

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LARRY DALY,	)	
	)	
Complainant,	)	CASE 7525-U-88-1575
	)	
vs.	)	DECISION 3318 - PECB
	)	
KING COUNTY,	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	
	)	

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Dustin N. Frederick, Business Representative, appeared on behalf of the complainant.

Norm Maleng, Prosecuting Attorney, by Mary E. Roberts, Deputy Prosecuting Attorney, appeared on behalf of the respondent.

On August 18, 1988, Larry Daly filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that King County had violated RCW 41.56.140(1) and (3) by a series of personnel actions taken concerning him. A hearing was held on April 26 and May 9, 1989, before Frederick J. Rosenberry, Examiner. The parties submitted post hearing briefs.

BACKGROUND

King County is a political sub-division of the state of Washington which encompasses the city of Seattle and its surrounding metropolitan area. The employer provides a number of public services including law enforcement.

Public Safety Employees, Local 519, is recognized by King County as the exclusive bargaining representative of a bargaining unit

consisting of all King County law enforcement personnel in the ranks of police officer, sergeant, and lieutenant. The employer and the union have had a collective bargaining relationship that pre-dates the events involved in this case. They are parties to a collective bargaining agreement for the period from January 1, 1988 through December 31, 1990.

Larry Daly is employed by King County as a police officer in the King County Department of Public Safety. As such, he is within the bargaining unit represented by Local 519. Daly was hired as a patrol officer in the Field Operations Division on December 10, 1979. In January, 1983, he was transferred to the position of detective in the Burglary and Larceny Division. In October, 1984, he was transferred to the Criminal Investigation Division, Special Assault Unit. In May, 1988, he was transferred to the Missing Persons Unit. In September, 1988, Daly was transferred back to the Field Operations Division as a patrol officer.

The record reflects that Daly demonstrated significant interest in his job assignment while he was with the Special Assault Unit. He investigated sex crimes and child abuse cases while in that assignment, and he attended many job-related training classes regarding sex crime investigation and criminal profiling. He also devoted a considerable amount of personal time and expense to improving his knowledge of the subject, by voluntarily attending non-mandatory training classes on his own time. Daly also operates a related private consulting business,<sup>1</sup> and he has written and copyrighted a 49 page training manual on the subject.

Daly has served occasionally as an instructor at the Washington State Criminal Justice Training Center (the academy) since 1985. During this period of time, he conducted two or three eight-hour

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<sup>1</sup> The scope of Daly's private consultant business was not divulged at the hearing.

classes a year regarding sex crime investigation and criminal profiling.

By memorandum dated May 9, 1988, Captain Robert Evans, the head of the Criminal Investigation Division, Major Investigation Section, announced a number of personnel reassignments, stating:

Effective May 16, 1988, the following changes within the Criminal Investigation Division, Major Investigation Section will occur.

Detectives Frances Carlson, Kevin Fagerstrom, and Rodney McDowell are assigned to the Special Assault Unit reporting to Sgt. Atchley.

Detective Larry Daly is assigned to Missing Persons, reporting to Sgt. Ferguson.

Also effective May 16, 1988, all Sexual Assault Crimes will be investigated by the Special Assault Unit.

Within a few days thereafter, the employer had stated that it transferred Daly out of the Special Assault Unit because of friction that had developed over Daly's investigatory tactics. Caseworkers from the state Child Protective Services unit (CPS)<sup>2</sup> coordinate their activities closely with the Special Assault Unit in their investigations of reported child abuse.

In March, 1988, a major controversy arose concerning the manner in which Daly had conducted an investigation of potential criminal charges. Daly had urged prosecution of a CPS caseworker who, he maintained, had failed to make a timely police report on an alleged incidence of child abuse. The employer maintains that Daly led it to believe that the prosecutor's office encouraged Daly's investigation, but that a subsequent check with the prosecutor's office

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<sup>2</sup>

CPS is a division of the State of Washington Department of Social and Health Services.

disclosed that Daly had led the prosecutor's office to believe that the department management had encouraged Daly's investigation. The employer maintained that, in actuality, neither the prosecutor's office nor department management felt that there was sufficient merit to the case to warrant prosecution of the case worker, and that Daly's credibility and personal integrity therefore came into question. The employer took the position that the incident with the CPS caseworker seriously damaged the working relationship between the Special Assault Unit and the outside agency, and impeded the department in its investigation of child abuse cases. There was also claim that the incident had created a sudden surge of referrals of frivolous cases, because of the breakdown in cooperation, confidence, communication and fear on the part of CPS caseworkers that they could be subjected to criminal charges if they failed to report all questionable cases.

Daly was displeased by his transfer from the Special Assault Unit to the Missing Persons Unit, and he considered it to be adverse to his interests. He engaged his co-workers in "shop talk", seeking their opinions about why he was transferred. Daly received several different individual theories, among which were that the transfer was "politically" motivated, because Daly had promoted sex offense criminal allegations against a retired high-ranking police officer, because Daly had promoted criminal allegations against the CPS caseworker, because of a personal dislike for Daly by Captain Evans, and/or because Daly had appeared as an expert witness for compensation while on vacation in Canada.<sup>3</sup>

Simultaneous with the foregoing personnel changes, there were a number of related supervisory changes in the department. Sergeant

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<sup>3</sup> It was implied that this activity was viewed by department management as a conflict of interest and the improper selling of information obtained in a police investigation, but there is no indication that Daly was ever reprimanded for any violation of department policy.

J. Patrick Ferguson was placed in charge of the Robbery / Missing Person / Child Find Unit, and thus was to become Daly's immediate supervisor. Daly's former supervisor in the Special Assault Unit, Sergeant Howard Reynolds, was transferred to a different section, and Sergeant Sue Rahr became the new supervisor of the Special Assault Unit.

On May 20, 1988, Daly filed a civil service appeal pursuant to Chapter 41.14 RCW, requesting that his transfer out of the Special Assault Unit be set aside. He called for an investigation and hearing into the reason for his transfer. Daly alleged in his complaint that:

- a. The removal by transfer was for reasons unrelated to appellant's fitness for duty and/or performance in his assigned position, or the needs of the department.
- b. RCW 36.28.010, et seq, mandates the general and specific duties of the sheriff and his deputies and under which mandate appellant has always served in the highest traditions of this Department. In recent investigations appellant reported his findings for possible prosecution of criminal activities of other law enforcement officers, as well as a member or members of a public agency which failed to report criminal activities as required by RCW Chapter 26.44, with resultant embarrassment to those individuals and/or agencies investigated and those law enforcement agencies or offices with which they work. As a result, and in reprisal therefore, appellant was removed from his duty section, which action was and is clearly contrary to the public policy expressed in RCW Chapter 36.28.
- c. The removal was otherwise contrary to Departmental policies or practices, or for punitive purposes.
- d. The departmental action of which appellant complains is contrary to the in good

faith and for cause requirement of RCW  
41.14.120.

Daly also initiated a grievance on May 20, 1988 under the procedure contained in the collective bargaining agreement between the employer and union. The grievance requested reinstatement of Daly to the Special Assault Unit. Daly raised his grievance orally, in a conversation with Sergeant James Ferguson, his immediate supervisor in the Missing Persons Unit. In so doing, he asked that his grievance be kept confidential between him and the department management.<sup>4</sup>

On May 23, 1988, Daly learned that a copy of his civil service appeal had been posted on a bulletin board in the offices of the Criminal Investigation Division. Daly complained to the departmental personnel office about the posting, claiming that it caused him considerable embarrassment, and that he felt that he was ridiculed by some of the other police officers because of it.

Later that day, Detective Richard Gies and Sergeant Ferguson removed copies of Daly's civil service appeal document from the board where they had been posted, because they felt that the posting was improper and in poor taste. At the time, neither Gies nor Ferguson knew who had posted the document.<sup>5</sup>

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<sup>4</sup> Although Ferguson could not recall the specifics of Daly raising this grievance with him, he did not deny that Daly had done so. The collective bargaining agreement calls for a written submission of grievances. The record does not reflect that a procedural objection was raised by the employer.

<sup>5</sup> Although Gies and Ferguson thought it improper to post a copy of the appeal, Gies testified that he has seen grievances and related data posted on the bulletin board over a period of time. The parties' collective bargaining agreement grants the union access to department bulletin boards, to post notices of meetings, elections of officers, and any other union material.

On or about May 24, 1988, Daly was summoned to Captain Evans' office, to discuss the complaint he had lodged with the personnel office concerning the posting. Sergeant Rahr was also present. The record does not reflect that Daly expressed any desire to be accompanied by a union representative at this meeting. The record is controverted as to what was said.

Daly maintains that he told Evans that he did not desire to discuss the matter with him, that he advised Evans that he already had an appointment with the sheriff, and that he would rather discuss the matter directly with the sheriff.<sup>6</sup> Daly testified that Evans criticized him as being his own enemy, that Evans maintained that Daly was burning bridges in his relations with others, and that his career was over. Daly further maintains that Sergeant Rahr told him that she was going to get rid of him when she came into the Special Assault Unit, that Daly had misled his supervisor in the past, and that Daly's peers did not want to work with him because they felt that he intimidated them.

Evans testified that he told Daly that he had posted a copy of the civil service appeal, and Evans acknowledged that he may have criticized Daly as being his own worst enemy. Evans denied that Daly indicated a preference to refrain from discussing the matter with him. Evans maintained that he told Daly that the civil service appeal contained flagrant mis-truths.

Daly was scheduled to teach classes at the academy on or about June 13, 1988 and July 21, 1988. On June 6, 1988, he was notified that his teaching assignment for June 13 was cancelled. About July 20, 1988, he was notified that the second teaching assignment was also cancelled.

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<sup>6</sup> The record does not reflect the results of Daly's meeting with the sheriff or that it actually took place.

Daly's grievance protesting his transfer out of the Special Assault Unit was not resolved at the first step of the grievance procedure, and the union advanced the grievance to the second step by a letter dated June 20, 1988. That letter stated, in relevant part:

The grievant asserts and the union concurs that his rights under the Collective Bargaining Agreement have been violated to wit: Article XIII Section 4: "No employee may be discharged, suspended without pay, or disciplined in any way except for just cause." Specifically, the grievant believes that his transfer was discipline and that there is no cause for the transfer.

By letter dated June 22, 1988, Major Terry Allman, the commander of the Criminal Investigation Division responded to the grievance on behalf of Sheriff-Director James Montgomery,<sup>7</sup> stating that the reassignment was a management decision as provided in Article III (Rights of Management), of the parties' collective bargaining agreement and denying that the transfer was a disciplinary action. The employer thus denied Daly's grievance.

On July 14, 1988, Daly was contacted at his residence by Officer Kevin Tucker of the City of Des Moines Police Department, who requested that Daly draft a criminal profile of a serial rapist.<sup>8</sup> Daly was desirous of drafting the profile, but referred Tucker to department management to obtain permission for him to do so. Within a day or two, Tucker reported back to Daly that the department management had denied permission for Daly to do the profile, and that they had referred him to a different individual.

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<sup>7</sup> Sheriff-Director Montgomery had been recently appointed to the position, and took office on June 13, 1988.

<sup>8</sup> Tucker had become acquainted with Daly when he attended a class on criminal profiling taught by Daly at the academy.



On July 15, 1988, Daly invoked step three of the collective bargaining agreement grievance procedure, presenting his grievance directly to Sheriff Montgomery in a meeting.<sup>9</sup> The meeting was inconclusive, with the sheriff agreeing to review the matter and respond at a subsequent meeting.

Daly met with Sheriff Montgomery again on or about July 26, 1988. At that meeting, Daly shared his concern with the sheriff regarding a cartoon that he had received anonymously through inter-department mail a few days earlier. The cartoon depicted a horoscope forecasting the future under the "Scorpio" zodiac sign, with a sketched caricature with a sword thrust through its body, and a phrase stating:

You are shrewd in business and cannot be trusted. You will achieve the pinnacle of success because of your total lack of ethics. Most scorpio people are murdered.

Daly felt that the cartoon was related to the processing of his grievance. Although not born under the "Scorpio" sign of the zodiac, he thought that the cartoon was intimidating. Daly did not consider it to be a joke, and took the threat seriously.

Daly's grievance was not resolved at the July 26, 1988 meeting, and Sheriff Montgomery formally notified Daly, by letter dated August 9, 1988, that the employer was rejecting his grievance. The letter stated in relevant part:

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<sup>9</sup> The grievance procedure calls for advancing a grievance to the third step within five working days after receipt of the employer's response at the second step. There was no explanation for the amount of time that transpired between the step two answer and the step three meeting, but there is also no indication that the employer made any procedural objection to the grievance.

Two common threads seem apparent as I have reviewed this case. One is that of your abilities as an investigator. Clearly, you have demonstrated some excellent investigative work over your time in various detective units. Second, is the adverse relationship that has developed between you and your supervisors, as a result of your work prior to the reassignment; for example, your inability to promote a cooperative relationship with others, particularly with outside agencies. This adversarial relationship is the prime reason for my concern and profound doubt regarding your ability to perform successfully in the Criminal Investigation Division.

Finally, your reassignment from one section to another was done to provide a more cooperative environment from which you and the unit could work. Upon thoroughly reviewing the facts, I have further determined that your ability to effectively serve the Department in the Criminal Investigations Division has been significantly diminished by circumstances which occurred prior to your reassignment. It is my position that it is clearly within the rights and obligations of management to place police officers in assignments in which they are likely to best serve the Department.

Therefore, you shall be transferred to the Field Operations Division effective September 1, 1988. Please contact Chief Burk immediately for specific assignment.

The collective bargaining agreement sets salaries on the basis of rank and length of service, so that Daly's salary was not changed as a result of his change of assignments.

Daly thereafter withdrew his grievance regarding his transfer from the Special Assault unit to the Missing Persons unit. The record does not reflect the disposition of his civil service appeal.

The work performance of King County police officers is evaluated on a semi-annual basis. The record does not reflect Daly's performance evaluation ratings prior to March 1, 1985. During the

three-year period from March 1, 1985 to February 29, 1988, while Daly was assigned to the Special Assault Unit, all of his performance evaluations gave him an overall rating of "exceeds standards", the highest rating available on the evaluation form.

Daly's overall performance was rated as "meets standards" during the March 1 to August 31, 1988 period during which he was transferred to the Missing Persons Unit and was notified of his transfer to patrol duties. The "meets standards" rating is the next rating available below the "exceeds standards" rating. Daly's supervisor noted in that evaluation that:

While I supervised you for only 3 months, I came to value your hard work and drive. You were certainly an asset to the Missing Persons Unit. Had you been in the unit longer, you would likely have earned a higher overall rating on the next period. I challenge you to maintain a positive frame of mind during your patrol assignment. You have a great deal of investigative experience which you can impart to the younger, less experienced officers. Through example, and training, raise their standard in crime scene investigations. I wish you the best of success during the remainder of your career.

The record does not reflect Daly's performance evaluation ratings subsequent to August 31, 1988.

#### POSITIONS OF THE PARTIES

Larry Daly alleges that King County engaged in unlawful interference, restraint, and coercion, and discriminated against him in violation of Chapter 41.56 RCW, by posting a copy of his civil service appeal on a department bulletin board, by canceling his teaching assignments at the academy, by denying him permission to draft a criminal profile for the Des Moines Police Department, and

by transferring him from the Missing Persons Unit to patrol duties. Daly maintains that the employer's actions were adverse to his interests, and were in direct reprisal for his processing his civil service appeal and grievance challenging his transfer from the Special Assault Unit to the Missing Persons Unit. Daly claims that there was no legitimate business reason for such actions by the employer, that he has been an outstanding employee as evidenced by his favorable personnel evaluation ratings, that he is a capable academy instructor who is knowledgeable about sex crimes investigation and criminal profiles, and that he is capable of performing proficiently in the Criminal Investigation Division. Daly requests that he be reinstated into the Criminal Investigation Division, that his teaching duties be reinstated, and that he be made whole for all loss of income and other benefits.

The employer denies that any of the personnel actions directed at Daly were in reprisal for his processing a grievance regarding his transfer out of the Special Assault Unit. The employer maintains that civil service appeals are public information, that there was considerable media and departmental interest in the allegations of Daly's civil service appeal, that there was no obligation on the employer to treat Daly's appeal confidentially, and that it posted Daly's civil service appeal in order to inform other employees of the nature of Daly's complaint. The employer denies that there was any intention to embarrass or intimidate Daly by posting the document. The employer claims that the Special Assault Unit was requested to provide an instructor for the academy to teach sexual assault investigation and that, because Daly was no longer a part of the unit and was not up-to-date on the latest procedures, the assignment was given to officers then assigned to the unit. The employer maintains that a more qualified individual was available to respond to the request for a criminal profile from the Des Moines Police Department. The employer claims that Daly's subsequent transfer out of the Criminal Investigation Division was based upon legitimate operational concerns. Specifically, the employer

contends that, when the sheriff investigated the circumstances of Daly's grievance it was determined that Daly was unable to get along with many of the people with whom he had to come in contact in the Criminal Investigation Division, including people from outside agencies, and that Daly's relationship with his superiors in the Criminal Investigation Division had deteriorated to the extent that he could no longer effectively perform in the unit. The Employer denies that Daly's transfer to patrol was in reprisal for his processing of the grievance, or that there was any anti-union motivation on its part in its dealings with Daly. The employer further maintains that Daly is attempting to use the Public Employment Relations Commission to instruct the employer how to assign police officers.

#### DISCUSSION

##### The Applicable Legal Standards

It is unlawful for a public employer to engage in any form of reprisal against its employees because they exercise their right, under Chapter 41.56 RCW, to pursue grievances. Valley General Hospital, Decision 1195-A (PECB, 1981). The statute provides, in relevant part:

**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.

. . .

**RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED.** It shall be an unfair labor practice for a public employer:

(1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;

(3) To discriminate against a public employee who has filed an unfair labor practice charge; . . .

Larry Daly claims that the employer violated the foregoing provisions of the Public Employees' Collective Bargaining Act. The burden of proving a violation of the Act, established by a preponderance of the evidence, rests with the complaining party. Bellingham Housing Authority, Decision 2335 (PECB, 1985); Lyle School District, Decision 2736 (PECB, 1987).

Allegations of Interference, Restraint, and Coercion

An interference violation occurs under RCW 41.56.140(1), where employees could reasonably believe that the employer has intruded into their free exercise of their right to organize and bargain collectively through an organization of their own choosing. The Commission and the courts of this state give consideration to federal precedent in the evaluation of unfair labor practice complaints, where that federal precedent 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). In American Freightway Co. Inc., 124 NLRB 146 (1959), the National Labor Relations Board (NLRB) held that:

It is well settled that the test of interference, restraint, and coercion under section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may

reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

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.

"Interference" violations will be found where a threat is perceived by employees to interfere with their rights under RCW 41.56. City of Mercer Island, Decision 1580 (PECB, 1983).

#### Allegations of Discrimination

A discrimination violation occurs where it is demonstrated that an employer has deprived an employee of some ascertainable right, or has unfairly or unequally applied policy, or differs in its treatment of employees in reprisal for employee pursuit of lawful activities protected by Chapter 41.56 RCW. Essential to such a finding is a showing that the employer intended to discriminate against the employee. City of Seattle, Decision 3066 (PECB, 1989).

#### The Burden of Proof -

The Commission and the courts have embraced the principles set forth in Wright Line, Inc., 251 NLRB 1083 (1980), where the NLRB prescribed a test for balancing the rights of employees with those of the employer in cases where a discriminatory motivation is alleged. Clallam County vs. Public Employment Relations Commission, Decision 1405-A (PECB, 1982), affirmed 43 Wn.App. 589, 599 (1986). In Port of Seattle, Decision 1624 (PECB, 1983), the Wright

Line test was applied in evaluating claims of adverse action against an employee based on discriminatory motivation, stating:

Where an employer responds to discrimination allegations with claim of business reasons for its actions, a shifting of burdens occurs during the course of litigation. . . . The complainant is required initially to make a prima facie showing sufficient to support an inference that protected activity was "a motivating factor" in the employer's decision. Once that is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Although Wright Line and much of its progeny generally address discharge cases where there may be both legitimate and prohibited reasons behind the employer action, the same principles can be applied where mixed motivation may be a factor that causes an employer to impose job transfers.

#### Application of Precedent to the Facts of this Case

##### Posting of the Civil Service Appeal -

Chapter 41.14 grants deputy sheriffs due process in employment related matters, by establishing a merit system administered by a civil service commission. In accordance with RCW 41.14.120, employee claims of violation of civil service regulations are processed by calling for a public investigation and public hearing into the matter.

The collective bargaining agreement recognizes that employees have access to more than one source for resolution of their employment-related claims, and requires that employees ultimately select either the grievance procedure or an alternate dispute resolution procedure for the final adjudication of grievances:



## Article XIII: GRIEVANCE PROCEDURE

Section 3. If employees have access to multiple procedures for adjudicating grievances, the selection by the employee of one procedure will preclude access to other procedures; selection is to be made no later than at the conclusion of Step 3 of this grievance procedure.

Employees can simultaneously process a grievance, a civil service appeal, or other avenues of redress afforded by law, up to the conclusion of the third step of the grievance procedure.<sup>10</sup> At that point, a decision must be made by the employee as to which procedure will be followed.

Captain Evans acknowledged that he posted a copy of Daly's civil service appeal document, but denied having any intention to embarrass Daly. Evans thought that the appeal was a matter of public information, he viewed Daly's charges as a personal attack against his own integrity, and he felt that the appeal document was full of mis-truths.<sup>11</sup> Evans had received several telephone calls, including calls from the news media,<sup>12</sup> regarding the sub-

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<sup>10</sup> Step one of the collective bargaining agreement grievance procedure calls for the submission of the grievance to the employee's immediate supervisor; step two refers the grievance to the division commander; step three refers the grievance to the sheriff-director; step four refers the grievance to a labor/management committee, and step five refers the grievance to binding arbitration.

<sup>11</sup> In denying any anti-union animus in his dealings with Daly, Evans testified that he supports employees' collective bargaining rights, that he was a member of Public Safety Employees, Local 519, and he served as an elected union officer from December, 1982 until January 1, 1988, and that he resigned that position because of his promotion to the rank of captain, which is outside of the bargaining unit.

<sup>12</sup> The record does not reflect how the news media became aware of the civil service appeal.

stance of Daly's civil service appeal, and he felt that there was a great deal of speculation and gossip on the subject within the division. He posted the appeal document on the bulletin board so people would know what had been filed, hoping that the posting might instigate questions that would give him an opportunity to respond and defend his actions.

Daly maintains that management's posting of the copy of his civil service appeal interfered with and discriminated against him in violation of Chapter 41.56 RCW. Civil service procedures are, however, a source of employment rights which are separate and apart from those contained in the Public Employees' Collective Bargaining Act, and Chapter 41.56 RCW does not protect employees in their pursuit of rights under civil service procedures adopted pursuant to Chapter 41.14 RCW. Similarly, the Public Employment Relations Commission does not have authority to review the decisions or actions of civil service bodies, except where there is an allegation of unilateral changes of wages, hours or working conditions which intrude upon the duty to bargain.<sup>13</sup>

It is understandable, given the language of the collective bargaining agreement, that Daly would seek to protect his options. Although he maintains that it was his grievance that was posted on the department bulletin board, his actions indicate that he recognized a distinction between a civil service appeal and a grievance filed under the collective bargaining agreement. In fact, Daly filed a grievance with his supervisor on the same day that the civil service appeal was filed.

Daly's unfair labor practice allegation concerning the posting of his civil service appeal must be dismissed. Civil service regulations call for a public investigation of a complaint and a public

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<sup>13</sup> See, City of Bellevue, Decision 839 (PECB, 1980) and City of Bellevue, Decision 3156 (PECB, 1989).

hearing. Daly has not established an ascertainable right under either Chapter 41.14 or 41.56 RCW to demand that the substance of his appeal be kept confidential. Daly has not established that the posting interfered with, restrained, coerced or discriminated against him in his exercise of collective bargaining rights protected Chapter 41.56 RCW.

Removal From Teaching Assignments -

While assigned to the Special Assault Unit, Daly taught sex crime investigation at the academy. Daly's teaching activities took place on the employer's time, and there was no additional compensation for the assignment. For unexplained reasons, Daly viewed such teaching activities to be favorable to his interests. He thus maintains that cancellation of the two teaching assignments was another example of employer reprisal for his filing the grievance concerning his removal from the Special Assault Unit.

Daly claims, in support of his argument, that he was treated in a disparate manner from other employees. He points to the situation of Sergeant Frank Atchley,<sup>14</sup> claiming that Atchley continued to teach sex crime subjects at the academy after he was promoted and transferred out of the Special Assault Unit.

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<sup>14</sup> Atchley was one of the officers that Daly engaged in "shop talk" regarding his transfer out of the Special Assault Unit. Atchley, who has been the president of the union for the past seven years, testified that he did not believe that Daly's transfer from the Special Assault Unit violated the collective bargaining agreement, and that he had so advised Daly. Daly sought to characterize Atchley's remarks as being those of a supervisor urging suppression of his grievance and, thus, an unlawful interference. The Examiner rejects such an inference. Although ranked as a sergeant, Atchley is a member of the bargaining unit. As president of the union, he was certainly entitled to state his opinion regarding the merits of Daly's grievance.

There is a substantial question here as to whether Daly has been deprived of anything to which he was otherwise entitled. Atchley confirmed that he continued to teach at the academy for a short period of time after he was transferred out of the Special Assault Unit. Following changes in the law and procedures, however, Atchley felt that he could no longer speak with hands-on experience, and that he was thus no longer competent to teach such classes. Atchley then recommended that the instructor be an individual currently assigned to the Special Assault Unit. The explanation for discontinuance of Atchley's teaching at the academy supports the employer's action in Daly's case. The disputed teaching assignments were, in fact, given to employees then assigned to the Special Assault Unit.

Even if it were to be assumed that Daly had some ascertainable right to perform the disputed teaching assignments, that does no more than shift the focus to the complainant's initial burden of proof under the Wright Line standard. Notwithstanding Daly's contention that he was told otherwise, Captain Evans denied having anything to do with the decision to terminate Daly's teaching assignment. Lieutenant Rahr maintained that, as the new head of the Special Assault Unit, she selected officers to teach at the academy who were currently assigned to the unit. Rahr maintained that there were significant changes in how the department operated after the "big rub" over Daly's handling of the CPS caseworker matter. As a result, several King County law enforcement agencies and the Child Protective Services were meeting regularly to draw up a working agreement on operating procedures for the coordination of joint investigations. Daly was not familiar with these revised procedures, therefore he was not selected to teach the class. The employer credibly explained that it selected officers then assigned to the Special Assault Unit to instruct at the academy, because they were the most familiar with current department policies and procedures. The "discriminatory termination of teaching assignments" allegation is subject to dismissal on the basis that Daly

has failed to support an inference that the action was based upon an unlawful motivation.

If the burden were to be shifted to the employer under the Wright Line standard, it is clear that the allegation must be dismissed. It is evident that the management decision to assign the teaching task to employees currently assigned to the Special Assault Unit was a proper exercise of management authority, based on legitimate operational concerns and consistent with past practice.

Denial of Request to Draft Criminal Profile -

The record reflects that Daly has spent considerable time studying criminal profiling, both on and off the job. He has attended a four-day class on criminal profiling. There is no indication that he was paid additional compensation or provided any other favorable treatment for drafting criminal profiles for his employer, but he views the denial of permission to draft a profile for the Des Moines Police Department as an employer action adverse to his interests. Daly sees the incident as one more example of employer discrimination and reprisal against him for pursuing his grievance.

As with the teaching issue, there is an initial question of whether Daly was deprived of anything to which he was otherwise entitled. The record indicates that Daly taught profiling at the academy. Beyond this, the record contains little additional information regarding the circumstances and frequency under which Daly drafted profiles, or the department's policies concerning drafting of such profiles for other police agencies.<sup>15</sup> Daly has not established that he drafted profiles for the employer or for outside agencies on a sufficient basis to support a finding that such functions were a regular expectation of his employment. Daly himself referred the

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<sup>15</sup> It is noted in Daly's performance evaluation for the period from September 1, 1987 to February 29, 1988, that he drafted a criminal profile of a serial rapist for the Everett, Washington Police Department.

Des Moines officer to higher authority in the department, from which it can be inferred that Daly did not assume that he had clearance to perform the task without approval from above. Daly thus failed to establish that the request made by the Des Moines officer was anything more than an isolated incident.

As with the initial burden of proof on the "teaching" issue, the record lacks evidence to support an inference that the denial of the criminal profiling assignment was based upon an anti-union animus. Captain Evans testified that he was unaware of Daly's education and experience in the area when he directed the Des Moines Police Department to a Seattle police officer who had considerable profiling experience. The Seattle officer had spent a year studying criminal profiling at the Federal Bureau of Investigation academy and was, in Evans' opinion, the most highly qualified individual in the area. Daly acknowledges the qualifications of that individual. More important, an inference of anti-union motivation is difficult or impossible where the evidence indicates that the employer's official acted upon a lack of knowledge of Daly's training and skills in the area. The allegation must be dismissed, because Daly has failed to establish a prima facie case under a Wright Line analysis, showing that he was denied permission to draft the criminal profile in reprisal for pursuing his grievance.

Even if the burden were to be shifted to the employer regarding this incident, the employer has met its burden under the Wright Line standard, establishing that Evans' referral of the Des Moines Police Department request for a criminal profile to a more highly qualified individual is a proper exercise of management authority.

#### The Transfer to Patrol Duties -

Daly's transfer out of the Criminal Investigation Division, to work in the Field Operations Division as a patrolman, is cited as the final act of a series of unlawful management actions which inter-

ferred with and discriminated against Daly in reprisal for his filing and pursuit of his grievance.

Although Daly's salary was not reduced as a result of this transfer, his claim of adverse personnel action was supported by Steven Eggert,<sup>16</sup> who credibly testified that Daly's transfer to patrol duties was generally perceived by other officers as a demotion. Eggert spoke of a general "pecking order" of promotion from the ranks of patrol to detective, and a career path highlighted by assignment to major crime investigation.

In the case of the assignment to patrol duties, there is evidence to support an inference that the transfer was made in reprisal for Daly's exercise of protected activity, and particularly for his filing and pursuit of the grievance protesting his removal from the Special Assault Unit. Sheriff Montgomery acknowledged that, had Daly not processed his grievance beyond the second step, the matter would not have come to Montgomery's attention. As a result of his personal involvement with the grievance and his consultation with various supervisors, however, Montgomery determined that the situation in the Special Assault Unit had deteriorated to such a degree that Daly should have been transferred out of the division, not just out of the unit. Thus, Montgomery effectively increased the "penalty" in response to the grievance.

At least an "interference" violation flows from these facts. Anti-union animus or motivation need not be established to support a finding of unlawful interference, restraint or coercion under RCW 41.56.140(1). Evidentiary standards for interference violations are addressed in Valley General Hospital, supra, which states:

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<sup>16</sup> Officer Eggert was assigned to the Criminal Investigation Division, Special Assault Unit, at the same time that Daly was assigned there. Eggert is currently assigned to patrol, and has served as a union shop steward while assigned to the Special Assault Unit and to patrol.

Public employers are statutorily barred from directly or indirectly interfering with, restraining, coercing or discriminating against any public employee in the free exercise of the employee's rights under the Act. (RCW 41.56.040). The statutory language allows this examiner to draw reasonable inferences of union animus from the evidence presented and, thus, specific employer anti-union animus need not be proven.

Regardless of Sheriff Montgomery's intentions, the circumstances and timing of Daly's transfer out of the Missing Persons Unit would discourage employees from exercising the right to process grievances for fear of employer reprisal against them for doing so, therefore unlawfully interfering with employee rights to pursue a grievance, in violation of Chapter 41.56 RCW.

A "discrimination" violation can also be based on these facts. The sheriff's action to re-direct Daly's desired career path were a conscious and intentional result of his investigation of the grievance. Daly has established a prima facie case of discriminatory motivation for his transfer out of the Missing Persons Unit. Pursuant to the standards set forth in Wright Line, the burden is shifted to the employer, to establish that the same action would have taken place without regard to Daly's protected activity.

Montgomery maintained that he did not act to move Daly out of the Criminal Investigation Unit until he had consulted with various supervisors, and that the unsatisfactory situation with Daly would have surfaced in due course, even without the grievance prompting his attention. Montgomery asserts that, over a period of time, he received information regarding Daly, the cumulative effect of which caused him to transfer Daly out of the division. Montgomery had little recollection, however, about supervisor remarks regarding Daly's performance. In describing Daly's shortcomings, Montgomery stated that his supervisors did not discredit Daly as being an



inherently poor police officer, or that Daly was lacking police skills. Montgomery did not recall reviewing Daly's evaluations. Notwithstanding management claims that Daly's shortcomings warranted his transfer out of the Special Assault Unit, there is no record of Daly having been admonished or disciplined for performance deficiencies. His periodic evaluations indicate that his performance prior to his transfer out of the Special Assault Unit exceeded the department's standards.<sup>17</sup> His good record of service followed him to the Missing Persons Unit, where his evaluator complimented him for his hard work and drive, noted that he went out of his way to share the specifics of his work assignments with his supervisor, and rated him an asset to the Missing Person Unit.

While Captain Evans maintained that he had no input into the decision and that, to the best of his knowledge, Sheriff Montgomery made the decision to transfer Daly to patrol duties, Evans contradicted himself by acknowledging that he wrote a memo to then-Acting Sheriff James Nichol, requesting that Daly be transferred out of his area of responsibility. That memo was written on or about June 1, 1988, after Daly's transfer from the Special Assault Unit, and while Daly's civil service appeal and grievance were both pending. Captain Evans acknowledged that he was angry with Daly for filing the civil service appeal, and that he viewed it as a personal

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<sup>17</sup> Daly's performance evaluations particularly discredit the employer's claim of serious problems with Daly's work. Those evaluations generally reflect that Daly was noted for performing his job with enthusiasm, efficiency, reliability and initiative, that he acted with care and sensitivity in dealing with the public, and that he was frequently commended by those he came in contact with and was repeatedly praised by the King County Prosecuting Attorney's office for his accuracy and thoroughness in case presentation. Such evaluations certainly do not support the employer's claim that Daly was no longer qualified to serve in the Criminal Investigation Division, and thus make the reasons given for the transfer appear to be pretextual.

attack against him. Evans testified of a subsequent conversation with Sheriff Montgomery, where they discussed returning Daly to the Special Assault Unit, and of Evans' strong opposition to such a solution. Accordingly, there was motivation for Evans to exercise reprisal against Daly. Evans' denial of being involved in the decision to transfer Daly to patrol duties is inconsistent with his actions. The Examiner finds it extremely unlikely that Evans did not share in the decision on Daly's transfer. Evans was at the heart of the dispute, and was instrumental in initiating the personnel action that caused Daly to file his grievance in the first place. Montgomery was new to the department and had no personal knowledge of Daly's performance.

The explanation for Daly's transfer out of the Missing Persons Unit is placed into further suspicion by Major Allman's letter of June 22, 1989, which stated in relevant part:

The reassignment of Lawrence Daly within the Criminal Investigation Division was a management decision as provided for in Article III of the Collective Bargaining Agreement, not a disciplinary issue as implied in your correspondence.

Such personnel matters are carefully reviewed prior to enactment. In this matter, the supervisors involved were in total agreement that Lawrence Daly be reassigned to another unit within C.I.D.

Allman's letter indicates that careful consideration had already been given to the situation, resulting in a decision to retain Daly in the Criminal Investigation Division. This discredits the employer's current contention that, upon close scrutiny, Daly's deficiencies in the Special Assault Unit were so serious that it necessitated that he be transferred out of the division.

It was incumbent on the employer to demonstrate that Daly would have been transferred out of the division regardless of his

grievance. The employer has failed to adequately explain gross inconsistencies between the allegations raised against Daly, its own positive evaluations of Daly, and the substance of Major Allman's response to the grievance. The Examiner finds that the transfer to patrol duties would not have occurred had Daly not persisted with his grievance. By its actions, the employer has discriminated against Daly because of his exercise of his right to process a grievance.

#### Reprisal for Filing Unfair Labor Practice Charge

Daly alleged in his complaint that the employer had also violated RCW 41.56.140(3), which prohibits discrimination against a public employee who has filed an unfair labor practice. Daly's complaint contained no reference to a previous unfair labor practice complaint, however, and no motion has been made to amend the complaint to include such an allegation. Daly has neither advanced argument nor submitted evidence in this proceeding to support such a claim, and does not address such claim in his brief. Accordingly, no violation of RCW 41.56.140(3) is found in this case.

#### FINDINGS OF FACT

1. King County is a public employer with the meaning of RCW 41.56.030(1).
2. Public Safety Employees, Local 519, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of King County employees classified as police officer, sergeant, and lieutenant.
3. Larry Daly is employed by King County as a patrol officer in the Department of Public Safety, and is a public employee within the meaning of RCW 41.56.030(2). Daly is within the bargaining unit represented by Local 519.

4. On May 9, 1988, Larry Daly was advised by Captain Robert Evans, the head of the Criminal Investigation Division, Major Investigation Section that he would be transferred, effective May 16, 1988, from the position of detective assigned to the Special Assault Unit of the Criminal Investigation Division to the position of detective assigned to the Missing Persons Unit of the same division. Daly was subsequently advised that the principal reason for that transfer was the manner in which Daly had conducted an investigation of criminal charges against a Child Protective Services caseworker, and a resulting major disruption in communications with that outside agency.
5. On May 20, 1988, Larry Daly filed a civil service appeal pursuant to Chapter 41.14 RCW, requesting that his transfer out of the Special Assault Unit be set aside.
6. On May 20, 1988, Larry Daly filed a grievance with his immediate supervisor, Sergeant James Ferguson, by means of an oral discussion in which Daly protested his transfer out of the Special Assault Unit.
7. On or about May 23, 1989, Captain Evans posted a copy of Daly's civil service appeal on a department bulletin board. In a meeting on or about May 24, 1988, Evans advised Daly that he had posted the appeal.
8. On or about June 1, 1988, Captain Evans sent a memorandum to then-Acting Sheriff James Nichol requesting that Daly be removed from his area of responsibility. In a subsequent conversation with Sheriff James Montgomery, Evans opposed a resolution of the grievance which would result in reinstatement of Daly to the Special Assault Unit.

9. On June 8, 1988, Daly was notified that previous arrangements calling for him to teach a class at the Criminal Justice Training Center on or about June 13, 1988, was cancelled. On or about July 20, 1988, Daly was notified that previous arrangements for him to teach a second class at the Criminal Justice Training Center on July 21, 1988, was also cancelled. In each case, the teaching assignment was given to an employee currently within the Special Assault Unit.
10. By letter dated June 20, 1988, Public Safety Employees, Local 519, filed a second step grievance on Daly's behalf stating that his transfer out of the Special Assault Unit was discipline for which there was no cause.
11. By letter dated June 22, 1988, the commander of the Criminal Investigation Division, Major Terry Allman, responded to the grievance on behalf of Sheriff James Montgomery, rejected Daly's grievance and maintaining that his transfer was not disciplinary. That correspondence indicated that the matter had been fully investigated by the employer prior to that response.
12. On July 14, 1988, Daly was contacted by an officer from the City of Des Moines Police Department, who requested that Daly draft a criminal profile. Daly had no right or claim of responsibility to draft such a profile, and referred the inquiry to his supervisors. The employer referred the request to a member of the City of Seattle Police Department who was highly qualified to draft such a profile, and denied permission for Daly to do so.
13. By letter dated August 9, 1988, Daly was notified by Sheriff Montgomery that he was being transferred out the Criminal Investigation Division and was being assigned to patrol duties in the Field Operations Division, effective September 1, 1988.

Daly was advised that the transfer was due to an adverse relationship which had developed between himself and his supervisors, because of an inability of Daly to cooperate with others (with particular reference to outside agencies), and because of doubt regarding his ability to perform successfully in the Criminal Investigation Division.

14. The reasons given by the employer in support of its transfer of Larry Daly to patrol duties were pretextual, designed to conceal the true reasons for such action against him. The transfer was, in fact, based upon the action of Daly and the union to pursue Daly's grievance to the sheriff.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. The complainant's allegations were filed in a timely manner pursuant to RCW 41.56.160, as the complained-of personnel actions occurred within the six-month period prior to the filing of the complaint.
3. The complainant has failed to sustain the necessary burden of proof demonstrating that he was deprived of any right or entitlement arising out of his employment, or was otherwise discriminated against in violation of RCW 41.56.140(1), with respect to the employer's posting of a copy of Daly's civil service appeal, with respect to its cancellation of Daly's teaching assignments, or with respect to its denial of permission for Daly to draft a criminal profile for the City of Des Moines Police Department.
4. The complainant made a prima facie showing sufficient to support an inference that his protected conduct of pursuing

his grievance was a motivating factor in the employer's decision to transfer him from the Criminal Investigation Division, Missing Persons Unit to patrol duties in the Field Operations Division, in violation of RCW 41.56.040 and RCW 41.56.140(1).

5. The employer has failed to meet its burden of proof that Daly would have been transferred out of the Missing Persons Unit of the Criminal Investigation Division regardless of his pursuit of his grievance, and so has committed unfair labor practices in violation of RCW 41.56.140(1).

ORDER

IT IS ORDERED that the respondent, King County, its officers and agents shall immediately:

1. Cease and desist from interfering with and discriminating against employees in the exercise of their rights to engage in concerted and protected activity as detailed in RCW 41.56.140(1).
2. Take the following affirmative action to effectuate the purposes and policies of Chapter 41.56 RCW:
  - a. Offer its employee, Larry Daly, immediate and full reinstatement to his former position in the Missing Persons Unit or a substantially equivalent position in the Criminal Investigation Division, without prejudice to his rights or seniority.
  - b. Post, in a conspicuous place on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto. Such

notices shall, after being duly signed by an authorized representative of King County, be and remain posted for sixty (60) days. Reasonable steps shall be taken by King County to ensure that said notices are not removed, altered, defaced or covered by other material.

- c. Notify the complainant, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a signed copy of the notice required by this Order.
- d. Notify the Executive Director of the Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

DATED at Olympia, Washington, this 16th day of October, 1989.

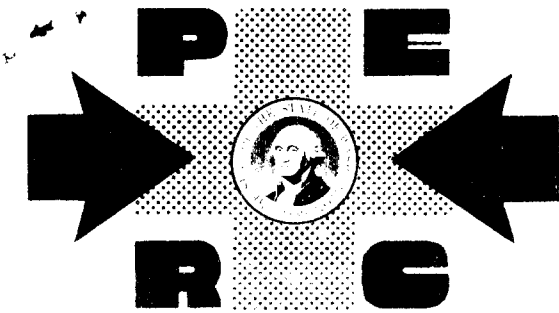
PUBLIC EMPLOYMENT RELATIONS COMMISSION



FREDERICK J. ROSENBERY, Examiner

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





PUBLIC EMPLOYMENT RELATIONS COMMISSION

# NOTICE

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

WE WILL NOT discriminate against or interfere with, restrain, or coerce employees for engaging in activities protected by Chapter 41.56 RCW, including the pursuit of grievances under a collective bargaining agreement.

WE WILL offer our employee, Larry Daly, immediate and full reinstatement to his former position as detective in the Missing Persons Unit or a substantially equivalent position in the Criminal Investigation Division.

DATED: \_\_\_\_\_

KING COUNTY

BY: \_\_\_\_\_  
Authorized Representative

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

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