STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KEITH G. JOHNSON	)	
	)	
Complainant,	)	CASE 14507-U-99-3608
	)	
vs.	)	DECISION 6854-A - PECB
	)	
PORT OF SEATTLE	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF
Respondent.	)	LAW AND ORDER
	)	
	)	

James A. NcNally, Attorney at Law, and Dore and Dore, by *James J. Dore Jr.*, Attorney at Law, appeared on behalf of the complainant.

Craig R. Watson, Attorney at Law, appeared on behalf of the respondent.

On April 5, 1999, Keith G. Johnson filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Port of Seattle violated RCW 41.56.140. A partial dismissal and preliminary ruling was issued under WAC 391-45-110,[1] finding a cause of action to exist on allegations limited to:

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[1] *Port of Seattle*, Decision 6854 (PECB, 2000). Allegations that the employer created a hostile work environment, violated a collective bargaining agreement, engaged in discrimination unrelated to union activity, engaged in an unlawful work stoppage, and refused to bargain in good faith, were dismissed on the basis of insufficient information or because their subject matter not within the jurisdiction of the Public Employment Relations Commission.

> [T]hat the employer's denial of overtime work on October 31, 1998, was in reprisal for Johnson's filing grievances, . . .
>
> [T]hat Johnson's suspension and discharge were in reprisal for his filing of grievances, . . .

A hearing was held on March 14, August 16, and August 17, 2000, before Examiner Frederick J. Rosenberry. The parties filed post-hearing briefs.

Based on the evidence presented at the hearing, Johnson failed to meet the burden of proof to establish that the employer committed unfair labor practices when it implemented the complained-of personnel actions. The complaint is dismissed.

BACKGROUND

At all times relevant to this proceeding, Keith Johnson was employed in the Aviation Maintenance Division at the Sea-Tac Airport facility operated by the Port of Seattle (employer). He was hired as an apprentice electrician in 1973. He went on a leave of absence in January of 1975, but returned as a journeyman "wireman" electrician in about June of 1976.

At one time, the employer conducted annual performance reviews of its employees. Evaluations conducted in 1983, 1985, 1986, 1987, 1989 and 1990 indicate that Johnson was generally rated as meeting the employer's performance standards.[2] One point expressed in common by those reviews was that Johnson did not have an electri-

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[2] The record does not reflect why other evaluations of Johnson were not placed in evidence.

cian's license.[3] Thus, the performance reviews described above included the following remarks:

1983: "Does not have state electrician license."

1985: "Needs to apply himself to learning more about Primary Electrical Systems and toward getting a State Electrician's License."

1986: "Needs to get state license."

1987: "Needs to work on . . . obtaining state Electrician License."

1989: "Perhaps should direct energies toward obtaining electrician license."

1990: "Needs to take time to get journey license requirement completed."

Although the employer discontinued conducting annual performance reviews after 1990, for reasons that are neither explained nor at issue here, Johnson acknowledges the employer continued to request that he obtain the state-issued electrician's license.

The employer provided evidence that it implemented a change of policy in about 1995. Since that time, it has required all Aviation Maintenance Division electricians to acquire and maintain a state certificate of competency.

On February 11, 1997, the employer's supervisor of electrical systems, Riley Parker, directed a memorandum to Johnson, stating:

Subject: State Electrical License

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[3] Shop parlance uses the term "license" in reference to the certificate of competency issued by the Washington State Department of Labor and Industries for electricians, as described in RCW 19.28.510.

> Dear Keith,
>
> In reviewing the list of State Licenses that each Electrician possesses, I find that you do not have a current State Electrical License.
>
> Therefore I am requesting that you obtain a valid and current State Electrical License within the next six (6) months.
>
> I have spoken to the Local 46 Business rep. and he will assist you in this process if you so require.

At that time, Parker was recently-appointed to his position. His duties included monitoring and enforcing the department's rules, including its policy calling for state certification of its electricians. According to Parker, all of the employer's aviation maintenance electricians other than Johnson held the state-issued certificate of competency.

The record reflects that Johnson was a member of a bargaining unit represented by Local 46 of the International Brotherhood of Electrical Workers, and that the employer was signatory to a collective bargaining agreement negotiated by Local 46 with the Puget Sound Chapter National Electrical Contractors Association. Local 46 was the union referenced in Parker's letter to Johnson.

Parker held a corrective interview with Johnson on April 27, 1998, to discuss Johnson's punctuality and lack of a state license. Parker memorialized that meeting with a memorandum dated April 27, 1998, stating as follows:

> Subject: Tardiness and State Electrical License
>
> Since becoming the Electrical System Supervisor I have received inquires about you not having a State Electrical License and your inability to be to work on time. I wrote a letter on February 2nd 1997 [sic] requesting

that you obtain a valid electrical License within six months. I reviewed your past performance records from 1985 through 1990 and found reference to your tardiness and not having a State Electrical License through this time period. I have received written inquiries as to these two subjects from your foreman. I have also reviewed the Access Control system logs that detail your tardiness. After reviewing all of this information we held a meeting on April 27th 1998 [sic] with yourself, Bob Waters (Shop Steward) Ray Rubalcava, (Swing shift Foreman) Tom Scheffler, (General Foreman) and myself. At this meeting we discussed your tardiness and the license requirement.

As to the tardiness I told you that you had been late for work 49 times from the first of January through April 13th of this year. You stated that you were not very late. I agreed but also stated you were habitually late even if it was only a few minutes. I also suggested to you that you report to your foreman at or before the start of your shift so that your foreman can vouch for your attendance. You stated that you could and would be on time to remedy this situation.

As to your not having a State Electrical License you said that you received my letter of February 2nd 1997 [sic] and did not acquire a license within the six month time period and still don't have one. I asked if you needed help with this requirement and you stated that you have the material needed. Also the local #46 union has offered their assistance in this matter. I asked how much time you needed to obtain this license and you said that you needed to the end of the year. I agreed and will allow you until the end of 1998 to acquire a current and valid Washington State Electrical License.

I will be monitoring your progress on these two issues, on a regular basis, for compliance to what we agreed upon. I will also provide you with copies of any and all documentation at your request. I believe that you should be aware that these issues are requirements of the position you currently hold and that

> failure to comply with these requirements will lead to disciplinary action and possible dismissal from employment at the Port of Seattle.

Parker's memorandum reflects that he was the only supervisor among those who attended the meeting. All of the others present, including Scheffler and Rubalcava who held "foreman" titles, were members of the bargaining unit represented by Local 46.[4]

The record fairly reflects that Johnson did not believe that the corrective interview was warranted. On May 26, 1998, he met with a union representative, Eugene P. Dimico, and submitted a written grievance on a form provided by the union. Johnson alleged that the corrective interview did not comply with the employer's "chain of command" reprimand process, and he alleged violations of several sections of the collective bargaining agreement: Section 1.10, concerning discrimination; Section 2.07, concerning identification of contractor trucks; and Section 3.26, calling for employees to be punctual in reporting for work at the start of their shift.[5] Johnson attached a statement to the grievance, claiming he was shocked by the accusation of tardiness. Johnson also stated that he had never been previously reprimanded regarding attendance, and pointed out that he felt the employer's chain of command called for workplace complaints such as this to be dealt with at the foreman level, that the supervisor's involvement in the matter was inappropriate. As remedy, Johnson's grievance asked for a letter

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[4] Parker's memorandum refers in two different places to a memorandum issued by him on February 2, 1998. Credible evidence indicates that he was referring to the letter dated February 11, 1998.

[5] The record does not reflect Johnson's rationale for alleging violation of Section 2.07 which, on its face, does not appear to be relevant to the complained of personnel action.

of apology from the employer, Scheffler, and Rubalcava, for not following the chain of command protocol in bringing their personnel concerns to his attention. Johnson also maintained that the foremen should, as fellow members of the Local 46 bargaining unit, be charged by the union "E board" with failing to stand up for union principles.[6] Johnson also requested copies of all material in his personnel file, that all materials referred to at the April 27 corrective interview be destroyed, that the employer be reprimanded, and that a financial sanction be imposed on the employer for allowing the corrective interview to take place.

At Johnson's request, union shop steward Bob Waters issued a memorandum dated May 29, 1998, confirming Waters' perception of the substance of the April 27 meeting. It stated:

> Subject: Meeting Concerning, Tardiness, & Electrical License
>
> Date: 5/29/98 9:52 PM
>
> Attending the Meeting: Riley Parker, Tom Scheffler, Ray Rubalcava, Bob Waters & Keith Johnson.
>
> To whom it may concern,
>
> Riley spoke with Keith on being late for work, on a constant basis (49 times since the first of the year) Riley said he got his data through I.D. access (Swipe Card) he mentioned that, of the 49 times some days, he was only talking about a minute or two which is no big deal, but that it was constant, he also remarked that some people have a pecueculiar [sic] travel pattern during work hours (checking through the swipe card system) that Keith was not the only person in the shop being looked at for lateness. Keith's records showed that he was talked to back in 1985 and

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[6] The Examiner infers that Johnson's use of "E board" was was intended to refer to an executive board or similar governing body of Local 46.

> then again in 1990 "I think those were the two dates"
>
> Riley pressed the issue of Keith getting his State Electrical License, He also added that he spoke with Keith on this issue last year, and that his records show other Supervisors has [sic] spoken with him in the past, and nothing has been done. Keith stated "He would try to have his License by the end of the year 1198 [sic].
>
> Ray & Tom brought up the matter of Keith keeping in contact with his Forman [sic] during working hours, between jobs ect. [sic] Keith feels he does, and that they both have radios, Ray can call him if he needs him for another project. Tom remarked if he can't get alone [sic] with his Foreman he will move him to day shift. Riley reported, He would put his memo's in writing, and get a cop-[y [sic] to Keith and one for his file. This meeting in Riley's office was held on ~~4/4/98~~ [sic] 4/27/98. Bob Waters
>
> Shop Steward
> Electric Shop

Waters forwarded his memorandum to Johnson by means of electronic mail.

Dimico testified that he investigated Johnson's grievance, and determined that it lacked sufficient merit to warrant filing it with the employer. He advised Johnson of his determination, and no grievance was submitted to the employer.

On July 1, 1998, Parker called Johnson to a meeting to discuss Johnson's progress in addressing the matters raised at the meeting held on April 27, 1998. Both Johnson's attendance and the electrician's license were discussed. The employer also disclosed that a possible violation of employee parking rules had come to its attention as a result of a review of an automated vehicle identification (AVI) system, which suggested that Johnson had been using

his employee parking pass to park his vehicle in the employer's parking garage at times that did not correspond to his work hours.[7] The employer also questioned Johnson about a recent incident where Johnson was summoned to the parking garage by the fire department to deal with fuel leaking from his vehicle, but Johnson remained in a pay status for the entire period of time. The employer pointed out that it felt Johnson should have removed himself from pay status while he was taking care of his private vehicle. Johnson was also cautioned about excessive personal telephone calls, and about his performance.

On July 2, 1998, Parker memorialized the substance of the July 1 meeting in an electronic mail message sent to foremen Scheffler and Rubalcava and to Johnson. He stated:

> A meeting was held on July 1st at approximately 3:45 P.M. in my office to discuss the status of Keith Johnson's on time attendance and his lack of a valid electrical license. In attendance at the meeting were Pat Dimico (Local 46) Tom Scheffler (G.F.), Ray Rubalcava (Swing Shift Foreman), Keith Johnson (Wireman) and Myself.
>
> Old items:
>
> 1. Attendance: Ray stated that Keith has been able to meet an acceptable level of attendance since meeting last May 5th, 1998.
>
> 2. License: Pat Dimico will assist Keith in attending a Journeyman Refresher Course. Riley presented Keith a coy of the application for the State License exam from the State.
>
> 3. Riley asked Keith about his use of his Port parking pass for times other than work.

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[7] Identification devices provided by the employer to its employees activate a system that records time of ingress and egress. The record is not entirely clear, but it is inferred that the employer provides free parking for employees while they are on-duty.

> Keith will respond, in writing, within two weeks. Due date: July 15th.
>
> 4. Riley asked Keith about his being away from work to respond to problems with his car in the parking garage. Keith's time cards do not reflect the absence from work. Keith will respond, in writing, within two weeks. Due date: July 15th.
>
> 5. Work Performance: Keith's job performance was discussed, various jobs are not completed within the foreman's (Ray's) expectations. Over the next two weeks Keith will work on his communication skills.
>
> 6. Riley stated that Keith has more personal phone calls, than is acceptable, and Keith should be aware of this problem.
>
> 7. Riley also noted that Keith is often away from his work site when Ray is checking on his job assignments.
>
> The next follow up meeting will on [sic] July 15th at 3:30 P.M. in my office.

Although Parker's e-mail message made reference to a meeting held on May 5, the record contains no other information regarding a meeting on that date. It is inferred that Parker used an erroneous date while referring to the meeting held on April 27.

As he stated he would do, Parker called a follow-up meeting on July 15, 1998, to receive Johnson's responses to the employer inquiries regarding his use of the parking garage and his failure to remove himself from pay status while attending to the problem with his vehicle. Rubalcava and Dimico also attended. Johnson was concerned about the tone of this meeting, and felt the inquiry regarding his use of the parking garage was inappropriate. Johnson asserted that the employer was engaging in selective scrutiny in looking only at his parking patterns, and not comparing him to other employees.

On August 14, 1998, Johnson filled out a union grievance form and attached a statement to it. Johnson described the nature of his grievance as "discrimination, retaliation, harassment." Johnson alleged a violation of Sections 1.10 and 2.11(c), each relating to discrimination. Notwithstanding the union's rejection of his previous grievance for lack of merit, Johnson's statement re-raised the attendance and licensing issues. Johnson also mentioned the parking and performance allegations raised on July 1, and maintained that the July 1 meeting was in retaliation for his filing the grievance regarding the April 27 meeting. In mentioning the July 15 meeting, Johnson's statement disclosed that he did not provide a written response as to why he was using his parking pass at times that were not commensurate with his work schedule, and that he did not respond to the employer's inquiry about his absence from work to attend to the problem with his vehicle. Defending his use of his employee parking pass for parking other than while on his work shift, Johnson asserted that he had not violated the employee parking regulation and that other employees used their parking pass in the same manner.[8] As resolution to his grievance, Johnson stated, "I feel that the Port of Seattle should be held responsible for discrimination and harassing practices." Johnson gave the grievance papers to Dimico.

Dimico investigated Johnson's August 14, 1998, grievance and determined that the meetings conducted by the employer on July 1 and July 15 did not violate the terms of the parties collective

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[8] Johnson made an independent request for Automated Vehicle Identification (AVI) information on use of the parking facility by all of the other electrical shop employees. That request was denied by the employer. Johnson's grievance statement acknowledged that Dimico was "very uneasy" with the manner in which Johnson was conducting himself, and that Dimico had cautioned that Johnson was setting himself up for a charge of insubordination.

bargaining agreement. Dimico advised Johnson of the results of his investigation, and informed him that the union would not be filing and processing a grievance on the matters raised in Johnson's August 14, 1998, complaint.

Johnson initiated a shift trade with a coworker for an overtime shift on Saturday, October 24, 1998. It was Johnson's intent that the co-worker take the shift, and that Johnson would reciprocate by appearing for the co-worker's overtime shift the following Saturday. Rubalcava was on vacation when Johnson arranged the shift trade, but returned to work before Johnson could complete the trade by working the reciprocal shift. When he became aware of the shift trade, Rubalcava opposed it as a violation of well-known department policy and he denied Johnson permission to work the overtime shift.[9]

Johnson disagreed with the foreman's decision, and submitted the matter to Dimico on an unspecified date. Johnson described the nature of his complaint as overtime, but he again alleged violation of Section 1.10 and Section 2.11(c), relating to discrimination. Johnson denied violating department regulations when he initiated the overtime shift trade, and he maintained that the foreman's refusal to allow him to complete the trade was discriminatory and a form of reprisal for filing a grievance over the investigatory meeting regarding the questionable use of his free vehicle parking pass. As remedy, Johnson requested that he be paid eight hours of pay at the double time rate of pay.

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[9] The collective bargaining agreement assigns responsibility for employee supervision, planning and scheduling to foremen. Their duties and conditions of employment, as members of the bargaining unit, are specified in the collective bargaining agreement.

The record reflects that Dimico submitted a grievance to the employer by letter dated November 23, 1998. That letter was directed to a labor relations official of the employer, Matt Menze, rather than to the department management at the airport. Although Dimico initially felt that Johnson's grievance might have merit, he testified that the union's subsequent investigation disclosed there was no clear department practice and there was no violation of the collective bargaining agreement. Further, the union's investigation did not reveal any support for Johnson's claim that the overtime denial was discriminatorily motivated, or a form of reprisal against Johnson engaging in protected action at some time in the past. Accordingly, the grievance was dropped.

On December 8, 1998, the general manager of the Aviation Maintenance Department, John Christianson, called a meeting to discuss the failure of Johnson to obtain his electrician's license. At that meeting, as he had done previously, Johnson stated that it was his intent to acquire the license. Christianson memorialized the meeting by way of a December 9, 1998, memorandum directed to Johnson, stating:

> On December 8th at 4 P.M. we met, in my office, to discuss the issue of you not having a valid Washington State Electricians License. Those in attendance where yourself, Paul Grace (People Programs), Tom Scheffler (General Foreman), Bob Waters (Shop Steward), Riley Parker (Electrical Supervisor), and myself.
>
> At this meeting we went over the documentation that identified you being asked by the Port of Seattle to obtain a valid Washington State Electricians license since 1983. Aviation Maintenance Management again identified this deficiency in April of this year and at that time you stated that you needed until the end of the year (1998) to comply with this requirement.

> During yesterdays meeting (12/8/98) I requested information as to where you are in this licensing process. You stated that you have sent an affidavit of qualifications for taking the test to the State of Washington and that you had not heard back from the state and you did not have a definite testing date but you thought there was one in January, 1999. I strongly suggested you do whatever is necessary to insure you are registered for the next available testing date.
>
> I then requested that you provide me with the next testing date prior to the end of the business day (5 P.M.) on December 9, 1998. Please use the chain of command, i.e., provide the information to your foreman who will then forward this information through the Electrical Group chain of command to my office.
>
> I again clearly identified the requirement that you must obtain your electrician's license! I'm expecting that you will take the first available test in January to comply with this requirement. *Failure to do so will mean that you will no longer be employed as an Electrician in the Aviation Maintenance Department.*
>
> I have attached to this memo information and forms that relate to the testing process and license requirements should you need them.

(emphasis added).

The memorandum indicated that a copy was provided to the union and to those who attended the meeting.

The record reflects that Johnson failed to complete the application process, so that he was not able to take an electrician competency test in January 1999. Although the circumstances are not entirely clear, it appears that Christianson met with Johnson on December 16, 1998, and that Christianson placed Johnson on an unpaid leave of absence effective January 1, 1999. The reason given for that action was the failure of Johnson to obtain his electrician's

license, and Johnson was told that he could be reinstated if he passed the electrician competency test. Christianson provided Johnson a letter dated December 16, 1998, detailing his expectations and consequences. That letter stated, in relevant part:

> You have failed to follow repeated management directive and the State requirement to have a current license to perform journeyman electrician's work. Further, based on advice from legal counsel, the Port cannot continue to assume the liability of having you perform such work without a license. Therefore, I am taking the following actions, effective today:
>
> - You are on paid administrative leave for the remainder of your scheduled work week;
> - You will be allowed to take your scheduled two-week vacation;
> - You will be on suspension without pay, effective January 1, 1999.
>
> When you have proof that you have passed the February 6, 1999 journeyman's test and are licensed as an electrician by the State of Washington, contact your foreman to schedule a return date. However, if you do not pass the February 6, 1999 test, your employment with the Port of Seattle will be terminated.
>
> Please turn in you [sic] Port identification, keys, tolls and all other Port property to your foreman before leaving the workplace today. Best of luck in your preparation for the February test, and we look forward to your return after we receive documentation that you have a current journeyman electrician's license.

Christianson forwarded copies of his letter to the foremen, to the union representative, and to the union shop steward.

Johnson obtained a letter from the Department of Labor and Industries, dated January 4, 1999, stating that electrician competency certification was not required if the work Johnson performed for the employer was limited to installing and maintaining electrical wires and equipment on property owned and used by the employer. The same letter pointed out that electricians employed by the Port of Seattle would have to be certified if they worked on new buildings intended for rent, sale or lease. Johnson felt that information should invalidate the employer's licensing requirement and, although details are lacking, the record establishes that Johnson forwarded that information to the employer. The employer responded that, regardless of the Department of Labor and Industries regulations, it was a condition of employment that electricians working in its Aviation Maintenance Department have the state certification of competency.

Johnson did not take the electrician competency test in February 1999. Johnson brought his suspension to the attention of the union about March 24, 1999, but there is no evidence that a grievance was filed.

By letter dated March 30, 1999, the employer notified Johnson that it had scheduled a pre-termination hearing for April 8, 1999. The letter invited Johnson to present any information that he felt might be relevant, and pointed out that he could be accompanied by a union representative.

Johnson appeared at the April 8 meeting accompanied by Dimico. The union representative stated that problems with Johnson's apprenticeship records were an impediment to his obtaining certification. Johnson and Dimico asked the employer for reinstatement and additional time for Johnson to obtain his certification. The

employer conditionally granted that request and, by letter dated April 16, 1999, Christianson detailed their agreement, stating:

> Subject: Loudermill Hearing Determination - Temporary Reinstatement
>
> Based on request for additional time from both yourself and your business agent, I have agreed to allow you until July 9, 1999 to acquire your State Electricians License. In addition I will remove you from your current status of suspension without pay and allow you to report back to work at 7:00 AM on Monday April 19, 1999.
>
> When you have proof that you have passed the journeymans's test and are licensed as an electrician by the State of Washington, you will be fully reinstated.
>
> It must be clearly understood, giving you additional time and allowing you to come back to work is based on *your* commitment to comply with management's directive to get your license. As agreed in yesterday's hearing, you have until July 9, 1999 to provide proof that you have passed the state journeyman's exam. *If you fail to get your license or provide proof of passing the journeyman's exam by July 9, 1999, your employment with the Port of Seattle will be terminated.*

(second emphasis added).

Johnson initiated this unfair labor practice proceeding on May 5, 1999. The record reflects that Johnson never acquired his electricians license, and that he was discharged by the employer on July 16, 1999, for failing to acquire the electrician's competency certification issued by the Department of Labor and Industries.

POSITIONS OF THE PARTIES

According to Johnson, the employer's refusal to allow him to complete the overtime work trade, the "unpaid leave of absence"

imposed upon him, and his eventual discharge were discriminatorily motived, in reprisal for his previous protected activity of filing grievances and complaints of unfair labor practices. Johnson views himself as a "squeaky wheel" who asserted his rights, and as a vocal "thorn in [the] sides" of managers. He maintains that his work history demonstrated that he performed his job satisfactorily. Johnson contends that the employer's electrician licensing requirement was without merit, and was nothing more than a fabrication and a pretextual reason used to discharge him.

The employer denies that it engaged in any unlawful discrimination or reprisal in its personnel action with Johnson. The employer maintains that it presented evidence demonstrating non-discriminatory reasons for its personnel actions. Responding to the allegation that it unlawfully denied Johnson an overtime work opportunity, the employer points out that Johnson violated a well-known department rule that prohibited the type of shift trade that he initiated without authorization from a foreman. It points out that there is no evidence that the employer had knowledge of the grievances which were rejected by the union, let alone evidence any evidence that the employer was acting in reprisal for those grievances. The employer further points out that Johnson was suspended, and subsequently discharged, for his failure to heed repeated warnings about the electrician license requirement given to him (along with offers of assistance) over a considerable period of time. The employer asserts that it was enforcing an evenhanded department requirement that its electricians have state-issued certification of their competency. The employer contends that Johnson failed to provide evidence sufficient to establish a prima

facie case of unlawful discrimination, and that it has met a burden of production by offering nonretaliatory reasons for its actions.[10]

DISCUSSION

Interference and Discrimination Unlawful

Johnson maintains that the employer violated provisions of the Public Employees' Collective Bargaining Act, by interfering with and discriminating against him for exercising his rights guaranteed by Chapter 41.56 RCW. That statute includes:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, interfere with , restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.
>
> . . .

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[10] The employer has not pursued, and is deemed to have abandoned, a request for sanctions in this matter.

In the course of presenting his case, Johnson sought to have three affidavits admitted in evidence. The employer objected to admission of the documents, and that objection was sustained by the Examiner. The union then requested a continuance to allow it an opportunity to subpoena the individuals.

The employer opposed the continuance request, and moved for imposition of a $1,000 sanction on Johnson to offset its increased defense costs associated with such continuance. The Examiner reserved a ruling on that request, and invited the employer to submit a written motion and address the matter in its post-hearing brief. The employer did not follow up on that invitation.

> RCW 41.56.140(1) UNFAIR LABOR PRACTICES ENUMERATED. It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; . . .

The Commission determines and remedies unfair labor practices under RCW 41.56.160.

Standard for Interference Violations -

An interference violation is established where it is demonstrated that employer conduct can reasonably be perceived by employees as a threat of reprisal or promise of benefit to deter their pursuit of lawful union activity. *King County*, Decision 7104 (PECB, 2000); *City of Tacoma*, Decision 6793 (PECB, 1999), and cases cited therein. The *Tacoma* decision points out that the legal determination of interference is not based on the actual reaction of the employee involved, but rather on whether a typical employee under similar circumstance reasonably could perceive the employer's actions as an attempt to discourage protected activity.

Standard for Discrimination Violations -

A discrimination violation is established where it is demonstrated that an employer has deprived an employee of some ascertainable right, or has unfairly or unequally applied policy, in reprisal for employee pursuit of lawful activities protected by Chapter 41.56 RCW. The *Roberts Dictionary of Industrial Relations*, BNA Books, Revised Edition (1971), defines a discriminatory discharge as follows:

> A discharge not based on job performance or failure to meet the standards set for the job, but on discriminatory reasons. It is generally applied to discharges for union membership or activity or other activities in con-

> nection with the protection and betterment of worker's wages, hours, and working conditions. Federal and state laws also set forth discharges which are discriminatory under the terms of the specific law.

Evaluation of discrimination allegations is made under the standard enunciated by the Commission in *Educational Service District* 114, Decision 4361-A (PECB, 1994), and reiterated in subsequent decisions such as: *City of Federal Way*, Decision 4088-B (PECB, 1994); *City of Mill Creek*, supra; *North Valley Hospital*, Decision 5809-A (PECB, 1997); and *City of Port Townsend*, Decision 6433-A (PECB, 1999). That standard is based on decisions of the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). Under that standard, a complainant claiming unlawful discrimination must first make out a prima facie case, showing:

- That the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;
- That the employee was discriminatorily deprived of some ascertainable right, benefit or status; and
- That there was a causal connection between the exercise of the legal right and the discriminatory action.

Where a complainant makes out a prima facie case of discrimination, the respondent has the opportunity to articulate non-discriminatory reasons for its actions. It does not have the burden of proof to establish those matters.

The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed employer action was in retalia-

tion for the employee's exercise of statutory rights. That may be done by:

- Showing the reasons given by the employer were pretextual; or
- Showing that union animus was nevertheless a substantial motivating factor behind the employer's action.

Essential to such a finding is a showing that the employer was aware of the protected activity, and intended to discriminate against the employee. *City of Seattle*, Decision 3066 (PECB, 1989). Thus, the disputed personnel action must have been conscious and deliberate to find a violation. *Port of Tacoma*, Decision 4626-A (PECB, 1995); *City of Seattle*, Decision 3066 (PECB, 1989); *King County*, Decision 3318 (PECB, 1989).

The Prima Facie Case - Protected Activity

The evidence does not support Johnson's claim that he engaged in protected activity or communicated an intent to do so.

Previous Unfair Labor Practices Complaints -
Johnson testified that the he filed unfair labor practice complaints with the Commission in the past, and he maintained that those filings caused the employer to look at him with hostility and to seek reprisal. Johnson provided no information concerning the approximate date(s), the nature of the complaint(s), the outcome(s), the case number(s) or any other information that would corroborate his assertion. There is no evidence whatsoever corroborating this claim.[11]

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[11] This defect was pointed out in the partial dismissal and preliminary ruling issued as *Port of Seattle*, Decision 6854, *supra*. It was not remedied.

Previous Grievances -

Johnson testified that he filed multiple grievances, and asked the union to raise other matters on his behalf, in the past. However, his self-characterization as a "squeaky wheel" falls far short of proof of those claims. Johnson provided no substantive evidence that he engaged in protected activity prior to early 1998. Although Johnson may have filled out multiple grievance forms in 1998, the record shows that the only one actually filed by the union with the employer was the grievance concerning the trade of overtime shifts. The union rejected Johnson's other grievances as lacking merit, and it also withdrew the shift trade grievance once it completed its investigation of the matter. There is no evidence of Johnson having submitted any other grievances to the employer as an individual.[12] Again, Johnson's testimony is not sufficient to support a finding of fact that he engaged in protected activity known to the employer, or announced his intent to do so.

The April 27, 1998, Corrective Interview -

There was considerable testimony about the meeting held on April 27, 1998, when Johnson's punctuality and his lack of an electrical license were discussed. Although it is apparent that Johnson felt that the "corrective" nature of that meeting was not warranted, there is no evidence that either he or the union filed a grievance with the employer over the matter.

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[12] Johnson has the right under RCW 41.56.080 to present his grievances to his employer and have them adjusted without the intervention of the union, provided that such adjustments are not inconsistent with the terms of the collective bargaining agreement and the union has been afforded the opportunity to be present at an initial meeting called to resolve such matters.

The July 1, 1998, Meeting -

There was considerable testimony regarding the meeting held on July 1, 1998, when Johnson's progress in addressing the punctuality and license issues was reviewed. Johnson's use of his parking pass, his personal activity while in a pay status, his job performance, and his personal telephone calls were also discussed at that time. It is clear that Johnson was displeased with having the additional matters raised by the employer, and that he claimed to be the victim of discrimination, but there is no evidence that either he or the union filed a grievance with the employer over the matter.

The July 15, 1998, Meeting -

There was testimony about the meeting held on July 15, 1998. This meeting was not a surprise to Johnson, because it was scheduled at the July 1 meeting as the time for the employer to receive Johnson's responses to allegations that had been made against him. The record reflects that Johnson told the union he was being discriminated against, and that he felt that the personnel action violated the collective bargaining agreement, but the record reflects that the union representative who looked into those claims did not find sufficient evidence to support filing a grievance. Moreover, there is no evidence that Johnson pursued the matter with the employer as an individual.

The October 1998 Shift Trade -

There was considerable testimony regarding a shift exchange that Johnson attempted to effect in October 1998. It is clear Johnson was displeased, but the incident does not provide evidence of protected activity. It is notable that this was a dispute between two bargaining unit members (Johnson and the shift foreman), rather than between Johnson and the managers who imposed the license requirement. Additionally, the collective bargaining agreement appears to assign responsibility for employee scheduling to the

foremen,[13] and the union representative who investigated the matter concluded that the grievance he submitted on Johnson's behalf lacked merit. There is no evidence that Johnson pursued the matter with the employer as an individual.

The December 8, 1998, Meeting -

There was considerable testimony regarding the meeting held on December 8, 1998, where the employer's insistence that Johnson acquire a state certificate of competency was discussed. This should not have come as a surprise to Johnson, as he had been warned of the employer's requirement on several occasions dating back a far as 1983, and he had received written notice in 1997.

Prima Facie Case - Deprivation

The evidence does not support a conclusion that the employer deprived Johnson of any ascertainable right, status, or benefit.

The Licensing Requirement -

There is no basis to conclude that Chapter 41.56 RCW or any past practice provided Johnson with a right to continue working as an electrician for this employer without obtaining a certification of competency issued by the Department of Labor and Industries. Even if Johnson might have been able to slip through a loophole in the state regulations, the employer was entitled to make the state certification a minimum qualification. Moreover, it is clear that the employer's requirement for its electricians to have the state

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[13] Section 2.06(a) of the collective bargaining agreement states in relevant part (with emphasis added):

> A foreman as compared to a journeyman has some distinct responsibilities which include: supervision of the worker, material requisition, *Employee planning and scheduling.*

certification was announced many years ago. Johnson had been admonished about this subject nearly 15 years before he perceives the employer as having "turned up the heat" on him. The fact that all of the other employees in the bargaining unit had their state certifications by 1997 supports a conclusion that the "heat" perceived by Johnson was related to the minimum qualification, rather than to any exercise of protected activity by employees.

The Chain of Command -

Johnson has argued that he was dealt with by the employer in some uncharacteristic manner, and that the employer did not follow the normal chain of command in addressing its personnel concerns. In support of this claim, Johnson submitted a copy of a memorandum issued by Christianson on October 1, 1998, describing an "Open Door" policy and pointing out that the employer encourages positive dialogue between individual employees and leadworkers, foremen, supervisors, and managers regarding problem solving and decision making. Johnson seems to nevertheless claim that some inference adverse to the employer should be drawn from the fact that General Manager Christianson and Electrical Supervisor Parker served as employer spokespersons at various investigatory meetings and corrective interviews. The argument is not persuasive.

Review of Christianson's memorandum discloses that it was designed to provide an orderly process for employees to address job-related concerns. While it expresses a preference for employees to resolve issues among themselves or through the employer's organizational structure, it did not give Johnson an ascertainable right to be free of scrutiny by the supervisor and department head. Because the foremen are included in the bargaining unit, it would be inappropriate for the employer to grant them extensive authority to negotiate with employees or their representatives regarding the resolution of serious grievances. Investigation of alleged

misconduct and corrective interviews are a normal supervisory and management function, rather than the role of leadworkers. Further, the employer must remain mindful in dealing with leadworkers and foremen within a bargaining unit that the statute prohibits it from circumventing the union by direct dealing with bargaining unit employees.[14] Johnson has failed to convince the Examiner that there was some impropriety in the manner in which the employer raised the personnel matters at issue here.

Prima Facie Case - Causal Connection

It is clear that Johnson had a statutory right to file and process employment-related grievances and unfair labor practice complaints, and it is also clear that one grievance was submitted to the employer on Johnson's behalf. There is no established minimum of protected activity that is required to invoke a "discrimination" claim under the statute, but the circumstances present in this case discredit Johnson's claim that there was a causal connection between Johnson's protected activity and his discharge.

Simply contacting a union and expressing displeasure regarding an investigatory or corrective interview does not equate with actual filing of a grievance. A union can serve as an intermediary and representative in personnel conflicts, but is not expected to automatically expend resources on all employee complaints. Instead, the case law on the duty of fair representation permits unions to reject or withdraw grievances where they have concluded, upon proper investigation, that they lack merit. *See Vaca v. Sipes*, 386 U.S. 171 (1967).

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[14] Direct dealing includes negotiating a resolution to an evaluation dispute. *City of Seattle*, Decision 6357 (PECB, 1998).

An employer certainly cannot be found guilty of discrimination based on employee unhappiness with the results of employee-union transactions. The employer is not a legitimate party to, or even entitled to knowledge of, internal union affairs. Johnson has failed to establish that this employer was ever aware of what he perceives as extensive grievance activity on his part, let alone that his actions caused employer hostility toward him and provided a motive for the employer to seek to retaliate against him.

The record does not support a finding of fact that the employer bore any animus because of the one grievance filed on behalf of Johnson: As noted above, the controversy was more between Johnson and another bargaining unit member than between Johnson and the employer; the grievance was withdrawn, based on the union's investigation and conclusion that it lacked merit; the withdrawal of the grievance at an early stage of processing was without any financial liability to the employer.

There is no other credible evidence that protected activity by Johnson caused hostility toward him or would have motivated the employer to retaliate against him. The Examiner is unable to conclude that the employer's reiteration of the electrical license requirement on April 27, 1998, was connected to Johnson's protected activities, or was anything other than the employer insisting on Johnson's compliance with a qualification that Johnson had been warned about since 1983.

Prima Facie Case - Conclusions

The Examiner declines to rely on unsupported allegations and sketchy assertions to fill gaps in the evidence. Johnson has failed to sustain the necessary burden of proof to establish a

prima facie case of discrimination based on his union activities protected by Chapter 41.56 RCW.

The Employer's Case - An Alternative Approach

The Examiner recognizes that reasonable minds can differ with regard to inferences about the existence of union animus. Even if Johnson was deemed to have established a prima facie case, however, that would not justify a decision in his favor. The employer has taken the opportunity to articulate non-discriminatory reasons for its actions against Johnson, and the Examiner is satisfied that the complaint would have to be dismissed.

The employer has demonstrated that it has applied its requirement of a state certificate of competency in an evenhanded and non-discriminatory manner in the Aviation Maintenance Division. It is generally accepted that working with electricity requires a great deal of knowledge, and that errors in electrical wiring can have serious implications.[15] The immediate results of errors can include fatal injuries to the electrician; the long-term results of errors include a risk of property damage from electrical fires. Apart from having an obligation to maintain a safe work environment for its own employees, this employer has obligations toward the thousands of employees of air carriers and others operating at the airport, as well as to the millions of passengers who travel through the airport each year. Those obligations certainly spell

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[15] Janet Lewis, former chief electrical inspector for the Department of Labor and Industries, provided the January 4, 1999, letter that Johnson relied upon to claim that state certification was not necessary. Testifying in this proceeding, Lewis explained that the state maintains the electrician competency certification program and continuing education requirement because the state views electrical work as inherently dangerous.

out legitimate and non-discriminatory reasons for the employer to insist that its electricians acquire and maintain competency at the level required for the state certificate. The employer's explanation for the complained of personnel action is credible. The employer gave Johnson numerous general warnings over a period of 15 years, gave him several specific opportunities to comply with its directive in 1998 and 1999, and even relented with a conditional reinstatement to give Johnson one last chance to obtain his electrical license. The record suggests that Johnson never even took the test. The employer has met its burden of production.

Substantial Factor Analysis - An Alternative Approach

Because the employer has asserted legitimate reasons for its actions, the burden of proof would remain on Johnson to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That could be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's action. No such conclusions are supported by the record in this case.

Johnson maintained that he was singled out, and that he was subjected to greater scrutiny than other employees. However, nothing of substantive value was offered to aid in the evaluation of Johnson's claims. The testimony fails to establish that the employer imposed different standards on Johnson than on other employees. The claim of disparate treatment was supported by vague testimony, most of which was in response to leading questions, which significantly compromised the quality of the testimony.

The legitimacy of Johnson's claim of shock over the issue of punctuality is questionable at best. His performance evaluations

point out that his punctuality was questioned as early as 1985. Additionally, regardless of Johnson's reaction to the allegation of tardiness raised in the corrective interview in 1998, his attendance was not a basis for the termination of his employment.

FINDINGS OF FACT

1. The Port of Seattle is a municipal corporation of the state of Washington, located in King County, and is a public employer within the meaning of RCW 41.56.030(1).

2. International Brotherhood of Electrical Workers, Local 46, a bargaining representative within the meaning of RCW 41.56.030-(3), is the exclusive bargaining representative of certain employees of the Port of Seattle, including electricians employed at the airport operated by the employer at Sea-Tac, Washington.

3. Keith Johnson was first employed by the Port of Seattle in 1973, as an apprentice electrician. He was employed by the Port of Seattle as a journeyman electrician from 1976 until he was discharged for reasons at issue in this proceeding.

4. Johnson's performance was the subject of annual evaluations issued in at least 1983, 1985, 1986, 1987, 1989, and 1990, each of which admonished Johnson to obtain a certificate of competency issued by the Washington State Department of Labor and Industries. There is no evidence that the employer ever excused Johnson from obtaining the state certification.

5. During or about 1995, the employer implemented a policy requiring that all electricians in the division where Johnson worked acquire and maintain state certification.

6. On February 11, 1997, the employer's supervisor of electrical systems directed Johnson to obtain state certification within six months, and referred Johnson to Local 46 for assistance in that matter. By that time, all of the other electricians in the division where Johnson worked held state certification.

7. On April 27, 1998, the employer's supervisor of electrical systems held a corrective interview with Johnson, to discuss Johnson's punctuality and his lack of a state certification. In a letter confirming the results of that meeting, Johnson was given until the end of 1998 to obtain state certification.

8. Johnson did not believe that the corrective interview was warranted; Johnson met with a union representative, and although Johnson submitted a written grievance to the union, the union found Johnson's claims to be without merit and no grievance was submitted to the employer.

9. On July 1, 1998, the employer's supervisor of electrical systems held a meeting with Johnson to discuss Johnson's progress in addressing the matters raised at the meeting held on April 27, 1998. The requirement that Johnson obtain state certification was reiterated. The employer also raised a possible violation by Johnson of employee parking rules and Johnson's use of work time to attend to a problem with his personal vehicle. Johnson was given until July 15, 1998, to prepare his responses to the new allegations, and he appeared to accept his responsibility to respond at that time.

10. On July 15, 1998, the employer's supervisor of electrical systems held a meeting with Johnson to receive Johnson's responses to the allegations raised on July 1, 1998. A union representative was present at that time. Johnson voiced

concern about the tone of the meeting, asserted that the inquiry regarding his use of the parking garage was inappropriate, and asserted that the employer was engaging in selective scrutiny in looking only at his activities and not comparing him to other employees.

11. Although Johnson submitted a written grievance to the union concerning the meeting held on July 15, 1998, the union found Johnson's claims to be without merit and no grievance was submitted to the employer.

12. In October of 1998, Johnson initiated a shift trade with a coworker without obtaining the approval of the foreman who is included in the bargaining unit represented by Local 46 but is authorized by the applicable collective bargaining agreement to establish and adjust employee work schedules. Upon his return to work, the foreman disapproved the shift trade as a violation of well-known department policy, and he denied Johnson permission to work the overtime shift.

13. Johnson disagreed with the foreman's decision, and submitted the matter to the union on an unspecified date. The union submitted a grievance to the employer by letter dated November 23, 1998, but withdrew that grievance after further investigation disclosed that it lacked merit.

14. On December 8, 1998, the employer's general manager of aviation maintenance held a meeting with Johnson to discuss the failure of Johnson to obtain his state certification. At that meeting, as he had done previously, Johnson stated that it was his intent to acquire the license. A memorandum stating the results of that meeting clearly reiterated the employer's requirement that Johnson obtain state certifica-

tion, and specifically stated that Johnson's employment would be terminated if he failed to take the first available test in January of 1999. That memorandum indicated that a copy was provided to the union.

15. Johnson failed to complete the application process, so that he was not able to take an electrician competency test in January of 1999.

16. On or about December 16, 1998, the employer placed Johnson on an unpaid suspension, effective January 1, 1999, based on the failure of Johnson to obtain his state certification. Johnson was told that he could be reinstated if he passed the electrician competency test in February of 1999. The employer issued a memorandum confirming the results of that meeting, copies of which were provided to the union representative and to the union shop steward.

17. Johnson did not take the electrician competency test in February of 1999.

18. Johnson brought his suspension to the attention of the union about March 24, 1999, but there is no evidence that a grievance was filed.

19. By letter dated March 30, 1999, the employer scheduled a pre-termination hearing for Johnson for April 8, 1999. The letter invited Johnson to present any information that he felt might be relevant and pointed out that he could be accompanied by a union representative.

20. Johnson appeared on April 8, 1999, accompanied by a union representative. Johnson and the union representative stated

that problems with Johnson's apprenticeship records were an impediment to Johnson obtaining certification, and asked the employer to reinstate Johnson and provide additional time for Johnson to obtain his certification. The employer conditionally granted that request, and allowed Johnson until July 9, 1999, to acquire state certification. The employer issued a memorandum confirming the results of that meeting, copies of which were provided to the union.

21. The record reflects that Johnson never acquired state certification as an electrician.

22. On July 16, 1999, the employer discharged Johnson for failing to acquire an electrician competency certification issued by the Department of Labor and Industries.

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. Keith Johnson has failed to establish, by a preponderance of the evidence, a prima facie case that the personnel actions taken against him by the Port of Seattle, as described in the foregoing findings of fact, were in reprisal for Johnson's exercise of rights protected by RCW 41.56.040.

3. The reasons articulated by the employer for the personnel actions it took against Keith Johnson, including its imposition and enforcement of a requirement that all electricians employed in the department where Johnson worked hold state certification of competency, were lawful under RCW 41.56.040.

4. Keith Johnson has failed to establish, by a preponderance of the evidence, that the Port of Seattle has committed, or is committing, any unfair labor practice under RCW 41.56.140.

ORDER

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

Issued at Olympia, Washington, on the 24th day of April, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Frederick J. Rosenberry

FREDERICK J. ROSENBERRY, 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.