STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY REGIONAL AFIS GUILD, Complainant, vs. KING COUNTY, Respondent.	CASE 127743-U-15 DECISION 12582 - PECB SECOND AMENDED PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On December 1, 2015, the King County Regional AFIS Guild (union) filed a complaint with the Public Employment Relations Commission alleging unfair labor practices against King County (employer). The union filed an amended complaint on December 4, 2015, and Unfair Labor Practice Manager Jessica J. Bradley issued a preliminary ruling on December 16, 2015, finding causes of action to exist for allegations of employer refusal to bargain and employer discrimination in violation of Chapter 41.56 RCW. On December 18, 2015, the matter was assigned to Examiner Stephen W. Irvin to conduct a hearing.

On April 5, 2016, the union filed a second amended complaint charging the employer with additional unfair labor practices. The Examiner reviewed the second amended complaint under WAC 391-45-070 and WAC 391-45-110 and granted the union's motion to amend its complaint. As detailed in the amended preliminary ruling issued on April 11, 2016, the allegations of the amended complaint that qualified for further processing concerned:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)] since October 23, 2015, by unilaterally changing vacation leave policies for bargaining unit employees, without bargaining to an agreement or lawful impasse.
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> Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)]:

1. Since November 19, 2015, by revoking Marquel Allen's lead status and premium pay in reprisal for union activities protected by Chapter 41.56 RCW.

2. Since November 19, 2015, by subjecting Allen to an internal investigation in reprisal for union activities protected by Chapter 41.56 RCW.

3. On March 16, 2016, by providing an unfavorable performance appraisal for Allen in reprisal for union activities protected by Chapter 41.56 RCW.

Employer interference with employee rights in violation of RCW 41.56.140(1):

1. On February 26, 2016, by sending an e-mail to bargaining unit members that suspended leave requests for potential witnesses in this unfair labor practice hearing and asked bargaining unit members to avoid discussion of matters related to the unfair labor practice hearing.

On April 22, 2016, the union made a motion for the Examiner to clarify the amended preliminary ruling. The union contended that the amended preliminary ruling did not properly address all of the discrimination and independent interference charges contained in the union's second amended complaint.

On May 19, 2016, the union filed a third amended complaint charging the employer with additional unfair labor practices in connection with a written reprimand Allen received on May 11, 2016, as a result of an internal investigation.

On May 23, 2016, the union filed a fourth amended complaint providing additional facts surrounding the written reprimand Allen received on May 11, 2016. The fourth amended complaint also clarified that the union is seeking an independent interference cause of action for statements that the employer allegedly made on November 19, 2015.

ISSUES

1. Does a cause of action exist for employer discrimination in connection with the February 26, 2016, e-mail to bargaining unit members that limited discussion of the matters related to the unfair labor practice hearing?

2. Does a cause of action exist for employer discrimination in connection with the February 26, 2016, e-mail to bargaining unit members that suspended leave requests for potential witnesses in the unfair labor practice hearing?

3. Does a cause of action exist for employer independent interference in connection with Allen's March 16, 2016, performance appraisal?

4. Does a cause of action exist for employer discrimination and independent interference in connection with Allen's May 11, 2016, written reprimand?

5. Does a cause of action exist for employer independent interference in connection with statements the employer is alleged to have made on November 19, 2015?

The facts in the second amended complaint do not state a cause of action for employer discrimination in connection with the February 26, 2016, e-mail to bargaining unit members. The union's second amended complaint does not describe any specific instance of a bargaining unit member being deprived of some ascertainable right, benefit, or status. The second amended complaint also does not contain any examples of employer reprisal or discrimination for employee discussion of the matters related to the unfair labor practice hearing or of the employer suspending leave requests for potential witnesses in the unfair labor practice hearing. Rather, the facts as pled describe independent interference with employee rights, for which the union already received a cause of action.

A cause of action for employer independent interference in connection with Allen's March 16, 2016, performance appraisal cannot be granted because the discrimination allegation regarding Allen's performance appraisal was pled on the same facts. Commission case precedent precludes the issuance of a cause of action for independent interference based on the same facts as a discrimination allegation.

The third and fourth amended complaints have been reviewed under WAC 391-45-070 and WAC 391-45-110, and they appear to meet the conditions of WAC 391-45-070(1). The union's motions to amend its complaint are granted.

Assuming for purposes of this preliminary ruling that all of the facts alleged in the third amended complaint are true and provable, it appears that an unfair labor practice violation could be found for discrimination in connection with Allen's May 11, 2016, written reprimand.

A cause of action for independent interference in connection with Allen's May 11, 2016, written reprimand cannot be granted because the discrimination allegation regarding Allen's written reprimand was pled on the same facts. Again, Commission case precedent precludes the issuance of a cause of action for independent interference based on the same facts as a discrimination allegation.

The facts described in the fourth amended complaint state a cause of action for independent interference on November 19, 2015. The statements that an employer representative is alleged to have made on November 19, 2015, that the employer "generally do[es] not allow [union] representatives to attend meetings" at the request of an employee and that management should be able to talk to employees without them "guilding up" could constitute independent interference in violation of RCW 41.56.140(1).

ANALYSIS

Applicable Legal Standards

Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *Jefferson County Public Utility District No. 1*, Decision 12332-A (PECB, 2015). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing:

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.

City of Vancouver, Decision 10621-B (PECB, 2012), *aff'd in part*, *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348-349 (2014); *Educational Service District 114*, Decision 4361-A (PECB, 1994).

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to common experience give rise to a reasonable inference of the truth of the fact sought to be proved. *See Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Id.* If the respondent meets its burden of production, the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or that union animus was a substantial motivating factor for the employer's actions. *Id.*

Interference

Employees covered by Chapter 41.56 RCW have the right to organize and designate representatives of their own choosing for purposes of collective bargaining or exercise other rights under the chapter free from interference, restraint, coercion, or discrimination. RCW 41.56.040; *Kitsap County*, Decision 12022-A (PECB, 2014). It is an unfair labor practice for a public

employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by Chapter 41.56 RCW. RCW 41.56.140(1).

To prove an interference violation, the complainant must prove, by a preponderance of the evidence, the employer's conduct interfered with protected employee rights. *Washington State Patrol*, Decision 11863-A (PECB, 2014); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *remedy aff'd*, *Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn. App. 809 (2000). An employer interferes with employee rights 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. *Washington State Patrol*, Decision 11863-A; *Kennewick School District*, Decision 5632-A (PECB, 1996).

An employer may interfere with employee rights by making statements, through written communication, or by actions. *Washington State Patrol*, Decision 11863-A; *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A. The complainant is not required to demonstrate that 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. *Id.*

Application of Standards

Paragraphs 3.18 and 3.19 of the union's second amended complaint state that Jail ID Supervisor Lisa Wray sent an e-mail to Allen and employees of the Jail ID bargaining unit. According to the complaint, Wray advised employees of the upcoming unfair labor practice hearing in this matter and further wrote:

> Potential witnesses need to ensure that they are available on these dates. You are on this email because you are a potential witness. As the time draws closer, leave requests for this time frame will be held until final determinations are made about who is needed by the Guild and by the KCSO [King County Sheriff's Office] to testify at the hearing. A mediation session is scheduled in May, at which time one

> or all issues may be resolved. For now, please make sure you are available these three days.

In Paragraph 4.9 of the union's second amended complaint, the union contends that withholding approval on leave requests during the hearing dates for employees identified as potential witnesses is discrimination in reprisal for union activities.

To have a cause of action for discrimination, the union must charge that an employee or employees were deprived of some ascertainable right, benefit, or status. The union's second amended complaint provided no specific instances where employees were denied leave; therefore, no cause of action for discrimination can be found.

The union's second amended complaint states that Wray's e-mail closed as follows:

> In order to ensure a comfortable work environment for everyone and protect confidentiality of a related IIU investigation, please maintain the confidentiality of substantive testimony, and avoid unnecessary discussion of these matters that may make co-workers uncomfortable. See GOM 3.03.090 which outlines the requirement for confidentiality of investigations. This does not preclude you from discussing the case with a legal representative in this ULP process, or appropriate command staff or legal advisor with regard to the pending IIU investigation.
>
> If you would like further clarification or have any questions, you may contact KCSO legal advisor, Diane Taylor.

In Paragraph 4.7 of its second amended complaint, the union contends that the employer's decision to send this e-mail while an unfair labor practice complaint is pending "is effectively putting a gag order on discussing the case among Guild members" and constitutes discrimination in reprisal for union activities.

As was the case regarding the potential restriction of leave, the union must charge that an employee or employees were deprived of some ascertainable right, benefit, or status to have a cause of action for discrimination. The union's second amended complaint provided no specific instances where

employees were deprived of any right, benefit, or status; therefore, no cause of action for discrimination can be found.

Discrimination Versus Independent Interference

In Paragraphs 4.11 and 4.12 of the second amended complaint, the union seeks causes of action in connection with Allen's annual performance appraisal for both discrimination and independent interference. In Paragraphs 4.13 and 4.14 of the third amended complaint, the union seeks causes of action in connection with Allen's written reprimand for both discrimination and independent interference. The Commission does not find independent interference allegations based upon the same set of facts in a dismissed discrimination complaint. *Northshore Utility District*, Decision 10534-A (PECB, 2010), *citing Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

To establish an interference violation under RCW 41.56.140(1) independent from an allegation of discrimination, a complainant needs to establish that a party engaged in separate conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. *Reardan-Edwall School District*, Decision 6205-A.

The facts described in the fourth amended complaint state a cause of action for independent interference on November 19, 2015. The statements that an employer representative is alleged to have made on November 19, 2015, that the employer "generally do[es] not allow [union] representatives to attend meetings" at the request of an employee and that management should be able to talk to employees without them "guilding up" could constitute independent interference in violation of RCW 41.56.140(1).

CONCLUSION

The second amended complaint does not describe a cause of action for employer discrimination in connection with the February 26, 2016, e-mail to bargaining unit members. The facts do not show that any bargaining unit member was actually deprived of some ascertainable right, benefit, or status. A cause of action for employer independent interference in connection with Allen's

March 16, 2016, performance appraisal cannot be granted because it was pled on the same facts as the discrimination allegation that received a cause of action for further case processing.

The third and fourth amended complaints have been reviewed under WAC 391-45-070 and WAC 391-45-110, and they appear to meet the conditions of WAC 391-45-070(1). The union's motions to amend its complaint are granted.

Assuming for purposes of this preliminary ruling that all of the facts alleged in the third amended complaint are true and provable, it appears that an unfair labor practice violation could be found for discrimination in connection with Allen's May 11, 2016, written reprimand.

A cause of action for independent interference in connection with Allen's May 11, 2016, written reprimand cannot be granted because the discrimination allegation regarding Allen's written reprimand was pled on the same facts.

The facts described in the fourth amended complaint state a cause of action for independent interference on November 19, 2015. The fourth amended complaint states a cause of action for further case processing.

WAC 391-45-110(2) requires the filing of an answer in response to an amended preliminary ruling which finds a cause of action to exist. Cases are reviewed after the answer is filed to evaluate the propriety of a settlement conference under WAC 391-45-260, deferral to arbitration under WAC 391-45-110(3), priority processing, or other special handling.

PLEASE TAKE NOTICE that the person or organization charged with an unfair labor practice in this matter (the respondent) shall file and serve its answer to the fourth amended complaint by June 16, 2016.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the complaint. Service shall be completed no later than the day of filing. An answer shall:

1. Specifically admit, deny, or explain each fact alleged in the fourth amended complaint, except if a respondent states it is without knowledge of the fact that statement will operate as a denial.

2. Assert any other affirmative defenses that are claimed to exist in the matter.

Except for good cause shown, a failure to file an answer within the time specified, or the failure of an answer to specifically deny or explain a fact alleged in the complaint, will be deemed to be an admission that the fact is true as alleged in the complaint and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

ORDER

1. Assuming all of the facts alleged to be true and provable, the fourth amended complaint states a cause of action, summarized as follows:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)] since October 23, 2015, by unilaterally changing vacation leave policies for bargaining unit employees, without bargaining to an agreement or lawful impasse.

The above refusal to bargain allegation will be the subject of further proceedings under Chapter 391-45 WAC.

2. Assuming all of the facts alleged to be true and provable, the discrimination allegations of the fourth amended complaint state causes of action, summarized as follows:

Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)]:

1. Since November 19, 2015, by revoking Marquel Allen's lead status and premium pay in reprisal for union activities protected by Chapter 41.56 RCW.

2. Since November 19, 2015, by subjecting Allen to an internal investigation in reprisal for union activities protected by Chapter 41.56 RCW.

3. On March 16, 2016, by providing an unfavorable performance appraisal for Allen in reprisal for union activities protected by Chapter 41.56 RCW.

4. On May 11, 2016, by providing a written reprimand to Allen in reprisal for union activities protected by Chapter 41.56 RCW.

The above discrimination allegations will be the subject of further proceedings under Chapter 391-45 WAC.

3. Assuming all of the facts alleged to be true and provable, the independent interference allegations of the fourth amended complaint state causes of action, summarized as follows:

Employer interference with employee rights in violation of RCW 41.56.140(1):

1. On November 19, 2015, by making statements that could reasonably be perceived as a threat of reprisal or force, or promise of benefit, associated with the employees' union activity.

2. On February 26, 2016, by sending an e-mail to bargaining unit members that that could reasonably be perceived as a threat of reprisal or force, or promise of benefit, associated with the employees' union activity by:

   a. Suspending leave requests for potential witnesses in this unfair labor practice hearing.

   b. Asking bargaining unit members to avoid discussion of matters related to the unfair labor practice hearing.

The above independent interference allegations of the amended complaints will be the subject of further proceedings under Chapter 391-45 WAC.

4. The allegations concerning discrimination in Paragraphs 4.7 and 4.9, which were added in the second amended complaint filed on April 5, 2016, are DISMISSED for failure to state a cause of action.

5. The allegation concerning independent interference in Paragraph 4.12, which was added in the second amended complaint filed on April 5, 2016, is DISMISSED for failure to state a cause of action.

6. The allegation concerning independent interference in Paragraph 4.14, which was added in the third amended complaint filed on May 19, 2016, is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 2nd day of June, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

STEPHEN W. IRVIN, Examiner

Paragraphs 4 through 6 of this order will be
the final order of the agency on
any defective allegations, unless
a notice of appeal is filed with
the Commission under WAC 391-45-350.

COLLECTIVE BARGAINING
PERC
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 06/02/2016

DECISION 12582 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 127743-U-15

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REP BY:	DIANE HESS TAYLOR KING COUNTY 516 THIRD AVENUE W116 KCC-SO-0100 SEATTLE, WA 98104 diane.taylor@kingcounty.gov (206) 263-2544
PARTY 2:	KING COUNTY REGIONAL AFIS GUILD
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