STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. CENTRAL WASHINGTON UNIVERSITY, Respondent.	CASE 21259-U-07-5423 DECISION 10118-A - PSRA DECISION OF COMMISSION

Eric Nordlof, General Counsel, for the union.

Rob McKenna, Attorney General, by *Lawson Dumbeck,* Assistant Attorney General, for the employer.

Public School Employees of Washington (union) filed an unfair labor practice complaint alleging that Central Washington University (employer) discriminated and interfered with protected rights in violation of Chapter 41.80 RCW by prohibiting employees from using the employer's electronic mail (e-mail) and intranet bulletin boards for its organizing effort. Examiner Claire Nickleberry held a hearing and ultimately dismissed the union's complaint.[1] The union now appeals that decision.

ISSUES PRESENTED

1. Did the employer discriminate and interfere with protected employee rights when it refused to allow use of its e-mail system for a union organizing campaign?

2. Did the employer discriminate and interfere with protected employee rights when it refused to allow use of its intranet bulletin board for a union organizing campaign?

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1 *Central Washington University*, Decision 10118 (PSRA, 2008).

For the reasons set forth below, we affirm the Examiner's conclusion that the employer did not commit an unfair labor practice when it refused to allow employees use of its e-mail or intranet bulletin board for union organizing.[2] Public employees do not have an inherent right to use the employer's equipment for union organizing. This record demonstrates that the employer's e-mail policy prohibited employees from using that system for postings that did not further its mission, and there was no evidence demonstrating that the employer applied its policy disparately with respect to non-work related messages, including union organizing messages. Therefore, the employer lawfully prohibited employees from using the e-mail system for sending messages about union organizing.

With respect to the allegation that the employer precluded employees from posting union organizing information on the intranet bulletin board, the union failed to prove its case. The evidence demonstrates that no university employee actually attempted to post a union-related message on the employer's intranet bulletin board. Thus, because the employer's policy was never applied to union related materials, we lack the necessary evidence to determine whether the employer applied its bulletin board policy in a disparate manner to allow non-work related materials while precluding union related material.

DISCUSSION

The facts leading up to the union's complaint are not in dispute. In 2007, the union started a campaign to organize employees. In July of that year, senior secretary Angie Wedekind sent an e-mail to some of her colleagues suggesting that forming a union might be a good idea. Shortly thereafter, Wedekind's supervisor reminded her of the guidelines for e-mail use and informed her that she was not to use the e-mail system for union related activities. Wedekind was not disciplined in any way for sending the e-mail.

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[2] This Commission reviews conclusions and applications of law, as well as interpretations of statutes, *de novo*. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

Following this event, the union contacted the employer to request that employees be allowed to use the employer's e-mail system and intranet bulletin board to communicate information about the organizing effort. The employer informed the union that university policy prohibits "any employees to post communications on our intranet to support the efforts of any outside entity (union or non-union)." The union then filed this complaint.

The preliminary ruling found that the union's complaint stated a cause of action of employer discrimination and interference in violation of the Personnel System Reform Act of 2002, Chapter 41.80 RCW, "by refusing to allow use of employer provided electronic mail and bulletin boards for the purpose of collective bargaining,[3] while at the same time allowing its employees the use of employer-provided electronic mail and intranet bulletin board for a wide variety of other non-employer related purposes" and forwarded the complaint for a hearing. The Examiner ultimately dismissed the union's complaint. This appeal followed.

Applicable Legal Standard - Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994).[4] The employee maintains the burden of proof in employer 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

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[3] Although union organizing is an activity protected under Chapter 41.80 RCW, it is not collective bargaining.

[4] Cases decided under Chapter 41.56 RCW are applicable to cases decided under Chapter 41.80 RCW unless the provisions of Chapter 41.80 RCW specifically provide otherwise. *State – Transportation*, Decision 8317-B (PSRA, 2005)(unlike Chapter 41.56 RCW, "internal auditors" are specifically precluded from coverage of the Chapter 41.80 RCW).

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 the *prima facie* case 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*, Decision 4626-A.

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.

Applicable Legal Standard - Interference

Generally, the burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party or individual. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or 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. *See 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 a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A. However, an independent interference violation cannot be found under the same set of facts that fail to constitute a discrimination violation. *See Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

Application of Standards – Use of Employer's E-mail

The Examiner found that the employer did not commit an unfair labor practice when it precluded employees from using its e-mail system for union organizing purposes. In reaching this conclusion, the Examiner found that the union did not have an inherent right to use the e-mail system, and the employer's policy regarding acceptable use of its e-mail system allowed e-mail transmittals related to "learning, teaching, research, and university business." The Examiner also found that although the employer allowed employees *de minimis* use of the e-mail system for sending individual messages, it has consistently enforced its policy that precluded employees from sending solicitations or outside organizations from using the system. Although the Examiner only analyzed this issue under the "interference" standard, as opposed to the "discrimination" and "interference" standard framed by the preliminary ruling, we nevertheless agree with her conclusion.[5]

The Union Failed to Make a *Prima Facie* Case of Discrimination

Although RCW 41.80.050 guarantees employees "the right to self-organize, to form, join or assist employee organizations, and to bargain collectively with their employer through a bargaining representative of their own choosing," Washington's labor laws do not give public employees an independent right to use an employer's equipment or facilities for union business, including for union organizing. *See, e.g., Whatcom County*, Decision 8245-A (PECB, 2004), *citing City of Seattle*, Decision 1355 (PECB, 1982).

For example, in *King County*, Decision 6734-A (PECB, 2000), the Commission affirmed an Executive Director decision holding that employees engaged in a campaign to decertify an existing union did not have the right to use the employer's e-mail system to support that campaign. Although the complainant alleged that other labor organizations were using the

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[5] For a discussion regarding an Examiner's obligation to follow the issues framed by the preliminary ruling, see *King County*, Decision 9075-A (PECB, 2006).

employer's e-mail for union business, the complainant failed to provide any specific evidence demonstrating that this occurred.

In *Whatcom County*, Decision 8245-A, the Commission clarified the standard by reiterating that public employees do not have a right to use an employer's facilities or equipment for an organizing campaign. This state's labor laws are meant to ensure that an employer remain neutral throughout the entirety of a union representation proceeding. *See Washington State Patrol*, Decision 2900 (PECB, 1987).

Although the union satisfied the first step in establishing a prima facie case by demonstrating that Wedekind engaged in a protected activity (assisting in the formation of a labor organization), it failed to demonstrate that she was deprived of a right or benefit because employees do not have an inherent right to use the employer's e-mail for organizing. In order to prove the second step in the analysis, the union needed to demonstrate that the employer disparately applied its policy by allowing non-work related e-mails to be disseminated through the e-mail system, or by granting other unions preferential treatment.

This record establishes that the employer consistently enforced its policy that precluded employees from using the e-mail system to send messages to groups of other employees that were not related to the employer's mission. Although the employer did allow employees to make *de minimis* use of the e-mail system to send individual personal messages,[6] that use did not rise to a level demonstrating that the employer permitted solicitations through the e-mail system, and the union did not present any evidence demonstrating the outside organizations were permitted to use the e-mail system.

The union argues that the employer allows other bargaining representatives to use the e-mail system to communicate with their members. The union points out that Washington Federation of State Employees (WFSE) and United Faculty of Central (UFC) both are permitted to use the

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[6] For example, the employer precluded e-mails that supported outside businesses, lobbying, illegal activities, and gambling. Testimony of Internal Auditor Margaret Ann Smith, Transcript pg. 152, line 10-12. The employer also instructed employees that *de minimis* use of the e-mail system is use: that is "brief, infrequent, effective," that did not "interfere with work," "disrupt the business or employees," and that did not "compromise [the employer's] security systems." Exhibit 13.

employer's e-mail system for contract administration. The union's reliance on other groups' use of the employer's e-mail system is misplaced.

The use of the employer's e-mail by WFSE and UFC is factually distinguishable from this case because those two labor organizations secured e-mail usage rights through their respective collective bargaining agreements. There is no evidence in this record to establish that WFSE or UFC were allowed to use the e-mail for organizational efforts.

Simply stated, the union failed to demonstrate that the employer disparately applied its e-mail policy to discriminatorily deprive employees of any right. Because the union failed to establish that the employer discriminated against employees by precluding them from using the e-mail system for organizing, we must dismiss the interference claim, as well as the discrimination claim, because the alleged facts that gave rise to the discrimination claim are the same facts that gave rise to the interference claim.

Application of Standard – Use of Intranet Bulletin Board

With respect to the posting of information on bulletin boards, this Commission has followed the National Labor Relations Board rule that bulletin boards are not automatically available for protected literature. *See King County*, Decision 7819 (PECB, 2002). An employer may adopt a rule that prohibits *all* non-work related materials from being posted on its bulletin board and not be in violation of Chapter 41.80 RCW. However, an employer may not prohibit union related notices or discriminate against employees who post them when it allows non-work related materials, such as personal items for sale, non-work related services that are being offered or requested, or announcements about outside clubs or events, to be posted by employees on employer-owned bulletin boards. *King County*, Decision 8630-A (PECB, 2005). An employer who disparately applies its rules to prohibit union related materials commits an unfair labor practice.

The employer adopted certain criteria to regulate the posting of materials on its intranet bulletin board. (exhibit 4). That criterion allows posting of an advertisement provided:

- The announcement is relevant to the Intranet's intended audience and complies with all CWU communications guidelines.

- The information/announcement is directly related to the purpose and/or charter of the department, club or CWU recognized group or individual posting the announcement.

- The urgency of or intent of the announcement does not require a direct distribution (e-mailing) to the intended audience.

- Classified ads are intended for personal use and items, and no items related to a business or business ventures are to be posted. In addition, certain types of items are prohibited from being advertised or solicited on the CWU Intranet Sites. These include, but are not limited to, firearms, sexually explicit material, alcohol, drugs and related paraphernalia, or other items which are illegal or are prohibited due to related university policies.

The Examiner found that the employer did not discriminate by precluding employees from posting information about the union organizing effort on the employer's electronic bulletin board. The Examiner concluded that the employer uniformly enforced its policy of precluding postings on the intranet bulletin board that support outside organizations.

The union argues that the Examiner applied the incorrect standard to the analysis. In the union's view, if the employer allowed *any* non-work related postings on its intranet, then it could not discriminate against postings that promoted union organizing. To support this argument, the union argues that certain postings on the intranet bulletin board promoted outside organizations, such as an advertisement requesting moving boxes, an advertisement selling a snowboard, and an advertisement for the U.S. Bank branch located on the employer's campus.[7]

Unlike the National Labor Relations Board, this Commission does not investigate unfair labor practices. WAC 391-45-270(1)(b). In *King County*, Decision 8631-A, the Commission noted that it will evaluate each case on its own facts. In cases such as this, where a complainant is alleging that a policy violates Chapter 41.80 RCW or other Washington State labor laws, if the complained-of policy does not facially violate the act by specifically targeting union related materials, then a complainant must provide actual evidence regarding the employer's application of its policy in order for an unfair labor practice to be found.

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[7] Exhibit 1 pages 4, 5 and 6. Although U.S. Bank is an outside entity, it has a specific contractual arrangement with the employer to post information on the bulletin board.

Nothing in the employer's policy suggests that it was attempting to prohibit employees from engaging in activities protected by Chapter 41.80 RCW. Therefore, the question that must be answered is whether the employer disparately applied that policy to union related postings in a manner that violated Chapter 41.80 RCW.

This record demonstrates that in order to post an announcement on the employer's intranet bulletin board, an employee must submit the proposed announcement to an intranet facilitator for approval. Although this record demonstrates that the union had discussions with the employer about the use of its equipment for the organizing effort, no university employee made an actual attempt to submit an intranet bulletin board announcement to a facilitator for approval.

Therefore, without evidence of an employee actually attempting to exercise his or her rights under Chapter 41.80 RCW, including the contents of the proposed announcement, we cannot make a proper evaluation as to whether the employer disparately applied its policy. Accordingly, the facts of this case do not support a finding that the employer's intranet bulletin board policy violates Chapter 41.80 RCW, and the Examiner's ultimate conclusion to dismiss the union's complaint must be affirmed.[8]

Certain Evidence Should Have Been Excluded

Although we are dismissing the union's complaint for failure to demonstrate that an employee attempted to exercise a protected right, we take this opportunity to comment upon a particular evidentiary matter contained within this record. During the hearing, both parties introduced exhibits that were printed pages from intranet or internet sources. In several instances, the printed materials included a date-stamp that post-dated the union's complaint.

For example, the first of the union's exhibits, a series of bulletin board postings and e-mails indicated the following: the date-stamp on Exhibit 1, page 1 was December 12, 2007; the date-stamps on Exhibit 1, pages 10 through 20, were all after December 4, 2007. However, the

[8] Finding of Fact 4 of the Examiner's decision states that the employer's appropriate use policy for its information technology equipment "does not include the use of information technology resources to support outside organizations." Although the employer attempted to differentiate U.S. Bank's use of the intranet bulletin board by noting that the bank has a special contract with the school to post information, U.S. Bank is nevertheless an outside commercial organization that is allowed to use the employer's information technology resources. Accordingly, Finding of Fact 4 must be amended.

union's complaint was filed on September 21, 2007. Although the employer objected to the admission of those portions of Exhibit 1 that were dated after September 21, 2007, the Examiner nevertheless admitted Exhibit 1 in its entirety into the record. This was in error.

This Commission has previously held that an employer may only be required to redress claims for which it has been placed on notice. *See City of Seattle*, Decision 8313-B (PECB, 2004)(refusing to award damages for allegation not properly pled and detailing the amended complaint procedure). Although Chapter 34.05 RCW does not require administrative agencies to strictly follow the rules of evidence, this Commission expects our examiners to admit into evidence only those exhibits that came into existence on or within the six-month period prior to the filing of the complaint or amended complaint(s). Exhibits that pre-date the six-month statute of limitations may be admitted as background information, provided they are relevant to the case. In this case, it appears that the only pages of Exhibit 1 that were in existence *at the time* the complaint was filed were pages 2 through 9. All other pages apparently came into existence *after* the filing of the union's complaint.

Furthermore, several of the employer's rebuttal exhibits were taken from internet or intranet sources, and also were affixed with a date-stamp that indicates that they were printed after the filing of the union's complaint. Although many of these documents may have existed prior to the filing of the union's complaint, the employer should have attempted to use original documents, and not copies created later. Finally, even where the parties to a proceeding desire to stipulate to the authenticity of exhibits prior to the hearing, they should expect a hearing officer or examiner to only conditionally admit those exhibits. Until an exhibit has been affirmatively confirmed through testimony as being authentic, relevant to the proceeding, and timely, an examiner should not accept an exhibit into evidence.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact issued by Examiner Claire Nickleberry are AFFIRMED and adopted by the Commission, except Findings of Fact 4 and 5, which are amended to read as follows:

4. The employer maintains policies for appropriate use of the employer's information technology. Appropriate use includes activities that support the employer's mission. Although the policy states that appropriate use of information technology does not include use to support outside organizations, the employer does allow at least one outside organization to use its information technology resources.

5. In order to post a message on the intranet, the message must be approved by a facilitator. While some inappropriate postings have been posted, the employer attempts to uniformly enforce the policy and removes inappropriate postings. There is no evidence that any employee attempted to post information on the intranet bulletin board about the union organizing effort.

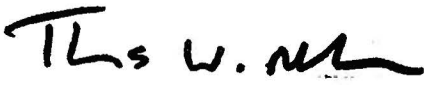
The Conclusions of Law and Order issued by Examiner Claire Nickleberry are AFFIRMED and adopted as the Conclusions of Law and order of the Commission.

ISSUED at Olympia, Washington, this 19th day of May, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner



THOMAS W. McLANE, Commissioner