STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PAUL BENTSON, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASES 23244-U-10-5925 and 23472-U-10-5984 DECISIONS 11091 – PSRA and 11092 – PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Younglove and Coker, PLLC, by *Christopher Coker,* for the complainant.

Robert M. McKenna, Attorney General, by *Mark Yamashita,* Assistant Attorney General, for the employer.

On May 25, 2010, Paul Bentson filed an unfair labor practice complaint against the University of Washington (employer). On May 27, 2010, the Unfair Labor Practice Manager issued a deficiency notice. Bentson filed an amended complaint on June 16, 2010. On June 22, 2010, the Unfair Labor Practice Manager issued a preliminary ruling finding a cause of action for employer interference. The employer filed an answer. The Commission assigned Charity Atchison as Examiner. A hearing was scheduled for September 9 and 10, 2010.

On August 25, 2010, Bentson filed a second unfair labor practice complaint. During a conference call on September 8, 2010, Bentson requested a continuance, the employer did not object, and the Examiner postponed the hearing. On September 10, 2010, the Unfair Labor Practice Manager issued a preliminary ruling in the second complaint, finding a cause of action for employer discrimination for filing an unfair labor practice complaint. He consolidated the two cases for processing. The Examiner conducted a hearing on January 27 and 28, 2011.

ISSUES

1. Whether the employer interfered in violation of RCW 41.80.110(1)(a) when it issued Paul Bentson a formal counseling letter on November 30, 2009?

2. Whether the employer discriminated in violation of RCW 41.80.110(1)(d), and, if so, derivatively interfered in violation of RCW 41.80.110(1)(a), by its actions toward Bentson for filing an unfair labor practice charge?

The employer did not interfere with employee rights when it issued Bentson a formal counseling letter for insubordination on November 30, 2009, for failing to follow management's direction not to use his employer-issued keys to enter locked offices to deliver grievances.

The employer did not discriminate against Bentson for filing an unfair labor practice complaint when it denied Bentson release time to attend a negotiation session on June 7, 2010, and issued him a final counseling on June 17, 2010.

ISSUE 1: Whether the employer interfered in violation of RCW 41.80.110(1)(a) when it issued Paul Bentson a formal counseling letter on November 30, 2009?

APPLICABLE LEGAL PRINCIPLES

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.80 RCW rests with the complaining party. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District,* Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *City of Tacoma,* Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *City of Tacoma,* Decision 6793-A.

ANALYSIS

Background - Paul Bentson began working for the employer in 2002, and worked as an electrician at Harborview Medical Center during the time period relevant to this matter. Pam Jorgensen is the Administrative Director of Facilities and Engineering at Harborview Medical Center. Bentson reported to Bart Hermes, the interim assistant director for facilities and engineering, who reports to Jorgensen. The employer issued Bentson keys that allowed Bentson to access locked areas to perform his electrician duties.

Over the years, Bentson has served as a shop steward, chief shop steward, vice president, member of the executive board, and negotiation team member for the Washington Federation of State Employees (union). Bentson became a shop steward in 2005. During his tenure as a shop steward, Bentson filed numerous grievances against the employer. When representing an employee for a grievance, Bentson would write a step 1 grievance and call the employee's supervisor to set up a meeting to discuss the grievance.

In Bentson's experience, supervisors would not always be present or available at the time designated to meet and discuss the grievance. If that scenario happened more than once, Bentson would request the supervisor to designate someone to receive the grievance. According to Bentson, the process was not always successful.

If Bentson continued to have difficulty serving grievances, he would go to the supervisor's work area and attempt to deliver the grievance. If the supervisor was not there, Bentson testified he would find a witness. With the witness present, Bentson would use his employer-issued work keys to unlock the supervisor's office, enter the office, place the grievance on the desk, and leave. Bentson used his employer-issued work keys to enter locked offices to deliver grievances from 2005 until the employer removed some of the employer-issued keys in November 2009.

During 2005-2009, Mark Olson supervised Bentson.[1] After Olson's supervisor received complaints about Bentson's method of delivering grievances, Olson spoke with Bentson. Olson testified that he told Bentson: he should not enter the offices as a shop steward without the

[1] The complainant called Olson as a witness. Olson testified by phone. The complainant did not inform the Examiner until the afternoon prior to the hearing that he would be calling Olson as a telephonic witness.

manager present; that if the manager was not present, Bentson should make arrangements to meet them; and Bentson should not go into offices and leave grievances. According to Olson, he told Bentson if delivery of the grievance was time-sensitive, Bentson should find someone in the area, preferably supervisory level or higher in that department, to witness Bentson placing the grievance on the desk. According to Bentson's recollection, however, Olson told the supervisors there was nothing he could do about it and, "if they had a complaint, they needed to take it to labor relations and contact the union and sit down and discuss it with them and to come up with some sort of working agreement. But if you are not going to be there and the guy keeps contacting you what do you expect him to do." The Examiner credits Olson's testimony of the conversation he had with Bentson because Bentson's version of events lacks detail and is simply consistent with Bentson's testimony about how all of the matters relating to Bentson's behavior should have been handled: management should raise the issue with labor relations and handle the issues through the collective bargaining process. The Examiner credits Olson, who is no longer employed by the employer, because Olson specifically recalled what direction he gave Bentson and what parameters were placed on when Bentson could enter a locked office. Further, Bentson consistently testified that management should raise issues with his behavior through the labor relations office and the union. The Examiner finds it implausible that Olson would have told other supervisors exactly what Bentson testified to throughout the hearing as Bentson's own approach to the matter. The Examiner concludes that the direction to Bentson was to have a manager present when he entered offices to deliver grievances, but not to enter offices on his own to deliver grievances.

Bentson testified he raised the difficulty of serving grievances at the joint labor management committee, but a resolution on the matter was never reached. Art Wake, who is a union shop steward, has served as union president, and currently serves as the chair of two joint labor management committees, recalled that at some point in time the union had difficulty serving grievances in the 30-day time frame, and that Bentson had the most difficulty serving grievances. According to Wake, Bentson raised the issue. No information about a resolution is in evidence.

According to Bentson, Peter Denis, the Interim Vice President of Human Resources, told Bentson that if he had to enter an office to deliver a grievance that was acceptable. Bentson

believed that his method of delivering grievances was an established past practice. Denis testified that he did not have authority to instruct Bentson how to use employer-issued keys. Denis was clear with Bentson that "we must follow the rules," which are the rules of the collective bargaining agreement.

Incidents Leading to Discipline/Grievance Delivery – On Monday, June 29, 2009, Brenda Ferguson returned to work and found a grievance on her desk in her office, which had been locked while she was away. Ferguson had not worked the preceding Friday, Saturday, or Sunday. Ferguson reported the grievance to the human resources department. On June 30, 2009, Bentson approached Ferguson and asked whether she received the grievance. Ferguson asked Bentson if he had entered her office and put the grievance on her desk. Bentson admitted to entering Ferguson's office and leaving the grievance. When Ferguson is not working, another manager acts in her stead. If Ferguson were not present, a grievance could be delivered to her by: finding the person acting for her, which could be done by asking the charge nurse; leaving the grievance with Ferguson's supervisor; leaving the grievance in her mailbox; or sliding the grievance under her door.

Associate Administrator Elise Chayet informed Jorgensen that Bentson entered a supervisor's office without permission. On July 20, 2009, Jorgenson approached Bentson in the hallway. Jorgensen told Bentson that she had a report that Bentson used his keys to enter an office without permission. Jorgensen told Bentson it was not appropriate for him to use his keys to deliver grievances and the keys were for performing his electrician duties. Jorgensen did not document this conversation with Bentson.

Bentson testified he did not meet with Jorgensen on July 20, 2009. Bentson testified he would not meet with management alone about anything relating to the union. According to Bentson, Jorgensen was unable to produce any documentation of the meeting. Bentson further testified:

> Q [By Yamashita]: Is it your opinion, Mr. Bentson, or is it your position that if there is no documentation of a meeting, that it did not occur?
>
> A [By Bentson]: That is correct.

The Examiner finds Jorgensen is a credible witness on this point, and credits that on July 20, 2009, she spoke with Bentson and instructed him that it was not appropriate for him to use his employer-issued keys to deliver grievances. The Examiner does not find Bentson credible on this point. Bentson's testimony varies between no meeting occurring, not recalling a meeting, and asserting that a meeting did not occur if there was no documentation of it. There is a stark difference between the absence of a memory and the absence of a meeting. A negative does not prove a negative. The absence of documentation does not equate to the absence of the conversation.

Bentson testified that on September 24, 2009, he asked union official Addley Tole to accompany him to serve a grievance. Bentson knocked on an office door, a woman came out, and he handed her the grievance. On cross-examination, Bentson testified that he could not recall whether the individual answered the door or came down the hall. Bentson testified that the person was the supervisor to whom he needed to serve the grievance. Anne Newcombe, clinical director, e-mailed Jorgensen and Chayet to inform them that she intercepted Bentson and an unknown individual at the door of the ED RNIII office. According to Newcombe's e-mail, Bentson handed her a grievance.[2]

On October 13, 2009, Chinua Lambie returned from lunch to find a grievance on his desk. Bentson had signed the grievance. Lambie locks his office when he leaves. Lambie contacted human resources to let them know about the grievance and to raise concerns about how the grievance got into his office. According to Lambie, if he were not available, it would be difficult to contact him. Two employees, including an administrative assistant, report to Lambie, but they do not work in his work area. It would be possible to slip paper under Lambie's door. Lambie has a mailbox in a locked staff lounge, and the staff knows the codes to open the lounge. The Examiner infers that Bentson could have used his keys to enter the staff lounge and leave the grievance in Lambie's mailbox had he so chosen. Bentson admitted he entered Lambie's locked office to deliver a grievance.

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[2] The employer offered a declaration from Newcombe. The Examiner rejected the declaration because a declaration is not a substitute for live testimony. On the record, the Examiner informed the parties that they could make arrangements for Newcombe to testify by telephone to complete the record, but the employer did not call Newcombe to testify. The employer cited the rejected declaration in its brief. The Examiner has not considered the declaration in rendering her conclusion and has relied only on the testimony and admitted exhibits.

Discipline – On October 26, 2009, Jorgensen sent Bentson an e-mail informing him that she was investigating his use of his employer-issued keys for union work. Bentson responded that Jorgensen should contact the labor relations office, who should in turn contact the union. Bentson wrote, "You need to contact Lou Pisano at U/W labor relations and have lro [sic] contact the Seattle field office to set up this meeting. You have no ability own [sic] your own to investigate me or any other steward while we are doing our union business[.]" Bentson further testified that he was surprised by the investigation because if the employer wanted to discuss the issue, "they should have used calling the union, notifying they had a problem with what a shop steward was doing. They could have used the JLM process. There were a lot of other things they could have done than personally taking somebody under investigation."

The Examiner acknowledges that Jorgensen was investigating certain actions of Bentson while he was acting as a shop steward. However, Bentson's union activities are incidental to the investigation. The employer had previously instructed Bentson in the appropriate use of the employer-issued keys. Jorgensen previously instructed Bentson not to use employer-issued keys to deliver grievances. Jorgensen did not instruct Bentson not to serve grievances or engage in union activities. The employer was not attempting to keep Bentson from filing grievances, nor was it attempting to make it extremely difficult for Bentson to file grievances or attempting in any other way to become involved in his protected activity. Rather, it was attempting to limit Bentson's use of keys only to work he was doing as an electrician. While the filing of a grievance is a protected activity, the precise means of filing may not be protected if that means was outside of the protocols for using the keys. The Examiner finds the evidence does not support a conclusion that the investigation into Bentson's use of the employer-issued keys was intended to curb Bentson's union activity.[3]

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[3] The Examiner admitted Exhibit 33, an unfair labor practice complaint filed by the Washington Federation of State Employees in another case, over the employer's objection, and Exhibit 12, a memorandum of understanding and settlement agreement regarding that unfair labor practice, over the complainant's objection. In evaluating a complaint to determine whether a cause of action exists, the Commission's unfair labor practice manager assumes that all facts are true and provable. The allegations in Exhibit 33 were never taken to hearing; thus the veracity of the allegations cannot be determined and cannot serve as a basis for determining that the employer's investigation into Bentson's use of employer-issued keys was intended to curb Bentson's union activity. The Examiner has not relied on Exhibit 33 in reaching her decision in this matter.

On November 13, 2009, Bentson, Jorgensen, Tole, and Lynn Diaz, from the employer's human resources department, met as part of the employer's investigation into Bentson's use of the employer-issued keys. During the meeting, Jorgensen told Bentson that he was not to use the employer-issued keys to enter locked offices and that the keys were intended for performing electrical duties. The employer asked Bentson about the Newcombe and Lambie incidents. Jorgensen recalled that Bentson admitted it was his intent to enter the office if Newcombe had not intercepted him. Bentson did not deny using the employer issued keys to enter Lambie's office. Both incidents occurred after Jorgensen had instructed Bentson that the employer-issued keys were to perform his electrician duties and not to deliver grievances.

Jorgensen asked Bentson if he understood the direction and could follow the direction. According to Jorgensen, Bentson did not answer the question and did not acknowledge that he would follow the action plan, but Tole, the union representative, acknowledged that Bentson would follow the action plan.

Following the meeting, the employer decided to remove the employer-issued keys from Bentson's possession. On November 16, 2009, Jorgensen took two or three master keys from Bentson. Jorgensen allowed Bentson to retain keys that enabled him to access elevators and electrical panels, keys that would allow him to perform his electrical duties. If Bentson needed access to other areas to perform his electrician duties, he could call his lead, another electrician, security, or the lock shop to gain access for work purposes.

On November 30, 2009, Jorgensen issued Bentson a formal counseling. The reasons for the formal counseling included: being intercepted by Anne Newcombe while attempting to enter a locked office delivering a grievance; leaving a grievance in Lambie's locked office; and that the failure to separate his employment duties and union duties was a breach of ethics and security. The letter scheduled a formal counseling meeting for December 1, 2009, and included an action plan. The action plan listed two problems: using work-issued keys for non-work reasons and insubordination and failure to comply with management expectations. Under the action plan, Bentson was to use his work keys to access areas only for the performance of his job as an electrician and to comply with management's expectations that keys were to be used exclusively to perform his electrician duties.

Did the employer interfere? – Bentson asserts that he was engaged in, and disciplined for, protected activity. The fact that an employee may have engaged in protected activity does not prevent an employer from disciplining an employee. In fact, an employee can step outside of the protection of the law when engaging in otherwise protected activity. First, Bentson's alleged protected activity must be examined. Second, the interference test will be applied.

It has long been established that processing grievances is protected activity. *Clallam County,* Decision 1405-A (PECB, 1982), *aff'd* 43 Wn. App. 589 (Div. I, 1986); *Valley General Hospital,* Decision 1195-A (PECB, 1981). The analysis does not stop there. As the Commission stated in *City of Pasco,* Decision 3804-A (PECB, 1992), "the fact that grievance processing constitutes protected activity does not mean that employees or union officials can act with impunity during the grievance process." If behavior becomes too disruptive or confrontational, it loses the protection of the Act. *Pierce County Fire District No. 9*, Decision 3334 (PECB, 1989).

"Employee protected activity loses its protection when it is unreasonable – but reasonableness is gauged by what a reasonable person would do in the midst of industrial strife, and not by what a reasonable person would do in the more ordinary affairs of life." *Vancouver School District v. PERC,* 79 Wn. App 905, 922 (Ct. App. Div. II, 1995). *See also, Vancouver School District,* Decision 3779 (PECB, 1991), *rev'd Vancouver School District,* PECB 3779-A (PECB, 1992). "Conduct may fall outside of the protections of labor statutes if the conduct is irresponsible and abusive." The court then applied a reasonableness test to evaluate the conduct. *City of Vancouver,* 107 Wn. App. 694, 711 (Ct. App. Div II. 2001).

In *Vancouver School District,* the employer investigated an incident that occurred on a school bus. The union requested that the employer interview more witnesses, and the employer complied. After the employer completed its interviews, the union informed the employer that the union would conduct its own investigation. The union representative spoke to an employer official about the union's planned investigation. The employer denied the union representative's request to ride the school bus. The union representative and grievant went to the school bus stop, and the union representative approached children and asked them where they lived and if their parents were home. While the court clearly noted that investigating a grievance is protected

activity, the court found the union stepped out of the protections of the law in its handling of the investigation. The court reasoned that the children were frightened; that the union knew or should have known that approaching elementary-aged children would cause fright; that the fright was avoidable and unnecessary; and that the activities at the bus stop were disruptive to the district in its role as supervisor of the children. The court was clear that its holding was specific to that case.

In *City of Pasco,* an employee who, during a grievance meeting, invited a supervisor to engage in physical combat, was not engaged in protected activity. However, the employer did commit an interference violation when the employer included past actions for which the employee had not been warned or counseled in the warning letter it issued for the incident. In upholding the Examiner in that case, the Commission agreed with the Examiner's conclusion that a warning would have been lawful had it been limited to the behavior of inviting the supervisor to settle the grievance by physical combat.

In this case, Bentson was delivering grievances, which is a protected action. However, Bentson's method of delivering grievances, using employer-issued keys to open locked offices after being repeatedly directed not to enter locked offices for non-work purposes, caused Bentson's activity to move beyond the protection of the statute.

Applying a reasonableness test to Bentson's action (using his employer-issued keys to open locked offices to deliver grievances when employer officials were not available to personally accept the grievances) leads the Examiner to conclude that Bentson's method of delivering grievances was unreasonable and no longer protected activity. A reasonable union official would have attempted to contact the employer official. There is no evidence that Bentson made any effort to locate any employer official prior to unlocking Ferguson's office to deliver a grievance. There is no evidence that Bentson attempted to contact Newcombe or Lambie prior to delivering those grievances, nor does the record indicate that Bentson attempted to deliver grievances to supervisor's mailboxes, or even to slide grievance paperwork under locked doors. If Bentson was unable to contact an employer official, his next step should have been to contact the human resources department, not unlock locked offices to deliver grievances.

On two occasions, the employer notified Bentson that he was not to open locked offices to deliver grievances. Olson told Bentson if necessary to comply with grievance timelines Bentson should secure an employer manager to witness him deliver grievances. Jorgensen informed Bentson that the intent of the employer issued keys was not to perform union duties, rather, it was to allow Bentson to perform his work. A reasonable union member would adhere to the long established and accepted maxim: act now, grieve later. If Bentson thought Jorgensen's July 20, 2009 direction violated his rights, he should have followed the direction and sought redress through the union and collective bargaining procedures.

A reasonable union official would have raised the matter through appropriate channels such as within the union, at the joint labor management committee, or through collective bargaining. While there is testimony that at some point in time the matter was raised, the fact that there may not have been a resolution does not provide Bentson authorization to proceed as he chose. The issue should have been taken to resolution. It is unreasonable and counterproductive to acknowledge a problem and not seek a resolution. At numerous points in his testimony, Bentson stated that if the employer had a problem with his method of delivering grievances, it should have brought the issue to the joint labor management committee. By the same token, if Bentson had a problem with delivering grievances, he should have sought assistance from the union, and not taken matters into his own hands. Collective bargaining provides opportunities for labor and management to work together to solve problems. The evidence is lacking that Bentson made a good faith attempt to seek a resolution to the problem.

Bentson blames management for his inability to serve grievances and uses the unavailability of management officials to justify his rogue actions. Bentson testified that he was not "married to" his method of delivering grievances, but management gave him no choice and no alternative. However, both Ferguson and Lambie testified that Bentson could have slid paper under their doors. While Bentson testified that serving grievances by fax was not a method favored by the union because delivery could not be guaranteed, the employer offered evidence that grievances bearing Bentson's signature were filed by fax. Options other than unlocking doors were clearly available for delivery of grievances. Simply stated, it was not reasonable for Bentson to take matters into his own hands and decide that he could use his employer-issued keys to unlock

locked offices and deliver grievances. The fact that Bentson had trouble serving grievances does not give him carte blanche to choose the method to serve grievances in the manner that he prefers.

This case is distinguishable from *City of Pasco*, because the employer disciplined Bentson only for actions he took after Jorgensen's July 20, 2009 direction to Bentson, and did not include discipline for actions that Bentson did not have notice were inappropriate.

CONCLUSION

The employer did not interfere with employee rights.

ISSUE 2: Whether the employer discriminated in violation of RCW 41.80.110(1)(d), and, if so, derivatively interfered in violation of RCW 41.80.110(1)(a), by its actions toward Bentson for filing an unfair labor practice charge?

APPLICABLE LEGAL PRINCIPLES

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. *Educational Service District 114,* Decision 4361-A (PECB, 1994); *Community College District 13 (Lower Columbia),* Decision 9171-A (PSRA, 2007). The employee maintains the burden of proof in such discrimination cases. To prove discrimination, the employee must first set forth a prima facie case by establishing the following:

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

Ordinarily, an employee may use circumstantial evidence to establish a prima facie case of discrimination because parties do not typically announce a discriminatory motive for their actions. *Clark County,* Decision 9127-A (PECB, 2007).

In response to an employee's prima facie case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma,* Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County,* Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma.*

To prove discriminatory motivation, the employee must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. Circumstantial evidence consists of proof of facts or circumstances which, according to the common experience, gives rise to a reasonable inference of the truth of the fact sought to be proved. *City of Yakima,* Decision10270-A (PECB, 2011).

ANALYSIS

On May 25, 2010, Bentson filed the first unfair labor practice complaint in this matter. Bentson served the employer's labor relations office with a copy of the complaint. On May 28, 2010, Leeanna Shaw, a union employee, e-mailed Peter Denis and Carly Williams, Administrative Specialist Labor Relations, requesting that the employer release five employees, including Paul Bentson, to attend a June 7, 2010 negotiation meeting. On May 28, 2010, Williams forwarded the request to Jorgensen and others at the employer asking if the union's request could be accommodated. On June 1, 2010, Jorgensen responded that she could not approve release time for Bentson. Within an hour of receiving Jorgensen's response, Williams forwarded that response to Shaw and Banks Evans at the union.

On June 7, 2010 at 8:42 A.M., union official Tole sent an e-mail to Bentson and Jorgensen informing Jorgensen that Bentson called Tole and stated that Bentson had not received information about whether he was released to attend the meeting. Tole requested Jorgensen inform him and Bentson if Bentson was released, and, if not, the reason why. On June 7, 2010,

at 10:32 A.M., Jorgensen forwarded Tole her prior response to Williams.[4] On June 7, 2010, at 3:55 P.M., Tole e-mailed Jorgensen and asked if Bentson had been informed that his release time had been denied. On June 8, 2010 at 7:29 A.M., Jorgensen responded that she did not know the process for notification. Jorgensen did not inform Bentson that he was not released. No one from either the employer or the union informed Bentson he was not released to attend the meeting. Bentson attended the June 7, 2010 negotiation session. Bentson did not notify Jorgensen or assistant director Hermes that he was attending the meeting.

In addition to his being a union bargaining team member, Bentson served as a union representative on two safety committees. The safety committee meetings occurred outside of Bentson's regular work hours. Earlier in 2010, Jorgensen had e-mailed Bentson that she would approve a schedule change for Bentson on the days of the safety committee meetings to allow him to attend during work hours and not accrue overtime; in other words, Jorgensen had offered to allow Bentson to alter his work schedule to attend safety meetings during work hours. Bentson did not flex his schedule and incurred unapproved overtime as a result of attending the meetings outside of his regular work day. Jorgensen denied Bentson overtime, and Bentson grieved the denial of overtime. On June 17, 2010, the employer issued Bentson a "final counseling." The counseling was for insubordination and for Bentson accruing unauthorized overtime on two occasions, one in April 2010 and one in May 2010 for attendance at safety committee meetings, as well as for Bentson attending the June 7, 2010 negotiations session without authorization.

Prima Facie Case – As stated above, the party alleging discrimination must first establish a prima facie case. On May 25, 2010, Bentson filed an unfair labor practice complaint; filing an unfair labor practice complaint with this agency is protected activity. On June 1, 2010, the employer denied Bentson release time to attend a June 7, 2010 negotiation session, and on June 17, 2010, the employer disciplined Bentson by issuing a final counseling. The employer deprived Bentson of a right, benefit, or status by denying release time to attend negotiations and by disciplining Bentson on June 17, 2010. The timing of Bentson filing his unfair labor practice complaint, in relation to the employer denying Bentson release time and subsequently issuing a

[4] Jorgensen responded only to Tole, and did not include Bentson in her reply.

final counseling, leads the Examiner to conclude that Bentson established a causal connection between his protected activity and the adverse action.

Employer Knowledge – The employee must demonstrate that the employer had knowledge of the alleged protected activity. In this case, Bentson served the employer's labor relations office with a copy of the unfair labor practice complaint that he had filed on May 25, 2010. Neither party raised the issue at hearing of whether the employer knew Bentson filed the complaint. However, in its brief the employer asserted that there is no evidence that Jorgensen, who denied Bentson's release time request, knew Bentson filed the unfair labor practice complaint. The evidence establishes that the employer knew Bentson filed the unfair labor practice complaint. The employer did not present any evidence that it had not been served with the unfair labor practice complaint, that the employer did not know about the unfair labor practice complaint, or that Jorgensen did not know Bentson filed the unfair labor practice complaint. Therefore, the Examiner does not consider the employer's assertion, raised for the first time in its brief, that the employer, by Jorgensen, lacked knowledge of the unfair labor practice complaint. The employer was on notice that Bentson filed an unfair labor practice complaint because Bentson served the employer. The complainant has established a *prima facie* case of discrimination.

Non-discriminatory Reason – When Jorgensen responded to Williams, denying Bentson release time, Jorgensen wrote, "We only have two electricians on campus for June 7th. This would leave us with only one." On Mondays, there are two electricians working at Harborview Medical Center. Jorgensen testified Bentson had work to perform for an upcoming Department of Health follow-up inspection,[5] in addition to his regular duties. Jorgensen disciplined Bentson for insubordination for attending the negotiation session in spite of having been denied release time. The employer articulated non-discriminatory reasons for denying release time and issuing final discipline. The burden remains with the complainant to prove that the employer's stated non-discriminatory reasons were either pretextual or substantially motivated by union animus.

Pretext or Union Animus – In *Kiona-Benton School District*, Decision 11035 (EDUC, 2011), employer officials had concerns about the union treasurer's role in the building and described her

[5] There is no evidence about when the follow-up inspection was scheduled to occur.

as a "union person" and a "control freak." The Examiner found these statements, along with other evidence, contributed to a finding that the employer's decision to transfer the teacher was discriminatory. In *Port of Tacoma,* Decision 4626-A and 4627-A (PECB, 1995), the Commission affirmed that the record supported a finding of union animus when the employer pressured employees to change their votes on a contract addendum, told one employee it had a problem with the employee's union activity, and told an employee that management was looking for team players in the upcoming promotional process. On the other hand, in *City of Brier,* Decision 10013-A (PECB, 2009), the Commission found that the employer's statement that "new hires in union positions get the short end of the stick" and the police chief's expression of concerns with the employee aligning himself with the union president did not provide evidence to support a finding that the employer's conflicts with the union president related to union matters. The record in each case must be analyzed to determine whether the facts support that an employer's decision was pretextual or motivated by animus.

Denial of Release Time – Bentson engaged in protected activity by filing the May 25, 2010 unfair labor practice complaint. On June 1, 2010, Jorgensen denied Bentson release time to attend negotiations on June 7, 2010. To show that the employer's denying Bentson release time was pretexual, the complainant offered evidence that on June 3, 2010, the employer approved a sick leave request for the other electrician who worked on Mondays to be absent on June 14 and 25, 2010, both Mondays. The other electrician was not a member of the union negotiation team or a shop steward. Hermes, the employee's manager, approved the request, and Jorgensen approved the request on June 4, 2010. While the employer approved sick leave for two Mondays for the other electrician who worked on Mondays, the facts surrounding the approval were not developed. Did the employee have duties for the Department of Health inspection? Had the Department of Health inspection occurred? What was the employer's reason for approving the leave? The complainant bears the burden of establishing that the employer's reason is pretextual or motivated by union animus; Bentson failed to carry his burden of proof regarding the employer's denial of release time.

Final Counseling – While Bentson has been an active shop steward during his employment and the incidents leading up to the filing of the two unfair labor practice complaints, the record does

not demonstrate that the employer's decision to discipline Bentson was substantially motivated by union animus, or was in retaliation for Bentson's having filed an unfair labor practice complaint.

On June 17, 2010, the employer issued Bentson the final counseling for unauthorized departure from work, unauthorized overtime, and insubordination. The final counseling outlines a pattern of Bentson not following Jorgensen's direction that she would approve a change in work schedule to allow Bentson to attend safety meetings without accruing unauthorized overtime. The reasons for the final counseling were:

- On April 26, 2010, Bentson worked his regular shift, 6:15 A.M. to 2:45 P.M. Bentson punched out at the end of his shift, punched back in at 3 P.M. to attend a safety committee meeting, and punched out at 4:30 P.M., resulting in unauthorized overtime.
- On April 30, 2010, Jorgensen reminded Bentson that she would approve changing his work schedule on dates of the Group 12 safety meeting and that she might consider his actions to accrue unapproved overtime to be insubordination.
- On May 24, 2010, Bentson worked his regular shift, but did not punch out until 4:30 P.M. Jorgensen contacted Bentson about the incident on June 1, 2010, and he stated he had a safety meeting at 3 P.M. and left at 4:30 P.M.
- On June 7, 2010, Bentson left work without authorization to attend the negotiations meeting. Jorgensen had informed the labor relations office that she did not approve the release time due to lack of staffing, and the labor relations office had informed the union; therefore the union had been informed in advance that Bentson's release time was not approved.
- Bentson's continued insubordination "disrupts the operations of the department, creates needless expense, and puts Harborview Medical Center at risk of being unable to respond to facility emergencies."

The final counseling memo included an action plan, under which Bentson was to comply with management direction and expectations; remain at his work station and obtain approval in advance of leaving the work site; and obtain approval from management for all overtime and requests to flex scheduled hours when attending safety committee meetings.

The employer's questioning Bentson about the April and May safety committee incidents, and its denial of overtime for attendance at those meetings, preceded Bentson's filing of the first unfair labor practice complaint; thus those actions could not possibly have been in retaliation for his having filed a complaint. Because those incidents are cited in the final counseling, along with the June 7th incident regarding Bentson attending the negotiations session without authorization, the Examiner will examine those incidents as possible evidence of union animus.

Under the collective bargaining agreement, overtime "must be approved in advance by the employer." Jorgensen did not tell Bentson he could not attend the safety meetings, but rather indicated she would allow Bentson to flex his schedule to attend the safety meetings during his work days. Employer policy 10.11, University of Washington Health and Safety Committees, and the collective bargaining agreement require the employee to arrange release time in advance to attend safety meetings. In her response to Bentson's grievance regarding denial of overtime, Nancy Dombrowski, Assistant Director of Labor Relations, cited an example of the employer allowing another employee to flex her schedule to be in paid status during a meeting. Jorgensen's offer to allow Bentson to flex his schedule was consistent with the employer allowing other employees to flex their schedules to attend safety meetings. This consistency is evidence of lack of union animus or pretext by the employer.

Regarding the discipline for the June 7th incident, Jorgensen explained that it was insubordination for an employee to leave the worksite without informing someone the employee was leaving. Jorgensen explained the expectation applied to everyone in the engineering department to let management know if they were leaving the worksite. Jorgensen disciplined Bentson for insubordination, abandoning his work station, and unauthorized overtime. Given the record as a whole, including Jorgensen's willingness to allow Bentson to flex his schedule to attend safety meetings, as well as her attempts to work with him to find other means of serving grievances, the Examiner does not find Jorgensen's actions to reflect union animus.[6]

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[6] When the employer issued Bentson the November 30, 2009 formal counseling for using his keys for non-work purposes and insubordination, the union filed a grievance. In a January 14, 2010 e-mail to Tole denying Bentson's grievance, Jorgensen wrote, "I feel formal counseling is appropriate given Paul's unwillingness to follow directives that he use his keys only for electrical projects and his pattern of poor judgment when acting as a shop steward." Unlike statements made by employer officials in other cases, this statement does not compel a finding of union animus for the reasons discussed in Issue 1, above.

The record is void of evidence that Bentson obtained release time for the negotiations meeting, sought approval for overtime for the safety meetings, or accepted Jorgensen's offer to flex his schedule for those meetings. The employer demonstrated that Bentson ignored employer direction for attendance at meetings. The employer disciplined Bentson for his failure to follow directives, not for filing an unfair labor practice complaint.

CONCLUSION

The employer did not discriminate when it issued Bentson a final counseling. Bentson had a pattern of insubordination, which was the basis of the employer's discipline. The complainant has not carried his burden to establish that the denial of release time and final counseling were either pretextual or substantially motivated by union animus.

FINDINGS OF FACT

1. The University of Washington (employer) is an institution of higher education within the meaning of RCW 41.80.005(10).

2. Paul Bentson began working for the employer in 2002 and worked as an electrician at Harborview Medical Center during the time period relevant to this matter.

3. Pam Jorgensen is the Administrative Director of Facilities and Engineering at Harborview Medical Center. Bentson reported to Bart Hermes, the interim assistant director for facilities and engineering, who reports to Jorgensen.

4. The employer issued Bentson keys that allowed Bentson to access locked areas to perform his electrician duties.

5. Over the years, Bentson has served as a shop steward, chief shop steward, vice president, member of the executive board, and negotiation team member for the Washington Federation of State Employees (union). Bentson became a shop steward in 2005.

During his tenure as a shop steward, Bentson filed numerous grievances against the employer.

6. Bentson used his employer-issued work keys to enter locked offices to deliver grievances on several occasions from 2005 until the employer removed some of the keys in November 2009.

7. Mark Olson, Bentson's supervisor from 2005-2009, told Bentson he should not enter the offices as a shop steward without the manager present; that if the manager was not present, Bentson should make arrangements to meet them; and Bentson should not go into offices and leave grievances. Olson told Bentson if delivery of the grievance was time sensitive, Bentson should find someone in the area, preferably supervisory level or higher in that department, to witness Bentson placing the grievance on the desk.

8. On July 20, 2009, Jorgensen instructed Bentson that it was not appropriate for him to use his keys to deliver grievances and the keys were for performing his electrician duties.

9. On September 24, 2009, Bentson asked union official Addley Tole to accompany him while he served a grievance. Bentson gave the grievance to Anne Newcombe.

10. On October 13, 2009, Chinua Lambie returned to his locked office and discovered a grievance signed by Bentson on his desk.

11. Bentson made no effort to locate any employer official prior to unlocking Ferguson's office to deliver a grievance. Bentson did not attempt to contact Newcombe or Lambie prior to delivering those grievances, nor did Bentson attempt to deliver grievances to supervisor's mailboxes, or even to slide grievance paperwork under locked doors.

12. On November 13, 2009, Bentson, Jorgensen, Tole, and Lynn Diaz, from the employer's human resources department met. During the meeting, Jorgensen told Bentson that he was not to use his keys to enter locked offices and that the keys were intended for

performing electrical duties. The employer asked Bentson about the Newcombe and Lambie incidents. Bentson admitted it was his intent to enter Newcombe's office. Bentson did not deny using his keys to enter Lambie's office. Both incidents occurred after Jorgensen instructed Bentson that the employer-issued keys were to perform his electrician duties and not deliver grievances.

13. On November 16, 2009, Jorgensen took two or three master keys from Bentson. Jorgensen allowed Bentson to retain keys that enabled him to access elevators and electrical panels, keys that would allow him to perform his electrical duties. If Bentson needed access to other areas to perform his electrician duties, he could call his lead, another electrician, security, or the lock shop to gain access for work purposes.

14. On November 30, 2009, Jorgensen issued Bentson a formal counseling. The reasons for the formal counseling included: being intercepted by Anne Newcombe while attempting to enter a locked office delivering a grievance; leaving a grievance in Lambie's locked office; and that the failure to separate his employment duties and union duties was a breach of ethics and security. The letter scheduled a formal counseling meeting for December 1, 2009, and included an action plan. The action plan listed two problems: using work issued keys for nonwork reasons and insubordination and failure to comply with management expectations. Under the action plan, Bentson was to use his work keys to access areas only for the performance of his job as an electrician and to comply with management's expectations that keys were to be used exclusively to perform his electrician duties.

15. Bentson's actions using employer-issued keys to open locked offices to deliver grievances is not protected activity.

16. Bentson served as a union representative on two safety committees. In early 2010, Jorgensen e-mailed Bentson that she would approve a schedule change for Bentson on the days of the safety committee meetings to allow him to attend during work hours and not accrue overtime. Jorgensen's offer to allow Bentson to flex his schedule was

consistent with the employer allowing other employees to flex their schedules to attend safety meetings.

17. On May 25, 2010, Bentson filed the first unfair labor practice complaint in this matter. Bentson served the employer's labor relations office with a copy of the complaint.

18. On May 28, 2010, Leeanna Shaw, a union employee, e-mailed Peter Denis and Carly Williams requesting that the employer release five employees, including Paul Bentson, to attend a June 7, 2010 negotiation meeting.

19. On June 1, 2010, Jorgensen responded that she could not approve release time for Bentson. Within an hour of receiving Jorgensen's response, Williams forwarded Jorgensen's response to Shaw and Banks Evans at the union.

20. No one informed Bentson he was not released to attend the meeting. Bentson attended the June 7, 2010 negotiation session. Bentson did not notify Jorgensen or Hermes that he was attending the meeting.

21. The employer's expectation that employees would let management know if they were leaving the worksite applied to everyone in the engineering department.

22. When Jorgensen responded to Williams denying Bentson release time, Jorgensen wrote, "We only have two electricians on campus for June 7th. This would leave us with only one." On Mondays, there are two electricians working at Harborview Medical Center. Jorgensen testified Bentson had work to perform for an upcoming Department of Health follow-up inspection in addition to his regular duties.

23. On June 17, 2010, the employer issued Bentson a final counseling.

24. The final counseling memo included an action plan, under which Bentson was to comply with management direction and expectations; remain at his work station and obtain

approval in advance of leaving the work site; and obtain approval from management for all overtime and request to flex scheduled hours when attending safety committee meetings.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapters 41.80 RCW and 391-45 WAC.

2. The employer's actions, as described in Findings of Fact 12, 13, and 14, did not unlawfully interfere with employee rights in violation of RCW 41.80.110(1)(a).

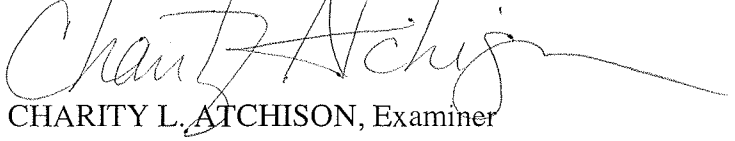
3. The employer's actions, as described in Findings of Fact 19, 20, and 22 24, did not violate RCW 41.80.110(1)(d).

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are dismissed.

ISSUED at Olympia, Washington, this 9th day of June, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CHARITY L. ATCHISON, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 06/09/2011

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

CASE NUMBER:	23244-U-10-05925	FILED:	05/25/2010	FILED BY:	PARTY 2
DISPUTE:	ER INTERFERENCE				
BAR UNIT:	OPER/MAINT				
DETAILS:	Discipline see 23670-S-10-0194				
COMMENTS:					

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RECORD OF SERVICE - ISSUED 06/09/2011

The attached document identified as: DECISION 11092 - PSRA has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	23472-U-10-05984	FILED:	08/25/2010	FILED BY:	PARTY 2
DISPUTE:	ER DISCRIMINATE				
BAR UNIT:	OPER/MAINT				
DETAILS:	see 23671-S-10-0195				
COMMENTS:					

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