STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY REGIONAL AFIS GUILD, Complainant, vs. KING COUNTY, Respondent.	CASE 127743-U-15 DECISION 12582-B - PECB DECISION OF COMMISSION

James M. Cline and *Sarah Derry*, Attorneys at Law, Cline & Associates, for the King County Regional AFIS Guild.

Susan N. Slonecker, Senior Deputy Prosecuting Attorney, and *Diane Hess Taylor*, Legal Advisor, King County Prosecuting Attorney Daniel T. Satterberg, for King County.

The King County Regional AFIS Guild (union) filed an unfair labor practice complaint and amended complaints alleging unilateral change, discrimination, and interference against King County (employer). Examiner Stephen Irvin conducted a hearing and issued a decision. *King County*, Decision 12582-A (PECB, 2017). The union appealed.

In the summer of 2015, the employer contacted the union about changing the vacation leave approval policy. The employer implemented changes to the policy in the fall of 2015. On November 16, 2015, the Jail Identification Unit held a quarterly meeting. During that meeting, the employer and employees discussed the changes to the vacation leave approval policy. The meeting included a tense exchange between management and Marquel Allen, a lead employee and union second vice president. After the meeting, the employer decided to end Allen's lead status early because the employer had lost confidence in her ability to bridge the gap between management and the employees. Allen had served as a lead for 11 years until the employer ended her appointment on November 19, 2015.

The Examiner found that the employer had unilaterally changed the vacation leave approval policy. The Examiner ordered the employer to rescind the policy and bargain changes to the policy.

The Examiner concluded that Allen had engaged in protected activity during the November 16, 2015, unit meeting but that her actions were unreasonable, causing her activity to become unprotected. The Examiner dismissed the discrimination allegations.

The Examiner found that the employer had interfered with employee rights by making statements to Allen and her union representative during a meeting on November 19, 2015. The Examiner found that an e-mail the employer had sent to bargaining unit employees did not interfere with employee rights.

The issues before the Commission are as follows:

1. Should the Examiner have addressed the union's allegation that the employer interfered with Allen's rights by conducting an internal investigation?

2. Was the remedy appropriate and adequate for the employer's unilateral change to the vacation leave approval policy?

3. Did the employer interfere with employee rights by sending an e-mail to bargaining unit employees that suspended leave requests for potential witnesses in the unfair labor practice hearing and asked bargaining unit employees to avoid discussing the unfair labor practice hearing?

4. Were Allen's actions at the November 16, 2015, Jail Identification Unit meeting so unreasonable to cause her activity to become unprotected? If not, did the employer discriminate against Allen when the employer revoked her lead status and premium pay;

conducted an internal investigation into Allen's conduct at the November 16 unit meeting; and issued Allen a written reprimand?

5. Did the employer discriminate against Allen by providing an unfavorable performance appraisal and changing Allen's performance appraisal during the appeal process of her performance evaluation?

The union's argument that the employer's internal investigation constituted independent interference was not properly before the Examiner.

An appropriate remedial order for an unlawful unilateral change includes a make-whole remedy. In this case, the Examiner's remedy did not make the employees whole. Therefore, we order the employer to pay the employees wages and benefits lost as a result of the unlawful unilateral change.

Allen engaged in protected activity at the November 16, 2015, unit meeting. On November 19, 2015, the employer ended Allen's lead status early. The employer's decision to end Allen's lead status early was based on her protected activity at the November 16 unit meeting. The employer's reason that Allen was no longer effective as a lead and could not bridge the gap between employees and management was substantially motivated by union animus. To make Allen whole, we order the employer to pay Allen wages and benefits lost from the time it removed her lead status on November 19, 2015, until the lead status was scheduled to end on December 31, 2015.

The employer discriminated against Allen when it subjected her to an internal investigation because of her protected union activity at the November 16 unit meeting and issued a written reprimand. To remedy the violation, we order the employer to destroy the internal investigation file and written reprimand.

The employer interfered with employee rights by sending an e-mail on February 24, 2016, imposing an order that employees could not discuss the unfair labor practice hearing. Employees

could have reasonably perceived the employer's e-mail as a threat of reprisal or force or a promise of benefit.

Because we find that Allen engaged in protected activity during the November 16, 2015, unit meeting, we remand the case to the Examiner to make sufficient findings on Issue 5 and apply the legal standard to those findings.

ANALYSIS

Issue 1: Should the Examiner have addressed the union's allegation that the employer interfered with Allen's rights by conducting an internal investigation?

Applicable Legal Standards

An unfair labor practice complaint is reviewed under WAC 391-45-110 to determine whether the facts, as alleged, state a cause of action. If one or more allegations state a cause of action for an unfair labor practice, the Commission's unfair labor practice manager or an examiner issues a preliminary ruling summarizing the allegations. WAC 391-45-110(2). A preliminary ruling "is an interim order which may only be appealed to the commission by a notice of appeal" filed after the examiner issues a decision under WAC 391-45-310. WAC 391-45-110(2)(a). However, a complainant who claims that a preliminary ruling failed to address one or more causes of action advanced in the complaint "must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling." WAC 391-45-110(2)(b).

If the facts alleged do not constitute a violation, the unfair labor practice manager or examiner issues an order of dismissal. WAC 391-45-110(1). "Unless appealed to the commission under WAC 391-45-350, an order of dismissal issued under this subsection shall be the final order of the agency on the defective allegation(s), with the same force and effect as if issued by the commission." *Id.*

Application of Standards

The union filed an unfair labor practice complaint on December 1, 2015, and an amended complaint on December 4, 2015. The union requested causes of action for employer discrimination and independent interference related to the employer's internal investigation of Allen. On December 16, 2015, the unfair labor practice manager issued a preliminary ruling that framed a cause of action for employer discrimination related to the internal investigation but not for independent interference. The agency assigned the case to the Examiner. The Examiner issued a notice of hearing on February 25, 2016. The union did not seek clarification of the preliminary ruling before the Examiner issued the notice of hearing as required by WAC 391-45-110(2)(b).

The union filed a second amended complaint on April 5, 2016. On April 11, 2016, the Examiner issued an amended preliminary ruling. On April 22, 2016, the union filed a motion under WAC 391-45-110(2)(b) asking the Examiner to clarify the amended preliminary ruling and address certain paragraphs. Before the Examiner responded to the motion, the union filed a third amended complaint on May 19, 2016, and a fourth amended complaint on May 23, 2016.

On June 2, 2016, the Examiner issued a second amended preliminary ruling and order of partial dismissal. *King County*, Decision 12582 (PECB, 2016). The Examiner addressed the issues raised in the union's April 22, 2016, motion. The Examiner dismissed some allegations, and the order of dismissal included a statement of appeal rights under WAC 391-45-350. The union did not appeal to the Commission.

In *King County*, Decision 12582-A, the Examiner explained that the union's December 1 and 4, 2015, complaints had requested causes of action for employer discrimination and independent interference related to the internal investigation. The unfair labor practice manager neither found a cause of action for independent interference nor dismissed the allegation. Accordingly, the union's options were to seek clarification before the Examiner issued the notice of hearing or appeal the preliminary ruling after the Examiner issued Decision 12582. WAC 391-45-110(2)(a) and (b). In its appeal, the union argued that the Examiner had erred by not addressing the union's claim of independent interference related to the internal investigation.

The Commission strictly enforces time limitations and the procedural requirements related to the contents of complaints. *DeLacey v. Clover Park School District*, 117 Wn. App. 291, 296 (2003); *Kiona-Benton City School District*, Decision 11563-A (EDUC, 2013). The union did not seek clarification of the preliminary ruling to include a cause of action for independent interference from the unfair labor practice manager before the Examiner issued a notice of hearing as required by WAC 391-45-110(2)(b). The issue became ripe for appeal when the Examiner issued *King County*, Decision 12582; however, the union did not appeal Decision 12582.

Conclusion

If the Examiner had not issued an order of partial dismissal, then the union could have appealed the December 16, 2015, preliminary ruling as part of its appeal of *King County*, Decision 12582-A. However, in this case the order of partial dismissal—*King County*, Decision 12582—triggered the union's right to appeal to the Commission. The union neither sought clarification of the preliminary ruling before the Examiner issued the notice of hearing nor appealed *King County*, Decision 12582. Accordingly, the question of whether the internal investigation interfered with employee rights was not before the Examiner and consequently is not before the Commission.

Issue 2: Was the remedy appropriate and adequate for the employer's unilateral change to the vacation leave approval policy?

Applicable Legal Standards

RCW 41.56.160(1) empowers the Commission to remedy unfair labor practice violations. The standard remedy for a unilateral change violation includes ordering the employer to restore the status quo ante; make employees whole for any loss of wages, benefits, or working conditions as a result of the employer's unlawful act; post a notice of the violation; and read that notice into the record at a public meeting of the employer's governing body. *City of Anacortes*, Decision 6863-B (PECB, 2001). The typical order also instructs the employer to cease and desist from making unilateral changes to mandatory subjects of bargaining unless the employer first provides the complainant union with notice of proposed changes and the opportunity to bargain over the proposed changes. *Central Washington University*, Decision 12305-A (PSRA, 2016).

When interpreting the Commission's remedial authority under Chapter 41.56 RCW, the Supreme Court of the State of Washington approved a liberal construction of the statute to accomplish its purpose. *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992). Appropriate remedial orders are those necessary to effectuate the purposes of the statute and to make the Commission's lawful orders effective. *Id.* at 633. "Agencies enjoy substantial freedom in developing remedies." *Id.* at 634. The Commission has authority to issue appropriate orders that, in its expertise, the Commission "believes are consistent with the purposes of the act, and that are necessary to make its orders effective unless such orders are otherwise unlawful." *Id.* at 634–35. *See also Snohomish County*, Decision 9834-B (PECB, 2008).

Application of Standards

The employer unilaterally changed the vacation leave approval policy. *King County*, Decision 12582-A. To remedy the violation, the Examiner ordered the employer to return to the status quo ante until the parties have bargained in good faith over the issue. *Id.* at 44. The union appealed, arguing that the order did not include a make-whole remedy and should have included payment of monetary damages. We agree.

"The Commission may order other relief, 'such as the payment of damages and the reinstatement of employees,' where doing so 'will effectuate the purposes and policies of [chapter 41.56 RCW].'" *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014). Before the employer changed the policy, the employer would approve an employee's vacation leave request if another employee agreed to work the shift. Willing employees earned overtime when working such shifts. An appropriate remedial order includes requiring the employer to rescind the policy, give notice and an opportunity to bargain in good faith over the policy, post the notice in the work place, read the notice at a meeting of the King County Commissioners, and compensate the employees for any lost wages and benefits with interest.

Conclusion

An appropriate remedial order includes a make-whole remedy. We order the employer to pay the employees' wages and benefits lost as a result of its unlawful unilateral change.

Issue 3: Did the employer interfere with employee rights by sending an e-mail to bargaining unit employees that suspended leave requests for potential witnesses in the unfair labor practice hearing and asked bargaining unit employees to avoid discussing the unfair labor practice hearing?

Applicable Legal Standards

Standard of Review

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission also reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). The Commission reviews factual findings for substantial evidence in light of the entire record. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Public Employment Relations Commission v. City of Vancouver*, 107 Wn. App. 694, 703 (2001); *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference, while not slavishly observed on every appeal, is highly appropriate in fact-oriented appeals. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

Interference

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. RCW 41.56.140(1). An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B; *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *remedy aff'd*, *Pasco Housing Authority v. Public Employment Relations Commission*, 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 other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

To prove an interference violation, the complainant must prove, by a preponderance of the evidence, that the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A. To meet its burden of proving interference, a complainant need not establish that an employee was engaged in protected activity. *State – Washington State Patrol*, Decision 11775-A (PSRA, 2014); *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). The complainant is not required to demonstrate that the employer intended or was motivated to interfere with an employee's protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee was actually coerced by the employer or that the employer had union animus. *Id.*

Application of Standards

On February 24, 2016, unit supervisor Lisa Wray sent an e-mail to bargaining unit employees in the Jail Identification Unit.[1] The subject of the e-mail was "Unfair Labor Practice Hearing - June 28-30, 2016." Wray wrote,

> The AFIS Guild has filed an unfair labor practice charge against the KCSO [King County Sheriff's Office] with the Public Employment Relations Commission and a hearing has been scheduled for June 28-30, 2016. This is an informal administrative hearing that will take place in a conference room at the Chinook building. Potential witnesses need to ensure that they are available on these dates. You are on this email because you are a potential witness. As the time draws closer, leave requests for this time frame will be held until final determinations are made about who is needed by the Guild and by the KCSO to testify at the hearing. A mediation session is scheduled in May, at which time one or all issues may be resolved. For now, please make sure you are available these three days. In order to ensure a comfortable work environment for everyone and protect confidentiality of a related IIU [Internal Investigations Unit] investigation, please maintain the confidentiality of substantive testimony, and avoid unnecessary discussion of these matters that may make co-workers uncomfortable. See GOM 3.03.090 which

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[1] Ex. UN 48.

> outlines the requirement for confidentiality of investigations. This does not preclude you from discussing the case with a legal representative in this ULP process, or appropriate command staff or legal advisor with regard to the pending IIU investigation.
>
> If you would like further clarification or have any questions, you may contact KCSO legal advisor, Diane Taylor.

The Examiner found that the e-mail did not interfere with employee rights. We agree with the Examiner that Wray did not eliminate employees' ability to take leave during the hearing. Rather, the e-mail explained to employees that as potential witnesses they needed to be available and that leave would be approved once the witness list was final or the parties settled. The union did not meet its burden to prove that the temporary suspension in approving leave requests interfered with employee rights.

The portion of the e-mail limiting the employees to discussing the unfair labor practice with legal advisors and command staff interfered with employee rights. While the employer may have wanted to create a "comfortable work environment," the directive interfered with employee rights by directly prohibiting employees from engaging in protected activity—namely, discussing the unfair labor practice proceedings among themselves.

Conclusion

The employer interfered with employee rights by sending an e-mail restricting employees' ability to discuss the unfair labor practice. Moreover, the employees could have reasonably perceived the employer's action as a threat of reprisal or force, or a promise of benefit, as a result of the union filing the unfair labor practice complaint.

Issue 4: Were Allen's actions at the November 16, 2015, Jail Identification Unit meeting so unreasonable to cause her activity to become unprotected? If not, did the employer discriminate against Allen when the employer revoked her lead status and premium pay; conducted an internal investigation into Allen's conduct at the November 16 unit meeting; and issued Allen a written reprimand?

Applicable Legal Standards

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing that

1. the employee participated in protected activity 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 protected activity and the employer's action.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. at 348; *Educational Service District 114*, Decision 4361-A.

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. If the respondent meets its burden of production, then the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or substantially motivated by union animus. *Id.*

Application of Standards

Background

The Jail Identification Unit held mandatory quarterly meetings. Wray organized the meetings and created the agendas. Identification Operations Manager Diana Watkins and Regional AFIS Manager Carol Gillespie attended the meetings. Each meeting concluded with a round table, which was an open forum for discussion and questions.

The employer had a culture of encouraging disagreement.[2] The Jail Identification Unit had a culture of confrontational behavior. Wray had attempted to change the culture by coaching employees, but she felt that the effort had been largely unsuccessful. One employee expressed that the group did not value professionalism.

On November 13, 2015, Wray met with leads Allen and Jody Tamura-Deering to discuss the agenda for the November 16, 2015, unit meeting. Wray did not initially include the vacation leave approval policy on the agenda, and Allen asked Wray to include the topic on the agenda. Wray agreed after Allen shared an e-mail Gillespie had sent stating that the policy could be discussed at unit meetings. Allen expressed to Wray that the employees were going to be upset about items on the agenda. Wray advised Allen and Tamura-Deering that discussion should be limited to how the policy arose, its implementation, and its application.

On November 16, 2015, Allen participated in three meetings. First, Allen attended a grievance meeting about the employer's unilateral change to the vacation leave approval policy. Second, Allen attended a meeting with Wray and Tamura-Deering to discuss the unit meeting agenda. During that meeting, Wray reiterated her intent for discussing the vacation leave approval policy. Finally, Allen attended the Jail Identification Unit meeting.

The unit meeting progressed in a timely fashion. Wray passed out the vacation leave approval policy, provided a brief background, and opened the floor for discussion. The vacation leave approval policy discussion merged with the last item on the agenda, the round table. Employees were upset about the announcement of new leads and the vacation leave approval policy.

The record is, at best, murky as to the order and the content of the conversation. An employee threw the written policy down and said, "I don't want to look at this shit." An employee asked a question. Gillespie and the management team discussed scenarios with the employees. The conversation evolved into a back and forth between Allen and management, mainly Gillespie.

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[2] Tr. Vol. V, 1080:13–14.

There is ample evidence that Allen said things that management found offensive, which included accusations against management of not caring about employee safety, questions why a supervisor supervised only two employees, and referrals to employees who worked in other units and were not present. Allen responded to statements made by management. For example, the employer places great weight on the fact that Allen asked what the public would think if it knew there were unit supervisors supervising just two people. However, the record also indicates that Watkins introduced the topic by stating that the employer was accountable to taxpayers and seems to have begun the statement with the question, "What would the public think?"

Was Allen engaged in protected activity?

To prove that an employer discriminated against an employee for engaging in union activities, the complainant must first establish that the employee engaged in union activity. The Examiner stated that Allen's participation in the meeting was, on its face, protected activity. *King County*, Decision 12582-A at 34. However, after evaluating whether Allen's conduct was reasonable, the Examiner concluded that "Allen's advocacy against the vacation leave approval policy became unreasonable as the meeting wore on, and her behavior became less about the policy and more about asserting that Gillespie was mismanaging the program." *Id.* at 36. Thus, the Examiner concluded that Allen's conduct during the meeting lost its protection. The union appealed the Examiner's conclusion that Allen was not engaged in protected activity during the November 16, 2015, unit meeting.

An analysis of whether an employee's conduct was reasonable is necessary only when the reasonableness of the conduct is questioned. To determine whether an employee's activity lost its protection, we evaluate the reasonableness of the employee's conduct. *Vancouver School District v. Service Employees International Union, Local 92*, 79 Wn. App. 905, 919–23 (1995).

> [E]mployee activity loses its protection when it is unreasonable—but reasonableness is gauged by what a reasonable person would do in the midst of industrial strife, and not by what a reasonable person would do in the more ordinary affairs of life. Employee activity may be unreasonable when measured against ordinary social intercourse, yet reasonable in the context of a labor dispute.

Id. at 922.

An employee must go to extremes before his or her activity loses protection. *See id.* (explaining that approaching children at the bus stop was not a reasonable exercise of the union's right to investigate a grievance); *City of Pasco*, Decision 3804 (PECB, 1991), *aff'd*, Decision 3804-A (PECB, 1992) (holding that an employee's offer to settle a grievance "out in back of the warehouse" was unreasonable and unprotected).

By challenging management in what some perceived as an abrasive and confrontational manner during the November 16, 2015, unit meeting, Allen did not go to the extreme necessary to lose protection. Allen's activity took place during a staff meeting in which the employer created an open forum for questions and discussion. Further, Allen had communicated to the employer before the meeting that employees would be upset about issues on the agenda.

The exchange between Allen and management covered a number mandatory subjects—including the vacation leave approval policy, staffing, safety, and public accountability—none of which Gillespie thought were out of line or off limits. Some of Allen's comments that the employer found offensive were in response to employer statements. While management may not have appreciated Allen's presentation, Allen's behavior, questions, tone, and even her accusation toward management did not lose protection.

The main subject of the heated exchange between Allen and management was the employer's unilateral change to the vacation leave approval policy. Allen's advocacy at the November 16, 2015, unit meeting was directly related to the employer's unilateral change. It was not unreasonable for Allen, an officer of the union, to speak for other employees during the meeting and to address the unilateral change and related topics.

The employer could have managed the meeting differently, but Gillespie wanted to answer the employees' questions. She decided to "let it flow." She thought if she had "stifled the conversation, [she] would have gotten a lot of criticism from that group." Gillespie decided not to manage the behavior as it was occurring.

For these reasons, we conclude that Allen's union activity challenging and questioning management and advocating for employees did not lose protection.

Did the employer discriminate against Allen by revoking her lead status and premium pay?
The employer appointed leads annually and first appointed Allen as a lead in 2005. The lead assignment included a 5 percent premium. The employer's guidelines established a maximum of two years for a lead assignment, but the employer had not followed that guideline. In early 2015, the employer determined that lead assignments were not meant to be long term. On July 20, 2015, the employer began recruiting new leads. Allen did not apply to continue her lead assignment; therefore, her lead assignment was scheduled to end on December 31, 2015. Following the November 16, 2015, unit meeting, the employer prematurely ended Allen's lead assignment.

The union alleged that the employer discriminated against Allen by prematurely ending Allen's lead status. We agree.

On November 17, 2015, Wray called Allen and Tamura-Deering to her office. Wray told them that before she went downstairs and had "[her] ass handed to [her]," she wanted to talk about the November 16, 2015, unit meeting with them. Wray was concerned about the "blatant disrespect for management" she had observed in the unit meeting and management's reaction to the meeting. Allen did not, to Wray's satisfaction, take responsibility for her conduct or acknowledge how the employer perceived Allen's behavior at the unit meeting.

On November 18, 2015, Wray, Watkins, and Gillespie attended a training. While there, they discussed how Wray was feeling in the wake of the November 16 unit meeting, how Wray felt about working with Allen after her behavior at the meeting, and available options. Wray decided she could no longer trust Allen as a lead after the meeting. They agreed Allen would no longer be an effective lead because of her actions at the November 16 unit meeting.

On November 19, 2015, Wray and Watkins met. They decided to revoke Allen's lead status early. Gillespie agreed with the decision because she "just couldn't have somebody like that being the example."[3]

Watkins called Allen to meet with Watkins and Wray. Watkins did not tell Allen the purpose of the meeting. Mark Roberts, union first vice president, accompanied Allen as her representative. Wray told Allen there was nothing she could say to justify her behavior at the November 16, 2015, unit meeting. Watkins told Allen the employer was ending her lead status effective immediately.

The employer deprived Allen of a right, benefit, or status when it revoked her lead assignment on November 19, 2015. A causal connection exists between Allen's protected activity and the employer's revocation of her lead assignment. The union established a prima facie case.

The burden of production shifted to the employer to articulate a legitimate, nondiscriminatory reason for revoking Allen's lead status. In its post-hearing brief, the employer asserted that Allen had violated employer policies that were established and enforced. The employer in its post-hearing brief did not identify which policies Allen had violated. The written reprimand stated that Allen had violated GOM 3.00.015(2)(i) Rules of Conduct: Misconduct: Courtesy.[4] With the employer having articulated a reason, the burden of persuasion remained with the union to establish that the employer's reason was either a pretext or substantially motivated by union animus.

The employer appointed leads to "bridge the gap" between management and staff. After the November 16, 2015, unit meeting, the employer no longer thought Allen was capable of bridging the gap. This sudden loss of confidence after Allen had successfully worked as a lead for 11 years was brought on by Allen's protected activity during the November 16 unit meeting and was substantially motivated by union animus.

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3 Tr. Vol. VI, 1292:5–6.

4 Ex. UN 61.

It is understandable that the employer could be confused about Allen's role in the meeting. Allen was a lead employee; however, she was also second vice president of the union. The employer knew that Allen represented the union regarding the vacation leave approval policy specifically because she had met with the employer and had discussed the issues in the grievance meeting earlier in the day. Allen had also warned Wray that employees would be upset during the discussion about the vacation leave approval policy at the unit meeting. Despite Wray's direction to keep the discussion focused on the policy history and administration, the employer did not tell Allen that it expected her to behave only in her role as a lead during the meeting.

The employer's reason for terminating Allen's lead status—that Allen had violated employer policies that were established and enforced—was substantially motivated by union animus. Other employees had engaged in disrespectful behavior during the November 16, 2015, unit meeting, but the employer did not take action against those employees. Wray was equivocal about counseling other employees.[5] An employee who threw down a copy of the policy and said "I don't want to look at this shit" was not counseled for disrespectful behavior.[6] At best, Wray's testimony that she had counseled employees is contradictory and cannot be relied on to establish that she had counseled employees other than Allen and Tamura-Deering.[7]

We conclude that the employer discriminated against Allen when it revoked her lead status and premium pay. The employer's decision was based on Allen's protected activity and was substantially motivated by union animus.

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5 Tr. Vol. V, 952, 957–59.

6 Tr. Vol. V, 953.

7 Tr. Vol. V, 952–53, 958–59.

Did the employer discriminate against Allen when the employer conducted an internal investigation into Allen's conduct at the November 16, 2015, unit meeting and issued a written reprimand as a result of the investigation?

As a result of Allen's conduct at the November 16, 2015, unit meeting, Gillespie entered a complaint into Blue Team, the employer's system for entering complaints or commendations about employees. A complaint in Blue Team is investigated by a sheriff's deputy in the Internal Investigations Unit.

The union established a prima facie case of discrimination. Allen engaged in protected activity at the November 16, 2015, unit meeting. Gillespie entered the Blue Team complaint three days after Allen engaged in protected activity. As a result, the employer initiated an internal investigation which culminated in a written reprimand. Both the internal investigation and the written reprimand were adverse employment actions. A causal connection exists between Allen's protected activity and the employer's actions.

With the union having established a prima facie case, the burden of production shifted to the employer to articulate a legitimate, nondiscriminatory reason for initiating the investigation and issuing a written reprimand. In its post-hearing brief, the employer asserted that it had initiated the internal investigation and issued the written reprimand because Allen had violated employer policies that were established and enforced.

To meet its burden of production, the employer offered evidence of other internal investigations and discipline issued by the employer.[8] Those investigations involved crude conversations, inappropriate comments about a coworker posted on Facebook, and drug use and personal journal entries about coworkers. The first two culminated in written reprimands. In the third case, the employer issued a one-day suspension. The circumstances leading to the employer's decision to investigate and discipline Allen are distinguishable from the circumstances in the evidence the

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[8] Ex. ER 45.

employer offered. In the other cases, the employer investigated employees who were not engaged in protected activity.

As discussed above, other employees engaged in behavior at the meeting that could arguably be described as disrespectful; however, the employer took no action against those employees.[9] It is undisputed that Gillespie made the Blue Team entry because of Allen's protected activity at the November 16, 2015, unit meeting. Because Gillespie's decision to request an investigation was inextricably tied to Allen's protected activity, the employer's decision to investigate Allen was substantially motivated by union animus. The employer's ultimate decision to issue Allen a written reprimand as a result of the investigation cannot be separated from the employer's discriminatory decision to investigate. Therefore, the employer's issuance of a written reprimand was also substantially motivated by union animus.

We find that the union met its burden of persuasion to prove that the employer disciplined Allen for engaging in protected activity. To remedy the unfair labor practice, we order the employer to expunge the internal investigation file and remove the written reprimand from all personnel files or other employment records concerning Allen.

Conclusion

Allen had served, to the employer's satisfaction, as a lead for 11 years. After Allen challenged the employer on mandatory subjects of bargaining at the November 16, 2015, unit meeting, the employer decided Allen was no longer an effective lead and could not "bridge the gap" between management and staff. The employer's decision to end Allen's lead assignment on November 19, 2015, was a direct result of Allen's union advocacy on November 16, 2015. To make Allen whole for the employer discriminatorily ending her lead status on November 19, 2015, the employer must pay Allen back pay plus interest for the time between when it revoked her lead status and when the lead status was scheduled to end and any benefits.

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[9] Tr. Vol. V, 953.

The employer's decision to initiate an internal investigation was based on Allen's protected activity and was therefore substantially motivated by union animus. The employer's decision to issue a written reprimand was based on its discriminatory decision to investigate Allen's protected activity and was therefore also substantially motivated by union animus. To remedy the unfair labor practice, we order the employer to expunge the internal investigation file and remove any and all references to the April 27, 2016, written reprimand from all personnel files or other employment records concerning Allen.

Issue 5: Did the employer discriminate against Allen by providing an unfavorable performance appraisal and changing Allen's performance appraisal during the appeal process of her performance evaluation?

Conclusion

The Examiner did not address the remaining issues because he had concluded that Allen did not engage in protected activity. In light of our conclusion that Allen's conduct at the meeting did not lose its protection, we remand the case to the Examiner to analyze whether the employer discriminated against Allen by issuing an unfavorable performance evaluation because of her protected activity. The Examiner is in the best position to make the necessary findings of fact—including credibility determinations, if any—and to apply the correct legal standard to those findings consistent with this decision.

ORDER

The case is remanded to the Examiner to analyze the remaining issues consistent with this decision.

The findings of fact entered by Examiner Stephen Irvin are AFFIRMED and adopted as the findings of fact of the Commission. We enter an additional finding of fact:

65. Allen engaged in protected activity during the November 16, 2015, Jail Identification Unit meeting.

Conclusions of Law 1, 2, 6 through 8, and 10 entered by Examiner Stephen Irvin are AFFIRMED and adopted as the conclusions of law of the Commission. Conclusions of Law 3, 4, 5, and 9 are VACATED. We substitute the following conclusions of law:

3. Based on Findings of Fact 36 through 39 and 65, the employer discriminated against Marquel Allen in violation of RCW 41.56.140(1) by revoking her lead status.

4. Based on Findings of Fact 40 through 42 and 65, the employer discriminated against Marquel Allen in violation of RCW 41.56.140(1) by subjecting Allen to an internal investigation.

5. Based on Finding of Fact 43, the employer discriminated against Marquel Allen in violation of RCW 41.56.140(1) by issuing Allen a written reprimand.

9. Based on Finding of Fact 64, the employer interfered with employee rights by sending an e-mail on February 24, 2016.

The order issued by Examiner Stephen Irvin is VACATED and the following order is substituted:

KING COUNTY, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from

   a. unlawfully announcing and implementing changes to the vacation leave approval policy (a mandatory subject of bargaining) for employees represented by the King County Regional AFIS Guild without providing the union with notice and an opportunity to bargain;

b. discriminating and interfering with employee rights by revoking Marquel Allen's lead status and subjecting her to an internal investigation because she engaged in activity protected by Chapter 41.56 RCW;

c. unlawfully interfering with employee rights by making statements that could reasonably be perceived as threats of reprisal or force or promise of benefit associated with the exercise of collective bargaining rights protected by Chapter 41.56 RCW;

d. unlawfully interfering with employee rights by sending an e-mail on February 24, 2016, that was reasonably perceived as a threat of reprisal or force or a promise of benefit associated with the exercise of collective bargaining rights protected by Chapter 41.56 RCW; and

e. in any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Restore the status quo ante by reinstating the vacation leave approval policy as it existed before the unilateral change in the fall of 2015.

b. Ascertain the employees who would have worked overtime but for the employer's unlawful unilateral change and make those employees whole for the loss of overtime work opportunities by payment of overtime wages and benefits.

c. Pay Marquel Allen back wages plus interest and benefits from November 19, 2015, the date the employer revoked Allen's lead status, until December 31, 2015, the date Allen's lead status was scheduled to end.

d. Delete IIU 2015-288, the internal investigation into Marquel Allen's conduct on November 16, 2015, and remove any and all references to the April 27, 2016, written reprimand from all personnel files or other employment records concerning Allen.

e. Remove the written reprimand dated April 27, 2016, from all personnel files or other employment records maintained by King County concerning employee Marquel Allen.

f. Give notice to and, upon request, negotiate in good faith with the King County Regional AFIS Guild before changing the vacation leave approval policy.

g. Contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice posting. Post copies of the notice provided by the Compliance Officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

h. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the King County Commissioners, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

i. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the Compliance Officer.

j. Notify the Compliance Officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the Compliance Officer with a signed copy of the notice provided by the Compliance Officer.

ISSUED at Olympia, Washington, this 15th day of February, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner

MARK BUSTO, Commissioner

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 02/15/2018

DECISION 12582-B - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 127743-U-15

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