STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES Complainant, vs. STATE – TRANSPORTATION Respondent.	CASE 130704-U-18 DECISION 12903 - PSRA CASE 130721-U-18 DECISION 12904 - PSRA PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On June 21, 2018, the Washington Federation of State Employees (union) filed complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Washington State Department of Transportation (employer) as respondent. The complaints were reviewed under WAC 391-45-110,[1] and a deficiency notice issued on July 13, 2018, indicated that it was not possible to conclude that a cause of action existed at that time for some of the allegations of the complaints. The union was given a period of 21 days in which to file and serve amended complaints, or face dismissal of the defective allegations. Nothing further has been received from the union.

ISSUES

The complaints allege:

1. Employer refusal to bargain in violation of RCW 41.80.110(1)(e) [and if so, derivative interference in violation of RCW 41.80.110(1)(a)] within six months of the date that the complaint was filed, by:

[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

a. Refusing to provide relevant collective bargaining information requested by the union related to the employee standby policies and practices.

b. Unilaterally changing employee standby practices and pay without providing the union an opportunity for bargaining.

2. Employer interference in violation of RCW 41.80.110(1)(a) within six months of the date that the complaint was filed, by:

a. Threats of reprisal or force or promises of benefit made to Michael Castro during the processing of a grievance or during a grievance meeting.

b. Threats of reprisal or force or promises of benefit made to employees during the processing of a standby duty grievance.

3. Employer discrimination in violation of RCW 41.80.110(1)(c) [and if so derivative interference in violation of 41.80.110(1)(a)] within six months of the date that the complaint was filed, by making statements to Michael Castro in reprisal for union activities protected by Chapter 41.80 RCW.

The allegations of refusal to provide information, of unilateral change, and of interference all state causes of action under WAC 391-45-110(2) for further proceedings before an examiner. The discrimination allegation is dismissed at the preliminary ruling stage for failure to state a cause of action.

BACKGROUND

The union represents bargaining units of nonsupervisory and supervisory employees in the employer's workforce. Maintenance positions in the nonsupervisory bargaining unit regularly performed mandatory standby maintenance shifts. The employer allegedly provided a state vehicle to employees scheduled for a standby shift. If an employee was called to perform work while on standby, the employee would move to "in-pay" status once he or she left home and continued in that status until he or she returned home. The nonsupervisory maintenance employees regularly traded mandatory standby duty shifts.

In the spring of 2017, bargaining unit employees allegedly circulated a petition asking the employer to end the mandatory standby shift practice. On December 15, 2017, the employer disciplined Cory Grimm, a nonsupervisory maintenance employee, for not being available for a standby shift. The union grieved that discipline.

According to the complaint, on January 11, 2018, union representative Inti Tapia requested that the employer provide copies of all standby practices.

On January 25, 2018, the employer allegedly notified bargaining unit employees that they would no longer be allowed to take home state vehicles while on standby shifts. The employer also stated that employees would not be paid for standby starting from the time they left home.

On February 6, 2018, two bargaining unit members, Gordon Anderson and Eric Dubic, allegedly agreed that Dubic would take Anderson's standby shift. When they informed their supervisor of this arrangement on February 9, 2018, they were allegedly told that all proposed standby shift exchanges must now be submitted to the agency by the Wednesday before the standby shift occurred. Employees were also allegedly told that management must approve all standby shift exchanges and that the employer would not start paying employees until the employees reached the employer's maintenance yard.

On February 27, 2018, Tapia allegedly made a second request for information regarding the changes to standby shifts. The employer allegedly informed him that there was no change in policy or practice, therefore no union notification was necessary.

The union submitted a grievance to the employer on March 19, 2018, concerning the alleged changes to standby shifts. The employer allegedly responded to the union that it appeared that supervisory bargaining unit member Pat Eakman would be investigated by the employer for his standby approval practices with the nonsupervisory employees. The employer issued a letter of reprimand to Eakman for his standby approval practices with nonsupervisory employees.

On May 4, 2018, the employer allegedly interviewed Grimm about the standby shift issue. The employer then allegedly interviewed Grimm and Steven Logan on May 31 about their standby shift approval practices.

On June 15, 2018, the employer and union met to discuss the March 19, 2018, grievance. Bargaining unit employee Michael Castro attended the June 15 meeting. During the June 15 meeting, Castro's supervisor allegedly told Castro that Assistant Superintendent Gary Durst viewed participation with union matters negatively regarding matters such as promotions. Castro allegedly had applied to several internal promotions recently.

ANALYSIS

Applicable Legal Standards

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.80.110(1)(c). An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.80 RCW. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in discrimination cases. To prove discrimination, the complainant must first set forth a prima facie case establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute 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 a protected activity and the employer's action.

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).

In response to a complainant's prima facie case of discrimination, the respondent need only articulate its nondiscriminatory reasons for acting in such a manner. The respondent does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant to prove either that the employer's reasons were pretextual or that union animus was a substantial motivating factor behind the employer's actions. *Id.*

Application of Standard

The union's complaint lacks specific facts demonstrating that Castro was actually deprived of a right, benefit, or status. While the complaint suggests that Castro had recently applied for several internal promotions, the complaint lacks facts that demonstrate he was denied any promotional opportunities or that a causal connection exists between the denial of those opportunities and the exercise of protected activity. The discrimination allegation is dismissed.

ORDER

1. Assuming all of the facts alleged to be true and provable, the complaints' allegations of refusal to provide information, of unilateral change, and of interference in Cases 130704-U-18 and 130721-U-18 state causes of action, summarized as follows:

   Issue 1. Employer refusal to bargain in violation of RCW 41.80.110(1)(e) [and if so, derivative interference in violation of RCW 41.80.110(1)(a)] within six months of the date that the complaint was filed, by:

   a. Refusing to provide relevant collective bargaining information requested by the union related to the employee standby policies and practices.

   b. Unilaterally changing employee standby practices and pay without providing the union an opportunity for bargaining.

Issue 2. Employer interference in violation of RCW 41.80.110(1)(a) within six months of the date that the complaint was filed, by:

a. Threats of reprisal or force or promises of benefit made to Michael Castro during the processing of a grievance or during a grievance meeting.

b. Threats of reprisal or force or promises of benefit made to employees during the processing of a standby duty grievance.

2. The Washington State Department of Transportation shall:

File and serve its answer to the allegations listed in paragraph 1 of this Order, within 21 days following the date of this Order.

An answer shall:

a. Specifically admit, deny, or explain each fact alleged in the complaint, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the complaint, will be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

3. The allegations of the complaints concerning employer discrimination in violation of RCW 41.80.110(1)(c) by making statements to Michael Castro in reprisal for union

activities protected by Chapter 41.80 RCW are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 13th day of August, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DARIO DE LA ROSA, Unfair Labor Practice Administrator

Paragraph 3 of this order will be the final order of the agency on any defective allegations, unless a notice of appeal is filed with the Commission under WAC 391-45-350.

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 08/13/2018

DECISIONS 12903 - PSRA and 12904 - PSRA have been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: AMY RIGGS

CASE NUMBERS: 130704-U-18 and 130721-U-18

EMPLOYER: STATE - TRANSPORTATION

REP BY:
FRANKLIN PLAISTOWE
OFFICE OF FINANCIAL MANAGEMENT
LABOR RELATIONS SECTION
PO BOX 47500
OLYMPIA, WA 98504-7500
labor.relations@ofm.wa.gov
(360) 407-4140

GIL HODGSON
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA, WA 98504-0145
gilh@atg.wa.gov
(360) 664-4167

PARTY 2: WASHINGTON FEDERATION OF STATE EMPLOYEES

REP BY:
HERB HARRIS
WASHINGTON FEDERATION OF STATE EMPLOYEES
1212 JEFFERSON ST SE STE 300
OLYMPIA, WA 98501-2332
herbh@wfse.org
(360) 352-7603

EDWARD EARL YOUNGLOVE III
YOUNGLOVE & COKER, P.L.L.C.
1800 COOPER PT RD SW, BLDG 16
PO BOX 7846
OLYMPIA, WA 98507-7846
edy@ylclaw.com
(360) 357-7791