STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. STATE – ECOLOGY, Respondent.	CASE 128133-U-16 DECISION 12732 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On April 19, 2016, the Washington Federation of State Employees (union) filed an unfair labor practice complaint against the Washington State Department of Ecology (employer). The union alleged employer interference in violation of RCW 41.80.110(1)(a). The Commission's Unfair Labor Practice Manager reviewed the complaint under WAC 391-45-110 and on May 11, 2016, issued a preliminary ruling with a cause of action for interference. I held a hearing on January 17 and 18, 2017. On March 20, 2017, the parties submitted post-hearing briefs to complete the record.

ISSUES

As framed by the preliminary ruling, the issues presented by the union are whether the employer interfered with employee rights in violation of RCW 41.80.110(1)(a) by

1. since December 7, 2015, commencing and conducting an investigation alleging that union shop steward Tryg Hoff abused his schedule in October 2015;[1]

[1] The employer used the terms "fact-finding" and "investigation" somewhat interchangeably at the hearing and in documents submitted as evidence. Fact-finding meetings are part of investigations.

2. on January 6, 2016, placing a performance review in Hoff's personnel file that untruthfully claimed he did not meet performance expectations;

3. since February 4, 2016, commencing and conducting an investigation alleging that Hoff misused agency time in January and investigating a business Hoff owned in the 1990s;

4. on March 22, 2016, giving a reprimand to Hoff dated March 15, 2016.

After a preliminary ruling framing the issues to be heard at hearing is issued, the Commission's rules allow a complaining party to attempt to change the scope of the proceedings. Following the appointment of an examiner, a complainant may move to amend its complaint prior to the opening of an evidentiary hearing. WAC 391-45-070(2)(b). On January 11, 2017, the union filed an amended complaint, and the employer filed on an answer on January 13, 2017. After hearing arguments from both the union and the employer on January 17, 2017, I amended the preliminary ruling by adding a fifth issue:

5. since December 5, 2016, commencing and conducting an investigation alleging that Hoff engaged in inappropriate behavior and failed to follow his supervisor's directions.

As detailed below, I find that the union did not prove, by a preponderance of the evidence, that the employer interfered with employee rights in violation of RCW 41.80.110(1)(a), and I dismiss the complaint.

BACKGROUND

The union represents a bargaining unit of classified employees at the employer's headquarters in Lacey, Washington. The bargaining unit's collective bargaining agreement (CBA) is a master contract which encompasses multiple state bargaining groups. The CBA is effective from July 1, 2015, through June 30, 2017.

Tryg Hoff, a union member and shop steward, has worked for the state of Washington for approximately 26 years, first at the Department of Transportation, then at the Department of Labor

and Industries, and finally as an Economic Analyst 3 for the employer. Hoff worked in the employer's "rules unit" before moving to the Program Development & Operations Support Unit of the Water Resources Program. Program Development & Operations Support is supervised by Section Manager Dave Christensen. Christensen reports to Program Manager Tom Loranger, who in turn reports to Deputy Director Polly Zehm.

The union alleges that at or around the time Christensen became Hoff's supervisor in 2013, the employer began interfering with Hoff's ability to engage in protected activities. The employer responds that, during this time period, management was taking steps to improve and respond to performance and conduct concerns regarding Hoff.

Hoff has been a union shop steward since July 2010. Additionally, he briefly served as the union's treasurer in 2016. Around the fall of 2014, Hoff began an investigation of Christensen's performance as a supervisor based on Christensen's interaction with Hoff as well as other bargaining unit members.

October 2014 Feedback from Hoff to Loranger

On October 21, 2014, Hoff sent an e-mail to Loranger, copying chief shop steward Patricia Bailey and Human Resource Consultant Corrina McElfish. In the e-mail, Hoff identified his concerns about Christensen, stating that Christensen's work expectations were unreasonable, that he was dishonest, and that he needed "immediate training on the Collective Bargaining Agreement and Federal Labor law." Hoff complained that Christensen had bullied him and other bargaining unit members on several occasions. Hoff also shared that he had been in touch with employees who Christensen had previously supervised at the Department of Health (DOH) and stated, "A variety of Department of Health employees have communicated with me on Dave's bullying behavior exhibited at DOH. We are currently investigating these reports in partnership with [the union]." Hoff's e-mail concluded with a list of recommended trainings for Christensen and a statement that Christensen "needs immediate corrective action for bullying type behavior in the workplace."

That same day, Hoff sent a second e-mail that included attachments about bullying that he wanted Loranger to share with Christensen.

October and November 2014 E-mails Regarding Hoff's Investigation of Christensen

On October 28, 2014, Hoff e-mailed Loranger and McElfish additional information about his investigation of Christensen's employment at DOH:

> Talking to past staff at Department of Health.
> I called doing a representation investigation and talk [sic] to a variety of people that worked with Dave at Department of Health. Most were either still at DOH or had moved on. Some of their feedback was frighteningly similar as to what I have observed over the last year here at Ecology. Additionally, I was going to itemize the mistruths for this email that I've witnessed from Dave over the last 4-6 months but they have become too numerous and are growing daily as I observe what he's saying and doing more closely. I don't think this information could not be used constructively. I've also chosen not to add further information at this time except to say that Dave Christensen should not be managing people. He has extraordinary skills in other areas that are valuable to Ecology and are very productive for delivering quality products to our customers. However, the long pattern of abusive behavior to subordinates does not seem to have been mitigated through training. As I said earlier, this is and will continue to be a serious problem.
>
> I will probably receive more calls from past staff regarding this representation investigation but I don't feel I need to add anything further to the observations I've already collected at this time.

Zehm, Bailey, union shop steward Kerry Graber, and Human Resource Consultant Tamarae McLaughlin were copied on this e-mail.

A week later, on November 4, 2014, Loranger replied, "Tryg, cease all investigative work about Dave Christensen immediately. Any further union representation work you do must first be approved by Dave Christensen." McElfish and Zehm were copied on Loranger's reply. Almost three hours later, Loranger sent a clarifying e-mail to the same recipients that stated, "Tryg to clarify my second sentence: any work time spent for union representation activities must be pre-approved by Dave Christensen."

March 2015 Union Grievance

On March 4, 2015, the union filed a grievance on behalf of Hoff alleging the employer violated CBA Articles 27, 38, and 47 when Christensen changed Hoff's work schedule on February 25, 2015. The union stated that the schedule change was perceived as a form of discipline in response

to Hoff's shop steward duties. The grievance also noted, "There has been some dissension amongst the grievant and the supervisor in question. This dissention has created a hostile work environment."

June 2015 Employer Investigative Report

The employer tasked Barbara Vane and Elena Boling from its human resources office to complete an investigation into Hoff's allegations of inappropriate workplace behavior, bullying, harassment, and retaliation by Christensen and Loranger. Vane and Boling conducted the investigation during April, May, and June 2015 and issued their investigative report on June 30, 2015. Hoff, Christensen, Loranger, and five employees they identified as potential witnesses were interviewed as part of the investigation.

The report included an in-depth chronology of interactions between Hoff, Christensen, and Loranger as well as feedback from other employees about the allegations and Hoff's work performance. The investigators concluded their report by finding that Hoff's allegations could not be substantiated.

August 2015 Summary of Performance Expectations E-mail from Christensen

On August 26, 2015, Loranger sent an e-mail to Hoff, copying Christensen:

> Tryg, as we discussed here is my summary of performance expectations for you as we discussed today. Tom
>
> All union representation work you do must be approved by your supervisor before it is initiated.
>
> Complete all work that is assigned to you by your supervisor in the time frame that is expected.
>
> Make appropriate use of your time at work as directed by your supervisor to complete assigned [sic] in a timely fashion.

October 2015 Reinstatement of Four-Ten Schedule

During a regular check-in meeting, around the end of October 2015, Christensen and Hoff discussed Hoff returning to a four-ten schedule. According to Christensen's notes from this

meeting, Hoff requested the reinstatement of his four-ten schedule. Christensen acknowledged that while he had been hoping for increased work output similar to that which occurred during the previous couple of weeks, he would agree to reinstate Hoff's schedule as an indication of good faith. This schedule change took effect on October 28, 2015.

Following this change, the union notified the employer that it was withdrawing the associated March 2015 grievance, which was scheduled for a hearing before an arbitrator on November 15, 2016.

November 2015 Union Grievance

On November 23, 2015, the union filed a grievance on Hoff's behalf alleging violations of CBA Articles "2.2, 47.1 and 47.2; 6.9, 6.3, 6.5, 6.7, and 20.1." The union stated that on November 5, 2015, Christensen chastised Hoff for personal cell phone use in front of his coworkers and that this chastisement, in addition to Christensen's application of overtime-eligible standards to Hoff who is in an overtime-exempt position, is part of a pattern of treatment that constitutes harassment and the creation of a "hostile work environment."

December 2015 Invitation for Fact-Finding Meeting

On December 2, 2015, Christensen sent a calendar invitation to Hoff for a fact-finding meeting scheduled for December 7, 2015. Hoff sent an e-mail to Christensen asking him "what the contents of this 'fact finding' meeting [were]." Hoff copied Graber, union council representative Tony Jones, and union staff member Nancy Agan. Christensen responded, "The purpose of this meeting is to gather facts regarding your performance and allegations that you misused state time and resources." Hoff then asked what the allegations were and who made them. Christensen responded that Hoff would find out more at the meeting and that the information he provided met the requirements outlined by the parties' CBA.

January 2016 Performance and Development Plan

On January 4, 2016, Hoff received his Performance and Development Plan (PDP), which included an evaluation of Hoff's performance from October 1, 2014, through September 30, 2015, and laid out expectations for Hoff for the time period of October 1, 2015, through September 30, 2016.

The PDP made several references to Hoff's engagement in non-work activities, including substantial use of his personal cell phone and being away from his workstation for significant periods of time during the workday. Christensen stated that he believed this behavior resulted in Hoff taking longer to complete his work than had been expected. When specifically responding to Hoff's performance as related to accountability, Christensen wrote,

> Tryg has not met expectations for this competency. Throughout the performance period, Tryg did not meet my expectations for the timeliness for completion of work. When attempting to address the behavior, he argued that my expectations (that he should use his work time to complete work more quickly and multi-task several projects at the same time) were unreasonable. This resistance to improve workplace behavior demonstrated lack of accountability by Tryg.

Christensen acknowledged in the PDP that by the end of the performance review period Hoff's performance had improved, which Christensen credited (at least in part) to his regular, ongoing check-in meetings with Hoff. Hoff responded to Christensen's criticisms in the PDP space allocated for Hoff to make suggestions for improved organizational support. Hoff complained that Christensen's directions and expectations were confusing or contradictory, that Christensen assigned him work outside of his job classification, and that he was being falsely accused of misusing state resources and not using his time effectively. Additionally, Hoff expressed frustration that Christensen was micromanaging him and was expecting him "to follow restrictions that apply to an overtime eligible, scheduled employee instead of an overtime exempt employee."

January 2016 Union Grievances

On January 7, 2016, the union filed a grievance on Hoff's behalf alleging that the employer violated CBA Articles 2.2, 5, 6.9, 32, and 47 through Christensen's performance evaluation of Hoff. Specifically, the grievance stated that the PDP included statements that were beyond those appropriate for an evaluation and were subjects of ongoing grievances, that Christensen waited until the end of the performance period to express concerns about Hoff's performance, and that the PDP continued a pattern of ongoing harassment of Hoff by Christensen.

The union filed another grievance on Hoff's behalf on January 13, 2016, alleging that the employer violated CBA Articles 20.1, 20.1a, and 20.1b. The grievance stated that the employer had failed

to adequately respond to the harassment of Hoff by Christensen, which had resulted in Hoff being in an unsafe and unhealthy workplace.

February 2016 Fact-Finding Meeting

On February 2, 2016, Christensen sent Hoff a notice of a fact-finding meeting to occur on February 4. Christensen stated, "The purpose of this meeting is to follow up on statements you made at the previous interview, and gather facts regarding your performance and allegations that you misused state time and resources. Please bring a copy of your calendar for the period of January 1 through January 31, 2016." During this meeting, Hoff was questioned about a business he had owned.

February 2016 Union Grievance

On February 25, 2016, the union filed a grievance on Hoff's behalf alleging that the employer violated CBA Articles 2, 20, 20.1, 31, 31.5, 38, 38.1, 47, 47.1, 47.2, and 47.3. The grievance alleged that Christensen directed Hoff to follow work expectations provided to him on October 9, 2014, in a memorandum that documented an oral reprimand he had received and that this memorandum should have been removed from Christensen's supervisor file after the evaluation process. The grievance stated that Hoff believed this directive constituted retaliation in response to a previously filed grievance. Additionally, the grievance stated Christensen discriminatorily directed Hoff not to use his personal cell phone, which constituted a change in working conditions. The union again alleged that these instances were part of an ongoing pattern of harassment of Hoff by Christensen that the employer had failed to adequately address.

March 2016 Written Reprimand

On March 15, 2016, Loranger issued Hoff a written reprimand for failing to meet performance expectations, follow supervisory directives, properly use state resources and time, and adhere to agency policy. The reprimand stated that Hoff failed to complete an assignment during October and November 2015 according to direction provided by Christensen despite having ample work time to do so. Next, the reprimand stated that Hoff used his personal cell phone to an excessive degree on November 3 and 5, 2015, in contradiction to an expectations memorandum dated August 14, 2014, and an oral reprimand issued by Christensen on October 9, 2014. Third, Hoff was told

he violated Executive Policy 15-01 when he used his work computer to visit non-work related websites. Finally, Loranger warned Hoff that continued failure to follow directives and meet expectations would result in further discipline, up to and including dismissal.

April 2016 Union Grievance

On April 8, 2016, the union filed a grievance on Hoff's behalf alleging violations of CBA Articles 2, 2.1, 2.2, 6, 6.9, 20, 20.1, 27, 27.1, 47, 47.1, and 47.2. In addition to reiterating charges that Christensen was harassing Hoff and requiring him to adhere to standards that were not applicable to overtime-exempt staff and that the employer had failed to respond appropriately to Hoff's complaints regarding Christensen, the union alleged that the written reprimand was issued in relation to the filing of the November 23, 2015, grievance.

October 2016 E-mails Between Christensen and Hoff Regarding Workload

On October 18, 2016, Christensen e-mailed Hoff asking that he determine how he would analyze data related to a recent court decision and that he be ready to discuss this at their next regularly scheduled check-in meeting. Christensen ended the e-mail by stating,

> If you have questions before the meeting about this assignment, then please set up a meeting before Monday. I do not want to have a meeting on Monday where you haven't started scoping this work out because you think the direction is unclear. If you need more, then let's talk sooner.

Approximately five minutes later, Hoff responded to Christensen and copied Loranger and another employee:

> Dave you continue to overload me with work.
>
> I have people trying to explain to me their cash flow needs regarding their agreements. Is this gonna be another project that you pull the rug out from under me? This has made our outside customers very mad and this continues to show you don't have a high regard for actually completing work that has a purpose.

Christensen responded four minutes later, copying the same individuals:

> Jim told me you'd not have a lot going on while you wait for responses from the recent mail outs. I didn't realize you were working actively on that right now.

> If you have the OCR-related contract work to do, then yes, that's your priority. If you don't have specific tasks to do related to the contract oversight, then I want you working on the economics of the Hirst decision. I expect that you will fit this in with your other work.
>
> Thank you for clarifying you [sic] current tasks. This is why in-person meetings are so important so there isn't misunderstanding of what you are working on.

Approximately 12 minutes later, Hoff responded to the same individuals, this time adding Zehm:

> Dave, nobody believes you act in good faith.
>
> You are constantly trying to inundate me with make work and then cancel it once I've engaged all the customers. It's totally inappropriate and has made a wide variety of customers outside the agency, and within, angry with us. My work with OCR and agreements was clearly laid out a month ago to you. You just continue to try to sink my ship.

Hoff concluded his e-mail by outlining his current workload and suggesting that the work Christensen had assigned to Hoff be contracted out to an economics firm.

October and November 2016 E-mails from Hoff to Loranger

On October 31, 2016, Hoff e-mailed Loranger about his ongoing dispute with Christensen and copied Bailey, Graber, Jones, and Zehm. Hoff complained that he "heard the [Office of Financial Management] attorney told [the employer's] attorney something about insubordination." At the end of the e-mail, he wrote, "Tom, please tell me what is 'insubordination' so I know how I can and cannot act?....otherwise it appears that this is the next thing I'm going to be falsely accused of."

On November 7, 2016, Hoff sent Loranger a follow up e-mail. He began by stating, "Maybe you didn't see this email or maybe you are unwilling to communicate." He again asked what insubordination was and complained about Christensen's behavior.

November 2016 Union Request to Remove Reprimand from Personnel File

On November 28, 2016, Bailey sent a letter to Director of Human Resources Sandi Stewart, alleging that the employer "did not have evidence to support ANY reprimand both verbally or

written" and that management employees in the Water Resources Program were misusing their authority. Bailey asked that the March 2016 reprimand be removed from Hoff's personnel file.

December 2016 Notice of Investigation Interview

On December 5, 2016, McElfish sent Hoff a notice of an investigation interview scheduled for December 8, 2016. She stated, "The purpose of this interview is to gather facts regarding allegations that you have engaged in inappropriate behavior and failed to follow supervisory directives and expectations."

ANALYSIS

Applicable Legal Standards

Statute of Limitations

An unfair labor practice complaint "shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." RCW 41.80.120(1). "The six-month statute of limitations begins to run when the complainant knows or should know of the violation." *Community College District 17 (Spokane)*, Decision 9795-A (PSRA, 2008), *citing City of Bellevue*, Decision 9343-A (PECB, 2007). The start of the six-month period, also called the triggering event, occurs when "a potential complainant has actual or constructive notice of the complained-of action." *University of Washington*, Decision 11091-A (PSRA, 2012). The notice provided by the employer to the union must be clear and unequivocal and communicate enough information about the decision or action to allow for a clear understanding. *City of Bellevue*, Decision 10830-A (PECB, 2012). Conversely, vague or indecisive statements are not adequate to put a party on notice of a decision or action. *Id., citing Community College District 17 (Spokane)*, Decision 9795-A.

Employer Interference

It is an unfair labor practice for an employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by Chapter 41.80 RCW. RCW 41.80.110(1)(a); *State – Corrections*, Decision 11571-A (PSRA, 2013). To establish an interference violation the union must prove by a preponderance of the evidence that the employer's conduct interfered with

protected employee rights. *State – Washington State Patrol*, Decision 11775-A (PSRA, 2014). The standard is not particularly high. *Columbia Basin College*, Decision 11609-A (PSRA, 2013); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997).

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. *State – Washington State Patrol*, Decision 11775-A; *Kennewick School District*, Decision 5632-A (PECB, 1996). An employer may interfere with employee rights by making statements, through written communication, or by actions. *State – Washington State Patrol*, Decision 11775-A; *Snohomish County*, Decision 9834-B (PECB, 2008). In *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014), the Commission stated, "There is no requirement that an employee be engaged in protected activity, or have communicated an intent to do so, for an employer interference violation to exist."

The complainant is not required to demonstrate that the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *State – Washington State Patrol*, Decision 11775-A; *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary for the complainant to show that the employees involved were actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *State – Washington State Patrol*, Decision 11775-A; *City of Tacoma*, Decision 6793-A.

The Commission differentiates between statements made to union representatives and those made to rank-and-file bargaining unit employees. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004); *City of Bremerton*, Decision 3843-A (PECB, 1994). "The longer a union official is involved in representing the interests of bargaining unit employees, the less reasonable are their claimed perceptions of threats and coercion." *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012).

Application of Standards

The union contends that Hoff has faced a series of unwarranted criticisms, investigations, and a reprimand as a result of his actions as a shop steward (investigating Christensen) and filing

grievances. The employer argues that while Hoff has appeared on the union's list of shop stewards, he has not been observed functioning as a shop steward during his tenure, suggesting that Hoff hasn't been an active shop steward who engaged in protected activity. Rather, the employer asserts Hoff has filed a significant number of grievances on his own behalf since Christensen began working with Hoff on perceived performance deficiencies, including inappropriate use of work time.

Statute of Limitations

At the hearing, a significant amount of testimony focused on events that occurred prior to the events at issue in the instant case. The union argued this testimony provided important context for the examiner's determination of whether interference occurred. For example, testimony was offered about Hoff's investigation of Christensen soon after Christensen began working for the employer. When testifying about a directive and an amended directive from Loranger that appeared to instruct Hoff to cease his investigation regardless of whether this investigation occurred during work time, employer witnesses suggested it was inappropriate for a shop steward to investigate his own supervisor. Additionally, Hoff testified Christensen began treating him differently soon after he filed his first grievance, which was not offered at hearing as evidence of an allegation. The union also presented evidence related to the filing of a grievance and e-mail exchanges occurring in 2015. However, while providing context for the issues in the instant case, these events are outside the six-month statute of limitations period and thus were not within the scope of the issues framed in the preliminary ruling.

Employer Interference

The employer's argument that Hoff was not an active shop steward who regularly engaged in representation duties is not relevant for a claim of interference. Interference is found when an employer's actions could result in an employee's reasonable perception of threat or benefit associated with union activity. This perception could be about prospective rather than retrospective union activity. The focus on reasonable perception in interference cases is different than the requirement in discrimination cases that an employee have actually engaged in protected activity. As highlighted above, the Commission has explicitly stated that a successful allegation of interference does not require an employee to have actually engaged in protected activity.

In fact, the union's argument that Hoff was a longtime steward suggests that he was sophisticated and less likely to be swayed by employer actions that would otherwise constitute interference. Again, "[t]he longer a union official is involved in representing the interests of bargaining unit employees, the less reasonable are their claimed perceptions of threats and coercion." *State – Office of Financial Management*, Decision 11084-A.

Issue 1: Did the employer interfere with employee rights in violation of RCW 41.80.110(1)(a) by since December 7, 2015, commencing and conducting an investigation alleging that union shop steward Tryg Hoff abused his schedule in October 2015?[2]

Considering all of the facts in this case and the evidence and arguments presented, the union did not prove by a preponderance of the evidence that the employer interfered with employee rights when it conducted an investigation of Hoff in December 2015. I dismiss this allegation.

As discussed above, the test for whether interference has occurred relies on what a reasonable employee perceives to be a "threat of reprisal or force." An investigation, which could lead to discipline, could be reasonably perceived as a threat of reprisal or force. Thus, the question is whether a reasonable employee could believe that the investigation was a threat associated with union activity.

The union argues that the investigation, which began on December 7 but of which Hoff was notified on December 2, was actually instigated by Hoff's protected activity of filing a grievance on November 23, 2015. The timing of adverse actions in relation to protected union activity can support a conclusion of an interference violation. *City of Omak*, Decision 5579-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *Kennewick School District*, Decision 5632-A (PECB, 1996). In the instant case, however, this temporal proximity is difficult to rely on, as Hoff was the subject of 12 grievances filed since May 2014 until the time of the hearing. Thus, due to the frequency of filing, the employer's actions were routinely close in time to a grievance filing.

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[2] No evidence was offered concerning any allegation from October 2015; rather, the allegation stems from conduct in early November. The November conduct was the subject of the December 7 investigation.

The employer states that the investigation interview was a result of Christensen observing Hoff using his work computer to visit a non-work related website on November 2, 2015, and using his personal cell phone for a significant length of work time on November 3 and November 5. It is clear from the record that these instances were not related to union activity. The use of work time for non-work purposes was observed during the first week of November 2015. Almost three weeks later, Hoff filed a grievance. Five workdays after filing the grievance (excluding the Thanksgiving holidays), Hoff was sent a notice of an investigatory meeting. As stated above, a charge of interference does not require that an employer intended to interfere but only that a reasonable person could interpret an action as interference. Additionally, there is no requirement that the underlying reasons for an investigation are themselves protected activity but rather that the employer's actions could interfere with an employee's protected activity—namely, filing grievances.

The fact that the employer did not begin its investigation during the more than two weeks after the observed misconduct, and instead did so five workdays after the filing of a grievance, could lead a reasonable person to believe the investigation was related to the filing of said grievance and in turn could dissuade an employee from filing future grievances. However, as discussed above, Hoff is a longtime union steward and thus what could be a reasonable perception of an employee is not necessarily reasonable for a steward. Through his representation work, Hoff would have been aware that employers do not regularly begin investigations immediately after an allegation of misconduct. Frontline supervisors, such as Christensen, regularly discuss allegations of wrongdoing with their managers prior to initiating an investigation. Additionally, as human resources is involved in investigations, it must be consulted, which results in delay. Additionally, coordinating time for several staff members to be available for a meeting, especially around holidays, can be difficult. For these reasons, possible coincidental timing is not enough for a reasonable shop steward to perceive an investigation as interference.

Issue 2: Did the employer interfere with employee rights in violation of RCW 41.80.110(1)(a) by on January 6, 2016, placing a performance review in Hoff's personnel file that untruthfully claimed he did not meet performance expectations?

Considering all of the facts in this case and the evidence and arguments presented, the union did not prove by a preponderance of the evidence that the employer interfered with employee rights when it placed a performance review in Hoff's personnel file stating that he did not meet performance expectations. I dismiss this allegation.

The performance evaluation Hoff received on January 4 covered the work period of October 1, 2014, through September 30, 2015. Hoff signed the evaluation on January 4, 2016, which indicated his receipt of—not his agreement with—the evaluation. Christensen signed on January 5, 2016, and Loranger signed on January 6, 2016. In the evaluation, Christensen criticized Hoff for failing to meet time-related work expectations and for often using his work time for non-work purposes. There was no mention of union activities. This evaluation was completed more than two months after the work period under review; however, Hoff did not file any grievances during the intervening time. Additionally, the union did not prove by a preponderance of the evidence that Christensen's comments about Hoff's performance were untrue or that this lack of truth could be construed as interference.

Issue 3: Did the employer interfere with employee rights in violation of RCW 41.80.110(1)(a) by since February 4, 2016, commencing and conducting an investigation alleging that Hoff misused agency time in January and investigating a business Hoff owned in the 1990s?[3]

Considering all of the facts in this case and the evidence and arguments presented, the union did not prove by a preponderance of the evidence that the employer interfered with employee rights when it investigated Hoff for misuse of work time and for a business Hoff previously owned. I dismiss this allegation.

On February 2, 2016, Hoff received a notice of a fact-finding interview set to take place on February 4. The calendar invitation stated that it was "official notification of a follow up fact-finding meeting." The union argued that this was a new investigation as the employer

[3] The union alleges that on January 19, 2016, during a grievance response meeting, Loranger made a rude comment to Hoff about the number of grievances he filed. As there is not a charge related to the comment, it is unnecessary to make a credibility determination about whether this comment was made and could meet the standard of interference.

questioned Hoff about whether he had a private business. The employer responded that the February meeting was not a new investigation, but rather a continuation of the previous investigation, which began on December 7, 2015. Specifically, the employer was seeking to determine whether Hoff's alleged misuse of time was connected to a private business. Hoff testified, "I had never received a formal notice that, 'You are under investigation.' So every fact-finding investigation, to me, is a new investigation." However, Hoff was notified on February 2, 2016, that he was called to a "follow up" fact-finding meeting, which—especially given his position as a shop steward—should have lead him to reasonably believe he was the subject of a continuing investigation. The fact that this interview did not result in any finding of wrongdoing mentioned in the March 15, 2016, reprimand does not mean it was not part of the same investigation. Therefore, the employer did not launch a new investigation and instead continued the investigation discussed in Issue 1 above. The union did not prove that a second meeting, related to an investigation that I ruled above was not interference, could be reasonably perceived by an employee as interference.

Issue 4: Did the employer interfere with employee rights in violation of RCW 41.80.110(1)(a) by on March 22, 2016, giving a reprimand to Hoff dated March 15, 2016?

Considering all of the facts in this case and the evidence and arguments presented, the union did not prove by a preponderance of the evidence that the employer interfered with Hoff by giving him a written reprimand in March 2016. Thus, the allegation is dismissed.

On February 25, 2016, Hoff filed a grievance alleging that Christensen had directed Hoff to follow the performance expectations outlined in a memorandum documenting an oral reprimand Hoff had received in 2014 and that this reprimand should have been removed from Christensen's file. On March 22, 2016, Hoff received another, written reprimand dated March 15, 2016, from Loranger for Hoff's failure to meet performance expectations in regard to a work assignment and the misuse of state resources. Similar to Issue 1, due to discussions between a supervisor, manager, and human resources and schedule coordination, there is often a delay before an employer issues a reprimand. In the instant case, there was a gap of 19 days, of which only 13 were workdays, between a grievance and the written reprimand. As discussed above, Hoff filed many grievances

and thus it is not a reasonable inference that this reprimand, referencing conduct from the fall of 2015, was issued in response to the February 25, 2016, grievance.

Issue 5: Did the employer interfere with employee rights in violation of RCW 41.80.110(1)(a) by since December 5, 2016, commencing and conducting an investigation alleging that Hoff engaged in inappropriate behavior and failed to follow his supervisor's directions?

Considering all of the facts in this case and the evidence and arguments presented, the union did not prove by a preponderance of the evidence that the employer interfered with employee rights by commencing and conducting an investigation of Hoff in December 2016. This allegation is dismissed.

On December 5, 2016, Loranger and McElfish sent an investigation interview notice to Hoff about an allegation that Hoff "engaged in inappropriate behavior and failed to follow supervisory directives and expectations." The investigation was ongoing at the time of the hearing and thus limited testimony was offered about what the investigation entailed. The union argues that this investigation was initiated soon after Bailey submitted a written request to have the March 2016 written reprimand removed from Hoff's personnel file. The removal of the reprimand was a requested remedy in the grievance challenging the reprimand, a grievance that was unresolved at the time Bailey submitted her request. When asked why she submitted a request, Bailey indicated that she filed the request because the resolution of the grievance was taking too much time.

As discussed in regard to Issue 1, coincidental timing is not enough for a union shop steward to reasonably perceive that the investigation was initiated in response to an ordinary steward activity—the seeking of a resolution to an outstanding grievance. Accordingly, the union did not meet the preponderance of evidence standard to prove that a reasonable union official would recognize the above actions as interference.

While I find that the union was unsuccessful in proving a claim of interference, testimony was offered at the hearing about the investigation that I would be remiss to not address.

When testifying, McElfish stated several times that this investigation was, at least in part, about Hoff's "union activities":

> Hull: What is the basis for the second investigation?
> McElfish: It has to do with e-mail communications, and union activities and supervisory directives.
> . . .
> Younglove: But your testimony is that it also has to do with Mr. Hoff's union activities?
> McElfish: Correct.
> Younglove: Okay. So we had a number of management people testify that Mr. Hoff hasn't filed any grievances, hasn't represented any employees for some time, I guess. What union activities was Mr. Hoff involved in that's being investigated?
> McElfish: Well, I'm a little uncomfortable answering that question because we are not completed with that process.
> Younglove: Okay.
> McElfish: So I can't give a full answer to your question at this point.
> Younglove: But you brought it up. So he is being investigated for union activities?
> McElfish: For activities under the CBA.

Additionally, Zehm confirmed that the investigation was focused, in part, on Hoff's union activities:

> Younglove: And as we sit here, there is an investigation that the department is apparently conducting, investigating Mr. Hoff's union representational activities; is that correct?
> Zehm: That is an aspect of the investigation, as I understand it.

These statements made by agency representatives about "union activities" being the reason for an investigation, rather than misconduct or performance deficiencies, are extremely concerning. However, as discussed above, the statements were made after the amended complaint was filed and thus do not aid the union in proving interference.

CONCLUSION

The union did not prove by a preponderance of the evidence that the employer interfered with employee rights in violation of RCW 41.80.110(1)(a). Accordingly, the complaint is dismissed.

FINDINGS OF FACT

1. The Washington State Department of Ecology (employer) is a public employer within the meaning of RCW 41.80.005(8).

2. The Washington Federation of State Employees (union) is a bargaining representative within the meaning of RCW 41.80.005(7).

3. The union and employer are parties to a collective bargaining agreement effective from July 1, 2015, through June 30, 2017.

4. The union represents a bargaining unit of classified employees at the employer's headquarters in Lacey, Washington.

5. Tryg Hoff, a union member and shop steward, is an Economic Analyst 3 in the employer's Program Development & Operations Support Unit of the Water Resources Program. Hoff briefly served as the union's treasurer in 2016.

6. Program Development & Operations Support is supervised by Section Manager Dave Christensen. Christensen reports to Program Manager Tom Loranger, who in turn reports to Deputy Director Polly Zehm.

7. On October 21, 2014, Hoff sent an e-mail to Loranger, copying chief shop steward Patricia Bailey and Human Resource Consultant Corrina McElfish. In the e-mail, Hoff identified his concerns about Christensen, stating that Christensen's work expectations were unreasonable, that he was dishonest, and that he needed "immediate training on the Collective Bargaining Agreement and Federal Labor law." Hoff complained that Christensen had bullied him and other bargaining unit members on several occasions. Hoff also shared that he had been in touch with employees who Christensen had previously supervised at the Department of Health (DOH). That same day, Hoff sent a second e-mail that included attachments about bullying that he wanted Loranger to share with Christensen.

On October 28, 2014, Hoff e-mailed Loranger and McElfish additional information about his investigation of Christensen's employment at DOH. Zehm, Bailey, union shop steward Kerry Graber, and Human Resource Consultant Tamarae McLaughlin were copied on this e-mail.

8. On November 4, 2014, Loranger replied, "Tryg, cease all investigative work about Dave Christensen immediately. Any further union representation work you do must first be approved by Dave Christensen." McElfish and Zehm were copied on Loranger's reply. Almost three hours later, Loranger sent a clarifying e-mail to the same recipients that stated, "Tryg to clarify my second sentence: any work time spent for union representation activities must be pre-approved by Dave Christensen."

9. On March 4, 2015, the union filed a grievance on behalf of Hoff alleging the employer violated CBA Articles 27, 38, and 47 when Christensen changed Hoff's work schedule on February 25, 2015. The union stated that the schedule change was perceived as a form of discipline in response to Hoff's shop steward duties. The grievance also noted, "There has been some dissension amongst the grievant and the supervisor in question. This dissention has created a hostile work environment."

10. The employer's human resources staff conducted an investigation into the allegations that Christensen and Loranger were creating a hostile work environment. The investigative report was submitted on June 30, 2015.

11. On August 26, 2015, Loranger sent an e-mail to Hoff, copying Christensen:

> Tryg, as we discussed here is my summary of performance expectations for you as we discussed today. Tom
>
> All union representation work you do must be approved by your supervisor before it is initiated.
>
> Complete all work that is assigned to you by your supervisor in the time frame that is expected.

> Make appropriate use of your time at work as directed by your supervisor to complete assigned [sic] in a timely fashion.

12. During a regular check-in meeting, around the end of October 2015, Christensen and Hoff discussed Hoff returning to a four-ten schedule. According to Christensen's notes from this meeting, Hoff requested the reinstatement of his four-ten schedule. Christensen acknowledged that while he had been hoping for increased work output similar to that which occurred during the previous couple of weeks, he would agree to reinstate Hoff's schedule as an indication of good faith. This schedule change took effect on October 28, 2015. Following this change, the union notified the employer that it was withdrawing the associated March 2015 grievance, which was scheduled for a hearing before an arbitrator on November 15, 2016.

13. On November 23, 2015, the union filed a grievance on Hoff's behalf alleging violations of CBA Articles "2.2, 47.1 and 47.2; 6.9, 6.3, 6.5, 6.7, and 20.1." The union stated that on November 5, 2015, Christensen chastised Hoff for personal cell phone use in front of his coworkers and that this chastisement, in addition to Christensen's application of overtime-eligible standards to Hoff who is in an overtime-exempt position, is part of a pattern of treatment that constitutes harassment and the creation of a "hostile work environment."

14. On December 2, 2015, Christensen sent a calendar invitation to Hoff for a fact-finding meeting scheduled for December 7, 2015. Hoff sent an e-mail to Christensen asking him "what the contents of this 'fact finding' meeting [were]." Hoff copied Graber, union council representative Tony Jones, and union staff member Nancy Agan. Christensen responded, "The purpose of this meeting is to gather facts regarding your performance and allegations that you misused state time and resources." Hoff then asked what the allegations were and who made them. Christensen responded that Hoff would find out more at the meeting and that the information he provided met the requirements outlined by the parties' CBA.

15. On January 4, 2016, Hoff received his Performance and Development Plan (PDP), which included an evaluation of Hoff's performance from October 1, 2014, through September 30, 2015, and laid out expectations for Hoff for the time period of October 1, 2015, through September 30, 2016. The PDP made several references to Hoff's engagement in non-work activities, including substantial use of his personal cell phone and being away from his workstation for significant periods of time during the workday. Christensen stated that he believed this behavior resulted in Hoff taking longer to complete his work than had been expected. When specifically responding to Hoff's performance as related to accountability, Christensen wrote,

> Tryg has not met expectations for this competency. Throughout the performance period, Tryg did not meet my expectations for the timeliness for completion of work. When attempting to address the behavior, he argued that my expectations (that he should use his work time to complete work more quickly and multi-task several projects at the same time) were unreasonable. This resistance to improve workplace behavior demonstrated lack of accountability by Tryg.

Christensen acknowledged in the PDP that by the end of the performance review period Hoff's performance had improved, which Christensen credited (at least in part) to his regular, ongoing check-in meetings with Hoff. Hoff responded to Christensen's criticisms in the PDP space allocated for Hoff to make suggestions for improved organizational support. Hoff complained that Christensen's directions and expectations were confusing or contradictory, that Christensen assigned him work outside of his job classification, and that he was being falsely accused of misusing state resources and not using his time effectively. Additionally, Hoff expressed frustration that Christensen was micromanaging him and was expecting him "to follow restrictions that apply to an overtime eligible, scheduled employee instead of an overtime exempt employee."

16. On January 7, 2016, the union filed a grievance on Hoff's behalf alleging that the employer violated CBA Articles 2.2, 5, 6.9, 32, and 47 through Christensen's performance evaluation of Hoff. Specifically, the grievance stated that the PDP included statements that were beyond those appropriate for an evaluation and were subjects of ongoing grievances, that Christensen waited until the end of the performance period to express concerns about

Hoff's performance, and that the PDP continued a pattern of ongoing harassment of Hoff by Christensen.

17. The union filed another grievance on Hoff's behalf on January 13, 2016, alleging that the employer violated CBA Articles 20.1, 20.1a, and 20.1b. The grievance stated that the employer had failed to adequately respond to the harassment of Hoff by Christensen, which had resulted in Hoff being in an unsafe and unhealthy workplace.

18. On February 2, 2016, Christensen sent Hoff a notice of a fact-finding meeting to occur on February 4. Christensen stated, "The purpose of this meeting is to follow up on statements you made at the previous interview, and gather facts regarding your performance and allegations that you misused state time and resources. Please bring a copy of your calendar for the period of January 1 through January 31, 2016." During this meeting, Hoff was questioned about a business he had owned.

19. On February 25, 2016, the union filed a grievance on Hoff's behalf alleging that the employer violated CBA Articles 2, 20, 20.1, 31, 31.5, 38, 38.1, 47, 47.1, 47.2, and 47.3. The grievance alleged that Christensen directed Hoff to follow work expectations provided to him on October 9, 2014, in a memorandum that documented an oral reprimand he had received and that this memorandum should have been removed from Christensen's supervisor file after the evaluation process. The grievance stated that Hoff believed this directive constituted retaliation in response to a previously filed grievance. Additionally, the grievance stated Christensen discriminatorily directed Hoff not to use his personal cell phone, which constituted a change in working conditions. The union again alleged that these instances were part of an ongoing pattern of harassment of Hoff by Christensen that the employer had failed to adequately address.

20. On March 15, 2016 Loranger issued Hoff a written reprimand for failing to meet performance expectations, follow supervisory directives, properly use state resources and time, and adhere to agency policy. The reprimand stated that Hoff failed to complete an assignment during October and November 2015 according to direction provided by

Christensen despite having ample work time to do so. Next, the reprimand stated that Hoff used his personal cell phone to an excessive degree on November 3 and 5, 2015, in contradiction to an expectations memorandum dated August 14, 2014, and an oral reprimand issued by Christensen on October 9, 2014. Third, Hoff was told he violated Executive Policy 15-01 when he used his work computer to visit non-work related websites. Finally, Loranger warned Hoff that continued failure to follow directives and meet expectations would result in further discipline, up to and including dismissal.

21. On April 8, 2016, the union filed a grievance on Hoff's behalf alleging violations of CBA Articles 2, 2.1, 2.2, 6, 6.9, 20, 20.1, 27, 27.1, 47, 47.1, and 47.2. In addition to reiterating charges that Christensen was harassing Hoff and requiring him to adhere to standards that were not applicable to overtime exempt staff and that the employer had failed to respond appropriately to Hoff's complaints regarding Christensen, the union alleged that the written reprimand was issued in relation to the filing of the November 23, 2015, grievance.

22. On October 18, 2016, Christensen e-mailed Hoff asking that he determine how he would analyze data related to a recent court decision and that he be ready to discuss this at their next regularly scheduled check-in meeting. Christensen ended the e-mail by stating,

> If you have questions before the meeting about this assignment, then please set up a meeting before Monday. I do not want to have a meeting on Monday where you haven't started scoping this work out because you think the direction is unclear. If you need more, then let's talk sooner.

Approximately five minutes later, Hoff responded to Christensen and copied Loranger and another employee:

> Dave you continue to overload me with work.
>
> I have people trying to explain to me their cash flow needs regarding their agreements. Is this gonna be another project that you pull the rug out from under me? This has made our outside customers very mad and this continues to show you don't have a high regard for actually completing work that has a purpose.

Christensen responded four minutes later, copying the same individuals:

> Jim told me you'd not have a lot going on while you wait for responses from the recent mail outs. I didn't realize you were working actively on that right now.
>
> If you have the OCR-related contract work to do, then yes, that's your priority. If you don't have specific tasks to do related to the contract oversight, then I want you working on the economics of the Hirst decision. I expect that you will fit this in with your other work.
>
> Thank you for clarifying you [sic] current tasks. This is why in-person meetings are so important so there isn't misunderstanding of what you are working on.

Approximately 12 minutes later, Hoff responded to the same individuals, this time adding Zehm:

> Dave, nobody believes you act in good faith.
>
> You are constantly trying to inundate me with make work and then cancel it once I've engaged all the customers. It's totally inappropriate and has made a wide variety of customers outside the agency, and within, angry with us. My work with OCR and agreements was clearly laid out a month ago to you. You just continue to try to sink my ship.

Hoff concluded his e-mail by outlining his current workload and suggesting that the work Christensen had assigned to Hoff be contracted out to an economics firm.

23. On October 31, 2016, Hoff e-mailed Loranger about his ongoing dispute with Christensen and copied Bailey, Graber, Jones, and Zehm. Hoff complained that he "heard the [Office of Financial Management] attorney told [the employer's] attorney something about insubordination." At the end of the e-mail, he wrote, "Tom, please tell me what is 'insubordination' so I know how I can and cannot act?....otherwise it appears that this is the next thing I'm going to be falsely accused of."

On November 7, 2016, Hoff sent Loranger a follow up e-mail. He began by stating, "Maybe you didn't see this email or maybe you are unwilling to communicate." He again asked what insubordination was and complained about Christensen's behavior

24. On November 28, 2016, Bailey sent a letter to Director of Human Resources Sandi Stewart, alleging that the employer "did not have evidence to support ANY reprimand both verbally or written" and that management employees in the Water Resources Program were misusing their authority. Bailey asked that the March 2016 reprimand be removed from Hoff's personnel file.

25. On December 5, 2016, McElfish sent Hoff a notice of an investigation interview scheduled for December 8, 2016. She stated, "The purpose of this interview is to gather facts regarding allegations that you have engaged in inappropriate behavior and failed to follow supervisory directives and expectations."

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. Based upon Findings of Fact 5 through 25, the union failed to sustain its burden of proof to establish that the employer interfered with protected employee rights in violation of RCW 41.80.110(1)(a).

ORDER

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

ISSUED at Olympia, Washington, this 19th day of June, 2017.

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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 06/19/2017

DECISION 12732 - PSRA has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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