Seattle School District, Decision 10732 (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 22030-U-08-5607 DECISION 10732 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Schwerin, Campbell, Barnard, Iglitzin & Lavitt, LLP, by *Kathleen Phair Barnard*, Attorney at Law, for the union.

John M. Cerqui, Senior Assistant General Counsel, for the employer.

On October 10, 2008, the International Union of Operating Engineers, Local 609 (union) filed an unfair labor practice complaint against the Seattle School District (employer). The complaint alleges the employer took actions which constituted interference with employee rights, discrimination, and refusal to bargain in violation of RCW 41.56.140(1) and (4). A preliminary ruling was issued on October 21, 2008. The employer filed a timely answer on November 13, 2008. On January 6, 2009, the union filed a motion to amend the complaint, with additional allegations of interference with employee rights, discrimination, and refusal to bargain. The motion was granted and an amended preliminary ruling was issued on January 28, 2009. The employer filed an answer to the amended complaint on February 17, 2009.

The Commission appointed Lisa A. Hartrich as the Examiner. A hearing was held on June 8, 9, 10, and 11, 2009. The parties submitted post-hearing briefs on September 2, 2009.[1]

[1] The parties requested and were granted permission to file 40-page briefs due to the length of the hearing and number of issues involved in this case. WAC 391-45-290(2)(c).

ISSUES

1. Did the employer interfere with employee rights by denying Chi Wong's right to union representation?

2. Did the employer interfere with employee rights by sending an e-mail regarding Wong to "all staff"?

3. Did the employer interfere with employee rights during verbal exchanges with Fred Castor and Chuck Dial?

4. Did the employer interfere with employee rights and refuse to bargain by circumventing the union through direct dealing with Wong and Castor?

5. Did the employer interfere with employee rights and discriminate by failing to investigate Dial's complaint while pursuing an investigation of union representative David Westberg?

6. Did the employer interfere with employee rights or discriminate when it restricted access to certain employer properties by the union representative for Wong, Castor, and Dial?

7. Did the employer interfere with employee rights and discriminate by denying Westberg access to worksites in the course of representing Dial and other bargaining unit members?

8. Did the employer interfere with employee rights by denying Dial's right to union representation?

9. Did the employer interfere with employee rights and refuse to bargain by failing or refusing to meet and negotiate with the union over the union's concerns regarding Wong, Castor, and Dial?

10. Did the employer interfere with employee rights and refuse to bargain when it (a) required Westberg to get prior permission to visit employer buildings and sign in during

the course of his duties as a union representative, and (b) prohibited Westberg from discussing collective bargaining issues with building administrators?

11. Did the employer interfere with employee rights and discriminate by (a) prohibiting Westberg from representing bargaining unit members in situations involving certain administrators, and (b) by threatening to bar Westberg from representing bargaining unit members on all employer property?[2]

After a thorough review of the record in this case, the Examiner concludes that no violations have occurred.

ISSUE 1 – INTERFERENCE – CHI WONG

APPLICABLE LEGAL STANDARDS

Employer Interference with *Weingarten* Rights

RCW 41.56.140(1) prohibits a public employer from interfering with, restraining, or coercing public employees in exercising their collective bargaining rights. One form of an interference violation occurs if an employer denies an employee's request for union representation at an investigatory interview, also known as the *Weingarten* principle.[3] In order to prove a violation, the union must show that: (1) the employer compelled an employee to attend an interview, (2) a significant purpose of the interview was to obtain facts which might support disciplinary action against the employee, (3) the employee reasonably believed that disciplinary action might result from the interview, (4) the employee requested the presence of a union representative, and (5) the employer rejected the employee's request and proceeded to conduct the interview without a union representative. *Okanogan County*, Decision 2252-A (PECB, 1986). Employees initiate their right to representation under Weingarten, not unions. *Methow Valley School District*, Decision 8400-A (PECB, 2004).

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[2] One additional allegation included in the amended complaint was withdrawn at hearing on June 9, 2009.

[3] *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975), and embraced by the Commission in *Okanogan County*, Decision 2252-A (PECB, 1986).

ANALYSIS

In the fall of 2008, Chi Wong was a custodial engineer at Wing Luke Elementary School. Wong served on the safety committee for Wing Luke during the 2008-09 school year. In September 2008, the safety committee discussed a problem with students arriving early to school and being on the playground without supervision. To address the problem, the safety committee informed the Wing Luke staff that no students were to be outside before 8:50 A.M., but instead should be directed inside.[4] Wong and other staff members agreed to direct the students to the cafeteria. On September 25, Joyce Jeong, Wing Luke administrative assistant, sent a clarifying e-mail to all Wing Luke staff ("all staff") stating: "Staff begins recess duty at 8:50 a.m. We will keep students in the cafeteria until the bell rings. Mr. Louis, Chi [Wong], & I will supervise to make sure that no students are outside until 8:50."

On Friday, September 26, Wong responded to Jeong's e-mail by sending a message to "all staff," copied to his supervisor, LaDonia Skinner, explaining that he had to do his custodial work first before he could help out with any extra duties. Although he originally agreed to help direct students to the cafeteria in the morning, Wong now believed that he was being asked to supervise students, a task not included in custodial duties. About 30 minutes later, Wing Luke's principal, Davy Muth, responded to Wong's e-mail. Muth's e-mail also went to "all staff," as well as to Skinner. The e-mail asked Skinner to stop by the school so that Skinner, Wong, and Muth could meet to talk about her "request," presumably to get Wong's help directing students to the cafeteria before school. Later that afternoon, Wong forwarded the e-mail chain to union representative, Mike McBee.

On the morning of Monday, September 29, McBee sent an e-mail to Principal Muth, stating that custodians were not responsible for supervising students. McBee also indicated that he was to be included in any meeting between Wong, Skinner, and Muth.

Wong, Skinner, and Muth met on the morning of September 29. Union representative McBee was not present. Both Skinner and Muth credibly testified that they did not read McBee's e-mail

[4] Supervision before school did not start until 8:50 A.M.; school started at 9:10 A.M.

before the meeting with Wong, and therefore did not know of McBee's request to be present at the meeting.

Wong testified that he was concerned the meeting with Skinner and Muth might involve some type of discipline. However, he was not asked any questions during the meeting, and he did not ask for union representation. At the meeting, Skinner informed Muth that Wong's duties did not include supervising students. Muth apologized, saying she did not realize Wong could not supervise students. The meeting was over in about 10 minutes.[5]

The Examiner concludes that the employer did not interfere with Wong's right to union representation. There is no evidence to support the claim that the meeting with Muth and Skinner was an investigatory interview that might lead to disciplinary action. Rather, the meeting served to clear up a misunderstanding regarding Wong's work duties. Even if Wong believed that discipline might be a result of the meeting, he did not ask for a union representative at the meeting, and the employer did not reject the request.

ISSUE 2 – INTERFERENCE – REPRISAL – CHI WONG

APPLICABLE LEGAL STANDARD

"Independent" Interference

An employer interferes with an employee's right to engage in protected union activity under RCW 41.56.140(1) if it threatens reprisal or force, or promises a benefit, related to that protected activity. In order to prove a violation, the union must establish that: (1) one or more employees engaged in activity protected by the collective bargaining statute, or communicated an intent to engage in protected activity, (2) an employer official made some statement or took some action, and (3) one or more employees reasonably perceived the employer's statement or action as a threat of reprisal or force, or promise of a benefit, associated with the protected activity. *King County*, Decision 8630-A (PECB, 2005).

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[5] On direct examination, Muth was asked, "Were you investigating Mr. Wong for any incidents of misconduct?" Muth replied, "No. At that moment, I said to him that I was sorry that I didn't know he could not supervise . . . I said it's fine. I said next time please tell me. Because I do not know what you can do and what you cannot do."

The burden of proving an allegation of unlawful interference rests with the complaining party, and must be established by a preponderance of the evidence. *City of Pasco*, Decision 3804-A (PECB, 1992). The complainant must demonstrate that the employer's conduct resulted in harm to protected employee rights. *Port of Longview*, Decision 9394-A (PECB, 2007). However, the complainant does not need to prove that the employer intended to interfere with an employee's collective bargaining rights, or that the employee involved was actually coerced. *City of Tacoma*, Decision 6793-A (PECB, 2000).

ANALYSIS

The union alleges that Principal Muth interfered with Wong's rights by sending an e-mail regarding Wong's work duties to "all staff" at Wing Luke School. Muth wrote the e-mail on Friday, September 26, 2008, in response to an e-mail that Wong wrote, which he also sent to "all staff" and his supervisor, Skinner (as described in ISSUE 1). Muth's e-mail asked Skinner to stop by the school to meet with Muth and Wong to discuss Wong's role in supervising students prior to the start of the school day. Wong forwarded Muth's e-mail to union representative McBee.

McBee sent Muth an e-mail on the morning of Monday, September 29, taking issue with Muth's e-mail to Wong. McBee confirmed that Wong was not responsible for supervising students, and stated that he (McBee) found it "offensive" that Muth would ask Wong to do so, particularly in an "all staff' e-mail. McBee stated it was "unacceptable" for Muth to "summon him [Wong] and his supervisor" in an "all staff" e-mail, and that he would now be "forced to insist we meet to correct your behaviour" [sic]. McBee testified that he thought Muth was "calling him [Wong] out in front of the whole staff," in retaliation for bringing the union in on a previous incident.[6]

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6 Wong previously contacted the union on September 10, 2008, after an incident where Wong felt humiliated and ridiculed by co-workers. On that date, Wong e-mailed union representative Dave Westberg (and copied "all staff") asking him to come to the school to help Wong with the problem because English was his second language. Westberg followed up by visiting Muth later that day. After Westberg's visit, Muth e-mailed Wong and the union, indicating that she was surprised to see Westberg, because she had not been previously informed of the incident. The union appears to argue that this was an additional act of interference by Muth. However, this allegation was not part of the preliminary ruling, and the union did not move to advance it as a separate allegation. Therefore, it is not an issue before the Examiner.

Aside from McBee's opinion that Muth retaliated against Wong for contacting the union, the union produced no evidence to demonstrate that Wong perceived that Muth's action was associated with his union activity. Wong provided no testimony that would indicate he believed Muth's e-mail was sent in reprisal for contacting the union.

Muth probably should have used more discretion when she sent the e-mail directed to Wong to "all staff," given the content of the message.[7] However, Wong did not seem to have a problem with making the issue public, as he sent his e-mail to "all staff" as well.

The Examiner concludes that there is no evidence to show Wong reasonably perceived Muth's sending of the e-mail to "all staff" in reprisal for Wong for contacting the union.

ISSUE 3 – INTERFERENCE – FRED CASTOR AND CHUCK DIAL

APPLICABLE LEGAL STANDARD

See "Independent" Interference, ISSUE 2 above

ANALYSIS

The union alleges that the employer interfered with the rights of custodians Fred Castor and Chuck Dial during verbal exchanges with Principal Cathy Rutherford.

In the fall of 2008, Castor was a day custodian and Dial was a night custodian at Cooper Elementary School. Rutherford was the principal.

Rutherford and Castor

In the fall of 2008, an issue arose about Castor's presence in the school lunch room. Castor routinely worked in the lunch room during meals and was available to clean up spills as they

7 Muth testified that she sent the e-mail to "all staff" because it involved the safety of the children, and felt the entire staff needed to be aware that they would have to now "rethink" the morning plan.

happened. On Thursday, September 18, 2008, Castor was working in the lunch room. An interaction occurred between Castor and a student, which Castor later admitted scared the student. The next day, the student's mother came to school and she and Rutherford went to talk with Castor about the incident. Castor apologized. At that point, Castor decided that he should not be present in the lunch room any more during student time, unless it was necessary to perform his work.

When Castor informed Rutherford that he would no longer be present in the lunch room during student time, Rutherford told Castor it was his job to be there. Castor showed Rutherford an e-mail from the union stating that it was not his job to be in the lunch room. Rutherford testified that she "didn't understand why the custodian could not clean up a spill in the lunch room." Castor notified the union of the problem in an e-mail to the union on September 22.[8]

Union representative McBee called Rutherford and Castor's supervisor, Skinner, to discuss the problem. Castor's decision not to be present in the lunch room was supported by Skinner. In an e-mail to McBee on September 23 (copied to Rutherford and Castor), Skinner stated ". . . it is not expected that Fred [Castor] spend his time in the lunchroom waiting for spills to happen. If there is a spill that requires Fred's attention, both Fred and Cathy [Rutherford] have walkie-talkies to communicate with, and Fred has expressed that he has no problem performing his duties."

On September 24, in response to Skinner's e-mail, McBee e-mailed Skinner to raise an objection to her characterization of appropriate lunch room duties for custodians, noting that because spills happen so often, it would require them to be in the lunch room and away from their other duties on a regular basis. McBee asserted that custodians ". . . are not to be in the lunchroom unless they are emptying garbage. There is a mop in the lunchroom for whoever is monitoring lunch to use for spills. We will not agree to a change in past practice and policy. I foresee Ms.

[8] In his e-mail to the union, Castor stated that when he told Rutherford he would no longer be in the lunch room, Rutherford replied "that if we thought that she was going to touch a mop she was going to have a[n] argument with my union."

Rutherford calling Fred [Castor] away from his assigned duties to clean up the smallest of spills because she, or another, does not want to touch a mop."

Even though McBee was not completely satisfied with Skinner's approach to resolving the problem, he testified that Skinner was "100 percent supportive that our members do not belong in the lunch room during the lunch period." Skinner was ultimately able to resolve the problem between Rutherford, Castor, and the union.

While the issue of custodial duties in the lunch room caused some friction between the union, Castor, and Rutherford, the Examiner concludes the union presented no evidence to show that Castor reasonably perceived Rutherford's actions were related to his union activities.

Rutherford and Dial

On October 2, 2008, Dial found feces smeared on the wall in the girls' bathroom at Cooper Elementary. Dial went to Rutherford's office to tell her about the incident, which had been a recurring problem at the school. Dial testified that he noticed Rutherford's door was open, so he tapped on the door, and asked her, "Do you got a minute?" Rutherford testified that Dial "bust in" without knocking, and was "loud and demanding."

Rutherford told Dial that she did not like his tone of voice. This upset Dial. Dial testified that he felt Rutherford did not like him and did not want to deal with him. Dial filed a harassment complaint against Rutherford on October 8 (received on October 13) after talking with his supervisor, Skinner, and union representative, Dave Westberg. Dial's complaint alleged a pattern of disrespect by Rutherford, beginning three years prior, when Rutherford became the principal at Cooper. His complaint was subsequently investigated by the district (as described in ISSUE 5).

The Examiner concludes there is no evidence to show that any of the alleged incidents of disrespect were related to Dial's involvement in activities protected under RCW 41.56. The union did not offer any argument as to how the verbal exchanges between Rutherford and Dial amounted to an interference violation.

ISSUE 4 – REFUSAL TO BARGAIN – CIRCUMVENTION

APPLICABLE LEGAL STANDARD

It is unlawful for an employer to bypass the exclusive bargaining representative and engage in direct dealings with employees on mandatory subjects of bargaining. Mandatory subjects of bargaining include wages, hours, and working conditions. The employer must negotiate with the union over those subjects, or risk a refusal to bargain violation for circumvention. In order to prove a violation, the union must establish that the employer engaged in direct negotiations with bargaining unit employees concerning mandatory subjects of bargaining. *City of Pasco*, Decision 4197-A (PECB, 1994), *aff'd on remand*, Decision 4197-B (PECB, 1999); *City of Yakima*, Decision 9062-B (PECB, 2008).

On the other hand, the law does not completely preclude direct communications between employers and their union-represented employees. *City of Seattle*, Decision 3566-A (PECB, 1991). Employers maintain the right to communicate directly with their represented employees, provided the communication does not amount to bargaining or other unlawful activity. *Washington State – Social and Health Services*, Decision 9690-A (PSRA, 2008).

ANALYSIS

The union alleges that the employer committed a refusal to bargain violation by circumventing the union through direct dealing with Wong and Castor concerning disputes about their job duties, as described above in ISSUE 1 (Wong) and ISSUE 3 (Castor). The union argues that Principals Muth and Rutherford knew that the union should be involved in such discussions, but nevertheless chose to engage in direct dealing by excluding the union.

The employer argues that not every request by a principal rises to the level of a direct negotiation. The employer suggests that neither Muth nor Rutherford had the authority to negotiate new job duties for all custodians, and that neither was proposing an actual change in custodial work duties.

In December 2006, two years prior to the filing of this complaint, the school district sent a memo to "All Principals" (copied to the union) clarifying the relationship between principals and custodial staff. The memo explained that principals "are not the direct supervisor[s] of custodial staff." Even so, there are times when an unscheduled event or task might arise in a school that needs to be assigned. The memo stated that in such cases a principal or other staff "may make a reasonable request of the custodian" and the custodian "should try to accommodate this request." In the event that an issue arose between the principal and a custodian, the principal was to contact the appropriate custodial area supervisor "who will handle the issue in conjunction with the principal."

There is no evidence to suggest that the union ever challenged this memo or its recommended practice. In fact, the memo states that the union agreed to contact the human resources manager when potential contract violations arose involving a custodian.

Muth did in fact contact Wong's direct supervisor, Skinner, to discuss the issue, which resulted in an expedient resolution to the problem. In Castor's case, it was Castor who decided to make a change in his work practice, *i.e.* to no longer be present in the lunch room while students were present. Rutherford did not request a change in his working conditions. Rather, she wanted him to maintain his long-standing practice.

The Examiner concludes that neither of these events rose to the level of a negotiation concerning a mandatory subject of bargaining. Tasks that were not within the job responsibilities of the custodians were quickly clarified by the custodial supervisor (Skinner) and the union. The employer did not circumvent the union by discussing job duties with Wong and Castor.

ISSUE 5 – DISCRIMINATION – FAILURE TO INVESTIGATE

APPLICABLE LEGAL STANDARD

RCW 41.56.140(1) bars an employer from discriminating in reprisal for the exercise of employee rights protected by the collective bargaining statute. The test for discrimination requires the

union to show that: (1) one or more employees exercised protected union activity, or communicated intent to do so, (2) one or more employees were deprived of some ascertainable right, status, or benefit, and (3) a causal connection exists between the protected union activity and the discriminatory action. *Educational Service District 114*, Decision 4361-A (PECB, 1994).

If the union makes its case by fulfilling the test for discrimination, the employer must show lawful reasons for its actions. If the employer provides lawful reasons, the union bears the burden of proof to show that the employer's reasons were pretexts to conceal the employer's true motivation, or that the protected activity was a substantial motivating factor for the action. *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A (PECB, 2009).

If a discrimination violation is dismissed, an interference violation cannot be found under the same set of facts. *Seattle School District*, Decision 9355-C (EDUC, 2010).

ANALYSIS

The union argues that the employer interfered with employee rights and discriminated in reprisal for union activities by failing to investigate Chuck Dial's complaint against Principal Rutherford. The union appears to argue that the investigation into Dial's complaint was substandard when compared to the attention given to the investigation of complaints against Westberg.

Chuck Dial filed a harassment complaint with the Seattle Public Schools against Principal Rutherford on October 8, 2008. The complaint detailed a verbal exchange between Dial and Rutherford on October 2, 2008 (as discussed in ISSUE 3 above), and also described several other "issues of disrespect." Dial reported that the incidents were escalating.

On October 20, 2008, Jeannette Bliss, Human Resources Manager, sent Dial an e-mail acknowledging receipt of his complaint against Rutherford. Bliss notified Dial that Sue Means in the human resources department would be conducting an investigation into his complaint. On October 27, 2008, Means contacted Dial by phone to arrange an interview with him. During the

conversation, Dial informed Means that he wanted union representative Westberg to be with him during the interview.

Meanwhile, Westberg sent several e-mails to the district, alleging that the district was holding up the investigation into Dial's complaint, and was interfering with the union's ability to represent Dial. Westberg testified that Brent Jones, Director of Human Resources, initially lost Dial's complaint.

The complaint was date-stamped "received" on October 13. Means was assigned to investigate on October 20, and Dial's interview was conducted on November 3.[9] Means prepared a final investigation report, dated November 25, 2008. Means submitted the report to Bliss. Bliss reviewed the report, and submitted a memo dated January 14, 2009[10] to Superintendent Maria Goodloe-Johnson.[11] That same day, Goodloe-Johnson notified Dial that the district had completed its investigation of his harassment complaint, and had found that the allegations were unsubstantiated.

Bliss testified that it took approximately three months, from start to finish, to complete the investigation into Dial's complaint against Rutherford. She also testified that the investigation into the complaints against Westberg took approximately two months. She believed both investigations were timely, and noted that some investigations take longer than three months.

The union took issue with the district assigning Means to the investigation. Westberg questioned her background and experience in doing investigations.[12] Westberg contrasted the investigation

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9 Means also interviewed Rutherford, Skinner, and Cooper Elementary School secretary, Melanie Elenez, as part of her investigation into Dial's complaint.

10 This exhibit was dated January 14, 2008, but this was a typographical error.

11 It is unclear why there is a gap in time between 11-25-08 and 1-14-09. Bliss testified that she reviewed Means' notes, then wrote her report for Goodloe-Johnson. The Examiner notes that schools are usually experiencing winter and holiday breaks during this time period, which could account for the delay.

12 Means testified that prior to the investigation into Dial's complaint against Rutherford, she took the lead in "roughly a dozen major investigations" for the district. She also testified that she had attended trainings on how to conduct investigations.

into Dial's complaint with the district's "top dollar" investigation into complaints against Westberg, and claimed this was evidence of discrimination.[13] For example, the employer hired an outside investigator to look into complaints against Westberg.[14] Westberg testified, "But if one of our members feels like he is being treated like a dog by a principal, they assign an entry level position holder to do the investigation."

Ultimately, the employer did not find any evidence to support Dial's harassment complaint. However, Bliss noted in her January 14 memo to Goodloe-Johnson that the relationship between Dial and Rutherford "may not be a perfect one." Bliss recommended mediation between Dial and Rutherford, and suggested that Dial consider exercising his option to transfer to another school. She also noted that Dial was not using the appropriate "chain of command" for problem solving.

None of the objections by the union point to a failure by the district to investigate Dial's claim, nor do they demonstrate that Dial's claim was treated with less vigor in retaliation for Dial's union activity. The Examiner finds the union did not meet its burden to support the claim that the district discriminated against Dial. There is no evidence to show that Dial was deprived of his collective bargaining rights, or that any causal connection existed between any protected union activity and the alleged discriminatory action.[15]

ISSUE 6 – DISCRIMINATION – RESTRICTING ACCESS

APPLICABLE LEGAL STANDARD

It is unlawful for an employer to discriminate against an employee in reprisal for exercising collective bargaining rights under RCW 41.56.140. (See ISSUE 5 above).

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[13] The district was simultaneously investigating two complaints against Westberg for harassment, as described in ISSUE 6.

[14] In answer to the question, "Why did you decide to go with an outside investigator?" Brent Jones testified, "We interact with Mr. Westberg and HR quite a bit. And because of that, we wanted to have an objective party go out and investigate these allegations."

[15] The Examiner acknowledges that this was a difficult and uncomfortable experience for Dial.

ANALYSIS

The union alleges that the employer restricted access to Wing Luke and Cooper Elementary Schools by union representative Westberg in reprisal for the union activities of Wong, Castor, and Dial. The employer argues that no employees were deprived of their collective bargaining rights, and asserts it only recommended that Westberg not go to Wing Luke and Cooper during the time it investigated harassment complaints filed against Westberg by the principals at these schools.

On October 7, 2008, Westberg visited Wing Luke and Cooper Schools. Westberg went to Cooper first, and met with Principal Rutherford in her office. He explained that he was at the school to deliver complaint forms to both custodians in her building, because of the way Rutherford had been treating them. In the course of the visit, the exchange between Westberg and Rutherford became heated. Rutherford testified that she "didn't feel comfortable," and told Westberg she wanted to have her supervisor, Patrick Johnson,[16] present at the meeting. Westberg responded by calling Johnson a "lying bag of shit."

Westberg told Rutherford that if she was unable to resolve the problems with the custodians at Cooper, the union could picket at school events or even her home, and stated what he thought was her home address.[17] Rutherford felt threatened, and asked Westberg to leave. Westberg left and delivered the forms to the custodial office.

Rutherford called her supervisor, Johnson, and told him she felt that she had been threatened. Johnson told Rutherford to call security and the police. Later that day, Rutherford sent an account of the incident to Brent Jones, Director of Human Resources. She requested that Westberg be banned from coming on school property.

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[16] Johnson is a director of elementary instruction.

[17] Rutherford testified that the address Westberg recited was not hers, but that there were "two Cathy Rutherfords in the district."

Westberg next went to Wing Luke and found Principal Muth in her office. Westberg sent Muth an e-mail the day before, telling her that he planned to meet with her. Muth indicated that she had received the e-mail. Westberg asked Muth to apologize to Wong for sending "all staff" e-mails regarding Wong (as described in ISSUE 2 above). Westberg stated that if the issues of "unjust treatment" of union members in Wing Luke were not resolved, the union intended to picket events at school, and if improvements did not result, would picket at Muth's home address.[18] Muth testified that Westberg was "screaming and shouting" and that she was shaking.

Muth told Westberg that she did not want to talk to him. Muth's secretary, Teresa Deegan, testified that she became concerned when she heard Westberg's "loud or raised" voice coming from Muth's office. Deegan went to Muth's office door to see if there was something wrong. Westberg tried to close the door, and Deegan put her foot out to stop the door from closing. Muth asked Deegan to call security and 911. Deegan called security, and Westberg left.

After the incident, Muth sent an e-mail to her supervisor, Patrick Johnson, describing the interaction with Westberg, and requesting help so that Westberg could not "just show up" at the school without calling first. Muth testified that she did not go home for two days after the incident because she was afraid Westberg would be at her house.

On October 8, 2008, the district notified Westberg that it would be investigating Westberg's October 7 interactions with Muth and Rutherford. In a letter to Westberg, Human Resources Manager Jeannette Bliss recommended that Westberg "not visit either of these School District properties [Cooper or Wing Luke] until the conclusion of the investigation." She further stated, "We understand that you have the right to talk with your union members and would suggest that you use the telephone or meet at an alternate District building to conduct your union business."

On October 28, Westberg received an e-mail from fellow union representative McBee which led Westberg to believe that he was not allowed to visit Cooper. Westberg e-mailed Jones to clarify

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18 Westberg's October 6, 2008 e-mail to Muth stated, "If no improvement is noted, we intend to picket evening and after school events, first at Wing Luke and (if improvement has still not been noted) then AT YOUR HOME ADDRESS and that of your secretary. The HR Department has been nice enough to supply us with these addresses . . . ." (*emphasis in original*).

whether or not he had been "admonished" from the building. Jones forwarded this e-mail to Bliss. Bliss e-mailed Westberg, again stating she "recommended" that Westberg not visit Cooper or Wing Luke while the harassment investigation was pending, but that he was "not admonished from the buildings."

On October 29, the employer received a letter from the union's attorney, stating that Westberg had not visited either Wing Luke or Cooper following the October 8 letter from Bliss. The letter stated that, by not visiting those schools, the union's ability to represent its members was "severely hampered." The letter put the employer on notice that Westberg would again resume visiting those schools, beginning with the meeting at Cooper concerning Dial's harassment complaint. Despite this letter, Westberg still agreed to attend Dial's meeting at a different location.

The Examiner finds that the employer did not restrict Westberg's access to certain employer properties in reprisal for the union activities of Wong, Castor, or Dial. There is no evidence that the employer deprived these employees of any rights protected under RCW 41.56.

The Examiner finds no causal connection between the activities of Wong, Castor, and Dial and the employer's action with respect to Westberg. The union seems to argue that the employer's recommendation to Westberg was a violation per se. Instead, Westberg's own interactions with the principals at Cooper and Wing Luke Elementary Schools were the impetus for the district's recommendations to Westberg that he refrain from visiting those properties while the incidents were under investigation.

ISSUE 7 – DISCRIMINATION – DENIAL OF ACCESS

APPLICABLE LEGAL STANDARD

It is unlawful for an employer to discriminate against an employee in reprisal for exercising collective bargaining rights under RCW 41.56.140. (See ISSUE 5 above.)

ANALYSIS

The union argues that the employer interfered with employee rights and discriminated by denying union representative Westberg access to worksites in the course of representing Dial and other bargaining unit members at those worksites.

There is no evidence to suggest that Westberg was ever denied access to worksites in the course of representing bargaining unit members. The district's recommendation that Westberg not visit Wing Luke and Cooper Elementary Schools was related to the specific time period during the investigation the district was conducting into Westberg's alleged harassment of the principals at those schools. The union failed to establish that the employer's recommendation amounted to discrimination.

ISSUE 8 – INTERFERENCE – CHUCK DIAL

APPLICABLE LEGAL STANDARD

Employer Interference with *Weingarten* Rights

It is unlawful for an employer to deny an employee's request for union representation at an investigatory interview. (See ISSUE 1 above.)

ANALYSIS

The union alleges the employer interfered with Dial's right to union representation in connection with an investigatory interview. The union claims that the employer refused to meet with Westberg at a location convenient to Dial.

On October 27, 2008, Sue Means called Dial to set up a meeting as part of her investigation into Dial's complaint against Rutherford, the principal at Cooper Elementary (as described in ISSUES 3 and 5). During the conversation, Dial requested Westberg's presence at that meeting. Dial preferred to meet at Cooper, but this posed a problem since the district recommended that

Westberg not go to Cooper while Rutherford's harassment complaint against Westberg was pending (as described in ISSUE 6).

It is unclear from the record if Means or Dial brought this problem to light, but in an October 28, 2008 e-mail, Westberg wrote to Brent Jones, Director of Human Resources, stating, "your 'investigator' [Means] appears to (not so subtly) be attempting to avoid allowing the complainant [Dial] his request for representation . . . . We wonder if by this subtle action, the District is increasing their interference in our ability to represent our members . . . ?"

On October 29, 2008, Means e-mailed Dial with two alternate suggestions for meeting. One option was to meet at another school (Denny Middle School) with Westberg on November 3. The other was to meet at Cooper with another union representative (McBee). In either instance, the district would pay for the overtime incurred by Dial for time spent in the interview. The meeting was set for November 3 at Denny Middle School, and Westberg agreed to be (and actually was) present.

The crux of the biscuit of this interference claim is that the interview in question was not an interview for the purpose of obtaining facts for a potential disciplinary action. The interview with Dial was conducted by Means, who was assigned to investigate a harassment complaint filed by Dial.

Because Dial's interview was not an investigatory interview, the allegation does not satisfy even the threshold questions required to apply a Weingarten analysis, or to sustain a Weingarten violation.

ISSUE 9 – REFUSAL TO BARGAIN – FAILURE TO MEET AND NEGOTIATE

APPLICABLE LEGAL STANDARD

It is an unfair labor practice for employers to refuse to bargain under RCW 41.56.140(4). There are several types of "refusal to bargain" violations. The elements of a refusal to bargain

violation for failure to meet include a showing that the union requested negotiations on a collective bargaining agreement, or some issue that was a mandatory subject of bargaining, and the employer failed or refused to meet with the union. *State – Washington State Patrol*, Decision 10314-A (PECB, 2010).

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).

ANALYSIS

The union argues that the employer refused to bargain over the union's concerns regarding Wong, Castor, and Dial, because it refused to meet with the union to discuss alleged retaliatory behavior by building principals.

As part of a mediated settlement between the employer and union, the parties entered into a memorandum of understanding (MOU) in January 2005.[19] That MOU was incorporated into the 2006-09 collective bargaining agreement. The MOU outlined a procedure whereby the employer and union could meet to discuss alleged retaliatory behavior between a union member and a building principal.

The MOU states that the union "may contact the Director of Labor Relations and request a meeting to discuss the alleged retaliatory behavior between a Local 609 represented member and a building principal."

Brent Jones, Director of Human Resources, was hired in August 2008. The labor relations function of the district reported to him. When Jones was hired, the position of Director of Labor Relations was vacant. That position had been vacant for "a number of years," but was finally filled in December 2008.

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[19] Case 18813-U-04-4781.

On September 10, 2008, Wong e-mailed the union to report an incident from the previous day where he was made to feel "like an idiot" in front of his co-workers. Wong asked Westberg to come to Wing Luke to talk about the issue. Westberg responded that he would come out that day with a form for Wong to fill out, and added that he intended to arrange a meeting with Principal Muth and Jones. On that same day, Westberg e-mailed Jones to invite him to make a joint visit to Wing Luke at his "earliest opportunity," citing the MOU as the basis for his request. On September 29, McBee also e-mailed Jones, asking him to visit Wing Luke because, McBee stated, "things are getting worse out there." Jones did not respond until October 6.

Jones did not visit Wing Luke as requested by the union. Jones testified that he did not do so for several reasons. First, Jones felt he had not been at the district long enough to have developed relationships with Westberg or Wing Luke staff so that he could be in a "problem-solving mode" consistent with the MOU. Secondly, Jones thought the matter was the result of a communication problem, not an instance of retaliation.[20] Third, Jones was not the director of labor relations (the position was vacant at the time). Fourth, Jones felt an attempt to resolve the problem should first be approached locally.

Even though Jones did not visit Wing Luke, he did ask Human Resources Manager Jeanette Bliss to assess the problem. On October 6, 2008, Jones informed the union by e-mail that if the problem was not resolved at the local level, it would move "up the chain." Jones also expressed an interest in scheduling regular meetings with the union to "get up to speed" on issues important to them.

Westberg objected to the assignment of Bliss, and indicated that Bliss had not been helpful in the past because "she is unable to find discrimination and/or harassment of any of our members." Westberg told Jones that, due to the district's unwillingness to make a joint visit, the union would "count on the old tried and true methods" of "picketing at the schools . . . and/or the principals [sic] homes."

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20 The parties contemplated that there could be disagreement about whether the MOU applied to a particular incident. A disagreement of this nature can be settled through the grievance process.

The Examiner agrees that Jones should have responded to the requests from Westberg and McBee in a more timely manner. A quicker, good faith response from Jones might have gone a long way in preventing escalation of the problems at Cooper and Wing Luke. However, if the union believed the employer was not following the MOU, the proper avenue to address the problem was the grievance process. "Failure to meet" in the unfair labor practice sense means a failure to meet to bargain. This circumstance does not fall under that description because the union did not make a request to bargain with the district. Instead, the union's requests aimed to get the district to meet in compliance with the MOU. The union did not sustain its burden.

ISSUE 10 – REFUSAL TO BARGAIN – UNILATERAL CHANGE

APPLICABLE LEGAL STANDARD

An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. When subjects relate to both conditions of employment and managerial prerogatives, the Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. The inquiry focuses on which characteristic predominates. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989).

Collective bargaining procedures are not necessarily mandatory subjects of bargaining. *City of Tukwila*, Decision 1975 (PECB, 1984.)

In order to prove an allegation of unilateral change, the union must show that the employer had an established practice concerning a mandatory subject of bargaining, and the employer decided upon and implemented a change of that subject: (1) without notice to the union, or (2) with notice that was insufficient to permit bargaining on the subject, or (3) without engaging in bargaining as requested by the union, or (4) without bargaining in good faith to agreement or impasse. *Kitsap County*, Decision 8292-B (PECB, 2007).

ANALYSIS

Prior Permission Required

The union argues that the employer made a change in its practice of allowing Westberg access to union members at schools when the district began requiring Westberg to check in at the building office before contacting members in the school, and to obtain prior permission before each visit.

On December 9, 2008, Seattle School District Superintendent, Maria Goodloe-Johnson, wrote a letter to Westberg, advising him that he had violated the district's anti-harassment policy during his October 7, 2008 interactions with Principals Muth and Rutherford. Because Westberg violated the policy, the district would now require him to strictly comply with the relevant language in the collective bargaining agreement.

Article IX, Section B: Communication Rights and Privileges in the 2006-2009 contract between the employer and the union states:

> Authorized representatives of the Union may have reasonable access to its members in District facilities for transmittal of information or representation purposes before work, during regular breaks, or at any reasonable time as long as the work of the District employees and services to the District are unimpaired. *Prior to contacting members in District facilities, such authorized agents shall check in at the building office to be directed into the District facility,* including the District Logistics Center. (emphasis added).

Goodloe-Johnson also stated that the district would require Westberg to strictly comply with board policies mandating that visitors obtain prior permission and sign in at the main office before visiting a school.[21]

Westberg testified that prior to the December 9, 2008 letter from Goodloe-Johnson, it had not been his practice to check in at school offices when he went to visit union members. He also testified that he was not previously required to call in advance to schedule visits. The employer did not deny that the contract language was not regularly enforced.

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[21] Seattle School District Board Policies E14.01 and F44.01.

The Examiner agrees there was a change in practice. However, the threshold question in this instance is whether or not the change was made to a mandatory subject of bargaining (wages, hours or working conditions). The Examiner concludes that, based on the facts in this case, the change in procedure is not a mandatory subject of bargaining. Applying the balancing test, the employer's requirement that Westberg sign in at the office before visiting a school is weighed against the employer's interest in enforcing its anti-harassment policy and providing a safe environment for its employees. Given that Westberg was found to be in violation of the employer's anti-harassment policy, and that signing in may only be an inconvenience to Westberg, the employer prevails.

Prohibition from Discussing Issues with Building Principals

For this allegation, the union points to Goodloe-Johnson's letter to Westberg dated December 9, 2008, which directs Westberg to discuss issues related to custodial staff directly with custodial management, not building principals or other building administrators.

The union asserts that the past practice has been to bargain building-specific issues at the building level, via exchanges between the union (including Westberg) and the building principals.

The employer argues that Goodloe-Johnson's letter simply reiterates the language of the collective bargaining agreement, which states that complaints or problems should be taken up with the appropriate supervisor first.

The Examiner concludes that, based on the facts in this case, the employer did not make a unilateral change in a mandatory subject of bargaining. The employer determined that Westberg should confer directly with custodial management about custodial matters. This simply alters the procedure Westberg must follow in the course of representing bargaining unit members. The union did not present evidence to show how this procedural change affected terms and conditions of employment.

ISSUE 11 – DISCRIMINATION – REPRISAL FOR UNION ACTIVITIES

APPLICABLE LEGAL STANDARD

It is unlawful for an employer to discriminate against an employee in reprisal for exercising collective bargaining rights under RCW 41.56.140. (See ISSUE 5 above.)

ANALYSIS

Prohibition from Contacting Certain Building Administrators

Superintendent Goodloe-Johnson's December 9, 2008 letter to Westberg stated, "You are also prohibited from having any contact, direct and indirect, with Ms. Muth and Ms. Rutherford." The letter cited the district's anti-retaliation policy, which prohibits Westberg from retaliating against Muth and Rutherford for filing harassment complaints against him. However, the letter did not prohibit Westberg from representing union members, nor did it prohibit him from visiting Wing Luke or Cooper Elementary.

The first prong of the test for discrimination requires one or more employees to be exercising some form of protected union activity. An employee has to exercise the right, or communicate the intent to do so. That has not happened here. Westberg serves in the capacity of union representative, and is not a bargaining unit employee.[22] A bargaining unit employee was not engaged in protected activity, and therefore the first prong of the test is not met. The union presented no evidence to show that the employer deprived any bargaining unit employee of a right, benefit or status as a result of the limitations placed on Westberg. The limitations were instituted because the district found Westberg to be in violation of its harassment policy, not as a result of activity protected by RCW 41.56.

[22] Westberg is not a public employee within the meaning of Chapter 41.56 RCW. *See Seattle School District*, Decision 9982-A (PECB, 2009).

Threat to Bar Westberg from All Employer Property[23]

The employer issued Westberg a warning in the event that he retaliated against Muth and/or Rutherford for filing harassment complaints against him. Superintendent Goodloe-Johnson's December 9, 2008 letter to Westberg stated:

> If the District receives a complaint(s) that you have retaliated against these employees [Muth and Rutherford], it shall promptly begin the investigative process and determine whether a full investigation is warranted. If there is a finding at the conclusion of the investigation that the policy has been violated, I and/or my designee will institute corrective measures including the issuance of an exclusion or trespass notice for the employees' work location and a request to the Union that another Business Manager/Agent of the Union be assigned to represent District members.

Once again, the first prong of the test for discrimination requires one or more employees to be exercising protected union activity. Westberg is not a bargaining unit employee. Therefore, the first prong of the test for discrimination is not met.

The union presented no evidence to show that the employer deprived any employee of a right, benefit or status as a result of the employer's threat to bar Westberg from the work locations of Muth and/or Rutherford.

FINDINGS OF FACT

1. The Seattle School District is a public employer within the meaning of RCW 41.56.030(1).

2. The International Union of Operating Engineers, Local 609, is a bargaining representative within the meaning of RCW 41.56.030(3). The bargaining unit includes custodians, gardeners, and groundskeepers.

3. The employer and union were parties to a collective bargaining agreement dated December 19, 2006, through August 31, 2009.

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23 The preliminary ruling misrepresents the amended complaint, which did not refer to "all employer property," but only the schools where Muth and Rutherford work ". . . or meetings at which they are in attendance."

4. In the fall of 2008, custodian Chi Wong was a member of Wing Luke Elementary School's safety committee. The committee discussed a problem with students arriving before school, without supervision.

5. Wong agreed to help direct students to the cafeteria in the morning, during the course of his regular duties. On September 25, 2008, administrative assistant Joyce Jeong sent an e-mail to all Wing Luke staff, stating "Mr. Louis, Chi [Wong] and I will supervise to make sure that no students are outside until 8:50."

6. On September 26, 2008, Wong sent an "all staff" e-mail, explaining that he had to do his custodial work first before he could help out with any extra duties. Principal Davy Muth responded to Wong's e-mail, which also went to "all staff." In that e-mail, Muth asked Wong's supervisor, LaDonia Skinner, to come to the school so that Skinner, Wong and Muth could meet to discuss the issue. Wong forwarded this e-mail to the union.

7. On the morning of September 29, 2008, union representative Mike McBee e-mailed Muth to inform her that custodians were not responsible for supervising students. McBee wanted to be included in any meeting between Wong, Skinner, and Muth.

8. Wong, Skinner, and Muth met briefly on the morning of September 29, 2008. There is no evidence to support the claim that the meeting was an investigatory interview that might lead to disciplinary action. Skinner informed Muth that Wong was not responsible for supervising students. McBee was not present.

9. In the fall of 2008, custodian Fred Castor decided he should no longer be in the Cooper Elementary School lunch room while students were present, a change from his customary work practice. Castor informed Principal Cathy Rutherford of his decision. Rutherford disagreed with Castor's decision.

10. On September 22, 2008, Castor notified the union of the conflict between Rutherford and Castor. Union representative Mike McBee called Rutherford and Castor's supervisor, LaDonia Skinner, to discuss the problem. The problem was resolved.

11. On October 2, 2008, custodian Chuck Dial went to Rutherford's office to alert her to a problem in the girls' bathroom at Cooper. The conversation was confrontational, but was not related to Dial's involvement in union activities.

12. On several occasions, including September 10 and September 29, 2008, the union asked Brent Jones, Director of Human Resources, to make joint visits to schools where principals and custodians were experiencing conflict. Jones did not respond until October 6.

13. A memorandum of understanding (MOU) between the employer and union outlined a procedure whereby the employer and union could meet to discuss alleged retaliatory behavior between a union member and a building principal. Disagreements about how or when to apply the MOU can be addressed by the grievance process. The union did not file a grievance when Jones failed to respond to the union's requests to meet.

14. On October 7, 2008, union representative Dave Westberg visited Cooper Elementary School. He met with Rutherford in her office. The exchange between Westberg and Rutherford became heated. Rutherford asked Westberg to leave.

15. On October 7, 2008, Westberg visited Wing Luke Elementary School. He met with Principal Muth in her office. The exchange between Westberg and Muth became heated. Muth's secretary checked to see if something was wrong. Muth asked her secretary to call security and 911.

16. On October 8, 2008, the employer notified Westberg that it would be investigating harassment complaints against him from Muth and Rutherford.

17. Dial filed a harassment complaint against Rutherford on October 8, 2008.

18. On October 20, 2008, the employer sent Dial an e-mail acknowledging receipt of his complaint against Rutherford. The employer notified Dial that an investigator had been assigned to look into his complaint.

19. On October 27, 2008, investigator Sue Means contacted Dial to arrange an interview with him as part of the employer's investigation into Dial's harassment complaint. Dial informed Means that he wanted union representative Dave Westberg to be present during the interview.

20. On October 28, 2008, Westberg received an e-mail from Mike McBee which led Westberg to believe that he was not allowed to visit Cooper Elementary. The employer confirmed it "recommended" that Westberg stay away from Cooper and Wing Luke while harassment complaints filed against him were pending, but offered to meet at alternative sites or with another union representative.

21. Means met with Dial and Westberg at Denny Middle School on November 3, 2008. Means prepared a final investigation report of Dial's complaint against Rutherford, dated November 25, 2008.

22. On December 9, 2008, Superintendent Maria Goodloe-Johnson informed Westberg that he had violated the employer's anti-harassment policy during his October 7 interactions with Muth and Rutherford.

23. On December 9, 2008, Goodloe-Johnson directed Westberg to strictly comply with the contract and board policy by checking in at each school before going on site. She did not deny Westberg access to employer properties. She also directed Westberg to discuss issues related to custodial staff with custodial management, not building principals or other administrators. She told Westberg that he was prohibited from having any contact, direct or indirect, with Muth and Rutherford.

24. Goodloe-Johnson's December 9 decision was based on the employer's finding that Westberg violated the employer's harassment policy.

25. The changes in procedure requiring Westberg to check in at schools and discuss issues related to custodial staff with custodial management are not mandatory subjects of bargaining.

CONCLUSIONS OF LAW

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

2. By the actions described in Findings of Fact 4 through 8, the employer did not interfere with Chi Wong's right to union representation in violation of RCW 41.56.140(1).

3. The employer did not commit an unfair labor practice within the meaning of RCW 41.56.140(1) when it sent an e-mail regarding Wong to "all staff."

4. The employer did not interfere with Fred Castor's or Chuck Dial's rights in violation of RCW 41.56.140(1) during certain verbal exchanges with Cathy Rutherford.

5. The employer did not circumvent the union in violation of RCW 41.56.140(1) or (4) in its dealings with Wong and Castor regarding their work assignments.

6. The employer did not discriminate against Dial in violation of RCW 41.56.140(1) by the conduct of its investigation into a harassment complaint filed by Dial.

7. The employer did not discriminate against bargaining unit members in violation of RCW 41.56.140(1) when it restricted access to certain employer properties by union representative Dave Westberg.

8. By its actions described in Findings of Fact 19 through 21, the employer did not interfere with Dial's right to union representation in violation of RCW 41.56.140(1).

9. The employer did not discriminate against bargaining unit members in violation of RCW 41.56.140(1) by denying union representative Westberg access to worksites.

10. The employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) by failing to meet and negotiate with the union over the union's concerns about certain bargaining unit members.

11. The employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) when it required union representative Westberg to get prior permission to visit employer buildings.

12. The employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) when it prohibited union representative Westberg from discussing collective bargaining issues with certain building administrators.

13. The employer did not discriminate in violation of RCW 41.56.140(1) by prohibiting union representative Westberg from representing bargaining unit members in situations involving certain building administrators.

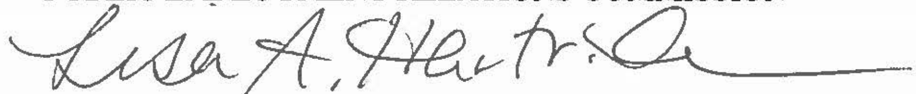
14. The employer did not discriminate in violation of RCW 41.56.140(1) by threatening to bar union representative Westberg from representing bargaining unit members on all employer property.

ORDER

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

ISSUED at Olympia, Washington, this 13th day of April, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



LISA A. HARTRICH, 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.