

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| GORDON G. BRAWN, |) | |
| Complainant, |) | CASE NO. 3405-U-81-490 |
| vs. |) | DECISION NO. 1624 - PECB |
| PORT OF SEATTLE, |) | |
| Respondent. |) | FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

Mrak and Blumberg, by Christine M. Mrak, attorney at law, appeared on behalf of the complainant.

Richard A. Jones, staff attorney, appeared on behalf of the respondent.

On April 16, 1981, Gordon G. Brawn (complainant) filed a complaint of unfair labor practices alleging that the Port of Seattle (respondent) violated RCW 41.56.040 and 41.56.140(1) by twice denying him a promotion because of his union activities. Hearing was held on the matter on October 26, November 20, December 9 and 17, 1981, and January 11, 1982, before Martha M. Nicoloff, Examiner. Post-hearing briefs were submitted by both parties.

FACTS

General Background

The Port of Seattle operates the Seattle-Tacoma International Airport. Included in its operation at that facility is the Aviation Fire Department, which is responsible for fire suppression and prevention in the airport buildings and grounds, emergency medical assistance in that same area, and emergency response in case of aircraft problems, including crashes. The department employs approximately 45 firefighters, ten lieutenants and captains, a deputy chief and a fire chief.

The composition of fire department administration changed several times in the period germane to these proceedings. In the fall of 1978, B. A. Delehoy was fire chief. James Kolb apparently took office as chief sometime in late 1978 or early 1979. Kolb was terminated in approximately June or July, 1980, reinstated on probation, and then terminated again in late September or early October 1980. During Kolb's tenure as chief, Thomas Barrett, Darold

Ball, and Paul DesJardin served at various times as acting deputy chief. Barrett became permanent deputy chief approximately two weeks prior to Kolb's second termination. Upon Kolb's termination, Barrett became acting chief and Ball acting deputy chief. In early March 1981, Roderick Smith was appointed fire chief, Barrett returned to deputy chief, and Ball to captain.

The department operates 24 hour shifts 365 days per year, manned by 12 to 15 firefighters, two lieutenants, and one captain. Lieutenants on shift assignment are responsible for implementing work assignments, training, and recommending discipline for firefighters working on their shift. They also assist their shift captain in planning training programs. In the absence of a captain, a lieutenant asked to act as captain assumes the duties and the pay of the higher position. Shift captains are involved in day to day administration of shift activities. They participate in or act as primary evaluators of firefighters and lieutenants on their shifts. Their recommendations for discipline are subject to further investigation by the chief or deputy chief. Certain individuals classified at or above the rank of lieutenant are assigned to special projects, and work day shift, with no responsibility for other personnel.

Since 1955, Local 1257, International Association of Firefighters, has been an organization of firefighters, lieutenants, and captains at the aviation fire department. Although the union has never petitioned for formal recognition or certification as exclusive bargaining representative of that group, and does not enter into a written collective bargaining agreement with the Port, it provides information to and confers with management regarding wages, hours, and terms and conditions of employment, represents fire department personnel in grievances, and is consulted with by management on a variety of matters.^{1/}

Gordon Brawn began employment as a firefighter with the aviation fire department in 1971. His prior experience includes three years as chief of a small fire department, several years at the Boeing company as a firefighter, and a number of years in the Air Force, during which time he gained experience fighting several fires which resulted from airline crashes.

From 1974 through September 1977 Brawn was vice-president of Local 1257. In May of 1974, DesJardin reviewed Brawn's performance for the purpose of making a recommendation regarding upgrade from "B" to "A" firefighter. At that time DesJardin noted that Brawn was very capable and intelligent, but that if he was not interested in an assignment or didn't like an idea, he "won't get

^{1/} The Examiner is aware of representation proceedings before the Commission subsequent to the hearing in this matter in which Local 1257 obtained formal certification. The facts are stated in this decision as they are reflected in this record and were at the time relevant to this case.

behind it and do a good job". Brawn was recommended for upgrade but DesJardin noted he would like him to evaluate himself and improve his work habits and attitude.

Brawn became union president in October 1977, and remained president during 1978, 1979, and 1980. His first official performance evaluation as a firefighter, under date of October 12, 1978, was completed by Lieutenant Donald Tessen and approved by Fire Chief Delehoy. On a rating scale of one to five, with one being outstanding and five unsatisfactory, Brawn received a "two" rating. Written remarks on that evaluation indicated that he had high work standards, was reliable and dependable and "accepts added responsibility as both shift cook and union president. He is exceptionally involved with the department".

1978 Promotions

Brawn first applied for a lieutenant position in the fall of 1978. He participated in an examination which resulted in a list of individuals eligible for promotion to lieutenant. Brawn ranked, by score, sixth of ten people on that list. The list was to be in effect for two years. The first promotions from that list were made in December 1979, when the top three candidates, Harmon, Couture, and Simmons, were appointed.

In the spring of 1980, the fifth ranking candidate, Pederson, filed a grievance claiming that Chief Kolb had not followed established procedures in making the first three promotions. Specifically, Pederson claimed his ranking was based on a procedurally defective evaluation. Brawn, in his capacity as union president, represented the grievant in that matter. On April 24, 1980, the department's lieutenants and captains sent a memorandum to Port management supporting the promotions and indicating their belief that the grievance was unfounded. A memorandum from Kolb dated May 30, 1980, announced that an investigation of the grievance was resulting in Pederson's promotion, effective April 21, 1980.

On July 7, 1980, the fourth ranking lieutenant candidate, Shank, was promoted. His was the last promotion from that list.

Firefighter Relationships

It is not uncommon for employees in the aviation fire department to engage in banter and criticism of each other in the course of their duties. Even threats and physical confrontation are not unknown. Several officers and at least two of the firefighters who were promoted in the period germane to these proceedings were parties to some type of confrontation. Both Brawn and DesJardin testified that it is common for fire department personnel to refer

to each other by somewhat derogatory nicknames, and to "ride" one another about errors in job performance. DesJardin testified that criticism of superior officers is common, and that it often takes place in front of other personnel. Ball testified that during Kolb's tenure, derogatory and non-supportive comments about Kolb "flowed like water" at times.

Intra-Union Relationships

It was apparently in the spring of 1980 that Chief Kolb began urging the firefighters to pursue a written contract with the Port. Witnesses called by both complainant and respondent testified to Kolb's pursuit of that goal in informal conversation with individuals and also in meetings with department officers. Ball either made or seconded a motion in a union meeting that Local 1257 pursue a contract with the Port. Brawn testified that he was reluctant to pursue a contract if Kolb was pushing it. By the time of hearing, the union and the Port had not entered into a written contract.

At some point in this same time frame, Kolb also began urging the captains and lieutenants to form their own separate bargaining unit and/or ensure that they had an officer representative in negotiations. Barrett, Ball, and DesJardin expressed dissatisfaction to Brawn with the representation being given the officers, and requested that officers accompany the negotiating team. They discussed with Brawn the potential for the officers to sever and form their own unit. Brawn informed them he would "fight them all the way" on any separate representation, but Barrett and DesJardin did sit in on at least some negotiation sessions.

In June of 1980, a petition was circulated among Local 1257 members to recall Brawn as union president due to "dissatisfaction" and "lack of confidence". Sixty-three percent of the members, including all officers then on active duty, signed the petition. Approximately 50 percent of the firefighters signed the petition. Brawn stepped down, but was re-elected union president by secret ballot approximately two months later.

The Acting Lieutenant Incidents

In late 1979 and early 1980, conditions in the fire department were such that a great deal of overtime was being worked, and shifts were often functioning with officers in "acting" capacities. The overtime and scheduling policy became a subject of grumbling among the firefighters, at least in part because they believed that the officers were scheduling themselves in a manner which would allow them both to work the "gravy" overtime and be able to continue to work outside jobs or participate in outside activities. In March 1980, Brawn refused an acting lieutenant position, apparently because of his belief that the department policy was inequitable. The incident was

the subject of a memorandum authored by acting shift captain Ronald Harmon to acting deputy chief DesJardin. Harmon characterized that memo as a disciplinary measure as well as an informational document designed to avert future problems. The policy was modified thereafter.

In May or June 1980, Brawn and other firefighters, including Harry Evans, again refused acting lieutenant assignments. By that time, the lieutenant promotional list created in 1978 had been "frozen". Brawn testified that the policy required that an "acting" position be offered to an individual on a promotional list, or absent that, to the most senior firefighter on shift. He was not the most senior firefighter at that time, and therefore believed that the policy was not being followed. The 1978 promotion list was reinstated shortly after this incident.

The Sick Slip Incident

On another occasion, Brawn returned to work after an absence due to illness, and brought with him a doctor's slip on an outdated form. Approximately five hours into his twenty-four hour shift, Brawn was informed by the shift captain that a new doctor's slip would be required, and that he needed to leave work to get the slip. It was Brawn's physician's day off, and Brawn informed the captain that if he was required to leave he would not return until his next regularly scheduled shift. He was sent home to obtain the slip, and did not return until his next shift.

DesJardin was acting as deputy chief at the time of the sick slip incident. His testimony was that he spoke to the shift captain after that occurrence, indicating to him that his handling of that incident was probably not in the best interest of the shift and that Brawn could have returned with the correct form on his next shift rather than being sent home, particularly since it was so many hours into the shift before the action was taken.

The Paycheck Incident

In response to one employee's domestic problems, the fire department promulgated a policy that no one other than the payee was allowed to pick up a paycheck, unless the payee had filed a written authorization to allow someone else to do so.

On an unspecified date when Brawn was serving as an acting lieutenant, he gave one firefighter's paycheck to another for delivery to the payee. Brawn is quoted as having remarked that he did not make the rules and so didn't have to enforce them. Lieutenant Dean Shank witnessed the incident. Under cross-examination, Shank agreed that it was common for firefighters to pick up paychecks for each other, and that it was Brawn's remarks more than his

actions which concerned him. Brawn did not recall the paycheck incident, but also testified that firefighters commonly pick up checks for each other. Brawn testified that in fact Shank has often brought Brawn's check to his home, although Brawn has not filed a written authorization for Shank to do so.

Benefit Meeting Incident

Shank and Brawn were also parties to a disagreement which involved attendance at a presentation of benefits available in a voluntary program. The meeting began with a discussion of this voluntary program. Brawn left the meeting; Shank followed him and informed him he was required to attend; they had a discussion during which Brawn became "argumentative", but when Brawn was ordered to return to the meeting, he complied. Shank and Brawn discussed that incident at a later time and apparently resolved the matter; however, Brawn testified that he subsequently learned that a "reprimand" regarding the incident had apparently been placed in a "secret" departmental file.

The National Committee Meetings Incident

Brawn was selected to represent the International Association of Firefighters as a member of certain committees of the National Fire Protection Association. He needed leave to be authorized in order to attend out-of-state committee meetings.

DesJardin was acting deputy chief at the time of Brawn's request to attend the meetings. Kolb was not in town and DesJardin did not believe he had the authority to grant the request. His testimony was that Brawn approached him with the request, and DesJardin directed Brawn to see the airport manager about it. Brawn did so, and there was no contemporaneous indication of any dispute.

1980 Promotions

In July 1980, the Port's Human Resources Department announced a new promotional examination for lieutenant. All class "A" firefighters were eligible to compete in that process, which included a written test and an interview by a panel of persons from outside the fire department. The examination announcement specified that all who passed the examination would be considered qualified for promotion. The fire chief was to make final promotion decisions, using past performance as one criterion. Although all who passed the examination were considered equally qualified, a list of candidate scores, identified by candidate numbers rather than names, was posted by the Port. Brawn received the highest score in the examination, 179.2 in comparison with the next candidate's 159.7. Harry Evans ranked third and Richard Donaldson seventh on the list of candidates.

On October 18, 1980, Brawn received a performance evaluation, signed by Captain Harold Noll as his supervisor and Ball as department head. He again received a "2" rating. In the job assignments "comments" section, Noll noted that Brawn was still union president. Noll's written evaluation included comments that Brawn's performance was good, skill levels high. He noted Brawn's refusal of an acting lieutenant assignment on one occasion and the problems it caused, and further noted that Brawn's cooperation had been excellent since that time. He found Brawn an asset to the department.

Sometime in October 1980, the fire department began promotional procedures. As acting fire chief, Barrett assigned acting deputy chief Ball, with the assistance of secretary Kristine Clement, to review and transcribe for him any noteworthy information from candidate personnel files. Clement was directed to tabulate each candidate's attendance record. Barrett and Ball conducted interviews of each candidate on the eligible list. Four standard questions were asked of each candidate, and follow-up questions developed from candidate responses. Clement recorded and transcribed candidate responses, as well as Barrett's and Ball's immediate post-interview reactions.

The parties' recollections regarding the basic questions asked in Brawn's interview coincide. However, the parties differ in their recollections of discussion of Brawn's union activities. Brawn recalls that Barrett asked whether he would stay on as union president if he became a lieutenant, and that Ball asked whether he believed that being union president would affect his outlook as a lieutenant. Brawn recalls responding that he believed his union activities would make no difference. Barrett, Ball, and Clement all recall that Brawn initiated mention of his union activities in response to the standard interview questions regarding background and special qualifications, and that Barrett and Ball made no remarks and asked no questions regarding Brawn's union activities. Brawn was noted on the post-interview comments as "quick-witted; very sharp; communicates well; answered questions well".

In the immediate post-interview notes on candidate Harry Evans, Barrett and Ball found him to be honest, with good communication skills, but that he "blamed others for problems--didn't directly address problems solutions" (sic). After his interview, Evans received a performance evaluation, completed by Noll as supervisor and Ball as department head. He received a "2" rating, and was noted as having excellent performance, high skill levels, good leadership qualities. Virtually the same remarks regarding his refusal to act as lieutenant on one occasion appear on his evaluation and on Brawn's. Evans, too, is noted as an asset to the department, and Ball added a handwritten "Keep up the good work. We depend on you".

Barrett's and Ball's reactions after candidate Richard Donaldson's interview note that he had good communication skills, was organized, and had a very impressive background and presentation. No performance evaluation for Donaldson was made a part of this record.

Following the interviews, Barrett directed each officer in the department to review the list and submit written recommendations to him concerning candidates working on their shift at that time. In addition, Barrett and Ball interviewed each officer and asked them for recommendations regarding the entire list. The record is somewhat confused regarding the recommendation process. Separate recommendations were solicited for Caucasian and minority candidates. Some officers recall being asked to recommend an overall choice in addition to the separate minority/non-minority choices; others did not recall being asked for an overall recommendation. Barrett's handwritten tabulation shows separate columns, minority and Caucasian, but his testimony simply reflected his asking for officer preferences. All of the officers making such recommendations were then current members of Local 1257, with the exception of Barrett himself. Some had held union office in the past. All were aware of Brawn's union presidency. All testified that they did not consider his union activities in making their recommendations. All lieutenant candidates were also union members. Other than Brawn, the only candidate serving in a union office at that time was Donaldson, who was a trustee.

Donald Couture began working for the fire department in 1975 and became a lieutenant in December, 1979. He worked with Brawn "off and on" over the years whenever their shifts coincided. He recommended Evans as first choice and Gary White as second choice among Caucasian candidates, and Donaldson as his choice among minority candidates. No written recommendations from Couture are a part of this record. Couture testified that Brawn had been vocal about his disagreements with management during Kolb's tenure as chief, that he did not recommend Brawn for promotion because he viewed Brawn as a "little anti-management", and he didn't think Brawn would work well under the administration at that time.

Kenneth Jolin has been a lieutenant since January, 1974. He and Brawn worked in the fire prevention unit together at an unspecified date. Jolin's recommendations for promotion were Caucasian: Evans and White; minority; Donaldson and Thomas Winston. He did not recall discussing Brawn with Barrett and Ball. Jolin testified that at the time he made his recommendations he simply felt Evans and White would make better lieutenants than would Brawn.

Dean Shank began work at the fire department in 1973 and became a lieutenant in July, 1980. He prepared a written evaluation of each candidate who worked

on his shift. In those remarks, Shank noted that Brawn had a good understanding of department policies and procedures, that platoon members were able to follow his commands and "not challenge him too much" as an acting lieutenant, but that he believed Brawn's attitude would have to change were he to become an officer, as Brawn "feels that there need to be a lot of changes and at this time challenges the Officers and the Administration openly". Shank testified that Brawn was not hesitant to voice his opinion about situations he believed were unfair or inappropriate, and that he "unfortunately" acted in that manner as union president; that he was a bit too anti-management and Shank did not feel Brawn as union president was representing him or his peers appropriately in some matters. His written remarks about Donaldson included positive remarks about his service as an acting lieutenant and his retention of knowledge, as well as a notation that Donaldson had volunteered for many worthwhile projects, such as being trustee of Local 1257. With regard to Evans, Shank noted many positives about his knowledge and performance capabilities. He also noted that Evans felt there were a lot of problems with the department, and he had at times let the administration know how he felt, but as acting lieutenant he did not let his feelings be known to shift personnel. Shank recalls his recommendations for promotion as Evans, Donaldson, White, Dan Zornes, and Winston, in that order. In testimony regarding Brawn, Shank cited the paycheck and the benefit meetings incidents in support of his written comments about Brawn's attitude.

At the time of hearing, Paul DesJardin had been with the fire department about 22 years and a captain for about ten years. Brawn was a firefighter on DesJardin's platoon in the early 1970's, but between that time and mid-1981 they did not work directly together again. In testimony, DesJardin recalled recommending Evans for promotion to lieutenant in the fall of 1980. His memorandum to Barrett at that time shows that he recommended White. He made no written remarks about the complainant. DesJardin cited the acting lieutenant incident as a reason for not recommending Brawn.

Ernest Robinson came to work for the Port in 1965 and has been a captain since the latter part of 1980. He worked with the complainant both as a firefighter and lieutenant for a number of years. He recommended White and Evans, Donaldson and Winston. He did not recommend Brawn because he believed Brawn's attitude was that department officers were incompetent. He testified that he discussed that problem with Brawn in the fall of 1980 and informed Brawn that he would have to change his tendency to badmouth people making management decisions or it would hurt him in his promotion effort. Brawn recalled that discussion as occurring when he and Robinson were going to be acting officers on the same shift for some period of time, and as a discussion during which they reached agreement regarding the manner in which they would run the shift. Brawn did not perceive it as a discussion about an attitude problem.

Harold Noll began working for the department in 1961 and became a captain in late 1980. He has worked with the complainant several times during Brawn's employment. His written recommendations were Evans, Caucasian, and Donaldson, minority. He did not recommend the complainant because of his feeling that Brawn was "having some problems with his attitude" and was frustrated and bitter regarding the department.

Douglas Simmons has worked for the fire department since 1975 and has been a lieutenant since late 1979. He apparently did not work directly with Brawn prior to June, 1981. His recommendations for promotion were White and Donaldson. His testimony was that he recommended those candidates because they had a good "fire department-oriented" attitude and had the ability also. He did not recommend Brawn because he felt from his dealings with Brawn both within and outside the department that Brawn was negative and did not support department policies.

At the time of hearing, Darold Ball had been with the Port over 25 years and a captain for approximately eleven years. He worked with the complainant for a period of at least six months in 1979. Ball testified that he made his recommendations after reviewing candidate personnel files, participating in interviews of all candidates, and soliciting recommendations from all officers. He recommended Evans and Donaldson. He testified that he did not recommend Brawn because he had repeatedly made destructive comments regarding department administration, and repeatedly made derogatory, non-supportive comments directed at any officer above his rank.

Barrett testified that he considered all the information amassed as a result of the above process, considered affirmative action, and then promoted Evans and Donaldson. Barrett testified that in making his selection he placed greatest weight upon the recommendations of the officers. However, Barrett himself did not consider Brawn "promotable" at that time. He did not believe that Brawn could be effective, in that he had a lot of animosity, was openly critical of the administration, officers, and other firefighters. He could recall no incidents specifically, but did recall several occasions when Brawn characterized another fire department employee in profane terms as incompetent. Barrett's own choices for promotion were Evans and Donaldson. They were promoted effective November 17, 1980.

Crash Truck Incident

In December, 1980, a wheel fell off one of the department "crash" trucks while it was in operation. This incident naturally was of concern and a topic of informal discussion in the department. At one such informal discussion, Barrett indicated to a group of personnel that it took a great deal of time to replace such a truck, at which time Brawn stated that he had

information to the contrary. Brawn does not believe that he specifically pointed out to Barrett at that time that he was acting in an official union capacity. A meeting was scheduled between Brawn and Barrett to discuss the problem. The meeting was not held, and apparently another was not scheduled although Brawn recalled having reminded Barrett about it once or twice more. In January, 1981, Brawn became a trustee of the union and Russell Powell became president. On February 4, 1981, the union executive board sent a letter to the Port Executive Director, reviewing the problem with the crash trucks and stating that they had attempted without success to meet with Barrett on the subject. On February 21, 1981, Barrett and Ball met with the union executive board to discuss the truck problem. All parties agree that Barrett was angry at the outset of that meeting. Complainant's witnesses all recall Barrett's anger being directed at Brawn specifically. Barrett's testimony indicated he felt the union had "backdoored" him, that no one had come to him from the local and presented their problems, and that he had been actively seeking a solution to the problem.

1981 Promotions

Brawn testified that he became aware in March, 1981 that a lieutenant position was opening and approached Barrett to ascertain the reasons why he had not been promoted in November, 1980. Barrett was not certain whether the conversation was just before or just after the March promotions. Brawn's recollection of that conversation was that Barrett told him that they had to address affirmative action in the November, 1980 promotion process. Further, the main reason for his not being promoted was that he was anti-management; that he (Barrett) had tried not to let the fact that Brawn was union president or his personal feelings influence his decision, and that he (Barrett) had not seen an improvement in attitude since November. Brawn recalls stating he was not anti-management, rather anti-poor management, and that as union president he was obligated to speak up when "things are wrong". Barrett recalled the anti-poor management remarks, but recalled no discussion of union activities.

On March 2, 1981, Roderick Smith joined the department as fire chief. He was almost immediately confronted with the necessity of promoting someone to lieutenant. In preparing to make his selection from the same list used the previous November, Smith solicited written recommendations regarding the candidates from the deputy chief and captains.

DesJardin's recommendations to Smith were White, Brawn, and Zornes, in that order. His comments indicated his belief that White was loyal and knowledgeable. He noted that Brawn had the most overall ability, but the worst track record - anti-management, stir-the-pot, rebel. Brawn ranked second because DesJardin was uncertain whether he was pro or con

administration. DesJardin stated that he believed Brawn was not as cooperative as necessary in some areas during Kolb's administration, when DesJardin believed it necessary that people subjugate their own feelings in order to make the department continue to function. Brawn was viewed as "outspoken", with "strong ideas about department management and policies".

Ronald Harmon came to work for the department in 1971 and became a captain in the latter part of 1980. He worked with the complainant for a short time when they were both firefighters, while Harmon was a lieutenant, and for a period of a few months when Harmon was an acting captain and Brawn an acting lieutenant. Harmon was apparently on vacation at the time of the 1980 recommendation. When asked in 1981 for his views, Harmon recommended White, McCaslin, and Zornes. He noted White had high level skills, knowledge and dedication to the fire service. Harmon made special note regarding Brawn after listing his preferences stating that Brawn had technical knowledge and experience superior to any other candidate, but that he could not recommend him for promotion "as he is a strict individualist, he has consistently opposed authority and has a history of indiscretions and unprofessional acts". In testimony, Harmon stated that he based his recommendations on the premise that ability to work with people is as important as the technical aspects of firefighting, and that Brawn had problems in that area, and had "opposition to authority". In support of that, he cited the first acting lieutenant incident. His testimony was that the memo concerning that incident was originated because of the attitude rather than the cold fact, that protesting a policy is all right through proper channels, but "striking out" is a breach of policy. He also cited the sick slip incident on the basis that department policy had been intentionally violated. His opinion about the incident was that there are means of resolving situations, even if mishandled, without that kind of "demonstrative protest". The third incident cited was the national committees incident, in which he believed Brawn had bypassed department chain of command.

Robinson recommended White, Brawn, and Zornes, in that order. White was rated as quite knowledgeable in all fields of firefighting, an excellent first aider, with good rapport with platoon members. Brawn was noted as well qualified but with a tendency not to support management decisions and at times, very vocal in opposition. His rapport with platoon members was rated fair.

Noll's first choice was White, second Zornes, and third a tie between Winston, Montgomery, and Gray. Brawn was not mentioned at all in his written remarks. In testimony, he stated that he did not recommend Brawn for the same reasons he hadn't recommended him before. His only remarks about White were that he had the knowledge and background to do an adequate job as lieutenant.

Ball recommended White, Zornes, and Brawn, in that order. He made no remarks about the first two, but noted that he would only recommend Brawn for promotion if his attitude changed to a more supportive one. He noted that Brawn had the experience and qualifications but had on many occasions made destructive comments directed toward the administrative officers of the department.

Barrett's recommendations were White, McCaslin, and Zornes, in that order. He noted that White had a good attitude, was a quick learner, advocated change when necessary, and would support group consensus even if contrary to his point of view. He made no written remarks about Brawn, but testified that he did not recommend him for the same reasons he hadn't promoted him in November.

Prior to reading those recommendations, Chief Smith personally reviewed the candidates' personnel files. He held an interview with each candidate, using several prepared questions, and had notes of those interviews transcribed for him by Clement. After the interviews, he requested each candidate to rank his choices for promotion among the others on the promotional list. After Smith reviewed all of the information, he promoted White, effective March 30, 1981. His priorities in making the selection were the needs of the organization, experience and education of the individual. He testified that sixty-three percent of the department's calls were medical aid, that White had considerable expertise in that area, and at the time of selection he did not believe many others had the same training or background. He also considered White's overall education as superior.

Within approximately a week's time, Brawn requested a meeting with Smith to discuss the reasons he had not been promoted. Both he and Smith concur that Smith was not specific in his responses. Smith testified that he was not specific because he felt Brawn was in a position to be promoted.

In April, Brawn advised Smith of his intent to file the instant unfair labor practice charges. In June, a lieutenant vacancy occurred when Evans requested a reduction in rank to firefighter. Smith did not proceed through another selection process, since he believed the information from the March selection was sufficiently current. He determined that he would promote Brawn, whom he considered to be the next most qualified candidate of those remaining on the eligible list. He advised Barrett, airport management, and port counsel of his decision, and in a meeting with Barrett and Brawn informed Brawn that he was being promoted effective June 20, 1981.

POSITIONS OF THE PARTIES

The complainant claims that the union's position as bargaining representative, regardless of the fact that it had not been certified as such through PERC, is clear from the respondent's practices toward the union over many years. He asserts that the unit of captains, lieutenants and firefighters was an appropriate one under both PERC precedent and statutory requirements. The complainant claims that the elements for proving discrimination have been met; that management's reliance on Brawn's alleged attitude problem is pretextual, and that by placing reliance upon recommendations of officers hostile to the complainant's union activities, department management elevated internal union dissension to the level of management retaliation against the complainant. Complainant argues that even if the Port is credited with some lawful justification for denying the promotion, the "mixed motive" doctrine still renders its conduct unlawful. It dismisses respondent's recitation of incidents in support of its denial of promotion as either situations in which the complainant was criticized for conduct common to others, or in which the officer involved was at fault. It requests that the Port be ordered to cease and desist its discrimination, that the complainant be made whole for loss of wages, benefits, and seniority, and that his attorneys fees and costs be awarded.

Respondent argues that complainant's charge is based completely upon speculation. It argues that the evidence in the case cannot support either a finding of anti-union animus or a conclusion that the complainant would have been promoted but for his participation in protected activity. Respondent further claims that a history of incidents involving the complainant, including the 1974 evaluation, series of destructive comments, refusal to accept overtime, opposition to authority, vocal opposition to management decisions, etc., amply supports a finding that there were substantial business reasons for failing to promote Brawn. It requests that the complaint be dismissed.

PERTINENT STATUTORY PROVISIONS

RCW 41.56.010 Declaration of purpose. The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

* * *

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 their 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; ...

DISCUSSION

Bargaining Representative Status

The relationship between the union and employer in this matter presents an unusual circumstance. Although Local 1257 has "represented" Port firefighters for a number of years, it never sought certification from PERC or voluntary recognition from the employer. Throughout the course of the instant proceedings, respondent has implied, although it has not made specific argument, that Local 1257 lacks bargaining representative status, (and, impliedly, that complainant's activities on behalf of the local lack statutory protection) both because of the lack of formal recognition or certification and the absence of a collective bargaining agreement between the parties.

Local 1257 has a constitution and bylaws, elects officers, and holds regular meetings which its members are eligible to attend. It is uncontroverted that the local union has represented employees in grievances (to wit: Pederson, re: 1978 promotions) and in informal complaints (Robinson and Simmons, premium pay), while Brawn was union president. The record clearly establishes that Port management and the local have conferred, in person and in writing, regarding wage and benefit matters.

RCW 41.56 requires simply that a bargaining representative be a lawful organization which has as a primary purpose the representation of employees in their employment relations with employers. RCW 53.18 defines an "employee organization" as any lawful association, labor organization, union, federation, council, or brotherhood, having as its primary purpose the representation of employees on matters of employment relations. In contrast to RCW 41.56, RCW 53.18 also defines "employment relations", as including matters concerning wages, salaries, hours, vacation, sick leave, holiday

pay, and grievance procedures. Where organizations have a purpose of representation of employees in collective bargaining, the Commission has held that they are labor organizations, even where those purposes have not yet come to fruition. Southwest Washington Health District, Decision 1304 (PECB, 1982). Where an "advisory committee" existed in part for the purpose of "dealing with" an employer concerning grievances, labor disputes, and work conditions, and employees participated in the committee's activities, the NLRB found it immaterial that the committee's activities may not be equated with the usual concept of collective bargaining. That committee had dealt with the employer concerning grievances and work conditions. Alta Bates Hospital, 226 NLRB No. 65 (1976). Where employees both voted for "committee" members and served on committees, and the committee succeeded in improving medical insurance, was instrumental in getting a raise for employees, and attempted unsuccessfully to establish other changes in work conditions, the committee was found to be a labor organization. Northeastern University, 235 NLRB No. 122 (1978). Local 1257 is clearly a bargaining representative within the meaning of the statutes.

The derivative inference from respondent's position on Local 1257's bargaining representative status would be that Brawn's activities on behalf of the local do not fall in the realm of those protected by the statute. The Commission found an employee's action in individually protesting terms of employment when he was not representing or represented by a labor organization to be unprotected by the statute. City of Seattle, Decision 489 (PECB, 1978). RCW 41.56 contains no "concerted activities" clause, so the employee's actions, completely on his own, with nothing in existence resembling a bargaining unit, and no organization drive underway, were found to be so remote from the right to organize and designate representatives as to be unprotected. In the instant case, the union and its officers were well known. Communications regarding employment matters were well established between the parties. The Port has, by its actions, conferred de facto, if not formal, status on Local 1257. Brawn's activities as a union representative in grievance and complaint handling and pursuit of improved wages and terms and conditions of employment fall into the realm of "right of representation concerning employment relations", a right protected by the statutes.

Lieutenants and Captains as Employer Agents

The record herein fails to establish that lieutenants are, in general, bona fide supervisory employees. They possess few of the traditional indicia of supervisory authority, and function on shift more as leadworkers. The status of shift captains is more difficult, particularly in light of the meager record regarding their duties. Clearly, they evaluate other employees. The

extent to which they determine the method and flow of work assignments is unclear. Evidence in the record indicates that they do not have policy-making authority. They clearly do not possess the authority to hire and fire, and the deputy chief or chief apparently conduct independent investigations prior to acting upon recommended discipline or reward. Thus, based upon this record, the examiner concludes that the shift captains are not, in general, supervisors within the traditional labor relations definition.

However, non-supervisory employees can in fact function as agents of an employer. Where a leadman served as conduit between foreman and employees, and employees could reasonably view the leadman as an employer representative, the leadman was an employer agent. Borman's Inc., 254 NLRB No. 130 (1981). Where a dispatcher accurately expressed company policy and employees perceived that he spoke for the employer, he was an employer's agent even though he may not have been a supervisor within the meaning of the Act. Petroleum Transportation Co., 236 NLRB No. 28 (1978). Where an employee possessed none of the indicia of supervisory authority, but attended management meetings, relayed information from management to employees, and was referred to by management as a "supervisor", employees could reasonably believe he spoke on management's behalf. B-P Custom Building Products, Inc., 251 NLRB No. 179 (1980).

Respondent in this case has frequently referred to both lieutenants and captains as "supervisors". Captains, and lieutenants at least from time to time, attend special meetings of "management" personnel. Both relay information from management to firefighters. Employees could reasonably perceive them as agents of the employer; they clearly perceive themselves as such and are apparently so perceived by fire department management. But even beyond that in this case, is the employer's specific elevation of both lieutenants and captains to agents by its actions in the selection process, particularly in November 1980. There was a temporary vacancy at the top of the management structure. Barrett's testimony that he placed his primary reliance upon the recommendations of captains and lieutenants places them in a "hire-fire" position, and clearly elevates them to agents of the employer in that process.

The Alleged Discrimination

Where an employer responds to discrimination allegations with claim of business reasons for its actions, a shifting of burdens occurs during the course of litigation. See: City of Olympia, Decision 1208, 1208-A (PECB, 1982); Clallam County, Decision 1405, 1405-A (PECB, 1982); Wright Line, 251 NLRB No. 150 (1980); and NLRB v. Transportation Management Corp., _____ U.S. _____ (June 15, 1983). The complainant is required initially to make a prima facie showing sufficient to support an inference that protected

activity was "a motivating factor" in the employer's decision. Once that is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The evidence does not support an inference of discriminatory motivation with respect to promotions from the 1978 list. Brawn placed well down the list for reasons which are not challenged. The first three promotions were made strictly according to the scores. Nobody with a score lower than Brawn's was promoted. The list was approaching its stated expiration time when the 1980 recruitment was conducted. The Examiner thus refrains from delving into the details concerning events which were more than two years old at the time the complaint was filed, see: METRO, Decision 1356, 1356-A (PECB, 1982), or into related events as to which the complainant has not sustained his initial burden.

By contrast, the evidence clearly supports an inference of discriminatory motivation with respect to the 1980 promotions. By that time, Brawn had been serving in union office for approximately six years. His union activities, and the internal union conflicts concerning his stewardship of his union office were a matter of common knowledge throughout the department. He was clearly a vocal union president whose style and/or positions were apparently a subject of concern to virtually all officers of the fire department. All opposed his position as union president in supporting a grievant in the 1978 promotion process. One of the officers making recommendations for promotion in 1980 was passed over for promotion when that grievant was successful. Very clear from the record is the apparent inability of the employer's agents during the 1980 promotional process to distinguish between an individual's actions in the performance of job duties and actions of the same employee engaging in protected union activities. The record is replete with examples of this confusion. Brawn's union presidency is cited in evaluations of his performance as a firefighter. The union activities of another employee are cited in recommendations supporting promotion. Certain of respondent's witnesses exhibited substantial confusion in their efforts to explain the means by which union business, as distinguished from departmental business, is conducted. That confusion reached its height in one officer's citation of the "national committees" incident as evidence of Brawn's attitude problem. Respondent placed its greatest reliance on the recommendations of its officers in the November 1980 selections. To a man, the officers recommended individuals other than Brawn for promotion. Respondent claims those recommendations were based upon bona fide business reasons, but virtually all officers cited, in one form or another, Brawn's attitude as the reason for not recommending him. Officers who cited specific incidents often distinguished Brawn's attitude as the primary problem generating their concern.

The evaluation of Brawn made immediately preceding the 1980 promotional selection, as well as one two years earlier, showed him an above average employee. No formal disciplinary actions had been taken against him. He scored well above any other candidate on the objective examination, and was widely regarded as an intelligent and technically competent firefighter. Written comments of department management after his interview for the position indicate he made a good impression, in that forum.

None of the incidents cited by the officers stand up under scrutiny as supporting respondent's claims. The officer citing the paycheck incident has himself violated departmental policy in that area, as have numerous other employees of the department. The benefits meeting incident did not rise to the level of insubordination, and in any event apparently was not regarded as sufficiently serious to warrant disciplinary action. The captain involved in the sick slip incident, rather than Brawn, was viewed as causing the problem in that circumstance. The only specific incident for which Brawn was in any way cited was the acting lieutenant incident, and one of the candidates selected for promotion was himself cited for a similar incident in almost precisely the same terminology. Further, there is evidence in the record, including a memorandum authored by Chief Kolb, which indicates that turning down requests to assume "acting" assignments was at that time common enough to have become a departmental concern. The concerns expressed regarding Brawn's attitude range from his being "argumentative" to concern with his making derogatory remarks about people in decision-making capacities, or anyone above his rank, but the record establishes that criticism of fellow employees or superiors and making derogatory remarks are common in the department.

The complainant comes through clearly as an individual who does not hesitate to engage in remarks, and whose manner may indeed be more abrasive than others. It is likely that the complainant can be argumentative, and that his conduct or remarks on certain occasions have, with justification, grated upon department officers. Brawn was cited as not pulling together with the department under the "trying times" of Kolb's administration. Nine of the ten officers asked for recommendations in the promotional process used terminology such as "anti-management", "critical of officers and administration", "vocal in opposition to management" in describing Brawn's attitude problem. The record supports the conclusion that Brawn's reputation was gained while Brawn was union president and engaged in protected activity. When a management disapproved of a steward's attitude in handling grievances, and found her too "pushy" and "aggressive" and with a "bad attitude", her discharge, ostensibly for spending too little time on production work, was found unlawful. NLRB v. Max Factor and Co., 105 LRRM 2765 (Cir. 9, 1980). The court noted that although that case might be viewed as a "mixed motive" case, in which the standard being applied at that time

had been clearly met, it might also be viewed as a case in which an employee committed arguable improprieties in the course of protected activities. There, the employee spent what could be deemed excessive hours on union affairs, to the neglect of her work, and she admittedly used abusive and profane language in violation of plant rules. However, the court found substantial evidence supported the Board's conclusion that her conduct was not so flagrantly improper as to forfeit the protection of the Act. Max Factor, supra. Nothing in this record suggests that technical or production aspects of Brawn's work were in any way wanting, or that his comments or actions were so distinguishable from those of other firefighters as to forfeit protection of the statutes.

Respondent cites Berry Schools v. NLRB, 627 F.2d 692 (Cir. 5, 1980) in support of its position. That case is distinguishable, in that the complainant therein had engaged in only one instance of possible protected activity, which occurred after the preponderance of the incidents or problems which the employer cited as reasons for its failure to promote.

The employer is found guilty of an unfair labor practice for its failure to promote the complainant in November, 1980. Because any remedy would therefore run from the November time period to June, 1981, when Brawn was promoted, the examiner finds it unnecessary to reach the issue of the March, 1981 promotions.

FINDINGS OF FACT

1. The Port of Seattle is a port district within the meaning of RCW 53.18.080, and is a public employer within the meaning of RCW 41.56.030(1). It operates an aviation fire department at the Seattle-Tacoma International Airport.
2. Since 1955, Local 1257, International Association of Firefighters, has been an organization of firefighters, lieutenants, and captains at the aviation fire department. The union had not, at the time of hearing, petitioned for formal recognition as exclusive bargaining representative, nor had it entered into a written collective bargaining agreement with the Port; but it had provided information to and conferred with management regarding wages, hours, and terms and conditions of employment, and represented department personnel in grievances and complaints.
3. Gordon Brawn became a firefighter with the aviation fire department in 1971. From 1974 through September 1977, he was vice president of Local 1257. He became union president in October, 1977, and remained president

during 1978, 1979, and 1980. In 1980, Brawn successfully represented a grievant in a dispute on a promotion, engaged in active protest regarding department policy concerning "acting lieutenant" positions, and frequently engaged in criticisms about department policies and officers. Such protests and criticisms were common throughout the department. The department's captains and lieutenants opposed his stand on the promotion grievance, and on other actions and positions taken by Brawn in his capacity as union president.

4. Thomas Barrett became deputy chief of the aviation fire department in September, 1980. James Kolb was terminated as fire chief approximately two weeks later, and Barrett then became acting fire chief. Darold Ball then moved from captain to acting deputy chief.
5. In the latter part of 1980, Brawn participated in an examination to become eligible for promotion to lieutenant. All candidates passing the examination were considered eligible for promotion. Brawn received the highest score in that examination, made a favorable impression in a subsequent interview with Barrett and Ball, and was rated as an above average employee in a performance evaluation completed in October, 1980.
6. Lieutenants and captains were asked to recommend firefighters for promotion to lieutenant in October and November 1980. Management of the department placed its greatest reliance upon those recommendations. Virtually all officers cited Brawn's attitude as their reason for not recommending him. His criticism of officers, his refusal of an acting lieutenant position and his comments in a "sick slip" incident and while handing out a paycheck were cited as examples of his attitude problem.
7. Many department officers displayed confusion in efforts to distinguish union business from department business. Union activity was cited in performance evaluations and recommendations for promotion.
8. Brawn was denied promotion in November, 1980, and the employer instead promoted candidates having the third and seventh highest scores on the promotional examination. In making his decision on those promotions, the acting chief of the department accepted and relied upon adverse subjective recommendations made against Brawn based on his protected union activities, and discriminated against Brawn for his lawful pursuit of rights through Local 1257 of International Association of Fire Fighters.
9. Brawn was promoted to lieutenant effective June 20, 1981.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.
2. Local 1257, International Association of Firefighters, is a bargaining representative for firefighters, lieutenants, and captains of the Port of Seattle aviation fire department within the meaning of RCW 41.56.030.
3. Gordon Brawn's activities as a representative of Local 1257 were protected under Chapters 41.46 and 53.18 RCW.
4. Persons holding the rank of lieutenant or captain in the aviation fire department in October and November, 1980 were agents of the employer in the selection process for lieutenant which culminated in two promotions on November 17, 1980.
5. By failing to promote Gordon Brawn in November, 1980, in part because of his union activities, the Port of Seattle violated RCW 41.56.140(1).

ORDER

The Port of Seattle, its officers and agents, shall immediately:

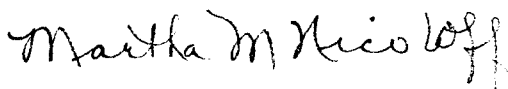
1. Cease and desist from:
 - a. Failing to promote or otherwise discriminating against any employee because of the exercise of the right to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations.
 - b. In any other manner interfering with, restraining, or coercing public employees in the exercise of their right to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations.
2. Take the following affirmative action which the examiner finds will effectuate the policies of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW:
 - a. Make whole employee Gordon Brawn by: making his promotion to lieutenant effective November 17, 1980; adjusting his seniority

date to reflect the adjusted date of promotion; reimbursing him for any loss in pay or benefits he may have suffered because of the failure to promote, by paying to him the sum of money equal to that which he would normally have earned or received as a lieutenant from November 17, 1980 to his date of promotion in June 1981, less wages he may have received as a firefighter or acting lieutenant during said period. Such remedy shall be subject to computation and payment of interest as provided in WAC 391-45-410.

- b. 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 A". Such notices shall, after being duly signed by an authorized representative of the Port of Seattle, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Port of Seattle to ensure that said notices are not removed, altered, defaced or covered by other material.
- c. Notify the Executive Director of the Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

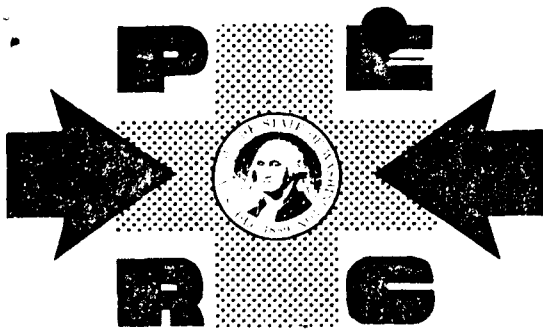
DATED at Olympia, Washington, this 15th day of July, 1983.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARTHA M. NICOLOFF, Examiner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

**NOTICE**

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against any employee by denial of promotion or in any other manner because of the exercise of the right to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations.

WE WILL NOT interfere with, restrain, or coerce employees in any other manner in the free exercise of the right to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations.

WE WILL make whole employee Gordon Brawn by: making his promotion to lieutenant effective November 17, 1980; adjusting his seniority date to reflect the amended date of promotion; reimbursing him for any loss in pay or benefits he may have suffered because of the failure to promote him on November 17, 1980.

DATED: _____

PORT OF SEATTLE

BY: _____
Authorized Representative

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

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.