Port of Anacortes, Decision 12160 (PORT, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 25, Complainant, vs. PORT OF ANACORTES, Respondent.	CASE 26287-U-14-6708 DECISION 12160 - PORT FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, by *Laura Ewan* and *Dmitri Iglitzin,* Attorneys at Law, for the union.

Chmelik Sitkin & Davis, P.S., by *Richard A. Davis III* and *Brian D. Rice,* Attorneys at Law, for the employer.

This case involves the Port of Anacortes (employer) discontinuing an employee's temporary light duty assignment. The International Longshore and Warehouse Union, Local 25 (union) alleges the employer unilaterally changed the employer's practices when it discontinued the employee's temporary light duty assignment, and discriminated against the employee for union activities. I find in favor of the employer and dismiss the union's complaint.

ISSUE

1. Did the employer unilaterally change a past practice when it discontinued David Bost's temporary light duty assignment?

2. Did the employer discriminate against Bost for union activity when it discontinued his temporary light duty assignment and when doing so required him to be off work and to exhaust the leave colleagues donated to him?

The union did not establish the existence of a binding past practice concerning light duty assignments for employees injured off-duty. The evidence does not demonstrate the employer discriminated against Bost for union activities. The union did not establish that the employer's reasons for discontinuing Bost's light duty assignment were a pretext to retaliate against Bost for his union activities or substantially motivated by union animus.

PROCEDURAL HISTORY

On February 13, 2014, the union filed an unfair labor practice complaint against the employer. Unfair Labor Practice Manager David Gedrose, issued a partial deficiency notice concerning one allegation. The union filed an amended complaint on February 26, curing the deficiency. On February 28, Gedrose issued a preliminary ruling finding causes of action for unilateral change and discrimination:

> [1] Employer refusal to bargain in violation of RCW 41.56.140(4) [and derivative interference in violation of RCW 41.56.140(1)], by its unilateral change to the use of light duty assignments, without providing an opportunity for bargaining.
>
> [2] Employer discrimination (and derivative interference) in violation of RCW 41.56.140(1), by:
>
> (a) denying light duty work to David Bost (Bost) and telling him to remain at home until released for full duty work, in reprisal for union activities protected by Chapter 41.56 RCW; and
>
> (b) refusing to return accrued paid vacation time to Ole Knudsen, Dale Fowlereach, and Steve Kreibs, who donated the time to Bost, in reprisal for union activities protected by Chapter 41.56 RCW.

The Commission assigned the case to Examiner Jamie L. Siegel who held a hearing on May 30, 2014. The parties filed briefs by August 7, 2014.

BACKGROUND

The union serves as the exclusive bargaining representative of employees performing facilities and maintenance services for the employer. At the time of the hearing, the parties had yet to reach their first collective bargaining agreement.[1]

Bost, a bargaining unit employee, serves as a maintenance mechanic 3. Bost suffered a work-related injury for which he had surgery in the fall of 2013. Bost returned to a light duty assignment on or about December 23, 2013. He was performing the light duty assignment when he experienced a non-work related medical issue on January 14, 2014.[2] During the December 2013 through February time period, Bost and Lindsey Herrick, the employer's human resources generalist, communicated about issues relating to Bost's employment, including light duty, Family Medical Leave Act (FMLA) leave, doctor releases, and shared leave. The following timeline highlights the relevant events during this time period.[3] For clarity, I refer to the doctor treating Bost's work-related injury as "L&I doctor"[4] and the doctor treating Bost's non-work related medical issue as "FMLA doctor."

December 23	The L&I doctor signed a release for Bost to perform light duty work from December 23, 2013, through February 15, 2014. The cost of the light duty assignment was subsidized by L&I's Stay-at-Work Program.
January 14	Bost suffered a non-work related medical issue and was hospitalized for several days. He did not return to work until February 10.
January 21	Bost and Herrick spoke by phone about FMLA and shared leave for Bost's non-work related medical issue.

[1] The bargaining unit was certified in December 2013. *Port of Anacortes,* Decision 11942 (PORT, 2013).

[2] All dates refer to 2014 unless otherwise noted.

[3] To the extent a discrepancy exists between Herrick's and Bost's testimony concerning the timing of events or communications, I find Herrick's testimony more credible than Bost's. Herrick provided clear, specific testimony regarding dates and times; Bost demonstrated difficulty recalling the timing and details of some events.

[4] Washington State Department of Labor and Industries.

January 21	Herrick e-mailed staff Bost's request to receive donations of shared leave.
January 23	Bost brought Herrick his FMLA paperwork documenting his incapacity through February 7.
February 3	The L&I doctor released Bost to return to full duty without restriction as of February 3; Bost did not share this information with the FMLA doctor and did not share it with the employer until February 11.
February 4	Bost and Herrick spoke by telephone; Bost reported the FMLA doctor may release him to light duty the following Monday (February 10). Bost said nothing about the L&I doctor releasing him to full duty.
February 4	Herrick e-mailed Bost the light duty job description and asked him to have the FMLA doctor review it to determine his ability to return to work.
February 5	The FMLA doctor signed the release for Bost to return to light duty on February 10.
February 6	Herrick e-mailed the employer's staff indicating that the employer would comply with a public records request from Tyler Ashbach (union representative) requesting employee discipline information.
February 10	Bost returned to light duty.
February 11	Bost informed the employer that the L&I doctor released him to full duty effective February 3. Bost said he disagreed and planned to get a second opinion.
February 11	Bost requested to review his personal file in light of the public records request.

February 11 After learning the L&I doctor released Bost to full duty without restriction, Herrick met with Deputy Executive Director Chris Johnson and Executive Director Bob Hyde to discuss Bost's light duty. Herrick was concerned that the FMLA doctor did not know the L&I doctor had released Bost to full duty, and she had only sent the FMLA doctor the light duty job description. Herrick testified about how Bost's situation was not something she had faced before. Bost had a work-related injury and a non-work related injury with different doctors treating him for each injury. The L&I doctor released him to full duty and the FMLA doctor released him to light duty not knowing the L&I doctor had released him to full duty. Herrick explained: "So I wanted to make sure that we were releasing him to the right duty." Johnson decided to discontinue Bost's temporary light duty assignment.

February 11 Herrick called Bost and told him to remain home until released for full duty by the FMLA doctor. Bost said he could probably get in to see the doctor the next day. Herrick advised him he had additional donated leave he could use until the FMLA doctor released him to full duty.[5]

February 12 Herrick scheduled a meeting for Bost to review his personnel file in response to his request.

February 18 Herrick contacted Bost because she had not heard from him since February 11. He said he was seeing the FMLA doctor the next day.

February 19 Bost gave Herrick the FMLA doctor's release to return to full duty without restriction dated February 18.

February 21 Bost reviewed his personnel file.

[5] Unfortunately, an error in the employer's new payroll system double-counted the number of leave hours one employee donated, so Bost had less accumulated shared leave available than Herrick realized. As a result, Bost exhausted the accumulated shared leave prior to his return to full duty. The new payroll system's double-counting problem impacted employees in addition to Bost.

APPLICABLE LEGAL STANDARDS

Duty to Bargain and Unilateral Change

Chapter 41.56 RCW requires a public employer to bargain with the exclusive bargaining representative of its employees. The duty to bargain extends to mandatory subjects of bargaining including wages, hours, and working conditions. RCW 41.56.030(4). The law limits the scope of mandatory subjects to those matters of direct concern to employees. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989) *(City of Richland)*. Unless a union clearly waives its right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. An employer must give a union sufficient notice of possible changes affecting mandatory subjects of bargaining and, upon union request, bargain in good faith until reaching agreement or impasse. *Wapato School District*, Decision 10743-A (PECB, 2011).

The Commission classifies managerial decisions that only remotely affect terms and conditions of employment as permissive subjects of bargaining. *North Franklin School District*, Decision 5945-A (PECB, 1998). Parties may bargain regarding these permissive subjects but are not required to do so. If an employer's decision on a permissive subject of bargaining materially impacts wages, hours or working conditions of bargaining unit employees, the employer must bargain with the union concerning those impacts. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

When a union alleges that an employer made a unilateral change, the union bears the burden of establishing that the dispute involves a mandatory subject of bargaining and that the employer's actions constituted an actual, material change to the status quo. *Kitsap County*, Decision 8292-B (PECB, 2007).

Past Practice

A past practice is a course of conduct between the parties, over an extended period of time, which the parties have acknowledged. A past practice may be so well understood between the parties that the parties consider it unnecessary to include it in a collective bargaining agreement. *Whatcom County*, Decision 7288-A (PECB, 2002). Parties may use their past practices to

construe ambiguous provisions of a collective bargaining agreement or to define an issue in which the agreement is silent. *Kitsap County*, Decision 8292-B. Where the parties' course of conduct with respect to a mandatory subject of bargaining is so well established that it constitutes a past practice, a party commits an unfair labor practice if it unilaterally changes that past practice without fulfilling its bargaining obligation. *Kitsap County*.

To establish a past practice, a party must prove the following two basic elements: (1) a prior course of conduct, and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *Kitsap County*. To establish these elements, "it must . . . be shown that the [prior course of] conduct was known and mutually accepted by the parties." *Kitsap County.* The party claiming a past practice bears the burden of proof. WAC 391-45-270(1)(a).

Discrimination

An employer unlawfully discriminates when it takes action against an employee in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in employer discrimination cases. To prove discrimination, the complainant 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.

Educational Service District 114, Decision 4361-A; *Central Washington University*, Decision 10118-A (PSRA, 2010). To prove an employer's motivation for an adverse employment action was discriminatory, the complainant must establish that the employer had knowledge of the

employee's union activities. *Metropolitan Park District of Tacoma*, Decision 2272 (PECB, 1986), *aff'd*, Decision 2272-A (PECB, 1986). The complainant may use circumstantial evidence to establish its *prima facie* case because a party does not typically announce a discriminatory motive for its actions. *Clark County*, Decision 9127-A (PECB, 2007).

When the complainant establishes a *prima facie* case, it creates a rebuttable presumption of discrimination. In response to a complainant's *prima facie* case of discrimination, the employer need only articulate a non-discriminatory reason for its actions. The employer does not bear the burden of proof to establish the reason. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant 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 complainant meets this burden by proving either that the employer's reason was pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

ANALYSIS

The Employer Did Not Unilaterally Change a Past Practice

The union's brief argues the employer's past practice allows employees with off-duty injuries to work light duty assignments: "there was an unwritten, long-standing practice in place by which management representatives approved employee requests for temporary light-duty assignments when employees were injured off-duty." Union's Post-Hearing Brief at 1. The evidence does not support this assertion. The employer did not unilaterally change a past practice when it discontinued Bost's light duty assignment.

The parties agree the employer has no written policy addressing light duty. The record includes no documentary evidence of light duty assignments, other than documentation relating to Bost's 2013 and 2014 light duty.

In its effort to establish a binding past practice, the union relies heavily on the testimony of Jason Chandler. Over the course of approximately 12 years, Chandler worked for the employer in two

supervisory positions: maintenance supervisor and manager of operations and maintenance.[6] Chandler's employment ended in 2010 and he currently works as a longshoreman.

The union argues that Chandler's testimony established how the employer's managers handled employees injured off-duty. Chandler's testimony that he never heard of an employee who was injured off-duty being denied light duty does not assist in establishing a past practice. To establish a past practice requires specific examples of when the practice occurred and has been accepted by both parties.

Through Chandler, the union introduced some examples associated with two employees but the examples were insufficient to establish a past practice. Chandler testified about an off-duty injury by an unnamed employee and Josh Beaner's multiple off-duty injuries. I will address each in turn.

First, Chandler testified about an employee who did not work in the maintenance department who had an off-duty lawn mower accident. The accident injured the employee's toes and the employee returned to work in a protective boot. The union presented no testimony or other evidence about the employee or the work he did; we do not know the employee's name, job title, department, or year of injury. Most important, the union presented no evidence the employee was placed in a light duty assignment. An injured employee's return to work does not necessarily mean the employee was placed on light duty. This first example lacks the detail necessary to determine whether it contributes to establishing a past practice of placing employees in light duty assignments when they have been injured off-duty.

Next, Chandler identified five injuries he said Beaner sustained off-duty and testified that Beaner was accommodated with each. Beaner also testified. When Chandler's and Beaner's testimony conflict, I find Beaner's testimony more credible because of his first hand knowledge and include his description of events. Beaner's injuries and return to work included:

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[6] The parties dispute whether Chandler's actions were taken with sufficient authority to bind the employer. I find it unnecessary to address this issue.

- Knee injury: in about 1996 a different supervisor allowed Beaner and a janitor to switch jobs.
- Broken wrist: date not reported. Beaner testified credibly that when he returned to work after breaking his wrist he wore an operational cast that allowed him to perform his regular duties.
- Shoulder/collarbone
    - About seven years ago Beaner broke his shoulder/collarbone. After taking some time off work, he returned to his regular position. He testified he was supposed to be placed on light duty, but "did not do light duty."
    - About three years ago, after moving to more of a "desk job," Beaner broke his shoulder/collarbone. He did not require light duty.
- Operation on a toe: no details offered.
- Accident resulting in soreness: no details offered.

The parties introduced no documentary evidence regarding Beaner's injuries or light duty work associated with these injuries. Herrick testified she could find no record of any light duty assignments authorized by Chandler.

Each party relies on a Commission decision to support its interpretation of whether a past practice exists. In *City of Wenatchee*, Decision 6517-A (PECB, 1999), the Commission found the employer committed an unfair labor practice when it attempted to change an existing practice of granting police officers temporary light duty assignments. The parties' collective bargaining agreement addressed light duty assignments and the record demonstrated a long 14 to 15 year history during which 19 employees were granted temporary light duty assignments and only denied two requests − one for an employee requesting permanent light duty and the other for an employee who requested light duty for an indefinite period of six months to two years.

The evidence in this case is not analogous to the facts in *City of Wenatchee*. At best, the evidence in this case demonstrates one accommodation made for Beaner in 1996 when he switched jobs with another employee and one intended, but not implemented, light duty

assignment from seven years ago when Beaner broke his shoulder/collarbone. I find these two events do not rise to the level of creating a past practice.

The union argues three prior incidents can be sufficient to establish a past practice, relying on *Pierce County*, Decision 11818 (PECB, 2013). I agree. Examiners and the Commission decide each case based on the unique facts presented. In some cases, three incidents may be sufficient to establish a past practice; to establish a past practice does not require a specific number of incidents. The more critical component in analyzing whether the parties have established a past practice is whether the prior course of conduct by the parties is well understood and accepted by both parties.

In *Pierce County*, Decision 11818, the issue was whether the employer unilaterally changed how deputies used leave if they were absent when county offices closed due to inclement weather. The examiner found three instances of closures over the course of six years sufficient to establish a past practice. The examiner relied on e-mails the employer sent the employees that established how the employer handled leave in each instance. With that evidence, the examiner found that requiring employees to use leave when county offices closed due to inclement weather was conduct "known and mutually accepted by the parties as the proper response to the circumstances."

In this case, providing light duty assignments is not the known and mutually accepted response when employees are injured off-duty. According to Herrick, in her six years in the employer's human resources department, she could recall no employee requesting light duty except Bost. At best, the record establishes, with minimal detail, an example of an accommodation made in 1996 allowing Beaner to switch jobs with a janitor, and an intended, but not implemented, light duty assignment from seven years ago when Beaner experienced his first broken shoulder/collarbone. These two instances do not constitute a course of conduct that was understood and accepted by the parties. These two instances do not constitute a binding past practice requiring the employer to bargain with the union if it chooses not to grant a light duty assignment to an employee who suffers off-duty injuries. The employer did not violate a past practice when it discontinued Bost's light duty assignment.

The Employer Did Not Discriminate Against Bost

The union's complaint alleged the employer retaliated against Bost and his co-workers for engaging in protected union activity. As asserted in the union's complaint, and admitted in the employer's answer, in October 2013, Executive Director Robert Hyde told Bost to remove his union button. This activity was addressed in a separate complaint. The examiner in *Port of Anacortes*, Decision 12155 (PORT, 2014), concluded that the employer interfered with employee rights when, within a week of the union filing a representation petition, the employer called meetings with Bost and two other employees "to instruct them to remove the union buttons they were wearing in support of the union's organization efforts."

In its post-hearing brief, the union asserts, "Given the circumstances surrounding the organizing campaign, the Employer's hostility toward the Union, and the unusual timing of Mr. Bost's dismissal from light-duty work, it is reasonable for the employees to perceive the negative employment actions were taken by the Port in relation to union activity." Union's Post-Hearing Brief at 14. At the hearing, the union introduced no evidence of Bost's union activity, except to the extent it asserts his request to review his personal file constitutes union activity. The record includes no evidence of the union's organizing campaign or of hostility toward the union.

Even if the union was able to prove the three elements necessary to establish a *prima facie* case of discrimination, the union fails to carry its ultimate burden of proving the employer's action was in retaliation for the employee's exercise of statutory rights.

The employer established it had a legitimate, nondiscriminatory reason for discontinuing Bost's light duty assignment. Deputy Executive Director Chris Johnson credibly testified about several reasons for the employer's actions, including: Bost failed to advise the FMLA doctor that the L&I doctor had released him to full duty so they needed updated information from the FMLA doctor; light duty would no longer be financially subsidized by L&I because the L&I doctor released Bost to return to full duty; lack of light duty work; and concerns about Bost not timely reporting injuries.

After the employer met its burden of articulating a non-discriminatory reason for its actions, the union bears the ultimate burden of proving the employer's reasons were either pretext or union animus substantially motivated the employer's actions. The union did not meet this burden.

While the union may strongly disagree with the reasons the employer articulated for its actions, the union did not establish the reasons were pretext for retaliation or that union animus substantially motivated the employer's action. The employer had genuine concerns about Bost returning to light duty, especially when he had been released to full duty by the L&I doctor and delayed sharing that information with the employer and the FMLA doctor.

With respect to whether union animus substantially motivated the employer's decision not to allow Bost to continue in the light duty assignment, the record contains no evidence of union animus. No exhibit or testimony describes Bost's involvement in the union except for the other unfair labor practice case which is based on Bost and other employees wearing union buttons. No exhibit or testimony describes the involvement in the union of those who donated leave to Bost. No exhibit or testimony reveals any comments made or actions taken by employer representatives even hinting at union animus.

Based upon the record, I conclude the union failed to prove the employer discriminated against Bost and dismiss the union's complaint.

The Preliminary Ruling Did Not Include an Independent Interference Cause of Action

The union's brief argues the employer interfered with employee rights in violation of Chapter 41.56 RCW. The Commission's regulations explain the critical role the preliminary ruling plays to limit causes of action that can be litigated in hearings:

> The preliminary ruling limits the causes of action before an examiner and the commission. A complainant who claims that the preliminary ruling failed to address one or more causes of action it sought to advance in the complaint must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling.

WAC 391-45-110(2)(b). Commission precedent confirms that the preliminary ruling frames the issues for hearing. *King County*, Decision 9075-A (PECB, 2007).

The preliminary ruling in this case included causes of action for unilateral change and discrimination. The preliminary ruling did not include an interference cause of action, so in this decision, I do not address an independent claim of interference.[7]

FINDINGS OF FACT

1. The Port of Anacortes (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The International Longshore and Warehouse Union, Local 25 (union) serves as the exclusive bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit of employees performing facilities and maintenance services for the employer.

3. At the time of the hearing, the parties had yet to reach their first collective bargaining agreement.

4. David Bost, a bargaining unit employee, serves as a maintenance mechanic 3.

5. Bost suffered a work-related injury for which he had surgery in the fall of 2013. Bost returned to a light duty assignment on or about December 23, 2013. The cost of the light duty assignment was subsidized by the Washington State Department of Labor and Industries' (L&I) Stay-at-Work Program.

[7] Derivative interference differs from an independent cause of action for interference. The preliminary ruling, reproduced above, included a parenthetical reference to derivative interference. As a routine practice, preliminary rulings finding causes of action for employer discrimination and refusal to bargain include reference to derivative interference, inferring that employees would reasonably perceive discriminatory conduct or refusal to bargain as an interference with employee rights. See *Mason County*, Decision 10798-A (PECB, 2011) (derivative interference attaches to a refusal to bargain violation).

6. On January 14, 2014, Bost was working in the light duty assignment when he experienced a non-work related medical issue and was hospitalized for several days. He did not return to work until February 10.

7. On January 21, Bost and Lindsey Herrick, the employer's human resources generalist, spoke by phone about Family Medical Leave Act (FMLA) leave and shared leave for Bost's non-work related medical issue. Herrick e-mailed staff Bost's request to receive donations of shared leave on the same day.

8. On February 3, the L&I doctor released Bost to return to full duty without restriction as of February 3; Bost did not share this information with the FMLA doctor and did not share it with the employer until February 11.

9. On February 4, Bost and Herrick spoke by telephone; Bost reported the FMLA doctor may release him to light duty the following Monday (February 10). Bost said nothing about the L&I doctor releasing him to full duty. Herrick e-mailed Bost the light duty job description and asked him to have the FMLA doctor review it to determine his ability to return to work.

10. On February 5, the FMLA doctor signed the release for Bost to return to light duty on February 10.

11. On February 6, Herrick e-mailed the employer's staff indicating that the employer would comply with a public records request from Tyler Ashbach (union representative) requesting employee discipline information.

12. On February 10, Bost returned to light duty.

13. On February 11, Bost informed the employer the L&I doctor released him to full duty effective February 3. Bost said he disagreed and planned to get a second opinion.

14. On February 11, Bost requested to review his personal file in light of the public records request. Herrick scheduled a meeting for Bost to review his personnel file on February 12 in response to his request; he reviewed his personnel file on February 21.

15. On February 11, after learning the L&I doctor released Bost to full duty without restriction, Herrick met with Deputy Executive Director Chris Johnson and Executive Director Bob Hyde to discuss Bost's light duty. Herrick was concerned that the FMLA doctor did not know the L&I doctor had released Bost to full duty, and she had only sent the FMLA doctor the light duty job description. Herrick testified about how Bost's situation was not something she had faced before. Bost had a work-related injury and a non-work related injury with different doctors treating him for each injury. The L&I doctor released him to full duty and the FMLA doctor released him to light duty not knowing the L&I doctor had released him to full duty. Herrick explained: "So I wanted to make sure that we were releasing him to the right duty."

16. At the February 11 meeting, Johnson decided to discontinue Bost's temporary light duty assignment. After the meeting, Herrick called Bost and told him to remain home until released for full duty by the FMLA doctor. Bost said he could probably get in to see the doctor the next day. Herrick advised him he had additional donated leave he could use until the FMLA doctor released him to full duty.

17. Unfortunately, an error in the employer's new payroll system double-counted the number of leave hours one employee donated, so Bost had less accumulated shared leave available than Herrick realized. As a result, Bost exhausted the accumulated shared leave prior to his return to full duty. The new payroll system's double-counting problem impacted employees in addition to Bost.

18. On February 18, Herrick contacted Bost because she had not heard from him since February 11. He said he was seeing the FMLA doctor the next day. On February 19, Bost gave Herrick the FMLA doctor's release to return to full duty without restriction dated February 18.

19. The employer has no written policy addressing light duty. The record includes no documentary evidence of light duty assignments, other than documentation relating to Bost's 2013 and 2014 light duty.

20. Over the course of approximately 12 years, Jason Chandler worked for the employer in two supervisory positions: maintenance supervisor and manager of operations and maintenance.

21. The example of an employee who returned to work wearing a protective boot after suffering an off-duty lawn mower accident lacks the detail necessary to determine whether the incident contributes to establishing a past practice of placing employees in light duty assignments when they have been injured off-duty.

22. Josh Beaner's injuries and return to work included:
    - Knee injury: in about 1996 a different supervisor allowed Beaner and a janitor to switch jobs.
    - Broken wrist: date not reported. Beaner testified credibly that when he returned to work after breaking his wrist he wore an operational cast that allowed him to perform his regular duties.
    - Shoulder/collarbone
        - About seven years ago Beaner broke his shoulder/collarbone. After taking some time off work, he returned to his regular position. He testified he was supposed to be placed on light duty, but "did not do light duty."
        - About three years ago, after moving to more of a "desk job," Beaner broke his shoulder/collarbone. He did not require light duty.
    - Operation on a toe: no details offered.
    - Accident resulting in soreness: no details offered.

23. In Herrick's six years in the employer's human resources department, she could recall no employee requesting light duty except Bost.

24. Providing light duty assignments is not the known and mutually accepted response when employees are injured off-duty. The union did not establish a past practice with respect to light duty assignments.

25. Deputy Executive Director Chris Johnson credibly testified about several reasons for the employer's actions, including: Bost failed to advise the FMLA doctor that the L&I doctor had released him to full duty so they needed updated information from the FMLA doctor; light duty would no longer be financially subsidized by L&I because the L&I doctor released Bost to return to full duty; lack of light duty work; and concerns about Bost not timely reporting injuries.

26. The employer had genuine concerns about Bost returning to light duty, especially when he had been released to full duty by the L&I doctor and delayed sharing that information with the employer and the FMLA doctor.

27. The record contains no evidence union animus substantially motivated the employer's decision not to allow Bost to continue in the light duty assignment. No exhibit or testimony describes Bost's involvement in the union except for the reference to the other unfair labor practice case which is based on Bost and other employees wearing union buttons. No exhibit or testimony describes the involvement in the union of those who donated leave to Bost. No exhibit or testimony reveals any comments made or actions taken by employer representatives even hinting at union animus.

CONCLUSIONS OF LAW

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

2. By its actions described in the above Findings of Fact, the Port of Anacortes did not unilaterally change a past practice and refuse to bargain in violation of RCW 41.56.140(4) when it discontinued David Bost's temporary light duty assignment.

3. By its actions described in the above Findings of Fact, the employer did not discriminate against David Bost in violation of Chapter 41.56 RCW when it discontinued his temporary light duty assignment and when doing so required him to be off work and to exhaust the leave colleagues donated to him.

ORDER

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

ISSUED at Olympia, Washington, this 17th day of September, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JAMIE L. SIEGEL, 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.