King County, Decision 12933 (PECB, 2018)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 587, Complainant, vs. KING COUNTY, Respondent.	CASE 129628-U-17 DECISION 12933 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On August 23, 2017, the Amalgamated Transit Union, Local 587 (union) filed an unfair labor practice (ULP) complaint against King County (employer). The union asserted that the employer interfered with employee rights and discriminated against Stewart Nevling, a technical trainer. The Public Employment Relations Commission's unfair labor practice manager issued a preliminary ruling on September 22, 2017, stating that a cause of action existed. Examiner Erin Slone-Gomez held a hearing on May 10 and 11, 2018, and the parties submitted post-hearing briefs on August 8, 2018, to complete the record.

ISSUES

1. Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] within the six months of the date the complaint was filed, by terminating Stewart Nevling's employment in reprisal for union activities protected by Chapter 41.56 RCW.

2. Employer interference with employee rights in violation of RCW 41.56.140(1) within six months of the date the complaint was filed, by threats of reprisal or force or promises of benefit made to Stewart Nevling after he engaged in protected activity.

The union met its burden to prove a prima facie case of discrimination by showing that the employer's termination of Nevling was causally connected to Nevling's engagement in protected activities. The employer failed to produce a nondiscriminatory reason for the termination. Thus, I find the employer engaged in unlawful discrimination and order the employer to place Nevling back into his former probationary technical trainer position or a substantially equivalent position.

As the union was successful in proving discrimination, which carries with it a charge of derivative interference, a finding of independent interference (issue two) based on the same set of facts is prohibited by the Commission's body of law.

BACKGROUND

King County is a large municipal entity that consists of multiple divisions and departments. Relevant in the instant case, King County Metro's rail section oversees operations and maintenance of the Link light rail and Seattle Streetcar programs. The maintenance of the light rail, with its unique electromechanical rail cars, requires employees with an uncommon, specific skill set. The employer had a program by which new personnel, who came into the organization with previously obtained mechanical proficiency, received in-house training to learn proficiency with the electromechanical vehicles. Around the end of 2016, the employer sought to create a similar but separate program that would allow staff without a mechanical background to receive training and thus enable them to perform maintenance on the unusual rail cars.

At the end of 2016, the rail section included a small training department consisting of one chief, Amanda Nightingale, and two technical trainers, Anthony Martin and Kevin Gumke. The employer made the decision to expand the training department by creating a special duty technical trainer position. A special duty assignment is when an employee temporarily leaves his or her regular position to work in an alternative placement. Nevling, who had been working as a vehicle

electro-mechanic, was hired for this special duty assignment that began September 10, 2016, and was expected to end no later than March 9, 2017.

At some point, the training department decided to create a new, non-special duty assignment technical trainer position. Nevling was hired into this position, thereby ending his special duty assignment, and began his new position on January 17, 2017. In Nevling's promotion notice letter, he was informed that his new position was overtime-exempt and that he would be required to complete a six-month probationary period. Technical trainer positions are the only Amalgamated Transit Union-represented rail positions that are classified as overtime-exempt.

Nevling was hired specifically to assist with vehicle maintenance training which, at that time, was conducted primarily by Martin. Martin and Nightingale discussed necessary training that Nevling should receive so that he could obtain the requisite knowledge and credentials to train other employees. Martin testified that he suggested Nevling should receive the same training he had so that Nevling could better assist Martin with the expanded training needs of the section. Additionally, Nightingale asked Martin whether or not he would like to participate in the creation of the new trainee program. Martin replied that he did not wish to participate in the program as he had concerns that the program would not comply with Labor & Industries standards. Nightingale was never called to testify at the hearing.

During the time period covered by this ULP complaint, the training department underwent several structural and personnel changes. Nightingale was hired into a special duty assignment outside the rail section. Michael Avery, the managing director of the rail section, determined that four employees would backfill the training chief position while Nightingale completed her special duty assignment and that these employees would rotate into and out of the training chief position quarterly. This rotation, however, did not occur.

In mid-January Chris Muhich moved from his regular assignment as a vehicle maintenance chief to a special duty assignment as training chief. Shortly after Nightingale left the department, her

position was reclassified from chief to that of superintendent.[1] Additionally, while these leadership changes were taking place, Edward Giertz was hired as a technical trainer to focus on operations (drivers) in February 2017.

On January 12, 2017, prior to Nightingale's departure, Muhich and Nightingale met with Nevling to discuss the duties of his new position and what trainings he would need to attend so that he was able to complete those duties. On multiple occasions, Nevling and Martin requested that Nevling attend several trainings including operator training, aerial lift, forklift, etc. Muhich decided not to send Nevling to these trainings due to scheduling conflicts and his belief that the trainings were not necessary for Nevling's duties. It is not clear whether Muhich ever communicated this decision to Nevling.

Nevling, as a technical trainer, was tasked to develop a pilot training program for employees without existing mechanical experience. This was a new program and Nevling was tasked with working with vehicle maintenance, namely Vehicle Maintenance Superintendent Evan Inkster, to create this new program. Inkster believed that Nevling, who he regarded as a "top-notch electromechanic" and a "great communicator," was particularly well qualified to work on this new program. Nevling was assigned to work with Paul Moutray who would be the trainee during the pilot program.

Nevling was also a union executive board member, a position he held since 2016. As such, he was often away from his work attending to union matters, especially bargaining. The previous contract had expired on October 31, 2016. The parties began negotiations for a successor in July 2016, and a tentative agreement was reached in December 2016. The bargaining unit voted against the tentative agreement at the end of February 2017. Bargaining began again the first week of May 2017. While Nevling was typically away from his duties to attend to union business for approximately three full or partial days per month in fall 2016, this number substantially increased in 2017 due to bargaining responsibilities.

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[1] In mid-June, Muhich began a special duty assignment of training superintendent, and Gumke began a special duty assignment as training chief.

As a member of the union executive board, Nevling also participated in meetings of the section's labor management relations committee (LMRC). The LMRC meeting on March 1, 2017, was more contentious than usual. Nevling created the agenda for the meeting and often introduced agenda items with "I" statements; i.e., "I am glad to see . . . ." Avery, the rail section managing director, complained at the meeting that the language used on the agenda and Nevling's tone during the meeting was inflammatory. Avery believed that Nevling had not been briefed by the other union team members that LMRC meetings typically were less adversarial than Nevling's approach would have suggested. During the meeting Avery highlighted that union business was, "tak[ing] away from [Nevling's] regular duties" and asked whether shop stewards could be used more often.

On March 16, 2017, Muhich had a conversation with Nevling about Nevling's duties, work progress, and time spent on union business. Muhich made notes of that meeting, which he e-mailed to Avery and Candy Arata, the section's labor relations specialist, but not to Nevling. Muhich specifically noted in his email that Nevling's shift, like that of the other technical trainers, ended at 2:30 p.m., and "[Muhich] was not telling him he was forbidden from conducting any [u]nion business at work, but [Muhich] was asking that he be aware of the amount of time spent on [u]nion business and limit it until he [was] off the clock." Muhich also requested that if an emergency arose and Nevling needed to address it during working hours that Nevling send a notification e-mail to Muhich. Muhich testified that he had this discussion because he believed Nevling's time away from work on union business was interfering with his development of the electro-mechanic pilot program. At this meeting, Muhich did not share his concerns about Nevling's performance with Nevling.

Inkster testified that he was dissatisfied with Nevling's work on the trainee program, which he expressed to Muhich. Specifically, Inkster viewed himself as Nevling's "customer" and, as such, expected regular communication from Nevling about how the program was progressing; communication he did not receive. Similarly, Inkster expected Nevling to approach him to provide updates on the training and thus did not approach Nevling directly.

In a March 31, 2017, response to an e-mail from Muhich asking for a copy of a training tracker document, Nevling expressed concerns about the trainee program. Nevling's e-mail signature line

in his reply identified him as a union executive officer, an identifying signature line he had not used during previous correspondence with Muhich in the same e-mail string. Nevling's reply e-mail was also copied to Mike Whitehead and Mike Rochon, who served in union leadership positions, and Nightingale. Nightingale forwarded this e-mail to Avery, Inkster, and Tom Jones, the rail operations superintendent.

Inkster, in his response to just Muhich, was clearly angry and frustrated with Nevling's e-mail. Inkster began his e-mail by indicating that it was "for [Muhich's] purview only." Inkster complained, "[Nevling] is taking the position of a [u]nion officer rather than a technical trainer on this and is working towards derailing this pilot." Inkster took particular umbrage with Nevling's claim that electro-mechanics had been denied additional training pay, a topic Nevling believed had been agreed to at the March 1, 2017, LMRC meeting. In his e-mail, Inkster vehemently denied this agreement had been made, although he indicated that he was open to further discussion on the topic.

The April 5, 2017, LMRC meeting was similarly contentious. Nevling also created this agenda and continued to use "I" statements. At this meeting, the training program in particular was discussed at length based on Nevling's request and over Inkster's objection, and the parties agreed to create a training committee to further discuss the new program.[2] Nevling felt it was his duty to express concerns he and other bargaining unit members had about the trainee program. Specifically, they felt that the trainee program would be too short—two years rather than a more typical four-year apprenticeship. In his testimony, Inkster highlighted the employer's deliberate decision to create a training program rather than a more regulated apprenticeship program. Additionally, a discussion took place about whether the training chief special duty assignment would be rotated as Avery had previously indicated to Martin. According to Rochon, Avery told Nevling that this rotation was "none of his business."

On May 10, 2017, Nevling received a three-month probationary evaluation and a three-month extension of his probationary period, postponing the end to October 17, 2017. The evaluation

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2 The committee eventually created the trainee program by borrowing the format used in a similar bus program.

identified two general areas for improvement: communicating about work product and Nevling's personal conduct. Muhich had repeatedly e-mailed Nevling requesting copies of notes or logs about the trainee program for which he did not receive answers. Nevling testified that he had informed Muhich that the requested documents were available on a shared network drive that Muhich was able to access, however, Muhich continued to e-mail Nevling requesting copies, e-mails to which Nevling did not respond.

Examples of Muhich's concerns about Nevling's personal conduct included: "Employee often affects attitude/morale of group with frequent negative remarks regarding the Agency, Department and Management." and "Employee resists management direction, often requiring multiple requests for action before being carried out." During testimony, Muhich explained that his comment about resisting management direction was based on feedback from Inkster, that the references to Nevling's poor attitude were based on comments from Gumke, and that he had not personally observed such behavior by Nevling. Both Martin and Giertz testified that Nevling never acted unprofessionally and did not make negative, anti-management statements or contribute to a negative working environment that affected morale. Giertz testified that he did not work closely with Nevling. Muhich had not spoken to Nevling about Gumke's concerns prior to his probationary evaluation.

At the hearing, the union pointed out that the employer's personnel manual states that when an employee's probationary period is extended, "the appointing authority should develop a documented plan of action for improvement." A plan of action was never created or documented for Nevling. Additionally, Muhich testified that he did not have any subsequent meetings with Nevling about his performance after his probation was extended.

On the same day as his probationary evaluation, Nevling wrote a three and a half-page letter to Avery in which he outlined his objections to the extension of his probationary period. (The letter was sent five calendar days later.) Nevling articulated that he was being held responsible for not meeting work requirements despite his belief that Muhich had failed to establish goals or clearly communicate expectations, and he voiced frustration at not receiving training in his new position. He highlighted his concerns with the trainee program, which had been discussed in

LMRC meetings. Finally, Nevling expressed concern that his role as an executive board member had negatively impacted his performance review:

> It also needs to be said that I'm concerned about the optics of management disciplining a union negotiator, without evidence and against procedure, during negotiations. I was recently placed on the core negotiating team, and this action taken by Mr. Muhich seems to coincide with my new appointment to this upper echelon bargaining group. Such political intimidation tactics are against the law and against the spirit of labor-management relations at King County. The question is: was this action taken by Mr. Muhich alone or is it a concerted effort by management to derail negotiations? Mr. Muhich has expressed to me, on several occasions, his dislike of the time I spend doing work in my Executive Board Officer role, and has made attempts to curtail it. Additionally, there is may be [sic] some confusion by Mr. Muhich about things people may have heard me say when I am acting in my Executive Board Officer role. This, of course, is protected by our collective bargaining agreement, and you may want to give him some guidance about the differences between the two positions.

Avery asked Arata and Jones to investigate the situation further.

On May 15, 2017, the union filed a grievance objecting to Nevling's probation extension. On June 1, 2017, Rail Operations Chief Al Azen denied Nevling's grievance stating that the personnel manual only required that notification of a probationary extension be provided to the employee and that notification had been appropriately provided. Azen referenced the employer's ability to dismiss an employee from his position during the probationary period without triggering the grievance clause of the contract. Azen also stated, "The notion that Management is discriminating against Mr. Nevling due to his Union activities is a baseless diversionary argument."

On May 31, 2017, Nevling e-mailed Adrienne Leslie, who was the transit human resources manager at the time, and called attention to his perceived connection between his union activities and the extension of his probationary period. Leslie then had communications with Spruce Metzger, a former transit labor and employment relations staff member who no longer works at the county. In two e-mail responses to Leslie, Metzger relayed conversations he had with rail management and labor relations staff and recounted a previous conversation with Jones and Muhich in which he "advised both of them over the phone against releasing [Nevling] from probation or extending his probation based on union activity and that it could lead to a

ULP." Metzger subsequently learned that Nevling's probation had been extended and that he would be "advising [Jones] to do 'reset' on the probation extension and to meet with the union to explain Rail's reasoning for the extension and to seek concurrence for an extension." This suggested reset and meeting never occurred.

On July 5, 2017, Nevling received a letter from Jones notifying him that his assignment as a technical trainer was terminated. Jones stated that Nevling was being terminated due to "[his] apparent unwillingness to accept and act on the feedback and the fact that no improvements have been noted since that meeting" in reference to his probationary evaluation meeting. While the department was not required to return Nevling to his previous position, it chose to move him back to an electro-mechanic position. Inkster was not consulted on this decision but was pleased that Nevling would continue as a mechanic. A probationary termination review was held by Jones on August 30, 2017, and the termination was upheld through a letter to Nevling from Jones on September 7, 2017.

ANALYSIS

Issue 1: The employer discriminated by terminating Nevling in reprisal for union activities.

Applicable Legal Standards

The Commission has consistently utilized the three-prong shifting burden scheme endorsed by the Washington Supreme Court in *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46 (1991) and *Allison v. The Housing Authority of the City of Seattle*, 118 Wn.2d 79 (1991). *Brinnon School District*, Decision 7210-A (PECB, 2001).

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *King County*, Decision 12582-B (PECB, 2018). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing that:

1. the employee participated in protected activity or communicated to the employer an intent to do so;

2. the employer deprived the employee of some ascertainable right, benefit, or status; and

3. a causal connection exists between the employee's exercise of protected activity and the employer's action.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. 333, 348–349 (2014); *Educational Service District 114*, Decision 4361-A (PECB, 1994).

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

Application of Standards

Through testimony, evidence, and arguments, the union has successfully established that a prima facie case exists to support a complaint of discrimination.

Protected Activity

It is clear that Nevling engaged in numerous instances of protected activity. Nevling engaged in bargaining, grievance processing, labor management meetings, and duties arising directly from his role as an executive board member such as monthly, full day union meetings and meeting with members about bargaining priorities and agreements. The employer was aware of these protected activities and made several mentions and requests to Nevling and other union officers to reduce Nevling's time away on union business. By engaging in these protected activities, with full knowledge by the employer, the first prong of the prima facie test is met.

Deprivation

It is undisputed that Nevling was dismissed from his technical trainer position while serving out his probationary period, thus the second prong of the prima facie test is met.

Causal Connection

The employer has consistently articulated (through a probationary evaluation, dismissal letter, probation termination review, and during testimony) that Nevling was terminated for two reasons. The first was due to his failure to complete, or communicate about the completion of, work related to the trainee program. The second was for perceived defects in his attitude and personal conduct, such as speaking negatively about management and resisting management direction. Both reasons are intertwined with Nevling's protected activities.

When Nevling was hired into his position as a special duty technical trainer, he worked on several projects and, according to uncontroverted testimony, his performance was well regarded. Martin testified to the efficacy of Nevling's work, and Nevling testified about positive feedback he had received from his previous supervisor, Nightingale. Nevling testified credibly about the feedback he received and Nightingale was not called as a witness in this hearing to provide contrary testimony, even if she was inclined to do so. These facts suggest that Nevling's non-trainee program work was at least satisfactory.

When Nevling became a non-special duty technical trainer, he was expected to work with Martin (the existing vehicle maintenance technical trainer) and to assist the operations technical trainer after he received appropriate training himself. In particular, Nevling was responsible for the development of the new trainee program. Nevling was assigned this duty due to his knowledge of electromechanical principles and tasks and because Martin was offered and refused the work due to concerns he had about the program. It appears that, at some point, the scope of Nevling's work changed from being the lead technical trainer assigned to create the new trainee program to Nevling's primary duty being the creation of the trainee program. Muhich determined that he would not send Nevling to several trainings, either due to scheduling conflicts or Muhich's decision that Nevling did not actually need the training to do his work on the trainee program. Muhich never communicated these decisions to Nevling or Martin. Thus, Muhich was narrowing the scope of Nevling's work without making that decision clear to Nevling, which was especially problematic as Nevling, in his role as a union officer, had concerns with the trainee program.

On multiple occasions Nevling articulated concerns he had about the trainee program that he was assigned to create. Nevling brought forward these concerns in labor management meetings and directly to Muhich on at least one occasion. Nevling's concerns were based on his own opinions as well as those of other electro-mechanics, Martin, and other bargaining union members to whom he was tasked to represent as a union officer. It is clear that these concerns were a point of conflict between the union, including Nevling, and management, especially Inkster. While the employer took umbrage with Nevling's use of "I" statements during LMRC discussions, Rochon testified that Nevling, as the union officer who created LMRC agendas and with the most knowledge on the topic, was appropriately addressing the issue.

On May 10, 2017, almost four months into Nevling's six-month probationary period, Muhich provided Nevling with a three-month probationary evaluation. As discussed above, Nevling received demerits about his lack of work product and communication about said work product as well as about his resistance to management based on comments to Muhich by Inkster. Inkster testified that he had not discussed his concerns about Nevling's performance with Nevling but that he expected Muhich, as Nevling's supervisor, to carry the message forward. Not only were Inkster's concerns about the trainee program not expressed to Nevling prior to his three-month evaluation, it is apparent from Nevling's May 10, 2017, letter to Avery that he still had not received clear direction or understood that Inkster's concerns about the trainee program were, at least in substantial part, the reason for Nevling's poor evaluation.

In sum, it is evident that the employer wished for Nevling's work to be increasingly focused on the trainee program, despite the union's concerns about the trainee program that Nevling expressed in LMRC meetings. Inkster, as the "customer" receiving the trainee program, was dissatisfied with Nevling's lack of work, and he expressed this to Muhich, who attempted to pass this on to Nevling through his performance evaluation.

The second criticism expressed to Nevling in his performance evaluation, perhaps for the first time, was Muhich's belief that Nevling was a negative presence in the office, who complained about management, and had poor work relationships with colleagues. During testimony, Muhich acknowledged that this belief was based solely on criticism from Gumke and that Muhich had not

witnessed this behavior first hand nor had he questioned any of Nevling's coworkers about the allegation. Gumke was not called to testify at the hearing. Martin (who was regularly in the office shared by Nevling, Martin, Gumke, and Giertz) and Giertz (who was infrequently in the office) both testified that Nevling's behavior did not align with Gumke's criticism. Thus, it is difficult to credit the criticism of Nevling's behavior with such tenuous evidence, and it is surprising that Muhich would rely so heavily on hearsay from one individual.

Additionally, as Nevling references in his letter to Avery, the source of Gumke's complaints could have arisen from conversations that Nevling had in his role as a union executive board member, to which Gumke would have been privy due to the shared office space. While Nevling was encouraged to attend to union business outside of his regular work hours, conversations critical of management between bargaining unit members and their union representative occurred during work time in Nevling's shared office. Additionally, Martin and Nevling discussed criticisms about the trainee program, also in their shared office. Without evidence to the contrary, there is no reason to doubt the union's assertion that any such conversations, which the preponderance of evidence shows is the source of Gumke's criticism, were had when Nevling was acting in his role as a union officer.

In its brief, the employer curiously argues that, without a comparator, Muhich's evaluative practices and lack of support or direction are insufficient to establish a prima facie case of discrimination. However, to establish a prima facie case, there is not a requirement that the individual actions of the employer be discriminatory on their face.

Both Nevling's technical trainer dismissal letter and the employer's response to Nevling's petition for probationary termination review explicitly reference only Muhich's performance review of Nevling. Therefore, it is clear that Nevling's probation was extended and that he was terminated due to Muhich's criticism, as expressed in Nevling's evaluation, which, as identified above, is not just causally connected to Nevling's protected activities but intimately entwined with them.

Failure to Produce Alternative, Nondiscriminatory Reason

As the union adequately proved a prima facie case of discrimination, the employer must now produce, not prove, a nondiscriminatory reason for said deprivation; however, the employer has failed to do so. An employer must articulate a legitimate, non-pretext, and nondiscriminatory reason for its actions by producing evidence sufficient to support a finding that the disputed action was taken for a nondiscriminatory reason. *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46*; Educational Service District 114*, Decision 4361-A. As discussed above, the behavior that Nevling was terminated for was, in large part, behavior that constituted his protected activities.

On numerous instances, Muhich e-mailed Nevling for copies of the trainee work log, and Nevling testified that he had informed Muhich that the log was kept on a shared network drive. It would have been prudent for Nevling to ask Muhich why he kept requesting the same documents after being informed about their location and for Muhich to have followed up with Nevling about why he was not responding to Muhich's requests. Nevling was under the impression that he had already directed Muhich to the information he requested, and neither Nevling nor Muhich followed up about the continued requests. This lack of communication is notable in the instant case as it was a missed opportunity for Muhich to have addressed any concerns he had about Nevling's work on the trainee program. By not following up with Nevling about the log and the work being done on the trainee program, Muhich failed to notify Nevling that there was a concern about his work. Instead, Nevling believed he was completing the trainee program work that he could do, while the union's concerns were being addressed through LMRC meetings. Muhich's actions, or lack of actions, did not suggest otherwise.

It appears that Muhich had concerns about Nevling's performance as early as mid-March. On March 16, 2017, Muhich met with Nevling to discuss work duties but never communicated that he initiated the conversation because of concerns about Nevling's work. Muhich obviously thought this conversation was important enough to send a recap to his manager and a labor relations representative. Muhich did not follow up with Nevling, either in writing or in person, about the discussion. Thus, it is difficult to believe Nevling was put on notice that the completion of his probationary period was in jeopardy. Nevling left that meeting with the perception that it was a

check-in meeting, and the only concern Muhich addressed was how much time Nevling was spending on union business. If Nevling's work performance on the trainee program concerned Muhich, he should have expressed his concerns to Nevling. This would have created an opportunity for them to discuss whether the trainee program work was happening but just not being communicated to Muhich, whether the union's objections were delaying Nevling's progress in creating the program, and that the trainee program progress was fundamental to Nevling successfully completing his probationary period.

After providing Nevling with a negative probationary evaluation, Muhich took no measures to assist Nevling in improving his perceived performance deficiencies. Muhich did not create a performance plan for improvement as the personnel manual strongly recommended. Nor did he seem to have any follow-up meetings or conversations with Nevling about work deadlines, performance, or expectations. In fact, the record shows that Muhich and Nevling rarely interacted during Nevling's time as a technical trainer—but especially between Nevling's evaluation on May 10 and his dismissal on July 5. Thus, the complaints in Nevling's evaluation are the only reasons provided to Nevling about his termination, actions that Nevling pointed out at the time were related to his protected activity. If the employer had other, nondiscriminatory reasons for terminating Nevling, these missing communications would have been opportunities to share these concerns with Nevling. Additionally, if Muhich had clearly articulated specific work duties and deadlines to Nevling, and Nevling then failed to meet these deadlines, the employer would have had a separate, nondiscriminatory reason for termination. Instead, Nevling was left with a general, amorphous criticism that he was not doing enough work on a trainee program, one for which the union had expressed concerns and was being discussed in a work committee. Muhich's failure to convey other concerns to Nevling suggest that the limited criticisms he provided to Nevling were the only reasons Nevling was terminated.

In conclusion, the employer dismissed Nevling from his probationary position for two reasons: (1) Nevling's failure to adequately perform work related to the trainee program—a program that the union, including Nevling (a union executive board member), was actively contesting; and (2) Nevling's perceived negative attitude about management, a perception that the preponderance of the evidence shows arose from his speech and actions taken as a union executive board member.

These reasons are discriminatory in nature. Only if a nondiscriminatory reason had been produced would the union then be tasked with proving union animus[3] or pretext. Nevling was not informed of any nondiscriminatory reason for his termination, nor was one offered at the hearing; therefore, it must be assumed that no such reason existed.

Conclusion

Nevling engaged in numerous protected activities in his role as a union executive board member, and management terminated Nevling from his technical trainer position directly for engaging in those protected activities. As the employer did not produce a nondiscriminatory reason for having terminated Nevling, the union's burden of proving a prima facie case of discrimination also merits a finding of discrimination. Therefore, I find that the employer discriminated against Nevling for protected activities when it dismissed him from his position as technical trainer.

Issue 2: The allegation of employer interference is dismissed.

Applicable Legal Standards

The Commission processes two kinds of interference claims: derivative and independent. A derivative claim depends upon the underlying claim; all causes of action automatically include a derivative interference claim. Derivative interference claims do not survive dismissal of the underlying claim. *Royal School District*, Decision 1419-A (PECB, 1982); *Northshore Utility District*, Decision 10534-A (PECB, 2010). Independent interference claims stand alone. *Cascadia Community College*, Decision 11543 (PSRA, 2012).

To establish an interference violation under RCW 41.56.140(1) independent from an allegation of discrimination, a complainant needs to establish that a party engaged in separate conduct that employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

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[3] I have no reason to believe that union animus served any role in the employer's decision. All of the members of management involved in this case are members of their own unions, and several had previously served in union officer roles themselves.

The Commission does not find independent interference allegations based upon the same set of facts in a dismissed discrimination complaint. *Northshore Utility District*, Decision 10534-A, *citing Reardan-Edwall School District*, Decision 6205-A.

Application of Standards

The union's allegations that the employer engaged in discrimination and interference are based on the same set of facts, namely, that Nevling was terminated from his technical trainer probationary position due to his protected activity as outlined above. The Commission's case law is clear that derivative interference and independent interference are separate and distinct. In the instant case I found that the employer discriminated against Nevling, and in finding discrimination I also found that the employer derivatively interfered with Nevling's rights. As I have already found that employer engaged in derivative interference, I cannot find that the employer engaged in independent interference based on the same facts. Accordingly, the union's allegation of independent interference is dismissed.

REMEDY

"Appropriate remedial orders" are those necessary to effectuate the purposes of the statute and to make the Commission's lawful orders effective. *University of Washington*, Decision 11499-A (PSRA, 2013), *citing Municipality of Metropolitan Seattle v. Public Employment Relations Commission,* 118 Wn.2d 621, 633 (1992). The standard remedy for an unfair labor practice violation includes ordering the offending party to cease and desist and, if necessary, to restore the status quo, make employees whole, post notice of the violation, publicly read the notice, and order the parties to bargain from the status quo. *State – Department of Corrections*, Decision 11060-A (PSRA, 2016), *citing City of Anacortes*, Decision 6863-B (PECB, 2001).

In this case, the standard remedy involves putting Nevling back in the position he would have had if the employer had not considered his protected activity. This can be effectuated by either placing Nevling back into his former probationary technical trainer position or a substantially equivalent position. Because the employer discriminated against Nevling for his protected activities, it would be unfair to Nevling to require him to complete a new, full six-month probation period. However,

it is important that Nevling be allowed adequate time in a technical trainer position for his work to be fairly evaluated. Accordingly, as Nevling's probationary evaluation on May 10, 2017, was the first time the employer explicitly criticized Nevling for protected activity, this date should be used to calculate the remaining probationary period that Nevling must serve. From his start date of January 17, 2017, through the date of his evaluation, Nevling served three months and twenty-four days of his six-month probationary period.[4]

Additionally, in order to make Nevling whole for the economic loss he suffered as a result of his termination, the employer must pay Nevling at the rate of pay he would have been entitled to as a technical trainer from the date he was terminated until the date he is reinstated, plus interest.

FINDINGS OF FACT

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

2. Amalgamated Transit Union, Local 587 (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. King County Metro's rail section oversees operations and maintenance of the Link light rail and Seattle Streetcar programs. The maintenance of the light rail, with its unique electromechanical rail cars, requires employees with an uncommon, specific skill set. The employer had a program by which new personnel, who came into the organization with previously obtained mechanical proficiency, received in-house training to learn proficiency with the electromechanical vehicles. Around the end of 2016, the employer sought to create a similar but separate program that would allow staff without a mechanical background to receive training and thus enable them to perform maintenance on the unusual rail cars.

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[4] As the parties are aware, a probationary period may be extended. If the employer chooses to extend Nevling's probationary period, I strongly urge that the support guidelines articulated in the county personnel manual be followed.

4. At the end of 2016, the rail section included a small training department consisting of one chief, Amanda Nightingale, and two technical trainers, Anthony Martin and Kevin Gumke. The employer made the decision to expand the training department by creating a special duty technical trainer position. A special duty assignment is when an employee temporarily leaves his or her regular position to work in an alternative placement. Nevling, who had been working as a vehicle electro-mechanic, was hired for this special duty assignment that began September 10, 2016, and was expected to end no later than March 9, 2017.

5. At some point, the training department decided to create a new, non-special duty assignment technical trainer position. Nevling was hired into this position, thereby ending his special duty assignment, and began his new position on January 17, 2017. In Nevling's promotion notice letter, he was informed that his new position was overtime-exempt and that he would be required to complete a six-month probationary period. Technical trainer positions are the only Amalgamated Transit Union-represented rail positions that are classified as overtime-exempt.

6. Nevling was hired specifically to assist with vehicle maintenance training which, at that time, was conducted primarily by Martin.

7. Martin and Nightingale discussed necessary training that Nevling should receive so that he could obtain the requisite knowledge and credentials to train other employees. Martin testified that he suggested Nevling should receive the same training he had so that Nevling could better assist Martin with the expanded training needs of the section. Additionally, Nightingale asked Martin whether or not he would like to participate in the creation of the new trainee program. Martin replied that he did not wish to participate in the program as he had concerns that the program would not comply with Labor & Industries standards.

8. In mid-January Chris Muhich moved from his regular assignment as a vehicle maintenance chief to a special duty assignment as training chief. Shortly after Nightingale left the department, her position was reclassified from chief to that of superintendent.

Additionally, while these leadership changes were taking place, Edward Giertz was hired as a technical trainer to focus on operations (drivers) in February 2017.

9. On January 12, 2017, prior to Nightingale's departure, Muhich and Nightingale met with Nevling to discuss the duties of his new position and what trainings he would need to attend so that he was able to complete those duties. On multiple occasions, Nevling and Martin requested that Nevling attend several trainings including operator training, aerial lift, forklift, etc. Muhich decided not to send Nevling to these trainings due to scheduling conflicts and his belief that the trainings were not necessary for Nevling's duties.

10. Nevling, as a technical trainer, was tasked to develop a pilot training program for employees without existing mechanical experience. This was a new program and Nevling was tasked with working with vehicle maintenance, namely Vehicle Maintenance Superintendent Evan Inkster, to create this new program. Inkster believed that Nevling, who he regarded as a "top-notch electromechanic" and a "great communicator," was particularly well qualified to work on this new program. Nevling was assigned to work with Paul Moutray who would be the trainee during the pilot program.

11. Nevling was also a union executive board member, a position he held since 2016. As such, he was often away from his work attending to union matters, especially bargaining. The previous contract had expired on October 31, 2016. The parties began negotiations for a successor in July 2016, and a tentative agreement was reached in December 2016. The bargaining unit voted against the tentative agreement at the end of February 2017. Bargaining began again the first week of May 2017. While Nevling was typically away from his duties to attend to union business for approximately three full or partial days per month in fall 2016, this number substantially increased in 2017 due to bargaining responsibilities.

12. As a member of the union executive board, Nevling also participated in meetings of the section's labor management relations committee (LMRC). The LMRC meeting on March 1, 2017, was more contentious than usual. Nevling created the agenda for the meeting and

often introduced agenda items with "I" statements; i.e., "I am glad to see . . . ." Avery, the rail section managing director, complained at the meeting that the language used on the agenda and Nevling's tone during the meeting was inflammatory. Avery believed that Nevling had not been briefed by the other union team members that LMRC meetings typically were less adversarial than Nevling's approach would have suggested. During the meeting Avery highlighted that union business was, "tak[ing] away from [Nevling's] regular duties" and asked whether shop stewards could be used more often.

13. On March 16, 2017, Muhich had a conversation with Nevling about Nevling's duties, work progress, and time spent on union business. Muhich made notes of that meeting, which he e-mailed to Avery and Candy Arata, the section's labor relations specialist, but not to Nevling. Muhich specifically noted in his email that Nevling's shift, like that of the other technical trainers, ended at 2:30 p.m., and "[Muhich] was not telling him he was forbidden from conducting any [u]nion business at work, but [Muhich] was asking that he be aware of the amount of time spent on [u]nion business and limit it until he [was] off the clock." Muhich also requested that if an emergency arose and Nevling needed to address it during working hours that Nevling send a notification e-mail to Muhich. Muhich testified that he had this discussion because he believed Nevling's time away from work on union business was interfering with his development of the electro-mechanic pilot program. At this meeting, Muhich did not share his concerns about Nevling's performance with Nevling.

14. Inkster testified that he was dissatisfied with Nevling's work on the trainee program, which he expressed to Muhich. Specifically, Inkster viewed himself as Nevling's "customer" and as such, expected regular communication from Nevling about how the program was progressing; communication he did not receive. Similarly, Inkster expected Nevling to approach him to provide updates on the training and thus did not approach Nevling directly.

15. In a March 31, 2017, response to an e-mail from Muhich asking for a copy of a training tracker document, Nevling expressed concerns about the trainee program. Nevling's e-mail signature line in his reply identified him as a union executive officer, an identifying

signature line he had not used during previous correspondence with Muhich in the same e-mail string. Nevling's reply e-mail was also copied to Mike Whitehead and Mike Rochon, who served in union leadership positions, and Nightingale. Nightingale forwarded this e-mail to Avery, Inkster, and Tom Jones, the rail operations superintendent.

16. Inkster, in his response to just Muhich, began his e-mail by indicating that it was "for [Muhich's] purview only." Inkster complained, "[Nevling] is taking the position of a [u]nion officer rather than a technical trainer on this and is working towards derailing this pilot." Inkster took particular umbrage with Nevling's claim that electro-mechanics had been denied additional training pay, a topic Nevling believed had been agreed to at the March 1, 2017, LMRC meeting. In his e-mail, Inkster vehemently denied this agreement had been made, although he indicated that he was open to further discussion on the topic.

17. The April 5, 2017, LMRC meeting was similarly contentious. Nevling also created this agenda and continued to use "I" statements. At this meeting, the training program in particular was discussed at length based on Nevling's request and over Inkster's objection, and the parties agreed to create a training committee to further discuss the new program. Nevling felt it was his duty to express concerns he and other bargaining unit members had about the trainee program. Specifically, they felt that the trainee program would be too short—two years rather than a more typical four-year apprenticeship. In his testimony, Inkster highlighted the employer's deliberate decision to create a training program rather than a more regulated apprenticeship program.

18. On May 10, 2017, Nevling received a three-month probationary evaluation and a three-month extension of his probationary period, postponing the end to October 17, 2017. The evaluation identified two general areas for improvement: communicating about work product and Nevling's personal conduct. Muhich had repeatedly e-mailed Nevling requesting copies of notes or logs about the trainee program for which he did not receive answers. Nevling testified that he had informed Muhich that the requested documents were available on a shared network drive that Muhich was able

to access, however, Muhich continued to e-mail Nevling requesting copies, e-mails to which Nevling did not respond.

19. Examples of Muhich's concerns about Nevling's personal conduct included: "Employee often affects attitude/morale of group with frequent negative remarks regarding the Agency, Department and Management." and "Employee resists management direction, often requiring multiple requests for action before being carried out." During testimony, Muhich explained that his comment about resisting management direction was based on feedback from Inkster, that the references to Nevling's poor attitude were based on comments from Gumke, and that he had not personally observed such behavior by Nevling. Both Martin and Giertz testified that Nevling never acted unprofessionally and did not make negative, anti-management statements or contribute to a negative working environment that affected morale. Giertz testified that he did not work closely with Nevling. Muhich had not spoken to Nevling about Gumke's concerns prior to his probationary evaluation.

20. The employer's personnel manual states that when an employee's probationary period is extended, "the appointing authority should develop a documented plan of action for improvement." A plan of action was never created or documented for Nevling. Additionally, Muhich testified that he did not have any subsequent meetings with Nevling about his performance after his probation was extended.

21. On the same day as his probationary evaluation, Nevling wrote a three and a half-page letter to Avery in which he outlined his objections to the extension of his probationary period. (The letter was sent five calendar days later.) Nevling articulated that he was being held responsible for not meeting work requirements despite his belief that Muhich had failed to establish goals or clearly communicate expectations, and he voiced frustration at not receiving training in his new position. He highlighted his concerns with the trainee program, which had been discussed in LMRC meetings. Finally, Nevling expressed concern that his role as an executive board member had negatively impacted his performance review.

22. Nevling's May 10, 2017, letter stated: "It also needs to be said that I'm concerned about the optics of management disciplining a union negotiator, without evidence and against procedure, during negotiations. I was recently placed on the core negotiating team, and this action taken by Mr. Muhich seems to coincide with my new appointment to this upper echelon bargaining group. Such political intimidation tactics are against the law and against the spirit of labor-management relations at King County. The question is: was this action taken by Mr. Muhich alone or is it a concerted effort by management to derail negotiations? Mr. Muhich has expressed to me, on several occasions, his dislike of the time I spend doing work in my Executive Board Officer role, and has made attempts to curtail it. Additionally, there is may be [sic] some confusion by Mr. Muhich about things people may have heard me say when I am acting in my Executive Board Officer role. This, of course, is protected by our collective bargaining agreement, and you may want to give him some guidance about the differences between the two positions."

23. Avery asked Arata and Jones to investigate the Nevling's complaint further.

24. On May 15, 2017, the union filed a grievance objecting to Nevling's probation extension. On June 1, 2017, Rail Operations Chief Al Azen denied Nevling's grievance stating that the personnel manual only required that notification of a probationary extension be provided to the employee and that notification had been appropriately provided. Azen referenced the employer's ability to dismiss an employee from his position during the probationary period without triggering the grievance clause of the contract. Azen also stated, "The notion that Management is discriminating against Mr. Nevling due to his Union activities is a baseless diversionary argument."

25. On May 31, 2017, Nevling e-mailed Adrienne Leslie, who was the transit human resources manager at the time, and called attention to his perceived connection between his union activities and the extension of his probationary period. Leslie then had communications with Spruce Metzger, a former transit labor and employment relations staff member who no longer works at the county. In two e-mail responses to Leslie, Metzger relayed conversations he had with rail management and labor relations staff and recounted a

previous conversation with Jones and Muhich in which he "advised both of them over the phone against releasing [Nevling] from probation or extending his probation based on union activity and that it could lead to a ULP." Metzger subsequently learned that Nevling's probation had been extended and that he would be "advising [Jones] to do 'reset' on the probation extension and to meet with the union to explain Rail's reasoning for the extension and to seek concurrence for an extension." This suggested reset and meeting never occurred.

26. On July 5, 2017, Nevling received a letter from Jones notifying him that his assignment as a technical trainer was terminated. Jones stated that Nevling was being terminated due to "[his] apparent unwillingness to accept and act on the feedback and the fact that no improvements have been noted since that meeting" in reference to his probationary evaluation meeting. While the department was not required to return Nevling to his previous position, it chose to move him back to an electro-mechanic position. Inkster was not consulted on this decision but was pleased that Nevling would continue as a mechanic. A probationary termination review was held by Jones on August 30, 2017, and the termination was upheld through a letter to Nevling from Jones on September 7, 2017.

CONCLUSIONS OF LAW

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

2. As described in findings of fact 3 through 26 the employer discriminated (and derivatively interfered) against Stewart Nevling by terminating him from a probationary technical trainer position in violation of RCW 41.56.140 (1).

3. As the union successfully proved discrimination and derivative interference, which carries with it a charge of derivative interference, there is no finding that addresses the cause of action for independent interference.

ORDER

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

1. CEASE AND DESIST from:

   a. Discriminating against Stewart Nevling for engaging in protected union activities.

   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. Offer Stewart Nevling immediate and full reinstatement to his former position or a substantially equivalent position, and make him whole by payment of back pay and benefits in the amounts he would have earned or received from the date of the unlawful termination to the effective date of the unconditional offer of probationary reinstatement made pursuant to this order. Back pay shall be computed in conformity with WAC 391-45-410.

   b. Contact a 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.

d. Read the notice provided by the compliance officer into the record at a regular public meeting of the King County Council 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.

e. 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.

f. 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 the compliance officer provides.

ISSUED at Olympia, Washington, this 9th day of November, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Erin J. Slone-Gomez

ERIN J. SLONE-GOMEZ, 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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 11/09/2018

DECISION 12933 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 129628-U-17

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