STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 129589-U-17 DECISION 13018 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On August 9, 2017, the International Union of Operating Engineers, Local 609 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission), naming the Seattle School District (employer) as respondent. After the Commission's unfair labor practice administrator (ULP administrator) issued a deficiency notice on September 12, 2017, the union filed a first amended complaint on October 3, 2017. On November 7, 2017, the union filed a second amended complaint with a motion for leave to file a second amended complaint. The ULP administrator issued a preliminary ruling on November 8, 2017, finding that the second amended complaint stated causes of action for employer interference with employee rights under RCW 41.56.140, employer discrimination in violation of RCW 41.56.140 [and if so, derivative interference in violation of RCW 41.56.140(1)], and failure to bargain in violation of RCW 41.56.140(4). The employer filed its answer November 29, 2017.

After six days of hearing held in June and September 2018, the parties submitted post-hearing briefs on December 7, 2018. On March 11, 2019, the parties participated in a conference call initiated by the examiner for the purpose of addressing ambiguity in the preliminary ruling. The phrase "the processing of the complaints" in the preliminary ruling lent itself to a myriad of interpretations under the facts alleged in the union's second amended complaint with respect to the union's independent interference claims. During the conference call, the examiner noted that the union addressed four distinct issues in the interference portion of its post-hearing brief. With the union's consent, the examiner granted the employer the opportunity to file a supplemental brief to address the interference claims asserted by the union in its post-hearing brief. The employer filed a supplemental brief on March 18, 2019.

ISSUES

The issues presented in this case are as follows:

1. Did the employer discriminate in violation of RCW 41.56.140(1) [and if so, derivatively interfere in violation of RCW 41.56.140(1)] by (a) refusing to send a second letter excluding a parent from the school campus, (b) denying the complaints Tiffany White filed against the district, and (c) terminating Tiffany White's employee benefits while White was on medical leave?

2. Did the employer interfere with employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of benefit made by Brenda Ball Cuthbertson to Tiffany White during the processing of the complaints she filed with the employer?

3. Did the employer refuse to bargain in violation of RCW 41.56.140(4) [and, if so, commit derivative interference in violation of RCW 41.56.140(1)] by refusing to provide relevant information requested by the union concerning incidents involving Tiffany White?

Issue 1 – Discrimination

The employer did not discriminate against the union when it declined to issue a second trespass letter to a parent excluding him from access to the school grounds, denied complaints filed against the district by union member Tiffany White, or terminated White's benefits while she was out on medical leave. The extensive record in this case shows that White and a parent were embroiled in an ongoing dispute, and the district made every attempt to ensure White's safety and to investigate White's complaints fairly and thoroughly. The district followed its internal policies when it terminated the union member's medical benefits.

Issue 2 – Interference

The union's interference claims fail because the union member was not deprived of an ascertainable right or benefit, nor could she reasonably perceive Ball Cuthbertson's actions as a threat of reprisal or force associated with her union activity. Because the union relied on the same facts in its interference claim as it relied upon in its discrimination claim, the Public Employment Relations Commission's precedent dictates that the union's separate interference claims be dismissed.

Issue 3 – Refusal to Bargain

The employer did not refuse to bargain with respect to union information requests. The record shows that the employer timely responded to each request relevant to this dispute, communicated with the union, and complied with the information requests submitted by the union.

BACKGROUND

The Seattle School District operates the John Muir Elementary School (John Muir). The International Union of Operating Engineers, Local 609 (union) is the exclusive bargaining representative of four bargaining units with the employer, including a unit of food service workers relevant to this matter. This dispute centers around events that occurred in the 2016–17 school year at John Muir, and all events occurred during that time period unless otherwise specified.

Tiffany White

Tiffany White, a member of the union, was the kitchen manager. White's duties included, among other things, serving food to students and acting as a cashier receiving payments via student-entered personal identification numbers (PINs).[1] White worked in various positions within child nutrition services during her six-year tenure with the employer. White became the kitchen manager when she transferred to John Muir at the start of the 2013–2014 school year. White reported solely to nutrition services personnel. White's direct supervisor was child nutrition services supervisor Billie Curtiss. Teresa Fields, director of nutrition services, was Curtiss's supervisor. White is Caucasian.

Brenda Ball Cuthbertson

Principal Brenda Ball Cuthbertson was in her third year as principal at John Muir. Ball Cuthbertson was at no time in White's chain of supervision.

Romana McManus

At all relevant times, Romana McManus was the assistant principal at John Muir. McManus was at no time in White's chain of supervision. McManus was typically present during lunchtime to supervise students.

Parent C

Parent C was the guardian of a second grade student who attended John Muir (Parent C's child).[2] Parent C's child routinely ate breakfast in the cafeteria, and Parent C regularly accompanied his child. White and Parent C commonly saw one another during the breakfast period. Parent C's child had some behavioral challenges, and Parent C often accompanied him to school to provide encouragement and support for the upcoming school day.[3] Parent C and his child are African American.

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1 White was not present at the hearing. Instead, she testified via a webcam/video connection (Skype).

2 In order to maintain confidentiality with respect to the child/student, the parent will be referred to as Parent C.

3 Parent C did not testify at the hearing; descriptions of his involvement are based on witness testimony, the employer's investigative report, and hearing exhibits.

In fall 2016, conflict developed between White and Parent C. This conflict continued to escalate and is described in relevant part below.

September 2016 Incident

In September 2016 Parent C and his child approached White at the cashier station to pay for breakfast. Parent C and his child arrived somewhat late that day, and White told the child he needed to use a paper tray instead of the plastic one he was already holding. White then reached out to exchange the child's plastic tray with a paper one, which prompted Parent C to intervene by telling White she was being "very rude" and that she shouldn't "take something out of a child's hands." This sparked further argument between them.

McManus was in the cafeteria helping to prepare for a school assembly at the time of the incident. McManus made efforts to diffuse the situation and later reported the event to Ball Cuthbertson.

March 2017 Incident

White and Parent C had a second interaction in March 2017.[4] It began when White observed a group of students, including Parent C's child, wearing backpacks while standing in line for breakfast. Believing that school policy prohibited students from wearing backpacks in line, White told the students to remove them. White later testified she believed the backpack rule existed, in part, to prevent students from using their backpacks to take extra servings of food.[5]

Parent C approached White, stating that his child "was not going to be accused of stealing because of the color of his skin." This led to further argument between White and Parent C, including White's allegation that Parent C called her "racist." In a subsequent investigative report, Parent C

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4 White was on leave from October through March for reasons unrelated to the present dispute. There were no interactions between White and Parent C during this time period.

5 White's supervisor, Curtiss, later clarified in writing that White and other employees in her position were not responsible for enforcing rules not directly related to their food service duties. Nor were they responsible for enforcing a "backpack rule" unless specifically instructed to do so by their schools. White responded to this admonition from Curtiss, in part, by writing: "I am feeling like these few kids that take extra things have ruined it for the other kids that maybe don't because the school is so worried about racial profiling it has to be allowed . . . so that's the message I feel that's being sent." Nothing in Curtiss's memo to the staff mentioned anything about race.

denied using that word, though he acknowledged that he may have commented on how White treated "students of color" for purposes of raising issues of diversity awareness.[6]

April 4, 2017 Incident

White and Parent C had another problematic interaction on April 4, 2017. Teacher Cristina Evangelista, who spent three mornings per week in the cafeteria, was there and testified regarding her view of what transpired. White told Parent C that his child had recently cussed at White. Parent C responded that if White did not like children she needed to find another job and that the children hated her. Evangelista described Parent C's behavior as loud and inappropriate. Evangelista described White's response as upset, angry, and accusatory. While the two were arguing loudly, Evangelista left to seek the assistance of McManus. Evangelista described White's demeanor toward others, generally, as "brusque."

The next day, April 5, Ball Cuthbertson met with Parent C to discuss the escalating conflict between him and White. Ball Cuthbertson asked Parent C to voluntarily stay out of the cafeteria. Parent C declined, but agreed not to interact with White.

Ball Cuthbertson also met with White on April 5. White told Ball Cuthbertson that Parent C made her feel uncomfortable and asked that Parent C be restricted from entering the cafeteria. Ball Cuthbertson advised White that, typically, the district's first response would be to issue a warning letter. Ball Cuthbertson suggested that White submit a written statement for review by the employer's legal department. The legal department could then determine next steps, including the possibility of issuing Parent C a trespass letter (i.e., a letter restricting Parent C from part or all of the employer's premises). Ball Cuthbertson also arranged for White to carry a two-way radio in the event she needed assistance at work and arranged for at least two staff members to be in the cafeteria during the breakfast meal. Ball Cuthbertson also spoke to McManus almost daily to discuss the situation. Last, Ball Cuthbertson spoke to Parent C asking him to "stand down."

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[6] John Muir serves a racially diverse student population. Some witnesses perceived the White-Parent C conflict in the context of this racial diversity.

In an e-mail dated April 6, 2017, from White to her supervisor, White stated that she was told the school district was "too scared to do anything because of the whole 'race' issue" and that the parent "would take it to the 'top' and go all the way with it." Ball Cuthbertson denies making these comments. Upon later review of the e-mail exchange, Ball Cuthbertson responded to the comments alleged by White in her e-mail by setting forth the actions Ball Cuthbertson had taken to help make White feel safe. Ball Cuthbertson also asked White who made the remarks about race. Ball Cuthbertson's query confirms that she is not the person who made the remarks. White's testimony on this issue was vague and unreliable. White first testified on direct that McManus made the remarks during a phone call that White made to McManus to discuss the interaction with Parent C. White's attorney asked her whether she was speaking about McManus or Ball Cuthbertson, and White clarified that she was speaking about Ball Cuthbertson. Ball Cuthbertson purportedly made that remark while meeting with White in Ball Cuthbertson's office.

April 19, 2017 Incident

On April 19, 2017, White alleged that Parent C used his cellular phone to record her inside the cafeteria. White e-mailed Ball Cuthbertson, McManus, and union representative Mike McBee recounting her concern. This was the first time White invoked union representation. Ball Cuthbertson e-mailed back, stating, "[I]f this parent[']s presence in the cafeteria is making you uncomfortable, please email us a written account of what happened at your earliest convenience and we'll work with the legal department to see what we can do."

McBee replied to Ball Cuthbertson's e-mail, stating that White was "under no obligation to submit written accounts or complaints" to work in an environment free of harassment and intimidation. McBee further stated the union would be representing White on the matter and would need to be present at any related meetings. Ball Cuthbertson met with McBee the following day.

First Discrimination Complaint

On April 28, 2017, White hand delivered a "discrimination" complaint[7] against Parent C to Ball Cuthbertson, more than three weeks after Ball Cuthbertson requested she do so. White alleged discrimination on the basis of race, retaliation, and bullying by Parent C. White attached a written statement to the complaint describing details of their conflict.

Ball Cuthbertson forwarded White's complaint to Ronald Boy, an attorney in the employer's legal department. Ball Cuthbertson requested that Boy review the statement "to see if we are able to restrict this parent's access and let me know what other steps we should take in order to provide a safe working environment." Ball Cuthbertson copied McBee on the e-mail.

McBee then e-mailed Noel Treat, another attorney in the employer's legal department, requesting that Parent C be trespassed from the lunchroom. Treat responded, "Thanks for bringing this to our attention. We will look at issuing a letter. I've asked [Boy] to follow up."

May 4, 2017 Incident

On May 4, 2017, White and Parent C had another negative interaction. White failed to greet Parent C's child when the child approached her to pay for breakfast. In White's presence, Parent C told his child to say "good morning" to White even if White did not say "good morning" in return. Parent C then said that White was being rude. White testified that this interaction made her feel nervous. The incident precipitated several e-mails from union representatives to Ball Cuthbertson, Pegi McEvoy, and other district administrators asking about the status of the trespass letter.

May 8, 2017 Discussion

On May 8, 2017, Ball Cuthbertson spoke to Parent C regarding the conflict with White. Ball Cuthbertson asked Parent C if he would be willing to voluntarily stop going to the cafeteria. Parent C declined and asked about the possibility of mediation. The same day, Ball Cuthbertson approached White in the cafeteria, without White's union representative, and asked White if she would be willing to participate in mediation. At first White agreed, as long as she could be paid

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[7] The discrimination complaint constitutes the first of the three Harassment, Intimidation, and Bullying (HIB) complaints in the record. While an HIB complaint does not always include a discrimination claim, discrimination complaints are processed by the employer as HIB complaints.

for her time. Shortly thereafter, White changed her mind and withdrew her consent. Ball Cuthbertson contacted White just two times, on the same day. Ball Cuthbertson notified the union via e-mail on May 8, 2017, of her interaction with White on this topic. White denies that she ever agreed to mediation and claims that Ball Cuthbertson just "yelled at [her] about it." Ball Cuthbertson's contemporaneous memorialization of the interactions by e-mail supports her testimony that White initially agreed to mediation. In her e-mail to the union, which was cc'd to White, Ball Cuthbertson specifically asked White to confirm White's position on mediation. McBee responded to Ball Cuthbertson's e-mail by sending two e-mails. The first e-mail was sent to Treat and stated, "As discussed. Please cease the direct dealing." Ball Cuthbertson was not included on that e-mail. McBee's second e-mail was sent to school district administrators, including Ball Cuthbertson, stating: "I will reiterate that Tiffany has requested representation on this matter. We do not see mediation as a viable option."

First Trespass Letter

Ball Cuthbertson spoke with Parent C to discuss the incident that occurred on May 4, 2017. Ball Cuthbertson told Parent C he had violated their voluntary agreement to not interact White and that a trespass letter restricting his access to the cafeteria was being considered by the legal department. The legal department drafted the letter on May 8, 2017, and Ball Cuthbertson called Parent C on May 9, 2017, to inform him it would be issued. Ball Cuthbertson issued Parent C the letter on May 10, 2017.

May 11, 2017 Incident

On May 11, 2017, Parent C and his child entered the rear door of the cafeteria on a rainy day. Parent C stood inside the entryway for two to five minutes. The entryway was roughly 20–60 feet from White's location at the time.[8] White reported that this made her feel "very scared" and "uncomfortable." White left the premises with Westberg. Westberg accompanied White to the Washington State Department of Labor & Industries to file a workplace safety complaint. The Department of Labor & Industries suggested White report the alleged harassment to the police, so White and Westberg next went there. Finally, the police suggested they file a motion for a

[8] The cafeteria was a large, multipurpose room which also served as a school assembly room. Some estimated the distance as 20–30 feet, but McBee estimated that the distance was 50–60 feet.

protective order, so White and Westberg went to court to do so. The court issued the Temporary Protective Order (TRO), which ordered Parent C to stay 200 feet away from White.

In response to the May 11 incident, Ball Cuthbertson consulted with the employer's legal department and spoke with Parent C by phone later that day. Ball Cuthbertson told Parent C that his presence at the cafeteria entryway was a violation of the terms of his trespass letter and told him to expect a second, more restrictive trespass letter.

The employer's legal department drafted a second trespass letter that would have restricted Parent C from the entire school campus. However, Ball Cuthbertson never issued it. In an e-mail sent May 12, 2017, to Treat, Boy, and others, Ball Cuthbertson stated, "After talking with [Parent C] I have decided **not** to send the letter restricting him from campus." Ball Cuthbertson explained:

> Yesterday [Parent C] was having trouble getting his nephew to go into the cafeteria on his own. He reports that he opened the backdoor, stepped into the doorway with [the child] and gave him encouragements for the day (be respectful, do your best, etc.). He report[ed] that he kept the door open the entire time and did not see this as entering the cafeteria. The back door is far away from the area where Ms. White works.

Ball Cuthbertson stated that restricting Parent C's access to campus would be a disproportionate response and that she clarified to Parent C that going forward he could not enter even the cafeteria entryway. The terms of the first trespass letter remained in effect, and White continued to have access to a two-way radio.

Informational Picketing

On May 9, 2017, Westberg held an informational picketing event outside the school at school dismissal time in response to Parent C's presence in the cafeteria earlier that morning. At the event, the union communicated its belief that the employer failed to provide White with a safe working environment. McBee held a similar event on May 11, 2017. According to Ball Cuthbertson, picketing occurred on "a couple of days."

McBee encountered Ball Cuthbertson while he was picketing. McBee testified that Ball Cuthbertson told McBee that she was planning to file a complaint against Westberg. McBee did not elaborate on his assertion. Ball Cuthbertson denies making that statement.

Staff Member Complaints against White

One week after the picketing event, Ball Cuthbertson received three complaints about White: from kindergarten teacher Lizzie Jackson, kindergarten teacher Ramona Bardwell Isaac, and district volunteer Julia Janak. Jackson claimed that White, in violation of policy, was telling students to ask their parents for money to pay meal balances. Bardwell Isaac claimed that White spoke to her and others in an "unprofessional" and "hostile manner." Janak claimed that White failed to keep the cafeteria tables clean and would not take responsibility for doing so.

On May 19, 2017, Ball Cuthbertson forwarded these complaints to White's second-line supervisor, Fields. Ball Cuthbertson's e-mail to Fields described the behavior in the complaints as "absolutely unacceptable" and asked about "corrective action" for White.

Ball Cuthbertson e-mailed Fields two additional complaints, from first grade teacher Anne Campbell, sent to Ball Cuthbertson on May 24, 2017, and assistant Tanya Salmi, sent to Ball Cuthbertson on May 30, 2017. These complaints alleged that White failed to prepare lunches for students on a field trip and that White became "loud, combative, and angry." Ball Cuthbertson asked Fields to "talk with Ms. White about being aware of her tone when speaking to adults."

May 18, 2017 Incident

Teacher Bardwell Isaac was in the cafeteria with a student who was having a tantrum. Bardwell Isaac placed food on a tray and asked White to enter the student's PIN. White refused, citing policy, and advised Bardwell Isaac that she could not take the tray without paying for it. On direct examination, White first testified: "I said, you can't take the tray of food with you. She [Bardwell Isaac] turned around to me and slammed the tray of food into my chest a couple times." White then restated her testimony: "I went to grab the tray from her [Bardwell Isaac]. . . . instead she started hitting me with it. . . . she slammed the tray into my arm and then I had turned to face her, after she hit me with the tray on my arm, and started slamming it into my chest." White claimed that she received bruises on her chest and arm as the result of this interaction. There were

at least six adult witnesses who were present in the cafeteria at the time of this interaction. They were interviewed in conjunction with the district's investigation of the HIB complaint against Bardwell Isaac (see below). None of those present witnessed Bardwell Isaac's alleged assault of White. White's inconsistencies render her testimony unreliable.

Hearing on Extension of the Protective Order

On May 26, 2017, with her union's support, White sought an extension of the protective order against Parent C. The court denied the requested extension on May 26, 2017. The hearing on the extension of the order was attended by Boy and several staff members, including some who testified in the proceedings. According to Westberg's testimony, White was distraught and fearful when the permanent protective order was denied.

Incident Involving Parent C and Westberg

Shortly after the May 26, 2017, hearing, Westberg entered Parent C's place of work (a coffee shop) and took photos of him. Parent C, who had never met Westberg prior to this incident, approached Westberg to question him about taking the photos. Westberg told him, "I wanted to make sure we didn't have any racists working around here." Parent C did not respond to this comment.

Harassment, Intimidation, and Bullying (HIB) Complaints

On May 19, 2017, White filed a second HIB complaint under the employer's internal complaint procedures. This complaint was for discrimination based on "Economic Status" and it named two individuals: Ball Cuthbertson and Bardwell Isaac. As such, it was processed by the district as two separate complaints. Specifically, White contended that Bardwell Isaac repeatedly shoved a tray into White's chest during a disagreement in the cafeteria and that Ball Cuthbertson failed to respond to the matter or talk with White after learning about it. The district assigned an investigator to review the complaints.

The employer assigned human resources investigator Brett Rogers, a former Seattle police lieutenant, to investigate these two complaints in addition to the complaint filed on April 28, 2017. Rogers interviewed several people and reviewed written statements and documents in investigating the complaints. Rogers issued investigative reports for all three complaints on June 27, 2017. In

the written reports, Rogers found that White's claims of discrimination, harassment, retaliation, and bullying were unsubstantiated.

White was notified of the results of the investigations on July 3, 2017, and appealed the outcomes to the Seattle School Board of Directors (SSBD). On July 26, 2017, the SSBD held a hearing. On August 7, 2017, the SSBD notified White that her appeal was denied.[9]

On August 28, 2017, White appealed the SSBD's decision to the Office of Superintendent of Public Instruction (OSPI). On November 9, 2017, OSPI notified White that it would not reopen her complaint for investigation. Its letter to White stated, in part, "OSPI has determined that the [employer] investigated the allegations in your complaint and reached a decision using legal standards comparable to those OSPI would apply."

Leave and Termination of Benefits

White began taking medical-related leave on May 26, 2017. White exhausted her paid leave on June 27, 2017, and requested that she be placed on unpaid employee health leave.

On July 6, 2017, leave analyst Corinne Ross notified White by letter that her request for employee health leave was approved. Ross's letter informed White of the following: (1) White's position would be held for her return through September 23, 2017; (2) after September 23, 2017, White would be considered for the next available and comparable position, (3) White's benefits were scheduled to terminate on September 30, 2017, and (4) paid leave would be used to cover her absence until exhausted, at which time unpaid leave would apply.

On October 5, 2017, manager of leaves and workers' compensation Lisa Garberg sent White a letter asking White to clarify her intentions about returning to work. The letter notified White that her position would be released on October 13, 2017, and that her employee benefits had terminated on September 30, 2017. Garberg attached copies of relevant leave policies to her letter to White.

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[9] This appeal only concerned White's discrimination claim against Parent C. The SSBD was in the process of scheduling a hearing date on White's remaining discrimination claims but prior to being finalized White entered into a settlement agreement with the employer that released her remaining appeal rights.

Garberg requested that White contact her by October 13, 2017, if she wanted to return to work. White did not return.

Requests for Information

The union submitted at least five information requests during the events at issue, the specifics of which are set forth in the analysis below.

ANALYSIS OF ISSUE 1 – DISCRIMINATION

Applicable Legal Standards

Discrimination

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.56.140(1). In *State – Corrections*, Decision 11571-A (PSRA, 2013), the Commission reiterated the legal principles applicable to proving employer discrimination under RCW 41.56.140(1). The Commission stated that an employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of protected rights. *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 elements:

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 that, according to the 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. *Port of Tacoma*, Decision 4626-A.

When the Commission finds a discrimination violation under RCW 41.56.140(1) it carries with it a derivative interference violation. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998). If there is no finding of a discrimination violation, then no derivative interference violation will be found. *Reardon-Edwall School District*, Decision 6205-A.

Hostile Work Environment

Under the Commission's decision in *Seattle School District*, Decision 12842-A (PECB, 2018), proof of a hostile work environment may be sufficient to satisfy the second element of a discrimination claim (deprivation of a right, benefit, or status, as discussed above). To prove a hostile work environment, the complainant must show harassment that (1) was unwelcome, (2) was due to a protected characteristic, (3) affected the terms or conditions of employment, and (4) was imputable to the employer. *Blackburn v. Department of Social and Health Services*, 186 Wn.2d 250, 260 (2016), *citing Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406–07 (1985). The third element requires that "[t]he harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Blackburn v. Department of Social and Health Services*, 186 Wn.2d at 260–61, *citing Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d at 406. "Harassing conduct has also been described as 'severe and persistent,' and it must be determined 'with regard to the totality of the circumstances.'" *Id.* at 261, *citing Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d at 406–07. The Commission adopted this standard in *Seattle School District*, 12842-A.

Application of Standards

Discrimination

The union contends there are several bases for its discrimination claims: (1) the employer's failure to issue Parent C a second, more restrictive trespass letter; (2) the employer's denial of all three HIB complaints without a fair investigation; (3) the employer's cutting White's medical benefits when she was on leave; and (4) creating and facilitating a hostile work environment. The union's claims are first analyzed to determine whether they meet the three-part test of a prima facie case.

Element One: Participation in Protected Activity

When determining whether activity is protected, the Commission will first look at whether, on its face, the activity was taken on behalf of the union or a union member. *See* RCW 41.80.050; *City of Seattle*, Decision 10803-B (PECB, 2012). Once determined that activity was taken on behalf of a union member or union, a "reasonableness" standard is then applied to determine whether that activity is protected under state collective bargaining laws. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694 (2001); *Vancouver School District v. Service Employees International Union, Local 92*, 79 Wn. App. 905 (1995), *review denied*, 129 Wn.2d 101 (1996).

Representation

On April 19, 2017, White e-mailed Ball Cuthbertson, McManus, McBee, and nutrition services supervisor Curtiss (White's first-line supervisor) alleging that Parent C was using his cellular phone to record White in the cafeteria. White included McBee in her e-mail to secure union assistance. McBee affirmed that he and the union represented White in an e-mail to Ball Cuthbertson later that day, stating that "[the union] will need to be in attendance at any meetings regarding [the allegation]." All subsequent communications regarding White, Parent C, and other staff were directly related to White's working conditions and are protected activity.[10]

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[10] Although the union was engaged in union activity, its behavior sometimes ventured into unreasonable territory. The exhibits were replete with instances of the union's sarcastic and sometimes inappropriate communication to the employer. Most egregiously, one of the union representatives went into Parent C's place of work and took photos of Parent C. When Parent C confronted the representative, the union representative stated that he was trying to see if Parent C's employer "had any racists working" there.

Informational Picketing

McBee and Westberg engaged in informational picketing relating to this dispute beginning on the afternoon of May 9, 2017, outside the employer's John Muir campus as school was letting out. The picketing occurred on at least two separate occasions. This picketing was, on its face, union activity and nothing in the record suggests it was conducted unreasonably. The picketing was held on behalf of White and directly concerned her working conditions; it was therefore protected activity.

Element Two: Ascertainable Right, Benefit, or Status

Denial of Second Trespass Letter

The union argues that the employer denied White her right to restrict Parent C from the school campus when Ball Cuthbertson chose not to send the second trespass letter. The employer acknowledges the second trespass letter was not sent but argues that White held no ascertainable right, benefit, or status in the letter for purposes of a prima facie discrimination claim.

Ball Cuthbertson issued the first trespass letter restricting Parent C from campus on May 10, 2017, the day after Westberg first picketed. Ball Cuthbertson initially sought to issue Parent C a second, more restrictive, trespass letter after learning that Parent C entered the entryway to the cafeteria on May 11, 2017, the same day that McBee picketed outside of school during dismissal time. Ball Cuthbertson called Parent C to tell him that a second letter would be forthcoming. Parent C explained that he stood in the entryway of the cafeteria to talk to his student to encourage him to eat breakfast. Parent C's version of the events was confirmed by teacher Evangelista. Evangelista observed Parent C in the cafeteria that day. She corroborated Parent C's recollection of the events, as set forth in the investigation report. Estimates from various witnesses, including McBee and White, indicate that Parent C was in the lunchroom, near the entryway, from 30 seconds up to five minutes. The union asserts that Ball Cuthbertson refused to issue the second trespass letter after McBee and Westberg picketed on May 11, 2017.

After interviewing Parent C, Ball Cuthbertson determined that the incident on May 11, 2017, arose from a misunderstanding that warranted a different response than originally contemplated. Ball Cuthbertson testified that in making decisions of this nature she was required to balance

Parent C's right as a parent against White's right as an employee. As executive director of labor and employee relations, Stanislaw Damas testified:

> It was a delicate balancing of protection for the employee and meeting the needs of a student that was going through a tough time. And [Parent C] was very beneficial to the student.
>
> So since we [had] multiple interests or multiple desired outcomes in this situation, I felt that the interest of Ms. White's protection from any annoying influence by [Parent C] could be met, and we could still maintain [Parent C's] beneficial involvement with the child.

In seeking this balance, Ball Cuthbertson expressly kept in place the restrictions on Parent C from entering the cafeteria as set forth in the first trespass letter. The union has failed to show that restricting Parent C from the entire school campus would have provided White any additional benefit she was not already receiving from the first trespass letter. To the contrary, Ball Cuthbertson credibly testified that "to remove [Parent C] from the entire campus would have had an adverse impact on the child, and it would not necessarily have increased the exposure of Ms. White. It would not have decreased the exposure of Ms. White to [Parent C] since her area was very isolated."

According to the union, Ball Cuthbertson was motivated by anti-union animus when she reassessed her decision to send Parent C a second trespass letter. The union's position is not supported by the evidence. The union points out that Ball Cuthbertson spoke to Parent C but did not speak to White after the May 11, 2017, incident. On May 11, 2017, the district did exchange e-mails on this subject with McBee. The employer's deputy general counsel, John Cerqui, requested witness statements from both McBee and White. McBee e-mailed Cerqui, "We will be happy to work with you on getting [White's] statement asap," and McBee provided his own written account of what he saw. The employer's request for witness statements was adequate and can be imputed to Ball Cuthbertson. Although Ball Cuthbertson did not issue the second trespass letter, she chose not to in an attempt to balance the needs of the child, Parent C, and White. Further, the record established that Ball Cuthbertson actively pursued issuance of the first trespass letter even after White obtained union representation and filed her first discrimination complaint. For instance, when e-mailing White's discrimination complaint to the legal department on April 28, 2017,

Ball Cuthbertson asked the employer about "restrict[ing] this parent's access." It defies logic to assume that even though the first letter was issued on May 10, 2017, Ball Cuthbertson would be motivated by anti-union animus on May 11, 2017. Westberg testified that he picketed on an earlier date.

White was not entitled to the second trespass letter as a matter of course, even though it had been prepared on May 11, 2017. The union relies on the Commission's holding in *Oroville School District*, Decision 6209-A (PECB, 1998), to argue that a deprivation of a "right, benefit or status" may occur when the employer's actions affect working conditions. In *Oroville*, the Commission held that a negative job evaluation was the deprivation of a "right" under RCW 41.56.140(1) because such evaluations are "often considered by employers and arbitrators in making judgments about matters affecting job security, such as layoffs, discipline, and discharge, and so affect employee working conditions." *Oroville* is inapplicable here. The union has not shown that White's interest in the second trespass letter is the type of right, benefit, or status that is "often considered" by third parties in matters of job security. The evidence presented at the hearing showed that the employer gave the first trespass letter to Parent C one day after Westberg picketed outside. Ball Cuthbertson provided legitimate, nondiscriminatory reasons for not issuing the second, more restrictive letter. The decision to send a second trespass letter was a matter of employer discretion that involved balancing White's rights with the depravation of a parent's and his child's rights, and it goes to the very heart of the school district's mission to educate its students.

Denial of HIB and Discrimination Complaints

Two employer policies are relevant to the employer's processing of the HIB and discrimination complaints. Superintendent Procedure 5010SP provides employees a complaint process for allegations of discrimination based on a protected status, while Superintendent Procedure 3207SP.B provides a complaint process for allegations of harassment, intimidation, and bullying. These policies allow for any employee to file a complaint under their procedures and specify that all complaints will be taken seriously.

In the present case, the employer promptly investigated White's complaints and issued its findings within two months of the first filing. Investigator Rogers conducted what appears to be a thorough

investigation of each complaint. White was also notified of her appeal rights and she exercised them at two levels of review. When the school board issued its ruling on the appeal, it noted that the district used a "preponderance of evidence" standard. The district in the present case adhered to its internal policies in conducting its investigation. In addition, OSPI declined to open its own investigation, noting that "[i]n general, OSPI will not open a complaint if, after reviewing the school district's investigation and decision, OSPI determines that the district applied comparable legal standards as those OSPI would use and OSPI would expect a comparable resolution under its process."

The union argues the outcome of the investigation was motivated by anti-union animus. It points out that Nielsen, who oversees human resources investigations, improperly contacted Ball Cuthbertson when he asked her for the written complaints she received following the informational picketing event on May 11, 2017. Nielsen testified that he made inquiries related to White's complaints consistent with the informal investigative process in Superintendent Procedure 3207SP.B. The employer did not deny White any right, benefit, or status available to her under the applicable complaint procedures.

Nielsen's communication with Ball Cuthbertson did not deprive White of the employer's internal discrimination complaint procedures. In this context, it was not unreasonable to expect that Nielsen would speak to relevant witnesses and request relevant documents.

The union has failed to make a prima facie case showing that White was denied an ascertainable right, benefit, or status when the employer did not sustain the allegations in White's complaints, or when it chose not to issue the second trespass letter.

Hostile Work Environment

The union claims that White was subjected to a hostile work environment when Ball Cuthbertson reversed her decision to send the second trespass letter and encouraged coworkers to make oral and written complaints about White, when Bardwell Isaac allegedly assaulted White, and when other coworkers expressed hostility towards her, making her feel "shunned." The hostile work environment allegation was absent from the second amended complaint and the preliminary ruling. The preliminary ruling limits the causes of action before an examiner and the Commission.

WAC 391-45-110(2)(b). Once an examiner is assigned to hold an evidentiary hearing, the examiner can only rule upon the issues framed by the preliminary ruling. *King County*, Decision 9075-A (PECB, 2007), *citing King County*, Decision 6994-B (PECB, 2002). The purpose for limiting the cause of action in this way is to provide the responding party with sufficient notice of the facts and issues to be heard by the examiner. Typically, the examiner would not address claims not specified in the complaint. In the present case, however, the preliminary ruling lent some confusion as to the nature of the allegations permitted to go forward in the complaint, so I will address the union's hostile work environment claim herein.

In *Seattle School District*, 12842-A (PECB, 2018), the Commission held that a hostile work environment may constitute a deprivation of a right, benefit, or status and thereby satisfy the second criteria in establishing a prima facie case of discrimination. The union's complaint will therefore be analyzed to determine whether White's union activity subjected her to a hostile work environment.

The union has failed to satisfy its burden in proving that White was subjected to unwelcome conduct of a severe and pervasive nature. First, White's duty location was in the cafeteria. This is notable because Parent C's first trespass letter restricted him from entering the cafeteria. The benefit of a second trespass letter would have thus been negligible or nonexistent because White's position in the cafeteria did not require her presence in other locations at the school.

Thus, the employer's decision not to send the second trespass letter cannot be unwelcome activity of a severe and pervasive nature because it did not subject White to any detriment.

Second, the complaints submitted by staff members against White also do not rise to the level of severe or pervasive conduct. While it is true that some staff brought complaints against White to Ball Cuthbertson's attention after the picketing activity, there is strong evidence that they were in response to the staff's understanding that White was seeking to exclude Parent C from the school. The documentary evidence supports a finding that the staff members believed that Parent C's presence was a positive impact on his student and that White was sometimes unduly harsh with parents and students. Ball Cuthbertson credibly testified that she requested the oral complaints be put in writing so they would be accurately recorded and forwarded to the appropriate person—in

this case, White's supervisor, Curtiss. Ball Cuthbertson had a legitimate interest in responding to employees who approached her with complaints, and this included taking appropriate procedural steps such as documenting and forwarding. Because Ball Cuthbertson was not in White's line of supervision, she was under no obligation to investigate the complaints prior to sending them to White's direct supervisor.

Third, the union has not met its burden in showing that White was assaulted or physically attacked by Bardwell Isaac. Both White and Bardwell Isaac gave conflicting accounts of the alleged attack as it unfolded. White was not a reliable witness at the hearing. White first testified that Bardwell Isaac took a tray full of a child's meal and repeatedly shoved it into White's chest. Then, White claimed, Bardwell Isaac slammed the tray into her arm. White's testimony also included an account stating that Bardwell Isaac first slammed her arm with a tray and then slammed her chest. White produced photos of bruises she claims to have sustained during the interaction but offered no corroborating evidence that White's injuries were caused by Bardwell Isaac. No food fell off the tray while Bardwell Isaac was alleged to be repeatedly hitting White with the tray. There were at least six other adults in the cafeteria nearby during the course of the interaction; none saw Bardwell Isaac's alleged assault of White.

Bardwell Isaac testified that White acted aggressively when she "tried to snatch" a tray by grabbing at Bardwell Isaac's wrist. Bardwell Isaac claimed that White was positioned at her work station with her right arm closest to Bardwell Isaac. The photos depicted a bruise on White's left arm. According to Bardwell Isaac, White was screaming and ranting during the incident, and that Bardwell Isaac finally put the tray down firmly on the counter. Bardwell Isaac testified no food was displaced from the tray, but that a milk carton or water bottle fell off of White's work station and into a basket when Bardwell Isaac put the tray down. Bardwell Isaac's testimony is credible to the extent she claims there was no intentional physical contact between her and White.

The evidence concerning Bardwell Isaac's alleged assault, and Cuthbertson's response to it, are insufficient to demonstrate severe and pervasive harassment. It was an isolated incident that was not corroborated by any of the other adults who were present. Even if the alleged assault had been

proven, it would have been insufficient to meet the first element of a hostile work environment claim, as it lacked in severity or pervasiveness.

White also testified that she felt "shunned" after the incidents with Crosby. White "[f]elt [she] had one friend in the school, and that was the custodian. Everybody else pretty much didn't want anything to do with me." She also testified that the employer's employees who attended the court hearing for the TRO were "very aggressive" toward her. She did not elaborate on these claims. In addition, nothing in White's testimony, or in the evidence presented at the hearing, corroborated or supported White's vague complaints of being "shunned" or that those who attended the TRO hearing outside of the work environment were being "aggressive" toward her. There was no indication in the record that the SSD's employees attending the hearing were acting in a work capacity while in the courtroom, or that they were present in the courtroom at the employer's direction or encouragement. Again, nothing in the evidence indicates severe or pervasive harassment.

Finally, none of the alleged actions taken against White in this case were convincingly carried out in response to White's union activity. There was no evidence that any of White's coworkers were even aware of White's union activities. Instead, Ball Cuthbertson took affirmative steps to address White's concerns, such as providing her a two-way radio and obtaining a trespass letter restricting Parent C from the cafeteria. Ball Cuthbertson also remained responsive to the conflict by making herself available, speaking with relevant parties, and assessing options that were proportionate and tailored to the needs of each person involved. Although Bardwell Isaac was aware there had been a dispute between Parent C and White, she was not aware of the circumstances.

Nothing in the record supports an inference that Bardwell Isaacs's actions, or Ball Cuthbertson's response to it, were taken in response to White's activities. Nor does the record support any claims that any employee of the employer mistreated White in connection with her union activities. In sum, the union has not shown that White was subjected to a hostile work environment.

Element Three: Causal Connection

The union's failure to prove that White was deprived of an ascertainable right, status, or benefit deems it unnecessary to address the element of "causal connection."

Termination of benefits

White claimed she was deprived of a right, benefit, or status when the employer terminated her employee health care benefits on September 30, 2017. Discussed below is whether the termination of benefits was causally connected to White's protected activities.

In the present case Garberg sent White notice that her benefits would terminate on September 30, 2017, if White did not return to work. Garberg provided detailed information about holding White's position open and finding her a comparable job if necessary. Garberg asked White to respond with her intentions by October 13, 2017. White testified at hearing that she provided a response "[t]hrough [her] union" but did not provide details beyond this vague assertion.

Here, the employer followed its policy in handling White's medical benefits. In fact, the district did more than required under its policy. Deputy superintendent Nielsen donated sick leave to White, and the employer attempted to find White a comparable position she could fill upon her return. However, White did not return or clearly communicate an intent to return. White's employee benefits were terminated in accordance with district-wide policy because she left work and moved to another state—not because of her union activity.

Conclusion

The employer did not deprive White of an ascertainable right, benefit, or status by failing to issue the second trespass letter or by failing to substantiate White's discrimination complaints. In addition, the union failed to establish that White's protected activity was causally related to the termination of her benefits. The union has not established a prima facie case of discrimination and its allegations are dismissed. Because the facts do not support a finding of discrimination, the derivative interference claim also fails.

ANALYSIS OF ISSUE 2 – INTERFERENCE

Applicable Legal Standards

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

Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *remedy aff'd*, *Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn. App. 809 (2000). An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

To prove an interference violation, the complainant must prove by a preponderance of the evidence that the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A. To meet its burden of proving interference, a complainant need not establish that an employee was engaged in protected activity. *State – Washington State Patrol*, Decision 11775-A (PSRA, 2014); *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). The complainant is not required to demonstrate that the employer intended to interfere or that it was motivated to interfere with an employee's protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee was actually coerced by the employer or that the employer had union animus. *Id.*

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 and cannot be based on the same set of facts as an independent interference cause of action. *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).

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.

The union's allegations that the employer engaged in discrimination and interference are based on the same set of facts as those set forth in its discrimination complaint. Thus, the dismissal of the discrimination complaints against the district must result in the dismissal of the interference claim.

Application of Standards

The union argues that Ball Cuthbertson interfered with White's exercise of statutory rights when Ball Cuthbertson: (1) attempted to retain control of the complaint process by speaking with White rather than McBee; (2) attempted to dissuade White from filing a formal complaint and instead participate in mediation with Parent C; (3) failed to issue a second, more restrictive trespass letter to Parent C; and (4) created and facilitated a hostile work environment. Each of these allegations will be addressed below.

(1) Ball Cuthbertson's Control of Complaint Process by Speaking Directly to White

The union contends that Ball Cuthbertson interfered when she spoke directly to White in conjunction with White's complaints. In the present case, the process of addressing the conflict between White and Parent C began before the union became involved. White first raised concerns to Ball Cuthbertson about Parent C after the April 4, 2017, incident. White did not notify Ball Cuthbertson that she was seeking union involvement until April 19, 2017, when she cc'd McBee on an e-mail to Ball Cuthbertson.

In response, on April 19, 2017, Ball Cuthbertson sent an e-mail to White, with a copy to McBee, summarizing the steps she and McManus had taken to make White feel more comfortable in her work environment. Ball Cuthbertson reiterated that if White wanted to limit Parent C's access to the cafeteria, she should file a written complaint that Ball Cuthbertson could forward to the legal department. Prior to that time, White declined to do so. Also on April 19, 2017, McBee sent an e-mail to Ball Cuthbertson, cc'ing several members of the employer's administration, stating,

> Thank you but, and with all due respect, Tiffany is under no obligation to submit written accounts or complaints to you in order to work in an environment free of harassment and intimidation. Further, she has requested union representation on this matter and we will need to be in attendance at any meetings regarding it.

Ball Cuthbertson met with McBee the following day. It was the first time Ball Cuthbertson ever met McBee. McBee notified Ball Cuthbertson that she had no supervisory responsibilities over White. After that meeting, Ball Cuthbertson routinely included McBee on correspondence relating to White's dispute with Parent C.

Once the union became involved in the dispute, it initiated its own campaign to restrict Parent C's access to the cafeteria by sending e-mails to Ball Cuthbertson and various members of the employer's administrative staff beginning on April 28, 2017, and continuing through the end of the school year. Sometimes the union included Ball Cuthbertson in its e-mail correspondence, sometimes it did not. As the union diligently represented White's interests, Ball Cuthbertson attempted to balance White's need to feel safe in her workplace with Parent C's right to support his student, and his student's needs.

The only evidence of Ball Cuthbertson contacting White directly after the union became involved was two times on May 8, 2017, to discuss Parent C's request to mediate the dispute. On that day, Ball Cuthbertson twice contacted White without the presence of her union representative about White's willingness to participate in mediation. There was no evidence that Ball Cuthbertson contacted White without her union present on any other date after the union requested to be included on any future discussions. Nothing in the record supports a claim that Ball Cuthbertson contacted White in an effort to thwart any rights associated with union activity. There is nothing to support even an inference that Ball Cuthbertson's actions constituted a threat of reprisal or force, or a promise of benefit, associated with union activity.

Ball Cuthbertson was attempting to balance two competing and legitimate rights. In the course of trying to resolve the dispute, Ball Cuthbertson believed that investigating the matter was essential to resolving it in the best interests of White and Parent C and his student. Even though the union was involved in the pursuit of a trespass letter, the district had not yet decided to issue one. The union's involvement at the time did not invoke the specter of discipline or negotiation; thus the

union's unheeded demand to be included in this particular interaction with White does not stand as the basis for its interference claim. White had no right to union representation in a meeting unrelated to discipline or negotiation. Neither White nor the union could reasonably expect that Ball Cuthbertson refrain from involvement in a dispute between a staff member and a parent at the school at which Ball Cuthbertson was the principal.

(2) Ball Cuthbertson's Attempt to Dissuade White from Filing a Formal Complaint and in Favor of Mediation

The union further bases its interference complaint on Ball Cuthbertson's alleged attempt to encourage White to engage in mediation and to dissuade White from filing a formal complaint. When Parent C rejected White's effort to voluntarily agree to restricted access to the cafeteria, Parent C suggested that the matter be resolved through mediation. Ball Cuthbertson approached White the same day to ask White if she would be willing to participate. There was no evidence to support the union's inference that there would be repercussions if she did not choose to mediate. It was presented as an option. White notified the union shortly after her conversation with White about the possibility of mediation.

Ball Cuthbertson diligently pursued various avenues for resolution of the dispute between White and Parent C. The union was pursuing just one: the issuance of a trespass letter. The employer was under no obligation to resolve the matter with a trespass letter. Nor was the union entitled to exclude the principal from trying to resolve the issue. Stanislaw Damas, the employer's executive director of labor and employee relations, testified as to the district's policy on trespass letters:

> [T]he issuance of the letter regarding what we refer to as 'trespass' letters involves a collection of legal and educational and policy considerations. So the legal office is involved, the instructional office gets involved, the principal is part of the instructional process. And my general view is that all voices should be considered.
>
> And it's a delicate matter to balance competing interests in situations like this.

Although the union was involved in the effort to maintain a safe workplace for its employee, the union was not entitled to dictate who would make the decisions for the employer. Neither White nor the union had a right to the issuance of a trespass letter. Rather, and as Ball Cuthbertson

acknowledged throughout the course of the dispute, White had the right to a safe workplace. Ball Cuthbertson was attempting to balance White's interests with Parent C's and his child's interests. The union suggests that because the principal was not White's supervisor, the principal should not have been involved in the decision about whether to issue a trespass letter. Nevertheless, the union persisted in contacting various members of the employer's administrative staff, including its in-house attorneys, to demand that the letter be issued. None of the in-house attorneys were White's supervisors. Instead, the administrators and attorneys were working in conjunction with Ball Cuthbertson, who was engaging in a good faith effort to find a lasting solution to White's feeling she was "unsafe" in her workplace. White could not have reasonably perceived that Ball Cuthbertson's continued involvement in resolving White's dispute with Parent C would cease once she obtained union representation. Nor could White reasonably perceive that Ball Cuthbertson would resolve the dispute only as the union dictated, by issuing a trespass letter. The union failed to meet its burden of proof, by a preponderance of the evidence, that the offer of mediation interfered with a protected employee right. Thus, the union's interference claim fails.

(3) Failure to Issue a Second, More Restrictive Letter

A finding of independent interference based on the same set of facts asserted in another cause of action is prohibited by Commission precedent. The union's claim that the district interfered by failure to issue a second, more restrictive letter was based on the same set of facts alleged in the union's discrimination complaint. Thus, the union's interference claims based on failure to issue a second, more restrictive letter fails.

(4) Facilitating a Hostile Work Environment

A finding of independent interference based on the same set of facts asserted in another cause of action is prohibited by Commission precedent. The union's claim that the district interfered by facilitating a hostile work environment was based on the same set of facts alleged in the union's discrimination complaint. Thus, the union's interference claims based on facilitating a hostile work environment also fails.

Conclusion

The union has failed to prove by a preponderance of the evidence that Ball Cuthbertson's conduct interfered with White's rights. Its complaint for independent interference is dismissed.

ANALYSIS OF ISSUE 3 – REFUSAL TO BARGAIN

The preliminary ruling found a potential cause of action for refusal to bargain. Although the union did not address the issue of the district's failure to respond to information requests in its post-hearing brief, it asserted in its complaint that the employer failed to respond to its requests, and it presented evidence at the hearing in support of its refusal to bargain claim.

Applicable Legal Standards

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4); *Island County*, Decision 11946-A (PECB, 2014).

In evaluating information requests, the Commission considers whether the requested information appears reasonably necessary for the performance of the union's function as bargaining representative. *City of Bellevue*, Decision 4324-A (PECB, 1994). Failure to provide relevant information upon request constitutes an unfair labor practice for refusal to bargain. *University of Washington*, Decision 11414-A (PSRA, 2013).

Communication is essential to fulfilling the obligation to provide information. Upon receiving a relevant information request, the receiving party must provide the requested information or engage in negotiations about the information request. *City of Yakima*, Decision 10270-B (PECB, 2011); *Seattle School District*, Decision 9628-A (PECB, 2008); *Port of Seattle*, Decision 7000-A (PECB, 2000). If the party receiving the information request believes the information request is not relevant or unclear, the receiving party has a duty to convey its concerns and questions to the requesting party in a timely fashion. *Pasco School District*, Decision 5384-A (PECB, 1996).

The obligation to communicate about the information request continues once the responding party begins gathering responsive information. The responding party must communicate with the

requesting party to ensure that the information being gathered is the type of information that has been requested. *Kitsap County*, Decision 9326-B (PECB, 2010), *citing City of Seattle*, Decision 10249 (PECB, 2008), *remedy aff'd*, Decision 10249-A (PECB, 2009).

The requirement to communicate continues even after the responding party provides information to the requesting party. After receiving a response, if the requesting party does not believe the information provided sufficiently responds to the original request, the requesting party has a duty to contact the responding party and engage in meaningful discussions about what type of information the requestor is seeking. *Kitsap County*, Decision 9326-B. Delay in providing requested information can constitute an unfair labor practice. *Fort Vancouver Regional Library (Washington Public Employees Association)*, Decision 2350-C (PECB, 1988). One factor to be considered when determining whether a delay constitutes an unfair labor practice is the preparation required for the response. *City of Seattle*, Decision 10249, *remedy aff'd*, Decision 10249-A. If the response will be delayed due to the time required to prepare the response, such a delay must be communicated.

The duty to provide information does not compel a party to create records that do not exist; however, a party does have an obligation to make a reasonable good faith effort to locate the information requested. *Kitsap County*, Decision 9326-B, *citing Seattle School District*, Decision 9628-A.

Application of Standards

The union made no fewer than 14 requests for information from the employer that are relevant to this dispute, some with multiple parts. The employer responded to each request, either with a request for clarification, or by providing responsive documents to the union. Because the union did not file any post-hearing brief on this topic, I am addressing what seem to be the most salient of its claims that the district failed to respond to the union's request for information.

May 11, 2017

McBee requested the following on May 11, 2017:

> All reports, statements, correspondence, messages, letters, photos etc to or from Ms. Ball Cuthbertson concerning Dave Westberg, Tiffany White, Mike McBee, or Muir parent [Parent C]. This should include but not be limited to emails and text messages. (emphases added).

Senior Human Resources Analyst Colleen Carlson asked for clarifying information on May 12, 2017, and May 19, 2017. Carlson sent McBee responsive documents on May 22, 2017.

On May 22, 2017, McBee replied to Carlson by expanding his request to include, among other things, "all correspondence to or from District personnel regarding [the White-Parent C matter] from April 1 through today." Carlson acknowledged McBee's request on May 23, 2017, and sent him responsive documents on June 1, 2017.

At the hearing, McBee testified that he was not told who advised Ball Cuthbertson to "file a report" against Westberg. On May 22, 2017, Carlson e-mailed McBee stating that there were "no documents located regarding Ms. Ball Cuthbertson filing a report with [human resources]." McBee was required to clarify his concerns if he felt the employer's documents were nonresponsive, but he did not do so.

The union has not met its burden of establishing that the employer failed to provide responsive information to its May 11, 2017, information request.

June 8, 2017

Westberg requested the following on June 8, 2017:

> Documents and records going to the leave status of all Muir employees who were released from duty on Friday, May 26th in order to attend the TRO hearing in Superior Court . . . . These should include IA Jackson, the Office Assistant and the second grade teacher as well as other staff members released from duty. We presume these were all approved by the principal at Muir as they seem to have acted in concert.

Carlson acknowledged Westberg's request on June 9, 2017. On June 16, 2017, Carlson e-mailed Westberg stating that "no data was collected on who attended the May 26th, TRO hearing,

therefore, no documents were located." On June 16, 2017, Westberg responded, "So, no one records the leave status of building based staff?" Carlson replied on June 19, 2017:

> I searched for a list of attendees at the TRO hearing. Since your last reply on Friday, June 16th I pieced together, from a few sources, who they think attended the hearing.
>
> So far, my list contains the following:
>
> > [Gray, Jackson, Janak, and two unknown names].
>
> Can you provide me the names of the two unknown or others who attended that are not listed above?

On June 19, 2017, Westberg replied, "Office Assistant. All on approved leave, we presume. We can subpoena them later but feel someone should track these things even when the District has a strategic plan."

On June 22, 2017, Carlson responded that John Muir had two office staff, Sonia Larson and Erika Irwin. Carlson informed Westberg that she reviewed leave records for the five above-named individuals and provided him a description of each one's leave status for the date of May 26, 2017. No leave time was recorded for Jackson, Janak, or Irwin.

On June 22, 2017, Westberg responded by asking, in relevant part, "we wonder what the consequences are for building leaders who release staff for such off campus activities without recording any absences?" The employer did not respond.

The district did not keep a list of people who attended the hearing. Carlson, who did not readily know which employees attended the hearing, made inquiries to Westberg and others to determine the scope of the request. From the information gathered she compiled a list of five employees she believed were in attendance, only three of whom were identified.

Carlson asked Westberg if he knew the names of these two unidentified employees. Westberg responded by stating "Office Assistant," and Carlson replied that John Muir had two office staff, Sonia Larson and Erika Irwin. Having identified all five employees believed to be at the hearing, Carlson reviewed leave records for each employee. Carlson provided this information to

Westberg, who did not dispute the sufficiency of the response, Westberg was required to clarify his concerns if he felt the employer's documents were nonresponsive, but he did not do so.

Here, Westberg raised concerns about the initial production of documents, and the employer responded by seeking clarifying information and making additional inquiries, and by providing responsive documents. The union has not met its burden of establishing that the employer failed to provide responsive information to its June 8, 2017, information request.

June 12, 2017

Westberg requested the following on June 12, 2017:

> Records of all complaints (especially via emails but including texts and telephone records) made to Deputy Superintendent Stephen Nielsen, Muir Principal Brenda Ball Cuthbertson and/or any other administrative employee regarding Ms. White's performance of her duties at Muir during the last 4 years, up to and including the remainder of this calendar month.

Carlson acknowledged the request on June 12, 2017, and requested clarifying information on June 21, 2017. Westberg responded on June 23, 2017, stating, "We never have received any of the documents [Nielsen] told me that he had received over the weekend of [June 9 through June 11, 2017] although we do not seek to limit the search any further." Carlson e-mailed Westberg on June 29, 2017, forwarding a responsive document from Nielsen. The tone of Westberg's response to Carlson was sarcastic and incredulous. Westberg raised concerns about the initial production of documents, and the employer responded by seeking clarifying information, making additional inquiries, and by providing responsive documents.

July 6, 2017

McBee requested the following on July 6, 2017:

> All reports, draft reports, comments, recommendations, interview notes, recordings etc made by the investigator as well as any and all edits drafts etc submitted by District officials related to HIB complaints filed by Tiffany White.
>
> All communications between administrators concerning Ms. White's complaint (and those involved) that have not already been provided.

McBee requested records pertaining to White's HIB complaints and investigations. The employer provided responsive documents on July 14, 2017, and August 1, 2017.

At the hearing, Carlson testified that she identified responsive documents by requesting materials from staff and by filtering records through search terms. Search terms included "HIB," "White," and the names of key administrative employees, among others. Further, Carlson reviewed search results that were performed in connection with prior information requests, as many of these searches had overlapping search criteria with the current one.

Here, McBee did not express concern with the validity or scope of Carlson's search after receiving responsive documents on July 14, 2017, and August 1, 2017. The employer provided responsive documents.

Conclusion

The burden is on the requesting party to engage in meaningful discussion if that party believes the documents produced are not sufficiently responsive. Here, with respect to each document request, Westberg or McBee raised concerns about the initial production of documents, and the employer responded by seeking clarifying information and making additional inquiries. The union has not met its burden of establishing that the employer failed to provide responsive information to its information requests.

The employer used reasonable search methods to identify and produce records responsive to the union's requests. Further, the employer engaged the union in meaningful dialogue to clarify and understand each request. The employer produced documents in a timely fashion. The union has not met its burden of establishing the employer failed to provide responsive records. The union's allegations are dismissed.

FINDINGS OF FACT

1. The Seattle School District operates the John Muir Elementary School (John Muir).

2. The International Union of Operating Engineers, Local 609 (union) is the exclusive bargaining representative of four bargaining units with the employer, including a unit of food service workers relevant to this matter.

3. This dispute centers around events that occurred in the 2016–17 school year at John Muir, and all events occurred during that time period unless otherwise specified.

4. Tiffany White, a member of the union, was the kitchen manager. White's duties included, among other things, serving food to students and acting as a cashier receiving payments via student-entered personal identification numbers (PINs). White worked in various positions within child nutrition services during her six-year tenure with the employer. White became the kitchen manager when she transferred to John Muir at the start of the 2013–2014 school year. White reported solely to nutrition services personnel. White's direct supervisor was child nutrition services supervisor, Billie Curtiss. Teresa Fields, director of nutrition services, was Curtiss's supervisor. White is Caucasian.

5. Principal Brenda Ball Cuthbertson was in her third year as principal at John Muir. Ball Cuthbertson was at no time in White's chain of supervision.

6. At all relevant times, Romana McManus was the assistant principal at John Muir. McManus was at no time in White's chain of supervision. McManus was typically present during lunchtime to supervise students.

7. Parent C was the guardian of a second grade student who attended John Muir (Parent C's child). Parent C's child routinely ate breakfast in the cafeteria, and Parent C regularly accompanied his child. White and Parent C commonly saw one another during the breakfast period. Parent C's child had some behavioral challenges, and Parent C often accompanied him to school to provide encouragement and support for the upcoming school day. Parent C and his child are African American.

8. In September 2016 Parent C and his child approached White at the cashier station to pay for breakfast. Parent C and his child arrived somewhat late that day, and White told the

child he needed to use a paper tray instead of the plastic one he was already holding. White then reached out to exchange the child's plastic tray with a paper one, which prompted Parent C to intervene by telling White she was being "very rude" and that she shouldn't "take something out of a child's hands."

9. McManus was in the cafeteria helping to prepare for a school assembly at the time of the incident. McManus made efforts to diffuse the situation and later reported the event to Ball Cuthbertson.

10. White and Parent C had a second interaction in March 2017. It began when White observed a group of students, including Parent C's child, wearing backpacks while standing in line for breakfast. White told the students to remove them. White later testified she believed the backpack rule existed, in part, to prevent students from using their backpacks to take extra servings of food.

11. Parent C approached White, stating that his child "was not going to be accused of stealing because of the color of his skin." This led to further argument between White and Parent C, including White's allegation that Parent C called her "racist." In a subsequent investigative report, Parent C denied using that word, though he acknowledged that he may have commented on how White treated "students of color" for purposes of raising issues of diversity awareness.

12. On April 4, 2017, teacher Cristina Evangelista, who spent three mornings per week in the cafeteria, heard White tell Parent C that his child had recently cussed at White. Parent C responded that if White did not like children she needed to find another job and that the children hated her. Evangelista described Parent C's behavior as loud and inappropriate. Evangelista described White's response as upset, angry, and accusatory. While the two were arguing loudly, Evangelista left to seek the assistance of McManus. Evangelista described White's demeanor toward others, generally, as "brusque."

13. The next day, April 5, Ball Cuthbertson met with Parent C to discuss the escalating conflict between him and White. Ball Cuthbertson asked Parent C to voluntarily stay out of the cafeteria. Parent C declined, but agreed not to interact with White.

14. Ball Cuthbertson also met with White on April 5. White told Ball Cuthbertson that Parent C made her feel uncomfortable and asked that Parent C be restricted from entering the cafeteria.

15. Ball Cuthbertson advised White that, typically, the district's first response would be to issue a warning letter. Ball Cuthbertson suggested that White submit a written statement for review by the employer's legal department. The legal department could then determine next steps, including the possibility of issuing Parent C a trespass letter (i.e., a letter restricting Parent C from part or all of the employer's premises).

16. Ball Cuthbertson also arranged for White to carry a two-way radio in the event she needed assistance at work and arranged for at least two staff members to be in the cafeteria during the breakfast meal. Ball Cuthbertson also spoke to McManus almost daily to discuss the situation. Last, Ball Cuthbertson spoke to Parent C asking him to "stand down."

17. In an e-mail dated April 6, 2017, from White to her supervisor, White stated that she was told the school district was "too scared to do anything because of the whole 'race' issue" and that the parent "would take it to the 'top' and go all the way with it." Ball Cuthbertson denies making these comments. Upon later review of the e-mail exchange, Ball Cuthbertson responded to the comments alleged by White in her e-mail by setting forth the actions Ball Cuthbertson had taken to help make White feel safe. Ball Cuthbertson also asked White who made the remarks about race. Ball Cuthbertson's query confirms that she is not the person who made the remarks. White's testimony on this issue was vague and unreliable. White first testified on direct that McManus made the remarks during a phone call that White made to McManus to discuss the interaction with Parent C. White's attorney asked her whether she was speaking about McManus or Ball Cuthbertson, and White clarified that she was speaking about Ball Cuthbertson.

Ball Cuthbertson purportedly made that remark while meeting with White in Ball Cuthbertson's office.

18. On April 19, 2017, White alleged that Parent C used his cellular phone to record her inside the cafeteria. White e-mailed Ball Cuthbertson, McManus, and union representative Mike McBee recounting her concern. This was the first time White invoked union representation. Ball Cuthbertson e-mailed back, stating, "[I]f this parent[']s presence in the cafeteria is making you uncomfortable, please email us a written account of what happened at your earliest convenience and we'll work with the legal department to see what we can do."

19. McBee replied to Ball Cuthbertson's e-mail, stating that White was "under no obligation to submit written accounts or complaints" to work in an environment free of harassment and intimidation. McBee further stated the union would be representing White on the matter and would need to be present at any related meetings. Ball Cuthbertson met with McBee the following day.

20. On April 28, 2017, White hand delivered a "discrimination" complaint against Parent C to Ball Cuthbertson, more than three weeks after Ball Cuthbertson requested she do so. White alleged discrimination on the basis of race, retaliation, and bullying by Parent C. White attached a written statement to the complaint describing details of their conflict.

21. Ball Cuthbertson forwarded White's complaint to Ronald Boy, an attorney in the employer's legal department. Ball Cuthbertson requested that Boy review the statement "to see if we are able to restrict this parent's access and let me know what other steps we should take in order to provide a safe working environment." Ball Cuthbertson copied McBee on the e-mail.

22. McBee then e-mailed Noel Treat, another attorney in the employer's legal department, requesting that Parent C be trespassed from the lunchroom. Treat responded, "Thanks for bringing this to our attention. We will look at issuing a letter. I've asked [Boy] to follow up."

23. On May 4, 2017, White and Parent C had another negative interaction. White failed to greet Parent C's child when the child approached her to pay for breakfast. In White's presence, Parent C told his child to say "good morning" to White even if White did not say "good morning" in return. Parent C then said that White was being rude. White testified that this interaction made her feel nervous. The incident precipitated several e-mails from union representatives to Ball Cuthbertson, Pegi McEvoy, and other district administrators asking about the status of the trespass letter.

24. On May 8, 2017, Ball Cuthbertson spoke to Parent C regarding the conflict with White. Ball Cuthbertson asked Parent C if he would be willing to voluntarily stop going to the cafeteria. Parent C declined and asked about the possibility of mediation. The same day, Ball Cuthbertson approached White in the cafeteria, without White's union representative, and asked White if she would be willing to participate in mediation. At first White agreed, as long as she could be paid for her time. Shortly thereafter, White changed her mind and withdrew her consent. Ball Cuthbertson contacted White just two times, on the same day. Ball Cuthbertson notified the union via e-mail on May 8, 2017, of her interaction with White on this topic. White denies that she ever agreed to mediation and claims that Ball Cuthbertson just "yelled at [her] about it."

25. Ball Cuthbertson's contemporaneous memorialization of the interactions by e-mail supports her testimony that White initially agreed to mediation. In her e-mail to the union, which was cc'd to White, Ball Cuthbertson specifically asked White to confirm White's position on mediation.

26. McBee responded to Ball Cuthbertson's e-mail by sending two e-mails. The first e-mail was sent to Treat and stated, "As discussed. Please cease the direct dealing." Ball Cuthbertson was not included on that e-mail. McBee's second e-mail was sent to school district administrators, including Ball Cuthbertson, stating: "I will reiterate that Tiffany has requested representation on this matter. We do not see mediation as a viable option."

27. Ball Cuthbertson spoke with Parent C to discuss the incident that occurred on May 4, 2017. Ball Cuthbertson told Parent C he had violated their voluntary agreement to not interact White and that a trespass letter restricting his access to the cafeteria was being considered by the legal department. The legal department drafted the letter on May 8, 2017, and Ball Cuthbertson called Parent C on May 9, 2017, to inform him it would be issued. Ball Cuthbertson issued Parent C the letter on May 10, 2017.

28. On May 11, 2017, Parent C and his child entered the rear door of the cafeteria on a rainy day. Parent C stood inside the entryway for two to five minutes. The entryway was roughly 20–60 feet from White's location at the time. White reported that this made her feel "very scared" and "uncomfortable."

29. White left the premises with Westberg. Westberg accompanied White to the Washington State Department of Labor & Industries to file a workplace safety complaint. The Department of Labor & Industries suggested White report the alleged harassment to the police, so White and Westberg next went there. Finally, the police suggested they file a motion for a protective order, so White and Westberg went to court to do so. The court issued the Temporary Protective Order (TRO), which ordered Parent C to stay 200 feet away from White.

30. In response to the May 11 incident, Ball Cuthbertson consulted with the employer's legal department and spoke with Parent C by phone later that day. Ball Cuthbertson told Parent C that his presence at the cafeteria entryway was a violation of the terms of his trespass letter and told him to expect a second, more restrictive trespass letter.

31. The employer's legal department drafted a second trespass letter that would have restricted Parent C from the entire school campus. However, Ball Cuthbertson never issued it. In an e-mail sent May 12, 2017, to Treat, Boy, and others, Ball Cuthbertson stated, "After talking with [Parent C] I have decided **not** to send the letter restricting him from campus." Ball Cuthbertson explained:

> Yesterday [Parent C] was having trouble getting his nephew to go into the cafeteria on his own. He reports that he opened the backdoor, stepped into the doorway with [the child] and gave him encouragements for the day (be respectful, do your best, etc.). He report[ed] that he kept the door open the entire time and did not see this as entering the cafeteria. The back door is far away from the area where Ms. White works.

32. Ball Cuthbertson stated that restricting Parent C's access to campus would be a disproportionate response and that she clarified to Parent C that going forward he could not enter even the cafeteria doorway. The terms of the first trespass letter remained in effect, and White continued to have access to a two-way radio.

33. On May 9, 2017, Westberg held an informational picketing event outside the school at school dismissal time in response to Parent C's presence in the cafeteria earlier that morning. At the event, the union communicated its belief that the employer failed to provide White with a safe working environment. McBee held a similar event on May 11, 2017. According to Ball Cuthbertson, picketing occurred on "a couple of days." McBee encountered Ball Cuthbertson while he was picketing. McBee testified that Ball Cuthbertson told McBee that she was planning to file a complaint against Westberg. McBee did not elaborate on his assertion. Ball Cuthbertson denies making that statement.

34. One week after the picketing event, Ball Cuthbertson received three complaints about White: from kindergarten teacher Lizzie Jackson, kindergarten teacher Ramona Bardwell Isaac, and district volunteer Julia Janak. Jackson claimed that White, in violation of policy, was telling students to ask their parents for money to pay meal balances. Bardwell Isaac claimed that White spoke to her and others in an "unprofessional" and "hostile manner." Janak claimed that White failed to keep the cafeteria tables clean and would not take responsibility for doing so.

35. On May 19, 2017, Ball Cuthbertson forwarded these complaints to White's second-line supervisor, Fields. Ball Cuthbertson's e-mail to Fields described the behavior in the complaints as "absolutely unacceptable" and asked about "corrective action" for White.

36. Ball Cuthbertson e-mailed Fields two additional complaints, from first grade teacher Anne Campbell, sent to Ball Cuthbertson on May 24, 2017, and assistant Tanya Salmi, sent to Ball Cuthbertson on May 30, 2017. These complaints alleged that White failed to prepare lunches for students on a field trip and that White became "loud, combative, and angry." Ball Cuthbertson asked Fields to "talk with Ms. White about being aware of her tone when speaking to adults."

37. On May 18, 2017, teacher Bardwell Isaac was in the cafeteria with a student who was having a tantrum. Bardwell Isaac placed food on a tray and asked White to enter the student's PIN. White refused, citing policy, and advised Bardwell Isaac that she could not take the tray without paying for it.

38. On direct examination, White first testified: "I said, you can't take the tray of food with you. She [Bardwell Isaac] turned around to me and slammed the tray of food into my chest a couple times." White then restated her testimony: "I went to grab the tray from her [Bardwell Isaac]. . . . instead she started hitting me with it. . . . she slammed the tray into my arm and then I had turned to face her, after she hit me with the tray on my arm, and started slamming it into my chest." White claimed that she received bruises on her chest and arm as the result of this interaction.

39. There were at least six adult witnesses who were present in the cafeteria at the time of this interaction. They were interviewed in conjunction with the district's investigation of the HIB complaint against Bardwell Isaac. None of those present witnessed Bardwell Isaac's alleged assault of White. White's inconsistencies render her testimony unreliable.

40. On May 26, 2017, with her union's support, White sought an extension of the protective order against Parent C. The court denied the requested extension on May 26, 2017. The hearing on the extension of the order was attended by Boy and several staff members, including some who testified in the proceedings. According to Westberg's testimony, White was distraught and fearful when the permanent protective order was denied.

41. Shortly after the May 26, 2017, hearing, Westberg entered Parent C's place of work (a coffee shop) and took photos of him. Parent C, who had never met Westberg prior to this incident, approached Westberg to question him about taking the photos. Westberg told him, "I wanted to make sure we didn't have any racists working around here." Parent C did not respond to this comment.

42. On May 19, 2017, White filed a second HIB complaint under the employer's internal complaint procedures. This complaint was for discrimination based on "Economic Status" and it named two individuals: Ball Cuthbertson and Bardwell Isaac. As such, it was processed by the district as two separate complaints. Specifically, White contended that Bardwell Isaac repeatedly shoved a tray into White's chest during a disagreement in the cafeteria and that Ball Cuthbertson failed to respond to the matter or talk with White after learning about it. The district assigned an investigator to review the complaints.

43. The employer assigned human resources investigator Brett Rogers, a former Seattle police lieutenant, to investigate these two complaints in addition to the complaint filed on April 28, 2017. Rogers interviewed several people and reviewed written statements and documents in investigating the complaints. Rogers issued investigative reports for all three complaints on June 27, 2017. In the written reports, Rogers found that White's claims of discrimination, harassment, retaliation, and bullying were unsubstantiated.

44. White was notified of the results of the investigations on July 3, 2017, and appealed the outcomes to the Seattle School Board of Directors (SSBD). On July 26, 2017, the SSBD held a hearing. On August 7, 2017, the SSBD notified White that her appeal was denied.

45. On August 28, 2017, White appealed the SSBD's decision to the Office of Superintendent of Public Instruction (OSPI). On November 9, 2017, OSPI notified White that it would not reopen her complaint for investigation. Its letter to White stated, in part, "OSPI has determined that the [employer] investigated the allegations in your complaint and reached a decision using legal standards comparable to those OSPI would apply."

46. White began taking medical-related leave on May 26, 2017. White exhausted her paid leave on June 27, 2017, and requested that she be placed on unpaid employee health leave.

47. On July 6, 2017, leave analyst Corinne Ross notified White by letter that her request for employee health leave was approved. Ross's letter informed White of the following: (1) White's position would be held for her return through September 23, 2017; (2) after September 23, 2017, White would be considered for the next available and comparable position, (3) White's benefits were scheduled to terminate on September 30, 2017, and (4) paid leave would be used to cover her absence until exhausted, at which time unpaid leave would apply.

48. On October 5, 2017, manager of leaves and workers' compensation Lisa Garberg sent White a letter asking White to clarify her intentions about returning to work. The letter notified White that her position would be released on October 13, 2017, and that her employee benefits had terminated on September 30, 2017. Garberg requested that White contact her by October 13, 2017, if she wanted to return to work. Garberg attached copies of relevant leave policies to her letter to White. White did not return to work.

49. McBee requested the following on May 11, 2017:

> All reports, statements, correspondence, messages, letters, photos etc to or from Ms. Ball Cuthbertson concerning Dave Westberg, Tiffany White, Mike McBee, or Muir parent [Parent C]. This should include but not be limited to emails and text messages.

50. Senior Human Resources Analyst Colleen Carlson asked for clarifying information on May 12, 2017, and May 19, 2017. Carlson sent McBee responsive documents on May 22, 2017.

51. On May 22, 2017, McBee replied to Carlson by expanding his request to include, among other things, "all correspondence to or from District personnel regarding [the White-Parent C matter] from April 1 through today." Carlson acknowledged McBee's request on May 23, 2017, and sent him responsive documents on June 1, 2017.

52. At the hearing, McBee testified that he was not told who advised Ball Cuthbertson to "file a report" against Westberg. On May 22, 2017, Carlson e-mailed McBee stating that there were "no documents located regarding Ms. Ball Cuthbertson filing a report with [human resources]." McBee was required to clarify his concerns if he felt the employer's documents were nonresponsive, but he did not do so.

53. Westberg requested the following on June 8, 2017:

> Documents and records going to the leave status of all Muir employees who were released from duty on Friday, May 26th in order to attend the TRO hearing in Superior Court . . . . These should include IA Jackson, the Office Assistant and the second grade teacher as well as other staff members released from duty. We presume these were all approved by the principal at Muir as they seem to have acted in concert.

54. Carlson acknowledged Westberg's request on June 9, 2017. On June 16, 2017, Carlson e-mailed Westberg stating that "no data was collected on who attended the May 26th, TRO hearing, therefore, no documents were located." On June 16, 2017, Westberg responded, "So, no one records the leave status of building based staff?" Carlson replied on June 19, 2017:

> I searched for a list of attendees at the TRO hearing. Since your last reply on Friday, June 16th I pieced together, from a few sources, who they think attended the hearing.
>
> So far, my list contains the following:
>
> > [Gray, Jackson, Janak, and two unknown names].
>
> Can you provide me the names of the two unknown or others who attended that are not listed above?

55. On June 19, 2017, Westberg replied, "Office Assistant. All on approved leave, we presume. We can subpoena them later but feel someone should track these things even when the District has a strategic plan."

56. On June 22, 2017, Carlson responded that John Muir had two office staff, Sonia Larson and Erika Irwin. Carlson informed Westberg that she reviewed leave records for the five above-named individuals and provided him a description of each one's leave status for the date of May 26, 2017. No leave time was recorded for Jackson, Janak, or Irwin.

57. On June 22, 2017, Westberg responded by asking, in relevant part, "we wonder what the consequences are for building leaders who release staff for such off campus activities without recording any absences?" The employer did not respond.

58. The district did not keep a list of people who attended the hearing. Carlson, who did not readily know which employees attended the hearing, made inquiries to Westberg and others to determine the scope of the request. From the information gathered she compiled a list of five employees she believed were in attendance, only three of whom were identified.

59. Carlson asked Westberg if he knew the names of these two unidentified employees. Westberg responded by stating "Office Assistant," and Carlson replied that John Muir had two office staff, Sonia Larson and Erika Irwin. Having identified all five employees believed to be at the hearing, Carlson reviewed leave records for each employee. Carlson provided this information to Westberg, who did not dispute the sufficiency of the response, Westberg was required to clarify his concerns if he felt the employer's documents were nonresponsive, but he did not do so.

60. Westberg requested the following on June 12, 2017:

> Records of all complaints (especially via emails but including texts and telephone records) made to Deputy Superintendent Stephen Nielsen, Muir Principal Brenda Ball Cuthbertson and/or any other administrative employee regarding Ms. White's performance of her duties at Muir during the last 4 years, up to and including the remainder of this calendar month.

61. Carlson acknowledged the request on June 12, 2017, and requested clarifying information on June 21, 2017. Westberg responded on June 23, 2017, stating, "We never have received any of the documents [Nielsen] told me that he had received over the weekend of [June 9

through June 11, 2017] although we do not seek to limit the search any further." Carlson e-mailed Westberg on June 29, 2017, forwarding a responsive document from Nielsen. The tone of Westberg's response to Carlson was sarcastic and incredulous. Westberg raised concerns about the initial production of documents, and the employer responded by seeking clarifying information, making additional inquiries, and by providing responsive documents.

62. McBee requested the following on July 6, 2017:

> All reports, draft reports, comments, recommendations, interview notes, recordings etc made by the investigator as well as any and all edits drafts etc submitted by District officials related to HIB complaints filed by Tiffany White.
>
> All communications between administrators concerning Ms. White's complaint (and those involved) that have not already been provided.

63. McBee requested records pertaining to White's HIB complaints and investigations. The employer provided responsive documents on July 14, 2017, and August 1, 2017.

64. At the hearing, Carlson testified that she identified responsive documents by requesting materials from staff and by filtering records through search terms. Search terms included "HIB," "White," and the names of key administrative employees, among others. Further, Carlson reviewed search results that were performed in connection with prior information requests, as many of these searches had overlapping search criteria with the current one.

65. McBee did not express concern with the validity or scope of Carlson's search after receiving responsive documents on July 14, 2017, and August 1, 2017. The employer provided responsive documents.

CONCLUSIONS OF LAW

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

2. As described in findings of fact 4, 5, 7, 9 through 12, 20, 27, 28, 30 through 32, and 42 through 48, the union failed to sustain its burden of proof to establish that the Seattle School District discriminated against (or derivatively interfered with) the union in violation of RCW 41.56.140(1).

3. As described in findings of fact 4, 5, 7, 9 through 28, and 30 through 40, the union failed to sustain its burden of proof to establish that the Seattle School District unlawfully interfered with employee rights in violation of RCW 41.56.140.

4. As described in findings of fact 49 through 65, the union failed to sustain its burden of proof to establish that the Seattle School District failed to bargain with the union in violation of RCW 41.56.140(4).

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 12th day of June, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, 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 06/12/2019

DECISION 13018 - 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 129589-U-17

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