STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BREMERTON PATROLMEN'S ASSOCIATION, Complainant, vs. CITY OF BREMERTON, Respondent.	)	CASE 8948-U-90-1969 DECISION 3843-A - PECB
BREMERTON PATROLMEN'S ASSOCIATION, Complainant, vs. CITY OF BREMERTON, Respondent.	)	CASE 9248-U-91-2053 DECISION 4738 - PECB
BREMERTON PATROLMEN'S ASSOCIATION, Complainant, vs. CITY OF BREMERTON, Respondent.	)	CASE 9291-U-91-2063 DECISION 4739 - PECB CONSOLIDATED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Hoag, Vick, Tarantino and Garrettson, by Brian J. Fresonke, Attorney at Law, appeared on behalf of the union.

Vandeberg and Johnson, by William Coats, Attorney at Law, appeared on behalf of the employer.

On December 17, 1990, the Bremerton Patrolman's Association (BPA) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (Case 8948-U-90-1969). The BPA alleged that the City of Bremerton had engaged in a pattern of interference and discrimination in reprisal for union activity

among its employees, and that it refused to provide the union with requested information concerning discipline imposed on Robert Waldroop. A preliminary ruling was issued pursuant to WAC 391-45-110 on January 22, 1991, finding a cause of action to exist regarding the employer's failure, or refusal, to provide the union with information necessary for it to carry out its functions as exclusive bargaining representative. The BPA filed amended statements of fact in that case on March 7, March 15 and July 10, 1991. On August 12, 1991, the Executive Director ruled that certain allegations in each of those amendments stated causes of action, but he dismissed other allegations.[1]

On July 11, 1991, the BPA filed a second complaint charging unfair labor practices with the Commission (Case 9248-U-91-2053). That complaint alleged that the employer unlawfully conditioned release of information requested by the union on advance payment of copier charges by the union, and that the employer unilaterally changed the procedures for providing information on discipline matters. A preliminary ruling letter issued in that case on March 27, 1992, found a cause of action to exist.

On July 29, 1991, the BPA filed a third complaint charging unfair labor practices with the Commission (Case 9291-U-91-2063). That complaint alleged that the employer unilaterally changed the procedures for promotions within the bargaining unit. A preliminary ruling issued in that case on September 19, 1991, found a cause of action to exist.

The matters were eventually consolidated for proceedings before Examiner J. Martin Smith. Dates set for hearing were postponed for

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[1] City of Bremerton, Decision 3843 (PECB, 1991). The allegations found NOT to state causes of action were: (1) That the employer improperly used Waldroop's name in the discipline of another employee; and (2) that the employer terminated the union's "telephone privileges".

various reasons.[2] The Examiner wrote to the parties on January 14, 1993, giving them 14 days to take steps to bring the matters on for hearing, or have the complaints dismissed. The BPA responded on January 25, 1993, suggesting dates for a hearing. A hearing was then held at Bremerton, Washington, on May 7, 1993, before the Examiner. Briefs were filed by the parties to complete the record.

BACKGROUND

Bremerton is the largest city in Kitsap County, in northwest Washington. It offers municipal services to an area which includes one of the nation's largest U.S. Navy facilities. Caroline Marshall was the personnel director at the times relevant here.

The Bremerton Police Department has 49 commissioned police officers working on a regular shift format. Chief of Police Del McNeal has headed the department since 1988. Captain Joe Hatfield is a supervisor within the department.

Since at least 1981, the non-supervisory police officers in the Bremerton Police Department have been represented for purposes of collective bargaining by the Bremerton Patrolmen's Association. Roy Alloway was president of the BPA at the times relevant here.

The issues remaining for decision in these cases involve dealings between the employer, the BPA, and bargaining unit members in three separate situations, as set out below:

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[2] A hearing was set for February 11, 1992, but the parties each requested a delay in the proceedings. By September of 1992, it was reported to the Commission that these claims had been settled. No letters withdrawing the complaints were submitted, however, and answers were received from the employer. In late 1992, the parties reached tentative agreement on a successor collective bargaining agreement, and again reported that these matters had been settled.

The Waldroop Notice - Case 8948-U-90-1969

Robert Waldroop came to Bremerton as a patrol officer in February of 1980, and he worked in the patrol division until at least January of 1991. Officer Waldroop was involved with the BPA for six years, first as secretary-treasurer and then as vice president. His union activities included representing employees in grievances, and in negotiating labor agreements.

Waldroop's employment was terminated on January 10, 1991. In his discharge letter, Chief McNeal indicated that Waldroop had 10 days in which to "appeal" his discharge to the employer's civil service commission. That letter did not make any reference to, or otherwise direct Waldroop's attention to, the collective bargaining agreement.[3]

Refusal to Provide Information - Case 8948-U-90-1969

One of the amendments in this case is framed as a "withdrawal of recognition" or "refusal to provide information". Acting in his capacity as a union official in connection with the processing of Waldroop's grievance, Alloway made a request of Chief McNeal for transcripts and/or tapes of the pre-disciplinary hearing. McNeal declined to provide those materials to the union, unless it provided a written release from Waldroop.[4]

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[3] A grievance was, in fact, filed under the collective bargaining agreement. Arbitrator Gary Axon issued an arbitration award late in 1991, reducing Waldroop's discharge to a 30-day suspension and reinstating him as an employee of the city. At the time of hearing held in this matter (March 23, 1993), Waldroop had been discharged by Chief McNeal for a second time. That termination is also the subject of a grievance.

[4] The BPA eventually obtained the requested materials, although likely as a result of an exchange of telephone calls between counsel, rather than a request by Waldroop.

Alleged Surveillance - Case 8948-U-90-1969

One of the amendments filed in this case raised an allegation that a supervisor, Captain Joe Hatfield, made several comments which created the impression that the BPA and its meetings were "under surveillance" by the employer. Two separate incidents are cited:

In February of 1991, the BPA sent a notice to its members that a "no-confidence vote" regarding Chief McNeal would be considered at a union meeting on March 4, 1991. Alloway testified that Hatfield learned of the meeting, and that he asked Alloway if he could attend the meeting, even though he was not a BPA member. Alloway continued:

> He then asked that I relay back to him what occurs at the meeting, and I rejected that as well. And he told me that "Well, don't think you don't have people that aren't going to come and tell me," and that ended this particular session.
>
> Transcript, at 35.

Alloway characterized Hatfield's demeanor as "semi-sarcastic" or "verbal jousting" in this conversation held in Hatfield's office, as well as in prior ones dealing with labor-management issues.

There was a subsequent comment made by Hatfield after a daily detective unit meeting, to the effect that he wanted to attend the BPA meeting on March 4. Alloway testified that he again denied Hatfield's request, after which Hatfield said he wanted to know the "results" of the meeting. Hatfield testified that he never spied on union meetings, attended them uninvited, or otherwise sought to elicit information about what transpired at union meetings. He recalled his request and Alloway's refusal during the conversation after the detectives' meeting, but characterized his follow-up comment as his having said, in a joking manner, that "Roy can let me know what's going on at the meeting."

Pre-payment of Copier Charges - Case 9248-U-91-2053

In March of 1991, a few weeks after the "union meeting" occurrences described above, Chief McNeal required union attorney Christopher Vick to advance a $70.00 payment to cover the cost of photocopying, prior to releasing internal investigation files that had been requested by the union in the course of its preparation for grievance and/or arbitration hearings involving bargaining unit employees.

Unilateral Change of Promotional Policies - Case 9291-U-91-2063

In June of 1991, a bargaining unit member, Detective Dean Dennis, was promoted to the sergeant rank in the department.[5] The detective position left open by that promotion was filled by the promotion of bargaining unit member Luis Olan from the position of patrol officer. There was no posting of the detective position.

Alloway discussed the Olan promotion with Captain Hatfield. In particular, Alloway inquired as to why there was no posting of the detective position as per the 1987 policy written by Chief McNeal's predecessor.[6] Alloway also wondered why Olan was promoted to detective while being on the promotion list for sergeant. Hatfield deferred an answer to Chief McNeal.

Hatfield testified that "review committees" were sometimes appointed when a specialty assignment came open, and that various formats had been used to screen applicants. In some cases, the employer's personnel director and another captain may have been

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[5] Chief McNeal apparently promoted Dennis from the civil service register. That action is not at issue here.

[6] The union has voiced concern about an adverse affect on patrol officers working the "graveyard" shift, who might prefer a transfer to detective duty on the "day" shift if informed of a vacant detective's position.

involved in the promotional decisions on certain positions. Some "specialty assignments" such as polygraph operator are training assignments, rather than job classifications by themselves.

DISCUSSION

The positions of the parties, additional facts and the Examiner's analysis for each of the four topics described above are set forth under separate headings, below.

Case 8948-U-90-1969 - Interference by Mis-direction

Positions of the Parties -

The BPA contends that the discharge letter given to Waldroop was false and misleading, with regard to his appeal rights under the collective bargaining agreement. The BPA argues that this denigrated the union's ability to represent Waldroop for purposes of the grievance procedure.

The employer urges that the advice given to Waldroop was not false or misleading, because it referred him to a civil service procedure that was available to him, and did not say that he was barred from using the grievance and arbitration procedure of the collective bargaining agreement.

Analysis -

The Public Employment Relations Commission has set a standard for employers that choose to advise their employees of appeal rights that might be available after an adverse ruling or disciplinary procedure: When an employer chooses to advise an employee regarding such rights, it has an affirmative obligation to give the employee a full and complete explanation which includes their rights under the applicable collective bargaining statute or collective bargaining agreement. In City of Seattle, Decision 2773

(PECB, 1987), the employer had properly advised union-represented employees that they **could appeal** retention of certain materials in their personnel files, but neglected to inform those employees of their options under another section of the contract which allowed employees to challenge, grieve or appeal the **standards** used to measure performance as being unreasonable. A violation of RCW 41.56.140(1) was found. See, also, City of Seattle, Decision 3066 (PECB, 1988).

Here, the BPA correctly contends that the employer's discharge letter to Waldroop failed to mention that he could file a grievance under the collective bargaining agreement. In effect, Waldroop was "steered" to the civil service commission. Until advised otherwise by BPA officials, Waldroop could reasonably have believed that his appeal routes lay only in the civil service commission. Other officers had, in fact, filed contractual grievances rather than appealing through the civil service forum.[7]

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[7] The contract's grievance procedure has a generic definition of "grievance", but specifically refers to both the civil service commission and unfair labor practice procedures under Chapter 41.56 RCW. The contract is not clear about the forum for officer's discharges:

> 19.1 Definitions:
> A. Grievance: A grievance is an allegation of a violation of the terms and conditions of this agreement which is to be resolved through this Grievance Procedure.
>
> B. Civil Service Appeal: An appeal is an allegation of a violation of the Civil Service Rules which is to be resolved through the Civil Service Appeals procedure and not resolvable through this Grievance Procedure.
>
> C. Unfair Labor Practice: An Unfair Labor Practice charge is an allegation of a violation of the Washington State statutes governing public employment labor relations which is to be resolved through the Public Employment Relations Commission's rules and regulations and is not resolvable through this Grievance Procedure.

Although the employer retains the right to "suspend or discharge employees for cause", it is stated in the "probation" and "promotional-probation" sections that appeal is only to the civil service procedure, and not to the grievance procedure. See Article 16.1 (A) and (B).

Whether McNeal actually believed Waldroop was not entitled to use the contractual grievance procedure is beside the point.[8] An objective test is being applied. As in City of Seattle, supra, the employee could reasonably have believed the employer was asserting (or would assert) procedural defenses to a grievance pursued under the collective bargaining agreement.

The employer is not relieved from having committed an "interference" violation under RCW 41.56.140(1) because Waldroop **actually did** file a grievance, or even because he was later reinstated by an arbitrator. An employer would be well-advised to leave it to the employee's exclusive bargaining representative to advise bargaining unit employees of their most prudent course of appeal under the collective bargaining agreement they helped negotiate.

Case 8948-U-90-1969 - Withdrawal of Recognition

Positions of the Parties -

The BPA argues that Chief McNeal refused to recognize the legal standing of its president as an agent of the exclusive bargaining representative under RCW 41.56.080, because he insisted that Waldroop issue a written authorization or release for information requested by Alloway.

The employer directs attention to its various dealings with the BPA's attorneys as a basis for asserting that a potential "legal ethics" violation excused it from providing the information that was requested directly by the BPA.

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[8] At the time this case arose, there may have been some doubt about the "interface" between collective bargaining rights and civil service procedures. Any such doubts have subsequently been resolved, however, by the unanimous decision of the Supreme Court of the State of Washington in City of Yakima v. IAFF, Local 469, 117 Wn.2d 655 (1991), holding that matters traditionally delegated to civil service commissions are a mandatory subject of collective bargaining under Chapter 41.56 RCW.

Analysis -

The facts on this issue are clear. After Waldroop was discharged and a grievance was filed, Alloway requested the transcript of his civil service appeal hearing. Chief McNeal's written response of March 7, 1991 has been made a part of the record in this case:

> Dear President Alloway
>
> RE: Letter 2-27-91 transcript
>
> Your request for all taped and or transcripts of the pre-disciplinary hearing, **I will need a signed document showing that Mr. Waldroop is requesting this through you.** We only have the transcript as all tapes are turned over to civil service by the rules.
>
> **Once I have received the signed authorization, I will be glad to supply copies of the transcripts.** As usual, the City will charge for the copies per the normal copy rates of the City. The copies will be supplied upon receipt of payment.
>
> Sincerely,
>
> /s/ DELBERT D. McNEAL, Chief of Police

[Emphasis by **bold** supplied.]

Again, the BPA makes a valid point. Alloway was the acknowledged leader of this independent union, not merely a fellow employee. He indicated to McNeal that he was appearing "in behalf of Bob Waldroop". Clearly, Alloway had the authority to request the hearing transcripts on behalf of the BPA. Waldroop had every right to rely on his union to file a grievance on his behalf, and to pursue it on his behalf. It is not the employer's responsibility to second-guess that representation. To require that Waldroop sign a "release" for such a document, as McNeal did in this situation, had the effect of calling into question the union's standing to represent Waldroop in the processing of his grievance.

The employer's arguments fit neither the facts nor the law. Chief McNeal was quite prepared to give the requested documents to

Alloway upon receiving written authorization from Waldroop, without any reference to the involvement of attorneys or legal ethics. The right of an exclusive bargaining representative to requested information that is necessary to its functions in contract negotiations and grievance processing flows directly from the duty to bargain in good faith under RCW 41.56.030(4). See, Pullman School District, Decision 2632 (PECB, 1987) and Aberdeen School District, Decision 3063 (PECB, 1988). An employer and union cannot delegate their statutory obligation to communicate with one another. It would make a mockery of the duty to bargain to hold that an employer would be excused from dealing with the union that represents its employees merely because one or both of the parties had retained attorneys on related issues. The employer committed a violation of RCW 41.56.140(4) and (1).

Case 8948-U-90-1969 - Surveillance of Union Activity

Positions of Parties -

The BPA contends that the employer committed an unfair labor practice because of comments made by Captain Hatfield. It points first to the insinuation made to Alloway in Hatfield's office, to the effect that the management always found out about what went on in union meetings. Second, it points to similar comments at the close of the detectives' meeting. The union argues that Hatfield's statements, standing alone, are sufficient to create an "impression" that the BPA could not effectively conduct its business in a secret, closed meeting. Hatfield's comments are seen as implying that one or more bargaining unit members were spying on behalf of the management.

The employer contends that these events did not constitute unfair labor practices. It asserts that Hatfield was only joking when he suggested to Alloway that he always learned every secret that was being kept at union meetings. Further, the employer argues that Hatfield never demanded information from union officers or members.

Analysis -

The BPA cites City of Westport, Decision 1194 (PECB, 1981), where a Commission Examiner wrote:

> Since the early days of the National Labor Relations Act, surveillance of employees by an employer, whether with rank and file employees, supervisors, or outsiders, has been held to be violative of the Act. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). The law is equally clear that the employer violates the Act if he creates the impression that he is engaged in surveillance. NLRB v. Grower-Shipper Vegetable Ass'n, 122 F.2d 368 (9th Cir., 1941); Bethlehem Steel Co. v. NLRB, 120 F.2d 641 (DC Cir., 1941). Moreover, the NLRB has found an interference violation even where supervisors were motivated solely by their own curiosity and were subsequently forbidden by the employer to continue such surveillance. Intertype Co. v. NLRB, 371 F.2d 787 (4th Cir., 1967).

The most recent application of those principles by the Commission was in City of Longview, Decision 4702 (PECB, 1994), where the Executive Director issued a summary judgment finding a violation on the basis of an employer's answer admitting that its police chief interrogated a union officer and a bargaining unit member about what had transpired behind the closed doors of a union meeting.

There are limits to the "surveillance" doctrine, however. In City of Seattle, Decision 3066, 3066-A (PECB, 1988), the Commission ruled that a search of employee desks was not unlawful surveillance, when the supervisor turned out to be pro-union and was not on a mission to disclose the contents of employee files to her superiors. In addition, the supervisor in the Seattle case had a business reason to look in working files of the two employees. Thus, the complainant is required to show that the employer's conduct could reasonably be perceived by employees as a threat to their protected union activities. Toutle Lake School District, Decision 2474 (PECB, 1987).

There is no evidence in this record that the employer actually solicited or maintained a "spy" inside the BPA's meetings.[9] Nor was there any demonstration by the employer official of actual knowledge that could only have been gained inside a union meeting, as existed in Longview, supra.

In all probability, Hatfield knew a good deal by virtue of simple observation. The BPA conducted its meeting at the city hall, in close proximity to the department's management, so that the employer surely would have known when the meeting began and ended. It would even have been difficult for employer officials not to observe who attended. Further, the announced purpose of the BPA meeting was to consider a "no-confidence" vote that would, like a doomsday device, have had no purpose or political effect unless the results of the meeting were made public.

Based upon the circumstances, and the record as a whole, it cannot be said that Hatfield's comments could reasonably be perceived by bargaining unit members as a threat to their rights under Chapter 41.56 RCW. Hatfield was not a new "player" in the troubles pitting BPA against Chief McNeal and his management. Hatfield's comments were made to a veteran police officer who was the president of the union, not to a rookie employee unfamiliar with the local labor-management history. Surely, the BPA believed it could hold a secret union meeting regarding sensitive topics, or else it would not have conducted its meeting at the city hall.

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[9] Contrast Davis-Monthan Air Force Base v. AFGE, FLRA Case DA-CA-20608 (9/27/93), reported at 31 GERR 1323. Where a U.S. Air Force base commander was asked by a bargaining unit employee, in a moment of jest, whether he would be attending union-sponsored lunch forums, the commander said he wouldn't be in attendance. The commander did send a maintenance supervisor to the meetings, however, and the union eventually had that person removed by security personnel. The FLRA found a "surveillance" violation, because the supervisor was clearly sent to "monitor" the meetings and report back to the base commander. This was inherently coercive.

Case 9248-U-91-2053 - Charges For Documentary Information

Positions of the Parties -

The BPA contends the employer unlawfully required, as a precondition, that the BPA tender payment at the rate of $0.10 per page for photocopying documents requested by the union attorney from disciplinary files of other bargaining unit members. The BPA contends that the employer made it more difficult for the union to represent its member under the grievance/arbitration procedure.

The employer admits demanding the advance payment of photocopying charges, but argues that its long-standing practice has been to charge union officials $0.10 per page for photocopying employer documents, except that five copies of normal correspondence are supplied free to the union officers. The employer also contends that state law requires that it be compensated for anything it produces or gives away.[10]

Analysis -

The BPA's original request for information concerning the Waldroop discharge was made on February 27, 1991, when Alloway wrote to Chief McNeal and requested:

> [C]opies of **all tapes and/or transcripts** of all tapes in this matter. Specifically, the tapes made of the pre-disciplinary hearings.
>
> [Emphasis by **bold** supplied.]

McNeal refused to provide the requested information until:

> [**A**]**s usual**, the City will charge for the copies **per the normal rates** for the City. The

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[10] The employer produced evidence that citizens requesting copies of accident or police reports pay $0.25 for the first page and $0.10 for each additional page.

> copies will be supplied upon receipt of payment.
>
> [Emphasis by **bold** supplied.][11]

The BPA's request for that information was renewed on March 15, 1991, when union attorney Christopher Vick made a written request of the employer's attorney, William Coats, for "reviewer comments" and other correspondence within the police department that led to Waldroop's discharge. Transcripts from hearings and interviews were also requested.

Chief McNeal testified that it was "his policy" from his earliest days as chief, in October of 1988, to require payment by the BPA for long-distance telephone calls and burdensome photocopier costs at police headquarters. He said he wrote a memo to the BPA in early 1989, which asked the BPA to pay for any copies of documents other than five copies which the employer routinely provides to the BPA officers and board members, and to pay for all long distance phone calls.[12]

Captain Hatfield was the employer official directly involved in collecting the payment from Vick.[13] Hatfield remembered the free copying of Waldroop's own file as being quite ordinary, but testified that the photocopying of the internal affairs files on other employees was unusual. Hatfield testified that Vick selected

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[11] The full text of Chief McNeal's letter is set forth above, in connection with discussion of his insistence that Waldroop authorize release of the information to the exclusive bargaining representative.

[12] McNeal said that the BPA had been billed for telephone use, but he was not certain of billings for photocopying, except for the Waldroop case.

[13] Vick did not testify, but a representation was made to the Examiner that Coats had notified Vick, in advance, that he would be required to make payment at city hall. The union did not dispute this account.

several files for copying from what he described as a sizable stack of materials.[14] Hatfield told Vick that the BPA must make payment for the additional photocopies made on machines at the police department. The total charge for these copies was $70.00, which would imply that Vick copied approximately 700 pages of documents.

Alloway insisted that the BPA had never been charged for reproduction costs before this particular incident in 1991. He remembered that Waldroop's investigation file was copied and provided to Waldroop without charge, but that files on other employees copied by Vick were paid for "under protest". The record is clear that Alloway had asked for tapes of the pre-disciplinary hearing and copies of the typed transcripts, if they existed, and that the union attained neither tapes nor transcripts.

The Commission has ruled, as recently as March of 1994, that it is an employer's duty to provide the exclusive bargaining representative with information necessary for grievance processing. City of Bellevue, Decision 4324-A (PECB, 1994). The dismissal of charges concerning a refusal to provide an internal investigation file in that case needs to be understood in the specific context of that request, (i.e., for a due process hearing under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)), and is not understood by the Examiner as a general exclusion of internal investigation files from the union's right to information. Here, Waldroop had already been disciplined, and the union attorney asked for internal investigation files in connection with the union's processing of a grievance on that discipline.

The issue here is whether the employer can charge the union to recover its cost for photocopies requested by the union under the duty to bargain. The Commission has made no prior ruling on

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[14] The Examiner's observations of this witness at the hearing include his gestures suggesting a pile of material in the range of 12" to 18" in thickness.

whether the subject of photocopying costs is a mandatory topic for bargaining. Review of National Labor Relations Board (NLRB) precedent reveals few cases, as well.

In Safeway Stores v. NLRB, 622 F.2d 425 at 429 (1980), it was held that a union was generally entitled to "discover" information relevant to a grievance proceeding. In Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979), the Supreme Court of the United States made clear that a union's statutory interest in obtaining relevant information does not always prevail over conflicting interests, (e.g., privacy). In applying this balancing test in Salt River Valley Water Users' Association v. NLRB, 769 F.2d 639 (9th Cir., 1985), the court decided that an employer was obligated to provide access to a grievant's personnel file as well as job performance and disciplinary records for similarly-situated employees, but it also stated:

> The [NLRB] did not abuse its discretion in limiting the union's access to [the other employee's] personnel file to "all records ... pertaining to disciplinary actions and performance reviews or which it intends to rely on in the grievance or arbitration procedure concerning the termination of [the grievant]." **The Union has not denied that it requested only the information specified in the NLRB order, apparently to save copying costs.** ... The modified order therefore provides a reasonable remedy.

Salt River, 120 LRRM at 2268 [emphasis by **bold** supplied.]

Thus, it went without saying that the union in that case expected to pay for the copies it obtained from the employer's files.

In Champion Parts Rebuilders v. NLRB, 717 F.2d 845 (3rd Cir., 1983), the company maintained a clear practice, agreed to by the union, of allowing the union to use company photocopying machines to copy grievances and minutes of meetings. Although an isolated refusal by the employer to copy certain grievance documents was

held to constitute a discriminatory action in violation of sections 8(a)1 and 8(a)3 of the NLRA, it did not stand as a unilateral change in conditions of employment.[15]

The Examiner concludes that the issue of prepayment for copies made pursuant to a union's request for information has only a remote and indirect impact on employee working conditions. The cost of copies demanded by the employer here was not unreasonable or discriminatory under the circumstances, inasmuch as it was the same price charged to citizens for police reports and similar public documents. RCW 42.17.300 indicates:

> **Charges for copying.** No fee shall be charged for the inspection of public records. Agencies may impose a reasonable charge for providing copies of public records and for the use by any person of agency equipment to copy public records, which charges shall not exceed the amount necessary to reimburse the agency for its actual costs incident to such copying.
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> [1973 c 1 sec. 30, Initiative Measure 276, approved November 7, 1972.]

An organization designated as exclusive bargaining representative under RCW 41.56.080 bears the duty to provide fair representation to all members of the bargaining unit. The costs of negotiation, litigation, and grievance processing are part of the burden that must be assumed by a union. The Examiner determines that the City of Bremerton did not engage in an unfair labor practice when it required a payment by the union for photocopying costs when the union made copies of investigatory files in preparation for taking Officer Waldroop's grievance to arbitration.

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[15] Accord: Seattle First National Bank v. NLRB, 444 F.2d 30 at 33 (9th Cir., 1971), where the court held that a change in the manner of copying doctors' excuses was not a mandatory topic for bargaining, because the issue bore only a "remote, indirect and incidental impact" upon conditions of employment. See, also, King County, Decision 4258-A (PECB, 1994).

Case 9291-U-91-2063 - Unilateral Change in Promotion Policy

Positions of Parties -

The BPA contends that the employer altered a long-standing policy, negotiated in 1987, under which vacant positions were to be posted for bids by bargaining unit employees. The union contended that this was a unilateral change in the promotion policy, and hence a failure to bargain in good faith under RCW 41.56.140(4). It particularly cites the detriment to patrol officers on the "graveyard" shift, if they are bypassed by officers from other shifts in the awarding of promotions and shift changes.

The employer contends that the chief was unaware of any practice with respect to how to post, notify, or otherwise promote police officers into vacant positions, job classifications, or special assignments. It asserts that the 1987 policy relied upon by the BPA here was not made known to Chief McNeal when he came to the department in 1988.

Analysis -

The parties' collective bargaining agreement includes several provisions which deal with shift assignments for patrol officers, and it is a safe conclusion that their bargaining history included some discussion on whether patrol officers worked the "day", "swing" or "graveyard" shift for their 40-hour workweek. There are no contract provisions dealing directly with re-assignments or promotions, although Article 16 of the contract states that the chief may "appoint" an officer to a position classification on a "provisional" basis at the new salary amount, and states that there is 12-month probationary period when an employee is promoted to "an appointment" at a "higher level position".[16]

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[16] The duration of the probationary period appears to be the same as for a new patrol officer, who passes probation only after 12 months on the job and compliance with the civil service rules and regulations.

No section of the contract refers to appointment or designation of police officers to perform the duties of a detective,[17] but there was a policy which affected assignments to the "detective" role. Drafted by Captain Hatfield and approved by then-Chief Coney in October of 1987, that policy indicated it was intended to ensure "fair and unbiased access to training and job assignments for all Bremerton Police Department employees in their class of employment". The policy continued:

> All police department assignment openings will be posted on the department information board (in addition to normal routing procedures) a minimum of ten (10) days prior to noted application closing date ... The assignment announcement shall include the following information:
>
> -- The assignment that is open
> -- the date the assignment is to be filled
> -- the application closing date,
> -- All prerequisites (if applicable)
> -- Instructions on how to make application for the assignment
> -- Information concerning the selection committee.
>
> The final selection for the transfer/reassignment will be made by the Chief of Police, taking into account recommendations of a selection committee.
>
> The above policy as set forth, will be adhered to in all inter-departmental transfers and reassignments. ...

The Examiner takes particular note that the 1987 policy was in the form of a **memorandum addressed to Roy Alloway as president of the Bremerton Patrolmen's Association**, with a copy to then-Chief Coney.

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[17] The parties' collective bargaining unit contains only two sets of pay scales, for "patrol officer" and "sergeant". There is no pay rate or stipend for "detective". Patrol officers are paid at one of five different levels, depending upon longevity. Base pay for the sergeant rank is higher than the Patrol Officer V, and is also subject to four upgrades based on longevity.

In two places, Hatfield wrote that the procedure set forth in that document would be the policy "in years to come" and "in the future".

It is well established in countless Commission decisions that an employer must give notice to the exclusive bargaining representative of its employees, and must provide an opportunity for good faith collective bargaining, if requested, prior to implementing any changes of employee wages, hours or working conditions. There is no evidence in this record that the employer gave notice to the BPA at any time since October of 1987 that it was abandoning the policy adopted at that time. This record does not even contain any evidence from which to conclude that the policy was abandoned or ignored during the intervening period.

After Dennis' promotion from detective to sergeant, an opening existed for a detective. Officer Olan was assigned to the vacant job without announcement of that vacancy to the entire bargaining unit. This unfair labor practice charge followed.

The employer's position at the deferral-to-arbitration stage of this proceeding was that Articles 17 and 21 of the parties' collective bargaining agreement allowed it to change the policy with respect to assignments and promotions. Article 17 is a management rights clause which very generally describes the right of management to assign work, direct the work force, etc., but also expressly states it is not a "waiver" by the union of its bargaining rights under Chapter 41.56 RCW. Article 21 is a "zipper" clause which excluded from bargaining those items not addressed within the articles of the contract. Neither of those contract provisions is sufficiently detailed to constitute a waiver of the union's bargaining rights concerning a change of the assignments and promotions policy adopted by the employer in 1987.

The employer suggests that Chief McNeal was not bound to follow the written policy adopted in 1987, because he was not aware of its existence. It follows, according to the employer, that ad hoc promotions were appropriate, and not bargainable. Apart from the inconsistency between this argument and the "waiver by contract" argument initially advanced by the employer, it is clear that Chief McNeal had the capability within the department to learn of the policy adopted by his predecessor. In particular, Captain Hatfield, who was the author of the 1987 policy document, remained very much a part of the department management.

The employer urges that disregard of the policy adopted in 1987 is a superior result to that sought by the BPA, which would enforce the 1987 policy even if it was unused or sometimes not followed. The employer's argument begs the question of what kind of policy the police officers were interested in obtaining -- namely, one which gave them prior notice when a different assignment or promotional opportunity was available within the police force. That employee interest had, in fact, been served by establishing "review committees" for certain internal transfers and re-assignments within the department. Such committees obviously presupposed a notice requirement -- all interested bargaining unit members were encouraged to consider a different position. Even though there may not have been a different rate of pay for work as a detective, an opening in this position could have been of interest to any of the officers, who of course have a right to bargain working conditions, training, promotions, and rates of pay.

Even if the 1987 policy was a side-agreement or a unilateral action, the BPA had a right to rely on it as a binding past practice. The employer never brought the issue to the bargaining table, and the chief's complete disregard of it amounted to an actionable change or abandonment of that practice. Hence, the employer committed an unfair labor practice under RCW 41.56.140(4) and (1) when it assigned Olan to the detective position, and by its

abandonment of posting detective vacancies in general. Unless the parties happen to have negotiated changes in the 1987 policy in connection with their most recent collective bargaining agreement, the employer will be obligated to reinstate the 1987 policy and maintain it in effect until such time as it has met its bargaining obligations under Chapter 41.56 RCW.

FINDINGS OF FACT

1. The City of Bremerton is an employer within the meaning of RCW 41.56.030(1). During the period relevant to this case, Del McNeal and Joe Hatfield were supervisory and/or managerial officials within the Bremerton Police Department.

2. Bremerton Patrolmen's Association (BPA), a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of non-supervisory law enforcement personnel of the City of Bremerton. During the period relevant to this case, Roy Alloway was president of the organization.

3. On January 10, 1991, Chief McNeal notified bargaining unit member Robert Waldroop of his discharge from employment with the City of Bremerton. The letter to Waldroop volunteered information concerning his right to appeal through the employer's civil service system, but made no mention of the employee's rights under the collective bargaining agreement between the employer and the BPA. The affected employee could reasonably have believed that he had no rights under the collective bargaining agreement, and could have been misled for a critical length of time at prejudice to his rights.

4. On February 27, 1991, Alloway requested certain information from the employer in his capacity as an officer of the BPA,

for the purpose of processing a grievance on behalf of Waldroop. Chief McNeal conditioned release of the requested information on obtaining a written authorization directly from Waldroop.

5. The Bremerton Patrolmen's Association scheduled a meeting of its membership to be held on March 4, 1991. The meeting was to be held on the employer's premises, in close proximity to the offices of the police chief and other department managers. The announced purpose of the meeting was to consider a vote of "no confidence" in Chief McNeal.

6. At a meeting held in his office shortly prior to the union meeting described in paragraph 5 of these findings of fact, Captain Hatfield asked Alloway for permission to attend the union meeting. When Alloway declined Hatfield's request, Hatfield made a remark to the effect that he would eventually learn what happened at the union meeting.

7. At a daily detectives' meeting held shortly prior to the union meeting described in paragraph 5 of these findings of fact, Captain Hatfield remarked that he would not be able to attend the union meeting and asked Alloway to report what transpired at the union meeting. When Alloway declined Hatfield's request, Hatfield made a remark to the effect that he would eventually learn what happened at the union meeting.

8. The comments made by Hatfield, as described in paragraphs 6 and 7 of these findings of fact, were in a jestful and joking manner. Hatfield said nothing which suggested previous or on-going surveillance of internal union affairs and policies. Hatfield said nothing which suggested actual knowledge of what had transpired at any union meeting.

9. In connection with preparing to represent Waldroop in grievance proceedings, the BPA made a request during March of 1991 for copies of documents from internal investigation files concerning other employees disciplined by the Bremerton Police Department. The employer conditioned release of those documents on payment by the BPA of a charge for photocopying the documents. The charge assessed by the employer was at the same rates charged to private citizens for copies of accident reports and other public documents obtained from the employer.

10. In June of 1991, the employer promoted bargaining unit employee Luis Olan to "detective", without posting the vacancy for bids from other bargaining unit members. The employer thereby ignored and abandoned a policy adopted and published to the BPA in October of 1987, under which all future promotions were to be posted for bids from bargaining unit members.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By giving bargaining unit member Robert Waldroop incomplete and misleading advice concerning his appeal rights following his discharge from employment, and specifically by omitting notice of his appeal rights through the collective bargaining process while directing the employee to the employer's civil service process, the City of Bremerton interfered with, restrained and coerced its employees in the exercise of their rights under RCW 41.56.040, and committed an unfair labor practice under RCW 41.56.140(1).

3. By refusing to recognize the status and authority of the Bremerton Patrolmen's Association, to request and obtain information needed by the BPA for its representation of

bargaining unit employee Robert Waldroop in a grievance protesting Waldroop's, the City of Bremerton failed and refused to bargain in good faith with the BPA as the exclusive bargaining representative of its employees, and committed an unfair labor practice under RCW 41.56.140(4) and (1).

4. Under the circumstances presented on this record, the statements made by Captain Joe Hatfield concerning his learning the outcomes of union meetings were not reasonably perceived by employees as indicating that the employer was engaged in surveillance of the activities of the Bremerton Patrolmen's Association, so that the employer did not commit an unfair labor practice by those statements under RCW 41.56.140(1).

5. By requiring, in accordance with its past practice, the BPA to pay reasonable and customary charges for photocopying of documents requested by the BPA, the City of Bremerton did not fail or refuse to provide the requested information, and did not commit an unfair labor practice under RCW 41.56.140(4).

6. By disregarding or abandoning the policy on promotions and reassignments which it adopted and promulgated to the BPA in October of 1987, with respect to the promotion of Luis Olan to the detective position and any subsequent promotions, the City of Bremerton has unilaterally changed the working conditions of its employees represented by the BPA without notice to the BPA or opportunity for collective bargaining within the meaning of RCW 41.56.030(4), and has committed an unfair labor practice under RCW 41.56.140(4) and (1).

ORDER

1. [Case 8948-U-90-1969]. The complaint charging unfair labor practices is DISMISSED with respect to the allegation concerning surveillance of BPA activities.

2. [Case 9248-U-91-2053]. The complaint charging unfair labor practices filed in this matter is DISMISSED.

3. [Cases 8948-U-90-1969 and 9291-U-91-2063]. The City of Bremerton, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

a. CEASE AND DESIST from:

1. Refusing to bargain in good faith with the Bremerton Patrolmen's Association with respect to the wages, hours and working conditions of its non-supervisory law enforcement employees.;

2. Implementing changes of the wages, hours or working conditions of its non-supervisory law enforcement employees, unless it has given notice of the proposed change to the Bremerton Patrolmen's Association and engages in collective bargaining, if requested.

3. Misleading employees concerning their rights under the collective bargaining process, or engaging in other conduct which frustrates the representation of bargaining unit employees by their exclusive bargaining representative;

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

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

1. Reinstate the policy promulgated in October of 1987 with respect to the promotions and assignments, and maintain that policy in effect unless notice is given and collective bargaining is concluded under the requirements of Chapter 41.56 RCW.

2. Receive and process, without asserting any defenses based on timeliness, any grievances filed within 30 days following the posting of notice required by this Order, with respect to the assignment given to Luis Olan in June of 1991 and any subsequent assignment(s) made in contravention of the policy promulgated in October of 1987.

3. 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.

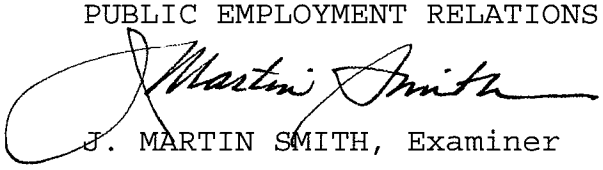
4. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

5. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what

steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 3rd day of June, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

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

WE WILL not refuse to bargain in good faith with the Bremerton Patrolmen's Association with respect to the handling of grievances, especially by refusing to deal with agents and representatives of the association;

WE WILL not interfere with, restrain or coerce bargaining unit employees in the exercise of their collective bargaining rights, by extending conflicting or misleading advice with respect to their appeal rights under the collective bargaining agreement;

WE WILL not refuse to bargain in good faith with the Bremerton Patrolmen's Association with respect to the issue of promotions to police duty assignments, either to maintain or alter past practice of the department;

WE WILL reinstate the promotions policy announced in October of 1987.

WE WILL offer the opportunity for any bargaining unit member to file, within 30 days following the posting date indicated in this notice, a grievance protesting the promotion of Luis Olan to detective in June of 1991, or any subsequent promotion made in contravention of the policy announced in October of 1987, and will process such grievances in the normal course of business without asserting any timeliness defenses.

Posting Date:_____

CITY OF BREMERTON

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 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.