

1 **I. INTRODUCTION.**

2 Defendants moved to dismiss certain individuals from this case as they
3 had not taken any adverse employment actions against the plaintiff, which is a
4 necessary prerequisite for his discrimination claims against them. Plaintiff has
5 failed to present any evidence of a legally defined adverse employment action
6 taken by these individuals against the plaintiff. Thus, these defendants should
7 be dismissed from the case.

8 **II. DISCUSSION.**

9 Plaintiff has outlined what he believes the adverse employment actions
10 taken by defendants Brame, Roberts, and Arreola to be. Each of these actions
11 will be addressed in turn, and it will be demonstrated how each of these fails to
12 establish a case against these individuals.

13 **A. Promotion.**

14 Plaintiff believes that he was passed over for promotion, and that states
15 a cause against these defendants. Defendants do not dispute that plaintiff was
16 not selected for the captain's position on two occasions. Defendants also do
17 not dispute that being passed over for a promotion constitutes an adverse
18 employment action. See Pierce v. Texas Dept. of Criminal Justice, 37 F.3d
19 1146, 1149 (5th Cir. 1994) (adverse employment actions are discharges,
20 demotions, refusals to hire, refusals to promote, and reprimands). However,
21 this does not state a case against any of these defendants.
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23 The police department utilizes what is referred to in the city's personnel
24 rules as the "rule of three." This means that the first three people on the
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1 eligible list are interviewed, and the Chief can select any of those three. (See
2 Exhibit 1, Affidavit of Mary Brown.) In the Tacoma Police Department, the
3 Chief of Police is the appointing authority, and has the final decision on
4 promotional decisions. (See Exhibit 2, deposition excerpt of James Hairston.)
5 James Hairston was Chief of Police from November 1998, through December
6 2001. Plaintiff was not selected to fill the captain's position in 1999, and 2000.
7 Thus, the decision not to promote the plaintiff was that of Chief Hairston, and
8 none of the defendants who are the subject of this motion. Thus, plaintiff's
9 failure to be promoted does not establish a claim against these defendants, and
10 should be disregarded.

11
12 **B. Unjustified initiation of Internal Affairs investigations.**

13 Preliminarily, in his response, plaintiff fails to identify which of the
14 defendants at issue initiated any internal affairs (IA) investigations against him.
15 He presented this court with no competent evidence that ties Brame, Arreola, or
16 Roberts to the initiation of unjust IA investigations, without such proof his claim
17 fails.

18 Even if the court does find that he presented evidence which ties one of
19 these individuals to the initiation of an internal investigation, plaintiff has failed
20 to establish that the initiation of such action is an adverse employment action
21 sufficient to meet his prima facie burden. Presumably this is because there is
22 no case law to support such a contention and in fact is contrary to the case law
23 on this topic.
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1 Several circuits have addressed whether employer investigations are
2 adverse employment decisions. They are in agreement that they do not. To
3 constitute an adverse employment action, a plaintiff must demonstrate that the
4 employment action was a materially adverse change in the terms and
5 conditions of employment. Richardson v. N.Y. State Dept. of Correctional
6 Service, 180 F.3d 426, 446 (2nd Cir. 1999). Further, not every unpleasant
7 matter, such as insubstantial changes in an employee's working conditions,
8 constitutes an adverse employment action. Wanamaker v. Columbian Rope
9 Co., 108 F.3d 462 (2nd Cir. 1997). Title VII was not designed to address every
10 decision made by employers that arguably might have some tangential effect
11 upon those ultimate decisions. Pollis v. Rubin, 77 F.3d 771, 781-82 (5th Cir.
12 1995). Investigations into possible employee misconduct or violation of
13 workplace rules does not affect the terms and conditions of employment, and
14 therefore does not qualify as an adverse employment action. Pierce v. Texas
15 Dept. of Criminal Justice, Institutional Div., 37 F.3d 1146 (5th Cir. 1994)
16 (investigation not adverse employment action); O'Hara v. Illinois Dept. of Mental
17 Health, 120 F.Supp.2d 704 (N.D. Ill. 2000) (investigation not adverse action and
18 failing to investigate would have been irresponsible). The O'Hara court went on
19 to state that "[t]o discourage investigations when a subject is in a protected
20 group would have the effect of barring all investigations, because everyone is in
21 some protected group." O'Hara, supra, citing Johnson v. Lema Systems Corp.,
22 170 F.3d 734, 745 (7th Cir. 1999).
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1 Plaintiff has the burden of establishing his prima facie case. He has
2 failed to demonstrate that initiating internal investigations are adverse
3 employment actions sufficient to establish his burden. And even if he does
4 satisfy this prong, he has failed to demonstrate that it was done for any
5 discriminatory purpose. Thus, his claim fails as a matter of law.

6 **C. Removal from the Clandestine Lab Team.**

7 Plaintiff claims that his removal from the Clandestine Lab Team
8 somehow makes a case against Brame, Arreola, and Roberts. Again, he
9 provides the court with no evidence that any of these individuals were the
10 decision makers relative to that action. His only argument in this regard is that
11 "Brame was notified of the removal...." Certainly plaintiff does not contend that
12 mere notification of a decision made by someone else gives rise for individual
13 liability for Assistant Chief Brame. Further, when asked who did make the
14 decision to remove hi from the team, he was unsure and thought it could have
15 been Hairston or Monner. (Exhibit 3, deposition excerpt of Kirby.) In any event,
16 Kirby did not identify any of the three individuals who are the subjects of this
17 motion. Plaintiff has not demonstrated by competent admissible evidence that
18 any of these defendants played any role in his removal from the lab team, and
19 as such, his claim fails.
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21 **D. Unjustifiable discipline for the "secretary incident."**

22 To begin, plaintiff claims that he was unjustifiably disciplined and
23 "compelled to attend counseling" for telling a secretary he disagreed with a
24 decision made by Assistant Chief Roberts. Plaintiff states that he was
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1 mandated to go to a counseling session, implying that is was psychological
2 counseling of some type. This certainly was not the case. Plaintiff was
3 counseled, in other words, talked to about his performance deficiency. (Exhibit
4 4, oral reprimand.)

5 Plaintiff boldly states, without citation to authority, that "unjustified
6 counselings are adverse employment decisions." (Plaintiff Brief, p. 18.) An oral
7 reprimand does not affect the material terms of employment; thus, without
8 some authority to the contrary, plaintiff has failed to establish that this is an
9 adverse action. See Sweeny v. West, 149 F.3d 550, 556 (7th Cir.) (No adverse
10 employment action when she was unfairly reprimanded for conduct she did not
11 engage in or should not have been responsible for.). *More importantly, plaintiff*
12 *has failed to offer any evidence to support his contention that this action was*
13 *taken **because of a protected status**.* A discrimination plaintiff must
14 demonstrate a causal link between the alleged adverse action and the
15 protected status. Bass v. City of Tacoma, 90 Wn. App. 681, 953 P.2d 129
16 (1998) (plaintiff must show disability was a substantial factor in the employer's
17 adverse decision for plaintiff's prima facie case); Grimwood v. Puget sound,
18 110 Wn.2d 355, 753 P.2d 517 (1988) (plaintiff's belief she was the subject of
19 discrimination is not enough to make a prima facie case). Plaintiff has not only
20 failed to show a protected status was a substantial factor, he has failed to show
21 was a factor at all. Plaintiff has completely failed to carry his burden of proof
22 and this action cannot form the basis of his discrimination claim.
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1 **E. Psychiatric examinations.**

2 Plaintiff states that he was subjected to psychiatric evaluations for
3 various reasons and that this is somehow attributable to these defendants.
4 Again, he has provided this court with no evidence to support that any of these
5 defendants made the decision to submit him for the exams. Further, he has
6 provided the court with no citation to authority supporting his contention that
7 psychiatric or fitness for duty exams are in fact adverse employment actions.
8 That is because this position is contrary to law. See Schoffstall v. Henderson,
9 223 F.3d 818 (8th Cir. 2000) (Employee did not suffer an adverse employment
10 action when the employer required her to submit to a fitness for duty
11 examination); Breaux v. City of Garland, 205 F.3d 150 (5th Cir. 2000) (the 5th
12 Circuit has held that psychological testing is not an adverse employment
13 action); Stone v. Board of Directors of the Tennessee Valley Authority, 35 Fed.
14 Appx. 193 (6th Cir. 2002) (Fitness for duty exam that employee was forced to
15 undergo was not an adverse employment action as would support a prima facie
16 case under Title VII). Thus, this claim cannot support a cause of action for
17 discrimination.
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19 **F. Search of e-mail.**

20 Lastly, plaintiff claims that Chief Arreola conducted a "warrantless search
21 of Mr. Kirby's e-mail...." Without citation, plaintiff boldly states that "Arreola's
22 decision to search Mr. Kirby's e-mail without a warrant, was an invasion of his
23 rights and adverse to the Plaintiff." Plaintiff's Brief, p. 19. The plaintiff has not
24 demonstrated that the law supports his contention that reviewing an employee's
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1 e-mail account is somehow an adverse employment action. Furthermore, a
 2 public employee has no expectation of privacy in his or her e-mail at work. See
 3 Exhibit 5, Tacoma Police Department Manual of Procedures Section 2.15.001,
 4 and City policy for electronic communication. And again, the mere fact of an
 5 investigation is not enough to qualify as an adverse employment action. Pierce
 6 v. Texas Dept. of Criminal Justice, supra.

7 **III. CONCLUSION.**

8 Plaintiff has failed to present this court with competent, admissible
 9 evidence that these three defendants took any actions which were a materially
 10 adverse change in the terms and conditions of employment thereby qualifying
 11 as an adverse employment action. Thus, he fails to make out a prima facie
 12 case of discrimination, and his case against these defendants should be
 13 dismissed.
 14

15 DATED this 5 day of January, 2003.

16 ROBIN S. JENKINSON, City Attorney
 17 ELIZABETH A. PAULI, Ch. Asst. City Atty.

18 By: 

19 _____
 20 SHELLEY M. KERSLAKE
 21 WSBA# 21820
 22 Assistant City Attorney
 23 Attorney for Defendants
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EXHIBIT 1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JOSEPH J. KIRBY and DEBORAH A.
KIRBY, husband and wife,

Plaintiffs,

v.

THE CITY OF TACOMA, a municipal
corporation; RAY CORPUZ and "JANE
DOE" CORPUZ, husband and wife;
PHILIP ARREOLA and "JANE DOE"
ARREOLA, husband and wife; WILLIAM
WOODARD and CATHERINE
WOODARD, husband and wife;
RAYMOND ROBERTS and "JANE DOE"
ROBERTS, husband and wife; DAVID
BRAME and "JANE DOE" BRAME,
husband and wife; and JAMES
HAIRSTON and "JANE DOE"
HAIRSTON, husband and wife,

Defendants.

No. 99-2-13911-4

AFFIDAVIT OF MARY BROWN IN
SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT TO
DISMISS PHILIP ARREOLA,
DAVID BRAME AND RAYMOND
ROBERTS

NOTED FOR:
December 13, 2002

ASSIGNED:
Judge Katherine M. Stolz

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STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

MARY BROWN, being first duly sworn on oath, deposes and states as follows:

1. I am over the age of eighteen and competent to give testimony in this matter, and make this affidavit upon personal knowledge.

2. I am the Assistant Human Resources Director for the City of Tacoma, and have been so since 1990.

3. The promotional process for a Captain's position within the Tacoma Police Department is as follows: (1) a written examination is taken by interested employees; (2) an eligible list is prepared in order of score, however, everyone on that list is deemed to be qualified based on the successful passing of the written examination; (3) when there is a vacancy, the top three candidates are certified and interviewed; (4) the interview panel makes a recommendation to the Chief of Police, who then makes the ultimate promotional decision.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Mary L Brown

MARY BROWN

SUBSCRIBED and SWORN to before me this 13th day of November, 2002.

M. J. Hughes

Printed Name: M. J. HUGHES
NOTARY PUBLIC in and for the State of
Washington, residing at: Tacoma
My commission expires: 11/11/03

EXHIBIT 2

RECEIVED
APR 28 2000

TACOMA CITY ATTORNEY
CIVIL DIVISION

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JOSEPH J. KIRBY and DEBORAH)
KIRBY, husband and wife,)
)
 Plaintiffs,)
)
 vs.)
)
 THE CITY OF TACOMA, a)
 municipal corporation; RAY)
 CORPUZ and "JANE DOE" CORPUZ,)
 husband and wife; PHILIP)
 ARREOLA and "JANE DOE")
 ARREOLA, husband and wife;)
 WILLIAM WOODARD and CATHERINE)
 WOODARD, husband and wife;)
 RAYMOND ROBERTS and "JANE DOE")
 ROBERTS, husband and wife;)
 DAVID BRAME and "JANE DOE")
 BRAME, husband and wife; and)
 JAMES HAIRSTON and "JANE DOE")
 HAIRSTON, husband and wife,)
)
 Defendants.)

NO. 99-2-13911-4

COPY

DEPOSITION OF JAMES HAIRSTON
Friday, April 21, 2000

APPEARANCES

For Plaintiffs: JOHN L. MESSINA
Messina Bulzomi
Attorneys at Law
5316 Orchard Street West
Tacoma, Washington 98467

For Defendants: SHELLEY M. KERSLAKE
Assistant City Attorney
747 Market Street, Room 1120
Tacoma, Washington 98402

Reported by: Carol Lynn Frederick, CCR
License No. FREDECL431P4

HAIRSTON - BY MR. MESSINA

1 Q Could you just briefly outline your career with the
2 Tacoma Police Department?

3 A January '69 to 1973 as a patrol officer. '73 to '78 as
4 a detective. '78 to '82 as a sergeant. '82 to '88 as
5 a lieutenant. '89 to '90 as a captain. '97 as an
6 assistant chief. '97 to '98 as a deputy chief.
7 December '98, chief of police until the present.

8 Q How many commissioned officers are there in the Tacoma
9 Police Department?

10 A Currently we have a force of 378 commissioned
11 personnel.

12 Q So the previous chief, Chief Arreola, you were the
13 deputy chief under him?

14 A Yes, sir.

15 Q What were the differences in your duties between being
16 an assistant chief and a deputy chief?

17 A There is a 1 percent difference in terms of salary, in
18 terms of position, that's now in the bargaining
19 agreement. When I was in that position, there was no
20 difference in the salary base because it had not been
21 bargained through the professional management
22 association so it didn't impact me.

23 The duties in terms of the job description, there
24 aren't any except for the fact the position is held
25 with the administrative services bureau and it was

HAIRSTON - BY MR. MESSINA

1 also as a part of that interview process.

2 Q Who makes the ultimate decision as to who gets the
3 captain's job?

4 A The chief of police. In this case, I do, and I did in
5 those instances.

6 Q What I'm getting at is what were your reasons for
7 choosing Lieutenant Woodard over Lieutenant Kirby for
8 the permanent captaincy?

9 A I look at three areas, really. I look at the feedback,
10 comments I get back from the assistant chiefs who
11 interview the applicant.

12 Q What was the feedback you got from them regarding
13 Lieutenant Kirby as opposed to Lieutenant Woodard?

14 A The feedback that I received in terms of both Deputy
15 Chief Darland and Assistant Chief Roberts the first
16 time indicated that they felt that the second
17 applicant, in that case, Lieutenant Woodard, was more
18 qualified and a better fit into the organizational
19 structure for the department.

20 Q Let's talk about both of those things. Let's talk
21 about more qualified first. How was she more qualified
22 than Lieutenant Kirby?

23 A Well, without being in a position now to put words in
24 their mouth, it's a case of what the applicant brings
25 forward in terms of what they can provide for the

EXHIBIT 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JOSEPH J. KIRBY and DEBORAH A.)
KIRBY, husband and wife,)
)
Plaintiffs,)

vs.)

No. 99-2-13911-4

THE CITY OF TACOMA, a municipal)
corporation; RAY CORPUZ, and "JANE)
DOE" CORPUZ, husband and wife;)
PHILIP ARREOLA and "JANE DOE")
ARREOLA, husband and wife; WILLIAM)
WOODARD and CATHERINE WOODARD,)
husband and wife; RAYMOND ROBERTS)
and "JANE DOE" ROBERTS, husband and)
wife; DAVID BRAME and "JANE DOE")
BRAME, husband and wife; and JAMES)
HAIRSTON and "JANE DOE" HAIRSTON,)
husband and wife,)

Defendants.)

DEPOSITION OF JOSEPH J. KIRBY

February 15, 2001
Tacoma, Washington

BYERS & ANDERSON, INC.

COURT REPORTING & VIDEO

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Tacoma, Washington 98403
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Suite 2300
Seattle, Wa 98101-4112
(206) 340-1316

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1 division, and in that I was no longer assigned to SID,
2 my affiliation must terminate.

3 I think the exact words from Jim Hairston were
4 "You're off the meth team, Joe. Get over it." I'm
5 not sure that was Hairston or Monner, but I remember
6 the words.

7 Q That would have been -- Monner was acting chief?

8 A I think it was Hairston though.

9 Q And what do you believe the reason that you were taken
10 off the lab team was?

11 A I think they were concerned, again, without
12 justification that I had at one time had a physical
13 disability related to either delayed stress or
14 something of that nature. And they were concerned
15 that I wasn't the candidate to be there contrary to my
16 good service on that team.

17 And I also believe that was just another way to
18 screw with me. They knew I was tactically competent.
19 They knew that I functioned well in that team, and
20 they took it away from me.

21 Q But you're not saying that management doesn't have the
22 ability to shift its personnel around, are you?

23 MR. SADLER: Object to the form.

24 WITNESS: I don't think as it relates to
25 the questions you just asked me is relevant. I think

EXHIBIT 4

TACOMA POLICE DEPARTMENT

Intra-Departmental Memorandum



TO: Temporary Captain Joseph Kirby

IB D.M.: 99- 107

FROM: Assistant Chief Ray Roberts
Investigations Bureau Commander

DATE: November 3, 1999

SUBJECT: Documentation of Oral Reprimand
Insubordination and Unsatisfactory Performance

You were assigned to the Criminal Investigations Division on September 20, 1999. On September 21, 1999, I met with you and gave you a document explaining those performance expectations I have for Captains assigned to the Investigations Bureau. I read the expectations aloud and we discussed in some detail various aspects of those expectations. You signed a copy of that document, acknowledging you had received a copy of it.

During this discussion, I informed you that as a high-ranking official of the Tacoma Police Department, you were expected to display "public support for the goals and policies of the City of Tacoma and the Tacoma Police Department..." During this discussion of leadership, you were encouraged to offer suggestions on issues that have an effect on the Department and community. You were also told that leadership "involves supporting the policies of the City and Police Department administrations and the decisions made to enable those policies. *Once a decision is made, you are expected to publicly support that decision and to do your best to make it work.*" (Emphasis added).

We also discussed teamwork and that as "a manager in the Tacoma Police Department, you are expected to be aware of how your decisions might affect the operations of other Bureaus or Divisions. We should strive to think of the Police Department's entire mission, including how that mission supports the City of Tacoma's goals. *You are expected to work cooperatively with other department and City managers to ensure the best possible service is delivered to the community.*" (Emphasis added).

FAILURE TO SUPPORT POLICIES OF A SUPERIOR OFFICER

On October 6, 1999, and again on October 13, 1999, you met with the CID secretaries. These meetings had been started by your predecessor, Captain Woodard, in an effort to develop a more cohesive and harmonious working relationship within this vital group of employees. During the first meeting, a discussion arose as to when they would begin cross-training with the secretary in

SID. Your response was to tell them you would not have made this decision and did not support it. This was based on your "three tours in SID." You stated you would discuss this with me, but you did not do so. You again strongly emphasized your lack of support for this decision during your second meeting.

Your demonstrated lack of support for a decision made by me had several potential and real effects. First, you demoralized a valued group of employees who were starting to develop a cooperative and caring working relationship. Rather than build on that foundation, your actions could have destroyed a great deal of effort on the part of these employees and other Command Officers.

Secondly, should you have succeeded in stopping implementation of this decision, my word to the secretaries' labor representative would have been broken, damaging a cooperative and respectful working relationship between a labor union and Tacoma Police Department Administration.

Finally, your displayed non-support of my directions undermines my ability to manage and support a major Bureau within the Tacoma Police Department. This has direct implications not to just the men and women within this organization who depend on us to direct and support their efforts, but also on the community we serve.

If you had concerns about my decision on secretarial assignments and training, you should have approached me directly with them. I appreciate diverse ideas and suggestions. This would have also provided me an opportunity to explain to you why the decisions were made. You should not have expressed your displeasure of management decisions directly to employees. During my interview with you on November 1, 1999, you stated that you did not know this was my decision. You stated that you thought Captain Mielbrecht had made this decision. Even if this were the case, your statements would still be inappropriate as they demonstrated to subordinates your non-support for the decisions of other high ranking officials of this department.

I am also deeply concerned with how you handled the knowledge that secretaries had spoken with me concerning these issues. On November 1, 1999, you spoke to Sandra Manchester and told her that if the secretaries could not agree, there would be no more meetings. Secretary Manchester stated you seemed very angry with her for speaking to me instead of you. She described you as venting and having an angry tone. She was so upset after your conversation that she contacted Personnel Manager Harmon in tears and subsequently went home rather than finishing her workday. Again, if you were concerned about my actions you should have contacted me. Displaying anger toward a subordinate for following directions from a superior officer is inappropriate.

On October 11, 1999, you again displayed a lack of support for my decisions and for the policies of the Tacoma Police Department to other employees of this department. On that date you contacted Police Department Personnel Manager, Tanya Harmon and stated that I had denied Detective Baker's request to work light duty on a special project in the Criminal Investigations Division with a "blank stare". You further told her that I had sent you a "scathing message" requesting you check into why Detective Baker had been denied light duty in ARU. (That message read, "Please find out what happened and get it fixed. Thanks." and was attached to an e-mail from Tanya Harmon requesting clarification as to why Detective Baker had not reported to work in ARU). And although you denied making the statement during our November 1, 1999 interview, Ms. Harmon states you also told her that you had told Detective Baker to not work light duty and to just "sit on his butt".

Later, you, along with Detective Baker, re-contacted her. You stated to Detective Baker that you had attempted to get him light duty in CID but that I had denied the request. You further commented that Detective Baker could be working on a project and not create a backlog instead of taking reports in ARU. After Baker left, you told Personnel Manager Harmon that you did not agree with my decision. Your comments throughout this episode were described by Tanya Harmon as made with a raised voice and upsetting tone. Detective Baker described you as intense during this conversation.

DELIBERATE FAILURE TO COOPERATE WITH PEERS

On September 29, 1999, Captain Woodard sent you a memo requesting information on Chaplain Bowlby's transfer to the Mall Substation. Captain Woodard states that you did not respond to her inquiry. Lieutenant Justice informed me that during a conversation with you, you stated that you were not going to respond to Captain Woodard's memo because you found it to be condescending and accusatory.

The document in question reads:

"Joe... What can you tell me about Chaplain Bowlby's transfer to the Mall Substation? Currently, the office he was using in CID is occupied by no one as both Lt. Howatson and Officer Coulter have relocated to the Muni Building.

Apparently, the Chaplain has special needs for his office, and it is more difficult to accommodate those needs at Sector 3. Lt. Justice informs me that he is occupying an office that is intended to be used by sergeants. It would seem to make sense that we keep him at the CC Building where he can have the vacant office to himself and conduct his business there without interfering with the daily operations of others.

Let me know... Thanks. CCW"

You told me on November 1, 1999 that the decision to provide office space at the Mall was approved by Deputy Chief Darland and Assistant Chief Brame. You further stated that you did not believe you had to explain this as Captain Woodard could have checked with Assistant Chief Brame and discovered reasons for this decision. Your failure to respond to Captain Woodard's request, along with your comments to Lt. Justice, demonstrates an unwillingness to cooperate with peers for efficient operation of the Police Department. Again, this effects not only the members of the Department, but also the service we provide to the community. Also, your failure to respond to this simple request has taken time from my day to handle what you should have handled.

PAST PERFORMANC ISSUE

A/C Brame counseled you on September 13, 1999 for failing to notify the Chief of Police of a situation involving critical positions on the department, placing documentation of that counseling in your Divisional file. In that document, A/C Brame mentions you failed to report the incident to the Chief because you did not trust how he might handle the incident. Your actions since assignment to the Criminal Investigations Division have continued to demonstrate non-support for the Tacoma Police Department's administration and policies.

I find these behaviors to constitute violations of the following two rules found in the Tacoma Police Department's Manual of Rules and Procedures:

MRP 12.01.005, **INSUBORDINATION**, which reads in part, "At all times, all personnel shall show proper respect toward superiors. Behavior which is demeaning personally, or which detracts from the authority of a superior, shall be considered insubordinate."

MRP 12.01.010, **UNSATISFACTORY PERFORMANCE**, which reads in part, "Members shall perform their duties in a manner which will maintain the highest standards of efficiency in carrying out the functions and objectives of the department. Unsatisfactory performance may be demonstrated by...the failure to conform to work standards established for the member's rank, grade, or positions..."

You are hereby orally reprimanded for these violations. Future episodes of insubordination, unsatisfactory performance, or similar violation of the rules, procedures, or policies of the Tacoma Police Department may result in more severe discipline.

This document will be placed in your Divisional file for a period of one year at which time it will be removed per Union contract.

RR:pmp

cc: Divisional File

I ACKNOWLEDGE RECEIPT OF A COPY OF THIS IDM
[Signature]

Temporary Captain Kirby did not read the document, nor did he wish me to go over it. He commented we had discussed these issues during our conversation on 11-1-99
[Signature]

EXHIBIT 5



| | | | |
|----------------------|--|------------------------------------|-----------------|
| GENERAL ORDER | Date of Issue December 9, 1997 | Effective Date December 9, 1997 | No: 97-7 |
| | SUBJECT: ELECTRONIC COMMUNICATIONS - DIRECTING MESSAGES TO ALL SYSTEM USERS | | Distribution: B |

Paragraph II B is revised in MRP 2.15.001, Electronic Communications. The procedure for directing electronic mail (email) to all system users has been updated. Replace the existing MRP in your manual with this General Order. A revised MRP will follow.

PURPOSE

To establish policy and procedure in the use of electronic communication systems for electronic mail (email), mobile data terminals (MDTs), radio, facsimile machines (faxes), cellular phones, and in-house and cellular voice mail.

I. POLICY

The use of these systems is expressly intended for conducting official business only. Electronic communication systems shall not be used for the transmission of information that promotes any form of discrimination. It also shall not be used for personal business interest, personal gain, or any unlawful activity.

A. Ownership

All information resources provided through these systems are the property of either the City of Tacoma, State of Washington, or the Federal Bureau of Investigation (FBI). Through a licensing agreement, the City of Tacoma has the privilege of using the technological resources available from the State and the FBI. As a part of these agreements, the City is obligated to ensure that unauthorized use or dissemination of information gained from these sources does not occur.

B. Security Background

Electronic communication systems are not secure. Both radio and cellular communication can be monitored through scanners. Electronic and voice mail messages and fax transmittals are vulnerable to interception. MDT screens may be viewed by unauthorized individuals.

PROCEDURE

A. Deleting Electronic Messages

We are encouraged to delete electronic and voice mail messages as they are reviewed unless later reference is necessary. The purpose is to clear computer disk space. Text will eventually be written over with new material as the computer identifies freed disk space for new incoming messages. Failure to clear these messages can result in system overload or slow the responsiveness to system users.

B. Electronic Mail

Be sure to target your audience carefully when communicating through the email systems. Prior to directing messages to all system users (broadcast messages), approval shall be obtained from a supervisor at or above the rank of Lieutenant or Division Manager (Finance and Property and Forensic Services). The name of the supervisor giving approval will be placed at the top of the message, i.e., "Per Captain Jones", or following the message, i.e., "approved for dissemination by Section Manager John Smith".

C. Mobile Data Terminals

Users need to recognize that MDT messages are routed through a central computer. The messages are retained in memory files and may be obtained through public disclosure or court order.

Whether for communication or records checks, care should be taken when using the terminals so that unauthorized persons cannot view the screen. The information obtained from law enforcement records is confidential and every attempt should be made to secure information displayed on the screen.

D. Radio

Radio users should maintain a professional demeanor at all times and conserve valuable air time by adhering to the ABCs of radio use: Accuracy, Brevity and Clarity. Radio frequencies are public domain. While use is controlled through licensing, the public has the right to monitor the airways via scanners. Copies of Communication Center phone or radio tapes are retained and available through the public disclosure process.

E. Cellular Phones

Cellular technology makes use of both the existing hardwire phone systems and radio frequencies operating from various cell antennas. For this reason cellular may not be the best medium for sensitive or confidential communication.

F. Fax Machines


When necessary to fax confidential information, call the intended recipient and inform that person you are about to fax confidential information. Ask the recipient to stand by the fax machine and advise you when it has arrived. Confirm the fax number and use care when dialing. Stand by the fax machine until all pages of your document have been fed through the machine. Retrieve the documents and check the activity report as verification that it has been sent.

When sending routine information review your documents before you fax them and consider that others in the recipient's office may retrieve the document, as may others in your own office if left at the fax machine.

G. Public Disclosure

Each form of electronic communication produces some record of its use and/or the actual message sent. These billings, logs, or messages are subject to the retention guidelines for public records and are retained accordingly. Therefore, the information may become the subject of a public disclosure request.

Caution should be exercised to ensure that confidentiality is protected and that the message content is appropriate for the communication medium selected.


James O. Hairston
Deputy Chief

JOH:rp



TACOMA POLICE DEPARTMENT

Intra-Departmental Memorandum

TO: All Personnel D.M. 94-188

FROM: Raymond A. Fjetland
Chief of Police DATE: October 19, 1994

THROUGH:

SUBJECT: ELECTRONIC COMMUNICATIONS

Communication through electronic means, while not always private or secure, is a valuable supplement to face to face communication, providing efficiency to both senders and receivers. It saves time and helps us deliver services promptly to the public. However, there are additional responsibilities incurred when using these technologies.

ELECTRONIC COMMUNICATIONS SYSTEMS

There are a number of electronic communication systems currently used in the Police Department. They include: electronic mail (e-mail), mobile data terminals (MDTs), radio, facsimile machines (Faxes), cellular phones, and in-house and cellular voice mail.

OWNERSHIP

All information resources provided through these systems are the property of either the City of Tacoma, State of Washington, or the Federal Bureau of Investigation (FBI). Through a licensing agreement, the City of Tacoma has the privilege of using the technological resources available from the state and the FBI. As a part of these agreements, the City is obligated to assure that unauthorized use or dissemination of information gained from these sources does not occur.

USE OF SYSTEMS

Employee use of these systems is restricted to the conduct of official City business. Electronic communication systems shall not be used for the transmission of information

October 19, 1994

that promotes discrimination on the basis of race, creed, color, gender, religion, or handicap; sexual harassment; copyright infringement; personal political beliefs; the expression of unsolicited opinion; personal business interest; personal gain or any unlawful activity.

SECURITY

Despite our best efforts, electronic communication systems may not be secure. Both radio and cellular communication can be monitored through scanners. Electronic and voice mail messages and FAX transmittals are vulnerable to interception. MDT screens may be viewed by unauthorized individuals.

Cellular phone conversations, while not recorded, may be picked up by a third party through radio waves. Billing records associated with calls related to cellular or outgoing in-house phone use are retained as administrative records.

Both in-office and cellular phone voice mail messages, while protected by security code, may be accessed from any telephone if the code is discovered. Telephone voice mail messages may also be forwarded to other extensions in the system which may not be secure.

DELETING ELECTRONIC MESSAGES

Most modern voice mail systems are not analog systems (tape). Rather, messages are digitized and stored on disc, much the same way electronic messages are stored.

We are encouraged to delete electronic and voice mail messages as they are reviewed, unless later reference is necessary. The purpose is to clear computer disc space. Failure to clear these messages can result in system overload or slow the responsiveness to system users. However, deleting a message does not destroy the text. It merely removes the computer disc location reference from the directory for that phone extension, on line computer or terminal. The text will eventually be written over with new material as the computer identifies freed disc space for new incoming messages.

ELECTRONIC MAIL

Be sure to target your audience carefully when communicating through the e-mail systems. Prior to directing messages to all system users, approval should be obtained from a division supervisor. The creation of custom distribution lists for general mailings should be practiced in order to help keep disc space available. When sending general mailings, there may be several recipients who do not read and delete the message for some time. This causes an accumulation of unusable disc space.

October 19, 1994

At times, there may be a tendency to over rely on electronic communication. Face to face contact, direct phone conversations, personal notes and bulletin boards are still viable forms of communication and may actually be better suited for many situations.

MOBILE DATA TERMINALS

MDTs essentially transmit key stroked data via radio frequency to other mobile or in house data terminals. While these are data burst transmissions and not clear voice, users need to recognize that these messages are routed through a central computer. The messages are retained in memory files and may be obtained through public disclosure or court order.

Whether for communication or records checks, care should be taken when using the terminals so that citizens cannot view the screen. The information obtained from records is confidential and every attempt should be made to secure information displayed on the screen.

RADIO

Radio users should maintain a professional demeanor at all times and conserve valuable air time by adhering to the ABCs of radio usage: Accuracy, Brevity and Clarity. Radio frequencies are public domain. While usage is controlled through licensing, the public has the right to monitor the airways via scanners.

Voice and/or audio noise occurring on each of our primary radio frequencies and incoming phone lines to the communications center are recorded on multi-track 24 hour tapes. The tapes are retained for a minimum of six months. Upon request for investigative, evidentiary or public disclosure reasons, copies are made and/or the original tape is placed into evidence when necessary.

CELLULAR PHONES

Cellular technology makes use of both the existing hardwire phone systems and radio frequencies operating from various cell antennas. For this reason cellular may not be the best medium for sensitive or confidential communication.

While conversations are not routinely recorded, cellular billing information is retained both by the contract vender and the department. These billings may reflect date, time, number called, length of call and charges for air time and long distance within the same area code.

FAX MACHINES

When necessary to FAX confidential information, call the intended recipient and inform that person you are about to FAX confidential information. Ask the person to stand by

All Personnel

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the FAX machine and advise you when it has arrived. Confirm the FAX number and use care when dialing. Stand by the FAX machine until all pages of your document have been fed through the machine. Retrieve the documents and check the activity report as verification that it has been sent.

When sending routine information review your documents before you FAX them and consider that others in the recipient's office may retrieve the document, as may others in your own office, if left at the FAX machine.

PUBLIC DISCLOSURE

Each form of electronic communication produces some record of its use and/or the actual message sent. These billings, logs or messages are subject to the retention guidelines for public records and are retained accordingly. Therefore, the information may become the subject of a public disclosure request.

Caution should be exercised to ensure that confidentiality is protected and that the message content is appropriate for the communication medium selected.

RAF:WRW:br

DISTRIBUTION: B

CITY OF TACOMA INTERNET AND ELECTRONIC COMMUNICATIONS USE POLICY

September 20, 2001

This policy is intended to identify the principles of acceptable use of the Internet and other electronic communication facilities provided in the course of employment to City employees

Principles of Acceptable Use

1. Employees will ensure that their use of the Internet and other electronic communication resources provided in the course of employment complies with the City of Tacoma Code of Ethics, TMC 1.46.;
2. Employees will respect the legal protection provided to programs and data by copyright and license;
3. Employees will protect data from unauthorized use or disclosure;
4. Employees will respect the integrity of computing systems: for example, users shall not use or develop programs that harass other users or infiltrate a computer or computing system and/or damage or alter the software components of a computer or computing system;
5. Employees will safeguard their accounts and passwords. Accounts and passwords are normally assigned to single users and are not to be shared with any other person without authorization. Users are expected to report any observations of attempted security violations.
6. Employees may make reasonable use of Internet or other electronic communication resources provided in the course of employment so long as:
 - a. The direct measurable cost to the public is none or is negligible or access supports the mission of the City, and;
 - b. There is no negative impact on employee performance of public duties.
7. Employees have no expectation of privacy in their use of Internet or other electronic communication resources provided in the course of employment, and all such use may be monitored or audited at anytime without notice.