

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 106

Complainant,

vs.

CITY OF BELLINGHAM,

Respondent.

CASE 131379-U-19

DECISION 13291 - PECB

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

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James Erb, Senior Assistant City Attorney, for the City of Bellingham.

On March 15, 2019, the International Association of Fire Fighters, Local 106 (union) filed an unfair labor practice complaint with the Commission against the City of Bellingham (employer). The union's complaint alleged the employer discriminated against Division Chief Mannix McDonnell in violation of RCW 41.56.140. Following preliminary proceedings, the case proceeded to hearing on August 11, 12, and 13, 2020, which was conducted by video conference before Examiner Daniel Comeau.¹ The parties submitted post-hearing briefs on October 19, 2020, to close the record.

ISSUE

The issue, as set forth in the April 3, 2019, preliminary ruling, is as follows:

Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by terminating Mannix McDonnell's employment in reprisal for union activities protected by chapter 41.56 RCW.

¹ The employer moved for summary judgment on August 27, 2019, which was denied by Examiner Elizabeth Snyder and upheld by the Commission on January 17, 2020.

Based on the record, the employer terminated Chief McDonnell's employment in September 2018. The employer's decision to terminate Chief McDonnell's employment was neither a pretext nor substantially motivated by Chief McDonnell's union activity. Therefore, the employer did not violate RCW 41.56.140(1) in this case.

BACKGROUND

The issue in this matter arises from the event that took place on July 31, 2018, at the City of Bellingham (employer) Fire Station 1. This event involved the usage of a technique called a noninvasive post-mortem intubation, colloquially referred to as a "tube check."² The techniques utilized on July 31, 2018, were supervised by Chief McDonnell, whose employment was terminated as a result of his involvement in these events.

The Practice of Post-Mortem Intubations at the Bellingham Fire Department

The employer provides fire and emergency medical services (EMS) throughout Whatcom County. EMS includes providing Advanced Life Support (ALS), which is an advanced form of life support that includes measures such as manual defibrillation, administration of certain medications, and intubating a patient's airway (intubation).³ Dave Pethick, Bellingham Fire Department (BFD)⁴ Fire Captain and former paramedic, testified that securing a patient's airway is of the utmost importance, because other lifesaving efforts are meaningless if you cannot assist the patient in breathing.

As of July 2018, the employer staffed approximately 32 certified paramedics who provided the ALS services for the employer. In order to maintain certification, a paramedic was required to

² The procedure is considered noninvasive because it does not break or enter the body through the skin.

³ The ALS function is distinct from lesser forms of life support, such as Basic Life Support (BLS), which are generally provided by emergency medical technicians (EMTs). EMTs, since they do not hold a paramedic certification, cannot perform ALS functions up to and including the restriction from performing intubations on patients.

⁴ For the ease of reference, BFD will be used when specifically referring to the Bellingham Fire Department.

successfully perform four intubations per year, in a rolling three-year period (for a total of 12 in a three-year period). The certification was (and still is) handled through Dr. Marvin Wayne, the state-appointed Whatcom County Medical Program Director, and each paramedic operated under his license and overarching supervision. Paramedics recorded successful intubations in medical incident reports in order to track them.

Opportunities for paramedics to perform intubations, and thereby being able to maintain their certifications, were limited. This limitation was due, in large part, because intubations were generally performed in the field as life-saving measures, and the opportunity to perform them was heavily dependent upon a paramedic's shift and the type of call to which the paramedic was responding. Therefore, BFD paramedics sought other opportunities to train, practice, and perform intubations.

Additional opportunities to perform intubations included performing them on cadavers or mannequins, or in the operating room at a local hospital. Rob Wilson, former BFD Division Chief and former president of the union, testified about the deficiencies of these alternate forms of intubating. In regard to cadavers and mannequins, cadavers will have gone through rigor mortis and mannequins are made of latex, making it difficult to truly simulate or maintain training fidelity with true life-saving situations. Nor was the operating room a viable option; firstly, anesthesiologists were uncomfortable with paramedics practicing on their patients and, secondly, paramedic time in the operating room was costly and often led to overtime for the department.

Therefore, a practice developed where BFD paramedics would discreetly perform intubations, post-mortem, on recently deceased patients. Both Wilson and Captain Pethick testified to the critical need for these post-mortem opportunities because paramedics are often required to intubate in very difficult situations. These situations include intubating inside motor vehicles or lying in ditches, and on patients that have varying anatomies, such as shorter necks or obstructed airways.

BFD had no written policy outlining the practice or placing any parameters on when or how often post-mortem intubations could be conducted. The practice of intubating post-mortem was generally performed in the field, after an attempted resuscitation had failed. The number of

intubations depended upon how many paramedics were on the scene. In regard to the specific practice, once a patient had died, while the tubes were still intact, a paramedic would remove the breathing tube, another paramedic would reinsert the tube to be “checked” by the first paramedic. Generally, no consent from the family members was obtained, and paramedics would seek to ensure privacy in the location before performing these post-mortem intubations.

Wilson testified about a particular example that differed from the general practice. Around 1990, when he was a new paramedic, a recently deceased patient was brought back to Fire Station 1 because no other entity would accept the body. Wilson testified that he recalled approximately three to five paramedics training on intubating the deceased patient in the back corner of the bay of Fire Station 1. The only staff that Wilson recalled being present at the 1990 intubation were the paramedics and the medical services officer (MSO).⁵

*The Post-Mortem Intubations at Fire Station 1 on July 31, 2018*⁶

On July 31, 2018, Paramedics Steve Larsen and Aaron Wolven were dispatched on Medic 1 to a nursing home for a patient who was experiencing shortness of breath. The patient had a “do not resuscitate” (DNR) order. During the trip to the hospital, the patient died in spite of other efforts to maintain life support.⁷ Upon arrival to the hospital, a member of the hospital staff informed Larsen and Wolven that they would not take the body, and, with direction from Captain Scott Farlow, they took the patient’s body back to Fire Station 1.

Once at the station, the patient was removed from Medic 1 and placed, while still in the body bag, on the floor of the bay where another aid vehicle normally parked. Chief McDonnell testified that

⁵ No EMTs, paramedic students, or administrative office staff were present for the 1990 intubation.

⁶ The facts surrounding the incident are generally consistent across witnesses, except for how the two office staff employees came to intubate the body. Furthermore, the issue in this case is *not* McDonnell’s culpability for the events. Rather, it is whether McDonnell’s separation was for or substantially motivated by union animus. For this reason, the event is described generally, except for noted differences that are relevant to this case.

⁷ Wolven, in his investigation interview, indicated that he placed an “I-gel” into the patient to assist with breathing but that this ultimately proved unsuccessful.

the patient was already out of the vehicle and on the bay floor when he arrived and that it was Larsen who mentioned “tube check.” Chief McDonnell testified that he understood this to mean the post-mortem intubation practice that had been ongoing within BFD, and he agreed that this would be an opportunity to perform the intubations.

Chief McDonnell further testified that, at the time of the event, he believed it would be a significant training opportunity for the staff. He had, at the time, recalled a former conversation with Dr. Emily Junck, supervising physician for BFD,⁸ in which it was discussed that the first-pass intubation rate for the new UEScope was a poor 52 percent. The patient at Fire Station 1 provided an opportunity to train with this new laryngoscope, and it provided the paramedic staff with the opportunity to perform and record successful intubations.

Initially, there were five staff involved in the event: Chief McDonnell, Captain Farlow, EMS Captain Jeff Brubaker, Paramedic Larsen, and Paramedic Wolven. The number of BFD staff who participated grew to eleven. In addition to the five who initially participated, the additional participants were Paramedic Matt Cook, Firefighter/EMT Hunter Elliott, Paramedic Micah Quintrall, Paramedic Derik Scott, Accounting Assistant Kristia Peschka, and Office Assistant Olivia Sund. Chief McDonnell was the highest ranking officer on scene during this event, and each of the other individuals at the scene stated during the investigation of the event that he either expressly or tacitly permitted them to perform the intubations.

Chief McDonnell testified that he was not aware of how either Peschka or Sund came to intubate the patient or who gave them the permission. However, both Peschka and Sund recalled turning to Chief McDonnell before intubating and him giving each of them permission.⁹ The only limitation given by Chief McDonnell, as recalled by Peschka, Sund, and several other witnesses, was that neither Peschka nor Sund were permitted to post any of the event on social media.

⁸ Dr. Junck served under Dr. Wayne.

⁹ Sund specifically recalled that McDonnell responded with “Yeah,” when she turned to seek permission.

Chief McDonnell testified that, by allowing them to perform the intubations, Wolven could obtain valuable experience as a preceptor.¹⁰

Firefighter Scott Peterson was also present for the event, but he did not participate in intubating the patient. In his post-event interview, he indicated that he did not feel right intubating a person who did not need it and who had been dead for some time. He was uncomfortable with what was happening but did not feel as if it was his place to say anything with the presence of Chief McDonnell and two EMS Captains. In this regard, he decided to sit on the bumper of the fire engine and ensure that no one from the public entered the area. Once he noticed that Peschka and Sund began to intubate, he felt that things had become “over the top,” and he could not sit and watch any longer.

The Investigation and Decisions Following July 31, 2018

The day following the event, Battalion Chief Chuck Henkel went to Chief McDonnell’s office to express his displeasure with the events of the previous day. Chief McDonnell testified that the discussion with Chief Henkel regarding the post-mortem intubation practice was brief, and Chief McDonnell indicated that it was good practice for the staff. Later that day, Chief Henkel again expressed his displeasure to Chief McDonnell, particularly regarding the inclusion of Peschka and Sund, and informed Chief McDonnell that he (Henkel) had been receiving calls from other staff about the event.

Chief McDonnell had two additional discussions regarding the event. The first was with Firefighter Peterson, who, according to Chief McDonnell, stated during a conversation that he simply did not like the location of the intubations. The second was the following day, on or about August 2, 2018, with Dr. Marvin Wayne, who expressed concerns about the events as well. According to Chief McDonnell, Dr. Wayne was especially concerned that no one obtained the family’s consent prior to performing the intubations, in addition to other reasons as to why the

¹⁰ A preceptor was described as a mentor, or one who would guide a paramedic student through the student’s paramedic coursework. Thus, McDonnell’s mindset was that Wolven would be an excellent preceptor if he could guide two untrained office staff on how to correctly intubate a patient.

events occurred as they did. Chief McDonnell ended that conversation by telling Dr. Wayne that he (McDonnell) would have a conversation with Fire Chief William Newbold the following Monday, August 6, 2018.

Chief McDonnell had the conversation with Chief Newbold that Monday and outlined the events that transpired on July 31, 2018. Chief McDonnell testified that, when describing the July 31 events and the post-mortem intubation practice, it became apparent to Chief McDonnell that this was the first time Chief Newbold was learning of the practice. Chief Newbold also testified that the conversation with Chief McDonnell was the first he learned of a post-mortem intubation practice at BFD.¹¹

After discussing the events with Chief Newbold, Chief McDonnell then described the events to Assistant Chief Bill Hewitt. During the conversation, Assistant Chief Hewitt indicated that an investigation of the event would be performed and that they should end the conversation. The conversation ended at that point.

The employer hired Sara Hale from Summit Law Group to conduct the investigation. Although Summit Law Group attorneys had assisted the employer previously on labor relations matters, Hale was not one of those attorneys and her only previous engagement with the employer was a prior investigation in about 2016. That investigation was in relation to the employer's wastewater treatment plant. Hale testified that she conducted a conflict check, which revealed no actual conflicts, and ensured that there was a "wall" between her and any of her colleagues within the firm.

Hale testified that the facts she uncovered in the investigation were generally consistent among the several witnesses she interviewed, particularly in terms of who participated and when. She also noted that the witnesses were consistent in their understanding that Chief McDonnell, as the highest ranking officer, was supervising the events. The only exception to the general consensus

¹¹ Chief Newbold began his tenure with BFD in 2013 and was appointed to fire chief in 2014.

was the issue of who gave Peschka and Sund permission to intubate the patient. Based on Hale's credibility findings, which were in accordance with standardized credibility factors, she concluded, on a more probable than not basis, that Chief McDonnell did provide permission for the office staff to intubate the patient on July 31, 2018.¹²

Furthermore, Hale's investigation uncovered distinctions between what happened on July 31, 2018, and the purported post-mortem intubation practice alluded to by witnesses Wilson and Chief McDonnell. First, the timing of the intubations occurred well after the patient had become deceased, taking approximately 45 minutes to complete, and did not follow any failed resuscitation attempts because of the DNR order. Second, the July 31, 2018, events included a larger number of intubations (15 intubations in total), which exceeded the total number of six that was the maximum number anyone interviewed could recall. Finally, the permission to allow office staff and EMT Elliott, though he planned to attend paramedic training, was also distinct from the purported practice.

Hale testified that, given the timelines involved, her investigation was limited to interviewing each of the witnesses within a two-day period. The timelines referenced in Hale's testimony were under Article 32.3 of the parties' collective bargaining agreement (CBA). That Article provided that any disciplinary action "shall be initiated within 15 calendar days of the date of the infraction or the date the infraction is brought to the attention of the Chief." Hale was able to complete her investigation within the two-day window she was given and concluded it on August 16, 2018, which would have been approximately 10 calendar days after Chief Newbold was made aware of the events by Chief McDonnell. Robert Glorioso (the current union president) and Captain Pethick acknowledged that the employer twice requested an extension of that timeline to complete the investigation, and the union agreed to those extensions.

¹² Captain Pethick took issue with this portion of Hale's report, testifying that he recalled Hale stating she would only be gathering facts and not making any determinations or commenting on anyone's character. Additionally, Wilson testified that Hale failed to include the 1990 incident; he also discussed the medical journal regarding the ethics of the intubation practice. Other than these issues, the union presented no other witness or claim that the facts within Hale's report were objectionable.

Upon completion of her report, Hale communicated her findings to the city and Chief Newbold. On September 4, 2018, Chief Newbold issued a letter to Chief McDonnell indicating that his (Newbold's) preliminary decision was to terminate Chief McDonnell's employment. In this letter, Chief Newbold explained that Chief McDonnell had engaged in serious misconduct and violated the "trust between the Department and the community we serve." Chief McDonnell was placed on administrative leave, with pay, and given the opportunity to present his case at a *Loudermill* hearing on September 11, 2018.

During his testimony, Chief Newbold explained his rationale for deciding upon Chief McDonnell's termination. He explained that the July 31, 2018, events went well beyond the post-mortem intubation practice that had been described to him. In this case, the deceased patient had been dead for more than 15 to 30 minutes, was taken out of the aid car, and had numerous intubations performed upon him. Furthermore, the patient had a DNR order; as such, there was no failed resuscitation (i.e., there were no tubes in the patient to begin with). Chief Newbold, in his own words, testified that "how [one could] extrapolate that it [was] then okay to assemble an ad hoc training scenario, to [him, was] unconscionable." Thus, Chief Newbold believed that Chief McDonnell had failed in his leadership role in conducting the July 31, 2018, events, and violated the public trust in the department.

Chief McDonnell and Captain Pethick (his union representative) presented Chief McDonnell's case to Chief Newbold at the *Loudermill* hearing. Human Resources Director Brian Heinrich was also in attendance. Captain Pethick and Chief McDonnell did not deny the July 31, 2018, events and both, knowing that Chief Newbold's preliminary decision was termination, sought a penalty that was less than termination—such as demotion or a lengthy suspension with a last chance agreement. Chief McDonnell was contrite during the *Loudermill* hearing but did not admit that what he did on July 31, 2018, was wrong.

Following the *Loudermill* hearing, Captain Pethick met with Chief Newbold on September 16, 2018, at Chief Newbold's personal residence to discuss the case. Captain Pethick testified that the ongoing discussions with Chief Newbold were to continue to advocate the union's position for something less than termination. Captain Pethick further testified that Chief Newbold

said to him that he (Newbold) did not believe what Chief McDonnell had done was a terminable offense, and that Chief Newbold gave the impression that his decision could be overturned by Mayor Kelli Linville. However, according to Chief Newbold, his discussion with Captain Pethick on this point had more to do with the complexities of the decision. Specifically, he relayed to Captain Pethick that differing levels of responsibilities and participation can weigh heavily on the outcomes and, depending upon perspective, one could arrive at different results given levels of responsibility. Chief Newbold never expressed to Captain Pethick that the disciplinary decision belonged to anyone else but himself.

On September 19, 2018, Chief Newbold met with Mayor Linville to let her know what his decisions were concerning the discipline. Heinrich was also in attendance. Mayor Linville testified that Chief Newbold certainly cared about his employees but that he made the decision to terminate Chief McDonnell. She also testified that Chief Newbold did not mention anything about Chief McDonnell's union activity, and it was not an issue in the discussion at all. Heinrich testified that Chief Newbold informed Mayor Linville at that meeting of his (Newbold's) decision to terminate Chief McDonnell and that Chief Newbold never mentioned doing anything less or other than termination.

In addition to Chief McDonnell, Chief Newbold disciplined the other participants involved in the July 31, 2018, events. EMS Captains Brubaker and Farlow received a 40-hour suspension and demotion, respectively.¹³ Firefighter/Paramedics Larsen and Wolven received 24-hour suspensions. Paramedics Cook, Quintrall, and Scott received written warnings, as did EMT Elliott, Accounting Assistant Peschka, and Office Assistant Sund. Tim Vandermay, a fire captain who was present but did not participate in the intubations, received a documented verbal warning for failing to report the incident to superiors.

¹³ Farlow retired in lieu of demotion, though, in his letter to Chief Newbold, he took issue with the fact that Brubaker, the other EMS Captain, did not receive a demotion. However, the merits of their discipline are not relevant to this case.

Chief McDonnell was the only employee of the group who received a termination recommendation. Chief Newbold explained that he arrived at the varying levels of discipline due to the varying levels of rank, responsibility, and participation in the events. Since Chief McDonnell was the highest ranking officer and was leading the event, he received the harshest penalty. Chief Newbold indicated that this was a difficult decision as he considered Chief McDonnell a friend and an excellent employee but that he could not, in the end, reconcile with himself any disciplinary action less than termination.

On September 19, 2018, Chief Newbold notified Captain Pethick and Chief McDonnell of his decision regarding termination. On September 20, 2018, Chief McDonnell tendered his resignation in a letter to Chief Newbold. Chief McDonnell testified that the decision to resign in lieu of termination weighed heavily on him, and upon additional reflection, he reversed course. On September 24, 2018, he submitted a rescission letter to Chief Newbold. Chief Newbold officially denied Chief McDonnell's rescission on the same day.

Chief McDonnell's Protected Union Activity and Alleged Union Animus

Chief McDonnell was a long-term employee at BFD. He began his career as a firefighter with the employer in 1995. In 1999, Chief McDonnell certified as a paramedic and served as a paramedic with the employer until 2006. In 2006, Chief McDonnell was promoted to EMS Captain, a position in which he served until 2017 when he was promoted, by Chief Newbold, into the position of Division Chief of EMS. Chief McDonnell served in his role as division chief until his separation in September 2018. Chief McDonnell had no other disciplinary record throughout his tenure with the employer.

As division chief, Chief McDonnell was responsible for 24-hour deployment of the EMS unit for BFD. This responsibility included oversight of the ALS and the BLS units within the City of

Bellingham. He was responsible for managing the unit's budget, securing equipment for the unit, and ensuring staff were appropriately trained to perform their duties.¹⁴

In addition to being a long-term employee, Chief McDonnell was a long-term union member, union leader, and union activist. He worked on several union political campaigns including, but not limited to, supporting the union's campaign to include esophageal cancer as an occupational disease and canvassing political candidates for the union's political endorsements. Furthermore, he assisted bargaining unit members with processing grievances and negotiated union contracts on behalf of the union.

The employer, at hearing, stipulated to Chief McDonnell's protected union activity. The employer further stipulated that the collective bargaining relationship between the parties could be characterized as contentious. The contentious issues included the esophageal cancer campaign and the EMS levy. Chief Newbold testified that the EMS levy did make it to the ballot and eventually passed, which he considered an example of a successful collaboration between the union and management.

The other evidence of animus presented by the union related mainly to Mayor Linville but also to Chief Newbold. In regard to Mayor Linville, union witnesses testified to hearing her refer to the union as "pigs at the trough" in about 2010, when Mayor Linville was serving as a state legislator.¹⁵ Furthermore, union witnesses testified that Mayor Linville held animus toward the union because it supported the incumbent mayor, Dan Pike, during Mayor Linville's initial mayoral election campaign and that she was frustrated with the union in reaching an agreement with the employer

¹⁴ He testified that he was responsible for ensuring that the paramedics received training but not that he was responsible for *delivering* the training.

¹⁵ The purported reference was relating to the union's position that some of the state revenue surplus be devoted to improving firefighter pensions.

prior to her being sworn into office.¹⁶ Mayor Linville, in addition to holding office, was a former union member and leader with the Bellingham Education Association. She testified that she understood the relationships between not only labor and management but also between union leadership and their own members. Therefore, she never held anything against any union member, let alone Chief McDonnell, for aggressively advocating for what they believed was good for their membership. She did recognize, though, that she could be direct with people and that some people could find this frustrating.

In regard to Chief Newbold, the union devoted a considerable amount of hearing time to his statement that the union “rules the roost” at BFD. Chief Newbold testified at several points during the hearing that this comment did not originate with him; he was simply relaying that sentiment to the union, and he used the phrase to facilitate a discussion with the union on how management and the union wanted their relationship to be. He testified that his intended use of the phrase was not in any way an effort to establish that he did not care for or did not wish to work with the union.

In regard to Chief McDonnell, the only specific instance where Chief McDonnell referenced an issue between Chief Newbold and himself occurred in 2015. Chief McDonnell testified that Chief Newbold became angry with him when Chief McDonnell confronted him on the “rules the roost” comment, and when Chief McDonnell explained to Chief Newbold the union’s desire to merge with other firefighter groups in Whatcom County. Fully aware of Chief McDonnell’s union activity, Chief Newbold promoted Chief McDonnell to the division chief position in 2017, and Chief Newbold explained that Chief McDonnell’s expertise as a paramedic was heavily relied upon by BFD.

During Chief Newbold’s tenure, he fired only one other employee. The decision was not overturned by Mayor Linville. She testified that these types of decisions belonged to her department heads. She further testified that she trusted her department heads and that overturning

¹⁶ Mayor Linville also testified that, in the latter portion of her political career when she had a record upon which to campaign, political endorsements were not as important for her. This was particularly true, she testified, when her district was so evenly split between liberal and conservative elements.

their decisions would be wrong. Heinrich testified that he is unaware of Mayor Linville ever overturning a personnel decision by any of the department heads.

Events Following Chief McDonnell's Termination and the Department of Health Investigation

Following Chief McDonnell's separation, the family members of the deceased patient were notified, and several family members filed lawsuits against the employer. Furthermore, a claim was filed with the Washington State Department of Health (DOH). As a part of the DOH investigation, several individuals related to these events submitted statements to the DOH, including but not limited to Chief Newbold, Dr. Wayne, and Dr. Junck. Chief Newbold testified that he was asked by Chief McDonnell's attorney to submit a statement and he agreed to do so.

In his statement, Chief Newbold wrote that "the City of Bellingham has determined that these 9 individuals reasonably believed that they were operating within their scope of employment on July 31, 2018." Chief Newbold testified that he wrote his statement in the belief that the individuals involved had already received their punishment and that there was no need to further jeopardize their certifications and make it more difficult for them to move on in their careers. Furthermore, Dr. Junck and Dr. Wayne indicated that the practice was no longer occurring at BFD, and both recommended that no further action be taken against the employees. The DOH concluded its investigation and determined that no further action was necessary against Chief McDonnell's or the other participants' paramedic certifications.

ANALYSIS

Applicable Legal Standard

Unlawful Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1). *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing that:

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

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. 333, 348–349 (2014); *Educational Service District 114*, Decision 4361-A.

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate nondiscriminatory reason for the adverse employment decision. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. If the respondent meets its burden of production, then the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or substantially motivated by union animus. *Id.*

Application of Standard

The issue before the Commission in this case is *not* the value or the ethics of the post-mortem intubation practice that existed at BFD.¹⁷ The issue, instead, is simply whether the employer unlawfully discriminated against Chief McDonnell by separating his employment in 2018. Based on the record, the employer (1) terminated Chief McDonnell's employment but (2) did not terminate Chief McDonnell's employment in reprisal for his union activities.

¹⁷ For this reason, the post-termination and *separate* investigation by the DOH, which occurred months after the events, are not probative to the issues before the Commission.

The Employer Terminated Chief McDonnell's Employment

The employer, through Chief Newbold's decision, terminated Chief McDonnell.¹⁸ The employer argued that Chief McDonnell was not terminated because Chief McDonnell, instead, tendered his resignation before the final decision was official. Though Chief McDonnell's resignation preceded any official announcement of his termination, Chief McDonnell's termination was all but a formality. Chief Newbold communicated directly with Captain Pethick and Chief McDonnell on September 19, 2018, indicating his decision to terminate Chief McDonnell, and Chief Newbold denied Chief McDonnell's later attempt to rescind his resignation. Thus, the issue of Chief McDonnell's resignation is a red herring, as Chief Newbold's decision was ultimately going to be a permanent separation of Chief McDonnell's employment (i.e., a termination).

The Decision to Terminate Chief McDonnell Was Not Motivated by Union Animus

The union established a prima facie case of discrimination. There were 11 employees involved in the post-mortem intubation events on July 31, 2018, and each of those 11 employees received some level of discipline. Of those 11 participants, *only* Chief McDonnell received termination. Since Chief McDonnell was the only employee of the group who was a leader in and involved with the union, and because the employer knew of his union activity, a causal connection can be inferred that his union activity led to his discipline being the harshest.

The employer, however, articulated a legitimate nondiscriminatory reason for Chief McDonnell's termination. The reason given by Chief Newbold was that Chief McDonnell was the highest ranking individual during the events, and his orchestration of the events was a failure in leadership and violation of the public trust. Therefore, the employer met its burden of production, shifting the burden back to the union to establish that the employer's stated reason was a pretext or that the decision was substantially motivated by union animus.

¹⁸ The union pled, and most of the evidence presented, the argument that Mayor Linville was responsible for the decision to terminate Chief McDonnell. Mayor Linville denied making the decision, which was supported by Heinrich and Chief Newbold's consistent testimony to the contrary. There also was a lack of any evidence or examples where Mayor Linville had made or overturned a department head's personnel decision in the past.

Furthermore, the union failed to establish by a preponderance of evidence that the employer's stated reason was a pretext. The recent case of *Snohomish County*, Decision 12723-B (PECB, 2018), is instructive of this point. In that case, the Commission found pretext due to the element of gamesmanship that occurred during the decision-making process. There, management, knowing that the employee was in violation of a policy during a meeting, permitted the employee to conclude the meeting before placing the employee in jeopardy of discipline. Furthermore, the appointing authority in that case went against the recommended level of discipline (warning) and escalated the discipline to a suspension, a level of discipline significantly higher than a warning. Thus, the Commission held that the employer's stated reason was a pretext and that employee's union activity, not the policy violation, was the real reason for the discipline.

Here, there is no such evidence of a pretext. The employer commissioned a thorough investigation¹⁹ and, following the investigation, Chief Newbold preliminarily decided upon termination as a result of Chief McDonnell's leadership role in the July 31, 2018, events. Although Chief Newbold took time following the *Loudermill* hearing to deliberate, and he discussed options with Captain Pethick on September 16, 2018, his decision to terminate Chief McDonnell remained consistent throughout the process. Furthermore, at the time of Chief Newbold's decision, he had sufficient evidence to support his stated reason for Chief McDonnell's termination. Chief McDonnell was the highest ranking officer on scene and his subordinates believed him to be in charge. The event Chief McDonnell orchestrated was in defiance of a medical order, and this defiance could raise questions from the public as to whether BFD staff could be trusted in future emergency medical decisions. The employer's decision was not a pretext.

In regard to the employer's motivation for Chief McDonnell's termination, the union must prove that the protected activity was a "significant factor" in the employer's decision. *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46 (1991). A factor is "substantial" if it is "important" or "significant." *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d at 71, 74-75; *University of Washington*, Decision 11199-B (PSRA, 2013). In this case, the union failed to

¹⁹ Union representatives were afforded full opportunity to participate during the investigation.

establish by a preponderance of evidence that the decision was substantially motivated by union animus.

Instead, the evidence leads to the conclusion that the employer was reacting to the post-mortem intubation practice, and Chief McDonnell's departure from that purported practice, rather than retaliating against Chief McDonnell for his union activity. It is clear from the evidence and testimony that the manner in which Chief McDonnell permitted the events to unfold, in defiance of a medical DNR order and with the permission he gave to unlicensed staff to perform intubations on the deceased patient, were significant in the employer's final decision. Other than the 1990 incident, there were no other examples of such a scenario unfolding or occurring. Moreover, the 1990 incident did *not* involve intubations by untrained and unlicensed office staff.

In addition, the significant levels of discipline handed down among the other higher ranking staff, and the sweeping nature in which the employer eliminated the entire practice, further supports the conclusion that the employer was reacting to the events themselves. The higher ranking staff received the more significant levels of discipline (suspensions, demotion, and termination). Dr. Junck, who was not alleged to harbor any union animus, summarily eliminated the practice, which impacted the entire department and left the remaining paramedics with fewer opportunities for successful intubations. I find the employer's decisions transcended Chief McDonnell's union activity and that this activity was not significant or important in the final disciplinary determination.²⁰

The union's reliance on *Pasco Housing Authority*, Decision 6248-A (PECB, 1998), and *City of Kalama*, Decision 7448 (PECB, 2001), is misplaced. The union failed to establish that the events of July 31, 2018, conformed to any previous example of the historical use of the post-mortem intubation. In this regard, the union's argument would have been more persuasive if

²⁰ Captain Vandermay's verbal warning is a good example of how serious the employer viewed the events. He did not participate in any of the intubations on July 31, 2018; his only involvement was that he closed the bay doors so that the public would not walk in on the event. Yet, he received discipline for *failing to report the incident* to superiors.

Chief McDonnell had ridden along with Larsen and Wolven in Medic 1 and had supervised a post-mortem intubation immediately following a failed resuscitation attempt. However, this was not the case and not what happened on July 31, 2018.

Furthermore, the union's evidence of union animus is simply too general and temporally attenuated to carry the burden of persuasion in this matter. *See King County*, Decision 12582-D (PECB, 2018) (explaining the employer changed a performance evaluation based upon a *specific* and *recent* exhibition of union activity). The most specific instance of alleged animus occurred nearly three years prior to the July 31, 2018, events. Since that time, there were no other specific examples of animus directed toward Chief McDonnell. And, to the contrary, Chief Newbold promoted Chief McDonnell in 2017 *with full knowledge* of his union activity. Therefore, the employer's decision to terminate Chief McDonnell was neither a pretext nor substantially motivated by union animus.

The statements made by Chief Newbold, Dr. Junck, and Dr. Wayne as part of a subsequent, and later, DOH investigation do not weigh heavily in this decision. First, the DOH investigation occurred after Chief McDonnell's termination and was not an investigation into whether Chief McDonnell should continue to be employed with BFD. Second, Chief Newbold, at least, was *asked* to provide the statement by Chief McDonnell's attorney. Therefore, Chief Newbold's explanation that he did not feel that he should cause further detriment to Chief McDonnell's career is credible under the circumstances.

The Evidence Suggests the Events of July 31, 2018, Were Polarizing

When examining the reactions of other BFD staff, none of whom are alleged to harbor union animus, it becomes clearer that Chief McDonnell's termination was not the result of Chief McDonnell being singled out for his union activity. Captain Pethick described several individuals' reaction as "visceral" to the July 31, 2018, events. Yet, visceral reactions leading to the termination of employment, while seemingly unfair, are not in themselves in violation of chapter 41.56 RCW.

For example, Firefighter Peterson stated during the investigation that he could no longer bear to watch the events once the office staff began to intubate the patient, which was well after several others had already intubated the patient. Chief Henkel was also upset over the events, as were Dr. Wayne and Dr. Junck. Indeed, even Assistant Chief Hewitt would not hold a conversation with Chief McDonnell on the issue, given the need for an investigation.

Unlike Mayor Linville or Chief Newbold, none of these individuals was alleged or purported to harbor any union animus toward Chief McDonnell. These individuals were tenured medical and emergency personnel professionals who reasonably understood the nature of emergency medicine. Yet their reactions demonstrated that they, too, believed a line had been crossed on July 31, 2018.

It is understandable that the union believes that the employer's decision to terminate Chief McDonnell was harsh, unfair, and the result of irrational and emotional reactions to the nature of the July 31, 2018, events. However, the question before the Commission is—to the extent the employer's decision was harsh, irrational, or unfair—whether the employer's decision was in retaliation for Chief McDonnell's union activity. The employer's decision was not in retaliation for Chief McDonnell's union activities.

Therefore, I find the employer's decision was not substantially motivated by union animus and the employer did not discriminate against Chief McDonnell in violation of RCW 41.56.140(1).

CONCLUSION

The employer terminated Chief McDonnell's employment in September 2018. The employer's decision was neither a pretext nor substantially motivated by Chief McDonnell's union activity. The employer did not violate RCW 41.56.140(1).

FINDINGS OF FACT

1. The City of Bellingham (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The International Association of Fire Fighters, Local 106, (union) a bargaining representative within the meaning of RCW 41.56.030(2), is the exclusive bargaining representative of an appropriate bargaining unit of supervisors in the Bellingham Fire Department.
3. Mannix McDonnell was an employee within the bargaining unit represented by the union.
4. The employer provides fire and emergency medical services (EMS) throughout Whatcom County. EMS includes providing Advanced Life Support (ALS), which is an advanced form of life support that includes measures such as manual defibrillation, administration of certain medications, and intubating a patient's airway (intubation).
5. A paramedic was required to successfully perform four intubations per year, in a rolling three-year period (for a total of 12 in a three-year period). The certification was handled through Dr. Marvin Wayne, the state-appointed Whatcom County Medical Program Director, and each paramedic operated under his license and overarching supervision.
6. Opportunities for paramedics to perform intubations were limited. BFD paramedics sought other opportunities to train, practice, and perform intubations.
7. A practice developed where BFD paramedics would discreetly perform intubations, post-mortem, on recently deceased patients.
8. BFD had no written policy outlining the practice or placing any parameters on when or how often post-mortem intubations could be conducted. In regard to the specific practice, once a patient had died, while the tubes were still intact, a paramedic would remove the breathing tube, another paramedic would reinsert the tube to be "checked" by the first paramedic.
9. Around 1990, a recently deceased patient was brought back to Fire Station 1 because no other entity would accept the body. Three to five paramedics trained on intubating the deceased patient in the back corner of the bay of Fire Station 1. No office staff participated in intubating during this event.

10. On July 31, 2018, Paramedics Steve Larsen and Aaron Wolven were dispatched on Medic 1 to a nursing home for a patient who was experiencing shortness of breath. The patient had a “do not resuscitate” (DNR) order. During the trip to the hospital, the patient died in spite of other efforts to maintain life support. Upon arrival to the hospital, a member of the hospital staff informed Larsen and Wolven that they would not take the body, and, with direction from Captain Scott Farlow, they took the patient’s body back to Fire Station 1.
11. Chief McDonnell believed it would be a significant training opportunity for the staff.
12. Initially, there were five staff involved in the event: Chief McDonnell, Captain Farlow, EMS Captain Jeff Brubaker, Paramedic Larsen, and Paramedic Wolven. The number of BFD staff who also participated grew to eleven. In addition to the five who initially participated, the additional participants were Paramedic Matt Cook, Firefighter/EMT Hunter Elliott, Paramedic Micah Quintrall, Paramedic Derik Scott, Accounting Assistant Kristia Peschka, and Office Assistant Olivia Sund.
13. Chief McDonnell was the highest ranking officer on scene during this event, and each of the other individuals at the scene stated during the investigation of the event that he either expressly or tacitly permitted them to perform the intubations.
14. Peschka and Sund recalled turning to Chief McDonnell before intubating and him giving each of them permission. The only limitation given by Chief McDonnell was that neither Peschka nor Sund were permitted to post any of the event on social media.
15. Firefighter Scott Peterson was also present for the event, but he did not participate in intubating the patient. In his post-event interview, he indicated that he did not feel right intubating a person who did not need it and who had been dead for some time.
16. The day following the event, Battalion Chief Chuck Henkel went to Chief McDonnell’s office to express his displeasure with the events of the previous day. Chief McDonnell testified that the discussion with Chief Henkel regarding the post-mortem intubation practice was brief, and Chief McDonnell indicated that it was good practice for the staff.

Later that day, Chief Henkel again expressed his displeasure to Chief McDonnell, particularly regarding the inclusion of Peschka and Sund, and informed Chief McDonnell that he (Henkel) had been receiving calls from other staff about the event.

17. Chief McDonnell also spoke with Dr. Marvin Wayne, who expressed concerns about the events as well. Dr. Wayne was especially concerned that no one obtained the family's consent prior to performing the intubations, in addition to other reasons as to why the events occurred as they did.
18. Chief McDonnell had the conversation with Chief Newbold that Monday and outlined the event that transpired on July 31, 2018. This was the first time Chief Newbold was learning of the post-mortem intubation practice.
19. After discussing the events with Chief Newbold, Chief McDonnell then went to Assistant Chief Bill Hewitt and described the events to him. During the conversation, Assistant Chief Hewitt indicated to Chief McDonnell that an investigation of the event would be performed and that they should end the conversation. The conversation ended at that point.
20. The employer hired Sara Hale from Summit Law Group to conduct the investigation.
21. The investigation uncovered distinctions between what happened on July 31, 2018, and the purported post-mortem intubation practice. The timing of the intubations occurred well after the patient had become deceased, taking approximately 45 minutes to complete, and did not follow any failed resuscitation attempts because of the DNR order. The July 31, 2018, events included a larger number of intubations (15 intubations in total), which exceeded the total number of six that was the maximum number anyone interviewed could recall. Chief McDonnell's permission to allow office staff and EMT Elliott was also distinct from the purported practice.
22. The employer requested two extensions from the union in order to complete the investigation without violating the disciplinary timelines in the parties' collective bargaining agreement.

23. Upon completion of her report, Hale communicated her findings to the city and Chief Newbold. On September 4, 2018, Chief Newbold issued a letter to Chief McDonnell indicating that his (Newbold's) preliminary decision was to terminate Chief McDonnell's employment.
24. In this letter, Chief Newbold explained that Chief McDonnell had engaged in serious misconduct and violated the "trust between the Department and the community we serve." Chief McDonnell was placed on administrative leave, with pay, and given the opportunity to present his case at a *Loudermill* hearing on September 11, 2018.
25. Following the *Loudermill* hearing, Captain Pethick met with Chief Newbold on September 16, 2018, at Chief Newbold's personal residence to discuss Chief McDonnell's case. Chief Newbold never expressed to Captain Pethick that the disciplinary decision belonged to anyone else but himself.
26. On September 19, 2018, Chief Newbold met with Mayor Linville to let her know what his decisions were concerning the discipline. Chief Newbold did not mention anything about Chief McDonnell's union activity. Mayor Linville did not make the decision to terminate Chief McDonnell.
27. Chief Newbold also disciplined the other participants involved in the July 31, 2018, event. EMS Captains Brubaker and Farlow received a 40-hour suspension and demotion, respectively. Firefighter/Paramedics Larsen and Wolven received 24-hour suspensions. Paramedics Cook, Quintrall, and Scott received written warnings, as did EMT Elliott, Accounting Assistant Peschka, and Office Assistant Sund. Tim Vandermay, a fire captain who was present but did not participate in the intubations, received a documented verbal warning for failing to report the incident to superiors.
28. Chief McDonnell was the only employee of the group who received a termination recommendation. The reason for Chief McDonnell's harsher penalty was due to his rank and level of responsibility in the event.

29. On September 19, 2018, Chief Newbold notified Captain Pethick and Chief McDonnell of his decision regarding termination. On September 20, 2018, Chief McDonnell tendered his resignation in a letter to Chief Newbold. Chief McDonnell testified that the decision to resign in lieu of termination weighed heavily on him, and upon additional reflection, he reversed course. On September 24, 2018, submitted a rescission letter to Chief Newbold. Chief Newbold officially denied Chief McDonnell's rescission on the same day.
30. Chief McDonnell was a long-term employee at BFD. In 2017 Chief Newbold promoted Chief McDonnell to the position of Division Chief of EMS. Chief McDonnell served in his role as division chief until his separation in September 2018. Chief McDonnell had no other disciplinary record throughout his tenure with the employer.
31. In addition to being a long-term employee, Chief McDonnell was a long-term union member, union leader, and union activist. He worked on several union political campaigns including, but not limited to, supporting the union's campaign to include esophageal cancer as an occupational disease and canvassing political candidates for the union's political endorsements. He assisted bargaining unit members with processing grievances and negotiated union contracts on behalf of the union.
32. The employer knew of Chief McDonnell's union activity, and the general relationship between the union and the employer was contentious.
33. Chief Newbold referred several times to the perception that the union "rules the roost" at BFD. His intended use of the phrase was in an effort to build a better relationship with the union.
34. The only specific instance where Chief McDonnell referenced an issue between Chief Newbold and himself occurred in 2015. Chief Newbold became angry with him when Chief McDonnell confronted him on the "rules the roost" comment and when Chief McDonnell explained to Chief Newbold the union's desire to merge with other firefighter groups in Whatcom County. Notwithstanding, Chief Newbold promoted Chief McDonnell to the division chief position in 2017 and explained that Chief McDonnell's expertise as a paramedic was heavily relied upon by BFD.

35. The union successfully made a prima facie case that the employer discriminated against Chief McDonnell in reprisal for his union activities.
36. The employer articulated a legitimate nondiscriminatory reason for terminating Chief McDonnell.
37. The employer's reason for terminating Chief McDonnell was not a pretext and the employer's decision was not substantially motivated by union animus.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.56 RCW and chapter 391-45 WAC.
2. By terminating the employment of Mannix McDonnell as described in findings of fact 3 through 37, the City of Bellingham did not discriminate against Chief McDonnell or violate RCW 41.56.140(1).

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 14th day of January, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DANIEL J. COMEAU, 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.



RECORD OF SERVICE

ISSUED ON 01/14/2021

DECISION 13291 - PECB has been served electronically by the Public Employment Relations Commission to the parties and their representatives listed below. Due to COVID-19 related circumstances the hard copy of the decision will not be placed in the mail until Tuesday, January 19, 2021.

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CASE 131379-U-19

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