STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| CITY OF SEATTLE,<br><br>Employer | |
| NIGEL KEIFFER,<br><br>Complainant,<br><br>vs.<br><br>INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17,<br><br>Respondent. | CASE 7292-U-88-1501<br><br>DECISION 3199-B - PECB<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

Nigel Keiffer, appeared pro se.

Richard E. Eadie, Attorney at Law, appeared on behalf of the respondent.

On March 3, 1988, Nigel Keiffer filed documents with the Public Employment Relations Commission, alleging that International Federation of Professional and Technical Engineers, Local 17, had committed unfair labor practices.[1] One of the allegations was that the union retaliated against the complainant after he ran for office as the employee representative on the Civil Service Commission of the City of Seattle, in competition with the business manager of Local 17.

On July 26, 1988, Keiffer filed a letter, with attachments, detailing additional claims of unfair labor practices. Those documents disclosed that Keiffer had been discharged from employment by the City of Seattle in June of 1988.

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[1] The documents were in the form of a letter, with attachments, which began: "In accordance with the National Labor Relations Act please consider this as a formal complaint of Unfair Labor Practices ...".

The documents filed on March 3, 1988 and July 26, 1988 were reviewed by the Executive Director for the purpose of making a preliminary ruling under WAC 391-45-110. A letter was directed to Keiffer on September 13, 1988, detailing numerous problems with the allegations then on file.

On September 30, 1988, Keiffer filed another letter, with extensive attachments. Among the attachments was documentation concerning a lawsuit, which gave further details concerning the campaign and election of the employee-representative on the Civil Service Commission of the City of Seattle.

The materials filed on September 30, 1988 were taken to be an amended complaint. The Executive Director issued a preliminary ruling on October 28, 1988, finding a cause of action limited to:

> Retaliation [by the union] against the complainant for seeking employment related office in competition with incumbent union officials.

The case was assigned to Examiner Rex L. Lacy of the Commission staff for further proceedings under Chapter 391-45 WAC.

Between October of 1988 and March of 1989, extensive correspondence and motions were exchanged between the parties and Keiffer filed numerous requests for admissions, stipulations and discovery. Examiner Lacy held a pre-hearing conference on March 10, 1989.

On March 20, 1989, Keiffer filed a "Motion to Amend Preliminary Ruling and Expand Scope of Hearing," with extensive attachments. Examiner Lacy thereupon referred the matter back to the Executive Director, who issued a "Preliminary Ruling and Order on Proposed Amended Complaint" on April 25, 1989. The Executive Director concluded that no cause of action had been stated against the City of Seattle, and that a cause of action would exist against the union for interference or discrimination (described collectively as

"retaliation") against the complainant for seeking an employment-related office in competition with a union official.[2]

Keiffer filed a petition for review with the Public Employment Relations Commission, seeking reversal of the Executive Director's "Preliminary Ruling and Order on Proposed Amended Complaint". A Commission decision issued on September 29, 1989 dismissed that petition for review as untimely filed, but it also indicated the Commission's affirmation of the Executive Director's order.[3]

The case was transferred to Examiner Frederick J. Rosenberry due to the unavailability of Examiner Lacy. A hearing was held on January 3, January 4, February 20, February 21, and February 22, 1990, before Examiner Rosenberry. The City of Seattle did not participate in the hearing. Keiffer and Local 17 submitted post-hearing briefs and reply briefs, the last of which was received by the Examiner on June 13, 1990.[4]

## BACKGROUND

In support of its municipal services, the City of Seattle occupies and manages various parcels of real estate. This property includes administration and public safety buildings, maintenance shops, the Seattle Civic Center and municipal parking facilities. The

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[2] City of Seattle, Decision 3199 (PECB, 1989).

[3] City of Seattle, Decision 3199-A (PECB, 1989).

[4] Attached to Keiffer's brief filed on June 12, 1990 were a number of documents which had not been admitted in evidence during the hearing in this matter. There was no motion to have the record reopened, and no explanation as to why those documents (many of which date from 1987 and 1988) could not have been identified and admitted as exhibits at the hearing. Those documents are not regarded as part of the evidentiary record in this case.

management and maintenance of such facilities is assigned to the employer's Department of Administrative Services.

The City of Seattle maintains a Civil Service Commission that provides a forum for the appeal of certain types of personnel actions.[5] At least one of the three members of the Civil Service Commission is chosen by city employees, by means of an election process administered by the City of Seattle Comptroller's Office.

International Federation of Professional and Technical Engineers, Local 17, represents approximately 5,000 members employed in the private and public sector throughout the state of Washington. It is governed by three tiers of internal administration: The Regional Executive Committee (REC), the Officers Committee, and the business manager. The membership of the union is divided into 20 geographic regions called chapters. Each chapter elects a proportionate number of delegates to the REC, which meets quarterly and is the union's highest level of governance. The REC is the administrative and policy-making body of the union, and is empowered to make final and binding decisions. Six officers, elected by the membership-at-large,[6] compose the Officers Committee, which is empowered to act on all matters referred to it and to represent the union between meetings of the REC. The day-to-day management of the union is vested in a business manager elected by vote of the REC for a term of three years. Business Manager Michael Waske has held that position for approximately 18 years.

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[5] Employees who have regular standing may appeal termination, suspension, demotion, violation of personnel ordinance or rules. Probationary employees may appeal a question of probationary status and the proper procedure for probationary discipline.

[6] The officer positions are those of president, vice president, secretary-treasurer, and three trustees.

Union business representatives, organizers and clerical assistants are employed by the REC under the direction and supervision of the business manager. The business representatives are responsible for the negotiation and enforcement of collective bargaining agreements. Their duties include processing grievances, representing members at grievance conferences with the management,[7] and presenting grievances in arbitration.

At all times pertinent to this proceeding, Local 17 was the exclusive bargaining representative of certain employees of the Department of Administrative Services of the City of Seattle. The collective bargaining relationship between the employer and Local 17 pre-dates all of the events involved in this case. It appears that the employer and union were parties to a collective bargaining agreement at all times pertinent to this proceeding.[8]

At the outset of these proceedings, Nigel Keiffer had been employed by the City of Seattle for approximately 15 years.[9] At all times relevant to this proceeding, Keiffer was employed by the Department of Administrative Services, as a Senior Real Property Agent. The position held by Keiffer was included in the bargaining unit represented by Local 17. Keiffer was active in union affairs while

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[7] This includes hearings held pursuant to Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). In that case, the Supreme Court of the United States held that public employees are entitled, as a matter of federal constitutional law, to a hearing for the purpose of reviewing the facts and circumstances of matters which will result in a suspension or discharge from public employment in which they have a property right.

[8] The past and current collective bargaining agreements between the City of Seattle and Local 17 were not placed in evidence in this proceeding. Other documents which were placed in evidence contain various excerpts from the collective bargaining agreements, as quoted below.

[9] Keiffer was discharged by the City of Seattle on June 28, 1988. The circumstances of his discharge are not at issue in this proceeding.

employed by the City of Seattle and, for a time, was a delegate to the Regional Executive Committee. He also served, after July 6, 1983, in the appointive position of shop steward.

## The Civil Service Commission Election

In addition to his role as business manager of Local 17, Michael Waske has held office as the employee representative on the Civil Service Commission of the City of Seattle.[10] Waske's term of office was due to expire on December 31, 1987. The filing period for candidates for the position was from October 5 to 9, 1987.

Seven individuals declared their candidacy for the Civil Service Commission position held by Waske. In the order of their filing, those candidates were: Allen D. Stowers, Nigel Keiffer, Michael Waske, Lurye M. Phillips, Pamela Harris, David L. Barber, and John Scannell.[11]

A secret ballot election for the Civil Service Commission position was conducted during the week of November 2, 1987. The election results were posted on November 16, 1987. Waske received the most votes, with 662 of the 2,286 ballots counted. The second highest tally was for Barber, who received 484 votes.[12] According to Civil Service Commission rules, a run-off election was held between Waske and Barber, the two candidates who acquired the most votes.

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[10] Waske commenced his service in that capacity when the Civil Service Commission was created by an amendment to the city charter approximately 11 years ago.

[11] Keiffer filed for the position on October 8, 1987, Waske, filed for the position on October 9, 1987.

[12] In descending order, the election results for the remaining candidates were: 296 votes for Stowers, 276 votes for Scannell, 266 votes for Keiffer, 163 votes for Harris, and 139 votes for Phillips.

The deadline for employees to cast their ballots in the run-off election was December 7, 1987.[13] There were 3,154 ballots counted in the run-off election. Waske received 1,623 votes, and was declared to be the winner.

Keiffer was displeased with the result of the initial election for the position on the Civil Service Commission, and he filed a formal protest with City Comptroller Norwood Brooks on December 7, 1987, seeking to have the election results overturned and a new election conducted. Keiffer maintained that some late-arriving ballots should have been counted; that some ballots were improperly rejected due to confusion regarding eligibility; that some voter eligibility could not be substantiated; that candidates Waske and Harris were allowed to file late personal statements; that many employees did not receive ballots; that voter anonymity was not adequately assured; that there were unfair candidate and voter eligibility rules; and that Waske unfairly used a union newsletter to distribute his campaign statement.

Brooks investigated Keiffer's allegations. Brooks' December 23, 1987, response declined to set aside the results of the election.

On December 30, 1987, Keiffer filed a complaint with the City of Seattle Ethics Board. He alleged that a city employee used a city telephone during normal work hours to campaign in support of Waske's candidacy for the Civil Service Commission position, in violation of city rules.[14]

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[13] Mail ballots were to be considered if received by December 11, 1987.

[14] The Ethics Board investigated the matter and issued a statement in April, 1988, finding an unintentional and "de minimis" violation. The employee involved agreed to refrain from engaging in such activity in the future, and the matter was apparently closed on that basis.

On January 6, 1988, Keiffer filed a lawsuit in the Superior Court for King County, seeking a writ of mandamus compelling the City of Seattle to set aside the results of the election for the position on the Civil Service Commission. Keiffer alleged that candidates Waske and Harris were allowed to file late personal statements; that ballots were provided to ineligible employees; that ballot boxes were not secure, readily noticeable and monitored; that some late-arriving ballots should have been counted; that some voter eligibility could not be substantiated; that several employees did not receive ballots; that voter anonymity was not adequately assured; that incumbent candidate Waske was not eligible to vote in the election, and his service as a member of the Civil Service Commission constituted an inherent conflict of interest; and that candidate Waske unfairly used a union newsletter to distribute his campaign statement.[15]

## Keiffer's Grievance Activities

The record indicates that Local 17 authorizes its shop stewards to file and process grievances on their own initiative, up to the point of, but not including, the invocation of arbitration.[16]

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[15] The record does not reflect the final disposition of the petition for a writ of mandamus. It is clear that Waske was seated, and has actively served, on the Civil Service Commission as the "employee representative".

[16] Testimony suggests that the collective bargaining agreement contains a four step grievance procedure. Step 1 is invoked by the aggrieved employee directly with the immediate supervisor; Step 2 formalizes submission of the grievance in writing with the department director; Step 3 requires submission of the grievance, in writing, to the employer's director of labor relations; and Step 4 is the invocation of arbitration within 30 days of the employer's response at Step 3. Steps 1, 2, and 3 call for a response from the employer within 10 days. If there is no response, the moving party can advance the grievance to the next step. Apparently, under undisclosed, limited circumstances, grievances can be initiated at Step 3.

As a shop steward, Keiffer filed and processed grievances on behalf of himself and other employees.[17] According to Keiffer, he felt competent to file and process his own grievances. Keiffer has also represented himself before the Civil Service Commission, the Equal Employment Opportunity Commission and before various courts-of-law.

Keiffer was aware that, where both contractual and civil service remedies are available, employees must make a prompt declaration as to whether they desire to process their grievance pursuant to the grievance procedure of the collective bargaining agreement or process an appeal with the Civil Service Commission.[18] According to Keiffer, a Civil Service appeal must be initiated within 20 days of the personnel action complained of, while a grievance initiated pursuant to the collective bargaining agreement must be filed within 10 days of the complained-of personnel action.

Work Out-of-class Grievances -

Keiffer was involved in a protracted dispute with his employer regarding out-of-class work. Dating back to at least 1984, Keiffer assisted in the processing of a number of grievances claiming that the employer had improperly permitted employees working out-of-class and/or supervisors to perform real property agent work. Keiffer appeared as a witness in at least one arbitration regarding

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[17] Waske removed Keiffer from the appointed position of shop steward on May 6, 1988. The circumstances of his removal are not before the Examiner.

[18] The collective bargaining agreement states:

> An employee covered by this Agreement must upon initiating objections relating to disciplinary action use either the grievance procedure contained herein or pertinent procedures regarding disciplinary appeals to the Civil Service Commission. Under no circumstances may an employee use both the contract grievance procedure and Civil Service Commission procedures relative to the same disciplinary action.

that subject. In that case, Business Representative Wayman Alston represented Real Property Agent Ed Lewis in an out-of-class grievance arbitration held on April 15 and 16, 1986.[19] The union prevailed in that grievance.

In a letter to Waske dated January 14, 1987, Keiffer stated his concern that there had been a long-standing problem of Department of Administrative Services management improperly allowing incorrect classifications of employees to do property agent work. Keiffer also alleged that the employer was mismanaging its properties. Keiffer stated that his interest was to preserve property agent jobs, and to guard against incompetent and improper utilization of city property. Keiffer maintained that the union had failed to pursue the problem aggressively, and had been ineffective. He requested that the union take the matter more seriously.

Waske and Alston met with Keiffer, Ed Lewis and Lorena Lewis on February 11, 1987. They discussed the issues that Keiffer had raised in his letter to Waske.

Keiffer wrote a letter on February 12, 1987, which summarized the substance of Waske's comments at their February 11, 1987 meeting. The Examiner infers from that letter that Waske had responded to all of the points raised by Keiffer, but that Keiffer continued to disagree with Waske's analysis of the situation. The record does not reflect any further steps taken on the subject after that time.

Incorrect Register Placement -

On January 24, 1986, Keiffer filed a grievance with Personnel Director Everett Rosmith, claiming that the employer had incor-

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[19] Wayman Alston was a member of the staff of the Public Employment Relations Commission in 1981 and 1982. His employment did not overlap that of the undersigned Examiner.

rectly ranked himself and other employees on a supervisory promotional register. The document indicates that a copy was provided to the union.

The employer's Director of Labor Relations, William Hauskins, responded by means of a letter to Keiffer under date of February 26, 1986. The letter indicates that a copy was directed to Waske. Hauskins explained the ranking process, and dismissed the matter as being resolved.

By a March 2, 1986 letter to Hauskins, with a copy to the union, Keiffer took exception to Hauskins' response, and requested additional information. The record does not reflect any further steps taken on that subject after that time.

Undisclosed Material in Personnel File I (February 14 1986) - The applicable collective bargaining agreement contains a provision concerning employee personnel files.[20]

On February 14, 1986, Keiffer sent a memorandum to John Franklin, the municipal facilities administrator at the Department of

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[20] The contract is quoted in another exhibit as stating:

> The employees covered by this Agreement may examine their personnel files in the Departmental Personnel Office in the presence of the Personnel Officer or a designated Supervisor. In matters of dispute regarding this section, no other personnel files will be recognized by the City or the Union except that supportive documents from other files may be used. Materials to be placed into an employee's personnel file relating to job performance or personal conduct or any other material that may have an adverse effect on the employee's employment shall be reasonable and accurate and brought to his or her attention with copies provided to the employee upon request. Employees who challenge material included in their personnel files are permitted to insert material relating to the challenge.

Administrative Services. Keiffer maintained that the employer had placed inaccurate memos in his personnel file, without his knowledge and in violation of the collective bargaining agreement. Keiffer requested that the material be removed. A copy of the memo was directed to the union.

The record does not reflect any further steps taken on that subject after that time.

Oral Reprimand I (May 30, 1986) -
Keiffer was reprimanded on May 30, 1986, for being disrespectful toward a management official. The employer identified the reprimand as Keiffer's first "verbal" [sic] warning.

The union submitted a written grievance on June 2, 1986, claiming that the reprimand was not reasonable or accurate.

That grievance was not resolved, and Arbitrator Janet Gaunt was selected to hear the dispute.[21] By letter dated January 11, 1987, Keiffer advised Waske that he was opposed to the selection of Arbitrator Gaunt, and he requested that he be represented by an attorney, rather than by a union business representative.

Waske responded to Keiffer by letter dated February 2, 1987, notifying him that the employer had declined to select another arbitrator. He further advised Keiffer that it was the union's policy to use its business representatives to present cases in arbitration.

Business Representative Alston presented the grievance at an arbitration hearing held on April 22, 1987. Arbitrator Gaunt

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[21] Arbitrator Gaunt was subsequently appointed as Chairperson of the Public Employment Relations Commission. The Examiner has had no communication with Chairperson Gaunt about the processing of this case.

issued an arbitration award on June 24, 1987, denying Keiffer's grievance.

Written Warning I (December 16, 1986) -
On December 16, 1986, Director of Building Operations Norma Miller, an official of the Department of Administrative Services, issued a written reprimand to Keiffer, citing him for "lack of follow-through" and "incomplete projects". This was designated by the employer as a "first written warning."

A grievance was submitted regarding the reprimand.[22] On March 27, 1987, the union invoked Step 3 of the grievance procedure on Keiffer's behalf. Director of Administrative Services George Pernsteiner formally notified the union, by letter dated July 2, 1987, that the employer was denying the grievance.

The record does not reflect any further steps taken on the subject after that time.

Undisclosed Material in Personnel File II (March 13, 1987) -
On March 13, 1987, Keiffer submitted a written grievance directly to Manager of Human Services Jean Mayes, an official of the Department of Administrative Services. Keiffer maintained there that a recent review of his personnel file had disclosed the presence of many documents placed in the file without notice to him. Keiffer sought removal of the offending documents. Keiffer's grievance indicates that a copy was provided to the union.

Their was an exchange of correspondence between Keiffer and Mayes, but Keiffer was apparently unable to resolve the matter to his satisfaction. By means of a memorandum directed to Waske or Alston

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[22] The record does not reflect whether the grievance was initiated by Keiffer or by the union.

under date of April 14, 1987, Keiffer asked the union to "initiate the necessary action to drive the point home".

The record does not reflect any further steps taken on the subject after that time until July 19, 1988, when Keiffer directed a letter to Waske.[23] Keiffer then alleged that the union had ignored the grievance, and requested that the union re-open and resolve it.

Written Warning II (June 22, 1987) -
On June 22, 1987, Keiffer was reprimanded for inadequate project tracking and completion dates. The reprimand was designated by the employer as a "second written warning".

On an undisclosed date, Keiffer submitted a grievance directly to his immediate supervisor, George Cooley. The record further reflects that Keiffer and Cooley discussed the matter on July 8, 1987. According to Cooley's memorandum regarding the matter dated July 9, 1987, he denied the grievance.

The record does not reflect any further steps taken on the subject after that time.

Vacation Denial (November 12, 1987) -
On an unspecified date, Keiffer made a request to take vacation on November 12 and 13, 1987. Employer officials notified Keiffer on November 10, 1987 that his request for vacation on November 12 was denied.

Keiffer submitted a written grievance, dated November 12, 1987, to Cooley and Miller. In his grievance, Keiffer maintained that the

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[23] Keiffer and the union frequently addressed multiple matters in the same letter. This was one such letter. Here, as elsewhere, the Examiner refers only to that portion of the document that is relevant to the separate evaluation of the grievance under discussion.

denial of the vacation leave was discriminatory and harassment. The document indicates that a copy was sent to the union.

The record does not reflect any further steps regarding the subject after that time.

Criticism of Professionalism (December 8, 1987) -
On December 8, 1987, Keiffer submitted a written grievance to Cooley, maintaining that Cooley had drafted and distributed a memo that unfairly criticized Keiffer's professionalism and defamed him. Keiffer requested a written apology. Keiffer's grievance indicates that he provided a copy to the union.

The record does not reflect any further steps taken on that subject after that time.

Management Displeasure Re: Work Projects (December 11, 1987) -
In a memorandum dated December 11, 1987, Cooley expressed displeasure with Keiffer's progress on a number of different projects.[24]

Keiffer responded to Cooley's December 11, 1987 memorandum with a memorandum of his own, dated December 14, 1987. Keiffer denied Cooley's allegations and defended his actions. Keiffer's document indicates that he provided a copy to the union.

The record does not reflect any further steps taken on the subject after that time.

Suspension I (January 14, 1988) -
On January 14, 1988, Director of Administrative Services George Pernsteiner formally reprimanded Keiffer for "failure to adequately perform the duties and responsibilities of a senior real property

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[24] Cooley's memorandum was not placed in evidence. Its substance is restated in Keiffer's December 14, 1987 response, as described below.

agent." That reprimand was initially discussed with Keiffer at a meeting held on January 11, 1988. Union representative Alston accompanied Keiffer to this meeting. The document was initially written as a two-day suspension, but was altered to a one-day suspension.

Keiffer responded directly to Pernsteiner in a memorandum dated January 19, 1988. Keiffer denied the charges, expressed unhappiness with the quality of representation that he had received from the union at the January 11 meeting, and advised Pernsteiner that he intended to appeal the reprimand.

There was an extensive exchange of correspondence between Keiffer and Waske regarding this incident. Keiffer requested that the union process the grievance to arbitration and provide an attorney to represent him in the matter. Waske advised Keiffer that the union did not believe that the employer's actions violated the collective bargaining agreement, so that Keiffer's grievance lacked sufficient merit to warrant arbitration. Waske advised Keiffer that he could appeal Waske's decision to the Officers' Committee, and he reminded Keiffer of his right to process an individual appeal before the Civil Service Commission.

The union's response was not acceptable to Keiffer, therefore he accepted Waske's invitation, and appeared before the Officers Committee on March 8, 1988. Keiffer stated that he felt that he was not receiving adequate representation from the union, and he requested that the Officers' Committee direct Waske to take the steps necessary to process the grievance to arbitration. Alternatively, Keiffer requested that the union provide him with the funds necessary to hire an attorney to represent him.

By letter dated April 25, 1988, the Officers Committee notified Keiffer that it was not persuaded he had been receiving inadequate representation. The committee concurred with Waske's decision that

Keiffer's grievance lacked sufficient merit to warrant further processing, and it denied Keiffer's request for funds to hire an attorney to represent him. Keiffer was offered an opportunity to appeal the decision of the Officers Committee to the REC at its next meeting.

Keiffer did not accept the offer to appear before the REC. The union's position remained unchanged.

Keiffer filed an appeal with the Civil Service Commission, seeking reversal of the reprimand and suspension. The disciplinary action was sustained by the Civil Service Commission hearing examiner.[25]

Oral Reprimand II (January 27, 1988) -
On January 27, 1988, Keiffer was reprimanded by Miller and Cooley for the manner in which he investigated a customer complaint regarding a city parking garage.

Keiffer responded on the same day, by way of a lengthy memorandum directed to both Miller and Cooley. Keiffer denied the allegations, defended his actions and countered that he was being harassed by the management. His memorandum indicates that he provided a copy to the union.

The record reflects that Keiffer discussed the substance of his January 27, 1988 memorandum with management officials on January 29, 1988.

At the outset of a meeting held with Franklin, Cooley and Miller on February 3, 1988, Keiffer inquired as to whether the meeting could result in his being disciplined. Keiffer was advised that discipline could result. Keiffer then requested union represen-

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[25] According to Keiffer, an appeal of that decision remains pending before the Superior Court for King County.

tation, and the meeting was rescheduled in order to accommodate his request.

Keiffer was accompanied by union representative Alston at a February 5, 1988 meeting held on this subject. Pernsteiner and Keiffer exchanged further correspondence regarding the matter in February, 1988, but it remained unresolved.

The record does not reflect any further steps taken on the subject after that time.

Suspension II (February 9, 1988) -
Keiffer was reprimanded by John Franklin on February 9, 1988, for allegedly refusing to "carry out a specific directive given by his immediate supervisors". Franklin recommended that Keiffer be suspended for 15 days.

By letter dated February 17, 1988, Keiffer notified the union that the employer had scheduled a Loudermill hearing regarding that reprimand for February 24, 1988. He sought the union's intervention, stating in relevant part:

> I look to the union to provide an aggressive defense against Mr. Franklin's irresponsible and contrived charges. I needn't dwell on Mr. Franklin's motives since you are well aware of this Department's hostile and retaliatory behavior toward me over the years.
>
> I request that the Union's attorney represent me at any such hearing and that adequate time be afforded for both of us to prepare for it. I ask this because my Business Representative Mr. Alston has failed to represent or defend my rights and interests. He comes to a meeting cold, no investigation. He says nothing in defense during these inquisitions then leaves without discussion. A potted plant would have done as well. Mr. Alston has ignored legitimate grievances and filed others in my section behind my back apparently for

> personal or political reasons. Such behavior does more damage than a failure to represent.
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> Such behavior may not be exclusive to Mr. Alston. Your failure to respond in the slightest to my complaints and protests conveys a strong message. Also, it has been brought to my attention that certain other business representatives have spoken derogatorilly (sic) of me during a recent Chapter meeting. I am very concerned about this.
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> Your duty to any member is to provide them competent, impartial representatives who will aggressively defend their rights.
>
> A timely response is of the essence.

At Keiffer's request, the union sought to have the Loudermill hearing postponed in order to provide more time to prepare for it. The employer denied the request.

Waske wrote a letter to Keiffer dated February 23, 1988, addressing several subjects.[26] Waske advised that he had assigned a different business representative to assist Keiffer at the Loudermill hearing; that the union would not provide an attorney to represent Keiffer; and that Keiffer could be represented by his personal attorney if he so desired, but that the union would not share in the cost and there could not be joint representation.[27] Waske asked that Keiffer promptly notify the union regarding how he desired to be represented at the hearing.

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[26] This grievance arose while there was ongoing discussion between Keiffer and the union regarding the processing of his January 14, 1988 reprimand grievance, and much of the considerable exchange of correspondence between Keiffer and the union referred to both grievances.

[27] Waske testified that there had been a ruling in a previous grievance arbitration with the City of Seattle, to the effect that there could not be joint representation: It must be either by the union representative or by the individual's private attorney, not both.

Initially, Keiffer was indecisive about whether he wanted the union or his personal attorney to assist him at the Loudermill hearing. Keiffer notified the union on the date of the hearing, February 24, 1988, that he had decided to have the union assist him. Keiffer was not accompanied by his personal attorney. The meeting was held, and the proposed 15-day suspension was reduced to 3 days.

By letter dated February 29, 1988, Keiffer again asked that the union provide an attorney to represent him on the grievance regarding the second suspension.

Waske acknowledged Keiffer's request by letter dated March 2, 1988. He advised Keiffer that the union had investigated the circumstances of the second suspension, and was of the opinion that Keiffer's conduct was inappropriate. Waske advised Keiffer that the reduced suspension imposed on Keiffer did not violate the collective bargaining agreement, that no further processing was warranted, and that the union would not provide either an attorney or business representative to assist Keiffer in challenging that three-day suspension before the Civil Service Commission or in arbitration.[28] Waske reminded Keiffer that he had the right to pursue his grievance as an individual before the Civil Service Commission, and that, if he desired to do so, his appeal must be filed within 20 days of February 26, 1988, the date that the three-day suspension was formalized. Waske denied that the union had ever failed to properly represent Keiffer, and reminded Keiffer that he could appeal to the union's Officers Committee to seek reversal of Waske's decision. Keiffer was notified that the Officers Committee was scheduled to meet on March 8, 1988.

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[28] Waske's March 2, 1988 letter addressed Keiffer's pending requests for legal assistance, his allegations that the union had failed to adequately represent him, and the two suspensions that had recently been imposed on him.

On March 2, 1988, Keiffer informed Waske that he desired to appear before the Officers Committee.

When he appeared before the Officers Committee on March 8, 1988,[29] Keiffer claimed that he had not been receiving adequate representation from the union. He requested that the business manager's decision to not process the two suspension grievances to arbitration be overturned, and that the union provide him the funds to hire an attorney to represent him regarding that grievance.

By letter to Keiffer dated March 11, 1988, Waske reconfirmed Keiffer's appeal rights before the Civil Service Commission and reiterated the union's position that it would neither process the three-day suspension to arbitration nor provide an attorney to represent him.

By means of a letter to Keiffer dated March 14, 1988, the union's president, Ralph Rodriguez, restated the issues that Keiffer had raised before the Officers Committee and reassured Keiffer that the committee was taking his appeal under advisement. Keiffer was advised that a decision would be rendered the following month.

The Officers Committee reported back to Keiffer by letter dated April 25, 1988. It advised Keiffer that it was not persuaded that he had been receiving inadequate representation, and that it concurred with Waske's decision to not process the grievance or provide funds to Keiffer to hire an attorney to represent him. Keiffer was offered the opportunity to appeal to the REC, which he declined to do.

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[29] Keiffer's appearance before the Officers Committee dealt with both of his suspensions.

Civil Service Appeal Re: Donna Hoggs -
On February 22, 1988, Keiffer submitted an appeal to the Civil Service Commission, alleging that bargaining unit employee Donna Hoggs had been appointed to a "real property agent" position in violation of the personnel rules. Keiffer maintained that Hoggs was not qualified to fill the position, that an employment register was improperly circumvented, and that the appointment took place with the collusion of the union.[30] Keiffer further alleged that Hoggs' had been granted preferential treatment with regard to vacation time, leave without pay, sick leave, and has been paid for hours not worked.[31]

The record does not reflect the outcome of that civil service appeal.

Written Warning V (April 8, 1988) -
George Pernsteiner issued a written reprimand to Keiffer on April 8, 1988, for submitting a memorandum to Mayes which allegedly contained "knowingly false and/or reckless statements and allegations". The reprimand was designated by the employer as a "fifth written warning".[32]

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[30] The union had processed a "work-out-of-class" grievance on behalf of Hoggs in 1987, claiming that she was performing the work of the "real property agent" class while classified as an administrative support assistant. The union requested that her salary be retroactively increased to the appropriate rate. Keiffer had disapproved of the union processing that grievance.

[31] Keiffer requested that Waske recuse himself as a civil service commissioner in that appeal on the basis that he had a conflict of interest.

[32] Keiffer's first package of documents was filed with the Commission prior to this incident and his discharge, as discussed below. These incidents were mentioned in the amendatory materials filed in July and September, 1988.

The union filed a grievance on Keiffer's behalf, contesting the April 8 written warning.[33]

The grievance contesting the April 8, 1988 written warning was eventually submitted to arbitration before Arbitrator Alan R. Krebs, who was selected by the employer and union from a panel provided by the American Arbitration Association.[34] An arbitration hearing was held on January 11, 12 and 13, 1989. Arbitrator Krebs issued his decision on March 27, 1989, denying the grievance.

By letter dated April 20, 1989, Keiffer notified the American Arbitration Association that he desired to have Arbitrator Krebs's decision vacated. Keiffer's letter indicates that a copy was provided to the union.

The union notified the American Arbitration Association, by letter dated April 28, 1989, that no action should be taken regarding Keiffer's letter, and that the union considered the award to be final and binding.

The record does not reflect any further steps taken on the subject after that time.

Discharge -

Cooley issued a written reprimand to Keiffer on June 14, 1988. He recommended that Keiffer's employment be terminated for failure to adequately perform his duties. A Loudermill hearing regarding the

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[33] The grievance was not offered in evidence in the hearing, but another exhibit referred to a grievance dated May 3, 1988. It is inferred that the May 3 grievance concerned this matter.

[34] Mr. Krebs was a member of the staff of the Public Employment Relations Commission from 1977 to 1983. His tenure overlapped that of the undersigned Examiner, if at all, by only a few days.

matter was initially scheduled for June 16, 1988, but was changed to June 24 by means and for reasons not disclosed in the record.

On June 17, 1988, union Business Representative Christopher Vick notified the employer, by letter, that he would be representing Keiffer.[35] Vick advised the employer of the union's position that the employer lacked "just cause" to discharge Keiffer, that Keiffer would not participate in a Loudermill hearing, and that the union would grieve and arbitrate the matter if the employer carried out the threatened discharge.

Because of the union's position, the employer canceled the Loudermill hearing. By a letter dated June 28, 1988, the employer formally notified Keiffer that he was discharged.

On June 30, 1988, the union submitted a formal grievance on Keiffer's behalf. To hasten the process, it requested that a hearing be scheduled at Step 3 or, alternatively, that the employer propose the name of an arbitrator to hear the grievance.

During a discussion of the situation on July 12, 1988, Keiffer told Vick that he might process the matter as an appeal before the Civil Service Commission, rather than by arbitration. Keiffer proposed that the union pay one-half of the cost of an attorney to represent him if he were to do so.

Vick consulted with Waske regarding the matter. In a letter dated July 13, 1988, Vick cautioned Keiffer that it would be difficult to litigate his case before the Civil Service Commission. Vick observed that Waske and one other member of the Civil Service Commission had recused themselves in past cases involving Keiffer, because of Keiffer's allegations that they were biased, and Vick

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[35] Vick testified that he became licensed to practice law in the State of Washington in May or June, 1988. He resigned from the union staff in December, 1988.

predicted that they would be required to recuse themselves in this case. Vick pointed out that such recusals would result in a lack of a quorum, so that the Civil Service Commission would not hear his appeal.[36] Citing that the union had negotiated the grievance arbitration procedure in the collective bargaining agreement and the union's policy of using its staff to process grievances through arbitration, Vick's letter also informed Keiffer that it was contrary to the union's policy to provide grievance representation at a trial in the Superior Court. Vick pointed out that members who choose to process appeals before the Civil Service Commission or a court do so as individuals. Vick advised Keiffer that the choice as to how to proceed was Keiffer's, but he reminded Keiffer that the collective bargaining agreement prohibited the simultaneous processing of a grievance through arbitration and an appeal before the Civil Service Commission.[37]

In a letter dated July 20, 1988, Vick advised the employer that the matter had become complicated due to the filing of the civil service appeal. Vick proposed that the time limit for the union to file its demand for arbitration be extended until 30 days after Keiffer gave written notice to the employer and union that he was withdrawing the civil service appeal. Alternatively, Vick proposed that the union would withdraw its grievance if Keiffer scheduled any preliminary hearings before the Civil Service Commission. Vick provided a copy of that letter to Keiffer.[38]

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[36] In that event, the appeal would have to be presented directly in the Superior Court for King County.

[37] Vick stated that he had become aware that Keiffer had filed an appeal of the discharge with the Civil Service Commission, and Vick indicated concern that such dual processing might conflict with Keiffer's rights under the collective bargaining agreement.

[38] In a separate letter dated July 20, 1988, Vick notified Waske and Keiffer that, after a review of the pending litigation, he perceived a conflict of interest under the professional responsibility rules applicable to attor-

The employer agreed to extend the time limits on the processing of a grievance concerning Keiffer's discharge.

By means of a letter to Keiffer dated July 27, 1988, Waske reiterated the points made by Vick. At one point in the letter, Waske stated that he understood Keiffer's appeal with the Civil Service Commission to be an election of remedies that relieved the union from any responsibility to represent Keiffer in arbitration, and asked for confirmation of Keiffer's intentions. At another point in the letter, however, Waske reflected on a conversation he had with Keiffer's wife on July 26, 1988, and of his impression that Keiffer had not finalized his decision about proceeding through arbitration or before the Civil Service Commission.[39] Waske reminded Keiffer that there was a time limit for invoking arbitration, and stated that Keiffer must give notice of how he wanted to proceed by not later than August 3, 1988.

In a letter dated August 2, 1988, Keiffer advised Waske that he felt that his ability to make a decision about the forum for processing his discharge grievance was hampered by the union's refusal to provide him with the services of an attorney, and by the prospect of a lack of a quorum at the Civil Service Commission. Keiffer advised Waske that he was reviewing his options with the assistance of legal counsel, and he requested an extension to August 19, 1988 to make his decision.

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neys, so that he could no longer represent either party in matters in litigation between the parties. Vick turned his files over to Waske, and agreed to review the status of the case with whomever the union secured to represent Keiffer's interest in the matter.

[39] Waske also advised Keiffer that the union paid for Keiffer's medical insurance for the month of July, 1988, out of an emergency fund and provided information to him regarding his health insurance.

On August 4, 1988, Waske responded to Keiffer by letter, granting the requested extension to August 19, 1988. Waske restated that Keiffer could not process his discharge through both arbitration and civil service. Waske restated that the filing of an appeal with the Civil Service Commission relieved the union of any responsibility to represent Keiffer in arbitration, and he notified Keiffer that he must withdraw his previously filed civil service appeal if he wanted the union to represent him in arbitration. Waske informed Keiffer that he must notify the union by not later than August 19, 1988, in the event that he decided to process his discharge grievance through arbitration.

On August 19, 1988, Keiffer notified Waske that, following discussions with his legal counsel, he chose to not have the union process his discharge grievance. Keiffer stated that he made his decision to proceed before the Civil Service Commission because the union had declined to provide an attorney to represent him.

The record does not reflect any further steps taken on the subject after that time.

Undisclosed Material in Personnel File II (July 16, 1988) - While reviewing his personnel file in June or July, 1988, Keiffer discovered that it contained several documents which had not been brought to his attention previously. Keiffer raised the matter with Mayes.[40]

On or about July 7, 1988, Mayes provided Keiffer with copies of the controversial material.

By letter dated July 19, 1988, Keiffer notified the union of his pending grievance on the personnel files, and he requested that the

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[40] Keiffer did not testify as to the precise date that he reviewed his personnel files or whether he raised that matter orally or in writing with Mayes.

union intervene on his behalf. Keiffer's request for union assistance was reiterated in a letter dated August 2, 1988.

On August 4, 1988, Waske notified Keiffer, by letter, that his grievance regarding material in his personnel file was related to his discharge grievance and should be consolidated with the discharge matter.

In a letter to Waske dated August 19, 1988, Keiffer stated that he disagreed with the union's analysis, and the he viewed the personnel file grievance as a separate issue from the discharge. He again requested that the union process it separately.

The exchange of correspondence between Keiffer and Waske on the personnel file matter continued into September, 1988. Neither party changed its position. The record does not reflect further steps taken on that subject after that time.

Claim for Regular, Vacation and Sick Pay -
On July 16, 1988, Keiffer sent a letter to Mayes, claiming that his final wage payment was short. He claimed he was entitled to 8 hours of regular pay for June 28, 1988, to 32 hours of sick leave pay for June 29 through July 4, 1988, and to 8 hours of holiday pay for his annual personal holiday which he had not yet taken. The letter indicates that a copy was sent to the union.

Mayes responded to Keiffer by letter dated July 16, 1988, notifying him that he would be paid for eight hours of regular pay. Mayes denied Keiffer's request for sick pay, noting that Keiffer had been discharged prior to the claimed absence. Mayes denied Keiffer's request for holiday pay on the basis that it was forfeited because it was not taken prior to the discharge.

In a letter to Waske dated August 2, 1988, Keiffer requested that the union intervene on his behalf and process a grievance claiming the sick leave and holiday pay.

The union responded to Keiffer by letter dated August 4, 1988, advising him that his claims for sick leave and holiday pay were an integral part of his discharge grievance, and should be dealt with in the same proceeding.

By letter dated August 19, 1988, Keiffer notified the union that he disagreed with its analysis, and that he viewed the pay claims as a separate issue. He again requested that the union process them separately.

The exchange of correspondence between Keiffer and the union on the pay claims continued into September, 1988. Neither party changed its position. The record does not reflect any further steps taken on the subject after that time.[41]

## POSITION OF THE PARTIES

Nigel Keiffer contends that International Federation of Professional and Technical Engineers, Local 17, has failed to fairly represent him. He alleges that the union has acted in retaliation against him because he ran for office in competition with Waske. Keiffer claims that he was a good employee, but that the workplace became hostile and the employer began to systematically reprimand

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[41] By letter dated September 23, 1988, Waske notified Keiffer's former employer that Keiffer had elected to process his dismissal through the Civil Service Commission. Waske further stated that it was the union's position that grievances regarding material in his personnel file and his claim for sick and holiday pay should be tried in conjunction with the discharge.

him after he complained about personnel system abuse. Although he had complained about the union's performance in the past, Keiffer alleges that the union had always supported him and processed his grievances. He alleges that such support disappeared when he declared his candidacy for the Civil Service Commission position held by Waske. Keiffer maintains that the union, without explanation, ceased investigating and processing his complaints, and declined to provide a competent attorney to represent him. Keiffer maintains that other members of the union were provided with professional legal representation when faced with circumstances similar to his. It is Keiffer's position that the union's decision not to process his grievances was politically motivated disparate treatment, so that the union engaged in unlawful interference and discriminated against him in violation of Chapter 41.56 RCW.[42]

The union points out that the cause of action before the Examiner is a narrow one, specifically, whether the union has refused or mishandled Keiffer's grievances concerning his wages, hours and working conditions in reprisal for his candidacy for the position on the Civil Service Commission. The union denies Keiffer's allegations. It maintains that there was a pattern of friction between Keiffer and his employer that predated his candidacy for the Civil Service Commission. According to the union, Keiffer became increasing embroiled in conflict with his supervisors, and that he persisted despite the union's efforts to warn him of the dangerous consequences of his course of conduct. According to the

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[42] Keiffer also argued that there was a pattern of union reprisals against others who opposed Waske for the seat on the Civil Service Commission. Three other former or current City of Seattle employees, Paul Hayes, Paul Soderberg and Patricia Hontz, testified of their belief that the union had retaliated against them because they supported Keiffer for the seat on the Civil Service Commission. There is no indication that any of those individuals has filed unfair labor practices against the union, and such allegations are not properly before the Examiner in this case.

union, the employer exercised progressive discipline in escalating the severity of the discipline imposed on Keiffer. Notwithstanding Keiffer's contentions, the union maintains that it did not pursue all of Keiffer's past grievances and that there were substantive reasons for not processing all of his recent grievances to arbitration. The union points out that Keiffer was offered, and exercised, the opportunity to appeal the decisions on his grievances to higher authorities within the union, and that, after consideration, the internal appellant body agreed that those grievances did not warrant processing to arbitration. The union views the copies of correspondence provided by Keiffer without a specific request for assistance as being informational only, pointing out that Keiffer filed and processed grievances as an individual. It notes that Keiffer had a history of requesting union intervention if and when he desired it. The union argues that Keiffer has failed to meet the requisite burden of proof to demonstrate by a preponderance of the admissible evidence that the union had illegal motives and retaliated against him because of his protected activity.

## DISCUSSION

### The Applicable Legal Standards

The duty of fair representation grows out of the status held by a union once it is certified or recognized as "exclusive bargaining representative" under the Public Employees' Collective Bargaining Act. RCW 41.56.080 states:

> **RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION.** The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be re-

> quired to represent, all the public employees within the unit without regard to membership in said bargaining representative: PROVIDED, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance. [emphasis supplied]

Chapter 41.56 RCW prohibits unions from interfering with or discriminating against a public employee who exercises his or her rights secured by the statute:

> **RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE BARGAINING REPRESENTATIVE.** No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.
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> . . .
>
> **RCW 41.56.150 UNFAIR LABOR PRACTICES FOR BARGAINING REPRESENTATIVE ENUMERATED.** It shall be an unfair labor practice for a bargaining representative:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; ...

The Public Employment Relations Commission is vested with the authority to ensure that certified exclusive bargaining representatives safeguard employee rights. Two different varieties of "fair representation" situations are identified in the cases; the

Commission asserts jurisdiction in one of those types, but declines to intervene in cases of the other type.

Fair Representation in Grievance Handling -

In a case arising under the "enforcement of contract" provisions found in Section 301 of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act), the Supreme Court of the United States described the union's duty of fair representation on grievances as follows:[43]

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. . . .

Vaca v. Sipes, 386 U.S. 171 (1976), at 177.

As detailed by the Executive Director in his preliminary ruling in this case, the Commission does not assert jurisdiction over "breach of contract" as an unfair labor practice, and so does not assert jurisdiction over "fair representation" claims arising exclusively out of the processing of contractual grievances. City of Seattle, Decision 3199 (PECB, 1989), citing Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982).

Discrimination and Alignment Against Interests -

The Commission has asserted jurisdiction in a variety of "duty of fair representation" situations where unions have been accused of discrimination against employees, or where unions have been accused

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[43] The Commission and the state's courts give consideration to federal precedent where it is consistent with Chapter 41.56 RCW. Nucleonics Alliance, Local 1-369 v. WPPSS, 101 Wn.2d 24 (1984); Public Employees v. Highline Community College, 31 Wn.App. 203 (Division II, 1982); Clallam County, Decision 1405-A (PECB, 1982), aff. 43 Wn.App. 589 (Division I, 1986).

of aligning themselves in interest against employees in the bargaining unit the union is certified to represent.

A union that discriminates against a bargaining unit employee because of that employee's exercise of protected activity would subject itself to a remedial order favoring the complainant employee and could jeopardize its right to continue to hold its status as exclusive bargaining representative of employees. City of Seattle, Decision 3199-A (PECB, 1989); Elma School District (Elma Teachers Organization), Decision 1349 (PECB, 1982).

Although a union does not have a statutory requirement to accomplish the goals of each member of a bargaining unit, City of Pasco, Decision 2327 (PECB, 1989), it does have an obligation to treat all bargaining unit members in an even-handed, non-discriminatory manner. City of Renton, Decision 1825 (PECB, 1984); Allen v. Seattle Police Officer's Guild, 32 Wn.App. 56 (Division I, 1982). Standards for the evaluation of equality of treatment were addressed by the Supreme Court of the United States as follows:

> Inevitable differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), at 338.

A union is obligated to expend its resources wisely and is not required to process frivolous grievances. A union is not required to submit grievances to arbitration at the sole discretion of the

individual involved, without regard to their merits. City of Redmond, Decision 886 (PECB, 1980).

The obligation of a union to fairly represent all bargaining unit members was recently addressed in Port of Seattle, Decision 3294-A, 3295-A (January 16, 1991), as follows:

> ... a union which tolerates or indirectly supports unlawful employer action against some bargaining unit employees, by refusing to process a grievance or otherwise, will have unlawfully aligned itself in interest against the employees injured by the employer's actions.

It is appropriate for a union to evaluate the merits of grievances that come before it to determine whether the circumstances warrant further action. Among the factors to be considered is whether the sanction imposed in a discipline case was commensurate with the seriousness of the offense.

A union commits an "interference violation" under RCW 41.56.150(1) if it engages in conduct which can reasonably be perceived by employees as a threat of reprisal or force or a promise of benefit intended to deter them from pursuit of lawful union activity. A finding of intent is not necessary to find such a violation. City of Mercer Island, Decision 1580 (PECB, 1983). In City of Seattle, Decision 2773 (PECB, 1987), standards for the evaluation of claims of unlawful interference were set forth as follows:

> The test for judgment on "interference" allegations has been determined by both the National Labor Relations Board and the Public Employment Relations Commission. A showing of intent or motivation is not required. Nor is it necessary to show that the employees concerned were actually interfered with or coerced.

An "interference" violation would be found where a union's activity is such that a bargaining unit member could reasonably believe that the union has intruded into his or her free exercise to pursue public office.

A discrimination violation occurs where it is demonstrated that a union has deprived a bargaining unit member of some ascertainable right, withholds benefits to which an employee would otherwise be entitled, takes adverse action against an employee in reprisal for the exercise of protected activity, has unfairly or unequally applied policy, or differs in its treatment of the members of a bargaining unit in reprisal for that member's pursuit of lawful activities.

Essential to finding a "discrimination" unfair labor practice is a showing that the union was aware of the protected activity, and that it intended to discriminate against the bargaining unit member. City of Seattle, Decision 3066 (PECB, 1989).

The complainant has the burden of proof in an unfair labor practice case. Bellingham Housing Authority, Decision 2335 (PECB, 1985). In this case, the burden is on Keiffer to set forth facts sufficient to support his allegation that the union declined to process certain of his grievances for "arbitrary" reasons, or that the union was "dishonest" and dealt with him in bad faith. Auburn School District, Decision 3406 (PECB, 1990).

The Commission and Washington courts have embraced the principles set forth by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083 (1980), which prescribed a causation test for balancing the rights of employees with those of the employer in cases in which discriminatory motivation is alleged. City of Olympia, Decision 1208-A (PECB, 1982); Clallam County v. PERC, 1405 Wn.App. 589, 599 (Division II, 1986). Wright Line and its progeny generally address dual motive cases, where there may be both

legitimate and prohibited reasons for an employer to impose discipline on an employee. The principles are the same, however, for evaluating the merits of a claim made by an employee against an exclusive bargaining representative. Port of Seattle, supra.

The burden is on Keiffer to make a prima facie showing sufficient to support an inference that his candidacy for the Civil Service Commission in competition with Waske was "a motivating factor" that influenced the union's decisions to not grant all of his requests regarding processing of his grievances. In the event that Keiffer is successful in making such a showing, the burden then shifts to the union to demonstrate that the same action would have taken place in the absence of Keiffer's protected conduct.

## Application of Legal Standards

Knowledge of Keiffer's Candidacy -
There is no indication that anyone associated with the union knew of Keiffer's intention to file for the position on the Civil Service Commission prior to his actual filing on October 8, 1987. Consequently, there can be no claim that any of the union's actions with regard to Keiffer that occurred before that date could have been discriminatorily motivated.[44]

According to Keiffer, he announced and promoted his campaign by distributing "campaign flyers" to city employees. It was his impression that the union knew that he was a candidate. Waske acknowledged that he reviewed a list of the candidates at some point in time, but he could not recall when he first learned of Keiffer's candidacy. Waske testified that his concerns about the election were about a competitor other than Keiffer, and that he was not aware of Keiffer's candidacy when he had notice of his own

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[44] Those events that pre-date Keiffer's actual filing have probative value to the extent that they disclose the union's past representation practice and policy.

candidacy published in the union's October, 1987, newsletter distributed to city employees.

Individual Grievances -
Normally, it is an unfair labor practice for an employer to deal directly with a union-represented employee on matters of wages, hours or other terms and conditions of employment. RCW 41.56.140-(4); City of Wenatchee, Decision 2216 (PECB, 1985); Seattle - King County Health Department, Decision 1458 (PECB, 1982).

Like Section 9(a) of the National Labor Relations Act, RCW 41.56.080 contains a "proviso" setting forth an exception to the principle of "exclusive" representation. Subject to certain notice requirements, employers are permitted to accept and hear grievances submitted by individual employees who desire to proceed without representation from the union. City of Seattle, Decision 3429 (PECB, 1990). Any adjustment reached by an employer with an employee processing a grievance as an individual must be consistent with the collective bargaining agreement, and individual employees are not authorized to invoke the grievance arbitration provisions of a collective bargaining agreement. METRO, Decision 2147 (PECB, 1985); Tacoma Public Library, Decision 1679-A, 1680-A (PECB, 1983); Pomeroy School District (Washington Education Association/Uniserv), Decision 1610 (EDUC, 1983); City of Seattle, Decision 1226 (PECB, 1981). Only the employer and exclusive bargaining representative are parties to the collective bargaining agreement, and only they have authority to invoke a procedure yielding a final and binding interpretation of the contract.

It is apparent that Keiffer routinely provided the union with copies of the grievance-related correspondence that he directed to his employer. Keiffer would have the Examiner conclude that the union was thereupon obligated to assume responsibility for processing those grievances on Keiffer's behalf, even without any specific request or direction from him. There is no evidence,

however, that Keiffer ever provided specific instruction to the union in that regard, or that he ever had such an understanding with the union.

The union acknowledged that it received copies of a great deal of correspondence between Keiffer and the employer, but it was unable to verify that it had received copies of all of the materials that Keiffer claims to have provided. Countering Keiffer's theory as to its obligations, the union stated that, as a matter of practice, it does not automatically submit grievances on behalf of its members without specific authorization to do so. The union maintains that it acted on Keiffer's grievances whenever he requested action, and that it kept Keiffer apprised of their status. Absent specific instructions from Keiffer, the union viewed its copies of grievance related correspondence to be informational only.

The Examiner is not persuaded that the union's conduct was irresponsible, or that it indicates a pattern of union reprisals against Keiffer. The evidence makes it apparent that Keiffer is capable of intelligently expressing his desires, both orally and in writing. Keiffer had served as a union steward, and was familiar with the terms of the collective bargaining agreement. He acknowledged that he felt competent to represent himself in grievances with his employer. His "paper trail" would certainly support such a conclusion, even without such an admission.

Keiffer had the option to process his grievances in at least three different forums: (1) As an individual pursuant to RCW 41.56.080; (2) as an appeal before the Civil Service Commission; or (3) as a grievance pursuant to the collective bargaining agreement. In such circumstances, a bargaining unit member has some obligation to express clearly what is desired from the exclusive bargaining representative. A union cannot be expected to assume that a member wants it to intervene in a matter merely because it was provided with a copy of grievance-related correspondence.

Alleged Change of Practice -

During the course of the hearing, Keiffer attempted to show some change of practice by the union.[45] Waske acknowledged that the union has represented its members in arbitration, before the Civil Service Commission, and in state and federal court.

Having examined all of the evidence, the Examiner concludes that Keiffer has failed to demonstrate any discernable change in the union's practices. In particular, the record does not support a conclusion that the union's practices in effect before Keiffer filed for the seat on the Civil Service Commission have been changed since that time. The Examiner thus rejects Keiffer's argument that the union discriminated against him and interfered with his rights, by failing to carry forward the processing of grievances that he had initiated as an individual.

The Union's Representation Policy and Practice -

It is clear that Keiffer was dissatisfied with the quality of representation that he had received from union business representatives. The "quality of representation" is not before the Examiner in this case, however.

Keiffer repeatedly requested that the union hire an attorney, or that the union subsidize his own hiring of an attorney, for pursuit of his various disputes in grievance arbitration and/or before the Civil Service Commission. The Examiner is unable to conclude from the evidence that the union's failure to provide Keiffer with what he considered to be a competent attorney supports Keiffer's claim that he is the victim of a discriminatorily-motivated lack of representation by the union.

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[45] Keiffer insisted, for this purpose, on submission of evidence concerning incidents occurring and grievances processed far beyond the six-month "statute of limitations" applicable to this case.

The record clearly supports the union's claim that its general policy has been to use its own staff to represent bargaining unit employees in their disputes with the employer. There is no indication whatever of a change of that policy at or since the time of Keiffer's candidacy for the Civil Service Commission.

According to Waske, the union policy to fairly represent all of its members is of long standing, and was in effect as an unwritten policy before he became business manager of the union. Waske testified that the representation policy was reduced to writing recently, and was formally adopted by the REC as a part of a union policy manual.[46] The union's representation policy now states:

> IT IS THE POLICY OF LOCAL 17 that:
>
> All factions and segments of the membership of Local 17 will be treated without hostility or discrimination;
>
> In exercising its discretion in asserting the rights of individual members, Local 17 will act in good faith and honesty;
>
> Decisions affecting individual members may be appealed by the member to the Business Manager and if not revolved to the satisfaction of the member at that level, may be further appealed to the Officers of Local 17, who shall issue a

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[46] Waske maintained that the written representation policy reflects the long-standing practice and unwritten policy. According to Waske, there were a number of union policies that had not been placed in writing until the officers and staff undertook to develop a policy manual that was distributed to the REC and adopted by that body. Waske indicated that a provision was added to the representation policy at the time it was promulgated in writing, in order to clarify the union's position regarding representation of members for industrial insurance and unemployment insurance claims. Waske provided conflicting testimony regarding when the adoption of the policy manual occurred. He initially testified that it was adopted by the REC in February, 1989, but later dated that action as occurring in February, 1988.

> decision that will be final and binding on all parties.
>
> IT IS THE POLICY OF LOCAL 17 that when Local 17 denies a member request for the filing of a grievance, the member will be advised of contract or civil service procedures by which the member can process the grievance without union representation; the member will be advised that time limits are applicable to filing grievances and should be carefully followed by the member. The member will also be advised that if the member does not agree with the denial of his or her request for the filing of a grievance, that decision can be appealed to the Business Manager and Officers.
>
> IT IS THE POLICY OF LOCAL 17 that members with issues concerning unemployment compensation and industrial insurance will not be represented by Business Representatives of Local 17 but will be referred to resources outside Local (sic) for such representation.

Even though the union's written representation policy was compiled after the events which gave rise to Keiffer's unfair labor practice charges, it has probative value to the extent that it articulates the previous unwritten policy described in testimony.

Waske testified that it is the union's practice to represent its members in arbitration, rather than other forums. He estimated that 99.9% of the cases presented to a neutral decisionmaker were submitted to arbitration, as opposed to courts or civil service bodies. According to Waske, it is standard procedure for the union's business representatives to review the merits of grievances with him prior to submitting them to arbitration, and to have those union staff members present cases in arbitration. The existence of that practice was supported by several witnesses called by Keiffer, and by peripheral evidence.[47]

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[47] Witnesses called by Keiffer to testify on other points gave indication of how grievances have been processed in the past. According to Paul Hayes, a former City of

Waske also maintained that it is the union's general rule to have its business representatives represent members in Loudermill hearings. That claim was not controverted.

Waske acknowledged that, on occasion, the union has hired an attorney to represent its members. Waske testified that a decision to use an attorney would be based on the recommendation of the business representative; a review of the circumstances of the case, the effects on the individual and the effects on the union; and on Waske's concurrence. Waske further testified that the final decisionmaking authority in this regard rests with the Officers Committee. Waske volunteered some examples of situations where the union has hired an attorney to represent an individual. The reasons behind some of those situations were not established by the evidence.[48] For others, there was a fairly clear explanation.[49]

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Seattle employee who had supported Keiffer's candidacy for the Civil Service Commission position, the union declined to hire an attorney to process a grievance regarding a reprimand given to Hayes in 1986. According to Dennis Blazina, an employee of the City of Seattle, Alston represented him in an arbitration hearing held in 1986 regarding an adverse downgrade grievance. Both incidents demonstrate that the practice of representation by union staff pre-dates Keiffer's candidacy.

Keiffer submitted a copy of a federal court complaint filed in 1983 by Seattle-King County Health Department employees JoAnna Nelson and Patricia McFarland, who alleged that Local 17 had breached its "duty of fair representation" by using a business representative, rather than an attorney, to represent them in arbitration under the collective bargaining agreement applicable to their employment.

[48] Waske testified that some of the incidents occurred some time ago, and he could not remember the details. A case involving an employee named Duggar was processed in federal court, but the nature of the allegations were not established. About 10 years ago, the union hired an attorney to represent an individual named Boiteen before the Civil Service Commission, in superior court and before the state court of appeals, but the nature of that case was not established.

Keiffer pointed to the union's hiring of an attorney in a dispute involving Gerawork Tilahun, an employee assigned in 1986 to a project at the City Light Department. In 1987, the union sponsored a lawsuit filed on behalf of Tilahun in federal court, alleging that the City of Seattle had discriminated against Tilahun because of her race and sex. Aside from offering a copy of the complaint, however, Keiffer offered no substantive evidence regarding the processing of that lawsuit, or the outcome of the matter. Waske's testimony, supported by Alston,[50] was that Tilahun's complaint was initially filed by Alston as a sex and race discrimination grievance pursuant to the terms of the collective bargaining agreement. Alston testified that an arbitration hearing had been scheduled for the grievance, but that the matter was then processed as a lawsuit, and was resolved by a court order. The record does not explain why the union moved the case from arbitration to the court.

The evidence reflects that at least some of the cases where Local 17 used an attorney involved alleged violations of public laws which must be adjudicated in the appropriate court of law. The union's non-attorney business representatives were prohibited from providing representation in such courts. In contrast, Keiffer's claims arise from rights provided by the terms of the collective bargaining agreement between his employer and union. That contract contains machinery for the resolution of grievances. Arbitration is the preferred method for resolving such grievance disputes. RCW 41.58.020(4). The Public Employment Relations Commission and the

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[49] A case involving an employee named Gillespie was processed in federal court, on allegations that the employee was being discriminated against because of her race. A grievance regarding the discharge of an employee named Taylor was turned over to an attorney after the business representative who had processed the grievance departed from the union's staff.

[50] The Examiner granted Keiffer's motion to sequester the Local 17 business representatives during testimony by Waske.

National Labor Relations Board both have a policy of deferral to arbitration as the preferred forum for disputes that arise under the terms of a collective bargaining agreement. Stevens County, Decision 2602 (PECB, 1987); Collyer Insulated Wire, 192 NLRB 837 (1971). Keiffer's demands for a union-provided attorney in arbitration, as well as his demands for union representation before the Civil Service Commission, are without merit. The union is not obligated to hire outside counsel to represent Keiffer. King County, Decision 3245-A (PECB, 1990).

The Examiner does not find that either the union's refusal to provide an attorney, or its insistence that its representation be in arbitration rather than before the Civil Service Commission, to have been a discriminatorily-motivated failure to adequately represent Keiffer. To the contrary, the Examiner finds that the union's positions in that regard were consistent with its past practice, and were reasonable under the circumstances.

Moreover, the evidence supports the union's claim that it has a responsive internal appeals procedure available to its members. There is no evidence of "animus" between Keiffer and the members of the Officers Committee or the REC. Nor is there any evidence of a bias that would taint their consideration of his appeal. Keiffer was offered and exercised the opportunity to appeal to the Officers Committee. He was offered the opportunity to appear before the REC, but apparently failed to do so in a timely manner.[51]

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[51] Keiffer appeared unannounced before the REC at its February 25, 1989 meeting. The Examiner infers that the time limits for processing his grievances with the City of Seattle had long-since expired by that time. Keiffer passed out material in support of his claim that he was receiving poor representation from the union, and he was allowed to address the delegates regarding his discharge, his pending unfair labor practice complaint and the Officers Committee rejection of his appeal for legal assistance. There is no indication that any earlier decisions regarding the processing of his grievances were reversed.

Alleged Discrimination on Basis of Sex or Race -
Keiffer argued at the hearing that the union processed Tilahun's case in court because of her race and sex, and he claimed that the union declined to provide him with the same degree of representation because he is a male caucasian. This allegation was raised before the Examiner even though it had been rejected by the Executive Director in the preliminary ruling process as failing to state a cause of action. City of Seattle, Decision 3199-A (PECB, 1989).[52] The allegation is not properly before the Examiner in this proceeding.

## Analysis of Keiffer's Grievances

Work Out-of-class Grievances -
The record reflects that Keiffer had been actively involved in the past in processing a number of work-out-of-class grievances. Keiffer's last formal contact with the union in this regard was the meeting held on February 11, 1987, between Waske, Alston, Ed Lewis, Lorena Lewis, and Keiffer. That meeting occurred approximately eight months prior to Keiffer's announcement that he was a

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[52] This is not to say that union discrimination on the basis of race or sex is outside of the purview of the Public Employment Relations Commission. Executive Director Schurke acted in this case on the basis of insufficient and untimely allegations in the complaint. Looking to precedent, a union's intentional discrimination against members of a racial minority in negotiations breaches the duty of fair representation. Steele v. Louisville and Nashville R.R., 323 US 192; 15 LRRM 708 (1944). The NLRB observes that the doctrine of fair representation and Title VII of the Civil Rights Act protect employees from invidious discrimination by their bargaining representative, and a contract will not serve as a bar to a representation election where the bargaining representative or the contract discriminates. Pioneer Bus Company, 140 NLRB 54 (1962). In those cases where the union has engaged in conduct inconsistent with the duty to fairly represent on the basis of sex, the NLRB has ordered the union to remedy the situation, including processing grievances without regard to sex. Glass Bottle Blowers, Local 106, 210 NLRB 943 (1964).

candidate for the Civil Service Commission. Although Keiffer disagreed with Waske's analysis of the situation, there is no indication that he requested that the union file or intervene in any work-out-of-class grievance subsequent to that meeting.

Keiffer has provided no evidence that would indicate that the union engaged in any activity that could be viewed as unlawful interference or discrimination.

Incorrect Register Placement (January 24, 1986) -
Keiffer raised this grievance approximately nine months prior to his declaration of candidacy for the Civil Service Commission. He submitted the grievance personally, by written memorandum submitted directly to the employer's personnel director. The employer's director of labor relations responded by a letter sent directly to Keiffer, and Keiffer requested further information by corresponding directly with the employer. Although Keiffer's correspondence indicates that a copy was provided to the union, there is no evidence that Keiffer ever asked the union to intervene in the matter on his behalf.

It is apparent that Keiffer processed this grievance as an individual. Keiffer has provided no evidence that would indicate that the union engaged in any activity that could be viewed as unlawful interference or discrimination.

Undisclosed Material in Personnel File (February 14, 1986) -
The processing history of this grievance is less than clear. It is apparent that Keiffer initiated the grievance as an individual. Aside from indicating that he provided the union with a copy of correspondence between him and his employer, there is no evidence that Keiffer ever asked the union to intervene on his behalf. Evaluation of this claim is confused by Keiffer's testimony that the union processed a grievance on his behalf regarding this very same issue in 1985. According to Keiffer that grievance was

"settled in lieu of arbitration". Keiffer's recollection was corroborated by Alston, who recalled that he processed a grievance on behalf of Keiffer regarding the subject, that it was slated to be arbitrated, and that there was a settlement and Keiffer's personnel file was purged of the objectionable material.[53]

The overlapping dates support an inference that this grievance was processed to arbitration and was settled beforehand. Even if this was a separate grievance regarding the same problem, the grievance was raised approximately eight months prior to Keiffer's declaration of his candidacy for Civil Service Commission. There is no evidence that Keiffer sought active pursuit of it by the union at the time that Keiffer declared his candidacy for the Civil Service Commission position or that the union's processing of the matter adversely changed as a result of his candidacy.

Verbal Reprimand (May 30, 1986) -
The union processed a grievance on this incident to arbitration. The arbitrator's award was issued on June 24, 1987, approximately three and one-half months prior to Keiffer's declaration of candidacy for the Civil Service Commission.

Keiffer has provided no evidence that would indicate that the union engaged in any activity that could be viewed as unlawful interference or discrimination.

Written Warning (December 16, 1986) -
There is meager evidence regarding the processing history of this grievance. While there is no information regarding the initiation of the grievance, it is apparent that the union invoked Step 3 of

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[53] There is conflicting testimony to the extent that Keiffer's file was purged in 1985, and yet in this grievance raised in early 1986, he complained of material that was placed in his personnel file in 1984. This apparent inconsistency was never explained.

the grievance procedure on Keiffer's behalf on March 27, 1987. The employer rejected the grievance by letter dated July 2, 1987. There is no evidence regarding further processing or activity regarding that grievance during that three month period between July 2, 1987 and Keiffer's filing for the seat on the Civil Service Commission on October 8, 1987. The period for invoking arbitration expired well before Keiffer declared his candidacy.

Although there is no doubt that the union was involved in the processing of that grievance it would appear that it was abandoned. Even if there was a realistic claim that the union was negligent in its handling of that grievance, the last evidence of activity regarding it occurred approximately nine months before Keiffer filed his unfair labor practice charge. Keiffer has provided no evidence that he was denied active prosecution of that grievance by the union after he declared his candidacy for the Civil Service Commission.

Undisclosed Material in Personnel File (March 13, 1987) - Keiffer maintained that documents were once again placed in his personnel file without notice to him, in violation of the collective bargaining agreement. As was the case in his 1986 grievance, Keiffer filed the grievance directly with the employer, and he merely provided a copy to the union. On April 14, 1987, Keiffer wrote a note to Waske or Alston on the bottom of the employer's response and forwarded it to the union. Keiffer's note stated:

> It was proper was it not to present this directly to Ms. Mayes as a grievance. She admits she was responsible. Shouldn't this be initiated at a 3rd step. Please initiate the necessary action to drive the point home.

It is thus evident that Keiffer sought union intervention in this grievance. It is also clear, however, that Keiffer's request for union intervention was initiated approximately four months prior to

his declaration of candidacy for the Civil Service Commission and approximately 10 months prior to when he filed his unfair labor practice complaint.

The record does not reflect any follow-up by the union, and the union offered no explanation for why it did not process this grievance. There is an inference that it may have been negligent in its handling of the matter. The time limits in the collective bargaining agreement for the initiation and processing of a grievance would have expired well before the six-month threshold for the timely filing of an unfair labor practice.

Keiffer re-raised that grievance 15 months later, along with a third grievance regarding the same issue, in a letter to the union dated July 19, 1988. In that letter, he alleged that the union had ignored the 1987 grievance, and requested, if possible, that it be re-raised. While the record does not reflect a union response to that inquiry, Keiffer has provided no evidence that a failure by the union to process this grievance was related to his candidacy for the Civil Service Commission. The personnel action and period for the timely processing of a grievance expired prior to Keiffer's declaration of candidacy for the Civil Service Commission.

Written Warning (June 22, 1987) -
The record contains little information regarding this grievance. Based on the context and substance of Cooley's memorandum to Keiffer dated July 9, 1987, the Examiner infers that Keiffer processed the grievance as an individual. Cooley's memorandum also discloses that he and Keiffer discussed the matter on July 8, 1987, that Cooley denied the grievance, and that he observed that the grievance would then move to Step 2. Keiffer raised that grievance approximately 10 weeks prior to his declaration of candidacy for the civil service position.

There is no evidence that Keiffer ever sought union intervention in this matter, or that the grievance remained active at the time Keiffer filed for the civil service position. Thus, Keiffer has provided no evidence that would indicate that the union engaged in any activity with regard to that grievance that could be viewed as unlawful interference or discrimination.

Vacation Denial (November 12, 1987) -
This grievance came up four days after Keiffer announced his candidacy for the Civil Service Commission. Keiffer had requested to take vacation on November 12 and 13, 1987.[54] Employer officials notified him on November 10, 1987 that his request for vacation on November 12 was denied. There is no indication that the employer had reneged on an earlier promise to allow him to take the time off. Keiffer submitted a personally written grievance directly to employer officials on November 12, 1987. The record does not reflect the outcome of that grievance.

Although Keiffer's memorandum to the management indicates that he provided a copy to the union, there is no evidence that he asked the union to intervene on his behalf. Keiffer has failed to demonstrate that the union engaged in any activity with regard to this grievance that could be viewed as unlawful interference or discrimination.

Management Criticism of Professionalism (December 8, 1987) -
Keiffer submitted a personal grievance directly to the employer on December 8, 1987. He maintained that the management unfairly criticized his professionalism. Keiffer did not characterize his memorandum to be a grievance alleging a violation of the collective bargaining agreement, but rather claimed that the employer's comments defamed him.

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[54] The record does not reflect when Keiffer requested the days off or why. It may have been earlier in the day on November 10, 1987.

While Keiffer's memorandum indicates that he provided a copy to the union, there is no evidence that Keiffer asked the union to intervene in the matter on his behalf. Although this matter came up after the civil service election, Keiffer has failed to demonstrate that the union engaged in any activity with regard to this grievance that could be viewed as unlawful interference or discrimination.

Management Criticism Regarding Work Projects (December 11, 1987) - Keiffer submitted a personal grievance memorandum directly to the employer on December 14, 1987. The record does not reflect a response by the employer or the outcome of that grievance.

There is no evidence that Keiffer asked the union to intervene in the matter on his behalf, or that the union declined to do so. Keiffer has failed to demonstrate that the union engaged in any activity with regard to this grievance that could be viewed as unlawful interference or discrimination.

Written Reprimand (January 14, 1988) -
Keiffer and the union produced a substantial record regarding this grievance. The record reflects that Business Representative Alston was involved in this dispute from the outset, and that he accompanied Keiffer to a Loudermill hearing on January 11, 1988. The record supports an inference that a proposed two-day suspension was reduced to a one-day suspension as a result of the union's intervention.

The reduced suspension apparently did not satisfy Keiffer, and he submitted a personal grievance directly to the employer, by letter dated January 19, 1988. Keiffer provided a copy to the union, and he also complained to Waske about the quality of representation that he had been receiving from the union. Keiffer once again requested that the union intervene in the matter, and asked that the union provide him an attorney to process an appeal on his

behalf with the Civil Service Commission. Waske advised Keiffer in writing that based on the union's investigation, it felt that Keiffer conducted himself inappropriately during the incident which precipitated the reprimand, and that the employer's action did not violate the collective bargaining agreement.[55] Waske advised Keiffer that the union did not believe that his grievance had sufficient merit to warrant submitting it to arbitration, and he declined to provide an attorney to represent Keiffer before the Civil Service Commission.

The union was responsive to Keiffer. It explained why it would not proceed with his grievance, it advised him that an alternative source of adjudication through the Civil Service Commission was available to him, and it offered him the opportunity to appeal to the Officers Committee to reverse Waske's decision. Although Keiffer disliked what the union told him, he has provided no evidence to indicate that the union's refusal to process the one-day suspension to arbitration or before the Civil Service Commission was an act of unlawful interference or discrimination.[56]

Management Criticism (January 27, 1988) -

Keiffer submitted a personal grievance memorandum directly to the employer on January 27, 1988. While his memorandum indicates that he provided a copy to the union, the record also reflects that Keiffer discussed the substance of his memorandum directly with members of the management on January 29, 1989. He did not seek the intervention of the union until February 5, 1988, when a meeting was held to further discuss the matter with Business Representative

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[55] The record contains evidence that the collective bargaining agreement provides that the employer may suspend, demote or discharge an employee for just cause.

[56] Keiffer processed his appeal before the Civil Service Commission as an individual. The hearing officer in that matter found that the discipline was warranted. Such a finding supports the union's previous evaluation that the merits of that grievance were weak.

Alston present. Apparently the matter was not resolved, and there was a further exchange of direct correspondence between Keiffer and the employer. As usual, Keiffer's memorandum indicates that he provided a copy to the union.

Although the record reflects that Keiffer was unhappy with the quality of representation that he received from Alston at the February 5, 1988 meeting, it does not reflect the outcome of the matter. Aside from Keiffer's exercise of his right to have a union representative present at an investigatory meeting with the management, there is no evidence that he ever requested that the union process a grievance to arbitration if necessary in the matter on his behalf. Keiffer has failed to demonstrate that the union engaged in any activity with regard to this grievance that could be viewed as unlawful interference or discrimination.

Written Reprimand (February 9, 1988) -
Keiffer and the union produced a substantial record regarding this grievance. The evidence reflects that the union clearly advised Keiffer about where it stood, and about his options. Although the record once again reflects that Keiffer was unhappy with the quality of representation that he received, the evidence indicates that the union cooperated with Keiffer when it sought to have his Loudermill hearing postponed, when it assigned a different business representative to assist Keiffer at the Loudermill hearing,[57] when it advised Keiffer of his internal union appeal rights, and when it advised Keiffer of his individual right to pursue an appeal before the Civil Service Commission. The record supports an inference

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[57] Waske assigned Business Representative Karen Place to represent Keiffer at that Loudermill hearing. Place testified that she cautioned Keiffer about progressive discipline, and warned him that it was possible that he could lose his job if the problems continued. She suggested that in the future he should carry out his work directives and then, if there was a problem, grieve the matter. That testimony was not rebutted.

that the union's involvement was at least partially instrumental in having a proposed 15-day suspension reduced to 3 days.

Consistent with its stated and actual past practice, the union declined to provide an attorney to represent Keiffer in the Loudermill hearing, in arbitration, or in a Civil Service Commission hearing. The union also advised Keiffer that it would not process a grievance on his behalf regarding the reprimand. The union explained that as a result of its investigation it did not believe that the disciplinary suspension violated the collective bargaining agreement.

Although Keiffer disagreed with the union's opinion, there is no evidence that the union's treatment of Keiffer in this grievance was indifferent, negligent, or careless. The union was responsive to Keiffer. Keiffer's February 17, 1988 letter to Waske reflects that it was his opinion that his employer had demonstrated hostile and retaliatory behavior towards him over the years. Such an observation by Keiffer is evidence of a long standing conflict at the workplace that pre-dates his candidacy for the civil service seat. Keiffer provided no evidence that he was treated any differently by the union in this case as a result of his candidacy for the Civil Service Commission than he would have had he not been a candidate. There is no evidence that the union's conduct toward Keiffer was unlawful interference or discriminatory.

Civil Service Appeal (February 22, 1988) -
It is apparent that Keiffer was opposed to the union processing of a work-out-of-class grievance on behalf of fellow employee Hoggs. The record reflects that the union filed that grievance on September 21, 1987, more than two weeks before Keiffer declared his candidacy for the Civil Service Commission. Consequently, there can be no argument that the union initiated that grievance in reprisal against Keiffer for his candidacy for the Civil Service Commission.

Written Warning (April 8, 1988) -
This grievance arose approximately three months after Keiffer filed his petition for a writ of mandamus in the Superior Court for King County seeking to have the results of the Civil Service Commission election overturned. The record reflects that the union processed this grievance to arbitration on Keiffer's behalf.

Although Keiffer was unhappy with the quality of representation and with the arbitration award, it is apparent that the union processed this grievance in accordance with its stated policies. Once again, Keiffer has provided no evidence that he was treated any differently by the union as a result of his candidacy for the Civil Service Commission. There is no evidence that the union's conduct toward Keiffer unlawfully interfered with his rights or discriminated against him.

Discharge (June 14, 1988) -
As was the case in the January 14, 1988 reprimand grievance, the union was involved from the outset. Keiffer originally proposed that the union pay for one-half of the cost of an attorney to represent him in a civil service appeal. He subsequently requested that the union provide him with a "competent" attorney, to represent him. His letter of August 19, 1988 to Waske stated in pertinent part:

> Following discussions with legal counsel I have elected not to have the Union adjudicate my unjust dismissal from the City of Seattle.
>
> I have selected this approach because the defense of my career and professional reputation demands no less than competent professional legal counsel. I see no other alternative since you and Local 17 have denied me the services of an attorney. Also, I feel that there is legitimate concern that the Union could not adequately and impartially advocate this issue given the past two years experience which I have documented before the Public Employees Relations Commission (sic).

Keiffer thus declined union representation in the processing of his discharge grievance. Keiffer's letter drafted approximately 10 and one-half months after he declared his candidacy for the Civil Service Commission indicates that his complaints about the quality of representation were not new, or related to his candidacy. Rather, it corroborates earlier evidence that Keiffer was dissatisfied with the union's performance long before he filed for the civil service seat.

The union has repeatedly demonstrated that its normal practice was to process grievances in arbitration with a business representative,[58] and that it unconditionally offered the same service to Keiffer on his discharge grievance. The union offered substantive representation to Keiffer, as evidenced by its serving as his spokesperson with the employer regarding the foregoing of a Loudermill hearing, by its prompt filing and processing of a grievance on Keiffer's behalf, and by convincing the employer to agree to an extension of grievance processing time limits so as to allow Keiffer additional time to decide how he desired to proceed. The union demonstrated compassion for Keiffer's situation by paying

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[58] The union offered substantive reasons for promoting arbitration as preferable to civil service appeals, when it pointed out that the dispute would likely end up in court, therefore requiring considerable time and expenses beyond the immediate resources of the union. In contrast to arbitration, which offered prompt resolution of the dispute, an appeal of a Civil Service Commission determination would require the services of an attorney, as the business representatives do not have standing to provide representation in a court of law. In support of this stated policy, Business Representative Christopher Vick testified, without rebuttal, that while employed by the union he tried only one case before the Civil Service Commission, that was because the grievant was a probationary employee who had no rights under the collective bargaining agreement, all other discipline matters were processed by way of arbitration.

his medical insurance premium for July, 1988.[59] It is noteworthy that Waske accommodated Keiffer's dislike for Alston by assigning a different business representative, Christopher Vick, to process his grievance.

Vick testified, without rebuttal, that he has been acquainted with Keiffer for several years, that he and Waske discussed and were concerned about the seriousness of the discipline problems facing Keiffer, and that he cautioned Keiffer after he was reprimanded to not give the employer reason to further discipline him.[60] Vick denied that the union ever discriminated against Keiffer because he had run for the seat on the Civil Service Commission.

Keiffer had provided no substantive evidence that he was treated any differently by the union in this case as a result of his candidacy for the Civil Service Commission than it would have had he not been a candidate. There is no evidence that the union's conduct toward Keiffer was unlawful interference or discriminatory.

Claim for Regular, Vacation and Sick Pay (July 16, 1988) - Keiffer initiated this grievance as an individual directly with the employer. Keiffer apparently asked the union to intervene only after the employer had declined to pay Keiffer for the sick leave that he claimed and for his annual personal holiday. The union responded to Keiffer's request two days later, advising him that it was of the opinion that sick leave and the personal holiday claims were sufficiently related to his discharge that they should be submitted for simultaneous resolution. Keiffer was opposed to this

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59 The Examiner infers that Keiffer's medical insurance was paid for by his employer, and that it would have lapsed unless a payment was made for the month of July, 1988.

60 Although Vick did not identify the specific reprimand, he identified it in context with Keiffer's discharge. This provides a strong inference that Vick's warning was directed to Keiffer in May, 1988.

approach, and insisted that the claim be processed separately. There was a considerable exchange of correspondence regarding the matter between Keiffer and the union. The union continued to maintain that Keiffer's claim for the sick leave pay and holiday pay should be argued in conjunction with his dismissal appeal.

The union's position on this issue was not unreasonable. There is a direct correlation between Keiffer's right to paid leave after the nominal date of his discharge and his status as an employee. The same can be said of his right to the personal holiday. It is fair to assume that Keiffer's discharge grievance requested that he be reinstated to his former position and that he be made whole for all loss of income and other benefits. A make whole order would likely include appropriate allowances for sick leave and personal holiday pay. Considerable time and expense is invested in processing a separate claim through arbitration, and it is prudent for parties to consolidate related grievances for a single hearing whenever practical. The union has demonstrated that it was willing to expend its resources to raise these issues on Keiffer's behalf, and it is noteworthy that the union was processing Keiffer's reprimand grievance to arbitration at the same time that this matter came up. At the time that the union advised Keiffer of how it would process his claim, it was still encouraging Keiffer to allow it to represent him in arbitration, he had not notified that union that he was going to proceed with an appeal to the Civil Service Commission. Keiffer has provided no substantive evidence that he was treated any differently by the union in this case as a result of his candidacy for the Civil Service Commission than it would have had he not been a candidate.

Undisclosed Material in Personnel File (July 19, 1988) - Keiffer initiated this grievance as an individual, submitting it directly to the employer. Although the record does not reflect the exact date, it must have been in either June or early July, 1988. There is no doubt that Keiffer asked the union to intervene in this

matter on his behalf. The union responded on this matter at the same time that it responded to Keiffer's request regarding his claim for sick leave and his personal holiday. As with the sick leave and holiday pay claims, the union advised Keiffer that it was of the opinion that the grievance was sufficiently related to his discharge that it should be included for simultaneous resolution. Keiffer was opposed to this approach and insisted that the grievance be processed separately.

The circumstances of this claim are the same as those for the sick leave and holiday pay claim. Again the union's position that the issue should be consolidated with the discharge grievance was not unrealistic.[61] Moreover, at the time that this claim came up, the union was still encouraging Keiffer to allow it to represent him in arbitration. Keiffer had not yet notified the union that he was proceeding with an appeal to the Civil Service Commission. There is no reason to doubt that the union would have included that issue in arbitration. Keiffer has provided no substantive evidence that he was treated any differently by the union in this case as a result of his candidacy for the Civil Service Commission.

Application of the Wright Line Analysis

The Examiner concludes that all counts of the complaint must be dismissed. Keiffer has failed to sustain his initial burden of proof under the Wright Line test. City of Bonney Lake, Decision 1962-A (PECB, 1985); Douglas County, Decision 1220 (PECB, 1981).

Accepting that reasonable minds could differ, and that there may be some who would shift the burden of proof to the union in this case, the Examiner nevertheless concludes that the complaint would have

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[61] In fact, this issue could well be even more closely related to the discharge should the employer have attempted to rely in arbitration on material improperly included in Keiffer's personnel file.

to be dismissed. In those instances that occurred within six months prior to Keiffer's filing of his unfair labor practice complaint, the union has demonstrated that it responded in a direct and forthright manner, and that it offered or denied representation consistent with its established practices, whenever Keiffer sought the union's intervention in processing his grievances.

## FINDINGS OF FACT

1. The City of Seattle, a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(2), is a municipality in King County, Washington. The City of Seattle maintains a Civil Service Commission that provides a forum for the appeal of certain types of personnel actions. At least one of the three members of the Civil Service Commission is elected by city employees by means of an election process administered by the City of Seattle Comptroller's Office.

2. Nigel Keiffer had been employed by the City of Seattle for approximately 15 years prior to the outset of these proceedings. At all times relevant to this proceeding, Keiffer was employed by the Department of Administrative Services as a real property agent. Keiffer was discharged on June 28, 1988.

3. International Federation of Professional and Technical Engineers, Local 17, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of City of Seattle employees in a bargaining unit which includes real property agents employed in the Department of Administrative Services. Local 17 is governed by three tiers of internal administration. The Regional Executive Committee (REC) is the union's highest level of governance, and is empowered to make final and binding decisions concerning administrative and policy matters. Six

officers, elected by the membership-at-large, compose an Officers Committee which is empowered to act on all matters referred to it and to represent the union between meetings of the REC. The day-to-day management of the union is vested in a business manager elected by vote of the REC for a term of three years. Business Manager Michael Waske has held that position for approximately 18 years. Union business representatives, organizers and clerical assistants are employed by the REC under the direction and supervision of the business manager.

4. It appears that Local 17 and the City of Seattle were parties to a collective bargaining agreement at all times relevant to this proceeding, and that the grievance procedure of that contract provided for an election of remedies such that an employee could process a dispute before the Civil Service Commission or under the contract, but not both. Said contract permits employees to pursue grievances individually, as specified in RCW 41.56.080.

5. The union has had a practice of preferring the use of the grievance and arbitration procedure over use of other dispute resolution procedures, and of using its own staff to represent bargaining unit members in the grievance procedure, in arbitration proceedings under the contract and in due process hearings conducted pursuant to federal court precedent. Decisions concerning processing of grievances to arbitration are made by the business manager on recommendation of the business representative, and are subject to appeal to the Officers Committee and the REC.

6. On various occasions, Keiffer had indicated dissatisfaction with the quality of representation provided by Local 17 and its staff. Keiffer was a union shop steward for a period of time, and he was familiar with the terms of the collective

bargaining agreement. Keiffer initiated a number of grievances on his own behalf. On occasions when Keiffer initiated grievances on his own behalf, he often supplied a copy of the correspondence to the union. On some, but not all, occasions when Keiffer initiated grievances on his own behalf, he made some specific request of the union for assistance. The union did not automatically take steps to intercede on the basis of copies of correspondence between Keiffer and the employer, unless specifically requested to do so.

7. In addition to his role as business manager of Local 17, Michael Waske has held office as the employee representative on the Civil Service Commission of the City of Seattle for approximately 11 years. Waske's term of office was due to expire on December 31, 1987.

8. The filing period for candidates for the position during the next term of office was from October 5 to 9, 1987. Seven individuals, including Nigel Keiffer and Michael Waske, declared their candidacy and filed for the Civil Service Commission position held by Waske. Keiffer filed for the position on October 8, 1987. Waske filed for the position on October 9, 1987.

9. A secret ballot election for the Civil Service Commission position was conducted during the week of November 2, 1987. The election results were not conclusive. A run-off election was conducted in early December, 1987, between Waske and David Barber, the two candidates who acquired the most votes. Waske was declared to be the winner.

10. Keiffer was displeased with the result of the election for the position on the Civil Service Commission, and he filed a formal protest with the city comptroller on December 7, 1987, seeking to have the election results overturned and a new

election conducted. Keiffer's allegations were investigated, and a response was provided on December 23, 1987 which declined to set aside the results of the election.

11. By a petition dated January 6, 1988, filed in the Superior Court for King County, Keiffer sought a writ of mandamus compelling the City of Seattle to set aside the results of the election for the position on the Civil Service Commission. Keiffer alleged that there were a number of irregularities. The record does not reflect the outcome of that court action.

12. Keiffer was reprimanded by the employer on December 11, 1987, regarding a number of projects. By memorandum dated December 14, 1987, Keiffer submitted a grievance directly to his employer, denying the allegations and defending his actions. There is no evidence that Keiffer asked the union to intervene in that matter, or that the union's failure to do so without invitation was a deviation from past practice.

13. Keiffer was given a two-day suspension by the employer on January 14, 1988, regarding inadequate performance of his duties. A due process hearing conducted by the employer with a union business representative present resulted in reduction of the two-day suspension to a one-day suspension. By memorandum dated January 19, 1988, Keiffer submitted a grievance directly to his employer. Keiffer requested that the union provide an attorney to process that grievance to arbitration or as a civil service appeal. The union declined to process the grievance, based on a conclusion that the grievance was without merit. There is no evidence that the union's refusal to provide an attorney or its refusal to process that grievance were a deviation from past practice.

14. Keiffer was reprimanded by the employer on January 27, 1988, regarding the manner in which he had investigated a customer

complaint. On the same day, Keiffer submitted a grievance directly to his employer on that matter. There is no evidence that Keiffer asked the union to intervene in that matter, or that the union's failure to do so without invitation was a deviation from past practice.

15. Keiffer was given a 15-day suspension by the employer on February 9, 1988. A due process hearing conducted by the employer with a union business representative present resulted in reduction of the 15-day suspension to a 3-day suspension. By letter dated February 17, 1988, Keiffer requested that the union provide an attorney to represent him regarding that reprimand and requested that the union process that grievance to arbitration or as an appeal before the Civil Service Commission. The union declined to process the grievance, based on a conclusion that the grievance was without merit. There is no evidence that the union's refusal to provide an attorney or its refusal to process that grievance were a deviation from past practice.

16. On February 22, 1988, Keiffer submitted an appeal to the Civil Service Commission, alleging that bargaining unit employee Donna Hoggs had been improperly appointed by the Department of Administrative Services to the position of real property agent, in violation of the personnel rules. Said appointment had resulted from a settlement reached between the employer and Local 17 on a grievance concerning the employee working out-of-class. Keiffer had been active in past grievances concerning employees performing work out-of-class. There is no evidence that the union's processing of that grievance was a deviation from past practice or that the union therein aligned itself in interest against Keiffer.

17. Keiffer was reprimanded by the employer on April 8, 1988, for allegedly making a false and reckless statement about the

management. On May 3, 1988, the union submitted a grievance on Keiffer's behalf regarding that reprimand. The union processed that grievance on Keiffer's behalf through arbitration. The arbitrator denied the grievance.

18. Keiffer was reprimanded by the employer on June 14, 1988, and was subsequently discharged, for failure to adequately perform his duties. Keiffer requested that the union provide an attorney to represent him in that matter. The union declined to do so, instead offering the services of a business representative to present that grievance in arbitration. The union arranged extensions of the time limits for Keiffer to file a grievance on the matter, and it advised Keiffer of his rights concerning the election of remedies available to him. Keiffer filed a civil service appeal, and eventually declined the union's proposal to process the matter to arbitration under the collective bargaining agreement. There is no evidence that the union's refusal to provide an attorney or its actions and advice concerning that grievance were a deviation from past practice.

19. On July 16, 1988, Keiffer submitted a grievance directly to his employer, claiming that he had not been properly paid for sick leave and holiday pay for dates after the effective date of his discharge. Keiffer subsequently requested that the union intervene in that matter and process it as a grievance. The union indicated a willingness to consolidate the issues with a grievance protesting Keiffer's discharge. Keiffer insisted that the leave issues should be processed separately, and they were not pursued by the union after Keiffer advised the union that he was proceeding with a civil service appeal on his discharge. There is no evidence that the union's position concerning the processing of that grievance was arbitrary, or that the union therein aligned itself in interest against Keiffer.

20. In June or July, 1988, Keiffer submitted a grievance directly to his employer, claiming that the employer had placed inaccurate memos in his personnel file without his knowledge. Keiffer subsequently requested that the union intervene in that matter and process it as a grievance. The union indicated a willingness to consolidate the issue with a grievance protesting Keiffer's discharge. Keiffer insisted that the personnel file issue should be processed separately, and it was not pursued by the union after Keiffer advised the union that he was proceeding with a civil service appeal on his discharge. There is no evidence that the union's position concerning the processing of that grievance was arbitrary, or that the union therein aligned itself in interest against Keiffer.

## CONCLUSIONS OF LAW

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

2. Nigel Keiffer has failed to sustain the burden of proof necessary to support an inference that International Federation of Professional and Technical Engineers, Local 17, has discriminated against him by its actions or lack of actions regarding those grievances described in paragraphs 12 through 20 of the foregoing findings of fact, because of his candidacy for an employment-related office in competition with Michael Waske.

3. Nigel Keiffer has failed to sustain the burden of proof necessary to establish that International Federation of Professional and Technical Engineers, Local 17, has interfered with, restrained, or coerced Keiffer in the exercise of his rights as detailed in Chapter 41.56 RCW.

4. International Federation of Professional and Technical Engineers, Local 17, has established in any event that its responses to Keiffer's grievances were an appropriate exercise of the prerogatives of an "exclusive bargaining representative", consistent with its past practices, so that there was no violation of RCW 41.56.150.

## ORDER

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

DATED at Olympia, Washington, this 19th day of March, 1991.

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.