City of Vancouver, Decision 6732 (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| VANCOUVER POLICE OFFICERS' GUILD, Complainant, | ) | CASE 14364-U-99-3560 |
| vs. | ) | DECISION 6732 - PECB |
| CITY OF VANCOUVER, Respondent. | ) | ORDER DISMISSING COMPLAINT |

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

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

On February 2, 1999, the Vancouver Police Officers Guild (union) filed a complaint with the Public Employment Relations Commission under Chapter 391-45 WAC, charging the City of Vancouver (employer) had committed unfair labor practices.[1] Examiner Pamela G. Bradburn held a hearing on April 15 and 16, 1999, and received the last reply brief on June 16, 1999.

The preliminary ruling issued under WAC 391-45-110 found a cause of action existed on allegations of:

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[1] The union's notice of intent to move for temporary relief was filed with its complaint. WAC 391-45-430. On March 17, 1999, the Commission granted the motion and directed the Office of the Attorney General to seek a preliminary injunction. The Superior Court for Clark County issued a preliminary injunction on April 1, 1999.

> The employer's threat to question, or actual questioning of, union officers and bargaining unit members about discussions during union meetings.

At hearing the parties stipulated the complaint was amended to include the employer's questioning of bargaining unit members after the February 2, 1999 filing of the initial complaint, and before the first day of hearing on April 15, 1999.

I hold the circumstances of this case permit the employer to question union officers and bargaining unit members about alleged harassing, discriminatory, and retaliatory comments (alleged comments) about another bargaining unit and union member (unit and union member) made during union meetings.

## PROCEDURAL BACKGROUND

The motion for temporary relief was handled by the Commission separate from the processing of the unfair labor practice complaint. I haven't seen a copy of the Commission's order or the injunction and do not know their exact terms.

When the hearing began, the union moved to exclude in advance all questions eliciting testimony about specific statements made at union executive board and general membership meetings, arguing such questions would nullify its complaint and circumvent the preliminary injunction. The union also contended allowing such testimony would burden the record with irrelevant information since it viewed proof that the alleged comments actually occurred as unnecessary to establishing its case or the employer's defense.

The employer resisted the motion, arguing that whether the alleged comments were made was the essence of the dispute. It saw its defense as depending on proof of the allegations it had when it decided to investigate the alleged comments. The employer contended its ability to prove the unreasonableness of perceptions that union rights were harmed by its questions depended on proving the questions had focused only on retaliatory, harassing, or discriminatory conduct, which it asserted wasn't protected by Chapter 41.56 RCW. Finally, the employer contended this question of first impression should be heard and decided in the context of all the facts, including whether the alleged comments were made, rather than in a vacuum.

I refused to issue a blanket exclusion of all questions about events during union meetings, preferring to entertain objections to specific questions that would undermine the Commission's grant of temporary relief and possibly violate the preliminary injunction; I said I wouldn't permit either to occur. Granting the motion wouldn't reduce the frequency of argument, it seemed to me, but merely change the subject from whether the proposed question violated the Commission's action, to whether the proposed question violated my grant of the motion in limine. That change seemed pointless to me. The employer's argument, it seems to me, would require an unfair labor practice proceeding in the midst of every investigation touching on events during union meetings. The merits of the allegations the employer had received would have to be determined before bargaining unit members could be asked the questions. That is circular reasoning. The employer's argument also forces the Commission to invade the investigative authority and responsibility of the department. If this hearing were focused as the employer wanted, and I decided whether the alleged comments had been made, what would be left for the department to investi-

gate? Such an invasion of an employer's authority and responsibility should be avoided unless absolutely required by the Commission's own statutory responsibilities.

Subsequent argument by the employer has not persuaded me to change my decision on this issue.

FACTUAL BACKGROUND

The facts and incidents of this case aren't disputed. The parties merely disagree whether the retaliatory, discriminatory, or harassing nature of the alleged comments permits the employer to question unit and union members about discussions in the union meetings during which the comments were made.

The employer's police department operates under Chief Doug Maas. Deputy Chief Janet Thiessen oversees the internal investigation process.

The union represents a bargaining unit of 150 to 170 uniformed police employees holding ranks of officer, corporal, and sergeant. Sergeants in this department supervise the officers assigned to their patrol shift, track their group's call load, insure that their officers follow employer policies and the law in their work, evaluate their officers' performance, give instruction as needed, conduct lineups, are held accountable for their group's equipment, and generally try to make things run smoothly for their shift.

The department's lieutenants and commanders are represented in a separate bargaining unit, and by a different union, than the lower ranks.

Union Meetings

Members of the union executive board meet monthly, usually on the employer's premises, but occasionally off premises at a restaurant. One or more of the executive board members may be on duty during the meeting. These meetings are always closed to the public and management, and usually closed to bargaining unit members.

The entire union membership is invited to a monthly meeting. Aside from exceptional circumstances, these meetings always occur on the employer's premises; because the department operates 24 hours a day, some of those attending will be on duty. Unless outsiders are specifically invited, the general membership meetings are closed to all but union members.

Ranks and supervisor-subordinate relationships are left at the door so union members can interact on an equal basis. Discussion in both executive board and general membership meetings becomes heated at times. Inflamed passions may cause rough language, curses, and screaming at other members or union officers, and may result in hurt feelings as well as continuing disagreements. Bargaining unit members discuss a wide variety of topics in both types of union meetings: work schedules, compensation, vacation, safety matters, discipline, many issues relating to grievances (whether to file, how far to pursue, what direction they're heading, and unexpected questions they raise), fundraising, work hours, proposals for negotiations, changes in practices or contract language, petitions from members on various issues, and any other work concerns.

Union officers believe both types of meetings must be private so union members can express themselves without worrying they'll be disciplined for what they say or how they say it, plan strategies

on negotiations or other issues without fear of management monitoring, discuss controversial situations, disagree among themselves, decide whether to grant requests for charitable contributions without hurting anyone's feelings, and have the union as an institution take stands on controversial issues for them so they don't have to take risky stands as individuals.

## Internal Investigation Process

The employer's police department (department or employer) has an internal investigation process used to determine the truth or falsity of complaints made against police employees (IA process). Department officials believe a formal procedure for receiving and investigating complaints is important to show the public it takes seriously any complaint about officer misconduct, and to demonstrate its expectation that employees will abide by the law. The policy establishing the IA process directs that information obtained through the process "shall be confidential" and shall "not be disclosed to any person without the express authority of the Chief of Police." Department officials expect witnesses interviewed during the IA process to answer questions truthfully, completely, without distortion caused by withholding any information, and to volunteer relevant information that hasn't been specifically requested. Employees who resist answering questions are ordered to testify or face discipline up to termination, but are protected from use of their compelled testimony against them in criminal proceedings. Subjects of an IA process may be, but aren't always, disciplined. Two IA processes are involved in this case.

## 1998 Investigation

The first IA process, numbered 98-31, was pursued in late summer to early autumn of 1998 and involved allegations about Sergeants John

Chapman and Scott Creager. Officer Navin Sharma was interviewed as a witness during this IA process and allegedly answered to the full extent of his knowledge rather than limiting his responses to answering the exact questions asked. This was Sharma's first experience with the IA process; he was not offered, nor did he request, advice from the union about how he should respond.

## 1999 Investigation

The second IA process, numbered 99-01, began with Lieutenant Bruce Hall's January 15, 1999 request that workplace concerns mentioned to him by Sharma be investigated. Deputy Chief Thiessen decided on the basis of the allegations discussed below that an investigation was needed. The subjects of IA 99-01 were Sergeants Chapman and Creager (also subjects of IA 98-31), and Sergeants Howard Anderson and Doug Luse. Anderson and Chapman were union officers.

Allegations Made -

It wasn't necessary, in this proceeding, to prove the truth or falsity of each allegation Thiessen relied on. They are:

- Allegations Sharma told Thiessen during November or December 1998 (before her promotion from lieutenant to deputy chief), that unidentified workplace problems were causing him distress;

- Allegations several union officers and members were angry at Sharma for volunteering information rather than just answering questions in IA 98-31, discussed that testimony and made a transcript of it available during November or December 1998 union executive board and general membership meetings, and labeled Sharma a "snitch" for his testimony;

- Allegations Creager and Chapman (subjects of IA 98-31 and Sharma's leaders in his SWAT team assignment), favored keeping confidential all testimony in IA 98-31 but Sharma's;

- Allegations Anderson said Sharma wasn't a friend of the union and needed a lesson, and suggested employees could boycott an activity Sharma had organized to benefit children with cancer;

- Allegations Luse, slated to become Sharma's immediate supervisor when the end-of-year shift change occurred, was one of the most vocal in denouncing Sharma for his testimony in IA 98-31, had reviewed Sharma's personnel file, and said he had unspecified concerns about how Sharma worked;

- Allegations Anderson, Chapman, Creager, and Luse singled Sharma out to teach him a lesson and to send a message to other officers about the consequences of saying too much in an IA process;

- Allegations union secretary Sergeant Wayne Reynolds was so uncomfortable with these comments that he shared his concerns with Sergeant Russ Winters, Sharma's then supervisor Sergeant Rick Smith, and Officer Dave Dohman;

- Allegations Dohman described these discussions to Sharma on December 10, 1998;

- Allegations Smith assured Sharma his performance was fine, and said the alleged comments raised officer safety and fairness issues in Smith's mind;

- Allegations Sharma reported these concerns to Hall on December 15, 1998;

- Allegations at least three bargaining unit members told Thiessen they were glad not to be subjects of such comments in union meetings, asked whether she knew about Sharma's situation, and whether supervisors were supporting him, and

- Allegations by Sharma that inattention to his projects for the SWAT team from Creager and Chapman, coolness toward him by those two and other SWAT team officers, and the disappearance of uniforms from his SWAT team locker might in hindsight be related to the alleged comments.

Employer's Concerns Based on Allegations -
Thiessen decided these allegations were very serious and had to be investigated. To her, they raised many possibilities:

- Sharma might not be safe at work because calling someone a "snitch" had very negative connotations in law enforcement and suggested fellow employees might not back Sharma up in dangerous situations,

- there might be a "code of silence" among some bargaining unit members which could prevent the IA process from working properly by discouraging employees from revealing full evidence of officer misconduct,

-the confidentiality of the IA process might have been violated, and

- union officers who disagree with actions of fellow employees might be retaliating against them.

Employer's Questions About Union Meetings -
The employer doesn't deny it questioned bargaining unit members about the alleged comments. It introduced a 39 page list of questions investigators asked about events at union executive board and general membership meetings when interviewing 26 named bargaining unit members between February 2 and March 11, 1999. Thiessen had directed the investigators, who were bargaining unit members, to limit questions about union meetings in order to elicit comments made during the meetings that were harassing, discriminatory, or retaliatory, without intruding on other matters. Some witnesses refused to voluntarily respond and were ordered to answer questions or face discipline, as allowed in the IA process.

The union filed an unfair labor practice complaint the day the first bargaining unit members were questioned by the employer about the alleged comments made in union meetings.

PARTIES' POSITIONS

The union contends the employer's questioning of bargaining unit members about the alleged comments is clearly unlawful surveillance and interference, citing City of Longview, Decision 4702 (PECB, 1994). The union argues the protections of Chapter 41.56 RCW must be liberally construed because employer surveillance threatens union independence, and that an award to the union of attorney's fees is warranted because the precedent is so clear.

The employer contends the protections of Chapter 41.56 RCW are not absolute, and there is a reasonableness test for union activities both in the public and private sectors which this union exceeded when members formed a conspiracy against a fellow employee either because of his testimony in IA 98-31 or of his national origin. In this contest between obligations under collective bargaining laws and civil rights laws, the employer urges the latter prevails.

ANALYSIS AND DECISION

Limited Issue Presented

It is important to begin by clearly delineating what this case is **not** about.

- Officer Navin Sharma hasn't filed an unfair labor practice charge alleging his union breached its duty of fair representation by aligning itself in interest against him, or in some other manner depriving him of rights granted in Chapter 41.56 RCW.

- This is not a criminal investigation.

- This is not an action for violation of civil rights granted by state or federal statute, or local policies.

It **is** about whether the circumstances of this case permit a public employer to question unit and union members about allegedly discriminatory, harassing, or retaliatory comments allegedly made during union meetings.

This is a case of first impression for the Commission. The parties haven't cited, nor have I found, decisions directly on point by any labor relations agency or court. Accordingly, Commission decisions on related issues, the legislative policies embedded in Chapter 41.56 RCW, the legislative policies underlying the National Labor Relations Act (NLRA), and decisions of the National Labor Relations Board (NLRB) guide me. See, Nucleonics Alliance, et al. v. Washington Public Power Supply System, 101 Wn.2d 24 (1984) [where statutes similar, decisions under NLRA are persuasive in interpreting Chapter 41.56 RCW].

## Interrogation and Surveillance Unlawful

Commission Precedent -

RCW 41.56.040 provides:

> 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.

Public employers commit unfair labor practices when they "interfere with, restrain, or coerce" public employees exercising rights protected by Chapter 41.56 RCW. RCW 41.56.140(1). For many years the Commission has held actual employer surveillance of employee

union activities, and behavior suggesting such surveillance, are each interference proscribed by RCW 41.56.140(1). See, City of Pasco, Decision 504 (PECB, 1978)(having police officer deliver termination letter to union activist, at union organizing meeting held off the city's premises, implied threat of discharge to others, suggested surveillance of organizing activities, and tended to inhibit future union activities).

Some situations fall short of surveillance. See, Educational Service District 114, Decision 4361-A (PECB, 1994)(no surveillance where supervisor waited outside, rather than in a corner of, large room while subordinates discussed seeking union representation), and City of Seattle, Decision 3066-A (PECB, 1989)(Commission affirms Examiner's credibility determination that perceptions of interference not reasonable where bargaining unit member working as acting supervisor had legitimate reason to search grievants' desks and observing unit members and shop steward didn't challenge her).

City of Longview, discussed above, is the closest to the facts of the present case. Unfortunately, it is a summary judgment based on the employer's admission of the facts alleged in the complaint, so the record is necessarily sketchy. Two days after a union meeting, the police chief heard from a captain, who had heard from an unnamed bargaining unit member, that another bargaining unit member made disparaging remarks about the chief at the meeting. The chief separately asked both the union president and the alleged disparager about the remarks. The Executive Director concluded the chief committed an interference violation by giving the impression he had gained his advance detailed knowledge of events at a closed union meeting through surveillance; the fact that the chief got his advance knowledge because a bargaining unit member volunteered it to a supervisor wasn't discussed.

Policy Goals of Chapter 41.56 RCW -

The statute incorporates policies favoring sound labor relations, employee free choice of exclusive bargaining representatives, and use of the Commission's authority to reduce occurrences of unfair labor practices. It also controls over conflicting statutes in order to achieve its aims.

The legislature declared in enacting Chapter 41.56 RCW that:

> The intent and purpose of this chapter is to **promote the continued improvement** of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their **own choosing** and to be represented by such organizations in matters concerning their employment relations with public employers.

RCW 41.56.010 (emphasis by **bold** added).

The Supreme Court interpreted this clause as requiring it to preserve bargaining rights to the fullest possible extent for employees working for both a county and the state judicial system, where the latter wasn't covered by Chapter 41.56 RCW. Zylstra v. Piva, 85 Wn.2d 743 (1975).

The legislature has decreed that:

> The provisions of this chapter are intended to be additional to other remedies and shall be **liberally construed** to accomplish their purpose...[I]f any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the **provisions of this chapter shall control.**

RCW 41.56.905 (emphasis by **bold** added).

The Supreme Court has ruled a liberal construction of the chapter is achieved by narrowly construing any exceptions from it. Yakima v. Fire Fighters, 117 Wn.2d 655(1991). Provisions of the chapter override contrary provisions of other statutes, even the state civil service law for deputy sheriffs which states it is the sole remedy for these employees. Rose v. Erickson, 106 Wn.2d 420(1986).

In delegating authority to the Commission, the legislature said:

> The commission is empowered and directed to **prevent** any unfair labor practice and to issue appropriate remedial orders.

RCW 41.56.160(1)(emphasis by **bold** added).

The courts have relied on this clause in finding the Commission possessed the authority to award extraordinary remedies it concluded were necessary to make its orders effective. Lewis County v. PERC, 31 Wn.App. 853 (1982), rev. den. 97 Wn.2d 1034 (1982) [award of attorney fees if necessary to prevent further unlawful behavior by the respondent]; Metro v. PERC, 118 Wn.2d 621(1992)[bargaining order can include interest arbitration if bargaining fails].

NLRA and NLRB Precedent -

Section 8(a)(1) of the NLRA provides:

> It shall be an unfair labor practice for an employer--
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

Section 8(a)(1) is identical to RCW 41.56.140(1)(except the latter adds the specification "public" to the word "employees").

Section 7 of the NLRA grants employees the following rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Both NLRA Section 7 and RCW 41.56.040,.080, and .100 grant the rights to organize, choose a bargaining representative, bargain collectively with the employer, and refrain from union activities. Accordingly, precedent under the NLRA is persuasive. Nucleonics Alliance, discussed above.

The NLRB generally finds interference violations when employers question employees about, or discharge employees for, attending meetings about union representation. Salant Corp., 214 NLRB No. 21, 88 LRRM 1314 (1974). The Board's current approach is to consider an employer's questioning about union meetings in its full context to determine its lawfulness, rather than finding all questioning unlawful per se. See discussion of current rule and historic flip-flops on approach in Hotel Employees Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985)[no violation when hotel owner and manager asked employee about union after receiving recognition demand, because no coercion in casual conversation about unionizing].

The employer's lack of legitimate knowledge of an employee's union activities is an important factor in finding a violation. Where a

manager twice accused an employee of leaving to go to a union meeting, the Board said:

> Smith's accusations reasonably tended to threaten or coerce Menbreno and to force him to disclose any union activity. Further, Menbreno could reasonably assume from Smith's accusations that the Respondent had placed his union activities, which were not open, under surveillance. Accordingly, we find Smith's remarks to Menbreno both constituted an interrogation regarding Menbreno's union activities and created the impression of surveillance....

Jumbo Produce Inc., 294 NLRB No. 75, 132 LRRM 1387, 1388.

But where the questioned employee has overtly supported the union, employer questions about his attendance at union meetings or negative comments about his union badge are innocuous questions and non-coercive expressions of opinion. Premier Rubber Co., 272 NLRB No. 76, 117 LRRM 1406(1984).

Where it was common practice for employees and supervisors to discuss union meetings openly, the employer didn't violate the law by asking a late-arriving employee whether he'd been to a union meeting the night before; the employer had a legitimate business reason for finding out what caused the late arrival, and gave no opinion about union activities. Redway Carriers, Inc., 274 NLRB No. 198, 119 LRRM 1023 (1985). But the Board found a violation in Gayston Corp., 265 NLRB No. 1, 112 LRRM 1336 (1982), when the employer asked employees to eavesdrop on colleagues and report back on union discussions; obviously the employees and management lacked any practice of open discussion in that workplace of union matters.

In Great Lakes Oriental Products, Inc., 283 NLRB No. 19, 124 LRRM 1356 (1987) an employee volunteered information to a supervisor, in front of several other employees, about his effort to organize the

workplace. Because the information was volunteered, the supervisor ranked fairly low in the company, and indicators of coercion didn't exist, the employer didn't violate the law when that supervisor asked another employee for the names of people who had signed cards, and what had happened at the union meeting. It's not clear from the decision whether the latter employee was present when the first volunteered the information, or whether the fact that it was volunteered in a group put other unit members on notice the employer's source of information was legitimate.

Innocuous employer comments made after overhearing a discussion of the previous night's union meeting in the company lunchroom don't create an impression of surveillance because the questioned employee engaged in the lunchroom discussion. Abitibi Corp., 216 NLRB No. 65, 88 LRRM 1554 (1975). On the other hand, violations were found where a foreman stood in a doorway and overheard an informal union meeting about grieving a discharge, then interrogated several employees about a comment made during the meeting that union leaders in the good old days would have gone on strike rather than file a grievance. The Board majority considered this a private union meeting in which one member gave an off-hand personal opinion of the union's leadership, rejecting the employer's contention that the interrogation was proper because the comment illegally incited a strike. General Electric Co., 253 NLRB No. 155, 106 LRRM 1091 (1981).

In the context of supervisors lacking representational rights, the employer was allowed to ask employees whether a supervisor had attended a union organizing meeting, because of: its legitimate interest, its assurances there would be no reprisals, its previous knowledge of the union's strength from the recognition demand, and the fact an employee had volunteered a list of attendees; the union's complaint was dismissed. Mead Corp., 211 NLRB No. 67, 86

LRRM 1501 (1974). The employer's legitimate reason for asking why an employee arrived late contributed to the absence of a violation in Redway Carriers, discussed above.

## Application of Precedent and Policies

Employee free choice doesn't end after the representation election; it requires the exclusive bargaining representative be allowed to function freely after being chosen. So employer actions that may discourage employees from union activity, or threaten them for engaging in such activities, are scrutinized carefully. Persuasive NLRB precedent suggests factors relevant to such scrutiny include whether: the interactions are coercive to the questioned employees; the employer assured questioned employees their answers wouldn't affect their future free exercise of union rights; the employer's information about the employee's union activities comes from a legitimate source; union activities are openly discussed in the workplace by union members and management, and whether the employer has a legitimate business reason for the questions.

IA Procedure Not Coercive Toward Exercise of Union Rights - Coercion exists in the moment of the employer's questioning of an employee about her or his union activities. See, April 1, 1935 testimony of William H. Davis before the Senate Committee on Education and Labor, in discussing why company unions were bad:

> Because you go to a man whose bread and butter is dependent on your pay envelope and suggest to him you think it would be a good thing for him to form a company union. Conditions differ, of course. It depends on the relations between men and the employer. But it so easily leads to what is coercion and fear.

II Legislative History of the National Labor Relations Act, 1935 (1985)(Legislative History) p.2100.

In the present case, the employer's questions about events at union meetings occurred during the IA process. Subjects of IA 99-01, Sergeants Anderson, Chapman, Creager, and Luse, could be disciplined based on the investigation results. Ex.8, policies 20.12.00, 20.15.00. The IA process functions like any other process an employer uses to find out whether an employee has violated work rules or expectations. Any such procedure carries with it the possibility of discipline for those investigated. Organized employees are frequently subjects of such inquiries; their organized status entitles them to union representation during the questioning, Snohomish County, Decision 4995-B (PECB, 1996), but it doesn't excuse them from investigations.

I see nothing **in the IA procedure itself** that **necessarily** brings the employer's economic power to bear on the job security of bargaining unit members in a way directly tied to their contemporaneous exercise of union rights. Viewed separately from the union-related nature of the questions asked, the IA process doesn't inherently coerce employees to abandon their union like the question of the employer described above in testimony before the Senate.

Employer's Advance Knowledge Legitimately Derived -

Unit and Union Members Volunteered Information - The complaint that initiated IA 99-01 was filed by Hall, who gained some information from Sharma; Sharma questioned other unit and union members after one of them told him comments had been made about him in union meetings. Sergeant Chris Sutter also told Hall what Sutter had learned about the alleged comments from Sharma and Executive Board member Doug Rickert.

While Thiessen was still a lieutenant, she was approached by at least three unit and union members who expressed gratitude they

weren't the object of the comments in the union meetings, asked whether she knew about Sharma's situation, and asked if supervisors were supporting him.

The fact that the employer's lieutenants are represented by another union doesn't affect the fact they act for management in interacting with employees they supervise who are represented by this union. See, City of Seattle, Decision 3066-A, discussed above [employee's temporary assignment caused other members of her unit and union to understand she acted for management]. When Sharma and others told Hall and Thiessen about the alleged comments, the unit and union members gave the employer legitimate advance knowledge of the comments and the fact they were made in union meetings.

City of Longview Decision Distinguished - This legitimately obtained advance knowledge is the determinative difference between the present case and City of Longview, discussed above. Only two days had intervened between the union meeting and the chief's questioning of the union president and the employee who had criticized the chief at the union meeting, and no one in the Longview unit knew the chief had gotten his advance knowledge from an unnamed unit and union member. In the present case, the workplace hummed with discussion about the alleged comments and the fact they occurred during union meetings for up to two months between the union meetings and the interrogations, and at least four or five employees separately told management about the situation.

Union Matters Openly Discussed -
This particular situation was widely and openly discussed in the workplace between management and members of the unit and union. Because this period of free discussion preceded the questioning of employees that is the subject of this complaint, it isn't necessary

to inquire what the parties' prior practice had been; in Redway Carriers, discussed above, whether a prior practice of discussion existed was important because the question whether the late-arriving employee had been to a union meeting the prior night came out of the blue.

Employer Has Legitimate Business Reason for Inquiry - Of course the department has a legitimate business interest in assuring its employees comply with departmental and city policies. Further, the circumstances of this case may expose the employer to liability for its employees' actions.

City of Seattle, Decision 3066-A, discussed above, isn't very useful as precedent on this issue, since the Commission called the case close and decided it by affirming the Examiner's credibility determinations.

Board precedent suggests this factor isn't determinative in itself, but is a consideration in finding a particular employer interrogation permissible if indicia of coercion or surveillance are absent. See discussions above of Mead Corp., 211 NLRB No. 67, 86 LRRM 1501 (1974), and Redway Carriers, Inc., 274 NLRB No. 198, 119 LRRM 1023 (1985).

The union contends the lack of proof of Sharma's race, national origin, or other basis of invidious discrimination precludes the employer from relying on this justification for its actions. The union is correct about the lack of evidence in the record, but its asserted conclusion doesn't necessarily follow because the merits of the alleged violations aren't decided here. The employer may be able to make a case of discrimination on the basis of race or national origin in the appropriate forum but those claims aren't before me, so I don't have to decide whether to take administrative

notice of my observations of Sharma, who attended both days of hearing but wasn't called to testify. See, Washington Rules of Evidence 201.

An additional defense the union raises actually suggests a cause of action within the Commission's jurisdiction: the union notes the employer discovered no motive for the alleged comments other than the union officers' and members' disagreement with the way Sharma answered questions in IA 98-31. Sharma didn't seek union guidance before his testimony, nor did anyone from the union offer him guidance before his first experience of an IA investigation. The employer could view the alleged comments about teaching Sharma a lesson, displaying his IA testimony, etc., as related to Sharma's failure to seek the union's guidance or follow the union's wishes in testifying; in other words, a failure to engage in union activities. Union retaliation against a unit member for engaging in, or failing to engage in, union activities is an unfair labor practice. RCW 41.56.150(1); Port of Seattle, Decisions 3294-B, 3295-B (PECB 1992). An employer must exercise diligence to avoid being induced by a union to commit an unfair labor practice, such as discriminating against an employee at the union's request or permitting its operational procedures to be bent to accomplish such discrimination. RCW 41.56.150(2), 41.56.140(1).

Reassurances About Future Exercise of Union Rights Sufficient - This factor in the NLRB cases seems to mean whether the employer's present behavior conveys a reasonable threat to employees of future interference; as coercion looks to the threat against present union activities, so interference looks to a threat against future union activities. The Commission has held:

> To establish an interference violation under RCW 41.56.140(1), a complainant need only

> establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. [citations omitted] A showing that the employer acted with intent or motivation to interfere is not required. Nor is it necessary to show that the employees concerned were actually interfered with or coerced.

City of Omak, Decision 5579-B (PECB, 1997)

The interviews challenged by this complaint were the employer's first attempt during its entire collective bargaining relationship with this union and its predecessor to question unit and union members about comments made during their union meetings.

Thiessen directed the IA 99-01 investigators to limit their questions about comments in executive board and general membership meetings to the comments alleged to have violated the policies and procedures identified in the initiating documents, and to have their written questions reviewed by the employer's attorneys "to avoid going over the line," Thiessen explained.

It is important to note that this case doesn't arise during an organizing campaign; docket records show the employer voluntarily recognized the union after it filed its October 14, 1991 petition to replace OPEIU, Local 11, as exclusive bargaining representative for this unit. Nor does this case arise during contract negotiations or involve the processing of a grievance. Labor relations in each of these situations is delicate and a union's independent functioning during such times should be carefully protected.

Unit and union members testified they weren't asked any questions during these interviews about labor management relations, criticism of management, negotiations strategy, or grievance strategy. The

partial transcript of questions, Ex.12, described as an effort to cull all questions during IA 99-01 about union meetings, lacks any questions about negotiations, grievances, union stands on workplace issues, or any other typical union business.

IA investigators read the following statement at the beginning of each interview with unit and union members:

> We will not ask any questions regarding Guild policy, practice or strategy. The City of Vancouver Police Department does have a legitimate interest of protecting employees from possible conduct that is retaliatory, discriminatory, and/or harassing. Consequently, questions pertaining to Guild executive board meetings will be circumscribed to illicit [sic] only those facts related to alleged violations of City and Vancouver Police department policy.

Ex.10.

Although this announcement doesn't specifically mention general union membership meetings, the transcript excerpts show the announcement was expanded to "statements pertaining to the Guild and/or Executive Board meetings" when it was given. Ex.12, p.1, 9.

In the circumstances of this case, no bargaining unit employee could reasonably conclude that her or his future exercise of union rights (filing a grievance, consulting the union, asking for union representation in interviews likely to lead to discipline, attending union meetings) would be diminished by the employer's investigation of these alleged comments. Various unit and union members independently concluded the alleged comments were wrong in themselves, regardless of the context in which they were made. They proved this by seeking others' advice, consulting with management about the alleged comments, and testifying that making such comments wasn't proper union business.

Notwithstanding the NLRB's rejection of a per se rule, the union strenuously argues any questioning about discussions in union meetings, regardless of topic, necessarily chills the quality and quantity of future unit and union member comments in union meetings and handicaps the union's effectiveness in fulfilling its representational role. The privacy of union meetings isn't universal, like evidentiary privileges between priest and penitent, spouses, or attorney and client. Instead, union meetings are protected only against the employees' employer. So if this department had asked the Clark County Sheriff's Office to conduct this internal investigation about alleged civil rights violations, the union might lack any grounds for complaint. Nor is the privacy of union meetings absolute; even the evidentiary privileges mentioned above may be waived by the holder. Instead, protection against employer intrusion into union meetings is a clear legislative policy in the NLRA to minimize opportunities for employers to affect or control the independence of unions that represent their employees. The NLRB has recognized the complex situations of real life may present a case in which a union isn't harmed in its representational independence because the employer's inquiries into union meetings lack coerciveness, don't involve surveillance, don't interfere with future exercises of union rights, and are made in pursuit of a legitimate employer business interest. The similar representational rights granted and obligations imposed by the NLRA and Chapter 41.56 RCW, and the lack of contrary Commission precedent, warrant adopting the same approach in the present case. The circumstances of this case prevent the employer's interrogation of employees from chilling future exercises of rights granted by Chapter 41.56 RCW.

The union also argues that union meetings can't "be divided into 'legitimate' union business protected from surveillance and other matters which would be subject to surveillance," that whether a

topic is "legitimate" union business is a question on which people can disagree, and the employer's justification could be extended to alleged violations of any employer policy, no matter how minor. Union Brief, p.15-24. The union's arguments soar far beyond the facts of this case.

The Commission has held there are limits to the protections of Chapter 41.56 RCW. See, City of Pasco, Decision 3804-A (PECB, 1992)[inviting supervisor to settle grievance by fighting wasn't protected activity although occurring during grievance meeting]. Whether the Commission should allow employer interrogation for alleged violations of policies less important than those prohibiting discrimination, harassment, and retaliation must wait for a future case. Also, the NLRB standard, which I believe I am obliged to adopt, makes the employer's business reason for inquiring into union activities only one factor in determining the legality of the employer's behavior; it, alone, doesn't control no matter how compelling.

From the uniqueness of the present effort, the assurance quoted above, and the limitation of questions to the subject that was widely discussed between management and unit and union members, employees could conclude future union discussions lacking these indicia wouldn't be the subjects of employer inquiry. Because of the unusual circumstances of this case, no employee could reasonably expect future employer interference with her or his union activities as a result of the employer pursuing IA 99-01.

Permitting Employer Interrogation Furthers Policies -
Cloaking comments such as those allegedly made during the union meetings wouldn't improve public employer-public employee relations. Instead, maintaining secrecy in such situations would

produce the same disturbed workplaces as in this case, expose other public employers to potential liability while frustrating their ability to properly investigate the situations, and produce heightened anger and resentment between employer and employees or union over the alleged improper use of union representation to escape the consequences of employee statements and actions.

Similarly, the policy favoring free choice of a union representative isn't subverted by this public employer's action. One's ability to designate an exclusive bargaining representative, or change representatives, isn't limited by the department's attempt to hold people responsible for their statements and actions, even when made in, or growing out of, union meetings. Whatever happens to individuals holding union office, employees still possess the power to retain their exclusive bargaining representative, if challenged, or make a change.

## Conclusion

For the reasons discussed above, I conclude the union hasn't established that the employer's interrogation of employees in the circumstances of this case interfered with employee rights contrary to RCW 41.56.140(1). The complaint is dismissed.

## FINDINGS OF FACT

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

2. Vancouver Police Officers Guild, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive

bargaining representative of an appropriate bargaining unit of police officers, corporals, and sergeants employed by the City of Vancouver. The employer's police lieutenants and commanders are excluded from this bargaining unit.

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

4. Officer Navin Sharma testified in internal investigation IA 98-31, which focused on were Sergeants John Chapman and Scott Creager. This was Sharma's first experience in an internal investigation; he neither asked for, nor was offered, union advice on participating. Sharma testified to the full extent of his knowledge rather than simply answering the questions asked.

5. Chapman, Creager, union President Sergeant Howard Anderson, and Sergeant Doug Luse allegedly exhibited a transcript of Sharma's testimony from IA 98-31 in a union meeting or meetings held in November or December, 1998, complained Sharma had volunteered information, said Sharma wasn't a friend of the union and needed to be taught a lesson, and discussed boycotting a charitable activity Sharma and others had organized. Some unit and union member or members allegedly labeled Sharma a "snitch."

6. Union Secretary Sergeant Wayne Reynolds allegedly was so concerned by these alleged comments he told other union and bargaining unit members about them and sought their advice. Word reached Sharma's then supervisor Sergeant Rick Smith, who alerted Sharma about the alleged comments; Sharma interviewed a number of unit and union members about the alleged comments.

7. Sharma allegedly reported the results of his investigation to Lieutenant Bruce Hall on December 15, 1998. At least three unit and union members told then Lieutenant Janet Thiessen about the alleged comments regarding Sharma.

8. After Thiessen was promoted to Deputy Chief and became responsible for internal investigations, she reviewed the material Hall had received and the formal complaint he had filed January 15, 1999. She determined an investigation (IA 99-01) was necessary because the allegations raised important issues about Sharma's safety in the field, the possible existence of a code of silence discouraging employees from volunteering all available information during an investigation, the possibility that confidentiality of IA 98-31 was breached, and the chance union officers might be retaliating against employees who disagreed with them.

9. The employer questioned a number of bargaining unit members about the alleged comments described in Finding of Fact 5 above. Questions about alleged comments made during union meetings were prepared in advance, reviewed by employer attorneys, and limited in scope to statements that could be harassing, retaliatory, or discriminatory. Each interview began with the same disclaimer of intent to intrude on union strategy, policy, or practice.

## CONCLUSIONS OF LAW

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

2. The Vancouver Police Officers' Guild has failed to sustain its burden of proof that RCW 41.56.140(1) was violated when the City of Vancouver questioned bargaining unit and union members about alleged discriminatory, retaliatory, and harassing comments made by Sergeants Chapman, Creager, Anderson, and Luse about fellow bargaining unit and union member Officer Navin Sharma during union meetings.

## ORDER

The complaint charging unfair labor practices filed by the Vancouver Police Officers Guild is DISMISSED on its merits.

Issued at Olympia, Washington, on the 14th day of July, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Pamela G. Bradburn

PAMELA G. BRADBURN, 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.