

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-C - PECB

ORDER ON REMAND

James M. Cline, Attorney 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 W. Irvin conducted a hearing and issued a decision on July 6, 2017, finding, in part, that the employer did not discriminate against Marquel Allen by providing an unfavorable performance appraisal, nor by changing Allen's appraisal during the appeal process. *King County*, Decision 12582-A (PECB, 2017).

The union appealed to the Commission on July 26, 2017, and the parties filed appellate briefs. The Commission issued a decision on February 15, 2018, which remanded the case with instructions for the examiner to reconsider the decision consistent with specific directions in the Commission's decision. *King County*, Decision 12582-B (PECB, 2018).

ISSUES

Did the employer discriminate in reprisal for union activities by (a) providing an unfavorable performance appraisal for Allen and (b) providing a more unfavorable performance appraisal for Allen during the appeal process of her initial performance appraisal?

On remand, I find that the union established its prima facie case regarding Allen's initial appraisal, as Allen was engaged in protected activity during a November 16, 2015, unit meeting; that the employer's appraisal of Allen on March 16, 2016, deprived Allen of an ascertainable right, benefit, or status; and that the employer's actions were causally connected to Allen's protected activity.

The employer met its burden of production by articulating a legitimate, nondiscriminatory reason for Allen's initial appraisal, specifically that the unfavorable portions of Allen's appraisal were based on a number of instances during the appraisal period in which Allen's workplace behavior did not meet the expectations her supervisor set for her in February 2015.

The record does not support the union's claim that Allen's protected activity at the unit meeting was a substantial factor in Allen's initial appraisal. Allen's supervisor observed behavior throughout the appraisal period that fell short of the expectations set for Allen in February 2015, counseled her shortly after those actions occurred, and produced an appraisal that reflected those interactions. As a result, the union did not meet its burden of persuasion to show that the employer's stated reason for Allen's initial appraisal was either a pretext or substantially motivated by union animus, and the union's allegation regarding Allen's initial appraisal is dismissed.

Regarding the employer's changes to Allen's initial appraisal during the appeal process, the union established that Allen was engaged in protected activity during the unit meeting. The record demonstrates that the proposed changes to Allen's appraisal and the appeal process were not completed, and no discipline or changes to Allen's working conditions arose as a result of the incomplete process. For these reasons, Allen suffered no deprivation of an ascertainable right,

benefit, or status during the appeal process, and the allegation is dismissed because the union was unable to establish its prima facie case.

ANALYSIS

Background

Manager Carol Gillespie directs the day-to-day operations of the King County Regional Automated Fingerprint Identification System (AFIS), which provides fingerprint identification services and technology for criminal justice agencies in King County. Identification Operations Manager Diana Watkins reports to Gillespie and supervises three identification supervisors.

Allen has worked in the AFIS program since 1998 and has been a jail identification technician since 1999. During the time of the events in question, Jail Identification Unit Supervisor Lisa Wray was Allen's direct supervisor.

On November 16, 2015, the Jail Identification Unit held a quarterly meeting. During that meeting, the employer and employees discussed changes to the vacation leave approval policy. The meeting included a tense exchange between management and Allen, who was a lead employee and union second vice president.

On March 16, 2016, Wray provided Allen a performance appraisal that covered the period from February 1, 2015, through January 31, 2016. It was the second performance appraisal Wray had done for Allen but the first in which Wray had supervised Allen during the entire appraisal period, as Wray became Allen's supervisor months into the 2014 appraisal period.

The appraisal had seven categories for nonsupervisory personnel: leadership, professionalism, service, teamwork, communications, seeks to improve performance, and policies and procedures. Within each category, there were three ratings (exceeds standards, meets standards, or needs improvement) and a comments section that the reviewer used to provide context for the ratings.

Allen received “exceeds standards” ratings in the service and seeks to improve performance categories. She received a “meets standards-plus” rating in teamwork and received “meets standards” ratings in the leadership, professionalism, communications, and policies and procedures categories.

Wray’s appraisal of Allen featured the following language in the leadership category’s comments section:

Marquel, as a long-term lead in the unit, you are self-motivated and require little direction to accomplish the primary responsibilities as an Identification Technician. You maintain high standards for yourself and others, and encourage employee development and responsibility. For these reasons, I have given you a Meets Standards in this category, even though you’ve sometimes struggled to channel your passion in a positive way.

In February 2015, I clarified lead expectations and roles. As a lead, you were expected to set the tone for the unit by limiting venting, negativity, general distrust, and distractions. I asked that you be cognizant of the message you share with staff regarding management, and ensure you were not being critical, or questioning anyone’s integrity or leadership. It appeared as though some staff in the unit were entrenched in distrust of leadership, and I asked you as a lead to assist me with combating these perceptions in [sic] with increased communication and interaction, positive messaging, and transparency to reconnect the unit with the section. Unfortunately, after I observed you continue to struggle with maintaining a positive and collaborative tone, and openly question my leadership and integrity, I lost confidence in your ability to be an effective lead in the unit. As of November 2015, your lead assignment has ended.

I encourage you to self-reflect, challenge yourself to see the positive aspects of decisions keeping in mind the overall mission of the program, support decisions of the section, connect them to operational outcomes as opposed to personal preferences, and offer solutions to facilitate conflict resolution.

The professionalism category had the following comments:

You are direct, hold others accountable for their actions, and do not hesitate to address a situation that is inappropriate or is in need of immediate attention. You are reliable, well respected, seen as an authority, and are held in high regards [sic]. You’re a fierce advocate for what you believe in, but in doing so I encourage you to always use a respectful tone, and a professional demeanor.

The communications category had the following comments:

While you typically address co-workers, supervisors, and the public in a positive and constructive manner, I have observed you in situations where you failed to demonstrate respect and courtesy when communicating your position in regards [sic] to training opportunities, unit, section, and program policies and practices. For example, I observed you in April 2015 discussing the justification of Identification Technician's attendance at the IAI conference with the Operations Manager. You became defensive, deflected, and shut down when you did not receive the answers you were hoping for. You were adamant that staff should be sent to out-of-state training for the purposes of morale, and implied that management didn't care about morale or want to invest in staff. I verbally expressed my concern and disappointment to you as we had discussed approach in previous lead meetings.

Because you routinely provide timely, responsive answers, and do not hesitate to ask questions during times of change or ambiguity, and maintain regular communication with coworkers, correctional staff, leads and your supervisor, I have rated you at Meets Standards in this category. However, in the future, remain open to differing views, interpret information and viewpoints in a positive and constructive way, and seek and rely on facts rather than make assumptions about other's intentions.

The appraisal also included a section detailing goals for the upcoming review period. Wray included the following goals for Allen:

1. Inspire confidence and respect of department personnel, including chain of command, through observed behavior, and connect leadership decisions to operational outcomes, as opposed to personal preferences.
2. Self-reflect, challenge your perceptions keeping in mind the overall mission of the program, and offer solutions to facilitate conflict resolution to benefit the individual, unit, and program.
3. Demonstrate respect and courtesy, and use the appropriate style of communication during difficult times, changes, or disagreements.
4. Attend 3 callouts in 2016 to remain active as a primary processor.
5. Remain open to differing views, interpret information and viewpoints in a positive and constructive way, and seek and rely on facts rather than make assumptions about other's intentions.

Allen signed the appraisal on March 16, 2016, which indicated that Allen had read the appraisal and that Wray had discussed its contents with her. The appraisal form stated that the employee's signature "does not necessarily constitute agreement with the conclusions of the rater," and Allen checked the box on the form that indicated her wish to appeal the report. Section 21.1 of the parties' collective bargaining agreement (CBA) allows employees to challenge the fairness or accuracy of appraisals by filing a written appeal within 10 days of receiving the appraisal.

In her appeal, Allen challenged her "meets standards-plus" rating in teamwork and "meets standards" rating in professionalism. She also sought to eliminate significant portions of Wray's comments in the leadership, professionalism, and communications categories and the goals section. For example, Allen proposed to keep only the following language in the leadership category's comments section:

Marquel, as a long-term lead in the unit, you are self-motivated and require little direction to accomplish the primary responsibilities as an Identification Technician. You maintain high standards for yourself and others, and encourage employee development and responsibility.

Allen proposed to keep only the following language in the professionalism category:

You are direct, hold others accountable for their actions, and do not hesitate to address a situation that is inappropriate or is in need of immediate attention. You are reliable, well respected, seen as an authority, and are held in high regards [sic]. You're a fierce advocate for what you believe in.

Allen proposed to keep only the following language in the communications category:

Because you routinely provide timely, responsive answers, and do not hesitate to ask questions during times of change or ambiguity, and maintain regular communication with coworkers, correctional staff, leads and your supervisor, I have rated you at Meets Standards in this category.

In the goals section, Allen proposed to eliminate the goal in which she was asked to "[d]emonstrate respect and courtesy, and use the appropriate style of communication during difficult times, changes, or disagreements" and proposed to keep only the following changes:

1. Inspire confidence and respect of department personnel, including chain of command, and connect leadership decisions to operational outcomes.
2. Challenge your perceptions keeping in mind the overall mission of the program, and offer solutions to facilitate conflict resolution to benefit the individual, unit, and program.
3. [Eliminated in Allen's proposal]
4. Attend 3 callouts in 2016 to remain active as a primary processor.
5. Remain open to differing views, interpret information and viewpoints in a positive and constructive way.

On April 7, 2016, Wray responded to Allen's appeal via e-mail. Wray indicated that she was not willing to change Allen's ratings in professionalism and teamwork, nor was she willing to make all of the language revisions Allen had requested. Wray stated nine times that she was "[n]ot willing to strike [the] entire comment as stated" but that she was "[w]illing to strike in part or work with [Allen] to revise." Wray also proposed language that could be removed from the appraisal.

Allen responded with a second appeal letter to Wray. Allen sought additional language changes to her appraisal in the leadership, professionalism, and communications categories, and she continued to challenge her rating in the teamwork category. In an e-mail on April 13, 2016, Wray indicated a desire to discuss the appraisal in person or by telephone, but on April 18, 2016, Allen responded that she preferred to keep their interactions on the matter in writing.

On April 21, 2016, Wray responded that she was unwilling to make further changes to Allen's appraisal and provided examples to support the comments she had made in the leadership and communications categories. Wray stated that Allen's options included meeting in person to work on alternative language instead of continuing over e-mail or appealing the appraisal to Gillespie as the second step in the process detailed in Section 21.1 of the CBA.

On April 29, 2016, Allen informed Gillespie by e-mail that she was moving her appraisal appeal to the second step. Allen attached a letter to the e-mail that reiterated the changes she sought in

her second appeal letter to Wray and added a request for the goals section of the appraisal to be rewritten.

Gillespie used Wray's proposed revisions to Allen's appraisal from April 7, 2016, as the starting point and made revisions of her own in four categories and the goals section before e-mailing it to Allen for her review on May 13, 2016. Gillespie did not change Allen's ratings in any category, but she added language to the leadership category comments that specifically referenced Allen's behavior in the November unit meeting.

On May 16, 2016, Allen informed Gillespie via e-mail that she did not accept Gillespie's proposed revisions and inquired about who would represent the employer on a three-person appeal panel in the third and final step in the appeal process. Section 21.3 of the CBA states that the panel cannot include anyone from the department who was involved in the review of the appeal. The affected employee is responsible for presenting his or her perspective of the appraisal to the panel, and the employee's evaluator (in this case, Wray) is responsible for providing his or her perspective. As stated in Section 21.4, the panel can either modify or preserve the original appraisal after hearing evidence.

In e-mails exchanged on May 17 and May 18, 2016, Gillespie and Allen indicated a willingness to work together to reach resolution on changes to the appraisal. On May 19, 2016, Allen sent Gillespie proposed changes to Allen's performance appraisal. Allen sought to strike any mention of the November unit meeting from the leadership category comments, continued to seek an "exceeds standards" rating in the teamwork category, and continued to dispute language in the communications category.

On June 1, 2016, Gillespie e-mailed a second proposed appraisal to Allen, in which she incorporated some of the changes Allen requested on May 19, 2016. These changes included revising Allen's teamwork category rating to "exceeds standards." However, Gillespie did not strike references to the November unit meeting from the leadership category, and she proposed to change Allen's rating in the leadership category to "needs improvement."

On June 4, 2016, Allen responded via e-mail that she was unwilling to accept a “needs improvement” rating in any category. Allen’s e-mail to Gillespie stated that she “continued to struggle” with the comments made in the communications category, but she was in agreement with other changes Gillespie proposed.

On June 6, 2016, Allen e-mailed Gillespie to ask that the time frame for appealing her appraisal be suspended, because the appraisal was part of the unfair labor practice proceedings and the parties had scheduled mediation later in the month to attempt to resolve issues involved in the hearing. The appraisal appeal process had not been completed by the time the record was closed in this case.

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); *King County*, Decision 12582-B. 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. 333, 348–349 (2014); *Educational Service District 114*, Decision 4361-A (PECB, 1994).

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, 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

In *King County*, Decision 12582-B, the Commission found that Allen had engaged in protected activity during the November 16, 2015, unit meeting and that the employer discriminated against Allen when it revoked her lead worker status, subjected her to an internal investigation, and issued her a written reprimand in connection with the protected activity. The Commission wrote,

An employee must go to extremes before his or her activity loses protection. . . . 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.

(citations omitted).

Based on the Commission's finding that Allen engaged in protected activity during the unit meeting, the union established the first prong of the prima facie test regarding Allen's original performance appraisal and subsequent changes during the appeal process. The Commission remanded the case for further analysis based on the correct legal standard for discrimination.

Initial Performance Appraisal

Although I have reservations in doing so, I find that the employer's original appraisal of Allen on March 16, 2016, deprived Allen of an ascertainable right, benefit, or status.¹ Based on

¹ In both *City of Yakima*, Decision 10270-B (PECB, 2011), and *Port of Seattle*, Decision 11848 (PECB, 2013), *aff'd*, *Port of Seattle*, Decision 11848-A (PECB, 2014), the Commission found that the union did not meet the second prong of the prima facie test because there was no evidence in the record that unfavorable comments documented by the employer constituted discipline or amounted to a deprivation of a right, benefit, or status. Although I am assuming there was a deprivation for the sake of argument in the instant case, it is debatable whether the union has provided evidence that Allen was disciplined as a result of the appraisals or that she suffered anything more than a speculative deprivation of a right, benefit, or status.

circumstantial evidence, I also find that the employer's actions were causally connected to Allen's protected activity.² As a result, the union has established its prima facie case, and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision.

Wray credibly testified that Allen's behavior during the contentious unit meeting was only part of the equation when she assessed Allen's work performance during the period covered in the original appraisal. The record shows that Wray established expectations for Allen shortly after the appraisal period began on February 1, 2015, and that Wray counseled Allen about behaviors in 2015 and January 2016 that did not meet those expectations.

On February 11, 2015, Wray reviewed roles and expectations for lead employees during a meeting with Allen and fellow lead employee Jody Tamura-Deering. Wray testified she did so because "[she] felt all three of [them] were engaging in behavior that was less than motivating." When asked about her directions to the lead employees, Wray testified,

So in that meeting, I set expectations for the three of us making sure that we are leading by example, setting the tone for the unit. Because if we set the example, then hopefully others would see those examples and change their own behavior outlook, to really decrease or refrain from engaging in issues of general distress, negativity, limit venting.

I stated something to the effect: "It's okay to disagree; however, it is in the way in which we do it"; that it's more persuasive to offer solutions in being constructive rather than pointing out things that are wrong, to be respectful. And again, to limit distractions, and just focus on jail ID.

Wray unequivocally testified that the appraisal she had completed for Allen was based on notes Wray compiled during the appraisal period and summarized in February 2016 in preparation for

² Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *Jefferson County Public Utility District No. 1*, Decision 12332-A (PECB, 2015), citing *Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to common experience give rise to a reasonable inference of the truth of the fact sought to be proved. See *Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

creating the appraisal. The following incidents unrelated to Allen's protected activity during the unit meeting were noted:

- Wray counseled Allen about professional communication after an April 30, 2015, meeting with Allen, Wray, Watkins, and Tamura-Deering that involved a disagreement about training opportunities. Allen testified, "The meeting wasn't going anywhere. So I said: 'Okay, I'm done. I'm done trying to explain why I think that we should go.' And that was it. That was the end of the meeting, and we got up and left."
- Wray counseled Allen in June 2015 after Allen and a coworker, Joe Morales, had a disagreement regarding the need to use a request form regarding major case fingerprints. Wray testified that she found it unacceptable that Allen and Morales were aggressive, raised their voices, and talked over each other during the discussion. Wray also testified that Allen told her it was normal for the two coworkers to communicate with each other in that manner because of their close relationship.
- Wray confronted Allen on October 26, 2015, after Wray overheard Allen questioning Wray's authority to make decisions in the unit. Wray's testimony and notes indicate that Allen said, "[S]he can't make decisions anyway." When Wray asked her why she would make that comment, Allen said, "[I]t is what it is."³
- Wray counseled Allen in January 2016 regarding Allen's response to lead employee Sasha Powers after Powers identified a potential mistake in Allen's work. Wray testified that she believed Allen acted inappropriately when Allen accessed the employer's crime database and responded to Powers with examples in which Powers made a similar mistake.

The record demonstrates that the employer articulated a legitimate, nondiscriminatory reason for the initial appraisal Wray provided Allen, specifically that Allen did not fully meet expectations detailed for her by Wray in February 2015. Since the employer met its burden of production, the union bears the burden of persuasion to show that the employer's stated reason was either a pretext or substantially motivated by union animus.

³ Allen's appeal letter to Wray in March 2016 stated that she "did not have any recollection of this conversation." I do not find that statement credible.

In an attempt to meet its burden, the union depicts Allen as an exemplary employee with a long history of positive appraisals, including one written by Wray in early 2015. The union contends Allen was blindsided by a negative appraisal that was directly linked to her protected activity at the unit meeting.

Allen testified, "I was just shocked that I got this evaluation, without any written documentation on anything that they were putting into my evaluation. I had never had any written documentation anywhere about having any of these problems with me." She also testified, "I didn't want anything to do with my tone and professional demeanor in my evaluation, only because it goes in my personnel file; and I don't believe that I was – I deserved to have this in my file. I thought it was all based on one unit meeting."

In her first appraisal of Allen, dated February 25, 2015, Wray gave Allen "exceeds standards" ratings in the leadership, professionalism, service, teamwork, and communications categories and "meets standards" ratings in seeks to improve, and policies and procedures categories. The comments Wray provided for each category were uniformly positive. The union argues that the appraisal Allen received a year later with lower ratings in the leadership, professionalism, teamwork, and communications categories and comments that reflected issues requiring attention is evidence of retribution for Allen's protected activity in the unit meeting.

The union's arguments are not persuasive for a number of reasons, primarily because it was unable to refute Wray's testimony that (a) Wray provided concrete expectations for Allen's workplace conduct in February 2015; (b) Allen engaged in behaviors that did not meet those expectations before, during, and after the unit meeting; and (c) Wray counseled Allen about her behavior after each instance. Allen's claims of ignorance regarding the issues Wray identified in the appraisal are not credible, and Allen's feeling that the unit meeting was the catalyst for what she perceived to be a negative appraisal is unsupported by the record.

In addition, the appraisal at issue dealt solely with actions Wray documented from February 1, 2015, through January 31, 2016, and a positive appraisal in one period is no guarantee of a positive

appraisal in another. Finally, Wray credibly testified that her first appraisal of Allen was based on a less complete knowledge of Allen's day-to-day behavior, as Wray was splitting her supervisory time between AFIS's Jail Identification and Tenprint Information units after becoming Allen's supervisor in May 2014.

Considering the record as a whole, the union has not met its burden of persuasion to show that the employer's stated reason for the ratings and comments in Allen's initial appraisal was either a pretext or substantially motivated by union animus.

Performance Appraisal Changes Made During the Appeal Process

As was the case with the original appraisal, the union established the first prong of the prima facie test for discrimination based on the Commission's finding that Allen had engaged in protected activity during the unit meeting. However, the record does not support the union's contention that the proposed changes to Allen's appraisal constituted deprivation of an ascertainable right, benefit, or status, and for this reason, the union has failed to establish its prima facie case.

In accordance with Section 21.1 of the CBA, Allen appealed her initial appraisal, discussed the appraisal with Wray, and appealed to Gillespie at the next step when Allen and Wray could not reach a suitable solution regarding proposed changes to the appraisal. Allen and Gillespie spent more than a month trading proposals on language and ratings in the appraisal in an effort to reach agreement before Allen asked Gillespie on June 6, 2016, to suspend the time frame of the appeal.

The union's point that Gillespie's proposed revisions to the appraisal shed a more unfavorable light on Allen's performance is well-taken, but the fact remains that neither Gillespie's nor Wray's proposals resulted in a final written determination. The appraisal was still a work in progress between Allen and Gillespie when Allen asked to suspend the time frame of the appeal. Testimony at hearing established that Gillespie's and Wray's drafts of proposed changes for the appraisal during the appeal process were kept separate from Allen's personnel file in the employer's human resources department.

If Gillespie, Wray, and Allen had reached a written determination as envisioned in Section 21.1 of the CBA regarding Allen's appeal, the matter would be resolved. If they were unable to do so, Allen retained the right to appeal her appraisal during a hearing before a three-member panel. According to Section 21.4, the panel would review evidence presented by Allen and Wray at hearing and would vote to preserve or modify the *original* appraisal.

The Commission found in both *City of Yakima*, Decision 10270-B, and *Port of Seattle*, Decision 11848-A, that the union did not meet the second prong of the prima facie test when no evidence in the record showed that documented negative comments by the employer constituted discipline or amounted to a deprivation of a right, benefit, or status.

The Commission overturned the examiner's conclusion in *City of Yakima* that a police officer was deprived of a right when the chief of police added additional, negative comments to an already completed performance evaluation. The Commission found that there was no evidence in the record demonstrating that the comments constituted discipline or in any other meaningful way deprived the officer of a right, benefit, or status.

The Commission upheld the examiner's decision in *Port of Seattle* that the employer did not deprive an employee of a right, benefit, or status when a supervisor documented a customer service complaint against an employee as a non-investigatory matter, later rescinded it, and mentioned a need to focus more on customer service in the employee's performance evaluation.

Similar to the unions in the aforementioned cases, the union in the instant case was unable to provide evidence that Wray's and Gillespie's proposed revisions to Allen's performance appraisal were forms of discipline or had any effect on Allen's working conditions. In addition, there was no final resolution of Allen's appraisal appeal before the record closed in this matter, which bolsters the conclusion that the union was unable to establish that Allen was deprived of an ascertainable right, benefit, or status from the proposed changes to her initial appraisal.

CONCLUSION

On remand, I find that the union established its prima facie case regarding Allen's initial performance appraisal, as Allen was engaged in protected activity during a November 16, 2015, unit meeting; that the employer's appraisal of Allen on March 16, 2016, deprived Allen of an ascertainable right, benefit, or status; and that the employer's actions were causally connected to Allen's protected activity.

The employer met its burden of production by articulating a legitimate, nondiscriminatory reason for Allen's initial appraisal, specifically that the unfavorable portions of Allen's appraisal were based on a number of instances during the appraisal period in which Allen's workplace behavior did not meet the expectations Wray set for her in February 2015.

The record does not support the union's claim that Allen's protected activity at the unit meeting was a substantial factor in Allen's initial appraisal. Wray observed behavior throughout the appraisal period that fell short of the expectations set for Allen in February 2015, counseled her shortly after those actions occurred, and produced an appraisal that reflected those interactions. As a result, the union did not meet its burden of persuasion to show that the employer's stated reason for Allen's initial appraisal was either a pretext or substantially motivated by union animus, and the union's allegation regarding Allen's initial appraisal is dismissed.

Regarding the employer's changes to Allen's initial appraisal during the appeal process, the union established that Allen was engaged in protected activity during the unit meeting. The record demonstrates that the proposed changes to Allen's appraisal and the appeal process were not completed, and no discipline or changes to Allen's working conditions arose as a result of the incomplete process. For these reasons, Allen suffered no deprivation of an ascertainable right, benefit, or status during the appeal process, and the allegation is dismissed because the union was unable to establish its prima facie case.

FINDINGS OF FACT

1. King County (employer) is an employer within the meaning of RCW 41.56.030(12).
2. The King County Regional AFIS Guild (union) is an exclusive bargaining representative within the meaning of RCW 41.56.030(2).
3. Manager Carol Gillespie directs the day-to-day operations of the King County Regional Automated Fingerprint Identification System (AFIS), which provides fingerprint identification services and technology for criminal justice agencies in King County.
4. Marquel Allen has worked in the AFIS program since 1998 and has been a jail identification technician since 1999. During the time of the events in question, Jail Identification Unit Supervisor Lisa Wray was Allen's direct supervisor.
5. On November 16, 2015, the Jail Identification Unit held a quarterly meeting. During that meeting, the employer and employees discussed changes to the employer's vacation leave approval policy. The meeting included a tense exchange between management and Allen, who was a lead employee and union second vice president.
6. On March 16, 2016, Wray provided Allen a performance appraisal that covered the period from February 1, 2015, through January 31, 2016. The appraisal included "exceeds standards" ratings in two categories, a "meet standards-plus" rating in one category, and "meets standards" ratings in four categories. The appraisal also included comments for each category, and a goals section.
7. Wray's appraisal of Allen was based on notes that Wray compiled throughout the appraisal period. During the appraisal period, Wray provided expectations for Allen's work performance and counseled Allen for failing to meet expectations on four occasions unrelated to the November 16, 2015, unit meeting.

8. On March 16, 2016, Allen indicated that she wished to appeal her appraisal pursuant to Section 21.1 of the parties' collective bargaining agreement (CBA). She challenged her ratings in two categories and sought to eliminate language in three comment sections and the goals section of the appraisal.
9. Between March 16 and April 29, 2016, Wray and Allen exchanged proposed changes to Allen's initial appraisal via e-mail. They agreed to some alterations during the exchanges but did not reach final agreement on the appraisal.
10. On April 29, 2016, Allen moved to the second step of the appeal process by appealing her appraisal to Gillespie. Allen continued to challenge her rating in one category and sought additional language changes in the comment sections and the goals section.
11. Between April 29 and June 4, 2016, Gillespie and Allen exchanged proposed changes to the appraisal via e-mail. They agreed to some alterations during the exchanges but did not reach final agreement on the appraisal, in part because Gillespie changed Allen's rating to "needs improvement" in one category.
12. The parties' CBA states that if the parties cannot reach agreement on an appraisal during the first two steps of the appeal process, the appraisal may be appealed to a three-member panel in the third and final step of the process. The panel can either modify or preserve the original appeal after hearing evidence.
13. On June 6, 2016, Allen e-mailed Gillespie to ask that the time frame for appealing her appraisal be suspended.
14. The appraisal appeal process had not been completed by the time the record was closed in this case.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.
2. By its actions described in Findings of Fact 6 and 7, the employer did not discriminate by providing an unfavorable performance appraisal for Allen and did not violate RCW 41.56.140(1).
3. By its actions described in Findings of Fact 9, 11, and 14, the employer did not discriminate by providing a more unfavorable performance appraisal for Allen during the appeal process of her initial performance appraisal and did not violate RCW 41.56.140(1).

ORDER

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

ISSUED at Olympia, Washington, this 26th day of March, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



STEPHEN W. IRVIN, 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 03/26/2018

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

BY: AMY RIGGS

CASE NUMBER: 127743-U-15

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REP BY: DIANE HESS TAYLOR
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