

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KALAMA POLICE GUILD,	)	
	)	
Complainant,	)	CASE 14942-U-99-3769
	)	
vs.	)	DECISION 7448 - PECB
	)	
CITY OF KALAMA,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	
	)	

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Emmal Skalbania & Vinnedge, by Alex J. Skalbania, Attorney at Law, for the union.

Nelson Law Firm, PLLC, by David A. Nelson, for the employer.

On December 22, 1999, the Kalama Police Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Kalama (employer) as respondent. A preliminary ruling was issued under WAC 391-45-110, finding a cause of action to exist on allegations of:

Employer interference and discrimination in violation of RCW 41.56.140(1), and employer discrimination for filing an unfair labor practice charge in violation of RCW 41.56.140(3), by its discharge of union president Mike Wren in reprisal for his union activities protected by Chapter 41.56 RCW.

The employer filed an answer. A hearing was held on June 28, June 29, and September 5, 2000, before Examiner Martha M. Nicoloff. The parties filed briefs.

The Examiner rules that the employer violated RCW 41.56.140(1) and (3) when it terminated the employment of Michael Wren, in substantial part because of his participation in union activities and testimony protected by Chapter 41.56 RCW. A remedial order is entered, requiring that Wren be reinstated and made whole for his loss of wages and benefits due to the unlawful employer action.

#### BACKGROUND

Kalama is a small community located along Interstate 5 in southwestern Washington. The employer provides municipal services through the mayor-council form of government, including operation of the Kalama Police Department.

The union has been the exclusive bargaining representative of the employer's non-supervisory law enforcement personnel since 1996. The bargaining unit includes police officers and the sergeant.<sup>1</sup>

Michael Wren worked for the employer as a police officer from 1990 to 1999. He became the first president of the Kalama Police Guild in 1996 and, as such, he authored most of the union's correspondence with the employer. Wren was also responsible for the union's handling of grievances and unfair labor practice complaints.

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<sup>1</sup> Notice is taken of the Commission's docket records for Case 12755-E-96-2134. The Kalama Police Guild filed its petition on October 9, 1996, seeking to replace Teamsters Union, Local 58, as exclusive bargaining representative. An interim certification was issued on December 13, 1996. *City of Kalama*, Decision 5778 (PECB, 1996). The case was held open for a hearing and determination on the eligibility of the police chief for inclusion in the bargaining unit. The Executive Director rejected the union's contentions, and excluded the police chief from the bargaining unit, in an order issued on January 7, 1998. *City of Kalama*, Decision 5778-A (PECB, 1998).

Difficult Relationships Among Employer Officials

Glen Munsey was the mayor of Kalama from 1994 through December 31, 1997. Bud Gish assumed that office on January 1, 1998, and was the mayor at the time of the incidents which are the subject of this proceeding. Michael Pennington was the chief of police in Kalama until July 1999, although he was on disability leave for the entire month of June 1999.

Gish and Pennington had a somewhat troubled relationship. A group calling themselves the Concerned Citizens' Committee made several criticisms of Pennington before Gish took office as mayor. While Gish denied being a member of that group, Munsey characterized Gish as the spokesperson for that group on certain occasions. In addition, Gish disciplined Pennington for conduct at an unfair labor practice proceeding that Gish deemed insubordinate. The employer's civil service commission overturned that discipline.

A Difficult Bargaining Relationship

Review of the Commission's docket records discloses a series of representation proceedings involving the Kalama Police Department employees during the 1980's, resulting in the certification and decertification of several exclusive bargaining representatives. From 1990 until 1996, the employer's police officers were represented for the purposes of collective bargaining by Teamsters Union, Local 58.<sup>2</sup> The last collective bargaining agreement negotiated by the employer and Local 58 expired on December 31, 1996. When the Kalama Police Guild filed a petition for investigation of a question concerning representation with the Commission, in October of 1996, Local 58 disclaimed the unit.

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<sup>2</sup> The police chief and sergeant were excluded from the bargaining unit while it was represented by Local 58.

From approximately January 1997 through the latter part of 1999, the union and employer were engaged in negotiating their initial collective bargaining agreement. Those negotiations were frequently acrimonious. The parties had the assistance of a mediator beginning in the spring of 1998.<sup>3</sup> Wren attended all of the negotiation sessions on behalf of the union. Gish was a member of the employer's bargaining team, and was present at all of the negotiation sessions held by the parties, after he took office as mayor in 1998.

Gish expressed frustration about the status of the contract negotiations in a memorandum he sent to Wren on September 23, 1998. The final paragraph of that memorandum noted:

In conclusion, I will say your attempt to gain media and citizen support for your negotiating position shows a lack of good faith effort, on the part of the Guild, to deal with the issues that have brought us to impasse. The negative, unprofessional manner with which the Guild president addresses the city negotiating team is indicative of what the City has had to deal with for the past twenty-two (22) months of negotiating. The Guild insists on putting the negotiations on a personality level. The city will not engage in these types of tactics.

According to Gish, he wrote that memo in an effort to "tone down" the discussions between the employer and union. That effort was not successful.

In May 1999, the employer made a "what-if" settlement proposal to the union, but the union did not respond for several months. It

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<sup>3</sup> Notice is taken of the Commission's docket records for Case 13803-M-98-4935, which was a mediation case initiated by a request filed on March 27, 1998.

was not until December 30, 1999, that a collective bargaining agreement was finally signed by the parties.

Previous Unfair Labor Practices and Grievances

Both the record in this proceeding and the Commission's docket records disclose that multiple unfair labor practice complaints were filed by these parties between January 1997 and July 1999.<sup>4</sup>

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<sup>4</sup> Notice is taken of the Commission's docket records for four unfair labor practice complaints filed while Munsey was mayor of Kalama:

- Case 13469-U-97-3286 (union allegations of unlawful "skimming" dismissed on their merits);
- Case 13493-U-97-3294 (union allegations of unlawful "circumvention" settled at hearing);
- Case 13592-U-97-3324 (unfair labor practice found as to unilateral change of work schedule); and
- Case 13593-U-97-3325 (unfair labor practice found as to unilateral change of overtime work).

Notice is taken of the records for eight unfair labor practice cases filed while Gish was mayor of Kalama:

- Case 13640-U-98-3338 (unfair labor practice found as to unilateral change of supplemental health benefit);
- Case 13711-U-98-3354 (employer allegations of breach of good faith dismissed for lack of service);
- Case 13878-U-98-3409 (unfair labor practice found as to unilateral change of take-home car policy);
- Case 14074-U-98-3480 (union allegations of unilateral change of call time dismissed);
- Case 14075-U-98-3481 (union allegations of unilateral change of holiday pay dismissed);
- Case 14076-U-98-3482 (union allegations concerning payment of witnesses dismissed);
- Case 14267-U-98-3539 (union allegations of unilateral change of shift assignments resolved by parties); and
- Case 14496-U-99-3599 (union allegations of unilateral change involving portable radios resolved by parties).

All hearings held on those matters took place after Gish took office as mayor, and Gish attended all of those proceedings. Wren testified on behalf of the union at all of those hearings, and he gave the following testimony in this proceeding:

When I was testifying on behalf of the guild I was very uncomfortable because I could see Mayor Gish sitting there and he would just glare and stare at me like how dare you say that. That's how I felt about it. I felt intimidated from him. And the one incident in particular that I really felt a lot of heat was the one that he jumped on Chief Pennington about and eventually suspended him for insubordination.

. . .  
I mean he got right up and was practically getting in the face of Pennington and treating him, you know, terrible. And, you know, since I was the guild rep and the guild had Chief Pennington on the side of the guild, representing the guild side as a witness, you know, I thought I'm next, he's going to jump down me for some reason.

It is clear that Wren perceived Gish as being upset during his testimony.

The union initiated a number of grievances during Gish's tenure as mayor, and Wren was the primary union representative for all of those matters. Several of the grievances concerned pay issues for bargaining unit employees. Wren testified:

Q: [By Mr. Skalbania] What sort of issues did you need to correspond with the City about?

A: [By Mr. Wren] Grievances, that included pay problems, repeated pay problems month after month after month. There wasn't a month go by without somebody having a pay

problem and I had quite a few pay problems. My pay was always - something was always wrong with my pay. And we had problems about pay as far as acting sergeant pay, acting chief pay, grievances on, you know, not getting paid holiday pay, requiring people to go on forced call time. I mean, there were so many grievances it's hard to recall each and every one. I believe that in the time period from '98 to about May of '99, I think, or March of '99, something like that, I think there was like 11 grievances we'd filed that I went over and had to deal with Mayor Gish on. And a lot of those were what I had just indicated; and some of them were two times. I mean, multiple violations of the contract.

City Clerk Val Marty recalled that Wren also complained to her about payroll issues on several occasions, and that Wren had criticized the performance of the Finance Department she directed. Marty was also well aware of tension between the employer and union regarding the contract negotiations, she was involved in investigating grievances, and she gave testimony in some unfair labor practice and grievance proceedings.

The record in this proceeding includes correspondence between the parties on a variety of other matters which were subjects of disputes between them. That correspondence includes acerbic comments from both parties. Wren also noted that Gish "for some reason" wanted to deal with Pennington regarding union matters, and that Wren had to correct Gish concerning his approach.

Gish was a long-time member of the International Brotherhood of Electrical Workers (IBEW). Writing as president of the Kalama Police Guild in the autumn of 1998, Wren sent letters to the IBEW in which he accused Gish of engaging in "union-busting" in

connection with his actions as mayor of Kalama. Gish was angry about that, and expressed his opinion in profanity-laden comments in a conversation with Munsey.

During the autumn of 1998, Wren organized informational picketing which took place during meetings of the employer's city council to protest the employer's actions. Wren testified:

I know Mayor Gish wasn't happy with it. The first day that we had it he immediately talked with Chief Pennington about it and what he said I don't know but Mike Pennington told me afterwards that he told Mayor Gish that we had the right to do that.

Wren and Sergeant Robert Heuer both recalled that Gish was upset with Wren during a grievance meeting where Wren was acting as Heuer's union representative, when Wren rolled his eyes at something Gish said. Wren noted that Gish "jumped down my throat and yelled at me . . ." while Heuer characterized Gish's actions as follows:

And Mike [Wren] rolled his eyes and gestured and Mayor Gish spun on him and said, Mr. Wren, I don't appreciate your gestures in an extremely hostile approach. And I felt it was direct - him trying to intimidate and dominate my guild rep that had the right to be there.

Wren also wrote to members of the state legislature, complaining about the lack of progress in negotiations. On March 30, 1999, three legislators wrote to the mayor, offering their assistance in resolving the dispute.<sup>5</sup>

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<sup>5</sup> The record does not reflect any further contact between the parties and those officials.



The Incident Leading to Wren's Termination

The employer had procedures to track expenses incurred for use of its vehicles. Each police officer was given a credit card with an identifying number, which was used when fueling employer vehicles at a card lock gas station located at the north end of Kalama. The employees received receipts at the pump, which were turned in to the employer. The police chief kept a manila envelope labeled "gas receipts" on the wall in the office, and employees would note identifying numbers or initials on receipts they dropped in that envelope. The employer received printouts at the end of each billing period, listing transactions by date, time, and the name and card number of the employee who made the purchase. The chief could then match the receipts turned in by employees with the master list, and verify the expenses for payment by the city clerk. If an employee failed to turn in a receipt, the chief could verify expenditures by reviewing them with the employees when he received the bill from the card lock station. The employer's written policies did not authorize employees to fuel personal vehicles at the employer's expense. There are references in the record to reimbursement for business use of personal vehicles at the rates prescribed by the federal Internal Revenue Service.<sup>6</sup>

On Saturday, April 10, 1999, at approximately 6:05 p.m., Kalama city council member Mike Reynoldson and his wife were passing the

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<sup>6</sup> According to Marty, employees who used personal vehicles for business were to fill out a travel voucher, noting the mileage and the purpose of the trip. When Sergeant Heuer requested both mileage and fuel for the same personal vehicle trip in March or April 1999, Marty informed him that he could not submit both for the same trip. Heuer testified that he had never before submitted a mileage claim, and he was confused about the procedure. The record does not suggest otherwise, and Heuer was not disciplined for that incident.

card lock gas station when they noticed Wren fueling what appeared to be a personal vehicle. The Reynoldsons were aware that the card lock facility used by the employer and a number of businesses was not as frequently used by individual patrons.<sup>7</sup> Reynoldson wondered aloud whether Wren could be misusing the employer's credit card, and Mrs. Reynoldson responded that the matter could be easily verified by checking printed receipts which included the dates and times of transactions. Reynoldson promptly asked Gish to check the gasoline receipts when they came in.

Gish forgot about Reynoldson's request for a time, but he asked Marty to check the receipts from the card lock gas station at the end of April 1999. Marty's review verified that the date and time on a receipt for fuel obtained by Wren matched with Reynoldson's observations. Both Gish and Marty testified they hadn't believed Wren would "do something like that" and felt sick when the receipt matched Reynoldson's report. Gish asked the Reynoldsons to provide written statements about the incident, which they did.

Steps Taken by the Employer -

Gish testified that, shortly after taking office, he established a policy that he would not investigate an issue unless the complaint was put in writing. He testified that the fuel incidents involving Wren would probably have been investigated even without written complaints, however, because the state auditor had become involved and Gish thought the auditor was going to insist on some kind of resolution. Gish decided not to perform an investigation of Wren himself.<sup>8</sup> He noted:

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<sup>7</sup> Most witnesses indicated that the gas station was primarily used by businesses; some witnesses noted it was not unusual for individual patrons to use the facility.

<sup>8</sup> Gish acknowledged that, while the employer's personnel regulations call for investigation by department supervisors in matters of possible disciplinary action, that process was not followed in this case.

I've investigated other complaints. But because of the nature of this complaint, the seriousness of it, and the fact that Mike Reynoldson, a City Council member, had filed the complaint, give me the statement, I decided to go with an outside investigator because I didn't want any implication of bias or collaboration on my part.

Gish first asked the Cowlitz County Sheriff's Department to investigate the complaint, but that agency declined. He later contacted the employer's insurer, Canfield & Associates, and Tom Pickett of the risk management division of that firm eventually conducted an investigation.<sup>9</sup> Pickett's only prior contact with the employer had been a courtesy call at the Kalama City Hall, to "let them know that Canfield went through town, so to speak." Pickett did not know, either directly or indirectly, anyone who was involved in the investigation of Wren.<sup>10</sup>

Pickett's best recollection was that he first spoke to Gish around June 7-10, 1999, when Gish gave him some general information about the nature of the complaint. Wren's first notice that he was under investigation came from a letter dated June 14, 1999, in which Gish requested that Wren be available for an interview on June 17, 1999. That letter only described the situation as "alleged theft and possibly other infractions of your job performance."

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<sup>9</sup> At the time of hearing in this matter, Pickett had been a risk manager with Canfield & Associates for three years. He had conducted investigations while serving as a public school superintendent for 11 years, and as a school principal previous to that. Prior to his investigation of Wren, Pickett had conducted investigations in three other situations involving alleged wrongdoing by employees of police departments.

<sup>10</sup> Pickett subsequently provided two telephone numbers in the "509" area code, indicating that his base of operation was in eastern Washington.

Pickett was in Kalama on June 17, 1999. Gish was unavailable when Pickett first arrived on the employer's premises, so Pickett spoke to Marty to find out more about the situation. He was given the written statements submitted by the Reynoldsons, as well as the receipts from the card lock station, but was not told what to do or whom to interview. Pickett reviewed the employer's personnel manual, and he recalled that both Marty and Gish told him there were no separate personnel policies for the police department, so he did not inquire further about any separate practices. Pickett interviewed both Reynoldsons, Marty, Wren, and Acting Police Chief Heuer.<sup>11</sup> During the course of his interviews, Pickett was informed of the tension between the employer and union.<sup>12</sup> He also learned that Wren was president of the union.

Pickett recalled that neither Heuer nor Wren told him there was a police department policy which allowed fueling of personal vehicles, although he did recall that Heuer mentioned fueling his personal vehicle during the 1996 flood and for training. Because Wren acknowledged during his interview that he had seen the personnel procedure which prohibited use of the employer's credit card for personal use, and because Wren had acknowledged he had used the employer's credit card to fuel his personal vehicle on April 10, Pickett felt no need to interview any other police department employees, including Pennington.

On June 25, 1999, Pickett filed his report, in the form of a letter to Gish. The entire content of that report was as follows:

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<sup>11</sup> Heuer was the acting chief while Pennington was on disability leave.

<sup>12</sup> It appears that Mrs. Reynoldson was the only interviewee who did not mention that tension. Pickett recalled Gish telling him of that tension, although Gish did not recall discussing the employer-union relationship with Pickett.

It was brought to your attention by Mike Reynoldson and Carolyn Reynoldson that they observed Officer Wren gassing his personal vehicle at the location of the cardlock station used by the city. The question was raised - could he be using a city credit card? You compared their information to the city invoice at the end of the month. At that time, you contacted me and we discussed a third party, unbiased investigation be done by me representing Canfield & Associates, Inc.

I conducted my investigation and interviews on June 17, 1999 and provide you with these findings:

A. I interviewed both Mike Reynoldson and Carolyn Reynoldson separately and found them to be solid witnesses and they verified the issue stated in their letters dated April 29, 1999 and May 4, 1999.

B. I examined the cardlock invoices and verified dates, times, and use of Officer Wren's card.

C. I have reviewed the personnel manual and union agreement for the City of Kalama.

D. I interviewed Officer Wren and when presented with the allegation and the invoice as evidence, Wren stated "yes, I filled my private pickup with a city credit card on 4/10/99 at 6:05 p.m." He further stated "I used the card on nobody's recommendation or authority but I just knew it was procedure. I feel that I am entitled to use the city credit card because I have used my personal vehicle for city use."

If I can be of any further assistance, please don't hesitate to call me. . . .

Pickett testified that he did not recall any mention of Wren's use of his personal vehicle for employer business, other than an incident mentioned by both Heuer and Wren where Wren used his personal vehicle to retrieve some tires from Longview. Pickett did

not recall Wren ever having offered to provide documentation of any trips made on behalf of the employer.<sup>13</sup>

Wren recalled Pickett asking whether he had any authority to gas up on April 10, but believed his response was somewhat different than Pickett's report indicated. Wren testified:

Q: [By Mr. Skalbania] In [Pickett's] report . . . It says [Wren] further stated: I used the card on nobody's recommendation or authority but I just knew it was procedure. Is that an accurate word-for-word quote of what you told him?

. . .  
A: [By Mr. Wren] No, I didn't say word-for-word on that.

Q: If you recall saying anything different than that, then tell us what you recall?

A: Well, what I recall telling him was that at that specific time I had not talked to Chief Pennington about going down and gassing up my vehicle on April 10.

Q: In your mind is that different - does that have a different meaning of what he quotes you here?

. . .  
A: Well, we were talking April 10 and I believe we were talking about he had asked if I had gone and talked with Chief Pennington to have approval to gas my car up on that date. Did I tell him I was going to do that and I told him I had not.

. . .  
Q: So, would it have been a more accurate quote then or citation to your statement for Mr. Pickett to have said that you hadn't specifically talked to Pennington about April 10?

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<sup>13</sup> Although Pickett recalled Heuer's mention of using his personal vehicle during a flood in 1996 and for training, he did not mention those situations in his report.

A: That's correct. And that's what I recall that he asked, was on April 10 did you have any authority to gas up. And I said no, that I had not talked to Chief Pennington and I didn't get his approval to go gas up.

Wren also recalled specifically mentioning to Pickett that Pennington had an informal, or verbal, policy of allowing employees to use the employer's credit card to fuel their personal vehicles.

Gish informed Heuer of the allegations against Wren in June of 1999, while Heuer was the acting chief. Heuer wanted to contact Pennington about the situation, but Gish directed him not to do so. Heuer recalled meeting with Gish after Pickett's written report was submitted to Gish and shown to Heuer. Heuer testified:

A: [By Mr. Heuer] I looked at the allegations and I expressed my opinion that it had what I considered a very big loophole or flaw in it. And that being that, you know, Wren had alleged that, you know, there was an informal policy. And I knew Chief Pennington, I knew Wren had been doing - using his personal vehicle for city business. I knew Chief Pennington knew about it, and I expressed my concern at the time to how can you conclude an investigation without talking to - basically his alibi, the person who could shed truth on that or light on that. Mayor Gish told me at the time that, you know, he had intentions to terminate Pennington upon his arrival on July 6 and he wasn't going to contact Chief Pennington. And had told me I was not to contact Chief Pennington. I had told Mayor Gish that as of July 28 Chief Pennington was off.

Q: [By Mr. Skalbana] As of June 28?

A: June 28. Chief Pennington was no longer on medical leave, his 30 days had expired and he was directly in my chain of com-

mand, I could not not contact Chief Pennington without violating the chain of command and I had to call him. Mayor Gish understood, and at that point he said well, I understood, I guess you're right, you'll have to notify him. Which I did, I called him by phone, back east in fact. His initial expression to me was he was shocked to the extent of saying now what's the City up to. And the second statement was well, you heard Mayor - this wasn't my policy, that was Mayor Munsey's policy, and you heard that remember, during the flood. I told him well, no I didn't hear that, I wasn't witness to that particular conversation. But, you know, I had the knowledge of Wren doing extensive use of his personal vehicle for city use and I knew Chief Pennington knew about it. And my thought - my advice to Mayor Gish at the time was, Mayor, you need to talk to the chief on this because eventually he's going to have to testify. He's going to have testimony to that. If, you know, wouldn't it be better to get this in light before you terminate an employee. And he thought about it and said, you know, he wasn't going to do that.

Heuer testified that he told Gish during their meeting of his own use of the employer's credit card to obtain fuel for his personal vehicle during the 1996 flood and when he went to training. Gish told him that he was not concerned about those occasions, that the flood was an extraordinary circumstance, and that a voucher would have been turned in when training was involved.

Gish recalled Heuer telling him about using the employer's credit card to fuel his personal vehicle, but Gish testified that Heuer did not bring up any department practice regarding credit card use which had an impact on Wren's situation.



Investigation Requested by State Auditor -

When the alleged misuse of an employer credit card first emerged, a representative of the Office of State Auditor was on the employer's premises for a routine review of the employer's accounts. The auditor requested that the employer review all of its records for the period of time during which employees had been issued credit cards for use at the card lock station.

Marty reviewed records for the period from April 1997 through May 1999, looking for receipts "for fuel-ups for fuel purchased on the city gas card on days off by police officers." Her review showed:

- Sergeant Heuer and Officer Neves had no such incidents;
- Officer Dugan had one incident; and
- Officer Wren had 12 incidents.

The employer chose to disregard some of the incidents that Marty identified, because the employer had a take-home car policy in effect through March 30, 1998. The one incident involving Dugan had occurred on September 9, 1997, and no effort was made to investigate it.<sup>14</sup> Eight incidents involving Wren, including all of the incidents through February 1998, were also disregarded.

After excluding the eight early incidents involving Wren, Marty was left with three incidents in addition to the incident observed by the Reynoldsons on April 10, 1999. They were:

- Wren obtained fuel on March 9, 1998, which was the fourth day of a period during which he was on sick leave;

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<sup>14</sup> No criminal investigation was initiated regarding Dugan.

- Wren obtained fuel on April 16, 1998, when the employer's records indicated that he did not have a take-home vehicle, was not on call, was not on duty, and was not called out;<sup>15</sup> and
- Wren obtained fuel on December 18, 1998, when he was neither on active duty nor on call.

Marty submitted the results of her review to Gish, in a memorandum dated June 22, 1999.

#### The Discharge of Wren

Gish did not discuss Wren's situation with Pennington at any time between April 10 and June 25, 1999. Neither did Gish ask Pennington about a police department practice allowing employees to use the employer's credit card to fuel personal vehicles, nor did Gish ask Pickett to make such an inquiry. Gish cited two reasons for excluding Pennington: First, that Pennington himself was under investigation on allegations unrelated to Wren's situation; and second, that Gish believed that Pennington should not be contacted while he was on leave for a "mental stress" condition.

After he received Pickett's written report dated June 25, 1999, Gish consulted the city clerk, the city's attorney, and the mayor pro tem, about what action to take concerning Wren. All three employer officials advised Gish that Wren's use of the employer's credit card to obtain fuel for his personal vehicle was a serious offense, and that Wren's employment should be terminated.<sup>16</sup> Gish gave the matter additional thought.

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<sup>15</sup> Wren had not turned in a receipt for this incident.

<sup>16</sup> Pickett had also stated his belief that "a police officer in [Wren's] situation could be terminated."

On June 29, 1999, Gish sent a letter to Wren, announcing he was considering termination of Wren's employment. The letter noted that Wren had been observed at the card lock gas station by the Reynoldsons on April 10, 1999, and Wren's admission during his interview with Pickett that he had used the employer's credit card "on nobody's recommendation or authority" to fuel his personal vehicle. Additionally, Gish cited the review conducted at the request of the state auditor and the three incidents revealed by that review,<sup>17</sup> a review of the employer's policy and personnel manual, and a review of Washington state statutes and Constitutional provisions which the employer considered applicable to the situation. The letter summed up the situation as follows:

Violation of the city credit card policy, the Washington Constitution and the Washington statutes constitutes a violation of the General Rules & Regulations of the Civil Service Commission of the City of Kalama. First, misappropriating city funds constitutes inattention to or dereliction of duty under Section 12.4.4. Second, the conduct constitutes "willful violation of the provisions of the law or these rules and regulations." Third, the conduct is unbecoming an officer or the service under Section 12.4.12.

Misappropriating the City of Kalama's public funds is an unacceptable breach of your obligation as a police officer and a public officer for the City of Kalama. Your admission that you used the city credit card to fuel your private pickup constitutes just cause for your immediate termination under Section 12.6 of the Civil Service Rules & Regulations.

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<sup>17</sup> With respect to the additional suspicious incidents when Wren used the employer's credit card, Gish wrote:

The circumstances surrounding the use of the city credit card on these dates strongly suggests you used the city credit card to fuel a personal vehicle.

Gish offered Wren a due process hearing to be held on July 2, 1999.<sup>18</sup> Wren testified that his attorney, Patrick Emmal, had prior commitments for July 2, 1999, that Emmal informed him on the morning of July 2 that he had requested that the hearing be rescheduled, and that Emmal informed him the employer had denied the rescheduling request.

The due process hearing was held on July 2, 1999. Mayor Gish, Mayor Pro Tem Reel, and City Attorney Nelson were present on behalf of the employer. Wren attended, but informed the employer representatives that he was present under duress, and that he felt he had been denied legal representation by the employer's refusal to reschedule the hearing.

As recalled by both Gish and Reel in this proceeding, Wren's statement at the July 2 hearing was that he had never filled his personal vehicle using the employer's credit card other than on April 10, and that he had done so on that date because he was reimbursing himself for everything he had done for the employer. Reel recalled Wren mentioning his transporting of materials for the employer during the 1996 flood, and various trips to Costco on behalf of the employer. Wren recalled telling the employer representatives about "times I had done stuff for the city."

Wren described Pennington's policy on obtaining fuel, as he understood it. Wren testified of being asked whether he had documentation, and of responding that he did not because Pennington had not required it. Reel recalled Wren's description of a "verbal" policy. Gish did not find Wren's comments credible because, although Wren claimed that a policy allowing employees to

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<sup>18</sup> See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

obtain fuel for their personal vehicles had been in place since 1994, he offered no written proof of the practice. Additionally, Gish testified he did not believe the April 10 incident would have been the first time Wren obtained fuel for his vehicle at the employer's expense, if the practice had existed for as long as Wren asserted.

The employer representatives conferred at the conclusion of the hearing, and Gish decided to discharge Wren. Gish then signed a discharge letter which he had prepared in advance, but had not signed prior to the hearing, and delivered it to Wren. Wren's employment was terminated effective July 2, 1999.

#### Post-Discharge Developments

After they learned of the stated reasons for Wren's discharge, Neves and Heuer became concerned about whether they would also be subject to investigation and discharge because they had also used the employer's credit card to obtain fuel for their personal vehicles. They met with Gish within approximately one week after Wren was discharged. Gish assured them that they were not under investigation, and that the review of the receipts had not shown any incidents which the employer considered inappropriate.

#### POSITIONS OF THE PARTIES

The union asserts that it has met the legal standard enunciated by the Commission in prior cases for finding both interference and discrimination. It notes that the employer clearly had knowledge of Wren's union activities, and that the record contains numerous examples of the employer's animus toward the union and toward Wren in particular. The union asserts that the employer's stated

reasons for its discharge of Wren are pretextual, and that retaliation against Wren's union activities was a substantial factor in the employer's decision to discharge him. The union argues that the facts Wren had never previously been disciplined and that he had received exemplary performance reviews lend credence to its contention that the employer violated the statute. Citing the employer's failure to investigate a former employee who was considered to have had a suspicious use of a credit card, the employer's failure to investigate or discipline any employees in regard to questionable use of take-home vehicles, and the employer's failure to discipline employees suspected of using the employer's telephones for personal long-distance calls, the union claims the different handling of those incidents lends credence to a finding that union animus motivated the employer's actions against Wren. The union argues that the mayor's claimed policy of not investigating such incidents unless he received a written complaint was clearly not followed in the Wren incident, in which an investigation and review was begun before any written complaint was received. The union argues that there were numerous suspicious aspects of the investigation conducted by the employer, including its failure to contact or interview the police chief, and multiple unexplained delays in the investigation, which the union attributes to the employer's waiting to see if it received a favorable response to its proposal to settle the contract negotiations. Finally, the union argues that any purported non-discriminatory reason for Wren's discharge simply does not hold up in view of the overwhelming evidence of anti-union animus.

The employer asserts Wren was discharged for misusing a credit card to obtain fuel at the employer's expense, an activity which is not protected by the collective bargaining statute, rather than for his union activities. It argues that the union has not established the prima facie case required by Commission precedents, and particu-

larly claims the union has not established a causal connection between Wren's protected activity and his discharge. It notes the absence of evidence placing the discharge close in time to any union activity, and it asserts that mere existence of contract negotiations and unfair labor practice complaints is not sufficient to sustain a causal connection. The employer contends that the union did not prove that the mayor had a pattern of union animus, and that the mayor's own union background is relevant in evaluation of this complaint. It points to the mayor's inclusion of outsiders in the investigation process to ensure a lack of bias. Even if the union is found to have established a prima facie case, the employer contends it had a legitimate, non-pretextual reason for Wren's discharge, supported by objective evidence. It argues that any prior instances of the employer's handling of possible misuse of funds can be distinguished by the fact that no clear policy had been established, or that written complaints were not filed, and it asserts that the other instance of an officer obtaining fuel for a personal vehicle is distinguished by the fact that it occurred when take-home vehicles were authorized. It notes also that any evidence that Pennington had a verbal policy is contradicted by other evidence.

## DISCUSSION

### The Legal Standard

The City of Kalama and its employees are subject to the provisions of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which includes the following:

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;

(4) To refuse to engage in collective bargaining.

The Commission is empowered to hear and determine unfair labor practice allegations, and to issue appropriate remedies. RCW 41.56.160.

#### Interference Violations -

An interference violation occurs under RCW 41.56.140(1), when an employee could reasonably perceive an employer's actions as a threat of reprisal or force or promise of benefit associated with their union activity. *Port of Tacoma*, Decision 4626-A (PECB, 1995). A determination of interference is not based on the actual feelings of particular employees, but on whether a typical employee in the same circumstances could reasonably see the employer's actions as discouraging his or her union activities. An employer's innocent intentions when engaging in the disputed actions are legally irrelevant. *City of Bremerton*, Decision 2994 (PECB, 1988); *City of Seattle*, Decision 3066 (PECB, 1988), *aff'd* Decision 3066-A



(PECB, 1989); *Kitsap County Fire District 7*, Decision 3105 (PECB, 1989); *City of Longview*, Decision 4702 (PECB, 1994). Commission precedent on this general proposition is consistent with decisions of the National Labor Relations Board (NLRB) under the similar "interference" provision found in Section 8(a)(1) of the National Labor Relations Act.

#### Discrimination Violations -

The standard for determining whether an employer has discriminated against the exercise of rights guaranteed by Chapter 41.56 RCW was adopted by the Commission in *Educational Service District 114*, Decision 4631-A (PECB, 1994) and *City of Federal Way*, Decisions 4088-B and 4495-A (PECB, 1994), based on the decisions of the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). That standard is:

Under the Wilmot/Allison test, the first step in the processing of a "discrimination" claim is for the injured party to make out a prima facie case showing retaliat[ion]. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
2. That he or she was discriminated against;
3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee. . . . While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the employee establishes his/her prima facie case, the employer has the opportunity to

articulate legitimate, non-retaliatory reasons for its actions. . . . the employee may respond to an employer's defense in one of two ways:

1. By showing that the employer's reason is pretextual; or

2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

*Educational Service District 114, supra.*

That standard has been followed in numerous subsequent decisions. See *City of Mill Creek*, Decision 5699 (PECB, 1996); *Mansfield School District*, Decisions 5238-A and 5239-A (EDUC, 1996); *Pasco Housing Authority*, Decisions 6248 and 6248-A (PECB, 1998).

#### The Prima Facie Case - Exercise of Protected Right

There is no question that the union has met its burden of proof to establish the first element of a prima facie case of discrimination. Wren was clearly engaged in protected activities as a union representative in collective bargaining negotiations, in handling grievances, and in testifying on behalf of the union in unfair labor practice proceedings conducted by the Commission. The employer clearly knew of Wren's union activities.

#### The Prima Facie Case - Discriminatory Deprivation

Wren's discharge on July 2, 1999, clearly deprived him of all of the rights, status, and benefits of his employment by this employer. Imposition of that "ultimate penalty" in the employment setting satisfies this element of the standard.

The Prima Facie Case - Causal Connection

The Examiner concludes that the union has provided sufficient evidence to meet its burden of proof as to this element of a prima facie case of discrimination. In cases of this sort, the Commission and its Examiners are faced with evaluating behaviors which the participants may sincerely believe have nothing to do with an individual's union activities. However, employer representatives sometimes confuse concerns about legitimate management issues with an individual's union activities. See *City of Mill Creek, supra*; *Port of Seattle*, Decision 1624 (PECB, 1983).

Council member Reynoldson, whose observation of Wren at the gas pump triggered the entire episode, was directly involved in the contract negotiations between the employer and union, as well as with frequent payroll complaints asserted by Wren on behalf of himself and other members of the union. Reynoldson had been a member of the city council for approximately seven years at the time of hearing, including the entire period germane to this proceeding. Reynoldson was aware of the various issues and tensions between the parties, including the various unfair labor practice complaints. He testified:

Q: [By Mr. Skalbania] [W]asn't that one of the reasons that you were concerned about seeing Officer Wren at the gas station on April 10, you knew there had been other disputes involving him and the City regarding pay?

A: I knew there had been some pay disputes, yes.

Q: Involving Officer Wren and the City, right?

A: Yes.

Q: Wasn't that one of the - your knowledge about that, wasn't that one of the reasons that caused you to be suspicious in your

mind about - or caused you to think this ought to be investigated, the fact that you had seen Officer Wren?

A: I wouldn't honestly say that that's what drove me to that, no. But I knew that the issues were there. I know that there's people out there that would create problems due to what they felt they had coming to them and probably did have coming to them.

Q: Mike Wren was one of those individuals, right?

A: Yes.

Q: Certainly you were called to testify in the civil service hearing in this matter, right?

A: Yes.

Q: And wouldn't you agree that at that hearing you had indicated that one of the reasons you became concerned about seeing Mike Wren at the gas pumps on this occasion is that he had had disputes about the City in the past about small amounts of money and that that caused you concern and caused you to wonder what was going on in this instance?

A: I can't remember exactly what I said at the Civil Service Commission meeting but that's something similar.

Reynoldson's classification of Wren among "people out there that would create problems" and his acknowledgment that he linked Wren's actions on April 10 to Wren's previous activism on payroll disputes clearly indicate that Reynoldson's subsequent actions were at least connected with his negative response to Wren's union activities.

Mayor Gish also exhibited behaviors which indicated his displeasure at Wren's union activities. His September 23, 1998, memorandum directly expressed his displeasure with Wren's "attempt to gain media and citizen support for your negotiating position," and

attacked the "negative, unprofessional attitude" of Wren in his role as union president. It is difficult to credit Gish's explanation that those comments were intended to "tone down" the discussions between the parties when they were so inherently inflammatory. Gish's demeanor during unfair labor practice hearings, as related by Wren from the perspective of a witness in those proceedings, was uncontroverted. Similarly, Wren's testimony regarding Gish's angry reaction to the informational picketing incident is uncontroverted.<sup>19</sup> In addition, Gish's negative attitude about the union is revealed by his discipline of the police chief for testimony given by the chief on behalf of the union at an unfair labor practice hearing.<sup>20</sup> The fact that Gish was himself a long-time union member does not negate his negative reaction and animus toward Wren as a representative of this union. If anything, Gish's union membership should have given him an understanding of the fundamental separation of labor and management, yet Gish's confusion of departmental matters and union matters is evidenced by his contacts with Pennington about the informational picketing and by his attempt to respond to Pennington, rather than to Wren, in responding to correspondence to Gish from the guild.

Finally, city clerk Val Marty, who joined in recommending Wren's termination to Gish, also exhibited animus in her testimony in this proceeding. The Examiner observed that she exhibited a hostile demeanor during her direct examination by the union's attorney. Additionally, her testimony included numerous negative references about telephone calls to the union's attorney.

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<sup>19</sup> Although Gish claimed those incidents did not motivate his discharge of Wren, the employer offered no evidence to contradict Wren's characterization of the events.

<sup>20</sup> Even the employer's own civil service commission found that discipline to be unwarranted.

All of these reasons are sufficient to infer a causal connection between Wren's protected activities and his discharge.

#### The Employer's Articulation of Defenses

With the conclusion that the union has made out a prima facie case of discrimination, the burden shifts to the employer to articulate lawful reasons for its actions. In this case, the Examiner concludes that the employer has met that burden of production.

The employer points to its policy against personal use of employer credit cards by employees, and to Wren's obtaining fuel on several questionable occasions, as ample reasons for Wren's discharge. It notes that Wren admittedly fueled his personal vehicle on April 10, 1999, and admittedly had no specific authorization to do so on that occasion. It notes that additional occasions of possible misuse of the employer's credit card were uncovered by the review of the billing records conducted at the request of the state auditor.

The burden remains on the union to prove the employer's asserted reasons were pretextual, or that Wren's union activities were a substantial motivating factor notwithstanding the legitimate reasons stated by the employer for its discharge of Wren.

#### Substantial Motivating Factor/Pretext Analysis

For the reasons set forth below, the Examiner concludes that the union has sustained its burden of proof to establish that Wren's union activities were a substantial factor in his discharge.

#### Employer's Responses to Previous Alleged Misconduct -

Evidence that the employer's conduct in investigating the allegations against Wren constituted a substantial deviation from its own

past practices supports a conclusion that the employer was actually acting upon a motivation other than the alleged theft of fuel on April 10, 1999.

At some point in 1997, concerns arose about possible employee use of the employer's telephones for personal long-distance calls. The investigation commenced prior to Gish becoming mayor, and continued into his administration. Gish, Marty, and Pennington were all involved in that investigation. On March 30, 1998, Gish issued a memorandum to Marty, Pennington, and the director of the public works department, directing them to review telephone records and to require reimbursement for any personal long-distance calls made by their employees. That memorandum indicated:

In reviewing the city telephone charges for the year 1997 of the Finance Department, the Public Works Department, and the Police Department, I find no apparent reason for ordering an outside investigation into those records at this time. However, to verify my own findings and to correct any minor infractions I may have overlooked, I am directing the three Department Heads to review their department's telephone records for 1997 and to require any personal charges they may find to be immediately corrected, payable to the City of Kalama Finance Department. Further, to insure infractions do not happen in the future, I am directing the Department Heads to review their department's telephone bills monthly and to require immediate reimbursement of any personal long distance calls made along with a copy of the bill in question, forwarded to the Finance Department for receipt, and to also reference the policy that personal long distance calls are not allowed on city telephones.

The matter of city time and equipment being used for Union business is a gray area. Therefore past records will be accepted but, the City will no longer pay for union related long distances or fax charges. A reasonable

amount of time for union business will continue to be allowed on city time.

Gish explained there was no clear policy on telephone use prior to his taking office, and that was part of the reason that employees who made personal long-distance calls prior to March 30, 1998, were not disciplined. Regarding that situation, Marty testified:

Q: [By Mr. Skalbania] My question - you would agree that unless someone reimbursed - unless the city employee reimbursed the city for the personal long-distance phone calls they had made that would be money out of the city's pocket because the city was billed for the long distance calls and paid for them?

A: [By Ms. Marty] In the instance of the telephone calls there was no way to determine whether or not they were personal or were not for personal use.

Q: You mean you couldn't ask someone what they were about? You couldn't investigate - certainly the city's phone bill show [sic] what numbers were called, don't they?

A: Well, for instance, the police department's phone calls to your office, there would be no way to determine whether or not they were the chief calling your office or whether or not it was guild members calling your office, and therefore there was no way to determine for certain which were which.

Q: But my question is whether or not the city's phone bill showed which numbers the long distance calls went to?

A: Yes.

Q: And are you saying you have a - you're saying you couldn't investigate as to where those calls went to in terms of asking the officers and doing other sorts of independent followup to determine who was called under what circumstances?



A: By going through each phone call on the long-distance phone bill?

Q: Yes. Are you saying you couldn't do that?

A: It could have been done.

Q: But the city decided not to do that, right?

A: We issued the - the Mayor issued the memorandum that is here.

Q: Sure. Even though as you've indicated the total of those calls was probably more than \$20?

A: I had no way of determining that.

. . .  
Q: Well, along with each number that's called the bill also shows the amount of money for that call, right?

A: Yes.

Q: So obviously again you can add up any calls that were to suspicious numbers and find out how much money was being talked about, right?

A: Again, I state that such as with the phone calls to your office there would be no way of determining which ones were guild and which ones were made by the chief for city business.

Q: Other than asking people and doing other sorts of investigative followup like that?

A: Correct.

Q: The bottom line, no one was disciplined about the long-distance phone call issue, to your knowledge, right?

A: They were asked to cease and desist.

Thus, the employer exhibited a very casual approach to possible employee misappropriation of the employer's property or funds during the 18 months preceding the discharge of Wren.

A similar inference is available from evidence concerning the past administration of a take-home car policy. For an unspecified period of time, members of this bargaining unit and other employees were allowed to use employer-owned vehicles for commuting between their residences and their jobs. Gish noted that a number of citizens complained to him that they saw employer-owned vehicles being used for transporting children to school, or for going to the store, but Gish testified he did not conduct a formal investigation in the absence of a written complaint from a community member.<sup>21</sup>

A Different Approach in Dealing with Union Activist -

This record supports a conclusion that the employer's investigation and action regarding Wren were motivated from their inception by anti-union animus: Reynoldson's request that Gish check the fuel transactions for April 10 was motivated by Reynoldson's adverse reaction to Wren's activities as a union representative.

Gish took up the allegations against Wren on the basis of an oral request, contrary to his consistent testimony that he had a policy of not investigating complaints unless they were put in writing. It is clear that Gish asked Marty to check the card lock station records and obtained confirmation of the suspicious transaction before he asked the Reynoldsons to put their concerns in writing. Thus, there is basis for concern about Gish's motivation from the outset of his investigation of Wren.

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<sup>21</sup> Gish changed the take-home car policy by a memorandum dated March 30, 1998. He testified that he acted "primarily to try to save the city money, both in maintenance and gas costs" which had been of concern to the mayor, to the city council, and to Pennington as the department head. The union filed an unfair labor practice complaint, *supra*, and a violation was found in Case 13878-U-98-3409, *supra*.

Further concern is raised by the fact that the employer followed a quite different procedure in investigating Wren's conduct than it followed in the prior cases of alleged misappropriation by its employees. In both the telephone misuse and take-home car misuse situations, any investigation was made by the department heads involved, individuals were not disciplined, employees who had made personal telephone calls were permitted to reimburse the employer for those calls,<sup>22</sup> and a "cease and desist" approach was deemed a sufficient conclusion to the inquiry. Gish asserted that any employee who violated the telephone policy set forth in his memo from that date forward would be subject to discipline, but his memo only called for department heads to review future telephone bills and to obtain reimbursement from employees for inappropriate calls. Those were very different sanctions from the mayor's actions in regard to the allegation of misappropriation by Wren.

Compounding the inference of an ulterior motive is Marty's initial insistence in her testimony that there was no way to determine either the nature or cost of any questionable telephone calls. That testimony is baffling, given the fact that she had conducted a similar review of records in the Wren situation. Deviations in personnel policies and changes in personnel practices have been a basis for finding unfair labor practices in the past, where an employer provides unclear or inconsistent explanations for its actions. *Port of Tacoma*, Decision 4626-A (PECB, 1995); *Mansfield School District*, *supra*; *Pasco Housing Authority*, *supra*.

The Examiner does not fault the mayor for asking an outsider to undertake the investigation. Even though that may not have been

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<sup>22</sup> By reciting what the employer allowed, the Examiner does not imply such a procedure would avoid the prohibition on lending of the credit of the employer found in Article VIII, Section 7 of the Washington State Constitution.

normal city practice, the union might well have claimed bias if the mayor had conducted the investigation himself. Also to the mayor's credit is his initial effort to have the investigation conducted by another law enforcement agency. The Examiner does not find that the mayor's selection of an agent from the risk management division of the insurance firm already doing business with the employer was outside the realm of reason, or indicative of animus. Gish certainly could have reasoned that insurance firms investigate matters regularly, and that an agent from a risk management operation would be experienced in such reviews. That said, the selection of Pickett to conduct the investigation does not insulate the employer from the "substantial motivating factor" test set forth by the Supreme Court.

The evidence supports a conclusion that the investigation was not well-conducted. There was a lack of follow-up by Pickett on matters which should have raised questions, such as the whether the police chief had an unwritten policy of the type mentioned by people he interviewed. The investigator neither made an effort to contact the chief on that issue, nor mentioned the possible existence of such a policy in his report. Although there is no evidence that Pickett was motivated by union animus, even though he was made aware of the tensions between the employer and union, his investigation and report do not constitute a security blanket protecting the employer from further scrutiny under the "substantial motivating factor" test.

Gish's actions after he received the investigator's report provide basis to conclude there was a rush to judgment concerning the union activist which was unlike anything that occurred previously. While the Examiner acknowledges Gish may not have been comfortable with having Pennington conduct the investigation of Wren if Pennington

was, himself, under investigation at the time,<sup>23</sup> that does not explain or excuse the failure or refusal of Gish and other employer officials to learn more about the actual practices followed in the Kalama Police Department at and prior to that time.

Even if Gish was unaware of Pennington's policy regarding fuel for personal vehicles during his first 17+ months in office, Heuer clearly made Gish aware of the existence of an unwritten policy in their discussion in June 1999. The Examiner finds Heuer to be a very credible witness, and credits Heuer's testimony that he both: (1) discussed Pennington's policy with Gish; and (2) recommended to Gish that he contact Pennington. It is clear that Gish made no such contact at any point prior to discharging Wren. The conduct of a fair investigation will likely help a respondent in defending against a "discrimination" allegation, but that requires examination of all known evidence which may be relevant to the issues at hand. In this case, Gish's ongoing refusal to get any information from Pennington regarding either department practice or Wren's use of his personal vehicle on police business provides basis for an inference adverse to Gish.

Even if he somehow missed the earlier signals, Gish and the other employer officials attending the due process hearing were clearly made aware of at least the possibility of an unwritten departmental practice. Gish testified that he did not find Wren's comments at that hearing to be credible, because Wren offered no written proof of the existence of what was always described in this record as an

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<sup>23</sup> Gish acknowledged, and the documentary evidence confirms, that department heads normally conducted investigations and reviews of any matters which might lead to discipline of their subordinates. Although that practice was not followed in this case, the deviation is not found to be evidence of union animus in this instance, because of Pennington's questionable status.

unwritten policy. Apart from whether Gish believed what Wren had to say at the due process hearing, his abject refusal to consider or investigate the existence of such a policy provides support for an inference that Gish had his mind made up long before that hearing was held.

The Examiner finds overwhelming evidence supporting the existence of a policy by which Pennington allowed employees to obtain fuel for their personal vehicles at the employer's expense, if they had used their personal vehicles on business. Heuer, Wren, and Neves all credibly testified to such a practice.

Multiple witnesses recalled that Pennington encouraged them to submit requests for direct reimbursement for money expended on fuel for business use of personal vehicles, rather than submitting a mileage expense voucher, because it would be cheaper for the employer to pay for gas than it would be to reimburse for mileage at the IRS rate. Neves and Wren both recalled a squad meeting early in Pennington's tenure as chief, when Pennington told the employees that they should replenish their fuel tanks by using the employer's credit card if they used their personal vehicles for business. Neves thought the policy was meant to apply to any sort of city business, although he personally used the employer's credit card to fuel his personal vehicle only when he attended training. Heuer also believed that Pennington's policy was the same whether an employee used a personal vehicle to attend training or for other business on behalf of the employer.

Neves had witnessed Wren using his personal vehicle to drive to a discount store for supplies on behalf of the city, and he was aware that Wren had made other business trips in his personal vehicle. Both Neves and Heuer testified that, because Wren was the only bargaining unit employee who lived in Kalama, he used his personal

vehicle for employer business more frequently than they did. The record indicates that Pennington was aware of, and provided advance approval of, Wren's use of his personal vehicle on at least some occasions. Heuer testified:

Q: [By Mr. Skalbania] Did you observe any other of the officers using their personal vehicles on behalf of the City other than what you've described for yourself?

A: [By Mr. Heuer] . . . Chief Pennington and I, it was 4:00 o'clock we were discussing that we better get up there, shuttle up there and pick the Blazer up. Officer Wren pulled up in his personal vehicle with his wife and said hey, I'm going to Longview, I'll just pick up the Blazer on my way back. Chief Pennington said fine we're not going to have to worry about it and sat back down. I rode with Officer Wren one time and we took a patrol vehicle down to Vancouver to get the transmission worked on and he drove his vehicle and I drove the police car and he dropped the patrol vehicle off and he gave me a ride back. I know he made trips to Costco to pick up supplies for the police department. I know that in 1999 he took his truck, because we had tires that needed repair, and he went up and took the tires, the spare tires that had been put on, in fact there was two of them, and took the City vehicle tires and put them in the back of his truck, drove up to Longview Tire, dropped them off. And then the next day he went back up and picked them up again, again in his personal truck. . . .

Q: And it sounds like there's at least one or two occasions you've already described when Chief Pennington was right there when Officer Wren was using his personal vehicle for the City?

A: Yes.

Q: What was your understanding as to whether Chief Pennington had approved these other situations that you mentioned where Officer Wren had used his personal vehicle?

A: Well, I can remember as far as like the Costco for example, Pennington had known, he'd made the list for the supplies needed, he knew Wren had went to Costco in his vehicle. In fact eventually we found out that we shouldn't be making purchases in Oregon, we should be making them in Washington. So Pennington said at that point sorry, we can't go to Costco any more. The thing with Wren was in order for me to, say, if we needed to pick up a vehicle I'd have to come from Kelso to here and then go up to Longview or bring the vehicle back to Kalama. Wren lived in town so it was a case of - and Wren and Pennington had a close relationship. I mean, many a time on his days off he'd be down visiting with Pennington and instead of Pennington having to call one of us in to go help him go shuttle a vehicle, you know, I know Wren has went with him many times.

Heuer also testified about Pennington's directions when Heuer used his own vehicle during the flood in 1996:

A: [By Mr. Heuer] . . . So my emphasis on the flood, I might as well clarify that piece right off the bat, is at the end of spending from probably 1:00 o'clock probably until 9:00 o'clock running through town back and forth making trips with my truck Chief Pennington told me, he goes make sure you go to the city pump and replenish your fuel that you've used on this because you're using your truck for city business. And he told me that Mayor Munsey had told him that it would be fine. I was never a witness there when Mayor Munsey was saying that but that's what he told me. I told him at the time, I go, Chief, I don't know how much gas I had to start with. It



wasn't on full when I started it. Because that's the instruction he gave us when I'd take my personal vehicle out of town is he'd say just make sure you start out with your tank topped off with your own money then you come back and then you go and turn the receipt in to me. On that particular instance I told him my tank's not topped off and he goes, you know, I'm sure you drove at least \$5 worth of gas and I go oh, I absolutely have. And he was kind of almost annoyed that I was trying to cross the Ts and dot the Is. He said go pump \$5 of gas and you give me the receipt and that's exactly what I did.

Heuer testified that Pennington had given him similar directions on occasions other than the 1996 flood. He testified:

Q: [By Mr. Skalbania] You described for us some of these conversations that you had with Chief Pennington but I want to make sure we're clear. I'm not sure you directly answered a question of what was your understanding as to Chief Pennington's policy concerning if you used your personal vehicle on behalf of the City, what you should do in order to be reimbursed for that?

A: [By Mr. Heuer] You should go pump the gas at the pump, keep the receipt, initial the back of the receipt and give it to the chief and he kept it in an envelope.

While he saw the unwritten policy as a legitimate reimbursement for expenses incurred, Heuer acknowledged that he thought more specific record-keeping would be appropriate:

Q: [By Mr. Nelson] Well, you were an acting chief, you should know how the department should run, don't you think you should keep track of mileage in order to justify what you take out of the gas pump?

- A: [By Mr. Heuer] I think that's a good accounting policy. When I became the acting chief I did make some changes partly because of the circumstances but yes, I think now I would never - I would always have - mileage is the only way to do it.
- Q: Don't you think that before somebody filled up their gas tank to reimburse themselves they should get preapproval from the authority, either the acting chief or chief?
- A: I think that's a wise idea. I also know the Chief Pennington didn't operate - he operated - we'd call him, for example, on a call-out night. Initially it was need to call and make sure overtime is approved. Eventually he would tell us quit calling me, I trust you. And the same thing like with the phone policy, he threw out the phone logs saying I trust you to carry a gun, we don't need a phone log. So how I would do it personally wasn't the same way that Chief Pennington did it.
- Q: Are you saying Chief Pennington's policy is that any time an officer felt they were entitled to a tank of gas they could go get it and that would be sufficient?
- A: No, I think Chief Pennington would want to know if you pumped gas.

In April, Heuer clearly believed that Pennington's policy of using the employer's credit card to obtain "reimbursement" fuel did not violate the employer's general policy against personal use of the credit card, and that policy even remained the same when Heuer became the acting chief in June 1999. Heuer's after-the-fact realization that Pennington's policy was sloppy from an accountability standpoint does not justify retroactive enforcement of a standard which was not honored in the department in April 1999.

Wren testified of his belief that his actions on April 10 were consistent with Pennington's policy:

A: [By Mr. Wren] Yes, and that basically was it, his policy. He didn't say I want you to keep track of miles. He didn't say I want you to keep track of where you're going. Basically as my understanding of it was it was an honor type deal where if you used your vehicle for the City go replenish your gas. He didn't say anything about keeping track of anything. He didn't say anything about I want you to do it the day that you fill up or you use it or a month after you use it or three years after you use it or whatever. He just says, you know, go ahead and replenish your gas. And in the number of trips I did for the City wasn't to Costco so much, there was only maybe three or four trips to Costco, the majority of my stuff was running in here to Longview, taking tires in, taking vehicles in for maintenance, radio maintenance. The trip to Vancouver for the transmission shop. Midas Muffler, I mean, several times over the years I did that. And I thought it was only logical and reasonable to feel that instead of only driving, you know, 10 or 20 miles and going and putting in \$2 worth of gas and trying to figure that out, that wasn't logical because then he'd be getting these receipts, \$2 worth of gas, dollar and a half worth of gas and that would become an administrative nightmare. So I just let it pile up. And in fact there were times when, you know, I didn't even do anything about it. I mean, I just kind of forgot about it and come April 10, you know, I remember, hey, you know, I've done a lot for the City and that's how I came about pumping the gas.

Q: [By Mr. Skalbania] Did you have - when you went to Costco or you went to Longview shuttling tires or vehicles, what kind of communication did you have with Chief Pennington about those various activities?

A: Well, you know, since I was the only officer that lived within the city limits of Kalama I'd be down there quite a bit talk-

ing with him and visiting and helping him out to do odd things around the police department. And, you know, I'd told him that, you know, that I'd be happy to take that stuff and do that any time that I'm free to do that. So basically he told me that's fine. And so I thought like I just kind of had an open ended thing that, you know, if something needed to be done, you know, I would do it. And he wasn't always around. . . . So it was kind of an understanding that I felt between me and Chief Pennington that, you know, if those things had to be done he had no problem with it. If it had to be done get it done. And I know Officer Heuer and Neves, living in Kelso and Longview, you know, it was difficult for them to drive all the way in to go back out so I tried to do the majority of it, I didn't do it all but I did the majority of it.

Wren did not believe he had violated a prohibition contained in the employer's personnel manual,<sup>24</sup> because he believed he was reimbursing himself for work done for the employer on work time.

The testimony of former mayor Munsey confirmed the existence of an unwritten policy during Pennington's tenure as police chief:

Q: [By Mr. Nelson] Did you ever agree to a policy with Chief Pennington where you agreed that the officers could top off their tank using the City credit card in their personal vehicle?

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<sup>24</sup> Wren acknowledged signing for a manual of the employer's personnel procedures in 1998, and that document included a prohibition against using an employer credit card for personal use, but Wren indicated that neither Pennington nor any other employer official informed him of a necessity to read that manual, or of its contents. Wren put the manual in his desk, and never read it.

A: No, I never did. In fact, at the other hearing I would have fired Pennington if I would have known he was doing that. I'll have to be - *in all honesty I have to say that since that time there's no doubt in my mind that he had a verbal policy because I've talked to too many people that refreshed that in my mind besides some other policies he had that were unwritten.* I didn't get to know all the ins and outs about Chief Pennington until he was gone.

Q: Would you agree, looking back on your tenure as Mayor, that if you issued a specific directive or a personnel policy from yourself that that would override anything that was verbally from the police chief?

A: Well, if I had written policy it certainly would have to be followed. The situations I'm talking about is when I didn't write a policy and they'd do something.

Q: Mayor, on June 11, 1998, Mike Wren signed for a personnel policy that included a credit card policy that said there would be no personal use of the credit card. Despite what verbal policy there was you would agree that this should be controlling on the behavior of Mr. [Wren] at that point, is that right?

A: The personnel policy is a controlling factor. . . .

(emphasis added).

What is crucial here is that Gish charged ahead with his discharge of Wren even after he was informed of the existence of the unwritten policy described by his predecessor and numerous people associated with the Kalama Police Department.

Pennington was not called as a witness in this proceeding, and there was indication that he was out of the country when the hearing was held. Although the employer had made no effort to talk

with Pennington prior its discharge of Wren, Pennington was contacted subsequently by Jeff Davis, a Longview Police Department detective assigned in August 1999 to conduct an investigation of "misappropriation of funds" by Wren in connection with the matters at issue in this proceeding. Davis sent a questionnaire to Pennington, who was in Kosovo at the time, and Pennington returned that questionnaire with his answers in October 1999. The employer offered that questionnaire with Pennington's responses for the purpose of impeaching the testimony of other witnesses regarding Pennington's practices, but the Examiner does not find the employer's arguments persuasive. Reasons for that conclusion are:

- There was no opportunity for cross-examination of Pennington, to explore his responses in greater specificity, to examine his veracity, or to examine any underlying assumptions which he may have had when answering the questions.
- Certain of the questions put to Pennington differ from the employer's stated reasons for discharging Wren,<sup>25</sup> which could affect the relevance of Pennington's responses.
- The Examiner was able to observe the testimony of Neves, Heuer, Wren, and Munsey, and credits their testimony concerning the existence of an informal policy at the police department. The breadth and detail of their testimony, and the fact that the existence of the practice was related by both bargaining unit employees and a former employer official, support a finding that the practice existed as described by those witnesses.

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<sup>25</sup> Specifically, the employer has indicated that it only considered the April 10 incident, and certainly no more than three other incidents, as questionable. However, Pennington was asked whether he was aware that Wren had fueled his "personal vehicle" on 12 separate occasions.

- Pennington's response to the first question posed in the questionnaire acknowledges at least the existence of an informal practice by which employees were permitted to fuel their personal vehicles at the employer's expense.
- Certain of the responses in the questionnaire are potentially contradictory, or conflict with specific, credible testimony in the record.<sup>26</sup>

Rather than providing a basis to impeach other witnesses, Pennington's responses to the questionnaire tend to confirm that Wren used his personal vehicle for the employer's business (as uniformly described by the credible testimony of Heuer, Neves, and Wren) and leave room for numerous gaps in knowledge and communications.<sup>27</sup>

#### Wren's Explanation of Three Other Fuel Incidents -

While the record does not reflect specific discussion during the due process hearing of the three credit card usages Marty had earlier identified as questionable, those incidents were certainly

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<sup>26</sup> For example, Pennington's response indicating he did not authorize employees to fuel their personal vehicles except for training conflicts with Heuer's credible and highly detailed testimony regarding his interaction with Pennington during the flood in 1996. As noted above, Heuer, Neves, and Wren all testified credibly to their belief that the policy included business activities other than training. It is impossible for the Examiner to credit Pennington's written responses in the absence of cross-examination and the dignity of an oath.

<sup>27</sup> The record suggests there were at least some occasions when Wren's errands for the employer coincided with his own business, such as going to Costco. Pennington could have thought such trips were being made without any cost to the employer, and Wren could have overstepped the limits of Pennington's policy by seeking or obtaining reimbursement for those occasions. However, the record does not indicate the employer investigated those matters sufficiently to know what happened, and is insufficient for the Examiner to decide what actually occurred.

part of the background. Wren gave specific testimony about each of those incidents at the hearing in this matter.

- Wren noted that the incident in March 1998 occurred while the take-home car policy was still in effect, and he asserted that the credit card receipt was for fueling a police vehicle. He explained that March 9 was his fourth day off in a period of at least three weeks of sick leave, he knew he was going to be on sick leave for the rest of the month, and he took the police vehicle to the card lock gas station and filled it up before leaving it at the police station for other officers to use. Wren's explanation of that incident was credible.
- The records for the incident in April 1998 showed that Wren fueled a police vehicle when he was off-duty and had no take-home vehicle. Wren believed that was an occasion when he fueled the police vehicle he had used when he had "done some comp time" the previous day.<sup>28</sup>
- Wren did not recall what occurred in December 1998, when he obtained fuel but was not on duty. He opined that this was probably similar to the incident in April 1998, because he had visited the police station on a number of occasions when he was off duty, and had fueled police vehicles on some such occasions.

The employer's handling of those three incidents certainly does not help its case. Its labeling of the March 1998 incident as questionable was inconsistent with its disregard of other incidents which occurred while the take-home car policy was in

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<sup>28</sup> Although Wren acknowledged, under cross-examination, that such an action could have triggered an overtime claim, and that the police officers filed a claim against the employer under the Fair Labor Standards Act at some time, he testified that he and other employees did not file overtime claims on a number of other occasions.



effect. Although Wren's recall concerning the circumstances of the incidents in April and December of 1998 lacked specifics, Wren's explanations were not implausible, given the record (supported by testimony from both union and employer witnesses, as well as documentary evidence) that he frequently interacted with the police department when he was off-duty. The evidence that the employer did no more than a minimal investigation of those incidents also supports an adverse inference.

Conclusion -

The Examiner is aware of certain inconsistencies and inadequacies in Wren's explanation of events, and does not portray him as an innocent victim of circumstances beyond his control. The fact that nobody told him to read the personnel policies he signed for is no defense at all to allegations that he engaged in behavior prohibited by those policies. Accepting that Pennington had an unwritten policy in place, Wren was guilty of incredibly poor judgment by doing what he claims to have done on April 10, 1999. It should not surprise anyone that an employee will be called upon to answer some tough questions if he waits months or years to obtain reimbursement under an unwritten policy, acts without advance approval from a supervisor, and acts without any specific documentation of his claim. However, the question before the Examiner is whether the employer's decision was substantially motivated by Wren's union activities.

Based on the evidence that both Gish and Reynoldson bore an anti-union animus, the evidence that the employer deviated from its past practice of taking a casual approach to allegations of employee misappropriation of employer property or funds, and the evidence that Gish disregarded numerous clear indications of both a departmental policy and reasonable explanations, the Examiner rules that the union has met its burden of proof. The employer violated

RCW 41.56.140(1) and (3), by its discharge of Michael Wren in reprisal for his union activities protected by Chapter 41.56 RCW.

#### REMEDY

The customary remedy in a "discriminatory discharge" case is to reinstate the affected employee and to make the affected employee whole for lost pay and benefits. Such an order is appropriate, and is entered, in this case.

The union's general request for reimbursement for its attorney fees is denied. The customary remedies in unfair labor practice cases do not include attorney fees. The Commission has awarded attorney fees, but only as an extraordinary remedy in cases where there is a demonstrated pattern of repetitive misconduct or the respondent has asserted frivolous defenses. The union has not suggested any different standard is applicable here. This appears to be the first discrimination claim between these parties, and is certainly the first discrimination violation found against this employer, so the "repetitive misconduct" standard does not apply here. Wren's actions certainly provided some basis for employer scrutiny, and for repayment under Gish's past practice for any purchases Wren could not justify under Pennington's unwritten fuel replacement procedure, so the employer's defenses are not deemed "frivolous."

#### FINDINGS OF FACT

1. The City of Kalama is a municipality of the State of Washington, and is a public employer within the meaning and coverage of Chapter 41.56 RCW.

2. The Kalama Police Guild is a bargaining representative within the meaning of RCW 41.56.030(3).
3. The employer and union have had a collective bargaining relationship since December 13, 1996, when the Commission issued an interim certification designating the union as the exclusive bargaining representative of non-supervisory law enforcement officers employed by the employer.
4. The employer and union had an acrimonious bargaining relationship from shortly after the union was certified until at least December 30, 1999. They negotiated through 1997, 1998, and 1999 without reaching agreement on their initial collective bargaining agreement until December 30, 1999. The parties filed no less than 12 unfair labor practice complaints against one another between October 1997 and March 1999.
5. Michael Wren became an employee of the City of Kalama in 1990, and he was a non-supervisory law enforcement officer on and after December 13, 1996, in the bargaining unit represented by the union. Wren became the first president of that union, and he actively represented that union in contract negotiations, pay claims, and processing of grievances. Wren testified as a witness for the union in hearings conducted by the Commission on unfair labor practice cases involving these parties. His union role and activities were clearly known to the employer and other employees.
6. Michael Pennington was employed by the City of Kalama as chief of police prior to December 13, 1996, and he continued in that role until July 1999. While Pennington was chief of police, he promulgated or continued an unwritten policy under which employees were permitted to obtain fuel for their personal

vehicles at the employer's expense, by use of an employer credit card, to replace fuel consumed in the course of using the personal vehicle for travel to and from training or for conducting other business on behalf of the employer. Credible evidence in this record establishes that Pennington endorsed his unwritten fuel replacement policy notwithstanding the existence of written employer policies and procedures which permitted employees to file expense vouchers and receive reimbursement at the rate allowed by the federal Internal Revenue Service (IRS) for business use of personal vehicles, that Pennington preferred use of his unwritten fuel replacement policy as being less costly to the employer than mileage reimbursement at the IRS rate, and that Pennington's policy was widely known among the employees in the police department.

7. Michael Reynoldson held elective office as a member of the Kalama City Council prior to December 13, 1996, and continued in that role through at least July 1999. Reynoldson served as a member of the employer's bargaining team in collective bargaining negotiations with the union, and he took part in the processing of numerous pay claims and grievances advanced by Wren on behalf of the union. As a result of his role and activities on behalf of this employer, Reynoldson formed and held a negative opinion of Wren as a person who would create problems due to what he felt he had coming to him.
8. Bud Gish was elected to office as mayor of Kalama in 1997, took office in January 1998, and continued to hold that office through at least July 1999. Gish served as a member of the employer's bargaining team in collective bargaining negotiations with the union, and he took part in the processing of numerous pay claims and grievances advanced by Wren on behalf of the union. As a result of his role and activities on

behalf of this employer, Gish formed and held a negative opinion of Wren. Gish wrote an inflammatory letter to Wren, chastising Wren for having a "negative" and "unprofessional" attitude in his role as a union official. While attending a hearing held by another member of the Commission staff in another unfair labor practice case, Gish exhibited a demeanor which evidenced his dislike for Wren and the union.

9. Val Marty held the position of city clerk of the City of Kalama from at least January 1998 through at least July 1999. Actions by Marty and the finance staff she headed were the subject of numerous pay claims and grievances advanced by Wren on behalf of the union. As a result of her role and activities on behalf of this employer, Marty formed and held a negative opinion of Wren. While testifying as a witness in this proceeding, Marty's demeanor and statements evidenced her dislike for Wren and the union.
10. Gish took a very casual approach to allegations of employee misappropriation of employer property or funds which arose in 1998, with regard to employees using the employer's telephones to place personal long-distance calls at the employer's expense. Gish delegated responsibility to department heads to pursue the matter. Although Gish announced a policy prohibiting future personal long-distance telephone calls at the employer's expense, the sanction imposed for both past and future misappropriations was limited to having the employee(s) reimburse the employer for their personal telephone calls.
11. Gish took a very casual approach to allegations of employee misappropriation of employer property or funds which arose in 1997 or 1998, with regard to employees using employer-owned vehicles for personal transportation and/or errands. Although

he and/or other elected officials of the employer had received questions and/or comments from the general public, Gish declined to pursue a formal investigation in the absence of a written complaint.

12. On April 10, 1999, Reynoldson observed Wren at a card lock retail fuel facility where the employer had established credit card accounts for its employees to obtain fuel. At that time, Wren was fueling a vehicle which was not an employer vehicle.
13. On or shortly after April 10, 1999, Reynoldson informed Gish that he had observed Wren at the retail fuel facility, and made an oral request that Gish investigate whether Wren had obtained fuel for a personal vehicle at the employer's expense. In making that request to Gish, Reynoldson was substantially motivated by animus towards Wren's role in and activities on behalf of the union.
14. Gish did not take any immediate action on Reynoldson's request, but later deviated from his own professed policy by initiating an investigation of Wren without having a written complaint.
15. On an unspecified date during or about May 1999, Gish asked Reynoldson and Reynoldson's wife, who had been with Reynoldson when they together observed Wren at the retail fuel facility on April 10, 1999, to file written statements. Gish also sought to have Wren's actions on April 10 investigated by another law enforcement agency. After his request for an investigation was rejected by the Cowlitz County Sheriff's Department, Gish arranged in June 1999 to have Wren's actions on April 10 investigated by a risk management agent from an insurance firm, Tom Pickett.

16. Pennington was on disability leave in June 1999, and Sergeant Robert Heuer was serving as acting chief of police. Heuer was familiar with the unwritten fuel replacement policy applied by Pennington, and he did not take any steps to alter or cancel that policy prior to July 2, 1999.
17. Pickett visited Kalama on June 17, 1999, was provided limited information by the employer as the basis for his investigation, and was told by both Gish and Marty that there were no separate personnel policies for the police department.
18. Pickett interviewed the Reynoldsons, Marty, Wren, and Heuer on June 17, 1999. Although Wren acknowledged that he obtained fuel for his personal vehicle at the employer's expense on April 10, 1999, and both Wren and Heuer mentioned Wren's use of his personal vehicle for conducting the employer's business, the record does not establish whether Wren or Heuer specifically informed Pickett of the unwritten fuel replacement policy applied by Pennington. Pickett was not directed to interview, and he did not interview, Pennington.
19. On or about June 22, 1999, Marty produced a list of incidents when bargaining unit employees obtained fuel at the card lock facility on days when they were not at work or on call. Wren was identified as the employee who obtained fuel on 12 of those occasions. Although the employer disregarded all other incidents prior to the change of a take-home car policy on March 30, 1998, including 8 incidents involving Wren, it listed a transaction involving Wren earlier in March 1998 as one of four suspicious transactions. The employer did not conduct any further investigation of the transactions other than the incident which occurred on April 10, 1999, and did not ask Wren about them at that time.

20. On June 25, 1999, Pickett sent a letter to Gish, in which he set forth the results of his investigation without any recommendation as to any followup actions to be taken.
21. In a conversation in June 1999, Heuer specifically informed Gish of the existence of the unwritten fuel replacement policy applied by Pennington.
22. Gish, Marty and two other employer officials discussed the allegations, and concluded that Wren's employment should be terminated. Gish sent a letter to Wren on June 29, 1999, offering a due process hearing to be held on July 2, 1999.
23. Gish prepared a discharge letter in advance of the due process hearing scheduled for July 2, 1999.
24. Wren appeared at the hearing on July 2, 1999, without benefit of counsel or union representation. Gish and two other employer officials were in attendance. Wren asserted that he obtained fuel on April 10 in conformity with the unwritten fuel replacement policy applied by Pennington.
25. On July 2, 1999, Gish signed the previously-prepared discharge letter, terminating Wren's employment as of that date.
26. Even though employees have no ascertainable right to misappropriate employer funds or property, under the policies and practices historically applied by Gish and this employer, any misconduct by Wren or similarly situated employees involving obtaining fuel for a personal vehicle at the employer's expense would have been a basis for requiring reimbursement of the employer, but would not have been a basis for discharge of the employee(s).



27. In deviating from his own professed policy of conducting investigations of alleged employee misconduct only upon written complaints, in deviating from the casual approach he applied in at least two previous situations involving alleged misappropriation of the employer's property or funds by employees, and in failing or refusing to consider the unwritten fuel replacement policy actually in effect within the police department, Gish was substantially motivated by animus against the Kalama Police Guild and Wren's activities for and on behalf of that union.
  
28. When Heuer and another employee disclosed to Gish, shortly after July 2, 1999, that they had obtained fuel for personal vehicles under the fuel replacement policy applied by Pennington, Gish inherently acknowledged the existence and validity of that unwritten policy in making a casual response to those disclosures that was consistent with his actions as described in paragraphs 10, 11, and 26 of these findings of fact, and Gish did not impose any discipline upon those employees.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.
  
2. By its discharge of Michael Wren substantially motivated by animus against the Kalama Police Guild and the previous activities of Michael Wren for and on behalf of that organization, as described in the foregoing findings of fact, the City of Kalama has discriminated against Michael Wren in reprisal for his union activities protected by Chapter 41.56 RCW, and has committed an unfair labor practice in violation of RCW 41.56.140(1).

ORDER

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

1. CEASE AND DESIST from:
  - a. Discharging or otherwise discriminating against Michael Wren for his activities for and on behalf of the Kalama Police Guild.
  - b. In any other manner, interfering with, restraining or coercing its employees in the 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 Michael Wren immediate and full reinstatement to his former position or a substantially equivalent position, and make him whole by payment of back pay and benefits in the amounts he would have earned or received from the date of the unlawful discharge to the effective 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.
  - b. 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 respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the

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 city council of the City of Kalama, 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 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 complainant with a signed copy of the notice attached to this order.
- 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 attached to this order.

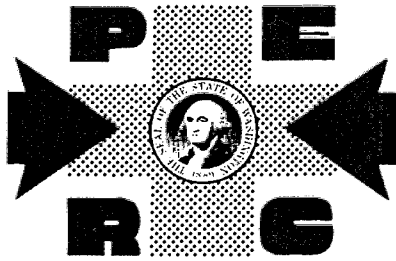
Issued at Olympia, Washington, on the 27<sup>th</sup> day of June, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARTHA M. NICOLOFF, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.



# 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 discriminate against Michael Wren in reprisal for his activities for and on behalf of the Kalama Police Guild.

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

WE WILL offer Michael Wren immediate and full reinstatement to his former position or a substantially equivalent position, and will make him whole for his lost pay and benefits.

WE WILL read this notice into the record at an open, public meeting of the Kalama City Council, and will permanently append a copy of this notice to the minutes of the meeting where it is read.

DATED: \_\_\_\_\_

CITY OF KALAMA

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.