STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, Complainant, vs. NORTHSHORE UTILITY DISTRICT, Respondent.	CASE 22092-U-08-5628 DECISION 10534-A - PECB DECISION OF COMMISSION

Audrey Eide, General Counsel, for the union.

Davis Grimm Payne & Marra, by *Joseph G. Marra*, Attorney at Law, for the employer.

The Washington State Council of County and City Employees (union) represents a bargaining unit of employees at the Northshore Utility District (employer). On November 6, 2008, the union filed an unfair labor practice complaint with this agency alleging that the employer committed multiple unfair labor practices, including discriminatorily discharging two employees for exercising collective bargaining rights and refusing to bargain in good faith over mandatory subjects of bargaining. On November 20, 2008, Unfair Labor Practice Manager David Gedrose issued a deficiency notice and provided the union an opportunity to cure the deficiencies in its complaint. On November 26, 2008, the union filed its amended complaint, and on December 4, 2006, the Unfair Labor Practice Manager issued a preliminary ruling setting this matter for hearing. Examiner Starr Knutson held a hearing and dismissed the union's complaint.[1] The union appeals the dismissal.

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[1] *Northshore Utility District*, Decision 10534 (PECB, 2009).

ISSUES PRESENTED

1. Did the employer terminate bargaining unit employees Cherie L'Heureux and Douglas Wittenger in retaliation for their exercise of protected collective bargaining rights in violation of RCW 41.56.140(1)?

2. Did the employer attempt to dominate the union in violation of RCW 41.56.140(2) by making a proposal during bargaining that local union officers may enter into memoranda of understanding without having the union's professional staff review such agreements prior to their effectiveness?

3. Did the employer fail to bargain in good faith over union security in violation of RCW 41.56.140(4) and (1) and by unlawfully escalating bargaining demands regarding union security, and by negotiating directly with bargaining unit employees?

For the reasons set forth below, we affirm the Examiner's decision that the employer did not commit an unfair labor practice.[2] Substantial evidence supports the Examiner's findings and conclusions that the employer did not discriminatorily terminate either L'Heureux or Wittenger in retaliation for exercising their collective bargaining rights. Substantial evidence also supports the Examiner's findings and conclusions that the union failed to prove that the employer attempted to dominate the union through its bargaining proposals. Finally, we also affirm the Examiner's decision that the employer did not commit an unfair labor practice by regressively bargaining about union security because the union's complaint is untimely, and there is no evidence that the employer attempted to directly negotiate with employees.

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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 Executive Director'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).

PROCEDURAL MATTERS

The employer challenges the union's appeal on the basis that the union failed to perfect filing of its appeal brief by timely sending a copy to the employer. The employer asserts that the union filed its brief to this agency electronically, as provided by in WAC 391-08-120(2)(c), but failed to e-mail a copy of its brief to the employer as required by WAC 391-08-120(3), even though the declaration of service indicates that it did. The employer questions whether the union actually filed a timely brief, and asks that the appeal be dismissed.

The union filed its notice of appeal on September 29, 2009, and the employer is not challenging the timeliness of this filing. Under WAC 391-45-350(6), any brief the union wished to file in support of its appeal was due fourteen days after the filing of its notice of appeal, or October 13, 2009. Agency records indicate that the union did, in fact, file its appeal brief on October 13, 2009. This record also demonstrates that the employer made no attempt to contact this agency to determine whether the union's brief was filed in a timely manner before alleging that it was not.

Furthermore, WAC 391-08-120(3) does not *require* that a party serving a brief or other paper on other parties do so in the same manner that it filed its papers with the agency. Rather, WAC 391-08-120(3) lists several approved methods by which a party may serve its papers. Although the union's certificate of service indicated that it e-mailed a copy of its brief to this agency and the employer, our rules technically did not require it to serve its brief on other parties in the same manner as it served this agency.

Moreover, although the union's alleged failure to e-mail a copy of its brief to the employer on the same day that it e-mailed that brief to the agency could have potentially prejudiced the employer, that delay does not warrant dismissal of the union's appeal. The employer did, in fact, receive a copy of the union's brief and the employer was free to file a motion with this Commission to request additional time for briefing (a request that is routinely granted provided both parties are in agreement with the delay). Where a party demonstrates that a late-filed brief has caused actual prejudice, this Commission *may* use its authority to strike that brief. However, provided the underlying notice of appeal has been timely filed, the underlying appeal should not be dismissed.

Finally, although this Commission strongly urges an appealing party to file a brief in support of an appeal, WAC 391-45-350 places no affirmative requirement that a party do so. *See Kitsap Transit*, Decision 10234-A (PECB, 2009).[3]

DISCUSSION

ISSUE 1 – Employer Discrimination with Protected Employee Rights

The complaint alleged that the employer unlawfully terminated L'Heureux and Wittenger in a reprisal for their union activities. L'Heureux started working for the employer in 2002 doing inventory and purchasing work. She was responsible for purchasing, receiving, and stocking inventory, processing employee time sheets, researching and overseeing service contracts, and other similar duties. Alycien Cockbain was her immediate supervisor.

L'Heureux served as the union's local chapter secretary from March 2006 until September 2007, when she resigned that from position. L'Heureux testified that when she was elected as local union secretary, her fellow employees informed her that, as a union officer, she would be under close scrutiny from the employer.

L'Heureux attended the September 10, 2007 Northshore Utility District Commission meeting with Pat Thompson, a member of the union's professional staff. At that meeting, L'Heureux and Thompson voiced concerns about the progress of negotiations between the employer and the union. In response to their comments, the employer wrote a letter to L'Heureux and Thompson, as well as the other union officers, outlining the employer's view of the state of negotiations. The letter also criticized the union for certain political activities that it undertook, for filing unfair labor practice complaints, and urged the union to continue face-to-face negotiations.

Following her resignation as a union officer, L'Heureux continued to work for the employer until she was terminated on June 13, 2008. The employer's stated reasons for terminating L'Heureux

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[3] Because this Commission reviews applicable legal standards and applications of law *de novo*, it is possible for an examiner's decision to be reversed on appeal without the benefit of briefing from either party.

were for insubordination and for a failure to comply with instructions given to her by her supervisor.

Wittenger started working for the employer in 2002 as an engineering specialist. His main duties included processing water and sewer extensions. Wittenger was elected as the local union president in 2003 and served in that capacity until 2006. Wittenger also testified that he faced intense scrutiny from the employer. Wittenger participated at the September 10, 2007 meeting where he spoke about a customer survey and also encouraged the employer to support employees in contract negotiations. He did not speak about any specific bargaining subject. Wittenger testified that he thought the employer received between fifty and one-hundred sewer extension applications per day. His supervisor, Engineering Director Dave Kaiser, testified that the employer received about two hundred applications a year.

Wittenger was laid-off from employment on June 27, 2008. The employer's stated reason for laying off Wittenger was a lack of work.

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). 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

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.

Application of Standard – Cherie L'Heureux

The Examiner found that the union made out its *prima facie* case of employer discrimination against L'Heureux. The employer has not challenged this finding. Accordingly, our analysis shall be limited to whether this record supports the Examiner's findings and conclusions that the employer articulated legitimate non-discriminatory reasons for her termination and whether the complainant proved that union animus was nevertheless a substantial motivating factor in the termination.

Employer's Non-Discriminatory Reasons

The Examiner found that the employer articulated several non-discriminatory reasons for the termination. For example, L'Heureux testified that she had been warned not to perform any union business at work, yet she admitted that she continued to do so. Cockbain testified that she discovered that L'Heureux failed to set up an account with Grainger Industrial Supply, an employer supplier, and instructed L'Heureux not to place any orders with Grainger for supplies because an account was needed for the employer to receive a discount on purchases. However, L'Heureux made at least two purchases without such an account. In a separate instance, L'Heureux failed to comply with an employer directive to ensure that products available for purchase from Office Depot were available at a lower price from an independent supplier.

In addition to the above-mentioned reasons, the employer also discovered that L'Heureux made numerous errors in entering employee payroll information. Cockbain discovered these discrepancies while she was temporarily filling in for L'Heureux. When confronted with these errors, L'Heureux admitted that she may have made some mistakes, but also defended her actions by stating that other department heads made errors, and that Cockbain or a different department head should have acted as a second set of eyes to ensure that the timesheets were accurate.

Union's Ultimate Burden

With respect to the union's ultimate burden, the Examiner found that the union failed to demonstrate that the employer's motives for terminating L'Heureux were pretextual. The union argues that the Examiner ignored testimony suggesting that L'Heureux felt intense scrutiny because of her work on behalf of and in and support of the union. The union points out that it

presented evidence of other employees who committed worse acts than L'Heuruex but were not terminated. The union suggests that termination was too harsh a discipline in this instance. We disagree.

Substantial evidence supports the Examiner's decision that the union failed to demonstrate that the employer was motivated by union animus when it discharged L'Heureux. As the Examiner pointed out, there is no evidence in this record demonstrating that other union officers suffered adverse employment action for speaking out at employer meetings. The Examiner discounted the union's argument that a different employee, a "union hater," was not terminated for falsifying a urine sample. Furthermore, in cases such as these, our analysis is limited to whether an employer's *motives* for disciplining an employee were in violation of Chapter 41.56 RCW, and not whether the level of discipline was appropriate. *See City of Yakima*, Decision 9451-B (PECB, 2007). In sum, we agree with the Examiner that the union failed to establish a case of discrimination.

Application of Standard – Douglas Wittenger

The Examiner also found that the union made its *prima facie* case of discrimination against Wittenger. Again, the employer has not challenged this finding. Accordingly, our analysis shall be limited to whether this record supports the Examiner's findings that the employer articulated legitimate non-discriminatory reasons for his termination and whether union animus was nevertheless a substantial motivating factor in the termination.

Employer's Non-Discriminatory Reasons

The Examiner found that the employer demonstrated that the downturn in the housing market was the primary reason that Wittenger was laid off from employment. The Examiner credited Kaiser's testimony explaining that in addition to the lack of work, other employees that the employer decided to retain had certain skills and knowledge that made their retention more attractive.[4] The Examiner also noted that the organizational chart demonstrates that between January 2008 and January 2009, the employer reduced the number of employees in the engineering department.

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[4] The union did not allege as part of this complaint that the employer violated the lay-off provisions of the parties' collective bargaining agreement.

Union's Ultimate Burden

With respect to the union's ultimate burden, the Examiner found that the union failed to prove that the employer discriminatorily laid-off Wittenger. Although Wittenger had previously been the local union chapter president, she specifically found that the employer's articulated reasons were not pretextual, and the union had not demonstrated that Wittenger's previous union activity motivated the employer to terminate him. The Examiner also noted that other employees in the engineering department served as union officers without reprisal.

The union argues that the Examiner failed to consider Wittenger's testimony that he felt he had a "bulls-eye" on him because of his previous support for the union. The union also asserts that Wittenger could not have been laid-off for lack of work considering he had been given additional assignments shortly before the employer took action. We disagree.

The Examiner specifically discredited Wittenger's testimony that he suffered intense scrutiny based upon his own testimony. She specifically found that "his demeanor did not match his words," and pointed out that Wittenger testified that instances where he was disciplined by his supervisor were warranted. Although the union disagrees with the Examiner's conclusion and offers its own version of events, this disagreement is not enough to warrant reversal of any of the Examiner's factual findings. *See Clark County*, Decision 9127-A (PECB, 2007). Substantial evidence supports the Examiner's findings and the conclusion that the union failed to demonstrate that the employer's motives were nevertheless pretextual.

Independent Interference Claim Must be Dismissed

The union claims that the Examiner erroneously failed to address the union's independent interference allegations. In effect, the union argues that Commission precedent states that where a discrimination claim is dismissed, a *derivative* interference violation must be dismissed, but that does not preclude a finding of an independent interference violation provided an independent interference claim is framed in the preliminary ruling. We disagree.

Commission precedent is clear: an independent interference violation cannot be found under the *same set of facts* that failed to constitute a discrimination violation. *See Reardan-Edwall School*

District, Decision 6205-A (PECB, 1998)(*emphasis ours*). We decline to overrule this longstanding precedent in this case.

ISSUE 3 – Domination of the Union

The union alleged that a string of e-mails sent between Cockbain and Thompson demonstrated the employer's intent to dominate the union. Exhibit 14. The e-mails concern a proposal that would allow local union officers to enter into binding memoranda of understanding without notice to or review by the union's professional staff. That proposal provided:

> The District and Union may come to understandings, from time to time, for the clarification and execution of the various terms of this Agreement. These subsequent understandings will be documented in the form of memorandums of understanding (MOU's). At least two of the three Union Officers will execute these MOU's jointly on behalf of the Union and the District's General Manager shall do the same on behalf of the District. For all purposes herein, the local Union's president, vice president, and secretary shall be agents of the Union.

The string of e-mails suggest that Thompson was concerned about the above-referenced language because he did not want memoranda of understanding to be enforceable without the signature of a professional union staff member. Cockbain responded that she was confused about whether local union officers were considered agents of the union who possess the authority to enter into binding agreements. Thompson responded that he was concerned that without review of union professional staff, the employer would attempt to force the local union officers into signing agreements prematurely.

Applicable Legal Standard

The Examiner's decision correctly states the law. It is unlawful under RCW 41.56.140(2) for an employer to control, dominate or interfere with a bargaining representative. The union bears the burden of proof and must establish that the employer intended to control or interfere with the administration of the union and/or intended to dominate the internal affairs of the union. *King County*, Decision 2553-A (PECB, 1987).

The element of intent in the case of control, domination or interference in RCW 41.56.140(2) is in contrast to the standard for interference previously discussed regarding RCW 41.56.140(1), where the showing of intent is not required. *See Community College District 13 – Lower Columbia*, Decision 8117-B (PSRA, 2005).

Application of Standard

The Examiner concluded that the union failed to prove that the employer intended to dominate the union. She specifically found that the e-mail exchange between Cockbain and Thompson had not been communicated to bargaining unit employees. The union claims that this e-mail series demonstrates that the employer wanted to ensure that union professionals could be excluded from reviewing tentative agreements so it could pressure local union representatives to quickly sign memoranda of understanding or tentative agreements. In effect, the union asserts that the employer's proposal in and of itself demonstrates an intent to dominate the union. The union supports this argument by asserting that throughout contract negotiations, the employer only wanted to deal with local officers directly, and not with professional union staff.

The Examiner specifically credited the testimony of union officers Rich Karschney and Mick Holte that it was not the employer's intent to preclude employees engaged in bargaining from discussing matters with the union's professional staff. Thus, the testimony of other union officers regarding the intent of the employer's proposal discounted the nefarious motivation that Thompson alleged. Furthermore, nothing in this e-mail series suggests that the employer was attempting to control the union, and the fact that the union may have shared these e-mails with its membership does not convert what is otherwise a private e-mail between the union and employer's respective negotiators into a transmission to the bargaining unit.

Additionally, because the union is relying upon e-mails to support its allegation, the context for the e-mails must also be examined. The e-mails were created while the parties were engaged in negotiations. The tone of Cockbain's e-mails to Thompson demonstrate an attempt to ascertain what the term "agent of the union" actually meant because there seemed to be disagreement about application of that term. Cockbain's questions are consistent with the purpose of Chapter 41.56 RCW, which encourages parties to ask questions in an attempt to clarify the intent or

meaning of a lawfully made proposal. WAC 391-45-550; *see also City of Redmond*, Decision 8879-A (PECB, 2006).

Finally, under this state's labor laws, parties have always had the right to not agree to a proposal, provided they do so in good faith. RCW 41.56.030(4); s*ee also Walla Walla County*, Decision 2932-A (PECB, 1988). Although the union obviously has concerns with the employer's proposal, those concerns do not automatically make the employer's proposal an attempt to dominate the union.

ISSUE 3 – Employer Refusal to Bargain and Circumvention of Bargaining Representative

The union alleged that the employer refused to bargain the mandatory subject of union security. According to the union, the employer raised this issue in June 2007, eight months after it presented the union with a "take it or leave it proposal".[5] The union also alleges that the employer attempted to circumvent the union through a letter issued to bargaining unit employees by General Manager Fanny Yee. That letter responded to a union memorandum and provided employees with the employer's viewpoint regarding the state of negotiations.

Applicable Legal Standard – Refusal to Bargain

RCW 41.56.030(4) defines collective bargaining as "the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be particular to an appropriate bargaining unit of such employer. . . ." RCW 41.56.030(4) also provides that "neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided for by [Chapter 41.56 RCW]."

A finding that a party has refused to bargain is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B

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[5] The Examiner correctly held that any documents and events that occurred more than six months prior to the filing of the union's complaint, or May 6, 2008, could only be considered as background information.

(EDUC, 1978). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees. While the parties' collective bargaining obligation under RCW 41.80.010(2) does not compel them to agree to proposals or make concessions, a party is not entitled to reduce collective bargaining to an exercise in futility. *Mason County*, Decision 3706-A (PECB, 1991)(totality of the evidence demonstrated that employer entered negotiations with a predetermined outcome).

Differentiating between lawful "hard bargaining" and unlawful "surface bargaining" can be difficult in close cases. This fine line in differentiating the two reflects a natural tension between the obligation to bargain in good faith and the statutory mandate that there be no requirement that concessions be made or an agreement be reached. *Walla Walla County*, Decision 2932-A. An adamant insistence on a bargaining position is not, by itself, a refusal to bargain. *Mansfield School District*, Decision 4552-B (EDUC, 1995), *citing Atlanta Hilton and Tower*, 271 NLRB 1600 (1984). However, good faith is inconsistent with a predetermined resolve not to budge from an initial position. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

In determining whether an unfair labor practice has occurred, the totality of circumstances must be analyzed. *Walla Walla County*, Decision 2932-A; *City of Mercer Island*, Decision 1457 (PECB, 1982). The evidence must support the conclusion that the respondent's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an intention to frustrate or avoid an agreement. *City of Clarkston*, Decision 3246 (PECB, 1989).

Applicable Legal Standard - Unlawful Communications

Communications from an employer to bargaining unit employees can form the basis of an interference unfair labor practice under certain criteria, including:

1. Is the tone of the communication coercive as a whole?
2. Are the employer's comments substantially factual or materially misleading?
3. Has the employer offered new "benefits" to employees outside of the bargaining process?

4. Are there direct dealings or attempts to bargain with the employees?

5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?

6. Did the union previously object to such communications during prior negotiations?

7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

City of Seattle, Decision 2483 (PECB, 1986). The complainant is not required to show an employer intended or was motivated to interfere with 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 or that the employer had union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Application of Standards

The Examiner found that the employer did not negotiate in bad faith with respect to union security. In reaching this conclusion, the Examiner noted that the parties included atypical union security language in previous collective bargaining agreements, and that there was no evidence demonstrating that the employer was not open to negotiating atypical language for the current agreement.

From the outset, we note that the employer raised the issue of union security in July 2007. The union filed its complaint on November 6, 2008, more than a year and a half after the employer first raised the issue. In cases such as this, where a complainant alleges that a party is either regressively bargaining or attempting to unlawfully escalate bargaining by raising an issue that had not previously been discussed in order to frustrate the bargaining process, the statute of limitations begins to toll when the respondent presents the offending proposal. *See City of Bellevue*, Decision 9343-A (PECB, 2007)(the six-month statute of limitations begins to toll when a complainant knows or should know of the violation). Based upon the factual situation presented, the union is precluded from raising its allegation that the employer unlawfully

escalated bargaining in violation of RCW 41.56.140(4) and (1) because the employer's union security proposal was presented well outside the six-month statute of limitations.[6]

With respect to the employer's conduct during bargaining about this issue, this record demonstrates that negotiations have been contentious between the two parties, and it is clear that the employer engaged in hard bargaining. However, the employer has been careful to explain why the union security issue was important to it and the reasons behind its proposals.

The Examiner also correctly dismissed the union's allegations that Yee's letter to bargaining unit employees, as well as the attachments submitted by the union as part of that exhibit, did not demonstrate intent to deal directly with bargaining unit employees or to unlawfully disparage the union. The Examiner, after analyzing the test outlined above, determined that the subject matter of the letter is based in fact, that the letter did not promise a benefit to employees, and that none of the comments demonstrated intent on the part of the employer to disparage the union. The Examiner found the letter to be a simple response to the union and also provided the employer's perspective on the progress of contract negotiations.

The union asserts that the employer's claim that employees would still receive a cost-of-living-adjustment (COLA) if the union were decertified is not true. The disputed language states:

> All increases are limited by the wage ceiling for the position. In addition, all regular salaried employees receive a cost of living adjustment as a percentage of the appropriate published CPI-W.

The union nevertheless disagrees with the Examiner's assessment, and argues that the employee handbook only permits the employer to authorize a COLA, but does not guarantee that one must be granted. We disagree.

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[6] This record also demonstrates that the parties agreed to "bargain from a clean slate" when Joseph Marra became the employer's negotiator in January 2007. Exhibit 23. This agreement allowed either party to raise new issues that were not previously raised during negotiations. In reaching these conclusions, we are specifically declining to address the employer's *res judicata* arguments.

Yee's statement informs employees of the COLA that all non-represented employees receive under the terms of the employee handbook, and does not promise them a new benefit as an enticement to decertify the union. Although the union may be correct that there is no contractual guarantee that employees would receive a COLA, there is no evidence that the employer has not consistently applied this policy. Without evidence that the employer *failed* to apply this policy, we cannot find that employer has acted unlawfully.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Starr Knutson are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 16th day of April, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner