STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ANDREW APOSTOLIS Complainant, vs. CITY OF SEATTLE, Respondent.	)	CASE 12854-U-96-3096 DECISION 5852-D - PECB ORDER OF DISMISSAL

Law Offices of Paul H. King, by *John Scannell*, represented Andrew Apostolis.

Mark H. Sidran, Seattle City Attorney, by *Janet K. Mays*, Assistant City attorney, and *Marilyn F. Sherron*, Assistant City Attorney, represented the employer.

On December 3, 1996, Andrew Apostolis filed a complaint with the Public Employment Relations Commission. The complaint charged the City of Seattle, through its Seattle Center department, had interfered with rights granted him by Chapter 41.56 RCW. After numerous procedural steps described below, Executive Director Marvin L. Schurke issued an order correcting preliminary ruling on November 20, 1997. This order: 1) referred for hearing the allegation that Apostolis was discharged for complaining about the lack of union representation in investigatory interviews, and 2) dismissed the remaining allegations as untimely filed or lacking allegations of facts necessary to state a cause of action. The hearing was opened before Examiner Pamela G. Bradburn on August 19, 1997, then suspended as explained below. The hearing resumed October 17, 18, and December 11, 2000. Briefs were filed on February 2, 2001.

Based on the evidence and the parties' arguments, I dismiss the complaint for failure to establish a causal connection between Apostolis' assertion of statutory rights and his discharge.

PROCEDURAL MATTERS

Original Processing

The original complaint alleged Apostolis was discharged because: 1) he had urged that the crew chief position be removed from the bargaining unit, and 2) he had asserted in meetings that crew chiefs were unfairly disciplining other bargaining unit members. The deficiency notice pointed out: 1) the lack of allegations that the employer knew about Apostolis' actions; 2) the absence of dates, participants' names, and other facts about the meetings at which Apostolis urged removal of the crew chiefs, and 3) the lack of allegations relating Apostolis' actions to his discharge.

An amended complaint supplied dates and added allegations that: 1) Apostolis was denied union representation at investigatory interviews, and 2) he was discharged in part for requesting union representation. The Executive Director dismissed the allegation that Apostolis' pursuit of removing crew chiefs from the bargaining unit contributed to his discharge because he had not alleged, or supplied facts suggesting, the employer knew about his actions on that internal union matter. The allegation that Apostolis was discharged for arguing the crew chiefs were unfairly disciplining other bargaining unit members was dismissed for the same reason. The partial order of dismissal erroneously referred for hearing only the allegation that Apostolis was reprimanded for requesting union representation in investigatory interviews; the order didn't

address the allegation that the same request contributed to his discharge. *City of Seattle*, Decision 5852 (PECB, 1997).

Apostolis appealed the partial dismissal to the Commission. The employer contended the appeal wasn't timely served on it. The document lacked a statement that a copy had been mailed to the employer, no affidavit of service was included with the appeal, nor was Apostolis able to supply proof he had served the employer contemporaneously with filing the appeal. The Commission dismissed the appeal for lack of service, without reaching the merits. *City of Seattle*, Decision 5852-A (PECB, 1997).

Correction of Processing Error

Apostolis appealed the Commission decision to the King County Superior Court and asked for a continuance of the scheduled hearing. After considering the parties' comments, I rejected Apostolis' request. It became crystal clear at the first day of hearing that Apostolis thought his case was much broader than the employer and I did. While researching an offer of proof from Apostolis, I discovered the agency's error. The order correcting the partial dismissal issued on November 20, 1997. It referred for hearing the allegation Apostolis had been discharged for requesting union representation. *City of Seattle*, Decision 5852-B (PECB, 1997).

Various Appeals

Apostolis appealed the corrective order and this time the Commission reached the merits of the complaint. The Commission affirmed the dismissal of the untimely allegations, while clarifying that those allegations could be used as background and support for the discharge allegation. The Commission also affirmed the dismissal

of Apostolis' claim that his efforts to remove crew chiefs from the bargaining unit contributed to his discharge, rejecting his argument that he had alleged sufficient facts for the agency to conclude a crew chief's knowledge of these efforts should be imputed to the employer. *City of Seattle*, Decision 5852-C (PECB, 1998).

The action then moved into the courts. Apostolis appealed the Commission's dismissal of his first appeal to King County Superior Court, which affirmed the dismissal for failure to timely serve the city. Division I of the Court of Appeals affirmed.

Apostolis appealed Decision 5852-C (the Commission's dismissal of Apostolis' appeal from the corrected order) to King County Superior Court in July 1998. In May 1999, the King County Superior Court affirmed Decision 5852-C. In an unpublished decision dated May 30, 2000, Division I of the Court of Appeals affirmed the King County Superior Court ruling that upheld the corrective order.

The hearing resumed in October 2000.

FACTUAL BACKGROUND

The Seattle Center (center or employer) is a department of the city of Seattle (city or employer). The Key Arena is a center facility that opened in late 1995 and is expected to pay for itself from fees for events such as basketball and hockey games. Virginia Anderson has directed the center since 1988. John Cunningham has managed the center's Human Resources office since 1994.

Public Service and Industrial Employees, Local 1239 (Local 1239), represents a bargaining unit of city employees that includes

positions in grounds, maintenance, road, and parks. Some of these positions were assigned to the center. John Masterjohn has worked for Local 1239 since about 1981 and been its business manager/ secretary/treasurer since about 1986.

Andrew Apostolis was hired by the center on October 4, 1995, into a position included in the unit represented by Local 1239. He worked in the Key Arena the whole time he was employed, cleaning, setting up for events, and tearing down after events. The series of positions then working at Key Arena, in ascending order, was general laborer, utility laborer (leading a crew of 4-6), maintenance laborer (in charge of the entire crew), facility lead worker, and crew chief. Apostolis was assigned to the position of utility laborer after an interview by a crew chief and another supervisor. During the period of Apostolis' employment, the chain of command as he knew it was: himself; the two crew chiefs; Jyo Singh, manager of the Key Arena; Liz Bukis, manager of Seattle Center grounds; Bruce Rooney, whose position Apostolis didn't know, and Anderson.

Although he worked under the direction of crew chiefs Carson Jones and Lenny Hull throughout his employment, Apostolis worked more under Hull than Jones. At this time Hull was supervising 20 to 22 regular employees and up to 20 intermittent laborers. Sometimes Apostolis was a lead worker by virtue of his utility laborer position, while at other times he worked under someone else's lead.

Relevant Agreement and Policies

The January 1, 1992, through December 31, 1994, collective bargaining agreement between the city and a number of unions including Local 1239 was applicable during most of Apostolis'

employment,[1] established a one year probationary period, and prohibited grievances over discharges during that period. Exhibit 5 sections 10.1.1, 10.2, 10.3, 10.3.1, 10.4.1.

Crew chief positions in various city departments are included in the bargaining unit represented by Local 1239. The 1992-1994 agreement prohibited crew chiefs from doing work commonly assigned to other bargaining unit members, except in emergencies. Exhibit 5, Appendix J, section J.2. Because of the extent of its supervisory authority over other unit positions, the appropriateness of including the crew chief position in the unit had been an issue for some years before Apostolis was hired. Apostolis and several other union members working at the center urged in several union meetings that the crew chief position be removed from the bargaining unit. The crew chief position was still in the bargaining unit, and the dispute continued to exist, at the time of the hearing.

A new corrective action process (new process) was adopted by the city and the unions representing its employees at an undetermined date. The new process began with an informal notification (known as coaching) that was memorialized but wasn't grievable or forwarded to Human Resources. Other progressive steps are included but only the final action of demotion, suspension, or discharge can be grieved to arbitration.[2] At the center, the new process replaced the 1993 discipline policy (1993 policy), which was a traditional progressive discipline approach beginning with verbal warning and ending with discharge.

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[1] The successor agreement was executed and effective on July 24, 1996, just two months before Apostolis was discharged. Exhibit 1.

[2] Exhibit 6.

Alleged Requests for Union Representation

There are three documented instances of Hull and Apostolis meeting to discuss workplace performance issues, on December 22, 1995, May 17, 1996, and July 13, 1996. Apostolis asserts he requested union representation at the beginning of each meeting, while Hull denies any request during the first two meetings and recalls Apostolis' July 13 request as coming at the end of the meeting.

Discharge

August 22, 1996, Cunningham recommended that Facility Manager Bukis consider discharging Apostolis, based on what Cunningham called "the third quarter" probationary review by Hull (see discussion below). Bukis responded August 30, 1996, proposing the two crew chiefs, Singh, Rooney, and she meet to reach a final recommendation.

Although the center's practice was to evaluate probationers quarterly, Apostolis received only one evaluation during his eleven months of employment.[3] It purported to cover the period from October 4, 1995, to April 4, 1996, and stated the next evaluation was due July 4, 1996. Hull didn't date the evaluation; the cover sheet was dated September 6, 1996, and Apostolis found the evaluation in his mailbox on September 7. Hull rated Apostolis negatively on teamwork. Apostolis never had the opportunity to discuss the evaluation with Hull.

On September 10, 1996, Cunningham recommended to Anderson that she discharge Apostolis, based on the recommendation of the crew chiefs

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[3] Exhibit 25.

and Bukis. Anderson discharged Apostolis on September 17, 1996, effective immediately.

This unfair labor practice was filed on December 3, 1996.

DECISION AND ANALYSIS

Ruling on Motion to Strike Brief

At the close of the hearing, I directed the parties to file the original of their brief at the agency's Olympia office and to mail a copy to me; briefs were to be postmarked January 31, 2001. My practice has been to set a postmark date for post-hearing briefs to eliminate the uncertainties about the postal service that arise if a date for my receipt of the brief is used. A dispute arose over whether the employer's brief was timely. I find the employer's brief wasn't filed according to my directions, but waive that defect under WAC 391-08-003 in the absence of any prejudice to Apostolis.

Timeliness of Employer's Brief Questioned -
Copies of each brief arrived in the agency's Kirkland office on February 2, 2001.[4] I didn't keep the envelopes. On February 9, 2001, I received Apostolis' motion to strike the employer's brief and for sanctions. The employer's reply reached me on February 22, 2001. Apostolis submitted a response on March 2, 2001.

Apostolis asserts the employer's brief was postmarked February 1, instead of January 31, and lacked a certificate of service. He

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[4] The employer's brief was filed with the Olympia office on February 2, 2001.

argues, relying on the Commission's decision on his first appeal, that briefs must include evidence of contemporaneous service. He also contends the late mailing raises the possibility the employer received and read Apostolis' brief before filing its own. He asks me to strike the employer's brief and find the employer has defaulted on the merits of the case.

The employer admits its brief lacked an affidavit of service. It asserts its January 31 transmittal letter and its brief were mailed January 31, 2001. It offers in support of this contention an affidavit by the receptionist whose duty it is to put out-going mail through the postage meter and deposit it in the U. S. Mail. The receptionist said the postage meter automatically resets the date at 12:01 a.m. each day, and that she recalled recently weighing and stamping three large envelopes while Sherron watched her. The employer also reasons that both briefs must have taken the same amount of time in the mail because they were received in Kirkland on the same day and the two offices are in the same ZIP code; therefore, the employer's brief must have been mailed on January 31 as Apostolis' brief was.

Apostolis' response asserted his brief was mailed at the Sea-Tac International Airport, far from the downtown office of the employer's attorney. In addition, Apostolis supplied a copy of the envelope which contained his copy of the employer's brief, and a declaration that the pick-up time was 5:00 p.m. for the only U. S. Mail mailbox on the first floor of the Municipal Building (the mailbox Sherron's receptionist habitually used).

Ruling and Analysis -

It is undisputed that the employer's brief lacked proof of contemporaneous service by mail on Apostolis. WAC 391-08-120(3),

(4). Therefore, other evidence must be considered to determine whether the employer's brief was timely filed.

I note the city attorney's receptionist doesn't say when she put the employer's brief in the U. S. Mail; she only states the envelope was put through the office postage meter on January 31, 2001. I infer the copy of the employer's brief mailed to Apostolis was handled by the employer and the U. S. Mail simultaneously with the copy addressed to me. The postage meter date is obscured on the copy of the employer's envelope Apostolis filed with his response, but the U. S. Mail postmark stamps show February 1, 2001. One logical conclusion is that the employer's envelopes didn't reach the U. S. mailbox in the Municipal Building by the 5:00 p.m. pick-up on January 31, 2001. I conclude the employer's brief wasn't mailed in conformance with my directions.

That conclusion doesn't mandate the type of sanctions Apostolis requests. WAC 391-08-003 states in pertinent part: "The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver." Apostolis argues there is a possibility he was prejudiced by the employer's receipt of his brief before it mailed its own. The evidence shows this possibility is minuscule. Apostolis hasn't contested the receptionist's declaration that the employer's brief was put through the postage meter just before 5:00 p.m. on January 31, 2001. Apostolis' brief was mailed to me and the employer at the airport just before midnight on January 31, 2001. Without some sort of subterfuge, which Apostolis hasn't alleged or proven, it's difficult to imagine how the employer's attorney could have seen Apostolis' brief before mailing her own. Apostolis hasn't shown the prejudice required to prevent my waiving the employer's failure to get its brief into the U. S. Mail on January 31, 2001.

In addition, the evidence Apostolis submitted with his response shows that the employer's brief reached Apostolis' representative on February 5, 2001, which was the third business day after the postmark deadline of January 31, 2001. This is substantial compliance with the requirement of contemporaneous service, especially given that the parties had agreed there wouldn't be reply briefs. *Mason County*, Decision 3108-B (PECB, 1991).

This decision is in accord with the Commission's approach. In *King County*, Decision 6772-A (PECB, 1999), the employer didn't get the union's brief until 12 days after it was filed with the Commission. The employer asked the Commission to strike the union's appeal brief for untimely service, or to reject the brief and dismiss the appeal. The Commission declined drastic action, noted that it had given parties more leeway in serving briefs than complaints or appeals, and held the service requirements should be waived since there was no evidence of prejudice.

I have read and considered the employer's brief.

Exclusion of Tainted Testimony

Sequestration Order -

During the hearing in this matter, I informed the parties I would determine how much testimony of a sequestered witness should be excluded because the employer's attorney had improperly given him information about earlier testimony.

Witnesses in this proceeding were sequestered at Apostolis' request. Administrative hearing officers are specifically granted the power to make such rulings. RCW 34.05.449(5). The purpose of witness sequestration is to "enhance the likelihood they will testify from their own recollection rather than accommodate their

testimony to that of preceding witnesses." *Shoreline School District*, Decision 5560-A (PECB, 1996). Attorneys "have an obligation not to frustrate an order excluding witnesses by relating the substance of the courtroom testimony to the excluded witnesses." *5A Washington Practice: Evidence* (1999, 4th Ed.) Section 615.2 (Commentary on Evidence Rule 615).

At the close of each witness's testimony, I explained the witness must not discuss his or her own testimony or the proceedings with anyone other than the attorney who called her or him until the case closed. See, for example, Transcript at 140-141. This practice of explaining the limits on witnesses has been encouraged by the Supreme Court. *Egede-Nissen v. Crystal Mountain*, 93 Wn.2d 127 (1980).

Order Violated -

It became clear during John Masterjohn's testimony on October 18, 2000, that the sequestration order had been violated. Under examination by employer attorney Marilyn Sherron, Masterjohn testified that the union's secretary had relayed a verbal message from Sherron to him before he came to testify. The message: 1) said union representative Bo Jeffers had testified that morning that a motion to remove crew chiefs from the bargaining unit may have been made in a union membership meeting, and 2) asked Masterjohn to search the union records for minutes of such a meeting. Because of that message, Masterjohn learned from Jeffers that he thought the motion had been made about July 1996. In accordance with the message and Jeffers' comments, Masterjohn searched the minutes of union meetings during 1996 and 1997, finding two sets of minutes which mentioned the crew chief issue.[5] Transcript at 570-573, 578-580.

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[5] Exhibits 28 and 29.

After temporarily excusing Masterjohn, I questioned Sherron about the situation. Sherron said she phoned the union secretary during a break in the hearing that morning and asked the secretary to have Masterjohn check the minutes for a motion about crew chief membership in the bargaining unit. Sherron said she told the secretary Jeffers would know the relevant time period to search, but didn't remember mentioning the substance of Jeffers' testimony. Transcript at 580-583.

I recalled Masterjohn and asked for more specifics. He said he spoke with Jeffers but didn't ask about the substance of his testimony because the union secretary had told Masterjohn that Jeffers had testified about a motion to remove crew chiefs from the bargaining unit that was made at a union meeting. Transcript at 584-585.

I conclude that Sherron intentionally violated my sequestration order by communicating the substance of Jeffers' testimony about the motion to Masterjohn through the union secretary; the evidence didn't suggest any other way Masterjohn could have known what Jeffers said before talking with him. Janet May, not Sherron, had represented the employer on the first day of hearing when Apostolis asked for sequestration, but Sherron heard me mention that witnesses had been sequestered during the morning of October 17, 2001, the first day she appeared as the employer's representative.[6] Sherron also heard me caution witnesses about the sequestration order four times on October 17 and twice on October 18 before Masterjohn appeared.[7]

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[6] Transcript at 230.

[7] Transcript at 295, 363, 420, 425, 440, 526.

Appropriate Penalty -

The proper penalty for a violation of a sequestration order is a question of first impression for the Commission. Commission rules provide:

> Misconduct at any hearing conducted by the commission or a member of its staff shall be ground for summary exclusion from the hearing. Misconduct of an aggravated character, when engaged in by an attorney or other person acting in a representative capacity pursuant to WAC 391-08-010, shall be ground for suspension or disbarment by the commission after due notice and hearing.

WAC 391-08-020.

In addition, three judicial sanctions for violating witness sequestration are generally recognized as appropriate by federal and state courts and commentators: citing the witness for contempt, comment by the court to the jurors, and refusal to permit the tainted witness to testify. Only the final judicial penalty is available to Commission staff.

Although seen as drastic, rejecting the tainted witness' testimony is regarded as appropriate when the witness violates the order "with the connivance or knowledge of a party or counsel." *5A Washington Practice: Evidence* at 267; Aronson, *The Law of Evidence in Washington* (2nd Ed. 1997) at 615-3. This penalty has been upheld by Washington appellate courts.

In *State v. Johnson*, 77 Wn.2d 423 (1969), criminal defendant Johnson insisted his wife remain during his trial despite the sequestration of witnesses and the judge's advance notice that, if she stayed, the wife wouldn't be allowed to testify to anything but character or other non-substantive matters. The Supreme Court

upheld the trial court's refusal to permit the wife to testify about the defendant's alibi, reasoning that this defendant was fully informed about the consequences of his wife's hearing other witnesses' testimony. "When, in the face of the court's order of sequestration, the defendant decided to have his wife with him in the courtroom, he made a binding election and, in our opinion, the court did not abuse its discretion in holding him to it." 77 Wn.2d at 429.[8] The court noted that earlier decisions dealing with instances of mistake or inadvertent violation of a sequestration order simply weren't applicable to the *Johnson* facts.

Masterjohn's testimony about whether or not a motion regarding crew chiefs' unit status was made at a union meeting must be excluded as tainted. I exclude his testimony at Transcript at 570, line 11, through 572, line 11; at 573, lines 10-19; at 578, line 22, through 580, line 5, and at 584, line 9, through 587, line 20. It would be too harsh to exclude all of Masterjohn's testimony, even though the Supreme Court approved the complete rejection of the wife as a witness in *Johnson*. Only the designated portions of his testimony related to the subject of Sherron's improper communication, and there's no suggestion in the record that Sherron committed any other violation of the sequestration order.

Similarly, I conclude the two sets of union meeting minutes Masterjohn brought to the hearing at Sherron's request were properly admitted into evidence. Sherron wouldn't have violated the sequestration order by leaving a message for Masterjohn asking that he bring any minutes mentioning the crew chief issue from the period of Apostolis' employment. It was proper for Sherron to ask that Masterjohn find the minutes, rather than a secretary, so

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[8] This decision hasn't been limited or reversed in the intervening years.

Masterjohn could identify the documents instead of bringing the union secretary to testify about it. In other words, this request could have been properly made without any revelation of the substance of Jeffers' testimony.

Summarily excluding Sherron from the rest of the hearing, as may have been permitted by WAC 391-08-020, wouldn't have been appropriate. Aside from her violation of the sequestration order, Sherron's representation was completely proper. In addition, exclusion of its representative from the rest of a hearing visits all the punishment on the party, since the party must quickly find another representative or continue without a representative. There was no evidence that other employer officials suggested Sherron's phone call, or later ratified the violation.

But some lesser sanction is necessary so that these and other parties will continue to take Commission sequestration orders seriously. I consider discussion of the intentional violation in this decision, with its publication to other parties and preservation in the records of this agency, in the unlikely event of additional misconduct by Sherron, to be sufficient.

Discrimination Claim: The Legal Standards

Apostolis says the employer unlawfully discriminated against him by discharging him because he exercised his legal right to ask for union representation in investigatory meetings. The employer challenges Apostolis' claim that he asked for union representation when meeting with Hull, and contends there was no right to union representation during any of those meetings because they were "non-disciplinary statements of performance expectations" under the new process. Employer brief at 6.

The Legal Standard: Discrimination -

Public employers are prohibited from discriminating against a public employee who is exercising a right granted by the statute. RCW 41.56.040. The Commission has jurisdiction to prevent this and grant appropriate remedies. RCW 41.56.160.

The Commission has said:

> 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.
>
> The Supreme Court of the State of Washington has established the standard of proof for "discrimination" cases. 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.

Grant County Hospital, Decision 6673-A at 5 (PECB, 1999) (citations omitted).

The Legal Standard: Right to Union Representation -

Apostolis argues the statutory right he tried to exercise was the right to union representation in investigatory proceedings. The Commission has said:

> Employees have a right to union representation at investigative interviews where the employee reasonably believes the interview might result in disciplinary action.
>
> . . .
>
> An "investigatory" interview is one in which the employer seeks information from the employee(s). The purpose of having a union representative present at such times is to assist employees who may be unfamiliar with and intimidated by the situation. . . . Historically, the Commission has firmly protected the rights of employees in this area. An employer official who dissuades an employee from exercising this statutory right takes on a substantial risk, and extraordinary remedies have been awarded in such cases.

Cowlitz County, Decision 6832-A at 5 (PECB, 2000).

In *Cowlitz County,* an employer official asked two employees about an alleged incident and then warned them against repeating the alleged conduct. Those actions made the meeting investigatory, although the employer official had either said nothing about the meeting's purpose or assured them it wouldn't be disciplinary. The Commission focused on the actual events and outcome, not on employer representations that weren't borne out by later events.

Prima Facie Case: Exercise of Protected Right

Based on all the evidence, I conclude Apostolis properly exercised his right to union representation in each of the three incidents discussed below. The employer's denial of union representation in each of these incidents can't be remedied in this case since the allegations were dismissed as untimely, but they can be evidence of Apostolis' claim he asserted a statutory right, the first factor in making a prima facie case of discrimination.

The December 1995 Incident -

Testimony - Apostolis said he and maintenance laborer Ken McGuire got into a noisy argument during a midnight shift in Key Arena about the order in which the new basketball floor should be picked up. McGuire insisted on a particular approach which Apostolis said would make laying the floor down again take the 12 person crew an hour longer. The Key Arena had recently opened and management was placing great emphasis on shortening the time it took crews to tear down after one event and prepare for the next. McGuire profanely insisted Apostolis do what he was told. Apostolis recalled that Hull wasn't at work when the incident occurred and that Hull called him and McGuire to the office the next day. Apostolis recalls asking for a shop steward, being denied, and the questioning continuing. Apostolis believed he was reprimanded by Hull.

Neither party called McGuire as a witness.

Hull said he remembered McGuire and Apostolis angrily yelling at each other on a late or early shift. He immediately took them to his office to calm them down and try to find a resolution. Hull reminded them that center employees had to work respectfully with each other, and that each of them should be setting an example because they were leads. Hull wasn't asked whether he questioned Apostolis in the office. Hull didn't recall Apostolis asking for union representation at any time during the incident. Hull described his interaction with Apostolis as counseling. Hull documented the first incident in a memo dated a week later, which wasn't given to Apostolis. It summarized McGuire and Apostolis' "explanations" of the incident and Hull's expectations. It adds that "both parties agreed to improve in areas discussed." The memo lacks any reference to a verbal warning. Copies were sent: to the other crew chief, to Hull's own superior, and to Human Resources.

The copy introduced at hearing was sent by Human Resources to Masterjohn two weeks after Apostolis' discharge. Exhibit 30 at 2.

Potential for Discipline - As explained in the discussion of the second incident, I conclude the center had not yet implemented the new corrective action process; thus the 1993 disciplinary policy still controlled. It gives "verbal warning" as the first step in the progressive discipline process. The phrase is defined as "Informs/warns the employee of a specific job-related problem, discussing what should be done, and when. (Should be documented in Human Resources personnel files.)" Exhibit 8 at 3. The 1993 policy general guidelines include the following:

> 7.2 VERBAL WARNINGS. A verbal warning is normally used for first-time violations of minor proportions to inform the employee about an unacceptable performance.
>
> 7.2.1 Privately tell the employee that the discussion is a verbal warning, relate the problem, incident involved and the expected performance. (See 7.1.6 [constructive correction process])
>
> 7.2.2 Inform the employee that a verbal warning is being administered and that the employee is being given an opportunity to correct the condition. Note the incident for the personnel file. (See 7.1.2 [documentation for possible future discipline])
>
> Exhibit 8 at 15.

Hull testified to the facts of the first incident, and described McGuire's and Apostolis' "explanations" in his memo documenting it. I infer Hull must have questioned them about it, since there is no

evidence that he personally observed the incident, whether or not he was on duty when it occurred.

I cannot credit the employer's claim that Hull's action in this incident was a non-disciplinary counseling or coaching. Apostolis was a probationary employee. He was being questioned by a supervisor several levels above him, under a disciplinary policy which began with verbal warnings that were documented and sent to Human Resources for possible future use. That procedure was followed in this case and Apostolis saw the interaction as a reprimand. Apostolis's belief that this meeting with Hull could result in discipline was reasonable in the circumstances.

Request for Representation - There is a conflict in Hull and Apostolis' testimony about whether he asked for union representation during this incident. Both had been shop stewards, Apostolis seven years with the International Longshore Workers Union and Hull from about 1988 to 1992 with Local 1239; both knew about the right to representation.

Their initial testimony about the first incident, on the first day of hearing, August 19, 1997, occurred some 20 months after the incident. Apostolis' testimony under direct and cross examination was consistent and he remembered the incident in some detail without documentation to refresh his recollection. Hull asked for documentation to refresh his recollection and commented on the passage of time when he was questioned by Apostolis' representative, then answered questions straightforwardly and emphasized the overt anger shown by both Apostolis and McGuire. (Hull's testimony about the incident was more detailed the last day of hearing, five years after the incident, when Exhibit 30 with his recap of the meeting had been introduced. The additional details were similar to the contents of the exhibit.)

The employer argues "the only evidence before this Examiner established that the Complainant, on two occasions never requested union representation. . . ." Employer brief at 5. The employer ignores Apostolis' consistent testimony that he requested union representation in each of the three encounters with Hull.

I conclude it is more likely that Apostolis remembered the meeting accurately. Hull promoted to crew chief about September 1995. The next month he suddenly became supervisor of about 40 people. The Key Arena was just opening and all supervisors were under great pressure to make it pay for itself by meeting the guarantees of quick turn-around between events. It is more likely that Apostolis would remember the first incident in more detail, since it involved himself, than that Hull would with his attention spread among 40 subordinates.

The May 1996 Incident -

Testimony - Apostolis said he was cleaning stands in Key Arena between scheduled events under the direction of lead Gert Gruenwoldt. He wanted sugar and soda in the expansion joints between stand sections to get extra cleaning, which would require making several passes over each stand. Apostolis was confused and asked what Gruenwoldt meant, explaining that the cleaning would damage the putty in the joints and that there wasn't time during a turn-around between events for the extra cleaning. Apostolis estimated that following Gruenwoldt's order would require an extra 1.5 hours work.

Apostolis said Hull, who was "in a shouting state," took both of them to the office. Apostolis testified on direct that he requested union representation before answering the first question, then on cross that he asked for union representation as soon as he got to Hull's office, before a question was asked. Hull denied the

request. Some time that same day, Hull filled out a form entitled "NOTICE OF UNSATISFACTORY WORK OR CONDUCT (notice)" and wrote an attached memo giving the facts of the incident. The memo begins, "This letter is to call your attention regarding your unsatisfactory work or conduct." Exhibits 2, 4. Apostolis signed both documents and wrote on the form that he protested it, that the incident was misunderstood, and that the orders he was given weren't clear. Apostolis said Hull reprimanded him for actions on the verge of insubordination and said the memo would go "to the file." Transcript at 73. The notice was a multiple-copy document showing a copy going to Personnel, and the copy provided for the hearing was received by Human Resources on May 17, 1996.

Gruenwoldt testified they were cleaning after an event and working under some strain. He didn't think clients were in the building because the work of cleaning had begun. He must have been in charge, and Apostolis and he were debating about cleaning the joints. Gruenwoldt appreciated Apostolis always expressing his feelings when they worked together, because Gruenwoldt felt he sometimes went overboard. Gruenwoldt was sure he and Apostolis were going to get the issue settled, but Hull "must have been lurking in the hallway or something." Transcript at 422. Hull took both of them up to his office. Gruenwoldt told Hull it wasn't a big thing and he would settle it with Apostolis. Gruenwoldt wasn't asked whether Apostolis requested union representation. Gruenwoldt thought he got some kind of negative action from Hull as a result of the incident.

Hull said he heard Gruenwoldt and Apostolis having "a pretty heated conversation on how something should be" done, with Apostolis disagreeing with Gruenwoldt's directions. Transcript at 173. Hull intervened and asked what the issues were. After hearing Gruenwoldt's explanation, Hull told Apostolis to follow his lead's

instructions. After Hull left the immediate area he heard the disagreement break out again, with Apostolis cursing and Gruenwoldt yelling he was going to find Hull and straighten out the issue. At that point, Hull took both men to his office because clients were within earshot. Hull repeated his comment that Gruenwoldt was the lead and Apostolis needed to accept his direction, told them yelling and cursing was out of line, and explained there were clients in the Arena. Hull said the notice of unsatisfactory work and his supplemental memo were coachings. Under examination by Apostolis' representative in 1997, Hull testified that he remembered clearly that Apostolis did not ask for union representation; under examination by the employer's attorney in 2000, Hull testified that if Apostolis had asked for union representation, Hull would have told him to note that in the section of the notice form for employee remarks, and Apostolis' comments didn't mention the subject. Transcript at 167, 714. I infer from Hull's testimony that he interpreted the lack of a comment on the notice to mean Apostolis hadn't made the request.[9]

Union representative Masterjohn testified Apostolis phoned after the second incident, saying that the center had over-reacted to a loud conversation between him and Gruenwoldt. Masterjohn wasn't asked whether Apostolis raised the issue of union representation during the conversation.

Potential for Discipline - As with the first incident, I am not persuaded by the employer's claim that the second incident was a non-disciplinary coaching. That suggestion fails because the evidence on the effective date of the new corrective action process

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[9] Hull may have confused this incident with the third, when Apostolis did add a comment about union representation and a labor/management meeting was held on the subject.

is inconclusive, and the employer used forms clearly tied to the 1993 policy.

Apostolis thought the new process was implemented in April or May, 1996. Cunningham said several things: it was late 1995 to early 1996; it occurred before the collective bargaining agreement had been signed on July 24, 1996, and he would have to get the document to give a firm date. Hull thought the new process was implemented after he became a crew chief in September 1995. Masterjohn, who had been involved in the negotiations on the new process between the city and the unions, said it probably became effective in 1995 or 1996.

Establishing the effective date of a new disciplinary policy should be a simple matter of producing a dated document. The employer is in the best situation to possess, maintain, and provide such a dated document. However, when the employer produced a copy of the new process, it lacked any date. I noted the problem, but the employer didn't produce a dated copy. This absence of evidence that the new process had been implemented before the May 1996 incident is corroborated by Hull's use of forms tied to the 1993 policy.

Hull documented the May, 1996 incident on a form entitled "notice of unsatisfactory work or conduct." The 1993 disciplinary policy states that such a notice is a written reprimand. Exhibit 8 at 16. The policy says a written reprimand is given "[i]f employee performance has not improved after verbal warning. . . ." Exhibit 8, section 7.3, at 15, 16. Hull gave Apostolis a documented verbal warning for the first incident, so a written warning would likely be the next step under the 1993 policy for a repetition of the earlier behavior. I note that Hull used the term "coaching session" in his memo when referring to a prior incident. This

usage may result from training about the new process that managers, crew chiefs (including Hull), and some shop stewards were given at an undetermined date; it is instructive to note that ordinary workers like Apostolis got no training in the new process. It wouldn't be unusual for such training to precede formal introduction of the new corrective action process.

The lack of reliable evidence of its effective date leads me to conclude I can't credit the employer's argument that the new process was actually in effect in May 1996, and Hull had mistakenly used a left-over, outdated form (the notice of unsatisfactory performance). Granting, solely for the sake of argument, that the employer had actually implemented the corrective action policy before May 17, 1996, it is the employer's responsibility to retrieve all outdated forms and, if it fails to, the employer is responsible for the acts of its supervisors who use forms the employer later claims are wrong. The employer didn't produce evidence that Hull was told at the time he'd used an incorrect form.

Because a dated version of the new process wasn't provided and because Hull used a form appropriate to the 1993 policy, I conclude that the new process wasn't in effect on May 17, 1996. Accordingly, Apostolis faced potential discipline for the second incident.

Timely Request for Union Representation - By all accounts, Hull was some distance off when the disagreement developed between Apostolis and Gruenwoldt, and couldn't have learned about the incident without asking questions. Again, Apostolis and Hull dispute whether a timely request was made. What Hull recalled about the May 1996 incident was that it was a repeat of Apostolis objecting to directions from his lead; Hull didn't remember the subject of

the disagreement until his testimony in 2000. Hull did recall with specificity details like where the disagreement occurred and that he spoke with Gruenwoldt and Apostolis twice before taking them to his office. Hull's testimony about whether union representation was requested appears to vary between the first and last days of hearing. The first day of hearing Hull simply said there was no request for representation. When asked the same question on the fourth day of hearing, Hull went into detail about the basis for his conclusion that there hadn't been a request. It was that he would have told Apostolis to mention his request on the notice of unsatisfactory work; Apostolis hadn't, so there must not have been a request.

Hull's reasoning isn't persuasive. Several equally plausible reasons for the lack of any written comment by Apostolis about union representation are suggested by the evidence. Hull may be confusing his reaction during the second incident with his reaction to the same request made during the third. Or Hull may not yet have been told by trainers on the new process that coaching situations weren't disciplinary and therefore union representation wasn't necessary; thus the issue may not have occurred to him. He may have known but been so sure the trainers were correct that he thought there was no point in Apostolis raising the issue. Or, as a bargaining unit supervisor, he may not have seen his interviews as raising disciplinary possibilities and didn't remember the apparently irrelevant request. Hull's attitude about recommending that Apostolis be discharged is instructive on this last possibility. Hull denied making any recommendation, saying he just expressed doubt whether Apostolis could meet expectations. Transcript at 727-31. However, all the pre-discharge documentation, and the discharge letter itself, referenced crew chief recommendations, and Hull signed all the documentation of performance problems.

The July 1996 Incident -

Testimony - Apostolis said he was vacuuming Key Arena entrance mats when the vacuum cleaner broke down. He asked for help from fellow employee Mark Garcia, who used the vacuum cleaner more often, and was told to take it apart and clean the tube. When Hull appeared suddenly, the vacuum cleaner was lying in pieces on the floor inside the entrance, while Apostolis was cleaning the vacuum's brush by the trash bin outside the entrance and talking with the other employee who was washing windows outside. Hull said he'd watched their discussion and wanted to speak with Apostolis later that day, then left. Probably after lunch, Hull took Apostolis to the office and asked what was going on, what Apostolis had been doing. Apostolis asked for union representation because he felt the meeting would lead to discipline; a shop steward had been appointed for Key Arena at that time. Hull said Apostolis didn't need a shop steward, asked questions which Apostolis answered, and told Apostolis to leave. Just before the end of the work shift, Hull handed Apostolis the recap Hull had prepared after their meeting. Hull offered Apostolis the chance to add comments on the recap, and Apostolis wrote "It appears this is a reprimand without benefit of a shop steward present. I wish to have this reviewed before becoming a part of my file." Exhibit 3.[10]

Hull said he saw Apostolis and Garcia standing outside a Key Arena entry. He watched their backs from inside the arena for what he thought was five minutes and they didn't move. Hull approached and asked what they were working on. Apostolis said cleaning the

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[10] Cunningham said a meeting occurred several weeks after the third incident, where he, Masterjohn, and Apostolis discussed union representation. Cunningham said Masterjohn agreed that coachings weren't disciplinary. Masterjohn said coachings wouldn't lead to discipline, but didn't know whether Hull and Apostolis were in that process. Transcript at 87-9, 588-94.

vacuum brush and Garcia said washing windows. Hull recalled that Apostolis didn't have a brush with him. Hull asked if they were on a break and directed them to go back to work when they said no. At the end of the shift, Hull brought both men in separately to give them feedback on the importance of staying productive. Hull didn't remember whether the coaching memo had already been prepared. Hull didn't ask Apostolis questions at this time; he'd gotten answers to his questions when he approached the men at Key Arena. (Later, Hull said a coaching was a two-way conversation in which he expected Apostolis to give his side of the story.) Apostolis argued, saying he was being shown something about the vacuum by Garcia; Hull rejected this explanation because the two men were some distance from the vacuum cleaner when he saw them. Hull remembered Apostolis asking for union representation at the end of their discussion of this incident. Hull went ahead anyway because he needed to give Apostolis feedback; Hull had been trained that coachings under the new corrective action process weren't disciplinary because copies weren't sent to the personnel file kept in Human Resources. Hull told Apostolis to put down his request for representation in writing so they could find out whether Hull was wrong in denying it. After reviewing Exhibit 3, Hull repeated his previous testimony without adding anything new.

Potential for Discipline - I conclude that the new process was in place when the third incident happened. The effect of the new process was to delay any arbitration-eligible grievances until the employer took final action (discharge, suspension, demotion). The earlier steps (informal counseling, follow-up counseling, corrective action plan, decision-making opportunity) can't be grieved to arbitration. One outcome of the new process would certainly be a reduction in the number of grievances over what would be considered lower-level discipline.

The employer argues that Apostolis "knew or should have known that written coaching memos were non-disciplinary," because he had recently been trained on the new process. From this, the employer reasons Apostolis couldn't have a reasonable expectation of discipline in his meetings with Hull. The evidence contradicts this claim. Masterjohn, who was a trainer at the center, said managers, supervisors, crew chiefs, and some shop stewards were educated about the new process. Apostolis didn't fit in any of these categories, and he wasn't asked whether he had any training on the subject.

The new process worked no harm on permanent employees, since I infer they would be able to challenge all earlier discipline if they were discharged, suspended, or demoted (the only discipline grievable to arbitration). But probationary employees like Apostolis are precluded by the collective bargaining agreement from challenging their dismissal. Accordingly, the new process effectively shields all probationer discipline from review. Since probationers lack an opportunity for later review of lower level disciplinary steps like coaching, those steps of the new process must be considered disciplinary.

Timely Request for Representation - Apostolis was clear that Hull asked questions in his office. Hull recalled asking questions when he approached the two men at Key Arena, but not in his office. But he also described coaching as a two-way process, with the employee giving his version of the event as well as the supervisor saying what expectations weren't met. The coaching memo wasn't prepared before the meeting, so the discussion in the office likely covered more than just Hull stating his expectations. I conclude Hull questioned Apostolis during the meeting in the office.

Apostolis said he asked for union representation after Hull's first question because he thought discipline was likely. This is the only incident during which Hull remembered Apostolis asking for union representation. Hull said the request occurred at the end of their meeting in his office, but then Hull also said he went ahead because he needed to give Apostolis feedback. (I infer Hull meant he went ahead despite the request for union representation.) If Hull had been correct and Apostolis asked for representation at the end of their meeting, there would be nothing left on which to "go ahead." For Hull to have gone ahead anyway means the request had to occur before the meeting had finished. Hull's inconsistent testimony causes me to accept Apostolis' version as accurate.

I draw a further inference about all three meetings between Hull and Apostolis from Hull's recommendation that Apostolis jot his question about union representation on the meeting recap. Hull's action suggests the request had been made before, he was tired of debating this issue with Apostolis, and wanted to find out who was correct.

Prima Facie Case: Deprivation of Right, Status, or Benefit

Apostolis was discharged on September 17, 1996. Discharge is a deprivation of employment status, and meets the legal standard for a discrimination case. This conclusion is bolstered by the fact that discharge during a probationary period is rare at the center. Cunningham said that only three to four represented, and four unrepresented, employees had been discharged during their probationary period in his ten years there.

Prima Facie Case: Causal Connection

I conclude that the evidence, considered as a whole, isn't sufficient to establish a causal connection between Apostolis'

proper assertion of his right to union representation and his discharge.

Timing of Discharge Suggestive -
Apostolis was discharged within five weeks after the third incident. Such a close calendar relationship between the exercise of a protected right and discipline has been found to be circumstantial evidence of a causal connection. *Mansfield School District*, Decision 5238-A (EDUC, 1996).

Grounds for Discharge Suggestive -
The employer's internal documents leading up to Apostolis' discharge demonstrate that performance issues addressed by Hull in the three incidents played a starring role in the employer's decision.

* Hull's only performance evaluation, undated but purporting to cover October 1995 through March 1996 mentions each of the issues that arose in the three incidents. Hull said Apostolis "has displayed unwillingness to cooperate in some team efforts and with some leads. Does work well independently on some tasks. Needs to apply self on cleaning tasks." Exhibit 25. This suggests to me that Hull wrote the evaluation after the July 1996 incident.

* Cunningham had received the performance evaluation from Hull by August 22, 1996. Cunningham sent it on to Manager Bukis and recommended she consider dismissing Apostolis for "performance problems which indicate [he is] unable/unwilling to adopt a cooperative and responsive attitude toward working with the leads, crew chiefs, and management staff." Exhibit 11.

* Bukis responded to Cunningham on August 30, 1996. She said Apostolis "has had coaching sessions about both standing around outside and inside the building [which I infer refers to the July 1996 incident] and after altercations he has had with other employees [which I infer refers to the November 1995 and May 1996

incidents]." Exhibit 12. Bukis recommended that she and Cunningham meet with the two crew chiefs and two other managers to review the information and make a recommendation for action.

* Cunningham wrote Anderson on September 10, 1996, saying, "the consistent reports I receive from the Crew Chiefs are that [Apostolis and another employee] don't work well with others or carry a full share of the work when they do respond to instructions. . . . The recommendation from the Crew Chiefs and the Manager is for their dismissal during the probationary period. I concur." Exhibit 10.[11]

* Finally, Anderson's September 17, 1996, discharge letter mentions that "[i]ssues of effective team work [and] willingness and ability to follow the instructions of the leads" arose and counseling didn't bring about improvement. Exhibit 19.

Anti-Union Animus -

The insurmountable defect in Apostolis' case is the lack of evidence that his discharge was motivated by employer anti-union animus. Both Anderson and Masterjohn described a relationship that was generally positive and respectful, with both recognizing that some of their interests diverged and that fact could lead to disagreements. When disagreements arose, the parties were able to resolve them to mutual satisfaction in many cases, though not all. The existence of grievances and other disagreements is a normal occurrence in labor-management relations, rather than an indication of anti-union or anti-employer animus. Masterjohn, who was in a position to know, said he had observed no provable evidence of employer anti-union animus.

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[11] Hull insisted he never recommended that Apostolis be discharged; he did express the opinion to supervisors that Apostolis couldn't meet expectations by the end of his probationary period. Whatever Hull thought he was doing, the documents make clear that his superiors interpreted his comments as recommending discharge.

Apostolis asserts the employer put crew chiefs like Hull in the Local 1239 bargaining unit "so they can observe and then punish employees who speak at the union meetings." Brief at 1. This claim fails to establish anti-union animus on several accounts.

* Employers cannot unilaterally place any position in a bargaining unit. Bargaining units are either defined by the Commission or by agreement between employer and union. There is no evidence in the record how the crew chief position was included in the Local 1239 bargaining unit. In addition, the record shows that the dispute whether crew chiefs should continue in the unit occurred completely within the unit, whether in personal discussions or during union membership meetings. There is no evidence of any employer involvement in the dispute over the unit status of crew chiefs.

* The employer correctly notes the record establishes that the issue of whether crew chiefs should continue in the Local 1239 unit arose before Apostolis was hired and continued after he was discharged. Hull said the issue arose while he was a shop steward, between 1988 and 1992. Masterjohn said bargaining unit members, including crew chiefs themselves, continued in October 2000, to question whether they should continue in the bargaining unit.

* The record suggests Apostolis and his colleagues spoke to the crew chief issue in union meetings during the summer of 1996, and once in Hull's presence. This expression of Apostolis' opinion on the crew chief issue couldn't have motivated Hull in the first two incidents, which had already occurred.

* The employer correctly argues the evidence fails to show that Hull was angered by Apostolis' position on the crew chief issue.[12] Long-time employee Richard Pedowitz has had a running

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[12] I discount Apostolis' testimony that Hull "glared" at Apostolis and his colleagues as proof that Hull was angry. Facial expressions are subject to differing interpretations and aren't reliable evidence of emotions. Actions are more reliable evidence of attitudes.

disagreement with Hull about the issue since 1990, when Pedowitz first asserted to Hull that crew chiefs were inappropriately included in the Local 1239 bargaining unit with subordinate employees. Hull was Pedowitz's immediate supervisor until Pedowitz was promoted to crew chief himself, and there is no evidence that Hull took any negative action against Pedowitz over the issue.

Apostolis also argues that crew chiefs are supervisors whose knowledge is imputed to the employer and whose actions bind the employer. Apostolis appears to use this argument to bridge the gap between Hull's knowledge of Apostolis' position on the crew chief issue and the lack of any evidence that non-bargaining unit management knew Apostolis' opinion. I am not persuaded. This argument accomplishes nothing unless Apostolis establishes Hull would harbor animosity against Apostolis for pushing a long-standing issue. Not only is there no reliable evidence of such animosity, the suggestion makes no sense. Supervisors have bargaining rights under Chapter 41.56 RCW, so removal of the crew chief position from the current Local 1239 unit wouldn't preclude establishment of a new supervisors unit represented by Local 1239, if the crew chiefs wished. Hull's testimony showed he knew that could occur. Finally, Apostolis has never shown why his position on the crew chief issue mattered to the employer. The record establishes the center management saw that as an internal union matter.

Apostolis argues the employer's anti-union animus is shown by its subcontracting bargaining unit work. This contention isn't supported by the record. The only time Local 1239 grieved subcontracting, the arbitrator held the collective bargaining agreement allowed the employer's actions. The only subcontracting that occurred after the arbitration involved bringing in people for the last push to get Key Arena ready for its opening, and contract-

ing with a firm to do outside window washing for which the employer lacked both equipment and experienced employees. These instances aren't likely to violate a collective bargaining agreement that has already been interpreted to permit subcontracting of work that definitely belonged to the unit. The employer hasn't shown any anti-union animus by exercising what have been held to be its legal rights.

Apostolis next argues the employer's anti-union animus is shown by the differing treatment it gives shop stewards. Again, the record doesn't establish that the employer acts against Local 1239 shop stewards because of their status. Apostolis' representative, John Scannell, had been a shop steward during part of the time he worked at the center. However, no reliable evidence was presented that would justify finding his discharge resulted from his union activities. Robert Boling had been a shop steward during part of his employment at the center, and Apostolis argued Boling had suffered for it by being removed from the temporary ice specialist position that was created during hockey season each year. No reliable evidence was introduced to support that assertion, and Masterjohn said it was management's right to decide who should work out of class as an ice specialist. Hull himself had been a shop steward for five to six years, and no evidence was introduced that he had suffered for it.

Conclusion

The lack of evidence that a causal connection exists between Apostolis' discharge and his proper exercise of protected rights requires the complaint be dismissed. It isn't necessary to discuss the reasons the employer articulated for the discharge, or whether any of them were pretextual.

FINDINGS OF FACT

1. The City of Seattle is a municipal corporation of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1).

2. Public Service and Industrial Employees, Local 1239, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain operations and maintenance employees of the City of Seattle, including some employees assigned to the Seattle Center.

3. Andrew Apostolis was employed by the City of Seattle in October 1995, in a position at the Seattle Center and within the bargaining unit described in Finding of Fact 2. At all times during his employment, Apostolis was a probationary employee under the collective bargaining agreement between the City of Seattle and Public Service and Industrial Employees, Local 1239. That agreement prohibited grievances from employees discharged during their probationary period.

4. Apostolis was discharged by the City of Seattle in September 1996, before he had completed his probationary period.

5. The complaint charging unfair labor practices filed in this matter on December 3, 1996, contained a timely allegation that the discharge described in Finding of Fact 4 was discrimination in reprisal for Apostolis' union activities protected by Chapter 41.56 RCW.

6. As background to the discrimination allegation described in Finding of Fact 5, Apostolis' request for union representation

was denied in an investigatory interview by an employer agent in November 1995. Apostolis had been involved in a loud disagreement with another bargaining unit member who had given Apostolis directions about how to pick up the new basketball floor. A crew chief who was also a bargaining unit member called Apostolis into the office where he was questioned under circumstances which Apostolis, or another bargaining unit member, could reasonably conclude were disciplinary.

7. As background to the discrimination allegation described in Finding of Fact 5, Apostolis' request for union representation was also denied during an investigatory interview by an agent of the employer in May 1996. On that occasion, Apostolis and another unit member were loudly disagreeing about how and whether to perform a cleaning task at that time. Both were called in to a meeting with the bargaining unit crew chief. The record again supports a finding that the crew chief questioned Apostolis under circumstances which Apostolis, or another a bargaining unit member, could reasonably conclude were disciplinary.

8. As background to the discrimination allegation described in Finding of Fact 5, Apostolis argued at union membership meetings held during the summer of 1996 that crew chiefs should be removed from the bargaining unit described in Finding of Fact 2. The bargaining unit status of the crew chiefs had been discussed within the union membership since at least 1988, and Apostolis' position had been argued previously by other bargaining unit members. The issue continued to be debated within the union membership when the hearing resumed in October 2000.

9. The record does not establish that the employer knew, or should have known, what Apostolis' position was on the crew chief issue, or that the employer would have had any objection if it had known.

10. As background to the discrimination allegation described in Finding of Fact 5, Apostolis' request for union representation was denied during an investigatory interview conducted by an employer agent in July 1996. On that occasion, Apostolis and another bargaining unit member had been observed by the bargaining unit crew chief apparently talking without working. Apostolis was called in to a meeting with the crew chief. The record again supports a finding that the crew chief questioned Apostolis under circumstances which Apostolis, or another bargaining unit member, could reasonably have concluded were disciplinary.

11. The complainant has not sustained his burden of proof to establish a causal connection between his union activities described in Findings of Fact 6, 7, 8, and 10, and his discharge described in Finding of Fact 4.

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. The complainant has failed to make out a prima facie case that his discharge described in Finding of Fact 4 was discrimination by the City of Seattle in violation of RCW 41.56.040, and no unfair labor practice has been established under RCW 41.56.140(1).

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED on its merits.

Issued at Olympia, Washington, on the 27th day of June, 2001.

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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MITCHELL NELSON

CASE NUMBER:	12854-U-96-03096	FILED:	12/03/1996	FILED BY:	PARTY 2
DISPUTE:	ER DISCRIMINATE				
DETAILS:	EE. discharged for insisting "crew chief" be excluded from B.U.				
COMMENTS:					

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