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

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEAN ISAAC,	)	
	)	CASE 12378-U-96-2937
Complainant,	)	DECISION 5579-B - PECB
	)	
DON EDDY,	)	
	)	CASE 12506-U-96-2967
Complainant,	)	DECISION 5580-B - PECB
	)	
MIKE MARSHALL,	)	
	)	CASE 12507-U-96-2968
Complainant,	)	DECISION 5581-B - PECB
	)	
RICHARD WATERS,	)	
	)	CASE 12509-U-96-2970
Complainant,	)	DECISION 5583-B - PECB
	)	
vs.	)	
	)	
CITY OF OMAK,	)	DECISION OF COMMISSION
	)	
Respondent.	)	
	)	
	)	

Cline & Emmal, by James M. Cline, Attorney at Law, appeared on behalf of the complainants.

Menke, Jackson, Beyer & Elofson, by Rocky L. Jackson, Attorney at Law, appeared on behalf of the respondent.

This case comes before the Commission on a petition for review filed by the complainants, seeking to overturn a decision issued by J. Martin Smith.[1]

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[1] City of Omak, Decision 5579-A (PECB, 1997).

BACKGROUND

The Bargaining History

These cases concern controversies in the Omak Police Department during a period of time when Ron Bailey was the chief of police, Mikael W. Cramer was the assistant chief of police, and Frank Rogers was the patrol sergeant. Oversight of the police department was provided by a mayor and city council. A "police committee" made up of members of the city council worked with the chief of police on issues of concern, and a "personnel committee" within the city council worked separately on personnel matters.

For many years, police officers were represented for the purpose of collective bargaining by Teamsters Union, Local 760. Officer Sean Isaac served on the negotiating team for the last three collective bargaining contracts. A collective bargaining agreement was in effect between the employer and Local 760 from January 1, 1995 through December 31, 1995. In approximately May of 1995, Isaac filed a grievance concerning a sick leave issue relating to a Labor and Industries claim. The employer and Local 760 commenced negotiations, but did not reach agreement on a successor contract.

Early in 1996 the Omak Police Guild (OPG) filed a petition for investigation of a question concerning representation with the Commission, seeking to replace Local 760 as exclusive bargaining representative of the police officers. Local 760 disclaimed the unit. A cross-check was conducted, and the OPG was certified as exclusive bargaining representative on May 7, 1996.[2] During the time of the controversies at issue in these cases, the bargaining

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[2] Notice is taken of the docket records of the Commission for Case 12315-E-96-2053.

unit consisted of approximately 16 members, including approximately 12 police officers, the police sergeant, a secretary, a records clerk, and an animal control officer. The police chief and assistant police chief were excluded from the bargaining unit.

The Assigned Car and K-9 Programs

The K-9 Programs -

The employer operated two K-9 programs, one with a "patrol dog", and the other with a "drug dog" that was trained to locate narcotics. Isaac handled the patrol dog; Officer Mike Marshall handled the drug dog. Costs to maintain and insure the dogs were borne by the employer, at least recently. Employer officials had periodically considered whether to continue the K-9 program.

The Take-Home Car Program -

Under a program instituted in 1992 on the suggestion of Chief Bailey, police officers were allowed to use patrol vehicles for commuting to and from their jobs. Some city council members opposed this program from its onset, and Bailey was required to review its cost/effectiveness each year.

In approximately October of 1994, Isaac moved about 15 miles outside the city limits of Omak. Bailey and city council members closely scrutinized Isaac's move, and drove out to his new house to check the mileage. On October 4, 1994, Isaac was given temporary authorization to use his assigned vehicle for travel to and from his residence.[3] That authorization was "subject to cancellation, review and/or change at any time".

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[3] The record suggests that Isaac had use of a patrol car on a take-home basis because he handled (and, thus, needed to transport) the patrol dog.

At least as far back as February 24, 1995, officers assigned a department vehicle were generally required to live within a six mile radius of a mid-point in the city of Omak.

Programs Reviews in 1995 -

In approximately June of 1995, Chief Bailey asked Assistant Chief Cramer to review cost and usage of the K-9 programs. It was found that the annual cost of the K-9 program had increased from $2500 to $7000-$10,000, and that the dogs had not been used as much as expected. In July or August of 1995, Cramer recommended to the chief that the K-9 programs be canceled because the cost did not justify the few callouts of the prior year.

Sean Isaac's Accident and Grievance

On August 21, 1995, Isaac was involved in a two-vehicle accident while driving a patrol vehicle near the city of Okanogan. The accident caused injury to the other driver, and damage estimates to both cars totaled over $10,000. The Okanogan County Sheriff's Office investigated the accident, and concluded Isaac had violated traffic codes. By letter of September 8, 1995, Bailey suspended Isaac from duty for two days, effective October 5 and 6, 1995. Bailey advised Isaac that he would be able to use two days vacation for the two days of suspension.

When Bailey met with Isaac concerning the discipline, Isaac warned Bailey that he would file a grievance. Bailey responded that "It's going to become very personal". On September 12, 1995, Don Eddy, a police officer who was then shop steward for Teamsters Local 760, filed a grievance claiming that the employer used excessive discipline by suspending Isaac for two days, failed to follow progressive discipline procedures, and failed to properly train its

officers. On September 22, 1995, Chief Bailey denied the grievance. By letter of October 18, 1995, the city council upheld the chief's action.

By letter of October 26, 1995, Bailey informed Isaac that he had learned it was an error to allow vacation time for the suspension, and retracted that authorization. After Local 760 wrote to the employer's attorney, the employer changed its position again, and allowed Isaac to use vacation leave for the two days. In a letter to Local 760, the employer stated that use of such leave to replace time for a suspension would not be allowed in the future.

Discontinuation of the Car and K-9 Programs

In the autumn of 1995, Bailey reviewed the advantages and disadvantages of the car program. He found that officers were not able to perform minor repairs or maintenance on a vehicle anymore, because of the Fair Labor Standards Act. Callouts in emergency situations were not extensive, and the only officers responding to callouts had been the chief, assistant chief, and sergeant. Bailey concluded there had been no callouts since the program started where the responding officer could not have driven safely to the police department parking area and picked up a patrol vehicle before proceeding to the scene. Out of 12 police officers, only three lived in town. The chief showed the Police Committee the distance each officer was traveling, the number of days they worked, and the mileage cost. In October of 1995, Bailey recommended to the police committee that the car program be eliminated.

By a November 29, 1995 letter addressed to Bailey, the Cities Insurance Association of Washington advised, "[N]ationally lawsuits

from dog bites are becoming a major concern of the insurance carrier[s]" regarding K-9 programs.[4] The letter indicated the K-9 program had not cost the city any significant dollars at present, but it was anticipated that would change drastically at the time of the next renewal. The letter encouraged Bailey to reevaluate the usage of the dogs as the liability exposure was becoming more and more difficult to insure, and stated "I would anticipate at our next renewal the carrier will either ask us for a K-9 exclusion, or charge a premium of $10,000 to $15,000 per dog for coverage".

In November of 1995, Bailey presented a budget proposal to the full city council, and recommended that both the car and the K-9 programs be discontinued.

Bailey's Efforts to "Regain Control"

For some time, Bailey and Cramer routinely sent electronic mail (e-mail) messages to individual police officers, groups of officers, or the entire staff, to communicate various directives. The following are examples of e-mail messages sent to all police officers during the first part of 1995:

- A January 14, 1995 e-mail reminded staff to keep dishes and food items picked up because "the kitchen was a mess."

- A January 25, 1995 e-mail directed police officers on night shifts to do bar checks every night in all the bars in town, and to ask bartenders if everything was OK.

- A January 27, 1995 e-mail directed police officers to not remove anything from Bailey's office without his approval.

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[4] The letter was sent on Bailey's request.

- By a February 14, 1995 e-mail, Cramer provided specific directions to police officers for mailing citations. In that memo, Cramer also told the staff he was finding the office a "pig sty" and asked them to clean up after themselves.

- A February 24, 1995 message from Cramer to police officers referred to having provided them with the policy concerning assigned vehicles and mileage/distance restrictions, and advised them that the policy took effect immediately.

- On April 11, 1995, the chief sent a memo giving police officers direction on the procedure for turning in reports. He stated, "There will be no excuses".

- Also on April 11, 1995, the chief concluded a directive to officers on picking up and dropping off paperwork with, "There are no exceptions".

- By an August 28, 1995 e-mail, the chief asked if anyone knew about a television set left on the kitchen table.

At some point during the autumn of 1995, Sergeant Rogers became concerned about an issue he had discussed with the chief many times over the previous two years. Rogers went to Bailey and told him that he had lost control of the department, mainly in relation to Isaac, and that he needed to regain control. Around October of 1995, the chief told Rogers that "it was time". Rogers, who served as the night shift supervisor, told Bailey in October that he was concerned about leaving for a hunting vacation, because the night shift may take advantage of his absence and spend their time in the office playing computer games instead of working. Bailey advised him not to worry, that he would take care of things.

During Rogers' absence, Bailey sat outside the office in his patrol vehicle and watched while Isaac, Marshall and Police Officer Joe Somday talked for about an hour. Bailey then set up a call, advising dispatch that a citizen locked keys in a car nearby. After Bailey waited 15 minutes, he called dispatch again, and then Somday and Marshall responded. Bailey informed the two officers that the lack of an immediate response should not have occurred, and that he may be testing them again for a better response.

After the grievance was filed concerning the discipline of Isaac, Bailey and Cramer issued more directives by e-mail:

- On October 4, 1995, Cramer reminded the staff of the need to notify the dispatcher, by radio, when going on duty, and of the need to be careful of confidential information relating to gang activity. The memo told the police officers they had done a good job on a murder case.

- On October 17, 1995, Cramer advised officers to stay out of the secretary's work area, stated "if misuse of the computer continues, the computer will be removed ...", and stated "violation shall be cause for disciplinary action".

- On October 18, 1995, Cramer banned smoking in front of the building, banned responding to calls outside the city except in certain instances, reminded officers that discussion of departmental activity with other agencies, people or citizens violated department policy, and encouraged more foot patrol. That e-mail ended with a statement that "All of the above are to be considered direct orders from the chief", and "Violation shall be cause for disciplinary action".

- An October 19, 1995 message from Bailey covered "response to calls" and reminded officers that "all calls coming into the police department are important and will be responded to as soon as is possible".

- On October 19, 1995, Cramer sent a memo to all staff stating his office would be locked when he was not on duty, reports were to be placed in an "in" file at his door, and they were not to leave any unapproved reports with the clerical staff.

- In an October 20, 1995 e-mail referred to as the "Woe is me" message, Bailey commented on a "complacent, unprofessional work attitude and habits" among the police officers, and advised them to only blame themselves, to not walk around saying woe is me. It stated, "The problems of complacent, lazy, slothful work have to end" and "It is time for self evaluations and corrects before any other action has to be taken by the administration".

- An October 26, 1995 memo from Cramer stated, among other things, that "We will start using the officer daily logs until further notice ... logs shall be turned in daily to my office and shall be complete and accurate ... by order of the chief".

- In an October 28, 1995 message, Bailey limited the use of the police dogs in bars and restaurants to only occasional use.

- On November 11, 1995, the chief reminded the staff to log their foot patrols and bar checks in calls for service.

- On November 13, 1995, the assistant chief sent a reminder that all logs were to be turned in at the end of each shift.

- On November 13, 1995, the assistant chief sent a notice that cases are not to be left lying around the office or left out at the end of a shift.

Around October or November of 1995, a part-time parking enforcement and community relations employee expressed her concerns to Bailey about work matters. That employee testified in this proceeding that Bailey told her he had a little bit of "stomping" left to do, and that things would get back to normal soon. Bailey testified he did not recall using the "stomping" term.

On November 28, 1995, Bailey issued an e-mail to the staff, stating that there would no longer be an assigned (take-home) car program, effective January 1, 1996, and on December 1, 1995, Bailey sent a message to the police officers, stating that both of the K-9 programs would also end effective January 1, 1996.

On December 4, 1995, Bailey sent a memo to the mayor, advising that the assigned patrol vehicle program and the K-9 programs would end on December 31, 1995.[5]

Bailey held a mandatory staff meeting on December 15, 1995. The chief told the police officers that the disgruntled attitudes and discontent needed to end, that it would be necessary to follow the disciplinary policy and procedure if the problems did not stop, that a final decision had been made on the car and K-9 programs, and that those subjects were not open for discussion.

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[5] The memo cited changes in the programs since their inception, including: Fewer police officers living in town, few callouts, increased vehicle maintenance costs, the K-9 programs not producing expected results, and increased costs and liability of the K-9 program.

At a meeting of the city council on December 18, 1995, Isaac presented a history of the K-9 programs, maintained that the benefits outweighed the costs, and asked that the council reconsider its decision to end the programs. Isaac suggested alternative ways to cut costs. Marshall also spoke in favor of maintaining the programs. Eddy presented a petition supporting the K-9 programs, on which the police officers had gathered 120 signatures. Citizens spoke in favor of maintaining the programs. Bailey spoke in favor of ending the programs. The council agreed to support the decision of the chief to discontinue the K-9 and car programs.

The Complaint Allegations on Appeal

On March 11, 1996, Sean Isaac, Mike Marshall, Don Eddy, Joe Somday and Richard Waters filed a complaint charging unfair labor practices, alleging that the employer imposed policy changes in response to the grievance protesting the suspension of Isaac, that the employer had unlawfully discontinued the take-home car and K-9 programs, and that the reasons given by the employer were pretexts designed to conceal the employer's attempt to undermine Isaac's union activity. The complainants requested restoration of the take-home vehicle and K-9 programs, payment to all officers for personal mileage used during the period in which the car privileges were displaced, and attorney fees and costs.

Examiner J. Martin Smith held a hearing, during which Somday requested that his complaint be withdrawn.[6] In his decision on the remaining cases issued December 29, 1997, Examiner Smith concluded that the actions of the chief and assistant chief in issuing e-mail

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[6] The case filed by Officer Somday was closed by City of Omak, Decision 5582-A (PECB, 1997).

messages designed to "stomp on" bargaining unit employees after and in response to the exercise of grievance rights protected by Chapter 41.56 RCW, constituted an unfair labor practice under RCW 41.56.140(1). Examiner Smith held that the complainants failed to sustain their burden of proof as to discrimination in relation to the discontinuation of the assigned cars and K-9 programs.

On January 20, 1998, the employees petitioned for review, and the employer filed a timely cross-petition for review, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

As to the discrimination issues, the complainants argue that the Examiner erred in arriving at the facts, that incorrect facts led to incorrect conclusions, and that the Examiner failed to apply the substantial factor test. The complainants contend that the employer discriminated against them by canceling assigned car and K-9 programs in reprisal for their filing and/or support of the Isaac grievance. The complainants argue that cancellation of those programs was detrimental to them, and that the employer's reasons for the canceling the programs were pretextual, as evidenced by the timing of their termination. The complainants agree with the Examiner's conclusions as to interference charge, but urge the Commission to overturn the Examiner's decision on the discrimination issue, restore the car and K-9 programs on a bargaining-unit wide basis, and assess the costs of the attorneys fees to the employer.

The employer argues that the Examiner erred in finding an interference violation. It claims that the memos or conduct of the

police chief and assistant chief were standard operating procedure. The employer urges the Commission to reverse the Examiner's conclusion as to the interference charge, but made no comment on the discrimination issue.

DISCUSSION

The Legal Standards

Chapter 41.56 RCW prohibits employers from discriminating against public employees who exercise the rights secured by the collective bargaining statute and interfering with the exercise of those rights:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, **interfere with, restrain, coerce, or discriminate against any public employee** or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.
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> [Emphasis by **bold** supplied.]

Enforcement of those statutory rights is through the unfair labor practice provisions of Chapter 41.56 RCW:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**

> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) **To discriminate against a public employee who has filed an unfair labor practice charge;**
>
> (4) To refuse to engage in collective bargaining.
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> [Emphasis by **bold** supplied.]

Authority to hear, determine and remedy unfair labor practices is vested in the Commission by RCW 41.56.160.

The Discrimination Allegations

A discrimination violation occurs under Chapter 41.56 RCW 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) and Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996).

The Supreme Court of the State of Washington has established the standard of proof for "discrimination" cases. Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991); Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991). A complainant has the burden to establish a prima facie case of discrimination, including that: (1) the employee has participated in protected activity or communicated to the employer an intent to do so; (2) the employee has been deprived of some ascertainable right, benefit or status; and (3) there is a causal connection between those events. If that burden is met, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. 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: (1) the reasons given by the employer were pretextual; or (2) union animus was nevertheless a substantial motivating factor behind the employer's action.

The Prima Facie Case - Exercise of Protected Right -
Isaac participated on the negotiating team for the last three contracts, and urged the filing of a grievance on his behalf. Eddy served as the shop steward, was a member of the negotiation team, and filed the grievance protesting the suspension of Isaac. Other officers supported the grievance, and we can infer that their views were well-known to the employer.

The Prima Facie Case - Discriminatory Deprivation -
The discontinuance of the car program deprived several officers of a valuable employer-paid commuting privilege that had been in effect for years. Employees are now required to provide their own transportation to and from the work place.[7]

Both components of the K-9 program were eliminated. Both Isaac, who handled the patrol dog, and Marshall, who handled the drug dog, were directly affected by the change: They lost a pay premium of one hour per day for handling the dogs. There is also evidence in the record that the removal of the dogs had indirect effect on the safety and working conditions of every officer, since the dogs had provided protection and were a public relations aid.

The Uniform Treatment Defense asserted by the employer in its brief to the Examiner is not persuasive. The employer argued that all

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[7] Employer-provided commuting has been held to be an alternative form of wages and/or a working condition. Pierce County, Decision 1710 (PECB, 1983), and City of Brier, Decision 5089-A (PECB, 1995).

employees in the bargaining unit were treated equally by being denied continued participation in the take-home car program, and that neither of the two employees involved with the K-9 program were singled out for disparate treatment. In Wellpinit School District, Decision 3625-A (PECB, 1991), the employer's notification to the union that it would no longer deduct union dues from bargaining unit employees' pay, and in announcing that employees who skipped the chain of command would be disciplined or have their contracts non-renewed, supported a finding of anti-union animus and a prima facie case of discrimination. There, as here, adverse actions applied to a group.

The case at hand is also comparable to National Labor Relations Board (NLRB) decisions holding that terminating operations at one facility and relocating to another for the purpose of retaliating against employees for selecting a union to represent them unlawfully *discriminates against the employees as a group*, in violation of their statutory rights.[8] The NLRB held an employer *discriminated against a group of employees* who walked out of a meeting after authorizing a shop steward to act on their behalf and the steward led a protest at the meeting.[9] An employer can even be held liable for discrimination without a finding of disparate treatment, where a closure and discharge of unit employees occurs and the employer is not even a direct participant to the discrimination.[10]

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[8] See, Central Transport, 306 NLRB 166 (1992), enforced in part and modified, 997 F.2d 1180 (CA 7, 1993).

[9] See, Seminole Intermodal Transport, 312 NLRB 236 (1993), enforced, 50 F.3d 10 (CA 6, 1995).

[10] See, e.g., Esmark Inc., 315 NLRB 108 (1994).

Inherently destructive actions support a finding of discriminatory deprivation in federal precedents. The federal courts have defined that concept, as follows:

> Inherently destructive conduct is that conduct which has "far reaching effects which would hinder future bargaining," i.e., that conduct which "creat[es] visible and continuing obstacles to the future exercise of employee rights. ..." the two types of recognized inherently destructive conduct are actions distinguishing among workers based on participation (or lack of participation) in a protected activity, and those acts which do not divide the work force, but rather discourage collective bargaining by making it appear as a futile exercise in the eyes of employees.

NLRB v. Centra, Inc., 954 F.2d 366 CA 6, 1992).[11]

The need to prove anti-union animus has even been minimized where employer conduct "inherently destructive" of employee interests is found, since such conduct carries with it "unavoidable consequences which the employer not only foresaw but which [it] must have intended" so that the conduct bears "its own indicia of intent". NLRB v. Centra, Inc., supra, citing NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). See, also, Harvey Manufacturing, Inc., 309 NLRB 465 (1992).

The timing of the employer's actions here created visible obstacles to the future exercise of employee rights. Isaac testified that he

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[11] In Centra, inherently destructive conduct was found in the termination of a contract with a company without notification to the union representing the other company's employees, or allowing for negotiations. The employer had deceptively continued operations and treated former employees of the other company as new hires.

clearly associated the termination of the car and K-9 programs with the filing of the grievance protesting his suspension. Because of the employer's actions, employees would think twice about filing a grievance, so that the employer's actions deterred any future filing of grievances. In addition, employees would consider exercise of their rights to be futile. The changes of working conditions imposed by the employer on several employees could be said to be inherently destructive of employer-union relations. If the employer treated employees adversely because of union activity, discrimination could have occurred. The complainants have satisfied this element of their prima facie case.

The Prima Facie Case - Causal Connection -

The record in this case lacks the blatant anti-union animus that has been found in other cases.[12] The record contains no comments by Bailey that can be clearly categorized as anti-union animus, and we give the employer credit for its interest in maintaining the rights of employees to file grievances.[13] The timing of adverse actions in relation to protected union activity can, however, serve as circumstantial evidence of a causal connection between protected activity and adverse action.[14] The Examiner concluded that these complainants had made out a prima facie case for discrimination in violation of RCW 41.56.140(1), based on the timing of events. We agree.

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[12] See, e.g., Mansfield School District, Decision 5238-A (EDUC, 1996), and City of Winlock, Decision 4784-A (PECB, 1995).

[13] Council members testified that the council would not have put up with the chief retaliating against bargaining unit members for Isaac's grievance.

[14] Winlock, supra; Mansfield, supra; and Kennewick School District, Decision 5632-A (PECB, 1996).

Isaac filed a grievance on September 12, 1995. By November 2nd, Bailey had the go-ahead from the police committee to eliminate the K-9 program; on December 1st, Bailey issued his e-mail message stating that both K-9 programs would end January 1, 1996; on December 15th, Bailey issued his memo stating that the assigned vehicle program would end December 31st. The timing and context of the employer's actions here provide a sufficient basis to infer that the removal of the K-9 and car programs could have been designed to deter, diminish, or discourage union activity.[15]

Finally, these complainants and other department employees endured threats and harassment by means of the e-mail campaign during the interim between the Isaac grievance and the announcements ending the K-9 and car programs. Even though those messages designed to "stomp on" the employees did not materialize into actual deprivations of rights, status or benefits, they can be considered as retaliation against Isaac's and Eddy's union activity, and of the support by other officers for that union activity.[16]

The Employer's Defense -

Since we agree that the complainants made out a prima facie case of discrimination, we turn to the reasons articulated by the employer for its actions. To avoid finding a violation at this point, there must be legitimate and nonretaliatory reasons for its actions.

In its brief to the Examiner, the employer made the following arguments:

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[15] See, City of Federal Way, Decision 4088-A (PECB, 1993), affirmed, Decision 4088-B (PECB, 1994).

[16] We defer to the Examiner's use of the word "stomping", and his crediting of the union's witness over the chief's non-denial denial on this point.

- It had legitimate business reasons to eliminate the K-9 programs: Costs had increased substantially; the programs were underutilized; there had not been as many callouts as expected; and the liability was a concern.

- It had legitimate business reasons to terminate the assigned car program: The costs could not be justified any longer, with more officers living outside Omak.

- The car program and the K-9 program were of concern prior to the Isaac grievance. From the time of his arrival, Bailey opposed the K-9 programs. From the beginning of the take-home car program, it had been a concern to the city council, with the program being approved by only a 4-3 margin. Discussions between Bailey and the police committee about the car program began in the spring or early summer of 1995, and discussions about the viability of the K-9 program had been going on for a couple years prior to Isaac's grievance. On August 28, 1995, the employer communicated to police staff concerns about the car program and the K-9 programs, and the need to gather statistics and justify costs.

- There is no basis for a belief that Bailey would choose to retaliate on Isaac's grievance, when he did not do so when Isaac previously filed a grievance in May of 1995, or while Isaac had threatened lawsuits as far back as 1992.

- An anti-union bias cannot be established, except on the part of the employees.

- The termination of the programs is justified by paragraph 3.2 of the last collective bargaining agreement.

The employer has thus articulated legitimate, nonretaliatory reasons for its actions. The burden remains on the complainants to prove that the employer's actions were in retaliation for the exercise of statutory rights.

Substantial Motivating Factor / Pretext Analysis -
The complainants contend the timing of the grievance and employer actions constitute circumstantial evidence of discrimination, and they appear to argue that some of Bailey's comments should be construed as evidence of anti-union animus. They claim Bailey made it clear, "that he was viewing Isaac's grievance in 'personal' terms"; that Bailey issued a discipline letter in response to the grievance that accused Isaac of "incompetency, inattention and dereliction of duty"; and that Bailey told Isaac, in rejecting the use of vacation days for the suspension, "[W]hen you lead the charge, you are going to get wounded".

The comments cited by the complainants are insufficient to sustain their burden of proof. There is no evidence that any employer official made any remarks deprecating a union, such as were found in Mansfield, supra, where a school superintendent exhibited anti-union sentiments from the beginning of his tenure, told a union activist he would break her in order to break the union, and made other anti-union remarks. See, also, Winlock, supra, where the employer vigorously opposed a representation petition, an employer official told a union activist that the mayor was "crazy with this union thing", and the mayor complained to others about "union problems". In the case at hand, the closest Bailey came to showing anti-union animus was his testimony that he thought it would have been much simpler if Isaac accepted the two-day suspension. Even then, that goes at least as much to the substantive outcome as to the process protected by the collective bargaining statute.

Nor do we find a basis to infer pretext. It appears the employer dealt openly with its employees. The chief and assistant chief maintained open communications through the prolific use of e-mail and memos. We infer from the tone of those messages that they stated what was on their mind.[17] None contain direct anti-union animus. With this record, it is difficult to detect hidden messages or underlying meanings from the employer, such as would provide the basis for an inference of pretext.

We agree with the Examiner that the employer's stated reasons for termination of the K-9 and car programs have not been discredited. The viability of both programs had been under debate and review for years. The cost of both programs had increased, for various reasons, and were expected to increase further in the future; the stated purposes of the programs were no longer being achieved:

- The car program was instituted at the discretion of the chief, but council members had opposed it from the outset. Council members and the chief had continuing concerns because many of the police officers lived away from the center of town. The record suggests the privilege had been abused and the mileage restriction ignored, providing a basis to infer that the program was not satisfying its original intent, and was out of control. The Examiner noted that the chief's testimony evidenced exasperation with the cars program, but not with the employees or any union activity. We agree.

- There had been changes to the K-9 program since its inception, and changes were not unusual. At its outset, the police

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[17] As noted in the discussion of the interference claim, below, they may sometimes have been too forthright for their own good. That does not, however, prove intent.

> officers maintained the dogs. Due to later concerns arising under the Fair Labor Standards Act, the employer began paying the police officers for their care and feeding of the dogs. Changes also occurred as dogs were retired and new dogs were procured, depending a great deal on the temperaments and abilities of the dogs. The chief requested cost figures and the assistant chief provided that information before Isaac's accident and grievance. The projected increase in insurance costs was significant. Like the Examiner, we do not find the employer's business concerns to be pretextual.

We are not persuaded that anti-union animus was a substantial motivating factor in the decision to end the programs. With this record, and without more anti-union animus, we conclude that the complainants have not met their burden to show that the employer's actions were in reprisal for employee activity protected by Chapter 41.56 RCW, so that the employer has not discriminated against employees in violation of RCW 41.56.140(1).

The Interference Charge

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, but the test for deciding such cases is relatively simple. 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. See, Mansfield School District, supra; Kennewick School District, supra; and cases cited in those decisions. 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.[18]

In this case, the employer disputes the Examiner's finding of an interference violation concerning the e-mail campaign of messages and the "stomping" comment.

Timing -

The employer notes that no retaliation is claimed to have occurred on the day the Isaac grievance was filed, or immediately following that grievance. The employer claims that three and one-half months passed between the filing of the grievance and the alleged actions, and it insinuates that no interference violation should be found because of that time lapse.

The Commission has previously found an interference violation based solely on the timing of events,[19] but the timing does not have to

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[18] Examples of situations where the Commission has found interference violations include: City of Seattle, Decision 3593-A (PECB, 1991)[refusal to permit union representation at "investigatory" interview]; King County, Decision 4299 (PECB, 1993) [employer allowed union representative to be present during investigatory interview, but refused to allow union representative to actively participate in meeting]; City of Pasco, Decision 3804-A (PECB, 1992) [employee's prior behavior only characterized as misconduct after the processing of his grievance]; and Port of Tacoma, Decision 4626-A (1995)[interview questions directed toward stifling union activity and characterization of a union activist as "iconoclastic"].

[19] In Kennewick School District, supra, the employer began investigating an employee's performance four days after the employee filed a grievance. The Commission concluded that employees could reasonably perceive, from the timing of events, that the employer's actions occurred because of the employee's grievance.

be immediate. In Mansfield, supra, an interference violation was found on the basis of protected activity (in the form of testimony at an unfair labor practice hearing) which occurred four months prior to the employer advising the employee that adverse action was being taken against her husband, and five months prior to the employer advising the employee that adverse action was being taken against her. Additionally, the interference violation in that case was based on protected activity in the form of service as a union negotiator ending six to seven months before the adverse actions. In Kennewick, supra, an interference violation was based partially on a reprimand of the employee that occurred three months after the protected activity.

The e-mail messages at issue in this case and the "stomping" comment came well within a time period in which the actions could be perceived by employees as retaliatory.

The "Stomping" Issue -

The employer takes issue with the Examiner's conclusion that e-mail messages were designed to "stomp on" bargaining unit employees in response to the exercise of protected rights.

The Examiner credited the testimony of a union witness who testified that Chief Bailey told her he had more "stomping" to do. Bailey did not acknowledge having used the word "stomping", but his testimony and the record concerning the surrounding circumstances indicate that he was attempting to gain control of the department.[20]

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[20] The sergeant had recommended to the chief that he needed to "regain control", but the record provides no basis to infer that other bargaining unit employees were aware of the discussions between the sergeant and the chief, so it was reasonable for them to develop their own perceptions based on the timing of events.

We find no error in the Examiner's crediting of the union's witness or of his repetition of her "stomping" term, and we defer to the Examiner's observation of the witnesses. As the Commission has previously noted:

> We attach considerable weight to the factual findings and inferences therefrom made by our Examiners. They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commission members are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every appeal, is even more appropriate of a "fact oriented" appeal ...

City of Pasco, Decision 3307-A (PECB, 1990), citing Asotin County Housing Authority, Decision 2471-A (PECB, 1987); Educational Service District 114, Decision 4361-A (PECB, 1994). See, also, Seattle School District, Decision 5237-B (PECB, 1996).

Bailey's comments applied to the entire unit. He did not directly invoke union activity in his comments, and he used the term in a general way, but employees could, considering the record as a whole, reasonably perceive that the "stomping" was in response to their union activities.

Content -

While e-mail messages were commonplace in the normal course of business, the record supports an inference that their number escalated after the Isaac grievance, that they took on a more ominous tone, and that there were more frequent references to disciplinary action. The record shows that in October of 1995 alone, there were eight memos, two specifically threatening disciplinary action. This is contrasted with the first part of

1995 up to October, where the record contains eight memos in nine months, none suggesting disciplinary action in the event of violations.[21]

Employees' Actual Perception is Reasonable -

The employer argues that the employees must establish that they had a reasonable perception that their rights were being interfered with, and that without factual basis for their beliefs, the perception cannot be considered reasonable. Contrary to the employer's contention, however, actual perception of the employees does not need to be shown. See, Kennewick School District, supra, and City of Pasco, supra.[22] In this case, however, the actual perception is overwhelming, is reasonable in light of the timing of events, and supports the conclusion reached on the basis of timing.

The evidence that the complainants provided at hearing persuades us that employees did in fact perceive that many of the employer's actions were precipitated by Isaac's grievance:

- Officer Eddy, who was the shop steward while Local 760 represented the employees, testified that there was a consensus among officers that the "woe is me" memo was sent to officers because of Isaac's grievance.

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[21] Mukilteo School District, Decision 5899-A (PECB, 1997), is distinguished by the fact that there was no union activity preceding an extremely short conversation between employers about an employee who had left one place of business and was looking for work in another. The disputed conversation lacked reference to unions, union activities, the filing of a grievance or the filing of an unfair labor practice.

[22] In fact, actual perception may even be deemed to be unreasonable. See, Seattle School District, Decision 5237-B (EDUC, 1996).

- Eddy also testified that he felt his job security was threatened when Bailey told him he had "overstepped his bounds" at a time when Eddy was faxing a request for information to the union.[23]

- Officer Marshall testified that, in his opinion, Bailey put out threatening memos and set up a fake callout after Isaac's grievance was filed, and that Bailey was unhappy because of the Isaac grievance and the support of other officers for that grievance.

- Officer Joseph Somday also testified of a belief that he was targeted because he supported Isaac.

The employer did not significantly rebut the general perception of employees as shown by the complainants, and we conclude that the employees' perception was reasonable in light of the record as a whole.

Employer's Arguments Regarding "Surveillance" -
The employer takes issue with the Examiner's use of the term "surveillance", citing City of Seattle, Decision 3066 (PECB, 1988),[24] and Toutle Lake School District, Decision 2474 (PECB, 1987).[25] We reach the same result, albeit based on different precedent.

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[23] The request was addressed to Bailey and Cramer, and concerned documentation used to decide on the elimination of the car and K-9 programs.

[24] An allegation concerning a supervisor's search of an employee's desk was dismissed, because the supervisor had a legitimate business purpose to obtain case file data.

[25] An allegation of taping of a meeting was dismissed, based on failure to sustain the burden of proof.

There was no surveillance of union activity here, as was found unlawful in City of Longview, Decision 4702 (PECB, 1994). We are changing paragraph 14 of the Examiner's Findings of Fact to delete reference to creating an impression of surveillance.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

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

2. Sean Isaac was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).

3. Don Eddy was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).

4. Mike Marshall was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).

5. Richard Waters was a police officer employed by the City of Omak at all times pertinent to this proceeding, and was a "public employee" within the meaning of RCW 41.56.030(2).

6. Teamsters Union, Local 760, was the exclusive bargaining representative of law enforcement officers at Omak until May 7, 1996. Fred Meiner was the business representative assigned

to represent the bargaining unit at Omak in 1995. Sean Isaac was a member of the union's negotiating team for the latest three contracts. Don Eddy was the shop steward for Local 760 during 1995.

7. During 1995, the City of Omak and Local 760 were parties to a collective bargaining agreement. That contract contained a procedure for resolution of grievances. Officers Isaac, Eddy, Marshall, and Waters were all members of the bargaining unit and were covered by that contract during the period relevant to this case.

8. A "K-9 Patrol" program was begun in the Omak Police Department at the behest of Sean Isaac, who also served as handler for the dogs used in the program. The first dog used in the program was a friendly and effective patrol dog, but had to be medically retired. The next dog was more aggressive, caused concerns about potential liability for dog bites, and eventually had to be replaced. The latest dog was less aggressive than the second dog, but an employee of another law enforcement agency nevertheless characterized the animal as "too hard" and as a risk for serious bites. Additionally, the effectiveness of the K-9 Patrol Program was limited by the fact that Isaac's residence was a substantial distance from Omak.

9. A "K-9 Drug Search" program was begun in the Omak Police Department with the support of Chief Bailey. The dog used in that program was effective. After the employee who first served as handler for the dog used in this program left the department, Mike Marshall received training as the handler for the drug dog. The effectiveness of the program was adversely

affected by Marshall being on disability leave for a period in 1994 and 1995.

10. An "assigned cars program", which allowed some police officers to keep patrol cars at their residences and to use them commuting to and from work, was begun at Omak at the behest of Chief Ron Bailey shortly after his arrival. The program was opposed from its outset by three of the seven members of the Omak City Council, and faced continuing opposition from council members in connection with the adoption of budgets for 1993 through 1995. Cost savings to the employer were not demonstrated for any of those years, and the City Council remained divided as to the wisdom of retaining the cars program.

11. In February of 1995, the "assigned cars program" was revised to clearly indicate that it was limited to employees who resided within six miles of a fixed point in downtown Omak, and to clearly indicate that the continuation of the program was at the discretion of the chief of police. An exception was made for employees who served as K-9 handlers, so Isaac retained the use of his patrol car for commuting even though he resided more than 6 miles outside of Omak.

12. In August of 1995, Isaac was disciplined for his involvement in an automobile accident while on duty.

13. In September of 1995, Isaac filed a grievance protesting the discipline imposed upon him in connection with the earlier automobile accident. Eddy represented Isaac in his capacity as shop steward for Local 760.

14. From October through November of 1995, Chief Bailey and Assistant Chief Cramer issued a series of e-mail messages to police officers. Unlike previous messages during 1995, some of those messages threatened (and others strongly implied) discipline for noncompliance. The tone of those messages left an impression that the police officers were to remain silent in the face of violations of their rights under the collective bargaining agreement. Coming so soon after the filing of Isaac's grievance, such messages were reasonably perceived by the employees as related to the exercise of grievance processing rights protected by Chapter 41.56 RCW.

15. The chief's recommendation and the resulting Omak City Council action to terminate the "assigned cars program" in November and December of 1995 were consistent with previous criticisms of that program, as well as with estimates of the current and continuing costs of that program. The evidence in this record fails to sustain a conclusion that the elimination of the program was substantially motivated by the employees' exercise of rights protected by Chapter 41.56 RCW.

16. The chief's recommendation and the resulting Omak City Council action to terminate the "K-9" programs in November and December of 1995 were consistent with previous concerns about those programs, as well as with concerns about potential liability for dog bites and a current estimate of greatly increased premiums for the employer's liability insurance coverage on the dogs. The evidence in this record fails to sustain a conclusion that the elimination of the program was substantially motivated by the employees' exercise of rights protected by 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 the actions of the chief of police and assistant chief in issuing e-mail messages designed to "stomp on" bargaining unit employees after and in response to the exercise of grievance rights protected by Chapter 41.56 RCW, the City of Omak has violated RCW 41.56.140(1).

3. The complainants have failed to sustain their burden of proof as to their allegation that the employer's discontinuance, in the autumn of 1995, of the "assigned cars program" theretofore applicable to police officers constituted discrimination in violation of RCW 41.56.140(1).

4. The complainants have failed to sustain their burden of proof as to their allegation that the employer's discontinuance, in the autumn of 1995, of the "K-9" Patrol Programs theretofore operated with police officers in the bargaining unit constituted discrimination in violation of RCW 41.56.140(1).

Based on the foregoing amended findings of fact and conclusions of law, the Commission makes the following:

AMENDED ORDER

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

1. CEASE AND DESIST from:

a. Threatening employees with changes of their wages, hours and working conditions in response to their exercise of their right to file and pursue grievances.

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

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

a. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

b. Have the notice required by the preceding paragraph read aloud at a public meeting of the Omak City Council, and attach a copy of said notice to the official minutes of the meeting where it is read.

c. Notify the above-named complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a

signed copy of the notice required by the preceding paragraph.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

Issued at Olympia, Washington, on the 10th day of June, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL NOT threaten our employees with changes of their wages, hours and working conditions of its employees in response to their exercise of their right to file and pursue grievances.

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

WE WILL have this notice read aloud at a public meeting of the Omak City Council, and will attach a copy of this notice to the official minutes of the meeting where it is read.

DATED: _____

CITY OF OMAK

BY: _____
Authorized Representative

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

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