

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 599,)	
)	
Complainant,)	CASE 14585-U-99-3640
)	
vs.)	DECISION 7258 - PECB
)	
PIERCE COUNTY,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
Respondent.)	AND ORDER
)	
)	

Schwerin Campbell Barnard LLP, by Kathleen Phair Barnard, represented the union.

Denise Greer, Deputy Prosecuting Attorney, represented the employer.

On May 18, 1999, Teamsters Union, Local 599 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Pierce County (employer) as respondent. The union initially alleged that the employer interfered with employee rights and discriminated against the exercise of rights protected by Chapter 41.56 RCW, and that the employer refused to bargain by failing to provide the union with requested information concerning the applicants for a position. The Executive Director issued a preliminary ruling on June 18, 1999, under WAC 391-45-110,¹ finding causes of action to exist on allegations summarized as:

¹ At that stage, all of the facts alleged in a complaint are deemed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Commission.

1. Employer interference with employee rights and discrimination against a bargaining unit employee in reprisal for his union activities protected by Chapter 41.56 RCW, by its failure or refusal to select Roy Nansel for an advertised position because the employer did not like Mr. Nansel's "style" and because Nansel was "always running to the union"; and
2. Employer refusal to bargain, by failing and refusing to provide the union with requested information concerning the applicants for the position.

An amended complaint was filed on December 2, 1999, concerning a subsequent transaction and comments made in association with it. A hearing was held on December 9, 1999, before Examiner Jack T. Cowan. At the hearing, the union voluntarily dismissed the "refusal to bargain" charge. Both parties submitted briefs.

On the basis of the evidence and arguments presented, the Examiner concludes that employee participation in protected activity was a substantial factor giving rise to the complained-of employer actions, and that the employer committed unfair labor practices. A remedial order is issued.

BACKGROUND

Organizational Structure

The Pierce County Department of Facilities Maintenance is responsible for maintenance of the employer's facilities, including buildings in downtown Tacoma (e.g., the county-city building, jail and the temporary jail) as well as several buildings located outside of the downtown core (e.g., the county annex, an emergency

communications center, sheriff's department precincts, and district court buildings). Don Cagle is the department director; Dick Zierman is the building superintendent; Buzz Burgess is the facilities maintenance supervisor; and Bob Hamilton is a lead mechanic, responsible for the jail and the temporary jail.

Building maintenance is performed by maintenance mechanics and maintenance technicians. Typically, the more skilled jobs are assigned to the mechanics. The technicians assist the mechanics and are to grow from their experiences, but are not supervised by the mechanics. The maintenance employees generally work under the supervision of Burgess, but those who work in the jail receive additional direction from Hamilton.

Employment History of Roy Nansel

At the time of his initial employment in 1993, Nansel reported to lead mechanic Fred Hogan. In a general conversation with Hamilton early in Nansel's tenure with this employer, Nansel expressed a preference to work nights, in order to receive the shift differential. Nansel was called into Hogan's office the next day, where a rather perturbed Hogan asked why Nansel was demanding to go to swing shift. Nansel responded by saying, "Bob had to tell you this because he was the only person I was talking with, and I wasn't demanding that I go to swing shift."

In a conversation with Hamilton and another worker held about six months after he started working for this employer,² Nansel indicated he was going to attempt to get his wages increased from the starting "A" step to the "C" step, so that his pay would equal what

² Hamilton was a bargaining unit employee when this conversation occurred.

he received in his previous job. In November or December of 1993, Nansel had conversations with Zierman and Cagle in connection with his (ultimately unsuccessful) attempt to have his wage rate upgraded.

In an evaluation issued in June 1994, Zierman criticized Nansel for attempting to secure an upgrade of his wages:

Roy has caused some eyebrows to be raised among his fellow employees. He has commented that he should be paid more than the entry level wages because he knew as much as some employees who have been here longer than he. Roy could also improve in the proper use of communication channels. Roy should except [sic] County policies even though he disagrees. Change can be effected by using the proper procedures.

Nansel learned from Zierman that this criticism stemmed from a complaint by Hamilton about Nansel's attempt to accelerate his movement up the classification ladder.³

Nansel filed a grievance with the union in November 1994, claiming that he should have been paid at the mechanic rate for certain work. The parties' collective bargaining agreement included a provision on work out-of-classification, as follows:

7.5 - Pay for work performed in higher classifications. When an employee is assigned to perform work in a higher classification for a normal workday, the employee shall be paid the rate of pay for hours worked in such classification. Preapproval by the Personnel Director or designee shall be required except in cases

³ The parties' 1997-1999 collective bargaining agreement suggests that wage increments occur annually for the first three steps of the wage scale.

of emergency. Compensation for working out of class shall not result in any rights to a permanent classification.

Nansel had spoken earlier with Hogan, who told Nansel that he would not be paid at the mechanic rate for the work. In a contemporaneous conversation with bargaining unit employee John Dailey, Hogan expressed frustration about Nansel filing the out-of-classification grievance. Hogan told Dailey that, because Nansel had filed the grievance, he was reluctant to make assignments where Nansel might seek out-of-classification pay for the work.⁴

A union representative gave a copy of Nansel's grievance to Zierman. The employer denied the grievance in 1995. Copies of the denial letter were sent to Zierman and Cagle.

As a result of a transfer in late 1995, Nansel began working in the main jail. When the temporary jail opened in 1996, Nansel began working in that facility in addition to continuing at the main jail. There was no mechanic on duty during the night shift hours Nansel worked at the jails, and Nansel's practice was to come to work early in order to confer with lead mechanic, Dale McMurty, and Hamilton for about 15 to 30 minutes before they left for the day. Nansel then worked independently for the balance of his shift.

In an evaluation completed in June 1996, Hogan's comment under "cooperation and interpersonal relationships" was:

Will work as a team member; however, he doesn't appear to be comfortable with this concept. Roy has criticized other workers,

⁴ Dailey's testimony on this matter is unrefuted. Hogan was not called as a witness in this case.

and questions established policies and procedures of the department.

In the spring of 1997, Nansel requested reclassification of his position from maintenance technician to maintenance mechanic. He submitted that request through Hogan, and was later advised that his request had been denied.

Later in 1997, Nansel applied for an open mechanic position at Remann Hall, a juvenile detention facility operated by the employer, and was interviewed by a panel which included Hogan. In a conversation soon thereafter, Hogan told Nansel that the other applicants did not have the necessary experience, and that Nansel had been selected for the open position. The recommendation of that panel was not followed, however. Instead, the applicants were called in for a second interview a few days later, and were given an explanation that the applicants were so close that another interview was necessary. The second interview was conducted by Zierman and the new supervisor at Remann Hall. Following the second interview process, the employer selected a technician who had only one year of experience with the employer.

Nansel ran for office as union shop steward in an election held in the autumn of 1998. He was not elected to that union office.

The Incident at Issue in the Original Complaint

Two maintenance mechanic positions became vacant in December of 1998, due to the retirements of two bargaining unit employees. Those positions were advertised as promotional opportunities. One of them was to be assigned to work in the jail and temporary jail, under Hamilton; the other was to be assigned to the annex and other buildings outside of the downtown core.

Six maintenance technicians, including Nansel, applied. All six applicants were interviewed by Cagle, Zierman, Burgess and Hamilton. The interview panel recommended that bargaining unit employees Dave Emry and Eric Wise be selected for the positions.

In early 1999, following completion of the interview process, Cagle directed Burgess and Hamilton to meet with each candidate and inform them of the outcome of the interviews. There is conflicting testimony as to what Nansel was told at that meeting:

Nansel testified that he asked why he had not been selected, and that Burgess responded, "Part of it is you're not a team player." When asked for examples of what a team player was, Hamilton responded, "You remember back last year when you were running for union steward, you were trying to split the shop." Nansel told Burgess that he was not satisfied with the reasons he had been given, and that he would be considering whether to take the issue to the union. Hamilton allegedly responded, "There you go again, you're not willing to listen to management, you're always willing to run to the union about something."

According to the employer officials, Nansel became defensive and agitated during the meeting, said that he believed the selection was "a popularity contest," said "you have to kiss rear to get ahead," and accused Hamilton of being dishonest and a back stabber. Hamilton testified that Nansel's having obtained only two votes when he ran for union steward was evidence of a lack of respect by his co-workers, but Burgess and Hamilton both testified that Hamilton did not criticize Nansel for "running to the union."

The Incident at Issue in the Amended Complaint

The union alleged that management discussion of creating another mechanic position was cut off, to avoid the possibility of Nansel applying for the position. A union witness quoted Burgess as

stating that Nansel would have been given the additional maintenance position if he "hadn't filed the unfair labor practice charge." Responding to that testimony, Burgess acknowledged that he responded by agreeing when the union witness stated that filing an unfair labor practice complaint is not a way to get ahead.

POSITIONS OF THE PARTIES

The union contends that the employer interfered with employee rights, and violated RCW 41.56.140(1) within the six months prior to the filing of the complaint, by failing to select Nansel for one of the posted maintenance positions because of his union activities. It also contends the employer violated RCW 41.56.140(3) by discriminating against Nansel in reprisal for his having filed unfair labor practice charges.

The employer responds that Nansel was not selected for a mechanic position because he was not deemed by the decision makers to be the most qualified applicant for the position, and that union activity had nothing to do with the decision. The employer contends there never was another position for which Nansel was passed over.

DISCUSSION

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, 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 bargaining, 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;

. . . .
(3) To discriminate against a public employee who has filed an unfair labor practice charge.

Collective bargaining relationships between Pierce County and its employees are subject to Chapter 41.56 RCW.

Standard for Determining Discrimination Allegations

The Supreme Court of the State of Washington established a "substantial motivating factor" test for evaluating discrimination claims in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). That test was embraced by the Commission in *Educational Service District 114*, Decision 4361-A (PECB, 1994).

Under the "substantial motivating factor" test, the complainant has the burden of proof at all times:

- A complainant must initially establish a prima facie case of discrimination, by providing evidence which, if not explained or contradicted is sufficient to sustain a judgment in its favor. That must include: Evidence that the employee(s)

involved engaged in protected activity or communicated an intent to do so; evidence that the respondent(s) deprived the employee(s) involved of some ascertainable right, status or benefit; and evidence establishing a causal connection between the protected activity and the deprivation. Proof of only one or two elements is insufficient.

- If a prima facie case is made out, a burden of production shifts to the respondent(s), to produce evidence of legitimate, non-discriminatory reasons for the disputed actions.
- The complainant may then respond with evidence showing that the reasons advanced by the respondent(s) are pretextual, or that union animus was nevertheless a substantial motivating factor behind the disputed actions.

The Examiner, the Commission and the courts all recognize that there is frequently no "smoking gun" in discrimination cases, and that evidence of discrimination is often subtle. The principal source of proof in such matters is often based on circumstantial evidence. *Port of Seattle*, Decision 3064-A (PECB, 1989).

The Prima Facie Case

Involvement in Protected Activity -

Nansel sought an increase of his wages within months after commencing his employment with this employer, and alerted employer officials of his willingness to seek assistance from the union.

Nansel's filing of a grievance in 1994 was clearly an activity protected by Chapter 41.56 RCW, and it clearly put employer officials on notice of Nansel's union activity. Nansel requested mechanic wages in November of 1994, for two days he allegedly spent working out-of-class. He told his supervisor, Hogan, that the work

assigned for those two days would cause him to be doing the full scope of mechanic work, since the mechanic to whom he was assigned would be in school for those two days and would be on vacation for the following week. Hogan said he might be able to get an additional 5% for Nansel, but Nansel declined and indicated he would check with the union. After talking with the union, Nansel filed a grievance which was signed by a union representative.

The election of a new shop steward in the autumn of 1998 was prompted by the retirement of the previous shop steward. Nansel sought the office, and testified that his platform was:

I thought there should be several changes. I wanted more honest communication between our facility maintenance group, and I wanted to be able to possibly bring about some changes. And it was pretty general. I didn't want to tear the county apart or anything. I just wanted to see some changes and have an honest opinion.

While Nansel was not chosen as shop steward, it is clear that Hamilton learned of Nansel's candidacy for union office.

During his six years of employment prior to the interviews for the promotions at issue here, Nansel worked with or for all of the employer officials who conducted the interviews, and was well known to all of them. Of particular concern here:

- Nansel's prior contacts with the interview panelists for the mechanic positions involved supervisors who dealt with his attempt to obtain a wage increase via adjustment of his step placement (Zierman and Hamilton), his grievance for alleged work out-of-class (Hogan and Zierman), and his effort to have his position reclassified (Hogan).

- The hiring process for the position at Remann Hall actually involved two interviews. The first of those was with Hogan, where he was told he had been chosen for the promotion; the second was with Zierman and Prentis, where another applicant was selected.

The Examiner infers that the panelists' previous contacts with Nansel provided the knowledge and opportunity for them to develop some adverse impressions of Nansel and his efforts to improve his own financial conditions by means of protected activities.⁵

Deprivation of Ascertainable Right -

Within the period for which this complaint is timely, Nansel was passed over for promotion to either of the vacant positions in the mechanic classification. Even if the employer did not pursue the matter, if it refrained from creating a promotional position because of an intent to discriminate, an unfair labor practice could also be found as to that action.

Causal Connection -

The Examiner finds ample evidence to support a conclusion that Nansel's supervisors resented his attempt to improve his wages by means of a change of his pay plan step. Nansel had conversations with Hamilton, Zierman, and Cagle about that matter; Zierman criticized Nansel in an evaluation issued in June of 1994, saying that Nansel had caused eyebrows to be raised among his fellow employees; Nansel learned from Zierman that this criticism stemmed from a complaint by Hamilton. While the statute of limitations set

⁵ Whether Nansel actually involved the union on all of these occasions cannot be ascertained from the evidence, but that is not the issue at this point in the analysis. It is sufficient that Nansel communicated an intent to seek union assistance, or that employer officials inferred/assumed he would seek assistance from the union.

forth in RCW 41.56.160 precludes issuance of a remedial order on that incident in the instant proceeding, evidence of union animus does not expire in the same manner as the right to a remedy.

The employer's labor relations manager asserted a procedural error in a January 31, 1995, letter denying Nansel's grievance, but also responded to the grievance on its merits. The employer official compared a long and specific paragraph concerning painting duties in the mechanic job description with a one-word reference to "painting" in the technician job description, went on to point out that the "business end" of painting project was performed by the mechanic, and asserted that Nansel simply performed the same duties in the absence of the mechanic as he performed when the mechanic was present. The letter continued:

It should also be noted that even if Mr. Nansel has performed or does perform some of the duties of Mr. Dailey's (mechanic) classification, it may still not qualify as "out of class" work, because it is not unusual for an employee in a lower level classification to perform some of the duties of the higher classification in either a training mode or as part of the traditional "overlap" of classifications. In addition, to be assigned to work "out of class" requires the approval of the Department Director and the Personnel Director.

Copies of the letter denying the grievance were sent to Cagle and Zierman, and the Hogan/Daily conversation occurred at about this time. As with the wage scale placement issue, the statute of limitations set forth in RCW 41.56.160 precludes issuance of a remedial order on the avoidance of subsequent opportunities for Nansel to work out-of-class, but there is no statute of limitations on the union animus evidenced by the employer officials involved.

Nansel's request for a reclassification of his position from technician to mechanic was denied in 1997. The same supervisors were involved, and the denial provides no basis to discredit or minimize the evidence of their earlier union animus.

The hiring process for the mechanic position at Remann Hall is also excluded from the Examiner's remedial authority in this case, but provides insight into the mindset and motivation of employer officials. Hogan was on the interview panel, and he told Nansel he had been selected for the job. The rejection of the recommendation of the first panel and the re-interview by the second panel which included past-antagonist Zierman would be a basis to suspect that union animus might have played a part in that scenario.

An inference of a causal connection with union animus is compelling when the evidence concerning the conversation in December of 1998 (following the interviews for the two vacant mechanic positions) is considered: When Nansel asked why he hadn't been selected, Burgess responded, "Part of it is you're not a team player." When asked what a team player was, Hamilton responded, "Remember back last year when you were running for union steward, you were trying to split the shop," and Hamilton emphasized that Nansel had received only two votes when he ran for the union steward position. A person acting on behalf of the employer has no business basing employer actions on internal union affairs.⁶

⁶ The term "team player" has been interpreted in past cases as a euphemism for "union activist." See *Port of Tacoma*, Decision 4626-A (PECB, 1995). Hamilton further stated that another reason Nansel did not get the job was his leadership style, that his style did not fit the jail, and that his style did not place him in the category of someone who could move up the ladder. Hamilton was also quoted as saying that the position required "people skills, co-worker respect and leadership abilities" which Nansel had not exhibited.

Following the selection of Emry and Wise as mechanics, Wise was given additional work assignments. He complained that he was given too much for one person to do all of the work alone. Burgess said employer officials were looking at the problem, and were working on doing something. Wise took a two week vacation about this time, but Burgess did not assign Nansel to do any of the out-building duties. Moreover, Burgess confided to Dailey that he would put Nansel in that work location, but felt that Nansel would file for reclassification as a mechanic or there would be a job action. Dailey testified that the crux of Burgess' concern was that Nansel was known for filing grievances to try to obtain additional pay for working in the mechanic classification, and that management "felt sort of limited in their abilities to assign the work because they were afraid that he would file a grievance based upon his feeling that the particular work being performed was at the mechanic level, not at the technician level."

The Employer's Explanation

The employer explains that each person applying for the mechanic positions took the same test, that six applicants were determined to be qualified by the personnel department assessment, and that all six were interviewed by the panel. The employer states that the six applicants were asked the same questions by the same panelists, and were evaluated by those panelists. It defines the interview as an assessment of the applicant's knowledge, experience, ability and leadership skills.

The employer further explains that the process evolved into a competition between four of the applicants, and that two of those were selected by the interview panel as being the best qualified for positions to be filled. It asserts that Nansel was not selected for reasons as stated, although it acknowledges his

qualifications to perform either of the positions were demonstrated by his work performance and by the number of favorable comments appearing in his evaluation forms. The employer states that Nansel's work was well-regarded by Hogan and Dailey.

None of the reasons asserted by the employer are discriminatory or otherwise unlawful on their face. The employer has met its burden of production under the "substantial motivating factor" test, and the inquiry shifts back to the union.

Evidence of Pretext or Unlawful Motivation

Comparison of Qualifications -

Prior to his retirement, Dale McMurtry held one of the two mechanic positions at issue in the original complaint. McMurtry was the mechanic at the temporary jail, which is also called the jail annex. That facility is a low security or medium security housing unit.⁷ Nansel had worked with McMurtry at the jail annex. Prior to his promotion, Dave Emry worked as a technician in the main jail. Thus, the selection of Emry to replace McMurtry cannot be characterized as a direct fit or as a foregone conclusion.

Prior to his retirement, Ken McLean held the other position at issue in the original complaint. He worked at the Pierce County Annex, a public service building that houses the 911 radio dispatch center. Prior to his promotion, Eric Wise was a technician assigned to the out-buildings, a series of smaller facilities in outlying areas in Pierce County (i.e., sheriff's precincts, and a district court). As with the other position filled at the same time, the selection of Wise to replace McLean cannot be characterized as a direct fit or as a foregone conclusion.

⁷ The main jail is a high security facility.

Employer Avoidance of Nansel -

The Examiner concludes that the evidence concerning employer actions after the promotion of Emry and Wise demonstrates a structured avoidance of Nansel by employer officials.

Wise was assigned to work in the county annex, which caused Wise to work as a mechanic at two separate locations. In conversations with Burgess, Wise emphasized that his assigned duties were too much for one person to handle. The answer given by Burgess to Wise was vague,⁸ but the subsequent conversation between Burgess and Dailey establishes the employer's intent to avoid giving Nansel any opportunity that might lead to a grievance. Inasmuch as there was no intervening event causing the employer to acquire a negative view about Nansel,⁹ it is inferred that the same attitude pervaded the interview and hiring process.

Interview Panel Had Union Animus -

The Examiner concludes that most of the members of the interview panel had previously indicated union animus in regard to Nansel:

Zierman was aware of Nansel's union leanings, and was privy to his filing of a grievance. Zierman took part in the second panel which denied Nansel a mechanic position at Remann Hall.

Burgess cautioned Dailey regarding Nansel, intimating that Nansel was inclined to initiate certain union actions. Burgess also gave assent to Dailey's comment that the filing of unfair labor practice charges was not the way to get ahead.

⁸ The terms "they" and "something" used by Burgess were never defined in the evidence.

⁹ If anything, the evidence supports a conclusion that Burgess was impressed with Nansel's work ethic, skills and ability based upon personal observation after Nansel was transferred to work in the public service building.

Hamilton had prompted the "raised eyebrows" comment that became part of Nansel's performance evaluation for 1994, and he communicated Nansel's alleged "demand" to work the swing shift to Hogan. Additionally, in his testimony concerning the conversation with Burgess and Hamilton following the selection of the two mechanics, Nansel credibly testified that Hamilton said words to the effect, "there you go, you're not willing to listen to management, you're always willing to run to the union about something."

Daniel Cagle, who is the director of the Facilities Management Department, sat on the interview panel because Nansel and union representative Jim Plante had raised issues of fairness of the selection process for the Remann Hall position filled earlier. Cagle testified that Nansel and three other applicants referred by the Personnel Department were deemed to be very qualified technically, and that it had been very difficult to choose between those four. It appears, however, that Cagle deferred to the opinions of subordinates. Regarding the selection of Wise, Cagle testified he had not personally witnessed that applicant's supervisory/leadership skills, but Zierman or Burgess had. When asked about his assessment of Nansel's leadership skills and abilities, Cagle indicated it was based on the discussion among the interview panel. When asked why he considered Wise and Emry to be better qualified than Nansel, Cagle responded, "I think they were stronger in communications skills and in showing leadership in the past." He went on to state that all the applicants had past experience with supervising, but two of them were judged to probably have better experience and having demonstrated that more at the work site. Perhaps important by its omission, Cagle could not recall any panel discussion of Nansel's experience in supervision.

Denials by Employer Officials Not Credited -

Credible evidence of Hamilton's previous attacks on Nansel's protected activity and of Burgess' statements about Nansel provide ample reason to discredit their denials, which include:

- Burgess and Hamilton denied saying the "there you go . . ." statement attributed to him at the meeting with Nansel after he was denied the promotion, but Hamilton never contradicted the testimony about his influence on Nansel's 1994 evaluation. In response to the question, "Did Nansel's union activity or union involvement have anything to do with your decision to recommend [Wise or Emry] over him?" Hamilton responded, "No, it did not." In later testimony, however, Hamilton said one fact against Nansel was, "The fact that he had ran for shop steward and his lack of leadership and his lack of -- and the lack of the guys' confidence in him as being able to lead the department, that he had received very few votes." In further testimony, Hamilton stated that he made no comments about the union to Nansel aside from the comment concerning the steward position. When asked, "Would you ever consider the fact that Nansel had gone to the union with a concern as a factor in your decision as to who you would recommend for a mechanic position?" Hamilton said, "I would not. In my decision, I wouldn't."
- Burgess responded, "Not at all," when asked, "Would you have considered the fact that Nansel had or hadn't gone to the union as a factor in your decision as to who should be selected for the mechanics positions?" However, Burgess told Dailey he would put Nansel in the out-buildings position but for his concern that Nansel would take some job action or would create a grievance or some other issue and he didn't really want to get into that kind of a problem. When asked about his conversation with Dailey, Burgess stated, "The only

thing I can recall John saying to me was something about Nansel filing an unfair labor practice is really not a way to get ahead. And I think I answered like, I guess not. Or something like that." In response to the question, "Did you consider or would you consider an employee having filed an unfair labor practice one way or another in any employment decisions, such as who was going to get a position?" Burgess responded, "No."

Thus, the Examiner concludes that the critique following Nansel's non-selection evidenced the enmity toward him by panel members.

Past or Present Union Membership Does Not Preclude Animus -

Burgess was a bargaining unit member until he became a supervisor, and he was also a shop steward for several years. Burgess had also utilized the union process himself, and he testified of his belief that every bargaining unit member has a right to go to the union. He testified that he did not consider that as a factor in his recommendations of Emry and Wise for the mechanic positions. His testimony in that regard is contradicted by Dailey's creditable testimony about Burgess' subsequent statements about avoiding the possibility of Nansel filing a grievance, and his distaste for having to process grievances.

Hamilton is currently a bargaining unit member, and was the union steward approximately three or four years ago. He testified of his beliefs regarding the right of bargaining unit members to file grievances or take issues to the union, including that he had "used the union to pursue some issues of my own in the past, so I think that is well within your rights to use the union." Hamilton also testified that he did not consider use of the union mechanisms as a factor in recommending Emry and Wise for the mechanic positions. His testimony is contradicted, however, by the creditable testimony

about his earlier distaste for Nansel's efforts to gain a wage increase, and his "there you go again . . ." comment.

The ability of these interview panelists to block out prior experiences with the applicant, and to judge skills and abilities objectively, without subjective influence, is at best questionable.

Employer Documentation Contradicts Selections Made -

In annual evaluations they had completed concerning Nansel, members of the interview panel had earlier rated Nansel as being a fraction below average, improving later to average, and improving later still to a bit above average. Nansel's skills and working habits were commended, as was his "improvement as a team member." Positive attributes appearing in evaluations included such terms as "timely, well-organized, works independently, reliable, confident, sound judgement, willing to do extra work." The early evaluations spoke to his interaction with fellow employees and a need to improve communication skills. Later evaluations indicated improvement. Nansel was given the responsibility of working by himself at night, without benefit of any mechanic's direction or accompaniment. Nansel still appears as a conscientious and ambitious workman who wants to get ahead. Work, skills and ability are set forth as attributes.

Burgess performed the 97-98 evaluation for both Emry and Wise. These two were the most recently hired of the four applicants who were interviewed for the two mechanic positions.

Pattern of Adverse Actions Following Protected Activity -

There were three separate occasions, as detailed earlier, where the employer took or neglected to take action because of some right which Nansel had exercised:

- After Nansel filed a grievance for out-of-class pay, Hogan wouldn't assign him certain duties because of his fear that Nansel might again seek out of class pay.
- After the panelists had selected the two mechanics, Burgess cautioned Dailey to be careful what he said in front of Nansel because Burgess felt Nansel might take some sort of action. Burgess did not want to assign Nansel work in the out-buildings when Wise was absent, because of the possibility of a request for out-of-class pay or reclassification.
- After Nansel had filed the unfair labor practice charges concerning the selection process, Burgess repeated his fear that if he were assigned to the out-buildings, he would initiate some type of action.

These actions by the employer were clearly retaliatory action for Nansel's exercise of his protected collective bargaining rights, a right to contact or involve the union in some way.

The Examiner concludes that the reasons given by the employer for its selection of other applicants were pretexts designed to conceal the true views harbored by the employer officials who sat as members of the interview panel. While the panel contended that Nansel's union alliance was not a factor in their selection process, the exclusion from other work, specifically stated as being because of a fear of future union involvement is an obvious violation of rights. Union animus was a substantial motivating factor in the employer's actions and decisions.

FINDINGS OF FACT

1. Pierce County is a public employer within the meaning of RCW 41.56.020 and 41.56.030(1).

2. Teamsters Union, Local 599, a labor organization and a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of facilities maintenance employees of Pierce County.
3. Roy Nansel began his employment with Pierce County on May 17, 1993, as a facilities maintenance technician in the bargaining unit represented by Local 599. Nansel worked through the wage steps from A to E in that classification.
4. After about six months of employment, Nansel asked to be moved from step A to step C on the wage scale set forth in the collective bargaining agreement, so that his pay would equal what he was earning at his previous job. The step increase was denied.
5. In his evaluation for 1994, Nansel was reprimanded by Zierman for having initiated his request for a change of his wage step. When he received that evaluation, Nansel learned from Zierman that this criticism stemmed from a complaint by Hamilton about Nansel's attempt to move up the ladder.
6. Nansel filed a grievance in November of 1994, claiming he should have been paid at the mechanic rate for certain work performed. A union representative gave a copy of Nansel's grievance to Zierman. The employer denied the grievance in 1995, and copies of the denial were given to Zierman and Cagle.
7. In a conversation with another employee, employer official Fred Hogan said he was reluctant to make assignments where Nansel might claim to be working out-of-class.

8. In an evaluation completed in June of 1996, employer official Hogan commented that Nansel "will work as a team member; however he doesn't appear to be comfortable with this concept."
9. Nansel worked in both the jail and the temporary annex in 1996. There was no mechanic on duty during Nansel's night shift at the jails. He worked alone after first conferring with the mechanic at the end of the day shift.
10. In the spring of 1997, Nansel requested the reclassification of his position from maintenance technician to maintenance mechanic. The request was denied.
11. Later in 1997, Nansel applied for a mechanic position at the employer's Remann Hall facility. Nansel was interviewed by a panel, and was told by Hogan that he had been selected for the position based on his four years of experience. That position was not given to Nansel, however, and was given to another applicant with only one year of experience after a second interview process in which Zierman was a member of the interview panel.
12. Nansel ran for office as union steward in 1998, but was not elected.
13. Two maintenance mechanic positions, including a position at the jail where Nansel had actual work experience, became available in 1998 due to the retirement of two bargaining unit members. Six applicants were interviewed by Cagle, Zierman, Burgess and Hamilton. Nansel was not selected for either of those positions.

14. In early 1999, following the interview process described in paragraph 13 of these Findings of Fact, Cagle directed Burgess and Hamilton to talk with the candidates and inform them of the outcome.
15. Burgess and Hamilton met with Nansel, as directed by Cagle. During that meeting, Nansel asked why he had not been selected and Burgess responded, "part of it is you're not a team player." When asked for a definition of "team player," Hamilton showed evidence of employer surveillance of the internal affairs of the union by responding "you remember when you were running for steward, you were trying to split the shop." Nansel told Burgess that he was not satisfied with the reasons he had been given and that he would be considering whether to take the issue to the union. Hamilton responded with words to the effect, "there you go again, you're not willing to listen to management, you're always willing to run to the union about something."
16. On May 18, 1999, Teamsters Union, Local 599, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging employer interference with employee rights and discrimination against a bargaining unit employee in reprisal for his union activities protected by Chapter 41.56 RCW, by its failure or refusal to select Roy Nansel for an advertised position.
17. Burgess stated to a bargaining unit employee that Nansel would have been given a maintenance position if he hadn't filed the unfair labor practice charge. In response to testimony in this regard, Burgess acknowledged that he responded with assent when the union witness stated that filing an unfair labor practice complaint is not a way to get ahead.

18. On December 2, 1999, the union filed an amended complaint alleging the employer had failed to select Nansel for another maintenance mechanic position, and that an employer representative stated that Nansel would have been given the position if he hadn't filed that unfair labor charge. The union alleged the employer passed over Nansel for another position because of his union activities. Although no such position was actually created or advertised, the union alleged that management discussion of creating another mechanic position was cut off to avoid the possibility of Nansel filing another charge.
19. The Employer provided testimony indicating that no new maintenance positions had been discussed subsequent to the two positions for which the interview had been given.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.56 RCW.
2. By denying Roy Nansel promotion to either of the two mechanic positions advertised in 1998 because of the previous exercise by Roy Nansel of rights protected by RCW 41.56.040, and by failing or refusing to assign work opportunities to Roy Nansel in order to avoid the possibility of Nansel exercising his rights protected by RCW 41.56.040, Pierce County has committed unfair labor practices in violation of RCW 41.56.140(1).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following:

ORDER

Pierce County, its officers and agents shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:
 - a. Denying Roy Nansel promotion because of his exercise of rights protected by Chapter 41.56 RCW.
 - b. Denying Roy Nansel other job opportunities because of his potential exercise of rights protected by Chapter 41.56 RCW.
 - c. In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:
 - a. Offer Roy Nansel promotion to the mechanic classification, and make him whole for the discrepancy between his actual wages and benefits and the wages and benefits he would have received if he had been selected as a mechanic in early 1999, at the completion of the interview process, computed pursuant to WAC 391-45-410.
 - b. Post, in conspicuous places on the employer's premises where notices to employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized representa-

tive of the 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. Read the notice attached to this order into the record at a regular public meeting of the Pierce County Council, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.
- d. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time, provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.
- e. 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.

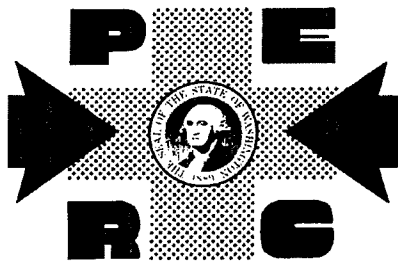
Issued at Olympia, Washington, on the 22nd day of January, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JACK T. COWAN, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL offer Roy Nansel promotion to the maintenance mechanic classification, and make him whole for the discrepancy between his actual wages and benefits and the wages and benefits he would have received if he had been selected as a mechanic at the completion of the interview process in early 1999, computed pursuant to WAC 391-45-410, with interest.

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

DATED: _____

PIERCE COUNTY

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