STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE PATROL TROOPERS ASSOCIATION, Complainant, vs. STATE – WASHINGTON STATE PATROL, Respondent.	CASE 26341-U-14 DECISION 12607 - PECB MODIFIED AND REISSUED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Jeffrey Julius, Attorney at Law, Vick, Julius, McClure, P.S., for the Washington State Patrol Troopers Association.

Kari Hanson, Senior Counsel, and *Charlynn R. Hull*, Assistant Attorney General, Attorney General Robert W. Ferguson, for the Washington State Patrol.

On March 11, 2014, the Washington State Patrol Troopers Association (union) filed a complaint with the Public Employment Relations Commission alleging unfair labor practices against the Washington State Patrol (employer or WSP). A preliminary ruling was issued on March 19, 2014, stating a cause of action existed. Examiner Erin J. Slone-Gomez held a hearing on January 19, 20, 21, and 22, 2016, and the parties filed post-hearing briefs to complete the record.[1]

ISSUES

The issues presented in the preliminary ruling are as follows:

1. Employer discrimination (and derivative interference) in violation of RCW 41.56.140(1), by revoking Temporary Disability Leave (TDL) for Sergeant Mark Crandall, in reprisal for union activities protected by Chapter 41.56 RCW; and

[1] This decision is being reissued according to the Order Setting Aside Decision, Granting Motion to Modify, and Reissuing Decision, *State – Washington State Patrol*, Decision 12607-A (PECB, 2016).

2. Employer interference with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made to all bargaining unit members, in connection with union activities, in revoking Crandall's TDL.

Based on the record as a whole, I find that the union did not prove by a preponderance of the evidence that the employer either discriminated against Crandall or independently interfered with employee rights. The complaint is dismissed.

BACKGROUND

At the time of filing of this complaint, the union and the employer were parties to a collective bargaining agreement effective from July 1, 2013, through June 30, 2015. The bargaining unit consists of all commissioned employees of the WSP through the rank of sergeant.

The union's complaint is centered around a traffic accident involving Crandall, the employer's granting of TDL, and the employer's rescinding of this grant. Crandall has been employed by the WSP since May 1991 and was promoted to the position of sergeant in October 2005. In September 2010 Crandall was selected as the coordinator for the WSP's Drug Recognition Expert Program. Additionally, Crandall is involved with the union and acts as the representative for the sergeants stationed in the west side of the state, a role he assumed in July 2011. As the west side sergeant representative, Crandall also sits on the union's executive board.

At the time of the events at issue in this complaint, Crandall—in his role as the Drug Recognition Expert Program Coordinator—was working in the Drug Evaluation and Classification Program of the WSP's Impaired Driving Section. The Impaired Driving Section, headed by Lieutenant Robert Sharpe, is one of three divisions in the Forensic Laboratory Services Bureau, which is headed by Director Larry Hebert. Hebert reports to Deputy Chief Curt Hattell, who in turn reports to the Chief of the WSP, John Batiste.

Crandall's coordinator position does not routinely engage in traffic law enforcement activities but instead works with other local and federal agencies to provide appropriate training for drug

recognition experts across the state. Crandall is assigned a vehicle owned by the WSP for business use including commuting. Crandall is not considered "on duty" while commuting. However, all employees of the WSP, including the Chief, are tasked with maintaining traffic safety even if they are not assigned to traffic patrol and are considered to go "on duty" if they engage in certain traffic law enforcement actions.

Crandall's Union Advocacy

Prior to the traffic accident that gave rise to the events at issue in this complaint, Crandall as a union representative acted as an advocate for his union. That advocacy included filing complaints and expressing concerns up through his chain of command. The union offered three examples of such actions at the hearing.

In one such example occurring in October 2012, Crandall expressed concern with a directive from Sharpe that WSP vehicles not be used to attend physical fitness centers and Crandall's belief that this prohibition was a change from existing terms and conditions of employment. Sharpe e-mailed a copy of Crandall's allegation to Hebert, who expressed his concern with the underlying request and made a sarcastic comment about Crandall's physical appearance for which Hebert's supervisor at the time, Deputy Chief Dave Karnitz, issued him a reprimand.

In November 2012 Crandall engaged in an e-mail exchange about leadership with Captain Chris Gundermann, a WSP captain who is not in Crandall's chain of command. Gundermann had distributed information about leadership qualities to several supervisors at the WSP to which Crandall responded that the WSP did not adhere to the principals discussed in Gundermann's e-mail. Gundermann responded to Crandall and forwarded this exchange to several colleagues, including Sharpe and Hattell, who was the Assistant Chief at the time. Hattell complimented Gundermann on his response to Crandall's e-mail. In a subsequent e-mail to Hattell and Captain Mike Dahl, the captain in charge of Internal Affairs, Gundermann expressed concern that Crandall, in his role as a union representative, would be advising sergeants in the WSP. Neither Hattell nor Dahl responded to this e-mail.

In November and December 2012 Crandall complained that Sharpe had issued a directive that non-patrol members in Crandall's unit dress in uniform more often than had been the practice. Crandall and other employees in the Impaired Driving Section shared that they had previously been allowed to wear business-casual civilian clothes. The employees eventually sought and received permission from Batiste to return to this dress code.

June 2013 Accident

On June 13, 2013, Crandall was rear-ended by a pickup truck when he was stopped at a stop sign during his evening commute home. After the accident, on June 25, 2013, Crandall submitted an interoffice communication (IOC) to Sharpe, stating:

> I was operating my issued patrol car, wearing the issued Impaired Driving Section uniform, and was struck from behind by another driver while I was stopped at a stop sign. . . . . Moments prior to the stop sign, I had noticed . . . [the] pickup . . . .

In the IOC, Crandall did not mention that he was engaged in any traffic enforcement activities. The IOC appears to indicate that Crandall was commuting home at the time of the accident. At the hearing, Crandall testified that he had been monitoring the pickup truck using his car's mirrors before it crashed into him because the driver was driving erratically. Crandall also testified that he was looking for a safe location to pull over so that he could position himself behind the truck in order to safely detain the driver and determine if the driver was impaired. Crandall provided this testimony when questioned as to whether he was actively engaged in traffic enforcement duties, such as monitoring and detaining a driver he believed to be impaired, at the time of his accident. Crandall asserted that he was struck while performing these traffic enforcement duties instead of being struck during his regular commute home as indicated in the IOC.

After the truck hit Crandall's vehicle, Crandall informed dispatch through his radio that he had been involved in an accident. Crandall then questioned the truck driver about the accident at which time an on-duty sheriff's deputy stopped at the scene to assist. Crandall testified that he informed the deputy that he believed the truck driver was impaired and then sought medical assistance from the fire department personnel at the scene. Crandall further testified that the deputy informed him that he did not believe the driver was impaired. Crandall asked the deputy to perform a field

sobriety test on the driver anyway because Crandall believed the driver was impaired and that this impairment contributed to the driver's observed erratic behavior and the accident. The deputy did not perform a sobriety test. WSP personnel arrived on the scene and completed a collision report. Crandall chose not to receive additional medical assistance as he was not in pain at the time and returned to his home. He informed Sharpe of the incident, and Sharpe encouraged Crandall to be evaluated at a hospital.

Request for TDL

Two days after the collision, on June 15, 2013, Crandall reported for prescheduled off-duty work at Safeco Field. While working at Safeco Field, Crandall began feeling pain. He sought medical treatment on June 17, 2013, from his family physician, Dr. Asmita Chaudhary. Beginning on June 18, 2013, Crandall worked with Sally Verrinder, a WSP administrative assistant, to complete an injury report. On June 25, 2013, Crandall worked with Verrinder and Sharpe to request TDL.

TDL is a special type of leave, authorized by RCW 43.43.040, available to WSP personnel who are injured "during line duty." TDL is separate and different from other types of disability leave available to workers in Washington State and may only be used by WSP employees. The leave is approved by the WSP Chief and provides injured personnel up to six months of disability leave. This results in an employee not needing to use any of his or her accrued leave and continuing to receive retirement, health, leave, and other benefits as if he or she were still working. Crandall also applied for worker's compensation through the Washington State Department of Labor & Industries (L&I).

Grant, Use, and Extensions of TDL

Sharpe first received Crandall's TDL request and informed Hebert in writing that Crandall was "injured as a result of a collision while on-duty." The TDL request was then reviewed by the WSP Human Resource Division, recommended by Hebert, reviewed by Hattell, and eventually approved by Batiste on July 2, 2013. The TDL request included an IOC in which Crandall stated, "Moments prior to the stop sign, I had noticed an older Ford pickup that had caught me rather rapidly as we both traveled south . . . ." On July 9, 2013, Crandall received written confirmation of and instructions regarding his TDL approval from June 13, 2013, to July 17, 2013, from Jennifer

Nuse, WSP Safety and Wellness Coordinator. Nuse informed Crandall that he would not be able to retain his workers' compensation checks while on TDL and that he would need to submit a medical update if he sought an extension of his TDL.

Over the next several months Crandall sought medical assistance from physicians and physical therapists and submitted updates to both the employer and L&I. These updates included documentation from Crandall's medical providers about his condition, progress, and ability to perform work. Activity Prescription Forms (APF), which were required to be completed by Crandall's physicians and submitted to L&I for workers' compensation, were part of the documentation. Electronic copies of the submitted APFs were kept in an online database that Crandall, L&I, and authorized employees of the WSP could access. The documentation also included doctor and physical therapy reports. All of the documentary updates were provided to L&I, but only three physical therapy reports (identified below) stating that Crandall was not ready to return to work were provided directly to the employer. The documentation consisted of the following:

- June 24, 2013, visit report and APF from Chaudhary, stating Crandall should begin physical therapy and return in three weeks for another visit but was not released to work.
- June 27, 2013, visit report and APF from Dr. Karen Nilson (a family physician who replaced Chaudhary), stating Crandall could return to work on light duty with physical activity restrictions.
- June 28, 2013, physical therapy visit report from Caleb Louvier, DPT, stating Crandall was not ready to return to work.
- July 3, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- July 8, 2013, unsigned physical therapy visit report, stating Crandall was not ready to return to work but could be ready for light duty in two or three weeks. Crandall e-mailed a copy of this report to Nuse on July 11, 2013, indicating he did so because "it list[ed] some of [his] treatment and expectations for getting back to work" and he knew "[the Human Resource Division] need[ed] some update on [his] progression of therapy."

- July 9, 2013, APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- July 23, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- July 26, 2013, physical therapy visit report from Louvier, stating Crandall was not ready to return to work even on light duty. Crandall e-mailed a copy of this report to Nuse on August 9, 2013. Nuse replied informing him to continue to use TDL through September 11, 2013.
- August 13, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- August 27, 2013, APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- September 10, 2013, APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- September 11, 2013, physical therapy visit report from Louvier, stating Crandall was not ready to return to work but would likely be ready for light duty in four weeks. This report was submitted by Crandall and received by the WSP Human Resource Division on September 27, 2013.
- September 13, 2013, physical therapy visit report from Ken Williams, PTA, stating Crandall was not ready to return to work but would likely be ready to return in four weeks.
- October 7, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- October 8, 2013, physical therapy visit report from Lori Howell, PTA, which did not contain a statement about returning to work.
- October 28, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- March 31, 2014, APF from Dr. Ken Takemura (a new physician Crandall began seeing), stating Crandall was released to work without physical restrictions.

At some time during July or August 2013 Crandall confirmed with the WSP Human Resource Division through Nuse that notes from physical therapy would be adequate ongoing medical documentation that he was required to provide in order to receive extensions of his TDL. Nuse informed him that as long as the physical therapy notes included the required information they would be sufficient. Crandall did not inform Nuse that the physical therapy notes were in conflict with notes from Nilson about Crandall's ability to perform light-duty assignments.

August 2013 Meeting Between Hebert and Hattell

During a regularly scheduled biweekly meeting between Hebert and Hattell in August 2013, Hebert shared concerns he had about Crandall's prolonged absence. Hebert informed Hattell that he had learned further information about the accident as part of a routine review of damage to agency equipment and that through this review he believed that the accident Crandall had been in was minor. Upon hearing that Crandall had been commuting at the time of the accident, Hattell directed Hebert to further examine Crandall's eligibility for TDL and report back on his findings. Hebert reviewed WSP regulations covering the prerequisites for granting TDL. Hebert shared with Hattell that after reviewing this information he believed he had inappropriately recommended approval of Crandall's TDL request. Upon recommendation from Hattell, Batiste decided to rescind the approval of Crandall's TDL.

September 9, 2013, Union Executive Board Meeting

While Crandall was on TDL on September 9, 2013, a meeting of the union's executive board occurred. Crandall attended and participated in this meeting. Batiste attended this meeting for a few hours during the morning to discuss labor relations concerns with the union. None of the other WSP employees in Crandall's chain of command attended the meeting.

Rescission of Crandall's TDL

On September 24, 2013, Hebert met with Crandall and then followed up by e-mail, informing Crandall that his TDL authorization had been rescinded because he did not meet the eligibility requirements for TDL set forth in RCW 43.43.040 as he was not engaged in an active law enforcement activity at the time of injury. Hebert also advised that Crandall would have to use

sick leave for the time he had been absent. A formal notice of this rescission was provided to Crandall by Captain Jeff DeVere, the Human Resource Division Commander at the time.

On September 26, 2013, Crandall replied to Hebert's e-mail stating that he was disappointed with the decision to rescind approval of his TDL, asking for several documents, notifying Hebert that he would be appealing the decision, and clarifying that the reason he was being denied TDL was because he was "not in active law enforcement activity." On October 1, 2013, Crandall submitted a new IOC regarding the accident on June 13, 2013. In this IOC, Crandall conveyed substantial detail about the truck driver's behavior, his monitoring of the driver, and his determination that he would be pulling the driver over for investigation.

Crandall's Return to Work

On October 15, 2013, Crandall e-mailed Sharpe and Nuse indicating that "[i]n an effort to save [his] sick leave balance" he could perform light duty work. Nuse responded by e-mail that same day requesting medical documentation releasing him to return to work.

On October 29, 2013, Hebert sent an IOC to Crandall stating that the employer had recently learned that Nilson had cleared Crandall to return to work on June 27, 2013. Crandall was directed to return to work on October 29, 2013, and informed that absences after Nilson cleared him to return to work would be coded as annual leave, compensatory time, or other forms of accrued leave but not sick leave.[2]

After receiving this IOC, Crandall responded to Hebert and forwarded an e-mail from July 11, 2013, where he provided physical therapy notes to Nuse as an example of his updating the employer on his medical treatment. In his response Crandall stated, "In that IOC it mentions a conflict that I have been dealing with since inception of my injury: Dr. Nilson's return to work notice. I have not hidden or denied that Dr. Nilson made that entry. I have been in conflict in her diagnosis and treatment of my injury." Crandall then shared that he was told by the Human

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[2] The employer determined that Crandall did not have adequate leave to accommodate all the time he was absent and was thus overpaid by 170.5 hours. After subtracting the workers' compensation checks Crandall submitted to the employer, Crandall's leave without pay was fully made up and the employer issued him a check for the remainder of the surplus.

Resource Division that "Dr. Nilson's indication was going to be ignored if [he] could provide definite proof of treatment." On October 29, 2013, Crandall reported to work, and on October 30, 2013, he filed an appeal of his TDL denial. On November 5, 2013, Hebert replied to Crandall in an IOC where he stated the employer had already reconsidered Crandall's TDL denial and would not review the request again.

Also on November 5, 2013, Crandall submitted an IOC to Sharpe about his use of sick leave, stating that he explicitly told WSP Human Resource Division staff that Nilson had said he could return to work but "that the WSP and [Human Resource Division] did not wish for [him] to return to work." In the IOC, Crandall did not explicitly identify who in the Human Resource Division he informed about Nilson's conclusion. At the hearing, Nuse credibly testified that Crandall never mentioned Nilson's recommendation in any of their conversations or e-mails.

ANALYSIS

Issue 1 – Applicable Legal Standards

It is an unfair labor practice for an employer to discriminate against employees for engaging in protected union activity. RCW 41.56.140(1). An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Kitsap County*, Decision 12022-A (PECB, 2014), *citing Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in discrimination cases. To prove discrimination, the complainant must first set forth a prima facie case 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.

Kitsap County, Decision 12022-A.

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *Id.*, *citing Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to the common experience give rise to a reasonable inference of the truth of the fact sought to be proved. *Kitsap County*, Decision 12022-A, *citing Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

In response to a complainant's prima facie case of discrimination, the respondent need only articulate its nondiscriminatory reasons for acting in such a manner. The respondent does not bear the burden of proof to establish those reasons. *Kitsap County*, Decision 12022-A, *citing Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant to prove either that the employer's reasons were pretextual or that union animus was a substantial motivating factor behind the employer's actions. *Id.*

To prove an employer's stated nondiscriminatory reason was pretextual or substantially motivated by union animus, a union must "prove by a preponderance of the evidence that the disputed action was in retaliation for" exercising statutorily protected rights. *State – Corrections*, Decision 12002-A (PSRA, 2014), *citing Central Washington University*, Decision 10118-A (PSRA, 2010); *Clark County*, Decision 9127-A.

When deciding cases based on employer discrimination, the Commission may consider vicarious liability. In *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), the United States Supreme Court held that an employer may be held liable for discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision. *City of Vancouver*, Decision 10621-B (PECB, 2012), *aff'd in part, City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348-349 (2014).

Issue 1 – Application of Standards

The Union Established a Prima Facie Case for Discrimination.

During the time period of the events at issue in the instant case, Crandall was a union executive board member who, in his role as the sergeant representative for Western Washington, advocated

for his fellow union members. Three instances of this advocacy that occurred in the fall of 2012 were highlighted by the union at the hearing. This advocacy and Crandall's participation in the September 2013 union board meeting are examples of protected activity, meeting the first prong of the discrimination prima facie test.

The union has proven that Crandall was denied TDL, which caused Crandall to have to use other forms of leave. Crandall was notified of the employer's decision to rescind its approval of his TDL just over two weeks after his participation in a union board meeting. The union relies on the temporal proximity of this meeting to Crandall's notification as evidence of a causal connection between Crandall's protected activity and the denial of his TDL. Additionally, the union alleges that Sharpe, Hebert, and Hattell were motivated by union animus, as a result of Crandall's advocacy work, and this motivation impacted their participation in the decision to grant or deny Crandall's TDL. By showing that the employer rescinded Crandall's TDL close in time to Crandall's participation in a union board meeting, the union has met its burden of proof regarding the second and third prongs of the prima facie discrimination test.

The Employer Articulated a Legitimate Nondiscriminatory Reason.

As stated above, after the union establishes a prima facie case, the employer need only articulate a legitimate, nondiscriminatory reason for its actions. Here, the employer states that it rescinded approval of Crandall's TDL because he was not engaged in "line duty" at the time of the June 13, 2013, traffic accident and thus should never have been granted TDL. The employer further explains that its rescission of Crandall's TDL approval does not constitute a harm to Crandall, because he was never entitled to TDL. Additionally, the employer argues that the decision was not made because of Crandall's participation in the union board meeting or because of union animus. This nondiscriminatory explanation by the employer is sufficient to shift the burden to the union to show the proffered explanation was pretextual.

The Union Failed to Establish That the Employer's Nondiscriminatory Reason Was Pretextual.

The union has not met its ultimate burden of proving by a preponderance of the evidence that the employer's decision to rescind its approval of Crandall's TDL was based on either his participation in a union board meeting or due to union animus.

I. Crandall's Participation in a Union Executive Board Meeting

The employer offered testimony and evidence showing that the initial decision to revisit its approval of Crandall's TDL occurred prior to the September 9, 2013, union board meeting. During a routine meeting between Hebert and Hattell, they discussed Crandall's absence. Both Hebert and Hattell credibly testified that this discussion occurred in August 2013. During this meeting, Hebert shared that he was surprised Crandall was still out of work as Hebert believed the accident Crandall had been involved in was relatively minor. Hebert mentioned that Crandall was commuting at the time of the accident, and Hattell realized that sustaining an injury while commuting did not meet the standard of line duty required for TDL. Soon after the meeting, Hattell, Hebert, and employees in the Human Resource Division reviewed the documentation in Crandall's request along with other information about the accident and determined that TDL should never have been approved. Hattell reported this to Batiste, and Batiste made a decision to rescind approval of Crandall's TDL.

Batiste is the only WSP employee who was involved in the decision to rescind approval of Crandall's TDL that also attended the union board meeting. Batiste credibly testified that he attended the September 9, 2013, union board meeting but that he did not pay particular attention to Crandall's attendance. Batiste did not communicate Crandall's attendance to Hattell or Hebert. Hattell credibly testified that he did not attend the September 9 meeting though he had attended union board meetings in the past. Neither Sharpe nor Hebert have attended a union board meeting.

The discussion during which Crandall's TDL was reviewed took place in August 2013, before Crandall's participation in the union board meeting in September. That Crandall was notified of the employer's decision to rescind its approval of his TDL two weeks after he attended a union board meeting was coincidental. The union relies solely on the temporal proximity of Crandall's participation in the meeting to his notification as evidence that Crandall's protected activity of attending the meeting was a reason for the approval of his TDL being rescinded. As this timing was merely coincidental, the union has not met its burden of proving discrimination by a preponderance of the evidence with this argument.

II. Crandall's Union Advocacy

The employer argues that because Batiste is the only WSP employee who can grant or deny TDL, and Batiste was only tangentially involved in the three examples of union advocacy Crandall participated in during the fall of 2012, the union's argument of animus must be discounted. However, Batiste did not make his decisions to approve and later rescind approval of Crandall's TDL in a vacuum. He testified at hearing that he relies on the recommendations of his executive staff. In this instance Hattell was the only executive staff member involved in the decisions regarding Crandall's TDL. As the union appropriately points out in its brief, the alleged animus of staff involved in an action cannot be discounted. Therefore, an examination of the alleged union animus held by Sharpe, Hebert, and Hattell is necessary.

As discussed above, the union offered three examples of Crandall's union advocacy work, which the union alleges resulted in union animus by staff members who were involved in the approval and later denial of Crandall's TDL. The first example occurred when Crandall complained about a directive from Sharpe that WSP vehicles could not be used by employees for their travel to and from workout facilities. Sharpe credibly testified that he did not harbor any ill will resulting from Crandall's complaint about vehicle use. Additionally, Sharpe did not review or recommend the decision to rescind approval of Crandall's TDL. The union showed that Hebert, in an e-mail exchange that did not include Crandall, stated that Crandall's physical appearance indicated he was not regularly using a workout facility. As discussed above, Hebert received a reprimand for what he described as his "sarcastic" comment. This remark by Hebert is not an indication of union animus; at best, it is an indication of personal animus toward Crandall. Personal animus, even when directed toward a union board member, is not equivalent to union animus.

The second example involved Crandall's e-mail discussion with Gundermann about leadership. Gundermann responded to a complaint from Crandall that the WSP did not adhere to the leadership principals Gundermann advanced in his e-mail. Gundermann responded to Crandall, and Hattell complimented Gundermann on that response. The union offered evidence of Hattell's encouragement of Gundermann's e-mail, which Crandall found to be offensive. Crandall's subjective view of this e-mail about leadership principals, not union activity or labor-management relations, does not constitute union animus. Additionally, the fact that Hattell complimented

Gundermann on a response that could be viewed as dismissive but that is unlikely to be objectively regarded as offensive is not indicative of union animus on Hattell's part. Gundermann later expressed concern that Crandall, in his role as a union board member, provided advice to other WSP sergeants. Gundermann is not in Crandall's chain of command and had no influence on any of the decisions made regarding Crandall's TDL.

The union's third example where Crandall complained about a directive from Sharpe that employees increase their wearing of a WSP uniform is not persuasive. Evidence shows that a meeting was held with Batiste where Crandall may have voiced objection to Sharpe's uniform directive, and this meeting resulted in Sharpe rescinding his directive about uniforms. Similar to the first example, Sharpe credibly testified that he was not upset with Crandall for voicing an objection to his directive. Again, Sharpe did not review or recommend the decision to rescind approval of Crandall's TDL.

After analyzing the union's three examples of Crandall's advocacy, I find the union has not met its burden of proving discrimination by a preponderance of the evidence.

III. Employer's Mistaken Grant of TDL

As explained above, based on the evidence provided by the union it is unlikely that Crandall's attendance at the union board meeting or the three examples of union advocacy advanced at the hearing had any influence on the decision to rescind approval of Crandall's TDL. Instead, I find it is more likely that a mistake was made when Crandall's TDL was approved and that the employer took the appropriate steps to correct this mistake. TDL is only approved for an employee who is disabled while performing line duty. Line duty is defined in RCW 43.43.040 as "active service which encompasses the traffic law enforcement duties and/or other law enforcement responsibilities of the state patrol. These activities encompass all enforcement practices of the laws, accident and criminal investigations, or actions requiring physical exertion or exposure to hazardous elements."

Although the union has shown that Crandall was commuting in a WSP-provided unmarked vehicle, it did not show that Crandall went "on duty" or therefore was actively involved in "line

duty" under RCW 43.43.040. Sharpe testified that he was unfamiliar with TDL at the time of Crandall's accident, as neither Sharpe nor any employee he supervised had previously applied for TDL. Hebert stated that he was also unfamiliar with the requirements of TDL, especially as he was most familiar with supervising civilian employees who do not perform line duty and are therefore not eligible for TDL.

The employer's August 2013 determination that Crandall was not acting in the line of duty was based on a plain reading of RCW 43.43.040 and Crandall's description of the incident in his June 25, 2013, IOC requesting TDL. According to the records available to Batiste and his executive staff at the time, Crandall was commuting from work to his home and was not engaged in line duty. Thus, Batiste should not have approved the TDL. The decision to remedy this inappropriate approval of TDL by rescinding the approval was the obvious next step upon determining that Crandall's accident did not meet the standard set out in the law.

After Crandall received notice of this rescission, he filed supplementary documentation outlining his belief that he was engaged in line duty at the time of injury. Crandall had never performed traffic enforcement duties during his commute before. Crandall's assertion that he was engaged in line duty, stated for the first time in an October 2013 IOC to Sharpe, was not convincing to the employer and the decision to deny Crandall's TDL was upheld.

Issue 1 – Conclusion

The union failed to prove by a preponderance of the evidence that the employer rescinded its approval of Crandall's TDL for discriminatory purposes. The employer offered clear evidence that the impetus for the review of Crandall's TDL approval was a review of Crandall's long absence from work. The employer also showed that the determination to rescind its approval of Crandall's TDL was based on the employer's interpretation of the requirement that an employee be acting in the line of duty when injured. The union was unable to show that this proffered explanation was pretextual or motivated by substantial union animus. Accordingly, the union's allegation of discrimination (and derivative interference) is dismissed.

Issue 2 – Applicable Legal Standards

The burden of proving unlawful interference rests with the complaining party. *Wenatchee School District*, Decision 8206-A (EDUC, 2005). In *Washington State Patrol*, Decision 11863-A (PECB, 2014), the Commission reiterated the legal principles applicable to prove employer interference under RCW 41.56.140(1). To prove an interference violation, the complainant must prove, by a preponderance of the evidence, the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd*, 98 Wn. App. 809 (2000). An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or a promise of benefit associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A, *aff'd*, 98 Wn. App. 809. The complainant is not required to demonstrate that the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *Id.* However, the complainant bears the burden of demonstrating that the employer's conduct resulted in harm to protected employee rights. *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012), *citing City of Wenatchee*, Decision 8802-A (PECB, 2006).

Issue 2 – Application of Standards

The union alleges that by rescinding its approval of Crandall's TDL, the employer interfered with the rights of the bargaining unit as a whole. As stated above, the union bears the burden of proving that other members of the bargaining unit could reasonably perceive the employer's actions regarding Crandall's TDL as a threat of reprisal or force or a promise of benefit and that the employer's actions resulted in harm to bargaining unit members. At hearing, the union did not offer evidence about the perceptions or possible perceptions of Crandall's fellow union members regarding his TDL. In fact, the union did not even assert that other bargaining unit members were

aware of the employer's decision to rescind its approval of Crandall's TDL. The union also presented no evidence of any possible, let alone actual, harm to other members' protected employee rights. Furthermore, although the union addresses a claim of interference in its brief, this claim is derivative from the discrimination allegation, not independent.

Issue 2 – Conclusion

The union did not prove by a preponderance of the evidence that the employer interfered with employee rights. The allegation is dismissed.

FINDINGS OF FACT

1. The Washington State Patrol (employer or WSP) is a public employer within the meaning of RCW 41.56.030(12) and RCW 41.56.473.

2. The Washington State Patrol Troopers Association (union) is a bargaining representative within the meaning of RCW 41.56.030(2) for a bargaining unit of commissioned employees of the WSP through the rank of sergeant.

3. Crandall has been employed by the WSP since May 1991 and was promoted to the position of sergeant in October 2005. In September 2010 Crandall was selected as the coordinator for the WSP's Drug Recognition Expert Program. Additionally, Crandall is involved with the union and acts as the representative for the sergeants stationed in the west side of the state, a role he assumed in July 2011. As the west side sergeant representative, Crandall also sits on the union's executive board.

4. Crandall's coordinator position does not routinely engage in traffic law enforcement activities but instead works with other local and federal agencies to provide appropriate training for drug recognition experts across the state. Crandall is assigned a vehicle owned by the WSP for business use including commuting. Crandall is not considered "on duty" while commuting. However, all employees of the WSP, including the Chief, are tasked

with maintaining traffic safety even if they are not assigned to traffic patrol and are considered to go "on duty" if they engage in certain traffic law enforcement actions.

5. In October 2012 Crandall expressed concern with a directive from the Impaired Driving Section head, Lieutenant Robert Sharpe, that WSP vehicles not be used to attend physical fitness centers and Crandall's belief that this prohibition was a change from existing terms and conditions of employment. Sharpe e-mailed a copy of Crandall's allegation to the Forensic Laboratory Services Bureau head, Director Larry Hebert, who expressed his concern with the underlying request and made a sarcastic comment about Crandall's physical appearance for which Hebert's supervisor at the time, Deputy Chief Dave Karnitz, issued him a reprimand. Sharpe credibly testified that he did not harbor any ill will resulting from Crandall's complaint about vehicle use.

6. In November 2012 Crandall engaged in an e-mail exchange about leadership with Captain Chris Gundermann, a WSP captain who is not in Crandall's chain of command. Gundermann had distributed information about leadership qualities to several supervisors at the WSP to which Crandall responded that the WSP did not adhere to the principals discussed in Gundermann's e-mail. Gundermann responded to Crandall and forwarded this exchange to several colleagues, including Sharpe and then Assistant Chief Curt Hattell. Hattell complimented Gundermann on his response to Crandall's e-mail. In a subsequent e-mail to Hattell and Captain Mike Dahl, the captain in charge of Internal Affairs, Gundermann expressed concern that Crandall, in his role as a union representative, would be advising sergeants in the WSP. Neither Hattell nor Dahl responded to this e-mail.

7. In November and December 2012 Crandall complained that Sharpe had issued a directive that non-patrol members in Crandall's unit dress in uniform more often than had been the practice. Crandall and other employees in the Impaired Driving Section shared that they had previously been allowed to wear business-casual civilian clothes. The employees eventually sought and received permission from WSP Chief John Batiste to return to this dress code.

8. On June 13, 2013, Crandall was rear-ended by a pickup truck when he was stopped at a stop sign during his evening commute home. After the truck hit Crandall's vehicle, Crandall informed dispatch through his radio that he had been involved in an accident. WSP personnel arrived on the scene and completed a collision report. Crandall chose not to receive additional medical assistance as he was not in pain at the time and returned to his home. He informed Sharpe of the incident, and Sharpe encouraged Crandall to be evaluated at a hospital.

9. On June 25, 2013, Crandall submitted an interoffice communication (IOC) to Sharpe, stating:

> I was operating my issued patrol car, wearing the issued Impaired Driving Section uniform, and was struck from behind by another driver while I was stopped at a stop sign. . . . . Moments prior to the stop sign, I had noticed . . . [the] pickup . . . .

In the IOC, Crandall did not mention that he was engaged in any traffic enforcement activities. The IOC appears to indicate that Crandall was commuting home at the time of the accident.

10. Two days after the collision, on June 15, 2013, Crandall reported for prescheduled off-duty work at Safeco Field. While working at Safeco Field, Crandall began feeling pain. He sought medical treatment on June 17, 2013, from his family physician Dr. Asmita Chaudhary.

11. Beginning on June 18, 2013, Crandall worked with Sally Verrinder, a WSP administrative assistant, to complete an injury report. On June 25, 2013, Crandall worked with Verrinder and Sharpe to request TDL. TDL is a special type of leave, authorized by RCW 43.43.040, available to WSP personnel who are injured "during line duty." TDL is separate and different from other types of disability leave available to workers in Washington State and may only be used by WSP employees. The leave is approved by the WSP Chief and provides injured personnel up to six months of disability leave. This results in an employee

not needing to use any of his or her accrued leave and continuing to receive retirement, health, leave, and other benefits as if he or she were still working.

12. Sharpe first received Crandall's TDL request and informed Hebert in writing that Crandall was "injured as a result of a collision while on-duty." The TDL request was then reviewed by the WSP Human Resource Division, recommended by Hebert, reviewed by Hattell, and eventually approved by Batiste on July 2, 2013. The TDL request included an IOC in which Crandall stated, "Moments prior to the stop sign, I had noticed an older Ford pickup that had caught me rather rapidly as we both traveled south . . . ."

13. On July 9, 2013, Crandall received written confirmation of and instructions regarding his TDL approval from June 13, 2013, to July 17, 2013, from Jennifer Nuse, WSP Safety and Wellness Coordinator. Nuse informed Crandall that he would not be able to retain his workers' compensation checks while on TDL and that he would need to submit a medical update if he sought an extension of his TDL.

14. Over the next several months Crandall sought medical assistance from physicians and physical therapists and submitted updates to both the employer and L&I. These updates included documentation from Crandall's medical providers about his condition, progress, and ability to perform work. Activity Prescription Forms (APF), which were required to be completed by Crandall's physicians and submitted to L&I for workers' compensation, were part of the documentation. Electronic copies of the submitted APFs were kept in an online database that Crandall, L&I, and authorized employees of the WSP could access. The documentation also included doctor and physical therapy reports. All of the documentary updates were provided to L&I, but only three physical therapy reports (identified below) stating that Crandall was not ready to return to work were provided directly to the employer. The documentation consisted of the following:

- June 24, 2013, visit report and APF from Chaudhary, stating Crandall should begin physical therapy and return in three weeks for another visit but was not released to work.

- June 27, 2013, visit report and APF from Dr. Karen Nilson (a family physician who replaced Chaudhary), stating Crandall could return to work on light duty with physical activity restrictions.
- June 28, 2013, physical therapy visit report from Caleb Louvier, DPT, stating Crandall was not ready to return to work.
- July 3, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- July 8, 2013, unsigned physical therapy visit report, stating Crandall was not ready to return to work but could be ready for light duty in two or three weeks. Crandall e-mailed a copy of this report to Nuse on July 11, 2013, indicating he did so because "it list[ed] some of [his] treatment and expectations for getting back to work" and he knew "[the Human Resource Division] need[ed] some update on [his] progression of therapy."
- July 9, 2013, APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- July 23, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- July 26, 2013, physical therapy visit report from Louvier, stating Crandall was not ready to return to work even on light duty. Crandall e-mailed a copy of this report to Nuse on August 9, 2013. Nuse replied informing him to continue to use TDL through September 11, 2013.
- August 13, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- August 27, 2013, APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- September 10, 2013, APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- September 11, 2013, physical therapy visit report from Louvier, stating Crandall was not ready to return to work but would likely be ready for light duty in four

weeks. This report was submitted by Crandall and received by the WSP Human Resource Division on September 27, 2013.

- September 13, 2013, physical therapy visit report from Ken Williams, PTA, stating Crandall was not ready to return to work but would likely be ready to return in four weeks.
- October 7, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- October 8, 2013, physical therapy visit report from Lori Howell, PTA, which did not contain a statement about returning to work.
- October 28, 2013, visit report and APF from Nilson, stating Crandall could perform light duty with physical activity restrictions.
- March 31, 2014, APF from Dr. Ken Takemura (a new physician Crandall began seeing), stating Crandall was released to work without physical restrictions.

15. At some time during July or August 2013 Crandall confirmed with the WSP Human Resource Division through Nuse that notes from physical therapy would be adequate ongoing medical documentation that he was required to provide in order to receive extensions of his TDL. Nuse informed him that as long as the physical therapy notes included the required information they would be sufficient. Crandall did not inform Nuse that the physical therapy notes were in conflict with notes from Nilson about Crandall's ability to perform light-duty assignments.

16. During a regularly scheduled biweekly meeting between Hebert and Hattell in August 2013, Hebert shared concerns he had about Crandall's prolonged absence. Hebert informed Hattell that he had learned further information about the accident as part of a routine review of damage to agency equipment and that through this review he believed that the accident Crandall had been in was minor. Upon hearing that Crandall had been commuting at the time of the accident, Hattell directed Hebert to further examine Crandall's eligibility for TDL and report back on his findings. Hebert reviewed WSP regulations covering the prerequisites for granting TDL. Hebert shared with Hattell that after reviewing this information he believed he had inappropriately recommended approval

of Crandall's TDL request. Upon recommendation from Hattell, Batiste decided to rescind the approval of Crandall's TDL.

17. While Crandall was on TDL on September 9, 2013, a meeting of the union's executive board occurred. Crandall attended and participated in this meeting. Batiste attended this meeting for a few hours during the morning to discuss labor relations concerns with the union. None of the other WSP employees in Crandall's chain of command attended the meeting.

18. On September 24, 2013, Hebert met with Crandall and then followed up by e-mail, informing Crandall that his TDL authorization had been rescinded because he did not meet the eligibility requirements for TDL set forth in RCW 43.43.040 as he was not engaged in an active law enforcement activity at the time of injury. Hebert also advised that Crandall would have to use sick leave for the time he had been absent. A formal notice of this rescission was provided to Crandall by Captain Jeff DeVere, the Human Resource Division Commander at the time.

19. On September 26, 2013, Crandall replied to Hebert's e-mail stating that he was disappointed with the decision to rescind approval of his TDL, asking for several documents, notifying Hebert that he would be appealing the decision, and clarifying that the reason he was being denied TDL was because he was "not in active law enforcement activity."

20. On October 1, 2013, Crandall submitted a new IOC regarding the accident on June 13, 2013. In this IOC, Crandall conveyed substantial detail about the truck driver's behavior, his monitoring of the driver, and his determination that he would be pulling the driver over for investigation.

21. On October 15, 2013, Crandall e-mailed Sharpe and Nuse indicating that "[i]n an effort to save [his] sick leave balance" he could perform light duty work. Nuse responded by e-mail that same day requesting medical documentation releasing him to return to work.

22. On October 29, 2013, Hebert sent an IOC to Crandall stating that the employer had recently learned that Nilson had cleared Crandall to return to work on June 27, 2013. Crandall was directed to return to work on October 29, 2013, and informed that absences after Nilson cleared him to return to work would be coded as annual leave, compensatory time, or other forms of accrued leave but not sick leave.

23. After receiving the October 29, 2013, IOC, Crandall responded to Hebert and forwarded an e-mail from July 11, 2013, where he provided physical therapy notes to Nuse as an example of his updating the employer on his medical treatment. In his response Crandall stated, "In that IOC it mentions a conflict that I have been dealing with since inception of my injury: Dr. Nilson's return to work notice. I have not hidden or denied that Dr. Nilson made that entry. I have been in conflict in her diagnosis and treatment of my injury." Crandall then shared that he was told by the Human Resource Division that "Dr. Nilson's indication was going to be ignored if [he] could provide definite proof of treatment."

24. On October 29, 2013, Crandall reported to work, and on October 30, 2013, he filed an appeal of his TDL denial.

25. On November 5, 2013, Hebert replied to Crandall in an IOC where he stated the employer had already reconsidered Crandall's TDL denial and would not review the request again.

26. Also on November 5, 2013, Crandall submitted an IOC to Sharpe about his use of sick leave, stating that he explicitly told WSP Human Resource Division staff that Nilson had said he could return to work but "that the WSP and [Human Resource Division] did not wish for [him] to return to work." In the IOC, Crandall did not explicitly identify who in the Human Resource Division he informed about Nilson's conclusion. At the hearing, Nuse credibly testified that Crandall never mentioned Nilson's recommendation in any of their conversations or e-mails.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The union did not meet its burden of proving by a preponderance of the evidence, as described in Findings of Fact 3 through 26, that the employer discriminated (or derivatively interfered) against Crandall by rescinding approval of his previously authorized TDL or interfered with the rights of other bargaining unit members by this rescission in violation of RCW 41.56.140(1).

ORDER

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

ISSUED at Olympia, Washington, this 15th day of September, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Erin J. Slone-Gomez

ERIN J. SLONE-GOMEZ, 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.

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 09/15/2016

DECISION 12607 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 26341-U-14

EMPLOYER: STATE - WASHINGTON STATE PATROL
ATTN: FRANKLIN PLAISTOWE
OFFICE OF FINANCIAL MANAGEMENT
2ND FL RAAD BLDG
128 10TH AVE SW
PO BOX 47500
OLYMPIA, WA 98504
labor.relations@ofm.wa.gov
(360) 407-4140

REP BY: CHARLYNN R HULL
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA, WA 98504-0145
charlynnh@atg.wa.gov
(360) 664-4167

KARI HANSON
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA, WA 98504-0145
karih@atg.wa.gov
(360) 664-4167

PARTY 2: WA STATE PATROL TROOPERS ASSOCIATION
ATTN: JEFFREY MERRILL
200 UNION AVE SE STE 200
OLYMPIA, WA 98501
jmer921@gmail.com
(360) 704-7530

REP BY: JEFFREY JULIUS
VICK, JULIUS, MCCLURE, P.S.
5506 6TH AVE S STE 201-A
SEATTLE, WA 98108
jeffj@vjmlaw.com
(206) 957-0926