Southwest Snohomish County Public Safety Communications Agency, Decision 11149 (PECB, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOCOM DISPATCHERS ASSOCIATION, Complainant, vs. SOUTHWEST SNOHOMISH COUNTY PUBLIC SAFETY COMMUNICATIONS AGENCY, Respondent.	CASE 23032-U-10-05868 DECISION 11149 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Cline & Associates, by *Reba Weiss,* Attorney at Law, *and Christopher J. Casillas,* Attorney at Law, for the union.

Summit Law Group PLLC, by *Rodney B. Younker*, Attorney at Law, for the employer.

On February 10, 2010, the SNOCOM Dispatchers Association (union) filed an unfair labor practice complaint against the Southwest Snohomish County Public Safety Communications Agency (SNOCOM or employer). The union amended its complaint on February 24, 2010, March 25, 2010, and April 12, 2010. The amended complaint alleges that the employer discriminated against two of its dispatch supervisors, Jodi Basim, the union's president, and Margaret (Margie) Penman, the union's second vice-president, in retaliation for their union activities. The complaint also alleges seven unilateral change (refusal to bargain) violations, four interference violations based on Weingarten rights, and two independent interference violations.

The Public Employment Relations Commission (Commission) appointed Jessica J. Bradley as the Examiner. I conducted initial days of hearing on July 14, 15, 16, and 19, 2010, and

additional days of hearing on August 27, September 15, 28, and 30, 2010. The parties completed the record by filing post-hearing briefs.

ISSUES

1. Unilateral Changes

   A. Did the employer unilaterally change the status quo by failing to notify Basim of the nature of an investigation prior to conducting an investigatory interview on October 13, 2009?

   B. Did the employer unilaterally change working conditions by failing to comply with the 45-day disciplinary timeline in the collective bargaining agreement (CBA) when investigating allegations against Basim?

   C. Did the employer unilaterally implement a new work rule requiring employees to report misconduct by user agencies' employees to the employer?

   D. Did the employer unilaterally change past practice by denying the union's request to change the date of an investigatory interview scheduled for February 14, 2010?

   E. Did the employer unilaterally change past practice by requiring employees on paid administrative leave to stay in their homes during their regularly-scheduled work hours?

   F. Did the employer unilaterally change past practice by prohibiting employees on paid administrative leave from having any contact with current or former employees of the employer and/or employees of user agencies?

   G. Did the employer unilaterally implement a new work rule prohibiting employees from participating in union-related discussions in the workplace?

By unilaterally implementing a new work rule that prohibits employees from participating in union-related discussions in the workplace, the employer refused to bargain in violation of RCW 41.56.040(4). The remaining unilateral change allegations are dismissed.

2. Interference with *Weingarten* Rights

A. Did the employer interfere with Basim's *Weingarten* rights when Pete Caw interviewed Basim on January 14, 2010?

B. Did the employer interfere with Basim's *Weingarten* rights when Deborah Coleman interviewed Basim on February 14, 2010?

C. Did the employer interfere with Basim's *Weingarten* rights when Debbie Grady interviewed Basim in a pre-disciplinary meeting on February 19, 2010?

D. Did the employer interfere with Penman's *Weingarten* rights when Terry Peterson called Penman with follow-up interview questions on February 25, 2010?

By instructing Basim's union representative that she was not to interrupt while the interview was in progress and by prohibiting Basim's union representative from engaging in any verbal or non-verbal communication with Basim during the interview on January 14, 2010, the employer interfered with Basim's *Weingarten* rights in violation of RCW 41.56.140(1). The remaining *Weingarten* allegations are dismissed.

3. Discrimination

A. Did the employer unlawfully discriminate against Basim when it issued a five-day unpaid suspension to her on February 19, 2010?

B. Did the employer unlawfully discriminate against Basim and/or Penman when it placed them on paid administrative leave on February 9, 2010?

C. Did the employer unlawfully discriminate against Basim and Penman when it issued a written letter of reprimand to them, withdrew endorsement for Basim to work as an instructor at the Criminal Justice Training Commission (CJTC) and removed Penman from the CAD build team in March 2010?

The employer unlawfully discriminated against Basim and Penman in violation of RCW 41.56.140(1). Basim's protected union activity was a substantial motivating factor in the employer's disciplinary decision to issue a five-day unpaid suspension to her on February 19, 2010. I also find that the employer's decision to place Basim and Penman on paid administrative leave on February 9, 2010, was discriminatory. The employer further discriminated against Basim by issuing a written letter of reprimand on March 18, 2010, and withdrawing endorsement for her to work as an instructor at the Criminal Justice Training Commission (CJTC) in March 2010. Finally, the employer discriminated against Penman by issuing a written letter of reprimand to her on March 19, 2010, and removing her from the CAD build team in March 2010.

4. Independent Interference

A. Did the employer interfere with Basim and Penman's right to engage in protected union activity by prohibiting them from having any contact with current or former employees of the employer and/or employees of user agencies while they were on paid administrative leave, and/or by sending an e-mail to all employees prohibiting them from contacting Basim and Penman?

B. Did the employer interfere with Basim and Penman's right to engage in protected union activity by prohibiting them from discussing the discipline they received on March 18 and 19, 2010, with their co-workers?

The employer prohibited Basim, the union's president, and Penman, the union's second vice-president, from having any contact with bargaining unit employees while they were on administrative leave from February 9, 2010, until February 24, 2010. The employer sent an e-mail to all employees prohibiting them from contacting Basim and Penman. These restrictions on employees' ability to communicate with their co-workers directly interfered with the union's ability to represent employees in violation of RCW 41.56.140(1). The employer further interfered with Basim's ability to engage in protected union activity, by informing her that she was not permitted to discuss the discipline she received on March 18, 2010, in violation of RCW 41.56.140(1). The record is insufficient to determine whether the employer imposed the same restrictions on Penman's ability to discuss her discipline.

ISSUE 1 – UNILATERAL CHANGE

APPLICABLE LEGAL STANDARDS

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires public employers to bargain with the exclusive bargaining representative of their employees. Specifically, RCW 41.56.030(4) states:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

"It is well established that the duty to bargain imposes a duty to give notice and provide opportunity for good faith bargaining prior to implementing any change of practice concerning the wages, hours, or working conditions of bargaining unit employees." *City of Pasco*, Decision 9181-A (PECB, 2008) citing RCW 41.56.030(4) and *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1990). "An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice." *City of Pasco*, Decision 9181-A citing RCW 41.56.140(1) and (4); RCW 41.56.150(1) and (4).

An examiner for the Commission explained the elements of a unilateral change violation in *Val Vue Sewer District*, Decision 8963 (PECB, 2005):

> [A] complainant alleging a unilateral change must establish the following: (1) the existence of a relevant status quo or past practice; (2) that the relevant status quo or past practice was a mandatory subject of bargaining; (3) that notice and an opportunity to bargain the proposed change was not given or that notice was given but an opportunity to bargain was not afforded and/or the change was a *fait accompli*; and (4) that there was a change to that status quo or past practice. A respondent charged with making a unilateral change may establish a waiver by inaction if the union was afforded notice and an opportunity to bargain upon the matter.

The complainant bears the burden of proof in establishing a unilateral change to a mandatory subject of bargaining. WAC 391-45-270(1)(a).

Status Quo or Past Practice

"The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement." *City of Edmonds*, Decision 8798-A (PECB, 2005) citing *City of Yakima*, Decision 3503-A (PECB, 1998), *aff'd,* 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

The status quo is defined both by the parties' collective bargaining agreement and by established past practice. As the Commission explained in *Kitsap County*, Decision 8893-A (PECB, 2007):

> Generally, the past practices of the parties are properly utilized to construe provisions of an agreement that may reasonably be considered ambiguous or where the contract is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (PECB, 2002), citing *City of Pasco*, Decision 4197-A (PECB, 1994).

"For a 'past practice' to exist, two basic elements are required: (1) an existing prior course of conduct; and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as the proper response to the circumstances." *City of Pasco*, Decision 9181-A, citing *Whatcom County*, Decision 7288-A.

Mandatory Subject of Bargaining

The potential subjects for bargaining between an employer and union are commonly described as "mandatory," "permissive," or "illegal" subjects. "[P]ersonnel matters, including wages, hours, and working conditions' of bargaining unit employees are characterized as mandatory subjects of bargaining." *King County*, Decision 10576-A (PECB, 2010) citing *Federal Way School District*, Decision 232-A (EDUC, 1977); and *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Washington State law requires public employers to engage in collective bargaining with the exclusive bargaining representative of their employees concerning mandatory subjects of bargaining. RCW 41.56.030(4); 41.56.100(1).

In determining whether a topic is a mandatory subject of bargaining, the Commission looks at the particular facts at hand and balances: (1) the relationship of the subject to wages, hours and working conditions; and (2) the extent to which the subject lies at the core of entrepreneurial control or is a management prerogative. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197 (1989). The critical consideration in determining whether an employer has a duty to bargain is the nature of the impact of the subject on the bargaining unit. *Spokane County Fire District 9*, Decision 3661-A. "When subjects relate to both conditions of employment and managerial prerogatives, the Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. The inquiry focuses on which characteristic predominates." *King County*, Decision 10576-A citing *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A.

To constitute an unfair labor practice, a change in the status quo must be meaningful and have a "material and substantial" impact on employees' terms and conditions of employment. *Kitsap County*, Decision 8893-A citing *City of Kalama*, Decision 6773-A (PECB, 2000) and *King County*, Decision 4893-A (PECB, 1995).

Notice of Proposed Change and Opportunity to Bargain

A party that is proposing a change to a mandatory subject bargaining must: "(1) give notice to the other party; and (2) provide opportunity to request bargaining on the subject; and (3) bargain in good faith, if requested, and reach an agreement or impasse before implementing the change." *City of Edmonds*, Decision 8798-A citing *South Kitsap School District*, Decision 472 (PECB, 1978); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *City of Vancouver*, Decision 808 (PECB, 1980).

"Absent a clear and unmistakable waiver of a union's right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects." *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A (PECB, 2009) citing *State - Social and Health Services*, Decision 9551-A (PSRA, 2008) and *Federal Way School District*, Decision 232-A. "[T]here is no duty to bargain for the life of the contract on the matters set forth in a collective

bargaining agreement, and an employer action in conformity with that contract will not be an unlawful unilateral change." *Yakima County*, Decision 6594-C (PECB, 1999); citing *City of Yakima*, Decision 3564-A (PECB, 1991).

Fait Accompli

The term *fait accompli* refers to instances where an employer contemplates making a change to a mandatory subject of bargaining and takes action toward implementing that change without first allowing the union an opportunity to bargain about the change. *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A; *Skagit County*, Decision 6348-A (PECB, 1998). In *fait accompli* situations the employer presents its planned action to the union as if it is a done deal. "It is an unfair labor practice to present a change to a mandatory subject of bargaining as a *fait accompli*." *King County*, Decision 10576-A. "In determining whether a *fait accompli* has occurred, the Commission focuses on the circumstances as a whole, and whether the opportunity for meaningful bargaining existed." *Clover Park Technical College*, Decision 8534-A (PECB, 2004).

Unilateral Change is a Refusal to Bargain Violation

"An employer violates RCW 41.56.140(4) and (1) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligations."*Skagit County*, Decision 8746-A (PECB, 2006). Similarly, a party commits an unfair labor practice if it unilaterally changes past practice relating to a mandatory subject of bargaining without fulfilling its bargaining obligation. *Whatcom County*, Decision 7288-A; *Edmonds Community College,* Decision 10250-A (CCOL, 2009).

A. Did the employer unilaterally change the status quo by failing to notify Basim of the nature of an investigation prior to conducting an investigatory interview on October 13, 2009?

ANALYSIS

SNOCOM is a regional emergency dispatch center that receives 911 emergency calls and dispatches police, fire, and emergency medical services in southwest Snohomish County. The dispatch center operates 24 hours a day, 365 days a year. SNOCOM was created in the 1970s by an interlocal agreement. SNOCOM provides dispatch services to the following Washington

cities: Brier, Edmonds, Lynnwood, Mill Creek, Mountlake Terrace, Mukilteo, and Woodway. It also provides dispatch services for Snohomish Fire District 1. SNOCOM is a public entity overseen by a board of directors made up of representatives from the police, fire, and emergency medical service agencies it serves (user agencies). SNOCOM is funded by the user agencies.

SNOCOM is managed by an executive director, who reports to the SNOCOM Board of Directors. On June 30, 2009, Steve Perry, SNOCOM's executive director of eleven years, retired. The SNOCOM Board hired Debbie Grady to fill the executive director position. Grady has served as SNOCOM's executive director since July 13, 2009.

SNOCOM employs an operations manager and technology manager who report directly to the executive director. The employer also employs six dispatch supervisors, who act as lead employees and directly oversee the work of approximately 27 dispatchers. The dispatch supervisor position is in the communications bargaining unit represented by the union.

In December 2002, the Commission certified the union as the exclusive bargaining representative of:

> All full-time and regular part-time communications employees of the Southwest Snohomish County Public Safety Communications Agency (SNOCOM), excluding supervisors, confidential employees, CAD coordinator, and administrative assistant.[1]

The parties had a collective bargaining agreement (CBA) that was effective from January 1, 2010, through December 31, 2010, that described the bargaining unit as:

> [A]ll full-time and regular part-time communications employees in the employment of Southwest Snohomish County Public Safety Communications Agency, excluding the Director, Operations Manager (or equivalent), Information Services employees and administrative assistants. (Exhibit 87R)

In 2008, Jodi Basim, a bargaining unit dispatch supervisor who also acts as the employer's training coordinator, was elected to serve as union president and continued to serve as union president in 2009 and 2010.

---

1 *SNOCOM*, Decision 7939 (PECB, 2002).

In July 2009, the Mountlake Terrace Police Department concluded a disciplinary investigation and terminated the employment of Officer Keith Poteet. At the time of his termination Poteet was the president of the Mountlake Terrace Police Guild. The Mountlake Terrace Police Department is one of SNOCOM's user agencies.

On October 12, 2009, the City of Mountlake Terrace participated in an unemployment benefits hearing concerning the benefit eligibility of Poteet, its former employee. Poteet was terminated for several alleged policy violations, including the "two-in-blue" policy. The two-in-blue policy prohibits more than two police officers from congregating together in public places when they are not responding to an incident.

During Poteet's unemployment hearing, Greg Wilson, Chief of the Mountlake Terrace Police Department and an alternate member of the SNOCOM Board of Directors, sent Grady a text message from a cellular phone saying that he suspected Basim had given Poteet information about other officers who violated the two-in-blue policy after he was terminated. Poteet was using the information to challenge Mountlake Terrace's justification for terminating his employment.

Wilson was involved in the administration of SNOCOM and had attended most monthly SNOCOM Board Meetings since he assumed the position of Chief of the Mountlake Terrace Police Department in August 2008. Wilson was on the hiring committee that selected Grady to be SNOCOM's new executive director. Wilson was aware that Poteet and Basim worked together on union activities and informed Grady of that fact on or around October 12, 2009. At the hearing, Wilson explained "I knew that Officer Poteet. . . . spent a lot of time at SNOCOM. . . . I knew that he was in contact with Supervisor Basim. They had a friendship in the past. And so I believed that that might be the source of information just based on my observations up to this point. And so I let Director Grady know that." (Transcript p.863)

On October 12, 2009, shortly after Wilson sent the above text message to Grady about his suspicions that Basim may have given Poteet the information that he was using to challenge his termination, Scott Hugill, a city councilperson from the City of Mountlake Terrace who serves as

an alternate SNOCOM Board member and as a member of SNOCOM's three-member personnel committee, sent Grady an e-mail stating:

> I know [the] Chief just sent you a message. We're in a telephone conf with Poteet and a judge right now on Poteet's unemployment, and Poteet stated he learned of a violation of our two-in-blue rule in July/August (after he was fired) when he got a text from a dispatcher.
>
> We just asked Poteet who the dispatcher was, and he said he would not give "her" name at this time.
>
> Before we finish this phone conf, when Poteet can call to tip-off the dispatcher, you may want to pull her [Basim] in and tell her Poteet just gave up her name (although he hasn't) and see how she reacts.
>
> If you wait until Poteet can call her, she may learn he never said her name. (Exhibit 6)

Grady understood that Hugill was advising her to question Basim. In the e-mail, Hugill encouraged Grady to question Basim immediately about her communication with Poteet. Hugill also advised Grady to lie to Basim by telling her that Poteet had disclosed her name, even though Poteet had refused to disclose the name of the dispatcher who sent him the text messages. Grady did not follow Hugill's advice and did not tell Basim that Poteet had disclosed her name.

On October 13, 2009, Grady approached Basim for what appeared to be a casual conversation. Grady asked Basim if she had any idea who from SNOCOM might be talking with Poteet about groups of more than two Mountlake Terrace police officers gathering together. Prior to asking Basim this question, Grady did not advise Basim that she was about to be interviewed about the matter.

The union alleges that the employer unilaterally changed the status quo requirement that the employer inform an employee about the nature of an investigatory interview before interrogating the employee. Specifically the union points to section 14.4.1 of the CBA which states: "Before interrogation the employee shall be informed of the nature of the matter in sufficient detail to reasonably apprize him of the matter."

The October 13, 2009, instance is the only example the union presents in support of this unilateral change allegation. Evidence regarding prior and subsequent investigatory interviews shows a clear pattern of the employer notifying employees of the nature of the investigation prior to interviewing them. The union argues that the employer is targeting Basim by not affording her the notice it provides to other employees who are under investigation. Allegations of disparate treatment are relevant to evaluating discrimination allegations and will be addressed later in this decision.

CONCLUSION

The employer's failure to inform Basim of the nature of the investigation prior to the interview on October 13, 2009, was an isolated incident. The employer did not change its practice of notifying employees of the nature of an investigation prior to conducting an investigatory interview, which is described in the CBA. I find that this single instance does not establish "that there was a change to [the relevant] status quo or past practice," which is a necessary element of the unilateral change test outlined in *Val Vue Sewer District*, Decision 8963. The employer did not unilaterally change the status quo of notifying employees of the nature of an investigation on October 13, 2009, in violation RCW 41.56.140(4).

B. Did the employer unilaterally change working conditions by failing to comply with the 45-day disciplinary timeline in the CBA when investigating allegations against Basim?

ANALYSIS

On October 13, 2009, at approximately 7:00 A.M., Grady and Basim were talking in Grady's office. Grady explained that Officer Poteet had his unemployment hearing yesterday and told the unemployment hearing that he had gotten information from someone at SNOCOM that officers are still violating the policy that he had been terminated for. Grady asked if Basim knew who might be talking to Poteet. Basim replied by saying that she was the person who had talked to Poteet and described a phone conversation she had with Poteet.

Basim explained that Poteet was a personal friend of hers and was upset about his termination. Grady asked Basim if the conversation took place while Basim was working. Basim explained that her contact with Poteet occurred while she was off-duty on her personal time. Basim explained that she talks with and sees Poteet regularly both regarding union matters and as friends. Basim and Poteet each have children and sometimes care for or transport each other's children. Basim recalls telling Grady she might have shared the fact that other officers were still violating the policy over the phone or when she was picking up or dropping off kids. Basim also recalls mentioning the possibility of communicating with Poteet by e-mail or text message. Grady did not recall Basim mentioning those possibilities. Grady did not ask Basim if she had sent text messages to Poteet.

Basim told Grady that her observations of other uniformed officers congregating in groups of more than two occurred while she was at Starbucks on break time or off-duty, not while she was on-duty. Grady asked Basim why she had shared the information with Poteet. Basim said she was trying to support her friend who, at the time, was frustrated that he was terminated while other officers continued to violate the policy.

Grady told Basim that SNOCOM employees needed to be careful to stay out of the internal workings, processes, and investigations of user agencies. Grady explained she wanted SNOCOM to remain neutral. Basim acknowledged that she understood. Based on the facts, I find that the conversation Grady had with Basim constituted an informal verbal counseling.

Later in the day on October 13, 2009, Grady sent an e-mail to Wilson and Hugill summarizing her conversation with Basim. At the end of the e-mail Grady wrote: "I did not tell Jodi [Basim] that Poteet had said he [Poteet] received information via text [message]. If you determine there are discrepancies with this information, I would like to be advised." (Exhibit 8)

On January 5, 2010, the City of Mountlake Terrace and the Mountlake Terrace Police Guild participated in an arbitration hearing on Poteet's termination. Wilson participated in the hearing on behalf of the City of Mountlake Terrace. At the hearing the Mountlake Terrace Police Guild used copies of the text messages that Poteet had received from Basim as an exhibit. This was the first time that Wilson, and the City of Mountlake Terrace, had the opportunity to see the text messages.

On January 6, 2010, Wilson faxed a letter to Grady alleging that Basim had interfered with the Mountlake Terrace Police Department's disciplinary actions against Poteet. (Exhibit 16) Wilson informed Grady that he felt that Basim's portrayal to Grady of what had happened in her communications with Poteet misrepresented the facts. He noted that "Jodi's [Basim] notification to Poteet of this matter was done at the time of [the] occurrence and possibly on duty as opposed to 'during a telephone conversation when Jodi [Basim] was off duty, picking up her daughter along with Poteet's.'" Wilson went on to explain that he was aware of another incident in May of 2008 where Basim had attempted to interfere with Mountlake Terrace on internal matters relating to the use of ten-codes, a type of communication coding sometime used in law enforcement. Wilson viewed Basim's conversations with Mountlake Terrace police officers as a form of interference in the affairs of the department that violated the proper chain of command.

Wilson wrote in his letter:

> I will leave it to your discretion to determine whether there are SNOCOM policy violations regarding this behavior. I would request that you direct Jodi [Basim] to report possible violations of policy by Mountlake Terrace employees through the proper chain of command and as a SNOCOM employee not to openly express her opinions about the internal matters occurring within Mountlake Terrace or share privileged information with non law enforcement personnel (terminated employees). (Exhibit 16)

Wilson's letter concluded by explaining: "an internal investigation is being conducted on Mountlake Terrace personnel. Jodi [Basim] has been identified as the complaining party/ witness and will be interviewed by Chief Caw who has been assigned to investigate the allegations of misconduct." (Exhibit 16)

On January 8, 2010, Grady gave Basim a memo titled "Notice of Investigation" informing Basim that SNOCOM had received a complaint from Police Chief Wilson of the Mountlake Terrace Police Department alleging that Basim had exhibited inappropriate supervisory/employee conduct. The letter explained:

> The allegations are considered very serious by SNOCOM and I believe a prompt and thorough investigation is required. I intend to have an Internal Investigation on behalf of SNOCOM conducted into this allegation. I am in the process of determining who will actually conduct the interviews for that investigation and I will notify you when that decision has been made. (Exhibit 20)

The letter directed Basim to participate in an interview with Pete Caw, Assistant Police Chief for the City of Mountlake Terrace. The letter further ordered Basim "not to discuss any general or specific detail involving either SNOCOM's or Mountlake Terrace's investigation with any current or former employees of SNOCOM or of SNOCOM's user agencies."

The union alleges that the employer unilaterally changed the disciplinary timeline outlined in section 15.1 of the CBA. Specifically, the union points out that the employer initially questioned Basim about her communications with Poteet concerning officers congregating at Starbucks on October 13, 2009. At this point in time the employer knew about the incident cited as the basis for the disciplinary action. The union argues that by waiting until January 8, 2010, to start investigating Basim's communications with Poteet, the employer unilaterally changed its disciplinary investigation timeline. In support of its position the union cites the CBA:

> 15.1 Just Cause. The Employer shall not discipline an employee without just cause. The Employer shall adhere to the principle of progressive discipline in administering discipline. Absent mutual agreement between the Association and the Employer, disciplinary action shall be taken within forty-five (45) calendar days of the Employer's knowledge of the incident cited as the basis for the disciplinary action. The Employer shall send a copy of any formal written disciplinary action(s) to the Association within a reasonable period of time after it was presented to the employee.

The employer interprets the event that triggered the timeline differently. Grady explained that she was not concerned by the information she received from Basim in October of 2009. Rather, it was the information in a January 6, 2010, letter from the Mountlake Terrace Police Department regarding the fact that the Basim sent information to Poteet by text message that triggered the employer's concern and determination that an investigation was warranted.

The union also argues that the delay and timing of the investigation into Basim's communications with Poteet show that the employer was targeting Basim. I will address that argument in the discrimination section of this decision.

CONCLUSION

The dispute between the parties ultimately concerns a disagreement about which event triggered the beginning of the contractual 45-day timeline to investigate Basin's communications with

Poteet. The employer's investigation into Basim's communications with Poteet is the only example the union presents of the employer failing to follow the 45-day investigation timeline outlined in section 15.1 of the CBA. The employer completed the investigation into Basim's communications with Poteet and issued discipline to Basim within 45 days of January 6, 2010, the date of the letter from Chief Wilson that the employer perceives triggered the timeline.

In evaluating the totality of the evidence I find that the record does not establish "that there was a change to [the relevant] status quo or past practice," which is a necessary element of the unilateral change test outlined in *Val Vue Sewer District*, Decision 8963. The employer did not unilaterally change the disciplinary timeline in the CBA by investigating allegations concerning Basim's communications with Poteet in January and February of 2010 and did not violate RCW 41.56.140(4).

C. Did the employer unilaterally implement a new work rule requiring employees to report misconduct by user agencies' employees to the employer?

ANALYSIS

Prior to January 2010, the employer had never informed employees that they had an obligation to report misconduct by employees of SNOCOM's user agencies to SNOCOM management.

On January 27, 2010, Grady gave Basim a letter outlining the allegations against her that were being investigated relating to information she shared with Poteet, a former Mountlake Terrace police officer. One of the allegations against Basim that the employer policies listed was: D.19 Duty to Report Misconduct. The union argues that this letter imposed a new work rule that requires bargaining unit employees to report policy violations by employees of SNOCOM user agencies, such as officers of the Mountlake Terrace Police Department, to SNOCOM management.

It is undisputed that employees at SNOCOM are required to report misconduct of other SNOCOM employees to management. This requirement is stated in SNOCOM Dispatch Policy

D.19 Duty to Report Misconduct, subsection D.19.1: "Employee Responsibility. Employees shall report any known violation of agency policy or order, neglect of duty, or illegal conduct by any member of the agency to a supervisor." (Exhibit 87Q)

The employer argues that it did not impose a new requirement on employees and does not have a policy that requires its employees to report misconduct of user agencies' employees. The employer points out that it did not find that Basim had violated policy D.19 and specifically stated in her February 19, 2010, disciplinary letter that the alleged violation of D.19 "was not sustained and will not result in disciplinary action." With the exception of the January 27 notice of investigation the employer gave Basim, testimony from employees supports the conclusion that the employer did not inform employees that they have an obligation to report misconduct of user agencies' employees.

CONCLUSION

The record failed to establish that the employer implemented a change in work rules requiring employees to report misconduct by user agencies' employees to the employer. The employer did not unilaterally implement a new work rule requiring employees to report misconduct by user agencies' employees when it referenced policy D.19, Duty to Report Misconduct, in the January 27, 2010 investigation notice to Basim and did not violate RCW 41.56.140(4).

D. Did the employer unilaterally change past practice by denying the union's request to change the date of an investigatory interview scheduled for February 14, 2010?

ANALYSIS

On February 4, 2010, Grady sent Basim an e-mail informing her that Detective Deborah Coleman of the Everett Police Department would interview Basim regarding the internal investigation on Sunday, February 14, 2010 at 8:00 A.M. at SNOCOM.

On February 5, 2010, Grady sent an e-mail to the union requesting a two-week extension of the investigation timeline described in section 15.1 of the CBA in order to allow more time to

complete the investigation into Basim's alleged misconduct surrounding police officer Poteet's termination. (Exhibit 37)

At 7:43 A.M. on February 9, 2010, Margaret Penman, the union's second vice-president and bargaining unit dispatch supervisor, who was serving as Basim's union representative during the investigation into Basim's communications with Poteet, sent Grady an e-mail declining the employer's request for extension of the disciplinary timeline in the Basim-Poteet matter. (Exhibit 37)

At 8:10 A.M. on February 9, 2010, Penman sent Grady an e-mail requesting that Basim's interview with Coleman be "rescheduled for a normal business day and hours as our SDA [union] attorney will be attending as provided in accordance with CBA section 14.4.2 -14.4.3." (Exhibit 38)

At 10:02 A.M. on February 9, 2010, Grady replied by e-mail and explained that the date and time of Basim's interview was acceptable under section 14.4.2 of the CBA because it was during Basim's regularly-scheduled work hours and would not be changed. Grady went on to explain that the union "has declined my request to agree to an extension of the timeline given in Section 15.1 of the CBA for this internal investigation. Although I had hoped to obtain mutual agreement with the SDA [union] in order to allow these types of requests, based on the imposed deadline I cannot do so." (Exhibit 38)

The union alleges that the employer unilaterally changed an established past practice of accommodating the regular work schedule of the union's attorney in scheduling investigatory interviews. More specifically, the union argues that the employer's denial of its request to move Basim's investigatory interview from Sunday, February 14, 2010 (Valentine's Day) to a regular work day for the union's attorney constituted an unlawful, unilateral change in past practice. The union cites sections 14.4.2 and 14.4.3 of the CBA which state:

> 14.4.2 Any interrogation of an employee shall be at a reasonable hour, preferably when the employee is on duty, unless the exigencies of the investigation dictate otherwise. When practicable, interrogations shall be scheduled for the daytime.

> 14.4.3 Any interrogation (which shall not violate the employee's constitutional rights) shall take place at SNOCOM except when impractical. The employee shall be afforded an opportunity and facilities to contact and consult privately with an attorney of his own choosing and/or a representative of the Union may be present during the interrogation, but may not participate in the interrogation except to counsel the employee.

The union argues that the employer established a past practice of rescheduling investigatory interviews in order to allow employees to have an attorney represent them. Chester Swanson, a former union president and bargaining team member, testified about one instance sometime in or after 2002 where the union requested that the employer change the scheduling of an investigatory interview to allow the employee's attorney to participate. In that instance the employer granted the union's request to reschedule the employee's interview and changed the time to allow the employee's attorney to be present.

The employer argues that it was not obligated to change the interview date because it followed the requirements of the CBA and scheduled Basim's interview during the daytime, while Basim was on duty. The employer also points out that Basim was not prevented from having legal representation, as evidenced by the fact that Basim's attorney attended the interview.

As described in *Val Vue Sewer District*, Decision 8963, the first step in establishing a unilateral change violation is proving the "existence of a relevant status quo or past practice." "For a 'past practice' to exist, two basic elements are required: (1) an existing prior course of conduct; and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as the proper response to the circumstances." *City of Pasco*, Decision 9181-A. In this case the union presented one rather vague example of the employer working with the union to reschedule an investigatory interview to allow for an attorney to participate. The single example presented by the union does not establish that the parties had a "known and mutually accepted" past practice that the employer would grant all requests to reschedule investigatory interviews to a regular work day for the union's attorney.

The employer scheduled Basim's interview during her regularly-scheduled shift, which was consistent with the CBA. The employer's unwillingness to change the interview date did not prevent Basim from having her union representative and the union's attorney present during the investigatory interview.

CONCLUSION

The parties did not have a past practice requiring the employer to schedule investigatory interviews during a regular work day for the union's attorney. The employer did not violate RCW 41.56.140(4) when it denied the union's request to change the date of Basim's February 14, 2010, investigatory interview.

E. Did the employer unilaterally change past practice by requiring employees on paid administrative leave to stay in their homes during their regularly-scheduled work hours?

ANALYSIS

On February 9, 2010, Grady met with Basim and Penman and gave each of them nearly identical memorandums informing them that they were being placed on paid administrative leave. The memorandums stated:

> I have received a formal complaint regarding allegations of misconduct. The allegations are considered very serious by SNOCOM and I believe a prompt and thorough investigation is required.
>
> I intend to have an Internal Investigation on behalf of SNOCOM conducted into these allegations. I am in the process of determining who will actually conduct the investigation and I will notify you when that decision has been made.
>
> Due to a number of issues that have been brought to my attention over the course of the past few days I am placing you on paid administrative leave effective immediately.
>
> This decision is based on allegations of the following:
>
> - Directing a subordinate employee to meet with you to discuss union business while on duty in possible violation of Section 3.3 of the Collective Bargaining Agreement (CBA).
>
> - Using your position as a supervisor to intimidate a subordinate employee into discussing union business after that subordinate employee declined to do so. This is a possible violation of Policies D.2 (Deportment), D.3 (Obedience to Orders), D.7 (Respect and Courtesy), D.43 (Bullying).

> During this administrative leave you are subject to the following. Failure to abide by any of these will be considered insubordination and may lead to termination.
>
> - You will turn in all department-owned equipment.
> - You will not act in any official capacity as a SNOCOM employee.
> - You are not to have any contact with any current or former SNOCOM employees or employees of SNOCOM user agencies, other than union representatives in their union capacity.
> - Your duty station during this period is your residence. Your hours of duty are the same as if you were remaining on the schedule.
> - Should you find it necessary to leave your home during these hours you are to contact me for prior approval.
> - You will make yourself available to the investigative agencies upon request. This includes any current or future investigations.
>
> In compliance with *Weingarten* and Section 14.4.3 of the CBA, you are entitled to representation of your choosing for any interview you are required to participate in for this investigation. During the interview(s) you are directed to be accurate, complete and truthful in all matters.
>
> Except for those communications required in the context of the representation rights noted above, you are being directed not to discuss any general or specific detail involving this matter with any current or former employees of SNOCOM or of SNOCOM's user agencies.
>
> Violation of this order or any other policies during this investigation may result in disciplinary action.
>
> Your signature below indicates your receipt of this Notice and that you have read and understand your obligations and responsibilities. Failure to comply with any of the above may result in disciplinary action up to and including termination of your employment. This order is to remain in effect until you receive formal notification from me. (Exhibits 39 and 40)

The union alleges that the employer unilaterally changed the parties' past practice by ordering Basim and Penman not to leave their homes during working hours while they were on paid administrative leave from February 9, 2010, until March 16, 2010.

Grady's decision to place Basim and Penman on paid administrative leave was the first time Grady utilized administrative leave during her tenure as executive director. Steve Perry, SNOCOM's executive director from approximately 1998 through June 30, 2009, testified that he put employees on paid administrative leave for fairly short durations, approximately half a dozen times during his tenure with the employer. Perry did not testify about whether or not employees

that he placed on paid administrative leave were required to stay in their homes during their regularly-scheduled work hours. There was insufficient evidence the employer had a consistent past practice with regards to employees' ability to leave their homes during their regularly-scheduled work hours while on paid administrative leave. A unilateral change violation cannot be found without first establishing the "existence of a relevant status quo or past practice." *Val Vue Sewer District*, Decision 8963.

CONCLUSION

The record failed to establish the existence of a past practice concerning the whereabouts of employees on paid administrative leave during their regularly-scheduled work hours. The employer did not refuse to bargain in violation of RCW 41.56.140(4) by ordering Basim and Penman to stay in their homes during their regularly-scheduled work hours while they were on paid administrative leave.

F. Did the employer unilaterally change past practice by prohibiting employees on paid administrative leave from having any contact with current or former employees of the employer and/or employees of user agencies?

ANALYSIS

On February 9, 2010, after the employer informed Basim and Penman that they were being placed on administrative leave, Grady sent all staff an e-mail stating: "Supervisors Penman and Basim have been placed on non-disciplinary, paid administrative leave. This means they are not to be contacted for work related matters and are restricted from access to SNOCOM without my approval."

The union alleges that the employer unilaterally changed past practice by prohibiting Basim and Penman from having any contact with current or former employees of the employer and/or employees of user agencies from February 9, 2010, when they were placed on administrative leave until after the employer interviewed them on February 24, 2010. The union further alleges that the employer changed past practice by informing bargaining unit employees that they could not contact Basim or Penman.

Perry explained that in his tenure as executive director he rarely used administrative leave. Perry recalled ordering employees on paid administrative leave not to talk with other employees about the subject of the investigation, but never issued a blanket order prohibiting an employee under investigation from having any contact with other employees.

Mandatory Subject

In order to prove a unilateral change violation, the union must establish that the issue being changed is a mandatory subject of bargaining. In determining whether an issue is a mandatory subject of bargaining I must balance the impact on employees' wages, hours and working conditions against the extent to which the subject lies at the core of entrepreneurial control or is a management prerogative.

The employer argues that use of administrative leave is a managerial prerogative and is not a mandatory subject of bargaining. Grady explained that the order prohibiting contact with current or former employees of the employer and/or employees of user agencies was intended to minimize disruption and protect the integrity of the investigation until its completion. The employer points out that Perry could not recall ever discussing his decision to use administrative leave with the union. When Perry was asked if he ever had an agreement with the union that he would not use administrative leave, he testified "No. Absolutly not." (Transcript p.982)

The union argues that the restrictions the employer placed on employees who are on administrative leave, including the restrictions on employees communications, are mandatory subjects of bargaining. Under normal circumstances, employees are permitted to communicate with each other during work hours. The employer altered Basim and Penman's working conditions when it ordered them not to have any contact with current or former employees of the employer and/or employees of user agencies.

In balancing these interests, I find that the employer's use of administrative leave and related restrictions are core management prerogatives that lie at the heart of the employer's ability to control its operations. Although these restrictions also impact employees, the ability to use administrative leave when investigating workplace incidents has an even greater impact on the employer's ability to operate its business.

CONCLUSION

The employer's managerial interest in determining when to use paid administrative leave and related restrictions in conducting an internal investigation into alleged employee misconduct, outweighs the impact on employees' wages, hours and working conditions. The employer's use of paid administrative leave to investigate allegations of employee misconduct and related restrictions on employee communications is a permissive subject of bargaining. The employer did not have an obligation to bargain with the union. Although the employer's restrictions on employee communications constituted unlawful interference as explained later in this decision, the employer did not commit a refusal to bargain violation under RCW 41.56.140(4), by prohibiting Basim and Penman from having contact with current or former employees of the employer and/or employees of user agencies from February 9, 2010, until February 24, 2010.

G. Did the employer unilaterally implement a new work rule prohibiting employees from participating in union-related discussions in the workplace?

ANALYSIS

The union alleges that the employer unilaterally changed past practice and implemented a new work rule when Grady sent an e-mail to all employees on March 19, 2010. The employer argues that the e-mail was merely a lawful reiteration of language in the parties' CBA and did not constitute a unilateral change.

On March 19, 2010, the employer sent an e-mail to all bargaining unit employees stating:

> Hello to all,
>
> Section 3.3 of the CBA reads ..... "Work hours shall not be used by employees or Association representatives for the promotion of Association affairs other than stated above". The items referred to are negotiations and investigation of grievances and require cooperative time off arrangements with SNOCOM administration.
>
> In the past, there has been lax enforcement in keeping SDA [union] business off the dispatch floor. Recently this has caused problems in the workplace and as a result I need to clearly communicate SNOCOM's expectation.

> Our expectation is that SDA [union] business, except as outline [sic] specifically in the CBA will not be conducted on SNOCOM time. This means that SDA [union] related discussions are not to be occurring on the dispatch floor, in the Supervisor office or when employees are being paid. I know it is easy to blur the union business with SNOCOM business, but the two have to be kept separate. It is my expectation that all employees will adhere to Section 3.3 of the CBA. If anyone has any questions, please let me know. (Exhibit 68)

Status Quo or Past Practice

Up until 2002, dispatch employees were represented by Teamsters Local 763. In December of 2002, the Commission certified the SNOCOM Dispatchers Association (union) as the exclusive bargaining representative of dispatch employees.

Section 3.3 of the parties' CBA reads:

> Association Investigation and Visitation Privileges. With reasonable advance notice, a representative of the Association may visit the work location of the employees covered by this Agreement at any reasonable time for the purpose of investigating grievances. Said representative shall limit his activities during such investigations to matters relating to this Agreement. Work hours shall not be used by employees or Association representatives for the promotion of Association affairs other than stated above.

Witness testimony shows that this language was in the parties' old Teamsters contract and has remained unchanged since the SNOCOM Dispatchers Association (union) negotiated its first contract with the employer in 2003. Penman explained that the wording in section 3.3 is:

> [A] holdover or a leftover or a continuation from our actual Teamster's contract. . . . [W]hen we were Teamsters we did not have a shop steward, we just had what they would call a business agent or a business rep. . . . [T]hey couldn't just show up and disrupt the workplace environment, that they really needed to understand that the workplace needed to continue on and that they couldn't just show up and do unsolicited union business. So unless they were there for specific reasons, that they needed to, you know, make arrangements to be there. (Transcript p.531)

Up until Grady sent the March 19, 2010, e-mail, employees regularly engaged in union-related discussion in the workplace. Testimony also shows that employees are generally allowed to engage in non-work related conversation when they do not have dispatch work to perform. Terry Peterson has been employed as the employer's information services manager since

approximately 2003. Peterson acknowledged that prior to the March 19, 2010, e-mail the employer had not applied section 3.3 of the CBA to prevent employees from discussing union-related matters in the workplace. The record also established that for many years the union, with management's knowledge, held union meetings in the workplace conference room. The union also conducted union-related votes in the workplace. This fact was known by management, as evidenced by one instance in 2008 where Dave Hudson, the employer's operations manager from 2005 until July 26, 2010, asked the union to borrow its workplace ballot box to conduct a workplace survey.

I find that the employer and union had developed a past practice of allowing union-related discussions between employees in the workplace. Ambiguous contract language can be construed or defined through the development of past practice. The language in section 3.3 of the CBA was interpreted through past practice to allow employees to have conversations with their co-workers in the workplace about union-related matters.

Mandatory Subject

The ability of employees to engage in general conversation with co-workers about their working conditions, grievances, bargaining proposals, or upcoming union meetings, are part of employee working conditions. In *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, the Supreme Court held "The scope of mandatory bargaining is limited to matters of direct concern to employees. Managerial decisions that only remotely affect 'personnel matters,' and decisions that are predominantly 'managerial prerogatives,' are classified as nonmandatory subjects." The reason that "[w]ork rules have generally been held to be mandatory subjects of bargaining" is that they often impact employee working conditions in significant ways. *King County Fire District 11*, Decision 4538-A (PECB, 1994); citing *City of Bellevue*, Decision 839 (PECB, 1980). In this instance, the subject matter that employees are able to discuss with their co-workers while at work is of direct concern to employees.

The rule imposed by the employer prohibits employees from engaging in union-related discussions "on the dispatch floor, in the Supervisor office or when employees are being paid." The implication of this work rule is that discipline could result if employees do not comply. The employer did not demonstrate under *International Association of Fire Fighters, Local 1052 v.*

PERC, 113 Wn.2d 197, that this work rule "lies at the core of entrepreneurial control or is a management prerogative."

This is not an example of a managerial decision that only remotely affects employees. In situations where "employee interests outweigh employer interests, the Commission has found the issue a mandatory subject of bargaining." *Yakima County*, Decision 6594-C (PECB, 1999) citing *City of Wenatchee*, Decision 6517-A (PECB, 1999). I find that the employer's work rule prohibiting employees from participating in union-related discussions in the workplace has a significant impact on bargaining unit employees' working conditions and is a mandatory subject of bargaining.

Opportunity to Bargain or *Fait Accompli*?

Grady did not notify the union or offer to bargain about changing the past practice of allowing union-related discussions in the workplace before sending the March 19 e-mail. The e-mail announced a decision that had already been made and was presented as a *fait accompli*.

Affirmative Defense - Waiver by Contract

The employer argues that the e-mail Grady sent to employees on March 19, 2010, was a lawful reiteration of language in the parties' CBA.

As the Commission explained in *City of Wenatchee*, Decision 8802-A (PECB, 2006):

> When a knowing, specific and intentional contractual waiver exists, an employer may lawfully make unilateral changes as long as those changes conform with the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). A waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564 (PECB, 1990). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). We have long held the general management rights clauses often asserted by employers as waivers of union bargaining rights are generally found inadequate under the high standards for finding a waiver. *See Chelan County*, Decision 5469-A (PECB, 1996).

In interpreting contract language "[t]he Supreme Court of the State of Washington has long adhered to an 'objective manifestation' theory of contracts, and imputes to a person an intention corresponding to the reasonable meaning of the person's words and acts." *City of Wenatchee*,

Decision 6517-A (PECB, 1999) citing *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514 (1965). In determining the meaning of contract language, "Washington courts may examine the subsequent conduct of contracting parties in discerning their contractual intent, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract." *Yakima County*, Decision 6594-C; citing *Berg v. Hudesman,* 115 Wn.2d 657 (1990); *Lynott v. National Union Fire Insurance Company*, 123 Wn.2d 678, 684 (1994); and *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1 (1997).

The employer contends that the union waived its right to bargain about employees' ability to engage in union-related conversations in the workplace by agreeing to section 3.3 of the CBA. Specifically, the employer points to the last sentence of section 3.3 "Work hours shall not be used by employees or Association representatives for the promotion of Association affairs other than stated above." The description of the work rule in the employer's March 19, 2010, e-mail goes beyond quoting the CBA by stating: "Our expectation is that SDA [union] business, except as outline [sic] specifically in the CBA will not be conducted on SNOCOM time. This means that SDA [union] related discussions are not to be occurring on the dispatch floor, in the Supervisor office or when employees are being paid."

"To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter was fully discussed by the parties and that the party relinquishing its rights did so consciously." *City of Edmonds*, Decision 8798; citing *Whatcom County*, Decision 7244-B (PECB, 2004). The language in section 3.3 does not clearly and unmistakably prohibit employees from talking about union-related issues on the dispatch floor, in the supervisor office, or when employees are being paid. Furthermore, the employer did not put on any testimony that would indicate this broader interpretation was agreed to in bargaining.

The employer did not establish that the term "promotion of Association affairs" in section 3.3 of the CBA is synonymous with the "union-related discussions" it prohibits in its e-mail. On its face, the phrase "promotion of Association affairs" seems to be more limiting than the term "union-related discussions." Although it is possible to have a union-related discussion to promote Association affairs, it is also possible that employees could engage in union-related discussions that do not "promote Association affairs."

The prohibition on union-related discussions "when employees are being paid" is also more limiting than the restriction on activities during "work hours" contained in the CBA. Work hours typically do not include employee breaks, lunches, or paid-leave time. "When employees are being paid" is a much broader term that could reasonably be interpreted by employees to include their breaks, lunches, or paid-leave time.

Similarly, the prohibition against union-related discussions in the supervisor office or on the dispatch floor is broader than the restrictions in the parties' CBA, which only references "work hours." The work rule described in the employer's March 19 e-mail seems to prohibit union-related discussions in the supervisor office or on the dispatch floor at all times, not just when employees are on work time. Overall, the requirement that "[union] related discussions are not to be occurring on the dispatch floor, in the Supervisor office or when employees are being paid" is significantly broader than the restrictions on promotion of union affairs during work hours contained in section 3.3 of the parties' CBA.

CONCLUSION

The language in section 3.3 of the parties' CBA was interpreted by the parties through past practice to allow employees to engage in union-related conversations with their co-workers in the workplace. The work rule the employer announced in its March 19, 2010, e-mail, prohibiting employees from participating in union-related discussions on the dispatch floor, in the supervisor office or when employees are being paid, impacted employee working conditions and was a mandatory subject of bargaining. The work rule was not consistent with the language in the parties' CBA or the parties' past practice. The record shows that the employer never provided the union with an opportunity to bargain this change in working conditions and presented the new work rule as a *fait accompli*. The employer raised a waiver by contract defense. By agreeing to the language in section 3.3 of the CBA, the union did not clearly and unmistakably waive its statutory rights to bargain the work rule the employer announced in the March 19, 2010 e-mail. I find that the employer violated RCW 41.56.140(4) by unilaterally changing work rules regarding employees' ability to engage in union-related discussions in the workplace, without fulfilling its bargaining obligations.

ISSUE 2 – INTERFERENCE WITH *WEINGARTEN* RIGHTS

APPLICABLE LEGAL STANDARDS

A public employer commits an interference violation under RCW 41.56.140(1) if it refuses an employee's request for union representation at an investigatory interview and continues the interview. The Commission explained an employee's right of union representation during an investigatory meeting, commonly called *Weingarten* rights, in *Methow Valley School District*, Decision 8400-A (PECB, 2004) (footnotes omitted):

> In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court of the United States affirmed a National Labor Relations Board decision that Section 7 of the National Labor Relations Act (NLRA) provides employees the right to be accompanied and assisted by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action.
>
> The U.S. Supreme Court explained that a lone employee may be too fearful or may not be articulate enough to present his side of the story during an investigatory interview. *Weingarten*, 420 U.S. at 263. An employee-representative's presence at an investigatory interview protects the individual employee from being overpowered or out maneuvered by the employer. *Weingarten*, 420 U.S. at 265 n. 10. *Weingarten's* language clearly indicates that the protected right is an individual employee right, not a union right. *Weingarten*, 420 U.S. at 256-257; *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), enforced, 338 F.3d 267 (4th Cir. 2003). Once an employee requests union representation, the employer must either grant the request or end the interview.
>
> This Commission and Washington Courts interpret issues arising under Chapter 41.56 RCW by examining federal decisions construing the NLRA, as amended by the Labor Management Act of 1947 (Taft-Hartley Act), when the language between the two statutes is similar. *State ex rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wn.2d 60, 67-8 (1980). Although the language of Section 7 of the Act and RCW 41.56.040(1)(3) are not identical, the Commission has previously held that the rights granted in Section 7 may be inferred in RCW 41.56.040. *Okanogan County*, Decision 2252-A (PECB, 1986).

As examiners explained in *Washington State Patrol*, Decision 4040 (PECB, 1992) and *Seattle School District*, Decision 10066-B (PECB, 2010), there are four elements necessary for *Weingarten* rights to be applicable:

> 1. The right to representation attaches only where the employer compels the employee to attend an investigatory meeting.

2. A significant purpose of the interview must be (or becomes) to obtain facts related to a disciplinary action.

3. The employee must reasonably believe potential discipline might result from the information obtained during the interview. *Mason County*, Decision 7048 (PECB, 2000).

4. The employee must request the presence of a union representative.

After an employee makes a valid request for union representation in an investigatory interview, an employer has three options: "1) Grant the request; 2) Discontinue the interview; 3) Offer the employee the choice of continuing the interview unrepresented, or of having no interview at all, thereby foregoing any benefit that the interview might have conferred upon the employee." *Omak School District*, Decision 10761-A (PECB, 2010) citing *Roadway Express*, 246 NLRB 1127 (1979).

"[W]hen an employee asserts his or her *Weingarten* rights, an employer may only schedule the investigatory meeting at a future time and place that provides an opportunity for the employee, on his own time, to consult with his union representative in advance thereof." *Omak School District*, Decision 10761-A, citing *King County*, Decision 4299 (PECB, 1993), *aff'd*, Decision 4299-A (PECB, 1993), citing *Climax Molybdenum Co.*, 227 NLRB 1189 (1977).

Role of Union Representative in an Investigatory Interview

The role a union representative plays in the investigatory interview process was addressed by an examiner in *King County,* Decision 4299 (PECB, 1993), *aff'd,* Decision 4299-A (PECB, 1993):

> The Supreme Court's *Weingarten* opinion does not paint a picture of a passive role for a union representative at an investigatory interview. The use of terms such as "assist", "assistance", "clarify", "eliciting favorable facts", "getting to the bottom of the incident", "raise extenuating factors" and "suggest", indicate the Court's belief that a union representative must have the opportunity to be more than a witness to the interview process. From its numerous uses of active verbs when describing the role of a union representative during an investigatory interview, it is clear that the Supreme Court in *Weingarten* envisioned that role as including the ability to ask questions, to bring out additional facts, counsel the employee under investigation, and to provide information concerning past employment practices.

The Commission adopted the examiner's analysis, as quoted above, in *King County,* Decision 4299-A (PECB, 1993), and repeated its "concurrence with that analysis, and with the conclusion

that a union representative cannot be completely silenced." *City of Bellevue,* Decision 4324-A (PECB, 1994).

While the Commission recognizes that a union representative must be allowed to actively represent an employee who requests representation, the Commission also recognizes that the ability to represent an employee is not without limitation. "A union representative is present to assist the employee at an investigatory interview, not to speak in place of that individual. An employer is entitled to ensure that the responses it gets are those of the employee, and it can rightfully insist that a union representative not answer the questions directed to an employee." *City of Bellevue.* The union representative is there to assist the employee, who may be unfamiliar with and/or intimidated by the situation.

A. Did the employer interfere with Basim's *Weingarten* rights when Caw interviewed Basim on January 14, 2010?

ANALYSIS

The union alleges that the employer interfered with Basim's *Weingarten* rights by not allowing her union representative to talk or counsel her during an investigatory interview on January 14, 2010.

On January 8, 2010, Grady gave Basim a memo titled "Notice of Investigation" which stated:

> On Wednesday, January 6, 2010 I received a complaint from Mountlake Terrace Police Chief Greg Wilson. This complaint alleges you have exhibited inappropriate supervisory/employee conduct.
>
> The allegations are considered very serious by SNOCOM and I believe a prompt and thorough investigation is required. I intend to have an Internal Investigation on behalf of SNOCOM conducted into this allegation. I am in the process of determining who will actually conduct the interviews for that investigation and I will notify you when that decision has been made.
>
> In the meantime, your behavior has directly contributed to the opening of an internal investigation of Mountlake Terrace Police Officers by the Mountlake Terrace Police Department, a SNOCOM user agency. You have been identified as a witness/complaining party in their internal investigation. An interview has

> been scheduled for you with Mountlake Terrace Assistant Police Chief Caw, on Thursday, January 14, 2010 at 10:00 am. The interview will take place at SNOCOM. If you wish to bring representation with you to this interview, you are welcome to do so. This interview is part of the Mountlake Terrace internal investigation and is not the SNOCOM internal investigation.
>
> During the interview, you are directed to be accurate, complete and truthful in all matters.
>
> In addition you are being directed not to discuss any general or specific detail involving either SNOCOM's or Mountlake Terrace's investigation with any current or former employees of SNOCOM or of SNOCOM's user agencies. Violation of this order or any other policies during this investigation may result in additional disciplinary action.
>
> Your signature below indicates your receipt of this Notice and that you have read and understand your obligations and responsibilities. Failure to comply with any of the above may result in disciplinary action up to and including termination of your employment. (Exhibit 20)

Basim was concerned that the information from the interview with Assistant Chief Caw on January 14, 2010, would be shared with her employer for use in its disciplinary investigation. Basim wanted a union representative to attend the interview with Caw and chose Penman to act as her representative.

Reasonable Belief of Potential Discipline?

The employer argues that *Weingarten* rights did not apply in this situation because there was no reasonable basis for Basim to think that the interview with Caw could lead to discipline. In support of its position the employer cites *University of Washington*, Decision 8794 (PECB, 2004), where the examiner found that the employer had not violated an employee's *Weingarten* rights when it denied the employee's request for union representation at meetings between the employee and the employee's direct supervisor. The meetings were conducted as part of a corrective action plan and "were not intended by the employer as either investigatory or disciplinary." The examiner noted that during the meetings in question, the supervisor did not question the employee about past incidents or ask any questions about new incidents. The fact pattern in *University of Washington* is distinguishable from Caw's interview of Basim.

In the case before us, the employer gave Basim a written memo stating she was under investigation by the employer for alleged misconduct. The memo also informed Basim of the

related investigation by the Mountlake Terrace Police Department and her interview with Caw. The memo made it clear that the investigation was the result of a complaint from Mountlake Terrace Police Chief Wilson. The employer's investigation into the same alleged misconduct was ongoing when Caw interviewed Basim. Caw questioned Basim about the same incidents (sending text messages to Poteet, communicating with Poteet about the conduct of other Mountlake Terrace police officers) that SNOCOM was investigating. Furthermore, the memo stated, "If you wish to bring representation with you to this interview, you are welcome to do so." The employer acknowledged that Basim was entitled to union representation. Unlike the employee in *University of Washington* I find that Basim had a reasonable belief that the interview with Caw could potentially lead to discipline.

The Interview

Grady worked with Caw to schedule his interview of Basim. Grady insisted that Caw comply with section 14.4 of the CBA titled "Employees' Bill of Rights." Grady told Caw that Basim would be allowed to have a union representative and insisted that Caw conduct the interview at SNOCOM during Basim's regular work hours. Before the interview, Grady and Caw met to discuss the general format and procedures of the interview.

On January 14, 2010, Caw came to SNOCOM to interview Basim about the same incidents (sending text messages to Poteet and communicating with Poteet about the conduct of other Mountlake Terrace police officers) that SNOCOM was investigating. Penman attended the interview as Basim's union representative. Caw explained that Basim was a witness in the internal investigation conducted by the Mountlake Terrace Police Department, not the subject of the investigation. Caw told Penman that she was not to interrupt, ask questions, or interject herself during the interview. Caw instructed Penman and Basim they were not to make eye contact with each other or use any body language or facial expressions to communicate with each other about the answers to questions. Caw also told Penman that if she were to interrupt, he would end the interview and consider such an interruption to be insubordination by Basim. Generally speaking, it appears that Caw described Penman's role as a silent observer.

Penman told Caw that his description of her role was not consistent with her understanding of a union representative's role in an investigatory interview. Penman asked Caw if he would be

providing a copy of the interview to the employer and asked if the union would be able to get a copy. Caw said he did not have an answer to that question. Penman raised concerns that Basim had not received a "*Garrity* warning." A heated exchange ensued between Penman and Caw. Caw found that Penman's terminology, calling it a warning rather than an order, to be confusing. Caw eventually determined that Penman was talking about a concept he knew as a *Garrity* order, which is used to compel employees to answer questions in matters that have potential criminal implications. The concept is named after the United States Supreme Court decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967).

Caw explained that he did not think a *Garrity* order was necessary because the investigation he was conducting did not involve a criminal matter. Basim explained that she had not been given much information about the reason for the interview and told Caw the union's attorney had instructed her to ask for a *Garrity* warning. Penman confirmed that the union's attorney had advised her to make sure Basim was given a *Garrity* warning. Caw expressed that he felt the union's legal counsel was giving poor advice. After a heated verbal exchange about the relevance of giving Basim a *Garrity* order, Caw told Penman that she needed to "shut up" and let him conduct the interview. Caw suggested that Penman get Grady and Penman complied.

Grady came into the interview and ordered Basim to answer Caw's questions, noting that Basim could be terminated if she did not comply. After Grady ordered Basim to answer Caw's questions, Grady left the room. Caw began the formal interview of Basim. Caw tape recorded the interview. Penman never attempted to speak or communicate with Basim during the tape-recorded interview. Caw did not tape record the exchange he had with Basim and Penman prior to asking Basim questions. Penman testified that she wanted to more actively assist and represent Basim, but was afraid that any action on her part could cause Basim to be fired or disciplined for insubordination.

The Mountlake Terrace Police Department had the tape recording of the interview transcribed into text. A few days after the interview, Grady contacted Caw and asked him to send her a copy of the interview transcript. On January 25, 2010, Caw e-mailed Grady a copy of Basim's interview transcript. Grady replied to the e-mail with several minor corrections to the transcript.

In the e-mail Grady wrote: "I made some minor edits. If they are appropriate, please accept the changes and send it back to me. I want to make sure I am using the same copy that will be in your file." (Exhibit 26) Grady had not been present at the interview. The edits were corrected spelling, grammar, and punctuation. Caw accepted Grady's edits and incorporated them into the final transcript of the interview.

Caw acknowledged that the Mountlake Terrace Police Department does not usually share interview transcripts with another agency, while the police department's investigation is still in progress. Giving the transcript of Basim's interview to Grady was the first and only time Caw could recall sharing the transcript of an internal investigation interview with another agency while the investigation was in progress.

Was Caw Acting as an Agent of the Employer?

The employer argues that *Weingarten* rights do not apply in this situation because the interview was not being conducted by the employer. The employer alleges that Caw, assistant chief of the Mountlake Terrace Police Department, was not acting as an agent of SNOCOM when he interviewed Basim. Ultimately, the employer explains that it should not be held responsible for Caw's conduct because Caw is an employee of the City of Mountlake Terrace and was conducting an investigation that was not under the control of SNOCOM. The union argues that the close cooperation between Grady and Caw demonstrates that Caw was acting as an agent of the employer.

In support of its position the employer cites *Seattle School District*, Decision 9982-A (PECB, 2009). In that case the Commission explained:

> This Commission applies the common law principals of agency when determining whether acts of an individual not employed by an employer can be imputed to that employer. *See Lower Columbia Community College (Community College District 13)*, Decision 8117-B (PSRA, 2005). An agent's authority to bind his principal may be either actual or apparent. *Deers, Inc. v. DeRuyter*, 9 Wn. App. 240, 242 (1973) (citing 3 Am.Jur.2d Agency sec. 71 (1962)) cited in *Lower Columbia Community College (Community College District 13)*, Decision 8117-B. With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person or party. *Smith v. Hansen, Hansen, Johnson, Inc.*, 63 Wn. App. 355, 363 (1991), *review denied*, 118 Wn.2d 1023 (1992). Implied authority is actual authority, circumstantially

> proved, which the principal is deemed to have actually intended the agent to possess. Washington courts have held that the "authority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services." *Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 351 (1966).

The employer argues that Caw's actions are distinguishable from the private investigator used by the employer in *Seattle School District* because Caw was not performing an investigation for SNOCOM's benefit or at its direction. I disagree. In *Seattle School District*, the Commission found that Reeves [the private investigator] was acting as an agent of the employer. In support of this finding the Commission noted:

> [T]he employer still retained certain control of the investigation. For example, even though Reeves drafted the investigation report, Green [the employer's Chief Operating Officer] returned the report to Reeves to delete certain conclusions to which Green objected. Furthermore, Green made sure that Reeves complied with certain procedural safeguards, such as providing employees with Weingarten rights. Therefore, we cannot say that Reeves had total independence to act outside of the employer's control.

The description of Caw conducting a separate investigation on behalf of the Mountlake Terrace Police Department ignores the larger context of the investigation. The Mountlake Terrace Police Department was not an uninvolved third party who just wanted to interview Basim because she happened to be a witness in its investigation. The Mountlake Terrace Police Department did not approve of Basim sharing information with Poteet and thought it was inappropriate for Basim to help Poteet grieve Mountlake Terrace's termination decision and it was Mountlake Terrace Police Chief Wilson who made the complaint that caused the employer to investigate Basim's alleged misconduct. Wilson also serves as an alternate member of SNOCOM's Board of Directors.

It is also important to note that SNOCOM and the City of Mountlake Terrace have a close and unique interrelationship. The City of Mountlake Terrace provides a variety of support services to SNOCOM including assistance with finance, payroll, and human resources. The City of Mountlake Terrace also owns the building where SNOCOM is housed. The City of Mountlake Terrace has two seats on the SNOCOM Board of Directors, two alternate board member seats and a seat on SNOCOM's three-member personnel committee.

Grady knew that the statement Caw was taking from Basim would also be useful in the employer's investigation. This is evidenced by Grady's involvement throughout the interview process. It is significant that Caw did not approach the interview with Basim the same way he would typically approach an interview with an outside witness. Caw worked with Grady to schedule the interview. When Grady told Caw the interview had to take place at SNOCOM on Basim's work time, Caw followed Grady's direction. Caw didn't think that Basim needed a union representative, but when Grady insisted that Basim was entitled to union representation, Caw complied. When Basim asked for a *Garrity* warning, Grady came into the interview and ordered Basim, under threat of termination, to answer the questions. After the interview was completed, Caw sent the transcript to Grady and allowed her to make changes and corrections to the transcript. The employer then used the transcript from Caw's interview in its disciplinary investigation. These actions support the conclusion that Caw was acting as an agent of SNOCOM when he interviewed Basim on January 14, 2010.

Did Caw Interfere with Basim's *Weingarten* Rights?

In the investigatory interview context, the union representative is there to assist the employee in the interview, but is not permitted to take over the interview. The law seeks to balance the employer's interest in obtaining relevant information with the employee's right to have representation. In *City of Bellevue,* Decision 4324-A the Commission looked at the role of a union representative in an investigatory interview and explained:

> [I]t is within an employer's legitimate prerogative to require the union representative to remain silent while an employee gives an initial statement without interruptions by either side. The Supreme Court noted:
>
> > The employer, . . . is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.
> >
> > Weingarten, supra, at 260.
>
> We thus agree with the view that an employer may achieve an orderly interview, by hearing the employee's account first.
>
> The balancing of interests changes, however, when an employer begins actively questioning an employee. It hardly makes sense to provide a right to representation and then force a union representative to sit idly by while the

> employer browbeats or intimidates an employee, or elicits damaging and unintended responses through the use of confusing or misleading questions. An employer cannot deny an employee the assistance a union representative can offer in alerting the employee to problems with the phrasing or scope of a question. Examples of the type of assistance which might be provided by a union representative include: Noting when questions are ambiguous or misleading; noting when questions invade a statutory privilege that the employee has the right to invoke; or interceding when questions become harassing or intimidating.

In the case at hand, Caw told Penman that she was not to interrupt, ask questions, or interject herself during the interview. Caw instructed Penman and Basim they were not to make eye contact with each other or use any body language or facial expressions to communicate with each other about the answers to questions. Caw also told Penman that if she were to interrupt, he would end the interview and consider such an interruption to be insubordination by Basim. These limitations on Penman's ability to act as Basim's representative interfered with Basim's right to union representation.

CONCLUSION

Caw was acting as an agent of SNOCOM when he interviewed Basim on January 14, 2010. Basim had a reasonable belief that discipline could result from the interview. Basim had the right to have a union representative present who was allowed to alert her to problems with questions, ask clarifying questions and communicate with her during the investigatory interview. Basim made it known to Caw and Grady that she brought Penman to the interview as her union representative. By instructing Penman not to interrupt while the interview was in progress and by prohibiting Penman from engaging in any verbal or non-verbal communication with Basim, the employer, through its agent Caw, interfered with Basim's right to union representation in violation of RCW 41.56.140(1).

B. Did the employer interfere with Basim's *Weingarten* rights when Coleman interviewed Basim on February 14, 2010?

ANALYSIS

On January 27, 2010, the employer gave Basim a letter that described allegations against her and explained that the investigation into her alleged misconduct would be conducted by Detective

Coleman and Inspector Grassi of the City of Everett Police Department. This letter made it clear that Coleman and Grassi were conducting the investigation for the employer and would be acting as agents of the employer in conducting the investigation into Basim's communications with Poteet.

On February 4, 2010, Grady sent Basim an e-mail informing her that Coleman would be at the employer's facility on Sunday, February 14, at 8:00 A.M. to interview Basim.

On February 14, 2010, Coleman and Grassi interviewed Basim at SNOCOM concerning her communications with Poteet. Penman and Reba Weiss, one of the union's attorneys, attended the interview as Basim's representatives. The interview was tape-recorded with consent of the parties and was subsequently converted into a written transcript.

The union alleges that the employer violated Basim's *Weingarten* rights when Coleman inhibited Weiss from making objections to questions and prevented Weiss from adding some clarifying statements during the interview. Specifically, the union argues that Coleman prevented Weiss from explaining why the employer's actions constituted entrapment. The union also alleges there were points in the interview when Coleman stopped Weiss from inserting information or argument that Weiss believed was relevant to the employer's investigation.[2] The employer argues that Weiss was allowed to ask clarifying questions and actively participated in the interview.

Penman testified that Weiss was allowed to ask some questions, but Coleman did not allow her to ask other questions while at times covering the tape recorder. Penman could not recall the subject matter of any of the questions that Coleman didn't allow Weiss to ask. The transcript of the interview contains several examples of Weiss successfully asking clarifying questions, both of Basim and Coleman. The exchange the union raises issue with in its brief concerning entrapment reads as follows:

> Weiss: Well, at any rate, we believe that Director Grady knew that it was Ms. Basim helping someone...

---

[2] Weiss did not testify as a witness. The union bases its arguments on the testimony of Penman and a transcript of the interview, Exhibit 87 L.

> Coleman: Okay, and I basically we're just interviewing Jodi [Basim] at this point, and all this will be included, your interview, but we're, you know, we're not here to argue the case.
>
> Weiss: Well I understand that, but nevertheless I think it was entrapment and I, which would also have been a violation of the contract, and there's...
>
> Coleman: Okay, that's something that you will have to deal with after...

(Ellipses in the above block quote appear in the interview transcript and are not an indication of an incomplete quote.) (Exhibit 87L)

Although Coleman made it clear she was not interested in arguing the point with Weiss, Weiss was able to get her concerns about entrapment noted on Basim's behalf. The record lacks detail on the context and subject of the other questions that Weiss was allegedly not allowed to ask.

CONCLUSION

The record does not show that Coleman prevented Weiss from acting in the capacity of Basim's union representative. I find that the employer did not interfere with Basim's right to union representation in violation of RCW 41.56.140(1) when its agent, Coleman, interviewed Basim on February 14, 2010.

C. Did the employer interfere with Basim's *Weingarten* rights when Grady interviewed Basim in a pre-disciplinary meeting on February 19, 2010?

ANALYSIS

On February 17, 2010, Grady sent Basim a memo titled "Notice of Intent to Discipline." In the memo Grady explained in part:

> I have reached a preliminary determination that your conduct warrants serious discipline in the form of an unpaid suspension and/or demotion, or termination. Before I make a final decision on discipline, however, I am offering you the opportunity to attend a pre-disciplinary meeting at SNOCOM at 9:00 a.m. on Friday, February 19, 2010. This will be your opportunity, if you elect to attend the meeting, to offer any further evidence regarding these events and/or mitigating factors you wish me to consider before any final decision on discipline is made. (Exhibit 49)

The memo went on to outline the issues of particular concern in Grady's disciplinary deliberations.

On February 19, 2010, Basim chose to attend the pre-disciplinary meeting. Jim Cline, one of the union's attorneys, attended the meeting as Basim's union representative. This type of pre-disciplinary meeting is often referred to as a *Loudermill*[3] hearing and allows an employee to confront the evidence against them before the employer makes a final decision on the disciplinary matter.

Did *Weingarten* Apply to the Pre-Disciplinary Meeting?

The employer argues that *Weingarten* rights did not apply to this meeting because it was a *Loudermill* hearing. The employer correctly notes that the Commission has held that: "The interests at stake in the *Loudermill* context are not within the realm of PERC jurisdiction." *Okanogan County,* Decision 2252-A (PECB, 1986). "The Public Employment Relations Commission does not assert jurisdiction through the unfair labor practice provisions of Chapter 41.56 RCW to enforce 'due process' rights emanating from the federal and state constitutions." *City of Tacoma,* Decision 3346 (PECB, 1989). Indeed, an employee's constitutional property rights protected by a *Loudermill* hearing are a distinct legal issue from an employee's *Weingarten* rights.

The union argues that *Weingarten* rights applied to the February 19 meeting. The same standard of analysis under *Weingarten* applies regardless what an employer labels a meeting. *Weingarten* rights only apply to situations where an employee is compelled, directed or ordered by an employer to participate in an investigatory meeting or interview. *Weingarten* rights did not apply because Basim's participation in the February 19, 2010, pre-disciplinary meeting with Grady was not compelled by the employer. The February 17, 2010, letter to Basim stated: "I am offering you the opportunity to attend. . . ." and "if you elect to attend the meeting. . . ." These statements make it clear that Basim was not required, ordered, or otherwise compelled to attend the meeting.

[3] The term "*Loudermill* hearing" refers to the decision of the Supreme Court of the United States in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), which held that public employees could not be deprived of a property right in their employment, without a due process right to a prior hearing.

CONCLUSION

The February 19 pre-disciplinary meeting Grady conducted with Basim was a *Loudermill* hearing and not an investigatory interview where *Weingarten* rights apply. I find that the employer did not interfere with Basim's right to union representation in violation of RCW 41.56.140(1) on February 19, 2010.

D. Did the employer interfere with Penman's *Weingarten* rights when Peterson called Penman with follow-up interview questions on February 25, 2010?

ANALYSIS

On February 23, 2010, Terry Peterson, the employer's information services manager, interviewed Basim and Penman separately. The interviews concerned Basim's and Penman's interactions with Jason Charvet, a SNOCOM dispatcher, on February 6, 2010. During the February 23, 2010, investigatory interview, Penman exercised her right to union representation. Penman was represented during the interview by the union's attorney and a union officer.

On February 25, 2010, Peterson called Penman explaining that he had some follow-up questions to the February 23, 2010, interview. Peterson told Penman that she was welcome to have her union representative or the union's attorney participate on the call. Penman asked Peterson what the question was. Peterson told Penman what his question was and Penman chose to answer the question without having a union representative included in the call.

The union argues that the employer violated *Weingarten* by calling Penman and asking to interview her in the absence of her union representative. Specifically, the union alleges that Penman's request for union representation on February 23 created an ongoing obligation on the employer not to conduct further interviews without a union representative present. The employer argues that Penman voluntarily waived her right to union representation during the follow-up phone interview.

CONCLUSION

I find that Peterson did not violate Penman's *Weingarten* rights by calling Penman on February 25, 2010. At the beginning of the phone call, before asking Penman any questions, Peterson offered to include Penman's union representative in the call. Penman chose to go ahead and answer Peterson's questions without the assistance of a union representative. Just as Penman had the right to request union representation during an investigatory interview, Penman also had the right to choose to answer the employer's follow-up questions without a union representative. I find that the employer did not interfere with Penman's right to union representation in violation of RCW 41.56.140(1) by calling her on February 25, 2010.

ISSUE 3 – DISCRIMINATION

APPLICABLE LEGAL STANDARDS

Under RCW 41.56.140(1) it is an unfair labor practice for a public employer to "interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter." Unlawful discrimination occurs when an employer takes action in reprisal for an employee's exercise of rights protected by Chapter 41.56 RCW. *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A (PECB, 2009), citing *Educational Service District 114*, Decision 4361-A (PECB, 1994). It is unlawful to retaliate against employees for engaging in protected union activity, such as filing grievances and participating in contract negotiations on behalf of the union.

In discrimination cases, the complainant maintains the burden of proof. The complainant must first set forth a *prima facie* case by establishing the following:

1. The employee, or employees, participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;
2. The employer deprived the employee(s) of some ascertainable right, benefit, or status; and
3. A causal connection exists between the exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish a *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). "The timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between protected activity and adverse action." *North Valley Hospital,* Decision 5809-A (PECB, 1997), citing *City of Winlock*, Decision 4784-A (PECB, 1995) and *Mansfield School District*, Decision 5238-A (EDUC, 1996).

While the complainant carries the burden of proof, there is a shifting of the burden of production. Once the complainant establishes a *prima facie* case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The complainant may respond to an employer's defense in one of two ways:

1. By showing that the employer's reason is pretextual; or
2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Port of Seattle, Decision 10097-A (PECB, 2009).

In the end, the burden remains on the complainant to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A, citing *Clark County*, Decision 9127-A.

ANALYSIS

CHRONOLOGY OF EVENTS

June 2009 – The City of Mountlake Terrace Police Department terminated Poteet's employment. One of Mountlake Terrace's reasons for terminating Poteet's employment involved a violation of the "two-in-blue" policy, which prohibits more than two police officers from congregating together in public places when they are not responding to an incident.

July 2009 – Basim sent text messages to Poteet and had conversations with Poteet about her observations of other City of Mountlake Terrace police officers continuing to congregate in public places in groups of three or more after Poteet was terminated. (Exhibit 87G)

August 2009 – Charvet sent at least four e-mails to Grady complaining about the union's leadership. Some of the e-mails expressed specific complaints about Basim and Penman. Other e-mails informed Grady of internal union deliberations and discussions surrounding the employer's proposal for a one-year contract extension. (Exhibits 123, 124, 125, 127) Charvet made the employer aware of his disagreements with Basim and Penman over union business.

October 2009 – The union held its annual election of officers. Basim, the union's current president, and Charvet, a dispatcher who served as the union's first vice-president from 2007-2009, ran for the position of union president. Basim was re-elected president. Margaret Gruzebeck was elected to serve as the union's first vice-president. Penman was re-elected to serve as the union's second vice-president. Penman has served as the union's second vice-president since the fall of 2008.

October 2009 – The union and employer met to bargain their successor CBA and discussed the idea of a one-year extension of the 2007-2009 CBA. Grady proposed eliminating the lead program and offered a two percent wage increase if the remaining terms of the 2007-2009 CBA were rolled-over into the new 2010 CBA. There was also some discussion about how overtime would be assigned once the lead program was eliminated. The union and employer have conflicting recollections about the substance of the overtime assignment discussions that occurred.

October 12, 2009 – Poteet had a phone hearing to determine unemployment eligibility. Poteet stated that a SNOCOM dispatcher sent him text messages that prove other City of Mountlake Terrace police officers have continued to gather in groups of more than two and were not disciplined. City of Mountlake Terrace Police Chief Wilson and Mountlake Terrace City Councilperson Hugill immediately contacted Grady and informed her they suspected Basim was the dispatcher that gave information to Poteet. (Exhibit 6)

October 13, 2009 – Grady asked Basim if she had any idea who from SNOCOM might be talking with Poteet about groups of more than two Mountlake Terrace police officers gathering together. Basim told Grady that she shared her observations of officers congregating at Starbucks with Poteet. That evening, Grady sent an e-mail to Hugill and Wilson explaining that Basim acknowledged giving information about two-in-blue violations to Poteet. (Exhibit 8)

October 19, 2009 – Basim filed a grievance on behalf of a bargaining unit dispatcher. The grievant was disciplined for posting a comment on Facebook while at work that referenced feeling hung-over. (Exhibit 10)

October 26, 2009 – Grady denied the union's October 19 grievance over disciplining an employee for an inappropriate Facebook post. (Exhibit 11) Basim subsequently notified the employer that the union was appealing the grievance to the SNOCOM Board of Directors, who upheld the employer's disciplinary decision. After the Board denied the appeal, the grievant decided to stop pursuing the grievance.

Fall 2009 – The employer posted vacant dispatch supervisor positions and accepted applications. The employer hired the top two applicants. Lisa Andrews was one of the employees selected for promotion. Charvet was not selected for promotion but was told that he was third on the promotion list, and would therefore be the next person to be hired into a supervisor position should a vacancy occur. Andrews and Charvet live together and are in a relationship. As a result of Andrews' promotion, the employer met with Charvet and Andrews to discuss the employer's expectations of them in the workplace with regards to the employer's nepotism policy. The employer informed them that it would try to schedule them on different shifts so that Andrews would supervise Charvet as little as possible.

December 2009 – The union and employer met to negotiate a CBA for 2010. Grady was the lead spokesperson for the employer and Basim was the lead spokesperson for the union. The parties reached a tentative agreement that included ending the lead program, giving employees a two percent pay increase in 2010, and retaining all other portions of the expired contract. The employer thought that it had explained that its proposal to eliminate the lead program also meant changing its overtime assignment procedure. The union did not understand that this was part of the employer's proposal.

December 8, 2009 – The union and employer had a labor-management meeting to discuss a variety of collective bargaining issues. One of the issues discussed was the employer's nepotism policy as it related to Andrews' promotion to a supervisory position and her relationship with Charvet. The parties discussed the change in rotational days off that had resulted from moving Charvet to a different work rotation on the same shift. At least two other employees had their schedules affected by the change and one of them lost a holiday that was previously scheduled as a day off in the work rotation. Kelly Daigle, a dispatcher and union officer, expressed that she felt strongly that Andrews should not be supervising Charvet on regularly-scheduled shifts or on overtime. Basim expressed that she thought the employer should not have promoted Andrews because they knew Andrews lived with Charvet. Basim also referenced the possibility that the nepotism situation could evolve into an unfair labor practice. Operations manager Hudson agreed to take a look at the impact that Charvet's schedule change had on other employees' schedules and holidays off. (Exhibit 158)

December 30, 2009 – Karen McKay, the person in charge of scheduling for the employer, sent an e-mail to all SNOCOM dispatchers announcing that the overtime assignment sheet system would be changing in 2010. The e-mail explained "the assignment of overtime goes back to pre-Lead program rules, which is Dispatchers get priority over Supervisor's for dispatch shifts; Supervisors get priority over Dispatchers for supervisor shifts and the 2R position is assigned with both the Supervisors and Dispatchers in one pool . . . ." (Exhibit 13)

December 31, 2009 – Basim sent Grady an e-mail saying she had signed copies of the 2010 CBA and was about to hand deliver them to the employer but was concerned about the December 30 e-mail from McKay about the change in overtime assignment. "It appears that there is an issue or a misunderstanding regarding overtime assignments." (Exhibit 14) Basim explained the union and employer had signed a MOU in 2008 that governs overtime assignments and puts all employees in one pool and attached a copy of the MOU to the e-mail. Basim went on to explain:

> Before the Lead program was implemented overtime assignments were divided up into availability/assignment by class (dispatchers, supervisors, etc). February 2008 there was an MOU issued changing the assignments to include one pool for all employees (which is how we still do it today). I have attached a scanned copy of the MOU for your review. Section 6.3.1 of the CBA states that overtime will be made available to qualified employees on a rotational system mutually agreed

> upon by the employer and the association. Because this change to the assignments of overtime was made as a memorandum of understanding outside of the contract, eliminating the Lead program from the contract does not automatically return the overtime assignments back to the way they were done prior to the Lead program. If it is management's wish to change the way that overtime is assigned, as the CBA states, the change must be one that is mutually agreed upon. With this said, the SDA [union] does not think that this issue is something that should hold back the approval of the extension of the contract. We are willing to go forward with acceptance of the contract extension and "table" this topic for immediate attention. If there have been assignments of overtime for dates from January 1, 2010 on the SDA [union] requests that these assignments are corrected to follow the current overtime assignments which are done by one pool of availability rather than by class. (Exhibit 14)

Early January 2010 – Basim was out of town working as a dispatch trainer for the Washington State Criminal Justice Training Commission (CJTC).

January 5, 2010 – Grady sent an e-mail to Basim expressing concern that she thought the union had agreed to the change to the overtime assignment process as part of the contract negotiations to eliminate the lead program. Grady explained:

> I have made [it] clear from our discussions about the contract extension and discontinuation of the lead program that in doing away with leads, we would necessarily revert to the overtime assignment system in effect before the 2008 MOU that you sent to me. To do otherwise results in costs for the agency that we did not agree to bear. Your email essentially makes a counterproposal: that we implement the proposed wage increases and discontinuation of the lead program, but continue using the overtime assignment system from the 2008 MOU (which is expressly designed to work with the lead program). That proposal is not acceptable to SNOCOM.
>
> Before I read your email, I was proceeding on the assumption that we had an agreement on the contract extension (including the elimination of the leads and the change in the way overtime is assigned), and therefore the leads were removed from the current schedule. If, however, we do not agree on how overtime will be assigned without the leads, then we do not have a full agreement at this point, and I need to reinstate the leads and other 2009 contract terms while we discuss this further. (Exhibit 14)

January 5, 2010 – Basim responded to Grady's e-mail expressing that she had a different view of how the overtime MOU interacted with the assignment of overtime in relation to the lead program. Basim explained that she was out of town teaching at the CJTC for the week, but

would call Grady during a break. Basim also informed Grady that Penman would be working the next day and was up to speed on the e-mail exchange on this issue. (Exhibit 14)

January 5, 2010 – The City of Mountlake Terrace and the Mountlake Terrace Police Guild participated in an arbitration hearing concerning Poteet's termination. Wilson participated in the hearing on behalf of the City. At the hearing the Mountlake Terrace Police Guild provided copies of the text messages that Poteet had received from Basim in July 2009. This was the first time that Wilson and the City saw the content of the text messages.

Sometime between December 31, 2009, and January 6, 2010, the union and employer's attorneys also engaged in at least one exchange about the overtime assignment issue as it related to the 2010 contract extension.

January 6, 2010 – Grady met with Penman, Gruzebeck, and two other union board members to discuss the 2010 contract and overtime assignment procedure. Basim was not able to attend the meeting. Grady told the union that the change to a three-sheet overtime assignment system, rather than a single overtime pool, was a core element of the employer's contract proposal. Grady informed the union that the employer would withdraw its two percent wage increase offer, reinstate the lead program and go into full contract bargaining if the union would not agree to change the overtime assignment procedure. Grady informed the union that it needed to respond to her offer within a few days, or the employer would revert back to the status quo under the expired CBA and withdraw the two percent wage increase proposal.

January 6, 2010 – Chief Wilson sent a letter to Grady, stating: "I would expect that if a supervisor from SNOCOM witnessed violations of policy being committed by a SNOCOM user agency, that these would be reported through the SNOCOM liaison to the department/agency director and not a terminated employee." (Exhibit 16) Wilson went on to explain:

> I would expect Jodi [Basim] to have a broader perspective of disciplinary matters, understand the chain of command when reporting violations and aware of disruption caused by voicing uninformed opinions about outside agency investigations.

> This is not the first time Jodi [Basim] has interfered with Mountlake Terrace on internal matters . . . .
>
> I will leave it to your discretion to determine whether there are SNOCOM policy violations regarding this behavior. I would request that you direct Jodi [Basim] to report possible violations of policy by Mountlake Terrace employees through the proper chain of command and as a SNOCOM employee not to openly express her opinions about the internal matters occurring within Mountlake Terrance or share privileged information with non law enforcement personnel (terminated employees).

January 7, 2010 – Grady met with Penman, Gruzebeck, and other union board members. The union informed Grady that it would agree to change the overtime assignment procedure to the three-sheet system, which had been utilized by the employer prior to the creation of the lead program, in exchange for the two percent wage increase and abolishment of the lead program.

After the meeting, Penman sent Grady an e-mail confirming that the union was agreeing to revert to the old overtime procedure as requested by the employer. (Exhibit 19)

January 8, 2010 – Grady gave Basim a memo titled "Notice of Investigation" informing Basim that SNOCOM had received a complaint from Wilson alleging that Basim had exhibited inappropriate supervisory/employee conduct. The letter explained:

> The allegations are considered very serious by SNOCOM and I believe a prompt and thorough investigation is required. I intend to have an Internal Investigation on behalf of SNOCOM conducted into this allegation. I am in the process of determining who will actually conduct the interviews for that investigation and I will notify you when that decision has been made. (Exhibit 20)

The letter went on to inform Basim that the City of Mountlake Terrace Police Department was also opening an investigation and that Basim was identified as a witness/complaining party. The letter directed Basim to participate in an interview with Mountlake Terrace Assistant Police Chief Caw. The letter further ordered Basim "not to discuss any general or specific detail involving either SNOCOM's or Mountlake Terrace's investigation with any current or former employees of SNOCOM or of SNOCOM's user agencies."

January 14, 2010 – Caw interviewed Basim concerning the communications she had with Poteet about officers gathering in groups of more than two. Penman attended the interview as Basim's union representative. (Exhibit 26)

January 23, 2010 – Hugill sent Grady an e-mail proposing some language for an investigation notice to Basim. Hugill stated in part "I suggest that you not tell Jodi [Basim] who is conducting the investigation. Also, I suggest you add something to the notice similar to what I've written in the attached [document] so that Jodi can see what prompted you to begin the investigation. This can avoid Jodi claiming she's being targeted." (Exhibit 149)

January 27, 2010 – Grady gave Basim a memo titled "Investigation Update." The memo stated:

> On Saturday, January 9, 2010, I provided you with notice that you are the subject of a SNOCOM Internal Investigation.
>
> This memorandum is to provide you with additional information in accordance with Section 14.4.1 of the SNOCOM Dispatchers Association (SDA) Collective Bargaining Agreement (CBA).
>
> Everett Police Department will be conducting the investigation. The investigators assigned to the investigation will be Detective Coleman and Inspector Grassi.
>
> You are being investigated for allegations of the following inappropriate conduct and policy violations. These allegations were prompted by a series of events that include (1) information provided by former Mountlake Terrace Police Officer Keith Poteet as part of a hearing for unemployment benefits; (2) a discussion I had with you following Mr. Poteet's unemployment hearing; and (3) additional information Mr. Poteet disclosed during an arbitration hearing:
>
> **Truthfulness/Candor** - Truthfulness and candor is a fundamental expectation of public safety employees in all work-related communications.
>
> **D.7 - Respect and Courtesy**
> Employees will maintain a courteous, respectful demeanor in dealings with police fire or EMS personnel, visitors, the public and fellow employees. Employees shall not use coarse, profane, or insolent language in such interactions. Employees may not ridicule or otherwise damage the reputation of the agency or its personnel. Employees shall not impair other employees in the performance of their duties, nor interfere with or subvert the reasonable supervision or proper discipline of employees.

D.12.l(f) - Confidentiality Issues
During the normal course of business, employees routinely have access to confidential information. Such information may not be revealed to any unauthorized persons. Generally speaking, all dissemination of information will be made via the Director.

Examples of confidential information include, but are not limited to:

Information that might tend to discredit or decrease the effectiveness of the agency;

D.19 - Duty to Report Misconduct
Employees shall report any known violation of agency policy or order, neglect of duty, or illegal conduct by any member of the agency to a supervisor.

It shall be the responsibility of the employees supervisor, upon notification of any such violation or illegal conduct, to take whatever immediate steps might be necessary (relief from duty, etc.), and to notify the Operations Manager as soon as practical. For more serious violations, such notification will be immediate; in cases of less serious violations notification may wait until the next business day. If the Operations Manager is not available, notification shall be made to the Director.

D.28 - Discipline: Standards of Conduct
Employees must maintain reasonable standards of job performance and personal and professional conduct. Employees failing to meet these standards, or violating any of the policies outlined in this manual, may be subject to disciplinary action, including verbal or written reprimand, suspension, demotion, or termination. This policy establishes guidelines for SNOCOM's disciplinary actions. The agency reserves the right to make exceptions to this policy where it considers those exceptions necessary.

D. 28.2.5 - Termination: Dishonesty related to employment
An employee may be terminated by the Director for serious offenses or repeated poor performance or misconduct. Examples of conduct that may result in termination for a first offense include, but are not limited to criminal acts, violation of SNOCOM's drug and alcohol policy, insubordination, dishonesty related to employment, fighting and neglect of duty.

Attached to this memorandum are several documents which are the basis for this investigation. These include:

- Mountlake Terrace complaint dated January 6, 2010
- Email summary of conversation with you on October 13, 2009
- Copies of text messages obtained from unemployment and termination hearing from Mountlake Terrace.

> In compliance with *Weingarten* and Section 14.4.3 of the CBA, you are entitled to representation of your choosing for any interview you are required to participate in for this investigation. During the interview(s) you are directed to be accurate, complete and truthful in all matters.
>
> Except for those communications required in the context of the representation rights noted above, you are being directed not to discuss any general or specific detail involving either SNOCOM's or Mountlake Terrace's investigation with any current or former employees of SNOCOM or of SNOCOM's user agencies. (Exhibits 29 and 87F)

January 29, 2010 – Detective Coleman and Inspector Grassi of the Everett Police Department began the investigation into the Basim-Poteet matter on behalf of SNOCOM.

February 5, 2010 – Grady sent an e-mail to the union requesting a two-week extension of the investigation timeline described in section 15.1 of the CBA in order to allow more time to complete the investigation into Basim's alleged misconduct surrounding Poteet's termination. (Exhibit 37)

February 6, 2010 – Penman was the supervisor on duty who was responsible for employees working on the dispatch floor. While making her morning rounds on the dispatch floor, Penman had a brief conversation with Charvet. Charvet expressed concern that the union, or someone in the union, was trying to get him fired under the nepotism policy for being in a relationship with Andrews, who was promoted to a supervisor position in the fall of 2009. Charvet also made a comment that Penman felt was a threat that he would try to get her fired. Penman ended the conversation because she was concerned that it would disrupt operations on the dispatch floor.
At 8:34 A.M. Charvet sent Grady an e-mail informing Grady that he had a brief exchange with Penman that morning about the grievance activity related to the employer's nepotism policy. (Exhibit 96B)

In the late morning, Penman asked Basim to sit in on a supervisory meeting Penman wished to have with Charvet. Penman explained that she wished to speak with Charvet about some statements he had made on the dispatch floor. Basim agreed to sit in as a witness.

At 11:07 A.M. Penman called Charvet into the supervisor's office for a meeting. (Exhibit 96N) Basim attended as a witness. Penman attempted to address Charvet's concerns with the union's activities related to the nepotism policy and his relationship with Andrews that he had raised earlier that morning.

At 4:09 P.M. Charvet sent an e-mail to Grady explaining that Penman and Basim had called him off the dispatch floor to meet with them around 11:00 A.M. Charvet described his account of the meeting and explained that Penman had told him that she felt threatened by comments he made to her on the dispatch floor earlier that day. Charvet went on to explain: "I feel Margie [Penman] in fact threatened me by saying I threatened her . . . ." (Exhibit 96B)

February 9, 2010 – At 7:43 A.M. Penman sent Grady an e-mail on behalf of the union, denying the employer's request for an extension of the disciplinary timeline in the Basim-Poteet matter. (Exhibit 37)

At 8:10 A.M. Penman e-mailed Grady and requested that Basim's investigatory interview, which was scheduled for Sunday, February 14, be rescheduled to a normal business day during normal business hours so the union's attorney could attend as Basim's union representative. (Exhibit 38)

At 10:02 A.M. Grady sent Penman an e-mail responding to the request to reschedule Basim's interview. Grady cited section 14.4.2 of the CBA and explained that the language in the CBA does not require the interview to take place during normal business hours, but only while the employee is on duty. Grady went on to write, "Unfortunately, the SDA [union] has declined my request to agree to an extension of the timeline given in Section 15.1 of the CBA for this internal investigation. Although I had hoped to obtain mutual agreement with the SDA [union] in order to allow these types of requests, based on the imposed deadline I cannot do so." (Exhibit 38)

In the late morning or early afternoon of February 9, Grady told Basim and Penman that they were being placed on paid administrative leave and gave them each a letter. The letters stated they were prohibited from communicating with current and former employees of SNOCOM and SNOCOM user agencies. (Exhibits 39, 40, 96C)

At 1:39 P.M., Grady sent all staff an e-mail stating "Supervisors Penman and Basim have been placed on non-disciplinary, paid administrative leave. This means they are not to be contacted for work related matters and are restricted from access to SNOCOM without my approval." (Exhibit 41)

February, 14, 2010–Basim was interviewed by Detective Coleman and Inspector Grassi. Penman and union attorney Weiss attended the investigatory interview as Basim's union representatives. (Exhibit 87L)

February 15, 2010 – Basim sent an e-mail to Grady explaining that she was scheduled to teach a class at the Criminal Justice Training Commission (CJTC) while she was out on administrative leave during pre-scheduled vacation time. Basim asked Grady to confirm that she was authorized to teach the class. Grady responded that Basim was approved to teach the class and use vacation time. (Exhibit 47)

February 17, 2010 – Coleman and Grassi completed their investigation into Basim's communications with Poteet and gave the investigation report and documents to Grady. (Exhibits 87A through T) The investigation showed that Basim obtained the information she shared with Poteet while she was out in public, on her own time. Basim did not provide Poteet with any confidential information that she gained during the course of her employment. Rather, Basim observed other police officers gathering in groups of three or more while she was off-duty and shared her observations with Poteet.

February 19, 2010 – Basim participated in a pre-disciplinary *Loudermill* hearing conducted by Grady. Union attorney Cline attended as Basim's union representative.

February 19, 2010 – Grady gave Basim a disciplinary letter including a five-day unpaid suspension related to her communications with Poteet. (Exhibit 52) The letter acknowledged that Basim had not violated the employer's policies on truthfulness and candor, confidentiality issues, or duty to report misconduct. The letter went on to explain:

> The following are violations of policy and inappropriate conduct resulting from the investigation which are **Sustained**:

> **• D.7 Respect and Courtesy**
> Policy D.7 requires employees to be respectful in their dealings with co-workers and employees of user agencies, it prohibits employees from doing things to damage SNOCOM's reputation, and it precludes employees from interfering with or subverting the supervision or disciplinary processes of others. As explained in the Notice of Intent to Discipline, the investigation revealed that on multiple occasions while on break or enroute to/from work, you initiated text message conversations with Mr. Poteet to alert him to situations you observed where his former co-workers were violating Mountlake Terrace's "two-in-blue" rule, the rule you knew resulted in his termination. Your intent in these communications was to assist Mr. Poteet in his ongoing challenges to the disciplinary termination he received for violating the "two-in-blue" rule. This is a clear case of taking action to interfere with Mr. Poteet's disciplinary termination, and as the complaint it triggered by Mountlake Terrace demonstrates, your actions damaged SNOCOM's reputation with one (or more) of its user agencies. I would consider this to be a serious violation of Policy D.7 by any employee. It is particularly serious given your role as a supervisor, and the corresponding duty you hold to model a higher standard of performance and behavior.
>
> **• D.28 Discipline - Standards of Conduct**
> Policy D.28 provides that employees must maintain reasonable standards of job performance and personal and professional conduct or face disciplinary action. Your actions described above do not meet this standard. And perhaps more distressing, and again as explained in the Notice of Intent to Discipline, this incident is the fourth in a series of disciplinary matters over the last four years, all of which call into question your judgment as an employee, and particularly as a supervisor. In particular: (1) you received a written reprimand for your actions which initiated a Mill Creek internal investigation in 2006; (2) in 2007 you received a suspension for misuse of the phones and demonstrating poor judgment; and (3) in 2009 you received another written reprimand for displaying poor judgment by failing to follow proper chain-of-command notifications related to adjusting your schedule. This troubling history makes clear that you are not maintaining reasonable standards of performance, and that prior discipline has not reinforced for you the importance of using good judgment and modeling responsible behavior when serving as a supervisor at SNOCOM.

The letter concludes by informing Basim:

> The allegations and findings against you are considered extremely serious by SNOCOM. Your efforts to assist a terminated employee in his dispute with Mountlake Terrace by secretly telling him - and only him - of ongoing violations of Mountlake Terrace policies by others was inappropriate and unacceptable, especially for a supervisory employee. It reflects poorly on SNOCOM, and on your judgment as a supervisor. Perhaps equally troubling is the fact that you do not appear to realize or accept that your actions here showed extremely poor judgment, despite a prior warning for inserting yourself in the internal affairs of a user agency.

> In light of the significance of your actions, the pattern of poor judgment you have shown as a supervisor, and the multiple disciplinary actions taken against you that do not seem to have underscored the need for improvement, I have decided that the appropriate disciplinary action in this matter is an **unpaid suspension of five work days.** The suspension will commence upon completion of the second internal investigation to which you are currently subject. The suspension will be coordinated and scheduled through Operations Manager Hudson. This disciplinary notice will become part of your permanent employee record.

The employer's Policy D.7 "Respect and Courtesy," referenced in the disciplinary letter to Basim, states:

> Employees will maintain a courteous, respectful demeanor in dealings with police fire or EMS personnel, visitors, the public and fellow employees. Employees shall not use coarse, profane, or insolent language in such interactions. Employees may not ridicule or otherwise damage the reputation of the agency or its personnel. Employees shall not impair other employees in the performance of their duties, nor interfere with or subvert the reasonable supervision or proper discipline of employees. (Exhibit 87Q)

A. Did the employer unlawfully discriminate against Basim when it issued a five-day unpaid suspension to her on February 19, 2010?

The union alleges that the employer disciplined Basim in retaliation for her protected union activities. Specifically, the union alleges that both the employer's decision to launch an investigation into Basim's communications with Poteet and the discipline imposed on her were discriminatory.

Union's *Prima Facie* Case

Protected union activity

As the union's president, Basim was actively involved in contract negotiations and grievance processing. The employer had knowledge of Basim's union activity. Basim also worked closely with the Mountlake Terrace Police Guild. Chief Wilson of the Mountlake Terrace Police Department made Grady aware that Basim regularly communicated with Poteet, the president of the Mountlake Terrace Police Guild. Wilson also made Grady aware that Basim worked with Poteet on other workplace issues in the past. As Basim described it, she and Poteet were good friends and often consulted with each other on union contract matters.

<u>Deprivation of an ascertainable right, benefit, or status</u>

The employer gave Basim a disciplinary letter that remains in her personnel file and suspended her for five days without pay. This disciplinary action deprived Basim of the right to perform her work as scheduled and caused her to lose five days of compensation and related benefit accrual. The disciplinary letter also diminished Basim's performance record.

<u>Causal connection between Basim's union activity and February 19, 2010 discipline</u>

First, the employer's disciplinary letter makes it clear that Basim was disciplined for helping Poteet, the former president of the Mountlake Terrace Police Guild, grieve his termination. Basim's efforts to help Poteet build his arbitration case were textbook union activity and were protected by Chapter 41.56 RCW. Employees of SNOCOM have a close working relationship with Mountlake Terrace police officers, providing them with dispatch and communications support every day. As I explained earlier in this decision, the City of Mountlake Terrace plays a significant role in the administration and management of SNOCOM. Although SNOCOM is its own legal entity, SNOCOM dispatchers and the City of Mountlake Terrace police officers work together daily and share similarities in administration that make their relationship much like the relationship between employees of the same employer in different bargaining units. When the SNOCOM Dispatchers Association collaborates with the Mountlake Terrace Police Guild on activities such as contract negotiations or grievances, employees who are involved in the process are engaged in protected union activity.

Second, the timing of the employer's investigation into Basim's communications with Poteet serves as evidence of a causal connection between Basim's union activity and the discipline she received on February 19, 2010. On January 5, 2010, Basim and Grady had e-mail exchanges that made it clear they did not have a meeting of the minds on their new CBA relating to abolishment of the lead program and the MOU on assignment of overtime. Three days later, on January 8, 2010, the employer notified Basim she was under investigation. The initiation of the investigation by the employer corresponded directly with the timing of the dispute between the employer and union over the assignment of overtime and abolishment of the lead program.

I find that the union established a *prima facie* case of discrimination. It is therefore necessary to consider the employer's reasons for its actions.

Employer's Reasons for Disciplinary Action

The employer argues that Basim was disciplined for having poor judgment and damaging SNOCOM's reputation with the Mountlake Terrace Police Department. As quoted earlier, the employer provided a rather detailed explanation of reasons for its disciplinary decision in its February 19, 2010 disciplinary letter to Basim. Grady testified that Basim violated the employer's D.7 policy on Respect and Courtesy by interfering with or subverting the supervision or disciplinary processes of others, and also damaging SNOCOM's reputation with the Mountlake Terrace Police Department.

Delay and Timing of Investigation

The October 12, 2009 e-mail from city councilperson Hugill to Grady shows that the City of Mountlake Terrace was targeting Basim for potential discipline, even before they had any substantive evidence showing that Basim was the dispatcher who was providing information to Poteet. Hugill's advice that Grady intentionally misinform Basim about the information Poteet provided in the unemployment hearing, shows that Hugill, a member of SNOCOM's personnel committee, had a desire to set Basim up for discipline, even if it required being dishonest with her.

The record is clear that the employer learned that Basim provided Poteet with information about other Mountlake Terrace police officers gathering in groups of more than two on October 13, 2009, when Grady questioned Basim. The fact that the employer did not take any action to investigate this supposedly "serious allegation of misconduct" until January 2010 raises questions as to the employer's real motive in investigating the incident. On October 13, 2009, Grady sent Wilson and Hugill an e-mail summarizing the conversation she had with Basim about communications with Poteet. The e-mail documents that Grady made a conscious decision not to ask Basim about text messages when she interviewed Basim on that date. At the end of the e-mail summarizing her conversation with Basim, Grady wrote "I did not tell Jodi [Basim] that Poteet had said he received information via text [message]. If you determine there are discrepancies with this information, I would like to be advised." (Exhibit 8) If the information being sent by text message was of such great concern to the employer it seems extremely odd that the employer consciously chose not to ask Basim about this allegation, particularly because Basim readily admitted she was the one who had shared the information with Poteet.

Wilson was upset about Basim's cooperation with the Mountlake Terrace Police Guild. Wilson's testimony made it clear that even prior to the Poteet incident he was frustrated by the fact that Basim had close contact with the Mountlake Terrace Police Guild president and officers. Wilson described Basim's off-duty communications about employees' terms and conditions of employment as interfering in the internal affairs of the Mountlake Terrace Police Department.

On January 5, 2010, just before the employer launched its disciplinary investigation, Basim and Grady had e-mail exchanges that made it clear they did not have a meeting of the minds on their new collective bargaining agreement as it related to assignment of overtime. (Exhibit 14)

In describing the meeting between Grady and the union on January 6, Penman testified that Grady "became very agitated and she raised her voice a little bit.... She turned to me and she very aggressively said multiple times, I need you to hear me. . . . I need you to say to me that you hear and understand what I'm saying, that if you do not agree to this change in overtime, then the 2 percent is gone, it is off the board . . . ." (Transcript p. 446-447) Grady denied that her exchanges with the union in the first part of January 2010 surrounding the overtime assignment issue became heated or tense. In looking at the totality of the evidence, including the related e-mails, I credit Penman's testimony, that the negotiations between Grady and the union in early January 2010 over the overtime assignment issue and related CBA provisions became heated and tense.

The employer argues that it started its investigation of Basim on January 8, 2010, because it received important new information on January 6, 2010, in a complaint letter from Chief Wilson of the Mountlake Terrace Police Department. (Exhibit 16) Specifically, the employer explains that the letter was the first time that the employer learned Basim had sent the information to Poteet as a real time text message rather than in a phone conversation after the fact. The employer says the timing and format of the information was significant.

The employer's argument that the timing of the investigation is a result of new information contained in the January 6, 2010, letter from the Mountlake Terrace Police Department appears pretextual. The record did not support that there was any real significance to the format the

information was provided in (text message versus phone call). Grady testified that the text messages providing real time information about the officers' locations were an officer safety issue and made reference to the Lakewood, Washington shooting (where a convicted criminal shot and killed several police officers who were having coffee). However, on cross-examination Grady acknowledged that she had no actual basis to believe that Poteet posed a threat to his former co-workers.

The employer also alleges that the January 6, 2010 letter from Wilson caused it to be concerned that Basim had not been truthful in the October 13, 2009 investigatory interview and may have been engaging in communications with Poteet on work time. While this may have justified conducting an investigation, it is important to note that the employer's investigation did not find merit to either of those allegations.

In reviewing the employer's February 19, 2010 disciplinary letter it appears that Basim was disciplined exclusively for actions that the employer had been aware of since October 13, 2009. Grady had already provided verbal coaching and counseling to Basim about her communications with Poteet on October 13, 2009. The employer's nearly three-month delay in further investigating Basim's communications with Poteet drastically undercuts the employer's argument that Basim's communications with Poteet constituted serious misconduct that warranted an unpaid suspension. The employer's long delay in investigating the matter supports the conclusion that the investigation and resulting discipline were substantially motivated by Basim's challenge to the employer's interpretation of the tentative contract agreement reached in the first week of January, 2010.

CONCLUSION

The disciplinary letter from the employer makes it clear that Basim was disciplined for helping Poteet grieve his termination. Unionized employees have the right to work with other unionized employees to assist each other with grievances and contract negotiations. Basim had the right to share examples and ideas with Poteet that could be helpful in grieving his termination under his collective bargaining agreement. Basim did not share any confidential information that she gained in the course of her employment. Rather, Basim was sharing observations that she made

as a member of the public, on her own time. Basim's observations were potentially useful to Poteet's grievance because they supported the argument that the Mountlake Terrace Police department was not consistently enforcing the two-in-blue rule prohibiting more than two uniformed officers from congregating together in public places.

Additionally, the timing of the employer's investigation and resulting discipline also serve as evidence that the employer's actions against Basim were discriminatory. I find that the dispute over the contract extension and related assignment of overtime issue, which Basim raised in early January 2010, was a substantial motivating factor in the employer's decision to investigate and ultimately discipline Basim on February 19, 2010. Basim's participation in contract negotiations was protected by Chapter 41.56 RCW. I find that Basim's protected union activity was a substantial motivating factor in the employer's disciplinary decision. The employer discriminated against Basim by issuing a disciplinary letter and unpaid suspension to her on February 19, 2010, in violation of RCW 41.56.140(1).

B. Did the employer unlawfully discriminate against Basim and/or Penman when it placed them on paid administrative leave on February 9, 2010?

The union alleges that the employer's decision to place Basim and Penman on paid administrative leave, restrict their access to the workplace, and prohibit them from having any contact with current and former employees of SNOCOM and user agencies, was a form of retaliation for union activity.

Additional Facts - February 6, 2010 Meeting with Charvet

On the morning of February 6, Penman noticed that Charvet was not acting like his normal self, when he gave short, abrupt answers to conversational questions. Penman asked Charvet if he was OK. Charvet eventually asked Penman what was new with the union. Penman indicated there was nothing new going on with the union. Charvet then asked Penman why the union had raised nepotism policy issues with Grady. Charvet explained that he was part of the union but didn't know anything about the nepotism issues that were being raised by the union. Penman told Charvet that she had a hard time remembering what had come up at supervisor meetings versus labor management meetings and needed to look at her notes from labor management

meetings and get back to him. Charvet asked Penman again if she knew anything about the union raising the nepotism issue with Grady.

Penman was concerned that this conversation was upsetting Charvet and thought continuing the exchange with Charvet could be disruptive to other employees working on the dispatch floor. Penman avoided answering Charvet's questions and asked him if he would like to come discuss this with her in the supervisor's office. Charvet declined Penman's offer to leave the floor and attempted to ask her again about what was going on with the union and the nepotism policy. Charvet was frustrated when Penman again offered to speak with him in the supervisor's office and told Penman "No. That's fine. Your no answer is enough for me, and I'm done with the conversation." Penman also recalls Charvet saying "I just want to know who is trying to get me fired." Charvet also asked Penman if she was trying to get him fired. Penman told him she didn't know who was trying to get him fired.

Charvet acknowledges that he was not happy about the conversation with Penman and was "perturbed" at the secrecy he felt was occurring within the union. Towards the end of the conversation, Charvet told Penman that he was going to do his own investigation and said he would be vigilant about watching Penman and other employees and reporting any policy violations to management. Penman could not recall the exact words Charvet used, but recalls that Charvet said something to her that implied that he was going to try to get her fired because the union was trying to get him fired.

Penman ended the conversation by walking away from Charvet. At the hearing, Penman explained that she ended the conversation because she was concerned further conversation would disrupt dispatch operations. Basim was busy teaching a class for trainees in a separate part of the employer's facility and did not witness the exchange between Penman and Charvet.

At 8:34 A.M. on February 6, Charvet sent Grady an e-mail explaining that he had a brief exchange with Penman that morning about the grievance activity related to the employer's nepotism policy. (Exhibit 96B) Charvet wrote, "I told you I would advise you before I spoke to

anyone about the SDA[union]/Nepotism concern . . . ." Charvet went on to explain that Penman "kept trying to get me to go off the floor and talk to her and Jodi [Basim]." Charvet also wrote:

> I hope you are not disappointed in me bringing it [the nepotism issue] up with Margie [Penman] but I felt stuck in what to or not to say or discuss. I kept it as short as possible and did not disclose how I might have come upon any information that anything was going on with the SDA [union] but was continuing my watching how the SDA was conducting business.
>
> To tell the truth, both Lisa [Andrews] and I still feel kind of shell shocked from the last revelation. Although thinking about it later I realized it was probably retaliation for backing you during the last SDA contract stuff.

After having the conversation with Charvet, Penman asked Basim to sit in on a meeting with Charvet and explained that she was concerned about an exchange she had with Charvet earlier that morning.

At 11:07 A.M. on February 6, Penman called Charvet into the supervisor's office for a meeting. Basim attended as a witness. Penman and Charvet sat across from each other and Basim sat in the corner of the office. Most of the dialogue occurred between Penman and Charvet.

Penman attempted to address Charvet's concerns with the union's activities related to the nepotism policy and his relationship with Andrews that he had raised earlier that morning. Charvet found the conversation upsetting and told Penman he did not want to discuss the union's position on the nepotism situation. When Penman asked Charvet where he had gotten his information, Charvet refused to answer her question. Either Penman or Basim explained to Charvet that the employer should not be going to employees with these types of concerns and instead should be going through the union.

Penman then told Charvet she was taking off her "union hat" and putting on "her supervisor's hat." Penman proceeded to tell Charvet that she was concerned about the threat he made to her that morning on the floor relating to watching everything Penman did and reporting everything she did to Grady in order to get her fired. Penman said she wanted Charvet to have a chance to explain the statement he made to her. Charvet testified that he said he would "continue to report

up the chain of command as the director told us to do if I see any violations of policy, illegalities, harassment or that on the floor." The meeting was interrupted, and ultimately ended, when an employee brought her family into the office to meet the staff.

At 4:09 P.M. Charvet sent a second e-mail to Grady explaining that Penman called him off the dispatch floor to meet with her around 11:00 A.M. and that Basim had also been present at the meeting. (Exhibit 96B) Charvet said that he told Basim and Penman he didn't want to discuss any SDA [union] business with them, but Basim and Penman continued to ask him questions about his concerns about union-related issues. Charvet went on to explain in his e-mail to Grady that Penman and Basim "continued to bring back up SDA issues including their concerns with your 'open door' policy to which they believe is circumventing them having the knowledge they want of what concerns or problems might be brought to you by the employees." Charvet stated that Penman had told him that she felt threatened by comments he made to her on the dispatch floor earlier that day. Charvet went on to explain to Grady: "I feel Margie [Penman] in fact threatened me by saying I threatened her . . . ."

February 9, 2010 – At 7:43 A.M. , Penman sent Grady an e-mail on behalf of the union that explained the union was denying her request for extension of the disciplinary timeline in the Basim-Poteet matter. (Exhibit 37) Later that day, Grady informed Basim and Penman that they were being placed on paid administrative leave.

February 10, 2010 – The union filed the original unfair labor practice (ULP) complaint in this case with the Commission.

February 23, 2010 – Information services manager Peterson interviewed Basim and Penman separately about the meeting they had with Charvet on February 6.

February 24, 2010 – Grady sent Basim and Penman e-mails lifting the order that they "not have any contact with any current or former SNOCOM employees or employees of SNOCOM user agencies . . . ." (Exhibits 55 and 56)

February 25, 2010 – Grady sent an e-mail to Chief Wilson informing him that the City of Mountlake Terrace was part of the amended unfair labor practice complaint the union had filed with the Commission on February 24, 2010. (Exhibit 57)

March 18, 2010 – Grady gave Basim a written reprimand dated March 16, 2010 for her participation in the meeting with Penman and Charvet. (Exhibit 99) Grady ended Basim's paid administrative leave.

March 19, 2010 – Grady gave Penman a written reprimand dated March 16, 2010, and ended Penman's paid administrative leave. (Exhibit 66)

Union's *Prima Facie* Case

Protected union activity

Basim was engaged in a significant amount of union activity which has already been described in detail. As the union's second vice-president, Penman was also actively involved in contract negotiations and in representing employees in disciplinary investigations. Penman was the lead spokesperson for the union in the January 6, 2010 meeting with Grady over the contract extension and related overtime assignment issue. Penman served as Basim's *Weingarten* representative throughout the investigation into Basim's communications with Poteet. On February 9, 2010, at 7:43 A.M., Penman sent Grady an e-mail on behalf of the union that explained the union was denying the employer's request for extension of the disciplinary timeline in the Basim-Poteet matter. The employer had knowledge of Basim's and Penman's protected union activities.

Deprivation of an ascertainable right, benefit, or status

As a result of being placed on paid administrative leave and being instructed not to have contact with current or former employees, Basim and Penman were prohibited from seeing or otherwise communicating with their co-workers, many of whom are also their friends. Basim and Penman were deprived access to the employer's facility and missed out on opportunities to earn additional income from working overtime shifts, which they have regularly preformed. The prohibition against having contact with current employees also prevented Basim and Penman

from engaging in union activities. Basim and Penman had their working conditions significantly altered by the employer's actions. Although the employer continued to pay Basim and Penman for their regularly-scheduled shifts, being placed on paid administrative leave deprived Basim and Penman of ascertainable rights, benefits and statuses.

Causal Connection between Union Activity and Paid Administrative Leave

The timing of events provides evidence of a causal connection between the discipline and Basim's and Penman's union activities. On the morning of February 9, 2010, Penman denied Grady's request for an extension in the disciplinary timeline to investigate Basim's communications with Poteet. Later that day Grady placed Penman and Basim on paid administrative leave.

I find that the union established a *prima facie* case of discrimination. It is therefore necessary to consider the employer's reasons for its actions.

Employer's Reasons for Disciplinary Action

The employer argues that the timing of the paid administrative leave was triggered by the complaint from Charvet, which it received three days earlier. Charvet's complaint alleges that Penman and Basim used their authority as dispatch supervisors to pressure him into talking with them about the position the union was taking on the nepotism policy.

The employer contends that it takes allegations of bullying very seriously and felt a full investigation was warranted. Grady testified that she put Penman and Basim on paid administrative leave because "Bullying is serious. They were supervisors. I felt it would be better for the organization to protect the supervisors from any further allegations of bullying, to protect the subordinate employee, and to prevent any disruptions in the work place. . . . The concern is employees discussing with other employees the investigation . . . ." (Transcript p. 1357) When asked about why she had instructed Basim and Penman not to have contact with SNOCOM employees or employees of user agencies, Grady explained: "To, again, protect the organization, prevent disruption, and to protect the process of the internal investigation . . . . To try to prevent any bleed over, spillover, or distortion of information during the investigation." (Transcript p. 1359)

However, the employer's concern for protecting the investigation did not extend to the other primary witness. Grady did not prohibit Charvet from discussing the investigation with other SNOCOM employees or employees of user agencies. The fact that the employer took no action to prevent spillover or distortion of Charvet's testimony undercuts the legitimacy of the employer's rationale for placing such broad restrictions on Basim's and Penman's ability to communicate with co-workers.

Union's Response to Employer's Reasons

The union argues that there was no need for the administrative leave or blanket "no contact" order because Charvet's complaint did not involve violence or a threat of any kind. The union further argues that the long duration of the administrative leave was inconsistent with the employer's past use of administrative leave. The union points out that the broad restrictions that prohibited Basim and Penman from having any communications with current or former employees of the employer or of user agencies, which was inconsistent with the employer's past practice, serves as evidence that the employer was discriminatorily targeting Basim and Penman. The union believes that the employer's actions were punitive and that an order not to discuss the investigation, which the employer typically issues in internal investigations, would have been adequate to protect the investigation. The union further argues that the "no contact" order violated Basim's and Penman's constitutional rights.[4]

CONCLUSION

A variety of factors support the conclusion that Basim's and Penman's union activities were a substantial motivating factor in the employer's decision to place them on paid administrative leave. The timing of the investigation corresponded directly with the union's denial of the employer's request for an extension of the disciplinary timeline in the CBA. The employer's decision to place Basim and Penman on administrative leave for over a month was inconsistent with the employer's past pattern of use of paid administrative leave. The coinciding prohibition against having contact with any current employees directly interfered with Basim's and

[4] The Commission does not have the statutory authority to decide issues of constitutionality. The union's constitutionality argument will not be addressed in this decision.

Penman's union activity, and supports the conclusion that the employer had a desire to punish Basim and Penman and prevent them from engaging in union activity. Furthermore, the nature of Charvet's complaint regarding union-related discussions in the workplace, does not appear to be so serious as to necessitate complete removal of Basim and Penman from the workplace. Prior to this complaint, Charvet made Grady aware that he was concerned about the nepotism policy and the implications it could have for him and Andrews.

I find that Basim's and Penman's union activities were a substantial motivating factor in the employer's decision to place them on paid administrative leave. The employer discriminated against Basim and Penman by placing them on paid administrative leave from February 9, 2010, through March 18 and 19 respectively, in violation of RCW 41.56.140(1).

C. Did the employer unlawfully discriminate against Basim and Penman when it issued a written letter of reprimand to them, withdrew endorsement for Basim to work as an instructor at the Criminal Justice Training Commission (CJTC) and removed Penman from the CAD build team in March 2010?

The union alleges that the employer disciplined Basim and Penman in retaliation for their protected union activities. Specifically, the union alleges that the employer's decision to issue written reprimands to Basim and Penman, take away Basim's ability to earn additional income by teaching at CJTC, and remove Penman as a representative on the CAD build team were discriminatory.

Union's *Prima Facie* Case

Protected union activity

Basim and Penman were engaged in protected union activities.

Deprivation of an ascertainable right, benefit, or status

Disciplinary Letters:

On March 18 and March 19, 2010, the employer gave Basim and Penman written reprimands that remain in their personnel files. The issuance and retention of these disciplinary letters diminished Basim's and Penman's performance records and made them vulnerable to more

serious progressive discipline in the future. These letters deprived Basim and Penman of the status of being employees in good standing with the employer.

Withdrawal of Basim's CJTC teaching endorsement:
Basim was selected to work at the CJTC after she received the telecommunicator of the year award in or around 1999 or 2000. In order to teach at the CJTC, Basim completed an application and screening process and received a recommendation from her employer. Up until March 2010, the employer provided Basim with a new letter of support each year, which is a requirement to be eligible to teach at the CJTC. Basim became a senior instructor at the CJTC and was one of the few trainers certified to teach all of the different dispatch programs. Basim was also certified to teach at the Basic Law Enforcement Academy, where law enforcement officers are trained to work with dispatchers. Additionally, Basim worked with the CJTC project manager to develop new classes and hire new instructors. Instructing at the CJTC is considered an honor and allowed Basim to earn a significant amount of additional income. As of 2010, Basim was teaching at the CJTC at least monthly.

After issuing a written reprimand to Basim on March 18, 2010, the employer informed the CJTC that it was no longer recommending Basim as a dispatch trainer. The CJTC terminated Basim's employment contracts. The employer's action of withdrawing its recommendation directly caused Basim to lose her employment with CJTC. The trainer position at CJTC was an ascertainable right, benefit, or status to Basim. The loss of the position caused Basim to lose out on the ability to fulfill teaching contracts, which at the time of hearing Basim estimated were worth approximately $22,000 from January 2010 through June 2010.

Removal of Penman from the CAD build team:
In the late summer or early fall of 2009, the employer selected Penman to serve as one of its representatives on a project committee, called the CAD team, to implement a new computer aided dispatch (CAD) system. Penman participated in the CAD team meetings on work time. Penman enjoyed being on the CAD team and saw her involvement and ability to share her input on the project as a benefit. Occasionally, the CAD team meetings caused Penman to have additional opportunities to earn overtime pay because the meetings were scheduled at times that did not fall during her regularly-scheduled shift.

On February 4, 2010, operations manager Hudson and information services manager Peterson met with Penman to discuss some complaints they received about a perception that Penman was not fully supporting the adoption of the new CAD system. Hudson and Peterson informed Penman that she needed to champion the project of implementing the New World CAD system, be open to receiving feedback, and not allow others to be negative. Penman said she understood and would champion the project. Hudson documented this verbal coaching/counseling meeting with Penman.

During the March 19, 2010 meeting when Grady gave Penman the written reprimand over the meeting with Charvet, Grady told Penman she was considering removing her from the CAD team. In late March 2010, Grady removed Penman from the CAD team and replaced her position on the committee with another employee. Grady did not immediately inform Penman that she was being removed from the CAD team. When Penman sent an e-mail asking whether she had been removed, Hudson responded with an e-mail explaining that she was no longer on the project because of her attitude. (Exhibit 163) At the hearing, Grady explained that she removed Penman from the CAD team because Penman had trouble interacting with Charvet after returning from paid administrative leave on March 19, 2010. Charvet was not on the CAD team.

Causal connection between union activity and discipline

The timing of the investigation, as discussed in the administrative leave section above, indicates a causal connection between Basim's and Penman's union activities and the written reprimands issued by the employer to Basim on March 18, 2010, and Penman on March 19, 2010. The fact that the employer discriminatorily used paid administrative leave to investigate the incident with Charvet, also points to a discriminatory motive.

Additionally, the subject matter of the conversation between Penman and Charvet and the subsequent meeting Penman and Basim had with Charvet also has a strong union nexus. Charvet was expressing concern to Grady about being called to a meeting to continue a discussion he had started with Penman earlier in the day on the dispatch floor regarding the union's position on the employer's nepotism policy as it related to his relationship with Andrews. The record shows that Charvet made frequent reports to Grady about the activities of the union and sent Grady e-mails

complaining about the union leadership and his frustration with the way the union leadership interacted with Grady.

Charvet reported to Grady, and later Hudson, that during the February 6 meeting Basim and Penman had tried to bully him into telling them where he had gotten certain information about the nepotism issue and concerns raised by other employees whose day off rotation was changed to attempt to keep Andrews from supervising Charvet on regularly-scheduled shifts. Charvet told Grady and Hudson that Basim and Penman wanted him to disclose his source of information, which they suspected was management, so they could file an unfair labor practice complaint against the employer. Basim and Penman acknowledge they were asking Charvet about the basis for his concern about the nepotism policy, but deny attempting to bully or intimidate Charvet.

The subject matter at issue in Charvet's complaint e-mails to Grady, timing of the investigation, and the discriminatory use of administrative leave establish a causal connection between Basim's and Penman's union activities and the employer's decision to discipline them. I find that the union established a *prima facie* case of discrimination. It is therefore necessary to consider the employer's reasons for its actions.

Employer's Reasons for Written Reprimand to Basim

On March 18, 2010, the employer gave Basim a disciplinary letter that explained the employer was not sustaining policy violations and not disciplining Basim for conducting union business on employer time in violation of section 3.3 of the CBA, or for violating employer policies D.2 Deportment or D.43 Bullying. The employer issued a written reprimand to Basim for violating employer policies on Obedience to Orders and Respect and Courtesy. (Exhibit 99) In explaining the violations, Grady wrote:

> - **D.3 Obedience to Orders**
>
> In the list of supervisory expectations I have provided to all supervisors, you, included, and verbally I have specifically told you to document and/or discuss with myself, the Operations Manager and your supervisory peers any counseling or action you take with our employees.
>
> I have no doubt that you are completely clear about this order, as you have several times asked for a meeting with me and the Operations Manager to discuss your approach to employee counseling sessions. In addition you have reported back to

me that you have documented incidents of counseling occurrences and/or employee contacts for placement into supervisory working files, along with advising your co-supervisors via email.

In my list of supervisory expectations, role modeling appropriate behavior, employee welfare and creating a work environment that was not intimidating to employees was all included. I believe you understand and recognize these are important, yet, you have failed to meet these expectations.

- **D.7 Respect and Courtesy**

Policy D.7 requires employees to be respectful in their dealings with coworkers. I have concluded that your actions in this matter violate this policy in a number of respects. As a co-supervisor to the supervisor on duty, you had been briefed and were aware that the meeting called by Supervisor Penman was not to discuss performance expectations or shortcomings. Despite this and despite Mr. Charvet's stated desire not to discuss non-work business, you participated in a closed-door meeting on just such issues which lasted some 40 minutes. As described above, I do not believe that your actions rose to the level of bullying, but they certainly were not respectful of Mr. Charvet's stated desire not to engage in the discussion of non-work matters with you, and constituted a significant disruption to his work day.

This is the second sustained finding of you violating SNOCOM's Respect and Courtesy policy in a very short time span. As noted in the suspension notice delivered to you on February 19, 2010, this is particularly serious given your role as a supervisor and the corresponding duty you hold to model a higher standard of performance and behavior. . . .

This history is very disturbing, and at this point is raising serious doubts about your fitness to continue as a supervisor. Because of this history and the doubts it raises, I will be contacting CJTC and sharing that you no longer have SNOCOM's recommendation to be an instructor.

Employer's Reasons for Written Reprimand to Penman

On March 19, 2010, the employer gave Penman a similar disciplinary letter as it gave to Basim. The employer determined that Penman had not violated section 3.3 of the CBA, or employer policies D.2 Deportment or D.43 Bullying. The employer issued a written reprimand to Penman for violating employer policies on Obedience to Orders, and Respect and Courtesy. (Exhibit 66) In explaining the violations, Grady wrote:

- **D.3 Obedience to Orders**

In the list of supervisory expectations I have provided to all supervisors, you, included, and verbally I have specifically told you to document and/or discuss

with myself, the Operations Manager and your supervisory peers any counseling or action you take with our employees.

In November 2009 . . . I again repeated that I wanted to be advised of employee counseling sessions you conducted.

In the incident which occurred on February 6, 2010, I find that you failed to provide proper notification of the supervisory counseling meeting you had with one of our employees to either me or Operations Manager Hudson. The meeting occurred on February 6, 2010. I spoke with you and specifically asked you if anything had occurred over the weekend that I needed to know about on Monday, February 8, 2010, just days after the meeting. I again checked in with you on Tuesday, February 9, 2010 and again you did not advise me of this event although you had ample time to do so. This is a clear violation of the orders I have given you both verbally and in writing.

- **D.7 Respect and Courtesy**

Policy D.7 requires employees to be respectful in their dealings with coworkers. I have concluded that your actions in this matter violate this policy in a number of respects. You ordered Mr. Charvet to attend a closed-door meeting off the floor lasting approximately 40 minutes to discuss SDA [union] issues that he repeatedly told you that he did not wish to discuss. As described above, I do not believe that your actions rose to the level of bullying, but they certainly were not respectful of Mr. Charvet's stated desire not to engage in the discussion of non-work matters with you, and constituted a significant disruption to his work day.

The employer's expectations regarding documentation of employee counseling were given to Basim and Penman at the September 8, 2009 supervisor meeting, in a document titled Supervisor Expectations (Exhibit 96K). The relevant portion of the document appears under the Shift Responsibility heading and states: "Document for evals [evaluations] and any counseling." The heading of Communication also directs supervisors to "Share ideas, suggestions and problems with SNOCOM admin[istration]."

Basim – Written Reprimand and Revocation of CJTC Teaching Endorsement

ANALYSIS

Basim and Penman were aware from discussions at past supervisor meetings that Charvet had become volatile towards supervisors when they had tried to talk with him. In talking with Basim, Penman explained that she didn't feel comfortable talking to Charvet alone and wished to

have a witness to the conversation. Basim had been asked by Penman and other supervisors in the past to sit in on counseling sessions or meetings with employees, and did not feel that Penman's request was unusual. Basim agreed to sit in as a witness.

The employer had an established expectation that a supervisor document any disciplinary meeting they had with employees they supervised. Basim was not supervising Charvet on February 6, 2010, and did not initiate the meeting with Charvet. Basim attended the meeting as a witness because Penman asked her to, per directions that supervisors were given by management. In reviewing the record, I find that Basim's attendance at the February 6, 2010 meeting was consistent with the supervisor expectations communicated to Basim by the employer.

When Penman was asked if she knew whether Basim had advised Grady of the February 6 meeting with Charvet or documented the meeting, Penman testified: "I wouldn't have expected her [Basim] to document it since she was just sitting in as a witness. That has not been the common practice of supervisors. And so I wouldn't have expected her to, and to my knowledge, I don't know of any documentation she would have submitted to management." (Transcript p. 564)

Prior to March 18, 2010, the employer had not informed supervisors, including Basim, that they were required to submit documentation to management when they witnessed a coaching and counseling session. The employer's practice was only for the supervisor administering the coaching and counseling session to document the meeting. Testimony also showed that Basim played a limited role in the meeting, which was ultimately directed by Penman. The facts do not support the employer's pretextual justification for disciplining Basim for failing to document the meeting with Charvet.

In the disciplinary letter to Basim the employer made it clear that its decision to withdraw Basim's CJTC teaching endorsement was based in part on Basim's recent disciplinary history, which included the discipline it had issued to her for communicating with Poteet. Using the discipline Basim received for communicating with Poteet in administering progressive discipline was also discriminatory, because the penalty would not have been as severe if it were not for the original unlawful discipline.

Additionally, the timing of the investigation and the pattern of discriminatory treatment of Basim, including the discriminatory use of paid administrative leave, support the conclusion that the employer's reasons for disciplining Basim were pretextual.

Lastly, the unrelated penalty of withdrawing endorsement of Basim to teach at the CJTC undercuts the employer's justification for its actions. The employer did not establish a nexus between Basim's alleged failure to document a coaching and counseling session with Charvet and Basim's qualifications to teach people how to perform dispatch work at CJTC. The employer's decision to withdraw Basim's endorsement to teach at CJTC appears to be punitive, rather than corrective in nature. The employer knew that its action would cause Basim to lose her teaching job at the CJTC. The Commission may "draw negative inferences when an employer resorts to an overly severe disciplinary response." *City of Winlock*, Decision 4784-A (PECB, 1995). Removing Basim's endorsement to teach at CJTC was overly severe and unrelated to the lack of documentation of the meeting with Charvet.

CONCLUSION

Basim's union activity was a substantial motivating factor in the employer's decision to issue a written reprimand to her on March 18, 2010, and to withdraw endorsement for Basim to teach at the CJTC. The employer violated RCW 41.56.140(1) by discriminatorily issuing a written letter of reprimand to Basim and withdrawing endorsement for her to teach at the CJTC on or around March 18, 2010.

Penman – Written Reprimand

ANALYSIS

The September 8, 2009, Supervisor Expectations document (Exhibit 96K) instructs supervisors:

> Each of you is responsible for the welfare and operation of your team . . . .
> . . . .
> Address employees who are exhibiting negative behaviors or conversations that are disrupting operations
> . . . .
> Personnel matters are confidential and are not topics of open discussion.
> . . . .
> If any employee needs to be counseled, it is to be conducted privately and in person. . . .

As part of her supervisory training, Penman was told that a discussion with an employee should take place in the supervisor's office so the employee has privacy and the discussion does not disrupt operations on the dispatch floor. Penman was also told to bring in another manager or supervisor as a witness if she is dealing with a situation where it may be beneficial to have a witness.

Penman was aware that the nepotism policy was a sensitive issue for Charvet and Andrews and knew that Charvet had become upset and emotional with supervisors in the past. Penman believed that she was following proper employer procedure by meeting privately with Charvet and bringing in another supervisor, Basim, as a witness to the meeting.

Penman was complying with the employer's supervisor expectations when she held the February 6, 2010, meeting with Charvet privately in the supervisor's office. The employer's claim that Penman was talking with Charvet about "non-work matters" does not accurately describe the situation or account for the context of this discussion. Charvet raised concerns about the employer's nepotism policy and related positions the union was taking to his supervisor on the dispatch floor. Charvet also made a statement to Penman which implied he was going to try to get her fired. This threat was of legitimate concern to Penman. Charvet was next in line for a dispatch supervisor position, should a dispatch supervisor vacate a position or be terminated.

Based on the supervisor expectations communicated by the employer, Penman could have been at risk of discipline had she not addressed Charvet's comments and perceived threat. Although the nepotism issue was something the union was also talking with the employer about, it is not "non-work matters" or strictly a matter of union business. The nepotism policy and its enforcement is a workplace policy matter. Charvet further made it a work issue when he expressed his frustration and concern to his supervisor on the dispatch floor. The employer's decision to discipline Penman for not being respectful of Charvet's desire not to participate in the conversation about the issue he raised on the dispatch floor is inconsistent with the supervisor expectations and appears to be a pretext for discriminating against Penman for union activity.

The employer also lists Penman's failure to document the meeting as a reason for the written reprimand. Penman was aware of the employer's expectations that an employee's supervisor

document employee counseling sessions. As of February 9, Penman had not documented the verbal counseling meeting she had with Charvet on February 6, 2010. When Penman was asked if she had documented the meeting she had with Charvet, Penman testified: "No. I hadn't gotten to it. It was on my to-do list." (Transcript p. 564) The employer never presented any evidence to show that supervisors are required to document a meeting with a subordinate employee within three days of the meeting.

The fact that the employer discriminatorily placed Penman on administrative leave in response to the same February 6, 2010 meeting further calls in to question the employer's motives in disciplining Penman for this incident.

CONCLUSION

The employer's reasons for giving Penman a written reprimand appear to be a pretext for union discrimination. Penman's union activity was a substantial motivating factor in the employer's decision to issue a written reprimand to her on March 19, 2010. The employer violated RCW 41.56.140(1) by discriminatorily issuing a written letter of reprimand to Penman on March 19, 2010.

Removal of Penman from CAD Team

ANALYSIS

The employer alleges that it removed Penman from the CAD team because she had a bad attitude, used closed body gestures, and accused one of the consultants from the software company of acting unprofessionally during a meeting after a consultant told Penman to "bite me." This incident occurred in January 2010.

On February 4, 2010, operations manager Hudson and information services manager Peterson met with Penman to talk about complaints surrounding her attitude and body language in the CAD team meetings. Hudson and/or Peterson expressed the expectation that Penman be more receptive and positive about the new CAD software. Penman disagreed with Hudson's and Peterson's description of her actions in the meetings, but agreed that she would work on being more open and supportive of the project. Penman did not have an opportunity to attend another

CAD team meeting and show a change in attitude toward the project before receiving further discipline for the same actions.

Penman was placed on paid administrative leave from February 9, 2010, through March 19, 2010, and was not permitted to attend the CAD team meetings during that time. On March 19, when Grady gave Penman the written reprimand for failing to document the disciplinary meeting with Charvet, Grady informed Penman that she was considering removing her from the CAD team but would take the weekend to think it over. In late March 2010, Grady removed Penman from the CAD team. The employer did not notify Penman of the decision. Penman learned of the decision on or around April 2, 2010, when she saw that she was not scheduled to attend a CAD team meeting.

During the same time period, Penman was actively representing Basim in investigations and disciplinary meetings. Penman had already been given a verbal coaching/counseling for her attitude in CAD team meetings and was not given an opportunity to attend another CAD team meeting before being removed from the CAD team. The employer's decision to remove Penman from the CAD team did not have any clear nexus with Penman's failure to document the meeting she had with Charvet on February 6, 2010, and appears to be a second wave of discipline for the same behavior in the CAD team meeting for which Penman had already received a verbal warning. The employer argues that it removed Penman from the CAD team because she continued to have difficulty communicating with Charvet. However, Charvet was not on the CAD team.

CONCLUSION

The employer's stated reasoning for removing Penman from the CAD team appears to be a pretext for discrimination. Penman had already received verbal coaching and counseling on February 4, 2010, for her attitude in CAD team meetings. Penman did not have an opportunity to correct her attitude before Grady removed her from the CAD team in late March 2010. The timing of the employer's decision to remove Penman from the CAD team correlated strongly with Penman's union activity and other discriminatory actions by the employer. Penman's protected union activity was a substantial motivating factor in the employer's decision to remove

Penman from the CAD team. The employer unlawfully discriminated against Penman in violation of RCW 41.56.140(1) by removing her from the CAD team in March 2010.

ISSUE 4 – INDEPENDENT INTERFERENCE

Applicable Legal Standard – Employer Interference

RCW 41.56.040 gives employees the right to organize and designate representatives without interference.

> No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party or individual. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *See City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

A. Did the employer interfere with Basim and Penman's right to engage in protected union activity by prohibiting them from having any contact with current or former employees of the employer and/or employees of user agencies while they were on paid administrative leave and/or by sending an e-mail to all employees prohibiting them from contacting Basim and Penman?

Analysis

The employer argues that the orders it issued to Basim and Penman on February 9, 2010, prohibiting contact with current or former employees of the employer and/or employees of user

agencies, was intended to minimize disruption and protect the integrity of the investigation until its completion. The employer did not explain why it could not achieve its objective of preserving the integrity of the investigation by ordering Basim and Penman not to discuss the investigation with other employees, as it had done in past investigations.

Conclusion

The February 9, 2010, memos informed Basim and Penman: "You are not to have any contact with any current or former SNOCOM employees or employees of SNOCOM user agencies, other than union representatives in their union capacity." The employer prohibited Basim, the union's president, and Penman, the union's second vice-president, from having any contact with bargaining unit employees while they were on administrative leave from February 9, 2010, until February 24, 2010. The employer's restrictions on Basim's and Penman's ability to communicate with their co-workers directly interfered with the union's ability to conduct business and represent bargaining unit employees in violation of RCW 41.56.140(1). The employer further interfered with employee rights in violation of RCW 41.56.140(1) when it sent an e-mail to all employees prohibiting them from contacting Basim and Penman.

B. Did the employer interfere with Basim and Penman's right to engage in protected union activity by prohibiting them from discussing the discipline they received on March 18 and 19, 2010, with their co-workers?

Analysis

When Grady met with Basim on March 18, 2010, to give her a written reprimand related to the Charvet incident, Grady reviewed the supervisor expectations document with Basim. (Exhibit 96K) Grady told Basim she wanted to make sure Basim understood the confidentiality piece. Grady told Basim that she could not discuss her discipline with her co-workers. Basim testified that Grady told her that she could not talk about her disciplinary action because it involved another SNOCOM employee (Charvet) and personnel matters are confidential. Grady told Basim it would not be appropriate for Basim to talk about her discipline or experience being put on administrative leave. (Transcript p. 181-182) The record did not contain clear testimony from Penman on this allegation.

Conclusion

Employees have the right to discuss discipline they receive and to grieve that discipline through processes outline in their CBA. The employer interfered with Basim's ability to grieve her discipline and to engage in protected union activity in violation of RCW 41.56.140(1) by informing Baism that she was not permitted to discuss the discipline she received on March 18, 2010. The record is insufficient to determine whether the employer imposed the same restrictions on Penman's ability to discuss her discipline.

REMEDIES

The fashioning of remedies is a discretionary action of the Commission. *City of Seattle*, Decision 10249-A (PECB, 2009), citing *City of Seattle*, Decision 8313-B (PECB, 2004). In order to make the affected employees whole for the losses they suffered from the employer's unlawful actions, the remedy portion of this decision contains some unique remedies.

E-mailing of Notice Posting

The employer used e-mail to communicate some of the unlawful restrictions on employees' union activity. In order to counteract the impact of the employer's unlawful e-mail I am ordering that the employer e-mail all employees a copy of the notice provided by the Commission, in addition to posting the notice in the workplace.

Letter of Recommendation for Basim to Teach at CJTC

In order to restore the status quo and make Basim whole, my remedial order requires the employer to send a letter to the CJTC specifically retracting the letter that it sent to that agency withdrawing its endorsement for Basim to teach at the CJTC. In this letter the employer will: 1) inform the CJTC that it erred in withdrawing Basim's endorsement; 2) explain that Basim is an employee in good standing; 3) express the employer's support of Basim's teaching at the CJTC; and 4) request that the CJTC rehire Basim.

The employer will provide the union, Basim, and the Compliance Officer for the Commission with a copy of the letter.

Backpay

In order to make Basim whole for the wages she lost as a result of its discriminatory actions, the employer will compensate Basim for the wages she would have earned from teaching at the CJTC, plus interest, from March 18, 2010, until the date the employer sends the letter requesting Basim's reinstatement to CJTC. Although it is unusual that an employer would be liable for back wages that an employee would have earned from another employer, this remedy is necessary to make Basim whole. The employer is liable because the loss of Basim's wages from the CJTC were a direct result of the unlawful discipline issued by the employer.

In order to make Basim and Penman whole for the economic losses they suffered as a result of being placed on paid administrative leave, my order requires that the employer pay Basim and Penman for overtime they would have worked had they not been on administrative leave, plus interest. The overtime wages will be calculated based on Basim and Penman's usual overtime wage rate, plus interest, for the average number of overtime hours that the employer's other dispatch supervisors worked from February 9, 2010, through March 18, 2010 (Basim) and March 19, 2010 (Penman).

The employer will pay Basim back wages, plus interest, for the five-day unpaid suspension that was issued to her on February 19, 2010.

Attorney Fees

The union requests attorney fees. The Commission may award attorney fees to a party when there is a continuing course of conduct that shows an intentional disregard of the union's or employee's collective bargaining rights. *Seattle School District,* Decision 5733-B (PECB, 1998); *Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982), *review denied*, 97 Wn.2d 1034 (1982). Attorney fees have been awarded as a punitive remedy in response to egregious conduct, recidivist conduct, or to frivolous defenses asserted by a party. *City of Tukwila*, Decision 10536-B (PECB, 2010), citing *Western Washington University*, Decision 9309-A (PSRA, 2008) and *Lewis County*, Decision 644-A (attorney fees awarded where it is clear that history of underlying conduct evidenced patent disregard for statutory mandate to engage in good faith negotiations).

There is no historical pattern of this employer failing to abide by its collective bargaining obligations with this union. *City of Tukwila,* Decision 10536-B, citing *City of Seattle*, Decision 4164-A (PECB, 1993) (denying attorney fees where union failed to demonstrate a pattern of recidivist conduct by the employer with the complainant bargaining unit). Although the employer's conduct was unlawful and unacceptable on several accounts, the employer presented a defense that was not frivolous and prevailed on many of the allegations at issue in this hearing. Accordingly, the union's request for attorney fees is denied.

FINDINGS OF FACT

1. Southwest Snohomish County Public Safety Communications Agency (SNOCOM or employer) is a public employer within the meaning of RCW 41.56.030(13).

2. SNOCOM Dispatchers Association (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. In December 2002, in *SNOCOM*, Decision 7939 (PECB, 2002), the Commission certified the union as the exclusive bargaining representative of:

   > All full-time and regular part-time communications employees of the Southwest Snohomish County Public Safety Communications Agency (SNOCOM), excluding supervisors, confidential employees, CAD coordinator, and administrative assistant.

4. The parties had a collective bargaining agreement (CBA) that was effective from January 1, 2010, through December 31, 2010.

5. SNOCOM provides emergency dispatch services to the following Washington cities: Brier, Edmonds, Lynnwood, Mill Creek, Mountlake Terrace, Mukilteo, and Woodway. It also provides dispatch services for Snohomish Fire District 1. SNOCOM is a public entity overseen by a board of directors made up of representatives from the police, fire, and emergency medical service agencies it serves (user agencies).

6. Debbie Grady has served as SNOCOM's executive director since July 13, 2009.

7. At all material times Jodi Basim was employed by the employer as a bargaining unit dispatch supervisor.

8. Basim was elected to serve as union president in 2008 and continued to serve as union president in 2009 and 2010.

9. As the union's president, Basim was actively involved in contract negotiations and grievance processing. The employer had knowledge of Basim's protected union activities.

10. At all material times Margaret (Margie) Penman was employed by the employer as a bargaining unit dispatch supervisor.

11. Penman has served as the union's second vice-president since the fall of 2008.

12. As the union's second vice-president, Penman was actively involved in contract negotiations and in representing employees in disciplinary investigations. The employer had knowledge of Penman's protected union activities.

13. In July 2009, the Mountlake Terrace Police Department concluded a disciplinary investigation and terminated the employment of Officer Keith Poteet. At the time of his termination Poteet was the president of the Mountlake Terrace Police Guild.

14. Poteet was terminated for several alleged policy violations, including "two-in-blue" policy, which prohibits more than two police officers from congregating together in public places when they are not responding to an incident.

15. During all material times Greg Wilson was the Chief of the Mountlake Terrace Police Department and an alternate member of the SNOCOM Board of Directors.

16. The Mountlake Terrace Police Department is one of SNOCOM's user agencies.

17. The City of Mountlake Terrace provides a variety of support services to SNOCOM including assistance with finance, payroll, and human resources. The City of Mountlake Terrace also owns the building where SNOCOM is housed. The City of Mountlake Terrace has two seats on the SNOCOM Board of Directors, two alternate board member seats, and a seat on SNOCOM's three-member personnel committee.

18. In August 2009, Jason Charvet, a bargaining unit dispatch employee, sent at least four e-mails to Grady complaining about the union's leadership. Some of the e-mails expressed specific complaints about Basim and Penman. Other e-mails informed Grady of internal union deliberations and discussions surrounding the employer's proposal for a one-year contract extension. Charvet made the employer aware of his disagreements with Basim and Penman over union business.

19. In October 2009, Charvet, a dispatcher who served as the union's first vice-president from 2007-2009, ran against Basim for the position of union president. Basim was re-elected president. Penman was re-elected to serve as the union's second vice-president.

20. In October 2009, the union and employer met to bargain their successor CBA. The union and employer have conflicting recollections about the substance of the overtime assignment discussions that occurred.

21. On October 12, 2009, the City of Mountlake Terrace participated in an unemployment eligibility hearing for Poteet, its former employee. Poteet stated that a SNOCOM dispatcher sent him text messages that prove other City of Mountlake Terrace police officers have continued to gather in groups of more than two and were not disciplined.

22. Wilson was aware that Poteet and Basim worked together on union activities and informed Grady of that fact on or around October 12, 2009.

23. During the October 12, 2009 unemployment hearing, Wilson sent Grady a text message from a cellular phone saying that he suspected Basim had given Poteet information about other officers who violated the two-in-blue policy after Poteet was terminated. Poteet

was using the information to challenge the Mountlake Terrace's justification for terminating his employment.

24. During all material times Scott Hugill, a city councilperson from the City of Mountlake Terrace, served as an alternate SNOCOM Board member and as a member of SNOCOM's three-member personnel committee.

25. On October 12, 2009, shortly after Wilson sent the above text message to Grady described in Finding of Fact 23, Hugill sent Grady an e-mail. In the e-mail, Hugill encouraged Grady to question Basim immediately about her communication with Poteet. Hugill also advised Grady to lie to Basim by telling her that Poteet had disclosed her name, even though Poteet had refused to disclose the name of the dispatcher who sent him the text messages. Grady did not follow Hugill's advice and did not tell Basim that Poteet had disclosed her name.

26. On October 13, 2009, Grady asked Basim if she had any idea who from SNOCOM might be talking with Poteet about groups of more than two Mountlake Terrace police officers gathering together. Grady did not advise Basim that she was about to be interviewed prior to asking Basim questions about her communications with Poteet. Basim replied by saying that she was the person who had talked to Poteet and described a phone conversation she had with Poteet. Grady asked Basim if the conversation took place while Basim was working. Basim explained that her contact with Poteet occurred while she was off-duty on her personal time. Basim told Grady that her observations of other uniformed officers congregating in groups of more than two occurred while she was at Starbucks on break time or off-duty, not while she was on-duty. Grady did not ask Basim if she had sent text messages to Poteet.

27. Evidence regarding investigatory interviews prior and subsequent to the conversations described in Finding of Fact 26 shows a clear pattern of the employer notifying employees of the nature of the investigation prior to interviewing them. The employer's failure to inform Basim of the nature of the investigation prior to the interview on

October 15, 2009, was an isolated incident. The employer did not change its practice of notifying employees of the nature of an investigation prior to conducting an investigatory interview.

28. During the October 13, 2009, conversation described in Finding of Fact 26, Grady told Basim that SNOCOM employees needed to be careful to stay out of the internal workings, processes, and investigations of user agencies. Grady explained she wanted SNOCOM to remain neutral. Basim acknowledged that she understood.

29. On October 13, 2009, Grady sent Wilson and Hugill an e-mail summarizing the conversation she had with Basim about communications with Poteet. The e-mail documents that Grady made a conscious decision not to ask Basim about text messages when she interviewed Basim on that date.

30. On October 19, 2009, Basim filed a grievance on behalf of a bargaining unit dispatcher.

31. In the fall of 2009, the employer posted vacant dispatch supervisor positions and accepted applications. The employer hired the top two applicants. Lisa Andrews was one of the employees selected for promotion. Charvet was not selected for promotion but was told that he was third on the promotion list, and would therefore be the next person to be hired into a supervisor position should a vacancy occur. Andrews and Charvet live together and are in a relationship. As a result of Andrews' promotion, the employer met with Charvet and Andrews to discuss the employer's expectations of them in the workplace with regards to the employer's nepotism policy.

32. In December 2009, the union and employer met to negotiate a CBA for 2010. Grady was the lead spokesperson for the employer and Basim was the lead spokesperson for the union. The parties reached a tentative agreement. The employer thought that it had explained that its proposal to eliminate the lead program also meant changing its overtime assignment procedure. The union did not understand that this was part of the employer's proposal.

33. On December 8, 2009, the union and employer had a labor-management meeting. One of the issues discussed was the employer's nepotism policy as it related to Andrews' promotion to a supervisory position and her relationship with Charvet. The parties discussed the change in rotational days off that had resulted from moving Charvet to a different work rotation on the same shift. At least two other employees had their schedules affected by the change and one of them lost a holiday that was previously scheduled as a day off in the work rotation.

34. On December 30, 2009, Karen McKay, the person in charge of scheduling for the employer, sent an e-mail to all SNOCOM dispatchers announcing that the overtime assignment sheet system would be changing in 2010.

35. On December 31, 2009, Basim sent Grady an e-mail saying she was concerned about the December 30 e-mail from McKay about the change in overtime assignment.

36. On January 5, 2010, Basim and Grady had e-mail exchanges that made it clear they did not have a meeting of the minds on their new CBA as it related to assignment of overtime.

37. On January 5, 2010, the City of Mountlake Terrace and the Mountlake Terrace Police Guild participated in an arbitration hearing concerning Poteet's termination. Wilson participated in the hearing on behalf of the City. At the hearing the Mountlake Terrace Police Guild provided copies of the text messages that Poteet had received from Basim in July, 2009. This was the first time that Wilson and the City saw the content of the text messages.

38. On January 6, 2010, Grady met with Penman and other union board members to discuss the 2010 contract and overtime assignment procedure. Grady told the union that the change to a three-sheet overtime assignment system, rather than a single overtime pool, was a core element of the employer's contract proposal. Grady informed the union that the employer would withdraw its two percent wage increase offer, reinstate the lead

program and go into full contract bargaining if the union would not agree to change the overtime assignment procedure. Grady informed the union that it needed to respond to her offer within a few days, or the employer would revert back to the status quo under the expired CBA and withdraw the two percent wage increase proposal.

39. The negotiations between Grady and the union in early January 2010 over the overtime assignment issue and related CBA provisions became heated and tense.

40. On January 6, 2010, Wilson faxed a letter to Grady alleging that Basim had interfered with the Mountlake Terrace Police Department's disciplinary actions against Poteet. Wilson's letter concluded by explaining: "an internal investigation is being conducted on Mountlake Terrace personnel. Jodi [Basim] has been identified as the complaining party/ witness and will be interviewed by Chief Caw who has been assigned to investigate the allegations of misconduct."

41. On January 7, 2010, Grady met with Penman and other union board members. The union informed Grady that it would agree to change the overtime assignment procedure to the three-sheet system, which had been utilized by the employer prior to the creation of the lead program, in exchange for the two percent wage increase and abolishment of the lead program.

42. On January 8, 2010, Grady gave Basim a memo titled "Notice of Investigation" informing Basim that SNOCOM had received a complaint from Police Chief Wilson of the Mountlake Terrace Police Department alleging that Basim had exhibited inappropriate supervisory/employee conduct. Grady wrote "I intend to have an Internal Investigation on behalf of SNOCOM conducted into this allegation. I am in the process of determining who will actually conduct the interviews for that investigation and I will notify you when that decision is made." The memo also directed Basim to participate in an investigatory interview with Pete Caw, Assistant Police Chief for the City of Mountlake Terrace, on January 14, 2010.

43. The January 8, 2010, memo to Basim described in Finding of Fact 42 specifically stated "If you wish to bring representation with you to this interview, you are welcome to do so." Basim requested the presence of a union representative at the January 14, 2010, interview.

44. Basim was concerned that the information from the interview with Caw on January 14, 2010, would be shared with her employer for use in its disciplinary investigation. Basim had a reasonable belief that the interview with Caw could potentially lead to discipline.

45. Basim had the right to have a union representative present who was allowed to alert her to problems with questions, ask clarifying questions, and communicate with her during the January 14, 2010 investigatory interview.

46. Grady worked with Caw to schedule his January 14 interview with Basim. Grady insisted that Caw comply with section 14.4 of the CBA titled "Employees' Bill of Rights." Grady told Caw that Basim would be allowed to have a union representative and insisted that Caw conduct the interview at SNOCOM during Basim's regular work hours. Before the interview, Grady and Caw met to discuss the general format and procedures of the interview.

47. On January 14, 2010, Caw came to SNOCOM to interview Basim about the same incidents (sending text messages to Poteet, communicating with Poteet about the conduct of other Mountlake Terrace police officers) that SNOCOM was investigating. Penman attended the interview as Basim's union representative.

48. On January 14, 2010, Penman, Basim, and Caw had a heated verbal exchange about the relevance of giving Basim a *Garrity* order. Caw explained that Basim was a witness in the internal investigation conducted by the Mountlake Terrace Police Department, not the subject of the investigation. Grady came into the interview and ordered Basim to answer Caw's questions, noting that Basim could be terminated if she did not comply.

49. Prior to questioning Basim on January 14, 2010, Caw told Penman that she was not to interrupt, ask questions, or interject herself during the interview. Caw instructed Penman and Basim they were not to make eye contact with each other or use any body language or facial expressions to communicate with each other about the answers to questions. Caw also told Penman that if she were to interrupt, he would end the interview and consider such an interruption to be insubordination by Basim. Penman asked Caw if he would be providing a copy of the interview to the employer and asked if the union would be able to get a copy. Caw said he did not have an answer to that question.

50. Caw tape recorded the January 14, 2010 interview, but did not tape record the exchange he had with Basim and Penman prior to asking Basim questions. Penman never attempted to speak or communicate with Basim during the tape-recorded interview.

51. On January 23, 2010, Hugill sent Grady an e-mail proposing some language for an investigation notice to Basim. Hugill stated in part "I suggest that you not tell Jodi [Basim] who is conducting the investigation. Also, I suggest you add something to the notice similar to what I've written in the attached [document] so that Jodi can see what prompted you to begin the investigation. This can avoid Jodi claiming she's being targeted."

52. The Mountlake Terrace Police Department had the tape recording of Caw's January 14, 2010, interview of Basim transcribed into text. On January 25, 2010, Caw e-mailed Grady a copy of Basim's interview transcript. Grady replied to the e-mail with several minor corrections to the transcript. Grady had not been present at the interview. The edits were corrected spelling, grammar, and punctuation. Caw accepted Grady's edits and incorporated them into the final transcript of the interview.

53. Caw acknowledged that the Mountlake Terrace Police Department does not usually share interview transcripts with another agency while the police department's investigation is still in progress. Giving the transcript of Basim's interview to Grady on January 25, 2010, was the first and only time Caw could recall sharing the transcript of an internal investigation interview with another agency while the investigation was in progress.

54. As described in Findings of Fact 15 through 17, 40, 42 through 44, 46 through 50, 52, and 53?, Caw was acting as an agent of SNOCOM when he interviewed Basim on January 14, 2010.

55. On January 27, 2010, Grady gave Basim a letter outlining the allegations against her that were being investigated relating to information she shared with Poteet. One of the allegations against Basim that the employer policies listed was D.19 Duty to Report Misconduct. The letter did not inform employees that they had an obligation to report misconduct of user agencies' employees.

56. The January 27, 2010 letter described in Finding of Fact 55 made it clear that Detective Coleman and Inspector Grassi of the City of Everett Police Department were conducting the investigation for the employer and would be acting as agents of the employer in conducting the investigation into Basim's communications with Poteet.

57. On February 4, 2010, Grady sent Basim an e-mail informing her that Detective Coleman would interview Basim on Sunday, February 14, 2010, at 8:00 A.M. at SNOCOM.

58. In the late summer or early fall of 2009, the employer selected Penman to serve as one of its representatives on a project committee, called the CAD team, to implement a new computer aided dispatch (CAD) system. Penman participated in the CAD team meetings on work time. Penman enjoyed being on the CAD team and saw her involvement and ability to share her input on the project as a benefit. Occasionally, the CAD team meetings caused Penman to have additional opportunities to earn overtime pay because the meetings were scheduled at times that did not fall during her regularly-scheduled shift.

59. Dave Hudson, was employed as the employer's operations manager from 2005 until July 26, 2010.

60. On February 4, 2010, operations manager Hudson and information services manager Peterson met with Penman to discuss some complaints they received about a perception that Penman was not fully supporting the adoption of the new CAD system. Hudson and Peterson informed Penman that she needed to champion the project of implementing the New World CAD system, be open to receiving feedback, and not allow others to be negative. Penman said she understood and would champion the project. Hudson documented this verbal coaching/counseling meeting with Penman.

61. On February 5, 2010, Grady sent an e-mail to the union requesting a two-week extension of the investigation timeline described in section 15.1 of the CBA in order to allow more time to complete the investigation into Basim's alleged misconduct surrounding police officer Poteet's termination.

62. On February 6, 2010, Penman was the supervisor on duty who was responsible for employees working on the dispatch floor. While making her morning rounds on the dispatch floor, Penman had a brief conversation with Charvet. Charvet expressed concern that the union, or someone in the union, was trying to get him fired under the nepotism policy for being in a relationship with Andrews, who was promoted to a supervisor position in the fall of 2009. Charvet also made a comment that Penman felt was a threat that he would try to get her fired. Penman ended the conversation because she was concerned that it would disrupt operations on the dispatch floor.

63. On February 6, 2010, in the late morning, Penman asked Basim to sit in on a supervisory meeting Penman wished to have with Charvet. Penman explained that she wished to speak with Charvet about some statements he had made on the dispatch floor. Basim agreed to sit in as a witness.

64. On February 6, 2010, at 11:07 A.M. Penman called Charvet into the supervisor's office for a meeting. Basim attended as a witness. Penman attempted to address Charvet's concerns with the union's activities related to the nepotism policy and his relationship with Andrews that he had raised earlier that morning.

65. Penman was complying with the employer's supervisor expectations when she held the February 6, 2010, meeting with Charvet privately in the supervisor's office.

66. On February 6, 2010, at 4:09 P.M. Charvet sent an e-mail to Grady explaining that Penman and Basim had called him off the dispatch floor to meet with them around 11:00 A.M. Charvet described his account of the meeting and explained that Penman had told him that she felt threatened by comments he made to her on the dispatch floor earlier that day. Charvet went on to explain: "I feel Margie [Penman] in fact threatened me by saying I threatened her. . . ."

67. On February 9, 2010, at 7:43 A.M. Penman sent Grady an e-mail on behalf of the union, denying the employer's request for an extension of the disciplinary timeline in the Basim-Poteet matter.

68. On February 9, 2010, at 8:10 A.M. Penman sent Grady an e-mail requesting that Basim's interview with Coleman be "rescheduled for a normal business day and hours as our SDA [union] attorney will be attending as provided in accordance with CBA section 14.4.2 - 14.4.3."

69. On February 9, 2010, at 10:02 A.M. Grady replied by e-mail and explained that the date and time of Basim's interview was acceptable under section 14.4.2 of the CBA because it was during Basim's regularly-scheduled work hours. Grady went on to explain that the union "has declined my request to agree to an extension of the timeline given in Section 15.1 of the CBA for this internal investigation. Although I had hoped to obtain mutual agreement with the SDA [union] in order to allow these types of requests, based on the imposed deadline I cannot do so."

70. The employer scheduled Basim's interview during her regularly-scheduled shift, which was consistent with the CBA. The employer's unwillingness to change the interview date did not prevent Basim from having her union representative and the union's attorney present during the investigatory interview on February 14, 2010.

71. Chester Swanson, a former union president and bargaining team member, testified about one instance sometime in or after 2002 where the union requested that the employer change the scheduling of an investigatory interview to allow the employee's attorney to participate. In that instance the employer granted the union's request to reschedule the employee's interview and changed the time to allow the employee's attorney to be present.

72. The parties did not have a past practice requiring the employer to schedule investigatory interviews during a regular work day for the union's attorney.

73. Penman was aware of the employer's expectations that an employee's supervisor document employee counseling sessions. As of February 9, Penman had not documented the verbal counseling meeting she had with Charvet on February 6, 2010. Penman testified that documenting the meeting was on her to-do list.

74. On February 9, 2010, Grady met with Basim and Penman and gave each of them nearly identical memorandums informing them that they were being placed on paid administrative leave. The memorandums stated in part:

- You will turn in all department-owned equipment.
- You will not act in any official capacity as a SNOCOM employee.
- You are not to have any contact with any current or former SNOCOM employees or employees of SNOCOM user agencies, other than union representatives in their union capacity.
- Your duty station during this period is your residence. Your hours of duty are the same as if you were remaining on the schedule.
- Should you find it necessary to leave your home during these hours you are to contact me for prior approval.
- You will make yourself available to the investigative agencies upon request. This includes any current or future investigations.

Grady did not prohibit Charvet from discussing the investigation with other SNOCOM employees or employees of user agencies.

75. The February 9, 2010, memos described in Finding of Fact 74 informed Basim and Penman: "You are not to have any contact with any current or former SNOCOM employees or employees of SNOCOM user agencies, other than union representatives in their union capacity." This restriction on Basim's and Penman's ability to communicate with their co-workers remained in effect until February 24, 2010, and directly interfered with the union's ability to conduct business and represent bargaining unit employees.

76. Grady's decision to place Basim and Penman on paid administrative leave on February 9, 2010, was the first time Grady utilized administrative leave during her tenure as executive director.

77. On February 9, 2010, after the employer informed Basim and Penman that they were being placed on administrative leave, Grady sent all staff an e-mail stating: "Supervisors Penman and Basim have been placed on non-disciplinary, paid administrative leave. This means they are not to be contacted for work related matters and are restricted from access to SNOCOM without my approval." The e-mail interfered with employee rights.

78. Although the employer continued to pay Basim and Penman for their regularly-scheduled shifts, being placed on paid administrative leave, as described in Finding of Fact 74, deprived Basim and Penman of ascertainable rights, benefits, and statuses including the ability to work overtime. Basim and Penman regularly volunteered to work overtime shifts. The timing of events on February 9, 2010, provides causal connection with Basim's and Penman's union activities. The union established a prima facie case of discrimination Basim's and Penman's union activities were a substantial motivating factor in the employer's decision to place them on paid administrative leave.

79. Steve Perry was SNOCOM's executive director from approximately 1998 through June 30, 2009.

80. Perry testified that he put employees on paid administrative leave for fairly short durations, approximately half a dozen times during his tenure with the employer. Perry did not testify about whether or not employees that he placed on paid administrative leave were required to stay in their homes during their regularly-scheduled work hours.

81. The record failed to establish the existence of a past practice concerning the whereabouts of employees on paid administrative leave during their regularly-scheduled work hours.

82. The employer's use of paid administrative leave to investigate allegations of employee misconduct and related restrictions on employee communications is a permissive subject of bargaining.

83. On February 14, 2010, Basim was interviewed by Detective Coleman and Inspector Grassi. Penman and union attorney Reba Weiss attended the investigatory interview as Basim's union representatives. Penman testified that Weiss was allowed to ask some questions, but Coleman did not allow her to ask other questions while at times covering the tape recorder. Penman could not recall the subject matter of any of the questions that Coleman didn't allow Weiss to ask. The transcript of the interview contains several examples of Weiss successfully asking clarifying questions, both of Basim and Coleman. The record does not show that Coleman prevented Weiss from acting in the capacity of Basim's union representative.

84. On February 17, 2010, Coleman and Grassi completed their investigation into Basim's communications with Poteet and gave the investigation report and documents to Grady. The investigation showed that Basim obtained the information she shared with Poteet while she was out in public, on her own time. Basim did not provide Poteet with any confidential information that she gained during the course of her employment. Rather, Basim observed other police officers gathering in groups of three or more while she was off-duty and shared her observations with Poteet.

85. Basim's participation in the February 19, 2010, pre-disciplinary meeting with Grady was not compelled by the employer. The February 19, 2010, pre-disciplinary meeting Grady conducted with Basim was a *Loudermill* hearing and not an investigatory interview.

86. SNOCOM dispatchers and the City of Mountlake Terrace police officers work together daily and share similarities in administration that make their relationship much like the relationship between employees of the same employer in different bargaining units.

87. When the SNOCOM Dispatchers Association collaborates with the Mountlake Terrace Police Guild on activities such as contract negotiations or grievances, employees who are involved in the process are engaged in protected union activity.

88. On February 19, 2010, Grady gave Basim a disciplinary letter including a five-day unpaid suspension related to her communications with Poteet. The employer's disciplinary letter makes it clear that Basim was disciplined for helping Poteet, the former president of the Mountlake Terrace Police Guild, grieve his termination.

89. The disciplinary action described in Finding of Fact 88 deprived Basim of the right to perform her work as scheduled and caused her to lose five days of compensation and related benefit accrual. The disciplinary letter also diminished Basim's performance record. The timing of the employer's investigation into Basim's communications with Poteet serves as evidence of a causal connection between Basim's union activity and the discipline she received on February 19, 2010. The union established a *prima facie* case of discrimination. Basim's union activity was a substantial motivating factor in the employer's disciplinary decision.

90. The employer completed the investigation into Basim's communications with Poteet and issued discipline to Basim within 45 days of January 6, 2010, the date of the letter from Chief Wilson that the employer perceives triggered the timeline. The record does not establish that there was a change to the relevant status quo or past practice.

91. It appears that Basim was disciplined exclusively for actions that the employer had been aware of since October 13, 2009.

92. The employer did not find that Basim had violated policy D.19 and specifically stated in the February 19, 2010, disciplinary letter that the alleged violation of D.19 "was not sustained and will not result in disciplinary action."

93. The employer did not inform employees that they have an obligation to report misconduct of user agencies' employees.

94. Terry Peterson is employed as the employer's information services manager and has held the position since approximately 2003.

95. On February 23, 2010, Peterson interviewed Basim and Penman individually about the meeting they had with Charvet on February 6, 2010.

96. Penman exercised her right to have union representation at the February 23, 2010, investigatory interview conducted by Peterson. Penman was represented during the interview by the union's attorney and a union officer.

97. On February 24, 2010, Grady sent Basim and Penman e-mails lifting the order that they "not have any contact with any current or former SNOCOM employees or employees of SNOCOM user agencies . . . ."

98. On February 25, 2010, Peterson called Penman explaining that he had some follow-up questions to the February 23, 2010 interview. Peterson told Penman that she was welcome to have her union representative or the union's attorney participate on the call. Penman asked Peterson what the question was. Peterson told Penman what his question was and Penman chose to answer the question without having a union representative included in the call.

99. On March 18, 2010, Grady gave Basim a written reprimand dated March 16, 2010, for: 1) failing to document a coaching and counseling session she had with Charvet on February 6, 2010; and 2) failing to respect Charvet's stated desire not to engage in the discussion of non-work matters by participating in the meeting called by Penman to discuss such matters. Grady ended Basim's paid administrative leave.

100. When Grady met with Basim on March 18, 2010, to give her a written reprimand described in Finding of Fact 99, Grady told Basim that she could not discuss her discipline with her co-workers. Basim testified that Grady told her that she could not talk about her disciplinary action because it involved another SNOCOM employee and

personnel matters are confidential. Grady told Basim it would not be appropriate for Basim to talk about her discipline or experience being put on administrative leave. The employer interfered with Basim's ability to grieve her discipline and to engage in protected union activity by informing Basim that she was not permitted to discuss the discipline she received on March 18, 2010.

101. Basim was selected to work at the Washington State Criminal Justice Training Commission (CJTC) after she received the telecommunicator of the year award in or around 1999 or 2000. In order to teach at the CJTC, Basim completed an application and screening process and received a recommendation from her employer. Up until March 2010, the employer provided Basim with a new letter of support each year, which is a requirement to be eligible to teach at the CJTC. Instructing at the CJTC is considered an honor and allowed Basim to earn a significant amount of additional income. As of 2010, Basim was teaching at the CJTC at least monthly.

102. After issuing a written reprimand (dated March 16, 2010) to Basim on March 18, 2010, the employer informed the CJTC that it was no longer recommending Basim as a dispatch trainer. The CJTC terminated Basim's employment contracts. The employer's action of withdrawing its recommendation directly caused Basim to lose her employment with CJTC. The trainer position at CJTC was an ascertainable right, benefit or status to Basim.

103. In the March 16, 2010, disciplinary letter to Basim the employer made it clear that its decision to withdraw Basim's CJTC teaching endorsement was based in part on Basim's recent disciplinary history, which included the discipline it had issued to her for communicating with Poteet.

104. The employer did not establish a nexus between Basim's alleged failure to document a coaching and counseling session with Charvet and Basim's qualifications to teach people how to perform dispatch work at CJTC. Basim's union activity was a substantial motivating factor in the employer's decision to withdraw endorsement for Basim to teach at CJTC.

105. Prior to March 18, 2010, the employer had not informed supervisors, including Basim, that they were required to submit documentation to management when they witnessed a coaching and counseling session. The employer's practice was only for the supervisor administering the coaching and counseling session to document the meeting.

106. On March 19, 2010, Grady gave Penman a written reprimand dated March 16, 2010, and ended Penman's paid administrative leave. The written reprimand was issued to Penman for: 1) failing to document a coaching and counseling session she had with Charvet on February 6, 2010; and 2) failing to respect Charvet's stated desire not to engage in the discussion of non-work matters by ordering him to attend a meeting to discuss such matters.

107. During the March 19, 2010 meeting, when Grady gave Penman the written reprimand over the meeting with Charvet, Grady told Penman she was considering removing her from the CAD team. The record is insufficient to determine whether the employer imposed restrictions on Penman's ability to discuss her discipline.

108. In late March 2010, Grady removed Penman from the CAD team and replaced her position on the committee with another employee. Grady did not immediately inform Penman that she was being removed from the CAD team.

109. Penman did not have an opportunity to attend another CAD team meeting after receiving the verbal coaching/counseling described in Finding of Fact 60.

110. The employer's decision to remove Penman from the CAD team did not have any clear nexus with Penman's failure to document the meeting she had with Charvet on February 6, 2010, and appears to be a second wave of discipline for the same behavior in the CAD team meeting for which Penman had already received a verbal coaching/counseling on February 4, 2010. The employer's stated reasoning for removing Penman from the CAD team appears to be a pretext for discrimination. Penman's protected union activity was a substantial motivating factor in the employer's decision to remove Penman from the CAD team.

111. Grady explained that she removed Penman from the CAD team because Penman had trouble interacting with Charvet after returning from paid administrative leave on March 19, 2010. Charvet was not on the CAD team.

112. The issuance and retention of the written reprimands described in Findings of Fact 99 and 106 diminished Basim's and Penman's performance records and made them vulnerable to more serious progressive discipline in the future. These letters deprived Basim and Penman of the status of being employees in good standing with the employer. The timing of the investigation and the pattern of discriminatory treatment of Basim, including the discriminatory use of paid administrative leave, support the conclusion that the employer's reasons for disciplining Basim were pretextual. Basim's union activity was a substantial motivating factor in the employer's decision to issue a written reprimand to her on March 18, 2010, and to withdraw endorsement for Basim to teach at the CJTC. The employer's reasons for giving Penman a written reprimand appear to be a pretext for union discrimination. Penman's union activity was a substantial motivating factor in the employer's decision to issue a written reprimand to her on March 19, 2010.

113. On March 19, 2010, the employer sent an e-mail to all bargaining unit employees stating in part:

> Our expectation is that SDA [union] business, except as outline [sic?] specifically in the CBA will not be conducted on SNOCOM time. This means that SDA [union] related discussions are not to be occurring on the dispatch floor, in the Supervisor office or when employees are being paid. I know it is easy to blur the union business with SNOCOM business, but the two have to be kept separate. It is my expectation that all employees will adhere to Section 3.3 of the CBA. If anyone has any questions, please let me know.

114. Up until 2002, dispatch employees were represented by Teamsters Local 763.

115. Witness testimony shows that the language in section 3.3 of the parties' CBA was in the parties' old Teamsters contract and has remained unchanged since the SNOCOM Dispatchers Association (union) negotiated its first contract with the employer in 2003.

116. The employer and union had developed a past practice of allowing union-related discussions between employees in the workplace.

117. The language in section 3.3 of the CBA was interpreted through past practice to allow employees to have conversations with their co-workers in the workplace about union-related matters.

118. Grady did not notify the union or offer to bargain about changing the past practice of allowing union-related discussions in the workplace before sending the March 19 e-mail described in Finding of Fact 113.

119. The work rule described in Finding of Fact 113 has a significant impact on bargaining unit employees' working conditions and is a mandatory subject of bargaining.

120. The work rule described in Finding of Fact 113 was not consistent with the language in the parties' CBA or the parties' past practice.

121. By agreeing to the language in section 3.3 of the CBA, the union did not clearly and unmistakably waive its statutory rights to bargain the work rule described in Finding of Fact 113.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. As described in Findings of Fact 26 and 27 the employer did not unilaterally change the status quo of notifying employees of the nature of an investigation on October 13, 2009 in violation of RCW 41.56.140(4) and (1).

3. As described in Findings of Fact 26, 37, 40, 42 and 90 the employer did not unilaterally change the disciplinary timeline in the collective bargaining agreement in January and

February of 2010 by investigating allegations concerning Basim's communications with Poteet in violation of RCW 41.56.140(4) and (1).

4. As described in Findings of Fact 55 and 93 the employer did not unilaterally implement a new work rule requiring employees to report misconduct by user agencies' employees when it referenced policy D.19, Duty to Report Misconduct, in the January 27, 2010 investigation notice to Basim in violation of RCW 41.56.140(4) and (1).

5. As described in Findings of Fact 57, 61, and 67 through 72, the employer did not unilaterally change past practice in violation of RCW 41.56.140(4) and (1) by denying the union's request to change the date of Basim's February 14, 2010 investigatory interview.

6. As described in Findings of Fact 74, 76, and 79 through 81, the employer did not unilaterally change past practice in violation of RCW 41.56.140(4) and (1) by ordering Basim and Penman to stay in their homes during their regularly-scheduled work hours while they were on paid administrative leave.

7. As described in Findings of Fact 74, 75, 77, 78 and 82, the employer did not unilaterally change past practice in violation of RCW 41.56.140(4), by prohibiting Basim and Penman from having contact with current or former bargaining unit employees while they were on administrative leave from February 9, 2010, until February 24, 2010.

8. As described in Findings of Fact 113 through 121 the employer violated RCW 41.56.140(4) and (1) by unilaterally changing work rules regarding employees' ability to engage in union-related discussions in the workplace, without fulfilling its bargaining obligations.

9. As described in Findings of Fact 40, 42 through 50, and 52 through 54, the employer by and through its agent Caw, interfered with Basim's right to union representation on January 14, 2010, in violation of RCW 41.56.140(1).

10. As described in Findings of Fact 55 through 57, and 83, the employer did not interfere with Basim's right to union representation in violation of RCW 41.56.140(1) when its agent, Coleman, interviewed Basim on February 14, 2010.

11. As described in Findings of Fact 85 the employer did not interfere with Basim's right to union representation in violation of RCW 41.56.140(1) on February 19, 2010.

12. As described in Findings of Fact 94 through 96 and 98the employer did not interfere with Penman's right to union representation in violation of RCW 41.56.140(1) by calling her on February 25, 2010.

13. As described in Findings of Fact 7 through 9, 12, 18, 19, 31, 33, 48, 62 through 67, and 73 through 78, the employer discriminated against Basim and Penman by placing them on paid administrative leave from February 9, 2010 through March 18 and 19 respectively, in violation of RCW 41.56.140(1).

14. As described in Findings of Fact 7, 9, 12, 13, 15 through 17, 21 through 30, 35, 40, 42, 51, 55, 56, 84, 86 through 89, 91, 99 through 105, and 112, the employer discriminated against Basim in violation of RCW 41.56.140(1) by issuing a five-day unpaid suspension to her on February 19, 2010, and by issuing a written reprimand to Basim and withdrawing endorsement for her to teach at the CJTC on or around March 18, 2010.

15. As described in Findings of Fact 10 through 12, 38, 39, 41, 58, 60 through 67, 73 through 78, and 106 through 112, the employer discriminated against Penman in violation of RCW 41.56.140(1) by issuing a written reprimand to her on March 19, 2010 and removing her from the CAD team in March, 2010.

16. As described in Findings of Fact 75 and 77, the employer's restrictions on Basim's and Penman's ability to communicate with their co-workers directly interfered with the union's ability to conduct business and represent bargaining unit employees in violation of RCW 41.56.140(1). The employer further interfered with employee rights in violation

of RCW 41.56.140(1) when it sent an e-mail to all employees prohibiting them from contacting Basim and Penman.

17. As described in Finding of Fact 100 the employer interfered with Basim's ability to grieve her discipline and to engage in protected union activity in violation of RCW 41.56.140(1) by informing Basim that she was not permitted to discuss the discipline she received on March 18, 2010.

18. As described in Finding of Fact 106, the employer did not interfere with Penman's ability to grieve the discipline she received on March 19, 2010.

ORDER

Southwest Snohomish County Public Safety Communications Agency, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Implementing the work rule, originally announced in a March 19, 2010 e-mail to all bargaining unit employees, which prohibits employees from participating in union-related discussions in the workplace.

   b. Interfering with Jodi Basim's right to union representation.

   c. Discriminatorily targeting Jodi Basim and Margaret (Margie) Penman for discipline.

   d. Interfering with the ability of Jodi Basim and Margaret Penman to communicate with their co-workers, and the SNOCOM Dispatch Association's ability to conduct business and represent bargaining unit employees.

e. Sending e-mails to employees prohibiting them from contacting Jodi Basim and Margaret Penman.

f. Prohibiting Jodi Basim from discussing the discipline she received on March 18, 2010, with her co-workers.

g. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

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

a. Restore the status quo ante by reinstating the working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change announced in the employer's March 19, 2010, e-mail prohibiting employees from participating in union-related discussions in the workplace, found unlawful in this order.

b. Remove the disciplinary letters issued to Jodi Basim on February 19, 2010, and March 18, 2010 (letter dated March 16, 2010) from Basim's personnel files and records. Send a letter to Basim, the union, and the Compliance Officer for the Commission confirming that the February 19, 2010, and March 16, 2010 disciplinary letters have: 1) been removed from Basim's personnel file(s) and 2) will not be used against Basim in the future.

c. Remove the disciplinary letter issued to Margaret Penman on March 19, 2010 (letter dated March 16, 2010) from Penman's personnel files and records. Send a letter to Penman, the union, and the Compliance Officer for the Commission confirming that the March 16, 2010 disciplinary letter has: 1) been removed from Penman's personnel file(s) and 2) will not be used against Penman in the future.

d. Make Jodi Basim whole by payment of back pay and benefits in the amounts she would have earned or received during the five days of unlawful suspension, announced in the February 19, 2010 disciplinary letter. Back pay shall be computed in conformity with WAC 391-45-410.

e. Make Jodi Basim whole by payment of back pay and benefits in the amounts she would have earned in overtime pay while she was on administrative leave from February 9, 2010, through March 18, 2010. The overtime wages will be calculated based on Basim's usual overtime wage rate, plus interest, for the average number of overtime hours that the employer's other dispatch supervisors worked from February 9, 2010, through March 18, 2010. Back pay shall be computed in conformity with WAC 391-45-410.

f. Make Jodi Basim whole by payment of back pay and benefits in the amounts she would have earned or received from teaching at the Washington State Criminal Justice Training Commission (CJTC) from the date that CJTC terminated her teaching contracts until the date the employer sends a letter to the CJTC specifically retracting the letter that it sent to that agency withdrawing its endorsement for Basim to teach at the CJTC. In this letter the employer will: 1) inform the CJTC that it erred in withdrawing Basim's endorsement; 2) explain that Basim is an employee in good standing; 3) express the employer's support of Basim's teaching at the CJTC; and 4) request that the CJTC rehire Basim. The employer will provide the union, Basim, and the Compliance Officer for the Commission with a copy of the letter. Back pay shall be computed in conformity with WAC 391-45-410.

g. Make Margaret Penman whole by payment of back pay and benefits in the amounts she would have earned in overtime pay while she was on administrative leave from February 9, 2010, through March 19, 2010. The overtime wages will be calculated based on Penman's usual overtime wage rate, plus interest, for the average number of overtime hours that the employer's other dispatch supervisors

worked from February 9, 2010, through March 19, 2010. Back pay shall be computed in conformity with WAC 391-45-410.

h. Make Margaret Penman whole by reinstating her to the CAD team.

i. Give notice to and, upon request, negotiate in good faith with SNOCOM Dispatchers Association, before changing a work rule relating to a mandatory subject of bargaining.

j. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

k. E-mail a copy of the notice provided by the Compliance Officer of the Public Employment Relations Commission to all bargaining unit employees.

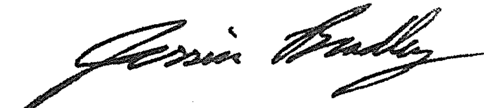
l. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Board of Directors of SNOCOM, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

m. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

n. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 26th day of August, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JESSICA J. BRADLEY, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

CASE 23032-U-10-05868
DECISION 11149 - PECB

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT *SNOCOM* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY:

- Implemented a new work rule prohibiting you from participating in union-related discussions in the workplace with first notifying your union and providing it an opportunity to bargain.
- Interfered with Jodi Basim's right to union representation (*Weingarten* rights) during an investigatory interview on January 14, 2010.
- Discriminated against Jodi Basim by giving her a 5-day unpaid suspension in February 2010.
- Discriminated against Jodi Basim and Margaret (Margie) Penman in February and March 2010 by placing them on paid administrative leave, issuing written reprimands to them, withdrawing Basim's endorsement to teach at CJTC, and removing Penman from the CAD team.
- Interfered with lawful union activity by prohibiting Basim and Penman from having any contact with bargaining unit employees while they were on administrative leave from February 9, 2010, until February 24, 2010.
- Interfered with Basim's right to engage in union activity by prohibiting her from discussing the discipline she received on March 18, 2010, with her co-workers.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL retract the work rule prohibiting you from participating in union-related discussions in the workplace.

WE WILL honor your request to have union representation in an investigatory interview and allow your union representative to assist you.

WE WILL remove the unlawful discipline from Basim's personnel file and pay her the wages and benefits she lost from the 5-day unpaid suspension we issued to her.

WE WILL make Basim whole for the wages and benefits she lost because we withdrew our endorsement for her to teach at CJTC and WE WILL request that CJTC rehire Basim.

WE WILL pay Basim and Penman for the overtime wages they lost as a result of being placed on administrative leave.

WE WILL remove the unlawful discipline from Penman's personnel file and reinstate Penman to the CAD team.

WE WILL NOT change a work rule relating to a mandatory subject of bargaining without first notifying your union and providing it an opportunity to bargain.

WE WILL NOT tell you that you cannot discuss your discipline with your co-workers.

WE WILL NOT interfere with your ability to communicate with your union officers or interfere with your union officers' ability to contact you.

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

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
PAMELA G. BRADBURN, COMMISSIONER
THOMAS W. McLANE, COMMISSIONER
CATHLEEN CALLAHAN, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 08/26/2011

The attached document identified as: DECISION 11149 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

CASE NUMBER: 23032-U-10-05868 FILED: 02/10/2010 FILED BY: PARTY 2
DISPUTE: ER MULTIPLE ULP
BAR UNIT: DISPATCHERS
DETAILS: -
COMMENTS:

EMPLOYER: SNOCOM
ATTN: DEBBIE GRADY
6204 215TH SW
PO BOX 180
MOUNTLAKE TERRACE, WA 98043
Ph1: 425-775-5201

REP BY: RODNEY YOUNKER
SUMMIT LAW GROUP
315 5TH AVE S STE 1000
SEATTLE, WA 98104-2682
Ph1: 206-676-7080 Ph2: 206-676-7000

PARTY 2: SNOCOM DISPATCHERS ASSN
ATTN: JODI BASIM
6204 215TH ST SW
PO BOX 180
MOUNTLAKE TERRACE, WA 98043-2031
Ph1: 425-422-3610 Ph2: 360-403-8477

REP BY: REBA WEISS
CLINE & ASSOCIATES
2003 WESTERN AVE STE 550
SEATTLE, WA 98121
Ph1: 206-838-8770