractor and turned down airline tickets to go fishing in Alaska.

b. Ex-significant other had threatened her with the loss of her job and never being able to work as permit tech in this state again (ex beau works with contractor's ex-wife).

c. No verbal or written warnings about having a private relationship with the contractor, even though it was common knowledge in the building section and the City departments.

3. Regarding Norm:

a. Norm went fishing one Saturday about nine months ago and ran into the contractor while in Port Angeles and then went fishing on the contractor's boat at no expense to the contractor. Norm also turned down tickets to go fishing in Alaska

b. No written or verbal warnings were given for his action.

c. Why did Norm's personal log books disappear from his desk after his termination? And who has them?

4. People who worked with Norm or have worked with Norm in the past, and other contractors have said that this contractor would not even attempt to bribe a city employee, but that he has been taking people on an annual fishing trip to Alaska for years if he thought they would enjoy it. He has done this without expecting anything in return.

5. None of the involved people have been contacted by the prosecutor's office, nor have any charges been filed against them.

6. The involved contractor has not been given preferential treatment of any kind or any slack on the inspections performed on his sites, nor has any been asked for by the contractor or Norm in his position as Senior Building Inspector.

The recent firing of Norm and Liz has made me come to some uncomfortable realizations about the conditions and terms of my employment with Federal Way.

1. I can be fired without notice and without just cause.
2. No verbal or written warnings for alleged or actual indiscretions are required (or are they?).
3. The private investigator might be following me around anytime day or night.
4. My personal life is not personal.
5. No appeals process or representation is available without retaining outside legal counsel.

One of the first things asked of the Washington State Council of County and City Employees (AFSCME) was free legal representation should anyone supporting the union be fired by the City. This promise has been fulfilled, not only has the Union's attorneys filed suit to get Norm and Liz back their jobs, it is also representing them at the hearing they have to go through to get unemployment benefits since they were both fired.

In the upcoming election we have two choices:

1. No representation which allows City management to do as they please with no regards to the effects its decisions have on the employees, OR
2. Union representation where each and every employee will have a voice and can be involved in the process of ensuring that the work environment at the City is safeguarded against arbitrary decisions and political whims.

I urge each and everyone of you to take measure to keep your personal and private life private. VOTE UNION on Thursday, July 16th.

P.S. Reminder - If your name appears on the eligibility list and / or you were hired full-time prior to June 10th - you are eligible to vote!

[Emphasis by underlining in original.]

Bodhaine's letter came into McFall's hands. On July 14, 1992, McFall sent the following memo addressed to all city employees:

Like you, the City is looking forward to the election to be held Thursday, July 16, 1992.

You are all urged to consider the long-term effect of your decision, and to use your best judgment as you cast your ballot.

Each of you was hired because you possess skills and judgment a cut above average. During the campaign, the management team and I have been confident that each of you would resist all attempts to make decisions based on only part of the story, or based on emotional arguments, rather than the facts.

The City hasn't offered you "free lunches", "free attorneys", and hasn't visited you at your homes. The City also hasn't used words like "spies", "manipulate", "intimidate" or "climate of fear" in quotes to the newspapers.

Throughout the campaign, the City has respected each employee's ability to exercise his or her own independent judgment on issues relating to third party union representation.

In contrast, the union has filled your mail-boxes with position papers. Attempts have been made to turn recent unrelated and unfortunate events into campaign issues -- where there is no real basis for doing so.

It is at this point where I feel I have no choice but to respond on behalf of the City.

Like you, in your own lives, there are times when the City is called upon to make difficult decisions. The union has attempted to exploit and find fault with the City's actions.

It is important for each of you to know that the recent employee decisions were not made lightly, easily or with pleasure by any party. The City believes, however, that given the facts known to it, the decision was based on just cause. The same would be true with or without a union contract.

And, using the City's existing Policies and Procedures Handbook as a guide, the affected employees have been provided with an internal grievance process to review that decision.

At all times, the City has respected the confidentiality of employee personnel issues. The union, instead, speaks out in the newspaper.

The union now claims that both affected employees were active union organizers, and that the City's recent action is part of a campaign of City "threats, intimidation, and interference" with employees' rights to organize and collectively bargain. Based on your own knowledge, each of you can evaluate this claim.

As you review even those facts that are known to you -- does it make any sense that the City's decision was based on claimed union activities, as the union tells you? Or is this unfortunate event, and the affected employees, being used to create headlines, where respect of privacy would be more appropriate?

It is no coincidence that the union has copied the City's theme of "SPIRIT" in its mailings to you. To the City, "SPIRIT" stands for the real values of **service, pride, integrity, responsibility, innovation, and teamwork**. To the City, these are not empty words.

The union's attempt to copy the City's theme of "SPIRIT" is the union's admission that to all City employees, this theme has true meaning, and is working, even despite temporary setbacks at times. To the City, integrity means keeping silent when the City is questioned about confidential personnel matters, even when we are unjustly accused of wrongdoing. To the City, teamwork means employees of all types and categories enjoying open dialogue, and not being segregated into "us versus them".

Your vote on Thursday is your choice of the voice, the style, and the attitude that will represent you in the years to come. Please consider carefully which "SPIRIT" reflects **your** values when you cast your ballot. Thank you.

[Emphasis by **bold** in original.]

McFall followed up with a memo to all employees that was dated July 16, but was delivered on July 15, 1992:

Once more the City has no choice but to respond to an mailing recently received by employees. I am referring to an **unsigned letter from Matt Bodhaine, which was postmarked "Everett,"** and was sent to you on a computerized mailing list.

It is unfortunate that **this individual employee has chosen to undertake his "own investigation"** of a confidential personnel matter.

It is also unfortunate that the information contained in **Matt Bodhaine's letter is incomplete and inaccurate.**

For example, the City has not and will not spy on employees. No employee has ever been followed. To suggest otherwise is offensive.

Some of you may have received copies of selected affidavits. They also don't tell the whole story.

Once again, you have been provided with information that is incomplete, inaccurate and inflammatory. While I would like to give you all the facts, my respect for the privacy of those involved prevents me from doing so.

It is with true regret that I read the claims made in Matt Bodhaine's letter. However, I am confident that each of you can independently evaluate the weight to be given to the letter.

Your vote tomorrow has long-range impacts. I trust you will not allow one recent unrelated and unfortunate event and **the union's fanning of the flame** to be your sole basis for that vote.

Please continue to work with me to make this City organization one that reflects your values - not those of outside third parties.

[Emphasis by **bold** supplied.]

Explaining the reference to "Everett", the Commission's docket records for the earlier cases list an address in Lynnwood, Washington, for the WSCCCE's business office. That community is located in Snohomish County, just to the south of Everett, Washington. McFall's letter delivered on July 15 thus tied Bodhaine to the union.

With 24 ballots for the WSCCCE and 26 ballots for the "no representative" choice, five challenged ballots cast in the July 16 runoff election were sufficient to affect the outcome. The WSCCCE filed timely objections under WAC 391-25-590, alleging that employer conduct improperly affected the results of the election.

The "Zero-Based Budgeting" Exercise -

On October 19, 1992, while the unfair labor practice charges and election objections were awaiting a hearing, Finance Director Deborah S. Larson wrote a memo to McFall which offered a comparison of "zero based budgeting" (ZBB) with "performance based budgeting". This was in response to a suggestion by a city councilman that the administration consider ZBB. Larson explained that ZBB consists of preparing budget proposals and alternative levels of spending grouped into "decision packages" which are then ranked in order of priority. Larson reported that ZBB was tried by the U.S. Department of Agriculture in 1964, with mixed results. She explained that critical evaluators concluded that the approach required voluminous documentation with a great deal of departmental time and energy, yet reached the same conclusions that would have been reached with the less expensive incremental approach. Larson offered a less expensive alternative of performance auditing, which she felt would evaluate a department's efficiency and compliance with relevant policies and laws and its results.

Nyberg, who was then assistant city manager, testified that McFall decided on doing a pilot project applying the ZBB concept only to the building division of the Community Development Services Department. An outside consultant, John D. Saven & Associates, was hired to do the study. Nyberg testified that he asked the heads of building division and the land use planners division to "totem" the employees for their divisions.³ This meant arranging employees on a list according to their merit, based on specified criteria.

Processing of the Earlier Cases -

A consolidated hearing on the unfair labor practice charges and election objections filed in July of 1992 was held on January 6, 8 and 14, and February 11 and 12, 1993. The evidence adduced at that

³ The directive to totem the employees in the land use planners division is inexplicable, since that division was not included in the ZBB study.

hearing clearly identified Bodhaine as a union supporter. Briefs were filed in those proceedings on May 7, 1993.

Layoff of Bodhaine -

On August 20, 1993, while the election objections and unfair labor practice charges were awaiting a decision by the Examiner, Mumma wrote Nyberg an eight-page confidential memorandum regarding staff analysis for reduction-in-force. Mumma gave a totem of staff members for retention, based on criteria of job skills, dependability, certification and education, communication and interaction with others, and work history. According to that evaluation, Mumma believed that Bodhaine and a permit specialist by the name of Joanne Johnson should be laid off.

On August 30, 1993, Nyberg notified Bodhaine that he was being laid off effective September 1, 1993. Nyberg wrote:

Dear Matt:

This letter is to inform you that, effective September 1, 1993, you are being laid off your position due to a reduction in the City's workforce.

The attached outlines the lay off procedure and benefits provided by the City. **I regret the economic necessity of this action.**

[Emphasis by **bold** supplied.]

Nyberg informed Bodhaine that his name would be placed on a job announcement mailing list for 12 months, to assist him in applying for positions for which he might be qualified.

On August 31, 1993, McFall issued a memorandum informing all city employees that a decline in building activity had caused the layoff of two employees in the building division. McFall wrote:

As some of you are undoubtedly aware, **building activity** in the city of Federal Way **has declined**

from the early days of cityhood. The less-than-robust local economy has served to slow down development. Therefore, the numbers of permits issued for new construction are at an all-time low. As a direct consequence of this lack of building activity, revenue from permits fees is also down below projections. As a result, it has become necessary to take action based upon lower-than-expected activity and revenue.

Effective immediately, we must undergo a reduction in force in the Building Division of the Department of Community Development. Two positions, a permit specialist and a building inspector, are subject to immediate layoff. We anticipate that the situation that led to this action will continue through the balance of this year and do not expect a reversal of this situation through 1993. Additionally, my budget recommendation to the City Council for 1994 will not include funding for these two positions. **Only in the event that building activity increases and there is a corresponding increase in revenue from permit fees will we consider a supplemental appropriation to fund the two positions.**

[Emphasis by **bold** supplied.]

Those actions were taken without benefit of the final report by Saven & Associates on the ZBB study.

The Consultant's Report -

Saven's report issued on September 1, 1993, cautioned there are inherent limitations on ZBB concepts when applied to relatively small organizations such as the building division (with 8.5 full-time employees), when compared to a larger organization (e.g., one with 85 FTE's). Saven advised that he had approached the study from the perspective of the division being financed as a "special operating fund", rather than a general fund activity. Saven's report noted that, while overall building activity was not as high in 1993 as in 1992, it could increase significantly from present trends. Saven also reported that a decrease in revenue from the examination of plans for new residential construction of nearly \$8,000 for a six-month period in 1993 was offset by new public

construction of \$7,500. In the corresponding timeframe, inspections declined from 6847 to a range between 5584 and 6070. Saven's report indicated that a reduction of 1 FTE would erode a "next-day inspection policy", would increase the number of inspections per day from 8.3 to 12.3, and would leave the city without any ability to respond to a major turnaround in the economy. The report forecast a decline in the quality of inspections with an increase in public complaints, and operational problems to cover sick leave and vacations. The report outlined approaches to supplement staffing by contracting out or hiring temporary personnel. The report also noted that staff could work overtime or use flex-time to cover periods of high activity. Saven raised the issue of the city's loss of investment in trained personnel who have developed a high level of expertise in their technical areas.

The employer abandoned the zero-based budget approach after it laid off Bodhaine. It has never used the ZBB approach again.

Subsequent Events -

The Examiner's decision in the earlier cases was issued on September 15, 1993. The Examiner overruled the objections and dismissed the complaints. The union petitioned for review and those cases remained pending before the Commission until it affirmed the Examiner's decision on July 15, 1994.

After Bodhaine was laid off, he applied for a vacant position advertised by the employer. He was not given the position.

POSITIONS OF THE PARTIES

The complainants argue that Bodhaine was identified as a union activist, and that his union activity was a substantial motivating factor in his being constructively discharged by a so-called layoff.

The employer argues that there is not a causal connection between Bodhaine's earlier union activities and a budgetary decision made a year later to reduce the staff of the building division. In arguendo, the employer asserts that it had substantial reason to lay off Bodhaine, because of his substandard work history.

DISCUSSION

Standards for Determining "Discrimination" Claims

RCW 41.56.040 gives public employees a right to organize and select representatives of their own choosing, free from interference and discrimination. RCW 41.56.140(1) makes it an unfair labor practice for a public employer to interfere with the rights conferred on its employees by RCW 41.56.040.

The Supreme Court of the State of Washington has adopted a "substantial factor" test for determining discrimination cases. Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991); Allison v. Seattle Housing Authority, 118 Wn.2nd 79 (1991). Under that test, the charging party retains the burden of proof at all times, but need only establish that statutorily protected activity was a substantial motivating factor in the employer's decision to take adverse action against the employee:

If the plaintiff presents a prima facie case, the burden [of production] shifts to the employer who must articulate legitimate nonpretextual nonretaliatory reasons for the discharge. ... If the employer produces evidence of a legitimate basis for the discharge, the burden shifts back to the plaintiff ... to ... establish the employer's reason is pretextual.

Wilmot at page 70.

...

Under the substantial factor test if the pursuit of [protected rights] was a significant 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. ... The employer is simply not entitled to discharge employees because of their assertion of statutory rights.

Wilmot at page 71.

The Commission adopted the "substantial motivating factor" standard in Educational Service District 114, Decision 4361-A (PECB, 1994), which was issued simultaneous with its decision in the earlier litigation between these parties.

The Prima Facie Case

To establish a prima facie case of unlawful discrimination, the complainants have the burden to prove:

1. The exercise of a statutorily protected right, or communication to the employer of an intent to do so;
2. That one or more employees was deprived of some ascertainable right, status or benefit; and
3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

Bodhaine's Union Activity -

The record establishes that the employer had ample knowledge that Bodhaine was a union activist. The exchange of correspondence authored by Bodhaine and McFall during the election campaign speaks for itself. The Examiner's decision in the earlier cases clearly identified Bodhaine as a union supporter.

The Disputed Action -

Whether termed a "layoff" or a "discharge", termination of employment has often been described as "capital punishment" in the employment setting. In this case, Bodhaine's employment was terminated with minimal notice and with no guarantees of recall. There was no precipitating incident of employee misconduct.

The Causal Connection -

The employer argues that there is no evidence that any supervisor or manager was aware of any union activity by Bodhaine between the date of the last union election and his layoff. The employer reasons, therefore, that there is no nexus between his prior union activity and his layoff. The law does not capsulize union activity into such discrete periods, however. The fact that the union lost the representation election did not alter the right of employees to be free from interference and discrimination under RCW 41.56.040 for their union activity up to that time.

The employer relies on Asotin County Housing Authority, Decision 3241 (PECB, 1989), where no nexus was found between budget cuts causing the layoff of several union activists and their previous reinstatement by a Commission decision.⁴ The Asotin County situation involved: (1) A union that had won the representation election; and (2) legitimate budget cuts caused by a 40% loss of operating funds three years later. Those facts are distinguished from the instant case, where litigation on the election campaign remained pending,⁵ and the legitimacy of the budgetary exercise is at issue. Further inquiry is warranted here.

⁴ In Asotin County Housing Authority, Decision 2471 (PECB, 1986), the earlier discharges were found to have been in reprisal for protected union activity.

⁵ After the Examiner dismissed the election objections and unfair labor practice charges in the earlier cases and the union appealed to the Commission, the employer took the position that the "certification bar" period should not begin to run until the Commission issued its final order. Acceptance of the employer's argument would have fore-stalled any renewed organizational activity among its employees for an indefinite time (i.e., for the unknown period that it took the Commission to decide the case plus one year thereafter). The Commission rejected the employer's argument, and computed the "contract bar" period from the date of the last unsuccessful election. City of Federal Way, supra. The Commission thus ruled (retroactively) that the certification bar year had ended on July 16, 1993.

The employer argues that a positive evaluation of Bodhaine in August of 1992, after Bodhaine's visible union activity, is inconsistent with the claim of animus. The employer cites Clallam County, Decision 4011 (PECB, 1992), where similar commendations led to an inference of no animus, but that precedent is not compelling in the context of the change of supervision which occurred at Federal Way. The evaluator cited by the employer here was Lorentzen, who had retired and had nothing to do with the "totem" of staff members or the layoff decision.

The employer notes that Mumma was hired after the last election, and it reasons that his decisions with respect to Bodhaine would have no connection to the union organizing. The employer also cites that Mumma had belonged to several unions in the past, as a basis for arguing that the decision to lay off Bodhaine was not based on union animus. Mumma is not entitled to an inference of having "clean hands", however, merely because of past membership in a union. The record does not disclose whether Mumma believed in the value of unions, or even whether he had regarded his past union membership as a good experience. At a minimum, the record indicates that Mumma was curious about the pending litigation. The Examiner does not find Mumma was a free agent in this situation.

There was a conflict in testimony among employer officials about the criteria for the totem. Mumma testified that he established the criteria on which he prepared an analysis of each staff person:

Q Mr. Mumma, who gave you the criteria for the toteming that you did?

A I believe my--well, let me--I established the criteria, then working with Human Resources and Mr. Moore, we all reviewed the criteria and agreed upon it.

Transcript at page 82, lines 9-14.

Nyberg testified, however:

A When I instructed Mumma to put together a totem, seniority wasn't one of the factors that I wanted him to consider. Experience, contribution to the organization, were the criteria that's laid out in there. Those were the criteria to use.

Transcript at page 133, line 25 through page 134, line 4.

At a minimum, Nyberg's testimony implicates higher authority in the decision to lay off Bodhaine.

The decisions in the earlier cases indicate that the employer vigorously opposed the unionization effort, and that Bodhaine was a key player in that organizational effort. By the late summer of 1993, the employer's workforce was at liberty to attempt another organizing effort. Those facts support an inference that Matthew Bodhaine's union activity could have been a basis for the employer's actions in the late summer of 1993. Based on the records of the earlier cases and the evidence produced in this proceeding, the Examiner concludes that the complainant has established a prima facie case of discrimination.

The Employer's Burden of Production

While the complainants carry the burden of proof throughout the prosecution of the case, the burden of production shifts to the employer after the complainant establishes a prima facie case of discrimination. If an employer fails to articulate lawful reasons for its actions, the complainant will prevail.⁶

In this case, the employer argues that it had legitimate economic reasons to reduce its workforce, and that Bodhaine was selected for

⁶ In City of Winlock, Decision 4783 (PECB, 1994), an Examiner found a "discrimination" violation as to the first of two discharges of an employee, because the reasons stated by the employer included the employee's union activity.

layoff because of his work history. In particular, the employer relies on the following incidents outlined in Mumma's memorandum containing a totem of the employees:

- * During a job evaluation in March of 1991, the building official acknowledged Bodhaine was willing to work additional hours if asked.

- * Bodhaine was talked to during his job evaluation in November of 1991 about the need to change his personal appearance.

- * A letter acknowledged a job well done in July, 1992.

- * During a job evaluation in August, 1992, Bodhaine was again asked to be aware of his personal appearance.

- * Mumma reprimanded Bodhaine in November of 1992, and placed him on six month's probation, based on a complaint that Bodhaine was discourteous to a subcontractor and a mobile home owner. Bodhaine was warned that he would be watched closely.

- * Mumma wrote a memo to Bodhaine on April 27, 1993, summarizing his interviews with Ellis and Watkins concerning a confrontation regarding an overtime assignment. Mumma told Bodhaine that Watkins was his immediate supervisor, and had the responsibility of assigning projects and approving overtime.

- * After a staff meeting on June 2, 1993, Mumma and Ellis overheard Bodhaine saying that he would like to shoot Watkins. Watkins heard of Bodhaine's statement later, told Mumma that he felt threatened, and reported to Mumma that Bodhaine had a gun in his personal affects. Even though Bodhaine had a permit for the gun and there was no city policy on carrying guns, Mumma thought Bodhaine's statement showed poor judgment. Mumma recommended that Bodhaine should receive a two week suspension and be required to attend an anger management course, but Nyberg later reduced the suspension to one week.

- * A complaint was received in July of 1992, that a city employee was driving a city vehicle too fast and running stop signs. Bodhaine was suspected of driving the vehicle and a note to that effect was placed in his file.

Substantial Motivating Factor Analysis

The Examiner recognizes that employer motives in cases of this type are seldom marked by specific actions, and must be deduced from the circumstances of the case. The complainant has the burden of proof to show that the reasons advanced by the employer for its actions were pretextual, or that union activity was nevertheless a substantial motivating factor in those actions. Wilmot, Allison, and Educational Service District 114, supra.

In this controversy, each party urges a plausible explanation which can be drawn from the facts as heretofore noted:

* One plausible scenario (offered by the employer) is that the city council forced application of the zero based budgeting analysis, that the Community Services Department was chosen because it derived revenue from permits and fees, and that an innocent consequence of those legitimate decisions was to reduce staff in the face of reduced revenues. The employer contends that it chose to lay off Bodhaine because of his lack of dependability and substandard work history. The employer insists that it made the decision to retain several employees with less service than Bodhaine based on objective criteria. The employer explains its decision not to consider Bodhaine for a part-time contract position, as because other applicants were better qualified.

* The other plausible explanation (offered by the union) is that top employer officials urged Mumma to get rid of the union activist by creating an employment record of discipline, that the employer feared another organizing drive when the certification bar year came to its end, and that it addressed both concerns by laying off Bodhaine in 1993. Under this scenario, the ZBB analysis provided a useful vehicle with less harsh implications and less unpleasantness than the earlier discharges for misconduct. A variant on this theory is that the employer merely utilized ZBB as a vehicle to remove the known union activist.

The Budget Crisis -

Nyberg's August 30, 1993 letter told Bodhaine that his layoff the next day was an "economic necessity". City Manager McFall put more emphasis on a "lack of work", stating that a "less-than-robust local economy" was slowing down development. If the termination of Bodhaine's employment was truly an economic necessity, one would not expect the employer to have constructed as elaborate of a case as if it were defending a discharge for cause based on alleged employee misconduct.

The initiation of a ZBB pilot program at the behest of just one council member seems contrived, in that public bodies operate by quorums, parliamentary motions and majority votes.

McFall's selection of the building division in which to conduct a ZBB analysis seems particularly contrived, because the budget for the Community Development Services Department is prepared on a department-wide basis. Outside consultant Saven also commented on the impropriety of selecting this small unit with only 8.5 FTE's, noting that a ZBB study would usually be done in a unit 10 times that large. While Saven stated that his study was based upon the assumption that Community Development Services would be funded by permit fees and other user revenues, the reality was that the department remained a general fund activity of the employer.

Another difficulty with the employer's "budget" defense is that the ZBB approach was implemented on the basis of only six months of experience. When questioned as to why the study was limited to the statistics for the preceding 6 months, rather than the previous 12 months, Development Services Manager Moore gave an answer that seemed evasive and nonresponsive:

Q Why is it only six months?

A Identifies the activity up to the point where the budget activity was important, and

to the point of the Zero Based Budgeting Study completed.

Transcript at Page 112, lines 12-14.

Nyberg testified that the budget process takes nine months, with each department preparing estimates of revenues and expenditures for the next year based on the council's goals and city manager's analysis of the economy. Clearly, the use of ZBB analysis to formulate the employer's budget for 1994 does not explain jumping to implement a layoff eight months into 1993.

McFall's statement that a "supplemental appropriation" would be needed to restore Bodhaine's position does not square with the reality that public bodies write budgets for a year at a time. It can be inferred that money had been appropriated to fund Bodhaine's position for the entire year in 1993.

The record showed that there was actually an increase in total city revenue for the year.⁷ In fact, the Community Development Service budget actually increased.⁸ Further contradicting McFall's statement in his August 31 letter that the positions would be restored only when the revenues from permit fees increased, the record indicates that Johnson's permit specialist position was restored several months later without any showing of increased revenue. By June of 1994, the permits staff was increased by 1-1/2 positions. In that same period, a contract position for building inspector was established without any showing of increased revenues from fees.

⁷ Housing starts for 1993 were at 206 down from 275 for 1992 but not significantly off the average of 216 for three out of the previous four years. Data for a 12-month comparison or for 1994 was not available.

⁸ The Community Service's budget increased from \$1.77 million in 1991 to \$2.087 million in 1992 (an 18% increase). In 1993, the budget increased to \$2.244 million (another 8% increase).

The most compelling reason for the Examiner to conclude that the employer's defense based on the ZBB analysis was pretextual comes from the final recommendation of the employer's own ZBB consultant. At a minimum, Saven's strong recommendation against the layoff of a building inspector should have provided the employer basis for a graceful reversal of its actions. Having paid the consultant to guide it through the ZBB process, and having jumped the gun to lay off Bodhaine before receiving the consultant's final report, it would have been logical for an employer that was really thinking "layoff" to have followed the recommendations of its consultant. A prompt recall of Bodhaine in September of 1993 would have avoided the risk of lost training investment that was identified by the consultant, and could even have limited the employer's potential legal liabilities (e.g., for unemployment compensation benefits and unfair labor practice litigation).

Characterization as a "Layoff" -

The employer chose to characterize its termination of Bodhaine's employment as a "layoff". Nyberg promised Bodhaine consideration for positions that might open up in the future; McFall announced to all of the employees that the employer might consider re-creation of Bodhaine's position if "building activity increases and there is a corresponding increase in revenue from permit fees". Employer actions at odds with such an approach give rise to an inference that the stated nature of the termination was also pretextual.

In Education Service District 114, supra, the employer gave assurances to laid off employees that they would be re-hired as soon as the federal and state funding was approved. In spite of these assurances, however, several union activists were not re-hired. As in this controversy, that employer attempted to discount satisfactory evaluations of the union activists by characterizing them as minimally satisfactory, and by soliciting testimony from supervisors that their work was really substandard. As in this controversy, that employer retained several less experienced

employees who had lower qualifications, and it failed to show that it hired better qualified replacements. Violations were found when the employer's stated reasons did not check out.

In Port of Pasco, Decision 3307 (PECB, 1989), the record did not support the employer's claim that there was a financial reason for the disputed layoff. A review of the record indicated there was a strong inference that the layoffs were a subterfuge. An alleged financial imperative is not established when positions are restored without additional revenues and the budgets for the department actually increase.

In Housing Authority of Bremerton, Decision 3168 (PECB, 1989), the employer's layoff of employees on the day after a representation election was not found to have been based on union animus, because the employer had announced a reorganization prior to the union organizing effort and the employer had not taken any other action that could be construed to show animus. By contrast, the contradictory actions by City of Federal Way officials are choreographed against a vigorous anti-union campaign that included a personal attack by the city manager against Bodhaine.

The employer's decision to lay off Bodhaine was made before the report from the consultant was issued. The consultant recommended against any layoff, based on the loss of training investment and potential delay of inspections.

The "layoff" of two employees does not assure the existence of valid economic reasons for either layoff. The layoff of a non-activist would still be unlawful under RCW 41.56.140(1) if it is done as part of a larger scheme to cover discrimination against a union activist. In this case, the record shows that the co-worker laid off with Bodhaine was offered her same position back within a matter of several months.

Bodhaine was not hired back in the part-time building inspector position that was created later. Director of Human Resources Mary McDougal testified that she mailed an announcement of a position opening to Johnson, later called Johnson to make sure she received the notice, and asked whether Johnson would come back. In distinct contrast, McDougal did not follow up by telephone after mailing a job announcement to Bodhaine, and did not inquire to ascertain his interest in returning to the city. The employer offers no explanation for this disparate treatment.

When Bodhaine applied for the position, he did not get the job. The employer claimed Bodhaine did not get the job because others were better qualified. That action further discredits the employer's characterization of the termination as a "layoff".

Mumma's Analysis of Bodhaine's Employment Record -

The employer attributes the layoff of Bodhaine to Mumma's totem of the employees in the building division. The effect of that exercise was that the employer laid off an experienced senior building inspector, while retaining two inspectors who had less than a year's service. One of those retained had used 85% of his sick leave, lacked a plumbing certification, and had sexually harassed a secretary. The other employee retained was not certified as an inspector.

Bodhaine was told that he was laid off for economic reasons, but the employer has attempted to defend in this proceeding that he was laid off because of his work record. In particular, Mumma's rating of Bodhaine as the least meritorious of the seven employees in the division discounted Bodhaine's performance on the basis of dependability, noting he was frequently tardy, used 97% of his available sick leave, and had several disciplinary incidents in his file. The Examiner has considered Bodhaine's work record, with the caution that it is well settled that an employer which discharges an employee for one or more stated reasons cannot justify his

action later with a different reason. See, City of Winlock, Decision 4783 and 4784, supra. A detailed review of Bodhaine's work record raises many questions as to Mumma's objectivity.⁹

The one-year evaluation made by Lorentzen in March of 1991 rated Bodhaine as technically proficient in building, plumbing, and mechanical inspections. It was noted that Bodhaine had "developed a rapport with contractors, construction workers and homeowners by taking the time to explain to them what is required by the code and suggesting possible ways to achieve the desired result". He also commended Bodhaine for volunteering to work additional hours when short-staffed and to work different shifts to accommodate builders and contractors. Lorentzen concluded that Bodhaine was:

[A] loyal and trusted employee. He is a definitely a valuable asset to this organization. It has been a pleasure to work with him.

Both Nyberg and Moore concurred at that time, but Mumma's August 20, 1993 totem of the employees reported only that Bodhaine was willing to work additional hours.

Another evaluation in November of 1991 gave Bodhaine a similar laudatory rating, and noted that Bodhaine had attended classes on

⁹ The employer attempted to create the impression that, as the building official hired after the union elections and not privy to organizing effort, Mumma made his decision to lay off Bodhaine based on objective work record criteria such as ability to get along with others and dependability. The record indicates, however, that Mumma was not as removed from the union organizing controversy as the employer might like him to be. Mumma testified he was aware of the failed union organizing attempt. Although he testified that his superiors would not discuss it because the matter was being litigated, Mumma himself demonstrated curiosity about that controversy. As noted above, the record demonstrates a conflict of testimony on who established the totem criteria, and that conflict also casts considerable doubt on the underlying motives.

the new Washington energy code, sexual harassment, a wood truss seminar, and a building code update. The evaluation cautioned Bodhaine on his appearance and on smoking at building sites, but Lorentzen continued to rate Bodhaine as a valuable asset with whom it has been a pleasure to work. Moore concurred, and the employer officials recommended Bodhaine for a pay increase at that time, but Mumma's totem only reported that Bodhaine was "talked to" on this occasion about his personal appearance.

Special training was provided to Bodhaine under a memorandum of understanding that he and Lorentzen signed in February of 1992,¹⁰ providing that Bodhaine was to obtain an I.C.B.O. certification as a combined dwelling inspector by taking a test scheduled for March of 1992. This was seemingly ignored by Mumma.

A memorandum of appreciation was issued to Bodhaine on July 1, 1992, in which Nyberg commended Bodhaine for his judgment and tact in handling a complaint of illegal construction activity.¹¹ Mumma calls this memorandum, "a letter of acknowledgement of a job well done", but omitted the comments on Bodhaine's tact and judgment.

Another evaluation by Lorentzen in August of 1992 gave Bodhaine another laudatory rating. It was noted that Bodhaine had obtained IAPMO Uniform Plumbing Code certification, and that he continued to attend classes and workshops on job-related subjects. Lorentzen continued to compliment Bodhaine as a valuable asset and a pleasure to work with during the first two and one-half years of city operations. On August 28, 1992, Lorentzen recommended to Moore

¹⁰ It is inferred that the organizational activity began in or prior to February of 1992. The representation petition in the earlier case was filed on February 25, 1992.

¹¹ This was the date of the second election, and also the date of the discharge of Bray and Snyder. Bodhaine clearly became visible as a union activist with the dissemination of his July 13, 1992 letter.

that Bodhaine be given a pay increase, based upon the performance evaluation. Moore concurred, noting Bodhaine had been particularly helpful picking up the slack because of staff shortages,¹² and Nyberg acknowledged that recommendation, but Mumma again reduces this evaluation to a warning about appearance while ignoring all of the positive statements.

Clearly, everything on Bodhaine's employment record was positive up to Lorentzen's retirement. Moreover, the extensive training given to Bodhaine validates the concerns expressed by consultant Saven in September of 1993.

The Discipline in November of 1992 -

The reprimand and "probation" imposed on Bodhaine in November of 1992 represents a substantial departure from the past, and so warrants close scrutiny. The union's failure to demonstrate a clear majority was old news by that time, but the hearings on the unfair labor practice charges and election objections had not yet commenced. A union activist is not entitled to hide behind the collective bargaining statute to cover poor work performance, but neither is an employer entitled to lash out at union activists once an unsuccessful organizing campaign has blown over. See, City of Olympia, Decision 1208-A (PECB, 1982), where the discharge of a union activist one week after an unsuccessful election was found unlawful. Several inconsistencies by employer officials concerning their handling of this incident cast doubt on the legitimacy of the reliance which they claim to have placed on it much later.

The November incident involved a claim that Bodhaine had been "discourteous". In view of the regulatory nature of the function performed by Bodhaine, where disputes with contractors and building owners are to be anticipated, the penalty of a formal reprimand and

¹² The building division staff would have been shorthanded after July 1 due to the discharges of Bray and Snyder.

six-month probation for a first offense seems ominous and excessively harsh. Either Bodhaine's excellent work record of two and one-half years (including Nyberg's commendation for tact less than two weeks before he publicly criticized McFall) was forgotten, or there was a drastic change of attitudes on one or both sides.

Mumma's own investigation report concerning the November incident does not support his conclusion that Bodhaine was discourteous. A witness to the incident was reported to have said that Bodhaine was "curt", not that he was "discourteous". Mumma gave credence to the complaint of a subcontractor who based his disagreement with Bodhaine on an incident six months earlier that had not been reported or investigated at the time of its occurrence. Bodhaine maintained that he could not recall having dealt with the subcontractor before.

Bodhaine grieved the discipline on November 30, 1992, but Nyberg initially asserted that the grievance was untimely. Nyberg issued a response anyway, but not until almost three months later (on February 24, 1993) and he then failed to give Bodhaine a copy of his response. Bodhaine never received the memorandum which had been placed in his personnel file. The employer's human resources director later removed it from his file, with her apology. The employer's later reliance on this incident is, thus, inconsistent with the earlier actions of its own officials.

The Incident of April, 1993 -

Mumma's April 27, 1993 memo grew out of a confrontation between Bodhaine and two co-workers.¹³ On April 19 and 20, Bodhaine had reported giving Watkins "a proper cursing out". The underlying controversy arose out of Watkins telling Bodhaine not to work

¹³ While Mumma used this memo to clarify the use of cellular phones for personal business, and to caution Bodhaine to keep the repayments for its personal use current, there is no claim or record of abuse or misconduct by Bodhaine.

overtime to inspect a picnic shelter without authorization from Watkins, Bodhaine's argument with Watkins about the need for approval, and Bodhaine's call to Ellis to seek approval of the overtime work.

Mumma used the April 27 memo to tell Bodhaine that Watkins was his immediate supervisor, and had responsibility of assigning projects and approving overtime. There is nothing in the record to suggest the information had ever been communicated previously. The employer would clothe Watkins in supervisory attire, but Watkins was actually no more than a lead worker and fellow employee who sat at an adjacent desk.¹⁴

Bodhaine was working on a project and ignored Watkins' directive to not work overtime. Circumstances on the project were such that Bodhaine's failure to work overtime would have inconvenienced a number of subcontractors and workers on the site. While Bodhaine did not know until later that the employer had assigned a high priority to the project, he did call Senior Plans Examiner Ellis to clear the overtime work. Watkins confronted Bodhaine in an angry manner on the next day, and provoked an angry response. Bodhaine testified that Watkins was overbearing and "nitpicked" contractors. Bodhaine's account of the altercation is unrebutted, because Watkins was not called as a witness.

Commendation of May 7, 1993 -

Mumma sent a memo to Bodhaine commending him on carrying an above-average workload when four inspectors were out. Mumma noted Watkins' report that Bodhaine had applied "a confident, cheerful, stable and helpful attitude to get the job done", and Mumma thanked

¹⁴ The supervisory structure of the department is surprisingly extensive. The chain of command includes six levels (the city manager, assistant city managers, Community Development Manager Moore, Building Official Mumma, Senior Plans Examiner Ellis and Senior Inspector Watkins) to supervise the remaining two building inspectors.

Bodhaine for a job well done. This commendation was selectively omitted by Mumma in his recounting of Bodhaine's work history in the August 20, 1993 totem memorandum.

Incident of June 2, 1993 -

After a staff meeting, Mumma and Ellis overheard Bodhaine say he would like to shoot Watkins. Mumma thought Bodhaine's statement showed poor judgment, and that he should receive a two week suspension and be required to attend an anger management course.

Watkins later told Mumma that Bodhaine had a gun in his personal effects. Mumma's totem memorandum erroneously stated "Watkins observes a handgun in Bodhaine's canvass bag beside his desk", whereas Mumma had reprimanded Watkins for going through Bodhaine's personal effects in a vehicle, not in a bag by his desk.¹⁵

While threats of physical violence are necessarily taken seriously, the statement was not made directly to Watkins. It was made in the context of an angry conversation between co-workers. Mumma testified he did not believe Bodhaine would really carry out such a threat. The record does not indicate whether Watkins received any counseling or warning about his role in the provocation which originally spawned the threat. Bodhaine later apologized to Watkins and bought him lunch. Nyberg reduced Bodhaine's suspension for the threat to one week. On July 29, 1993, Bodhaine entered into a letter of understanding to attend a city-paid two-month anger management course in Kent, Washington, using a city vehicle.

¹⁵ On July 1, 1993, Bodhaine wrote a memo to Mumma, stating that he saw Watkins going through a tote bag in which Bodhaine kept his personal effects. The gun was kept in a zippered fanny pack. Bodhaine considered the search illegal and unethical, and asked if it was directed by management. Mumma's reprimand criticized Watkins for going through Bodhaine's personal possessions in a car. Moore's testimony that Watkins saw the butt of the gun in a bag by Bodhaine's desk thus contradicts Mumma's reprimand of Watkins.

Conclusions on the "Totem" -

The record does not support the employer's defense based on the totem of its employees. In a period of little more than a year after Bodhaine took a stance in opposition to McFall, Bodhaine received disciplinary actions and his employment was terminated. The record indicates that Mumma's style of supervision was different than that provided by Lorentzen, but that does not close the many gaps and inconsistencies revealed by the evidence.

Bodhaine was recognized by his supervisors as a valuable and trusted employee from the date of his initial hire in March of 1990 up to the date in September of 1992 when Mumma replaced Lorentzen. The record shows that Bodhaine was not free of criticism and on a few occasions fell short of his employer's expectations, but Bodhaine was specifically commended for developing "a rapport with contractors and homeowners".

The employer's attempt to discount the lack of negative material in Bodhaine's file during the first few years of his employment is not persuasive. It provided testimony that Lorentzen was a kindly person who could not bring himself to be disagreeable, but the record shows that it was Lorentzen who initiated the terminations of Bray and Snyder in the earlier City of Federal Way cases.

The employer also attempts to discount the years of good evaluations by soliciting testimony from supervisors that they did, in fact, counsel Bodhaine on his appearance and manner.¹⁶ The Examiner does not credit such testimony, because those comments

¹⁶ Bodhaine's career began as a logger. After he was injured, he was later retrained as a building inspector. Bodhaine had been criticized for smoking at construction sites, having tatoos and a brusque manner. The employer also recalled that back in 1991, Bodhaine was asked to remove a cartoon of a rodent with a dagger through it and the caption, "Comply or die".

were scarcely mentioned in the performance evaluations as areas in which to improve.

The employer's assertion that Bodhaine was not dependable because he used most of his sick leave and was frequently tardy is contradicted by Mumma's laudatory memo of May 7, 1993, and by the lack of any previous criticism or discipline. Given Mumma's propensity to dispense severe punishments for other indiscretions,¹⁷ consistency would have dictated that Mumma at least reprimand Bodhaine for any abuse of sick leave or habitual tardiness. Since no previous evaluation, written warning or even oral counseling had raised these subjects with Bodhaine, one wonders why it was considered important in a totem of employees for layoff.¹⁸ Mumma's focus on dependability ignored the performance evaluations which praised Bodhaine for his willingness to skip lunches and work different shifts to accommodate clients.

After excluding almost all of Bodhaine's positive contributions from his evaluation, Mumma concluded by listing a citizen complaint that a city employee in a city vehicle was speeding and running stop signs in a residential district. Watkins had reported that it may have been Bodhaine, based on the description of the driver, but Bodhaine was not given a reprimand. Nevertheless, Mumma disregarded the superficial investigation and his own inaction when he listed this incident in his analysis of Bodhaine's work history.

Bodhaine testified in a forthright manner, freely admitting his shortcomings; his testimony was very creditable. In contrast,

¹⁷ E.g., a six-month probation for a first offense of conflict with a client and a two-week suspension for a statement about Watkins that "showed poor judgment".

¹⁸ The record does not indicate whether the sick leave was used for the appendectomy Bodhaine had shortly after he was hired or some other major health problem. The customary purpose of sick leave is to enable employees to take time off for such illnesses or injuries.

Mumma's totem of the staff selectively omitted Bodhaine's many good points. Mumma "overlooked" the very favorable evaluations and commendations regarding Bodhaine's dependability and tact in working with clients, and instead selected minor comments in the evaluations or relied on matters which had not previously been called to Bodhaine's attention. It is clear by the foregoing that Mumma's analysis of Bodhaine's work record was tailored to select him for layoff.

Summary

The certification bar period following the unsuccessful election ended in July of 1993. Soon thereafter, the employer "laid off" the most visible union supporter within its workforce.

The employer's reliance on the "ZBB" defense is fraught with gaps and inconsistencies, starting with the source of the inquiry in a lone council member. Facts adding up to discredit the employer's defense include: The criticism of the ZBB approach by its own finance director; the selection by McFall of the department which was described as a hotbed of the union activity; the initiation of the pilot study in only one-half of a budgeted department; the advancing of the ZBB process into the current budget year; the making of ZBB decisions based on part-year data; the rush to implementation before receiving the consultant's report; and the disregard of the consultants' dual recommendations against the application of ZBB principles to the building division and against the loss of its investment in trained personnel and inspection capacity.

Even if one were to accept that some layoff was indicated, the totem of the building division staff is discredited by its own set of gaps and inconsistencies. Those include: The conflicts as to the criteria for the totem; the selective evaluation of Bodhaine's work record, emphasizing negative items and patently overlooking

the favorable statements; the decision to retain an inexperienced and non-certified inspector; the decision to retain another less experienced inspector with a poor work record; and then failing to recall Bodhaine from "layoff" when a position became available for which he was qualified.

Based on the evidence and these considerations, the undersigned concludes that Bodhaine's earlier role as a union activist constituted a substantial factor in the employer's decision to lay him off and that the reasons given by the employer for its actions were pretextual, so that the employer has committed unfair labor practices under RCW 41.56.140(1).

FINDINGS OF FACT

1. The City of Federal Way is a public employer within the meaning of RCW 41.56.020 and 41.56.030(1). At all times pertinent hereto, J. Brent McFall was its city manager.
2. The Washington State Council of County and City Employees, a bargaining representative within the meaning of RCW 41.56.030-(3), conducted an organizing drive in 1992 among employees of the City of Federal Way. The WSCCCE filed a petition for investigation of a question concerning representation with the Commission, seeking certification as exclusive bargaining representative of a bargaining unit of approximately 51 employees of the City of Federal Way.
3. The employer campaigned vigorously against the selection of an exclusive bargaining representative by its employees, beginning with personal letters from the city manager and meetings with employees.
4. The results of a representation election conducted by the Commission on May 6, 1992 were vacated by the Executive

Director of the Commission, based on a determination that officials of the City of Federal Way had improperly manipulated the eligibility list for that election.

5. A representation election conducted by the Commission on July 1, 1992 was inconclusive. On the same day, the employer discharged two employees of the building division of the Community Development Department, based on the recommendation of Building Official Bruce Lorentzen. The union filed unfair labor practice charges alleging those discharges were in reprisal for union activity.
6. At all times pertinent to this proceeding, Matthew Bodhaine was employed by the City of Federal Way as a building inspector in the building division of the Community Development Department. Bodhaine had been a logger until injured in an industrial accident and retrained as a building inspector. He had acquired several certifications through training received while employed by the City of Federal Way, and was commended by the employer for acquiring that training. The Examiner's observations of Bodhaine's demeanor as a witness in this proceeding were that Bodhaine testified in a forthright manner, freely admitting his shortcomings. Bodhaine was an active supporter of the union in the organizing campaign, and was a co-worker of the two employees discharged by the employer on July 1, 1992.
7. On July 13, 1992, Bodhaine wrote a letter to all employees challenging McFall's decision to discharge the two employees who had worked in the building division.
8. McFall issued letters concerning the discharges of the two building division employees to all employees on July 14, 1992 and July 15, 1992. At least the letter issued on July 15 was a direct response to Bodhaine's letter, in which he called

Bodhaine's letter inaccurate and inflammatory and objected to Bodhaine's investigation into a confidential personnel matter.

9. The "no representative" choice received the highest number of valid ballots cast in a run-off election conducted by the Commission on July 16, 1992, but challenged ballots were sufficient in number to affect the outcome. The WSCCCE filed objections to employer actions during the campaign.
10. Matthew Bodhaine's evaluations and work record up to and including August of 1992 were laudatory. Bodhaine was complimented on his rapport with contractors and homeowners, and for his taking the time to explain what was required by the code and suggesting ways to achieve compliance. Bodhaine's evaluations up to that time by Lorentzen specifically noted his willingness to work long hours and through lunch periods to accommodate contractors and other clients. On July 1, 1992, Bodhaine was issued a memorandum of appreciation for his judgment and tact in handling a complaint of illegal construction activity. On August 18, 1992, Lorentzen recommended to Moore that Bodhaine be given a pay increase. Moore agreed noting that Bodhaine had been particularly helpful picking up the slack because of staff shortages.
11. Lorentzen retired as building official on September 1, 1992 and was replaced by Dick Mumma.
12. In October of 1992, the employer's finance director wrote a memo which was critical of the "zero based budgeting" (ZBB) approach, and proposed alternative approaches. This was done in response to the expressed interest of a lone member of the city council, and the record contains no evidence supporting a conclusion that any ZBB system was adopted or approved by the legislative body of the City of Federal Way. McFall directed that a pilot project implementing the ZBB approach be

implemented in only the building division, notwithstanding that the Community Development Department was budgeted for as a single unit. An outside consultant, John Saven, was hired to advise the employer on the ZBB process.

13. On November 12, 1992, while the unfair labor practice charges and election objections remained pending before an Examiner, Mumma investigated a contractor's complaint that Bodhaine was discourteous to a mobile home owner during an inspection. Mumma's report showed only that Bodhaine was "curt", but he gave Bodhaine a written warning for being discourteous and placed Bodhaine on probation for six months. Bodhaine believed he had acted according to state policy requiring inspection of mobile home tie-downs, and that he had been misunderstood. Bodhaine grieved the discipline under a procedure established unilaterally by the employer. Assistant City Manager Nyberg initially responded that the grievance was not timely filed, but later denied the grievance without giving Bodhaine a copy of his decision. The human resources director later removed the document from Bodhaine's file and gave Bodhaine an apology.

14. On April 27, 1993, after Bodhaine's union activity was a subject of testimony before the Examiner but while the unfair labor practice charges and election objections remained pending for decision by the Examiner, Mumma issued a memo criticizing Bodhaine for his involvement in a controversy with a co-worker or leadworker named Watkins. Although told by Watkins not to work overtime to inspect a picnic shelter on April 18, Bodhaine had cleared the overtime work with the senior plans examiner in order to avoid inconveniencing the contractors. So far as it appears from this record, Mumma's memorandum was the first notice to Bodhaine that Watkins was his supervisor.

15. On May 7, 1993, Mumma commended Bodhaine for working an above-average workload when four inspectors were out. Mumma noted that Watkins reported Bodhaine had a helpful, confident and cheerful attitude.
16. After a staff meeting on June 2, 1993, Mumma overheard Bodhaine saying he'd like to shoot Watkins. The statement was made in the context of an angry dispute between co-workers. Watkins was not present, and Mumma he did not believe Bodhaine would really carry out such a threat. Mumma nevertheless took action to suspend Bodhaine for two weeks without pay. Nyberg reduced the suspension to one week, and directed Bodhaine to take an anger management course at the employer's expense. Bodhaine later apologized to Watkins and bought him lunch.
17. When Watkins heard about Bodhaine's statement described in the preceding paragraph of these findings of fact, Watkins reported to Mumma that he felt endangered because Bodhaine had a gun in his totebag. Watkins was subsequently reprimanded by Mumma for going through Bodhaine's personal effects stored in an automobile.
18. July 16, 1993 marked the end of the one year period following the "attempted certification" election of July 16, 1992, in which the employees of the City of Federal Way failed to select an exclusive bargaining representative. The employees of the City of Federal Way became eligible to again seek union representation as of that date.
19. On August 20, 1993, Mumma wrote Nyberg an eight page confidential memorandum containing a "totem" of building division staff for reduction-in-force, based on the criteria of job skills, dependability, certification and education, communication and interaction with others, and work history. Mumma's testimony that he established the criteria was contradicted by

Nyberg. According to the evaluation, Mumma believed that Bodhaine and a permit specialist should be laid off.

20. Mumma's analysis did not consider Bodhaine's work record objectively, and selectively ignored performance evaluations which had praised Bodhaine in each of the preceding years for his willingness to skip lunches and work different shifts to accommodate clients. Mumma recommended that an inspector who had less than one year of service be retained, notwithstanding that he had already used 85% of his sick leave and had been warned about sexual harassment. Mumma also recommended retention of another inspector who had been recently hired and who was not certified.
21. On August 30, 1993, Nyberg notified Bodhaine that he was being laid off effective September 1, 1993 for economic reasons. Nyberg informed Bodhaine that his name would be placed on a jobs announcement mailing list for 12 months to assist in applying for positions for which he may be qualified.
22. On August 31, 1993, City Manager McFall advised all employees that the positions vacated by layoff would be restored only when permit fee revenues increased.
23. On September 1, 1993, Saven submitted his final report on the ZBB process for the building division. Saven cautioned of inherent limitations with application of ZBB concepts to relatively small organizations such as the building division, and indicated a preference for their application to organizations at least 10 times that large. Saven advised that he approached the study from the perspective of the division being financed as a "special operating fund", rather than a general fund activity. Saven's report noted that overall building activity, while not as high in 1993 as in 1992, could increase significantly. Saven raised the issue of the city's

investment in trained personnel who have developed a high level of expertise in their technical areas, and indicated that a reduction of one full-time employee would erode the employer's "next day inspection policy" and increase the number of inspections per day from 8.3 to 12.3 without any ability to respond to a major turnaround in the economy. The report forecast a decline in the quality of inspections with an increase in public complaints and operational problems to cover sick leave and vacation coverage. The Saven report noted that the ZBB analysis was based on only six months of experience, instead of the customary one year. McFall did not act on the concerns indicated by Saven, and made no further use of the ZBB approach.

24. The evidence establishes that the budget actually adopted for Community Development Services actually increased each year prior to the layoff of Bodhaine, and that it continued to increase following the layoff of Bodhaine. The co-worker laid off at the same time as Bodhaine was offered recall to her same position several months later, and the staffing in the department had increased by another 1-1/2 positions as of June of 1994, without any showing of increased revenues. In the same period of time, a "contract" position for a building inspector was established without any showing of increased revenues from fees.
25. When the co-worker laid off at the same time as Bodhaine was recalled, the employer made telephone contact with that individual to confirm her receipt of the job announcement and to confirm her willingness to return to employment with the City of Federal Way.
26. When a contract building inspector position was opened for applicants, the employer mailed a copy of the job announcement to Bodhaine but did not follow up in the same manner as it did

with the co-worker laid off at the same time as Bodhaine. The employer offers no explanation for that difference in treatment of its laid off employees. Although Bodhaine applied for and was qualified for the job, he was not recalled from layoff. The employer's claim that it offered the position to a more qualified applicant contradicts its characterization of the separation as being only a layoff for economic reasons.

27. The "zero based budgeting" and "economic" reasons advanced by the City of Federal Way for the layoff of Matthew Bodhaine were pretexts designed to conceal the employer's true motives, and the previous union activities of Bodhaine constituted a substantial factor motivating the employer's decision and action to terminate the employment of Bodhaine.
28. The reasons advanced by the employees for its "totem" of the employees and its selection of Matthew Bodhaine for layoff were pretexts designed to conceal the employer's true motives, and the previous union activities of Bodhaine constituted a substantial factor motivating the employer's decision and action to terminate the employment of Bodhaine.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. The evidence, as described in the foregoing findings of fact, establishes a prima facie case sufficient to support an inference that union animus could have been a motivating factor in the employer's decision to lay off Matthew Bodhaine, so that the employer could be found guilty of an unfair labor practice in violation of RCW 41.56.140.

3. The evidence, as described in the foregoing findings of fact, establishes that Matthew Bodhaine's activity on behalf of the union was a substantial factor in the employer's decision to lay him off and that the reasons given by the employer for its actions were pretextual, so that the City of Federal Way has committed and is committing unfair labor practice in violation of RCW 41.56.140(1).

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following:

ORDER

The City of Federal Way, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:
 - a. Interfering with or discriminating against Matthew Bodhaine for his exercise of his collective bargaining rights under Chapter 41.56 RCW.
 - b. In any like or related manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:
 - a. Offer Matthew Bodhaine immediate and full reinstatement as an employee in good standing of City of Federal Way and make him whole by payment of back pay and benefits, for the period from September 1, 1993 to the date of the unconditional offer of reinstatement made pursuant to this

Order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

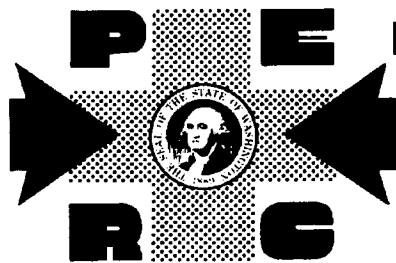
- b. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. 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.
- d. Notify the above-named complainants, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainants with a signed copy of the notice required by the preceding paragraph.
- e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington on the 30th day of June, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


WILLIAM A. LANG, Examiner

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



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

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

WE WILL reinstate Matthew Bodhaine as an employee in good standing, and shall provide him back pay and benefits for the period since his unlawful layoff on September 1, 1993.

DATED: _____

CITY OF FEDERAL WAY

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: (360) 753-3444.