

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEAN ISSAC,	)	
	)	CASE 12378-U-96-2937
Complainant,	)	DECISION 5579-A - PECB
	)	
DON EDDY,	)	
	)	CASE 12506-U-96-2967
Complainant,	)	DECISION 5580-A - PECB
	)	
MIKE MARSHALL,	)	
	)	CASE 12507-U-96-2968
Complainant,	)	DECISION 5581-A - PECB
	)	
RICHARD WATERS,	)	
	)	CASE 12509-U-96-2970
Complainant,	)	DECISION 5583-A - PECB
	)	
vs.	)	
	)	FINDINGS OF FACT,
CITY OF OMAK,	)	CONCLUSIONS OF LAW
	)	AND ORDER
Respondent.	)	
	)	
	)	

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Cline & Emmal, by James M. Cline, Attorney at Law, appeared on behalf of the complainants.

Menke, Jackson, Beyer & Eloffson, by Rocky Jackson, Attorney at Law, appeared on behalf of the respondent.

On March 11, 1996, five employees of the City of Omak filed unfair labor practice charges with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging violations of RCW 41.56.140. Separate cases were docketed for each of the individual complainants, consistent with the Commission's docketing procedure. Several allegations were disposed of by an Order of Partial Dismissal issued by the Executive Director on June 25, 1996, pursuant to WAC 391-45-110, but other allegations were referred to Examiner J. Martin Smith for further proceedings under Chapter 391-

45 WAC.<sup>1</sup> The employer filed its answer and a hearing was held, before the Examiner, on November 13 and 14, 1996 and February 24, 25 and 26, 1997. One of the complainants withdrew his complaint at the hearing, and that case was closed by a separate order.<sup>2</sup> The employer and the remaining complainants filed post-hearing briefs.

#### BACKGROUND

These controversies surfaced in the Omak Police Department at a time when Ron Bailey was the chief of police. Bailey was on disability leave by the time of hearing.

For many years, the police officers at Omak were represented for the purpose of collective bargaining by Teamsters Union, Local 760. There was a collective bargaining agreement in effect between the employer and Local 760 through December 31, 1995. The employer and that union but did not reach agreement on a successor contract.

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<sup>1</sup> City of Omak, Decision 5579 (PECB, 1996). The Executive Director dismissed: (1) As untimely, allegations relating to discipline of Issac more than six months before the complaint was filed; (2) as failing to state a cause of action under City of Walla Walla, Decision 104 (PECB, 1976), allegations that the employer had violated a collective bargaining agreement; (3) as vague and insufficient, allegations that the employer interfered with employee rights by a statement that an employer official "would take it personally" if a grievance were pursued; and (4) any and all "refusal to bargain" allegations under RCW 41.56.140(4), on a basis that individual employees lack standing to pursue such claims. Only "interference" claims advanced under RCW 41.56.140(1) were referred to the Examiner for hearing.

<sup>2</sup> City of Omak, Decision 5582-A (PECB, 1997).

Early in 1996 the Omak Police Guild (OPG) filed a petition for investigation of a question concerning representation with the Commission, seeking to replace Local 760 as exclusive bargaining representative of the police officers at Omak. A cross-check was conducted after Local 760 disclaimed the unit, and the OPG was certified as exclusive bargaining representative on May 7, 1996.<sup>3</sup>

### DISCUSSION

Under the unusual circumstances of this case, where a change of exclusive bargaining representatives has limited the scope of the issues referred to the Examiner for further proceedings, the facts, positions of parties, and legal analysis of issues are set forth separately under the headings which follow.

#### Alleged Discrimination Against Sean Issac

Many of the recent disputes in the Omak Police Department have involved 12-year veteran police officer Sean Issac.<sup>4</sup> As deep background to the limited issues now before the Examiner:

- The employer started a K-9 patrol program in 1992, and enlisted and trained Issac as its first K-9 patrol officer.
- Issac was involved in an auto accident in the late summer of 1995. While making a U-turn to pursue a traffic violator, Issac collided with a vehicle driven by a private citizen,

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<sup>3</sup> Notice is taken of the docket records of the Commission for Case 12315-E-96-2053.

<sup>4</sup> Case 12378-U-96-2337.

causing considerable damage.<sup>5</sup> At first, Chief Bailey was not alarmed by Issac's report on the accident. He apparently responded later to criticism from city council members, and eventually "appeased the dragon down at City Hall" by suspending Issac for two days. It also appears that Bailey told the Okanogan County Sheriff's Department to cite Issac for negligent driving, and causing the accident.<sup>6</sup>

- Issac informed Bailey that he would be filing a grievance, and he met with his Teamsters shop steward, Officer Don Eddy.<sup>7</sup>
- Issac was going on a long-planned three week vacation, and it was claimed he could not respond during that time. Eddy filed a grievance on Issac's behalf, on September 12, 1995.

This complaint filed on March 11, 1996, is timely only as to actions taken by the employer on and after September 11, 1995. Events within the period for which the complaint is timely include:

- Bailey's first response to the Issac grievance, dated September 22, 1995, mentioned "driving incidents" going back to 1994. There was mention of Issac's move to the Tonasket area

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<sup>5</sup> The estimates were \$6500 damage to the patrol car and \$4000 damage to the other vehicle.

<sup>6</sup> The accident occurred in the county, between Omak and the nearby town of Okanogan. A judge dismissed the case, on condition that Issac have no more violations for six months. A final dismissal has been issued in that case.

<sup>7</sup> Bailey was accused of stating that if Issac fought the suspension it "was going to get personal". As noted above, however, this was one of the allegations dismissed by the Executive Director.

in 1994, which placed his residence some 12.2 miles outside the Omak city limits.

- Issac and Eddy demanded written verification of the alleged "driving incidents", some of which was forthcoming. Bailey is accused of having indicated displeasure over Officer Eddy's criticism of lack of training for the officers' driving.<sup>8</sup>
- Unhappy with comments about negligence, incompetence, and dereliction of duty, Issac continued to pursue the suspension grievance.
- The employer and Local 760 exchanged correspondence on the Issac grievance in late September of 1995, in the context of contacts and meetings concerning negotiations on a successor contract.<sup>9</sup>
- In addition to the dispute about the suspension itself, a dispute arose as to whether Issac could use two days of earned vacation leave to "pay" for the two-day suspension.<sup>10</sup> During a discussion of the use of vacation days in early October, Bailey told Issac, "[W]hen you lead the charge you are going to get wounded." Issac testified that he felt threatened by this comment.

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<sup>8</sup> Bailey is quoted as having said, "I feel like I'm under attack ...."

<sup>9</sup> Attorney Rocky Jackson represented the employer in those negotiations; Fred Meiner represented Local 760.

<sup>10</sup> Those issues were resolved, however, and are not before the Examiner in this proceeding. See exhibits 11-13, and the partial dismissal order, supra.

- By October 18, the City Council denied Issac's grievance on the driving reprimand. Bailey told Issac, "[If] you had just taken your two days we could have swept this under the carpet".
- The first involvement of counsel for the OPG was in the form of a letter dated October 27, 1997, apparently written as counsel for Issac as an individual.
- In November of 1995, Bailey issued a notice to employees that the employer would no longer permit employees to use accumulated vacation time to serve suspensions. The notice indicated that the change of practice would be negotiated with the union the same day.

Applicable Legal Standard -

The Public Employment Relations Commission has adopted the "substantial factor" test for evaluating discrimination allegations under RCW 41.56.140. Educational Service District 114, Decision 4361-A (PECB, 1994). In doing so, the Commission expressly adopted the test articulated by the Supreme Court of the State of Washington in Wilmot v Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v Seattle Housing Authority, 118 Wn.2d 79 (1991). The Commission stated the test as follows:

In establishing a prima facie case, the employee need not attempt to prove the employer's sole motivation was retaliation or discrimination, but merely that it was a cause. The burden of production then shifts to the employer, which must articulate a legitimate nonpretextual, nonretaliatory reason for the discharge. The burden of proof remains on the employee, who must establish the employer's articulated reason is pretextual or show that although the employer's stated reason is legitimate, the worker's pursuit of or intent to pursue [statutory

rights] was nevertheless a substantial factor motivating the employer to discharge the worker.

Education Service District 114, Decision 4361-A at 19.<sup>11</sup>

See, also, North Valley Hospital, Decision 5809-A (PECB, 1997) [discrimination against employee who contacted Commission about election procedure]; City of Mill Creek, Decision 5699 (PECB, 1996) [right of employee to union representation].

There is, of course, no discharge involved in the facts before the Examiner. The issue here is limited to whether the chief of police acted in a manner towards officer Issac and other identified officers so as to interfere with or retaliate against them after they rallied around officer Issac's grievance.

Prima Facie Case Regarding Issac Discipline -

As was stated in the Partial Order of Dismissal, events prior to six-month statutory period cannot be remedied as unfair labor practices in this proceeding. Thus, Bailey's comments to Issac immediately following the accident cannot be directly considered an unfair labor practice. Nor could his actions in discussing the case with city council members, officials of the county sheriff's department, or the press be subject to any direct remedy here.

Protected Activity is a required ingredient in a "discrimination" case. The events which predated the filing of the grievance are

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<sup>11</sup> We are wary of employer's reliance on Kennewick School District, Decision 5632-A (PECB, 1996) as a restatement of the "substantial factor" test of Wilmot, Allison, and ESD 114. A close review of that decision shows that the Examiner was reversed on critical points, and that the Commission decided there was discrimination against an employee for filing a grievance. Kennewick at pp 11-16.

not swept into a memory dustbin, since they led to a grievance which was protected activity under Chapter 41.56 RCW. They stand as background for what transpired after the grievance was filed, and go to the motivation of employer officials regarding concerted activity.

Deprivation of some ascertainable right, status or benefit is the next required ingredient for a "discrimination" claim. In this case, it is difficult to identify any loss that Issac suffered within the realm of his wages, hours and working conditions. The collective bargaining process does not immunize him from discipline for his own misconduct; the traffic citation is clearly outside of the scope of collective bargaining; the change of practice about use of vacation time was not applied to him.

A causal connection must also be established between protected union activity and the deprivation of rights. In this case, the discipline appears to be related to the fact of the traffic accident and the amount of the damages, which are not disputed. This record does not sustain a claim that the discipline of Issac was imposed or escalated because he subsequently filed a grievance.

The allegations concerning discrimination against Issac in regard to the traffic accident must be dismissed.

#### Chief's Campaign Against Employees

RCW 41.56.140(1) prohibits employers from threatening employee with reprisal or force or promising benefits in connection with the pursuit by employees of their rights under Chapter 41.56 RCW. The test for determining "interference" violations is whether the employer action was reasonably perceived by the employee(s) as related to their union activity.



The Disputed Actions -

On or about October 18, 1995, the police officers begin to receive a series of e-mail messages through the employer's computer system. Several of those messages ended with an admonition that "failure to comply will result in disciplinary action".<sup>12</sup>

- After observing an employee using a computer, the chief declared that police officers were no longer allowed to make National Criminal Information Center (NCIC) searches from certain computers, and he also admonished the police officers to stay away from the work area occupied by Tommye Robbins.<sup>13</sup>
- A second E-mail of the same day, sent by Assistant Chief Mikael Cramer, told police officers: (1) to smoke only "out-back" of the building, not in front; (2) to not answer calls outside of the City of Omak, despite mutual aide agreements with surrounding police departments for Okanagan and Colville Tribes;<sup>14</sup> and (3) to refrain from talking about internal affairs of the Omak Police Department during discussions with police officers from other departments.<sup>15</sup>

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<sup>12</sup> TR 108. Several exhibits, and particularly Exhibits 16, 18 and 27, were correspondence between Fred Meiner for Local 760 and Rocky Jackson for the employer. To the extent they stated the position of Local 760 regarding the Issac grievance, they have been disregarded by the Examiner.

<sup>13</sup> Exhibits 19. Ms. Robbins is a police clerk who was excluded from bargaining as a confidential employee.

<sup>14</sup> Issac testified that the chief "jumped him" for responding a week earlier to a roll-over auto accident on Highway 97, one mile south of Omak. Issac was the first to arrive at the accident scene.

<sup>15</sup> Exhibit 20.

- Another message required the police officers to file detailed logs each day, documenting each of the 480 minutes that the police officer spent on their shifts.<sup>16</sup>
- In a memo addressed "to all whiners", the chief criticized incompetent and unprofessional work by the police officers.<sup>17</sup> This was not well received, and Officer Eddy answered with a "defense" memo in which he pointed out that the officers had just been praised for their work in a double-homicide case.
- An additional E-mail message on October 26 announced the daily log would be used beginning November 1.
- Another E-mail of October 28 told officers Marshall and Issac that they were to take their police dogs into restaurant food-service areas only in emergencies. In this memo, the chief mentioned that he defended the police dogs as "police officers who could go anywhere anytime...".<sup>18</sup>
- On November 2, Chief Bailey sent an E-mail which revised Issac's work shift so that the police dog assigned to Issac, Tommy, could help in gang-related patrol.
- A November 7 E-mail announced that a change of practice to preclude employees from using vacation leave to "pay" for suspensions had been discussed with Local 760 that day.<sup>19</sup>

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<sup>16</sup> Exhibit 21.

<sup>17</sup> Exhibit 22.

<sup>18</sup> Exhibit 25.

<sup>19</sup> Exhibit 27.

The testimony of Marcie Ward, who worked in the police department from July of 1995 to June of 1996, indicated that Chief Bailey was well aware of the hostile impact his actions were having in October and November of 1995.<sup>20</sup> As a reserve police officer, Ward was concerned that the overall working environment was not good, and that non-cooperation was occurring from the police clerk and chief of police. In a meeting soon after receiving an E-mail message from Ward, Bailey cautioned Ward to be patient, that he "had been doing a little stomping on the guys a little hard lately", and to just give it some time until "things would be back to normal".<sup>21</sup>

When asked whether he had used the words "stomp" or "stomping" in relation to the officers, Chief Bailey did not recall using those words. But he also forgot that he had two - not one - conversations with Marcie Ward about internal "staff" issues:

A: [By Mr. Bailey] I think when I listened to the testimony here today, it refreshed my memory, that we did have two different meetings. One was limiting the riding in the [police] car, and one was where she was very emotional and distraught and upset at the atmosphere in the office.  
...

Q: [By Mr. Cline] What was her concern that she was expressing about the atmosphere?

A: You know, I don't know. I don't remember the total conversation. I know that she was upset about being picked on, and

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<sup>20</sup> The Examiner does not credit Ward's testimony with regard to what was the attitude of the police officers, since she was not in that bargaining unit. Nor is it pertinent what her opinion was about the morale and attitude of the "troops". She testified credibly, however, as to what Bailey said in their meeting.

<sup>21</sup> Transcript, page 1050.

about being picked on, and about people talking about each other. You know what, I don't know what her total concerns were. So what I remember is her being upset and crying at the meeting. ...

Q: Do you recall what you told her?

A: I do not.

[TR. 1075-76]

Bailey did not need his memory refreshed on all of the other meetings which took place from early 1995 through 1996. In that context, it seems unlikely that Marcie Ward would have such a clear memory of what was said in this meeting, while Chief Bailey remembered so little. The Examiner credits the testimony provided by Ward, whose statement that Bailey was "stomping a bit" is consistent with Bailey's own testimony that he was "regaining control" over the department. The Examiner interprets "stomping" to include surveillance and promises of disciplinary action.

All of the police officers who testified indicated that they perceived that the chief was engaged in a disciplinary campaign against them as a group. They cited the series of E-mail messages in the autumn of 1995 as having no other purpose. Additionally, the fact that Bailey became especially upset with Officer Eddy after he made requests on behalf of Local 760 for information on the Issac grievance indicates that Bailey's anger was directed at an activity which the Commission has long held to be protected by the collective bargaining statute.<sup>22</sup> While Eddy found Bailey to be "nonchalant" about the September 11 news that a grievance would be filed, he noted that the chief became quite upset because of his

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<sup>22</sup> See, Valley General Hospital, Decision 1195-A (PECB, 1980).

reference to the lack of consistent emergency vehicle (EVOC) training for the police officers at Omak. Bailey recalled:

I remember that I was highly upset and not knowing what I was going to do with it, be it disciplinary action or how to respond to it. And we talked about it and I told [Eddy] that I would talk to him the following day or the day after. And he wanted to know if there would be disciplinary action. And I told him I didn't know at the time.

TR. 905-906

Bailey later calmed down, and the records were eventually produced, but Eddy could reasonably have "felt the heat" personally when he stepped forward as a union representative.<sup>23</sup>

By a preponderance of the evidence, it is clear that the complainants have sustained their burden of proof to show that the employees reasonably perceived that their association with and support of Sean Issac in the grievance procedure led to threatened disciplinary actions and increased managerial scrutiny. Even if the employees could also have believed that the chief's campaign was temporary, or that it was ultimately connected to political pressures on the chief of police, the law does not make exception for such defenses. On these facts, a violation of RCW 41.56.140 is made out, and a remedy is required. There was evidence that the chief "had a bone to pick" with Marshall over a slow-response where Bailey posed as a stranded, locked-out motorist, but that is not

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<sup>23</sup> The documentation was also requested in a September 27, 1995 letter from Miner to Bailey. With the possible exception of media accounts of the accident, all of the material would be relevant to a disciplinary grievance. Both Miner and Eddy were thus within their statutory rights, as officials of the incumbent exclusive bargaining representative in making this request.

related to any assertion of protected rights by Marshall. In addition to the E-mail messages, they comprised a campaign of intimidation and surveillance designed to make the officers think twice about complaining.

The foregoing are cited by the complainants as evidence of "interference" by the employer with their rights. The employer cites Kennewick School District, Decision 5632-A (PECB, 1996) in support of its argument that it was not reasonable for the employees to perceive these E-mail messages as threats of reprisal, or force, or promises of benefit associated with their union activity.

Analysis of "Interference" Claim -

The complainants' expands upon Kennewick by focusing on City of Seattle, Decision 3066 (PECB, 1988), which admonished employers against conduct which "deters" employees from the pursuit of lawful union activity. More recent cases have cited both Kennewick and Seattle. Yakima County, Decision 5790 (PECB, 1996); Mukilteo School District Decision 5899-A (PECB, 1997); City of Seattle, Decision 5391-B (PECB, 1997).

The burden of proving an allegation of unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, and must be established by a preponderance of the evidence. The "reasonable perception" test does not require a showing that particular employees were actually interfered with, restrained, or coerced. An individual employee or a group of employees may prove that an employer took some action against them, meant as a "warning" threat or coercive measure in response to their voicing of some concern or union activity. Yakima County, supra, at 7.

The Examiner is convinced that the complainants in this case have established that the police officers in this bargaining unit reasonably perceived that they would be disciplined if another grievance were filed in the same manner as the grievance involving Sean Issac. This was a violation of RCW 41.56.140(1).

In City of Mill Creek, Decision 5699, (PECB, 1996), the Commission made a "mixed" determination that certain of a police chief's actions were interferences under RCW 41.56.140(1), and certain of his actions were retaliations under the Wilmot-Allison test. Here, Bailey did not retaliate: Although upset with Issac's resistance to a two-day suspension, he never declared Issac "insubordinate" or escalated the discipline against him growing out of the auto accident, as some on the City Council were urging him to do. Although also angry at officers Eddy, Somday, and Marshall, the chief directed his displeasure at the bargaining unit as a whole. That distinguishes this case from Mill Creek, where the manager actually singled out one employee in a discriminatory fashion, and managers interfered with an unresolved grievance.<sup>24</sup>

There would have been no violation had Chief Bailey kept his upset, anger, or even resentment over the Issac grievance to himself. The fact that the memoranda sent via the department's computer system were confined to department employees only, and in that sense were not subject to public scrutiny, is not controlling. Anyone with access to the computer system could read the messages there. However, his E-mail messages communicated threatened punishment of police officers who were rallying together and

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<sup>24</sup> In City of Mill Creek, a violation of RCW 41.56.140(1) and (3) was made out, a psychologist's notes and other material were placed in an employee's personnel file after he pursued a grievance.

generally supporting Issac and his grievance.<sup>25</sup> The unstated message was "back-off" and "behave" because the Chief needed to manage the department.

### Discrimination Regarding Vehicles and K-9 Assignments

#### Facts Concerning Claimed Discrimination -

Chief Bailey issued an E-mail announcement late in the day on November 28, 1995, informing all police officers that an "assigned vehicle program" was to be terminated. The text of that message included:

EFFECTIVE JANUARY 1, 1996 THERE WILL NO LONGER BE AN INDIVIDUAL ISSUED CAR PROGRAM. WE WILL BE RETURNING TO THE FLEET TYPE OF VEHICLE PROGRAM WITH ASSIGNED VEHICLES WITHIN THIS FLEET. THE FLEET WILL BE PARKED AT THE CITY SEWAGE PLANT IN THE FRONT LIGHTED PARKING LOT WITH IN [sic] THE SECURE LOCKED FENCE AT THE PLANT. I WILL GIVE MORE DETAIL, REASON AND FUTURE PLANS AT THE DEPARTMENT MEETING ON DEC. 15, 1995.

Exhibit 28.

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<sup>25</sup> In a recent case, the National Labor Relations Board ruled on what "casual" remarks might actually constitute illegal interference with employee rights. At one end of the spectrum was a speech by a manager who violated Section 8(a)(1) by stating that the "battle" against a union was all part of a larger "war". Harper Collins Publishers Inc. v NLRB, 151 LRRM 2870 (2d Cir. 1996). Less trenchant was a supervisor's comment to several union adherents that, "If I saw a storm coming, I would get out of the way", but the NLRB still found a violation of Section 8(a)(1) on the basis that it constituted a threat of unspecified retaliation against employees who continued to support the union. Highland Yarn Mills, 313 NLRB No. 31, 146 LRRM 1059 (1993).



There was a conversation between Issac and Assistant Chief Cramer the same day, when Issac said he was not worried because K-9 officers needed assigned cars despite this limitation.

On November 30, 1995, Chief Bailey received a letter from David Canfield of Cities Insurance Association of Washington. The letter which was a follow-up on a previous conversation between Bailey and Canfield, notified the employer that insurance carriers would be asking for a premium of \$10,000 to \$15,000 per dog at the next renewal of insurance, for coverage against lawsuits involved in the K-9 program.<sup>26</sup> On December 1, 1995, Bailey sent another E-mail message to the department, indicating the end of the K-9 program:

EFFECTIVE JANUARY 1, 1996 BOTH K-9 PROGRAMS OF OMAK POLICE DEPART. [sic] WILL END. THIS WILL BE COVERED IN MORE DETAIL AT THE DECEMBER 15<sup>TH</sup> MEETING. 1) K-9 FRED WILL GO TO THE DRUG TASK FORCE. 2) I AM CONTINUING TO LOOK FOR A HOME FOR K-9 TOMMY.

Exhibit 29.

Bailey followed that memo with a longer version to the mayor of Omak, dated December 4, 1995.<sup>27</sup> The chief cited the assigned car program, which had been in place since 1992, as being "no longer valid" because too many officers drove the cars to their homes outside of Omak. The memorandum asserted that the costs for the K-9 program would increase from \$2,500 per year to more than \$10,000 per year. Bailey attached the letter from the insurance official, predicting high premiums because of the liability exposure.

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<sup>26</sup> Exhibit 32.

<sup>27</sup> Exhibit 30.

In preparation for a December 15 meeting with the Police Department staff, Bailey prepared a second memorandum to the employees.<sup>28</sup> It was substantially the same as the December 4 E-mail message, but added paragraphs indicating that the K-9 program would cost \$11,391 for 1995, and that the assigned-cars program would cost \$6,239 for the same year.

The meeting December 15 was contentious. While "minutes" of that meeting were kept by Laurel Heldberg, a secretary in the Police Department,<sup>29</sup> it was the testimony of some police officers that requests to tape-record the meeting were refused and several statements were left out of the minutes. The meeting seems to have led off with Chief Bailey pointing out the "just cause" provisions in the employer's civil service rules, and his indication that general attitudes of discontent in the department had to end immediately. The minutes indicate "More discussion followed on Dogs and Patrol Cars". Among those comments were statements by Issac and Marshall that the police officers would go to the public to start a campaign to maintain the K-9 program. There were several questions about the program costs and how they were derived, but the Chief indicated that elimination of the programs was "not open for discussion". A yearly ritual of complaining about the pace of negotiations had begun anew, in the context of negotiations for a successor labor agreement, but this was not considered unusual in Omak.

Positions of Parties on Alleged Discrimination -

The union argues that Chief Bailey became upset with Sean Issac in September of 1995, and subsequently eliminated the assigned cars program and the K-9 program in retaliation. It indicates that both

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<sup>28</sup> Exhibit 31.

<sup>29</sup> Exhibit 44.

programs benefitted Issac and other officers in the department, and that the employer retaliated against bargaining unit members because of their concerted activities.

The employer contends that the two programs in dispute – personally assigned police cars and the K-9 patrols – were temporary and experimental programs which were phased out because they lost political support among elements of the City Council. The employer contends that its elected officials were not convinced that either program was budget-effective, and preferred that the money be spent in other areas of police service.

Prima Facie Case Analysis -

Issac speculated that the employer would find a way to “punish” him, by eliminating the take-home police car program and the K-9 program. Bailey indicated early-on he had heard no rumor to that effect, but his ultimate recommendation to drop the assigned vehicle program was not made until November 27, 1995, after repeated conversations with Eddy and Issac about the grievance and related issues. It appears that Complainant Waters and a newer officer were told the cars program would continue.

The record is clear that the City Council altered its preliminary budget after a budget workshop on November 27, 1995, by deducting a \$24,000 amount earmarked for the purchase of additional patrol cars.<sup>30</sup> Councilperson Clinton Watts was initially surprised by the

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<sup>30</sup> Testifying in advance of the other council members at the hearing, Councilmember Donna Short did not remember the date of this meeting. Councilmember Watts had been in favor of the program in 1992 and recalled budget meetings beginning in February or March and the budget recommendation meeting being in late November. Exhibit 51 is dispositive that the city’s police budget for 1996 was adopted by Ordinance 1300 on December 18, 1997.

chief's recommendation.<sup>31</sup> Clara Neal also appeared surprised, but Councilperson Dave Womack recalled a full discussion of the program in the Autumn of 1995, and re-iterated his concern that the program paid for Issac's long commute to his residence near Tonasket.

The deprivation of an ascertainable right, status, or benefit is also established by this record.<sup>32</sup> Moreover, Issac was particularly a beneficiary of the discontinued programs.

A prima facie case has been made out for discrimination in violation of RCW 41.56.140(1), based on the events and their timing. The grievance activity is well-established. The E-mail messages grew out of the chief's effort to "stomp" on employees in connection with their protected activity.

The Employer's Articulated Reasons for Changes -

The employer argues that the decision to terminate the assigned-cars program was inevitable, given opposition to the program by city council members since the inception of the program in 1992 and

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<sup>31</sup> TR. 808.

<sup>32</sup> Personally-assigned car programs have been found of benefit to affected employees, and thus a mandatory subject of bargaining under Chapter 41.56 RCW. Pierce County, Decision 1710 (PECB, 1983). In a more recent case, City of Brier, Decision 5089-A (PECB, 1995) the Commission ruled on similar issues relative to police use of official vehicles. The police officers in Brier had an eight-year history of taking their assigned patrol cars home. "Experimental" and "temporary" characterizations imposed by employers on programs do not lessen their bargain ability if it effects employee wages, hours, or working conditions. Spokane County Fire District 9, Decision 3661-A (PECB, 1991); Evergreen School District, Decision 3954 (PECB, 1991) and City of Centralia, Decision 2904 (PECB, 1988).

limitations imposed on the program in February of 1995. The employer argues that the decision to terminate the K-9 program was due to its increasing and potentially increasing costs. Either or both of those reasons appear to be lawful.

Substantial Factor Analysis on Assigned Cars -

As a whole, the record in this case fails to sustain a finding that the grievance filed by Sean Issac, or any other employee activity protected by Chapter 41.56 RCW, was a substantial factor in the determination to eliminate the assigned vehicle program.

It is evident from the record that the "assigned cars" program was in trouble from the outset. At the time of its creation, three of the seven members of the Omak City Council opposed the program.<sup>33</sup> The rationale given in support of the program had included: (1) more police vehicles would be visible along city streets in Omak, and hence would deter crime; (2) improved cost efficiency was anticipated, in terms of vehicle maintenance; (3) the ability to take cars home was expected to improve police officer morale; and (4) having police vehicles at their homes was expected to improve police officer response times to crime scenes.

By February of 1995, the assigned vehicles program was made effective "at the discretion of" the chief, and was generally restricted to police officers who lived within a six-mile radius of a fixed point in downtown Omak. Only three to five of the 12

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<sup>33</sup> As of June of 1993 when the program started, council members Dave Womack, Clara Neal, and Donna Short all opposed the program.

officers lived within that area.<sup>34</sup> No grievances or demands to bargain were made at the time of that revision.

There was continuing concern that many of the police officers lived away from the center of town. Apart from the extensive revisions of the program in February of 1995, the concerns included:

- There was long-term and consistent opposition to the program by three or more City Council members.
- The fact that many police officers lived beyond the six-mile limit, posed a political problem for the Police Department'
- Both Issac and Assistant Chief Cramer knew that City Council members were unhappy with the long-commute by Issac to his residence.<sup>35</sup>

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<sup>34</sup> TR. 485. Officer Waters was hired a month after this provision was added to the work rules. He knew about the 6-mile rule, lived within that area, and was aware of which officers were "beneficiaries" of the program.

<sup>35</sup> TR. 913. This puts a different meaning on Chief Bailey's statement to Issac, in October of 1995, that he had not heard any "rumors" of the assigned vehicle program or K-9 program being eliminated. [TR 79] Bailey testified that Issac already had a take-home car as a K-9 officer. In that light, Bailey's statement is easily understood as relating to what the chief was hearing about the program from its known opponents on the City Council. Similarly, Bailey's statement that the cancellation was a "management decision" can be understood as indicating it came from higher authority beyond his control.

- Councilmembers consistently asked for economic justification, which was not convincing in 1995 or 1996;<sup>36</sup> and
- Councilperson Womack was especially opposed to police "responses beyond Omak's jurisdiction" because he was often at such scenes as a firefighter/EMT, and felt that the county police had things under control.
- Assistant Chief Cramer had prepared data in July and August of 1995, with the assistance of bargaining unit member Sergeant Rogers,<sup>37</sup> and it was transmitted to the City Council prior to the accident and grievance involving Issac.
- Only the chief, assistant chief, and Sergeant Rogers were ever called out while the assigned cars program was in effect.<sup>38</sup>
- The Chief said that he was disciplining Officer Issac to "appease the dragon down at City Hall".

It would have made little sense for the employer to tell Waters and other new employees that the assigned car program was tenuous, temporary, or experimental at the time of hiring, when it was attempting to recruit its best candidates. Although the assigned cars were described as important to Waters, new officers hired on

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<sup>36</sup> The fact that two new patrol cars were ordered after officers were hired is consistent with either a "pooled" or "assigned car" policy, since an officer drives to work, changes clothes, fuels his patrol car and begins his shift in the same manner.

<sup>37</sup> TR. 856. An issue concerning the inclusion of the sergeant in the bargaining unit was not framed until much later.

<sup>38</sup> Exhibit 30

November 2, 1995, did not testify about whether the "assigned cars" were critical elements of their decision to hire on at Omak.

The chief's testimony evidences exasperation with the assigned cars program, but not with the employees or any union activity:

And it was always this fight. Its always a fight to keep the program. It was always justification. It was always - that was the one program that was always under the gun. No matter what happened, that was under the gun.

Bailey's testimony that he first recommended ending the assigned cars program in an October meeting with the Police Committee was corroborated by the testimony of Councilmember Womack. In addition, while the chief himself appears to have been willing to concede the political realities of the situation, he did not oppose political "lobbying" efforts by the police officers to the assigned cars program.

The Examiner concludes that neither the Issac grievance or other protected activity among the employees was a substantial factor in the decision to eliminate (and to not budget extra funds for) the assigned cars program. While the facts show that Chief Bailey had some animus directed at Issac generally, the complainants have not sustained their burden to prove that the elimination of the assigned cars program was in reprisal for any protected activity by the employees or by Teamsters, Local 760, which was their exclusive bargaining representative at the critical time months before any representation petition was filed.<sup>39</sup>

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<sup>39</sup> The teacher in Seattle School District Decision 5237-B (EDUC, 1996) had been the subject of poor work evaluations before he joined three other teachers in filing a grievance over classroom-assignment polices in high schools. The Commission overruled an Examiner's



Substantial Factor Analysis on K-9 Program -

It was Issac, not the chief or any other employer official, who speculated that the employer would find a way to "punish" him by eliminating the K-9 program. In this instance, Bailey's statement that he had heard no rumor to that effect is entirely consistent with a lack of City Council opposition to what had been, up to that time, a relatively low-cost program.

On December 1, 1995, after the employer received the letter in which an insurance official predicted a four-fold increase in liability insurance costs for the K-9 program,<sup>40</sup> Cramer and Bailey invited Issac into the office for a "little chat". Bailey told Issac that he would be expected to "show" the patrol dog if it were put up for sale. Issac refused, saying "He's a part of my family...you become attached to these dogs." Bailey ordered Issac to show the dog, if necessary.<sup>41</sup>

The issue here is whether Chief Bailey eliminated the K-9 program in retaliation for Issac's grievance or for other employee activity protected by Chapter 41.56 RCW. The K-9 program is distinguished from the assigned cars program by the fact that only two police officers were directly affected - Issac and Mike Marshall.<sup>42</sup> After

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determination that the teachers' subsequent nonrenewal stemmed from his activity under the grievance procedure.

<sup>40</sup> Exhibit 29.

<sup>41</sup> Issac eventually purchased the animal from the employer, and kept it at his home.

<sup>42</sup> The dog assigned to Issac was used in general police work. The dog assigned to Marshall was specifically trained to locate illicit drugs. Both employees apparently received \$165.00 per month to house and feed the animals, plus \$7.50 an hour for handling the dog in special investigations.

the K-9 program was eliminated at Omak, the drug dog continued to be available under auspices of the federal government.

The record, as a whole, does not show that the elimination of the K-9 program was retaliatory as to the entire bargaining unit, since the dog handled by Issac was never available for all shifts and was not necessarily designated as "back-up" for the patrol officers in cases of unusual criminal investigations or situations. It was not argued that lack of a patrol dog made the jobs of police officers less safe, despite testimony that the dog was useful in gang situations. There was no evidence which controverted the substantial cost increases predicted for the department as a whole, if the K-9 program was to continue in effect.

The evidence also falls short of establishing that protected union activity was a substantial motivating factor as to either Issac or Marshall, who were the dog handlers. The grievance filed by Issac is an established fact, as discussed above, but the only direct connection appears to have come from Issac's own speculation. While there was only vague and limited testimony about discussion between the chief and the City Council with respect to increased cost for the K-9 program, an increase to \$10,000 per dog for insurance coverage would hardly seem to require a great deal of discussion.<sup>43</sup>

Even before the escalation of insurance costs was injected into the equation, Sergeant Rogers had warned Issac that the K-9 program was facing serious budget problems. Assistant Chief Cramer also had prepared documents indicating that the costs of the program, including food, kenneling and veterinary costs, were escalating.

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<sup>43</sup> To keep things in perspective, the same amount of money would have covered the purchase of the additional cars needed for the assigned cars program.

There was also evidence that the "recruitment" of suitable dogs had been uneven, in terms of putting animals on the street that would not injure, bite, or scare the innocent as well as the criminal suspect. In that context, the letter projecting insurance premium costs of more than \$10,000 per year per dog (owing to several notorious dog-bite litigations which cost municipalities large tort settlements) was seemingly the straw that broke the back of the K-9 program at Omak.

The letter from the insurance official is not conclusive, and must be evaluated like any other piece of evidence. In Spokane County, Decision 2167-A (PECB, 1985), a letter from an insurance carrier was rejected as a basis for that employer's "business necessity" defense, upon a conclusion that the employer itself had solicited the change announced in the letter. In this case, however, the letter confirmed information that originated with the insurance official. Some level of fiduciary obligation, good faith or fair dealing, on the part of the insurance official can be inferred, in the absence of any evidence to the contrary. The letter was intended for the chief, as well as the employer's budget writers and the city council, and was not aimed at the police officers or their exclusive bargaining representative. In no event could the insurance for a patrol dog be considered a mandatory subject for bargaining.

Although they are not dated and it is uncertain when they were authored, the documents drafted by the assistant chief do not bear any indicia of fabrication. Whether he overestimated the costs of the program by \$500 or \$5000 is not the point - the evidence supports a conclusion that he was making a good faith effort to lay out the costs of the program at the behest of Chief Bailey. Those

requests pre-date the accident and grievance involving Issac.<sup>44</sup> The complainants in this case would have the Examiner believe that the police chief at Omak could get anything he wanted from the City Council, but the record proves that proposition to be false.

As with the claim of discrimination regarding the assigned cars, the chief's "animus" against the K-9 program predated Issac's auto accident and grievance:

- For the drug dog program, the problem was rooted in a change-over of handlers. The chief had favored the drug dog program when it was suggested by a former employee named Bunker, and the drug dog was effective. After Bunker departed, however, the dog handler assignment was shifted to Marshall, and Marshall was then on disability leave for a period in 1994-1995. Hence, utilization of a good dog was adversely affected by inconsistent handling.
- For the patrol dog program, Issac had consistently served as the handler, but the problem was rooted in having inconsistent dogs. Bailey arrived at Omak while Issac had the first dog used in the program. "Irk" was generally considered a friendly, effective patrol dog, but had to be medically retired. When replaced by a more aggressive animal named "Benjo", the picture changed. Chief Bailey gave the following testimony about that transition:

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<sup>44</sup> Assistant Chief Cramer testified that he received a memo from Chief Bailey on June 28, 1995, regarding K-9 maintenance costs. Cramer also testified that the department was out of budget by \$815 for the 1993-95 period, and that he finally recommended elimination of K-9 Programs to the chief in July of 1995. See, also, Exhibit 62.

In hindsight, had I waited awhile, I would not have gone along with it. I would not have started the dog program again. But we did, we went out and solicited money and we collected money from the community and we bought a new patrol dog [Benjo]. [T]he first day here, [Benjo] almost bit the Mayor and almost bit a young teenage girl who came to pet him. And that's understandable; the dog's a trained biter ... so he' got to calm down. But Benjo never really calmed down that much. He stayed hyper and he was always a real liability concern .... And eventually, [Issac] came to me and told me the dog had to be replaced.

TR. 915-916.

Chief Bailey testified that the latest patrol dog, named "Tommy", was a better dog of a different breed, but was not effective in the patrol program largely because Issac lived so far out of town. He indicated that the program had "deteriorated", and lacked community support. Even Issac quoted the chief a liability exposure of \$50,000 for each time a police dog bit a citizen in California.<sup>45</sup> Although Sergeant Rogers argued to keep the program, Bailey decided its end was at hand.

The chief gave credible testimony that he attempted to sell the patrol dog to the Waitsburg Police Department, but that the deal fell through when that municipality was advised that insurance on the dog would be a substantial cost. The chief also credibly recalled that a Spokane County law enforcement officer knew of this particular dog, and evaluated it as "too hard" and a risk for serious bites, especially on the west side of the State.

The Examiner concludes that the complainants have failed to prove that employer reprisal for employee activity protected by Chapter 41.56 RCW constituted a substantial factor in the employer's decision to end its K-9 program(s).

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TR. 918.

FINDINGS OF FACT

1. The City of Omak is a "public employer" within the meaning of RCW 41.56.030(1).
2. Sean Issac was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).
3. Don Eddy was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).
4. Mike Marshall was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).
5. Richard Waters was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).
6. Teamsters Union, Local 760, was the exclusive bargaining representative of law enforcement officers at Omak until May 7, 1996. Fred Meiner was the business representative assigned to represent the bargaining unit at Omak in 1995.
7. During 1995, the City of Omak and Local 760 were parties to a collective bargaining agreement. That contract contained a procedure for resolution of grievances. Officers Issac, Eddy, Marshall, and Waters were all members of the bargaining unit and were covered by that contract during the period relevant to this case.

8. A "K-9 Patrol" program was begun in the Omak Police Department at the behest of Sean Issac, who also served as handler for the dogs used in the program. The first dog used in the program was a friendly and effective patrol dog, but had to be medically retired. The next dog used in the program was more aggressive, caused concerns about potential liability for dog bites, and eventually had to be replaced. The latest dog used in the program was less aggressive than the second dog, but was nevertheless characterized by an employee of another law enforcement agency as "too hard" and as a risk for serious bites. Additionally, the effectiveness of the K-9 Patrol Program was limited by the fact that Issac's residence was a substantial distance from Omak.
9. A "K-9 Drug Search" program was begun in the Omak Police Department with the support of Chief Bailey. The dog used in that program was effective. After the employee who first served as handler for the dog used in this program left the department, Mike Marshall received training as the handler for the drug dog. The effectiveness of the program was adversely affected by Marshall being on disability leave for a period in 1994 and 1995.
10. An "assigned cars program", which allowed some police officers to keep patrol cars at their residences and to use them commuting to and from work, was begun at Omak at the behest of Chief Ron Bailey shortly after his arrival. The program was opposed from its outset by three of the seven members of the City Council, and faced continuing opposition from council members in connection with the adoption of budgets for 1993 through 1995. Cost savings to the employer were not demonstrated for any of those years, and the City Council remained divided as to the wisdom of retaining the cars program.

11. In February of 1995, the "assigned cars program" was revised to clearly indicate that it was limited to employees who resided within six miles of a fixed point in downtown Omak, and to clearly indicate that the continuation of the program was at the discretion of the chief of police. An exception was made for employees who served as K-9 handlers, so Issac retained the use of his patrol car for commuting even though he resided more than 6 miles outside of Omak.
12. In August of 1995, Issac was disciplined for his involvement in an automobile accident while on duty.
13. In September of 1995, Issac filed a grievance protesting the discipline imposed upon him in connection with the earlier automobile accident. Employee Don Eddy represented Issac in his capacity as shop steward for Local 760.
14. From October through November of 1995, Chief Bailey and Assistant Chief Cramer issued a series of E-mail messages to be read by the police officers as in the form of a daily bulletin. Many of those messages announced changes of policy or practice, created an impression of surveillance of the employees' daily activity (including but not limited to time sheets, log books and direct observation by management officials), and threatened discipline for failure to obey the directives they contained. The tone of those messages left an impression that the police officers were to remain silent in the face of violations of their rights under the collective bargaining agreement. Such messages were reasonably perceived by the employees as, and were in fact, related to the exercise of grievance processing rights protected by Chapter 41.56 RCW.
15. The chief's recommendation and the resulting City Council action to terminate the "assigned cars program" in November



and December of 1995 were consistent with previous criticisms of that program, as well as with estimates of the current and continuing costs of that program. The evidence in this record fails to sustain a conclusion that the elimination of the program was substantially motivated by the employees' exercise of rights protected by Chapter 41.56 RCW.

16. The chief's recommendation and the resulting City Council action to terminate the "K-9" programs in November and December of 1995 were consistent with previous concerns about those programs, as well as with concerns about potential liability for dog bites and a current estimate of greatly increased premiums for the employer's liability insurance coverage on the dogs. The evidence in this record fails to sustain a conclusion that the elimination of the program was substantially motivated by the employees' exercise of rights protected by Chapter 41.56 RCW.

#### Conclusions of Law

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.
2. By the actions of the Chief of Police and Assistant Chief in issuing E-mail messages designed to "stomp on" bargaining unit employees after and in response to the exercise of grievance rights protected by Chapter 41.56 RCW, the City of Omak has violated RCW 41.56.140(1).
3. The complainants have failed to sustain their burden of proof as to their allegation that the employer's discontinuance, in the Autumn of 1995, of the "assigned cars program" theretofore applicable to police officers constituted discrimination in violation of RCW 41.56.140(1).

4. The complainants have failed to sustain their burden of proof as to their allegation that the employer's discontinuance, in the Autumn of 1995, of the "K-9" Patrol Programs theretofore operated with police officers in the bargaining unit constituted discrimination in violation of RCW 41.56.140(1).

ORDER

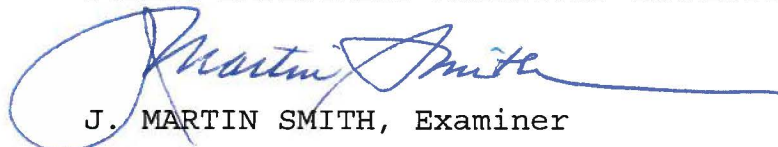
The City of Omak, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:
  - a. Threatening, engaging in surveillance of, or altering the wages, hours and working conditions of its employees in response to their exercise of their right to file and pursue grievances.
  - b. In any other 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. 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.

- b. Have the notice required by the preceding paragraph read aloud at a public meeting of the Omak City Council, and attach a copy of said notice to the official minutes of the meeting where it is read.
- c. Notify the above-named complainant, 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 complainant with a signed copy of the notice required by the preceding paragraph.
- d. 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 the preceding paragraph.

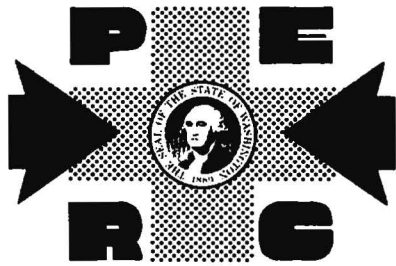
Issued at Olympia, Washington on the 29<sup>th</sup> day of December, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, Examiner

This order will be the final order of the agency unless 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:

1. WE WILL CEASE AND DESIST from:
  - a. Threatening, engaging in surveillance of, or altering the wages, hours and working conditions of its employees in response to their exercise of their right to file and pursue grievances.
  - b. In any other 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. WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:
  - a. 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.
  - b. Have the notice required by the preceding paragraph read aloud at a public meeting of the Omak City Council, and attach a copy of said notice to the official minutes of the meeting where it is read.
  - c. Notify the above-named complainant, 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 complainant with a signed copy of the notice required by the preceding paragraph.
  - d. 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 the preceding paragraph.

DATED: \_\_\_\_\_

City of Omak

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.