STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 128823-U-17 DECISION 12842-A - PECB DECISION OF COMMISSION

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We are faced with a case that involves a complicated supervisory structure and a communication problem. This case stems from a disagreement between a principal and a custodial engineer about whether it was the custodian's job to perform certain duties.

The International Union of Operating Engineers, Local 609 (union) represented custodial engineers working for the Seattle School District (employer). The employer's principals are the highest level supervisory employee in each school. Principals supervise the educational programs at the schools they manage. Importantly, principals are not the direct supervisors of all of the employees in the buildings. There are many employees in the schools, including administrative staff, teachers, and classified staff. Custodians are classified staff. Custodians are supervised from the Facilities Department "down town."

Mustefa Tessi was a custodial engineer at Madrona PreK-8 School. Mary McDaniel was the principal at the school. Area Supervisor Patrick Chan supervised Tessi. These facts contributed to the discord in this case.

Some early communications involving the union and management, including the labor relations department and McDaniel, may have resulted in a better understanding of the reporting structure and duties of the custodial engineer. Unfortunately, the layers of the system prevented any resolution of the dispute between McDaniel and Tessi when it was occurring

The union's attitude and approach to conflict with the employer exacerbated the situation. Rather than seek solutions that would alleviate the situation for the union member and create a more harmonious workplace, the union's business agent decided the best medicine was to engage in confrontational attacks, including picketing the elementary school. It is no surprise that such measures were not successful.

The union filed the unfair labor practice complaint in the present case. Examiner Stephen W. Irvin held a hearing and issued a decision dismissing the complaint. *Seattle School District*, Decision 12842 (PECB, 2018). The union appealed

There are four issues before the Commission. First, did the employer interfere with employee rights by statements McDaniel made to Tessi on December 8, 2016? Second, did the employer discriminate against Tessi since December 12, 2016, by making statements about Tessi's work performance? Third, did the employer discriminate against Tessi by delaying the processing of his complaint against McDaniel? Fourth, did the employer refuse to bargain when it did not provide an e-mail that was responsive to the union's April 25, 2017, information request?

We reverse the Examiner's conclusion that the employer did not interfere with employee rights when McDaniel made statements to Tessi on December 8, 2016. We affirm the Examiner's conclusion that the employer did not discriminate against Tessi by making statements about his work performance. We explain our conclusions with regard to these issues in the analysis.

We affirm the Examiner's conclusion that the employer did not discriminate against Tessi by delaying the processing of his complaint. While the union appealed the Examiner's conclusion that the employer did not refuse to provide information, the union did not appeal the related

findings of fact. The employer failed to provide one document to the union as part of its information request. An employer official later provided the document to the union. The findings of fact support the conclusion of law. We affirm the Examiner's conclusion that the employer did not refuse to bargain by failing to provide information.

ANALYSIS

Did the employer interfere with employee rights by statements McDaniel made to Tessi on December 8, 2016?

Applicable Legal Standards

Standard of Review

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission also reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

The Commission reviews factual findings for substantial evidence in light of the entire record. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference, while not slavishly observed on every appeal, is highly appropriate in fact-oriented appeals. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

Interference

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. RCW 41.56.140(1). An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (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.*

Application of Standards

McDaniel was the principal at Madrona PreK-8 School. Tessi became the custodial engineer at Madrona in July 2016. Chan was Tessi's supervisor. During the fall of 2016, McDaniel and Tessi disagreed about Tessi's job duties. At times, McDaniel contacted Chan about duties she had asked Tessi to perform.

The Examiner found in finding of fact 15 that on December 8, 2016, McDaniel and Tessi discussed delivering science kits to classrooms. Tessi told McDaniel, "I'm not doing it. Not my job. You

do it" and "[y]ou can't tell me what to do. You're not my boss." McDaniel told Tessi, "This is my school. This is my building. So if you not [sic] listening to me, you have to get out of here. You have to find another job."[1] The Examiner concluded that McDaniel's statements did not interfere with employee rights. We disagree.

The prior custodial engineer performed tasks that Tessi asserted were not within his work jurisdiction. McDaniel assumed, as the building supervisor and based on her experience with the previous custodian, that she could direct Tessi to perform certain tasks and he would perform them. However, the chain of command placed Tessi outside of McDaniel's direction. Undoubtedly, this contributed to McDaniel's frustration with Tessi and his refusal to perform what she thought were his duties.

The Examiner found that Tessi understood the employer's supervisory structure. The Examiner considered this when determining that McDaniel's comments were not interference. The Examiner concluded that Tessi could not reasonably perceive McDaniel's statements as interference because Tessi understood that McDaniel could not carry out any threats. The standard is not whether the employer official making statements can carry out a threat. A statement can interfere even when an employee knows the employer official is unable to take any threatened action, because interference chills union activity of the employee or others. The purpose of a comment may not be to carry out a certain action but to cause an employee to change his or her actions. An employer official need not have the authority to follow through with its statements for those statements to interfere with employee rights.

A reasonable employee could perceive McDaniel's comments as threats of reprisal or force for Tessi engaging in protected activity—namely, refusing to perform work that was not assigned by his supervisor and the union claimed was outside of his unit's work jurisdiction. It was reasonable for Tessi to think McDaniel was targeting him. McDaniel's statement that Tessi would have to find another job if he wouldn't listen to her is linked to Tessi's refusal to perform work.

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[1] Neither party appealed finding of fact 15.

McDaniel's comments were made in reprisal for Tessi asserting work jurisdiction and designed to coerce Tessi into performing the tasks McDaniel assigned

Did the employer discriminate against Tessi since December 12, 2016, by making statements about Tessi's work performance?

Applicable Legal Standards

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

1. the employee participated in protected activity or communicated to the employer an intent to do so;
2. the employer deprived the employee of some ascertainable right, benefit, or status; and
3. a causal connection exists between the employee's exercise of protected activity and the employer's action.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. 333, 348 (2014); *Educational Service District 114*, Decision 4361-A.

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

Application of Standards

The Examiner concluded—and substantial evidence supports the finding—that Tessi had engaged in protected activity. The Examiner also concluded the union did not establish that the employer had deprived Tessi of an ascertainable right, benefit, or status. Thus, the union did not establish a prima facie case to prove discrimination. The union appealed and argued that the employer had discriminated against Tessi by creating a hostile work environment, which in turn deprived Tessi of his right to work in a nonhostile setting.

The Commission has jurisdiction only over hostile work environment allegations in retaliation for protected union activity. *City of Seattle (Laborers Local 1239)*, Decision 12415 (PECB, 2015). A complainant must prove that the protected activity occurred before the hostile work environment began. *Id.* A hostile work environment could constitute a deprivation of a right, benefit, or status, thereby satisfying the second criteria to establish a prima facie case of discrimination.

The Commission has addressed hostile work environments in two cases. *North Valley Hospital*, Decision 5809-A (PECB, 1997) (finding an employer discriminated against an employee when it reprimanded her for calling the Public Employment Relations Commission during an election period); *Warden School District*, Decision 1062 (EDUC, 1981) (finding an employer interfered with employee rights when it created a hostile work environment). Neither decision discussed what level of harassment must occur for a hostile work environment to constitute a deprivation

Washington State courts have addressed hostile work environments in cases alleging workplace harassment in violation of the Law Against Discrimination, Chapter 49.60 RCW. We find it appropriate to adopt the standard applied by the courts in those cases. To prove a hostile work environment, the complainant must show that the harassment (1) was unwelcome, (2) was because of a protected characteristic, (3) affected the terms or conditions of employment, and (4) was imputable to the employer. *Blackburn v. Department of Social and Health Services*, 186 Wn.2d 250, 260 (2016), *citing Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406–07 (1985). The third element requires that "[t]he harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Blackburn v. Department*

of Social and Health Services, 186 Wn.2d at 260–61, *citing Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d at 406. "Harassing conduct has also been described as 'severe and persistent,' and it must be determined 'with regard to the totality of the circumstances.'" *Id.* at 261, *citing Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d at 406–07.

In the context of labor law, to prove a hostile work environment as part of a discrimination claim, the complainant must show that the harassment (1) was unwelcome, (2) was because of the employee's protected union activity, (3) affected the terms or conditions of employment, and (4) was imputable to the employer. Like the courts, we require that the harassment be severe and pervasive.

The union did not prove that the employer created a hostile work environment.

Our analysis in this case is limited to the events that occurred on or after December 12, 2016. On December 12, 2016, McDaniel wrote to Tessi, Chan, and Educational Director Sarah Pritchett, who was McDaniel's supervisor. McDaniel outlined six things that she had "talked to" Tessi about since September. McDaniel expressed her frustration with the situation between her and Tessi. McDaniel concluded, "I am ready to formally file a complaint so please let me know your process for making this happen." Chan and McDaniel exchanged e-mails about a potential meeting.

On December 22, 2016, McDaniel e-mailed Chan, Assistant Principal Bruno Cross, McDaniel's secretary Tana Leybold, and Pritchett about Tessi having the lock on the custodian's door changed. McDaniel complained that Tessi had not moved paper, science kits, or other deliveries from a hallway. She concluded, "I am at a point of filing a complaint against Mustefa Tessi. I want to meet with his union representative immediately!" Significantly, Tessi was not included on this correspondence.

Also on December 22, 2016, McDaniel e-mailed Chan, Cross, Leybold, and Pritchett. In her e-mail, McDaniel asked to be invited to a meeting with the union, requested a change for Tessi, and complained about Tessi's behavior, particularly about Tessi telling her what was not his job. Tessi was not included on the e-mail.

On December 29, 2016, McDaniel e-mailed Tessi, Cross, the union, Leybold, Pritchett, Chris Cronas, and Chan. McDaniel asked Tessi to move items pictured in an attached photo and complained about Tessi's response to previous requests. She concluded, "For the safety of students, I have directed office staff to have all deliveries be placed in the custodian's office or outside of your office area." McDaniel denied that she had followed through with this directive. The union presented evidence that boxes had been placed in an area where custodians needed to use an access ladder.

Tessi eventually moved the supplies, and McDaniel thanked him

In December 2016, Tessi filed a harassment, intimidation, and bullying and discrimination complaint against McDaniel. The employer did not immediately investigate the complaint or notify McDaniel of the complaint. Executive Director of Labor and Employee Relations Stan Damas asked union Business Manager David Westberg for an extension to complete the investigation. As a condition of granting the extension, Westberg insisted that Damas notify McDaniel of the complaint. Damas notified McDaniel of the complaint on January 18, 2017.

McDaniel made no other complaints about Tessi until February 2017. Following a snow event, on February 7, 2017, Cross e-mailed Tessi, Chan, McDaniel, and Pritchett about Tessi's response to the snow event. The next day, McDaniel e-mailed Tessi, Chan, Cross, and Pritchett about a complaint from a volunteer.

On February 8 and 9, 2017, Human Resource Manager Mark McCarty e-mailed McDaniel and Pritchett. McCarty informed McDaniel and Pritchett that Westberg had alleged that Cross's February 7 e-mail was retaliatory. On February 9, McCarty asked that critical remarks directed at Tessi cease.

On March 1, 2017, the employer issued its investigative findings related to Tessi's complaint against McDaniel. The employer found that, on the whole, McDaniel had engaged in intimidating and bullying behavior. Following these findings, McCarty worked with McDaniel to clarify the

roles and reporting structure for custodians. McDaniel directed any further questions or issues she had to the Facilities Department and McCarty.

Much of the behavior addressed in the investigative findings occurred before December 12, 2016, and constituted bullying. Accordingly, the investigative findings cannot be used as a basis to find that McDaniel's behavior created a hostile work environment after December 12, 2016.

McDaniel's statements and e-mails after December 12, 2016, were not sufficiently severe and pervasive to create a hostile work environment. While McDaniel's December 29, 2016, e-mail can be read as an inappropriate tit for tat, the other e-mail messages McDaniel sent to Tessi between December 12 and 29, 2016, continued to direct Tessi to perform tasks his supervisor Chan had directed him to complete. On the two occasions McDaniel and Cross e-mailed Tessi in February 2017, they raised relevant workplace questions. After the employer issued its investigative findings, all communication was directed to the Facilities Department. Contrary to the union's assertion that McDaniel created a hostile work environment after December 12, 2016, McDaniel raised legitimate performance concerns about Tessi's work

It was not unreasonable for McDaniel, as the supervisor of the school, to raise concerns about Tessi's work performance. McDaniel had legitimate concerns about safety. The union did not establish that the employer had created a hostile work environment in retaliation for union activities.

CONCLUSION

We have reviewed the Examiner's findings of fact and conclusions of law. The union appealed findings of fact 16 and 19, which are supported by substantial evidence. All other, unchallenged findings of fact are verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 347

We reverse the Examiner's conclusion that the employer did not interfere with employee rights. The employer interfered with employee rights when McDaniel made statements to Tessi on December 8, 2016. The statements were made in reprisal for Tessi's union activity and could reasonably be perceived as threats

We affirm the Examiner's conclusions that the employer did not discriminate against Tessi by making statements about Tessi's work performance or by delaying the processing of his complaint against McDaniel. We affirm the Examiner's conclusion that the employer did not refuse to bargain by failing to provide information.

ORDER

The findings of fact issued by Examiner Stephen W. Irvin are AFFIRMED and adopted as the findings of fact of the Commission

Conclusions of law 1, 3, 4, and 5 are AFFIRMED and adopted as the conclusions of law of the Commission. Conclusion of law 2 is VACATED and the following conclusion of law is substituted:

2. By Mary McDaniel making statements to Mustefa Tessi on December 8, 2016, as described in finding of fact 15, the employer interfered with employee rights in violation of RCW 41.56.140(1).

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

The Seattle School District, 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 a supervisory employee; 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 41.56 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 School Board of the Seattle School District, 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 the Compliance Officer with a signed copy of the notice provided by the Compliance Officer.

ISSUED at Olympia, Washington, this 2nd day of August, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner

MARK BUSTO, Commissioner

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DECISION 12842-A - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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CASE NUMBER: 128823-U-17

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