Seattle School District, Decision 10732-A (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 22030-U-08-5607 DECISION 10732-A - PECB DECISION OF COMMISSION

Schwerin, Campbell, Barnard, Iglitzin & Lavitt, LLP, by *Kathleen Phair Barnard,* Attorney at Law, for the union.

John M. Cerqui, Senior Assistant General Counsel, for the employer.

On October 10, 2008, the International Union of Operating Engineers, Local 609 (union) filed an unfair labor practice complaint against the Seattle School District (employer). Examiner Lisa A. Hartrich issued a decision finding that the employer did not commit an unfair labor practice.[1] The union filed a timely appeal.

ISSUES

Issue 1: Did the employer interfere with employee rights by denying Chi Wong's request for union representation?

Issue 2: Did the employer interfere with employee rights by denying Charles Dial's right to union representation?

[1] *Seattle School District,* Decision 10732 (PECB, 2010).

Issue 3: Did the employer interfere with employee rights and discriminate by failing to investigate Charles Dial's complaint while investigating the complaint against David Westberg?

Issue 4: Did the employer interfere with employee rights and discriminate by (a) prohibiting David Westberg from representing bargaining unit members in situations involving certain administrators, and (b) by threatening to bar David Westberg from representing bargaining unit members on all employer property?

Issue 5: Did the employer interfere with employee rights or discriminate when it restricted the union representative's access to certain employer properties?

Issue 6: Did the employer interfere with employee rights and discriminate by denying David Westberg access to worksites in the course of representing Charles Dial?

Issue 7: Did the employer interfere with employee rights and refuse to bargain by failing or refusing to meet and negotiate with the union over the union's concerns regarding Chi Wong, Fred Castor, and Charles Dial?

Issue 8: Did the employer interfere with employee rights and refuse to bargain when it (a) required David Westberg to obtain permission to visit employer buildings and sign in during the course of his duties as a union representative, and (b) prohibited David Westberg from discussing collective bargaining issues with building administrators?

Issue 9: Did the employer interfere with employee rights by Davy Muth sending an e-mail to all staff asking Chi Wong's supervisor to stop by to discuss Davy Muth's request?

Issue 10: Did the employer interfere with employee rights when Cathy Rutherford had verbal exchanges with Fred Castor and Charles Dial?

Issue 11: Did the employer interfere with employee rights and refuse to bargain by circumventing the union through direct dealing with Chi Wong and Fred Castor?

We affirm the Examiner's decision that the employer did not commit any unfair labor practices.

BACKGROUND

Facts Relevant to Chi Wong

In the fall of 2008, Chi Wong (Wong) was a custodial engineer at Wing Luke Elementary School. Wong served on the safety committee during the 2008-2009 school year. In September 2008, the safety committee discussed a problem with students arriving early to school. The safety committee developed a plan, and on September 25, 2008,[2] Joyce Jeong (Jeong), an administrative assistant at Wing Luke, sent an e-mail to all staff informing them of the plan. The e-mail stated: "Staff begins recess duty at 8:15 a.m. We will keep students in the cafeteria until the bell rights. Mr. Louis, Chi, & I will supervise to make sure that no students are outside until 8:50."

On Friday, September 26, Wong responded to Jeong's e-mail by sending a message to "all staff" and copying his supervisor, LaDonia Skinner (Skinner), explaining that he had to perform his custodial duties prior to assisting with other duties. Wing Luke Principal Davy Muth (Muth) responded to Wong's e-mail. Muth's e-mail went to "all staff" and Skinner. Muth thanked Wong for trying to help and requested that Skinner come to the school so Wong, Skinner, and Muth could talk about Muth's request that Wong direct students to the cafeteria.

On September 26 at 7:46 a.m., Wong forwarded the e-mail chain to Mike McBee (McBee), the union's recording and corresponding secretary. On September 29, McBee responded to Muth, including employer representatives Brent Jones (Jones), Executive Director of Human Resources; Jeannette Bliss (Bliss), Human Resources Manager; Bruce Skowyra (Skowyra), Custodial Services Manager; Skinner; Wong; and the Wing Luke all staff e-mail. McBee's e-mail stated, "Also, any talk you have with Chi and his Supervisor will include myself as he has requested representation."

---

[2] All dates are in 2008 unless otherwise noted.

On the morning of September 26, Muth, Skinner, and Wong met. McBee was not included in the meeting. Wong did not request union representation during the meeting. Wong testified that he was not asked any questions during the meeting.

Facts Relevant to Fred Castor

In the fall of 2008, Fred Castor (Castor) was the day custodian at Cooper Elementary. Cathy Rutherford (Rutherford) was the principal at Cooper. Skinner was Castor's supervisor.

In the fall of 2008, an issue arose about Castor's presence in the lunchroom. Castor decided that he should no longer be present in the lunchroom when students were present, unless necessary to perform his work. When Castor informed Rutherford that he would no longer be present in the lunchroom during student time, Rutherford told Castor it was his job to be there. Castor showed Rutherford an e-mail from the union explaining that it was not his job to remain in the lunch-room.

Castor e-mailed the union on September 22. McBee called Rutherford and Skinner. Skinner sent an e-mail to McBee informing him that she spoke with Castor and Rutherford. Skinner supported Castor's decision that he did not need to spend his time in the lunchroom waiting for spills to occur.

Facts Relevant to Charles Dial

In the fall of 2008, Dial was the night custodian at Cooper. Skinner was Dial's supervisor.

On October 2, Dial found feces smeared on the wall in a bathroom at Cooper. Dial went to Rutherford's office to inform her about the incident, which was a recurring problem. Dial testified he noticed Rutherford's door was open, he tapped on the door, and asked, "Do you got a minute?" Rutherford testified that Dial "bust in" to her office without knocking and was "loud and demanding." Rutherford told Dial she didn't like his tone. Rutherford went with Dial to observe the bathroom. Dial testified that he felt Rutherford disliked him and wanted to avoid "deal[ing]" with him.

On October 8, Dial filed a harassment complaint against Rutherford, which was received by the employer on October 13. Dial's complaint alleged a pattern of disrespect by Rutherford, including the October 2 interaction. On October 20, Bliss e-mailed Dial informing him that Sue Means in the human resources department was assigned to conduct the investigation.

On October 27, Means contacted Dial to set up an interview. During the conversation, Dial informed Means that he wanted Westberg, the union business manager, to serve as his representative. Dial mentioned that there was an issue with Westberg being present at Cooper. On October 29, Means e-mailed Dial with two options to conduct the interview for his harassment complaint. Option one was to meet at Denny Middle School with Westberg. Option two was to meet at Cooper with McBee. During this time frame, Westberg sent multiple e-mail messages to the district. Westberg alleged that the employer was delaying the investigation into Dial's complaint. On November 3, Means and Eva Edwards, Senior Human Resources Analyst, interviewed Dial with Westberg present.

Means prepared the final investigation report, which she completed November 25. Bliss reviewed the report and submitted a memorandum to Superintendent Maria Goodloe-Johnson on January 14, 2009. On January 14, 2009, Goodloe-Johnson sent Dial a letter informing him that the investigation did not substantiate the allegations of harassment.

Facts Relevant to David Westberg

Westberg was the union's business manager. Westberg was on contractual union leave from the employer and worked full time for the union advocating and representing union members. In the fall of 2008, Westberg was involved in the incidents described above.

When Westberg visited a school, he did not report to the front desk and sign in as detailed in the collective bargaining agreement and the employer's policies. Rather, Westberg entered through the door closest to the dumpster, not the main school entrance. Westberg would then meet with the bargaining unit member he came to the school to see.

On September 10, Wong e-mailed the union, and copied Wing Luke "all staff", to report an incident at the school the prior day. On September 10, Westberg responded that he would visit Wing Luke and bring Wong a form. That same day, Westberg forwarded Wong's e-mail and Westberg's response to Jones. In that e-mail, Westberg invited Jones to visit Wing Luke with Westberg or McBee as outlined in a memorandum of understanding (MOU) in the collective bargaining agreement.

On September 10, Westberg went to Wing Luke to meet with Wong. Westberg went in the school front door, unlike his usual habit. Westberg did not check in at the front desk; he immediately entered Muth's office. Westberg met with Muth and discussed Wong's e-mail. Westberg provided Wong the form and left.

On September 29, McBee e-mailed Jones and asked him if he was able to visit Wing Luke. On October 6, Jones responded to McBee. Jones declined to visit Wing Luke, but asked Bliss to assess the situation. On October 6, Westberg responded to Jones's e-mail and expressed his intent to visit the school alone and "straighten that place out." Later that day, Westberg wrote to Jones again. Westberg informed Jones that the union "will count on the old tried and true methods. This may include picketing at the schools [sic] open house (this threat will also be made at Wing Luke) and/or the principles [sic] homes." Westberg made "no promises as to my demeanor at either school . . .". Jones responded. Westberg responded on October 7: "I will square this up at the building level and/or utilizing "street" tactics that were used BEFORE the District asked that we effectuate the MU and commenced meditative [sic] approaches."

On October 6, Westberg e-mailed Muth, Jones, and Wing Luke "all staff" informing Muth that Jones would not visit Wing Luke with him. Westberg outlined what he wanted Muth to do and what he would do, including picketing the school, her home, and the home of her secretary.

On October 7, Westberg visited Wing Luke and Cooper. Westberg went to Cooper to deliver forms to Castor and Dial and to speak with Rutherford. Westberg entered through the loading dock door by the dumpster. At the time, the school was having an assembly. Westberg went to the office and asked to speak with Rutherford. The secretary walked Westberg to the assembly

and pointed out Rutherford. Westberg introduced himself, and they went to Rutherford's office. Westberg told Rutherford he was there to deliver complaint forms, and Rutherford told him she had a complaint in the other direction. Westberg told Rutherford the complaint was only going in one direction.

Rutherford was uncomfortable in the meeting and said she wanted her supervisor, Education Director Patrick Johnson, present. Westberg called Johnson a "lying bag of shit." Westberg proceeded to threaten to picket the school during the next school event. Westberg told Rutherford he was going to go to her home address and stated an address that was not Rutherford's. Rutherford told Westberg the address was not hers. Westberg told Rutherford to talk to another principal about the union picketing. Rutherford asked Westberg to leave. Westberg delivered the complaint forms to the custodians and left the building.

Rutherford called Johnson and told him she felt she had been threatened. Rutherford sent an e-mail account of the events to Jones.

After leaving Cooper, Westberg went to Wing Luke. Westberg entered Wing Luke through the front door and found Muth in her office. Westberg asked Muth to apologize for sending the "all staff" e-mail messages regarding Wong. Westberg threatened to picket the school and Muth's home. Westberg told Muth he would come to her home with 12 of his friends and told Muth her home address.[3] Muth's secretary, Teresa Deegan (Deegan), heard a "loud or raised" male voice coming from Muth's office. Deegan went to Muth's office. Westberg attempted to close the door. Deegan stopped the door with her foot. Muth asked Deegan to call security and 911.

Westberg left Muth's office and delivered the form to the custodian. Westberg left the school prior to security arriving.

After Westberg left her office, Muth telephoned her supervisor, Johnson. Muth sent an e-mail to Johnson. Later, Muth forwarded the e-mail to Goodloe-Johnson.

---

[3] The Examiner found Muth's testimony that Westberg was "screaming and shouting" to be credible.

The employer treated Muth's and Rutherford's reports of the Westberg incidents as complaints. On October 8, the employer notified Westberg that it would investigate the October 7 incidents with Muth and Rutherford. In an October 8 letter to Westberg, Bliss recommended "that you do not visit either of these School District properties until the conclusion of the investigation. We understand that you have a right to talk with your union members and would suggest that you use the telephone or meet at an alternate District building to conduct your union business."

On October 28, Westberg received an e-mail from McBee that the employer told a bargaining unit member that Westberg was not allowed at Cooper. Westberg sent an e-mail to Jones asserting that he had been "admonished" from the building. Bliss responded to Westberg, informing him that he had not been "admonished." Bliss reiterated that "in light of the circumstances, we continue to recommend that you do not visit those buildings until the investigation is concluded."

The employer hired an outside investigator to investigate Muth and Rutherford's complaints against Westberg. On October 30, the investigator submitted her report to the employer. On December 1, Bliss sent Westberg an e-mail informing him that the superintendent would respond to Westberg about the investigation within ten days.

On December 9, Goodloe-Johnson sent Westberg a letter informing him that the investigation was complete. Goodloe-Johnson informed Westberg that the employer had determined that Westberg violated the employer's anti-harassment policy. The employer required Westberg to comply with the collective bargaining agreement, specifically Article IX, Section B, required union representatives to check in at building offices when visiting buildings. The employer required Westberg to follow school board policies requiring visitors to sign in. The letter directed Westberg to discuss issues with the custodial staff with the employer's custodial management staff members. The letter prohibited Westberg from having contact with Muth and Rutherford.

APPLICABLE LEGAL PRINCIPLES

Standard of Review

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).

Interference

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complainant. 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 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).

Weingarten Rights

In *NLRB v. Weingarten,* 420 U.S. 251 (1975) (*Weingarten*), the Supreme Court of the United States affirmed a National Labor Relations Board (NLRB) decision holding that under the National Labor Relations Act (NLRA), employees have the right to be accompanied and assisted

by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action. In *Okanogan County,* Decision 2252-A (PECB, 1986), the Commission held that the rights announced in *Weingarten* are applicable to employees who exercise collective bargaining rights under Chapter 41.56 RCW. *See also Methow Valley School District,* Decision 8400-A (PECB, 2004).

When an employee makes a valid request for union representation, an employer has three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of continuing the interview unrepresented, or having no interview at all, thereby foregoing any benefit that the interview might have conferred upon the employee. *Roadway Express,* 246 NLRB 1127 (1979). An employer may not continue the interview with an unrepresented employee who has asserted his or her *Weingarten* rights unless the employee voluntarily agrees to continue the interview unrepresented and the employer has made the employee aware of the choices described above. *U.S. Postal Service,* 241 NLRB 141 (1979). Additionally, when an employee asserts his or her *Weingarten* rights, an employer may only schedule the investigatory meeting at a future time and place that provides an opportunity for the employee, on his or her own time, to consult with his or her union representative in advance. *King County,* Decision 4299 (PECB, 1993), *aff'd,* Decision 4299-A (PECB, 1993), *citing Climax Molybdenum Co.,* 227 NLRB 1189 (1977). An employer who fails to satisfy these requirements interferes with protected employee rights and commits an unfair labor practice.

Although *Weingarten* and its progeny grant employees the right to have a representative at a meeting that could lead to discipline, the right is not without limitations. For example, an employer is not required to postpone a disciplinary interview because a particular union representative is unavailable for an unreasonable period of time for reasons not attributable to the employer, provided another representative is available whose presence could have been requested by the employee in the absent representative's place. *See Coca-Cola Bottling Co. of Los Angeles,* 227 NLRB 1276 (1977). If the employee still asserts that no available union representative is satisfactory and continues to demand that the unavailable union representative be present, then the employer must either discontinue the interview or offer the employee the opportunity to continue the interview unrepresented.

Weingarten's language clearly indicates that the protected right is an individual employee right, not a union right. *Weingarten,* 420 U.S. at 256-257; *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), *enforced*, 338 F.3d 267 (4th Cir. 2003).

Discrimination

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

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

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

In response to an employee's prima facie case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma,* Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County,* Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or that union animus was nonetheless 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. *City of Yakima,* Decision 10270-A (PECB, 2011).

An independent interference violation cannot be found under the same set of facts that failed to constitute a discrimination violation. *Reardan-Edwall School District,* Decision 6205-A (PECB, 1998).

Failure to Meet and Negotiate

Chapter 41.56 RCW imposes a mutual obligation upon public employers and the exclusive bargaining representative of public employees:

> to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to the grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided by statute.

RCW 41.56.030(4). In order to resolve their contractual differences through negotiations, parties to the collective bargaining agreement must meet in a timely fashion. *Morton General Hospital*, Decision 2217 (PECB, 1985).

In determining whether an unfair labor practice has occurred, the totality of circumstances must be analyzed. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982). The complainant union must first demonstrate that it is the exclusive bargaining representative of the employees involved and that it requested negotiations on a collective bargaining agreement or some issue that was a mandatory subject of bargaining. If the complainant establishes these two facts, it must then demonstrate that the employer either

failed or refused to meet with the complainant, or imposed unreasonable conditions or limitations which frustrated the collective bargaining process. *See City of Clarkston*, Decision 3246 (PECB, 1989). What may be reasonable conduct in one case may not be reasonable in another. *State – Washington State Patrol,* Decision 10314-A (PECB, 2010).

The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. *City of Walla Walla,* Decision 104 (PECB, 1976).

Unilateral Change

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *City of Richland,* Decision 2448-B (PECB, 1987), *remanded,* 113 Wn.2d 197 (1989); *Federal Way School District,* Decision 232-A (EDUC), *citing NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958).

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making that decision. *Lake Washington Technical College*, Decision 4712-A (PECB, 1995). To be timely, notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). Formal notice is not required; however, in the absence of formal notice, it must shown that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A.

The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of

action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found. *Washington Public Power Supply System*, Decision 6058-A, *citing Lake Washington Technical College,* Decision 4712-A.

If the employer's action has already occurred when the employer notifies the union (*a fait accompli)*, the notice would not be considered timely, and the union will be excused from the need to demand bargaining. *Washington Public Power Supply System*, Decision 6058-A.

Therefore, an employer violates RCW 41.56.140(1) and (4) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligation.

Circumvention

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees concerning mandatory subjects of bargaining. *Royal School District,* Decision 1419-A (PECB, 1982). In order for a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations with one or more employees concerning one or more mandatory subjects of bargaining. *City of Seattle,* Decision 3566-A (PECB, 1991).

Where an employer's workforce is organized for purposes of collective bargaining, Chapter 41.56 RCW does not preclude direct communications between employers and their union-represented employees. *City of Seattle,* Decision 3566-A. Employers retain the right to communicate directly with employees who are represented, provided that the communication does not amount to bargaining or other unlawful activity. *Grandview School District,* Decision 10639-A (EDUC, 2011), *citing University of Washington,* Decision 10490-C (PSRA, 2011).

Analysis

Issues 1 & 2: Did the employer interfere with employee rights by denying Wong's request for union representation and by denying Dial's right to union representation?

Wong

The union alleges that the employer denied Wong's right to union representation. Wong forwarded to the union Muth's e-mail requesting that Skinner meet with her and Wong to discuss Muth's request. McBee responded, including "all staff," "Also, any talk you have with Chi and his Supervisor [sic] will include myself as he has requested representation." The union relies on McBee's e-mail to establish that Wong requested union representation during the meeting.

The right to have a union representative present during investigatory meetings does not extend to all meetings between employers and employees. *Weingarten* rights apply to meetings that the employee reasonably believes may result in disciplinary action. The purpose of the meeting among Muth, Skinner, and Wong was to discuss Muth's request that Wong direct students to the cafeteria. Muth and Skinner did not ask Wong any questions. The meeting was not investigatory in nature.

Weingarten rights apply to employees, not to unions. The union asserts that *Weingarten* applies because McBee sent an e-mail to the employer that he should be included in any meeting with Wong because Wong requested union representation. Employees have responsibility to invoke their *Weingarten* rights if they reasonably believe a meeting is investigatory in nature. Wong did not request union representation during the meeting with Muth and Skinner. McBee's e-mail to Muth did not invoke Wong's *Weingarten* rights.

Dial

The union alleges that by failing to meet with Westberg and Dial at Cooper, the employer interfered with Dial's right to union representation. When Means contacted Dial to establish a date for the investigatory interview, Dial requested that Westberg be present as his union representative. The employer provided Dial with two options: meet with McBee at Cooper or meet with Westberg at Denny Middle School. The employer did not deny Dial's request for union representation. The employer was acting reasonably in light of the complaints filed against Westberg.

As discussed above, *Weingarten* applies when a meeting is investigatory in nature and will potentially result in discipline of the employee. *Weingarten* does not apply every time an employer conducts an investigation. In this case, the employer was not investigating Dial. The employer was investigating a harassment complaint filed by Dial. The complaint Dial filed is outside of the scope of Chapter 41.56 RCW.

Conclusion

The employer did not interfere with employee rights by denying Wong union representation. Wong failed to request union representation during the meeting with Muth and Skinner. The employer did not wrongly deny Dial's request for union representation because the meeting was about Dial's complaint against Rutherford. *Weingarten* rights are employee rights that apply to interviews in which the employee reasonably believes that discipline might result.

Issue 3: Did the employer interfere with employee rights and discriminate by failing to investigate Dial's complaint while investigating the complaint against Westberg?

Analysis

The union alleges that the employer's conduct in its investigation of Dial's complaint when compared to the investigation of Muth and Rutherford's complaints against Westberg was discriminatory.

Dial filed his harassment complaint on October 8, and it was received by the employer on October 13. The employer notified Dial on October 20 that it received Dial's complaint. On October 27, the employer contacted Dial to set up an investigatory interview. The employer investigated the complaint. On January 14, 2009, Goodloe-Johnson sent Dial a letter informing him of the outcome of the investigation.

In order to prove discrimination, the union must establish a prima facie case. As described above, Dial requested that Rutherford observe the conditions in the school bathroom and contacted the union about Rutherford's reaction to him. Dial sought union assistance. Contacting the union for assistance is protected activity.

The union must next establish that the employer deprived Dial of some right, benefit, or status. The union failed to establish that the employer deprived Dial of a right, benefit, or status. The employer investigated Dial's complaint, but not at the speed the union would have preferred. While the employer moved more quickly and hired an outside investigator to investigate Muth and Rutherford's complaints against Westberg, the employer did investigate Dial's complaint.

Conclusion

The union did not establish a prima facie case of discrimination. The employer did not discriminate against Dial when it took three months to complete its investigation into Dial's complaint.

Issue 4: Did the employer interfere with employee rights and discriminate by (a) prohibiting Westberg from representing bargaining unit members in situations involving certain administrators, and (b) by threatening to bar Westberg from representing bargaining unit members on all employer property?

Analysis

We agree with the Examiner that Westberg is not an employee. Westberg is a paid union representative who works full time for the union. The union failed to establish the first prong of the discrimination test. The employer did not discriminate against Westberg.

Issues 5 & 6: Did the employer interfere with employee rights and discriminate when it restricted the union representative's access to certain employer properties, and denied Westberg's access to Dial's workplace?

Analysis

The union alleges that the employer discriminated against the bargaining unit, including Wong, Castor, and Dial, by denying Westberg access to the buildings in which the three employees worked. The union further alleges that the employer interfered and discriminated by denying Westberg access to their workplaces in the course of representing Dial and other bargaining unit members.

In response to complaints about Westberg's behavior, Bliss sent Westberg a letter. In the letter, the employer suggested that Westberg not visit Wing Luke or Cooper while the employer investigated the complaints filed by Muth and Rutherford against Westberg. The evidence established that the employer did not deny Westberg access to the buildings. The employer suggested Westberg not visit Wing Luke or Cooper during the pendency of the investigation. However, at no point did the employer bar Westberg from either school or bar him from representing bargaining unit members.

While investigating Dial's complaint, Means provided Dial with two options: meet at Cooper with McBee or meet at Denny Middle School with Westberg. The employer was acting reasonably when it sought to avoid having a meeting with Westberg in a school where the principal had filed a harassment complaint against Westberg.

Conclusion

The employer did not deny Westberg access to the school. The employer did not discriminate against the bargaining unit when it suggested that Westberg not visit Wing Luke and Cooper during the investigation of complaints against him. The employer did not discriminate by denying Westberg access to worksites in the course of representing Dial.

Issue 7: Did the employer interfere with employee rights and refuse to bargain by failing or refusing to meet and negotiate with the union over the union's concerns regarding Wong, Castor, and Dial?

Analysis

The parties' collective bargaining agreement contained a memorandum of understanding (MOU) that provided a procedure for the parties to meet and discuss alleged retaliatory behavior between a union member and a school principal. On September 10, Westberg contacted Jones requesting that Jones visit Wing Luke per the MOU. On October 6, Jones informed McBee that he would not visit Wing Luke. The union asserts that Jones's refusal to visit Wing Luke with the union is a failure to meet.

Unfair labor practice proceedings are not the appropriate forum to remedy a contract violation. The MOU states: "Failure to schedule a meeting is considered a grievable issue under the grievance provisions contained in the District/Local 609 CBAs." The union has alleged a contract violation.

The employer did not interfere with employee rights and refuse to bargain with the union by failing to meet and visit Wing Luke Elementary. The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions. *City of Walla Walla,* Decision 104.

Issue 8: Did the employer interfere with employee rights and refuse to bargain when it (a) required Westberg to obtain permission to visit employer buildings and sign in during the course of his duties as a union representative, and (b) prohibited Westberg from discussing collective bargaining issues with building administrators?

Analysis

In a December 9 letter, Goodloe-Johnson informed Westberg that he had violated the employer's anti-harassment policy. As a result, the employer would require Westberg to comply with the collective bargaining agreement and school board policies concerning visitors at schools. The union argues that the employer had a duty to bargain over the unilateral restrictions it placed on Westberg's access to union members.

The employer did not regularly enforce the language in the collective bargaining agreement requiring union representatives to check in at the building office prior to contacting union members in employer facilities. It was Westberg's practice to not comply with the collective bargaining agreement or the employer's policies.

We affirm the Examiner. The employer's action to require Westberg to follow the collective bargaining agreement is reasonable in light of the incidents. Under these circumstances, the employer did not refuse to bargain when it required Westberg to comply with the collective bargaining agreement, despite not enforcing the agreement in the past.

Issues 9, 10, & 11:

We conclude that on all the remaining issues, substantial evidence supports the Examiner's findings.

CONCLUSION

We affirm the Examiner. The employer did not commit any unfair labor practices.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Lisa A. Hartrich are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 7th day of March, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 03/07/2012

The attached document identified as: DECISION 10732-A - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBERTE DUFFIELD

CASE NUMBER:	22030-U-08-05607	FILED:	10/10/2008	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	MIXED CLASSES				
DETAILS:	-				
COMMENTS:					

EMPLOYER: SEATTLE S D
ATTN: SUSAN ENFIELD
PO BOX 34165
MS 32-151
SEATTLE, WA 98124-1165
Ph1: 206-252-0180

REP BY: JOHN CERQUI
SEATTLE S D
PO BOX 34165
MS 32-151
SEATTLE, WA 98124-1165
Ph1: 206-252-0110 Ph2: 206-252-0115

PARTY 2: IUOE LOCAL 609
ATTN: DAVID WESTBERG
2800 1ST AVE STE 311
SEATTLE, WA 98121
Ph1: 206-441-8544 Ph2: 206-255-7452

REP BY: KATHLEEN PHAIR BARNARD
SCHWERIN CAMPBELL BARNARD
18 W MERCER ST STE 400
SEATTLE, WA 98119-3971
Ph1: 206-285-2828 Ph2: 800-238-4231