STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

COWLITZ COUNTY JAIL EMPLOYEES GUILD,	)	
Complainant,	)	CASE 14230-U-98-3530
vs.	)	DECISION 6832-A - PECB
COWLITZ COUNTY,	)	
Respondent.	)	DECISION OF COMMISSION

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

Amburgey & Rubin, P.C., by Howard Rubin, Attorney at Law, appeared for the respondent.

This case comes before the Commission on an appeal filed by Cowlitz County, seeking to overturn the Findings of Fact, Conclusions of Law and Order issued by Examiner Vincent M. Helm.[1] We affirm.

BACKGROUND

Corrections personnel of Cowlitz County (employer) have been represented by the Cowlitz County Jail Employees Guild (union) since approximately July of 1998.[2] The issues presented by this

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[1] Cowlitz County, Decision 6832 (PECB, 1999).

[2] The employees were previously represented by another labor organization. At the time of the hearing in this case, the parties were negotiating their first collective bargaining agreement, but had not agreed on provisions concerning shop stewards.

appeal concern meetings at which two employees were allegedly denied union representation.

Prior to the events giving rise to this case, bargaining unit employees Sia Gould and Rob Wetmore had established a dating relationship with one another. They were together at Wetmore's home on approximately August 15, 1998, when Gould received a telephone call from a female co-worker. The co-worker told Gould that a jail inmate claimed to have seen Gould and Wetmore kissing at the jail the previous night. The co-worker stated that she had told another bargaining unit employee about the inmate's claim, and that she believed the other employee had told superiors about it. The co-worker also told Gould she had heard Gould and Wetmore were under investigation for the incident. Gould shared the conversation with Wetmore.

The First Disputed Meeting

When they arrived for work on the night shift on August 18, 1998, Gould and Wetmore noticed that Lieutenant Kurt Bledsoe was present at the facility. As the operations lieutenant in charge of personnel issues, Bledsoe usually works on the day shift and it was unusual for him to be at the jail at midnight. Gould and Wetmore believed Bledsoe was present to talk to them about the "kissing" allegation, and they talked with William Lynam, Jr., a bargaining unit employee who was a member of the union bargaining team in the contract negotiations which were then ongoing. Gould and Wetmore asked Lynam to accompany them as their union representative, if Bledsoe wanted to talk with them.

A sergeant came into the room while Gould and Wetmore were talking with Lynam, and announced that Bledsoe wanted to see Gould and Wetmore in the administration office. Lynam, Gould and Wetmore then proceeded to that office together.

Outside of the administration office, Lynam told Bledsoe that Gould and Wetmore were concerned that the meeting was going to be of a disciplinary nature, and that Gould and Wetmore wanted him to be present as a representative of the union. Bledsoe responded that the meeting was not going to be a disciplinary action, and that a union representative was not needed. Gould or Wetmore stated that they had asked Lynam to be present. Bledsoe shook his head, and again said that it was not a disciplinary matter. Bledsoe made it clear that Lynam was not welcome at the meeting.

Gould and Wetmore entered the administration office with Bledsoe, and the door was shut. Bledsoe then stated that the subject of the meeting was the accusation that Gould and Wetmore were seen kissing. Although Bledsoe said he did not care if it happened, he asked whether the accusation was true. Gould and Wetmore stated that the kissing accusation was a lie, and that it did not happen. Bledsoe said there was no written policy on the subject, but that he would prefer (if it did happen) that they be more professional. Gould and Wetmore did not feel free to leave the room until the discussion was complete. Gould and Wetmore did not reiterate their request for union representation, because they felt it would have been futile after Bledsoe had twice rejected their request.

At the end of the meeting, Bledsoe told Gould and Wetmore that the incident was not going to lead to disciplinary action, and that the discussion was over, unless another allegation arose. Bledsoe warned Gould and Wetmore, however, that another allegation against them could lead to disciplinary action.

The Second Disputed Meeting

On August 21, 1998, Sergeant Jeanne Hollatz told Wetmore that she would like to speak with him in her office. Wetmore asked whether he needed to have anyone accompany him, but Hollatz said "No".

When the meeting began, Hollatz discussed inmate release and booking procedures with Wetmore. Hollatz advised Wetmore that the meeting was to be considered a coaching/counseling session, and not disciplinary. She stated, however, that any further errors by Wetmore could be the basis for disciplinary action.

In a conversation between Wetmore and Bledsoe shortly after the second disputed meeting, Bledsoe recommended that Wetmore be taken off booking until his then-pending divorce was final. Wetmore voiced no objection.

The Proceedings Below

The union filed a complaint charging unfair labor practices on November 6, 1998, alleging that the employer discriminated against employees and interfered with employee rights in violation of RCW 41.56.140(1), and refused to bargain in violation of RCW 41.56-.140(4). The union amended its complaint on November 18, 1998, and January 5, 1999. In its complaint as amended, the union alleged: (1) that Wetmore and Gould reasonably perceived they might be subjected to disciplinary action in connection with their meeting with Bledsoe, that the employer violated RCW 41.56.140 by refusing their requests for union representation at that meeting; and (2) that the employer further violated the statute by refusing Wetmore union representation at the second disputed meeting. The union requested an order directing the employer to make Wetmore and Gould whole, and to pay the union's attorney's fees.

Examiner Vincent M. Helm held a hearing, and issued Findings of Fact, Conclusions of Law, and Order on September 22, 1999. The Examiner found the employer interfered with, restrained and coerced bargaining unit employees in the exercise of rights guaranteed under RCW 41.56.040, and thereby committed unfair labor practices within the meaning of RCW 41.56.140(1), by rejecting the timely

requests for Gould and Wetmore for representation with regard to the first disputed meeting. While holding that the second disputed meeting was an investigatory interview where Wetmore would have been entitled to union representation upon request, the Examiner dismissed the allegations concerning that meeting, on the basis that Wetmore did not make a timely request for union representation in regard to that meeting. The Examiner denied the union's request for attorney fees.

The employer filed a notice of appeal on October 12, 1999, asking the Commission to reverse the Examiner's decision with regard to the first disputed meeting.

DISCUSSION

The Legal Standards

RCW 41.56.140(1) prohibits employers from interfering with or discriminating against public employees in the exercise of the rights secured for them by the Public Employees' Collective Bargaining Act:

> 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.]

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

Employees have a right to union representation at investigative interviews where the employee reasonably believes the interview might result in disciplinary action. Denial of a request for such union representation is an unfair labor practice in the private sector, under the National Labor Relations Act. National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975). The same right has been found applicable to public employees in this state under Chapter 41.56 RCW. See, Okanogan County, Decision 2252-A (PECB, 1986); Washington State Patrol, Decision 4040 (PECB, 1992); King County, Decision 4299 (PECB, 1993), affirmed, Decision 4299-A (PECB, 1993).

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. When an employer questions an employee, a union representative might be able to point out ambiguous or misleading questions, might be able to intercede if the questioning invades a statutory privilege the employee has the right to invoke or if the questioning becomes harassing or intimidating, might keep the interviewer and/or employee on task,[3] or might be able to bring out all of the facts (or at least facts unknown to or overlooked by the employer official). 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. City of Seattle, Decision 3593-A (PECB, 1991).

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[3] Close reading of the decision in Weingarten discloses that, while being questioned without union assistance about an allegation of improperly giving away food to a customer, the employee at issue in that case blurted out an unrelated fact which led to discipline. The Supreme Court saw the value of union representation in such as situation.

Application of Legal Standards

The "Investigatory" Nature of the Interview -
The existence of a right to union representation turns on whether the meeting was of an "investigatory" nature, so we first address the employer's claim that the disputed meeting was not "investigatory". The employer would have us focus on *why* employees are questioned, rather than *whether* they are questioned, and it states that Bledsoe's purpose was to clarify policy rather than to determine whether Wetmore and Gould had engaged in inappropriate behavior while on duty. We decline to engage in revision of the facts established by the evidence, and so reject the employer's argument. We read the evidence as indicating that Bledsoe solicited answers from Gould and Wetmore, either directly or by strong implication, as to whether they had been kissing while on duty. Even if Bledsoe intended the purpose to be otherwise, his actual statements and questions brought the meeting within the type for which a right to union representation arises.

The employer cites Snohomish County, Decision 4995-B (PECB, 1996), but we find that case distinguishable. The meeting at issue there was a fitness-for-duty evaluation by an outside professional psychologist, rather than interrogation by a supervisor. The questions asked in Snohomish County were not designed to bring out factual information concerning specific instances of misconduct warranting discipline, and the Commission stated there that a fear of employer discipline would have been unreasonable under those circumstances. That was a much different process from the one involved here, where the employer sought information from Gould and Wetmore and then warned them against repetition of the conduct.

Several cases cited in Snohomish County involved "investigatory" meetings comparable to the meeting at issue here: In City of Bellevue, Decision 4324-A (PECB, 1994), the questioning was designed to elicit information about an incident under investiga-

tion; in King County, Decision 4299-A (PECB, 1993), the questioning concerned an alleged improper arrest; in Okanogan County, Decision 2252-A (PECB, 1986), the questioning concerned alleged misconduct. Violations were found in those cases.

No "Employer Notice" Prerequisite to Employee Rights -
The employer urges that the right of employees to demand union representation does not (or should not) arise prior to the employer giving notice of its purpose in calling a meeting. It cites NLRB and Commission decisions in support of its proposal to impose an employer notice limitation on the rights of employees, but we do not read the cited precedents as supporting the legal standard asserted by the employer.

The employer cites AAA Equipment Service Co. V. NLRB, 598 F.2d 1142 (8th Circuit, 1979), where a manager approached an employee in a parking lot and said he wanted to talk with the employee. The employee said he wanted his shop steward, but then walked off and was later discharged. The NLRB ruled that the employer committed a violation by refusing to allow the employee to have his union steward present during an investigatory interview. The reviewing court disagreed, crediting the manager's testimony that he was never given an opportunity to inform the employee about the subject of the meeting, and rejecting the employee's interpretation of a brief reference to a previous conversation was sufficient basis for the employee to reasonably infer a potential for discipline. We certainly do not read that situational decision by one court of appeals as establishing a new general limitation on Weingarten, to the effect that the right to demand union representation can never arise before the employer sets forth its purpose of the meeting.

The employer also cites Whatcom Transportation Authority, Decision 5276 (PECB, 1995) (citing AAA Equipment Service), where the complaining employee overheard his supervisor lamenting to someone else that she had not had a chance to take her subordinates out for

coffee and thought it was a good time to start doing so. Soon thereafter, the supervisor took the complaining employee to a park, and they took seats on a bench. The only part of their conversation that even remotely related to discipline was when the supervisor advised the employee that he had been cleared of wrongdoing in connection with a complaint filed by a passenger, and we regard that statement as being of the "cut and dried" type.[4]

It is clearly unlawful, under Commission precedent, for an employer to preclude an employee from consulting with his/her union representative. City of Bellevue, Decision 4324-A (PECB, 1994). We thus also reject the employer's argument that this complaint should be dismissed on the basis that Gould and Wetmore sought out Lyman before they had "any right or reason" to demand union representation.

Employees had Independent Basis for Concern -
The employer also argues, again citing AAA Equipment Service, that Gould and Wetmore had no right to presume that discipline was imminent, simply because a co-worker with "absolutely no supervisory or investigatory authority" told them the employer was undertaking an investigation of their conduct. We also reject that argument. Whether an employee's concerns about the potential for discipline were reasonable is a question of fact and law for the Commission to decide on the basis of the information available to the employee. The right to union representation is conferred by

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[4] The Examiner concluded in Whatcom that the employee's comments relating advice given by a union official about the right to union representation was insufficient to constitute a request for union representation. In the alternative, the Examiner opined that the employee's "vague comment" made before the employee "had an inkling of the purpose of the meeting", did not meet the criteria for an effective request for union representation. We certainly do not elevate that factual analysis to the level of a new legal standard.

the statute upon employees, and they may rely upon any information available to them. The amount of information provided or withheld by the employer is not controlling. We certainly find no basis to impose a legal standard which would make the employer the sole source for employee inferences about their need for union representation.

The situations are also factually distinguishable. The employee in AAA Equipment Service apparently drew inferences from the presence of his shift supervisor in the parking lot when he arrived for work, but there was no indication that employee had any independent source of information that his actions were under investigation. In the case before us, Gould and Wetmore made inferences based on the highly unusual presence of Bledsoe at the jail in the middle of the night, but their inferences were supported by (and consistent with) the information they had previously received from a trusted co-worker. Gould and Wetmore thus sought out union representation without waiting for word that Bledsoe wanted to meet with them. They had a reasonable basis for doing so.

Supervisor Assurances Not Controlling -
The employer would have us focus on the words used by Bledsoe at the start of the disputed meeting, and would have the complaint dismissed because (according to the employer's brief) Bledsoe gave assurances, "that the conversation would not be of a disciplinary nature and that no representation would be needed". We find that Bledsoe's actual conduct during the meeting differed from his announced intentions, however. The employer is liable for such a change of direction, even if it is not proximate to the meeting itself. In City of Seattle, supra, an employee who asked to bring a shop steward to a meeting with his immediate supervisor was told there was no reason for union representation. In actuality, the meeting became a fact-gathering session. When a more senior employer official later issued a letter of reprimand based on what transpired at the meeting, and an unfair labor practice violation

was found. Regardless of what he said at the outset, we find that the meeting at issue in this case became an investigatory meeting at the moment when Bledsoe invited a response to the "kissing" allegation, and certainly when Bledsoe expressly warned Gould and Wetmore that repetition of the alleged conduct would be a basis for discipline.

The employer asserts that no disciplinary action was taken against either employee as a result of the discussion, and would have us find that Bledsoe's assurances overrode any concerns that Gould and Wetmore may have had. It cites Spartan Stores, Inc. v. NLRB, 628 F.2d 953 (6th Circuit, 1980), but we decline to read that precedent as restrictively as the employer would have it interpreted. Spartan Stores concerns whether an employee may have a reasonable fear of disciplinary action where the possibility of disciplinary action is expressly disclaimed by the supervisor. Applying what it described as "objective standards under all the circumstances of the case", the reviewing court denied enforcement of an NLRB order because the established practice was that the supervisor would summon the union steward in situations where the employer perceived a right to union representation. As already indicated above, we decline the invitation to put the exercise of the employees' statutory rights in the hands of an employer.[5]

Gould and Wetmore had every reason to believe that Bledsoe would retain his own memory of his warning, even if he did not make a written record of the conversation. The questioning as to an incident that was to alleged to have occurred, as well as the

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[5] We also find the case factually distinguishable. That the employee was specifically told he would not be disciplined was only one factor considered by the court in making its determination that the employee had no reasonable grounds to believe the discussion might result in discipline. The employee in Spartan Stores also failed to follow an established policy in that workplace.

comment that another allegation could lead to disciplinary action, places this case squarely in line with cases where the Commission has found the right to representation applies.

Threat of Discipline not merely "Latent" -
The employer argues that Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403 (9th Circuit, 1978), cited by the Examiner, is factually distinguishable, and would have us characterize the disputed conversation as routine questioning of Gould and Wetmore about their work performance. We find the case generally on point, however.

In Lewis, so-called counseling sessions explored the reasons why employees failed to meet production quotas, and employees were questioned about any problems that accounted for their poor production. That counseling was an integral part of the disciplinary system, and was deemed by management to be a preliminary stage in the imposition of discipline. At least one employee was told that discipline would be the next step under the system. In those instances, the court stated,

> The presence of an employee's representative at the interview would be of obvious benefit to the employee and in addition, the representative "could assist the employer by eliciting favorable facts" from a frightened, inarticulate, or ignorant employee.

The court affirmed the NLRB's conclusion that the employees were entitled to union representation. While the decision in Lewis may support a finding, in appropriate circumstances, that a latent threat of future discipline is not sufficient to invoke the right to union representation by itself, we are satisfied that all the circumstances on this case do invoke a Weingarten right. We agree with the Examiner that Lewis supports a finding that an unfair labor practice violation occurred in this case, because Bledsoe actually warned Gould and Wetmore that repetition of the alleged

kissing would be a basis for disciplinary action.[6] Moreover, based on a reasonable evaluation of all the circumstances, we infer that some discipline stronger than the oral warning actually given might well have been imposed by Bledsoe if Gould and Wetmore had admitted they were kissing while on duty. This rose above the "counseling" level urged by the employer.

The employer cites NLRB v. United States Postal Service, 689 F.2d 835 (9th Circuit, 1982) for the proposition that an employee who is aware of the employer's disciplinary procedure and who is told by a supervisor that he would not be disciplined has no reasonable basis to fear being disciplined as a result of participating in the meeting. Close reading of the cited case discloses factual distinctions, however. At a minimum, the Postal Service employee was aware of, and the court took into account, a collective bargaining agreement stating that informal, private discussions are not disciplinary, not grievable, cannot be recorded in the employee's personnel folder, cannot be cited as an element of prior adverse record, and can be relied on to show only that the employee was made aware of his obligations and responsibilities. We have no such contract here.[7] Further, the supervisor in Postal Service responded to a request for union representation by assuring the

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[6] Weingarten principles were found inapplicable to certain "cut and dried" meetings in Lewis, where that employer merely advised employees of disciplinary actions without interrogating them, but we have no parallel facts here.

[7] In Alfred M. Lewis, Inc., supra, the Court found relevance in the fact that the applicable disciplinary system had been imposed without collective bargaining. The court stated, "[T]he atmosphere of intimidation and uncertainty was heightened and the justification for the fear that the interview would be used in significant part for disciplinary purposes was increased". Without either a collective bargaining agreement or agreed arrangements for shop stewards in effect in the case before us, we infer that Gould and Wetmore would have had added grounds to fear potential disciplinary action.

employee "This is just a discussion", and then lived up to his own advice. When asked questions that we would deem to be "investigatory" in the absence of the collective bargaining applicable there,[8] the employee was evasive or refused to respond, used foul language, and walked out. That employee's misconduct and past record were considered as grounds for a suspension there, and we have no comparable exacerbating behavior by Gould and Wetmore.

Conclusions Concerning Existence of a Violation

The arguments asserted by the employer would excessively limit the statutory rights of employees, and are not persuasive. Gould and Wetmore reasonably believed they were under investigation, based on information they received in advance of the disputed meeting, and they clearly asserted their right to union representation. The subjects of discussion at the disputed meeting included questioning of Gould and Wetmore, and warning them against recurrences. On the record made, we also concur that it would have been futile for Gould and Wetmore to renew their request for union representation. The employer is responsible for Bledsoe's actions, and it committed an unfair labor practice when Bledsoe questioned and warned Gould and Wetmore after both rejecting their request for union representation and seeking to allay their reasonable concerns.

The Remedy

The customary remedy for an "interference" violation is to require the posting of notice to employees, and public reading of that notice. Since no discipline followed the August 19, 1998 meeting, we agree with the Examiner that no make-whole remedy is appropriate or necessary.

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[8] The supervisor asked the employee to explain his being late the previous day, and to explain his not seeking approval before working overtime.

The employer record also fails to justify an award of attorney fees. Different from the situation in City of Seattle, supra, there is no claim or record of this employer being a repeat offender in the Weingarten arena. The only employer defense which invites characterization as frivolous is its claim that neither Gould nor Wetmore testified that Bledsoe specifically informed them that the incident would be considered in evaluating any subsequent misconduct. That misstates the evidence,[9] but we decline to impose an "extraordinary" remedy for that one erroneous statement.

NOW, THEREFORE, the Commission makes and issues the following:

ORDER

1. The Findings of Fact and Conclusions and Law issued by Examiner Vincent M. Helm in the above-captioned matter are AFFIRMED.

2. Cowlitz County, its officers and agents shall immediately take the following actions to remedy its unfair labor practice:

   A. CEASE AND DESIST from:

      1. Interfering with, restraining or coercing its employees in the exercise of their right to union representation in investigatory interviews including coaching/counseling meetings where the employee reasonably perceives a possibility of disciplinary action.

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[9] At page 34 of the transcript, Gould testified that Bledsoe told them another allegation could lead to disciplinary action.

2. Relying, in any manner, upon the counseling given to bargaining unit employees Gould and Wetmore on August 19, 1998, as a basis for any future disciplinary action against those employees.

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

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

1. 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.

2. Read the notice attached hereto and marked "Appendix" aloud at the next public meeting of the Board of Commissioners of Cowlitz County, and append a copy thereof to the official minutes of said meeting.

3. 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.

4. 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 this order.

Issued at Olympia, Washington, on the 12th day of April, 2000.

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 EMPLOYEES:

WE WILL NOT ignore, reject, disregard and/or refuse the requests of our employees for union representation at investigatory interviews, including meetings characterized as coaching/counseling sessions, where the employee(s) reasonably perceive discipline could result.

WE WILL NOT rely, in any manner, upon the information obtained from and warning given to bargaining unit employees Sia (Gould) Wetmore and Rob Wetmore on August 19, 1998, as a basis for any future disciplinary action against those employees.

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

WE WILL read this notice aloud at an open, public meeting of the Board of County Commissioners, and will permanently append a copy of this notice to the minutes of that meeting.

DATED: _____

COWLITZ COUNTY

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: (206) 753-3444.