STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE PROSECUTING ATTORNEYS ASSOCIATION,	)	
Complainant,	)	CASE 12173-U-95-2874
vs.	)	DECISION 5391-C - PECB
CITY OF SEATTLE,	)	
Respondent.	)	DECISION OF COMMISSION

Cline & Emmal, by Roger C. Cartwright, Attorney at Law, appeared on behalf of the complainant.

Mark H. Sidran, City Attorney, by Leigh Ann Collings Tift, Assistant City Attorney, appeared for the respondent.

This case comes before the Commission on a petition for review filed by the City of Seattle, seeking to overturn a decision issued by Vincent M. Helm.[1]

BACKGROUND

This dispute between the City of Seattle (employer) and Seattle Prosecuting Attorneys Association (union) arises out of union organizing efforts that took place in the employer's criminal division during 1995.

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[1] City of Seattle, Decision 5391-B (PECB, 1997).

On September 8, 1995, the union filed a representation petition, seeking certification as exclusive bargaining representative for "All Assistant City Attorneys in the Criminal Division up to and including the rank of Assistant Supervisor".

By memorandum of October 2, 1995, the chief civil attorney set forth the employer's position on the representation effort and its understanding of "basic ground rules" in a question-and-answer format, including:

> Q. *What limitations are there on union activity at work?*
> A. In general, employees may not hold union meetings or conduct union campaigning at the workplace or during work hours or use office resources for those purposes. Nonetheless, management is willing to allow the use of City space for union meetings during non-work hours if arrangements are made in advance.

Copies of that memorandum were distributed to assistant city attorneys affected by the union's petition for certification.

On an unspecified date after October 1, the head of the criminal division, Ted Inkley, held a meeting with assistant supervisors Mari Trevino and Bob Murashige. A supervisor named Bob Chung also attended. Inkley stated the employer's position that the assistant supervisors were "management" and would not be part of the union. He explained that certain of the job responsibilities of the assistant supervisors would have to be removed as a result of unionization, because they were management responsibilities.

A second meeting held on an unspecified date was attended by Trevino, Murashige and Assistant Supervisor Edward McKenna. The

director of the employment section in the civil division, Marilyn Sherron, was present. Sherron made statements limiting what the assistant supervisors could do or say at union meetings.

The chief civil attorney issued another memorandum on October 13, 1995, in which he attempted to clarify issues addressed in the October 2 memorandum. The October 13 memo included:

> First, my reference to "work hours" may have been ambiguous in that, as FLSA-exempt employees, assistant city attorneys do not have rigid work schedules. With that in mind, a better term would have been "office hours" — those hours during which the office is officially open for business — 8:00 a.m. to 5:00 p.m., Monday through Friday.
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> Second, as what activity is prohibited, I expect that a "rule of reason" must be applied to decide the sort of meetings or communications that would constitute improper "campaigning" in the office during office hours. For an analogy I would suggest looking to the broader prohibitions against using City time, facilities, or resources for election campaigning. Thus, I would not expect this restriction to apply to a brief, casual conversation between two colleagues, but I would get concerned at the point that its nature became more like deliberate or organized advocacy or solicitation. Because there are no bright lines in this area, I would particularly expect you — both those who favor and those who oppose the petition — to simply use your good, professional judgment. I have no doubt that you will.

The October 13 memo was also distributed to employees in the bargaining unit petitioned-for by the union.

A pre-hearing conference was held on the representation petition. A Statement of Results of Prehearing Conference issued on November

8, 1995, indicated that the parties disagreed on whether the assistant supervisors should be included in the bargaining unit as lead workers or excluded as supervisors.

On November 17, 1995, the union filed the complaint charging unfair labor practices to initiate this proceeding. It alleged that the blanket restrictions on union activity during office hours were unlawful, that the employer interfered with employee rights by threatening the assistant supervisors with loss of duties and pay, and that the employer had interfered with employee rights, in violation of RCW 41.56.140(1).

A tally of election ballots issued on November 30, 1995, indicated that 19 of 28 eligible voters cast ballots. Twelve ballots were cast for the union, and seven were cast for no representation. Four challenged ballots did not affect the outcome of the election.

On December 8, 1995, the Executive Director issued an interim certification for:

> [A]ll full-time and regular part-time assistant city attorneys of the City of Seattle criminal division, excluding supervisors, confidential, and all other employees.

Issues concerning the eligibility of the assistant supervisors for inclusion in that unit were reserved for subsequent determination.

The Executive Director considered the union's unfair labor practice complaint under WAC 391-45-110, and issued a deficiency notice as to some allegations. The union amended its complaint on December 22, 1995.

On February 20, 1996, the parties entered into a stipulation in the representation case, defining the bargaining unit as:

> All full-time and regular part-time employees classified as "assistant city attorneys" of the City of Seattle criminal division, excluding supervisors, and one assistant supervisor (position #02462) which is presently assigned to supervision in the "high impact offender unit".

Based on that stipulation, the Executive Director ordered that the interim certification stand as the final certification, and closed the representation case on March 6, 1996.[2]

Allegations found not to state a cause of action in this case were dismissed on March 18, 1996. Examiner Vincent M. Helm was assigned to conduct further proceedings on those allegations found to state a cause of action. The employer filed an answer.

The union filed a second amended complaint on October 4, 1996. A preliminary ruling issued on November 7, 1996, found a cause of action to exist on the new allegations.

On January 2, 1997, the union filed a third amended complaint, alleging the employer refused to bargain, and alleging the employer had changed the titles and responsibilities of the assistant supervisors. By an order issued on January 2, 1997, Examiner Helm only permitted the proposed amendment to the extent the allegations related to previous allegations.[3]

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[2] City of Seattle, Decision 5381-A (PECB, 1996).

[3] City of Seattle, Decision 5391-A (PECB, 1997). The remaining allegations were docketed as a separate case, as Case 12911-U-97-3115.

Examiner Helm held a hearing on January 7, 1997, and issued his decision on June 6, 1997. The Examiner found the employer interfered with, restrained or coerced employees in the exercise of rights guaranteed by statute in violation of RCW 4156.140(1), and that the employer failed and refused to bargain in good faith in violation of RCW 41.56.140(4). The Examiner ordered the employer to return non-supervisory, non-confidential work to the assistant supervisors which was transferred to non-bargaining unit employees after February 20, 1996, including written and verbal contact with attorneys, victims, members of the public and judges, and to restore the title of "assistant supervisor" to the three individuals in the bargaining unit who had that title prior to February 20, 1996.[4]

The employer filed a petition for review on June 26, 1997, thus bringing the case before the Commission.[5]

POSITIONS OF THE PARTIES

The employer argues that it did not unlawfully restrict employees' discussion of the union, that the memoranda issued in October of 1995 did not unlawfully interfere with or restrain employees, that it did not threaten or retaliate against employees, and that it did not make unlawful changes in job duties. The employer argues that the Examiner's remedy exceeds the statutory authority of the Commission, that the Commission's jurisdiction is limited to relief

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[4] City of Seattle, Decision 5391 (PECB, 1997).

[5] The union filed a brief in opposition to the employer's petition for review, but it neither petitioned for review nor filed a cross-petition for review of adverse rulings made by the Examiner concerning the existence of union animus and the absence of a "discrimination" violation.

for actual harm, and that the Commission has no jurisdiction to remedy psychological harm or to make adjustments for perceived demotions or diminished employment. The employer argues the Examiner's decision is not based on substantial evidence and requests the Commission to reverse the Examiner's decision.

The union argues that the employer unlawfully interfered with employee rights when it unilaterally imposed a no-solicitation rule. It argues the restrictions were reasonably perceived by employees as limiting their ability to discuss the union, that employees were threatened with diminution of pay and benefits, and reasonably perceived that certification of a bargaining unit would have an adverse impact on their job status. The union argues that the employer unilaterally and unlawfully removed job duties and titles of positions. It contends that the Examiner understated the extent of the interference, but that the Examiner's order should be affirmed.

DISCUSSION

The Legal Standards

Chapter 41.56 RCW prohibits employers from interfering with or discriminating against public employees who exercise the collective bargaining rights secured by the statute:

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

> their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

[Emphasis by **bold** supplied.]

Enforcement of those statutory rights is through the unfair labor practice provisions of Chapter 41.56 RCW:

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

[Emphasis by **bold** supplied.]

RCW 41.56.160 authorizes the Commission to determine and remedy unfair labor practices.

The Interference Allegations

The burden of proving 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,[6] but the standard is not particularly high. An interference violation will be found when *employees could reasonably perceive* the employer's actions as a threat of reprisal or force or promise

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[6] See, City of Mill Creek, Decision 5699 (PECB), and cases cited therein.

of benefit associated with the union activity of that employee or of other employees.[7] A showing that the employer acted with intent or motivation to interfere is not required. Nor is it necessary to show that the employees concerned were actually interfered with or coerced. See, Kennewick School District, Decision 5632-A (PECB, 1996), and cases cited therein.

The October Memoranda -

The employer argues the memoranda of October 2, 1995, and October 13, 1995 only clarified permissible union organizing activities, and actually had little impact on organizational discussions. The record in this case reveals, however, that employees could reasonably perceive that the employer placed undue restraints on union activity and union discussions during the summer and autumn of 1995. Employees could reasonably perceive the employer's action as a threat of reprisal associated with union activity.

The record contains no evidence that the employer had placed any restrictions on employees' conversations at the work place prior to the time of the union organizing campaign in 1995. The record shows that, historically, employees felt no reservations about talking about any subject at work. During the union organizing campaign, however, they were careful about discussing the subject of the union.

The October 2, 1995 memorandum indicated an employer policy that employees "may not hold union meetings or conduct union campaigning

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[7] See, City of Seattle, Decision 3066-A (PECB, 1988); City of Seattle, Decision 3566-A (PECB, 1991); City of Pasco, Decision 3804-A (PECB, 1992); Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995); King County, Decision 4893-A (PECB, 1995); Mansfield School District, Decision 5238-A (EDUC, 1996); and Kennewick School District, Decision 5632-A (PECB, 1996).

at the workplace or during work hours". The October 13, 1995 memorandum, intended to clarify the October 2nd directive, defined "work hours" to mean office hours, from 8:00 a.m. to 5:00 p.m., Monday through Friday. With these statements, the employer interfered with employees' rights. Specifically:

- Because of the vague reference to "union meetings", employees could reasonably perceive that a discussion among employees during a meal or break period might by interpreted to be a union meeting. Also, employees could reasonably perceive that the vague reference to "union campaigning" at the work place might be interpreted by the employer to include any discussion of the pros and cons of joining the union, or that any personal debate among employees on the issue could be prohibited.

- In the October 13, 1995 memorandum employees were specifically advised to look to the prohibitions against election campaigning as an analogy. The Seattle City Attorney "Office Policies and Procedures" Manual, section on "Political Campaigning" states only:

> As to his own office, the City Attorney will not accept any financial contribution from any employee. Although the City Attorney does not believe it is appropriate to limit other campaign activities by employees, such participation is absolutely not expected of employees.
>
> As to other elected offices or ballot issues, the City Attorney respects the rights of employees to participate in campaign activities, but encourages each employee to use care that such participation not harm or jeopardize the ability of the office to maintain a positive working relationship with its clients.

Employees could reasonably be confused as to the extent of union discussion permitted by the employer, and interpret the employer's directives to mean that they needed to be careful in their conversations.

- The employer's analogy to election campaigns could, in the context of a bargaining unit of attorneys, lead the employees to Chapter 42.17 RCW.[8] That statute imposes more stringent limits than are placed on lawful union activity:

> [U]sing any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election ... Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency **during working hours**, vehicles, office space, publications of the office or agency ...
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> [RCW 42.17.130. Emphasis by **bold** supplied.]

Employees could reasonably have perceived that they were to be very careful in any discussions about the union and determined it was best to keep quiet about the subject.

- National Labor Relations Board (NLRB) precedent considers employer rules prohibiting solicitation or distribution on company premises to be overly broad on their face if they are not restricted to working time. The NLRB holds that a rule without such restrictions is presumptively unlawful, and that an employer can only avoid the finding of a violation by a showing that its rule was communicated or applied in such a

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[8] Cities are included within the definition of "agency" by RCW 42.17.020(1).

way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work. Our Way, Inc., 268 NLRB 394 (1983). See also, MTD Products, Inc., 310 NLRB 733 (1993), and Ichikoh Manufacturing, Inc., 312 NLRB 1022 (1993). In Clallam County Public Hospital District 1, d/b/a Forks Community Hospital, Decision 5445 (PECB, 1996), an Examiner found that an employer did not violate the law by not having a no-solicitation rule during a decertification effort. In so finding, the Examiner stated that a valid employer policy might prohibit union-related activities on employee work time and in work areas, but cannot prohibit discussion of such issues by employees on their breaks, during lunch periods, or on their own time. As the Examiner footnoted in Clallam County, a valid no-solicitation rule would also have to uniformly ban other solicitations, such as selling raffle tickets or admissions for charities or charitable events. Likewise, where evidence showed an employer rule regarding working hours was narrow in scope and did not apply to breaks and lunch periods, a "no-talking rule" was not a violation. City of Seattle, Decision 3066 (PECB, 1988), affirmed, Decision 3066-A (PECB, 1989). The employees could not reasonably perceive such rule as a threat to protected activities.

In the case at hand, the two memos clearly indicate, on their faces, the employer intended to limit solicitation and discussion about the union.[9] The employer did not restrict the limitations to

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[9] The employer's intention is shown by the limitation of union meetings or union campaigning at the workplace or during work hours, and in the employer's definition of work hours as office hours, "those hours during which the office is officially open for business – 8:00 a.m. to 5:00 p.m., Monday through Friday".

working time, and it put forth no evidence to show that it conveyed an intent to permit solicitation or open discussion during employees' non-work time.

The employer argues that the memos did not affect the discussions occurring among employees, but the evidence shows otherwise. It is clear that Trevino, McKenna and Chung felt a greater concern about discussing union activities in the office after receipt of the October 2, 1995 memo. The employer also argues that attorneys who testified on behalf of the union found the memos to be reasonable, but direct evidence of the employees' perception is not necessary to the finding of an interference violation. In cases where evidence of employees' perception has been sparse, the Commission has relied on timing of the employer's actions and other circumstantial evidence to infer that employees could reasonably perceive employer actions as a threat of reprisal or force or promise of benefit associated with union activity. See, e.g., Kennewick School District, Decision 5632-A (PECB, 1996). Here, the employees' testimony concerning the constraints they felt upon discussions belies their statements, in a different context, that the memos were "reasonable".

The Meetings -

The Examiner found that Inkley told the assistant supervisors that certain of their responsibilities would be removed if they were to be included in the bargaining unit, and that changes in responsibility would affect their pay. The employer claims the evidence does not support such a conclusion. We credit Trevino's testimony on this point, however, as it was essentially unrebutted.[10] Sherron testified that the affected employees received a pay

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[10] Transcript, p. 18. It was, in fact, partly borne out by the actual removal of job duties months later.

increase when they went into the assistant supervisor jobs, that "there was no assumption that once in that position you would always have that position", and that the pay increase was for doing assistant supervisor work. The assistant supervisors could reasonably have inferred from Inkley's comments that their responsibilities would be reduced and that pay for their positions could be affected, if they were included in the bargaining unit.[11]

The employer's claim that a "perception" of retaliation with respect to what was said at the meetings is not actionable, and its reliance on Delahunty v. Cahoon, 66 Wn. App. 829 (1992), are entirely without merit. The cited case was decided under Chapter 49.60 RCW, the state law against discrimination. A plaintiff in a "discrimination" case must prove that retaliation was a substantial factor behind a defendant's adverse employment action,[12] but we are not engaged in a "discrimination" analysis at this point. Both the

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[11] The incumbents did not actually lose pay. Sherron testified this was due to the fact they were already at the top step. We infer from the record, however, that future incumbents in the positions may not be paid at a salary reflecting assistant supervisor titles and responsibilities. The testimony of the union's attorney that future position incumbents would lose the economic opportunities of more rapid advancement through the pay scale was unrebutted.

[12] See, Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), The Commission adopted the "substantial motivating factor" test for determining allegations of retaliatory discrimination in Educational Service District 114, Decision 4631-A (PECB, 1994), and that test has been used by the Commission to determine discriminatory allegations under Chapters 41.56 and 41.59 RCW since then. See, e.g., Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995); City of Winlock, Decision 4784-A (PECB, 1995); Mansfield School District, Decision 5239-A (EDUC, 1996); and Seattle School District, Decision 5237-B (EDUC, 1996), aff'd, King County Superior Court (1997).

original complaint and the amendment filed in December of 1995 (i.e., before any actual action was taken) alleged that the assistant supervisors were threatened with loss of responsibilities and pay, and those allegations were found to state a cause of action. The reasonable perception of a threat is actionable under an "interference" analysis.

After the two meetings with Inkley and Sherron, employees could reasonably have perceived that union activity was a sensitive issue at the employer's place of business, and that employees should be guarded in their discussions. Trevino testified of being advised the employees could attend union meetings, but were not to participate as supervisors, and reasonably perceived she was to be careful in her participation. Bob Murashige received the impression they were not supposed to express any opinions at union meetings, just to listen, and reasonably perceived that he could be disciplined for participating in union activities. Edward McKenna understood that they needed to be careful in their discussions, and that if they talk about unionization, it would be their personal opinions and not those of the office or their position. He became uncomfortable in communicating his concerns to others, and reasonably felt he could jeopardize the union's ability to organize and the management's ability to work with the union if he expressed his opinions.

Restrictions on the union activity of supervisors which might arguably have been apt in the private sector were entirely misplaced in this employment relationship. Even if they properly would have been excluded from the petitioned-for bargaining unit under City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), supervisors have full collective bargaining rights under

Chapter 41.56 RCW, under Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), and even have the right to join and participate in the same union that represents their subordinates, under International Association of Fire Fighters, Local 1052 v. PERC, 45 Wn.App 686 (Division III, 1986), review denied 127 Wn.2d 1030 (1987), reversing City of Richland, Decisions 1519, 1519-A (PECB, 1983).

The Unilateral Change Allegations

The Legal Standards -

The duty to bargain under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is defined as follows:

> RCW 41.56.030 Definitions.
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> ...
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> (4) "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including **wages, hours and working conditions**, which may be peculiar to an appropriate bargaining unit ...
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> [Emphasis by **bold** supplied.]

That definition is patterned after the definition found in the National Labor Relations Act (NLRA). The Supreme Court of the State of Washington has ruled that decisions construing the NLRA are persuasive in interpreting state labor acts which are similar to the NLRA. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1981).

The potential subjects for bargaining between an employer and union are commonly divided into categories of "mandatory", "permissive"

and "illegal". Matters affecting wages, hours, and working conditions are mandatory subjects of bargaining. See, Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster division of Borg-Warner, 356 U.S. 342 (1958), affirmed, Federal Way Education Association v. Public Employment Relations Commission, WPERR CD-57 (King County Superior Court, 1978).

The duty to bargain includes a duty to give notice and provide opportunity for bargaining prior to changing employee wages, hours or working conditions. A party to a bargaining relationship commits an unfair labor practice if it fails to give notice of a change affecting a mandatory subject of bargaining (i.e., presents the other party with a fait accompli), or fails to bargain in good faith upon request. Federal Way School District, supra.[13]

Changes in Job Duties and Job Title -
Mari Trevino had been employed by the employer for about seven years at the time of the hearing in this case. Trevino's performance evaluation for the period February of 1993 to May of 1995 used the title of "assistant supervisor", and showed her job duties as:

> Assist in the supervision of the filing and pretrial unit. Prepare and staff pretrial hearings, in-custody arraignments, review and make filing decisions on out-of-custody incident reports.

Trevino's next performance evaluation, issued on July 2, 1996, for the period from June 1995 to February 1996 shows her title was changed to "assistant city attorney", and her job duties to:

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[13] See, also, NLRB v. Katz, 369 U.S. 736 (1962); Green River Community College, Decision 4008-A (CCOL, 1993); City of Brier, Decision 5089-A (PECB, 1995).

> Prepare and staff pretrial calendars including case setting calendars.

Thus, the emphasis on assisting the supervisor was removed from Trevino's duties. Trevino was not formally told her position title had changed, but learned about the change when she received her performance evaluation.

Robert Murashige has been employed with the criminal division since February of 1990. He became an assistant supervisor in November of 1991. Murashige's performance evaluation for the period from 1993 to 1994 shows his title to be "assistant pretrial supervisor", and his job duties to be:

> To assist the supervisor of the unit by filing cases, covering calendars, supervising unit attorneys, and developing policies for more efficient processing of cases.

Murashige's next performance evaluation, issued July 3, 1996, shows his title as "assistant pretrial supervisor", and the duties of his position to be:

> To prepare and staff pretrial calendars including Case Setting Calendars.

Thus, the emphasis on assisting the supervisor was also removed from Murashige's duties.

Edward McKenna has worked for the employer since February of 1990. McKenna has been the "readiness and master calendar prosecutor" and was the assistant trial unit supervisor. He had been in charge of jury instructions for the office, and would report to the trial unit supervisor on personnel issues and disciplinary matters. He

heard he was no longer going to be an assistant supervisor from a secretary, who informed him she was changing the phone list to reflect his position as assistant city attorney instead of assistant supervisor. He had dealings with judges regarding policies and procedures between the office and the court prior to the change, but is no longer privy to those discussions. He has noticed a reluctance for other prosecutors to obey his commands or heed his suggestions regarding trial strategy. He no longer deals with personnel matters. When people contact him about situations, he must tell them he is no longer in a supervisory capacity and refer them to his superiors. McKenna's performance evaluation dated August 21, 1996, shows the title of "assistant city attorney", and shows his duties as:

> [H]handling Readiness Calendar; handling Master Calendar; assisting trial unit attorneys with questions of law and trial strategy, trying assigned cases; preassigning cases to trial attorneys; approving (or declining to approve) exceptional dispositions under the division's filing and disposition standards; and other duties as assigned ... .

Any emphasis on assisting his supervisor that existed prior to the union organizing effort has been deleted.

All three of the performance evaluations issued in 1996 included the following:

> As you know, your position became part of the collective bargaining unit in January. To avoid incompatible duties, we then scaled back the former "assistant supervisor" designation to eliminate responsibilities for personnel issues and performance evaluations and attendance at the Tuesday Group meetings. Despite

> these changes, I have kept you in an informal "lead attorney" role ...

Thus, it is clear the employer removed both duties and title from three of the employees in assistant supervisor positions.[14]

Waiver by Inaction -

The employer argues that the union was placed on notice of intended changes by the parties' stipulation regarding the bargaining unit description to include "all ... assistant city attorneys", and that the union did not request bargaining, so that the employer's action cannot be considered to be a unilateral action. We find the employer's argument without merit.

The Commission prefers the use of generic terms in bargaining unit descriptions, because of potential problems created by the use of specific job titles. See, City of Milton, Decision 5202-B (PECB, 1995). The "assistant city attorney" language stipulated by the parties in the related representation case is such a generic term. It was broad enough to encompass "assistant supervisors", positions that were not being excluded as "supervisors" under City of Richland, Decision 279-A, supra. Sherron testified that the "senior city attorney" is the official title for the next level above "assistant city attorney". The "assistant supervisor" title appears to be a working title given to individuals paid at a higher step within the "assistant city attorney" pay range. Therefore, the union cannot be held to have been put on notice of any change of title, duties, or scope of bargaining unit work by the stipulation.

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[14] Even though Murashige's performance evaluation showed no change in job title, we can infer from the evidence that there was an actual change.

The employer claims the change in job title was dictated by the removal of supervisory duties, that the parties agreed with respect to each substantive job change, and that all other adjustments or revisions to peripheral tasks were within the employer's management prerogative. We find the Examiner's conclusions supported by the record. The union's attorney testified that the union agreed the bargaining unit would include three assistant supervisor positions and one position would remain outside the bargaining unit. He testified the parties reached no further agreement on job duties,[15] and that he made attempts to correct a misunderstanding concerning job duties. The record shows that the parties agreed the three assistant supervisors placed in the unit would not attend "Tuesday Group" meetings of supervisors, and would not have a role in evaluating, promoting or disciplining employees. However, the parties did not agree to removing the title of assistant supervisor, removing their responsibilities in having contact with victims, attorneys and members of the public, and eliminating special projects or contacts with judges relative to court policy.

Remedy and Statutory Authority of the Commission

The employer cites Anacortes School District, Decision 2464-A (EDUC, 1986) for the proposition that there is no authorization, express or implied in Chapter 41.56 RCW or Title 391 WAC, to remedy psychological harm, to make adjustments for perceived demotions (which result from an employee's belief that having been accreted to a bargaining unit he is no longer a part of management), or to rectify diminished employment potential. We agree with the employer, and we do not base our decision or order on the psychological impacts discussed at page 18 of the Examiner's discussion.

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[15] Transcript, p. 157.

That deletion does not, however, change the result of the decision.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact and Conclusions of Law of the Examiner's decision issued in the above captioned matter on June 6, 1997, are AFFIRMED.

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

   a. Cease and desist from:

      (1) Interfering with, restraining or coercing public employees in the free exercise of their rights guaranteed them by statute by:

         (a) eliminating the job responsibilities of assistant supervisors which are not of a confidential or supervisory nature because they are included in a bargaining unit.

         (b) eliminating the job title of "assistant supervisors" upon inclusion of employees bearing this title in a bargaining unit.

         (c) threatening to eliminate job responsibilities or cut the pay of assistant supervisors if they are included in a bargaining unit.

(d) maintaining a rule prohibiting solicitation for or discussion of the union at the work place or during working or office hours where there are no comparable restrictions on non-work related activity and no compelling circumstances exist for promulgation of such a rule in order to maintain an orderly work environment.

(2) Refusing to bargain in good faith with Seattle Deputy Prosecutors Association, by eliminating non-supervisory or non-confidential job duties and job titles of assistant supervisors without notice to the union.

(3) In any other manner, interfering with, restraining or coercing public employees in the exercise of their rights under Chapter 41.56 RCW.

b. Take the following affirmative actions to remedy the unfair labor practices found and to effectuate the policies of the Act:

(1) Return the non-supervisory, non-confidential work to the assistant supervisors which was transferred to non-bargaining unit employees sometime after February 20, 1996, including written and verbal contact with attorneys, victims, members of the public and judges.

(2) Restore the title of "assistant supervisor" to the three individuals in the bargaining unit who had that title prior to February 20, 1996.

(3) Post, in conspicuous places on the employer's premises where notices to employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall, after being duly signed by an

authorized representative of the City of Seattle, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the City of Seattle to ensure that said notices are not removed, altered, defaced, or covered by other material.

(4) Notify the complainant, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a signed copy of the notice required by the preceding paragraph.

(5) Notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) days of the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by paragraph 2(b)(3).

Issued at Olympia, Washington, on the 19th day of November, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

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, or coerce our employees in the free exercise of their rights guaranteed by the Public Employees' Collective Bargaining Act, by promulgating overly broad restrictions on discussions of the union, or removing non-supervisory, non-confidential job responsibilities or threatening to do so, or to affect employees' pay and changing job titles because employees are placed in a unit for bargaining purposes.

WE WILL NOT refuse to bargain in good faith with the Seattle Deputy Prosecutors Association concerning elimination of job duties and titles.

WE WILL permit discussions of the union in the same manner as other subjects at the work place.

WE WILL restore non-supervisory, non-confidential work functions to the assistant city attorneys designated as "assistant supervisors" and included in the bargaining unit.

WE WILL restore the title of "assistant supervisor" to those employees having that title prior to February 20, 1996.

WE WILL bargain in good faith with Seattle Deputy Prosecutors Association with respect to changes in duties or job titles of bargaining unit employees.

DATED: _____

CITY OF SEATTLE

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, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.