STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JOHN F. PRESTON, Complainant, vs. PACIFIC TRANSIT SYSTEM, Respondent.	CASE 132142-U-19 DECISION 13274 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
JOHN F. PRESTON, Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 1765, Respondent.	CASE 132374-U-19 DECISION 13275 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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The complainant, John Preston, filed a complaint against his employer, Pacific Transit System, on September 26, 2019. On December 6, 2019, an amended complaint was filed against the employer. Included within that complaint was a new set of allegations against the union, Amalgamated Transit Union, Local 1765. A preliminary ruling was issued on December 24, 2019, and a separate case was opened against the union. By way of the December 24 preliminary ruling, an Unfair Labor Practice Administrator consolidated the two cases. The union filed its answer on January 10, 2020, and the employer filed its answer on January 14, 2020. A consolidated hearing

was conducted by videoconference on August 3–5, 2020, and on September 24, 2020, in front of Examiner Christopher Casillas. The parties filed post-hearing briefs by October 30, 2020, to close the record.

ISSUES

The issues as framed by the preliminary ruling involve:

> Employer discrimination in violation of RCW 41.56.140(1) [and if so derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by its verbal discipline of John Preston in reprisal for union activities protected by chapter 41.56 RCW.
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> Union interference with employee rights in violation of RCW 41.56.150(1), within six months of the date the amended complaint was filed, by breach of its duty of fair representation related to the union failing to provide representation of and failing to respond to John Preston related to verbal disciplinary action and an investigation.

Preston, the complainant, has not carried his burden of proof to establish that his verbal warning of April 20, 2019, was the result of unlawful discrimination by Pacific Transit System in violation of RCW 41.56.140(1). As a union steward and member of the union's negotiation committee, Preston had been involved in union activity at the time the verbal warning was issued. But the record lacks evidence that his warning represented any kind of deprivation of right, benefit, or status, and the employer had a nondiscriminatory reason for issuing the warning. The union's efforts to seek removal of the verbal warning from Preston's file and its actions to represent Preston at a subsequent investigatory interview did not breach its duty of fair representation to Preston. As such, there was no union interference in violation of RCW 41.56.150(1). The claims against the employer and the union are dismissed.

BACKGROUND

Pacific Transit System (employer) is a rural public transportation system that provides regional bus service to the residents of Pacific County, Washington. Some bus service extends outside of

Pacific County, including at least one route that crosses state lines into the area of Astoria, Oregon. The Coach Operators, who drive buses for the employer, are in a bargaining unit represented by the Amalgamated Transit Union, Local 1765 (union). The employer and union have historically been parties to a collective bargaining agreement. The agreement in effect at the time of the events giving rise to the complaints herein was for a period of January 1, 2016, through December 31, 2018.

Preston is a coach operator who has been employed by Pacific Transit System for approximately four and one-half years as of the time of the hearing. During his tenure at Pacific Transit System, Preston has regularly driven route 204, which is a round trip that leaves from and returns to Ilwaco, Washington, after crossing over to Astoria, Oregon, via the Metro Bridge. While employed with Pacific Transit System, Preston has held some official positions with the union. Preston served as a union shop steward from approximately November 2018 through June 2019. While serving as a shop steward, Preston also participated in contract negotiations as part of the union's team. Preston testified that, as part of his role with the union, he advocated for workplace safety issues and for improvements to employee breaks.

Preston testified that his role as a union representative and advocate was a source of tension with the employer, particularly Director Rich Evans. Generally, Preston cited three areas of activity that he believed strained his relationship with Evans: (1) his participation in contract negotiations; (2) a Labor & Industry complaint that was filed; and (3) his advocation for employee safety and breaks. Although there is evidence to support the fact that Preston was engaged in these activities, the evidence that these activities created tension with the employer or precipitated adverse actions against Preston is scant. Preston's recollection of when bargaining meetings occurred, who was present, and what was discussed is, at best, vague. Others who witnessed some of these interactions did not testify to observing anything unusual in these interactions or any level of tension or hostility stemming from them. Bruce Weilepp, the local shop steward, testified that Preston's role in contract negotiations was "minimal." Evans testified that he did not perceive Preston's involvement in contract negotiations or his advocacy for union members and issues to be at all

problematic, or even particularly memorable. Evans also testified that he did not even know who had filed a complaint with Labor & Industries.

On March 11, 2019, Preston was driving his regular route 204. During a scheduled stop at the Astoria bus station, several passengers aboard the bus reportedly began verbally harassing another passenger on the bus, including the use of a racial slur toward this individual, Passenger A.[1] Preston issued a verbal warning to the offending passengers, which temporarily brought an end to the harassing behavior. Preston reported that the passengers appeared to be intoxicated. After the behavior ceased, Preston resumed the return trip to Ilwaco. Shortly thereafter, and before fully departing the Astoria bus station, the harassment of Passenger A began again. Preston issued another warning to the offending passengers (and also spoke to Passenger A) in an effort to try and calm the situation. Preston also contacted the dispatch center for Pacific Transit System and spoke with Dispatcher Michael Williams[2] about having the police called. There was a delay in getting a response from dispatch, but Williams eventually reconnected with Preston and informed him that Passenger A could call the police but it was not Preston's responsibility. The record does not establish whether the police were, in fact, contacted, but all the passengers remained on the bus. Preston's second warning stopped the harassing behavior and statements, and he was able to complete his bus route back to Ilwaco without further problem.

On the night of the incident, Preston drafted an incident report that he submitted to the employer the next day. Preston stated in the report that several passengers boarded the bus at the Astoria station, went to the back, and immediately started harassing Passenger A, including the use of a racial slur. According to Preston, he told the offending passengers to cease the behavior or he would ask them to exit the bus. Preston also called into the dispatch center to report the incident and inform dispatch that the situation was under control. Approximately seven minutes after the

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[1] The Examiner instructed the parties to refer to the affected passenger as "Passenger A" to protect the identity of the passenger. References to the passenger's name in documents admitted into the record were also redacted.

[2] Dispatcher Williams is also referenced in the record as both "Mike Williams" and "John Michael Williams."

first incident, and upon leaving the Astoria bus station, the offending behavior restarted. In his report, Preston stated that he again instructed the offending passengers to stop and that they complied with his second order. Preston contacted dispatch again but decided to continue with his route. There were some communication problems with the radio that caused a delay in getting a response from dispatch about whether Preston should contact the police. Dispatch eventually advised Preston not to contact the police but relayed that he could advise Passenger A to call the police if desired. At the conclusion of his report, Preston stated he was "unsure" how to handle the situation and mentioned that it was a protocol that could be "addressed in the future."

The next day, March 12, 2019, Passenger A called Pacific Transit System to report what happened on the bus and file a formal complaint. Passenger A was put into contact with Evans. According to Evans, Passenger A reported being scared for his life and questioned why the offending passengers were not removed from the bus at the time of the incident. As a result of the complaint and his conversation with Passenger A, Evans opened a formal investigation into the incident. Evans sought assistance in investigating the matter from the administrative services manager, Audrey Olson. They immediately began investigating the matter. Olson issued a notice of investigation to Preston on March 21, 2019, notifying Preston that he was under investigation for failing to remove the offending passengers from the bus during the March 11 incident. At the time of the scheduled investigatory interview, Preston invoked his Weingarten rights and sought union representation. A union representative was not immediately available, so the employer ended the interview. An investigatory interview was never rescheduled.

The employer has adopted a discrimination complaint procedure consistent with the requirements of Title VI of the Civil Rights Act of 1964. As part of the procedure, Pacific Transit System has committed to "ensuring that no person is excluded from participation in, or denied the benefits of its transit services on the basis of race, color, or national origin . . . ." Coupled with this, the employer has also implemented an "Exclusion Policy" that prohibits specified conduct on its buses or property. The policy prohibits "harassing behavior or language" as well as refusing "to follow a directive of a transit operator." Attached to the Exclusion Policy was a memo to employees

instructing the operators that they may exclude any passenger for up to one day for any violation(s) of the policy.

Upon review of the investigatory file related to the March 11 incident, Evans issued a verbal warning to Preston on April 20, 2019. Preston was also required to complete a training class within 30 days that included a review of the employer's Exclusion Policy. Evans explained in the verbal warning memo that Preston failed to adhere to the employer's Exclusion Policy by not removing the offending passengers from the bus on March 11 for both engaging in harassing behavior and failing to follow Preston's first directive to stop harassing Passenger A.

No grievance contesting the verbal warning was ever filed by the union or Preston. Under Article 11.2 of the collective bargaining agreement between the union and the employer, "[v]erbal warnings are not subject to the grievance provisions of this Agreement." In fact, the parties' contract specifically defines discipline to only include written reprimands, suspensions and discharges. Nevertheless, Preston vigorously opposed the verbal warning issued by the employer, and he sought to have it removed from his personnel file. On April 23, 2019, the employer received a rebuttal letter from Preston regarding the verbal warning. Preston asserted several arguments as to why Evans unfairly issued the verbal warning. The arguments included an alleged failure to notify Preston's union representative sufficiently in advance of the investigatory interview, a failure to reschedule the investigatory interview, and a failure to obtain all relevant information about the incident, among others. Preston sought removal of the verbal warning from his personnel file.

By way of letter dated June 12, 2019, Preston contacted both Evans and David Sharwark, the union president, seeking a formal review of the March 11, 2019, incident on Preston's bus. Evans and Sharwark met shortly thereafter during a scheduled labor-management meeting and discussed Preston's verbal warning. The meeting produced an agreement between the two whereby the employer agreed to remove Preston's verbal warning from his personnel file and the union agreed that the removal would not be precedent setting. There were some conflicting accounts over whether Preston needed to agree to or acknowledge the plan, but the weight of the evidence established that he was not required to take any action. The meeting between Evans and Sharwark,

where Preston's discipline was discussed, was a private meeting between the two individuals. Preston later objected to this because a notetaker did not attend and record what was said during the meeting.

Despite reaching an agreement to remove the verbal warning, Preston strenuously objected to the settlement. On June 17, 2019, Sharwark informed Preston as to the terms of the agreement between the union and the employer. That same day, Preston drafted a reply letter to Evans and Sharwark notifying them that he was "refusing to accept" the agreement and was concerned that it would set a "precedence" (sic) for Evans to discipline employees "without cause." Notwithstanding Preston's objection, the verbal warning was subsequently removed from Preston's file and, by way of email, Sharwark agreed with Evans that the union did not consider the action (the removal of the verbal warning) precedent setting.

Following these events, the employer opened a second investigation against Preston related to accusations that he had influenced a passenger to alter a complaint against Pacific Transit System and retaliated against a passenger for filing a complaint. A notice of investigation was sent by the employer to Preston on September 7, 2019, and an investigatory interview was scheduled for September 11, 2019. The same day of the notice, Preston contacted Bruce Weilepp, the union's chief shop steward at Pacific Transit System. The two spoke on the phone twice that day about the most recent investigation and the upcoming investigatory interview. Weilepp and Preston further discussed the matter over the phone on September 9 and then scheduled an in-person meeting on the evening of September 10, 2019.

At the September 10 meeting, Weilepp was accompanied by Cherry Stalnaker, an assistant shop steward, and Preston was accompanied by his wife, Kathy Preston. Prior to the meeting, Preston informed Weilepp that he was looking to hire an attorney to be present at the investigatory interview, at least in part to serve as a notetaker. During the September 10 meeting, Weilepp informed Preston that, consistent with union protocols, Stalnaker would serve as the union's notetaker. Weilepp testified that he was trained by the union to bring a notetaker to investigatory interviews so that the union could retain an accurate record of the event. Weilepp noted, however, that the union's notes could be shared with the individual member if so desired. Preston objected

to this arrangement and insisted that his own personal notetaker be present at the interview. Weilepp informed Preston that he could choose to have the union and its notetaker be present or he could have his own representation, outside the union, present; however, he could not select both options. I find credible Weilepp's account that he made clear to Preston that he could choose union representation or his own representation but not both, as Weilepp drafted a contemporaneous note, which both he and Stalnaker signed, documenting this conversation.

Both Sharwark and Weilepp testified that the reason the union insists on having its own notetaker in interviews is so that it can retain possession and control of the notes for purposes of the union's duty of representation. An individual member can bring one's own personal representation and notetaker, but union policy is that a union representative will not attend if the member brings a self-chosen representative. Part of the union's expressed concern is the potential inability for it to access a record of a meeting or interview if it is not in possession of that information, thus impairing its ability to represent a member. Sharwark and Weilepp both testified that the union may share its notes with a member if requested.

Preston ultimately hired a paralegal, Queen Katsuta, who worked at a local attorney's office to serve as a notetaker during the investigatory interview. Katsuta attended the investigatory interview with Preston and produced a set of notes from the interview. No one from the union attended the investigatory interview on September 11, 2019. There is nothing in the record as to the outcome of the investigation or whether any discipline was imposed.

ANALYSIS

Applicable Legal Standards

Discrimination

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

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

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

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

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

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

The Commission processes two kinds of interference claims: derivative and independent. A derivative claim depends upon the underlying claim; all causes of action automatically include a derivative interference claim. Derivative interference claims do not survive dismissal of the underlying claim. *Royal School District No. 160*, Decision 1419-A (PECB, 1982); *Northshore Utility District*, Decision 10534-A (PECB, 2010).

Duty of Fair Representation

The Commission is vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012). A union commits an unfair labor practice if it interferes with, restrains, or coerces public employees in the exercise of their rights. RCW 41.56.150(1). One way unions can violate

RCW 41.56.150(1) is by breaching the duty of fair representation. The duty of fair representation arises from the rights and privileges held by a union when it is certified or recognized as the exclusive bargaining representative under a collective bargaining statute. *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 367 (1983); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002) (citing *City of Seattle (International Federation of Professional and Technical Engineers, Local 17)*, Decision 3199-B (PECB, 1991)).

The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute and does not assert jurisdiction over breach of duty of fair representation claims arising exclusively out of the processing of contractual grievances. *Bremerton School District*, Decision 5722-A (PECB, 1997). While the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances, the Commission does process other types of "breach of duty of fair representation" complaints against unions. *City of Port Townsend (Teamsters Local 589)*, Decision 6433-B (PECB, 2000). A union breaches its duty of fair representation when its conduct is more than merely negligent; it must be arbitrary, discriminatory, or in bad faith; or be based on considerations that are irrelevant, invidious, or unfair. *City of Redmond (Redmond Employees Association)*, Decision 886 (PECB, 1980); *Vaca v. Sipes*, 386 U.S. 171 (1967). The employee claiming a breach of the duty of fair representation has the burden of proof. *City of Renton (Washington State Council of County and City Employees)*, Decision 1825 (PECB, 1984).

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, the Washington State Supreme Court adopted three standards to measure whether a union has breached its duty of fair representation:

1. The union must treat all factions and segments of its membership without hostility or discrimination.

2. The broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty.

3. The union must avoid arbitrary conduct.

Each of these requirements represents a distinct and separate obligation.

While an exclusive bargaining representative has the obligation to provide fair representation, the courts have recognized a wide range of flexibility in the standard to allow for union discretion in settling disputes. *Allen*, 100 Wn.2d at 375. There is no statutory requirement that a union must accomplish the goals of each bargaining unit member, and complete satisfaction of all represented employees is not expected. A union member's dissatisfaction with the level and skill of representation does not form the basis for a cause of action, unless the member can prove the union violated rights guaranteed in statutes administered by the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004).

Application of Standards

Discrimination

As framed by the preliminary ruling, Preston's initial burden to establish a prima facie case of discrimination centers around the verbal warning he received on April 20, 2019. While there is evidence that Preston had been engaged in protected activity prior to this date, the record does not prove that he was ever deprived of an ascertainable right or benefit. Even if the warning he received could be so construed, the record does not establish that it was issued in connection with his protected activity. Despite this fatal deficiency, even if a prima facie case could be established, the employer has articulated a legitimate nondiscriminatory reason for issuing the verbal warning, which was Preston's failure to adhere to the employer's Exclusion Policy during the events of March 11, 2019. There is no evidence in the record that the employer's stated rationale for the warning was a pretext or substantially motivated by an underlying union animus.

The record does support Preston's burden of demonstrating that he was engaged in protected activity in somewhat close proximity to the time of the alleged adverse action (his verbal warning on April 20, 2019). Preston had been selected as a union steward and appointed to the union's negotiation team in late 2018. While the dates of his participation in negotiation sessions with the employer are not clear, he participated in at least a couple negotiation sessions during the first few

months of 2019. Preston also participated in representing other members during this same time frame and was outspoken in his efforts to make some changes around how operators take breaks during their routes. Employer officials were undoubtedly aware of Preston's activities from the time he obtained a union steward role in November 2018 through at least the point of his verbal warning in April 2019.

Notwithstanding Preston's engagement in protected activities leading up to his April 2019 verbal warning, he has failed to carry his burden of proof that he was deprived of some ascertainable right or benefit. Preston's argument in this regard fails for two reasons. First, the evidence does not support the conclusion that the verbal warning initially issued by the employer deprived Preston of any ascertainable right, benefit, or status. By definition, verbal warnings are not considered discipline in the collective bargaining agreement. Preston failed to establish that the warning had any impact on his employment status, or could in the future, other than the document sitting in his personnel file for a proscribed period of time. Second, after a couple of months, the employer removed the verbal warning from Preston's file without requiring any action on Preston's part. Although the warning letter cannot reasonably be considered a deprivation of a right, benefit, or status, at worst it was a temporal event of minimal duration with no lasting impact on Preston's employment status.

While the April 2019 verbal warning had no adverse consequences for Preston, even if that were not the case, he is still unable to demonstrate any causal connection between the warning letter and his union activities. Put simply, the record is without evidence that the employer had any motivation to act against Preston as a consequence of his engagement in protected activities. The body of evidence concerning Preston's role as a steward and member of the union's negotiation team is only remarkable for being unremarkable. The employer has a long history with the union acting as the representative of the Coach Operators. That history includes a regular practice of addressing employee concerns at the bargaining table and working with stewards in their representative capacity. From that vantage point, Preston's involvement in negotiations, advocacy for employee interests, and work as a steward do not appear to have prompted any unusual or hostile response from the employer. Preston may have perceived his union advocacy efforts to be

the source of some agitation, but that perspective does not appear to be shared by anyone else who witnessed his transactions with the employer, including representatives of both the union and employer.

Even if Preston's initial burden of proof were not fatally defective, the employer successfully demonstrated a legitimate nondiscriminatory reason for issuing the verbal warning. The events on route 204 on March 11, 2019, were of the utmost seriousness in which a disabled passenger was the subject of harassing and racist comments on at least two occasions, which caused the passenger to be fearful for his safety. Prior to the incident, the employer had taken measures to minimize the likelihood of such events occurring on its buses through the adoption of its Exclusion Policy and Title VI procedure. The combination of those policies and procedures makes evident two things. For one, harassing behavior, particularly with a racial animus, is not tolerated on buses at Pacific Transit System. Second, riders on the buses are expected to comply with operator directives. The Exclusion Policy authorizes operators to remove passengers for violating either of these policies. There is certainly some space to argue that the employer's Exclusion Policy could offer greater clarity and direction to operators for what to do in such situations. But, the existing policy is clear enough to arguably form the basis for the employer to issue Preston the verbal warning for failing to remove the offending passengers on the grounds of their harassing behavior or the refusal to comply with Preston's initial directive to cease the behavior. This is not to suggest that, to the extent required, the verbal warning would satisfy the standard of just cause; rather, it simply demonstrates a legitimate nondiscriminatory reason for its issuance.

There is nothing in the record to even minimally suggest that the verbal warning was a pretext to disguise an underlying union animus. The evidence does not support any pattern of behavior by the employer against union officials at Pacific Transit System. Preston's more direct role as a union steward was for a relatively limited duration, and the record does not support any conclusion that his activities prompted any particular level of concern or ire by the employer. If there was some undetected union animus, it begs the question why that would have manifested itself solely as a verbal reprimand against Preston. The verbal reprimand had no disciplinary consequences for Preston and was removed from Preston's personnel file after a couple of months even though the

employer had no legal responsibility to do so. The sum of those activities does not lend any support to the notion that any underlying union animus existed.

Duty of Fair Representation

Preston's claims against the union center on two incidents—the resolution of his verbal warning in June 2019 and his representation at a September 2019 investigatory interview—but the facts pertinent to each event do not establish that the union violated its duty of fair representation. The facts do not meet Preston's burden of proof in either incident. The union's efforts, and ultimate decision, with respect to resolving the verbal warning and in not sending a representative to a separate investigatory interview were not done in an arbitrary, discriminatory, or bad faith manner. Reasonable minds may differ on the best course of action in these situations, but the duty of fair representation protects against conduct that is invidious or unfair and not merely actions or outcomes that an employee disagrees with or were not objectively the most reasoned decision.

The union's effort, and ultimate agreement, to resolve Preston's verbal warning clear the duty of fair representation bar by a significant margin. Undoubtedly the agreement between the union and employer was reached over Preston's objection, but that objection appears to be based on a deep misunderstanding of what was being agreed to rather than an instance where the union's actions fell below its duty of fair representation. To be clear, the verbal warning, based on the terms of the collective bargaining agreement between the parties, was not even considered discipline. At worst, it served as a record of notice to Preston regarding his obligations under the employer's Exclusion Policy. Nevertheless, despite no discipline being issued or the ability of the union to grieve the matter, the union still met with the employer to secure the removal of the verbal warning from Preston's file. In this effort, the union was successful and secured removal of the warning from Preston's file for a simple commitment, from the union to the employer, that the union would not rely on the decision to remove the warning as precedent in the future. Preston was not required to agree to anything or take any action for the warning to be removed, and any vestige of the March 11, 2019, incident no longer resides in his personnel file.

Preston's strong objection to the above-described events appear to stem from a significant misunderstanding with respect to the term "precedent." As testified to by Preston, he believed he

was being asked to sign onto an agreement that would *create* a precedent for the employer to discipline employees in the future without just cause. Admittedly, such an outcome would be a concern and at least partially explains why Preston so adamantly objected to the arrangement. However, Preston's concern and perspective were badly misplaced. What the employer sought, and the union agreed to, was that in exchange for removing Preston's verbal warning, the *union* would agree to not cite Preston's case (specifically, the removal of his warning) as precedent in the future if another employee found one's self in a similar situation. Normatively speaking, this was a positive outcome for both Preston and the union. Unfortunately, it appears there was a lack of clarity or understanding around the agreement that had been reached. That misunderstanding, however, does not overcome the objectively positive outcome for Preston, and it certainly does not rise to a breach of the union's duty of fair representation.

Separately, the union's decision not to send a representative to Preston's investigatory interview on September 11, 2019, is of questionable wisdom but does not rise to the level of being invidious or unfair so as to breach its duty of fair representation. After receiving notice of an investigatory interview, Preston contacted the union for representation and the local shop steward, Weilepp, made himself available to Preston on several occasions. On the day the notice was received, Preston and Weilepp spoke at least twice for an extended period of time. Weilepp followed up with Preston over the phone the next day, and the parties arranged an in-person meeting at a local restaurant on the evening before the scheduled interview. The combination of those efforts demonstrate that Weilepp was engaged in his duties as a union representative and worked with Preston to prepare for his upcoming investigatory interview.

Ultimately, however, the union did not send a representative to Preston's investigatory interview, due in large part to a dispute between Weilepp and Preston over having a notetaker at the interview. During their in-person meeting on September 10, Preston expressed a strong desire to have his own representative and notetaker at the meeting. The evidence also supports the fact that Weilepp informed Preston that either the union would be there with its own notetaker or Preston could elect to have his own representation—but not both. Preston chose the latter, and the union did not attend the investigatory interview. During testimony, both Weilepp and Sharwark stated that the union's

policy was for its own notetaker to be present in meetings of this nature so that the union could retain control of the notes and verify their authenticity. If a member wanted their own representation or notetaker they could so elect, but both Weilepp and Sharwark testified that this meant that the union would not participate in any proceeding. It is not for this Examiner to judge the overall merits of this policy; rather, the question here is whether the decision in this particular case violated the union's duty of fair representation.

The union's policy and its application to the case at hand lacks a strong rationale, but it does not rise to the level of being decided in an arbitrary or bad faith manner. There is no evidence in the record to indicate that the employer would have objected to the presence of both the union and its notetaker as well as Preston's personal notetaker, Katsuta. The union does not appear to have pressed for any clarity on that point nor is there reason to believe both representatives would have been denied access to the investigatory interview. Instead, the union rested on its general policy that if the employee elects one's own representation, the union will not participate. Union officials testified that this is how they had been trained and is a position they have consistently taken with their membership. The union may be well served by giving further consideration to such a blanket policy moving forward, but there is a rationale behind it and no evidence that it was applied in Preston's case in a discriminatory or arbitrary fashion. The fact that reasonable minds may differ on the wisdom of the union's policy at issue in this proceeding does not turn its application here into a situation where it has breached its duty of fair representation to Preston.

CONCLUSION

The charges of employer discrimination and union interference through breach of the duty of fair representation are dismissed. In issuing the complainant a verbal warning on April 20, 2019, the employer did not discriminate in violation of RCW 41.56.140(1). The charge of derivative interference against the employer also fails as a result of the dismissal of the underlying discrimination charge. Likewise, the union's actions to gain removal of the verbal reprimand from Preston's personnel file and its subsequent actions to represent Preston at a separate investigatory interview on September 11, 2019, are not interference in violation of RCW 41.56.150(1).

FINDINGS OF FACT

1. Pacific Transit System is a public employer as defined by RCW 41.56.030(13).

2. Amalgamated Transit Union, Local 1765 is a bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit of Coach Operators at Pacific Transit System.

3. The collective bargaining agreement that was in effect at the time giving rise to the events at issue in this proceeding was for a period from January 1, 2016, through December 31, 2018.

4. Pacific Transit System is a rural public transportation system that provides regional bus service to the residents of Pacific County, Washington. Some bus service extends outside of Pacific County, including at least one route that crosses state lines into the area of Astoria, Oregon.

5. John Preston is a coach operator who has been employed by Pacific Transit System for approximately four and one-half years as of the time of the hearing. During his tenure at Pacific Transit System, Preston has regularly driven route 204, which is a round trip that leaves from and returns to Ilwaco, Washington, after crossing over to Astoria, Oregon, via the Metro Bridge.

6. While employed with Pacific Transit System, Preston has held some official positions with the union, of which he has historically been a member. Preston served as a union shop steward from approximately November 2018 through June 2019. While serving as a shop steward, Preston also participated in contract negotiations as part of the union's team. In his role with the union, Preston has advocated for workplace safety issues and for improvements to employee breaks.

7. In his role as a union representative, Preston believed that his service became a source of tension with the employer, particularly Director Rich Evans. Generally, Preston cited three areas of activity that he believed strained his relationship with Evans: (1) his participation in contract negotiations; (2) a Labor & Industry complaint that was filed; and (3) his advocation for employee safety and breaks. The record does support the fact that Preston was engaged in these listed activities. There is not, however, sufficient evidence to establish that these activities created any undue tension with the employer or precipitated adverse actions against Preston. The evidence established that Preston's role in contract negotiations was "minimal." Statements and actions by employer representatives failed to establish that interactions between Preston and employer representatives were particularly problematic or consequential. The employer did not know, for instance, who had filed a complaint with Labor & Industries.

8. The employer has adopted a discrimination complaint procedure consistent with the requirements of Title VI of the Civil Rights Act of 1964. As part of the procedure, Pacific Transit System has committed to "ensuring that no person is excluded from participation in, or denied the benefits of its transit services on the basis of race, color, or national origin . . . ." Coupled with this, the employer has also implemented an "Exclusion Policy" that prohibits specified conduct on its buses or property. The policy prohibits "harassing behavior or language" as well as refusing "to follow a directive of a transit operator." Attached to the Exclusion Policy was a memo to employees instructing the operators that they may exclude any passenger for up to one day for any violation(s) of the policy.

9. On March 11, 2019, Preston was driving his regular route 204. During a scheduled stop at the Astoria bus station, several passengers aboard the bus reportedly began verbally harassing another passenger on the bus, including the use of a racial slur toward this individual, Passenger A. Preston issued a verbal warning to the offending passengers, which temporarily brought an end to the harassing behavior. Preston reported that the passengers appeared to be intoxicated. After the behavior ceased, Preston resumed the return trip to Ilwaco. Shortly thereafter, and before fully departing the Astoria bus station,

the harassment of Passenger A began again. Preston issued another warning to the offending passengers (and also spoke to Passenger A) in an effort to try and calm the situation. Preston also contacted the dispatch center for Pacific Transit System and spoke with Dispatcher Michael Williams about having the police called. There was a delay in getting a response from dispatch, but Williams eventually reconnected with Preston and informed him that Passenger A could call the police but it was not Preston's responsibility. The record does not establish whether the police were, in fact, contacted, but all the passengers remained on the bus. Preston's second warning stopped the harassing behavior and statements, and he was able to complete his bus route back to Ilwaco without further problem.

10. On the night of the incident, Preston drafted an incident report that he submitted to the employer the next day. Preston stated in the report that several passengers boarded the bus at the Astoria station, went to the back, and immediately started harassing Passenger A, including the use of a racial slur. According to Preston, he told the offending passengers to cease the behavior or he would ask them to exit the bus. Preston also called into the dispatch center to report the incident and inform dispatch that the situation was under control. Approximately seven minutes after the first incident, and upon leaving the Astoria bus station, the offending behavior restarted. In his report, Preston stated that he again instructed the offending passengers to stop and that they complied with his second order. Preston contacted dispatch again but decided to continue with his route. There were some communication problems with the radio that caused a delay in getting a response from dispatch about whether Preston should contact the police. Dispatch eventually advised Preston not to contact the police but relayed that he could advise Passenger A to call the police if desired. At the conclusion of his report, Preston stated he was "unsure" how to handle the situation and mentioned that it was a protocol that could be "addressed in the future."

11. The next day, March 12, 2019, Passenger A called Pacific Transit System to report what happened on the bus and file a formal complaint. Passenger A was put into contact with

Evans. According to Evans, Passenger A reported being scared for his life and questioned why the offending passengers were not removed from the bus at the time of the incident.

12. As a result of the complaint and his conversation with Passenger A, Evans opened a formal investigation into the incident. Evans sought assistance in investigating the matter from the administrative services manager, Audrey Olson. They immediately began investigating the matter. Olson issued a notice of investigation to Preston on March 21, 2019, notifying Preston that he was under investigation for failing to remove the offending passengers from the bus during the March 11 incident. At the time of the scheduled investigatory interview, Preston invoked his Weingarten rights and sought union representation. A union representative was not immediately available, so the employer ended the interview. An investigatory interview was never rescheduled.

13. Upon review of the investigatory file related to the March 11 incident, Evans issued a verbal warning to Preston on April 20, 2019. Preston was also required to complete a training class within 30 days that included a review of the employer's Exclusion Policy. Evans explained in the verbal warning memo that Preston failed to adhere to the employer's Exclusion Policy by not removing the offending passengers from the bus on March 11 for both engaging in harassing behavior and failing to follow Preston's first directive to stop harassing Passenger A.

14. No grievance contesting the verbal warning was ever filed by the union or Preston. Under Article 11.2 of the collective bargaining agreement between the union and the employer, "[v]erbal warnings are not subject to the grievance provisions of this Agreement." The parties' collective bargaining agreement specifically defines discipline to only include written reprimands, suspensions and discharges.

15. Preston vigorously opposed the verbal warning issued by the employer, and he sought to have it removed from his personnel file. On April 23, 2019, the employer received a rebuttal letter from Preston regarding the verbal warning. Preston asserted several arguments as to why Evans unfairly issued the verbal warning. The arguments included an

alleged failure to notify Preston's union representative sufficiently in advance of the investigatory interview, a failure to reschedule the investigatory interview, and a failure to obtain all relevant information about the incident, among others. Preston sought removal of the verbal warning from his personnel file.

16. On June 12, 2019, Preston contacted both Evans and David Sharwark, the union president, seeking a formal review of the March 11, 2019, incident on Preston's bus. Evans and Sharwark met shortly thereafter during a scheduled labor-management meeting and discussed Preston's verbal warning. The meeting produced an agreement between the two whereby the employer agreed to remove Preston's verbal warning from his personnel file and the union agreed that the removal would not be precedent setting. Preston was not required to take any action to consummate the agreement. The meeting between Evans and Sharwark, where Preston's discipline was discussed, was a private meeting between the two individuals. Preston later objected to this because a notetaker did not attend and record what was said during the meeting.

17. On June 17, 2019, Sharwark informed Preston as to the terms of the agreement between the union and the employer. That same day, Preston drafted a reply letter to Evans and Sharwark notifying them that he was "refusing to accept" the agreement and was concerned that it would set a "precedence" (sic) for Evans to discipline employees "without cause." Notwithstanding Preston's objection, the verbal warning was subsequently removed from Preston's file and, by way of email, Sharwark agreed with Evans that the union did not consider the action (the removal of the verbal warning) precedent setting.

18. The employer subsequently opened a second investigation against Preston related to accusations that he had influenced a passenger to alter a complaint against Pacific Transit System and retaliated against a passenger for filing a complaint. A notice of investigation was sent by the employer to Preston on September 7, 2019, and an investigatory interview was scheduled for September 11, 2019. The same day of the notice, Preston contacted Bruce Weilepp, the union's chief shop steward at Pacific Transit System. The two spoke on the phone twice that day about the most recent investigation and the upcoming

investigatory interview. Weilepp and Preston further discussed the matter over the phone on September 9 and then scheduled an in-person meeting on the evening of September 10, 2019.

19. At the September 10 meeting, Weilepp was accompanied by Cherry Stalnaker, an assistant shop steward, and Preston was accompanied by his wife, Kathy Preston. Prior to the meeting, Preston informed Weilepp that he was looking to hire an attorney to be present at the investigatory interview, at least in part to serve as a notetaker. During the September 10 meeting, Weilepp informed Preston that, consistent with union protocols, Stalnaker would serve as the union's notetaker. Weilepp was trained by the union to bring a notetaker to investigatory interviews so that the union could retain an accurate record of the event. Weilepp noted, however, that the union's notes could be shared with the individual member if so desired. Preston objected to this arrangement and insisted that his own personal notetaker be present at the interview. Weilepp informed Preston that he could choose to have the union and its notetaker be present or he could have his own representation, outside the union, present; however, he could not select both options.

20. The reason the union insists on having its own notetaker in interviews is so that it can retain possession and control of the notes for purposes of the union's duty of representation. An individual member can bring one's own personal representation and notetaker, but union policy is that a union representative will not attend if the member brings a self-chosen representative. Part of the union's expressed concern is the potential inability for it to access a record of a meeting or interview if it is not in possession of that information, thus impairing its ability to represent a member.

21. Preston ultimately hired a paralegal, Queen Katsuta, who worked at a local attorney's office to serve as a notetaker during the investigatory interview. Katsuta attended the investigatory interview with Preston and produced a set of notes from the interview. No one from the union attended the investigatory interview on September 11, 2019. There is nothing in the record as to the outcome of the investigation or whether any discipline was imposed.

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 4–13, the employer did not commit a discrimination or derivative interference violation under RCW 41.56.140(1), by issuing a verbal warning to John Preston on April 20, 2019.

3. As described in findings of fact 14–21, the union did not commit an interference violation under RCW 41.56.150(1), by not adhering to its duty of fair representation with respect to the verbal warning issued to John Preston on April 20, 2019, and its representation of Preston at a subsequent investigatory interview on September 11, 2019.

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are DISMISSED.

ISSUED at Olympia, Washington, this 17th day of December, 2020.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CHRISTOPHER J. CASILLAS, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

RECORD OF SERVICE

ISSUED ON 12/17/2020

DECISION 13274 - 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 132142-U-19

EMPLOYER: PACIFIC TRANSIT SYSTEM

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RECORD OF SERVICE

ISSUED ON 12/17/2020

DECISION 13275 - 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 132374-U-19

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