STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY CORRECTIONS GUILD, Complainant, vs. SNOHOMISH COUNTY, Respondent.	CASE 128885-U-17 DECISION 12723-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On April 10, 2017, the Snohomish County Corrections Guild (union) filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission). In its complaint, the union alleged that Snohomish County (employer) refused to bargain by (1) unilaterally implementing a new directive on cell phone usage within the jail and (2) unilaterally implementing a new shift turnover policy, both without providing the union with an opportunity to bargain. In addition to these allegations, the union alleged the employer interfered with employee rights by first making statements that could reasonably be perceived as a threat of reprisal or force, or promise of benefit, in response to employee testimony at an interest arbitration, and then by discriminating against that employee in reprisal for that testimony. The Commission's unfair labor practice manager issued a preliminary ruling on June 8, 2017, stating that a cause of action existed. Examiner Daniel Comeau held a hearing on November 30 and December 1, 2017, and the parties filed post-hearing briefs on February 23, 2018, to complete the record.

ISSUES

The allegations in the complaint, as framed by the preliminary ruling, are as follows:

1. Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)] by:

    (a) Unilaterally implementing a new directive on cell phone usage within the jail on or around October 11, 2016, without providing the union with an opportunity for bargaining.

    (b) Unilaterally implementing a new shift turnover policy on or around October 19, 2016, without providing the union with an opportunity for bargaining.

2. Employer interference with employee rights in violation of RCW 41.56.140(1) since October 19, 2016, by Chief Aston making statements that could reasonably be perceived as a threat of reprisal or force, or promise of benefit, in response to employee testimony during an interest arbitration hearing.

3. Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] since December 5, 2016, by its imposition of a disciplinary suspension of Carrell in reprisal for union activities protected by Chapter 41.56 RCW.

Following the general background of this case, each issue will be addressed as an individual allegation in the order listed above.

GENERAL BACKGROUND

The union is the exclusive bargaining representative for a bargaining unit consisting of all full-time and part-time corrections deputies below the rank of sergeant working in the Corrections

Bureau of the Snohomish County Sheriff's Office. The employer and the union were parties to a collective bargaining agreement (CBA) effective from January 1, 2015, through December 31, 2017.

The Corrections Bureau's function is to securely house inmates who are either pretrial detainees or those who have been convicted of a crime carrying a sentence of less than one year. Once booked into the jail, the inmates are classified and sorted by security level (low to high) and are assigned to one of 21 housing modules. While within the jail, inmates are supervised by corrections deputies 24 hours per day.

The Corrections Bureau employs a direct supervision model, which means corrections deputies are immersed within the inmate housing module and are in direct contact with inmates. To communicate with each other, corrections deputies and staff utilize county-issued radios. In addition to radios, there are departmental telephones that can dial *only* within the jail itself. When corrections deputies are transporting inmates between agencies and are outside of radio range, they are permitted to use county-issued cell phones.. Corrections deputies can communicate by calling the jail's main telephone number and then be transferred to the appropriate individual.

The jail is contained within two large, yet separate, buildings: the Oakes Building and the Wall Street Building. These buildings are connected by a sky bridge and an underground tunnel. Within these buildings, the jail facility is further divided into secure and nonsecure areas that are separated by interlocking sally port entry systems. The housing modules and video court are considered secure portions of the jail, while the administrative offices, reception, locker rooms, and staff dining areas are considered nonsecure areas. The inmates are housed within the secure areas at all times, except when the inmate is being transported, by corrections deputies, to court proceedings or medical appointments, or being transferred between agencies.

ISSUE 1(a): Did the employer refuse to bargain by unilaterally implementing a directive on personal cell phone use on October 11, 2016, without providing the union with an opportunity for bargaining?

The issue is whether the employer's decision to prohibit personal cell phones within the secure areas of the jail was a mandatory subject of bargaining that must have been bargained with the union prior to implementation. The security risks that personal cell phones posed to the employer's operation of a secure inmate facility outweighed the impacts to the wages, hours, and working conditions of employees. Therefore, the decision to prohibit personal cell phones from the secure areas of the jail was a permissive subject of bargaining and the employer was not obligated to bargain the decision with the union. The employer also attempted to meet with the union following the change in policy, but the union failed to show for the meeting to discuss any impacts of the employer's decision.

Issue 1(a): Background

Permission for corrections deputies to have or use personal cell phones within the secure portions of the jail was a recent practice. The practice at-issue can be further broken down into two categories: (1) the ability for union executive board members to use their personal cell phones within the jail for representational purposes; and (2) for transport deputies to use their personal cell phones on transport when out of radio range. Each is described in more detail below.

Union executive board members. On November 8, 2013, then Corrections Bureau Chief Mark Baird e-mailed the corrections lieutenants and sergeants (supervisors) to inform them that "[b]eginning immediately, the Guild President – Jake Hoff – is permitting [sic] to have the Guild cell phone with him inside the secure portion of the jail." Prior to this e-mail, no corrections deputies were permitted to have or use their personal cell phones within the secure areas of the jail.

Corrections deputies were not permitted to have personal cell phones because of the risks associated with maintaining inmate security while in custody. Major Jamie Kane testified that personal cell phones are perceived as valuable and highly sought after by inmates because they have internet capabilities and, most significantly, direct communication access to the outside world. Inmates in possession of a personal cell phone could use that direct line of unsupervised[1]

[1] The Corrections Bureau allows inmates to communicate via cell phone, but the phones provided to inmates are monitored and recorded in all circumstances except communications with an inmate's attorney.

communication to further organize criminal activity or intimidate potential witnesses, or to arrange for the delivery of illicit contraband. Furthermore, a personal cell phone could provide personal information about the corrections deputy that, once in the hands of an inmate, could be used to manipulate a corrections deputy as a way of recruiting that deputy to further the inmate's illicit aims. Therefore, Kane testified that allowing Hoff to use an unregulated cell phone "was incredibly laughable" and "completely contradicted anything we had done in the past."

Following Baird's e-mail, Hoff was permitted to carry and use a non-county issued cell phone in the secure portions of the jail. Though Baird's e-mail did not expressly permit other union executive board members to have their personal cell phones, the practice eventually expanded to other union executive board members. Deputy Charles Carrell, the current union president, testified that he carried his personal cell phone as well, and union executive board members have been doing so for the last seven or eight years. Carrell testified that he used his personal cell phone within the secure areas of the jail for representational purposes, such as recording an investigatory interview or efficiently communicating with bargaining unit members on contract issues.

Transport deputies. As early as the year 2000, corrections deputies were allowed to wear pagers so they could be paged when outside of radio range. However, Kane testified that when a transport deputy was transporting an inmate outside of the jail, it was not reasonable to expect a corrections deputy to stop, with an inmate, and find a pay-phone to make a call. Thus, the county began issuing cell phones to transport deputies to communicate more safely and efficiently.

These county-issued cell phones were considered unreliable, outdated, and were often underutilized by corrections staff. Transport deputies then began using their own personal cell phones when transporting inmates. Kane, who supervised transport deputies between 2012 and 2015, noticed that his transport deputies were using their own personal cell phones. Kane was concerned about his deputies carrying their cell phones because transport deputies are often required to navigate through secure portions of the jail to arrive at their transport posts.

Given the limited exposure to the secure areas of the jail, Kane instructed his transport deputies to handle their personal cell phones carefully. He did not expect them to "walk through the rain, around the secure portion of the building" to retrieve their cell phones to get to the transport

location. Instead, he instructed them to "[k]eep your phone in your pocket. Keep it secured. Make your way to the transport area, and get your equipment. Go amongst your business." Kane warned his deputies that if they took their cell phones out while in the secured areas of the jail, they could be disciplined.

Memorialization of the personal cell phone practice. On February 17, 2016, Operations Captain Kevin Young issued a memo to staff explaining the employer's policy regarding personal electronic devices and their usage within the secure portions of the jail. Specifically, he wrote, in relevant part:

> Guild E-Board, are permitted to have their cellphone on their person while on duty even if they are working a post that is inside the secure portion of the jail.
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> Transport Staff, that are going on a transports [sic] outside of the facility have been approved to have their cellphone on them for these transports, since some areas they travel to have poor radio reception.

For all other employee groups, personal electronic devices, including personal cell phones, were prohibited within the secure areas of the jail. They were prohibited because they had internet, gaming, photo, and video capabilities and could not be regulated by the employer. Conversely, county-issued cell phones could be remotely deactivated if the device was compromised. The union did not object to this memo because, as Carrell testified, it was consistent with the union's understanding of the personal cell phone practice.

The parties' 2016 negotiations and interest arbitration hearing. At the time of Young's February 17, 2016, memo, the parties were negotiating a successor CBA. During these negotiations, the union proposed a contract provision that would permit all corrections deputies to carry their cell phones in the jail. Carrell testified that the union's interest was to provide bargaining unit members with an efficient method of communication with family members in cases of emergency, personal, or otherwise. Additionally, it would bring the union into parity with other groups who were allowed to have their personal cell phones in the jail.

The employer did not agree to the union's cell phone proposal. On December 14, 2015, the Executive Director of the Commission certified this provision, among other issues, to interest

arbitration.[2] The interest arbitration hearing before Arbitrator Michael Cavanaugh was held on October 3, 4, 5, and 6, 2016, during which Young testified to the practice as he expressed in his February 17, 2016, memo. The union also did not object to Young's testimony at the interest arbitration because, again, it was consistent with the union's understanding of the cell phone practice.

During the interest arbitration hearing, Kane noticed the union had introduced exhibits depicting secure portions of the jail and that the pictures were taken by a cell phone that the county had not issued.[3] Since these photographs posed a security risk, Kane took the issue to Corrections Bureau Chief Anthony Aston and Undersheriff Rob Beidler. Aston, who had recently attended a conference at which security risks posed by cell phones were discussed, did not believe permitting personal cell phones within the secure areas of the jail was appropriate.

Specifically, Aston believed that personal cell phones carried the risk of unauthorized and unregulated photographs or videos being taken within the secure portions of the jail. These photographs or videos could reveal the locations of security cameras, officer stations, and the layout of the modules and access points. If these photographs or videos were released or shared outside of the prison, in an unregulated manner, then it could compromise the security of the jail and violate the legal rights of inmates.[4]

With these concerns in mind, Aston issued a superseding cell phone directive on October 11, 2016. In this directive, Aston explained that employees who were issued county cell phones could possess them within the secure areas of the jail, because the county could remotely deactivate them at any given time should they become compromised. He further explained:

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[2] The employer did not object to the inclusion of this provision in the certification letter.

[3] The pictures were not admitted into evidence in this case. The employer argued that the pictures were protected and would become public record if entered as an exhibit at the hearing. The union objected to specific references to any pictures not introduced into evidence, so Kane's testimony was limited to what concerned him about pictures taken with personal cell phones inside secure areas of the jail.

[4] Aston also testified that, in addition to the security risks, these photographs or videos could also capture inmates, who enjoy certain legal protections from identification. Such photographs and videos could pose liability risks if not identified upon a public records request.

> No longer permitted within the secure portion of the jail are electronic devices not controlled by Snohomish County, i.e., Guild E-Board members, and Transport Staff. If Transport Staff has need of an electronic device (cell phone) the county issues controlled phones for usage.
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> All personal cell phones and above mentioned electronic devices must be secured outside the secure envelope of the buildings. Staff members that enter the building from the Lombard staff entrance are permitted to travel through the building to the Level C mailbox area to secure their electronic device. Classification Counselors as well as Medical personnel may transport their items to their secured area of employ and lock them down there. Electronic devices are not permitted in the Wall St building break room, since it is within the secure portion of the jail.
>
> Use or being in possession of personal cell phones or electronic tablets, iPads, Nooks or Kindles to include any of the following capabilities: photography, videography, internet access, wireless access, gaming, reading, music playing and video playing within the secured perimeter of the corrections facilities is prohibited. It shall be prohibited to video, photograph, or record the secure area of the jail without written consent from the Bureau Chief.

The union considered this a significant change in policy and practice, and demanded to bargain the decision and effects of this change on October 31, 2016. Carrell testified that Aston's directive significantly impacted his ability, as a union executive board member, to represent his members. Specifically, he testified that he would be unable to use his personal cell phone to record investigatory interviews, which was the union's right under the parties' CBA. Moreover, he testified that he would be unable to effectively administer the CBA or effectively represent bargaining unit members with their issues. Carrell testified that, in one situation, he was unable to efficiently assist Deputy Rick Hecht with a bereavement leave issue because he was unaware of the issue until a fellow staff member fortuitously found him in Carrell's assigned inmate housing module.[5]

Arbitrator Cavanaugh issued his award on March 6, 2017, in which he declined to award the union's proposed personal cell phone use language. His rationale for denying the provision was

[5] Kane testified that he, too, was involved in resolving Hecht's contract issue. According to Kane, Hecht texted him (Kane) directly and Kane took care of the issue. He further testified that Carrell was assigned to transport, and not an inmate housing module, on the day of the communications.

that the employer's approach seemed to "balance security needs with the needs of some employees to use cell phones within the secure area for work-related (or Guild business) reasons."

Following the interest arbitration award, Deputy Christopher Lundi was disciplined for using his personal cell phone while in a secure area of the jail. Specifically, he was observed playing "Candy Crush," a video game, on his cell phone in video court while court was in session. At the time, his attention was diverted away from the inmate and his transport duties, and his focus was on his phone. Permitting corrections deputies to have personal cell phones within the secure areas of the jail posed an additional security risk.

Issue 1(a): Applicable Legal Standards

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.030(4). Whether a particular item is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to wages, hours and working conditions" of employees, with "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.*

While the balancing test calls upon the Commission to balance these two principal considerations, the test is more nuanced and it is not a strict black-and-white application. Subjects of bargaining fall along a continuum. At one end of the spectrum are grievance procedures and "personnel matters, including wages, hours and working conditions," also known as mandatory subjects of bargaining. RCW 41.56.030(4). At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives. *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d at 203. In between are other matters that must be weighed on the specific facts of the case. One case may

result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive.

Unilateral Change

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). A complainant alleging a unilateral change must establish both the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

The burden of establishing a past practice is on the party asserting its existence. *See* WAC 391-45-270(1)(a). The Commission has described a past practice as a "course of dealing acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous." *Whatcom County*, Decision 7288-A. Therefore, to establish the existence of a past practice, a party must show (1) a prior course of conduct; and (2) an understanding by the parties that such conduct is the proper response to the circumstances, which includes proving that the conduct claimed as practice was known and mutually accepted by the parties. *Kitsap County*, Decision 8292-B; *Kitsap County*, 8893-A.

The Commission focuses on the circumstances as a whole to determine whether an opportunity for meaningful bargaining existed. *Bellevue School District*, Decision 12767 (PECB, 2017), *citing Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the employer's action has already occurred when the employer notifies the union (a *fait accompli*), the notice would not be considered timely and the union would be excused from the need to demand bargaining. *Id.*

Effects Bargaining

The bargaining obligation applies to a decision on a mandatory subject of bargaining as well as the effects or impacts of that decision, but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University*, Decision 10413-A (PSRA, 2011), *citing Skagit County*, Decision 6348 (PECB, 1998). The employer must bargain the effects of the permissive decision on mandatory subjects of bargaining. *Wenatchee School District*, Decision 3240-A (PECB, 1990). The employer, however, is not required to delay implementation of a decision on a permissive subject of bargaining while impacts or effects bargaining occurs. *City of Bellevue*, Decision 3343-A (PECB, 1990).

Issue 1(a): Application of Standards

The decision to prohibit the usage of personal cell phones. The first question in the analysis is whether the employer's decision to prohibit corrections deputies from bringing personal cell phones into the secure portions of the jail is a mandatory subject of bargaining. This determination requires balancing the impact the personal cell phone use has on "wages, hours and working conditions" of employees with "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d at 203. Recognizing that public sector employers are not "entrepreneurs" in the same sense as private sector employers, entrepreneurial control concerns the right of the Corrections Bureau to control management and direction of government. *Central Washington University*, Decision 12305-A (PSRA, 2016), *citing Unified School District No. 1 of Racine County v. Wisconsin Employment Relations Commission*, 81 Wis.2d 89, 95 (1977). The security risks that personal cell phones posed to the employer's operation of a secure inmate facility outweighed the impacts to the wages, hours, and working conditions of employees.

The function of the Corrections Bureau is to securely house inmates who are either pretrial detainees or those who have been convicted of a crime carrying a sentence of less than one year. The employer effectively established that the security of the jail can be compromised if personal cell phones were allowed within the secure areas of the jail. Since personal cell phones are communication devices, have access to the internet, and have the capability to take photographs

and videos, they can be used for illicit purposes when in the hands of an inmate. These illicit purposes, such as furthering criminal activity outside of the jail or threatening potential witnesses, poses a public safety concern.

For these reasons, personal cell phones tend to be highly sought after by inmates, who could use tactics designed to compromise, exploit, or manipulate a corrections deputy in order to obtain that device. Furthermore, the restriction on personal cell phone use limits the ability for anyone, corrections deputy or inmate, to capture photos or videos on the cell phone of security measures in and around the jail. These security measures could be the design and layout of the housing modules, access points into and out of the jail, and the locations of security cameras and officer stations.

The prohibition for transport deputies also carries with it security risks similar to those in the secure areas of the jail. To the extent the deputy is responsible for the direct custody of the inmate while in transport, the personal cell phone could be a distraction for the corrections deputy. In the present case, Lundi was distracted by the "Candy Crush" video game and was not focusing his attention on guarding the inmate. These risks are minimized through county-issued cell phones where personal activities are reduced and the phone can be remotely deactivated.

The impact to employee wages, hours, and working conditions is slight when compared with the security risks posed by personal cell phones. The union's main argument is that the loss of personal cell phone use significantly impacts union executive board members' ability to represent their members. However, the union's argument is unpersuasive in this case.

Personal cell phones are not the only method by which union executive board members can communicate with other union members or record investigatory interviews. In regard to Hecht's bereavement leave issue, Carrell was not completely shut off from communication. There are departmental phones that can dial within the prison, and Hecht could have called the main line and asked to be connected with Carrell or leave a message for him. To the extent that Hecht was able to text Kane, Kane could also have located Carrell should it have been necessary to resolve the issue.

Investigatory interviews can be recorded with other electronic devices. While personal cell phones may provide a convenient tool for this purpose, a voice recording device that does not pose such a security risk could be used. Such voice recording device could be a recorder that is not capable of taking pictures, taking videos, or gaming.

The union argues that the representational nature of personal cell phone use is sufficient to render it a mandatory subject of bargaining. Specifically, the union equates the ability to use personal cell phones with access to bulletin boards and paid union release time, which are subjects the Commission has found to be mandatory subjects of bargaining. *Kittitas Public Hospital District 1*, Decision 11992 (PECB, 2014); *Snohomish County*, Decision 9291-A (PECB, 2007); *Yakima County*, Decision 10204 (PECB, 2008), *aff'd*, *Yakima County Law Enforcement Officers' Guild v. Public Employment Relations Commission (Yakima County)*, 174 Wn. App. 171 (2013). However, those items are distinguishable from a personal cell phone because a bulletin board or paid union release time does not provide an inmate with immediate access to the outside world. A corrections deputy's personal cell phone does provide such access and, as mentioned above, other methods in which to engage in representational activities exist.

Finally, the union argued that the employer did not object to the inclusion of the cell phone proposal in the interest arbitration certification process. When the Executive Director certifies issues submitted by the parties to interest arbitration, he is not monitoring those issues for their mandatory versus permissive characteristics. Instead, the employer would have had to challenge the inclusion of the issue by filing a timely unfair labor practice complaint. *Cowlitz County*, Decision 12483-A (PECB, 2016). The employer's failure to do so, however, did not convert the permissive subject into a mandatory subject, or forever waive its right to claim that it was a permissive subject of bargaining.[6]

<u>Effects of the decision to prohibit the possession or use of personal cell phones</u>. Though the decision to prohibit personal cell phone use was a permissive subject of bargaining, the employer

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[6] Since the employer's cell phone policy is a permissive subject of bargaining, the employer was under no obligation to revert back to the policy prior to Aston's October 11, 2016, directive, even though Arbitrator Cavanaugh assumed the "balanced" approach was a sufficient status quo for the parties.

must still bargain the impacts of the decision, upon union request. The employer, however, is not required to delay its decision on the permissive subject of bargaining while bargaining the effects.

In this case, Carrell demanded to bargain with the employer on October 31, 2016, regarding both the decision to change the cell phone policy and the effects of that decision. Upon receipt of the union's demand to bargain, Aston directed his assistant to schedule a meeting. On November 1, 2016, Beth Taylor, Aston's assistant, tentatively scheduled a demand to bargain meeting for November 28, 2016, at 1600 hours (4:00 p.m.) and e-mailed the union with this information.

Aston testified definitively that he and Snohomish County Prosecutor Steven Bladek were present and ready to negotiate on November 28, 2016, but the union never arrived. Carrell was more equivocal in his testimony, in that he recalled that the employer tried to set up a meeting but could not recall what caused it to fall through. Specifically, he could not remember on what day the meeting was supposed to occur, or whether the union showed up and "they kicked us out," but "for whatever reason," the subject was never negotiated.

Issue 1(a): Conclusion

I find that the decision to prohibit personal cell phones within the secure portions of the jail was a permissive subject of bargaining and, therefore, there was no obligation to bargain this decision with the union. I find the employer stood ready to negotiate the effects of the change in policy. The union had the opportunity to identify and bargain any impacts of the employer's decision to prohibit personal cell phones in the jail. There was no violation of a refusal to engage in effects bargaining.

ISSUE 1(b): Did the employer refuse to bargain by unilaterally implementing a new shift turnover policy on October 19, 2016, without providing the union with an opportunity for bargaining?

The issue regarding the shift turnover policy involves two separate union claims of unilateral changes to mandatory subjects of bargaining. The first claim focused on the requirement that corrections deputies arrive 10 minutes before the start of their shift for turnover duties. The second claim centered on the requirement that corrections deputies remain on premises prior to the end of their shift. These two subjects relate directly to wages and hours of work and, therefore, are

mandatory subjects of bargaining. However, the union contractually waived its right to bargain this issue when it agreed to CBA language governing both pre- and post-shift activities and expectations.

Issue 1(b): Background

The parties' CBA contains language relating to pre-shift turnover/activity period (pre-shift turnover) and late breaks/relieved from duty (end-of-shift relief) provisions. Both provisions originated from previously settled grievances between the parties.

Pre-shift turnover. Since the jail is operated 24 hours per day, shifts are divided into day shift (8:00 a.m. to 4:00 p.m.), swing shift (4:00 p.m. to 12:00 a.m.), and graveyard shift (12:00 a.m. to 8:00 a.m.) At the beginning of each shift, corrections deputies are expected to arrive early in order to receive a report from the outgoing deputy about the activities from the prior shift. This report could include information ranging from which inmate was on mop duty to which inmates were fighting during the previous shift.

Prior to requiring face-to-face turnover reports, the jail relied upon paper logs to pass down information from shift to shift. That system proved unsustainable as some information was lost at times when corrections deputies were too busy to write everything down. Furthermore, as the jail expanded, the number of pass-down logs became too cumbersome (up to 60 logs per day, for example) to monitor or mine for important information.

Prior to 2007, the employer mandated that face-to-face turnover reports be conducted at the change of each shift. This required corrections deputies to arrive anywhere from 14 to 10 minutes prior to his or her shift. At that time, corrections deputies were not being paid for working during this pre-shift period.

On April 8, 2007, Corrections Deputy Vincent Cavaleri filed a grievance seeking pay for time performing this additional work. Specifically, the claim requested pay for time worked before the shift (for turnover) and for post-shift work (when the head count had not cleared or relief was late arriving to shift and the deputy had to stay and provide turnover). His claim was that the employer's failure to pay corrections deputies for these activities violated Article 5.1.3, which, at

the time, set the regular work day at eight hours. Cavaleri's grievance was later amended to include all adversely affected corrections deputies.

The parties settled this grievance on October 17, 2008, and Hecht, who was the union president at the time, signed the settlement agreement. Under the settlement, the employer agreed to compensate corrections deputies $609,880 in the aggregate for back wages and liquidated damages for performance of turnover activities. The employer also agreed to pay employees $20 going forward for performing these turnover activities during the "de minimus" pre-shift period. The parties' agreement defined de minimus as "exchange of keys/chits, radios, and other basic equipment; travel to assigned post; and, a brief functional on-post briefing."

The $20 premium pay was intended to last until the parties negotiated a successor CBA. The parties bargained a successor CBA in which they added the following language to Article 5.1.3.1:

> The Employer will establish a ten (10) minute pre-shift turnover/activity period that extends the regular work schedule for all members. Employees shall begin work duties at the designated time pre-shift and shall be at their designated post location no later than five (5) minutes before the start of the shift.
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> . . .
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> Payment for the turnover/activity period shall be at one and one-half (1-1/2) times the employee's regular straight time rate of pay as compensation for all pre- and post-shift work activities.
>
> . . .
>
> The regular work day is eight (8) hours per day for purposes of leave accrual and usage such that employees shall not accrue additional leave based upon the ten minute turnover/activity period and employees in a paid leave status will use and be paid for only eight (8) hours of leave per day.

On August 25, 2010, Baird e-mailed all corrections staff to notify them of the new turnover period. In his e-mail, Baird informed staff that "[a]ll corrections deputies are required to be in the facility by ten (10) minutes prior to the start of their shift," and "[t]hey are required to be at their assigned post by five (5) minutes prior to the beginning of their shift." The 10 minutes was to allow

additional time to gather equipment and navigate to his or her post, whereas the five-minute pre-shift was specifically "to be used for face-to-face turnover."

Turnover briefings were not required in certain areas of the jail that were not staffed at the time of shift change. For example, video visitation or professional visitation (attorney-client interviews) were not staffed on graveyard shift, so the oncoming shift was not relieving anyone. Similarly, the transport team ran only from 8:00 a.m. to 4:00 p.m., so there was no outgoing shift at 8:00 a.m. or incoming shift at 4:00 p.m. However, corrections deputies assigned to these areas, were still required to arrive prior to shift to navigate the large facility, and obtain keys, radio, and other equipment in preparation for their shift.

Post-shift relief. At around the same time as the parties were resolving the pre-shift turnover issues, the union also filed grievances against the employer for failing to begin required breaks on time. Corrections deputies were either starting their breaks late or not getting their breaks at all. At the time, supervisors were only approving additional pay for these breaks if they began outside of a seven and one-half minute, or de minimus, window.

The parties were able to settle the grievances in early 2009. The parties did not memorialize the settlement in writing at the time, but Baird sent an e-mail to all jail staff on February 13, 2009, explaining the parties' agreement. His e-mail stated the following, in relevant part:

> The Sheriff's Office and the Guild have entered into an agreement pertaining to de minimus time for late breaks and coming on and off shift. When a Custody/Corrections Officer is relieved by the oncoming shift, he/she may begin to move through the building prior to the end of the shift. This could be working ones way to the locker rooms, staff dining or out to reception. Staff should still remain on the premises and in uniform until the end of one's shift – and respond to any emergency that may arise. As part of this agreement the Guild has dismissed all grievances relating to breaks that have been provided less than 7 ½ minutes late, and will not file such grievances in the future.

Prior to sending this e-mail, Chief Baird sent a draft of this e-mail to union president Hecht for review and feedback.

The draft version that Baird shared with Hecht included the language quoted above. Hecht shared this draft with other individuals, including the union's attorney, and encouraged feedback on the language. Hecht's only issue with the e-mail was whether to include the 10-minute window that would correspond to the pre-shift activity.

Specifically, on February 9, 2009, at 12:45 p.m., Hecht wrote:

> I agree that 10 minutes is much cleaner and simple. I struggle with the language in the contract that speaks of the greater of 15 minutes (7.5 min) if we agree that overtime will be authorized for a break outside 7.5 minutes and a break will be given my concern is satisfied. If the position is going to be an Officer will be paid the overtime but not allowed the break we might be back in the same boat. Our goal is to eliminate any grievance on this issue.

Hecht did not object to the language requiring corrections deputies to remain in the building until the end of the shift.

In a subsequent CBA, the parties agreed to the following language, which is in Article 5.3:

> De Minimus Time for Late Breaks and Being Relieved – Breaks provided less than seven and one half (7 ½) minutes after their required time shall not be considered late. When an employee is relieved by the oncoming shift, he/she may begin to move through the building prior to the end of the shift.

Past practice and interest arbitration. The parties disagreed on how frequently corrections deputies were arriving 10 minutes early or how frequently corrections deputies were leaving the facility during the de minimus window prior to the end of shift. Carrell testified that corrections deputies were not required to arrive 10 minutes prior to the start of shift. The union presented a portion of the transcript from Carrell's interest arbitration testimony:[7]

> I wouldn't consider it [pre-shift turnover] a mandatory because if you don't show up and you don't get your turnover, you don't get compensated for that day. So in other words, I can show up late for the day and if I get caught up in traffic or

[7] Only limited and relevant portions of the parties' October 2016 interest arbitration transcript were admitted at hearing.

> something, I can show up at 8:00. I don't get in trouble, but I don't get compensated for that time either.

In addition, the union presented testimony from Carrell, Hecht, and Henry, each of whom testified that he had left the facility prior to the end of shift many times. Henry estimated that he left the facility early approximately four out of every five shifts and sometimes up to five to eight minutes early. In several instances, corrections deputies were either leaving with supervising sergeants or the sergeants were aware of their leaving early.

By contrast, Kane testified that corrections deputies, as a practice, would also congregate at the exit points while waiting for the shift to end. This suggested that some corrections deputies knew that they weren't allowed to leave until their shift was over. In spite of this, Kane and Beidler acknowledged that there were most likely cases where corrections deputies were leaving earlier than the end of their shift, as Beidler testified that he could often look out his window and see people coming and going right before a shift change.

Beidler testified that 100 percent compliance or enforcement would be unreasonable. The volume of employees, shifts, and exit locations made the complete enforcement prohibitive on management, and he believed in giving corrections deputies the benefit of the doubt on having the character and integrity to follow the rules. To this end, Kane testified that, if he received a report that a corrections deputy had not shown for turnover or left early, then he would investigate the issue. He further testified that there had been times when he had to investigate a claim, but he had usually found that the corrections deputy had been authorized to do so. In cases where employees were not authorized, the result was generally a coaching or a Performance Incident Report (PIR). The employer did not consider PIRs disciplinary.

Kane was present at the interest arbitration hearing to hear Carrell's testimony concerning pre-shift turnover. He was concerned that Carrell's understanding did not comply with the existing pre-shift turnover requirement. Furthermore, he was concerned that Carrell's understanding may have been shared by the bargaining unit, and he brought this concern to Aston.

On October 19, 2016, Aston issued a memorandum to all corrections deputies regarding the turnover requirements. In this memo, Aston specifically referenced Carrell and his testimony at the interest arbitration hearing:

> During the recent interest arbitration hearing held to establish certain terms of a new labor agreement, Guild President Charles Carrell testified that he understands turnover to be optional. While we do not believe there is any significant confusion about turnover requirements and directives, we will take this opportunity to provide some important reminders[.]

Aston went on to list those reminders, including that turnover was mandatory, that the requirement was to be at the facility 10 minutes prior to shift and at post by five minutes prior to that same shift, and that deputies remain on the premises until the end of that shift. For the post-shift expectation, Aston wrote:

> Unless approved by a supervisor, an employee must remain on premises and "in uniform" until the end of his or her shift, which occurs at the top of the hour (0800, 1600, and 0000 hrs, etc.) If an employee under this or a similar bargaining agreement is found to have "left early" without permission, the incident could result in progressive discipline and deduction of applicable pay.

The union disagreed with this memo, because the union believed it was a change in practice.

Following Aston's memo, two corrections deputies received PIRs for leaving the premises prior to the end of shift. Corrections Deputy Scott Maxey (since deceased) received his PIR for being observed outside the facility in his car at 7:55 a.m., though his shift ended at 8:00 a.m. Corrections Deputy Derrick Henry also received a PIR and was deducted .25 hours of vacation pay for leaving the facility prior to the end of his shift. The union grieved these PIRs and the employer denied the union's grievances.

<u>Issue 1(b): Applicable Legal Standard</u>

The legal standard that applies is set forth above in the discussion of the personal cell phone policy. Since the employer asserted a waiver by contract defense in its answer, and argues that the parties' CBA and bargaining history preclude the union's claims, the legal standard for waiver is presented here.

Waiver by Contract

A contractual waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes, as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). Waiver by contract is an affirmative defense and the burden of proving such a waiver is on the party asserting it. *Lakewood School District*, Decision 755-A (PECB, 1980).

In *Washington Public Power Supply System*, Decision 6058-A, the Commission adopted an "objective manifestation" theory of contracts, which imputes to a person an intention corresponding to the reasonable meaning of the person's words and acts. The "unilateral or subjective purposes and intentions about the meanings or what is written do not constitute evidence of the parties' intentions." *Washington Public Power Supply System*, Decision 6058-A, *quoting Lynott v. National Union Fire Insurance Company*, 123 Wn.2d 678, 684 (1994). "Where the contract provisions are not ambiguous, and when the contract terms themselves evidence a meeting of the minds, we need go no further to determine what was intended." *Washington Public Power Supply System*, Decision 6058-A, *citing Chelan County*, Decision 5469-A (PECB, 1996).

Issue 1(b): Application of Standard

Pre-Shift and Post-Shift Activities

The union claims that pre-shift turnover activities and, conversely, the requirement to remain on the premises prior to the end of the shift are mandatory subjects of bargaining. These subjects clearly relate to and impact bargaining unit employees' hours of work and pay for performing this work. Therefore, these two subjects are mandatory subjects of bargaining.

The next question in the analysis is whether the union established a relevant status quo and a meaningful change to that status quo. *Whatcom County*, Decision 7288-A. For both pre-shift and post-shift activities, the evidence weighs in favor of the union in terms of a practice that existed. The union's examples were more specific and direct in regard to when and how often deputies were arriving and leaving the facility. With Beidler's and Kane's acknowledgment that perfect

enforcement could not be expected, it is clear that a consistent and significant number of employees were not abiding by the pre-shift and post-shift CBA language and that the employer did not consistently enforce these provisions until after Aston's October 19, 2016, memo.

Since the employer's enforcement of the language in the CBA changed the status quo of a mandatory subject of bargaining, the remaining question is whether the employer was privileged to do so by contract. When a knowing, specific, and intentional contract waiver exists, an employer may lawfully make changes as long as the changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A. Under these facts, the union waived by contract its right to bargain both the pre-shift turnover period and the end-of-shift relief period. Thus, the employer acted lawfully when it reminded employees of the preliminary and end-of-shift expectations and began enforcing the language through PIRs.

Pre-shift turnover activity. In this case, Article 5.1.3.1 unambiguously states that corrections deputies *shall* begin work duties at the 10-minute pre-shift turnover activity period established by the employer, and that corrections deputies *shall* be at their designated post location no later than five minutes before the start of a shift. This language leaves no room for employee discretion to decide whether or not to be at the facility or post at these times, unless that employee has obtained authorization from a supervisor to do so. Thus, the union, in agreeing to this language, waived its right to claim that this turnover activity was voluntary.

Baird's August 25, 2010, e-mail to all staff regarding the turnover period further established that the parties knew that pre-shift turnover was mandatory. In this e-mail, Baird twice used the term "required" in referring to both the 10-minute and the 5-minute pre-shift turnover period, and the union presented no evidence that it objected to this e-mail at the time. The parties' objective manifestation through the use of clear contract language, and the unchallenged language in Baird's e-mail, is conclusive that the parties intended to mandate pre-shift turnover activities, and supersedes any subjective understanding held by the union about the intended meaning.

Post-shift relief. The language in Article 5.3 of the parties' CBA allows an employee, once relieved by oncoming shift staff, to "begin to move through the building prior to the end of the shift." This language is also clear in that it limits a corrections deputy's freedom of movement to

within the building prior to the end of a shift. Still, the union argues that the intent of the language was not to restrict a corrections deputy from leaving the facility prior to the end of his or her shift.

The evidence in this case, in particular the parties' bargaining history, does not support the union's argument. Rather, it establishes that the union knew the parameters of the agreement at the time it was made. The employer can establish a waiver by demonstrating that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer. *City of Yakima*, Decision 3564-A. In this case, the employer effectively demonstrated the union's knowledge of the parties' intent at the time of the agreement.

Hecht, as union president, actively participated in settling the late breaks grievances as well as crafting the message to all staff announcing the resolution. He never objected to the expectation expressed in the February 13, 2009, e-mail to all staff (before or after its creation) that corrections deputies were to remain on the premises. If Hecht had an objection to the language, then it is reasonable to conclude that he would have done so at that time. Since he did not, an objective conclusion is that Hecht understood that "begin to move through the building prior to the end of the shift" meant remaining on the premises and in uniform, as Aston stated in his October 19, 2016, memo. Knowing this intent, the union waived its right to bargain the requirement to remain on premises until the end of the shift.

Issue 1(b): Conclusion

I find that the employer has proven that the union waived its right to bargain the 10-minute pre-shift turnover activities and waived its right to bargain the privilege to leave the premises during the post-shift relief period. Therefore, the employer did not refuse to bargain in violation of RCW 41.56.140(4).

ISSUE 2: Did the employer interfere with employee rights by Chief Aston's statements in his October 19, 2016, memorandum referencing Deputy Carrell's testimony at the interest arbitration hearing?

The precise issue here is whether Aston's written statements in his October 19, 2016, memo, which identify Carrell and his testimony at the interest arbitration hearing, could reasonably be perceived as a reprisal for Carrell's testimony at that hearing. In this case, a typical employee could reasonably conclude that Aston was referring to Carrell in reprisal for Carrell's testimony.

Issue 2: Background

Aston referenced Carrell's interest arbitration testimony in his October 19, 2016, memo to corrections staff. For ease of reference, Aston's language is reiterated here:

> During the recent interest arbitration hearing held to establish certain terms of a new labor agreement, Guild President Charles Carrell testified that he understands turnover to be optional. While we do not believe there is any significant confusion about turnover requirements and directives, we will take this opportunity to provide some important reminders[.]

In the remainder of the memo, Aston expressed the employer's understanding of the turnover expectations, which the employer believed were mandatory.

Issue 2: Applicable Legal Standard

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 (PECB, 2008); *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.*

Issue 2: Application of Standard

Interference with Employee Rights

An interference claim does not require the union to establish intent or motive, nor does it require the union to establish that an employee was actually coerced. While the employer may characterize Aston's statement as innocuous or true in character, the analysis does not turn on how the employer characterizes the statement. Instead, interference turns on whether a reasonable *employee* would perceive the statement as a threat of reprisal or force. *Warden School District*, Decision 12778-A (EDUC, 2018), *citing Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). Aston was certainly within his management rights to express the employer's position on turnover expectations, but he went further and linked his expression to Carrell's interest arbitration *and* did so in a memo to rank-and-file employees.

Recently, in *State – Ecology*, Decision 12732-A (PSRA, 2017), the Commission reaffirmed the importance of an employee's reasonable perceptions as a critical factor in the evaluation of an interference allegation. The Commission explained that legal determination of interference is based upon "whether a typical employee under similar circumstances could reasonably perceive the actions at issue as attempts to discourage protected activity." *Id., citing King County*, Decision 6994-B (PECB, 2002); *University of Washington*, Decision 11091-A (PSRA, 2012). Thus, Aston's memo must be viewed from a reasonable employee's perspective.

From the perspective of a reasonable employee, Aston references Carrell's interest arbitration testimony and publicly contradicts it by reaffirming pre-shift and end-of-shift requirements. Furthermore, bargaining unit members (Hecht, Henry, and Lundi) believed this memo took

something away from them, such as the ability to leave the building early if relieved by the oncoming shift. Since Carrell was testifying at the interest arbitration hearing on the union's behalf, Aston's decision to take that perceived benefit away could reasonably be understood to have been in reprisal for Carrell's testimony. Therefore, a reasonable employee could view Aston's memo as an attempt by him to discourage Carrell's protected activity, or any other bargaining unit member who wished to engage in that protected activity.

Issue 2: Conclusion

I find the union proved, by a preponderance of the evidence, that Aston's memo could be perceived by a reasonable employee as a threat of reprisal associated with testifying at an arbitration hearing. Therefore, the employer interfered with employee rights in violation of RCW 41.56.140(1).

ISSUE 3: Did the employer unlawfully discriminate against Deputy Carrell, since December 5, 2016, by imposing a disciplinary suspension against him in reprisal for union activities protected by RCW 41.56.140(1)?

The issue here is whether the employer discriminated against Carrell in reprisal for his interest arbitration testimony.[8] Based upon the facts of this case, the union failed to prove that the employer's nondiscriminatory reasons were pretext for a discriminatory motive, or that union animus was a substantial motivating factor for the employer's decision to discipline Carrell.

Issue 3: Background

In late 2016, the employer was investigating Carrell for an incident involving a matter unrelated to cell phone usage. Lieutenant Clint Moll was assigned to investigate the matter, and scheduled an investigatory interview with Carrell on December 7, 2016, in the Level D conference room, which was in a secured area of the jail.

[8] The union argued that the employer also discriminated against Lundi. However, the preliminary ruling is limited to the allegation that the employer discriminated against Carrell and, therefore, the argument that the employer unlawfully discriminated against Lundi is not a part of this decision. This decision does, however, discuss the argument that Lundi's less severe penalty is evidence of the employer's discriminatory motive against Carrell.

Carrell wanted to record the interview, so he requested that Moll relocate the interview to the administrative conference room outside of the secured portions of the jail. Carrell testified that Moll denied the request. When asked why, Moll answered "[b]ecause I can" and "I'm not going to move it."[9] Carrell did not specify whether he informed Moll that relocating the meeting would allow Carrell to record the interview with his personal cell phone or that Carrell's other recording device was not working.

Carrell had been storing his cell phone in his mailbox on Level C, which was outside of the secure areas of the jail. On the day of the interview, Carrell retrieved his cell phone so that he could record the interview. He made contact with his attorney, Geoff Kiernan, and both made their way to the interview location on Level D.

Carrell showed his cell phone to Moll and Lieutenant Randy Harrison, who Moll asked to attend the interview, and asked if he could use his cell phone to record the interview. At the time of his request, Carrell was already in a secure area of the jail with his cell phone. Moll did not object, as Moll was also recording the interview.[10]

Before the interview began, Moll excused himself from the room because of an issue pertaining to Carrell's *Garrity* rights. He spoke with Kane, and while discussing the *Garrity* issue with Kane, Moll mentioned that Carrell was recording the interview with a cell phone. Kane asked Moll if the cell phone was Carrell's personal cell phone or his attorney's, and Moll did not know. Kane told Moll to conduct the interview first and then address the cell phone issue. At the conclusion of the interview, Moll asked if the cell phone was Carrell's or Kiernan's, and Carrell said the cell phone was his.

On or about December 9, 2016, Moll submitted a personnel complaint form against Carrell for having his personal cell phone in a secure portion of the jail in violation of Aston's October 11,

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9 During the investigation, Carrell did not mention his request to move the meeting. Furthermore, the investigator's notes reflect that Carrell said he had had "a couple days notice" of the interview and "didn't know the location of the interview until just before it started."

10 The record is not clear whether the cell phone Moll was using was his personal cell phone or a county-issued cell phone. The union, with the burden to prove the discrimination claim, did not clarify this ambiguity.

2016, cell phone directive. There were two allegations against Carrell listed in the personnel complaint. These allegations were that (1) Carrell violated the policy requiring staff to knowingly observe and obey all written directives, policies, and procedures; and (2) Carrell violated the policy prohibiting insubordination.

Lieutenant Mark Simonson was assigned to investigate the matter. When Simonson interviewed Carrell, he asked him if he was aware of Aston's October 11, 2016, directive, and Carrell answered in the affirmative. Carrell mentioned that he had permission from Moll to use his cell phone to record the interview, but acknowledged that he did not have permission from Aston. Simonson concluded his investigation on January 18, 2017, and sustained the allegation of knowingly disobeying written directives, policies, and procedures. Since Carrell had another sustained personnel complaint for insubordination within the previous 24 months, it moved the current violation to a "grade 2" and Simonson recommended a two-year written reprimand.

Simonson did not sustain the allegation for insubordination. He forwarded his investigation and recommendations to Captain Young. Young disagreed with Lieutenant Simonson's findings and Young recommended a finding on the insubordination charge. In a January 20, 2017, memo Young wrote, "I know that Deputy Carrell was aware of the directive prohibiting staff from taking electronic devices into the secure portion of the jail since he admitted to being aware of it during his investigation." Since Young found this to be a blatant disregard for the rules, he recommended a five-day suspension with a five-year written reprimand. Major Kane concurred with Young's recommendation. On February 17, 2017, following a pre-disciplinary hearing, Carrell was issued a five-day suspension with a five-year written reprimand.[11]

The employer also disciplined Deputy Lundi for violating the cell phone usage policy in a separate incident. In Lundi's case, he was charged with using his personal cell phone to play "Candy Crush," while transporting an inmate on March 23, 2017, to video court in a secure portion of the jail. The inmate's defense attorney witnessed Lundi using his personal cell phone in this manner.

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[11] Simonson's grade two penalty recommendation was based on the combination of Carrell's knowing disobedience of the cell phone policy with his prior insubordination violation. Young's elevated penalty, however, was the combination of Carrell's knowing disobedience of the cell phone policy with *two* insubordination violations within a 24-month period.

During the investigation, Lundi admitted to using his phone to play games and acknowledged that he was not supposed to have the phone in the secure portions of the jail. He also admitted to using profanity with the inmate, which was something for which Lundi had received pervious discipline. Lundi received a three-day suspension, but, unlike Carrell, Lundi did not have a prior insubordination violation.

Chief Labor Negotiator Rob Sprague issued a Step 3 grievance response to Lundi's grievance on September 20, 2017. In that response, Sprague wrote:

> [I]t is also worth noting that the Union sought to have employees able to carry their personal cell phones in the secure perimeter of the jail through the negotiation process and lost that in an interest arbitration award received on March 6, 2013 [sic] which was over two and one-half weeks prior the incident at hand.

Sprague was not involved in the investigations or the decisions to discipline Carrell or Lundi.

The employer's policy defined insubordination as follows:

> 7.2.7 INSUBORDINATION
>
> Members shall observe and obey the lawful verbal and written directives, policies, and procedures of the Snohomish County Sheriff's Office. They shall also subordinate their personal preferences and work priorities to the lawful verbal and written directives, policies, and procedures of this Office, as well as to the lawful orders and directives of supervisors and superior command personnel of this Office. Members shall perform all lawful duties and tasks assigned by supervisory and/or superior ranked personnel. Refusal to do so is insubordination.
>
> 7.2.7.2 INSUBORDINATION: EXAMPLES OF VIOLATIONS
>
> 5. Deliberate defiance of management's legitimate exercise of its rights.

An employee who is insubordinate will receive a level of discipline corresponding to one of the levels on the employer's discipline matrix. Aston testified that the employer's disciplinary matrix has three levels, each corresponding to a more severe penalty. The more severe penalties correspond to the more serious rule violations and to repeat violations of the same or similar rules. Aston testified that insubordination was a "grave" offense, and that "a lot can deteriorate when we start to have insubordination."

The union did not directly rebut the explanation of the disciplinary matrix or the gravity of an insubordination claim. Indeed, Lundi acknowledged the matrix, and also acknowledged that his elevated disciplinary penalty was due to his prior instances of using profanity with inmates. Finally, the union did not provide any examples of employees receiving less severe discipline for violations of the insubordination policy.

Issue 3: Applicable Legal Standard

Discrimination

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); *Jefferson County Public Utility District No. 1*, Decision 12332-A (PECB, 2015), *citing Educational Service District 114*, Decision 4361-A (PECB, 1994). When discrimination is claimed, the complainant must first establish a prima facie case of discrimination by showing

1. the exercise of a statutorily protected right;
2. the employee was deprived of some ascertainable right; and
3. that there was a causal connection between the exercise of the legal right and the discriminatory action.

Educational Service District, Decision 4361-A. Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *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).

Once the complainant establishes a prima facie case, the respondent has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. *Educational Service District*, Decision 4361-A. The respondent must produce relevant admissible evidence of another motivation, but need not do so by a preponderance of the evidence necessary to sustain the burden of persuasion.

Id. 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 pretext or that union animus was a substantial motivating factor for the employer's actions. *Id.*

Issue 3: Application of Standard

The Prima Facie Case

The first step in the analysis is to determine whether the union has made a prima facie case of discrimination. This requires the union to establish that Carrell exercised a statutorily protected right, that he suffered a deprivation of some ascertainable right, and that a causal connection existed between Carrell's exercise of his protected rights and the discriminatory action.

Exercising a statutorily protected right. Carrell testified on behalf of the union at the interest arbitration hearing in October 2016. The legislative policy in Washington prohibits strikes by uniformed personnel as a form of settling labor disputes and promotes uninterrupted services by creating "an effective and adequate alternative means of settling disputes." RCW 41.56.430. The adequate and alternative means of settling disputes are the impasse resolution procedures, including interest arbitration, set forth in RCW 41.56.450. Therefore, participation in and providing testimony at an interest arbitration hearing is encouraged for settling labor disputes and Deputy Carrell's testimony at the interest arbitration hearing is protected. *See City of Yakima*, Decision 10270-A (PECB, 2011) (concluding that testimony at the interest arbitration hearing was protected activity).

Deprivation of some ascertainable right. Carrell was issued a five-day suspension, without pay, and a five-year written reprimand. His discipline deprived him of pay and subjects him to elevated penalties in the future. Therefore, he was deprived of an ascertainable right.

Causal connection. To establish that a causal connection existed, the union may rely upon circumstantial evidence or upon circumstances from which one can reasonably infer a connection. *City of Federal Way (WSCCCE)*, Decision 5183-A (PECB, 1996). In this case, there are three circumstances that lead to the inference of a causal connection between Carrell's interest arbitration testimony and his subsequent discipline.

First, the level of Carrell's discipline is significant. He was penalized five-days without pay and given a written reprimand that will remain in his file for five years. This level of discipline may seem harsh, given that Carrell's personal cell phone was stored outside the secured areas of the jail and it was only brought inside a secure area for the limited purpose of recording his interview. Though he was mistaken, Carrell also believed that he had authorization because the lieutenants conducting the interview did not immediately object, suggesting the issue could have been a misunderstanding.

Second, there was internal disagreement among management concerning the results of the investigation and the determination of the penalty. Young disagreed with the original recommendation from Lieutenant Simonson. Instead, Young recommended a finding of insubordination and an elevated penalty of a five-day suspension and a five-year written reprimand. Since Young was present at the interest arbitration hearing and knew Carrell testified at that hearing to support cell phone usage, Young certainly had knowledge of Carrell's protected activity.

Third, Kane also participated in the circumstances leading to Carrell's discipline. Kane was the one who advised Moll to question Carrell about the cell phone, and Kane also concurred with Young's elevated penalty recommendation. Finally, Kane was also present for Carrell's interest arbitration testimony and admitted that the substance of Carrell's testimony concerned him. Thus, Kane had knowledge of Carrell's protected activity and knew of it at the time he was participating in the investigation and decision to discipline Carrell.

Taking all of these circumstances together, one could reasonably infer that a causal connection existed between Carrell's protected interest arbitration testimony and the level of Carrell's discipline. Therefore, the union has established a prima facie case.

Legitimate Nondiscriminatory Reason

With the union establishing a prima facie case, the next question is whether the employer articulated a legitimate nondiscriminatory reason for the discipline. In this case, the employer sufficiently produced three legitimate nondiscriminatory reasons for Deputy Carrell's discipline.

First, Carrell's actions met the definition of insubordination. Carell knew and understood the parameters of Aston's October 11, 2016, directive, and he knew that he was not permitted to bring his personal cell phone into secure areas of the jail. Since Carrell did not obtain permission *before* he entered a secure area of the jail, he was knowingly in violation of Chief Aston's directive the moment he brought his cell phone with him. Thus, the employer had a legitimate claim that Carrell was, in fact, in violation of the insubordination policy.

Second, there is a nondiscriminatory reason for the severity of Carrell's penalty. The insubordination violation for the cell phone was Carrell's second insubordination offense within 24 months. This repeated offense elevated the level of discipline from the original recommended penalty of a two-year written reprimand. Carrell's repeated *insubordination* violations distinguished his penalty from Lundi's penalty, which was predicated on prior use of profanity with inmates.

Third, Young's disagreement with the initial recommendations was not based on Carrell's participation at the interest arbitration hearing. Instead, Young wrote in his recommendation that he knew that Carrell was aware of the directive prohibiting him from bringing his personal cell phone into the secure portions of the jail "since he admitted to being aware of it during his investigation." This explanation is a link back to Carrell's own admission and section 7.2.7.2 of the insubordination policy, and, therefore, was not based on Carrell's protected activity.

Pretext/Substantial Motivating Factor

If the employer articulates a legitimate nondiscriminatory reason for its action, the union still bears the burden of persuasion to prove that the employer's action was pretext or that union animus was a substantial motivating factor in its decision to discipline Carrell. Four factors that the union contends were union animus or pretext in Carrell's discipline are (1) the harshness of his discipline, (2) his testimony and participation at the interest arbitration hearing, (3) his position and involvement with the union, and (4) the proximity of the investigation to his discipline. However, these factors were legitimately explained by the employer's nondiscriminatory reasons, and the union produced no additional evidence to carry its burden of persuasion in this case.

Carrell was suspended for five days for insubordination, which was not only his second violation in 24 months, but it was his second within one year. There was no evidence presented to establish that Carrell had been treated any differently than anyone who was under similar circumstances. Similar circumstances could be examples of other corrections staff who had not engaged in protected activity and deliberately defied management directives or were repeatedly insubordinate and received either a lesser penalty or no penalty at all.[12] Lundi's case does not fit into this category because he was not repeatedly insubordinate and, therefore, lower on the matrix scale.

The union, in its brief, made reference to a written comment by Rob Sprague in response to the union's Lundi grievance. Specifically, Sprague's comment referred to the union's attempt to obtain language allowing all corrections deputies to have personal cell phones in the jail. This comment is taken out of context, because Sprague is making the statement to illustrate how Lundi, and the union, is knowingly asserting a right to use personal cell phones that it failed to achieve through negotiations. Without more, one cannot infer illicit intent from Sprague's statement.

Issue 3: Conclusion

The union established its prima facie case of discrimination, and the employer articulated legitimate nondiscriminatory reasons for Carrell's discipline. However, the union failed to prove that the employer's reasons were pretext or that union animus was a substantial motivating factor in Carrell's discipline. Therefore, the employer did not unlawfully discriminate against Carrell in violation of RCW 41.56.140(1).

Independent Interference Violation Stands

The employer argued that, if the independent interference claim is based on the same facts as the discrimination claim, then the independent interference claim must be dismissed if the discrimination claim is dismissed. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998). The union relies on different facts to support its interference and discrimination claims. Specifically, the union relies exclusively on Aston's reference to Carrell in his October 19, 2016, memo to support its interference claim, but does not rely on this fact to support its discrimination

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12 The Examiner is not suggesting that this is the only way to show pretext or substantial motivating factors, but these examples would be relevant to the analysis.

claim. Therefore, the cited case is inapposite and there is no reason to dismiss the finding of independent interference in this case.

FINDINGS OF FACT

1. Snohomish County (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The Snohomish County Corrections Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2), is the exclusive bargaining representative of an appropriate bargaining unit of regular full-time and regular part-time corrections deputies below the rank of sergeant.

3. The employer and the union were parties to a collective bargaining agreement (CBA), which was effective January 1, 2015, to December 31, 2017.

4. The Corrections Bureau's function is to securely house inmates who are either pretrial detainees or those who have been convicted of a crime carrying a sentence of less than one year.

5. While within the jail, inmates are supervised by corrections deputies 24 hours per day under a direct supervision model. The direct supervision model immerses the corrections deputy within the housing modules of the inmates they supervise.

6. The jail facility is divided into secure and nonsecure areas that are separated by interlocking sally port entry systems.

7. The housing modules and video court are within the sally port entry system and, therefore, are considered secure portions of the jail. Conversely, the administrative offices, reception, locker rooms, and staff dining areas are outside of the sally port entry system and are considered nonsecure areas.

8. The inmates are housed within the secured areas at all times, except when the inmate is being transported by a corrections deputy, to court proceedings, medical appointments, or to a different agency.

9. To communicate with each other, corrections deputies and staff utilize county-issued radios that work within the jail and departmental phones that dial only within the jail. The departmental phones are restricted from calling outside of the jail.

10. Corrections deputies can communicate with other staff by calling the main jail telephone number and then be transferred to the appropriate individual, or by calling another staff member on that staff member's county-issued cell phone.

11. Corrections deputies were not permitted to have personal cell phones in the secure areas of the jail, because of the risks associated with maintaining inmate security while the inmate was in custody.

12. The security risks posed by personal cell phones were that inmates could use them to communicate with individuals outside of the jail, in an unsupervised manner, to further organize criminal activity or intimidate potential witnesses, or to arrange for the delivery of illicit contraband within the jail.

13. Additional security risks were that a personal cell phone could be used to take unauthorized photographs of secure areas of the jail that could expose sensitive security measures, such as the location of security cameras, access points, and officer duty stations, and be distributed to the public.

14. When transporting inmates, corrections deputies sometimes travel outside of radio range.

15. Prior to 2013, the employer provided county-issued cell phones for corrections deputies to utilize for communication while in transport.

16. County-issued cell phones can be deactivated remotely by the employer if the county-issued cell phones were lost or otherwise compromised.

17. Despite the availability of county-issued cell phones, corrections deputies utilized their own personal cell phones while on transport, even though transport deputies navigated through secure portions of the jail and had direct custody of inmates.

18. On November 8, 2013, then Corrections Bureau Chief Mark Baird permitted then union president, Jake Hoff, via e-mail, to carry the "Guild cell phone" with him inside the secure areas of the jail.

19. Following this e-mail, the practice expanded to include union executive board members, and the current union president, Deputy Charles Carrell, to carry personal cell phones in the secure portions of the jail.

20. Union executive board members used their personal cell phones to represent bargaining unit members, which included recording investigatory interviews and communicating with bargaining unit members regarding contract issues.

21. On February 17, 2016, Operations Captain Kevin Young issued a memo to staff confirming the practice of union executive board members' and transport deputies' use of personal cell phones.

22. In 2016, the union proposed a contract provision that would allow all corrections deputies to use personal cell phones within the jail, but the parties were unable to agree upon this language.

23. The Executive Director certified this issue for interest arbitration on December 14, 2015, and an interest arbitration hearing was held on October 3, 4, 5, and 6, 2016, before Arbitrator Michael Cavanaugh.

24. Carrell testified at the interest arbitration hearing in support of the new personal cell phone proposal. The union also introduced pictures of secure areas of the jail that were taken with a non-county cell phone.

25. Major Jamie Kane was concerned about the security risks posed by the pictures and the use of cell phones in this manner, and he reported his concern to Chief Anthony Aston and Undersheriff Rob Beidler.

26. On October 11, 2016, Aston issued a directive, which superseded Young's February, 17, 2016, directive, prohibiting all personal electronic devices, including personal cell phones, inside the secure areas of the jail.

27. Aston's directive also prohibited corrections deputies on transport duties from using personal cell phones, and directed staff to use county-issued cell phones instead.

28. The security risks posed by cell phones outweighed the benefits bargaining unit members enjoyed by having personal cell phones to record investigatory interviews and communicate regarding contract issues and, therefore, Aston's directive was a permissive subject of bargaining.

29. On October 31, 2016, the union demanded to bargain with the employer over the decision and the effects of the new policy.

30. Following the union's demand to bargain, Aston directed his assistant to schedule a meeting with the union. On November 1, 2016, Beth Taylor, Aston's assistant, tentatively scheduled a bargaining meeting for November 28, 2016, at 1600 hours (4:00 p.m.).

31. Aston and Snohomish County Prosecutor Steven Bladek attended the meeting on November 28, 2016, but the union did not.

32. Since the jail operates 24 hours per day, shifts are divided into day shift (8:00 a.m. to 4:00 p.m.), swing shift (4:00 p.m. to 12:00 a.m.), and graveyard shift (12:00 a.m. to 8:00 a.m.).

33. At the beginning of each shift, corrections deputies are expected to arrive early in order to receive a face-to-face report from the outgoing deputy about the activities from the prior shift.

34. On April 8, 2007, Corrections Deputy Vincent Cavaleri filed a grievance seeking pay for time performing this work. This grievance was later expanded to include all similarly situated corrections deputies.

35. The grievant claimed that the employer's failure to pay corrections deputies for these activities violated Article 5.1.3, which, at the time, set the regular work day at eight hours.

36. The parties settled this grievance on October 17, 2008, and Deputy Rick Hecht, who was the union president at the time, signed the settlement agreement.

37. The parties' settlement established a de minimus window of time to allow employees to arrive on the premises to "exchange of keys/chits, radios, and other basic equipment; travel to assigned post; and, a brief functional on-post briefing."

38. During the next round of contract negotiations the parties agreed to language establishing a 10-minute pre-shift turnover/activity period during which an employee would be paid at one and one-half times their straight time rate of pay.

39. The language also provided that employees "shall begin work duties at the designated time pre-shift and shall be at their designated post location no later than five (5) minutes before the start of the shift."

40. In 2009, the parties also settled union grievances regarding breaks. At the time, management was paying overtime for late breaks only if they began outside of a de minimus seven and one-half minute window from the start of scheduled break time.

41. The parties agreed that the union would not grieve late breaks that began up to seven and one-half minutes late and the employer would allow corrections deputies to "begin to move through the building prior to the end of shift" if appropriately relieved.

42. Then Chief Baird sent an e-mail to all staff explaining the settlement agreement, and included an expectation of what "begin to move through the building" meant. Specifically, he wrote that it "could be working ones [sic] way to the locker rooms, staff dining or out to reception. Staff should still remain on the premises and in uniform until the end of one's shift – and respond to any emergency that may arise."

43. Then union president Hecht participated in drafting this e-mail and never objected to the language used by Baird concerning moving through the building or remaining on premises.

44. In the subsequent CBA, the parties agreed to the language that a corrections deputy "may begin to move through the building prior to the end of the shift" into Article 5.3 of the CBA.

45. The pre-shift turnover and post-shift relief activities relate directly to hours of work and wages and, therefore, is a mandatory subject of bargaining.

46. Following Baird's e-mail, the employer did not uniformly enforce Article 5.3 of the CBA, as bargaining unit members left the jail facility prior to the end of shift within the seven and one-half minute de minimus period.

47. At the interest arbitration hearing, Carrell testified that the pre-shift turnover period was not mandatory, in that a corrections deputy would not be disciplined. Instead, a corrections deputy who missed that turnover period would not receive the one and one-half times straight time pay.

48. Kane was again concerned, because he believed Carrell was incorrect and that the bargaining unit might share his view of the pre-shift expectation. Kane brought his concerns to Aston.

49. On October 19, 2016, Aston issued a memo to all corrections staff, including rank-and-file bargaining unit members, to remind staff that pre-shift turnover activities were mandatory, and that corrections staff were to remain on premises and in uniform prior to the end of shift.

50. In Aston's October 19, 2016, memo, he specifically referenced Carrell and his testimony at the interest arbitration hearing and contradicted Carrell, the union president, in front of rank-and-file bargaining unit members.

51. At the time of Aston's October 19, 2016, memo, bargaining unit members, including Deputy Hecht and Deputy Derrick Henry, believed that they could leave the jail facility if they were properly relieved within the seven and one-half minute de minimus window.

52. Aston's memo could reasonably be perceived as taking the benefit of leaving early away from the bargaining unit.

53. The union did not demand to bargain the decision or the effects of the change to pre-shift and post-shift activities.

54. Following Aston's memo, two bargaining unit corrections deputies were issued Performance Incident Reports (PIRs) for leaving the jail facility prior to the end of shift.

55. On December 7, 2016, Carrell brought his personal cell phone into a secure area of the jail to record his investigatory interview.

56. Carrell did not have prior approval to bring his personal cell phone, but asked Moll, at the meeting location, whether he could use his phone to record the meeting.

57. Before the meeting began, Moll excused himself to speak with Kane about Carrell's *Garrity* rights.

58. Moll conferred with Kane, and Moll told Kane that Carrell was using a cell phone to record the interview. Kane told Moll to conduct the interview first and to then determine whether the cell phone belonged to Carrell.

59. At the close of the meeting, it was determined that the cell phone belonged to Carrell, and, a few days after the meeting, the employer issued a personnel complaint against Carrell for violating the cell phone policy and for insubordination.

60. The investigator found that Carrell violated the policy requiring employees to knowingly obey all written directives, policies, and procedures, but did not find that Carrell violated the insubordination rule. The recommended penalty was a two-year written reprimand.

61. Captain Young disagreed with the findings and recommended penalty, and found that Carrell deliberately violated the cell phone policy based on Carrell's own admissions.

62. Young recommended a five-day suspension and a five-year written reprimand, to which Kane concurred. On February 17, 2017, Carrell was issued the five-day suspension and five-year written reprimand.

63. This was Carrell's second insubordination violation within a 24-month period and warranted an elevated penalty according to the employer's disciplinary matrix.

64. Deputy Lundi received a three-day suspension, but, unlike Carrell, Lundi did not have a prior insubordination violation.

CONCLUSIONS OF LAW

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

2. By implementing a new directive on cell phone usage within the jail as described in Findings of Fact 9 through 31, Snohomish County did not refuse to bargain or violate RCW 41.56.140(4) and (1).

3. As described in Findings of Fact 32 through 43, the union contractually waived its right to bargain the decision to mandate pre-shift turnover and post-shift relief activities, and, therefore, the employer did not violate RCW 41.56.140(4) and (1).

4. By referencing Deputy Charles Carrell and Carrell's interest arbitration testimony as described in Findings of Fact 47 through 52, Snohomish County interfered with employee rights in violation of RCW 41.56.140(1).

5. By disciplining Deputy Charles Carrell as described in Findings of Fact 26 and 55 through 64, Snohomish County did not discriminate against Carrell or violate RCW 41.56.140(1).

ORDER

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

1. CEASE AND DESIST from:

   a. Interfering with protected employee rights through statements made by an employer official; and

   b. 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 RCW:

a. 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.

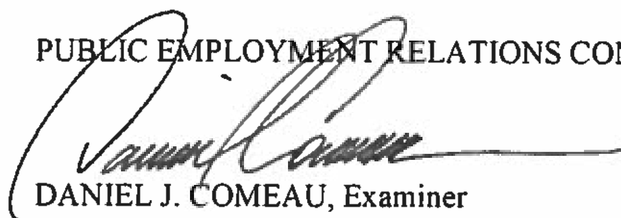
b. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the County Council of Snohomish County, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

c. 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.

d. 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 her with a signed copy of the notice she provides.

ISSUED at Olympia, Washington, this 29th day of May, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DANIEL J. COMEAU, 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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MARK E. BRENNAN, COMMISSIONER
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MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 05/29/2018

DECISION 12723-A – PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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