City of Vancouver, Decision 6732-A (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VANCOUVER POLICE OFFICERS GUILD, Complainant,	)	CASE 14364-U-99-3560
vs.	)	DECISION 6732-A - PECB
CITY OF VANCOUVER, Respondent.	)	DECISION OF COMMISSION

David A. Snyder, Attorney at Law, appeared on behalf of the complainant.

Debra Y. B. Quinn and Michelle Holman Kerin, Assistant City Attorneys, appeared on behalf of the respondent.

This case comes before the Commission on an appeal filed by the Vancouver Police Officers Guild (union), seeking to overturn a dismissal of its unfair labor practice complaint issued by Examiner Pamela G. Bradburn,[1] and a cross-appeal filed by the City of Vancouver (employer). We reverse the Examiner and find the employer guilty of an unfair labor practice.

BACKGROUND

The City of Vancouver (employer) and the Vancouver Police Officers Guild (union) are parties to a collective bargaining agreement covering police officers, corporals, and sergeants. In addition to the collective bargaining agreement, the employer also maintains a

[1] City of Vancouver, Decision 6732 (PECB, 1999).

police department policy and procedure manual which includes: A code of professional conduct, a series of personnel rules, policies, procedures, and sections on equal employment opportunity and harassment. Police officers are also covered by city-wide policies, including a harassment prevention policy.

Internal Investigation IA 98-31

The employer uses an "Internal Affairs Investigation" process to investigate allegations of misconduct against Police Department employees of any rank. Employees are subjected to formal, in-depth interviews in that process. The aim of that mechanism is to determine whether a violation of policy has occurred. Employees are ordered to attend internal affairs interviews, and are ordered to answer questions. Employees are subject to discipline if they fail to answer the questions fully and truthfully.

Prior to the events giving rise to this unfair labor practice case, the employer commenced an internal investigation on June 9, 1998, coded as "IA 98-31", regarding alleged misconduct of employees at a training session held on June 5, 1998. The training session concerned domestic violence issues. Bargaining unit employee Navine Sharma, a member of the Domestic Violence Task Force within the Vancouver Police Department, was among the panel of presenters. Because Sharma was a witness to the behavior under scrutiny in IA 98-31, he was interviewed during the internal affairs investigation. That investigation was concluded by early autumn of 1998.

Statements and Conduct at Union Meetings

Sharma had a conversation with Lieutenant Hall on or about December 15, 1998. Sharma stated he had been approached by another employee

about statements and conduct that occurred at a meeting of the union's executive board and at a union membership meeting. Sharma was concerned that some employees were upset with him because he had allegedly volunteered information during his IA 98-31 interview. As relayed to Hall, concern had been expressed about Sharma's safety,[2] there had been talk that Sharma should be taught a lesson, and a move to boycott a charitable event or program which Sharma had initiated.[3] It appeared to Hall that Sharma believed a concerted effort had been instigated by certain sergeants and union executive board members to "get even" with Sharma for his IA 98-31 testimony.[4] Lieutenant Hall filed allegations against the employees implicated in the harassment of Sharma.

Independent of the information given by Sharma to Hall, Lieutenant Janet Thiessen became aware of rumors that employees were angry at Sharma for bringing forward any information, that Sharma was being referred to as being a snitch, that other employees felt Sharma should have limited himself to answering what was asked, and that Sharma should not have revealed the full scope of his knowledge during his IA 98-31 interview. There was some discussion about Sharma's standing on the SWAT team, and about some equipment issued to Sharma being missing. Thiessen was responsible for internal affairs investigations at that time, and she felt that the behavior, statements and conduct went beyond a lack of courtesy or lack of respect, and got into areas of harassment, retaliation,

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[2] There was reference to Sharma being a member of the "SWAT team", which we understand to mean a "special weapons and tactics" unit.

[3] Details of the "Crop a Cop" program do not appear necessary to a decision in this case.

[4] Sharma was on disability leave in late December of 1998 and early January of 1999. It was rumored that his leave was related to stress at work.

and/or discrimination. Thiessen felt the employer had an obligation to conduct a thorough investigation into allegations of harassment or behavior that could be termed retaliatory or discriminatory.[5]

Internal Investigation IA 99-01

Based on the allegations filed by Lieutenant Hall and Thiessen's concerns, the employer initiated an internal affairs investigation, coded as "IA 99-01", on January 15, 1999. The subjects of the investigation were bargaining unit employees Howard Anderson (the president of the union), Scott Creager, John Chapman (a vice-president of the union) and Doug Luse. All of the employees under investigation held the rank of "sergeant".

The employer had not previously asked questions or investigated conduct that occurred at union executive board or membership meetings, and Thiessen directed the investigators to stay away from any questions about information that did not pertain to the specific allegations and specific policies or laws named in the IA 99-01 documents. Thiessen also asked the investigators to have questions prepared ahead of time, so they could be reviewed by the employer's legal counsel to assure they did not delve into union policies, practices, or strategies.

The internal affairs investigators interviewed members of the bargaining unit, questioning them about statements or conduct at private meetings of the union's executive board and at private meetings of the union membership. In a statement read to each

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[5] Thiessen was promoted to deputy chief, effective January 1, 1999. Her current responsibilities include overseeing headquarters operations, including internal affairs investigations.

interviewee, the internal affairs investigators indicated they would not ask any questions regarding union policy, practice, or strategy. The employer asserted having a legitimate interest in protecting employees from possible retaliatory, discriminatory, and/or harassing conduct, and that questions about events at union meetings would be circumscribed to elicit only facts related to alleged violations of the employer's policy. The interviewees were not asked any questions about union strategy as it applied to grievances or contract negotiations. Deviating from practices at previous internal affairs investigations, every witness was offered the opportunity to have representation at the interviews.

The Unfair Labor Practice Complaint

The union filed a complaint charging unfair labor practices on February 2, 1999. The union alleged: (1) the employer interfered with employee rights by planning and/or conducting investigatory interviews concerning discussions and statements made at union meetings; (2) interrogation of the union's board members would deter current and future board members from freely speaking their mind, exercising discretion on behalf of the guild and its membership, and freely exercising rights guaranteed by RCW 41.56.040; and (3) the employer's inquiries into discussions at private union meetings would constitute surveillance of employees engaged in protected union activities, and unlawfully interfere with employee rights guaranteed by RCW 41.56.040, and willfully violate RCW 41.56.140(1).[6]

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[6] On February 11, 1999, the union filed a motion for temporary relief under WAC 391-45-430. After hearing oral arguments at its regular monthly meeting on March 16, 1999, the Commission authorized the Attorney General to seek an injunction pendente lite. The Superior Court for Clark County granted a preliminary injunction, which is to remain in force through November 20, 1999.

A hearing was held, and Examiner Pamela G. Bradburn issued a decision in this case on July 14, 1999. She concluded that no employee could reasonably expect future employer interference with union activities as a result of the employer's actions in pursuing IA 99-01, and that the union did not establish that the employer's interrogation of employees interfered with employee rights contrary to RCW 41.56.140(1). The Examiner dismissed the complaint.

POSITIONS OF THE PARTIES

The union contends that all matters discussed at private union meetings must be considered protected activity, and shielded from all employer surveillance. It thus claims the investigation was inherently coercive and chilled future participation in union meetings. The union argues that the Examiner erred by using an improper analysis, and by ignoring precedent concerning employer surveillance of union meetings. It claims the employer is subject to state law, and that its reliance on its equal employment and harassment prevention policies is misplaced. The union argues that the Examiner erred by accepting the employer's asserted business reasons for the investigation, that an impression held by employer officials about Sharma not being covered on calls was only conjecture. The union argues that discrimination was not an issue, that arguments about Sharma being a member of a protected class should be rejected for lack of evidence in the record, and that an individual's national origin is not a proper subject for judicial notice. The union argues the Examiner erred in failing to award the union its representation costs.

The employer contends that it had a legitimate reason to investigate allegations of discrimination, harassment, and retaliation as potential violations of state and federal civil rights laws. The

employer argues that the conduct at issue falls outside the protections of Chapter 41.56 RCW, that it is obligated to do a complete and thorough investigation of serious misconduct, and that purported union activity adversely affecting an employee's employment is not protected by labor statutes. It argues that the questions asked by the internal affairs investigators were carefully circumscribed to facts related only to alleged violations of city and police department policies, were designed to elicit only information about harassing, discriminatory and/or retaliatory conduct in union meetings, and were carefully tailored to avoid any intrusion into legitimate union activity. The employer contends that the Examiner erred in failing to find evidence in the record of Sharma's protected class status and invidious discrimination, and that the Examiner erred by not taking judicial notice of Sharma's national origin. It also argues that no member could or did reasonably perceive their protected union activity was interfered with, and that there is no evidence that the employer actually interfered with the union's rights. The employer argues that the union failed to meet its burden of proof, and it asks the Commission to uphold the Examiner's decision.

DISCUSSION

Motion in Limine

At the hearing, the union made a motion in limine, to exclude testimony concerning statements made at union executive board and general membership meetings. The Examiner refused to exclude all questions about events during union meetings, but stated she would entertain objections to specific questions. The Examiner noted that the purpose of the Commission's authorization of temporary

relief and of the preliminary injunction issued by the Superior Court was to freeze the employer's investigation until the Commission could rule on the right of the employer to investigate, and that she did not want to undercut the effect of those rulings.

On appeal, the employer argues that the Examiner erred in prohibiting it from asking bargaining unit members about union meetings and internal affairs interviews. It argues that the preliminary injunction did not bar it from asking questions in the unfair labor practice hearing, that evidence about the conduct in the union meetings was essential and relevant to the dispute, and would go to the reasonable perceptions of union members about their rights. The employer thus contends that the union failed to prove harm to its members.

In opposition to the employer's arguments, the union contends the Examiner's approach was correct, and that examination at the hearing about the events at these particular union meetings would have violated the purpose and spirit of the injunction. It argues generally that allowing the employer to examine witnesses concerning private union meetings would make it impossible for the union to preserve the confidentiality of such meetings, and would transform unfair labor practice hearings into a hearing on the merits of the allegations made against the four union members.

We agree with the Examiner's handling of this motion. Some limitation on the scope of questioning was clearly warranted. The issue in the case involves the employer's attempt to question employees about what occurred at the union meeting, rather than the truth or falsity of what was actually said at those union meetings. The Commission's ruling authorizing temporary relief and the preliminary injunction were designed to prohibit the questioning of

employees until the case could be fully heard, and a final order could be issued on the propriety of such questioning. At the same time, rejection of a blanket exclusion and allowing objections to specific questions was fair and orderly.

The Legal Standards

The Statutory Framework -

RCW 41.56.040 delineates the rights of employees to organize and be free to exercise their collective bargaining rights 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.

The Supreme Court of the State of Washington has ruled that Chapter 41.56 RCW is to be liberally construed to effect its purpose of implementing the right of public employees to join and be represented by labor organizations. Nucleonics Alliance v. Washington Public Power Supply System, 101 Wn.2d 24 (1984). See, also, Municipality of Metropolitan Seattle v. PERC, 118 Wn.2d 621 (1992).

Our Supreme Court has held that Chapter 41.56 RCW prevails in a conflict with another statute. Rose v. Erickson, 106 Wn.2d 420 (1986). RCW 41.56.905 provides:

> Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation

> of any public employer, the provisions of this chapter shall control.
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> [Emphasis by bold supplied.]

See, also, Peninsula School District v. Public School Employees of Peninsula, 130 Wn.2d 401 (1996).

Enforcement of the statutory rights in RCW 41.56.040 is through the unfair labor practice provisions of the statute. RCW 41.56.140 enumerates unfair labor practices by a public employer:

> 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.

The Commission has jurisdiction to determine and remedy unfair labor practice claims. RCW 41.56.160. The burden of proof in an unfair labor practice proceeding under Chapter 41.56 RCW rests with the complaining party, and must be established by a preponderance of the evidence.

To establish an "interference" violation under RCW 41.56.140(1), a complainant need only establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. City of Seattle, Decision 3066 (PECB, 1989); affirmed, Decision 3066-A (PECB, 1989). See, also, City of Pasco, Decision

3804-A (PECB, 1992), and cases cited therein. 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. It is not even necessary to show anti-union animus for an interference charge to prevail. Clallam County v. Public Employment Relations Commission, 43 Wn.App. 589 (1986).

The employee rights protected by RCW 41.56.040 include the right to attend and participate in union meetings. An employer commits a violation if it creates the impression that it is engaged in surveillance of employees engaged in protected activities, even if there was no actual surveillance. City of Longview, Decision 4702 (PECB, 1994).

Application of Legal Standards

Neither the union nor this Commission questions that an employer has a right and duty to manage its affairs, including a right and duty to investigate and remedy misconduct among its employees. The issues in this case concern whether the employer's rights are unlimited in the context of collective bargaining laws and relationships, and the extent of any such limitations. The employer would have us validate its intrusion into union meetings under the circumstances of this case, while the union would have us adopt a per se prohibition of employer questioning about any union meeting.

Union Meetings Were Private -

The union meetings at issue in this case were private meetings, closed to the public and employer officials. The record indicates that was the practice of this labor organization, and supports the union's claim that its meetings are a forum for free-flowing

discussion among bargaining unit members, where members speak their mind on various issues of concern to them.

Precedent under the National Labor Relations Act -
The Supreme Court of the State of Washington has ruled that decisions construing the National Labor Relations Act (NLRA) are persuasive in interpreting state labor acts which are similar to the NLRA. Nucleonics Alliance v. WPPSS, supra. Federal cases involving direct employer intrusion into union meetings are few and far between, likely because a rejection of employer involvement in union affairs was clearly delineated in the legislative history of the Wagner Act in 1935. See, Washington State Patrol, Decision 2900 (PECB, 1988). The National Labor Relations Board (NLRB) sought to impose a per se prohibition of all employer interrogation of employees at one time, but it abandoned that approach in the face of judicial disapproval. Compare, Standard-Coosa-Thatcher Co., 85 NLRB 1358 (1949) with Struksnes Construction Co., 165 NLRB 1062 (1967). Nevertheless, the NLRB and the federal courts have long held that employer questioning of employees is unlawful interference in the context of union organizing campaigns. NLRB v. West Coast Casket Co., 205 F.2d 902, 904 (9th Cir. 1953). The NLRB also imposes strict limits on employer questioning of employees in the context of unfair labor practice proceedings, under Johnnie's Poultry Co., 146 NLRB 770 (1964).

While the Examiner correctly cited Premier Rubber Co., 272 NLRB 466 (1984), as a case where the NLRB found the questioning of an active union supporter about a union meeting to be "innocuous", we find that part of that decision unpersuasive. We note the strong dissent by Member Zimmermann in that case, and we particularly note that a violation was found in that same case in regard to another incident of employer questioning of an employee. The latter incident involved questioning of an employee about the union

activities of other employees, which we find to be the closer of the two to the facts in the case now before us.

The Examiner drew a distinction between NLRB cases where union affairs were openly discussed between employees and supervisors, and cases where union affairs were not discussed openly. While the Examiner concluded that employer questioning was excused by the NLRB in the context of more open discussion, we do not embrace the underlying distinction. In Redway Carriers, 274 NLRB 1359, at 1403 (1985), the employer asked a late-arriving employee whether he had been to a union meeting, but that questioning was in the context of a discussion about an assigned trip. The key basis for the NLRB decision appears to be that the supervisor had a legitimate reason to ask whether the employer attended the meeting, in order to ascertain whether the employee had a valid reason for being late to work. Of particular interest to us in this case, there was no questioning about what happened at the union meeting, and the supervisor expressed no views about the meeting or union issues. We view Redway as an example showing that, where minor or unobtrusive inquiries are accompanied by legitimate reasons, the employer does not commit an unfair labor practice by merely asking an employee about a union meeting. At the same time, we view the systematic and repetitive questioning of employees in the case now before us about what went on in union meetings as far more intrusive than the fact pattern in Redway.

Other NLRB decisions support finding a violation in this case. In Daniel Construction Company, 241 NLRB 336, 338 (1979), the NLRB found an employer's solicitation of employees to engage in surveillance of union activities, by attending a union meeting and reporting back on what transpired, was unlawful interference. A violation was found in General Electric Co., 253 NLRB 155 (1981), even though the employer interrogation merely involved an impromptu

meeting where a grievant and a union official discussed a grievance in the presence of other union-represented employees. Both cases, like the circumstances in the case at hand, involve an employer intrusion into union affairs.[7]

In Gayston Corp., 265 NLRB 1 (1982), the employer asked employees to eavesdrop on colleagues' conversations of union issues in a lunch room, and report back on those discussions. The NLRB found a violation, and the Examiner cited Gayston in this case as showing that a violation occurs when employees and management lack "any practice of open discussion in the workplace of union matters". We read the case as indicating there was much more open communication between employees and superiors about union affairs than was present in the case at hand, and we find it significant that the NLRB found a violation based on eavesdropping on informal conversations among union members. The intrusion into union affairs in that case was much less significant than either the impromptu union consultation in General Electric or the formal union meetings in the case now before us.

The Examiner also cited Great Lakes Oriental Products, Inc., 283 NLRB 99 (1987), where a supervisor asked an employee what happened at a union meeting, and what the employee was going to do with union authorization cards in his possession. In rejecting a claim of unlawful interference, the NLRB noted that the conversation was initiated by the employee, in the presence of other employees, and that the employee volunteered information about the organizing

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[7] Accord: Cardinal System, A Division of Hospitality Motor Inns, Inc., 456 NLRB 456, 459-460 (1981). Although that case also involved employer questioning of an employee about her feelings about the union in a context of other unfair labor practices, at least part of the basis for finding a violation was repetitive questioning of the same employee about what went on in union meetings.

effort. Coupled with the fact that the alleged interrogation was not accompanied by any threats, promises of benefit, or other unlawful conduct, the NLRB found no violation under a test of: "Whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed in the Act". We distinguish that case from the case at hand, where the employer's actual and proposed questioning of a significant number of employees was part of a systematic and formal investigative process designed to elicit information under threat of discipline if the employees did not answer.

The Examiner relied upon Abitibi Corp., 216 NLRB 373 (1975), where a plant superintendent asked an employee if he had enjoyed the free beer at a union meeting the previous evening. The union meeting and free beer had been a topic of discussion in the plant, and an interference claim was rejected as to that query. While a "surveillance" theory was rejected in that case based on the open discussion in the plant, we have difficulty equating that casual situation with the affirmative effort to interrogate employees in the case before us. We also note that a violation was found in Abitibi with respect to other employer interrogation of employees.

F.C.F. Papers, Inc. (Mead Corp.), 211 NLRB 657 (1974), is also distinguishable. In that case, five non-supervisory employees were summoned individually into the office of the company president, and were told that the employer had been informed of a union meeting. Each of the employees was told of their right to engage in or refrain from union activities, that participation was voluntary, and that there would be no reprisals or benefits. The only information sought from the employees concerned the activities of a supervisor. Although the employees were asked about whether they were present at the union meeting, about who passed out authorization cards, and about who signed cards, the NLRB concluded that the

employer's legitimate concerns about supervisory participation excused its actions under the circumstances there present.[8] The best that can be said for the employer in the case now before us is that it may have had some fragmentary reports about what occurred at the union meetings, which is far less than the information circulating in F.C.F. Papers. Additionally, and importantly, the NLRB restated the general rule that, under most circumstances, employer questioning of employees about who attended or what occurred at a union meeting constitutes unlawful interrogation.

While the union did not rely on NLRB precedent in the proceedings before the Examiner, it argues on appeal that the interrogations at issue in this case cannot reasonably be compared to isolated or innocuous comments. It aptly cites Endo Laboratories, Inc., 239 NLRB 1047 (1978), where the Board found that employer questioning of employees about attendance at a union meeting overstepped the bounds of innocent curiosity.

Washington Precedent -

The Examiner sought to distinguish City of Longview, Decision 4702 (PECB, 1994), partially because of the limited record in that case, but chiefly on the basis that the employer in the case at hand had legitimately obtained information volunteered by bargaining unit members. We do not find those distinctions persuasive, and we agree with the union that Longview supports finding a violation in the case at hand, because of the commonality of serious employer inquiry into what transpired at union meetings.

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[8] The union had previously informed the employer that all employees but one had signed cards, so that any information obtained from the interrogation about union strength or employee participation was cumulative. Also, the employees were aware that such was the case, so the interrogations did not tend to be coercive.

The Executive Director issued a summary judgment in Longview, after comparison of the complaint and answer disclosed that there were no contested facts.[9] A violation was found, based upon the employer interrogation of employees about what had transpired behind closed doors of a union meeting, giving the impression of surveillance of lawful union activities protected by RCW 41.56.040, and thereby interfering with, restraining, and coercing its employees in violation of RCW 41.56.140(1).

We do not find evidence supporting the Examiner's attempt to distinguish Longview on its facts. Rather than fitting into the small category of NLRB decisions in which union affairs were freely discussed, there are many references in this record to the union keeping its meetings closed and there is little in the record to suggest that union issues are freely discussed with supervisors. The limited discussion of Sharma that came to the employer's attention does not constitute a wholesale discussion of union affairs. There will always be rumors in a workplace, and some of those will always come to the attention of employer representatives. We are concerned in any unfair labor practice case about the actions of the parties, and this employer took strong action based on rumor. We do not foreclose the possibility of a situation in which free discussion of union affairs may constitute a defense for an employer, but this is not such a situation.

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[9] The employer's answer admitted allegations that: The police chief asked a union officer about remarks made at a union meeting; the union officer confirmed that a union member had made certain comments; and the chief then met with the employee, expressed anger and dissatisfaction with the employee's comments at the union meeting, and encouraged the employee to come to him directly in the future to discuss any disagreement.

Employer inquiries about union meetings were found lawful in City of Bremerton, Decision 3843-A (PECB, 1994), where comments described as "semi-sarcastic" or "verbal jousting" were made to a veteran employee who was also president of the union. The Examiner in that case stated, "Surely, the [union] believed it could hold a secret union meeting regarding sensitive topics, or else it would not have conducted its meeting at the city hall." In that case, there was no allegation that any bargaining unit employee was under pressure of discipline to answer the employer's questions, and the Examiner ruled that, under those circumstances, the comments could not reasonably be perceived by bargaining unit employees as a threat to their rights under Chapter 41.56 RCW. The case now before us is distinguished by the fact that the employer here has sought to formally and systematically interrogate employees, in depth, about discussions at union meetings, and employees were ordered to respond under threat of discipline.

Surveillance Precedents -

Other Commission precedent supports finding a violation in this case. The Commission and its staff have approached employer intrusion into employee protected activities with a hard line. For example, in Town of Granite Falls, Decision 2692 (PECB, 1987), a violation was found because the employer created an impression that it was engaging in surveillance of their protected activities. The employees reasonably believed they were the subjects of photographs taken on two different days, and the mayor was observed driving by a residence where a union organizing meeting was being held. While the employer defended that it was taking pictures of street conditions, and that the employees were merely working in the area, some of the photographs were taken on the same day that the employees had a meeting with the employer about an overtime pay issue, so the employees reasonably felt threatened by the employer actions in that case.

In City of Westport, Decision 1194 (PECB, 1981), the employer created an impression of unlawful surveillance, and thereby committed an unfair labor practice, when an employer official made inquiries to another employer regarding an individual who was auditing the employer's financial records on behalf of the union. Again, the actual intrusion into union affairs was found unlawful.

A surveillance claim was dismissed in Skagit County, Decision 6348-A (PECB, 1998), where deputy sheriffs were assigned to monitor a ferry after announcement of a controversial plan to contract out the operation, but they were only instructed to watch for employee misconduct that would not have been protected activity under Chapter 41.56 RCW. No union meeting or activity was planned or occurred during the period involved, so the presence of the law enforcement officers was not reasonably perceived by the bargaining unit employees as surveillance of or interference with their lawful union activities. The case is inapposite here, where we are confronted with a clear and direct intrusion by the employer into closed union meetings.

Limitations on Protected Union Activity -

The employer's basic defense in this case is that what went on at the union meeting was (or at least arguably was) unlawful, and it cites Vancouver School District v. Service Employees International Union, 79 Wn.App. 905 (Division 2, 1995), as precedent showing that the rights conferred by Chapter 41.56 RCW are not limitless. In that case, an employee and a union representative approached school children in pursuing a grievance investigation, and asked them for their addresses and for information about whether their parents were at home. In deciding that the conduct in that case exceeded the bounds of protected activity under Chapter 41.56 RCW, the

court stated that "reasonable employee activity is protected while unreasonable employee activity is not",[10] and further stated:

> [R]easonableness is gauged by what a reasonable person would do in the midst of industrial strife, and not by what a reasonable person would do in the more ordinary affairs of life. Employee activity may be unreasonable when measured against ordinary social intercourse, yet reasonable in the context of a labor dispute.

Vancouver School District, at p. 922.

In that case, the court found that approaching the school children at a bus stop was not a reasonable exercise of the right to investigate grievances, even when a labor dispute was in progress.

The employer would have us equate the behavior in Vancouver to the alleged conduct by four sergeants in the case at hand, and even claims that the conduct of those four sergeants toward Sharma inside the closed union meeting was considerably more egregious than approaching school children on a public street. The union argues that Vancouver School District and other protected activity cases cited by the employer can be distinguished, because they involved public union activity, rather than closed union meetings.

The employer has not demonstrated that its widespread interrogation into employee conduct at the particular union meetings was necessary. In particular, the employer has not shown that any information presented to it about conduct at the union meetings was sufficient, by itself, to reasonably lead it to believe any laws were violated. Other than some venting by employees and some rumors of problems in regard to working relationships between other

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[10] Vancouver School District, at p. 923.

employees and Sharma, nothing was reported to the employer. The Court of Appeals specifically limited its holding in Vancouver School District to the facts of that case, expressing alarm that children under the age of 12 were approached without first obtaining permission of their parents. The Court concluded the children had been frightened, and that the employee and union representative knew or should have known they would cause fright to children of that age. We find it imperative to apply the Court of Appeals holding in a way that recognizes the mandate to differentiate between activity occurring in the midst of a labor dispute and activity when no dispute was in process. The court found the actions in Vancouver School District unprotected, even recognizing a labor dispute was in process. The employer is under the same burden to show the conduct was unprotected in the case at hand, since it would intrude behind the closed doors of the union meetings, but it has not met that burden. The employee conduct in this case involved speech by adults at private meetings attended by other adults. Even if Sharma was frightened or alarmed upon learning of what allegedly occurred in his absence at the union meetings, his capacity to deal with the situation, as an adult, is far different from the capacity of the young children in the cited case.

No Legitimate Business Reason for Employer's Inquiry -
While circumstances may exist where it would be lawful for an employer to interrogate its employees about some unlawful conspiracy developed (or being developed) behind the closed doors of a union meeting, our thorough review of the record indicates no such facts in this case. Indeed, the employer appears to have overreacted to exceedingly limited information, and to have gone on a fishing expedition.

The employer contends the Examiner erred in finding insufficient evidence in the record to making a ruling on Sharma's race or national origin, or to provide other basis for a finding of invidious discrimination. The employer also assigns error because the Examiner did not take judicial notice of Sharma's national origin. While the Examiner stated that Sharma sat through the hearing, the employer did not call Sharma as a witness to establish his race or national origin, it has not pointed out any transcript citation where it asked the Examiner to take judicial notice, and it has not provided any case citations in support of its argument.[11] A person's race or national origin is not always evident by visual observation alone, and we find that taking notice of such matters would be risky for any examiner or judge. Finally, the employer did not even request the Examiner to take judicial notice in its post-hearing brief, so this request is being presented for the first time on appeal. The Commission does not allow parties to bring forth new facts or arguments on appeal that could have been considered in proceedings before Examiners or the Executive Director. See, e.g., King County, Decision 6291-A (PECB, 1998), and cases cited therein.

The employer urges us to use the factors outlined in NLRB v. McCullough Environmental Services, Inc., 5 F.3d 923 (5th Cir. 1993), in determining whether an interrogation is an unfair labor practice, and argues that it met all of those factors. The NLRB listed eight factors: (1) the history of the employer's attitude toward its employees; (2) the nature of the information sought; (3) the rank of the questioner in the employer's hierarchy; (4) the place and manner of the conversation; (5) the truthfulness of the

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[11] The employer only quotes Washington Rule of Evidence 201 as requiring a court to take judicial notice "if requested by a party".

employees' reply; (6) whether the employer had a valid purpose for obtaining the information sought about the union; (7) whether a valid purpose, if existent, was communicated to the employee; and (8) whether the employer assured the employee that no reprisals should be forthcoming should he or she support the union. Even if we exercise our discretion to apply those factors in this case, we find the employer has not met all of them. Regarding item (3), it is clear that the disputed interrogation was being conducted as a formal internal affairs investigation sanctioned by officials at the top of the employer's organization; under (4), the questions asked were not just off-the-cuff interchanges between a first-level supervisor and rank-and-file employees, and the interrogation put the bargaining unit employees in the position of having to tell the truth under threat of discipline.

The employer cites NLRB v. Shelby Memorial Hospital, 1 F.3d 550 (7th Cir. 1993), for the proposition that the courts consider all relevant circumstances, including whether the questions were accompanied by a persuasive legitimate explanation for the employer's interest and whether the questioned employee was assured that no reprisals would follow. In the case at hand, the employer may have thought it had a legitimate explanation for its questioning of its employees, but it assumed a risk that the Commission would not agree with its assessment of the situation.

The employer has not proven that allegations of harassment, discrimination and retaliation needed to be investigated by delving into what transpired at the union meetings. The record only shows discussion at the union meetings based upon Sharma's responses in the previous internal affairs investigation. Sharma was not present at those union meetings, and nothing in the record shows that any information received by the employer from other bargaining

unit employees referred to discussion of Sharma's race or national origin at those meetings. The theory of discrimination on the basis of race (or any other type of invidious discrimination for which state and federal civil rights laws would be applicable), was a creation of employer officials. In particular, Thiessen appears to have translated comments about Sharma being "not a friend of the [union]" (Tr. page 208) and about Sharma being "blackballed" (Tr. page 208) into a theory of harassment, discrimination, and retaliation of the kind that would violate state and federal civil rights laws. From the record before us, the employer's alleged concern about discrimination on the basis of race or national origin was not based upon information received from any employee.

Although the employer asserted concern about Sharma's safety as a basis for the disputed interrogation, it has not established a legitimate basis for such concerns. Thiessen testified she was not aware of anything in the backgrounds of the alleged ringleaders in the actions against Sharma (Sergeants Creager, Luse, Chapman, and Anderson) that would indicate to her any of them would intentionally jeopardize the safety of another police officer. Sergeant Rick Smith discussed safety concerns with Sergeant Chapman near the time the controversy first arose, and was apparently satisfied with Chapman's assurances that there was no cause for concern about Sharma's safety. If the employer had taken concerns about Sharma's safety seriously at that time, this record suggests that Smith and senior employer officials would have done something immediately. The absence of employer action (other than the disputed interrogation) supports an inference that the threat was not taken as seriously as the employer would now have us believe.

Other Alternatives Were Open to the Employer -
The employer could have handled its concerns a different way, and could have chosen a method that would have been less intrusive into

union affairs. For instance, the employer could have responded to rumors by holding a meeting with its employees, and informing them of the employer's expectations concerning professional conduct and that conduct of the type rumored was unacceptable. Thiessen testified she was not aware of any management official admonishing the four sergeants accused of misconduct, or even warning them that they would be subject to discipline if there was any truth to the allegations. Such responses would have been considerably less intrusive into union affairs than questioning a wide range of employees through a formal internal affairs investigation.

It appears to us that this employer has somewhat confused the roles of law enforcer and employer. There is a role for each, but the two roles are different from one another, and may be difficult to harmonize in some situations under a collective bargaining law. The collective bargaining law would not and does not protect person(s) who commit crimes at union meetings, but it embodies a strong public policy interest in prohibiting employer intrusion into internal union affairs. While investigation by a law enforcement agency of a crime committed at a union meeting would be entirely appropriate, an employer might be well advised to bring in a special prosecutor or another law enforcement agency to avoid the type of problems that have arisen in this case. The reactions of employer officials in this case were, however, more like those of law enforcement officers than of supervisors or managers. They began an investigation into the facts, and they questioned employees. While they attempted to draw some line of demarcation and to limit the scope of their inquiry into what occurred at the union meetings, that does not avoid the certain reality that they were, and are, agents of the employer. The operative test in an "interference" case turns on what the employees reasonably perceived, not on what the employer intended. The employer violated RCW 41.56.140(1).

Collective Bargaining Statute Paramount -

We are called upon to strike a balance in this case. In doing so, the Commission is guided by the ruling of our Supreme Court in Rose v. Erickson, supra. Beyond predominance in a conflict between statutes, the rights and obligations of Chapter 41.56 RCW clearly prevail over conflicting City of Vancouver and Vancouver Police Department policies. The employer has not persuaded us that it had a sufficient basis to launch an investigation for invidious discrimination under state or federal law, or that it actually had a legitimate business interest to question employees about occurrences in closed union meetings.

Attorney Fees

The remedial authority granted to the Commission by RCW 41.56.160 has been interpreted as broad enough to authorize an award of attorney fees. See, Municipality of Metropolitan Seattle v. PERC, 118 Wn.2d 621 (1992). The Commission has used "extraordinary" remedies sparingly. Public Utility District 1 of Clark County, Decision 2045-B (PECB, 1989).

The Commission awards attorney fees when it is necessary to make the order effective and if the defense to the unfair labor practice is frivolous or meritless. The term "meritless" has been defined as meaning groundless or without foundation. See, State ex rel. Washington Federation of State Employees v. Board of Trustees, 82 Wn.2d 60 (1980); Lewis County v. PERC, 31 Wn.App. 853 (1982), review denied, 97 Wn.2d 1034 (1982); King County, Decision 3178-B (PECB, 1990); Public Utility District 1 of Clark County, Decision 3815-A (PECB, 1992).

The Commission has also awarded attorney fees when the respondent has engaged in a pattern of repetitive conduct showing a patent disregard of its statutory obligations. Pasco Housing Authority, Decision 5927-A (PECB, 1997); City of Seattle, Decision 3593, 3593-A (PECB, 1989).

In this case, we have no indication that an award of attorney fees is necessary to make our order effective. We believe the employer acted in good faith, even if erroneously. It clearly attempted to confine its questioning to the matters it perceived as relevant and appropriate, after seeking legal advice on how the questioning was to be conducted. While the careful crafting of questions to elicit only information the employer believed was permissible does not serve as a defense against the reasonable perceptions of the employees, it persuades us that the employer was concerned about harmonizing state and federal law, and that its arguments here are not frivolous such as to warrant attorney fees. There is certainly no evidence of repetitive conduct outside of this one situation.

NOW, THEREFORE, it is

ORDERED

The Order issued in the above-captioned matter by Examiner Pamela G. Bradburn is REVERSED, and the Commission makes and issues the following:

AMENDED FINDINGS OF FACT

1. The City of Vancouver is a public employer within the meaning of RCW 41.56.030(1).

2. Vancouver Police Officers Guild, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of an appropriate bargaining unit of police officers, corporals, and sergeants employed by the City of Vancouver. The employer's police lieutenants and commanders are excluded from this bargaining unit.

3. The employer uses its internal investigation procedure to investigate complaints of employee misconduct. Employees are expected to answer questions during an internal investigation honestly and to the full extent of their knowledge. Information gained during an internal investigation is to be kept confidential unless Chief Doug Maas permits otherwise. Subjects of an internal investigation may be, but aren't always, disciplined.

4. Meetings of the general membership of the Vancouver Police Officers Guild and meetings of its executive board are private and closed to the public. Such meetings are the forum by which free-flowing discussion occurs among bargaining unit members.

5. On June 9, 1998, the employer commenced a formal investigation (IA 98-31) under its internal affairs procedure, concerning allegations of misconduct by certain of its employees at a training session held on June 5, 1998. Bargaining unit employee Navine Sharma was among the panel of presenters at the June 5, 1998 training session, and was a witness to the alleged misconduct of other employees. Sharma was interviewed by employer officials in connection with IA 98-31. The IA 98-31 investigation was concluded by the early autumn of 1998.

6. Sharma's testimony in connection with IA 98-31 was a subject of discussion at meetings of the executive board and general membership of the union. Information came to the attention of the employer that some employees felt that Sharma had given the IA 98-31 investigators more information than he needed to give, and that Sharma needed to be taught a lesson, and that a program Sharma had begun should be boycotted.

7. On or about December 15, 1998, Sharma told an employer official what he had heard about comments at the union meetings, and Sharma indicated he was upset. Lt. Hall subsequently filed allegations against the employees accused of having discussed Sharma's IA 98-31 interview at the union meetings.

8. On January 15, 1998, the employer initiated an internal affairs investigation (IA 99-01) concerning the allegations filed by Hall. Employer official Thiessen expressed concern that statements allegedly made and the conduct which allegedly occurred at the union meetings involved harassment, retaliation, and/or discrimination. In pursuit of that investigation, the employer neither referred the matter to an outside investigator or agency, nor used other alternatives that were available to it, such as admonitions against misconduct.

9. As part of its investigation in IA 99-01, employer officials interviewed or sought to interview members of the bargaining unit and union officers, and to question them under threat of discipline about statements or conduct at private union meetings.

10. Employees in the bargaining unit represented by the Vancouver Police Officers Guild could reasonably perceive interrogation

by employer officials about discussions and events that transpired at private union meetings as coercive, and as interfering with their collective bargaining rights under Chapter 41.56 RCW.

11. Employees in the bargaining unit represented by the Vancouver Police Officers Guild could reasonably perceive that the future possibility of interrogation of the type described in paragraph 10 of these findings of fact would subject them to discipline and would limit their ability to freely communicate with fellow bargaining unit employees and to freely conduct union business in the confines of private union meetings.

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By its actual and planned interrogation of bargaining unit employees about discussions and actions occurring at private meetings of the Vancouver Police Officers Guild, as described in paragraphs 9, 10 and 11 of the foregoing Findings of Fact, the City of Vancouver has interfered with, restrained and coerced its employees in the exercise of their rights under Chapter 41.56 RCW, and has committed an unfair labor practice in violation of RCW 41.56.140(1).

AMENDED ORDER

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

a. CEASE AND DESIST from:

(1) Interrogating employees concerning discussions and conduct occurring at private meetings of the Vancouver Police Officers Guild.

(2) 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.

b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

(1) 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.

(2) Read the notice attached hereto and marked "Appendix" aloud at the next public meeting of the City Council of the City of Vancouver and append a copy thereof to the official minutes of said meeting.

(3) Notify the Vancouver Police Officers Guild, in writing, within 30 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 Vancouver Police Officers Guild with a signed copy of the notice required by the preceding paragraph.

(4) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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 9th day of November, 1999.

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 interrogate employees concerning discussions and conduct occurring at private meetings of the Vancouver Police Officers Guild.

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

WE WILL read this notice into the record of the next public meeting of the City Council, and append a copy thereof to the official minutes of such meeting.

DATED: _____

CITY OF VANCOUVER

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.