STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF SNOPAC EMPLOYEES, Complainant, vs. SNOHOMISH COUNTY POLICE STAFF AND AUXILIARY SERVICES CENTER, Respondent.	CASE 26313-U-14 DECISION 12342-A - PECB DECISION OF COMMISSION

James M. Cline, Attorney at Law, and *Erica Shelley Nelson*, Attorney at Law, Cline & Casillas, for the Association of SNOPAC Employees.

Michael C. Bolasina, Attorney at Law, Summit Law Group PLLC, for the Snohomish County Police Staff and Auxiliary Services Center.

The Association of SNOPAC Employees (union) filed an unfair labor practice complaint alleging that the Snohomish County Police Staff and Auxiliary Services Center (employer) committed multiple unfair labor practices. Examiner Stephen W. Irvin conducted a 10-day hearing and issued a decision concluding that the employer committed certain unfair labor practices and dismissing other allegations.[1] The union filed a timely appeal.

The employer operated on a 4/10s work schedule. On June 12, 2013, the employer notified the union that it wanted to discuss the schedule.

The 2012-2016 collective bargaining agreement contains the following language:

> 5.1.2 **Schedule Change.**
>
> (a) In the event that the 4/10s schedule in effect as of the effective date of this Agreement results in unforeseen additional operating costs or

[1] *Snohomish County Police Staff and Auxiliary Services Center*, Decision 12342 (PECB, 2015).

> other operational problems, either party may reopen the Agreement for the purpose of negotiating additional changes to the schedule.
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> (b) In the absence of a mutual agreement between the parties to continue the 4/10s Schedule, all Calltakers and Dispatchers will return to the 5/8s Schedule following a forty-five (45) day notice from the Employer to the Union. Supervisors and Lead Dispatchers will remain on the 4/10s Schedule.

In July and August 2013 the employer and union met and discussed the schedule. Unable to reach an agreement on how to keep the 4/10s schedule, on August 27, 2013, the employer told the union it planned to return to the 5/8s schedule.[2] On January 1, 2014, the employees began working a 5/8s schedule. As a result, the time at which police dispatchers took breaks changed.

The union alleged the employer unilaterally changed the work schedule and the break policy. Additionally, the union alleged that the employer unilaterally changed the minimum staffing formula, the pre-disciplinary notice procedure, and the grievance and arbitration procedure. The union alleged the employer interfered with employees' rights to a union representative.

After conducting a 10-day hearing and reviewing the evidence, the Examiner found that the employer unilaterally changed the work schedule, but the union waived its right to bargain and the change conformed to the waiver in the collective bargaining agreement. The Examiner found that the employer did not unilaterally change the minimum staffing formula, the break policy, the pre-disciplinary notice procedure, or the grievance and arbitration procedure. The Examiner also found that the employer interfered with employee rights by refusing to allow employees a union representative.

The appeal presents four issues. First, did the employer unilaterally change the work schedule? Second, did the employer unilaterally change (a) the minimum staffing formula, (b) the break policy, (c) the pre-disciplinary notice procedure, or (d) the grievance and arbitration procedure?

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[2] Commissioner Brennan notes parties should be aware that a statement of an intent to do something cannot be the trigger for the statute of limitations when only the action itself is an unfair labor practice. *Bellevue School District*, Decision 10868-A (PECB, 2011); *Lake Washington School District*, Decision 11913-A (PECB, 2014).

Third, did the Examiner enter the appropriate remedial order? Fourth, did the Examiner err when he rejected Exhibit 144? We reverse the evidentiary ruling and admit Exhibit 144. We affirm the Examiner on all other issues.

This case also presents a fifth issue concerning what improper conduct is when practicing before the Commission.

Legal Standards

Standard of Review

The Commission reviews conclusions of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

Unilateral Change

As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith, upon request; and bargains to agreement or to a good faith impasse concerning any mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010), *citing Skagit County*, Decision 8746-A (PECB, 2006).

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). A complaint alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory

subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

Did the employer unilaterally change the work schedule, the minimum staffing formula, the break policy, or the pre-disciplinary notice procedure?

We have reviewed the transcripts, exhibits, and briefs filed by the parties. The Examiner's decision correctly stated the legal standards. Substantial evidence supports the Examiner's findings of fact, which in turn support the Examiner's conclusions of law. With respect to the issues of whether the employer unilaterally changed the work schedule, minimum staffing formula, the break policy, or the pre-disciplinary notice procedure, we affirm the Examiner.

The union alleged the employer unilaterally changed from a 4/10s schedule to a 5/8s schedule. The Examiner properly interpreted the language of Article 5.1.2(a) and determined that Article 5.1.2(a) was a waiver. The employer notified the union it wanted to discuss the schedule. The employer and union negotiated the schedule. As required by Article 5.1.2(a), the employer identified operational problems caused by the 4/10s schedule. The parties did not agree to continue the 4/10s schedule. The employer acted in conformity with Article 5.1.2(b) when it changed from a 4/10s schedule to a 5/8s schedule. The majority affirms the Examiner's conclusion that the employer did not unilaterally change the work schedule when the employer implemented the 5/8s schedule.

The union appealed the Examiner's conclusion that the employer did not unilaterally change the minimum staffing formula. Substantial evidence supports the Examiner's Finding of Fact 32, which found that the employer established minimum staffing levels and that the collective bargaining agreement did not contain a provision addressing minimum staffing. The union did not challenge the Examiner's finding that supervisors have discretion to approve or deny paid time off

requests down to the minimum staffing. Unchallenged findings of fact are treated as verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014); *Kitsap County*, Decision 11869-A (PECB, 2014); *Brinnon School District*, Decision 7210-A (PECB, 2001). We affirm the Examiner's conclusion of law that the employer did not unilaterally change the minimum staffing formula.

The union appealed the Examiner's conclusion that the employer did not unilaterally change the break policy. Substantial evidence supports the Examiner's Finding of Fact 37, which found that the break schedule for police dispatchers on the 5/8s schedule is different than it was on the 4/10s schedule. On the 5/8s schedule police dispatcher breaks begin 30 minutes into the shift and as late as 30 minutes before the end of the shift. All other findings of fact are verities on appeal. The current 5/8s break schedule is not different from the break schedule for police dispatchers when the employer had a 5/8s schedule in the past. The findings of fact support the Examiner's conclusion that the employer did not unilaterally change the break policy. We affirm the Examiner's conclusion of law that the employer did not unilaterally change the break policy.

The union appealed the Examiner's conclusion that the employer did not unilaterally change the pre-disciplinary notice procedure. The union did not appeal Findings of Fact 53 through 55, which address the pre-disciplinary notice procedure. Those findings of fact are verities on appeal and support the Examiner's conclusion that the employer did not unilaterally change the pre-disciplinary notice procedure. We affirm the Examiner's conclusion of law that the employer did not unilaterally change the pre-disciplinary notice procedure.

Did the employer unilaterally change the grievance and arbitration procedure?

The union appealed the Examiner's conclusion that the union did not produce evidence of a change in the grievance and arbitration procedure at the hearing and the employer did not unilaterally change the procedure. The Examiner entered Finding of Fact 30 about a grievance the union filed. The record contained additional evidence about the grievance and arbitration procedure.

The parties' collective bargaining agreement contains a grievance procedure (Article 16). The union must submit grievances to Finance and Administrative Services Manager Angie Baird. If the employer does not respond within the time limit set by the grievance procedure, the grievance moves to the next step.

At step one the union must submit the grievance within 28 days of the occurrence. The "appropriate Manager" has 14 calendar days to respond. If the grievance is not resolved, the union has 14 calendar days to submit the grievance to Executive Director Kurt Mills or his designee. The director must respond within 14 calendar days of receipt of the grievance at step two. If the grievance is not resolved at step two, and the union desires to proceed to arbitration, within 30 calendar days the union shall submit a written request for arbitration.

As stated in Finding of Fact 30, "[o]n November 19, 2013, the union filed a grievance regarding the employer's decision to revert from the 4/10s schedule to the 5/8s schedule. Baird denied the grievance in a letter to the union on December 2, 2013. As of the dates of the hearing, the grievance had not been before an arbitrator."

On December 13, 2013, the union's president Chris Boone e-mailed the employer stating that the union had "not received an adequate response" to the grievance and had resubmitted the grievance "on the basis of [its] request for the supporting documentation listed, as well as the lack of any proof of 'unforeseen operational costs or operational problems.'"[3] On January 27, 2014, Boone wrote to Mills, "We never did receive a response from you on this, our Step 2 of the grievance. Did Snopac need some more time to respond or gather documentation?"[4]

On February 1, 2014, Boone e-mailed the employer stating that the union intended to arbitrate the scheduling grievance.[5] The union asserted that the employer failed to answer the union's step two grievance and that the employer did not meet its contractual obligation by reasserting its step one

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3 Exhibit 11.

4 *Id.*

5 Exhibit 35.

answer at step two of the grievance procedure. Boone asked the employer to contact the union's attorney about the arbitration.

On February 10, 2014, Mills responded to Boone's e-mail about the union's intent to arbitrate the schedule change grievance.[6] Mills asserted that he had not received a step two grievance from the union. Mills also asserted that the grievance was untimely and denied the union's request to arbitrate.

Grievance procedures are mandatory subjects of bargaining. RCW 41.56.030(4). The union and employer had previously resolved grievances before arbitration. The union received a response from the employer that the union did not believe was adequate. The parties did not agree that the grievance had been properly advanced. Under the language of the collective bargaining agreement, a failure to respond to the grievance would have resulted in the grievance advancing to the next step. The parties disputed the timeliness of the grievance and whether the grievance could be advanced to arbitration. There is no evidence that the employer unilaterally changed the grievance and arbitration procedure. We affirm the Examiner's conclusion of law that the employer did not unilaterally change the grievance and arbitration procedure.

Did the Examiner enter the appropriate remedial order?

The union appealed the Examiner's remedial order for the Marscha Schumann *Weingarten* violation and requested the Commission reinstate Schumann with full back pay. The Examiner found that the employer interfered with employee rights by denying Schumann's request for union representation. To remedy the violation, the Examiner entered a cease and desist order along with an order requiring a notice posting and reading of the notice at the employer's Board of Director's meeting.

As detailed in the Examiner's decision, the employer began, but did not complete, an investigation of Schumann. During the investigation, Schumann resigned. There is no way to determine what

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[6] Exhibit 24.

discipline, if any, the employer would have imposed. The investigation may not have been the sole reason Schumann resigned. We affirm the Examiner's remedy.

The customary remedy includes a reading of the order at the employer's governing body. *University of Washington*, Decision 11499-A (PSRA, 2013). The union seeks to extend this requirement to the governing bodies of all agencies that make up an inter-governmental agency. While we understand the union's desire to expand the applicability of the reading, we decline such an extension. We affirm the Examiner's remedy ordering the employer to read the notice at a Snohomish County Police Staff and Auxiliary Services Center Board of Directors' meeting.

Did the Examiner err when he rejected Exhibit 144?

During the course of the hearing the employer offered evidence about the amount of mandatory overtime worked in 2012 and 2013. The employer did not offer evidence about the mandatory overtime in 2014 after returning to a 5/8s schedule.

In its rebuttal case the union attempted to show that the amount of mandatory overtime did not decrease after the employer returned to a 5/8s schedule. Using the employer's scheduling software, bargaining unit members ran a report about the amount of overtime in 2014 through November 3, 2014.[7] The union offered Exhibit 144. The Examiner rejected Exhibit 144 on relevance and because the evidence post-dated the complaint. The union appealed.

The Commission has previously issued guidance that post-complaint evidence is inadmissible. In *Central Washington University*, Decision 10118-A (PSRA, 2010), the examiner admitted exhibits from the internet postdating the date of the union's complaint. The Commission wrote:

> Although Chapter 34.05 RCW does not require administrative agencies to strictly follow the rules of evidence, this Commission expects our examiners to admit into evidence only those exhibits that came into existence on or within the six-month period prior to the filing of the complaint or amended complaint(s). Exhibits that pre-date the six-month statute of limitations may be admitted as background information, provided they are relevant to the case.

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7 Exhibit 144.

Post-complaint evidence is neither inherently inadmissible nor inherently admissible. Evidence of events occurring after a complaint has been filed with the agency may be relevant to the case. A strict prohibition of post-complaint evidence would not effectuate the purposes of the statute.

In this case Exhibit 144 was relevant to the union's rebuttal case. The union offered the evidence to attempt to prove that changing to the 5/8s schedule did not eliminate the mandatory overtime problem. Exhibit 144 is admitted and has been considered by the Commission in reaching our conclusion in this case.

What is improper conduct when practicing before the Commission?

As noted at the outset, this case raises a question of what improper conduct is when practicing before the Commission. From the beginning of the hearing the lead counsel for both parties engaged in unprofessional on-the-record behavior. They talked over each other and the Examiner. Through their objections the attorneys coached witnesses. The attorneys made speaking objections when more concise objections would have worked. Both attorneys attempted to give each other lessons in litigation through objections.

Some examples of the attorneys' behavior will be instructive to demonstrate what type of behavior is unacceptable in practice before the Commission.

Mr. Cline:	Objection. Compound question.
Hearing Examiner:	You'd like to respond?
Mr. Bolasina:	I think the question was clear. The witness was prepared to answer it.
Mr. Cline:	It's a compound question. It had an and in it. And the and is where the argument is. He's trying to get her—
Mr. Bolasina:	He's doing—he's doing it again. Just make your—make your—force him to make the objection and shut his mouth, so we can move forward.[8]

After an examiner has ruled on an objection, counsel should move on. For example, Mr. Bolasina asked a witness the question, "And is that the definition—the contractual definition of annual

[8] Tr. Vol. 2, 274:16-275:1.

vacation?" Mr. Cline objected. The Examiner asked Mr. Bolasina to lay more foundation. As Mr. Bolasina was laying the foundation, Mr. Cline continued to object for lack of foundation.[9]

By way of another example, Ms. Nelson asked a witness a question.[10] Mr. Bolasina objected. The Examiner sustained the objection. However, after the Examiner ruled on the objection, Mr. Bolasina continued:

> Mr. Bolasina: I still don't—
> Hearing Examiner: I'm sustaining your objection.
> Mr. Bolasina: What's the next question, you know? Do you believe that—
> Hearing Examiner: Whoa, whoa, whoa. I'm sustaining your objection.
> Mr. Bolasina: —he gave a birthday gift to his roommate Karl.
> Hearing Examiner: Objection sustained. Can you move on, please?[11]

When counsel speak over each other, it is especially bad to then argue about who is talking over whom.

> Ms. Nelson: I'm sorry. I waited until you were done, so now let me finish.
> Mr. Bolasina: You didn't wait until I was done—
> Ms. Nelson: I did.
> Mr. Bolasina: —because you were interrupting me.[12]

Counsel should explain their objections in a concise manner and refrain from coaching witnesses through their testimony.

> Mr. Cline: Objection. This is the worst kind of testimony for a witness to relay.
> Mr. Bolasina: This is—this is—again, this is a speaking objection. There is a standing objection. This is solely designed to disrupt the testimony of the—of the witness.
> Mr. Cline: As I was saying, when a witness says I don't recall who said what to whom but I'm now left with this general impression, that is just the worst kind of recall testimony that a witness—

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9 Tr. Vol. 1, 141:6-144:17.

10 Tr. Vol. 1, 227:2-3.

11 Tr. Vol. 1, 228:5-15.

12 Tr. Vol. 3, 617:11-618:6.

Mr. Bolasina:	Well, that's—that's something he can argue in his post hearing brief.
Mr. Cline:	No, it's inadmissible.
Mr. Bolasina:	That is not—
Mr. Cline:	You can't lay a foundation for precise recall.[13]

Practitioners before the Commission and courts are expected to zealously represent their respective clients. The conduct by counsel throughout the 10 days of hearing in this case far transcended acceptable advocacy. Rather, the actions of both of the lead counsel took a straight forward fact pattern and diverted attention from the facts, turning the hearing into a full display of how not to try a case.

The Examiner repeatedly tried to stop the behavior exhibited by counsel, but to no avail. Counsel continued to make speaking objections, coached witnesses, argued with one another, ignored clear evidentiary rulings, and let personal animosity permeate the hearing.

Regrettably, the Commission has no effective way short of exclusion to discipline practitioners who engage in conduct that in a courtroom may result in significant sanctions. If there were ever a case that evidences contempt for what the hearing process should entail, this is that case. This is not a case of inexperienced counsel whose behavior during a hearing was a one-time event. Rather, counsel of record in this case are known and frequent litigants before the Commission. The litany of unacceptable behavior did nothing to advance the cause of either side and needlessly extended the time necessary for the hearing, with attendant expenditure of attorney fees and costs.

While the tools available to deal with the contumacious behavior exhibited in this case are limited, the penalty of barring counsel from appearing before the agency does exist. A repeat of the conduct exhibited in this hearing may necessitate the use of the remedy. WAC 391-08-020.

We expect attorneys and advocates appearing before the Commission to behave in a civil manner with respect for the Commission, the process, and the taxpayers of Washington.

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[13] Tr. Vol. 9, 1769:13-1770:5.

We find it necessary to address a procedural issue of questioning witnesses. Under Washington State Court Civil Rules for Courts of Limited Jurisdiction,

> [w]hen two or more attorneys are upon the same side trying a case, the attorney conducting the examination of a witness shall continue until the witness is excused from the stand; and all objections and offers of proof made during the examination of such witness shall be made or announced by the attorney who is conducting the examination or cross examination.

CRLJ 43(2). In this case the union was represented by two attorneys. Union counsel Ms. Nelson examined some of the union's witnesses on direct examination. When the employer's counsel Mr. Bolasina examined those witnesses on cross-examination, union counsel Mr. Cline made objections. Mr. Bolasina objected to the practice and the Examiner overruled the objection.[14]

While the court civil rules do not explicitly apply to administrative proceedings, we expect the attorneys appearing before the agency to conduct themselves in accordance with the customs of the practice. Thus, the one-attorney-per-witness rule applies to Commission proceedings.

ORDER

The Findings of Fact issued by Examiner Stephen W. Irvin are AFFIRMED and adopted as the Findings of Fact of the Commission. The following additional Findings of Fact are entered:

79. On December 13, 2013, the union's president Boone e-mailed the employer stating that the union had "not received an adequate response" to the grievance and had resubmitted the grievance "on the basis of [its] request for the supporting documentation listed, as well as the lack of any proof of 'unforeseen operational costs or operational problems.'"

80. On January 27, 2014, Boone wrote to Mills, "We never did receive a response from you on this, our Step 2 of the grievance. Did Snopac need some more time to respond or gather documentation?"

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[14] Tr. Vol. 1, 113:8-115:12.

81. On February 1, 2014, Boone e-mailed the employer stating that the union intended to arbitrate the scheduling grievance. The union asserted that the employer failed to answer the union's step two grievance and that the employer did not meet its contractual obligation by reasserting its step one answer at step two of the grievance procedure.

82. On February 10, 2014, Mills responded to Boone's e-mail about the union's intent to arbitrate the schedule change grievance. Mills asserted that he had not received a step two grievance from the union. Mills also asserted that the grievance was untimely and denied the union's request to arbitrate.

Conclusions of Law 1 through 4 and 6 through 11 are AFFIRMED and adopted as Conclusions of Law of the Commission. Conclusion of Law 5 is modified as follows:

5. By its actions described in Findings of Fact 30, 32 through 41, 52 through 55, and 79 through 82, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) by making unilateral changes to (a) the minimum staffing formula, (b) the break policy, (c) the pre-disciplinary notice procedure, and (d) the grievance and arbitration procedure.

The Order issued by Examiner Stephen W. Irvin is AFFIRMED and adopted as the Order of the Commission.

ISSUED at Olympia, Washington, this 26th day of February, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join with the majority opinion on all issues except I respectfully dissent on the issue of whether the employer unilaterally changed the work schedule.

Article 5.1.2 of the collective bargaining agreement waived the union's right to require bargaining on a change from a 4/10s to a 5/8s schedule. The employer had the burden to prove its actions were consistent with that provision.

Unlike the majority, I would read "unforeseen" in Article 5.1.2(a) to modify both additional operating costs and other operational problems, principally based upon the sentence's structure. "Unforeseen" is followed by two clauses joined by "or" without a comma separating them. Thus, the employer had to show unforeseen operational problems caused by the 4/10s schedule. In my view, the employer did not do so.

Overtime issues arose before the parties reached agreement on the 2012-2016 collective bargaining agreement. Thus, they could not be characterized as unforeseen. Moreover, the employer failed to show any increase in overtime was caused by the 4/10s schedule rather than other factors, such as decreased staffing. There is no evidence that returning to the 5/8s schedule alleviated the overtime issues.

MARK E. BRENNAN, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

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DECISION 12342-A - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 26313-U-14

EMPLOYER: SNOPAC
ATTN: KURT MILLS
1121 SE EVERETT MALL WAY
STE 200
EVERETT, WA 98208
kmills@snopac911.us
(425) 407-3911

REP BY: MICHAEL C. BOLASINA
SUMMIT LAW GROUP PLLC
315 5TH AVE SOUTH STE 1000
SEATTLE, WA 98104-2682
mikeb@summitlaw.com
(206) 676-7006

PARTY 2: ASSOCIATION OF SNOPAC EMPLOYEES
ATTN: CHRIS BOONE
1121 SE EVERETT MALL WAY
STE 200
EVERETT, WA 98203
greenacarina@comcast.net

REP BY: ERICA SHELLEY NELSON
CLINE & CASILLAS
520 PIKE ST STE 1125
SEATTLE, WA 98101
erican@clinelawfirm.com
(206) 838-8770

JAMES M. CLINE
CLINE & CASILLAS
520 PIKE ST STE 1125
SEATTLE, WA 98101
jcline@clinelawfirm.com
(206) 838-8770