STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

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

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

This matter comes before the Commission on a petition for review filed by the City of Federal Way, seeking to overturn a decision issued by Examiner William A. Lang.[1]

BACKGROUND

The City of Federal Way (employer) is a recently-incorporated municipality, located in King County.

Matt Bodhaine was hired by the employer in 1990. As a building inspector in the building division of the community development department, he inspected residential and commercial construction for compliance with various codes.

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[1] City of Federal Way, Decision 5183 (PECB, 1995).

On February 25, 1992, the Washington State Council of County and City Employees (union) filed a petition for investigation of a question concerning representation with the Commission, seeking certification as exclusive bargaining representative of all of the employer's full-time and regular part-time employees, excluding confidential employees and commissioned employees of the police and fire departments.

The employer engaged in a vigorous campaign against the selection of an exclusive bargaining representative. The results of an election held on May 6, 1992 were vacated, based on union objections alleging employer actions had improperly affected the outcome, and the results of an election held on July 1, 1992, were inconclusive. Union supporters Norman Bray and Elizabeth Snyder were discharged on July 1, and the union filed unfair labor practice complaints on July 10, 1992.

In anticipation of a runoff election scheduled for July 16, 1992, Bodhaine wrote a letter dated July 13, which was sent to each employee eligible to vote in the runoff election. It included:

> What circumstances gave the City of Federal Way the right to destroy two people's ability to earn their livelihood in their respective fields after 2-1/2 years of faithful service? The appearance that they might possibly have done something to cast a negative reflection on the City.
>
> Feeling that there must be more to the firing of Norm and Liz than meets the eye, I did my own investigation on my own private time (if there is such a thing). I have talked with Norm, Liz, the contractor involved, as well as gained unsolicited information from a state inspector and other contractors that have worked for years with, and / or are currently in competition with the contractor involved.
>
> This is what I came up with:
>
> 1. Complaints came from anonymous sources, and the fired employees and contractor were not allowed the right to face or know their accusers.

2. Regarding Liz:

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

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

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

3. Regarding Norm:

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

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

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

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

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

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

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

1. I can be fired without notice and without just cause.

2. No verbal or written warnings for alleged or actual indiscretions are required (or are they?).

> 3. The private investigator might be following me around anytime day or night.
>
> 4. My personal life is not personal.
>
> 5. No appeals process or representation is available without retaining outside legal counsel.
>
> One of the first things asked of the Washington State Council of County and City Employees (AFSCME) was free legal representation should anyone supporting the union be fired by the City. This promise has been fulfilled, not only has the Union's attorneys filed suit to get Norm and Liz back their jobs, it is also representing them at the hearing they have to go through to get unemployment benefits since they were both fired.
>
> In the upcoming election we have two choices:
>
> 1. No representation which allows City management to do as they please with no regards to the effects its decisions have on the employees, OR
>
> 2. Union representation where each and every employee will have a voice and can be involved in the process of ensuring that the work environment at the City is safeguarded against arbitrary decisions and political whims.
>
> I urge each and everyone of you to take measure to keep your personal and private life <u>private</u>. VOTE UNION on Thursday, July 16th.
>
> P.S. Reminder - If your name appears on the eligibility list and / or you were hired full-time prior to June 10th - you are eligible to vote!

[Emphasis by <u>underlining</u> in original.]

City Manager J. Brent McFall sent the following memo addressed to all city employees on July 14, 1992:

> Like you, the City is looking forward to the election to be held Thursday, July 16, 1992.
>
> You are all urged to consider the long-term effect of your decision, and to use your best judgment as you cast your ballot.
>
> Each of you was hired because you possess skills and judgment a cut above average. During the

campaign, the management team and I have been confident that each of you would resist all attempts to make decisions based on only part of the story, or based on emotional arguments, rather than the facts.

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

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

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

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

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

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

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

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

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

> As you review even those facts that are known to you -- does it make any sense that the City's decision was based on claimed union activities, as the union tells you? Or is this unfortunate event, and the affected employees, being used to create headlines, where respect of privacy would be more appropriate?
>
> It is no coincidence that the union has copied the City's theme of "SPIRIT" in its mailings to you. To the City, "SPIRIT" stands for the real values of **service, pride, integrity, responsibility, innovation, and teamwork**. To the City, these are not empty words.
>
> The union's attempt to copy the City's theme of "SPIRIT" is the union's admission that to all City employees, this theme has true meaning, and is working, even despite temporary setbacks at times. To the City, integrity means keeping silent when the City is questioned about confidential personnel matters, even when we are unjustly accused of wrongdoing. To the City, teamwork means employees of all types and categories enjoying open dialogue, and not being segregated into "us versus them".
>
> Your vote on Thursday is your choice of the voice, the style, and the attitude that will represent you in the years to come. Please consider carefully which "SPIRIT" reflects **your** values when you cast your ballot. Thank you.
>
> [Emphasis by **bold** in original.]

McFall then replied explicitly to Bodhaine's letter with a memo that was dated July 16, but was delivered on July 15, 1992:

> Once more the City has no choice but to respond to an mailing recently received by employees. I am referring to an **unsigned letter from Matt Bodhaine, which was postmarked "Everett,"** and was sent to you on a computerized mailing list.
>
> It is unfortunate that **this individual employee has chosen to undertake his "own investigation"** of a confidential personnel matter.
>
> It is also unfortunate that the information contained in **Matt Bodhaine's letter is incomplete and inaccurate**.

> For example, the City has not and will not spy on employees. No employee has ever been followed. To suggest otherwise is offensive.
>
> Some of you may have received copies of selected affidavits. They also don't tell the whole story.
>
> Once again, you have been provided with information that is incomplete, inaccurate and inflammatory. While I would like to give you all the facts, my respect for the privacy of those involved prevents me from doing so.
>
> **It is with true regret that I read the claims made in Matt Bodhaine's letter.** However, I am confident that each of you can independently evaluate the weight to be given to the letter.
>
> Your vote tomorrow has long-range impacts. I trust you will not allow one recent unrelated and unfortunate event and **the union's fanning of the flame** to be your sole basis for that vote.
>
> Please continue to work with me to make this City organization one that reflects your values - not those of outside third parties.
>
> [Emphasis by **bold** supplied.][2]

The union lost the runoff election held on July 16, 1992, and the union filed new election objections. Bodhaine testified against the employer at a hearing held by the Commission on the unfair labor practice charges and the new election objections.[3]

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[2] In interpreting this letter, it is helpful to know that the union's headquarters are in Everett, Washington.

[3] The union's unfair labor practice complaints challenging the discharges were eventually dismissed, on the basis that the reasons advanced by the employer for those discharges were not pretextual, and that protected activities were not a substantial motivating factor in the employer's action. The union's election objections based on the discharges were also overruled. See, City of Federal Way, Decisions 4088-A, 4495, & 4496 (PECB, 1993), affirmed, Decision 4088-B, 4495-A, & 4496-A (PECB, 1994). Later, a "no representation" result was certified.

In November of 1992, the employer received a complaint from a local resident who was displeased with the treatment she received from Bodhaine during his inspection of her mobile home. As a result of that incident, the employer suspended Bodhaine with pay while an investigation was conducted, then gave him a warning letter, and then imposed a one-week suspension without pay. The employer required Bodhaine to participate in anger management counseling, and warned him that further violations would result in his discharge.

In 1992, a city council member suggested that funds be set aside to perform a zero based budgeting (ZBB) exercise for a department or division during the budget process that would take place during 1993 for the 1994 budget. Money was set aside to have consultants perform such a study, and McFall selected the community development department, based on discussion with department directors. Upon further discussion with Ken Nyberg, who was assistant city manager and acting director of community development at that time, it was decided to apply the study within the building division of the community development department.

Parallel to the ZBB exercise, the employer performed its own budget analysis. Nyberg directed managers to look at their budgets carefully, and directed managers in the community development department to "totem" their personnel for the purpose of deciding which employees should be laid off in a reduction-in-force. The building official in charge of building codes at that time, Richard Mumma, sent his recommendations to Nyberg in a memo dated August 20, 1993. Mumma placed Bodhaine seventh out of seven employees. Joanne Johnson, a permit specialist, was placed sixth.

By letter dated August 30, 1993, Nyberg informed Bodhaine that he was being laid off. That letter stated:

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

> force. The attached outlines the layoff procedure and benefits provided by the City. I regret the economic necessity of this action.

On August 31, 1993, McFall sent a memorandum to all employees, as follows:

> The less-than-robust local economy has served to slow down development. Therefore, the numbers of permits issued for new construction are at an all-time low. As a direct consequence of this lack of building activity, revenue from permit fees is also down below projections. ... Effective immediately, we must undergo a reduction in force in the Building Division of the Department of Community Development. Two positions, a permit specialist and a building inspector, are subject to immediate layoff. ... [M]y budget recommendation to the City Council for 1994 will not include funding for these two positions. Only in the event that building activity increases and there is a corresponding increase in revenue from permit fees will we consider a supplemental appropriation to fund the two positions.

The final report of the ZBB consultant, issued on September 1, 1993, included some statements about staff reductions in the permit specialist and inspector/plans examiner areas.

On January 28, 1994, Bodhaine and the union filed this unfair labor practice complaint, alleging the employer violated RCW 41.56.140(1) by discharging Bodhaine because of his union activities. Examiner Lang held a hearing on January 30, 1995, and issued his findings of fact, conclusions of law, and order on June 30, 1995. The Examiner found that Bodhaine's activities on behalf of the union were a substantial factor in the employer's decision to lay him off, that the reasons given by the employer for its actions were pretextual, and that the employer had committed unfair labor practices in violation of RCW 41.56.140(1). The employer filed a timely petition for review, bringing the matter before the Commission.

POSITIONS OF THE PARTIES

The employer claims Bodhaine's layoff was justified because of compelling economic circumstances. It contends that city staff and independent consultants determined that it needed to lay off two employees in the building division, and that Bodhaine's selection for layoff was based on legitimate, nondiscriminatory reasons. The employer argues that it was Bodhaine's unsatisfactory work history that resulted in his layoff when reductions were required.

The union argues that Bodhaine's layoff is the culmination of threats, intimidation, and interference with his rights to organize and collectively bargain. It argues that Bodhaine was clearly identified by management as a union supporter, and that the employer took an active role in seeking to discourage union representation among its employees. Contending that Bodhaine's performance has always been excellent and exemplary, the union argues that the exercise of Bodhaine's rights as a union supporter was a substantial factor in his layoff, and requests the Commission uphold the Examiner's finding of an unfair labor practice.

DISCUSSION

The Applicable Legal Standards

These parties are subject to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which includes:

> 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 bargain-**

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

An interference violation occurs under RCW 41.56.140(1) when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with their union activity. City of Pasco, Decision 3804-A (PECB, 1992); City of Seattle, Decision 3566-A (PECB, 1991); City of Seattle, Decision 3066-A (PECB, 1988).

A "discrimination" violation under RCW 41.56.040 and RCW 41.56.140-(1) involves intentional action by an employer based on protected union activity, and so requires a higher standard of proof than an "interference" violation. In Educational Service District 114, Decision 4631-A (PECB, 1994) and City of Federal Way, Decision 4088-B, supra, the Commission adopted the "substantial motivating factor" test set forth in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991).[4] Cases decided under the previous test based on Wright Line, 251 NLRB 1083 (1980), may have given greater consideration to

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[4] Wilmot and Allison involved statutes that parallel Chapter 41.56 RCW in making employer retaliation illegal where employees exercise statutory rights.

an employer's business reasons for adverse actions against employees, while the current test may be more favorable to employees.

The Prima Facie Case

To make out a prima facie case, a complainant claiming unlawful discrimination needs to show:

1. That the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. That the employee was discriminatorily deprived of some ascertainable right, benefit or status; and

3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

Bodhaine's Union Activity -

Bodhaine was among a group of employees which initially met with the union to seek assistance in organizing, and was one of the individuals in the employer's workforce who became a lead contact with the union. As a result of those contacts, the union filed a representation petition on February 25, 1992.

After the union lost elections on May 6 and July 1, and two fellow employees were discharged on July 1, Bodhaine wrote a letter encouraging all eligible employees to vote for the union. Bodhaine also testified in the proceedings before the Commission.

After the union lost the runoff election on July 16, there were continued contacts between the union and Bodhaine, in an effort to determine whether the union should return for another election.[5] The employer's argument that there were few such contacts after the

[5] Bodhaine told the union it would not be fruitful to return, because of the fear of intimidation and retaliation.

July 16 runoff election is not persuasive, inasmuch as the fact there were any calls is indicative of continued union activity.

It is clear Bodhaine was engaged in the exercise of statutorily protected rights under Chapter 41.56 RCW.

The Deprivation -
By letter of August 30, 1993, Bodhaine was laid off effective September 1, 1993. Bodhaine was thus deprived of his employment status with minimal notice.

The Causal Connection - Employer Knowledge -
Employers are not in the habit of announcing retaliatory motives, so circumstantial evidence of a causal connection can be relied upon. Wilmot, p. 70. See, also, Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995). An employee may establish the requisite causal connection by showing that adverse action followed the employee's known exercise of a protected right, under circumstances from which one can reasonably infer a connection. In this case, the Examiner found there was such a connection.

The employer argues that Mumma made his recommendations regarding layoffs without having been employed during the union's organizing effort or the elections, and that Mumma was not apprised of those events by city management. It claims that Bodhaine never engaged in any protected activity during Mumma's tenure. Even if Mumma did not have knowledge of Bodhaine's union activity, unlawful motivation of the more senior employer officials could be a basis for finding the employer guilty of unfair labor practices.

McFall and Nyberg were heavily involved in the decision-making process leading up to Bodhaine's layoff. They were both present throughout the organizing campaign, and were well-acquainted with Bodhaine's union involvement. It was McFall who selected the community development department for the ZBB study, and who

targeted the building division for the study. Nyberg discussed the ZBB study with McFall, directed Mumma to "totem" the building division staff, and gave Mumma some of the criteria to use. A public employer is responsible for the acts of all of its officials acting in an official capacity. RCW 41.56.030(1). We are not confined to considering Mumma's role in this case, and base our decision on the actions of McFall and Nyberg.[6]

The employer asserts there was no evidence that anyone in city management was aware of any union activity on the part of Bodhaine between his letter in July of 1992 and his layoff in September of 1993. The inquiry is not limited to the post-election period, and Bodhaine's previous union activity was open and obvious. The ZBB process that the employer claims resulted in Bodhaine's layoff was set in motion long before the layoff, and was the subject of a memo from the finance director in October of 1992, only three months after Bodhaine's letter asking employees to vote for the union in the runoff election. Employer officials were present at the unfair labor practice hearings held on the earlier cases in January and February of 1993, when Bodhaine testified for the union. We concur with the Examiner that the record contains ample evidence to conclude the employer had knowledge of Bodhaine's union activity.

The Causal Connection - Union Animus -

The Examiner concluded that there was a causal connection between Bodhaine's union activities and the termination of his employment.

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[6] Actions committed by supervisors while serving in an official capacity are considered to be the responsibility of the public employer as an entity, even if not known to or ratified by senior officials. See, City of Mercer Island, Decision 1026 (PECB, 1980), affirmed in part, Decision 1026-A (PECB, 1981); Seattle-King County Health Department, Decision 1458 (PECB, 1982); City of Tacoma, Decision 1342 (PECB, 1982); City of Seattle, Decision 2230 (PECB, 1985); Port of Seattle, Decision 2661-A (PORT, 1988); and City of Seattle, Decision 3066 (PECB, 1989); City of Brier, Decision 5089-A (PECB, 1995).

The employer disputes some of the Examiner's findings of fact, as well as his conclusion on this issue.

The employer takes issue with paragraph 3 of the Examiner's findings of fact, which refers to the employer's vigorous campaign against the selection of an exclusive bargaining representative. The employer notes that its election conduct was found to have been lawful. The employer was not silent, however. Even though the union's election objections were ultimately dismissed, the decisions in City of Federal Way, Decision 4088 et seq., clearly indicate that the employer conducted a vigorous campaign against the selection of an exclusive bargaining representative.[7] The finding of fact will stand as written.

The employer argues that there is no evidence of union animus in this case, and no nexus between Bodhaine's letter to coworkers in July of 1992 and the decision to lay him off more than a year later. The employer cites two cases as supportive of its position:

* The Examiner in Asotin County Housing Authority, Decision 3241 (PECB, 1989), found there was no causal relationship linking disputed layoffs to previous union organizing activity by the laid off employees, but the Examiner in the present case noted that the union had won the election in Asotin and that the budget cuts in Asotin were deeper than are involved here. The employer argues those two grounds do not support a different causation analysis, and claims that a union victory or defeat in an election is irrelevant to whether the employer discriminated on the basis of union activity. A danger in citing precedent for factual conclu-

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[7] Election objections are evaluated against a different standard than discriminatory discharge allegations. Improper conduct affecting the results of an election can include suggesting that the agency supports one of the choices on the ballot (WAC 391-25-430), improper electioneering (WAC 391-25-470), as well as violation of Commission rules, use of forged documents, or coercion or intimidation of or threat of reprisal or promise of reward to eligible voters (WAC 391-25-590(1)).

sions is that the records of the past and current cases may not support the same conclusion. In this case, we agree with the Examiner. The debate on perceived factual distinctions does not obscure the fact that the employer acted against Bodhaine while the litigation stemming from the 1992 elections was still before the agency. The potential causal connection is evident in this case.

* In Clallam County, Decision 4011 (PECB, 1992), the employer began an extensive process of documenting an employee's deficiencies shortly after the employee was given a complimentary performance evaluation, and the Examiner in that case concluded that the employer would have toned down the evaluation if the employee's previous union activity had been the motivation for the discharge. Based on the fact that Bodhaine received a satisfactory performance evaluation in August of 1992 (i.e., after the last union activity which the employer acknowledges) the employer asserts that Clallam County dictates a conclusion that there was no causal connection between Bodhaine's union activity and his layoff. We find the facts distinguishable, however. In Clallam County, the individual's work history contained sufficient grounds for his termination, irrespective of his union activity. In this case, the satisfactory performance evaluation given to Bodhaine in August of 1992, must be evaluated in light of the whole situation, and of a layoff that was purportedly for economic reasons.

In a discriminatory discharge case, union animus may be inferred from a wide variety of employer behavior. In the previous unfair labor practice litigation between these parties, the employer's negative campaign letters about the union were found sufficient for that purpose. City of Federal Way, Decisions 4088-A and 4088-B, supra. Actions showing employees that the employer was concerned or upset about union activity were part of the basis for a similar conclusion in Educational Service District 114, Decision 4361-A (PECB, 1994). Therefore, the fact the conduct was not found objectionable is not a conclusive defense for the employer.

The record provides a reasonable basis on which to conclude that there was a causal connection between Bodhaine's exercise of his statutory rights and the discriminatory action. The complainant has established a prima facie case.

The Employer's Burden of Production

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. It does not have the burden of proof to establish those matters.

The Zero-Based Budgeting Study

Prior to October 19, 1992, a council member suggested that the city administration consider zero based budgeting (ZBB). In response, the finance director presented an analysis of the ZBB approach, comparing it to performance auditing. The Examiner ultimately discredited employer actions purportedly based on the ZBB approach.

The employer takes issue with paragraph 12 of the Examiner's findings of fact, which characterizes the finance director's memo as "critical" of the ZBB approach. That memorandum stated that a focus on the minimum level of operational support is the most compelling benefit of ZBB, while noting that was already a fundamental principle with the City of Federal Way.[8] Phrases such as "voluminous documentation and a great deal of departmental time and energy", "paper monster", "ZBB was abandoned", "the few empirical studies negative", "does not help judge priorities", and "does not deal with programs ... which comprise a significant

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[8] In her analysis, the finance director explained that budget proposals are normally prepared with alternative levels of spending, and then "decision packages", or self-contained units containing information about the resources needed to operate the program and the products of the program, are ranked in order of priority, with the lowest levels receiving no funding.

portion of the budget", were used to refer to the ZBB approach. The finance director explained that the general response of governmental organizations that have used the ZBB approach was negative. Terms such as "less administrative burden", and "less expensive incremental approach" were used in that memo to refer to the performance auditing approach. Although the memorandum stopped short of making a recommendation, we can reasonably infer it was "critical" of the ZBB approach.

The employer takes issue with other components of paragraph 12 of the Examiner's findings of fact. We find the employer's assertions have no effect on the result, but we are changing some minor and harmless errors in the finding.

* A reference to the finance director proposing more than one alternative approach is corrected, since the memorandum only refers to one alternative approach.

* A reference to approval of the ZBB experiment is corrected on the basis of McFall's testimony that "This was something that was advocated by a member of City Council, and he convinced the council to do that ...", indicating it had the blessing of the full council.

* A reference to the selection of the building division is modified. We read the record to indicate that McFall determined that a pilot project using the ZBB approach was to be implemented in the community development department, and that McFall and Nyberg together chose the building division.[9]

Despite the finance director's analysis, the employer decided to set aside funds in its 1993 budget for a ZBB exercise. In July of 1993, the employer entered into a "professional services agreement" with an outside consultant to perform the ZBB study, the results of which were to be used during the preparation of the proposed budget

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[9] Transcript, page 130 and transcript, page 150-151.

for 1994. The building division, which had only 8.5 full-time-equivalent employees, was selected to undergo the ZBB study.

The employer argues that the Examiner mischaracterized the consultant's report, minimized the drop-off in building activity (by merely stating that it was "not as high in 1993 as in 1992" when the differences were significant), and ignores the key conclusions of the report. The employer contends the consultant concluded that the building division was overstaffed by one inspector and one permit specialist due to a drop in revenues, in contradiction of paragraph 23 of the Examiner's findings of fact and the Examiner's discussion of this issue.[10] A review of the report indicates the consultant presented alternatives to the employer, stated that it was difficult to justify retaining two permit specialists, and proposed the elimination of one inspector/ plans examiner. However, the consultants cautioned that building activity could increase significantly from the 1993 trends, and raised an issue about whether the employer should staff to respond to current conditions or preserve resources that may be needed in the future. The consultant also noted that the employer had an investment in trained personnel. While the consultant's report included a reduction of positions, it cautioned the employer on a variety of issues associated with any reduction, including legal liability in regard to service reductions in life safety programs, such as enforcement of the uniform building codes.

The employer takes issue with paragraph 23 of the Examiner's findings of fact, which include that "McFall did not act on the concerns indicated by" the consultant. The employer argues that McFall did act on the consultant's recommendations, and determined that one permit specialist and one building inspector should be laid off. The Examiner's finding of fact is accurate, to the

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[10] The Examiner stated, "The consultant recommended against any layoff ... ". Decision, page 23.

extent that McFall did not act on the specific concerns noted in this finding of fact, and did not act on the consultant's concerns about staffing problems that would arise as a result of reductions.

The employer takes further issue with paragraph 23 of the Examiner's findings of fact, which states that the consultants preferred to apply the ZBB approach to organizations at least 10 times as large as the building division. The report states, "There are inherent limitations in the applicability of ZBB concepts to relatively small organizations",[11] and "ZBB concepts are often used in a large organization where there are multiple layers of employees and a wide array of services provided. In the case of the Building Division, there are only 8 FTE's...".[12] Exhibit 12 thus supports a reasonable inference that the consultant does "prefer" using ZBB in larger organizations.

The employer argues that the report does not state a ZBB analysis is customarily based on one year of experience, rather than six months, as stated in the Examiner's findings of fact. Exhibit 12 includes, however:

> Establishment of a base level of service rely heavily upon data from the first half of 1993 compared to **1992**, and in some cases **1991** data.[13]
>
> ...
>
> [A ZBB system] does not presume that an agency will receive its **prior year**'s appropriation level.[14]
>
> ...
>
> For comparisons between **1991**, **1992**, and the first half of 1993 in some areas adjustments

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[11] Exhibit 12, Letter, page 1.

[12] Exhibit 12, Identification of Program Elements, page 9.

[13] Exhibit 12, Letter, page 1.

[14] Exhibit 12, Introduction, page 1.

> have to be made to the existing reporting systems to reflect both changes in the classification of information and programming deficiencies in report formats.[15]
>
> ...
>
> Given the changes in reporting systems for financial information from **year to year**, the consulting team felt the most comfortable examining **1992** data and comparing it to the 1993 experience, year to date.[16]

The fact that the ZBB analysis is "customarily" based on one-year periods can thus be reasonably inferred.

The employer argues that paragraph 23 of the Examiner's findings of fact gives an erroneous implication that the city had a policy regarding inspection turn-around time.[17] The consultant's report indicated, however:

> The Building Division does have target time lines...for inspection turn around...."[18]
>
> ...
>
> The proposed base budget could change considerably, if city policy mandated specific time lines regarding ... inspection turn around".[19]

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[15] Exhibit 12, Methodology, page 5.

[16] Exhibit 12, Revenue Expenditure Comparison, page 6.

[17] The Examiner's decision stated, at p. 12, that "Saven's report indicated that a reduction of 1 FTE would erode a "next-day inspection policy", and referred in finding of fact 23 to Saven's indication that "a reduction of one full-time employee would erode the employer's 'next day inspection policy'".

[18] Exhibit 12, cover letter at page 2.

[19] See, Exhibit 12 at page 21.

The report itself refers to the preservation of "next day inspection services".[20] This supports the Examiner's references to a "next day inspection policy". Even if the employer may not have had specific timelines regarding inspection turnaround, it produced the consultant's report, and moved for its admission in evidence as an exhibit. That document certainly leads one to believe that the employer had target timelines calling for next-day inspections. The employer did not produce any other testimony or documentation to show that the consultant's statements were in error.

The Employer's Budget -

The employer argues that its own budget process also revealed that the building division was overstaffed by one inspector and one permit specialist, due to the total number of inspections in 1993 being down significantly as compared to 1992. It claims that 1,000 fewer inspections were done during the period from January through July of 1993, than were done during the comparable seven-month period in 1992, and that its revenues declined by more than $87,000 in the first six months of 1993. Several other facts established by the record are notable, however. We note that inspection activity was actually increasing during the last three of the months cited by the employer, and that they were not too far off from certain months in 1992.[21] We also note that the budget for 1993 was an increase over 1992, and there was actually an increase in total city revenue for the year.

The employer takes issue with paragraph 24 of the Examiner's findings of fact, arguing it is irrelevant whether the budget increased from 1991 to 1993, and that there is no evidence the budget increased in 1994. The employer argues that the overall

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[20] See, Exhibit 12 at page 22.

[21] The 511 inspections in May of 1993 compare favorably with 514 inspections in February of 1992. In July of 1993, inspection activity rose to 644, which was higher than each of the months of February and March of 1992.

budget grew, but that revenues fell off in the community development department in 1993. We are modifying this finding of fact, although we do not find that modification conclusive. The consultant's report on the ZBB study provides some basis for the Examiner's inferences, and the record supports the finding that the budget for community development actually increased each year prior to the layoff of Bodhaine.[22] The existence of a budget increase for 1994 is less certain, but is also the least probative aspect of this particular debate.

The employer argues that its staffing remained constant in 1994, contrary to paragraph 24 of the Examiner's findings of fact. It claims the only change in the building division in 1994 was that an employee who worked in the division prior to the layoff was upgraded from an office technician to a permit specialist. There were 8-1/2 positions in that division just prior to the layoff, but the evidence concerning subsequent events is confusing. Our review of the record discloses one interpretation suggesting that there were 7-1/2 positions as of June 1994, which would have been an increase from the staffing level after Bodhaine's layoff.[23]

The employer takes issue with paragraph 22 of the Examiner's findings of fact, which refers to McFall's notification to

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[22] The budgets actually adopted for the community development department increased each year prior to the layoff of Bodhaine on September 1, 1993. Exhibit 18 shows the 1991 adopted budget for community development was $1,772,428, out of a total budget of $14,500,700 for that year; the 1992 budget for community development was $2,041,656 out of a total of $19,027,550; the 1993 adopted budget for community development was $2,243,972 out of a total of $19,661,310. Exhibit 18 thus contradicts McFall's testimony that the budget for community development fell off in 1993.

[23] See, Exhibit 16. We note that while the Examiner's Finding of Fact 24 refers to the staffing in the department (community development), Exhibit 16 only refers to the building division staffing history.

employees that the positions vacated by layoff would be restored only when permit fee revenues increased. We are changing the finding to reflect McFall's statements that the positions vacated by layoff would be **considered** for restoration only when permit fee revenues increased, but it should be obvious that any restoration of positions could only follow consideration of the subject.

The employer claims the Examiner's reference to the establishment of a "contract" building inspector position in paragraph 24 of the findings of fact is erroneous. The record indicates that the employer budgeted money for overtime and for an on-call inspector, in anticipation of the need to add overtime for inspectors to meet vacation schedules and peak periods. The employer argues there was no need to show increased revenues from fees before budgeting for those two items. While we are correcting the finding to describe the on-call position for which the city budgeted, we note that the employer's action in budgeting for the extra help indicates that it must have had some concerns about whether it had a sufficient staffing level after the layoff of Bodhaine.

The "Totem" -

The employer asserts that Nyberg directed the managers in the community development department to "totem" (rank) their personnel during the budget process in 1993 for 1994, so that the employer would be prepared to act in the event of layoffs, and only the lowest-ranking employees would be affected.

The employer takes issue with paragraph 19 of the Examiner's findings of fact, which refers to the criteria for the "totem" as having not been established by Mumma. Our review of the record indicates that Nyberg had a significant part in establishing the criteria. He testified:

> When I instructed Mr. Mumma to put together the totem, **seniority wasn't one of the factors that I wanted him to consider**. Experience, contribu-

> tion to the organization, were criteria that's laid out in there. **Those were the criteria to use.**
>
> [Emphasis by **bold** supplied. Transcript, pp. 133-134.]

While Mumma probably had some part in establishing the criteria, we can reasonably infer he was following Nyberg's instructions.[24]

The employer takes issue with paragraph 20 of the Examiner's findings of fact, which states that Mumma's totem analysis selectively ignored performance evaluations praising Bodhaine.[25] Mumma mentioned praise for Bodhaine's willingness to work additional hours when asked, and he also noted a letter acknowledging a job well done, but he omitted that Bodhaine was praised in past performance evaluations for his willingness to skip lunches and work different shifts to accommodate clients. We are clarifying the finding, but find it to be fundamentally accurate.

The employer takes issue with the part of paragraph 20 of the Examiner's findings of fact which states that Mumma recommended retention of other inspectors with less seniority. The employer argues that the finding is an incomplete attempt to compare Bodhaine with another inspector, that a mentioned sexual harassment warning given to the other inspector was only an oral one, and there was no other disciplinary action regarding the other individual. The incontrovertible facts are, however, that Mumma

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[24] Mumma ranked individuals under his supervision according to the criteria of job skills, dependability, certification and education, communication and interaction with others, and work history. See, also, Exhibit 8 and Mumma's testimony at Transcript, p. 82.

[25] Mumma's totem submitted to Nyberg on August 20, 1993, ranked Bodhaine seventh out of seven employees.

recommended retention of other inspectors who had less seniority than Bodhaine, one of whom had no certification.[26]

Bodhaine's Work History -

The employer claims that Bodhaine's problems with interpersonal skills became more prevalent and serious during 1992, and that Mumma addressed those problems after he joined the employer in September of 1992. The employer then cites Bodhaine's work record from November of 1992 through July of 1993 as reasons for his selection for layoff. According to the employer, that record includes: Oral and written warnings; a six-month probation; a suspension; a final warning for misconduct; the complaint by the mobile home owner regarding inappropriate actions and discourtesy; insubordination; and an incident involving threats of bodily harm directed against another employee.

The employer takes issue with the Examiner's findings of fact on numerous items in relation to Bodhaine's work history:

* The employer asserts error in paragraph 10 of the findings of fact, which describes Bodhaine's evaluations and work record up through August of 1992 as laudatory. The employer argues that Bodhaine's annual evaluations in 1991 and 1992 were not uniformly positive, and that he had unacceptable workplace performance problems prior to September of 1992. While we recognize that Bodhaine's performance was not always laudatory, a review of the record indicates that Bodhaine did not have many negative comments about his performance prior to September of 1992.[27] We conclude

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[26] The employer urges that Bodhaine's use of 97% of his accrued sick leave was not noted in the finding, but neither was it an announced basis for his layoff.

[27] Bodhaine's November 14, 1991 performance evaluation was satisfactory, with few negative comments. On November 14, 1991, he was recommended for a pay increase because of his performance. His March 15, 1991 performance evaluation was laudable. Bodhaine was commended by Nyberg on July 1, 1992. Bodhaine was commended again on August 28, 1992.

this finding is accurate for the most part. It does omit reference to oral criticisms prior to November of 1991, as testified to by Nyberg, and the ways Bodhaine could improve, as noted in his performance evaluations, so we are changing this finding.

* The employer argues that the recommendation of a pay increase for Bodhaine in August of 1992,[28] as stated in paragraph 10 of the Examiner's findings of fact, is not significant, since all city employees received all available merit raises. The raises given to other city employees are not a part of the record in this case, and we regard the recommendation of former supervisor Lorentzen to be noteworthy. The recommendation is in writing, and specifically states that "[Bodhaine's] ... performance of his duties warrants a pay increase", suggesting that a pay increase was not automatic.

* The employer contends that paragraph 6 of the Examiner's findings of fact ignores Bodhaine's admissions about his shortcomings, specifically admissions that he disobeyed, cussed out, yelled at and may have threatened to punch a leadworker, that he regularly brought a gun onto city premises, and that he carried a gun in a city vehicle. The union argues that Bodhaine freely admitted his shortcomings; that he objected to the discipline he received for insubordination, for threatening his leadworker and for the incident with the mobile home owner; and that he grieved those actions without an outcome. The union argues that the discipline for allegedly threatening his leadworker was based on hearsay taken out of context. The union argues that Bodhaine had a permit to carry a gun, that there was no city policy against carrying a gun to work, and that it was well known that others did the same. We are changing the finding of fact to reflect a greater balance of Bodhaine's admissions.

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[28] On August 28, 1992, Bodhaine was recommended for a pay increase. The development services manager concurred, saying that he had been particularly responsive and helpful to pick up the slack during the past couple of months, due to staff shortages.

* The employer argues that there is no evidence that Bodhaine was commended by the city for acquiring certain training, as stated in paragraph 6 of the Examiner's finding of fact. The employer claims the training Bodhaine received was required, and he did not complete it in a timely manner. A review of the record shows that Bodhaine's training was clearly noted in his performance evaluations, without any negative connotation.[29]

* The employer takes issue with that portion of paragraph 13 of the Examiner's findings of fact which refers to Mumma's investigative report of November 12, 1992, about the complaint that Bodhaine was discourteous to the mobile home owner.[30] The employer argues that Mumma's report shows Bodhaine's conduct to be more than "curt", as the Examiner describes it, and that Mumma also determined that there was no reason to deem or post the mobile home as unsafe. Mumma's memorandum refers to Bodhaine being "curt", but it also notes that Bodhaine's actions were inappropriate, that Bodhaine was discourteous, and refers to the mobile home owner

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[29] In the November 14, 1991 performance evaluation, it was noted that:

> Matt has attended classes on:
> The new Washington State Energy Code
> Wood Truss seminar
> Sexual Harassment
> Building Code Update

In the August 28, 1992 performance evaluation, it is noted that:

> Matt has attended classes on:
> PERMIT*PLAN
> Stress Reduction
> UBC Nonstructural Plan Review

Exhibit 1 in this record includes five certificates showing training Bodhaine had received: Defensive Driving; Managing Change; Certified Plumbing Inspector (1991 Uniform Plumbing Code); U.B.C./U.F.C. Plan Review and Inspection (awarded November 5, 1992); and Certified Building Inspector (issued November 6, 1992).

[30] A review of the record indicates that on November 12, 1992, Mumma wrote a memorandum to "File", in which he compiled the results of his investigation.

being quite upset with what she perceived as "verbal abuse" by Bodhaine. We can understand how the finding could be misconstrued, and are changing it to be more reflective of Mumma's total report. The record shows, however, that Bodhaine had reason to believe it was appropriate to post the mobile home as unsafe.

* The employer argues that paragraph 13 of the Examiner's findings of fact incorrectly suggests that the written warning of November 20, 1992, and the 180-day probation, were removed from Bodhaine's personnel file. We find this argument does not have a basis, in that the finding makes no such suggestion. We understand how the finding could be misinterpreted, and are clarifying a reference to the grievance response.

* The employer asserts error in paragraph 14 of the Examiner's findings of fact, which refers to Bodhaine clearing overtime with the senior plans examiner. A review of the record indicates that the senior plans examiner had not cleared the overtime, but had only cleared the use of compensatory time off on the following day, not being aware of a previous directive that Bodhaine was not to work overtime.[31] We are correcting that portion of the finding.

* The employer takes issue with that portion of paragraph 14 of the Examiner's finding of fact, which refers to Mumma's April 27, 1993 memorandum being the first notice to Bodhaine that Watkins was his supervisor. A review of the record shows that Bodhaine was aware that Hap Watkins was his superior in January of 1993, so we are correcting the last sentence of the finding.[32]

* The employer takes issue with paragraph 16 of the Examiner's finding of fact, which states that Bodhaine's statement that he'd like to shoot Watkins was made in the context of an angry dispute between co-workers. Claiming there was no "angry dispute

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[31] See, Exhibit 5.

[32] Bodhaine testified that Hap Watkins had started in the Senior Inspector capacity as of January, 1993. See, Transcript at pp. 37-38.

between co-workers", the employer argues that there was no evidence that Watkins was part of a dispute, and no evidence that he had a role in a "provocation which spawned the threat", as stated in the Examiner's decision, at p. 30. The union argues that Bodhaine's comment about Watkins was overheard and taken out of context by Mumma, that it was not intended to be a threat, and not taken as a threat by those who heard it. The union claims that Watkins trumped up charges of a threat later, after Watkins searched Bodhaine's personal effects and found a weapon. We recognize that the words "angry dispute between co-workers" may minimalize the context of the incident. Since the record shows no evidence of any provocation on the part of Watkins, it is questionable whether there was a "dispute". We are changing that finding.

* The employer asserts error in paragraph 17 of the Examiner's findings of fact, which refers to Watkins' report that he felt endangered because Bodhaine had a gun in his totebag, and to Watkins subsequently being reprimanded by Mumma for going through Bodhaine's personal effects. The employer argues that this finding does not reflect that Bodhaine's personal effects were stored in a city vehicle, and it asserts that the Examiner confused two separate incidents.[33] We are correcting the finding.

* The employer argues that the co-worker laid off at the same time as Bodhaine was not offered recall, as stated in

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[33] There were two separate incidents:

1. On June 21, 1993, Watkins observed a handgun in Bodhaine's totebag while it was on the floor near his desk. On June 22, 1993, Watkins requested management to resolve the matter (aware of Bodhaine's comment about him and feeling he was in danger); and

2. On June 23, 1993, Bodhaine found Watkins inside the city truck, with his hands in Bodhaine's tote bag. On July 8, 1993, Watkins was given a verbal warning for improperly searching a co-worker's canvas bag that was in a city vehicle.

See, Examiner's decision at page 30 and footnote 15; exhibit 5 of the complaint (a July 1, 1993 memo from Mumma to Nyberg and Moore); and Exhibit 8, page 7.

paragraph 24 of the Examiner's findings of fact. We are correcting the harmless error. The record shows that the human resource manager spoke to the co-worker to make sure she had received a copy of the announcement, and to see if she would be applying, and did not offer her recall to the position she had held.[34]

* The employer takes issue with paragraphs 25 and 26 of the Examiner's findings of fact, which refer to the employer's telephone call to confirm that Bodhaine's co-worker had received a job announcement, and the lack of similar follow-up for Bodhaine. The employer claims that Bodhaine was treated differently from the co-worker only because he had, in fact, responded to the notice of the job announcement by applying, so that there was no need to contact him further. Although such an explanation would be plausible, there is no evidence that this was the actual reason for the disparate treatment. We have only the employer's argument. We have no evidence showing the time span between the issuance of the job announcements and the employer's telephone call to the other individual, which might be indicative of the employer's intention to call Bodhaine. The employer also makes no assertion that it intended to call Bodhaine. No inference can be made from the record that the employer would have called Bodhaine if he would not have applied.

* The employer argues that the Examiner erroneously concluded, in paragraph 26 of the findings of fact, that the city had a recall policy. The employer asserts that the city only promised to notify laid-off employees of future position openings for 12 months from date of layoff. Asserting that the selection of Bodhaine for layoff was based on his work record, the employer argues it was not obligated to recall him, and that the selected candidate was better qualified. We find no implication of a recall policy in finding of fact 26, as the employer suggests. We conclude that a reasonable reading of the record indicates inconsistencies in the employer's statements. On one hand, the

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[34] See, Transcript at page 143.

employer characterized Bodhaine's layoff as one for economic reasons. On the other hand, the employer claims the job was later offered to a more qualified applicant, which belies the economic reasons asserted.

* The employer argues that the Examiner's decision is internally inconsistent. It points to page 27, where the Examiner stated: "Clearly everything on Bodhaine's employment record was positive up to Lorentzen's retirement"; and to footnote 16 on page 31, where the Examiner stated: "Bodhaine had been criticized for smoking at construction sites, having tatoos and a brusque manner [and he was asked to remove a cartoon]". We agree that there is some internal inconsistency here, and that not everything on Bodhaine's employment record was positive.

Substantial Motivating Factor

The burden remains on a complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's action.

The employer contends Chapter 41.56 RCW does not give the Examiner authority to interfere with an employer's right to select and to terminate its employees, and that the Examiner does not have the authority to substitute his judgment for that of an employer in making personnel decisions.[35] An employer does, indeed, have the discretion to select employees it wishes to keep, so long as the employer does not base its decision on consideration of union

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[35] The employer cites NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); Sioux Quality Packers v. NLRB, 581 F.2d 153, 156 (8th Cir. 1978); and City of Seattle, Decision 3066 (PECB, 1988).

activities.[36] Even considering the employer's challenges to the Examiner's findings of fact in this case, we still find sufficient credible evidence to support the Examiner's conclusions that union animus was a substantial motivating factor in Bodhaine's layoff, and that the reasons given by the employer for its actions were pretextual.

The "ZBB-driven Layoff" Defense -
The employer's assertion that it laid off Bodhaine due to the results of the ZBB study is belied by the fact that Bodhaine was given notice of his layoff prior to the date of the consultant's report. That sequence of events provides reason to question whether the ZBB study results were even considered in the decision.

The employer purportedly selected the building division because revenues for permits and inspections were down, because there was some redundancy in the division, and because that division had an identifiable data base. Nyberg testified, however, that one reason for the selection of the building division for the ZBB study was that if there were going to be any layoffs, he was "planning on having it come out of the building division". This casts doubt on the employer's ZBB defense. Since the employer was planning for layoffs in the building division even before the ZBB study was commissioned, the idea that the results of the ZBB study had a significant role in the layoffs cannot be given much credence.

Moreover, the fact that the ZBB study was ostensibly begun for the purpose of formulating the employer's **1994** budget provides cause for question. The application of the ZBB process to effect an immediate layoff in August of 1993, even before the ZBB consultant's report was issued, remains unexplained.

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[36] Kitsap County Fire Protection District 7, Decision 3610 (PECB, 1990).

The ZBB defense does not hold up under close scrutiny, particularly when we consider the targeting of a small division, and the implementation even before receipt of the report. The fact that ZBB was being discussed shortly after Bodhaine's letter asking employees to vote for the union provides a basis for inferring that the employer was considering ways to rid itself of an irritant long before the actual layoff.

Even if we read the consultant's report as suggesting a staff reduction, we are aware that the end results of such studies often include ways to cut staff. With salaries commonly being the largest expenditure of a public employer, we can easily infer that the consultants were making proposals to correspond with perceived or stated desires of the employer officials who hired them. We conclude that a reasonable inference can be made that the ZBB study was not a reason for Bodhaine's layoff, and that the employer's claims regarding the ZBB process are pretextual.

The Totem -
Mumma admitted the "totem" process could be designed to target someone for a high or low ranking. The toteming of the building division staff is also discredited because of the extent of Nyberg's influence over the criteria, including his direction to Mumma that seniority was not to be considered. The record allows a reasonable inference that Bodhaine's prior union activity affected the targeting of the building division for the "toteming", as well as the use made of the totem to select Bodhaine for layoff instead of a non-certified employee with less seniority.

The "Layoff Driven by Employer's Budget" Defense -
The employer argued that city revenues were declining, resulting in great scrutiny of its budget, but we conclude that the employer's budgeting process did not require a layoff in 1993. The budget for community development was increased from 1992, and overall city revenues increased in 1993. The record indicates a variable number

of building inspections and revenues potentially attributable to a temporary decline in the local economy. The evidence is too nebulous to find the employer's own budget required that Bodhaine be laid off, effective September 1, 1993.

In addition, the budget process was for the year 1994, not for 1993. Nevertheless, the employer took action eight months into 1993, only 10 days after Mumma submitted the "totem" ranking. The rush to take action, as soon as there was some sort of written justification, even before the ZBB report was in, and certainly before the budget for 1994 was implemented, is suspect. A budget-driven layoff would seemingly have required a greater analysis of the employer's entire workforce and more timely notice to the affected employees. A layoff driven by the 1994 budget would have taken place in 1994. A pure budget-driven layoff would seemingly have involved humane concern for the affected employees, and their recall to work when positions became available. We can infer that the employer had motives other than its budget.

The "Poor Work Record" Defense -

The employer argues that Bodhaine engaged in a long course of inappropriate conduct, beginning in November of 1992, that it has a right to discipline employees for misconduct, and that it has a right to consider employee performance records when forced to identify employees for layoff.

The employer cites Washougal School District, Decision 2055 (PECB, 1984), affirmed, Decision 2055-A (PECB, 1985), to support its contention that a complainant's negative behavior may absolve an employer of a discrimination claim. In that case decided under the now-discredited Wright Line standard, an employer with no record of anti-union animus sustained the burden of proving that the transfer of a custodial employee following a successful grievance was due to the employee's negative behavior impacting others. In the case now before us, we have strong anti-union sentiments exhibited by the

employer, a sudden change of employer attitudes toward the most visible union adherent soon after the union lost the hotly-contested election, and a layoff which the employer itself attributes to a ZBB process that was set in motion soon after Bodhaine's union activity. Since Wilmot and Allison, even the discharge of an employee with a tarnished employment record must be overturned as unlawful, if union activity was a substantial motivating factor.

The employer also cites Lewis County, Decision 2424 (PECB, 1986), affirmed, Decision 2424-A (PECB, 1986), but that is another case which was decided under the Wright Line test and is distinguishable on its facts. The discharges of two employees during a union organizing campaign were found to be made for legitimate business reasons in Lewis County, but it was found significant that complaints against the employees came from a wide variety of participating agencies, a majority coming from within the ranks of another bargaining unit represented by the same union.[37] There was no credible evidence that the discharges in Lewis County were based on any anti-union animus.

The employer argues that the decision about who to lay off was made in August of 1993, not in 1992, and that an employer should not be expected to ignore abusive treatment of citizens, insubordination, threats of bodily harm to a leadworker and bringing of firearms to the workplace following the threats. We agree that an employer should not ignore behavioral deficiencies in employees, but the record in this case contains sufficient evidence to support an inference that a decision was made in 1992 to set Bodhaine up for a layoff, even prior to the behavior patterns exhibited and the discipline of Bodhaine in 1993.

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[37] The dischargees were dispatchers for the county sheriff's office, and their work performance deficiencies were very serious and considered safety hazards.

Moreover, the "poor work record" defense asserted by the employer at the hearing before the Examiner and in its brief on review are discredited by the language used by the employer in the layoff notice to Bodhaine and the contemporary notice to other employees. Employers are not in the habit of announcing retaliatory motives, so circumstantial evidence of a retaliatory motive can be relied upon. Wilmot, at page 70. Employer attempts to add rationale after a discharge has been challenged as discriminatory are thus suspect. In this case, an employer which has not persuaded us with its "ZBB" and "budget" defenses for the layoff of an outspoken union adherent and unfair labor practice hearing witness would now have us believe that Bodhaine was discharged for cause (under the announced guise of a reduction-in-force) because of performance deficiencies. Even though the "totem" placed Bodhaine at the bottom, the record fails to show that Bodhaine was informed of that fact. The employer did not announce a discharge for what it now urges were serious work performance deficiencies, and did not even announce that his work history made up any part of the reasons for his layoff. Had Bodhaine really been an unsatisfactory employee, a simple discharge would have been much more straightforward in a context that the employer was not limited by a union contract, or by the possibility of arbitration under a "just cause" standard. Instead, the "poor work record" component of the employer's defense only surfaced later, in response to this unfair labor practice complaint.

When an employer's actual motives lie in its animosity against the employee's assertion of his rights guaranteed under the collective bargaining laws, the discharge must be overturned. Even if we acknowledge there were some deficiencies in Bodhaine's work performance, we find nothing in the record to indicate support for the employer acting against Bodhaine at the time the layoff was announced. There was no "precipitating incident" of misconduct by Bodhaine. When considered with the record as a whole, we find the employer's assertions about Bodhaine's work history unpersuasive.

Certification Bar Period -

The timing of events can be used to infer unlawful motives. In this case, the Examiner found it significant that the employer laid off its most visible union supporter during the period when the employees were again eligible to seek union representation. The employer claims that no one knew how the Commission would calculate the "certification bar" period until July 25, 1994,[38] and that it was not until September of 1994 (when the union withdrew its challenge to certain ballots) that the employer knew its employees were free to attempt another organizing effort.

We are not persuaded by the employer's arguments. RCW 41.56.070 states, in part, "No question concerning representation may be raised within one year of a certification or attempted certification". The last runoff election took place on July 16, 1992. Therefore, by the late summer of 1993, there was a statutory basis for a claim that the employer's workforce was at liberty to attempt another organizing effort. Indeed, Bodhaine consulted with the union about that very question. The decision in the earlier case indicates the employer was concerned about a new organizing drive in 1993, when it raised the issue concerning the computation of the "certification bar" period.[39]

Conclusions on Substantial Factor -

We find sufficient credible evidence to support the Examiner's conclusion that Bodhaine's earlier role as a union activist constituted a substantial factor in the employer's decision to lay

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[38] This is the date the Commission overruled election objections filed by the union. City of Federal Way, Decision 4088-B, supra.

[39] Notice is taken of the brief the employer filed with the Commission on October 19, 1993, in support of its petition for review of the Examiner's decision in that case, City of Federal Way, Decisions 4088-A, supra. That brief raised the certification bar issue which was the subject of a ruling in the Commission's decision in that case.

him off, and that the reasons given by the employer for its actions were pretextual, so that the employer has committed unfair labor practices under RCW 41.56.140(1). We have found the employer's economic arguments for the layoff unpersuasive. It appears the employer conjured up a pretextual scheme to get rid of Bodhaine.

The Interference Violation

Because of the visibility of Bodhaine's pro-union letter to all employees in July of 1992 and his testimony for the union at the unfair labor practice proceedings before the Commission, other employees were well aware of his interest in pursuing rights under the collective bargaining statute. Because of McFall's campaign letters, the employees were also well aware of the employer's strong desire to keep the union out of its workforce. Employees could thus reasonably perceive the employer's actions to terminate Bodhaine's employment as a threat of reprisal associated with their union activity.

NOW, THEREFORE, the Commission makes and enters the following:

AMENDED FINDINGS OF FACT

1. The City of Federal Way is a public employer within the meaning of RCW 41.56.020 and 41.56.030(1). At all times pertinent hereto, J. Brent McFall was its city manager.

2. The Washington State Council of County and City Employees, a bargaining representative within the meaning of RCW 41.56.030-(3), conducted an organizing drive in 1992 among employees of the City of Federal Way. The WSCCCE filed a petition for investigation of a question concerning representation with the Commission, seeking certification as exclusive bargaining representative of a bargaining unit of approximately 51 employees of the City of Federal Way.

3. The employer campaigned vigorously against the selection of an exclusive bargaining representative by its employees, beginning with personal letters from the city manager and meetings with employees.

4. The results of a representation election conducted by the agency on May 6, 1992 were vacated by the Executive Director, based on discovery that the stipulations made by the parties concerning a cut-off date and eligibility list had improperly disenfranchised some otherwise eligible voters from participation in the election.

5. At all times pertinent to this proceeding, Matthew Bodhaine was employed by the City of Federal Way as a building inspector in the building division of the community development department. Bodhaine had been a logger until injured in an industrial accident and retrained as a building inspector. He had acquired several certifications through training received while employed by the City of Federal Way. The employer noted the training on Bodhaine's performance evaluations. The Examiner's observations of Bodhaine's demeanor as a witness in this proceeding were that Bodhaine testified in a forthright manner, freely admitting his shortcomings. Bodhaine admitted cussing out, yelling at, and threatening his lead with bodily harm. Bodhaine was an active supporter of the union in the organizing campaign, and was a co-worker of the two employees discharged by the employer on July 1, 1992.

6. On July 13, 1992, Bodhaine wrote a letter to all employees, challenging McFall's decision to discharge the two employees who had worked in the building division.

7. McFall issued letters concerning the discharges of the two building division employees to all employees on July 14, 1992 and July 15, 1992. At least the letter issued on July 15 was

a direct response to Bodhaine's letter, in which he called Bodhaine's letter inaccurate and inflammatory and objected to Bodhaine's investigation into a confidential personnel matter.

8. The "no representative" choice received the highest number of valid ballots cast in a runoff election conducted by the Commission on July 16, 1992, but challenged ballots were sufficient in number to affect the outcome. The WSCCCE filed objections to employer actions during the campaign.

9. Bodhaine's evaluations and work record up to and including August of 1992 were, for the most part, complimentary. Prior to November of 1991, Bodhaine received a few oral criticisms. In his performance evaluations, Bodhaine was advised of the need for some improvements, but also was complimented on his rapport with contractors and homeowners, and for his taking the time to explain what was required by the code and suggesting ways to achieve compliance. Bodhaine's evaluations up to that time by Lorentzen specifically noted his willingness to work long hours and through lunch periods to accommodate contractors and other clients. On July 1, 1992, Bodhaine was issued a memorandum of appreciation for his judgment and tact in handling a complaint of illegal construction activity. On August 18, 1992, Lorentzen recommended to Moore that Bodhaine be given a pay increase. Moore agreed, noting that Bodhaine had been particularly helpful picking up the slack because of staff shortages.

10. Lorentzen retired as building official on September 1, 1992, and was replaced by Dick Mumma.

11. In October of 1992, the employer's finance director wrote a memo which was critical of the "zero based budgeting" (ZBB) approach, and proposed an alternative approach. This was done in response to the expressed interest of a lone member of the

city council, who convinced the council to go along with the idea. McFall determined that a pilot project implementing the ZBB approach be implemented in the community development department, and McFall and Nyberg chose the building division. An outside consultant, John Saven, was hired to advise the employer on the ZBB process.

12. On November 12, 1992, while the unfair labor practice charges and election objections remained pending before an Examiner, Mumma investigated a contractor's complaint that Bodhaine was discourteous to a mobile home owner during an inspection. Mumma's report showed the owner was dissatisfied with Bodhaine's placement of a notice on her home and his statements to her that it could not be occupied. Mumma gave Bodhaine a written warning for being discourteous and placed Bodhaine on probation for six months. Bodhaine believed he had acted according to state policy requiring inspection of mobile home tie-downs, and that he had been misunderstood. Bodhaine grieved the discipline under a procedure established unilaterally by the employer. Assistant City Manager Nyberg initially responded that the grievance was not timely filed, but later denied the grievance without giving Bodhaine a copy of his decision. The human resources director later removed the February 24, 1993 document from Bodhaine's file and gave Bodhaine an apology.

13. On April 27, 1993, after Bodhaine's union activity was a subject of testimony before the Examiner but while the unfair labor practice charges and election objections remained pending for decision by the Examiner, Mumma issued a memo criticizing Bodhaine for his involvement in a controversy with a co-worker or leadworker named Watkins. Although told by Watkins not to work overtime to inspect a picnic shelter on April 18, Bodhaine worked overtime to avoid inconveniencing

the contractors, and cleared the use of compensatory time on the following day with K.C. Ellis.

14. On May 7, 1993, Mumma commended Bodhaine for working an above-average workload when four inspectors were out. Mumma noted that Watkins reported Bodhaine had a helpful, confident and cheerful attitude.

15. After a staff meeting on June 2, 1993, Mumma overheard Bodhaine saying he'd like to shoot Watkins. Watkins was not present, and Mumma did not believe Bodhaine would really carry out such a threat. Mumma nevertheless took action to suspend Bodhaine for two weeks without pay. Nyberg reduced the suspension to one week, and directed Bodhaine to take an anger management course at the employer's expense. Bodhaine later apologized to Watkins and bought him lunch.

16. On June 21, 1993, Watkins observed a handgun in Bodhaine's totebag while it was on the floor near his desk. Aware of Bodhaine's comments about him and feeling he was in danger, on June 22, 1993, Watkins asked management to resolve the matter. On June 23, 1993, Bodhaine found Watkins inside the city truck, with his hands in Bodhaine's tote bag. On July 8, 1993, Watkins was given a verbal warning for improper search for handgun of a co-worker's canvas bag that was in a city vehicle.

17. July 16, 1993 marked the end of the one year period following the "attempted certification" election of July 16, 1992, in which the employees of the City of Federal Way failed to select an exclusive bargaining representative. The employees of the City of Federal Way became eligible to again seek union representation as of that date.

18. Nyberg instructed Mumma to put together a "totem" of building division staff, ranking the individuals for reduction-in-force purposes. Nyberg instructed Mumma to use experience, as well as contribution to the organization, but not seniority as some of the criteria for the toteming process. On August 20, 1993, Mumma wrote Nyberg an eight page confidential memorandum containing a "totem" of building division staff for reduction-in-force, based on the criteria of job skills, dependability, certification and education, communication and interaction with others, and work history. According to the evaluation, Mumma believed that Bodhaine and a permit specialist should be laid off.

19. Mumma's analysis did not consider Bodhaine's work record objectively, and ignored some of the praise in Bodhaine's performance evaluations for each of the preceding years for his willingness to skip lunches and work different shifts to accommodate clients. Mumma recommended retention of one inspector who had less than one year of service, and retention of another inspector who had only recently been hired, but who was not certified.

20. On August 30, 1993, Nyberg notified Bodhaine that he was being laid off effective September 1, 1993 for economic reasons. Nyberg informed Bodhaine that his name would be placed on a job announcement mailing list for 12 months to assist in applying for positions for which he may be qualified.

21. On August 31, 1993, City Manager McFall advised all employees that the positions vacated by layoff would be considered for restoration only when permit fee revenues increased.

22. On September 1, 1993, Saven submitted his final report on the ZBB process for the building division. Saven cautioned of inherent limitations with application of ZBB concepts to

relatively small organizations such as the building division, and indicated a preference for their application to organizations at least 10 times that large. Saven advised that he approached the study from the perspective of the division being financed as a "special operating fund", rather than a general fund activity. Saven's report noted that overall building activity, while not as high in 1993 as in 1992, could increase significantly. Saven raised the issue of the city's investment in trained personnel who have developed a high level of expertise in their technical areas, and indicated that a reduction of one full-time employee would erode the employer's "next day inspection policy" and increase the number of inspections per day from 8.3 to 12.3 without any ability to respond to a major turnaround in the economy. The report forecasted a decline in the quality of inspections with an increase in public complaints and operational problems to cover sick leave and vacation coverage. The Saven report noted that the ZBB analysis was based on only six months of experience, instead of the customary one year. McFall did not act on the concerns indicated by Saven, and made no further use of the ZBB approach.

23. The evidence establishes that the budget actually adopted for community development actually increased each year prior to the layoff of Bodhaine. After the layoff, the staffing in the building division increased by another position as of June 1994, without any showing of increased revenues. In the same period of time, the city budgeted money for overtime and an on-call inspector, without any showing of increased revenues from fees.

24. When a permit specialist job opening occurred, the employer made telephone contact with the co-worker who was laid off at the same time as Bodhaine to confirm her receipt of the job

announcement and to confirm her willingness to return to employment with the City of Federal Way.

25. When a contract building inspector position was opened for applicants, the employer mailed a copy of the job announcement to Bodhaine. The record does not explain the employer's failure to follow up in the same manner as it did with the co-worker laid off at the same time as Bodhaine. Although Bodhaine applied for and was qualified for the job, he was not chosen. The employer's claim that it offered the position to a more qualified applicant contradicts the extent to which it characterized economic factors as the reasons for Bodhaine's layoff.

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

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

Based on the foregoing amended findings of fact, it is

ORDERED

1. The conclusions of law entered by Examiner William A. Lang are affirmed and adopted as the conclusions of law of the Commission in these matters.

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

a. CEASE AND DESIST from:

1. Interfering with or discriminating against Matthew Bodhaine for his exercise of his collective bargaining rights under Chapter 41.56 RCW.

2. In any like or related manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

1. Offer Matthew Bodhaine immediate and full reinstatement as an employee in good standing of City of Federal Way and make him whole by payment of back pay and benefits, for the period from September 1, 1993 to the date of the unconditional offer of reinstatement made pursuant to this Order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

2. 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.

c. Notify the above-named complainants, 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 above-named complainants with a signed copy of the notice required by the preceding paragraph.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 15th day of February, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

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

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

DATED: _____

CITY OF FEDERAL WAY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.