Town of Steilacoom, Decision 6213 (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

STEILACOOM OFFICERS' ASSOCIATION, Complainant,	)	CASE 13059-U-97-3161
vs.	)	DECISION 6213 - PECB
TOWN OF STEILACOOM, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Lowenberg, Lopez & Hansen, by Stephen M. Hansen, Attorney at Law, appeared on behalf of the complainant.

Glenn & Hoffman, by Lawrence E. Hoffman, Attorney at Law, appeared on behalf of the respondent.

On March 27, 1997, the Steilacoom Officers' Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Town of Steilacoom (employer) violated RCW 41.56.140 by unilaterally imposing physical fitness standards and using them as a pretext to discharge George L. Green in reprisal for his lawful union activities. The complaint was processed pursuant to the preliminary ruling procedure of WAC 391-45-110, and was found to state a cause of action as to a "discrimination" claim.

The matter came on for hearing on September 13, 1997, before Examiner Frederick J. Rosenberry. The parties indicated a desire to proceed with the "unilateral change" claim which had not been addressed as a separate issue in the preliminary ruling, and the employer waived both: (1) Its right to a preliminary ruling

declaring that the unilateral change allegation stated a cause of action; and (2) its right to advance notice of hearing on that issue. The union indicated that it viewed the answer filed by the employer as being responsive to all elements of its complaint, and waived any claim of prejudice because the unilateral change claim was not answered as a separate allegation. Accordingly, the union prosecuted its complaint in all respects, and the employer defended in all respects against the complaint. The parties filed briefs.

BACKGROUND

Located in Pierce County, the Town of Steilacoom now has a population of approximately 6,185.[1] Paul Chasco has been the employer's administrator since April 1, 1996. The employer maintains a public safety department that, for the past five years, has operated under the direction of Michael Campbell. According to Campbell, this is the only department in the state of Washington where the employees are trained to perform the combined functions of police officer, emergency medical technician, and fire fighter.

The Steilacoom Officers' Association has been the exclusive bargaining representative of employees of the employer's Public Safety Department since at least 1988.[2] David Gall was president of

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[1] Population data as of April 1, 1997, as published by the state Office of Financial Management.

[2] Notice is taken of Commission's docket records for Case 7111-E-87-1225. This union was certified on February 12, 1988, for a bargaining unit described as:

> All full-time paid commissioned law enforcement officers within the Department of Public Safety; excluding personnel with the rank on lieutenant or above.

the union during part of the period relevant to this case; George Green became vice-president of the union in 1991, and held that office throughout the period relevant to this case.

Effective July 1, 1997, RCW 41.56.030(7) was amended to include law enforcement officers as defined in RCW 41.26.030,[3] employed in towns with a population of 2,500 or more, as "uniformed personnel". The effect of that amendment was to make this bargaining unit eligible for interest arbitration under RCW 41.56.430 et seq., as the means of resolving impasses in contract negotiations.[4]

Green's Physical Condition

George Green was hired by the employer in 1978, as a police officer. He testified he was the only department employee who was exclusively a police officer, and that all of the other officers in the department are public safety officers and serve as both fire fighters and police officers.

Green's Initial Injury and Disability -

In May of 1993, Green injured his left knee and lower back while participating in an on-duty training exercise. His injuries caused him to take disability leave and limited him to light duty work for an unspecified period of time. Green subsequently underwent surgery

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[3] The Law Enforcement Officers' and Fire Fighters' (LEOFF) Retirement System provides, at RCW 41.26.030(3)(e), that the term "law enforcement officer" includes persons employed on or after January 1, 1993, as public safety officers, provided that the job duties substantially involve only police or fire duties or both.

[4] RCW 41.56.470 provides that existing conditions of employment cannot be changed during the pendency of interest arbitration proceedings, without the consent of the other party.

to repair ligament damage to his knee. Medical and time loss claims resulting from those injuries were processed through the Washington State Department of Labor and Industries (L&I).[5]

An analysis of the duties Green performed prior to his injury was conducted while he was disabled, and a report was issued on May 6, 1994, by "Olsen and Associates".[6] That report set forth a job description for Green, stating in relevant part:

> **JOB SUMMARY**: Performs police and medical aid service, crime prevention, public education and training.
>
> **ESSENTIAL FUNCTIONS**:
> 1. Responds to police and medical aid calls.
> 2. Performs initial and follow-up investigation and writes reports.
> 3. Maintains and operates police vehicles and medical aid equipment.
> 4. Performs crime prevention to include business and check patrol.
> 5. Performs traffic enforcement to include parking, speeding, and accident prevention.
> 6. Participates in physical training, on a weekly basis, i.e. obstacle course, SCBA drills.
> 7. May have to lift, drag, restrain body.

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[5] The record does not precisely establish Green's LEOFF plan membership. Based on his hire date at Steilacoom and the references to industrial insurance provided to him under Title 51 RCW, the Examiner infers he was a Plan II member. Only limited evidence was presented regarding how his injury and disability were processed, and no evidence was presented regarding time loss payments.

[6] The record does not include any details regarding "Olsen and Associates", or why the job analysis was conducted. The Examiner infers that "Olsen and Associates" is a consulting firm that conducts job analysis describing the fundamental pre-injury job requirements of an employee, to be used as a baseline to determine eligibility for Workers Compensation time loss benefits and/or if and when the employee can return to full duty.

8. Performs similar and incidental duties as assigned such as set up barricades, get additional hoses, SCBA tanks, etc.
9. May need to act as "backup" assisting another officer at anytime under any condition.

The job analysis addressed physical demands and frequency. This segment of the assessment addressed and commented regarding the physical exertion, circumstances and frequency of:

sitting	standing
walking	lifting
carrying	pushing (resistance)
pulling (resistance)	overhead reaching
other reaching	handling
fingering or feeling	keyboarding
foot controls	trunk twisting
bending -knees straight	crouching - knees bent
squatting	kneeling
crawling	climbing stairs
talking	hearing
seeing	climbing ladders/ balancing

The assessment also included a "General Comments" section, which stated:

> Many of these functions, while having relatively few incidents per year, do require extreme agility and physical exertion. This job analysis is for reference purposes only and does not necessarily represent a job opening.

Green was also subjected to a "Performance Based Physical Capacities Evaluation" during the period he was disabled. The diagnosis section of that report referred to both the knee and back problems.

A 13-page evaluation report, dated May 9 and 10, 1994,[7] provided detailed information on Green under headings of:

> HISTORY/REFERRAL REASON
> ASSESSMENT/TEST PERFORMANCE VALIDITY
> RECOMMENDATIONS
> THERAPIST'S SUMMARY SHEET
> INSERTS/ATTACHMENTS
> SUBJECTIVE REPORTS
> Reported Symptoms/Symptom Questionnaires
> Physical Characteristics
> Reported Activity Tolerances
> Reported Leisure Activities
> Reported Substance Abuse
> Reported Adoptive Equipment
> OBJECTIVE/PERFORMANCES
> Demonstrated Activity Tolerances
> Sitting, Standing, Walking Siting/Standing/Walking, climbing,
> Arm/foot controls
> Weight Handling
> Lift, Carry, Push/Pull and Endurance
> Demonstrated Functional Range of Motion
> Reach, Squat/Kneel, Bend, Crouch, Eye-Hand-Finger
> Handling/Fingering

The "recommendations" section of the physical capacities evaluation stated that Green:

> [A]ppears to possess the necessary physical capacities to sustain gainful employment as both a Security Guard and Law Enforcement Officer.

On July 22, 1994, Dr. John Bargren issued a written release for Green to return to full-time work. He noted that Green was:

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[7] The evidence was often sketchy or disorganized. For example, a statement in this report that Green "reports that his last day of gainful employment was 6/13/93" is at odds with evidence the injury was in May of 1993.

> Able to run and able to kneel but may have to modify kneeling and running from time to time but not enough to interfere with the functions of his job.

By letter dated July 27, 1994, Green's vocational counselor from Olsen & Associates notified the employer's acting administrator that Green was fully released to return to work to the duties of police officer.

Recurrence of Disability -

According to Green, he was encountering substantial back pain in the spring of 1996. He saw his personal physician regarding the matter, and also returned to light duty. While the record does not disclose when this period of light duty began or ended, it is clear he was on light duty from April 1 through 15, 1996. Green reported the matter to L&I as a work-related medical condition.

In May of 1996, Green was examined by Dr. R. Charles Ray, an orthopaedic surgeon, for chronic back pain.[8] According to Dr. Ray,[9] Green complained that:

> He [Green] was getting pain in the gluteal areas on both sides, and he was getting numbness into the front parts of both thighs. He stated he was also having a lot of pain in his feet especially upon getting up in the morning. He was having difficulty getting in and out of patrol cars.

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[8] Dr. Ray had also treated Green's back injury in 1994.

[9] Dr. Ray was not called as a witness in this proceeding. A deposition he gave on September 3, 1997 was, however, admitted as evidence with the consent of both parties. The deposition was taken before the same attorneys who appeared for the parties in this proceeding.

Dr. Ray concluded that surgery was needed to correct the problem. He was unable to predict when Green could return to full duty.

In a May 14, 1996 letter to Dr. Ray, newly-appointed Town Administrator Paul Chasco expressed concerns regarding the management of the employer's personnel and emergency services. Chasco stated:

> It is my understanding that Mr. George Green, a Public Safety Officer for the Town of Steilacoom, will be re-evaluated by you on Thursday (5/16) for continuing chronic back pain. I believe this re-evaluation is being conducted as the result of a recommendation to Mr. Green by Dr. Bruce Brazina of Medalia Healthcare.
>
> This letter is to request than any recommendations regarding no work, light duty, or any other recommended conditions be specific in nature to enable the Town to cope with a reduced work force. This will save both Mr. Green and the Town time and confusion in dealing with his condition.
>
> As a small Town with a small Public Safety Department, it is difficult to provide full coverage of emergency services when even one individual is absent or functioning at less than 100% of capability. To better manage personnel and ensure emergency services coverage, I would appreciate your specific recommendations as to work plans which meet Mr. Green's condition.
>
> As an example, should there be a recommendation for light duty, I will need to know how long light duty is required, the extent of activities which can be performed on light duty and the anticipated medical management plan to return Mr. Green to full duty in incremental phases.
>
> An example of light duty would be:
>
> **LIGHT DUTY PROGRAM:** George Green
>
> SHIFT:
> Five consecutive days
> 8 hours per day

> One hour lunch, two 15 minute breaks, evenly spaced
> Shift is 9:00 a.m. to 6:00 p.m.
>
> **DUTIES AND PHYSICAL CONDITIONS:**
>
> Two hours radar reader board
> - requires sitting in patrol car with no activity (in and out of vehicle)
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> Two hours speed traffic enforcement
> - requires operating vehicle, getting in and out of vehicle and writing traffic tickets
>
> Two hours crime prevention
> - requires walking door to door canvassing homes, talking with residents, writing reports. Mr. Greet [sic] will have some opportunity to sit during this period. Also requires beach patrol which includes, at times, walking on uneven surfaces
>
> Two hours administrative duties
> - includes report writing, filing (bending and some twisting), sitting, phone work, etc.

Dr. Ray responded to Chasco's letter by a letter dated May 16, 1996, stating in relevant part:

> I do not see [Green] getting better without surgery, and, in fact, by his symptomatology he has been gradually getting worse since I saw him two years ago. I am unable to tell you when he can get off light duty. I am, frankly, surprised that he has been able to function as well as he has over the last two years.
>
> I think it would be worthwhile to get an updated CT scan, which has been ordered. I think that with proper postop rehab he has a reasonable chance of getting back to full duty, which I would envision being 3-4 months after surgery.

According to Campbell, the employer canceled Green's light duty at around this time, as a precaution so that Green would not further injure himself.

Green underwent back surgery on June 26, 1996, followed by a period of structured therapy. Green testified the surgery was not successful, and that he had reduced strength after a period of recuperation. The possibility of more surgery was considered.

Green recalled that an "MRI" was taken of his back in August or September, 1996,[10] and that he was referred to Dr. Michael G. Wiese, a surgical neurologist. When Green was seen by Dr. Wiese on October 10, 1996, they discussed the possibility of surgery.

In a letter to Dr. Ray under date of October 10, 1996, Dr. Wiese stated in relevant part:

> I saw George Green in my Tacoma office on October 10, 1996. He was accompanied by your note from February of 1994 which I reviewed plus the additional history that he'd had surgery in June of this year but had failed to respond. In fact he feels pretty much the same now as he did before.
>
> ...
> Some disturbing aspect of his symptoms, however, is that a lot of it is back pain that is not likely to be helped by repeat surgery. If he does find that he is improving because of the surgery in terms of his overall leg discomfort it may be possible to re-build his back with a good exercise program.
>
> ...
> RECOMMENDATIONS: Based on these findings I would feel that re-exploration is certainly an

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[10] The Examiner infers that "MRI" stands for magnetic resonance imaging, a test used to assess medical conditions.

> option to consider. I am not optimistic that this is going to make him well to where he can return to his former job but I do think that there is sufficient stenosis in his symptoms sufficiently consistent with the diagnosis that it would merit consideration or re-exploration.

Dr. Ray told Green that he did not think a second surgery would make a significant difference, and would not be beneficial. Green was referred to another medical professional who Dr. Ray thought could help Green rehabilitate himself, modify Green's therapy, assess Green's vocational abilities, and help Green cope with chronic back pain, without surgical treatment. Ray recalled last seeing Green on January 21, 1997.

Employer Action Regarding Green's Employment Status

By letter dated December 11, 1996, Chasco notified L&I that the employer was concerned regarding Green's medical condition and prognosis for return. That letter stated, in pertinent part:

> First, once again let me express my sincere appreciation for your efforts in keeping our office informed on the progress of Mr. Green. I have reviewed the latest information forwarded by your office consisting of a neurological examination and opinion from Dr. Michael Wiese and updated case management notes for Dr. Charles Ray. It appears, from my lay person perspective, the opportunity for Mr. Green to return to his full time Police Officer duties is zero.
>
> A review of Mr. Green's medical history as it relates to L&I demonstrates the focus of treatment is controlling pain and returning Mr. Green to a "somewhat mobile" lifestyle. There appears to be no discussion relating to Mr. Green's ability to return to an unrestricted employment status as a Police Officer. In point of fact, the most recent opinion ex-

pressed by the neurological specialist is, "I am not optimistic that.... [sic] he can return to his former job... [sic]"

Perhaps it would be beneficial to review what a "typical" Police Officer experiences in the course of his or her duties. Without exception, the challenges faced by an officer in "normal day to day course of duties" are very physically oriented. The classifications of activities as defined by the Washington Association of Sheriffs and Police Chiefs are:

1) Lifting and Carrying

Situations requiring this type of activity are associated with movement of intoxicated persons, rescue iterations [sic], disorderly conduct, suicide, etc. In the course of an average year, the Steilacoom Public Safety Department (SPSD) has and will continue to experience all of these conditions. Failure to meet lifting and carrying requirements posses a serious risk of injury to the officer, general public and other officers as well as possible loss and/or damage to property.

2) Dragging/Pulling

Situations requiring this type of activity are associated with removal of intoxicated persons, removal of traffic hazards, assault situations, burglary, DWI arrests, etc. As an example in 1996 alone, officers confronted dragging/pulling situations in rescuing children from playground toys on numerous situations, an officer was attacked while exiting his vehicle sustaining injuries in subduing the perpetrator, assisting in rescues during a train derailment, assisting in boat recoveries requiring strenuous pulling of hand lines, rescuing drowning victims, etc. Many of these incidents were of such an extreme / uncontrollable nature, there was not time for officer backup to assist. Once again, there is a high incidence of injury to the officer and/or the public in failure to meet this requirement.

3) Running

Officers in Steilacoom are required on [sic] run/sprint between 100/500 feet at various times throughout the year in the normal

course of duty. Running is mainly associated with pursuit of criminals. However, since Steilacoom officers also provide Basic Life Support services, they often face situations where running is critical to saving a life. Officers often confront running situations over ground which is uneven, filled with obstacles as vehicles, shrubs, fences, ditches, walls, etc. There is risk to loss of property and/or injury to the officer or public for failing to meet this requirement.

4) Climbing

In his or her capacity as an officer and emergency aid responder, a Steilacoom officer must rapidly and effectively climb stairs, ladders, building, scale fences and walls and other objects. He or she must be able to grab hand/footholds in or on chain link fencing, window sills, rails, pipes, bricks, boards, cross bars, and other such apparatus. Failure to meet this requirement will result in loss of property and injury to officers and the public.

5) Jumping Across/Over

Steilacoom officers during the course of the year jump over or across objects such as ditches, fences, wall, roof-to-roof, etc. This is mainly characterized by pursuit and rescue operations. Failure to meet this requirement can result in failure to apprehend suspects, potential injury to the public.

6) Crawling

At times during the year Steilacoom officers encounter situations requiring stepping and/or crawling. These activities are associated with the rescue of small children from play structures, entry through windows for rescue and/or apprehension, and other such situations. Oftentimes these incidents do not allow time for backup to arrive on scene. Failure to meet this requirement can result in injury to the officer.

7) Jumping Down

Steilacoom officers are often confronted with situations requiring jumping down from an object or platform. Typically, these situations include jumping from walls, fences,

building to ground, roof-to-roof and other incidents. Failure to perform such activity correctly can result in injury to the officer. It is clear that the average situations confronted by a Steilacoom officer during the normal course of work is very challenging both mentally and physically. It must not be forgotten that a significant time component of an officer's day is sitting long hours in a patrol car with numerous lower body twisting movements entering and existing [sic] the patrol vehicle.

It would appear that, again from the lay person perspective, from the documentation provided by the various care providers and specialist, Mr. Green will never be able to meet the requirements of a police officer. Even after surgery and/or extensive rehabilitation, to return Mr. Green to this position will certainly result in a reoccurrence of his condition and quite possibly lead to an extremely debilitating condition. As it is, Mr. Green may be retrained and have a long productive career in a field more suitable to his physical limitations. This certainly would be preferable over complete disability should Mr. Green return to work and sustain a reoccurrence of his existing injury.

It appears that Mr. Green, the Department of Labor and Industries and the Town of Steilacoom will best be served by declaring Mr. Green ineligible to return to his former employment and by initiating a search for more suitable employment or retraining. The fiscal impact on the limited budget of our small town has been significant. Further, small towns do not have the luxury of sufficient staffing to fill in during the absences of others nor are there resources to hire temporary assistance.

In summary, it appears Mr. Green will never qualify for or meet the requirements of a Police Officer position with or without surgery and/or continuing rehabilitation. Continuing to delay this decision results in further complications in transitioning Mr. Green back into the work force and a continuing hardship on the budget and citizens of Steilacoom. I request you or the appropriate L&I staff review

> the police officer position requirements enumerated in this letter and the medical prognosis developed to date for Mr. Green. I am certain the same conclusion will be reached. Please contact me at your earliest convenience upon review of this request.

Chasco directed copies of his December 11, 1996 letter to Green, to Dr. Brazina, to Dr. Ray, and to Dr. Wiese.

Green recalled that he was concerned about Chasco's December 11, 1996 letter, because he did not believe that he could meet the standards mentioned. Dr. Ray responded to Chasco's letter by a letter dated December 19, 1996, stating in relevant part:

> I have faxed back to you the bottom line of this letter, but I thought it would be worthwhile to explain my decision.
>
> I agree that **it is now apparent that Mr. Green will not return to his previous job as a full duty policeman for the Town of Steilacoom.** The scientific literature states that when dealing with back surgery the most important determinant of whether a patient returns to his former occupation or not is his own desire. I have held off on making this final determination in Mr. Green's case because of his previously stated desire to return if at all possible to his previous employment. I feel **it is obvious at this point whether his desires to return to his employment are there or not the physical reality is that his spine is so degenerated that it is not going to be a reality.** I do not see that further surgery would change that basic fact. Whether further surgery is even indicated in this patient is still trying to be ascertained.

[Emphasis by **bold** supplied.]

On December 20, 1996, Chasco sent a letter to Green, stating in pertinent part:

> I am in receipt this date of correspondence between you and Mr. Randy Guzman, Claims Manager for L&I. Said correspondence pertains to your requirements and responsibilities in reference to contacting and cooperating with your vocational counselor.
>
> The correspondence further references the requirement that you contact Steilacoom pertaining to transitional job opportunities with the town. Please be informed that on December 17th, 1996 the Town Council passed the 1997/98 Biennial Budget. The budget contains no new position to be added over the next two years nor are there any foreseeable vacancies which you may qualify for.
>
> I will inform L&I via a copy of this letter that **no positions exist with the town with the exception of that of an unrestricted Police Officer**. Employment opportunities with the town in any capacity other than an unrestricted police officer do not exist.
>
> I wish you the best in your re-training endeavor and success in your new career field.

[Emphasis by **bold** supplied.][11]

Chasco testified he did not believe L&I responded to his December 11 letter, but that his December 20 letter prompted a telephone call from the L&I representative. The employer was advised that L&I was assigning a vocational rehabilitation counselor to Green.

At about this time, Chasco discussed Dr. Ray's letter with Campbell, and they decided to hold a hearing to notify Green of the employer's

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[11] No copy of the correspondence referred to in this letter was placed in evidence. It is inferred that it addressed a change of careers for Green.

concern regarding his continued employment, and to provide Green an opportunity to present relevant information.[12] The hearing was scheduled for January 16, 1997, and copies of the notice were sent to Green's attorney and the union. Green believes he discussed the implications of the predetermination notice with his attorney. The hearing was postponed at Green's request.[13]

On January 17, 1997, Green saw Dr. Brian E. Long, a chiropractor, regarding a chiropractic alternative to surgery. In a January 27, 1997 letter to Green's attorney, Dr. Long stated:

> Mr. George Green was seen in my office on January 17,1997, for the purpose of consultation and evaluation concerning injuries he sustained from a work related accident.
>
> SUBJECTIVE FINDINGS:
> Lumbar spine - Pain into the lumbosacral region extending bilaterally into the sacroiliac joints. This pain is daily and constant with associated numbness and tingling. Pain in the bottom of the feet associated with walking, bending or sitting. The patient complains of shooting pain up both legs extending up into the head.
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> OBJECTIVE FINDINGS:
> Decreased lumbosacral range of motion with pain; increased left patellar reflex, left L4

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[12] In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the U.S. Supreme Court held that the due process clause of the Fourteenth Amendment requires that tenured public employees be afforded a hearing before they are deprived of any property interests in regular employment. Loudermill requires notice of the charges against the employee, an explanation of the evidence against that individual, and an opportunity to respond.

[13] At the hearing, Green's attorney interposed that he asked Green to request that the hearing be postponed. Although that was not sworn testimony, no objection was raised and there is no reason to doubt the truth of the assertion.

> increased, left L5 decreased dermatome; positive ... test, positive ... bilateral muscle spasm with tenderness at L1-L5, bilateral S1 and L1-L5 pain on palpation.
>
> XRAY FINDINGS:
> Multiple vertebral subluxations complicated by moderate loss of the normal lumbar lordosis and moderate to severe degenerative joint disease in the L3-S1 region.
>
> CONCLUSION
> Based upon the objective findings chiropractic care is indicative. **I have recommended a period of 90 - 120 days of conservative care to determine whether the condition can improve and stabilize. No definitive prognosis can be made prior to this period of care.**

Exhibit 3 [emphasis by **bold** supplied].[14]

According to Dr. Long, Green complained of chronic daily pain in his lower back, radiating into both legs, his knees, and the bottom of his feet.[15] Long found Green had extensive degenerative disease, but projected the 90 to 120 day period as necessary to develop a reasonably accurate prognosis on whether chiropractic treatment could restore Green's physical condition so as to be re-employable as a police officer. Long reported his assessment to L&I.

Green's hearing was held on January 27, 1997. Chasco and the employer's attorney attended for the employer;[16] Green was accompa-

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[14] The copy of this letter which was placed in evidence is very poor, and some of its contents are illegible.

[15] Dr. Long was not called as a witness in this proceeding. A deposition he gave on September 9, 1997 was, however, admitted as evidence with the consent of both parties. The deposition was taken before the same attorneys who appeared for the parties in this proceeding.

[16] The same attorney represented the employer in the instant proceeding.

nied by his attorney.[17] The employer inquired about Green's medical condition and prognosis for the future. Green advised the employer that he was under chiropractic care, requested that he be allowed to complete the treatment plan, and offered to undergo and pass a physical capacities examination at an undetermined time in the future as a condition of his reinstatement. Green asked for an additional 90 to 120 days of leave to determine if chiropractic treatment would allow him to return to work without restriction. Chasco granted a 30 day extension of leave, but declined a longer extension because he felt Green's physicians had provided sufficient evidence that Green would not be able to return to work as a police officer. Chasco recalled that Green had never approached the employer to discuss his status, condition, or prognosis for return to work until the predetermination hearing.

Within a few days after the hearing, Green's attorney contacted Dr. Long. A telephone conference between the chiropractor, Green's attorney and the employer's attorney was scheduled for February 28, 1997. In preparation for that conference, the employer's attorney sent a letter to Dr. Long, dated February 24, 1997, which stated:

> I am the attorney for the Town of Steilacoom, Mr. Green's employer. I am submitting this information regarding the physical requirements of Mr. Green's job as a police officer/EMT for the Town of Steilacoom in anticipation of our telephone conference scheduled for Friday, February 28,1997. The purpose of our discussion is to receive an update on Mr. Green's physical condition.
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> As a police officer/EMT, Mr. Green typically is scheduled to work ten (10) hour shifts on four (4) consecutive days, with the next three (3) days off. While on duty, Mr. Green is expected

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[17] The same attorney represented Green in the instant proceeding.

to be able to perform the following types of duties, as defined by the Washington Association of Sheriffs and Police Chiefs:

1) Lifting and Carrying: Situations requiring this type of activity are associated with movement of intoxicated, injured, or ill individuals, rescue operations, and physical confrontations with unruly and resisting suspects. As an EMT, Mr. Green is expected to perform medium physical activity, moving around a lot and handling objects usually weighing ten (10) to twenty-five (25) (occasionally up to fifty (50) pounds). Much time is spent kneeling, bending, standing and lifting and at times the work can be extremely strenuous. For example, when using and aid car, Mr. Green is expected to be able to remove a Heartstart unit weighing twenty-six (26) pounds from a shelf seventeen (17) inches from the floor and place it over one shoulder; then, remove the oxygen kit weighing twenty-two (22) pounds from a shelf twenty seven (27) inches high and place it over the other shoulder; then, remove the trauma bag weighing thirteen (13) pounds from a shelf forty-seven (47) inches high; and carry all the equipment up two flights of stairs and set it up. With the aid of one other EMT, Mr. Green is expected to be able to move an average size patient from a bed to the floor and to perform, while kneeling, CPR for up to fifteen (15) minutes.

2) Dragging/Pulling: Situations requiring this type of activity are associated with removal of intoxicated persons, removal of traffic hazards, assault situations, misdemeanor and felony arrest situations and rescue situations involving traffic accidents, drownings and train derailments.

3) Running: Mr. Green is expected to be able to run/sprint 100 to 500 feet at any time while on duty. Mr. Green will face running situations over ground which is uneven and filled with obstacles such as vehicles, shrubs, fences, ditches, walls, etc.

> 4) Climbing: Mr. Green is expected to be able to rapidly and effectively climb stairs, ladders, and catwalks in building, and to scale fences and walls and other objects. He must be able to grab hand/footholds in or on ladders, chain link fencing, window sills, rails, pipes, bricks, boards, cross bars, and other such apparatus.
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> 5) Jumping Across/Over: Mr. Green is expected to be able to jump over or across objects such as ditches, fences, walls roof-to-roof, etc. as part of pursuit and rescue operations.
>
> 6) Crawling: Mr. Green is expected to be able to respond to situations requiring stooping and/or crawling such as rescuing small children from play structures or entry into structures through windows for rescue and/or apprehension.
>
> 7) Routine Patrolling: Mr. Green is expected to be able to spend significant portions of his duty hours sitting in a patrol car with numerous lower body twisting movements while entering and /or exiting the patrol vehicle.
>
> I would appreciate it if you would consider these job requirements as you formulate your opinion as to Mr. Green's condition and the likelihood of his return to work as a police officer for the Town of Steilacoom.

Green's attorney corresponded with the employer's attorney by letter dated February 25, 1997, stating in relevant part:

> I have reviewed Paul Chasco's correspondence to Officer Green of February 13, 1997 and your correspondence to Dr. Brian Long of February 24, 1997. As you know, I have arranged a conference for us with Dr. Long on Friday February 28, 1997 at 1:00 p.m.
>
> I am concerned about the requirements you have listed in your correspondence to Dr. Long. These job requirements have not been agreed to by the Steilacoom Police Officers Association

> and the Town's attempt to unilaterally impose these requirements would constitute an unfair labor practice.
>
> The better course of action is to allow Officer Green to continue with his treatment with Dr. Long, which we understand to be between 90 and 120 days from the date of Dr. Long's previous letter. At the end of this course of treatment, Officer Green will submit himself to a physical capacities examination to determine his fitness for duty.
>
> George reports that his condition is improving. In anticipation that we will receive a favorable report from Dr. Long, we are asking that in lieu of requesting successive 30 days leaves of absence, Officer Green's leave of absence be extended to allow him to complete the course of treatment prescribed by Dr. Long. In the interim, I ask that you accept this letter as Officer Green's request for a second extension of his leave of absence.
>
> As we have previously discussed, there exists precedent within the Town of Steilacoom for this request in that other Town employees have experienced absences of one year and greater as a result of injury and illness.
>
> Exhibit 6.[18]

At the time scheduled for the telephone conference, Dr. Long declined to participate. He later explained that he could not determine if Green would be able to perform some or all of the tasks outlined in the letter from the employer's attorney, because it was premature for him to make that type of assessment,[19] that he felt

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[18] The February 13, 1997 letter from Chasco to Green, which is referred to in this correspondence, was not offered as evidence in this proceeding.

[19] The Examiner infers that Dr. Long was referring to the 120 day course of treatment he had outlined earlier.

the telephone conference was unreasonable, and that he could not offer any specific information regarding Green.

Green's attorney corresponded with the employer's attorney by letter dated March 11, 1997. It was reported that Green was seeing Dr. Long three times per week, and the circumstances under which Green drove an automobile to Texas in February were explained.

By letter dated March 12, 1997, Chasco notified Green that his employment was being terminated, stating in relevant part:

> As you are no doubt aware, the leave of absence without pay which was granted to you as a result of our pre-discharge hearing on January 28, 1997 expired on February 25, 1997.
>
> As I review of your file at this time in light of Mr. Hansen's February 25, 1997 request for an additional leave of absence period, I had hoped for additional input from Dr. Long. It was for that reason that a conference call was scheduled with Dr. Long for February 28, 1997. For whatever reason, Dr. Long canceled that conference call and has only provided copies of your chart notes and dates of your treatment starting January 20, 1997. I find it significant that these notes show a sixteen-day interruption in treatment while you drove to Texas. At this point then, I have nothing additional before me that indicates further treatment is likely to help you perform the essential functions of your job.
>
> In my effort to determine your ability to return to work as a Patrol Officer for the Town of Steilacoom, I have considered the report of Dr. Wiese dated October 10, 1996, the letter of Dr. Ray dated December 19, 1996, Dr. Long's letter dated January 27, 1997, Dr. Long's chart notes, and a summary of Mr. Hoffman's telephonic interview with Dr. Ray on February 11, 1997. My conclusion is that, regardless of how much you might want to return to work, your physical condition will not permit it. There-

> fore your employment with the Town of Steilacoom is terminated effective March 14, 1997 at 5 p.m. due to your being physically unfit for the job held. See Town of Steilacoom Civil Service rule 13.30(3).
>
> In considering your employment situation, I have determined that currently there are no job openings at the Town of Steilacoom for which you are qualified. If you wish, the Town will advise you in writing of all future job openings with the Town as they occur. Please indicate your desire to receive such notices to the Human Resources Officer.
>
> You have the right to appeal this termination to the Civil Service Commission. Attached to this letter is a copy of Civil Service Rule 15 which deals with appeals. Your right to appeal will end on March 28, 1997, at 5 p.m.

Chasco testified that he considered several factors in deciding to discharge Green, but that the decision was mostly based on his responsibility for employee and citizen safety and on the documentation provided by Green's physician. Chasco felt the documents "... clearly indicated that Mr. Green would not be able to return to his job...". It appeared to Chasco that the focus of the current medical efforts were to control pain, and improve the quality of Green's life. Chasco did not view the medical evidence as indicating that Green would be able to return to work. Chasco relied on Dr. Ray's report which was supported by Dr. Wiese, and he noted that Dr. Long did not respond to the employer's request for information. Chasco did not seek additional medical information regarding Green's condition. Green acknowledges that he was not physically capable of performing the duties of a public safety officer at the time of his discharge.

Green's Union Activity

Green was an officer of the union at the time of his discharge, and he had been involved in the Steilacoom Officers' Association since its inception.[20] There can be no doubt that the employer was aware of Green's union activities, which included at least:

- Green was a union spokesman during negotiations for a successor agreement to replace a collective bargaining agreement that expired at the end of 1994;
- Green filed unfair labor practice charges with the Commission in 1995, acting as a representative of the union;
- Green raised an issue with Chasco in April of 1996, when informed that his pay rate was to be reduced to one-half of his normal rate while he was on light duty;[21]
- Green accompanied and represented Gall at a pre-disciplinary conference, under a union practice of designating bargaining unit members to assist other bargaining unit members when called upon to appear at hearings that could result in discipline or discharge.[22]

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[20] His recall that the employer recognized the union as exclusive bargaining representative in about 1986 conflicts with docket records showing a certification in 1988, but has no bearing on the outcome of the case.

[21] At Chasco's request, Green submitted a memorandum on April 18, 1996, requesting that he be paid his regular rate of pay. Chasco granted his request.

[22] Green only dated this as having occurred while he was on disability leave, prior to his discharge.

POSITIONS OF THE PARTIES

The union contends the employer disregarded its collective bargaining obligation when it unilaterally adopted and implemented undesirable physical fitness standards in violation of RCW 41.56.140(4), and then used those unilaterally implemented standards as its basis for the unlawful discharge of Green. The union also maintains that the employer discharged Green in reprisal for his vocal union advocacy and participation in union related activities, so that it also violated RCW 41.56.140(1).

The employer denies that it unilaterally adopted and implemented new physical fitness standards, or that it used unlawful standards as a basis to discharge Green. The employer asserts that it had an obligation to Green, to the other public safety officers, and to the public, to ensure that Green was not returned to duty when he was physically incapable of meeting all of the requirements of the job. According to the employer, the disputed physical fitness standards only applied to Green, and that it has not imposed physical fitness standards on the bargaining unit "as a whole" or "in a way that could be used against them". The employer argues that, under these circumstances, it did not have an obligation to bargain with the union. The employer also denies discriminating against Green, and denies he was discharged in reprisal for his union activity. The employer defends on the basis that it relied on valid medical information indicating that Green's physical condition had deteriorated to the point that he would not be able to perform the essential duties of a police officer position.

DISCUSSION

The Duty to Bargain and Unilateral Changes

These parties bargain collectively pursuant to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Their duty to bargain is defined in RCW 41.56.030(4), as follows:

> "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on **personnel matters, including wages, hours and working conditions**, ...
>
> [Emphasis by **bold** supplied.]

That duty is enforced through RCW 41.56.140(4) and unfair labor practice proceedings under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-445-270. The burden to establish affirmative defenses lies with the party asserting a defense.

This case presents a number of issues stemming from the employers' alleged unilateral adoption of physical fitness standards. The issues are not matters of first impression, however. Similar issues have previously been raised and decided by the Commission:

- The subjects of bargaining are segregated into "mandatory", "permissive" and "illegal" categories. Federal Way School District, Decision 232-A (EDUC, 1077), citing NLRB v. Wooster Division of Borg Warner, 356 U.S. 342 (1958).

- The status quo ante must be maintained regarding all mandatory subjects of bargaining, except where changes are made in

conformity with a collective bargaining obligation or the terms of a collective bargaining agreement. City of Yakima, Decisions 3501-A and 3504-A (PECB, 1998), affirmed 117 Wn.2d 655 (1991); Spokane County Fire District 8, Decision 3661-A, (PECB, 1991); Pierce County Fire District 2, Decision 4146 (PECB, 1992). A complainant alleging a "unilateral change" must establish the relevant status quo. Municipality of Metropolitan Seattle, Decision 2746-B, 3151-A (PECB, 1990).

- Mere reiterations of established policies do not give rise to a bargaining obligation. To breach a bargaining obligation, a change must be material, substantial, and significant. King County, 4893-A (PECB, 1995); City of Burlington, Decision 5841 (PECB, 1997).

- Matters delegated to civil service commissions created by Chapter 41.12 RCW are not removed from the scope of collective bargaining by RCW 41.56.100. City of Yakima, Decisions 3503-A and 3504-A (PECB, 1990), affirmed, 117 Wn.2d 655 (1991). Thus, the facts that this case involved Green's discharge and that Green may have had civil service rights do not eliminate the collective bargaining obligation.

- The establishment and substance of physical fitness standards are mandatory subjects of bargaining. City of Olympia, Decision 3194 (PECB, 1989). Similarly, the unilateral imposition of physical agility testing was found unlawful in City of Anacortes, Decision 5668 (PECB, 1996).

An employer commits an unfair labor practice under RCW 41.56.140(4) if it imposes a new term or condition of employment, or changes an existing term or condition of employment of its represented employees, without having exhausted its bargaining obligation under

Chapter 41.56 RCW. City of Tacoma, Decision 4539-A (PECB, 1994); City of Anacortes, supra.

The duty to bargain notwithstanding, the Public Employment Relations Commission is not empowered to resolve each and every dispute that may come up between employees and their employers:

- The Commission does not assert jurisdiction to determine or remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statutes, and such matters must be pursued through the courts or through arbitration procedures established by the contract itself;[23]
- The Commission does not have jurisdiction over claims involving the state Industrial Insurance act, Title 51 RCW;
- The Commission does not have jurisdiction over claims that either the state law against discrimination, Chapter 49.60 RCW, or the federal "American's with Disabilities Act", 42 U.S.C., Section 12101, has been violated; and
- The Commission does not assert jurisdiction to remedy alleged violations of past practices, where there is no announced change of practice. King County, Decision 4893-A (PECB, 1995); City of Auburn, Decision 4896 (PECB, 1994); City of Pasco, Decisions 4197-A and 4198-A (PECB 1994).

Even though the parties expanded this case from the issue set forth in the preliminary ruling, the Examiner still confines this case to the unfair labor practices defined in RCW 41.56.140.

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[23] City of Walla Walla, Decision 104 (PECB, 1976). Thus, no question of whether the discharge of Green was for "just cause" (which is the standard adopted by the parties in their collective bargaining agreement) is before the Examiner in this case.

Analysis of "Unilateral Change" Allegation

The threshold question in this case is whether the employer did, in fact, impose a change of standards on this bargaining unit.

The Union's Claims -

Green testified that the employer has never adopted physical fitness requirements as a condition of continued employment, and has never required officers to meet prescribed physical fitness or agility standards as a condition of employment. Moreover, according to Green, the union has never accepted or acquiesced to *any* physical fitness standards. Green indicated that he considered the standards contained in the December 11, 1997 letter from Chasco to L&I, as well as those contained in the February 24, 1997 letter from the employer's attorney to Dr. Long, to be outrageous. Green noted that other officers have been injured and disabled, but that he was unaware of any other officer being required to meet any testing requirements or minimum physical standards for continued employment. Green further pointed out that the employer does not conduct any periodic physical fitness testing, that it has no physical conditioning requirements, and that it does not offer an economic incentive for physical fitness.

The Employer's Rebuttal -

Public Safety Director Campbell acknowledged that the parties' collective bargaining agreement does not address physical fitness, but he contended that the department has long-standing physical fitness standards. Those standards are a commingling of:

- Campbell's experience over a 30 year period of police service;
- The employer's adoption of the criteria contained in the "Washington State Law Enforcement Medical Physical Standards"

manual, formulated and published in 1982 by the Washington Association of Sheriffs and Police Chiefs; and

- The physical requirements necessary to perform emergency medical technician duties.

Campbell cited the May 6, 1994 "job analysis", conducted by Olsen and Associates as describing the employer's physical fitness standards. Campbell maintained that, where circumstances warranted, the employer has required that officers submit to physical examinations in the past.[24]

Examiner's Analysis -

Green acknowledged that the employer has a general policy of requiring officers to maintain a level of physical fitness sufficient to allow them to effectively perform the fundamental duties of their positions. When cross-examined regarding the matter, Green testified:

> Q. [By Mr. Hoffman] Are there any policies in the public safety officers' manual or policy guidelines regarding physical fitness?
> A. [By Mr. Green] I think there's a height, weight requirement, but I'm not aware of anything that — if you're talking about specifics. I'm not aware of anything that lists specifics.
> Q. Are you aware of any policy that may have been in place that required an officer to maintain a level of physical fitness that will allow them to perform their duties effectively as a general policy?
> A. I would say yes.

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[24] He recalled that Officer Gall and Officer Green have both been subjected to physical and/or psychological examinations in the past.

> Q. Were you aware of any policy that would have been in place that would require an officer to submit to an examination as to an officer's health or physical fitness level?
> A. No, I wasn't, but I've been willing to do that.
>
> Transcript, page 100

Other evidence also supports a conclusion that the employer's assertions are well taken. The job analysis performed in 1994 contains a good description of the tasks Green was expected to be capable of performing; describes the essential functions of the job; the tools, equipment, and work aids used; the skills and abilities; and the physical demands on police officers. It thus established a baseline for the duties and physical requirements for employees in this bargaining unit more than two years before Green was discharged.[25]

The Examiner disagrees with Green's characterization of the letters written by Chasco in December of 1996, and by the employer's attorney in February of 1997. Rather than constituting impositions of any new or different physical standards, those letters merely reiterated the established and long-standing job duties and normal expectations for Green's position. There is no evidence that they raised any additional expectations, or changed the general scope of the job duties. Although the union has sought to characterize them

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[25] Green was a union officer in 1994, and an inference is thus available that the union knew or reasonably should have known of those physical fitness standards at that time. If the union believed that the job analysis constituted a change of standards, that would have been the appropriate time for it to file an unfair labor practice complaint alleging a violation of a duty to bargain. This complaint filed in 1997 is untimely under RCW 41.56.160 as to any change in 1994.

as establishing new physical fitness standards, those letters do not require that a police officer meet specific physical fitness criteria, such as the ability to lift a specific amount of weight a minimum height a predetermined number of times. Rather, they describe actual duties that go with the job, such as handling bulky or heavy emergency lifesaving equipment. Even a reference to dragging and pulling is not new: The record fairly reflects this to be an occasional job requirement, as are running, climbing, jumping, and crawling. These physical activities are characteristic of the fundamental duties of police officers and/or emergency medical technicians.

While the employer did not produce evidence of having written physical fitness standards,[26] that is not conclusive. No provision of Chapter 41.56 RCW requires that all of the past practices constituting the "status quo" be embodied in written department policies or written personnel policies adopted with any particular form or ceremony to make them "official". In this case, the "job analysis" completed on Green's position in 1994 fairly reflected the employer's historical expectation that its police officers would maintain sufficient physical capacity to perform their duties. Green's testimony corroborated this, and his own medical records indicate that the employer has, in the past, required its officers to have the ability to perform physical activities.

The Examiner concludes the union has failed to meet its burden of proof that the employer imposed new physical fitness standards on the bargaining unit in late 1996 or early 1997.

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[26] In this particular instance, the testimony of employer witnesses was not supported by documentary evidence.

The "Discrimination" Allegation

The Roberts' Dictionary of Industrial Relations, BNA Books, Revised Edition (1971), defines a discriminatory discharge as follows:

> A discharge not based on job performance or failure to meet the standards set for the job, but on discriminatory reasons. It is generally applied to discharges for union membership or activity or other activities in connection with the protection and betterment of worker's wages, hours, and working conditions. Federal and state laws also set forth discharges which are discriminatory under the terms of the specific law.

The Commission has embraced the "substantial factor" test set forth in Wilmont v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), for evaluating allegations of discriminatory personnel action. In the application of that test the burden of proof does not shift but rather:

> A complainant claiming unlawful discrimination must first make out a prima facie case, showing:
>
> 1. That the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;
> 2. That the employee was discriminatorily deprived of some ascertainable right, benefit or status; and
> 3. That there was a causal connection between the exercise of the legal right and the discriminatory action.
>
> Where a complainant establishes a prima facie case of discrimination, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. A violation will be found if the employer does not meet this burden of production.

> The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed employer action was in retaliation for the employee's exercise of statutory rights. That may be done by:
>
> 1. Showing the reasons given by the employer were pretextual; or
>
> 2. Showing that union animus was nevertheless a substantial motivating factor behind the employer's action.

Port of Tacoma, Decision 4626-A (PECB, 1995).

Thus, a showing that the employer's disputed personnel action was conscious and deliberate is essential to such a finding. Port of Tacoma, Decision 4626-A (PECB, 1995); City of Seattle, Decision 3066 (PECB, 1989); King County, Decision 3318, (PECB, 1989).

The Prima Facie Case

Green's Activity as a Union Negotiator -

Green was the union's chief spokesperson in negotiations with the employer for a successor agreement in 1995. Green sometimes met alone with the employer's bargaining team and sometimes was accompanied by other union officials. The employer was represented in those negotiations by its labor relations consultant and an acting administrator who preceded Chasco.[27] Green recalls that it took seven or eight months to complete negotiations, and that the final agreement was not signed until about July of 1995, but:

- The record reflects that the parties met regularly and successfully negotiated a three-year agreement (covering the period from January 1, 1995 to December 31, 1997) without impasse or the need to call in a mediator;

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[27] The record suggests that Campbell was not actively involved in those negotiations.

- The principal employer negotiators for the 1995-1997 contract were not involved in Green's discharge;[28] and
- There is nothing to indicate that those negotiations were conducted in other than a businesslike manner, or that the parties did not meet their mutual obligation to bargain in good faith, without threats, or intimidation.

Thus, the evidence does not support a conclusion that Green's participation in those negotiations caused hostility toward him or that anything that came out of those negotiations motivated the employer to retaliate against him in reprisal for his union activity.

The 1995 Unfair Labor Practice Charges -

On November 29, 1995, Green filed a complaint charging unfair labor practices with the Commission which, after review for purposes of making a preliminary ruling, was divided into three separate cases. Commission records indicate the disposition of those cases as:

- The complaint docketed as Case 12217-U-95-2884 was dismissed as untimely in Town of Steilacoom, Decision 5479 (PECB, 1996);
- The complaint docketed as Case 12193-U-95-2880 was withdrawn by the union after the parties negotiated a settlement; and
- The complaint docketed as Case 12218-U-95-2885 was found to state a cause of action, and was assigned for hearing,[29] but the Examiner's decision finding that the employer committed an

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[28] Chasco commenced his job after the negotiations were concluded; the employer's labor relations consultant in those negotiations was not involved in Green's discharge.

[29] Green represented the union at a hearing held in that case on August 28, 1996.

> unfair labor practice was not issued until June 6, 1997, approximately 12 weeks after Green was discharged.[30]

There is no evidence of any hostility by the employer directed at Green as a result of his processing these unfair labor practice complaints. Even as to the case where a violation was found, the employer complied with the Examiner's remedial order and the case was closed promptly without appeal to the Commission or courts. Moreover, those cases were filed before Chasco became the employer's administrator. Any connection between Green's processing of these unfair labor practice charges and his discharge is speculative. There is no substantive evidence of a connection.

Light Duty Pay Rate Inquiry -

There is no indication that Green's inquiry about his pay rate while on light duty ever even rose to the level of a grievance. When Green brought the matter up, Chasco merely asked that Green make a written request to be paid his regular rate of pay. Green responded, and Chasco paid the rate. This incident occurred within a matter of days after Chasco commenced work as administrator. There is no evidence of any contentious debate regarding the matter. In the absence of any substantive evidence, any connection between Green's request that he be paid his regular rate of pay while on light duty and his discharge is speculative.

The Pre-disciplinary Hearing -

Green recalled that he objected to the manner in which Campbell was conducting a pre-disciplinary hearing where Green was present as the

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[30] Town of Steilacoom, Decision 5947 (PECB, 1997). The violation concerned the employer's failure to provide the union with requested information relevant to the processing of a grievance.

union representative for Officer Gall.[31] Green testified of his belief that his presence agitated Campbell, that the director's attitude indicated he was opposed to Green's presence,[32] and that Green commented that he had a right to be present as a union representative. However, Green's perceptions of the situation were largely based on the director's tone of voice, pitch, and body language. In response to Green's protest, Campbell recessed the hearing. Campbell recalled Green's claims that the specific charge and exact discipline to be imposed were lacking, and he recalled stopping that meeting, but he also recalled that another officer appeared with Gall when the hearing was reconvened at a later date.

The record in this case is insufficient to determine even whether the meeting described by Green was within the boundaries of the collective bargaining process. Commission precedent indicates that due process hearings conducted under Loudermill, supra, are beyond the scope of Chapter 41.56 RCW. The decision in Snohomish County, Decision 5231 (PECB, 1995) states, in relevant part:

> In City of Bellevue, Decision 4324-A (PECB, 1994), the Commission clearly and firmly refused to extend the rights and obligations of the collective bargaining process to "due process" hearings which are conducted by public employers to meet their obligations under the United States Constitution, as interpreted by the Supreme Court of the United States in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). The Commission subsequently reiterated that stance in City of Winlock, Decision 4784-A (PECB, 1995), saying:

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[31] Green felt the director was being too general, and wanted to know the specific charges against Gall.

[32] Green recalled that the director told Gall he would like to talk to him but that he couldn't.

> [T]he Commission has declined to extend the collective bargaining process and its unfair labor practice procedures to enforce the constitutional "due process" rights on which Loudermill is based, City of Bellevue, Decision 4324-A (PECB, 1994) ...
>
> The same principle has been enunciated in decisions at least as far back as Okanogan County, Decision 2252-A (PECB, 1986).

The parties collective bargaining agreement allows the union to have a representative present at "pre-disciplinary" meetings called by the employer, and so offers no guidance. Green maintained that he has represented several officers at what he called "disciplinary hearings", but he only offered testimony regarding the one incident representing Officer Gall, could not recall when that occurred, and even characterized that one incident as a "Loudermill" hearing.

Other union officers have assisted and represented bargaining unit members who were being disciplined, but no pattern of reprisal or interference is evident here. Thus, Green's assertion stands by itself and is inadequate to support his claims.[33]

Claim of Disparate Treatment -

Green cited other examples of Town of Steilacoom employees who have been allowed extended periods of time to recover from injuries:

- Utilities employee Jim Hill injured his back and had allegedly been on leave longer than Green, yet Green believed that Hill was still employed by the employer;

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[33] Green testified that he has "filed papers with Chasco as matters have come up", but presented no evidence on the subject, so the contention is unfounded.

- Debbie Matheson had allegedly been on a disability leave, but for a period less lengthy than Green's disability;
- Sue Wilson was allegedly on leave for about one year for medical reasons;
- An unnamed officer was allegedly on disability leave with an angioplasty; and
- An unnamed officer who was seriously overweight had allegedly been on medical leave twice for knee surgery.

These assertions were, however, vague, unsupported by corroborating evidence, and appeared to be permeated with conjecture.

The evidence was somewhat more specific with regard to the experiences of Officer Gall, who injured his back in 1994 and was concerned that the injury was career-threatening:

- According to Green, no physical fitness standards were applied to Gall, and he has not seen such standards applied to other officers;
- According to Officer Gall, who was called as a witness at the hearing and testified about his personal experiences regarding disability leave and the employer's standards, Green has been treated differently than other employees, but provided no substantive details in support of his view.
- By way of vague narrative, Gall sought to characterize a physical capacities assessment completed on him as a "Worker's Compensation" requirement, and as a threshold step to reinstatement which was separate from the employer's interest in an officer's ability to perform the job requirements.

Notwithstanding the testimony of Green and Gall, the record reflects that Gall underwent a physical capacities assessment after a period

of recuperation, and that he met some standard prior to his return to duty.

The testimony fails to establish that the employer imposed different standards on Green than on other employees. In fact, most of the evidence offered on this issue failed to adequately address the matter, and is of no substantive value in evaluating the union's claim.

Removal from Light Duty -
Green claims that the examples given by the employer of light duty activities, as described in Chasco's letter of May 14, 1996 to Dr. Ray, were tantamount to regular duty, and that there would have been no need for a "light duty" status if he could perform those activities. Green doubted that such light duty standards have been imposed on other employees in the past, and thus claimed that his removal from light duty was another example of being treated differently than other employees. However, aside from his own somewhat vague testimony, Green offered no substantive evidence sufficient to intelligently evaluate these assertions.

Green did not establish specific periods of time when he or other officers were on light duty, the circumstances of that light duty, or what those duties were for himself or other officers. Green has characterized Chasco's example as if it were implemented personnel action, but that is not the case, and there is no evidence that it was adopted by the employer. Green did not establish any comparative standard for assessment of his claim of disparate treatment.

Conclusions on Prima Facie Case -
The Examiner declines to rely on sketchy assertions. As a result of these evidentiary gaps noted above, the complainant has failed

to sustain the necessary burden of proof to establish a prima facie case of discrimination based on his union activities protected by Chapter 41.56 RCW. Under these circumstances, there is no need to shift the burden of production to the employer (i.e., for it to articulate lawful reasons for its discharge of Green) or to make the "substantial factor" analysis called for by the precedents cited above.[34]

FINDINGS OF FACT

1. The Town of Steilacoom is a public employer within the meaning of RCW 41.56.030(1). Paul Chasco is the Town Administrator. The employer operates a Public Safety Department, under the direction of Michael Campbell, in which most of the employees are trained to perform the combined functions of police officer, emergency medical technician, and fire fighter.

2. The Steilacoom Officers Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a unit described as:

> All full-time paid commissioned law enforcement officers within the department of Public Safety; excluding personnel with the rank of lieutenant or above.

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[34] Even if the Examiner had found a prima facie case was made in this case, the "physical incapacity to perform the job" reasons given by the employer are amply supported in this record, and Green's acknowledgment of his physical limitations precludes a "pretext" finding. The Examiner would thus dismiss this allegation even if a prima facie case were made out.

During the period relevant to this proceeding, bargaining unit employees Larry Collings, David Gall, and George Green have been officers of the union.

3. George Green was hired by the employer in 1978, as a police officer, and was a member of the bargaining unit described in paragraph 2 of these Findings of Fact. Green suffered an occupational injury to his left knee and back during or about May of 1993, and was on light duty and/or off work due to disability for a time thereafter.

4. During Green's period of disability as described in paragraph 3 of these Findings of Fact, an analysis of his job duties was performed by "Olsen and Associates". A report issued on May 6, 1994 contained a job summary, described the essential functions of Green's job, and addressed the physical demands of the job in terms of exertion, circumstances and frequency. The evaluation report stated that Green then appeared to possess the necessary physical capacities to be employed as a law enforcement officer.

5. By letter dated July 27, 1994, Green's vocational counselor notified the employer that Green was fully released to return to his duties of police officer.

6. Although Green served as chief spokesman for the union in negotiations for a successor agreement to replace a collective bargaining agreement that expired on December 31, 1994, those negotiations resulted in a collective bargaining agreement for 1995 through 1997, without the parties reaching an impasse or requiring mediation. The negotiations appear to have been characterized by good faith, and the record does not support

a conclusion that Green's participation was a basis for the employer to form or maintain any animus against Green. The individuals who represented the employer in those negotiations did not take part in later events relevant to this case.

7. Inasmuch as Green was vice-president of the union in 1994, the union knew or reasonably should have known of the physical capacities in the job analysis reports made on Green in 1994 and implemented in connection with his return to work in 1994. The union did not, however, file any unfair labor practice complaint within six months thereafter, alleging that the physical standards applied to Green in 1994 constituted a unilateral change of a mandatory subject of bargaining.

8. In the spring of 1996, Green encountered significant back pain, and was no longer able to perform his regular duties. Green was assigned light duty work for an unspecified period during or about April of 1996.

9. Upon receiving information in April of 1996 that his salary would be reduced by one-half while he was on light duty, Green objected to the wage reduction. Green discussed the matter with Chasco, who was new to his position at that time. At Chasco's request, Green submitted a memorandum which cited a bargaining obligation and requested that he be paid his regular rate of pay. Chasco promptly granted Green's request, and the record does not support a conclusion that Green's request was a basis for the employer to form or maintain any animus against him.

10. Green became totally disabled on an undisclosed date, and underwent back surgery on June 26, 1996. The surgery was not

successful, and Green was unable to return to work. Green sought additional medical opinions, including consultation regarding further surgery. Green's physicians indicated doubt that further surgery would be beneficial.

11. On December 11, 1996, Town Administrator Chasco sent a letter to the Washington State Department of Labor and Industries, with copies to Green and his physicians, expressing concern that it appeared Green's medical condition would preclude him from returning to work as a regular police officer. Chasco's letter outlined Green's duties in terms consistent with the job analysis performed on Green's position in 1994.

12. On December 19, 1996, Green's surgeon, Dr. Ray, sent a letter to Chasco, reporting that "it is now apparent that Mr. Green will not return to his previous job as a full duty policeman".

13. The employer gave Green notice of a hearing to be held on January 16, 1997, to notify Green of the employer's concern regarding his continued employment and to provide Green an opportunity to present information relevant to continued employment. After conferring with his attorney, Green requested that the hearing be postponed. That request was granted by the employer, and the hearing was rescheduled for January 27, 1997.

14. On January 17, 1997, Green was seen by a chiropractor, Dr. Long, who confirmed that Green had extensive degenerative disease in his back. Dr. Long projected that a 90-day to 120-day course of chiropractic treatment would be needed before he could issue a reasonably accurate prediction regarding Green's future ability to return as a full duty police officer.

15. On January 27, 1997, the employer held a hearing on Green's medical condition and future employment. Green advised the employer of the chiropractic treatment, and offered to condition his reinstatement on successful completion of a physical capacities examination at some indeterminate time in the future. Green requested an additional 90 to 120 days of disability leave. The employer granted an additional 30 days of leave.

16. On February 24, 1997, the employer's attorney sent a letter to Dr. Long, advising him of the physical requirements for Green's position in terms consistent with the job analysis performed on Green's position in 1994.

17. By letter dated February 25, 1997, Green's attorney notified the employer's attorney that the union viewed the substance of the letter referred to in paragraph 14 of these Findings of Fact as an attempt to unilaterally impose physical fitness requirements, pointing out that those requirements had not been agreed upon, and asserting that their implementation would be an unfair labor practice.

18. Green did not return to work on or before the expiration of the 30 days of additional leave granted to him on January 27, 1997, and he acknowledged that he was physically incapable of performing his duties.

19. By letter dated March 12, 1997, Chasco notified Green that he was discharged effective March 14, 1997. The reason given for that action was a determination that his physical condition will not allow him to perform the essential functions of a police officer.

20. On an unspecified date, likely during a period when he was disabled, Green accompanied and provided union representation to Officer Gall at a meeting called by the employer. The precise nature of that meeting is not established by this record, although there is basis for an inference that it was a due process hearing outside the scope of the collective bargaining process. The record does not support a conclusion that Green's activity in this regard was a basis for the employer to form or maintain any animus against him.

CONCLUSIONS OF LAW

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

2. The union has failed to sustain its burden of proof to demonstrate, by a preponderance of the evidence, that the employer implemented unilateral changes, in December of 1996 and/or February of 1997, of the physical fitness standards imposed upon members of the bargaining unit as a condition of employment.

3. The union has failed to sustain its burden of proof to show, by a preponderance of the evidence, that a prima facie case has been made that the employer's discharge of George Green was discrimination in reprisal for his exercise of lawful union activity in violation Chapter 41.56 RCW.

4. The employer has presented substantive, credible evidence demonstrating that Green was discharged because he was

physically incapable of performing the regular duties of his position.

ORDER

The complaint charging unfair labor practices filed in the above entitled matter is hereby DISMISSED.

Issued at Olympia, Washington, this 18th day of February, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Frederick J. Rosenberry

FREDERICK J. ROSENBERRY, Examiner

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