STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, Complainant, vs. GRAYS HARBOR COUNTY, Respondent.	)	CASE 15308-U-00-3865 DECISION 7239-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

David M. Kanigel, Attorney at Law, for the union.

Kirsten Barron Weight, Special Deputy Prosecuting Attorney, for the employer.

On July 17, 2000, Washington State Council of County and City Employees, (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Grays Harbor County (employer) violated RCW 41.56.140. The case was reviewed under WAC 391-45-110, and a deficiency notice was issued on November 14, 2000. The union filed amended complaints on December 1, 2000, and May 3, 2001, but they did not substantively change the allegations. A partial dismissal and preliminary ruling were issued under WAC 391-45-110, finding a cause of action to exist on allegations limited to:

> Employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), by reducing overtime opportuni-

> ties for sign technicians Ken Jacobson and Steve Brumfield in reprisal for their union activities protected by Chapter 41.56 RCW.

Grays Harbor County, Decision 7239 (PECB, 2000).[1]

A hearing was held on October 18, 2000, before Examiner Frederick J. Rosenberry. The parties filed post-hearing briefs.

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

BACKGROUND

The employer and union are parties to a collective bargaining relationship for a bargaining unit of employees working in the Public Works Division of the Department of Public Services. The parties' collective bargaining agreement for 1999-2001 reflects that the division is further divided into an administrative division, an engineering division, a road maintenance division, a utility division, and an equipment pool division.

The record fairly reflects that there have been differences of opinion among road maintenance division employees for several years, regarding how overtime should be allocated. In a letter to

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[1] Allegations of employer domination or assistance of the union were dismissed as insufficient. None of the facts alleged in the complaint suggest that the employer involved itself in the internal affairs or finances of the union, or that the employer had attempted to create, fund, or control a "company union."

the union dated January 27, 1993, the Director of Public Works set forth details of an agreement between the parties concerning the allocation of overtime to traffic control technicians.[2] That letter stated, in relevant part:

> It was agreed upon by the Union and management that the traffic Control Technicians *would not* be utilized for snow and ice control, other than erecting and maintaining traffic control devices, unless and until department personnel seniority list [sic] had been exhausted in accordance with Section (J) of the current working agreement. This provision shall remain consistent for any and all overtime allocations for road maintenance with the exception of signing. In cases of overtime allocation for signing, the traffic control personnel shall always be used first before road maintenance personnel are utilized.
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> This agreement was made based on the need to have the traffic control technicians *immediately* available at all time [sic] for signing and traffic control.

There is no indication that the union disputed the substance of that letter, but the allocation of overtime between the traffic control technicians and other road maintenance employees continued to be a problem.

Traffic control technicians, union representatives, and supervisors attended a meeting on July 2, 1998, to discuss the overtime allocation issue. The director of public services summarized the substance of that meeting in a letter he sent to Kathleen Shelton,

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[2] Although not specifically stated in the record, the evidence suggests that the traffic control technicians are assigned to the road maintenance division.

the union's business representative, on July 8, 1998. That letter stated:

> This letter is a follow-up to the above referenced meeting. As I understand it, the purpose of the meeting was to establish a clear understanding of overtime allocation for Traffic Control Technicians. While differing opinions currently exist, I feel that management's implemented practice for at least the life of the current contract has been totally consistent and acceptable. As stated at the meeting I feel that change in current and past practice with only six (6) months remaining in the existing contract would be inappropriate. If the Union membership feels that change is needed in contract language to further clarify procedure for this overtime allocation, it is best accomplished in the contract negotiations process. Trying to accomplish it as a stand-alone issue or through a time consuming and costly grievance process wherein a third party would render a decision, in this case, that neither side may be happy with would not be acceptable. It will be my intent to offer language that would clarify existing practice as described as follows:
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> > Traffic Control Technicians shall be the first called or scheduled for overtime for activities in those categories of work normal to traffic control, implementing provisions of the Manual of Uniform Traffic Control Devices (M.U.T.C.D). Assignment shall be first by seniority among Traffic Control Technicians in each duty station or assigned work area; second, by seniority among Traffic Control Technicians in other duty stations. Other personnel will only be utilized when the list of Traffic Control Technicians is exhausted.
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> I am in hopes this clarification summarizes the intent we left the meeting with. I appre-

ciate the opportunity to express the County's position in this matter.

During negotiations for a successor contract on November 30, 1998, the union raised concerns about a report or rumor that the traffic control technicians were losing as much as $3,000 to $5,000 of overtime income annually (as compared to other categories of road maintenance employees) and about an alleged lack of advancement opportunities for traffic control technicians. The union was looking for ways to resolve those alleged disparities.

At about the same time that negotiations for a successor collective bargaining agreement were underway in 1998, the employer decided to add two new positions to its cadre of traffic control technicians. Steve Brumfield was transferred from a road maintenance position to one of the new traffic control technician positions, and was assigned to work with Traffic Control Technician Stan Jacobson at a facility located at Elma.[3] One new employee was hired, increasing the number of traffic control technicians from three employees to five employees.

The parties concluded their negotiations for a successor agreement in March of 1999. During those negotiations, the parties agreed to implement three changes favorable to the traffic control technicians, as follows:

1. Upon successful acquisition of the IMSA certification, the traffic control technicians were to be reclassified upward on

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[3] Brumfield was hired by the employer in about 1983. He had a difficult time recalling when the transfer took place: At one point in his testimony he placed the transfer as about October or November 1998; at another point he placed the transfer in early 1999.

the salary schedule, to a "technician II" classification at the same rate of pay as the "equipment operator I" class;[4]

2. A new "traffic control lead technician" classification was to be created at the same rate of pay as assistant area supervisors; and

3. As a new perquisite not set forth in the collective bargaining agreement, the traffic control technicians were to be allowed to use employer vehicles for commuting between their residences and their work locations.

The employer intended that the foregoing changes favorable to the interests of the traffic control technicians would resolve their complaints about the allocation of overtime.[5]

After his transfer, Brumfield expressed disappointment about the amount of overtime that was available to the traffic control technicians. He viewed the newly-bargained changes affecting the traffic control technicians as an inadequate resolution of his interest in acquiring more overtime. Jacobson also expressed concerns about the lack of overtime opportunities, and he requested

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[4] Based on information contained in the record the Examiner infers that this reclassification resulted in approximately a 6% wage increase in addition to a 2% across-the-board salary increase. The parties used the acronym IMSA in their testimony, the record does not reflect the underlying full name, but it is appears that it is a proficiency certification relevant to the duties of a traffic control technician.

[5] The parties' 1996-98 and 1999-01 collective bargaining agreements are in evidence. Comparison of those documents discloses no apparent change in the manner in which overtime was to be allocated among the employees in the Road Maintenance Division.

a meeting with the public works director in mid-1999:[6] According to Brumfield, Assistant Area Supervisor Dan Comer stated in about June of 1999 that the road crew was jealous of the amount of overtime emergency flagging work that was being given to Brumfield and Jacobson, and that Comer stated that he would be assigning the emergency flagging work to road crew members in the future.[7] Brumfield thought that could reduce his overtime opportunities by 40 hours over a one-year period. Brumfield recalled a meeting held with the Road Superintendent Stan Anderson in about August of 1999, at which he and Jacobson complained about the lack of overtime. Brumfield testified that Anderson became angry when he and Jacobson threatened to file a grievance, that Anderson said "overtime would dry up" if they went to the union about their complaint, that Anderson said he was meeting with the employees on the instructions of the director, and that there would be no meeting with the director. Brumfield reported the incident to the union.

There is no evidence that a grievance was filed regarding the distribution of overtime, but the department director, Daniels, recalled hearing about Anderson's alleged comments. Daniels' source was a union shop steward, whose name he could not recall. Daniels discussed the matter with Anderson, but felt he was not able to conclusively determine what took place at the meeting.

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[6] Jacobson has since deceased, and did not testify at the hearing in this proceeding.

[7] The evidence suggests that the assistant area supervisor position filled by Comer is included in the bargaining unit represented by the union; the position does not appear on a list of excluded positions contained in the parties' collective bargaining agreement. Additionally, the position is listed on what appears to be an appendix to the parties collective bargaining agreement containing a salary matrix. Comer did not appear as a witness at the hearing.

Daniels reported his conclusion back to the union shop steward, and did not recall the matter ever coming up again.

Pointing to what he views as a number of unusual incidents, Brumfield maintains there has been a deliberate decrease in the amount of overtime assigned to him. He cited:

a. An incident in December of 1999, when he responded to a traffic accident for emergency flagging and then installed emergency signs. For an unknown reason, the employer had him record all of his time as sign-related and deleted a reference to flagging.

b. A change of procedure in about December of 1999, when the employer commenced having the assistant supervisor go to the site of an incident and determine whether a traffic control technician would be dispatched. In the past, traffic control technicians were dispatched first.

c. An incident of high water in about December of 1999, when a road crew was dispatched to place traffic control signs. Traffic control technicians had been given such assignments in the past.

d. An incident in about February of 2000, when the assistant supervisor called Brumfield and Jacobson out for overtime. Brumfield disagreed with the manner the assistant supervisor handled the call-out.

e. A conversation with Comer in about March of 2000, when Brumfield inquired about "moving up" and was told that the only way he could move up was with training. Brumfield alleges that Comer simultaneously made a gesture with his hand as if he was painting and made comments to the effect that

> Brumfield had painted himself into a corner when he filed the complaint charging unfair labor practices, that Brumfield would never move up, and that Brumfield was at a dead-end. Brumfield testified that he asked if he could be trained as an equipment operator, and that Comer replied in the negative and said that traffic control technician was as far as Brumfield would progress.

Brumfield acknowledged, however, that weather and other circumstances contributed to fluctuations in the amount of overtime available to him.

On April 5, 2000, Public Services Director Daniels issued a memorandum directed to a union spokesperson, detailing the employer's policy regarding maintenance crew call-outs. It stated:

> This memorandum is a follow-up to our phone conversation of last week regarding callout procedures as it relates to the Sign Technicians and Road Maintenance Crew workers. Hopefully the following will bring some clarity to what I believe to be a compromised settlement of the issue. Since the issue was raised a couple years ago in East County, we have attempted to be consistent in the following procedure:
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> In the event that an incident of any activity occurring within the County road system requires any type of signing (permanent or temporary) the area Sign Technicians are be [sic] called out first. If the area technicians are not available or additional personnel are needed, the sign lead tech is the next called then the other area Sign Technicians. Once the area technicians, the lead tech. and/or the sign techs from the other areas have been called, then the Area Supervisor is free to callout personnel from the area road crew - all callout is based on seniority protocol.

> If an incident or activity occurs that requires flagging only, then in that case the sign tech are [sic] not called. If signing is needed subsequent to the flagging activity, the sign techs are called out, if not to set the signs, then to review the signed area making modifications as required.
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> If the sign tech arrive [sic] and place signs, they can perform flagging duties until relieved by area road crew personnel, making them available for additional signing activities.
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> This situation is a difficult one and we strive to create situations that are fair and equitable for all parties.
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> We have upgraded the sign tech positions in part to recognize their technical training and in part to compensate for perceived lack of overtime. Based on their training they should always be available to repair or replace traffic control devices as first priority. To be put in a position to have a sign tech flagging and an untrained individual placing signs in [sic] unacceptable and should only occur in the rarest of circumstance if at all.
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> Hopefully, this will clarify the policy and procedure for all affected employees. If you have additional questions, let me know.

Brumfield testified that the traffic control technicians had traditionally performed some flagging, but there is no evidence that the union responded to Daniels' memorandum or made any kind of a claim that the employer's statement violated an agreement with the union or was an inappropriate unilateral change of personnel policy.

According to Brumfield, unusual incidents continued after the memorandum issued by Daniels. He cited:

f. A conversation on or about May 30, 2000, when the assistant supervisor told Brumfield there would be no more painting on overtime.

g. An exchange on or about July 6, 2000, when the request of Brumfield and a co-worker to continue working through lunch on a project of painting railroad crossing stop bars was denied, even though other crews were allowed to do so.

Brumfield felt that overtime had been discontinued, because there was no overtime opportunities for emergency flagging, painting, chip sealing or working through lunch, and that he was being treated in a disparate manner while summer help and other road maintenance employees were allowed to work overtime.

The union filed the complaint charging unfair labor practices to initiate this proceeding on July 17, 2000.

POSITIONS OF THE PARTIES

The union contends that the employer reduced the amount of overtime assigned to Brumfield and Jacobson in reprisal for their complaints and their threat to file a grievance concerning the allocation of overtime. The union points out that Brumfield earned $7,072 for overtime work in 1999, but only $2,992 for overtime worked in 2000. According to the union, that reduction was unlawful discriminatory reprisal for the exercise of rights under the Public Employees' Collective Bargaining Act. The union contends that overtime should be allocated in accordance with the terms of the parties' collective bargaining agreement and past practice, and that Brumfield and Jacobson should be made whole for loss of income resulting from the unlawful reduction of overtime hours.

The employer denies that any of its personnel actions involving Brumfield or Jacobson were in reprisal for their comments about overtime opportunities or the filing of a grievance. According to the employer, no overtime was allocated in a manner that did not comply with the terms of the parties' collective bargaining agreement. Morever, the employer maintains that the interests of the traffic control technicians were addressed and resolved in collective bargaining. The employer points out that overtime has historically been variable, and is influenced by a number of factors including personnel policy, weather, the numbers and classifications of employees available, the parties' collective bargaining agreement, and the needs of the employer. The employer also contends that no claim for overtime can be perfected as to Jacobson, because he is deceased.

DISCUSSION

Procedural Issue - Admissibility of Journal

The union's complaint included allegations that the employer discriminated against bargaining unit employee Ken Jacobson, but Jacobson passed away some time before the hearing was held. At the hearing, the union moved for admission into evidence a journal that had allegedly been kept by Jacobson, which the union claimed would support the allegations contained in its complaint. The employer objected to the admission of the journal in evidence, on the basis that there was no way that its contents could be subjected to cross-examination. The Examiner sustained the objection at the hearing, and re-affirms that ruling here. The objection goes to the competency of the evidence. RCW 5.60.030.

"interference" allegations 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. It is not necessary to show anti-union animus for an interference charge to prevail. *Clallam County v. Public Employment Relations Commission*, 43 Wn. App 589 (1986).

Standard for Discrimination Violations -

The *Roberts Dictionary of Industrial Relations*, BNA Books, Revised Edition (1971), defines "discrimination" as follows:

> The unequal or unfair application of policy to an individual or group. Thus the Taft-Hartley Act forbids discrimination in hire and tenure of employment because of membership or non-membership in a union. The federal and most state laws dealing with rights of employers and employees in collective bargaining proscribe certain acts as being discriminatory and in violation of public policy.
>
> It applies also to unfair treatment in employment practices, hiring, promotion, discharge, etc., based on race, creed, color, sex, or national origin, rather than on actual job performance.

Citing standards enunciated by 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), the Commission requires a higher standard of proof to establish a discrimination violation than is required for an interference violation. *See Educational Service District 114*, Decision 4361-A (PECB, 1994), and numerous subsequent decisions. Discrimination only occurs where one or more employees has/have been granted or

deprived of some ascertainable right, status, or benefit. Thus, a complainant must first make out a prima facie case, showing:

- Employee exercise of a right protected by the collective bargaining statute, or communicating 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.

If the complainant fails to make out a prima facie case, analysis ends at that point and the complaint must be dismissed.

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

- Showing that the reasons given for the disputed action were pretextual; or
- Showing that the protected activity was nevertheless a substantial motivating factor behind the disputed action.

Essential to such a finding is a showing that the party accused of unlawful action 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 supports a finding that Brumfield engaged in protected activity or communicated an intent to do so. An employee's expression of concern regarding the allocation of overtime is closely related to "wages" and is a right protected by the collective bargaining statute. Regardless of the merits of a claim, the filing and pursuit of grievances is clearly protected by Chapter 41.56 RCW. *Valley General Hospital*, Decision 1195-A (PECB, 1981).

The Meeting in June of 1999 was an exercise of protected rights by Brumfield and Jacobson. A debate concerning overtime allocation had been ongoing for years. Even if the participating assistant supervisor (Comer) was a bargaining unit employee, and regardless of the source of Comer's information about jealousy between the road crew and the sign technicians, there is no evidence controverting Brumfield's testimony that Comer said the overtime opportunities would be assigned to the road crew in the future. Even though the meeting occurred outside of the six month period prescribed by RCW 41.56.160, the exchange establishes background to the timely allegations that are before the Examiner.[8]

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[8] The Examiner thus need not decide (and does not decide) whether Comer had authority to speak on behalf of the employer.

The Meeting in August of 1999 clearly involved an official with authority to act on behalf of the employer and Brumfield's comment about filing a grievance was clearly protected by the collective bargaining statute. Brumfield testified that Anderson reacted adversely to the possibility of a grievance being filed. Anderson was not called as a witness at the hearing in this matter, so there is no direct contradiction of Brumfield's testimony. There is also some corroboration: Beyond recalling that he was contacted by a union steward who expressed concerns, Public Services Director Daniels testified that he contacted Anderson to discuss the matter. As contrasted with an employer investigation resulting in a categorical denial, both the fact that Daniels interposed himself and the inconclusive result he reached support an inference that the meeting between Anderson and Brumfield unfolded along the lines claimed by Brumfield.[9] Again, however, this incident occurring about 11 months prior to the filing of the complaint can only be used to establish protected activity, and cannot be the basis for finding an "interference" violation in this case.

The conclusion to be reached from the foregoing is that the record supports a finding that Brumfield engaged in protected activity by expressing displeasure regarding how overtime was distributed. Even if that occurred more than six months before the filing of the complaint, protected activity does not "expire" and there is no statute of limitations on protected activity.

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[9] Brumfield recalled reporting the incident to a union steward, but the union steward was not called as a witness. Brumfield also thought (with less certainty) he had brought the incident to the attention of union representative Kathleen Shelton, but Shelton's vague recollection precludes reliance on her testimony.

The Prima Facie Case - Deprivation -

The evidence does not support a conclusion that the employer deprived Brumfield of any ascertainable right, status or benefit. Brumfield acknowledged that overtime can fluctuate based on legitimate factors, and the union failed to sustain its burden of proof to show that what occurred was outside of a normal range.

Brumfield's testimony was disconnected, as he had difficulty recalling dates and was unable to provide detailed information that supported his allegations. His focus was on five points following Anderson's comment that there would be no more overtime:

The Work Time Allocation Report in December of 1999 occurred more than six months before the filing of the instant unfair labor practice complaint, and so cannot be a basis for finding a violation in this proceeding. Further:

The evidence does not establish that Brumfield was deprived of any pay or benefits. Brumfield had responded to the scene of a traffic accident where he performed some flagging work and then installed emergency signs. His objections concern how his work time was recorded, not the amount of work time for which he was paid. Even if the employer, for some unknown reason, did not want a paper trail showing that traffic control technicians were performing flagging work, that does not explain how or why that actually deprived Brumfield of some ascertainable right.

Brumfield has not established that traffic control technicians have an exclusive claim to flagging work, either as a matter of past practice or by virtue of the terms of the applicable collective bargaining agreement. To the contrary, it is clear from the record that the traffic control technicians did not have any kind of an exclusive claim to such work.

There is no evidence that the union processed a grievance or otherwise challenged the employer's position.

The dispatch procedure change in December of 1999 also occurred more than six months before the filing of the complaint, and so cannot be a basis for any remedy.

Accepting that a procedure was changed to call for the assistant supervisor to go to the site of an incident and make a determination as to whether a traffic control technician should be dispatched, the evidence reflects that the assistant supervisor is a member of the same bargaining unit as Brumfield, so there is not even basis for concern about a "skimming" of unit work.[10]

Supervisors and lead workers are commonly vested with authority to make decisions about whether other employees should be called out, so the union has not explained how Brumfield or any other traffic control technician was or could have been deprived of some ascertainable right.

The high water incident in December of 1999 also occurred more than 6 months before the filing of the complaint.

Brumfield voiced concern that a road crew was dispatched to place warning signs, but the union has failed to provide other details regarding the incident or explain how this incident is indicative of a discriminatory deprivation of some ascertainable right.

If there was a violation of the parties' collective bargaining agreement, the union would have needed to proceed through the grievance and arbitration machinery established by the contract.

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[10] Under *South Kitsap School District*, Decision 472 (PECB, 1978) and numerous subsequent decisions, a duty to bargain exists concerning transfers of bargaining unit work to persons outside of the bargaining unit.

The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. *City of Walla Walla*, Decision 104 (PECB, 1976).

The disagreement concerning call-out in February of 2000 was the first incident cited by Brumfield that occurred within the six months prior to the filing of the complaint. Nevertheless, the union has failed to explain how or why that incident establishes that Brumfield was deprived of any ascertainable right, status, or benefit.

Brumfield testified that there had been a landslide which obstructed a road, and he asserted that the assistant superintendent deprived him of overtime work by waiting longer than was appropriate before Brumfield was called out. A simple difference of opinion may or may not be a basis for a grievance, but certainly falls short of sustaining the union's burden of proof in this adjudicative proceeding under a state statute.

The discussion of promotional opportunities in March of 2000 would be troublesome if it were clear that the assistant supervisor (Comer) was acting on behalf of the employer on that occasion. On the other hand, the employer cannot be held accountable for expressions of opinions between bargaining unit employees. Brumfield testified that Comer responded by gestures that Brumfield interpreted as indicating he had painted himself into a corner and was at a dead-end. The evidence fairly reflects that Comer's position is included in the bargaining unit, and the Examiner interprets the statement in light of WAC 391-35-340 and Commission precedents holding that it is inappropriate to include supervisors in the same bargaining unit with their subordinates. It would similarly be inappropriate for an employer to confer significant

supervisory authority (such as authority to grant or deny promotions) on a bargaining unit employee.

The union has not alleged in its complaint, and Brumfield did not assert in his testimony, that Brumfield had actually been passed over for any promotion. Rather, this complaint exclusively addresses overtime work opportunities.

The parties' collective bargaining agreement contains a bidding procedure for employees to advance to higher-paid positions. There is no evidence that Brumfield filed or processed a grievance claiming that the bidding procedure was violated.

Aside from being unhappy about the incident, Brumfield failed to provide any explanation as to how or why he was deprived of some ascertainable right.

The overtime limitation in May of 2000 arose out of a painting assignment where there not even a suggestion of an emergency. Brumfield testified that he was told that instructions had come from the engineer in charge that there was to be no more overtime for painting.

It may be understandable that Brumfield was disappointed with that decision, because painting was a source of overtime assignments for him, but that falls short of establishing that Brumfield had a right to expect that painting work would be performed on an overtime basis. Indeed, Brumfield acknowledged in his testimony that he was not aware of any guarantee of the availability of overtime work.

The applicable collective bargaining agreement addressed how overtime was to be distributed, when available. Brumfield failed to explain how this personnel action is indicative of or deprived him of some ascertainable right.

The lunch period incident in July of 2000 appears to be nothing more than another example of a difference of opinion about priorities. Brumfield testified that he asked to work through his meal period on a particular assignment, because he thought that would be more efficient. Supervisors and lead workers are usually responsible for deciding what will or will not be efficient. Brumfield claimed that employees in other classifications were allowed to work through their lunch hours on occasion, but he failed to explain how this personnel action was indicative of a pattern of discrimination or deprived him of an ascertainable right.

Other incidents recalled by Brumfield suggest matters that should have been pursued as contract violations, and certainly lack sufficient details to form the basis for a finding that the employer committed unfair labor practices.

Brumfield asserted traffic control technicians have been required to work overtime for as much as 15 to 20 consecutive hours on occasion, but have not been granted the same perquisite as other road maintenance division employees. He claimed that the employer tried to make the traffic control technicians miserable by denying them paid release time to travel home for meals and a break, but he failed to provide any information about when this occurred.

Even if two different classes of employees were treated differently in what is inferred to be an emergency situation, that does not explain how or why such an action is indicative of a pattern of discrimination or deprived him of some ascertainable right. The classifications appear to have different job responsibilities.

The contractual provisions concerning overtime do not guarantee equal overtime opportunities for all classifications within the bargaining unit. Instead, the parties' collective bargaining

agreement merely specifies a bidding process for advancement and designates how overtime is to be allocated, stating at Article IX:

> I. Senior employees by assigned duty stations shall be given preference for job allocation, including assignment of overtime, within each division of the department. Transfer to a different division within the department shall cause the employee to have a new in-class seniority date for purposes of job allocation preference and/or promotion.
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> . . . .
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> M. For purposes of this Article, the divisions of this department shall be defined as follows: Administration, Engineering, Road Maintenance, Utilities, and Equipment Pool.

The evidence supports a conclusion that overtime has historically been distributed by divisions or by duty stations. The Examiner does not find it surprising that different groups within the employer's operation have different overtime needs. While Brumfield and union representative Shelton both testified that there were grievances over the matter of overtime distribution, no specific details were provided. There is no evidence that the union or Brumfield invoked the grievance procedure of the parties' collective bargaining agreement and processed grievances in accordance with the collectively bargained procedure regarding the allocation of overtime.

The conclusion from the foregoing is that the union has failed to sustain its burden of proof as to a required element of its claim.

Prima Facie Case - Causal Connection -

Accepting that Brumfield had a statutory right to file and process a grievance, and that Brumfield communicated his intent to go to

his union for assistance regarding the allocation of overtime work opportunities, the evidence presented in this case still fails to establish a causal connection between Brumfield's protected activity and the overtime work that was assigned to him.

Employer animus toward lawful union activity cannot be inferred merely because one or more employees is unhappy about some term or condition of their employment. In this case, the employer had negotiated the overtime allocation matter with the union, and had made a number of concessions to meet the interests of the employees in the traffic control technician classification. Brumfield bid for the change of classification, yet complained that he no longer got as much overtime work as he had in his previous classification. The union has failed to sustain its burden of proof as to the existence of a causal connection between Brumfield's union activity and the employer's practices concerning overtime work.

While Brumfield's spotty recollection of dates and events compromised the overall credibility of his testimony, the Examiner notes that Brumfield's testimony was clearly in error with regard to at least one alleged causal connection: He testified that Comer's hand gesture and comment about having painted himself into a corner related to the filing of the instant complaint charging unfair labor practices, but that sequence of events could not have occurred. The incident occurred in March of 2000, while the unfair labor practice complaint was not filed until July of 2000.

The union's allegations and evidence are entirely too vague to support its claim of reprisal by the employer against Brumfield for filing grievances. These parties have a mature relationship and a well-developed grievance procedure that moves unresolved grievance to binding arbitration in less than 60 days. Grievances are either

actively processed, abandoned for lack of merit, or forfeited for failure to prosecute. There is no evidence of any grievances alleging contract violations being actively pursued by the union on behalf of Brumfield. The Examiner declines to rely on unsupported allegations and sketchy assertions to fill gaps in evidence.

The Employer's Case - An Alternative Approach

Although the Examiner concludes that the union has failed to sustain the necessary burden of proof to establish a prima facie case of discrimination in reprisal for Brumfield's union activities protected by Chapter 41.56 RCW, the Examiner also recognizes that reasonable minds can differ with regard to inferences. Even if Brumfield was deemed to have established a prima facie case, however, the Examiner concludes that would not justify a decision in his favor.

The employer has taken the opportunity to articulate non-discriminatory reasons for its personnel actions, and the Examiner is satisfied that the complaint would have to be dismissed. The employer acknowledged that it was aware of unhappiness on the part of the traffic control technicians regarding their overtime work opportunities, but it points to its effort to ameliorate those concerns in the negotiations that led to the 1999-01 collective bargaining agreement. The employer thus points out that it:

- increased the pay rate for the traffic control technicians;
- provided further pay advancement for traffic control technicians who acquire the IMSA certification;
- created a traffic control technician assistant supervisor position with a further pay increase; and

- granted the traffic control technicians a benefit by allowing them to use a county vehicle for commuting to and from work.

The record also reflects that the employer nearly doubled the number of traffic control technicians in its workforce, and there can be little doubt that such an increase in staffing will inherently reduce the opportunities for individuals to work the finite amount of overtime that may be available. 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 Brumfield to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. The union has failed to show that the reasons given by the employer were pretextual, or that union animus was nevertheless a substantial motivating factor behind the employer's action.

Brumfield maintained that he was singled out, and that there was a conscious decision on the part of the employer to deprive him of overtime work, but nothing of substantive value was offered to aid in the evaluation of Brumfield's claims. The union presented only vague testimony, which failed to establish that the employer imposed standards on Brumfield that were different from those applied to other employees.

In rejecting a "substantial factor" conclusion, the Examiner places importance on the fact that Brumfield did not transfer to the position of traffic control technician until late 1998 or early 1999, when the employer and union were negotiating a successor

collective bargaining agreement that significantly enhanced the pay and benefits of the traffic control technicians. The record is clear that union concerns regarding the amount of overtime and promotional opportunities for traffic control technicians were given favorable consideration by the employer in the negotiations. It is also important to note that there is no evidence to support comments that there were grievances pending regarding the allocation of overtime.

The Examiner recognizes that employer motives in cases such as this are rarely marked by specific actions, and must be deduced from the circumstances of the case. However, the union has failed to establish a comparative standard for assessment of his claim of disparate treatment and has failed to offer substantive evidence sufficient to intelligently evaluate his assertions.

FINDINGS OF FACT

1. Grays Harbor County is a county of the State of Washington and is a public employer within the meaning of RCW 41.56.030(1).

2. Washington State Council of County and City Employees, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees of Grays Harbor County, including employees who perform traffic sign and road maintenance work.

3. During a period dating back several years prior to 1998, the bargaining unit employees responsible for traffic signs had voiced concerns about the amount and allocation of overtime work opportunities available to them. The interests of those employees were addressed by the employer and union during

negotiations for a successor collective bargaining agreement in 1998, resulting in a general wage increase and other changes favorable to the traffic control technicians.

4. Concurrent with the collective bargaining negotiations described in paragraph 3 of these findings of fact, the employer created three new positions in the traffic control technician classification.

5. Steve Brumfield bid for and was awarded one of the new traffic control technician positions created as described in paragraph 4 of these findings of fact.

6. After commencing work in the traffic control technician position, but more than six months prior to the filing of the complaint charging unfair labor practices in this proceeding, Brumfield and another traffic control technician voiced concerns about the amount and allocation of overtime work opportunities available to them and indicated an intent to pursue their interests by filing a grievance under the collective bargaining agreement.

7. The union has failed to establish, by a preponderance of the evidence, that Brumfield or any other employee was deprived of any ascertainable right, status, or benefit during the six months prior to the filing of the complaint in this matter.

CONCLUSIONS OF LAW

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

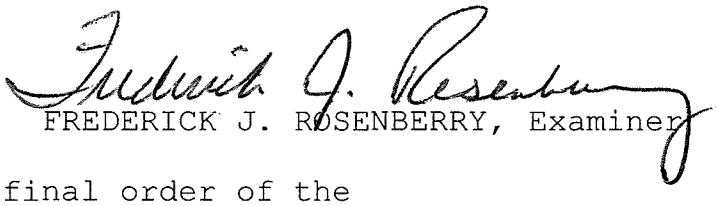
2. The union has failed to establish a prima facie case that the employer has interfered with or discriminated against Steve Brumfield or any other employee based on the exercise of rights protected by Chapter 41.56 RCW, so that no unfair labor practice has been established under RCW 41.56.140.

ORDER

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

Issued at Olympia, Washington, on this the 15th of July, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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.