STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

YAKIMA POLICE PATROLMANS ASSOCIATION,	)	
Complainant,	)	CASE 21562-U-08-5494
vs.	)	DECISION 10270 - PECB
CITY OF YAKIMA,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	)	

Cline & Associates, by *Reba Weiss*, Attorney at Law, for the union.

Menke Jackson Beyer Elofson Ehlis & Harper, LLP, by *Kirk A. Ehlis*, Attorney at Law, for the employer.

On February 29, 2008, the Yakima Police Patrolmans Association (union) filed a complaint charging unfair labor practices against the City of Yakima (employer) with the Pulbic Employment Relations Commission. A preliminary ruling was issued finding causes of action for multiple allegations of unfair labor practices. A hearing was held on June 3, 4, 5, and 6, 2008, before Examiner Sally B. Carpenter. The parties filed post-hearing briefs.

ISSUES

1: Did the employer make a unilateral change in a mandatory subject of bargaining by:

A. Extending the duration of the Detective Sergeant in Training (DST) position from one year to two years?

B. Failing to post the DST position in the fall of 2007?

C. Failing to complete the investigation of misconduct allegations before using such allegations in an employee's evaluation?

2: Did the employer refuse to provide relevant information requested by the union concerning consultant reports?

3: Did the employer discriminate against Officer Elaine Gonzalez in reprisal for protected union activities?

4: Did the employer interfere with employee rights by the Police Chief's addition of negative comments to Gonzalez's evaluation?

I find that the union has carried its burden of proof on each of the allegations listed above. The employer interfered with employee rights in violation of RCW 41.56.140(1), discriminated against Elaine Gonzalez in violation of RCW 41.56.140(1), and refused to bargain in violation of RCW 41.56.140(4).

STATUTE OF LIMITATIONS

The complaint was filed in this case on February 29, 2008. The statute of limitations for unfair labor practice complaints is six months.[1] Events occurring prior to August 29, 2007 are discussed solely as background to establish context leading to allegations

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[1] RCW 41.56.160--COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS AND CEASE AND DESIST ORDERS.

(1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.

made in this current case.[2] Events prior to August 29, 2007 are not determinative in this case.

APPLICABLE LAW

Refusal to Bargain and Unilateral Changes

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, gives the Commission jurisdiction over unfair labor practice complaints. It is an unfair labor practice for a public employer to refuse to engage in collective bargaining. RCW 41.56.140(4). Absent a union waiving its statutory right to notice and opportunity to bargain, an employer is prohibited from making unilateral changes in wages, hours and working conditions, whether those matters are covered in the parties' collective bargaining agreement or in the past practices of the parties. An employer commits an unfair labor practice if it fails to bargain concerning a mandatory subject of bargaining. *State - Social and Health Services*, Decision 9551-A (PSRA, 2008).

Mandatory subjects of bargaining are wages, hours and working conditions. RCW 41.56.030(4). When called upon to determine whether a particular proposal or topic is a mandatory subject of bargaining, the Commission uses a balancing test under *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197 (1989). "It is well established that the duty to bargain imposes a duty to give notice and provide opportunity for good faith bargaining prior to implementing any change of practice concerning the wages, hours, or working conditions of bargaining unit employees." *City of Pasco*, Decision 9181-A (PECB, 2008).

For an interest arbitration-eligible group, the employer may not unilaterally implement a change if good faith bargaining fails to

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[2] *City of Fircrest*, Decision 5094 (PECB, 1995).

reach an agreement. The status quo must be maintained until an interest arbitrator has issued a decision.

Timely notice of a proposed change is essential. Early in its planning process, an employer must give notice to the union so that the union may decide whether to request bargaining on the issue. If the union requests bargaining, there must be time for it to formulate proposals and for both sides to enter into good faith bargaining. A *fait accompli* will be found if the employer has planned a decision which the union cannot influence in bargaining.

> In the absence of formal notice, however, it must be shown that the union had actual, timely knowledge of the contemplated change. The Commission's focus should be on the circumstances as a whole, and on whether an opportunity for meaningful bargaining existed. If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain if requested, then a fait accompli should not be found.

City of Edmonds, Decision 8798-A (PECB, 2005), quoting *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998).

A pattern and practice between the employer and union can become a silent part of the parties' collective bargaining agreement. The employer cannot make unilateral changes in past practices. For a past practice to exist, two basic elements are required: (1) an existing prior course of conduct; and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as the proper response to the circumstances. *City of Pasco*, Decision 9181-A. Past practices create enforceable expectations in a collective bargaining relationship.

A law enforcement workplace is extremely complicated, with shift work, specialty assignments, and constant training needs requiring

frequent changes in working hours. This challenges the police officer to balance a career in law enforcement with family and community obligations. Thus, the delicate precision of: shift bidding, how assignments are obtained, when notice of a change is given, and what assignments are necessary for promotional opportunities all have a critical significance. Law enforcement past practices are more precise, detailed, and subtle than in simpler industries. The United States Supreme Court recognized and underlined this in a series of three 1960 decisions called the Steelworkers Trilogy. "[T]he industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement, although not expressed in it." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The *Warrior* case quotes with approval, "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages."[3]

Analysis - Refusal to Bargain - Unilateral Changes

There are three unilateral change allegations in this case.

Issue 1: A. Did the employer make a unilateral change in a mandatory subject of bargaining by extending the duration of the Detective Sergeant in Training (DST) position from one year to two years?

The employer's police department includes 120 police officers and sergeants who are represented by the union. In September 2003, Sam

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[3] Quoted by the Supreme Court from Cox, "Reflections Upon Labor Arbitration," 72 Harv.L.Rev. 1482, 1498-1499 (1959).

Granato was appointed as Police Chief. Chief Granato did not have prior law enforcement experience in Washington State. The employer and the union have a mature bargaining relationship which has developed over many years.

Several essential scheduling issues are historically imbedded in the parties' relationship. One scheduling issue was the parties' past practice of doing shift bidding for patrol positions on an annual calendar basis. Shift bidding was done in October or early November for the following year. Work shifts were for one year. Another scheduling past practice of the parties was that temporary police officer reassignments could not exceed six months.[4]

Assignment to the detective roster was also guided by past practices. The police department rotates officers and sergeants through its divisions, initiated by the employee's request in response to the employer's job posting. A detective assignment requires training and experience developed on the job, thus typical detective assignments last for approximately five years.

In 2006, the shift roster for the police department consisted of three divisions:

- Patrol - two teams. Each team had 31 officers and sergeants, for a total of 62 employees.

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[4] The Policy and Procedure manual for the Yakima Police Department provides that "No employee shall be required to work more than six consecutive months . . . unless by request." Manual Section 5.06.01. Testimony indicated that the parties had a long history of applying this language to their practice that the maximum duration of a special assignment was six months unless otherwise agreed to.

- Detective [or Criminal Investigation Division] - four assignment areas, 23 officers and sergeants.
- Special Operations - three assignment areas, 19 officers and sergeants.

Assignment to a division is guided by past practice. Specialty positions, those in the detective and special operations divisions, are normally multi-year tasks. Annual decisions are made on how to fill the specialty positions. Management first decides which employees to keep in their current specialty slot. Next, management posts openings for the soon-to-be-vacant positions in specialty jobs and then selects individuals to fill the positions. Finally, patrol shifts are filled by shift bidding based on seniority. Employees bid for their preferred patrol shift. The union learns who has been assigned to a specialty position by the absence of that employee's name from the patrol shift bid seniority list.

The DST position was created in 2005. On August 25, 2005, Chief Granato issued a memo regarding "Department Reorganization." He wrote in part:

> The Detective Division will add another Sergeant's position. This sergeant's position will be a one-year career development position. It will give sergeants who lack recent detective experience an opportunity to gain experience in investigation and crime scene management. The purpose of this position is to more fully develop sergeants, who may not have had an opportunity to be assigned to detectives recently, the skills needed so they could supervise and manage major crime investigations. This position will rotate by seniority.

The union was not consulted prior to the issuance of this memo. While the union considered filing a failure-to-bargain complaint or

a grievance, they decided not to do so after having internal discussions and some conversations with management.

There were two primary factors that the union considered in permitting the new DST position to proceed unchallenged. One was the opportunity for skills development and improvement in the quality of the department's work. The union president testified, "we had approximately seven sergeants with no investigative skills, . . . I was hoping they were going to get . . . an opportunity to learn about crime scene management."[5] He went on to testify that it was not a pure seniority assignment. Sergeants who were already in specialty positions, who had recently served as detectives, or who were nearing retirement would not be placed in this one-year training position. Like most specialty positions, the DST assignment had: regular Monday through Friday work assignments with nights, weekends and holidays off; an assigned take-home car; paid clothing allowance; and other benefits. With these understandings as to posting, duration, seniority assignment, benefits, and training, the union acceded to the new one-year DST position. Thereafter, Chief Granato posted the opening for the new position in August 2005, as follows:

> Detective Sergeant (Career Development Position):
> As stated on the Department reorganization memo, Sergeants who lack recent experience in the Detective Division will fill this position. This slot is a one-year rotation and is filled by seniority.

In 2006 the DST position was filled by Sergeant Bob Hester, who was appointed by seniority and lack of recent detective experience. In 2007 the position was filled by Sergeant Lloyd George. The unilateral charge issue in this case arose from the Chief's assignment of Lloyd George to a second year in the DST position.

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[5] The 2006 shift roster identifies 15 sergeants.

On October 3, 2007, the employer posted the 2008 shift bidding list for patrol division positions, with bidding to begin immediately. Officers and sergeants who were assigned to specialty positions were not on the list. Sergeant Lloyd George's name was not on the list. He held the 2007 one-year position of Detective Sergeant in Training (DST).[6] Based on past practice, the union expected him to return to the patrol division and to be on the October shift bid list. The union filed a grievance that same date. The Chief testified he consulted legal counsel and was told he was required to bargain the change in the duration of the DST position from one year to two years.

On October 9, 2007, Chief Granato sent the union president a letter beginning, "This memorandum will serve as formal notice to the Association the Department is considering the expansion of the assignment for the Detective Sergeant Training Position from a one year to a two year assignment."

Meanwhile, shift bidding for 2008 patrol division assignments had begun on October 3. On October 23, bidding was completed and the final shift roster was issued. Sergeant Lloyd George was assigned to the position of DST. Sergeant Brenda George was on the patrol list.

By letter of October 22, 2007, the Chief wrote the union, "The City stands ready to bargain the proposed extension of the Detective Sergeant Training position." The employer and the union met to bargain on November 16, 2007. The tape recording of the meeting was transcribed by a court reporter. The transcribed conversation

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[6] The senior sergeant next in line for the DST position was Sergeant Brenda George. She was the sergeant who was at Yakima Police Athletic League (an assignment in the special operations division) during the Crystal Dodge incidents described later.

shows no genuine openness by the employer to any program other than expansion of the DST assignment from one year to two years for Sergeant Lloyd George in 2008. The Chief did not make any proposal to modify, postpone or in any other manner revise his proposal. The employer engaged in surface bargaining. The union did not agree to the proposed change.

On November 21, 2007, the Chief sent a letter to the union stating in part, "Please be advised that I plan on implementing the changes to the Detective Sergeant in Training position rotation that I have previously proposed as of January 1, 2008."

The Commission's balancing test is used to determine whether the issue here, the duration of a specialty assignment, is a mandatory subject of bargaining. On one side of the balance is the relationship the topic bears to employee wages, hours and working conditions. On the other side is the extent to which the topic is a management prerogative.

Shift bidding on a 24-hour-a-day, seven-day-a-week operation is a central issue for police officers and sergeants. Employees bid annually for their next year's work schedule in the fall. Reassignments, such as from patrol to detectives, or back to patrol, are given before beginning the shift bidding process. This notice of reassignment allows police officers and sergeants to correctly participate in shift bidding.

A change in the duration of a specialty assignment is a mandatory subject of bargaining. The employer presented the union with a *fait accompli* when it posted the 2008 bidding list on October 3, 2007. The employer violated its duty to maintain the status quo until either the parties reached agreement at the bargaining table, or an interest arbitration award gave the employer the ability to

make the requested change. The employer did not give pre-decision notice to the union. The employer engaged in surface bargaining while bidding on the roster proceeded. The employer planned a decision which the union could not influence in bargaining.

Issue 1: B. Did the employer make a unilateral change in a mandatory subject of bargaining by failing to post the DST position in the fall of 2007?

Like the duration of a specialty assignment, the posting of a specialty assignment position has a similar effect on employee wages, hours and working conditions, and is a mandatory subject of bargaining.

The parties' current collective bargaining agreement, executed September 11, 2007, requires the employer to post openings in non-patrol positions: "Art 23, Section 10-Notice of Specialty Openings. Notice of all openings for specialty positions will be posted." Because this agreement language states "all openings" for specialty positions will be posted, the employer had a duty to post the DST position in 2007. In addition, the past practice, beginning in 2005, was to post the position each year. The employer changed a mandatory subject of bargaining without prior notice to the union and an opportunity for good faith bargaining.

Issue 1: C. Did the employer make a unilateral change in a mandatory subject of bargaining by failing to complete the investigation of misconduct allegations before using such allegations in an employee's evaluation?

Officer Elaine Gonzalez signed her two-year personnel evaluation on August 28, 2007, after her two sergeants had prepared and signed the evaluation. The employee signature line on the evaluation form recites, "I hereby certify that I have reviewed this evaluation in

the presence of the rater and have received a copy. . . ." The signature line conveys a message that the evaluation is complete at the time the employee signs. In late September 2007, Officer Gonzalez received another copy of her evaluation from her sergeant. The new copy had negative comments written by Chief Granato, who stated, "I do not concur in the area of civilian contacts. There is a pattern of rudeness to citizens." The sergeant supervising Gonzalez and other witnesses testified they had never seen an addition to an evaluation after the employee had signed it. No citizen complaints against Officer Gonzalez had been completely investigated and sustained during the time period covered by the evaluation.

The relationship of performance evaluations to employee wages, hours and working conditions must be balanced with management prerogatives. An examiner in *Seattle School District*, Decision 8976 (PECB, 2005), citing previous decisions, reiterates that job evaluations affect employee working conditions, because they are often "considered by employers and arbitrators in making judgments about matters affecting job security . . . ." Employees have a reasonable expectation that the employer will not change its evaluation practices, absent fulfillment of its bargaining obligations. An evaluation is a working condition because it can impact the employee's ability to get specialty assignments and promotions for the rest of their career.

The employer introduced a few evaluations in which "attaboy" comments had been added by the employer. However, no evaluation other than Officer Gonzalez's had a negative comment added after the employee had signed it. No prior incidents had occurred where incomplete investigations into citizen complaints had been noted on an employee's evaluation. The employer changed a mandatory subject of bargaining without prior notice and an opportunity for good faith bargaining, by failing to complete the investigation of

misconduct allegations against Officer Gonzalez before using such allegations in her evaluation.

APPLICABLE LAW

Refusal to Provide Information

It is an unfair labor practice for a public employer to refuse to engage in collective bargaining. RCW 41.56.140(4). The Commission has stated that the duty to bargain includes a duty to provide relevant, necessary information requested by the opposite party for the proper performance of its duties in the collective bargaining process. *Port of Seattle*, Decision 7000-A (PECB, 2000). This is consistent with viewing the duty to provide information as part of an ongoing and continuous obligation to bargain. Union requests for information pertaining to employees in the bargaining unit represented by that union are presumptively relevant. *Port of Seattle*, Decision 7000-A; *City of Bremerton*, Decision 6006-A (PECB, 1998).

There are three elements of proof required for a finding that an employer unlawfully refused to provide information. Those elements are: (1) the union is the exclusive bargaining representative of the employees involved; (2) the union requested existing information relevant to the performance of its functions in collective bargaining or contract administration; and (3) the employer failed or refused to provide the requested information.

When a union requests information, the employer must respond. The employer has a duty to explain any confusion about, or objection to, the request, and then negotiate with the union toward a resolution satisfactory to both parties. *Port of Seattle*, Decision 7000-A; *Seattle School District*, Decision 5542-C (PECB, 1997). In *Seattle School District*, Decision 5542-C, the Commission further holds that an employer must discuss the requested items with the

union "so as to attempt to reach a mutually acceptable compromise or accommodation on the request."

For instance, in the Seattle School District case, employees were first placed on administrative leave, then discharged. The employer took the position that it had no duty to disclose investigation documents unless and until the employees were fired. The *Seattle School District* decision specifically rejects that contention. The Commission held that an employer must respond to the union's requests during the process, not after the termination is completed.

In the *Port of Seattle* decision, the employer declined to produce foreman time logs and payroll labor reports. The Commission found a violation because the employer did not explain its concerns to the union and make a good faith effort to reach agreement with the union on its request. If an employer believes a document request is irrelevant or unclear, it is obligated to timely communicate its concerns to the union. *Pasco School District*, Decision 5384-A (PECB, 1996).

A party has an obligation to make a good faith effort to locate the information requested. *City of Seattle*, Decision 10249 (PECB, 2008). Any objection by the employer to providing requested documents must be handled through clear and prompt communication in the form of dialogue with the union.

Analysis - Refusal to Provide Information

Issue 2: Did the employer refuse to provide relevant information requested by the union concerning consultant reports?

The police department supervises a program called Yakima Police Athletic League (YPAL). A police sergeant and two police officers

are assigned full-time to work on the premises of YPAL with youth from the community. YPAL is a non-profit corporation run by a Board of Directors. Chief Granato was chair of the board in 2006. YPAL had one employee in 2006, Crystal Dodge. Her position was paid by grant funds. Dodge provided support services to the police officers and sergeant who staffed the program.

In January 2006, Sergeant Brenda George was assigned to YPAL. Two officers reported to her, Ben Hittle and Rey Garza. Crystal Dodge complained to Sergeant George that Officer Hittle was harassing her because she had a physical handicap. Sergeant George spoke to Hittle and reported the allegation to her supervisor, Captain Light. Light then spoke to the captain from 2005, who confirmed Hittle's behavior towards Crystal Dodge was an ongoing issue.

Chief Granato found out about Crystal Dodge's allegations at a meeting on the YPAL premises on March 1, 2006. Granato told Hittle if it was going on, to quit it. Ben Hittle was a friend of the Chief. Within a month the Chief reassigned Sergeant George to patrol duty. In early June, 2006, Crystal Dodge left YPAL and obtained legal counsel. Her attorney filed a handicap discrimination claim against the employer.

The employer hired a consultant to investigate the charge of unlawful workplace discrimination. The first consultant the employer hired, Carolyn Cairns, was fired in December 2006 after she submitted her preliminary report. The Cairns report was critical of the police administration, finding that the Chief's "actions and inactions were motivated in substantial part, by retaliation based on Dodge's discrimination complaints regarding Hittle . . . ." The Cairns report goes on to recite many instances of statements made by the Chief and others, concluding, "It is therefore not at all surprising that various witnesses are concerned that he will retaliate." A second consultant hired by

the employer, Kris Cappel, submitted a report with different conclusions six months later. In response to the Cappel report, the Chief wrote his city manager, "I believe appropriate action and discipline was administered by me (to Officer Hittle) at the March 2006 meeting."

In the course of these investigations, many employees were interviewed by the consultants. All interviewed employees for the second report (Cappel report) were given their *Garrity* rights.[7] *Garrity* rights are only given when the matters at issue involve criminal misconduct. Sergeant Brenda George was one of the individuals given her *Garrity* rights.

Chief Granato wrote an apology letter to Crystal Dodge on September 11, 2007.[8] He concludes that letter by saying, "The Command Staff supervisors involved have been appropriately disciplined. The failure to supervise by the first line supervisor is under review and discipline if any has yet to be determined." The first line supervisor at YPAL was Sergeant Brenda George.

The employer received the first consultant's report from Cairns on the situation at YPAL in December 2006. On February 28, 2007, the union filed its first request for documents; by letter to the city manager the union requested a copy of the Cairns report. The union withdrew that request, substituting a formal request.

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[7] *Garrity v. New Jersey*, 385 U.S. 493 (1967), concerned police officers allegedly involved in fixing traffic tickets. In *Seattle Police Officers' Guild v. City of Seattle*, 80 Wn.2d 307 (1972), the Supreme Court of the State of Washington followed the *Garrity* holding, stating, "Thus an employee knows that if he fails to divulge information pertinent to the issue of his use or abuse of his public trust he may lose his job."

[8] The Chief's letter was dated within the six-month statute of limitations for the complaint in this case.

On March 13, 2007, the union made its formal request for the Cairns report, specifically stating that the request was not made under the Public Disclosure Act. "We are claiming our rights to the report under Collective Bargaining rights R.C.W. 41.56 and the City of Yakima/Yakima Police Department Collective Bargaining Contract." The union's request for information goes on to enumerate reasons why the report is relevant to the union's duty to represent its members. There is no record of any response from the employer to the union's March 13 request.

However, the employer's attorney, Jeff Kruetz, had responded to the union's former withdrawn request by letter dated February 12, 2007. It gave the following three reasons for refusal:

> Pursuant to RCW 42.56.250(5), investigative records compiled by an agency are not subject to disclosure pending the conclusion of the investigation. . . . [S]ome or part of the records and related documents may be subject to the attorney-client privilege and therefore exempt from public disclosure. . . . [S]ome of the documents you requested may have been prepared in anticipation of litigation and therefore exempt under the work product exemption, they may not be disclosable.

The union's request for information was prompted by complex events around the handicap discrimination charge filed against the employer. In response to an anonymous whistleblower complaint, the employer commissioned the first consultant report by Cairns. A video conference report meeting was held between Cairns, City Manager Zais, Police Chief Granato, City Attorney Ray Paolella, and Helen Hawley on November 7, 2006. The Chief rejected Cairns' findings, and the meeting concluded with the Chief having an opportunity to suggest other witnesses or provide other evidence. A week later the Chief's attorney wrote the employer a letter asserting that the Chief believed he had an attorney-client relationship with Cairns, and thus she could not use what he told her in her report. The employer terminated the contract with

Cairns after she delivered a written report to the employer dated December 1, 2006.

The employer then hired a second consultant, Kris Cappel. Cappel's report is dated May 17, 2007. It comes to strikingly different conclusions than that of the Cairns report. The Cappel report was accepted by the employer.

On September 28, 2007, the employer issued a press release captioned, "YPAL Whistleblower Complaints Investigation Completed." Shortly thereafter there was a local newspaper article about the investigation, and redacted copies of both consultant reports were posted on the newspaper's website. The union obtained redacted copies of the reports from the website.

On December 4, 2007, in a formal letter from the union to the employer, the union's written request for information was renewed and expanded. In addition to previous requests, the union requested all interview notes and background information used by the consultants to form their opinions and reports.

Kruetz, the employer's attorney, responded to the union's December 4 request on December 13, 2007, with a letter and thirteen enclosed documents. The letter begins with "This letter is written in response to your December 4, 2007 Public Records Act request." The thirteen documents are then listed, followed by the employer's reasons to redact information:

> The redacted information in these documents was redacted pursuant to the American With Disabilities Ace, HIPPA, and Washington's Healthcare Information Act, Chapter 70.02 RCW. Additionally, pursuant to RCW 42.56.230(2) personal information that would violate an individual's right to privacy has been redacted from the enclosed documents.

This December 13, 2007, response is the only information given to the union by the employer. It does not provide all the documents requested by the union, nor does it explain why all documents are not produced. It did not include any interview notes or background information used by the consultants, nor mention that part of the union's request. The employer did not offer to meet with the union to discuss the request.

On December 17, 2007, the union sent another letter to Kruetz, the employer's attorney. The letter repeated that the request for information was made under Chapter 41.56 RCW, explained the employer's duty to respond, and raised questions concerning whether, even under the Public Disclosure Act, the production of documents could be limited. The letter stated, "That certainly has not been how the City of Yakima has responded to past requests nor how I have seen other agencies respond. That simply seems to be an effort by the City to keep secret the underlying information." The employer did not respond to this letter.

No unredacted copy of the consultant reports was ever provided to the union. No response was ever provided to the union's request for the interview notes and background information used by the consultants in preparation of their reports. The employer did not provide any evidence it made an attempt to obtain the documents sought by the union.

The employer had a duty to provide information to the union as part of its ongoing and continuous obligation to bargain. *Seattle School District*, Decision 5542-C, specifically holds that an employer has the duty to provide requested information to a union at the time the investigation is proceeding so that the union may carry out its responsibilities toward its members.

If the employer has concerns about releasing information to the union, it must explain any confusion about, or objection to, the request and then negotiate in good faith with the union toward a resolution satisfactory to both parties. It cannot dictate what will be released and when it will be released. *Port of Seattle*, Decision 7000-A; *City of Seattle*, Decision 10249; and *Seattle School District*, Decision 5542-C.

The union had a member (Sergeant Brenda George) whose conduct was under review for possible disciplinary action as a result of the YPAL events. The union had a legitimate interest in the details of the YPAL investigations as contained in the consultant reports.

The employer has a duty to provide documents immediately to the union upon request. The employer has a duty to obtain copies of documents which it does not have but presumably could obtain. If the employer has any concerns, it has a duty to immediately share those in open communications with the union. The employer failed to carry out its duties under the law.

APPLICABLE LAW

Discrimination

The Commission decides discrimination cases under standards drawn from decisions of the Supreme Court of the State of Washington. The test for discrimination is:

> A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. *See Educational Service District 114*, Decision 4361-A (PECB, 1994), where the Commission embraced the standard established by 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). A discrimination violation can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so.
2. The employee was deprived of some ascertainable right, status or benefit.
3. A causal connection exists between the protected union activity and the action claimed to be discriminatory.

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. The employer does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Seattle School District, Decision 9628-A (PECB, 2008).

Analysis - Discrimination

Issue 3: Did the employer discriminate against Officer Elaine Gonzalez in reprisal for protected union activities?

Officer Elaine Gonzalez was an active leader and member of the bargaining team of the union, prior to and during Chief Granato's time. The parties' collective bargaining agreement expired on December 31, 2005. On September 1, 2006, the Commission certified 17 unresolved issues for interest arbitration.

On September 19, 2006, Officer Gonzalez and the union president met with the mayor and a city council member. Gonzalez and the union president complained to the elected officials about Chief Granato's breach of traditional negotiating processes. The union said that: (1) the Chief had given a public speech and had gone to the newspaper supporting mandatory random drug testing of officers

prior to the first negotiating session; (2) the Chief told the union there was a random testing procedure for Yakima management but no such policy was produced; and (3) the Chief continued to take the issue to the public rather than keeping it at the bargaining table.

On January 1, 2005, prior to difficulties at the bargaining table, Officer Gonzalez had been transferred into "major crimes", in the detective division. The assignment was a good career step. Typically an assignment to major crimes lasts approximately three to six years, with five years being average.

On September 21, 2006, Officer Gonzalez was told she would be transferred out of detectives. It was two days after the meeting with elected officials. It was three weeks after the parties had been certified for interest arbitration. Her supervisor, Sergeant Levno, told Officer Gonzalez that the Chief had made the decision and had decided her time in detectives was up. The union filed a grievance. On November 2, 2006, Captain Schnieder called in Officer Gonzalez and told her that he had made the transfer decision because she was getting burned out. During the time Officer Gonzalez was in major crimes, the department sent her to many advanced crime scene trainings. Her performance warranted retention and extensive training until her sudden September transfer. No credible explanation was given for the precipitous change from being approved for training to removal from detectives. Sixteen of the 17 certified issues were settled before the matter was finally submitted to Arbitrator Michael Beck. The final open issue was the question of whether the employer's proposal for random drug testing would be included as a collective bargaining agreement provision. Officer Gonzalez testified against the employer's proposed drug policy in the interest arbitration hearing held in June 2007. The random drug testing dispute was emotional, lengthy, and a matter of principle for both sides. The drug

testing dispute was frequently covered and commented on by the local media. A fired police officer claimed he was terminated because of the friction over the employer's proposed drug testing. Beck's award was issued on December 4, 2007. The award states, "The random drug testing proposal of the Employer is rejected. The Union proposal of no random testing is awarded."

On August 28, 2007, Officer Gonzalez was given the original of her two-year performance evaluation, covering the period from June 1, 2005, to May 31, 2007. Typically performance evaluations are for one-year periods. Two different sergeants who had been her supervisors completed the form. Gonzalez signed the original of the evaluation at that time and was given a copy.

In late September 2007, Officer Gonzalez received another copy of her evaluation from her sergeant. The new copy had negative comments written by Chief Granato, "I do not concur in the area of civilian contacts. There is a pattern of rudeness to citizens." The statute of limitations for the complaint in this matter began on August 29, 2007.

Officer Gonzalez engaged in protected activities. There was close timing between her protected activities and adverse actions by the employer. The Chief's negative notes in her evaluation were unprecedented and were based on complaints which had not yet been investigated to completion. A causal connection can be inferred from the timing and type of adverse action taken. Cause can also be inferred based on a pattern shown by Officer Gonzalez's removal from detectives in 2006. The union has established a prima facie case of discrimination.

The employer argues in rebuttal that there were four individuals on the union bargaining team, and that only Officer Gonzalez had any complaint about her evaluation. The employer also argues that the

Chief's notes on the evaluation are of no consequence and therefore not an adverse action. The argument continues that the Chief did not change any of the numerical scores, but merely added text indicating disagreement with a numerical score.

In response, the union points to the timing and the pattern of conduct. Intent is rarely directly proven through employer admissions. Causal connection must be inferred from the employer's actions. The employer's reasons are pretextual. Union animus was a substantial motivating factor behind the employer's actions.

Two things especially persuade me that the employer violated the law. One is the fact that the Chief had never previously written a negative comment in an employee's completed evaluation. The other is the employer's argument concerning the consequences of negative comments in an employee's permanent file. It stretches credibility to say that the Chief's notes have no effect on the employee, and that disagreement with a numerical score does not amount to changing the score.

APPLICABLE LAW

Interference

RCW 41.56.140(1) states:

> 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.

The Commission's test for an interference violation is:

> [W]hether one or more employees could reasonably perceive employer actions as a threat of reprisal or force or promise of benefit associated with the pursuit of rights

> under Chapter 41.56 RCW. It is not necessary for a complainant to show that the employer intended to interfere, or even that the employees involved actually felt threatened. *City of Omak*, Decision 5579-B (PECB, 1997).

City of Tacoma, Decision 8031-A (PECB, 2004), *aff'd*, Decision 8031-B (PECB, 2004).

Analysis - Interference

Several witnesses testified that the Chief's close scrutiny of Officer Gonzalez, and his addition of the remarks in her evaluation immediately after she negotiated and testified at the interest arbitration hearing, led to a perception that an active and assertive union leader will suffer adverse employment consequences.

The perception is reasonable. Both the removal from detectives and the negative notes on her personnel evaluation happened immediately after Officer Gonzalez had opposed the Chief in her role as union leader. The timing of these events could make a typical employee believe there is a pattern of coercion and threats.

I find the union carried its burden of proof of an independent interference violation for the Chief's addition of negative comments to Elaine Gonzalez's evaluation.

FINDINGS OF FACT

1. The City of Yakima (employer) is a public employer within the meaning of RCW 41.56.030(1). The employer maintains and operates a Police Department. Sam Granato serves as Police Chief.

2. The Yakima Police Patrolmans Association (union) is a labor organization and exclusive bargaining representative within the meaning of RCW 41.56.030(3). The union represents a

bargaining unit of police officers up to and including the rank of sergeant.

3. On August 25, 2005, the employer established a one-year specialty position for Detective Sergeant in Training (DST), to be filled by seniority for those who lacked recent experience in investigation and crime scene management.

4. The DST position had: a take-home car; a regular Monday through Friday work week with nights, holidays, and weekends off; and a paid clothing allowance. The employer posted the position opening.

5. Shifts are filled for calendar year periods. Special assignments, such as detective and special operations, are set prior to posting the bid sheet for patrol assignments.

6. On October 3, 2007, the employer posted the 2008 patrol shift bidding list. Sergeant Lloyd George's name was not on the list, which indicated to the union that he remained in the DST specialty position for a second year. The employer changed the duration of the DST position in the fall of 2007 for the 2008 assignment year. The employer did not advise the union that it proposed to make that change.

7. On October 3, 2007, the union filed a grievance. The duration of a specialty assignment is a mandatory subject of bargaining. The employer was advised by its attorney that it had to bargain the decision to change the assignment's duration.

8. On October 9, 2007, the employer sent a letter to the union indicating that it was considering expanding the DST assignment to two years. The employer and union met to bargain on November 16, 2007.

9. The parties signed a collective bargaining agreement on September 11, 2007 which states in part that "all openings for specialty positions will be posted." The DST position is a detective assignment and therefore is a specialty position.

10. The employer did not post the DST 2008 position in 2007. The posting of a specialty assignment is a mandatory subject of bargaining.

11. On August 28, 2007, Officer Gonzalez was given the original of a two-year evaluation completed by two sergeants who had been her supervisors. Gonzalez signed the original of the evaluation at that time and was given a copy.

12. In late September 2007, Officer Gonzalez received another copy of her evaluation with negative comments written by Chief Granato. Granato stated that there "is a pattern of rudeness to citizens." No other employee had received an evaluation with a negative comment added after the evaluation was signed by the employee. The negative comments on her evaluation deprived Gonzalez of an ascertainable right, status or benefit.

13. No citizen complaints against Officer Gonzalez had been completely investigated and sustained during the time period covered by Gonzalez's evaluation.

14. No prior incidents had occurred where incomplete investigations into citizen complaints had been noted on an employee's evaluation. Employee job evaluations are a mandatory subject of bargaining.

15. In 2006, the employer commissioned an investigation into Crystal Dodge's charge of handicap discrimination in the Yakima Police Athletic League (YPAL). Carolyn Cairns inter-

viewed many employees in preparing her report, which was issued in December 2006.

16. A second consultant was hired to investigate the same issue. Kris Cappel issued her report in May 2007, six months later. She also interviewed many employees, and all interviewees were given their Garrity rights indicating that a potential criminal investigation was underway.

17. The union requested the Cairns report beginning on February 28, 2007. The union formally requested the same report specifically under Chapter 41.56 RCW on March 13, 2007. In February 2007, the employer refused to provide a copy of the report. The employer did not respond to the March request.

18. On September 11, 2007, Chief Granato said in an apology letter to Crystal Dodge that "failure to supervise by the first line supervisor is under review and discipline if any has yet to be determined." Sergeant Brenda George was the first line supervisor at YPAL.

19. The union had a member, Sergeant Brenda George, whose conduct was under review for possible disciplinary action as a result of the YPAL events. The union had a legitimate interest in the details of the YPAL investigations as contained in the consultant reports.

20. The employer issued a press release on September 28, 2007, and shortly thereafter, redacted copies of the Cairns and Cappel reports were posted on a local newspaper's website. On December 4, 2007, the union renewed its request for information and expanded it to a request for unredacted copies of the consultant reports and all interview notes and background information used by the consultants to form their opinions and reports.

21. The employer responded by letter on December 13, 2007. The employer did not provide all the documents requested by the union, nor explain why all documents were not produced. The employer did not include any interview notes or background information used by the consultants, nor mention that part of the union's request. The employer did not offer to meet with the union to discuss the request.

22. The union sent another letter to the employer dated December 17, 2007, explaining why the union believed the employer had a legal duty to disclose the information. The employer did not respond to this letter.

23. Officer Elaine Gonzalez was an active leader and member of the bargaining team of the union prior to and during Chief Granato's time. Gonzalez was engaged in protected union activities.

24. The parties' collective bargaining agreement expired on December 31, 2005. On September 1, 2006, the Commission certified 17 unresolved issues for interest arbitration.

25. Officer Gonzalez and the union president met with the mayor and a city council member regarding contract bargaining on September 19, 2006. Officer Gonzalez criticized Chief Granato's use of the media in his pursuit of mandatory random drug testing of officers.

26. On September 21, 2006, two days after the meeting with elected officials, Officer Gonzalez was told she would be removed from her special assignment in detectives and assigned to patrol by direction of the Chief.

27. In June, 2007, an interest arbitration hearing was held. Sixteen of the 17 issues certified for interest arbitration

were settled before the hearing. The only issue at the hearing was the employer's proposal for random drug testing. Officer Gonzalez testified at the interest arbitration hearing against Chief Granato's proposal for mandatory random drug testing.

28. A causal connection exists between Officer Gonzalez's protected activities and the negative comments to her evaluation added by the Chief. The reasons given by the employer for its actions were pretextual. Union animus was a substantial motivating factor behind the employer's actions.

29. An employee could reasonably perceive the negative comments added by the Chief to Officer Gonzalez's evaluation as a threat of reprisal associated with the pursuit of rights under Chapter 41.56 RCW.

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 unilaterally changing the duration of the Detective Sergeant in Training assignment from one to two years as described in Findings of Fact 3 through 8, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

3. By unilaterally failing to post the Detective Sergeant in Training assignment for 2008 as described in Findings of Fact 9 and 10, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

4. By unilaterally failing to complete the investigation of misconduct allegations before using such allegations in an employee's evaluation as described in Findings of Fact 11

through 14, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

5. By refusing to provide relevant information requested by the union as described in Findings of Fact 15 through 22, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

6. By adding negative comments to Officer Elaine Gonzalez's evaluation as described in Findings of Fact 11, 12 and 23 through 28, the employer discriminated against Gonzalez and violated RCW 41.56.040 and RCW 41.56.140(1).

7. By adding negative comments to an employee's evaluation as described in Findings of Fact 12 and 29, the employer interfered with employee rights in violation of RCW 41.56.140(1).

ORDER

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

1. CEASE AND DESIST from:

   a. Making a unilateral change in a mandatory subject of bargaining without prior notice to the union and an opportunity for the union to request bargaining.

   b. Refusing to provide relevant information requested by the union.

   c. Discriminating against any employee for engaging in protected union activities.

   d. Interfering with any employee for exercising collective bargaining rights.

e. In any other manner interfering with, restraining or coercing public employees in the exercise of their collective bargaining rights under 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. Restore the *status quo ante* by reinstating the wages, hours and working conditions which existed for employees in the affected bargaining unit prior to the unilateral change in duration of the Detective Sergeant in Training (DST) position found unlawful in this order.

b. Post all openings in non-Patrol Division positions in accord with Article 23, Section 10 of the parties' collective bargaining agreement.

c. Provide the union with the information it requested concerning consultant reports and associated materials related to the investigation of workplace discrimination charges filed by Crystal Dodge.

d. Permanently remove the September 2007 copy of Officer Elaine Gonzalez's personnel evaluation from her files both in Human Resources and in the Police Department, and substitute the evaluation which she originally signed on August 28, 2007.

e. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain

posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

f. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Yakima, 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.

g. 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 provided by the Compliance Officer.

h. Notify the Compliance Officer 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 Compliance Officer with a signed copy of the notice provided by the Compliance Officer.

Issued at Olympia, Washington this 16th day of January, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Sally B Carpenter

SALLY B. CARPENTER, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE
TO EMPLOYEES

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE *CITY OF YAKIMA* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS:

WE UNLAWFULLY refused to bargain with the Yakima Police Patrolmens Association (union), refused to provide relevant information to the union, discriminated against an employee for union activities, and interfered with employee rights.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL restore the *status quo ante* by reinstating the wages, hours and working conditions which existed for employees in the affected bargaining unit prior to the unilateral change in duration of the Detective Sergeant in Training (DST) position.

WE WILL post all openings in non-Patrol Division positions in accord with Article 23, Section 10 of the parties' collective bargaining agreement.

WE WILL provide the union with the information it requested concerning consultant reports and associated materials related to the investigation of workplace discrimination charges filed by Crystal Dodge.

WE WILL permanently remove the September 2007 copy of Officer Elaine Gonzalez's personnel evaluation from her files both in Human Resources and in the Police Department, and substitute the evaluation which she originally signed on August 28, 2007.

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.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.