STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. MILL A SCHOOL DISTRICT, Respondent.	CASE 129785-U-17 DECISION 13015 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Jason K. MacKay, Assistant General Counsel, for the Public School Employees of Washington.

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On October 25, 2017, Public School Employees of Washington (union) filed an unfair labor practice complaint against the Mill A School District (employer) with the Public Employment Relations Commission (PERC). A preliminary ruling was issued on October 30, 2017, finding that the complaint had stated a cause of action in violation of RCW 41.56.140(3) [and if so, derivative interference in violation of RCW 41.56.140(1)] for employer discrimination by reducing local chapter president Doug Dyer's hours of work for filing an unfair labor practice complaint.

I held a hearing on January 11, 2019. Both the union and the employer filed post-hearing briefs.

ISSUE

Did the employer discriminate against Dyer when it reduced the hours budgeted for technology staffing?

Yes, the employer's reduction of hours was discrimination. Dyer engaged in protected activity and lost a benefit when his budgeted hours were reduced. The employer's articulated reason was pretextual.

BACKGROUND

Mill A School District is one of the smallest school districts in Washington State. Before the 2017/2018 school year, it served students in kindergarten through the eighth grade with approximately seventeen students and eight staff members (two teachers and six classified employees). After it began a high school program during the 2017/2018 school year, it had 28 students and 17 staff members. The classified employees are in a wall-to-wall bargaining unit represented by the union, and the local chapter president is Doug Dyer. Dyer is the school's sole information technology classified employee; he is the system administrator and tech advisor.[1]

Dyer's duties included maintaining and updating the school district's technology. Like other employees, Dyer's hours were budgeted at the start of each school year. Unlike employees with food service or transportation duties, Dyer's day-to-day hours and duties were flexible, and his budgeted hours were not always sufficient for urgent or special projects. More hours would be approved when needed; however, Dyer kept his total actual hours and his total budgeted hours as close as possible. Dyer's position has always been part time, and Dyer has been in it for approximately 20 years.

Dyer was budgeted nine hours per week for the 2015/2016 school year. This was reduced to three hours per week for the 2016/2017 school year until May 2017 when he was restored back to nine hours for the rest of the school year. In the 2017/2018 school year, Dyer was budgeted approximately five hours per week despite an additional high school program that began that year.[2]

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1 After the school district began its high school program, it employed a technology instructor who teaches students about technology. This work is different than Dyer's.

2 Initially, the 2017/2018 hours were allocated at three hours per week with additional eight-hour blocks for special projects. This was later changed to five hours per week.

The decision to set Dyer's budgeted hours at only five, despite the new high school program, is at the center of this unfair labor practice case.

Some background is necessary to put the dispute in context. In the spring and summer of 2016, Dyer and Indra Burcella, the union field representative, engaged in bargaining for a new collective bargaining agreement with the employer. At first, the school district's bargaining representative was superintendent Benton Dorman, and the parties reached a tentative agreement.

Prior to ratification of that agreement, Dorman resigned and the employer's board of directors replaced him with Bob Rogers. The board instructed Rogers to reduce classified staffing and focus resources toward the classroom as the school district was facing about a 10 percent funding cut in its budget. Rogers cut the hours of classified staff, Dyer's most severely. This is when Dyer's budgeted hours went from nine to three.

The union opposed the staffing cuts, and Dyer addressed the board on behalf of the entire bargaining unit in a letter where he asked the board to reconsider the cuts. In this letter, Dyer argued that the district's rainy day funds should be used to avoid the cuts, that the cuts would severely impact the wages and health insurance rates of other long-serving school district employees, and that the severe cut to his position would hobble the school district's technology.

On September 30, 2016, the union filed an unfair labor practice complaint with PERC over the staffing cuts, and a preliminary ruling was issued. Over the following months, the union conducted four public demonstrations at school board meetings. In April 2017, the union and the employer reached a settlement regarding the union's 2016 unfair labor practice allegations. The employer agreed to restore the budgeted hours through the end of the school year and, by doing so, restored Dyer's hours from three to nine per week. The employer agreed to settle in order to avoid legal expenses and provide more technology hours as the employer was preparing to begin its high school program.

The new high school program was called the Pacific Crest Innovation Academy and was created in conjunction with another school district and a college. The new school marked the beginning of new technology needs, in addition to the existing ones for the K–8 program. The K–8 program

used technology with Macintosh operating systems, such as iPad and other Apple devices and computers.[3] The new high school program was set to use computers and devices with a Microsoft Windows operating system.

In the 2017/2018 school year, all classified staff maintained or increased their budgeted hours, yet Dyer's budgeted hours were reduced to five hours per week, down from the nine hours per week that had been a part of the unfair labor practice settlement. On October 25, 2017, the union filed a second unfair labor practice complaint with PERC, and a preliminary ruling was issued finding a cause of action related to discrimination against Dyer for the filing of the first unfair labor practice complaint.

ANALYSIS

Applicable Legal Standards

Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *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 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.

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[3] I have taken judicial notice of the fact that Macintosh devices are more commonly referred to as Apple products.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. 333, 348–349 (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. The employer does not bear the burden of proof to establish the reason. *Port of Tacoma*, Decision 4626-A.

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. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349.

Application of Standards

A Prima Facie Case of Discrimination

The union has established a prima facie case of discrimination. Dyer engaged in protected activity. He was the local chapter president who bargained on behalf of the unit and advocated against the employer's cuts to bargaining unit employees' hours. He was engaged at the bargaining table with superintendents Dorman and Rogers, and he advocated against the cuts in a letter to the school board. Cuts to Dyer's budgeted hours were the subject of the first unfair labor practice charge that the union filed against the employer in September 2016.

Subsequent to his protected activity, Dyer suffered a loss of a benefit when his hours were set for the 2017/2018 school year. During the summer of 2016, his budgeted hours per week were cut from nine to three, but in May 2017, as part of the unfair labor practice settlement, his hours were restored to nine for the remainder of the year. So at the start of 2017/2018, when the employer

budgeted Dyer's hours to about five per week, this reduction in hours was a deprivation of a benefit.[4]

The employer argues that I should not find that Dyer was denied a benefit. It has characterized the move to five hours for the 2017/2018 year as an increase not a cut because it is higher than the three hours budgeted the year before. I do not find this interpretation of the facts to be persuasive. Dyer's budgeted hours were restored to nine from May 2017 through August 2018 per week as part of the settlement, and so the move to five hours was a cut even if the employer had not intended to stay at nine hours permanently. Dyer was shocked when the employer notified him about his 2017/2018 hours.

The employer also argues that the difference between the budgeted and actual hours should mean that a cut in budgeted hours was not a deprival of benefits. I find this argument unpersuasive as the record clearly demonstrates that Dyer attempted to work according to the budget and only sought additional hours in special circumstances. And so while the budgeted hours did not precisely correlate with actual hours, it structured how many hours Dyer attempted to work.

A causal connection exists between the cut to Dyer's budgeted hours and Dyer's protected activity. The timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between the protected activity and the adverse actions. *City of Winlock*, Decision 4784-A (PECB, 1995); *Mansfield School District*, Decision 5238-A (EDUC, 1996). Dyer's advocacy on behalf of the bargaining unit and his leadership of the local chapter occurred before and during the employer's decisions to cut, restore, and cut his hours again. His letter urged the employer's board of directors to undo their staffing cuts decision when the initial cuts were made. The school board proceeded with those cuts, and the union then filed the first unfair labor practice complaint to address cuts to Dyer's hours. The employer's decision to reduce Dyer's budgeted hours to about five per week for the 2017/2018 school year was its first opportunity to change them after the unfair labor practice settlement agreement regarding those

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[4] In August 2017, Dyer was initially scheduled to work an average of three hours per week plus some blocks of time for special projects. However, as the application of special project work hours provided difficult, it became five hours per week.

cuts. This timing and Dyer's direct opposition to the 2016 cuts established a causal connection sufficient for a prima facie case of discrimination.

A Legitimate, Nondiscriminatory Reason

The employer has articulated a legitimate, nondiscriminatory reason for it adverse action. It was faced with funding cuts in the summer of 2016 of approximately 10 percent and wanted to keep resources in the classrooms. Rogers testified that the employer was attempting to balance its staffing needs with more limited financial resources. Adjusting staffing in light of a tighter budget is a legitimate, nondiscriminatory reason for staffing cuts. These cuts were related to a decline in federal, state, and local funding. I find the 2016 budget reduction to be a legitimate nondiscriminatory reason for the 2017 decision related to Dyer's hours because it shows that the school district had recently been experiencing a declining budget, which is a legitimate reason to reduce hours.

Employer's Stated Reason a Pretext

The union met its burden of persuasion to establish that the employer's stated reason for reducing Dyer's budgeted hours was a pretext. An articulated reason is a pretext when it is not the real reason for the adverse action, and there is no legitimate business justification for the action. *Educational Service District 114*, Decision 4361-A.

The manner in which the employer determined Dyer's hours for the 2017/2018 school year is evidence that the articulated nondiscriminatory reason was a pretext. In making this determination, I have considered the facts that indicate that the employer had faced a budget reduction in the 2016/2017 school year but also had a significant change in the school district with the creation of the new high school program. On balance, the complainant has met its burden and I find that an unfair labor practice has been committed. The changes related to the new school program, and the manner in which the employer had researched its technology staffing needs, demonstrate that the employer's economic reason to make cuts in 2016 was a pretexual reason in its 2017 decision.

The employer made severe cuts to its technology hours during the summer of 2016 as it attempted to balance staffing needs with its reduction in funding. As part of these cuts, the board asserted that it specifically wanted to reduce Dyer's budgeted hours and Roger testified that the board's

motive was twofold. Not only did it want to cut the hours to help balance the budget, it also expressed a belief that too many hours had been budgeted when compared to similarly sized districts.

Rogers conducted research by looking at other small districts and having informal conversations with two technology professionals, one of whom was his brother who worked for a university in California. This research was to determine whether or not the board's desired cuts were reasonable, not to determine its actual technology staffing needs. The research was not extensive. Rogers' consultation with outside technology professionals was informal and did not deeply explore the district's specific needs, such as having more than one operating system.

Rogers' research of other small school districts was based on information from the Office of Public Instruction's (OPSI) website and conversations with three other school districts. He did not investigate how many devices were in each of those school districts or how many operating systems were in use. Evidence of Rogers' research into other school districts' technology staffing was a spreadsheet on small districts that he created from information available on the OPSI website and supplemented with extremely short notes from his conversations with the three districts. The spreadsheet also indicated that many smaller school districts had no technology staffing specified in the OSPI data, and there was no indication how they met their technology staffing needs. In the brief notation for the three school districts that Rogers contacted, it appears that those districts had a variety of ways to meet technology needs that were not reflected in the OSPI data, such as using an outside contractor or contracting with staff for a total amount of compensation and not an hourly wage rate. And so, the fact that many of the districts were listed as having no technology staff does not fully illustrate their actual staffing practices. In other words, it is evidence that Rogers' research sought to confirm whether or not the board's desired staffing cuts were reasonable, but the research did not explore the specific needs of the employer compared with other small school districts.

Dyer played a key role in the union's opposition to the 2016 staffing cuts decision. Dyer made substantive augments against those cuts in his letter to the board, and the union had four public protests against those cuts at school board meetings. Procedurally, the union challenged the cuts with an unfair labor practice complaint. Thus, it was the pressure of the unfair labor practice

complaint that brought the parties to a settlement that had a different staffing level than the one decided on by Rogers and the school board in the summer of 2016. The board was committed to contesting the allegations in the union's initial unfair labor practice complaint as it was seen as challenging its authority to set staffing levels (Tr. 150–51). The board settled the case, though, as it sought to avoid the legal expenses related to taking a matter to hearing as well as to address additional technology needs related to the creation of the new high school program.

The new high school program meant that in 2017/2018 the employer's staffing needs changed. The new high school program meant more students and more staff and a second computer operating system to manage in the upcoming school year. The school district's enrollment was still very small, it only grew from 20 to 28, but that increase represented a 40 percent increase in enrollment. This new program changed the school district significantly. After the new high school program was established, the employer had the resources and motivation to restore and/or increase staffing for the other classified positions that it cut. The only position that did not have its hours fully restored was Dyer's—the union leader who had advocated against the cuts.

Rogers did not talk with Dyer in making this decision or review the history of how many hours per year Dyer's position had historically worked. He based it on the prior year's budget of three hours per week and decided that only two hours more per week would be reasonable in light of the additional duties related to the high school program. Due to the terms of the unfair labor practice settlement, the 2017/2018 school year was the employer's first opportunity to make a decision about Dyer's hours. And by setting the hours at five, Rogers essentially set the technology hours as close as possible to the cuts in 2016, given the existence of the new high school program that required additional staffing. By resetting Dyer's hours as low as it reasonably thought it could justify, without meaningfully exploring its actual technology needs, the employer was using its 2017 staffing decision to punish a union leader who had been part of the union's partially successful effort to reverse the employer's decision to cut staff hours in 2016.

Dyer credibly testified that his workload dramatically increased in the 2017/2018 school year. He described it as containing "a completely new paradigm in the middle of an existing system. So it was an atom bomb dropping." Despite the fact that Dyer attempted to work within his budgeted

hours and only requested additional hours when necessary, the actual hours that Dyer's worked in the 2017/2018 school year demonstrated that the budgeted number of hours was not reasonable. He was only budgeted for 200 hours, but actually worked 327 more.[5]

Rogers' testimony that the unfair labor practice was not a substantial motivation for his 2017 decision is not credible. Rogers' testimony was terse at times, and he often used a tone of voice that indicated to me a frustration with the union's questioning of his decision-making process. Cross-examination is rarely enjoyable, and while some witnesses are more cautious and thoughtful in their answers than others, Rogers' testimony was especially notable. His tone and tenor contradicted his testimony that the union's unfair labor practice complaint and related demonstrations at school board meetings were not frustrating to the employer.

Taken together, these facts persuade me that the employer discriminated against Dyer for filing an unfair labor practice complaint. The employer's stated reason was a pretext as there was no legitimate business reason in 2017 to set the technology hours so low in light of the specific needs of the new high school program. I have considered the totality of the circumstances and find that the union has met its burden of persuasion. To remedy this unfair labor practice, I order the employer to rescind its reduction of Dyer's budgeted hours and restore them to nine per week. The employer shall make Dyer whole by paying him any pay and benefits lost as a result of this reduction.

FINDINGS OF FACT

1. Mill A School District (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. Public School Employees of Washington (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

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5 A large portion of the additional hours were incurred in the months before the filing of this unfair labor practice complaint.

3. Mill A School District is one of the smallest school districts in Washington State. Before the 2017/2018 school year, it served students in kindergarten through the eighth grade with approximately seventeen students and eight staff members (two teachers and six classified employees). After it began a high school program during the 2017/2018 school year, it had 28 student and 17 staff members.

4. The new high school program was called the Pacific Crest Innovation Academy and was created in conjunction with another school district and a college. The new school marked the beginning of new technology needs, in addition to the existing ones for the K–8 program. The K–8 program used technology with Macintosh operating systems, such as iPad and other Apple devices and computers. The new high school program was set to use computers and devices with a Microsoft Windows operating system.

5. The classified employees are in a wall-to-wall bargaining unit represented by the union, and the local chapter president is Doug Dyer. Dyer is the school's sole information technology classified employee; he is the system administrator and tech advisor.

6. Dyer's duties included maintaining and updating the school district's technology. Like other employees, Dyer's hours were budgeted at the start of each school year. Unlike employees with food service or transportation duties, Dyer's day-to-day hours and duties were flexible, and his budgeted hours were not always sufficient for urgent or special projects. More hours would be approved when needed; however, Dyer kept his total actual hours and his total budgeted hours as close as possible.

7. Dyer was budgeted nine hours per week for the 2015/2016 school year. This was reduced to three hours per week for the 2016/2017 school year until May 2017 when he was restored back to nine hours for the rest of the school year. In the 2017/2018 school year, Dyer was budgeted approximately five hours per week despite an additional high school program that began that year. Initially, the 2017/2018 hours were allocated at three hours per week with additional eight-hour blocks for special projects. As this was unworkable, it was changed to five hours per week.

8. In the spring and summer of 2016, Dyer and Indra Burcella, the union field representative, engaged in bargaining for a new collective bargaining agreement with the employer. At first, the school district's bargaining representative was superintendent Benton Dorman, and the parties reached a tentative agreement. Prior to ratification of that agreement, Dorman resigned and the employer's board of directors replaced him with Bob Rogers. The board instructed Rogers to reduce classified staffing and focus resources toward the classroom as the school district was facing about a 10 percent funding cut in its budget. These cuts were related to a decline in federal, state, and local funding. Rogers cut the hours of classified staff, Dyer's most severely.

9. As part of the 2016 cuts, the board asserted that it specifically wanted to reduce Dyer's budgeted hours. Not only did it want to cut the hours to help balance the budget, it also expressed a belief that too many hours had been budgeted when compared to similarly sized districts. The union opposed the staffing cuts, and Dyer addressed the board on behalf of the entire bargaining unit in a letter where he asked the board to reconsider the cuts. On September 30, 2016, the union filed an unfair labor practice complaint with PERC over the staffing cuts, and a preliminary ruling was issued. Over the following months, the union conducted four public demonstrations at school board meetings. The board was committed to contesting the allegations in the union's initial unfair labor practice complaint as it was seen as challenging its authority to set staffing levels.

10. In April 2017, the union and the employer reached a settlement regarding the union's 2016 unfair labor practice allegations. The employer agreed to restore the budgeted hours through the end of the school year and, by doing so, restored Dyer's hours from three to nine per week. The employer agreed to settle in order to avoid legal expenses and provide more technology hours as the employer was preparing to begin its high school program. The 2017/2018 school year was the employer's first opportunity to change Dyer's hours after the unfair labor practice settlement. In the 2017/2018 school year, all classified staff maintained or increased their budgeted hours, yet Dyer's budgeted hours were reduced.

11. In researching technology staffing, Rogers looked at other small districts and had informal conversations with two technology professionals, one of whom was his brother who worked for a university in California. Rogers' consultation with outside technology professionals was informal and did not deeply explore the district's specific needs, such as having more than one operating system. Rogers' research of other small school districts was based on information from the Office of Public Instruction's (OPSI) website and conversations with three other school districts. He did not investigate how many devices were in each of those school districts or how many operating systems were in use.

12. The only position that did not have its hours fully restored was Dyer's—the union leader who had advocated against the cuts.

13. Rogers did not talk with Dyer in making this decision or review the history of how many hours per year Dyer's position had historically worked. He based it on the prior year's budget of three hours per week and decided that only two hours more per week would be reasonable in light of the additional duties related to the high school program.

14. In the 2017/2018 school year Dyer was only budgeted for 200 hours, but actually worked 327 more.

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 14 the employer discriminated (and derivatively interfered) against Doug Dyer for filing an unfair labor practice complaint in violation of RCW 41.56.140 (3) and (1).

ORDER

MILL A SCHOOL DISTRICT, its officers and agents, shall immediately take the following actions to remedy its unfair labor practice:

1. CEASE AND DESIST from:

   a. Discriminating against Doug Dyer for filing an unfair labor practice complaint.

   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 Doug Dyer immediate and full reinstatement to his former number of budgeted hours, 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 reduction of hours to the effective date of the unconditional offer of 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 for 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.

c. Read the notice provided by the compliance officer into the record at a regular public meeting of the Mill A School District's Board of Directors 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.

d. 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.

e. 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 3rd day of June, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily H. Martin, 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.

RECORD OF SERVICE

ISSUED ON 06/03/2019

DECISION 13015 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 129785-U-17

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