University of Washington, Decision 11199-B (PSRA, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 23649-U-10-6033 DECISION 11199-B - PSRA AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON REMAND

Younglove & Coker, by *Christopher J. Coker*, Attorney at Law, for the union.

Attorney General Robert W. Ferguson, by *Mark K. Yamashita*, Assistant Attorney General, for the employer.

On November 22, 2010, the Washington Federation of State Employees (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The union's complaint alleged that the University of Washington (employer) interfered with employee rights in violation of RCW 41.80.110(1)(a), by threats of reprisal or force or promises of benefit made to Michael Lynne through its investigations of Lynne in connection with his union activities. The complaint also alleged that the employer discriminated in violation of RCW 41.80.110(1)(c), by its final counseling of Lynne in reprisal for union activities protected by Chapter 41.80 RCW. Unfair Labor Practice Manager David I. Gedrose reviewed the complaint under WAC 391-45-110, found a cause of action to exist, and issued a preliminary ruling on November 30, 2010. On December 7, 2010, the Commission assigned this case to Examiner Joel Greene, who presided over a hearing on March 24, 2011. The parties filed post-hearing briefs on June 7, 2011, and I issued a decision on October 11, 2011. The union appealed to the Commission on October 27, 2011, and the parties filed appellate briefs. The Commission issued a decision on February 4, 2013, which remanded the case with instructions for me to re-

consider the decision consistent with specific directions in the decision. *University of Washington*, Decision 11199-A (PSRA, 2013).

ISSUES

1. Did the employer discriminate against Michael Lynne by issuing him a final counseling in reprisal for union activities?

2. Did the employer interfere with employee rights by investigating Lynne in connection with his union activities?

Based on the record as a whole, I find that the employer neither discriminated against Lynne by issuing him a final counseling, nor interfered with employee rights by investigating Lynne.

APPLICABLE LEGAL STANDARDS

Discrimination

As expressed recently in *State – Corrections*, Decision 10998-A (PSRA, 2011), an employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by the Personnel System Reform Act of 2002, Chapter 41.80 RCW. *Central Washington University*, Decision 10118-A (PSRA, 2010); *see also 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 ultimate 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 the employer had knowledge of the employee's union activity. An examiner may base a finding of discrimination on an inference drawn from circumstantial evidence although the 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. *State – Corrections*, Decision 10998-A.

Interference

RCW 41.80.110(1)(a) establishes that an employer commits an unfair labor practice when the employer interferes with, restrains, or coerces employees in the exercise of the rights guaranteed by Chapter 41.80 RCW. The rights guaranteed to employees are listed in RCW 41.80.050:

> RCW 41.80.050 Rights of employees. Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all such activities except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

The Commission stated in *Grays Harbor College*, Decision 9946-A (PSRA, 2009) that the burden of proving unlawful interference with the exercise of rights protected by Chapter 41.80 RCW rests with the complaining party. An interference violation exists when an employee could reasonably perceive the employer's statements or 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 union is not required to show how an employer intended or was motivated to interfere with collective bargaining rights. *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 a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

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

ANALYSIS

Background

The union represents a bargaining unit of campus security officers at Harborview Medical Center. The employer and union were parties to a collective bargaining agreement for the security officers bargaining unit effective from July 1, 2009, through June 30, 2011. Lynne has been employed as a campus security officer at Harborview since 2001. Lynne has been an active union member and shop steward for approximately eight years. Lynne works in the department of parking and security, which is managed by Administrative Director Bill Garber and Associate Director of Program Operations R.J. Angeles. Sergeant Duane Pederson was Lynne's immediate supervisor when the incidents occurred that led to the union's unfair labor practice complaint.

On March 12, 2010, Angeles informed Pederson that Malik Corbin, one of the employer's campus security officers, was on a list of employees who had not paid citations they had received for parking in restricted areas near the employer's facilities. When Corbin was reminded of his outstanding parking citation from June 23, 2009, he contacted Lynne and told Lynne that he thought he was being treated unfairly because supervisors had been parking in the same lot without repercussions.

On April 25, 2010, Lynne wrote and sent an e-mail to Sergeant Ruben Bonilla, titled "Illegal Parking":

> Ruben,
>
> It has come to my attention that our department is cracking down on an officer who received a parking ticket for being parked in the engineering lot, and demanding that he pay a $35 fine.
>
> I recall shortly after your job title changed from Lieutenant to Sergeant, I saw you with your vehicle parked in that lot just prior to your shift. I recall I took a photo of your vehicle with my cell phone and you made a comment about having to move or something like that. I deleted the photo, but you did not move your vehicle. I have seen your vehicle, and those of other supervisors parked in that lot on many other occasions.
>
> As a supervisor, you lead by example. If an officer sees you and other supervisors park your personal vehicles in that lot, the officer would naturally assume that it is ok to park there also. One has done so, and now faces a $35 fine.
>
> Simply because you did not "get caught", that is, receive a parking citation, does not mean that it was alright [sic] for you or other supervisors to park there.
>
> As a supervisor, it is your duty to notify your supervisor that you have illegally parked your personal vehicle in the engineering lot in the past, and offer to pay the $35 fine for each instance you can recall illegally parking there, so that everyone is treated equally. As a supervisor, you should also report to your supervisor if you have observed other supervisors also illegally parking there and request that he take appropriate action.
>
> I assume that you will take the appropriate action within the next few days.
>
> Thank you,
>
> Michael Lynne
> Shop Steward
> WFSE Local 1488

Four days later on April 29, 2010, Angeles notified Lynne that Lynne was scheduled for an investigatory meeting on May 7 regarding Lynne's e-mail to Bonilla. In a subsequent e-mail to the union, Garber stated the purpose of the meeting was to discuss allegations Lynne made "regarding security supervisors parking illegally as well as the appropriateness of the email."

The investigatory meeting was re-scheduled and took place on May 26, 2010. Lynne's e-mail preceded in time Lynne's later discipline in August 2010.[1]

On August 2, 2010, Garber gave Lynne a final counseling letter. Article 23 in the collective bargaining agreement between the parties describes a series of corrective action steps that can be taken to address concerns with employee performance, from informal oral coaching to dismissal. Final counseling, which includes an action plan when appropriate, is a very serious procedure and is the step before dismissal and can be the step before a mutually agreed demotion.

The employer's August 2 final counseling letter to Lynne mentioned the e-mail along with three other incidents involving Lynne on May 12, June 2, and July 15 that the employer considered insubordinate and disrespectful. The employer's final counseling letter also referenced two previous final counseling letters the employer gave Lynne in 2006 and 2009. This decision will next summarize and describe the three incidents and the two final counseling letters.

On May 12, 2010, Lynne used the employer's security radio channel to question Pederson about a letter Lynne received from Pederson. Lynne asked Pederson what time of day Pederson received the letter and wanted to know who handed Pederson the letter. After Pederson informed Lynne that he received the letter at approximately 4:00 P.M. (1600 hours) from Angeles, Lynne asked Pederson, "And how come it took you from 1600 until 1735" to deliver it? Lynne and Pederson then met at the medical center, where Lynne asked Pederson about his whereabouts and what Pederson was doing that kept him from delivering the letter promptly. Pederson testified he was concerned because Lynne's "mannerism" was so "demanding."

On June 2, 2010, Lynne called Pederson after Lynne had been asked to search a patient's belongings prior to the patient's departure. Lynne informed Pederson that the belongings might contain narcotics. Lynne told Pederson that Lynne would give any narcotics discovered during the search to the medical staff for disposal. On three occasions, Pederson directed Lynne to take what was found in the search to the property room, log in the material, and fill out a report

[1] The original decision in this case contains a sentence which reads "Lynne's e-mail to Bonilla led to Lynne's discipline." This sentence was inartful and should have more accurately stated "Lynne's e-mail to Bonilla preceded in time Lynne's discipline."

consistent with employer policy. Lynne was confrontational throughout the conversation, questioned the legality of transporting narcotics, and eventually refused to follow Pederson's directives while citing Article 26.2 of the collective bargaining agreement, which states in part that "All work shall be performed in conformity with applicable health and safety standards. Employees are encouraged to immediately report any unsafe working conditions to their supervisor."

On July 15, 2010, the night shift supervisor informed Pederson that changes needed to be made to a report Lynne had written. When Pederson shared the need for changes with Lynne, Pederson testified that Lynne took the report, angrily wrote an "F" on the report, and posted it on a bulletin board following a briefing involving the campus security officers.

In addition to the three incidents just described, Lynne's August 2, 2010 final counseling letter also cited and relied upon two previous final counseling letters. The employer gave Lynne a final counseling letter on July 10, 2009, "for utilizing poor judgment and neglecting [his] assigned duties when loitering with the driver of a private vehicle on the HMC [Harborview Medical Center] ambulance ramp." The employer gave Lynne his first final counseling letter on January 31, 2006, "for unprofessional behavior toward a young patient and leaving work early without authorization."

Lynne's August 2, 2010 discipline, his third final counseling letter, cited his performance and behavior problems, including "poor judgment" and "arguing/unprofessional behavior toward a supervisor." Garber wrote that "Based on my investigation, I find that your continued disruptive, angry, and insubordinate behaviors are inconsistent with a professional security officer in a healthcare setting. As part of the action plan, I will enroll you in anger management and effective communications classes."

Union's *Prima Facie* Case of Discrimination

The first prong in the three-part test to establish a *prima facie* case of discrimination requires the union to prove that Lynne engaged in protected union activity. The Commission's appellate decision in this case examines and explains the principles applicable to determine whether activity is protected:

> we first look at whether, on its face, the activity was taken on behalf of the union. . . . If the activity appears to be union activity on its face, Washington courts have adopted a "reasonableness" standard. . . . "Employee protected activity loses its protection when it is unreasonable – but reasonableness is gauged by what a reasonable person would do in the midst of industrial strife, and not by what a reasonable person would do in the more ordinary affairs of life." . . . "Conduct may fall outside of the protections of labor statutes if the conduct is irresponsible and abusive."
>
> . . . .
>
> Depending on the context and delivery, confrontational statements may or may not be protected activity. . . . the use of defiant language in a written letter is inherently less confrontational than in face-to-face interaction and is not necessarily unreasonable. . . . It is not strictly unreasonable to question a supervisor's veracity or even make unsubstantiated allegations, as long as these are relevant to union activity. . . . it could be argued that confrontational language in a written communication may be reasonable when those same words said in person would be unreasonable. . . .
>
> Ultimately, what conduct qualifies as unreasonable will differ in every case. What will qualify as protected activity depends upon the facts of the case.

University of Washington, Decision 11199-A (numerous citations and examples omitted).

Applying these principles to the facts in this case, I find Lynne engaged in protected union activity. Corbin contacted Lynne because Corbin thought he was being treated unfairly compared to supervisors who parked in the same parking lot without receiving parking citations. Lynne's e-mail to supervisor Bonilla began by mentioning an employee received a parking citation and then questioned whether supervisors were receiving preferential treatment. Significantly, Lynne's e-mail explicitly stated he was writing on behalf of the union when he signed his e-mail "Michael Lynne, Shop Steward, WFSE Local 1488." Given the potential unequal treatment between employees and supervisors, Lynne's e-mail was reasonable. Lynne's e-mail was neither irresponsible nor abusive. Because Lynne communicated in writing, his e-mail was inherently less confrontational than a face-to-face interaction. Lynne's unsubstantiated allegations that Bonilla improperly parked in the parking lot were not unreasonable because they were related to Lynne's union activity. Lynne was appropriately representing and advocating for an employee in Lynne's role as a shop steward. After reviewing the facts and circumstances of this case, I find Lynne's e-mail was protected union activity.

The second prong in the three-part test to establish a *prima facie* case of discrimination requires the union to prove the employer deprived Lynne of an ascertainable right, benefit, or status. The employer disciplined Lynne when it gave Lynne a final counseling letter on August 2, 2010. The employer's discipline deprived Lynne of an ascertainable right, benefit, or status.

The third prong in the three-part test to establish a *prima facie* case of discrimination requires the union to prove a causal connection between Lynne's exercise of a protected union activity and the employer's action. Lynne wrote his e-mail to Bonilla on April 25, 2010. On April 29, just four days later, Angeles notified Lynne he was scheduled to attend an investigatory meeting regarding his April 25 e-mail. Although timing alone is not enough to prove the causal connection necessary to establish a *prima facie* case, a causal connection can be inferred from close timing between protected activity and an adverse action. *Mansfield School District*, Decision 5238-A (EDUC, 1996). The close proximity between Lynne's April 25 e-mail and the April 29 notice to attend an investigatory meeting is sufficient to establish the causal connection necessary for the union to make its *prima facie* case.

In sum, the union proved a *prima facie* case of discrimination. The evidence demonstrated Lynne's e-mail was protected union activity, the employer's final counseling deprived Lynne of a right or benefit, and circumstantial evidence supports a causal connection between Lynne's protected union activity and his discipline.

Employer's Non-Discriminatory Reasons for Lynne's Final Counseling

In response to the union's *prima facie* case of discrimination, the burden of production shifts to the employer to articulate a non-discriminatory reason for Lynne's final counseling. The employer met this burden by presenting evidence and testimony from two witnesses, Pederson and Angeles, proving the employer had numerous non-discriminatory reasons to issue its final counseling to Lynne. In specific, I find the testimony from Pederson and Angeles to be credible and compelling evidence. Pederson and Angeles credibly testified about continuous problems with Lynne's behavior and work. I find Angeles's testimony that the employer disciplined Lynne for "a series – a pattern of consistent behavior that we had seen [as] inappropriate conduct" based upon "sustained consistent documentation of inappropriate behavior" was credible. In contrast, I find Lynne was not a credible witness, and his testimony was neither

trustworthy nor reliable. For example, Lynne's testimony that he wrote the April 25 e-mail to address the contractual requirement to resolve disputes at the lowest level was insincere, rehearsed, and not believable.

Union's Ultimate Burden to Prove Employer Retaliation in Response to Lynne's Protected Union Activity

To prevail in establishing discrimination, the ultimate burden of proof remains on the union to prove that the employer issued its final counseling in retaliation for Lynne's exercise of his statutorily protected right to send the e-mail to Bonilla. The union can meet this burden and respond to the reasons given by the employer to discipline Lynne in one of two ways. The union must prove by a preponderance of the evidence either: (1) the employer's reasons for disciplining Lynne were pretextual; or (2) that union animus was a substantial motivating factor behind the employer's actions.

The union cannot prove pretext. As described more fully above, the employer's testimony details numerous valid reasons for its final counseling of Lynne. I find the employer's reasons were reasonable and do not represent a pretext to discipline Lynne in lieu of Lynne's protected union activity, his e-mail to Bonilla.

Was Lynne's E-mail a Substantial Motivating Factor Behind the Employer's Final Counseling of Lynne?

Therefore, the final and determinative question in this case is whether the union can prove union animus in response to Lynne's e-mail was a substantial motivating factor behind the employer's final counseling of Lynne.

The Commission first adopted the discrimination test used in this decision in *Educational Service District 114*. In subsequent discrimination cases, including this decision, the Commission and examiners have applied the three-part burden shifting test from *Educational Service District 114*. The Commission adopted this discrimination test, which includes the substantial motivating factor analysis, in direct reliance upon two companion landmark discrimination cases issued by the Washington State Supreme Court: *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991).

The court issued *Wilmot* and *Allison* the same day and used them to articulate and adopt the three-part burden shifting test described in this decision. *Wilmot* involved the employer's alleged discrimination and retaliation against employees who were discharged after they filed workers' compensation claims. *Wilmot* held the employees had a cause of action for wrongful discharge as a tort claim independent of the state workers' compensation statutes. *Allison* involved the employer's alleged discrimination and retaliation against an employee who filed an age discrimination complaint after the employer eliminated her position in a reduction in force. *Allison* held sufficient evidence existed that the employer discriminatorily eliminated the employee's position and remanded the case with instructions for the trial court to determine whether the employer's retaliation was a substantial motivating factor in its decision to eliminate the employee's position.

In deciding to adopt the substantial factor analysis as part of the test for discrimination, *Wilmot* and *Allison* distinguished it from two other frequently used standards: the "to any degree standard" and the "but for" standard. Under the "to any degree standard," "slight retaliatory animus" could support a finding of union animus. *Allison*, 118 Wn.2d at 94. On the other end of the continuum, application of the "but for" standard requires proof of "cause in fact" to support a finding of union animus. *Allison*, 118 Wn.2d at 93. The Washington State Supreme Court rejected both these tests and adopted the substantial motivating factor standard. The court characterized the substantial motivating factor test as an "intermediate standard" (*Allison*, 118 Wn.2d at 95), a test requiring more proof than the "to any degree standard" and less proof than the "but for" standard.

In addition, *Wilmot* and *Allison* clarified the meaning of the word "substantial." *Wilmot* and *Allison* state that a factor is "substantial" if it is "important" or "significant." *Wilmot*, 118 Wn.2d at 71, 74-75. Defining "substantial" in this manner is consistent with the long-standing definition used in tort law. For example, Black's Law Dictionary 1142-43 (7th ed. 1999) defines the "substantial-factor test" as follows: "Torts. The principle that causation exists when the defendant's conduct is an important or significant contributor to the plaintiff's injuries."

Applying these principles to the facts in this case, the length of time between Lynne's e-mail and the discipline support the conclusion that the e-mail was not a significant or important factor in

the employer's decision to issue the final counseling. Lynne sent his e-mail to Bonilla on April 25. The employer issued its final counseling letter on August 2, a little over three and a half months – 14 weeks – later. The employer disciplined Lynne shortly after the most recent incident described in the letter, when Lynne challenged his supervisor and angrily wrote "F" on a report and posted it on a bulletin board following a briefing on July 15. Three of the four incidents described in the final counseling letter occurred after Lynne's e-mail and were closer in time to the date of the letter, the closest being the July 15 incident, which occurred only two-and-a-half weeks before the date of the letter.

In addition, the August 2 final counseling letter references two prior counseling letters the employer gave Lynne. Final counseling is very serious discipline and is the step before dismissal. Lynne's history of work performance problems over a period of more than four years raised serious concerns about his conduct.

More importantly, the employer presented testimony describing numerous specific reasons why it disciplined Lynne.[2] The final counseling letter lists four specific events that formed the basis of the employer's decision, three of which had nothing to do with Lynne's e-mail. Lynne's e-

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[2] The employer presented testimony at the hearing describing four additional incidents when Lynne engaged in inappropriate and unprofessional behavior. First, on February 3, 2010, Lynne attended a briefing wearing a baseball cap that was black with red flames. Lynne's supervisor advised him that officers were only permitted to wear plain black or navy blue baseball caps. Lynne yelled at his supervisor in front of the other officers present and walked out of the briefing room.

Second, on March 2, 2010, an unnamed security officer found a green leafy substance in a client's shoe that appeared to be marijuana and was asked to transport the substance to the property room. Lynne told the officer it was illegal for the officer to transport a potentially illegal substance. When the conversation got "heated," the supervisor involved transported the substance himself and later showed Lynne the RCW that permits officers to transport illegal substances. This situation is similar to the June 2 incident in Lynne's final counseling letter.

Third, Lynne submitted sick leave requests for multiple doctors appointments. When he was absent from work for entire days on the day of the appointments, the employer advised Lynne on May 12, 2010, that his absences were considered unauthorized and requested information about the start time and end time of his doctors appointments. In response, Lynne canceled his doctors appointments because he believed the employer's written request for clarifying information was "harassment" by management.

Last, on May 25, 2010, an elderly woman who had just undergone foot surgery asked Lynne to push her in a wheelchair to the door of the women's restroom. Lynne refused and stated he would call transportation for assistance. Lynne's supervisor helped the woman and decided to use this incident as a training example for all the officers to encourage them to assist visitors and patients at Harborview Medical Center.

The employer neither cited nor relied upon these four incidents when it disciplined Lynne in writing for other incidents described in the August 2, 2010 final counseling letter.

mail occupies approximately two-and-a-half lines of text in the two-page letter. Lynne's e-mail was a factor, but just one of many factors the employer considered. The union did not prove, and nothing in the record supports the conclusion, that the e-mail was a substantial factor – that the e-mail was important or significant to the employer. In terms of substantive reasons for the discipline, Lynne's e-mail played a relatively small and inconsequential part in the employer's decision to discipline him. To reach the opposite conclusion would be to decide Lynne's e-mail was the cause in fact for the employer's decision, an analysis the supreme court rejected when it rejected the "but for" causation standard in *Wilmot* and *Allison*.

Since *Educational Service District 114*, when the Commission adopted the discrimination test from *Wilmot* and *Allison*, the Commission and examiners determine whether a specific protected union activity is a substantial motivating factor on a case-by-case basis, depending on the unique facts and circumstances presented in each case. The union established a *prima facie* case of discrimination. The union did not present any evidence that the employer's discipline of Lynne was substantially motivated by Lynne's e-mail. Under the unique facts and circumstances of this case, the union did not carry its ultimate burden of proving the employer's discipline of Lynne was substantially motivated by union animus.

CONCLUSION

I find Lynne's e-mail to Bonilla was a statutorily protected activity, and the union established a *prima facie* case the employer discriminated against Lynne. In response, the employer articulated legitimate, non-pretextual, non-discriminatory reasons for the discipline. The union failed to maintain its ultimate burden of proof that Lynne's protected union activity was a substantial motivating factor for the employer's discipline.

In accordance with Commission precedent, an independent interference violation cannot be found under the same set of facts that fails to constitute a discrimination violation. *Reardan-Edwall School District*, Decision 6205-A. I therefore dismiss the union's complaint.

FINDINGS OF FACT

1. The University of Washington (employer) is an employer within the meaning of RCW 41.80.005(8).

2. The Washington Federation of State Employees (union) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

3. The union represents a bargaining unit of campus security officers at Harborview Medical Center. The employer and union were parties to a collective bargaining agreement for the security officers bargaining unit effective from July 1, 2009, through June 30, 2011.

4. Lynne has been employed as a campus security officer at Harborview since 2001. Lynne has been an active union member and shop steward for approximately eight years.

5. Lynne works in the department of parking and security, which is managed by Administrative Director Bill Garber and Associate Director of Program Operations R.J. Angeles. Sergeant Duane Pederson was Lynne's immediate supervisor when the incidents that led to the union's unfair labor practice complaint occurred.

6. On March 12, 2010, Angeles informed Pederson that Malik Corbin, one of the employer's campus security officers, was on a list of employees who had not paid citations they had received for parking in restricted areas near the employer's facilities.

7. When Corbin was reminded of his outstanding parking citation from June 23, 2009, he contacted Lynne and told Lynne that he thought he was being treated unfairly because supervisors had been parking in the same lot without repercussions.

8. On April 25, 2010, Lynne wrote and sent the following e-mail to Sergeant Ruben Bonilla, titled "Illegal Parking":

> Ruben,
>
> It has come to my attention that our department is cracking down on an officer who received a parking ticket for being parked in the engineering lot, and demanding that he pay a $35 fine.
>
> I recall shortly after your job title changed from Lieutenant to Sergeant, I saw you with your vehicle parked in that lot just prior to your shift. I recall I took a photo of your vehicle with my cell phone and you made a comment about having to move or something like that. I deleted the photo, but you did not move your vehicle. I have seen your vehicle, and those of other supervisors parked in that lot on many other occasions.
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> As a supervisor, you lead by example. If an officer sees you and other supervisors park your personal vehicles in that lot, the officer would naturally assume that it is ok to park there also. One has done so, and now faces a $35 fine.
>
> Simply because you did not "get caught", that is, receive a parking citation, does not mean that it was alright [sic] for you or other supervisors to park there.
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> As a supervisor, it is your duty to notify your supervisor that you have illegally parked your personal vehicle in the engineering lot in the past, and offer to pay the $35 fine for each instance you can recall illegally parking there, so that everyone is treated equally. As a supervisor, you should also report to your supervisor if you have observed other supervisors also illegally parking there and request that he take appropriate action.
>
> I assume that you will take the appropriate action within the next few days.
>
> Thank you,
>
> Michael Lynne
> Shop Steward
> WFSE Local 1488

9. On April 29, 2010, Angeles notified Lynne that he was scheduled for an investigatory meeting regarding the e-mail to Bonilla, and the meeting occurred on May 26, 2010.

10. On August 2, 2010, Garber gave Lynne a final counseling letter, which mentioned the e-mail along with three other incidents involving Lynne on May 12, June 2, and July 15 that the employer considered insubordinate and disrespectful. The employer's final counseling letter also referenced two previous final counseling letters the employer gave Lynne in 2006 and 2009.

11. When he wrote his e-mail, Lynne was appropriately representing and advocating for an employee in Lynne's role as a shop steward. Lynne's e-mail was reasonable and was neither irresponsible nor abusive. Because Lynne communicated in writing, his e-mail was inherently less confrontational than a face-to-face interaction. Lynne's unsubstantiated allegations that Bonilla improperly parked in the parking lot were not unreasonable because they were related to Lynne's union activity. Under the facts and circumstances of this case, Lynne's e-mail was protected union activity.

12. The union proved a *prima facie* case of discrimination. The evidence demonstrated Lynne's e-mail was protected union activity, the employer's final counseling deprived Lynne of a right or benefit, and circumstantial evidence supports a causal connection between Lynne's protected union activity and his discipline.

13. The employer articulated legitimate, non-pretextual, and non-discriminatory reasons for the discipline.

14. The union failed to maintain its ultimate burden of proof that the employer's reasons for disciplining Lynne were pretextual or that Lynne's protected union activity was a substantial motivating factor for the employer's discipline.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-45 WAC.

2. By its actions described in Findings of Fact 9 and 10, the employer did not discriminate against Lynne or interfere with employee rights, and did not violate RCW 41.80.110(1)(a) or (c).

ORDER

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

ISSUED at Olympia, Washington, this 23rd day of April, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JOEL GREENE, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23649-U-10-06033	FILED:	11/22/2010	FILED BY:	PARTY 2
DISPUTE:	ER DISCRIMINATE				
BAR UNIT:	SECURITY				
DETAILS:	See 23720-S-11-0201 Campus Security Officers				
COMMENTS:					

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