City of Mill Creek, Decision 5699 (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| MILL CREEK POLICE GUILD,<br><br>Complainant,<br><br>vs.<br><br>CITY OF MILL CREEK,<br><br>Respondent. | CASE 11333-U-94-2653<br><br>DECISION 5699 - PECB<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

Brian K. Fresonke, Attorney at Law, appeared on behalf of the complainant.

Short Cressman & Burgess, by David E. Breskin, Attorney at Law, appeared on behalf of the respondent.

On September 13, 1994, the Mill Creek Police Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the City of Mill Creek (employer) had interfered with and discriminated against police officer Rex Britton in connection with actions arising out of a "fitness for duty" evaluation. On January 23, 1995, the union filed additional allegations, claiming that the employer had interfered with Britton's rights, and had discriminated and retaliated against him for engaging in protected activity and for filing an unfair labor practice complaint. A hearing was held in the matter on March 15 and 16, May 8, 9, 10, and 11, June 7, and November 14, 1995, before Examiner Martha M. Nicoloff.[1] The parties filed post-hearing briefs.

[1] With the exception of the police chief and the president of the union, who acted as representatives of the parties, witnesses were sequestered.

## GENERAL BACKGROUND

The city of Mill Creek is located in Snohomish County, Washington. John Klei has been its police chief since 1988. Commander Scott Drown reports directly to Klei, and supervises day shift patrol operations.[2] Bob Crannell, who has been a sergeant since 1989, and Ken Neaville, who became a sergeant in 1992, supervise swing and graveyard patrol shifts and report to Drown.

Rex Britton began work as a police officer in Mill Creek in about October of 1990, after an 11-year career with the Wyoming State Patrol. Britton has a condition known as "acquired cold urticaria", a hypersensitivity to anything cold. He first experienced the condition while serving in the military, and was medically discharged as a result. By late 1974 or early 1975, the condition was in remission, and remained so until it flared up late in 1993. In mid-November 1993, at his physician's behest, Britton took a medical leave of absence from employment. His physician released him to return to work in February 1994. The employer then sent him to another physician for evaluation. That physician agreed that Britton could return to work, and he did so.

## THE "FITNESS FOR DUTY" ALLEGATIONS

### Decision to Send Britton to a Psychologist

Britton was supervised by each of the shift supervisors at some point during his employment. Neaville supervised him for most of the period germane to this proceeding.[3] During the spring and

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[2] Drown was hired into the department as commander in early 1992.

[3] Britton was discharged from his employment at Mill Creek in February 1995, but that discharge is not at issue in these proceedings.

early summer of 1994, the employer became concerned about Britton's performance. Klei and Drown conferred about Britton with psychologist David Smith during that period, both by telephone and in person. Klei discussed Smith's input with department supervisors, in which he became aware for the first time of the breadth of the supervisors' concerns. Klei noted that "pieces started coming together" during those discussions, and he decided to refer Britton to Smith for a "fitness for duty" evaluation.

Klei considered a number of issues in making that decision: Citizen complaints; reports from other employees that Britton had become somewhat "standoffish" since his return from leave of absence; certain lapses by Britton in investigation of accidents or crime scenes; and concerns about Britton's interaction with women. It was Klei's hope that by sending Britton to Smith:

> ... we could come up with the underlying cause for what we saw as a drop in performance and the change in behavior, and put together a path of correction to bring him back in and improve his performance.

Klei asked Drown and the two sergeants to put into writing the issues about Britton which they had addressed in their discussions. Sergeant Crannell prepared documents dated June 16, July 8, July 23, and July 24, 1994. Sergeant Neaville prepared documents dated June 29 and July 22, 1994, and Commander Drown prepared a memorandum dated July 1, 1994.

In a July 8, 1994 letter to Dr. Smith, Klei officially requested the fitness for duty evaluation:[4]

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[4] Certain of the memoranda written by the supervisors, as well as other documents concerning Britton, were sent to Smith at approximately the same time. Additional documents were compiled and sent to him on at least one subsequent occasion.

> This request is based on my concern that Rex Britton is exhibiting signs of inability to due [sic] his job effectively and behavior inconsistent with his years of experience. ...
>
> The purpose of this evaluation is to determine:
>
> 1. Whether Rex Britton presently meets the standards to perform as a Patrol Officer.
>
> 2. What long-range issues are involved, if any.
>
> 3. Whether there are considerations of which we are unaware which are pertinent to Rex Britton's ability to perform his duties.
>
> 4. A prognosis and recommendations regarding Rex Britton's condition as to whether he is fit for duty or not.
>
> I have enclosed for your reference memorandums from the supervisory staff which describe some recent behavior which have [sic] lead to my concern. Because it may be relevant, you should also be aware that with in [sic] the last year Rex Britton has been off duty for a medical ailment which adversely impacted his ability to perform this job of Patrol Officer.

Smith also received information about Britton from Larry Davis, the president of the Mill Creek Police Guild, who had shared living quarters with Britton for a short period.[5] Around July 8 or 9, 1994, Drown officially informed Davis that the department had decided to send Britton to Smith.

Informing Britton of Evaluation -

On July 9, Drown telephoned Britton at home, and directed him to come to the police department for a meeting. At that meeting, Drown informed Britton that he would be sent for the "fitness for duty" evaluation. Drown told Britton that some concerns about his

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[5] Drown recalled that Davis had expressed some concerns about Britton, and Drown then made an appointment for Davis to talk to Smith. Drown did not believe that he had ordered Davis to see Smith, but Davis testified that he had been "instructed" to give input to Smith.

performance had arisen since Britton returned from disability leave. Britton testified:

> They were worried about my previous divorce. They were worried about the problems I'd had with my girlfriend for about a month. They were worried about when a lady backed into me in a parking lot. ... They were worried about a security on a rape scene that I was doing an interview on. They were worried about an investigation of an accident. They were worried about my disability. ... And they were concerned about inconsistencies on my initial report. ... He said that they couldn't understand how my followups were so good and my initial reports were so bad.

Britton also testified that Drown told him that some officers were concerned about Britton's ability to perform his job because of his cold urticaria. Britton told Drown of his own concerns about that possibility, but testified that Drown was not worried because of Britton's having worked in Wyoming. Britton "objected a little bit" about being sent to the psychologist, and told Drown that the employer had not raised any concerns during his recent performance evaluation. Drown told Britton that he had no option other than to report for the evaluation.[6]

Drown recalled telling Britton that he could not advise Britton to contact an attorney, but Britton might wish to do so. Britton recalled that Drown had said "we will not advise you not to seek legal counsel". According to Drown, Britton then told him that he would contact guild president Davis. Drown encouraged him to do so, and advised him that the employer had already informed Davis of the planned examination.

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[6] Drown told Britton the employer had no plans to fire him, but the two discussed discharge as a possibility if the result of the evaluation came back as "unfit for duty".

Drown directed Britton to sign an "evaluation understanding" form, which he witnessed. That form noted:

> I hereby acknowledge that at the directive of my Department I am undertaking the present psychological evaluation with the clear understanding that the Department which referred me to Dr. David H. Smith will receive a report based on my responses. Hence, I understand that the usual confidentiality between a psychologist and a client does not exist between Dr. Smith and myself during this evaluation process.
>
> The purpose of the evaluation is to help the Department determine my fitness to perform all the duties of a law enforcement officer. I am aware that Dr. Smith may talk with appropriate Department personnel and review agency files to obtain information about my performance or to clarify Department concerns about me. Only the client, the Department in this instance, will receive a copy of any report.
>
> I also understand that some or all of this information may be used for purposes of psychological research on law enforcement officers. All information for research purposes will be kept completely anonymous [and] will have no bearing on my tenure in this department.
>
> I acknowledge that my failure to cooperate in this Fit-For-Duty Psychological Examination may result in discipline.

The form came from a protocol established by the Psychological Services Committee of the Washington Association of Sheriffs and Police Chiefs. The employer used the same form when it previously sent another employee for evaluation, but the union and the employer had never discussed the wording of that form.

At some point on or about July 9, Britton spoke to officers of the Mill Creek Police Guild, and asked for the union's assistance. The guild's secretary-treasurer, Jim Deanne, testified that the three voting guild officers decided to hire an attorney on Britton's

behalf. At some unspecified point thereafter, Britton was advised that "they [the guild] had retained [attorney] Chris Vick to represent the Guild and me in this issue."[7]

Initial Day of Evaluation

Britton had his initial appointment with Dr. Smith on July 11, 1994.[8] Britton recalled spending the entire day there, taking psychological tests and being interviewed by Smith. In a letter dated that same day, Smith wrote to Klei:

> Officer Britton completed his fitness-for-duty evaluation this date. The evaluation included 4 hours of directed, clinical interviewing and psychological testing [names of tests omitted] and a review of file materials provided by you. He was completely cooperative and responsive to the concerns of the evaluation, which he acknowledged. Tests have been scored, reviewed and results discussed with Commander Drown and Officer Britton.
>
> **Conclusion**: Officer Britton has no major or substantive personality or psychological problems. He can be returned to duty this evening, per schedule, without restriction. A long, more detailed report will be generated this week but I thought you might like to have this brief summary.

[Emphasis by **bold** and underlining in original.]

Just before they left his office, Smith gave Drown and Britton essentially the same information as that contained in the letter to Klei. Britton believed from Smith's remarks that the evaluation had been completed. He worked his previously-scheduled graveyard shift that evening.

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[7] Deanne testified that he later wrote a check to Vick from the union's account, for services to Britton in July 1994.

[8] Drown took Britton to Smith's office, and returned later to pick up Britton for the return trip to Mill Creek.

The Second Evaluation

At some point after July 11, Smith telephoned Drown and said that he wished to do some additional evaluation of Britton. On July 13, Drown telephoned Britton at his home, and advised Britton of Smith's request. An appointment was made for Britton to have a second interview with Smith on the afternoon of July 14.[9] Britton noted, "I was really worried, now. The fact that Doctor Smith said I didn't have any problems, and now they want to ask more questions about stuff, I was a little scared."

Contact with Union Attorney -
After Drown's call, Britton left a voicemail message for attorney Vick, to the effect that he was very concerned about being ordered to go for further evaluation when he thought he had been told after his evaluation on July 11 that there were no problems. He asked Vick to call him. He recalled leaving a second voicemail message at Vick's office about 8:00 a.m. on July 14.[10]

Vick returned Britton's call at approximately 9:00 a.m. to 9:30 a.m. on July 14, at which time they discussed the "evaluation understanding" form. At some unspecified time later on the same day, Britton apparently had another telephone conversation with Vick. During a telephone conversation with Vick's secretary at approximately 2:00 p.m. on the same day, the secretary told Britton that Vick had said to go to the appointment with Smith and to be cooperative, but to give Smith a letter which revoked the evalua-

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[9] Drown recalled scheduling the appointment, while Britton believed that he had called Smith and scheduled it himself.

[10] Britton's testimony about the timing of these calls was confusing. He initially testified that his first call to Vick was on "July 12 or 13", but he later testified that his first call to Vick was on July 14. Britton also had difficulty recalling the number and timing of the various calls made on July 14.

tion understanding. It appears that Vick's secretary may have dictated the wording of such a letter to Britton over the telephone, and that Britton typed the letter himself.

Revocation of Waiver -

Neither the guild nor Britton reported any concerns about the original waiver to Klei or any other department supervisors, prior to Britton's appointment with Smith. When he arrived for his second evaluation session at approximately 4:00 p.m. on July 14, Britton gave Dr. Smith the following document:

> This letter shall serve as revoking any prior releases of information and I specifically revoke any authorization I may have given Dr. Smith to release any more information to my employer than is allowed pursuit [sic] to the Americans with Disabilities act [sic].

Britton testified that he knew nothing about the Americans With Disabilities Act (ADA) before talking to Vick, and had "no idea" at that point what information could have been released under the terms of the letter he was presenting to Smith.

Britton did not discuss the revocation with Smith, nor did he tell Smith that he was prepared to proceed with the evaluation in some manner. Britton testified that Smith read the note and said "this put a whole new light on everything". He asked Britton to wait while he telephoned Klei.

Klei was in a meeting with Drown at the time the call came in from Dr. Smith, and the employer officials listened to the call on a speakerphone. Klei asked Smith about the implications of the revocation. He testified that Smith said he could continue with the evaluation, but:

> [H]e couldn't give me any of the answers I was looking for, because without the evaluation

> understanding I was no longer the client. And I said, if indeed that was the case, then I wasn't paying his bill. The conversation went up a little bit. That's when Scott [Drown] stepped in, and he said that he should probably talk to the doctor instead of me before I did something stupid.

Klei acknowledged that he was upset, "... that we'd put together a process and a path and all of a sudden this came in and knocked us off course."

Klei asked Smith to send Britton back to the police department, and also requested that Smith send him a copy of the "revocation" document. Britton testified that Smith told him to go back to see the chief, and that "I would probably be suspended". Klei did not recall making any comment about suspension to Smith.

Smith sent a letter to Klei by telefacsimile on July 14, which read, in part:

> Officer Britton arrived for his 1600 appointment, per his instructions, to complete the interview process of his "fit-for-duty" evaluation. He told me right off that he had consulted an attorney who suggested that he give me a letter revoking his prior "release of information" which he did (copy accompanying).
>
> ... Given Officer Britton's reluctance to complete the interview, I am now unable, per state law, to give you any further information about his evaluation. Given the unfinished nature of the evaluation, I am also not able to maintain that he is "fit-for-duty" at this time and hereby revoke my recommendation that he be returned to active patrol duty. ...

Smith's telefacsimile to Klei included the "revocation" document which Britton had given to Smith.

Predisciplinary Notice -

Britton returned to the police department after leaving Smith's office on July 14, and observed that Klei, Drown, and City Manager John Simms were meeting in Klei's office. Britton was heading for Klei's office to tell them that he had arrived, when Crannell told him to wait outside, that "they didn't want me inside the Mill Creek Police Department".

Drown remained with Klei while Klei conferred with the employer's attorney, Scott Missall, by telephone. At some point during those deliberations, Klei drafted a "predisciplinary notice" which he gave to Britton in the early evening of July 14, as follows:

> On July 10, 1994 you were ordered to see David H. Smith Ph.D. to participate in a fit for duty evaluation. Part of this evaluation was a follow up consultation on July 14, 1994. On July 10, 1994 you signed an Evaluation Understanding indicating that you were aware that the city needed this information to be able to assess your ability to perform the functions of your job. This waiver also indicated that your failure to comply could result in disciplinary action. At the beginning of the July 14, 1994 consultation, you presented a notice to David H. Smith Ph.D. revoking your permission to release the information from the evaluation to the city. Because of your revocation notice, the city is unable to make this determination.
>
> Chapter 04.03 of the Department Policy and Procedure Manual states that you must follow direct orders. Your failure to follow through with the completion of this examination is a failure to obey a direct order.
>
> You are hereby suspended from duty with pay pending a disciplinary hearing on Tuesday July 19, 1994 at 1000 hours. You are also ordered to turn in your service weapon, badge, commission card, and city issued keys. Further you are ordered to complete the fit for duty evaluation with David Smith Ph.D. at 1500 hours on July 15, 1994 at his office and allow David Smith Ph.D. to release any information needed by the city to evaluate your fitness

> for duty. Your failure to complete this examination may result in further discipline, up to and including termination.

Klei spent only a few minutes with Britton when that notice was presented, and did not discuss the events of that day with him.

Resolution of Waiver Matter Between Attorneys

Employer attorney Missall and guild attorney Vick discussed the "waiver revocation" matter during a telephone conversation some time on July 15, 1994, and were able to resolve that issue. In a letter to Smith dated July 15, 1994, Missall wrote:

> At this time, Chief Klei requests that you provide to the City of Mill Creek only as much information as is necessary to answer the question whether Officer Britton is fit for duty, and/or, if some accommodation is needed on the City's part so that he can be fit for duty, what that accommodation must be. This inquiry is intended to be consistent with the four questions you were previously asked to answer in Chief Klei's letter of July 8, 1994 ...

The discussions leading to that agreement and letter are not at issue before the Examiner in this proceeding.

Further Fitness for Duty Evaluation -

Britton met with Smith on two more occasions.[11] Following those meetings, Smith advised Klei that Britton met the standards to perform as a patrol officer. Smith's undated letter was received by the employer on August 9, 1994, and Klei sent a memorandum on that same day, telling Britton that Smith had cleared him as fit

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[11] There was a conflict in the record about the exact dates of these evaluations (Britton recalled having seen Smith on July 19 and July 24 or 25, while a letter from Smith to the employer indicates that he met with Britton on July 19 and 27), but it ultimately makes no difference.

for duty. That letter said, however, that Britton would be required to take certain steps to "improve your performance". Britton was returned to duty on August 10, 1994.

Predisciplinary Meeting

The predisciplinary meeting originally scheduled for July 19, 1994, was postponed by the employer, because Britton's employment status was uncertain pending the results of the fit for duty evaluation.[12]

A predisciplinary meeting was held on August 19, 1994. The employer officials present were Klei, Neaville, and Missall. Britton was accompanied by union official Deanne and a different guild attorney, Brian Fresonke.[13] Klei began to ask questions after people introduced themselves and sat down, and that Missall also asked some questions. Britton testified on direct examination:

> Q: [By Mr. Fresonke] Were you ever questioned about any conversations you'd had with Mr. Chris Vick?
>
> A: [By Britton] Yes, I was.
>
> Q: What do you recollect about that questioning?
>
> A: They asked me if I'd had some contact with Chris Vick earlier on, which I'd had.
>
> Q: Did they ask you anything further about your conversations with Chris Vick?
>
> A: They might have, I can't remember.

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[12] Klei did not recall any objection from either Britton or the union with respect to rescheduling the disciplinary hearing.

[13] While Fresonke was the guild's legal counsel, Britton testified that he had also retained Fresonke as his personal counsel earlier on that day.

Q: Was there any discussion or any questions asked of you with respect to why you didn't contact or discuss things with John Klei?

A: Yes.

Q: What do you recollect about what was -- what those questions were?

A: Chief Klei asked me why I -- if I'd considered consulting him first before retaining the Guild attorney and complaining to the Guild about how I felt.

Q: Do you remember anything else that Chief Klei said about that?

A: He asked me why I didn't consult him first.

Q: Was there -- did I say anything at this point?

A: Yes, you did.

Q: What do you recall me saying?

A: You objected to the question, and you said -- I'm trying to think here -- you objected to the question that Chief Klei asked.

Q: Did you nonetheless answer the question at some point?

A: Yes, I did.

Q: What did you say?

A: I told him that, by the time I got ahold of an attorney I didn't have enough time to consult with the Chief about going down to Doctor Smith.

Britton testified that he felt intimidated, that "I had the distinct feeling the Chief did not want me to go to the Guild with my problems or seek legal advice. ... I needed to come talk to him rather than go to the Guild."

Britton gave somewhat different testimony on cross-examination, when he testified:

Q: [By Mr. Breskin] You said [Klei] started asking you questions. Tell me what he said to the best of your recollection at that point in time. He was the first person to speak in terms of substance, if I understand it.

A: [By Mr. Britton] I can't remember if it was Chief Klei or the City Attorney.

Q: Okay.

A: But one of them said that just -- you know, he had had some conversation with Chris Vick during this time.

Q: So that statement could have been made by Mr. Missall?

A: Yes.

Q: Then what was the next thing that happened?

...

A: The Chief asked me if I had ever considered consulting him first before I went to the Guild. ... Mr. Fresonke objected to that. The Chief asked a question again. Mr. Fresonke objected again. The Chief asked the question, have you ever thought of consulting me first about this issue. Mr. Fresonke objected again. The City Attorney and the Chief both said something at the same time about they needed to know the answer. ... The Chief then asked the question again. I told him, no, that I didn't have time because I had just recently got ahold of the attorney before I went in to see Doctor Smith.

...

Q: Do you recall Chief Klei starting the session by stating that the disciplinary hearing stemmed from the July 14 visit to Doctor Smith where you revoked your permission to release information to the city?

A: He may have. I don't remember. It has been quite a while.

...

Q: So before any discussion whatever about your visiting an attorney or the Guild, Chief Klei may have opened the session by

telling you that the disciplinary hearing stemmed from your revocation of permission to release information to the city, correct?

A: He may have.

Q: With regard to the comment concerning your contact with the attorney, is it possible that you may have raised the issue about contacting the attorney before anyone on behalf of the city raised that?

A: I may have. I can't remember.

...

Q: Do you recall during the August 19, 1994 meeting, Mr. Britton, that Chief Klei asked you why, if you had a problem with the release of information that you didn't talk to him first about it?

A: Yes.

Q: Do you recall that Chief Klei mentioned that he was concerned about why you had arrived at the doctor's office if you had a problem with the release of information without talking to him about it?

A: I believe he said something like that. It has been quite a while.

Under further cross-examination, Britton testified that he did not believe he had an obligation to communicate with the chief about his concerns. Britton testified that his intent was, "That I didn't care if they evaluated me. I just wanted that whatever information was given back to the city ... conform with the Americans with Disabilities Act." He reiterated that he did not understand the chief's comments at the August 19 meeting to be an attempt to encourage him to communicate his concerns, but rather believed that the chief was trying to intimidate him and keep him from exercising his right to speak to the guild and to retain legal representation.

Klei's recollection of the August 19 meeting was that he asked why Britton didn't come to him instead of going to Smith with his

concerns. According to Klei, Britton said he had spoken with the attorney early that morning, that he had been very tired at that point, and that he had then gone to bed. Klei testified that he then asked whether Britton would have continued with the evaluation if Smith had been prepared to proceed.

> Q: [By Mr. Breskin] Why did you want to know that?
>
> A: [By Mr. Klei] Because I was looking for his intent. I mean, was it his intent to go down there and disobey the direct order, or was his intent to actually go through with it and Doctor Smith is the one who screwed it up and decided not to continue the evaluation process.
>
> Q: Okay. Why would that have made any difference in your consideration?
>
> A: Well, because if his intent was to not follow through with the direct order, then that would have substantiated the charge of failure to obey a direct order. But if his intent was different than that and that was just the outcome of it, then it would cause -- would give me different evidence on whether or not there was a violation of a policy and procedure or not.

Notes which Klei wrote shortly after the meeting ended were identified as an exhibit in this record, but the employer never moved that they be admitted into evidence.

Neaville's recollection of the predisciplinary meeting was as follows:

> Q: [By Mr. Breskin] ... Can you relate what occurred from your observations there?
>
> A: [By Mr. Neaville] Basically what occurred is, Officer Britton was present. I believe another Guild member, Officer Jim Deanne, was present -- Chief Klei, and myself, and possibly some other members. I did not keep notes during that

> meeting. And it basically came down to, Chief Klei asked why Mr. Britton didn't keep his appointment, there at the meeting.
>
> Q: Keep his appointment with Doctor Smith?
>
> A: Correct.
>
> Q: Okay. And what occurred then?
>
> A: Basically I think there was a side bar with Officer Britton and Mr. Fresonke, and then there was just a brief response. Like I say, I didn't keep notes. I believe Officer Britton's response was either "I don't know," or "I'm not sure."

Deanne's sole function at the meeting was to take notes on behalf of the guild. While he testified that his notes were an effort to make a record of what was said at the meeting "in a manner which would allow for recall at a later time", he had virtually no independent recollection of what occurred at that meeting. He did recall that the primary participants in the discussion were Klei, Britton and the two attorneys. His impression of the meeting was that the employer was concerned that Britton had been ordered to report to Smith, but essentially had not done so because of the revocation. Deanne thought that Klei's demeanor was "normal demeanor for the Chief", but that he was upset that Britton hadn't dealt directly with him.

Deanne's contemporaneous notes first list the meeting attendees and then continue:

> JK [Klei]: Stems from the visit to Smith. Rex revoked permission to release info to city.
>
> RB [Britton]: Rex consulted with atty. Drafted note to Smith. Told by Smith he would be suspended.
>
> JK: What happened on arrival to Drs office, what happened next?

> RB: ~~Smith~~ Scott said city would not recommend getting atty.[14] Went 2d time & gave Dr. note. Smith said "changes things." [illegible] to talk to your chief right away, probably be suspended.
>
> JK: If Smith wanted you to continue would you.
>
> RB: On advice of atty yes, under protest
>
> JK: After signing under protest would you?
>
> RB: Yes.
>
> SCOTT: Clarification re: scope of waiver letter of 7/15/94 from Scott Missal [sic].
>
> SM [Missall]: Did speak w Chris Vick in July re ADA problems
>
> ~~SCOTT~~ BF: Objection not relevant ADA.
>
> JK: Why didn't you consult me?
>
> ~~SCOTT~~ BF: What order did RB disobey? (to JK)
>
> SM: Clarification of JK's ?
>
> RB: On advice of atty
>
> JK: Never occurred to you to consult me first?
>
> RB: [illegible] short warning, was contacted early a.m.

The indicated alterations to Deanne's notes occurred at some point subsequent to their original writing.[15]

Deanne's notes record another exchange concerning the exact nature of the charge against Britton:

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[14] The notes do not make clear whether "Scott" refers to Commander Scott Drown or one of the meeting attendees.

[15] The attorney in attendance for the employer was Scott Missall. A complicating factor is that Deanne thought Fresonke's first name was also "Scott" at the time he was recording the notes. At a number of points where remarks were initially attributed to a "Scott", that name has been crossed out and replaced by "BF", indicating Brian Fresonke.

> [illegible as to speaker]: What is charge?
>
> JK: Failure to go to Dr. and be evaluated
>
> [illegible as to speaker]: What facts alleged
>
> SM: Fundamentally RB was ordered to go to Smith, RB didn't.

It is clear that there was also some discussion about obtaining documents and the expected timing of the chief's response to the meeting.

## Discipline Imposed

On August 29, 1994, Klei personally delivered a notice of written reprimand to Britton. The notice began with a recitation of the chronology surrounding the fitness for duty evaluation. It continued:

> Information from the predisciplinary meeting and investigation indicates the following:
>
> * You were ordered to go and participate in a fit for duty evaluation with David Smith Ph.D. and did complete one evaluation session.
>
> * You were ready and willing to follow through with the second evaluation meeting provided that David Smith Ph.D. complied with ADA requirements.
>
> * You also were willing to sign a second waiver, under protest, and proceed with the evaluation.
>
> * Neither of these options were communicated by you to David Smith Ph.D.
>
> * David Smith Ph.D. terminated the evaluation session and directed you to return to city hall. You did so.
>
> * The notice which you delivered to David Smith Ph.D. before the second evaluation session was ambiguous, internally contradictory, and poorly written. Thus the notice failed to communicate your willingness to continue with the evaluation provided that your rights under the ADA were satisfied.

> * David Smith Ph.D. appears to have acted very conservatively in this situation when he canceled the interview session. However, that reaction is understandable because the ADA is new and complex legislation, and has not yet been extensively tested in or interpreted by the courts. Attorneys are struggling with the meaning and consistent application of the law. Particularly untested is the interplay of fitness for duty evaluation and privacy requirements of the ADA.
>
> ... These facts lead to the conclusion that you exercised poor judgement by not clearly stating your concerns to David Smith Ph.D. and by not attempting to resolve your concerns directly with your superiors. Your poor judgement lead [sic] to a "crisis situation" upon delivery of your revocation notice, resulting in significant waste of departmental resources, imposing hardships on other personnel required to cover for your absence, and interference with other criminal justice agencies. Given David Smith's inability to timely evaluate you, the city had little choice but to place you on administrative leave until all the issues were resolved. I hereby find that you displayed poor judgement and communication abilities that negatively impacted the operations of the Police Department.

Klei testified that, after hearing Britton's side of the story at the predisciplinary meeting:

> I realized that while technically he probably violated or failed to obey a direct order, by the spirit of that direct order, no, that he had some issues with it. And if he had brought the issues to me, they could have been resolved, which they were, with a short phone call between two attorneys afterwards. ... The conclusion was he used poor judgment.

Klei also noted:

> [I]f he would have communicated directly with me, if he would have come to me after he found

> out or after he had that language for that revocation and said, Chief, I have a problem with the meeting that you've scheduled me for at 4:00 o'clock today I'm scheduled to attend, we could have worked it out. He would have never had to been removed from duty. He wouldn't have had to sit home for a month on city pay. We wouldn't have had to realign work schedules. We wouldn't have had to delay cases in prosecution. And he would have continued working. Smith would not have pulled his okay to go to work.

This was offered to explain the variance from the predisciplinary notice, which had accused Britton of failure to follow a direct order.

Britton testified about his reaction to discipline being imposed for the exercise of poor judgment, as follows:

> I was upset. Really confused because, except for discipline, it was not what we talked about in the pre-disciplinary meeting. I was being accused of something here that the Chief here on his conclusions said that I'd exercised poor judgment by not going to my supervisor. I thought this was trying [sic] intimidate me into the next time I had any concerns I'd need to go to my supervisors first regardless of what it was over. I felt that the whole thing was derogatory towards me, and I don't think that I deserved it.

On cross-examination, Britton testified that he had no facts which would lead him to believe that Klei's conclusions about poor judgment were based on anything other than the confusion which resulted from Britton's revocation of the original waiver. Britton testified that he disagreed with Klei's characterization that he had failed to communicate; he believed "I didn't fail to communicate. I wasn't asked to continue."

Britton recalled that Klei said the matter was concluded when the chief gave him the reprimand, and that Klei also made some comments to the effect that the evaluation had been completed, that they didn't find anything wrong, and that they hadn't expected to. Britton also recalled a few comments on his part about the "process of what had happened", including saying that he didn't think that he deserved the discipline, and was bitter about it.[16] The reprimand was placed in Britton's personnel file.

## Discussion

The City of Mill Creek and its employees are subject to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which includes the following provisions:

> 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.
>
> * * *
>
> RCW 41.56.140 Unfair labor practices for public employer enumerated. It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;

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[16] Britton recalled the chief saying he was bitter about it too, but Klei did not believe he made any such comment.

> (4) To refuse to engage in collective bargaining.

It has long been settled law that motive is not a critical element in making determinations of employer interference with employees' statutory rights in violation of RCW 41.56.140(1). City of Bremerton, Decision 2994 (PECB, 1988); City of Seattle, Decision 3066, 3066-A (PECB, 1989); Kitsap County Fire District 7, Decision 3105 (PECB, 1989); City of Longview, Decision 4702 (PECB, 1994).[17] Nor does finding a violation turn on the success or failure of the action. The test is whether the employer's conduct may reasonably be said to interfere with the free exercise of employee rights. Commission precedent on this general proposition is consistent with decisions by the National Labor Relations Board (NLRB) under the similar "interference" provision found in Section 8(a)(1) of the National Labor Relations Act.

The Commission adopted a new standard in 1994 for determining whether an employee has been discriminated against for the exercise of rights guaranteed by Chapter 41.56 RCW. The standard adopted in Educational Service District 114, Decision 4631-A (PECB, 1994) and City of Federal Way, Decisions 4088-B and 4495-A (PECB, 1994) is based on decisions by the Supreme Court of the State of Washington in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), and applies whether the matter is a "mixed motive" or a "pretext" case. In delineating its new position, the Commission noted:

> Under the Wilmot/Allison test, the first step in the processing of a "discrimination" claim is for the injured party to make out a prima

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[17] Highline Community College, 45 Wn.App. 803 (1986), was cited by the employer as requiring proof of an adverse motive in an interference case. That case, which involved an allegation of discrimination under the standard then applied by the courts, is inapposite here.

> facie case showing retaliat[ion]. To do this, a complainant must show:
>
> 1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
>
> 2. That he or she was discriminated against;
>
> 3. That there was a causal connection between the exercise of the legal right and the discriminatory action.
>
> If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee. ...
>
> While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions.
>
> ... the employee may respond to an employer's defense in one of two ways:
>
> 1. By showing that the employer's reason is pretextual; or
>
> 2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Educational Service District 114, supra.

In Port of Tacoma, Decision 4626-A and 4627-A (PECB, 1995), the Commission noted that a discrimination violation requires a showing that an employee was deprived of "some ascertainable right, benefit, or status". See, also, Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996).

The Predisciplinary Meeting -

The guild alleges that the employer violated RCW 41.56.140(1) by Klei's questioning Britton at the predisciplinary meeting, and asserts that Britton reasonably perceived the questions to be a threat. It also claims that Klei's testimony regarding the meeting

was fabricated after the unfair labor practice complaint was filed, and was belied by other evidence.

The employer asserts that the record regarding the predisciplinary meeting, including testimony from guild witnesses, establishes that Klei's questions went to Britton's reasons for not raising his concerns about the release form with Klei before he went to the second appointment with Smith. In addition, the employer argues that no rights secured under Chapter 41.56 RCW were at issue in Britton's contact with Vick or in revoking the release, and that the allegation with respect to this issue is based on the coincidence that Vick was "on the guild's payroll", when the facts show that Vick was acting as Britton's personal attorney concerned with his ADA rights.

The burden of proving an allegation of unlawful interference rests with the complaining party, and must be established by a preponderance of the evidence. Lyle School District, Decision 2736 (PECB, 1987); Bellingham Housing Authority, Decision 2335 (PECB, 1985); City of Pasco, Decision 3804-A (PECB, 1992), and citations therein. The Commission has found interference violations where an employer created the impression of surveillance [City of Westport, Decision 1194 (PECB, 1981); Town of Granite Falls, Decision 2692 (PECB, 1987)], where an employer asked what amounted to questions regarding union bargaining positions during the course of a promotional interview [Kitsap County Fire District 7, supra; Port of Tacoma, Decision 4626-A and 4627-A (1995)], and where an employer interfered with grievance processing Valley General Hospital, Decision 1195-A (PECB, 1980); City of Seattle, Decision 3429 (PECB, 1990); Clallam Transit System, Decision 4597 (PECB, 1994).

With respect to the interrogation of employees (particularly as it relates to union sympathies in a representation setting), the NLRB standard has fluctuated. Its most recent position requires an

evaluation of all of the circumstances surrounding an interrogation, including the background, the nature of the information sought, the identity of the questioner, and the place of interrogation. Rossmore House, 269 NLRB 198 (1984); Sunnyvale Medical Clinic, 277 NLRB 131 (1985); Emery Worldwide, 309 NLRB 19 (1992). The Courts have tended to apply a slightly different approach, but one which also considers the specific circumstances in making a determination as to whether interference has occurred. NLRB v. Brookshire Grocery Co., 919 F.2d 359 (5th Cir. 1990); Midland Transportation Co. v NLRB, 962 F.2d 1323 (8th Cir. 1992).

Whether an interference violation occurred in the course of the predisciplinary meeting turns on the specific wording of Klei's questions of Britton. If the complainant were to prove that Klei asked why Britton did not contact him before he contacted the guild, there is no question that it would prevail on the interference allegation under Commission precedent. The complainant did not, however, meet its burden.

The record regarding the wording of the questions themselves does not clearly indicate precisely what was said. Britton first testified, on both direct and cross-examination, that Klei asked why Britton did not consult him before talking to the guild or its attorney. Britton's further testimony during both direct and cross reflects that Klei said "have you thought of contacting me first", or words to that effect, without any reference to the guild or guild attorney. Klei's testimony was that he questioned why Britton didn't come to him after he knew he had a problem with the release, that is, after he spoke to the attorney. Deanne's notes reflect Klei saying "why didn't you consult me?", but Deanne himself could recall no specifics. Neaville recalled only that Klei asked Britton why he didn't keep his appointment with Smith.

In a situation such as this, where the participants recall different versions of the conversation, and where it does not appear any

are being deliberately deceptive, the Examiner must look to other clues in the record which might reveal what actually occurred. In this case, the primary clue lies in Britton's answer to the contested question. Deanne's notes and testimony by Britton and Klei all indicate that Britton responded that he did not contact Klei **because by the time he had talked to Vick, there was not enough time to talk to Klei** before he went to his evaluation appointment. Further support that Klei's question concerned Britton's failure to contact the chief **after** talking to Vick is found in Deanne's notes, which indicate that Britton at one point apparently responded to Klei's "why didn't you consult me?" by saying "on advice of atty".[18] Logic dictates that the answer to a question about consulting the chief **before** consulting an attorney would not be "I didn't have time to consult you **after** I consulted the attorney." Britton's answer makes sense only in response to questioning about why he did not consult his employer after he had talked to the guild attorney and knew he had a problem with the waiver.[19]

The Examiner does not find the chief's questioning should **reasonably** be perceived as interfering with Britton's right to contact his bargaining representative or its legal counsel.[20]

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[18] The "atty" is taken to be an abbreviation for "attorney".

[19] The Examiner recognizes a possible reading of Britton's testimony is that Klei asked two questions, the first referencing the guild and the latter shortened to omit reference to the guild. The Examiner is convinced that the record as a whole, including the pleadings, Britton's testimony, and the guild's arguments, indicates Britton and the guild understood that the same question was being asked repeatedly. Britton's answer reflects a question that did not include a reference to the guild.

[20] It would be troublesome if Klei continued to question Britton after being told that the attorney advised him not to contact the chief, but such a response appears only in Deanne's notes and nowhere else in the record.

Imposition of Discipline -

The guild alleges that the discipline issued Britton constituted both interference with and discrimination against Britton in violation of RCW 41.56.140(1). It claims that it has made out a prima facie case of discrimination with respect to that discipline, and that any nondiscriminatory reasons given for the discipline are pretextual. The employer again argues that the only rights which Britton sought to protect were those under the ADA, not rights under Chapter 41.56 RCW, and that there is no evidence that the chief desired to interfere with any such rights. With respect to the retaliation allegation, the employer asserts that Britton was at most asserting an ADA right in revoking his prior release without advising the employer, so that the first element of the retaliation test has not been met. The employer asserts that the retaliation charge cannot be sustained, because Klei's discipline of Britton was motivated by the problems which resulted from Britton's actions. It also claims that no adverse employment action exists, because the chief ultimately withdrew the disciplinary notice.

The Interference Allegation -

Because the complainant did not sustain its burden of proving that Klei actually asked the offensive questions which were alleged, it cannot be said that the employer's discipline of Britton was based on improper questions. The wording of the discipline notice gives rise to some concerns, however.

When Klei issued the discipline, he included the following statement in the document:

> * The notice which you delivered to David Smith Ph.D. before the second evaluation session was ambiguous, internally contradictory, and poorly written. Thus the notice failed to communicate your willingness to continue with the evaluation provided that your rights under the ADA were satisfied.

> * David Smith ... appears to have acted very conservatively ... when he canceled the interview session. However, that reaction is understandable because the ADA is new and complex legislation ... Attorneys are struggling with the meaning and consistent application of the law.
>
> ... These facts lead to the conclusion that you exercised poor judgement by not clearly stating your concerns to David Smith ...

An interference violation was found in City of Seattle, Decision 2773 (PECB, 1987), when that employer's standard predisciplinary memo could reasonably have been interpreted by an employee to preclude having union representation. That decision noted:

> [The employee] was advised in a standard form disciplinary memo that "you may have an attorney or some other representative assist you at your own expense."
>
> ... Referencing an attorney as a possible representative does not, on its face, exclude union representation. Some union representatives may be attorneys, or a union may retain an attorney to represent employees in processing grievances. ...
>
> On the other hand, the employer's form letter language is so general as to be capable of carrying the implications imputed by the union. [The employee] was, in fact, confused by the language. The record shows that she had earlier been advised by a supervisor to seek union assistance. The letter from the department head makes no reference to the possibility of union representation. The phrase "at your own expense" only tends to add to the potential for employee confusion. ... an employee could reasonably imply that the department head was suggesting that someone other than the union should be representing them.
>
> However intended, it is concluded that the employer's incomplete statement of rights could reasonably have been taken by [the employee] in a manner which interfered with her exercise of right to representation under

> Chapter 41.56 RCW, and so violated RCW 41.56-.140(1).

When he issued the reprimand in this matter, Klei was aware that Britton had consulted his exclusive bargaining representative, and that Britton was acting on advice from the attorney who represents the union when he reported to Smith on July 14 and gave him the revocation document. The comments in the reprimand that the waiver revocation notice (based on Vick's advice) "failed to communicate", and that Britton himself exercised poor judgment by "not clearly stating his concerns", cross the line. This is particularly so, when those comments are coupled with the employer's willingness to excuse Smith's actions because they resulted from "understandable" confusion about the ADA. The employer's reprimand so intertwines Britton's actions at Smith's office with his protected quest for union assistance, that Britton could reasonably have believed that the employer was attempting to interfere with his rights. Regardless of its intent, and even though the employer was correct that the revocation document was "ambiguous, internally inconsistent, and poorly written", the aggregate of the comments could reasonably have been interpreted by Britton to be an attempt to interfere with his exercise of a right to representation, and therefore violated RCW 41.56.140(1).

The Discrimination Allegation -

The employer argues that Britton's contact with his exclusive bargaining representative and attorney Vick are outside the protection of Chapter 41.56 RCW, because Vick's advice had to do with Britton's rights under the ADA. The Examiner does not agree. As an exclusive bargaining representative under the statute, the Mill Creek Police Guild has a right and obligation to represent bargaining unit "employees in their employment relations with employers." RCW 41.56.030(4). Nothing is closer to the heart of the employment relationship than the retention of one's job. Britton had reason to contact the guild when he learned he was to

be sent for a "fit for duty" evaluation. He had even more reason to do so when, after thinking the evaluation was completed with a positive result, he was told to report for additional questions.

Uncontroverted testimony by both Britton and Deanne leaves no doubt that Vick was acting as the guild's attorney, rather than as Britton's personal attorney, at the time Britton contacted him. The guild clearly authorized the contact, and paid Vick's bill. The employer would have the determination as to whether contacts are protected activity depend on the nature of the advice given by an attorney, but such an approach would land the Commission squarely within the forbidden territory of privileged communications between bargaining representative and employee. Port of Tacoma, supra. The fact that part of Vick's advice may have involved rights under the ADA does not mean that the contact itself was outside the protection of Chapter 41.56 RCW.

The Examiner still does not conclude that the employer discriminated against Britton in issuing the warning document, because the union has not sustained its burden of proof on the question of intent. Klei credibly testified that considerable confusion and cost to the police department resulted from having to place Britton on administrative leave after Dr. Smith withdrew his "fit for duty" assessment.[21] The chief also credibly explained that the cost and confusion might have been avoided by a postponement of Britton's appointment with the psychologist, if Britton had notified the employer of the issues between talking to Vick and appearing at Smith's office. Although the employer was willing to excuse Smith while unwilling to completely excuse Britton for the results of that appointment, Klei also credibly testified that his questions

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[21] Unlike the situation in Snohomish County, Decision 4995-A (PECB, 1995), Britton was not placed on administrative leave before he reported for his evaluation. The action to place Britton on leave resulted from the encounter with Smith on the second day.

as to Britton's intentions upon reporting to Smith were meant to determine Smith's role in the matter, as well as to determine Britton's perspective. The record does not support a finding that the employer intended to discriminate or retaliate against Britton in issuing the reprimand. The question of whether there was "just cause" for the discipline is not before the Examiner.

## THE "GRIEVANCE" AND "PERSONNEL FILE" ALLEGATIONS

### The Filing of the Grievance

On September 9, 1994, Britton filed a grievance contending that the employer lacked cause to discipline him. He requested that the reprimand and any references to it be removed from his personnel file, and that the employer provide a written acknowledgement that it had no cause to discipline him. Although the grievance document was signed only by Britton, it was prepared by Fresonke in the course of a meeting with Britton. The reprimand was listed as an attachment, but was not actually attached to the grievance.

The grievance was filed with Drown, and noted that Neaville was not on duty that day. Britton did not discuss the grievance with Neaville before filing it, because "he was unavailable". He also did not believe that he needed to talk to Neaville or to any other supervisor before filing a grievance.[22]

The chief and Drown discussed the grievance within a day or two after it was filed. Klei told Drown to respond to the grievance, because it had been filed with him. Drown noted that Klei told him to do whatever he thought was appropriate. Klei did not discuss

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[22] During cross-examination, Britton expressed a belief that his comments at the time Klei gave him the reprimand constituted an attempt to work with his supervisor before filing a grievance.

the grievance with Neaville,[23] nor did he ask Drown to tell Neaville to discuss with Britton the necessity of talking to his supervisor before filing a grievance. Drown recalled telling Neaville that he might want to talk to Britton about not having discussed his concerns with Neaville before filing his grievance.

Performance Expectations Plan

Concurrent with the preparation and filing of the grievance, the employer had begun developing a plan by which it would, in the words of the reprimand given to Britton, establish "performance goals and an evaluation period on which to address your deficiencies in communications as well as other areas delineated by David Smith's report and your supervisors". Klei had given Smith's report to Drown, and directed him to "put together a method of addressing these issues in Rex's performance". Klei directed that Britton be involved in formulating that plan, because "it had to work for him". Drown and Neaville subsequently prepared a "performance expectations" memorandum.[24]

The completed plan, dated September 6, 1994, included three areas of "concern", with suggested methods for correction: Inconsistent communication, report writing/data entry, and failing to follow up on investigative leads. The plan noted that Britton and his supervisor would meet weekly to discuss "needed improvement and

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[23] Consistent with the "chain of command" approach, Klei testified that he recalled no discussion of this unfair labor practice complaint with Neaville after the guild filed its original complaint on September 13, 1994. Klei notified Drown when he became aware of that filing, and also recalled discussing this case with the city manager.

[24] As with other matters in this record, there was a conflict in the testimony: Neaville recalled discussing the plan with Britton, getting some input from him, and making some changes. Britton testified, to the contrary, that he had no input into the content of the performance expectations plan.

successes", and that a written evaluation of Britton's progress would be completed monthly over the following six months. Britton recalled feeling concerned when he received the performance plan:

> I was thinking that they're still trying to intimidate me, trying to punish me for going to the Guild, for exercising my rights. I didn't know if these things were true or not. I had seen nothing from the Doctor or from anybody else saying that this stuff that was in the performance expectation was actually valid concerns.

At some point presumably after September 6, the monthly written evaluations referenced in the plan became weekly. Neaville could not recall precisely how that change occurred; he thought that he may have spoken with Drown and "we agreed, a weekly may be appropriate".

The Performance Plan Meetings -

Neaville held his first "performance plan" meeting with Britton on September 10, 1994, at some time after being told by Drown that Britton had filed a grievance. Neaville reported the results of that meeting to Klei and Drown in a computer "e-mail" note sent on September 12, 1994, where he wrote: "Rex never gave me any indication that he was displeased or planned to greive [sic] this discipline." Neaville indicated that he would discuss the matter with Britton at their next meeting. He also noted that he had discussed training and communications issues with Britton, including some areas in which he noticed improvement.

Neaville sent another "e-mail" to Drown and Klei on September 21, 1994, following a second "performance plan" meeting with Britton.[25] Neaville wrote:

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[25] Britton testified that the "e-mail" documents fairly reflected the content of the meetings.

> We also discussed the filing of the grievance without my knowledge and not having the needed attachments to make the grievance clear. Rex inidcated [sic] that I was not working when he filed the grievence. [sic] Again I emphasized that he make me aware of any such concerns he had even if it means calling me at home. Rex agreed to communicate with me more personally in the future even though we may disagree on different issues, we should be able to discuss the diferences. [sic]

In that document, Neaville noted that Britton had told him that he was unaware of the contents of the report from Smith, and was therefore concerned about the performance plan and could not completely agree with it.

With respect to the connection between the performance plan and Britton's filing a grievance, Neaville testified:

> Q: [By Mr. Fresonke] And after he filed the grievance, what work performance issues did you correlate with the filing or the processing of Rex's grievance?
>
> [objection and ruling omitted]
>
> A: [By Mr. Neaville] Well, in my mind, you know, it was consistent with some prior-identified problems with communication that were noted in the performance expectations.
>
> Q: And what specifically were those communication issues?
>
> A: I think, just, you know, speaking to his supervisors if there is a problem and whatnot.

Neaville noted that Britton tended to avoid talking to a supervisor if he perceived a conflict. He also noted that he was concerned if an employee under his supervision was having problems, and believed that, if an employee came to him prior to filing a grievance, maybe "we can help them with those problems". He acknowledged he could not have removed the discipline meted out by Klei, but felt that he

and Britton could at least have discussed the matter, and he might have been able to pass Britton's concerns on to the chief. He testified that he had no problem with the union processing a grievance, or with an individual going to the union to discuss filing a grievance. Neaville testified further:

> Q: [By Mr. Fresonke] What's wrong with him just going to the Union to find out if he wants to file a grievance or not?
>
> A: [By Mr. Neaville] Well, he certainly can.
>
> Q: Has that been the practice in Mill Creek?
>
> A: I'm not sure how many grievances have been filed.
>
> Q: Not a whole lot.
>
> A: Right. So I'd say there's not a lot of past history for it. And they certainly can, but it certainly doesn't go to the side of improving communication and what-not if you don't try to work problems out first.
>
> Q: Is there any reason why an officer would have to tell you they are displeased before they file a grievance or before the Union files a grievance?
>
> A: No, they wouldn't have to.

Klei believed the language of the collective bargaining agreement required that an employee speak to a supervisor about an issue before that employee can file a grievance. He testified:

> Q: [By Mr. Fresonke] So in your opinion if the employee and his Guild, the Mill Creek Police Guild, decided to file a grievance and they didn't talk to a supervisor first, it's your opinion that the labor agreement is somehow violated? Is that your opinion?
>
> [objection and ruling omitted]
>
> A: [By Mr. Klei] I don't think the Guild sitting down and discussing whether they want to file a grievance or not is in

> violation of it, but I think the employee going through that without trying to resolve the problem before it gets to that stage is in violation of this, yes.

Britton testified that he perceived Neaville's comments about talking to him before filing a grievance as intimidation.

> I interpreted them as trying to intimidate me in not seeking the assistance of the Guild or legal representation. The way it came across to me is, that before I did any type of grievance or anything else I needed to contact him and tell him I was going to do it first. I was being criticized because I exercised my rights to do that, and he was -- he told me that I had agreed to get ahold of him before I did anything like that.

The record does not indicate there were any further "performance plan" meetings between Neaville and Britton.

Employer Response to Grievance

Drown responded to the grievance in a letter to Britton dated September 15, 1994. Although he did not send a copy of that response to the guild, Drown had previously informed guild president Larry Davis of the response he intended to make.[26]

Drown wrote that the grievance "... was timely, filed in accordance to the labor contract, and is a subject which appears to be grievable ...", but he believed that the discipline was justified because of Britton's failure to inform the department about the revocation. In addition to denying the grievance, Drown wrote:

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[26] Drown thought it likely that he and Davis discussed the issue of the level at which Britton filed the grievance, but could recall no specifics.

> I would like to point out to you that when you delivered your Grievance letter to me on September 9th, the Notice of Discipline was referenced as an attachment. However, there was no attachment. This oversight further demonstrates the problems addressed in the fit for duty evaluation. It is my expectation that you will work with Sgt. Neaville on a weekly basis to address the performance problems that have been identified, including the problem with communications, and attention to detail.

Drown did not recall telling Britton he should have dealt with Neaville on the grievance, but he testified it was his belief that the grievance procedure of the contract was an attempt to foster open communication, and that "employees should follow the contract and try to resolve it at the lowest level, as the contract says".

By letter dated September 23, 1994, the guild moved the grievance to the next level, informing the chief that the guild's attorney had prepared the original grievance, and that the guild had not directly received a copy of Drown's response.

Klei replied in an undated letter, noting that Drown's response had gone to Britton because Britton had filed the grievance, and asserting that the employer had no intention of bypassing "any appropriate recipient of our communications."

Documents Placed in Britton's Personnel File

Klei was aware from Neaville's "e-mail" notes and other comments from supervisors that Britton had concerns about the performance plan, "that he wasn't happy with what was going on", and "didn't understand why we're doing all this". At some point in September, he began consideration of how to address the issue.

Klei was aware that Britton's concerns resulted, at least in part, from Britton's not knowing what documents had been sent to Smith or

the nature of Smith's recommendations to the employer. After consultation with Drown and Missall, Klei decided that Britton should have copies of the documents which had been supplied to Smith and Smith's reports. Klei testified that memoranda relating to performance issues are commonly placed in personnel files, and that he believed that placement of the documents into Britton's personnel file was appropriate because the documents involved performance issues.

By late September or early October of 1994, Drown was about to become Britton's direct supervisor.[27] On September 30, 1994, Drown generated a memorandum to Britton in which he noted, in part:

> I have read Sgt. Neaville's notes [of the "performance plan" meetings] and I would like to address one issue that you have raised, in that you could not agree with the entire agreement document because you were unaware of what was in the report from Dr. Smith.
>
> Since Dr. Smith's report is a part of the basis for the performance expectation agreement, attached is a copy of not only that report but also all of the supporting documents which were provided to Dr. Smith. This memo, along with the attached listed documents, will be a part of your personnel file.

Drown gave that memorandum to Britton on October 1, together with copies of all of the documents which had been sent to Smith and received from Smith. Drown reiterated that the information would be placed in his personnel file. Drown testified that Britton made no objection to placing the documents in his file at that time.

According to Britton, he had wanted to see the documentation, but had not ever asked for it. He also testified that Drown did not tell him why the documents were going in his file, nor did he ask,

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[27] This was apparently due to a normal shift rotation.

because he was "shocked that they had all this paper on me". Britton felt that the action was retaliatory:

> I never asked them to be in my personnel file. I never asked to see them. I just would not agree to the performance expectation. They, on their own, decided, well, we know you would agree with it, so here it is on your file now. Read them and let us know what's going on.
>
> These were placed in my file a short time after I had filed my grievance, my EEOC complaint, and because of the timing that they put them in, and they just chucked them in there. They didn't tell me why. They just said here, they're in your file now.

Drown acknowledged that Britton had not requested that the documents be placed in his personnel file.

The employer had not placed documents into the personnel files of another Mill Creek police officer who was sent for a fit for duty examination. In that regard, Klei noted:

> Q: [By Mr. Breskin] With regard to the other officer who was sent specifically to Doctor Smith, were there -- did Doctor Smith recommend a performance improvement program similar to what he recommended for Rex Britton?
>
> A: [By Mr. Klei] No, he did not.
>
> Q: With regard then to why his evaluation from Doctor Smith was not in his personnel file, why was that?
>
> A: Well, two reasons. One is, I don't remember ever actually getting a report back from Doctor Smith at this time. But the reason it wasn't moved over there is, he continued to see Doctor Smith and resolved whatever issues there were, and his performance came back up and he's a good contributing member of the organization.

No claim is made here that the materials which were placed in Britton's personnel file have been referred to subsequently.

## Discussion

The "Grievance Processing" Issues -

The guild claims that Neaville's written and oral admonishments to Britton to discuss grievances with his immediate supervisor are an independent interference violation, as well as retaliation and discrimination against Britton for filing the unfair labor practice complaint. It asserts that the collective bargaining agreement does not require an employee or the union to notify a supervisor prior to filing a grievance, and it contends the employer's argument that the contractual grievance procedure contains a waiver of the right to pursue a grievance until after discussion with a supervisor is completely without merit under established case law. It argues that the timing of Neaville's remarks, as well as the lack of any legitimate basis for the employer's actions, expose the discriminatory intent.

The employer asserts that, in order to establish an interference violation, the guild would have to establish that Britton had a statutorily protected right to ignore any obligations which he might have had under the contract. It argues that Prudential Insurance Company of America v. NLRB, 661 F.2d 398 (5th Cir. 1981) supports a finding that the guild contractually waived any right for an employee to refuse to discuss a grievance with his supervisor. Citing NLRB v. Cameron Iron Works, Inc., 591 F.2d 1 (5th Cir. 1979), the employer notes that it is not an unfair labor practice to urge employees to comply with a labor agreement. It notes that the performance expectations plan and the regular meetings with supervisors were formulated before Britton ever filed his grievance, and that Neaville's comments to Britton were made in the context of the communications aspects of that plan. It asserts that no adverse employment action was taken against Britton after

he filed the grievance, and that Neaville's comments cannot be taken to constitute adverse action within the meaning of the law.

The collective bargaining agreement in effect between the parties at the time germane to this proceeding included a grievance procedure with "purpose" and "step one" provisions as follows:

> SECTION 1. PURPOSE
> The grievance procedure is established to further good employee-employer relations by providing employees with a means for airing problems or complaints regarding their employment with the City. It is the City's policy to provide appropriate avenues of communication to meet a variety of needs and to encourage honest and open communication in the employee-supervisor relationship. Employees and supervisors are encouraged to resolve problems and pursue solutions through an informal process of communication and problem-solving. It is in the interests of the organization that problems be resolved at the lowest level possible. If, however, an employee feels that, after working with his/her supervisor, a satisfactory solution to his/her complaint has not been reached, he/she may file a formal grievance. No retaliation, disciplinary action or discrimination shall occur because of the filing of a grievance, nor shall such filing prevent the City from taking appropriate personnel actions.
>
> ...
> SECTION 3. PROCEDURE
> A grievance shall be handled in the following manner:
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> a. Step 1. The officer will present the complaint to his/her supervisor, in written form within ten (10) calendar days of its alleged occurrence or when the officer should reasonably have discovered the alleged occurrence. The supervisor shall respond in writing to the complaint within ten (10) calendar days of receiving the complaint.

The balance of the grievance procedure consisted of three steps, culminating in mediation.

It is clear from the record that Britton did not discuss the grievance with Neaville before filing it, nor did he believe he had any obligation to do so. The guild impliedly acknowledged some deviation from the contractual grievance procedure when Fresonke wrote into the grievance an explanation of why it was being filed with Drown, rather than with Neaville. For its part, the employer appears to have contributed to any procedural irregularities: Klei told Drown, rather than Neaville, to respond to the grievance, which was not the contractual order of things; Drown's response noted that the grievance was timely and filed in accordance with the agreement; although Neaville spoke to Britton about the need to contact him before filing a grievance, at no point during the processing of the grievance did the employer ever assert that Britton was in violation of the contract.[28] The issue here does not, however, turn on whether Britton followed the contract or whether the employer had the right to insist that he speak to his supervisor before filing a grievance.

Rather than respond to procedural concerns within the context of the grievance process, the employer dealt with Britton's grievance in the context of performance expectations meetings which were clearly a forum concerned with Britton's on-the-job behavior. Britton's standing as a police officer was potentially an issue in the performance expectations meetings. Neaville placed the method by which Britton filed his grievance squarely into job-related activity when he testified that he saw it as "consistent with ... problems with communication that were noted in the performance expectations."

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[28] Raising such arguments for the first time at the point of hearing does not lend them credibility.

Filing and processing a grievance is clearly a protected activity. Valley General Hospital, supra; City of Seattle, supra. An employer which blurs the distinctions between its employees' job-related activity and their protected activity does so at its peril. Port of Seattle, Decision 1624 (PECB, 1983). Kitsap County Fire District 7, supra. By Neaville's actions, the employer interfered with Britton's statutory rights, and violated RCW 41.56.140(1).[29]

There is not, however, sufficient evidence to determine that Neaville's actions constituted discrimination.[30] Certainly, it is clear that the employer knew that Britton was engaging in protected activity by filing a grievance. While there is no direct evidence in the record to indicate that Neaville was informed of the filing of the unfair labor practice complaint, the "small shop doctrine" would apply to impute such knowledge to him in this case. Port of Pasco, Decision 3307 (PECB, 1989). As noted in Mansfield School District, supra, and Port of Tacoma, supra, however, a complainant must show that an employee was deprived of some ascertainable right, benefit, or status in order to prove discrimination. The fact that Neaville spoke to Britton and memorialized that conversation in a memorandum to his superiors did not, of itself, deprive Britton of any benefit or status. The employer's actions will be considered, however, in evaluating the allegation regarding the placement of documents in his personnel file.

The "Personnel File" Issue -

The guild claims that Drown's reading of the September 30 memorandum and placing that memorandum and a number of other documents

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[29] Although not alleged, Drown's comments in his letter responding to the grievance would also constitute an independent interference violation.

[30] The Examiner finds that the standards enunciated by the Commission with respect to determination of discrimination under RCW 41.56.140(1) apply equally to such charges under RCW 41.56.140(3).

into Britton's personnel file were acts of discrimination against Britton for his having engaged in protected activity in general, and were also in retaliation for filing the unfair labor practice complaint. The guild argues that Drown's actions closely followed the filing of the grievance and unfair labor practice, and lacked any legitimate non-discriminatory reason. The employer asserts that there is no evidence that placing the documents sent to Dr. Smith in Britton's personnel file was motivated by any desire to retaliate against Britton. It notes, further, that Britton has never asked to have those documents removed from his file.

Employers routinely place documents relating to an employee's performance into that employee's personnel file, and use those documents in evaluating that employee's performance and in determining appropriate discipline. In case after case involving allegations of discriminatory action, documents (both laudatory and critical) placed into an employee's personnel file are considered in determining the efficacy of an employment action. City of Pasco, Decision 3804-A (PECB, 1992); Clallam County, Decision 4011 (PECB, 1992); City of Federal Way, Decision 5183-A (PECB, 1995).

In this matter, the employer gathered and generated a number of documents to be used in a determination of whether Britton was "fit for duty", and used those documents in developing a plan for improving his performance. Those documents clearly had the potential to be used in an adverse employment action. Most of those documents had not been placed in Britton's file until shortly after the grievance and unfair labor practice complaint had been filed. The timing of that action is inherently suspect, and the Examiner can reasonably infer that there is a causal connection between Britton's protected activities and the placement of the documents into his personnel file. Mansfield School District, supra; City of Winlock, Decision 4784-A (PECB, 1995).

The employer asserts that its action was routine, and in fact in response to Britton's concerns about the background of the performance plan. Even if the Examiner were to accept those explanations, there is no reason that the employer could not simply have shown the documents to Britton or provided copies to him without placing the documents in his file.

In evaluating the employer's motivation, it is of concern to the Examiner that Drown testified he was unaware of Britton's contact with the guild until the day Britton filed his grievance. That testimony is simply not credible. The record shows that Drown was with Klei when the call came in from Dr. Smith on July 14, and that a speakerphone was in use. Drown stayed with Klei throughout the deliberations about Britton on that day, when Smith's letter made reference to Britton having consulted an attorney. Soon thereafter, Klei was made aware that the attorney involved was the guild's attorney, Christopher Vick. It is not supportable that the person second in command in this small department then went two months without knowing that the attorney in question was the guild attorney. Drown's testimony gives rise to an inference that he believed there was a reason for him to hide his knowledge of the guild's involvement, which places his motivation in question.

The record supports a finding that Britton's protected activity was a substantial motivating factor in the employer's decision to place the documents in the file. By that action, the employer violated RCW 41.56.140(1) and (3).

ALLEGED COUNTERCLAIM

In its brief, the employer asserts that it has filed and established a counterclaim alleging bad faith on the part of the guild. It asserts that the evidence at the hearing established that the reason for the complaint was to enable the guild to obtain

information in support of Britton's ADA claim, and to secure more favorable language in upcoming collective bargaining negotiations between the parties.

The Commission's rules do not contain any procedures for the filing of counterclaims. Any claim by the employer against the union should have been advanced in a timely filed complaint charging unfair labor practices under Chapter 391-45 WAC.[31] The claims advanced by the employer are not before the Examiner.

REMEDY

The guild asserts that a remedy awarding attorney's fees is appropriate in this matter, because the employer has engaged in an extended campaign of deliberate disregard for the law, including the development of a series of "specious and contrived" defenses to the allegations.

An award of attorney's fees remains an extraordinary remedy before the Commission, used only in situations "where it is necessary to effectuate the order of the Commission, or where defenses are frivolous or without merit." City of Bremerton, Decision 5079 (PECB, 1995); Public Utility District of Clark County, Decision 4563 (PECB, 1993). The Examiner does not find such an award appropriate in this case.

The union has failed to sustain the burden of proof on some of its allegations, and the employer's defenses have been found sufficient

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[31] The Commission routinely consolidates proceedings filed by opposing parties on related issues.

on other allegations. There is no claim or evidence of general repetition of violations beyond this situation.[32]

## FINDINGS OF FACT

1. The City of Mill Creek is a public employer within the meaning of RCW 41.56.030(1). At all times germane to this proceeding, John Klei was the chief of police, Scott Drown was the police commander, and Ken Neaville and Bob Crannell were the police sergeants for the employer.

2. The Mill Creek Police Guild is a bargaining representative within the meaning of RCW 41.56.030(3), and is the exclusive bargaining representative of an appropriate bargaining unit consisting of approximately 10 commissioned rank-and-file police officers of the City of Mill Creek.

3. Rex Britton was employed by the City of Mill Creek as a commissioned police officer from approximately October 1990 through February 1995, and was a member of the bargaining unit described in finding of fact 2.

4. On July 9, 1994, Commander Drown met with Officer Britton and directed him to report to David Smith, Ph.D, for a "fitness for duty" evaluation. At that time, Britton was directed to

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[32] Klei responded to the grievance in an October 21, 1994 letter to Fresonke, noting that he had decided to withdraw the notice of discipline issued to Britton. The document was removed from Britton's file. Klei did not issue an "acknowledgement" that the employer lacked cause to discipline Britton, because Klei believed the employer did have such cause. Klei testified it was his belief that removing the reprimand resolved the grievance. While the employer referenced the reprimand in a later evaluation, the grievance was not pursued beyond Klei's level.

and did sign an "evaluation understanding", by which he acknowledged that the results of the evaluation would be provided to the employer, rather than to him, and that the usual confidentiality between a psychologist and a client would not exist. The document noted that Britton could be disciplined if he failed to cooperate in the evaluation process.

5. At some point on or about July 9, 1994, after his meeting with Drown, Britton contacted the Mill Creek Police Guild for assistance in the "fitness for duty" matter. Shortly thereafter, the guild informed Britton that it had retained attorney Christopher Vick to represent Britton and the guild.

6. On July 11, 1994, Britton reported to Smith for evaluation. At the end of the day, Smith sent a letter to Chief Klei, notifying him that Britton had no major or substantive personality or psychological problems, and that he could be returned to duty that evening without restriction. Smith imparted essentially the same information in person to Britton and Drown.

7. On July 13, 1994, Drown informed Britton that Smith wished to evaluate him further. An appointment was made for Britton to report to Smith on the afternoon of July 14, 1994.

8. After learning that he was to be evaluated further by Smith, Britton made several telephone calls to attorney Vick's office. At approximately 2:00 p.m. on July 14, 1994, Britton had a conversation with Vick's secretary, in which he was informed that Vick had said that Britton should go to his appointment, be cooperative, but give Smith a letter which revoked the evaluation understanding which Britton had previously signed. Vick's secretary apparently dictated the wording of that letter to Britton. Neither Britton nor any

guild officers informed the employer of any concerns about the evaluation understanding at that time.

9. Britton reported to Smith for his appointment at approximately 4:00 p.m. on July 14, 1994, and gave Smith a document which revoked "any prior releases of information", and also specifically revoked any authorization for Smith to release any more information to the employer than was allowed under the Americans with Disabilities Act (ADA). Britton did not discuss the revocation with Smith, nor did he tell him that he would proceed with the evaluation.

10. After giving Smith the document described in finding of fact 9, Britton waited in Smith's office while Smith telephoned Klei. Smith told Klei that he could not give him any information about Britton under the terms of the new letter. Klei asked Smith to send him the revocation letter by telefacsimile, and to send Britton back to the police department in Mill Creek. Smith promptly "faxed" the revocation and an accompanying letter to Klei. In the letter, Smith informed Klei that Britton had consulted an attorney who suggested that he revoke his prior release. Smith also told Klei that he could not maintain that Britton was fit for duty under the circumstances.

11. After Britton returned to the police department on the afternoon of July 14, 1994, Klei gave him a predisciplinary notice, in which he informed Britton that his failure to complete the fitness for duty evaluation constituted a failure to obey a direct order. The notice also informed Britton that he was being suspended with pay pending a disciplinary hearing, and required him to turn in his weapon, badge, keys, and commission card. He was ordered to complete the evaluation with Smith.

12. The city's attorney, Scott Missall, and guild attorney Vick resolved the "waiver" issues in a telephone call on July 15, 1994. In a letter to Smith on that same date, Missall noted that Klei requested from Smith only as much information as was necessary to answer whether Britton was fit for duty, or whether some accommodation by the employer was required so that he could be fit for duty. Missall noted that inquiry was intended to be consistent with Klei's prior request.

13. Britton was subsequently evaluated by Smith in two additional sessions. In a letter received by the employer on August 9, 1994, Smith advised that Britton was "fit for duty" as a patrol officer, but recommended actions to resolve certain performance issues. Klei returned Britton to duty effective August 10, 1994.

14. As a result of Britton's absence from duty between July 14 and August 9, 1994, the employer was required to rearrange employee work schedules and court dates, resulting in considerable cost and inconvenience.

15. Britton's predisciplinary meeting was convened on August 19, 1994. Employer officials in attendance were Klei, Sergeant Neaville, and Missall. Britton was accompanied by union officer Jim Deanne and guild attorney Brian Fresonke. The employer asked Britton why he did not contact Klei rather than Smith once Britton realized that he had a problem with the original waiver contained in the "evaluation understanding" document. Britton answered that he did not have time to contact Klei because by the time he talked to the attorney there was not enough time to talk to Klei before reporting to Smith for the evaluation appointment. Klei also asked Britton whether he would have continued with the evaluation if Smith had been prepared to do so, and Britton indicated that he would have proceeded under protest.

16. On August 29, 1994, Klei issued a written reprimand to Britton, concluding that Britton "exercised poor judgment by not clearly stating your concerns" to Smith, and "by not attempting to resolve your concerns directly with your superiors." The reprimand noted that the revocation notice was "internally contradictory, poorly written, and failed to communicate" Britton's willingness to continue with the evaluation as long as his rights under the Americans with Disabilities Act (ADA) were satisfied. It also noted that Smith acted "very conservatively" in canceling the evaluation session, but that Smith's reaction was understandable because of confusion about the ADA.

17. The aggregate of the employer's comments in the discipline notice could reasonably have been interpreted by Britton to be an attempt by the employer to interfere with his exercise of a right to representation. In issuing that discipline, the employer did not intend to discriminate against Britton for having sought the assistance of the union.

18. The collective bargaining agreement in effect between the parties in 1994 encouraged employees to resolve problems through an informal communication process, but noted "if ... an employee feels that, after working with his/her supervisor, a satisfactory solution has not been reached ... " the employee could file a formal grievance. Step 1 of the grievance procedure involved presenting a written grievance to the supervisor.

19. On September 9, 1994, Britton filed a grievance contending that the employer lacked cause to discipline him. The grievance noted that it was being filed with Drown because Neaville was not on duty that day. Britton did not discuss the grievance with Neaville before its filing. The grievance was signed by Britton, but prepared by the union attorney.

The reprimand was referenced as an attachment to the grievance, but was not attached.

20. Drown asserted that he first learned of Britton's contact with the union when the grievance was filed, but that assertion is not credible given Drown's command status, his involvement in the fit for duty process, and the size of the department.

21. In approximately early September 1994, the employer developed a "performance plan" for Britton, based on Klei's direction to Drown to put together a method by which to address performance issues identified in Smith's August 9 report. The completed plan, prepared by Drown and Neaville, was dated September 6, 1994. It noted that Britton and his supervisor would meet weekly, and that a written evaluation of his progress would be completed on a monthly basis. At some point after September 6, 1994, the planned monthly evaluations became weekly.

22. Pursuant to the performance plan, Neaville met with Britton on September 10 and September 21, 1994. After each of those meetings, Neaville sent a report to Klei and Drown by computer "e-mail". In an e-mail note dated September 12, 1994, Neaville noted that Britton had never told him that he planned to grieve the discipline. In an e-mail note dated September 21, 1994, Neaville noted that he had discussed with Britton "the filing of the grievance without my knowledge and not having the needed attachments to make the grievance clear."

23. By responding to procedural concerns about the grievance in the context of performance plan meetings, Neaville improperly mixed Britton's protected activity with job performance issues.

24. The Mill Creek Police Guild filed its original complaint charging unfair labor practices in this matter on September

13, 1994. Klei informed Drown when he became aware that a complaint had been filed.

25. Klei told Drown to respond to Britton's grievance, although he testified that Britton's filing a grievance without talking to his immediate supervisor was a violation of the collective bargaining agreement between the parties. Drown also testified that he believed an employee should "follow the contract" and try to resolve matters at the lowest level. In spite of that, Drown's denial of the grievance, dated September 15, 1994, did not reference Britton's failure to talk to Neaville before filing the grievance, nor did Drown speak to Britton about that. Drown's response noted that the grievance was timely and filed in accordance with the labor contract.

26. Drown's grievance response noted that the discipline notice was not attached to the grievance. He pointed out that "[t]his oversight further demonstrates the problems addressed in the fit for duty evaluation", and noted that he expected Britton to continue to work with Neaville on performance problems, including communications and attention to detail. Drown's response improperly mixed Britton's protected activity with his job performance.

27. Britton told Neaville at some time on or about September 21, 1994, that he was unaware of the contents of the report from Smith, and was therefore concerned about the performance plan. After learning of Britton's comments, Klei determined that Britton should have copies of documents which had been supplied to Smith and copies of Smith's reports to the employer. Klei placed those documents in Britton's personnel file. He asserted that he did so because documents relating to performance issues are normally placed in personnel files.

28. As of late September or early October 1994, Drown was about to become Britton's direct supervisor. On September 30, 1994, Drown wrote a memorandum to Britton in which he noted that the documents referenced in finding of fact 27 would be placed in Britton's personnel file. On October 1, 1994, Drown met with Britton, told him the documents would be placed in his personnel file, and gave him the memorandum and copies of all of the documents.

29. Placement of those documents into Britton's personnel file constitutes an adverse employment action. The timing of the action gives rise to an inference that a causal connection exists between Britton's protected activities and the placement of the documents into his file.

## CONCLUSIONS OF LAW

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

2. By its questioning of Britton in the predisciplinary meeting of August 19, 1994, described in finding of fact 15, the employer did not interfere with Britton's rights, and did not violate RCW 41.56.140(1).

3. By the wording of its August 29, 1994 discipline notice to Britton, the employer interfered with Britton's rights in violation of RCW 41.56.140(1).

4. By its August 29, 1994 discipline of Britton, the employer did not discriminate against him in violation of RCW 41.56.140(1).

5. By making the manner of filing of Britton's grievance a component of Britton's performance plan, as described in

finding of fact 21, the employer interfered with Britton's rights in violation of RCW 41.56.140(1).

6. By its actions described in finding of fact 21, the employer did not discriminate against Britton for filing an unfair labor practice complaint in violation of RCW 41.56.140(3).

7. By its placement of Smith's reports and documents sent to Smith in Britton's personnel file, and by its communication to Britton of that action, the employer violated RCW 41.56.140(1) and (3).

## ORDER

THE CITY OF MILL CREEK, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. interfering with, discriminating against, restraining, or coercing Rex Britton in the exercise of his collective bargaining rights secured by the laws of the State of Washington.

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

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

   a. Remove any copies which may remain of the July 14, 1994 predisciplinary notice and the August 29, 1994 discipline notice, and any and all references to those documents, from any and all files maintained by the employer.

b. Remove the reports received from psychologist David Smith and the documents sent to Smith in connection with the July and August 1994 evaluation of Rex Britton from Britton's personnel file.

c. 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.

d. 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.

e. 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.

Dated at Olympia, Washington, on the 10th day of October, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARTHA M. NICOLOFF, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

# NOTICE

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

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

WE WILL remove any copies which may remain of the July 14, 1994 predisciplinary notice and the August 29, 1994 discipline notice involving Rex Britton, and any and all references to those documents, from any and all files maintained by the employer.

WE WILL remove the reports received from psychologist David Smith and the documents sent to Smith in connection with the July and August 1994 evaluation of Rex Britton from Britton's personnel files.

DATED: _____

CITY OF MILL CREEK

BY: _____
Authorized Representative

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

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