STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARQUES JOHNSON, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 132545-U-20 DECISION 13352 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Marques Johnson, the complainant.

Christina L. Thacker, Assistant Attorney General, Attorney General Robert W. Ferguson, for the University of Washington.

On February 14, 2020, Marques Johnson filed an unfair labor practice complaint with the Public Employment Relations Commission (PERC) against the University of Washington (employer). The complaint alleges that the employer interfered with Johnson's collective bargaining rights and unlawfully discriminated against him because of his union activity.

On March 10, 2020, an Unfair Labor Practice Administrator issued a preliminary ruling finding a cause of action. The undersigned conducted a hearing via videoconference in the matter on February 19 and March 5, 2021. The employer did not file a brief; the complainant filed a brief on April 23, 2021, to complete the record.[1]

[1] The complainant's brief, consisting of 40 single-spaced pages, does not comply with the requirements of WAC 391-45-290, which limits briefs, absent special permission, to 25 double-spaced pages. Because the employer did not move to strike any portion of the brief, and in light of the complainant's status as pro se during the proceedings, I have considered the entire document.

ISSUES

The complaint, as framed by the preliminary ruling and articulated by the complainant, presents the following issues:

1. Did the employer interfere with Johnson's collective bargaining rights in violation of RCW 41.80.110(1)(a) by providing inaccurate information to his union representative during discussions regarding a grievance filed on his behalf?

2. Did the employer discriminate against Johnson in violation of RCW 41.80.110(1)(c) by subsequently failing to promote him because of his activity protected under chapter 41.80 RCW?

The employer provided inaccurate information to the union during settlement discussions regarding a grievance filed on Johnson's behalf. This conduct does not rise to the level of threats of reprisal or force or promises of benefit related to protected rights necessary to establish unlawful interference.

With respect to the second allegation, the complainant failed to prove there was a causal nexus between his protected activity and the employer's decision not to promote him. He did not establish a prima facie case of discrimination. Even if a causal nexus was proven, the employer articulated a legitimate, nondiscriminatory reason for its decision, and the complainant did not show that it was either pretextual or motivated by anti-union animus.

The complaint is dismissed.

BACKGROUND

The employer operates a four-year institution of higher education. Its flagship campus is located in Seattle. The Health Sciences Academic Services and Facilities (HSAS&F) is a subdivision of the Health Sciences Administration. It is responsible for providing instructional support and certain security services to the health sciences facilities. The head of the department is HSAS&F Director

Lacey Racich. Reporting to Racich is Assistant Director Steven Berard. Berard is responsible for oversight of the building management, security, and some instructional support functions. Paul Siscel is the manager of the HSAS&F building operations and security. His job functions include supervision of the department's security officers.

Many labor relations functions for the employer are managed by its Office of Labor Relations (OLR). Labor Negotiators employed in the OLR handle, among other things, grievances if they are not resolved at the first step in the process. The employer is a large organization. It processes a substantial number of grievances every year. The employer's former Assistant Vice President for Labor Relations estimated the annual number of grievances handled to be 2,000 across the university's various bargaining units.

Service Employees International Union Local 925 (union) represents a bargaining unit composed of a wide range of classifications of employees. Security officers employed within HSAS&F are included in this bargaining unit and represented by the union. The union and the employer have been parties to a series of collective bargaining agreements. The 2017–19 collective bargaining agreement (CBA) contained provisions related to internal promotions. Article 14.6(D) of the CBA provided that

> The Employer will determine if applicants possess the essential skills required of the position. Essential skills are the minimum qualifications listed in the job description for the classification and any specific position requirements. The Employer will refer all current bargaining unit applicants possessing the essential skills prior to referring any non-bargaining unit applicants. Where the skills, abilities and experience of the vacant position applicants are considered equal, the Employer will offer the position to a bargaining unit applicant. Should the senior qualified applicant not accept the position, the Employer shall offer the position in seniority order to the other qualified applicants before hiring outside. In accordance with applicable law, affirmative action goals will be considered when filling vacancies.

Article 14.6(E) adds:

> At least one (1) bargaining unit applicant per job requisition, who is a regular monthly employee and who possesses the essential skills, shall be among those

> granted an interview for bargaining unit positions. Which bargaining unit applicant(s) the Employer chooses to interview shall not be grievable.

HSAS&F has a multistep hiring process applicable for security officer positions. Prior to posting a security officer position, managers and human resources staff review the job description for any needed changes. The position is then posted. After the posting period ends, the hiring manager screens the applications. Each applicant is rated A, B, or C. The ratings are based, in part, on the extent to which a given application shows the candidate meets the knowledge, skills and abilities as identified in the job description. Typically, applicants with an A rating are offered a phone interview. The employer selects several of the applicants for an in-person interview based on their performance in the phone interview. During the in-person interview, the applicants meet with several managers individually. They also participate in a panel interview. The panel is composed of HSAS&F leadership and outside stakeholders. The panel participants rate each applicant along a variety of metrics related to the knowledge, skills, and abilities required for the position. Based on those scores and the hiring manager's own opinion, the hiring manager determines who to hire. Information concerning how each applicant was rated in during the process is contained on a spreadsheet referred to as a hiring matrix.

Marques Johnson is employed as a security officer in HSAS&F. He works at the employer's Seattle campus. He was hired in 2008 and is currently in a position represented by the union. During most of the period relevant to the instant proceedings, he reported to Siscel.

Campus Security Sergeant Position

Historically, security at the employer's health sciences complex was provided by HSAS&F security officers, with supplemental coverage provided by the University of Washington Police Department (UWPD). Pursuant to a memorandum of understanding between the two organizations, UWPD charged HSAS&F hourly labor costs as well as certain administrative fees. In 2017 HSAS&F reviewed the costs involved with its agreement with UWPD. HSAS&F determined it was more cost effective to control the entire security program itself. In order to ensure effective performance of the larger security role, HSAS&F determined a security sergeant position was needed. The employer envisioned the security sergeant would be responsible for

working as a lead security officer, performing both direct security work as well as certain administrative tasks related to the program. Commensurate with the higher level of responsibility, the position would also offer a higher rate of pay than that for other security officers.

At approximately the same time that HSAS&F leadership was making the determination to assume control of the entire security operation, Johnson submitted a proposal to a number of managers within the organization making the same suggestion. There is no evidence that the proposal was submitted in conjunction with, or on behalf of, the union.

The employer initiated the hiring process for the security sergeant position during fall 2017 in light of its new needs. Johnson applied for the position on September 19, 2017. His application was given a preliminary rating of "B." Normally, applicants who receive this rating are not invited to participate in a telephone interview. Because of Johnson's tenure with the employer, however, he had a phone interview with Siscel and another HSAS&F manager on October 13, 2017. The managers determined that Johnson's performance during the phone screen did not warrant moving him to the next stage of the hiring process. Ultimately, three candidates participated in in-person interviews. At the end of the competitive hiring process, the employer offered the security sergeant position to Stefen Kaelber.

Kaelber was considered an internal applicant. Prior to being awarded the security sergeant position he worked as a security officer at the employer's Bothell campus. Hired on November 5, 2015, Kaelber had less seniority than Johnson. Kaelber began working in the new position on December 4, 2017.

Johnson's Promotion Grievance

After Johnson was informed he was not selected for the sergeant position, the union filed a step one grievance on his behalf on December 28, 2017. The grievance alleged that the employer's failure to select Johnson for the position violated Article 14 of the parties' CBA. Among other things, the union argued that the language of Article 14.6(D) required the employer to hire the most senior qualified bargaining unit applicant. The employer disagreed with this interpretation so the grievance moved through steps one and two of the process. The employer was represented at

step two by Labor Negotiator Mark Hansen, employed in the OLR. The parties agreed to participate in mediation on February 21, 2019, in an attempt to resolve the matter.

During the week prior to the mediation, on February 14, 2019, HSAS&F Human Resources staff informed Hansen that Kaelber had resigned. His last day as security sergeant was February 15, 2019. The email from HSAS&F staff to Hansen indicated that the position would be "reposted and recruited for as usual." Emails between Racich and HSAS&F Human Resources on the day of the mediation confirmed the employer's intent to repost the sergeant position. On February 27, 2019, Racich met with Siscel and Berard to discuss the employer's hiring plan for the position. They determined that filling the sergeant position would take a back seat to other more pressing staffing needs.

The parties were not able to reach a resolution for the grievance during the February 21 mediation. The union sent the employer a notice of its intent to arbitrate Johnson's grievance on February 28, 2019. Although the matter remained unresolved, the parties continued discussing potential avenues for settlement. HSAS&F Human Resources staff had a conference call with Hansen about the grievance on March 19, 2019. The employer representatives discussed the extent to which the sergeant position would be reposted during the call.

Following the discussion Hansen called the union representative responsible for handling the grievance, Damian Kent. During their conversation Hansen told Kent that the sergeant position would not be reposted. He explained that he had learned HSAS&F believed the security officers were a self-sufficient group and might not need a sergeant. Hansen's comments regarding the future of the position were memorialized in an email he sent to HSAS&F Human Resources staff on April 1, 2019, as well as in a separate email he sent to Kent on the following day, April 2. Hansen's last day with the employer was on April 5, 2019.

Hansen's communications to Kent regarding whether the position would be posted in the future were incorrect. The employer had not decided to eliminate the security sergeant position. Rather, the employer determined that it would be more prudent to wait to post the position until after Johnson's grievance was resolved via either a settlement or at arbitration. The employer reasoned

that posting the position before the grievance was resolved could cause potential issues. In the event it was posted, a candidate other than Johnson was selected, and the union prevailed at arbitration, the employer could face the problem of having to separate or move the successful applicant.

After Hansen's departure there was a communication lag between the union and the employer regarding settling the grievance. Around May 2019, Assistant Vice President for Labor Relations Peter Denis began handling the matter. He exchanged several emails with Kent in June. In July, the union proposed settling the grievance by editing some language contained in Johnson's 2016–17 and 2017–18 performance appraisals. Kent did not testify as to why the union proposed resolving the grievance in this manner. He also did not discuss whether Hansen's April comments regarding the future of the security sergeant position had any effect on the union's approach to settlement. Kent and Denis discussed the union's proposal throughout the latter portion of July and into August. They eventually reached a conceptual agreement. Kent sent Denis an email on September 3, 2019, accepting an offer extended by the employer. His email further indicated that the union considered the matter resolved.

There is no evidence that the employer expressed or harbored animus towards Johnson's union activity in seeking the union's assistance to file and process the promotion grievance.

Campus Security Sergeant Position Is Reposted

At the same time that Kent and Denis were working on finalizing an agreement to resolve Johnson's grievance, HSAS&F leadership began preparing to repost the security sergeant position. Siscel, Berard, and Racich exchanged emails in early August revising the job description for the position so that it was prepared when the employer was ready to initiate the hiring process. The position was eventually posted on October 1, 2019. On seeing the posting, Kent expressed his frustration to Denis in an email. Kent credibly testified he was frustrated because he felt that he had been lied to when he was informed by Hansen that the employer was not going to repost the security sergeant position when in fact the opposite occurred. Although Denis testified that he informed Kent that the position would be reposted, I do not credit the testimony as it is contradicted

by Kent's contemporaneously drafted email expressing surprise and frustration at the development.

The employer managed the 2019 hiring process for the security sergeant position in much the same way that it did in 2017. It received 24 applications for the position. Seven of those applicants, including Johnson, met certain basic qualifications and were invited to participate in a phone interview. Of the individuals selected to participate in the phone interview, Johnson's application received the lowest score. Four of those applicants advanced to the final in-person interview stage.[2] In contrast to his 2017 application, Johnson was among those selected for an in-person interview. The finalists had interviews with Siscel as well as a panel of stakeholders. Each interviewer rated the applicants along a variety of metrics, giving each applicant a score of zero to three for each metric. The ratings were then combined into a total score. The maximum score an applicant could receive from a single interviewer was 48. There were five interviewers on each panel. The best cumulative score an applicant could receive was 240. Siscel considered these scores, as well as other factors, including his own assessment of the applicant's performance, when determining who to recommend for hire.

Siscel did not recommend Johnson, instead preferring Ian Foster, an external candidate. Siscel did not select Johnson for several reasons. Siscel felt Johnson did not perform as well as other candidates during the in-person interviews. Of the three applicants interviewed, Johnson received the lowest cumulative score. Siscel also determined that, in light of Foster's previous experience, which included 30 years working as a sergeant for the Seattle Police Department, he was the most qualified candidate. Foster also received the highest cumulative interview scores of those who participated.

Foster was ultimately offered the security sergeant position. He began work on January 13, 2020.

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[2] One applicant failed to show up for the in-person interview.

ANALYSIS

Applicable Legal Standards

Interference

It is an unfair labor practice (ULP) for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. RCW 41.80.110(1)(a). 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).[3] 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. *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.*

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[3] Unless a specific legislative intent directs otherwise, cases decided under the Public Employees' Collective Bargaining Act, chapter 41.56 RCW, are applicable to cases under the Personnel Services Reform Act, chapter 41.80 RCW. *Washington State – Natural Resources*, Decision 8458-B (PSRA, 2005).

Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. *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. [t]he employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. [t]he 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.

City of Vancouver, Decision 10621-B (PECB, 2012), *aff'd, in part*, *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348–349 (2014); *Educational Service District 114*, Decision 4361-A.

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 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).

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver*, 180 Wn. App. 333, 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Id*. If the respondent meets its burden of production, the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or that union animus was a substantial motivating factor for the employer's actions. *Id*.

Application of Standards

Interference

The employer's failure to accurately inform the union that it intended to eventually repost the security sergeant position, while harmful to productive labor relations, does not meet the standard for interference.[4]

The ULP provisions of chapter 41.80 RCW provide a mechanism to enforce the collective bargaining rights guaranteed by the Personnel System Reform Act (PSRA). They are not intended to address all conduct by the parties during settlement discussions that is perceived as unfair. The ULP process, for example, cannot be used to enforce private settlement agreements when a party believes the other has failed to live up to its prior commitments. *Grandview School District*, Decision 10639-A (EDUC, 2011). In the context of interference allegations, the Commission addresses claims that a party's conduct interfered with employees' collective bargaining rights. *Kitsap County*, Decision 12022-A (PECB, 2014) (finding a cause of action for interference when the union alleged that the employer threatened to institute a collections action against an employee if the union did not withdraw a grievance). In contrast, absent a connection to employees' statutory rights, complaints alleging only that a party interfered with employee rights by being untruthful during settlement negotiations have been dismissed for failure to state a cause of action.[5] *Seattle School District*, Decision 9747 (PECB, 2007).

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[4] The employer asserted in its answer that the complainant's claim was untimely. The six-month statute of limitations begins to run when the complainant knew or should have known of the allegedly unlawful conduct. *City of Bellevue*, Decision 9343-A (PECB, 2007). Johnson's theory of the interference violation is premised on the employer's April 2019 inaccurate communication to the union that the security sergeant position would not be reposted. Johnson had no reason to know that the assertion was inaccurate until the position was actually posted in October 2019—within the six-month period preceding the filing of the instant complaint. I therefore agree with the complainant that the claim was not untimely and address it on the merits.

[5] Making untruthful statements may violate a party's obligation to bargain in good faith. *Seattle School District*, Decision 9628-A (PECB, 2008). The instant case does not present this issue. The obligation to bargain in good faith can only be enforced by a union or public employer. Individual employees, such as the complainant here, do not have standing to file allegations concerning breach of a party's good faith bargaining obligations.

The employer's inaccurate statements to the union that it would not repost the security sergeant position do not rise to the level of unlawful interference.[6] An employer interferes with employee rights when its statement(s) or actions would be reasonably perceived to constitute a threat of reprisal or force, or a promise of benefit, associated with union activity. *City of Mountlake Terrace*, Decision 11831-A. Neither the statute nor the Commission have explicitly defined the term "threat." Absent such a definition, the common dictionary definition is instructive. BLACK'S LAW DICTIONARY (8th ed. 1999) defines a threat as a "communicated intent to inflict harm or loss on another or on another's property." The employer's inaccurate statement that it did not intend to repost a position simply does not meet this definition. The statements made by Hansen did not implicitly or explicitly tie employer action to any union activity. In fact, although it was untrue, Hansen told Kent that the reason the employer decided not to repost the position was related to operational issues. Absent a direct impact on employees' statutory collective bargaining rights, it is not the role of the Commission to police the truth or veracity of statements made by parties during settlement discussions through the interference provisions of the PSRA.

Johnson's claim that the union relied on the employer's inaccurate statements to his detriment in settling the grievance does not warrant finding a violation. As an initial matter, the record evidence does not support the claim. Kent did not testify as to why the union chose to settle the grievance in exchange for revisions to Johnson's performance appraisals. Johnson also did not testify during the hearing, and the documentary evidence contained in the record does not shed insight into the union's motivation. Johnson makes several factual assertions in his brief regarding the union's decision to settle the grievance. The claims about the union's motives are not based on facts contained in the record. Similar allegations were included in the complaint filed against the union in PERC Case 132546-U-20, which was dismissed without a hearing for failure to state a cause of action. Neither the statements in the brief that are not based on the record nor the alleged but

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[6] Johnson does not appear to allege that the employer's decision itself to wait to re-post the sergeant position constitutes interference. Instead, in his brief he objects to the misrepresentations by employer representatives regarding the position's future.

unproven allegations in a related complaint dismissed prior to a hearing constitute evidence in the instant proceeding.

The legal determination of interference, however, is not based on the reaction of the particular employee involved. *King County*, Decision 6994-B (PECB, 2002). Instead, the Commission utilizes an objective standard of how a reasonable employee would perceive the employer's actions. Assuming that a reasonable employee would believe that the employer's statements contributed to a less-than-favorable settlement, I still do not find a violation. The Commission has previously found that misrepresentations directly related to protected employee rights are unlawful. *Pasco Housing Authority*, Decision 5927-A (PECB, 1997). In contrast, alleged misrepresentations regarding issues unrelated to employees' statutory rights fall outside the jurisdiction of the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004) (affirming dismissal of complaint that a union misrepresented the terms of a settlement agreement on which the complainant relied to her detriment). The inaccurate statement by the employer here—namely the extent to which it intended to repost a particular position—is not so directly related to employee rights under the PSRA as to constitute unlawful interference.

My finding that the employer's actions did not violate RCW 41.80.110(1)(a) should not be construed as condoning its conduct during settlement discussions regarding Johnson's grievance. Effective labor-management relationships are founded on mutual trust. When that trust is damaged, the relationship is strained and resolving issues becomes more difficult. The consequences of damaged relationships are illustrated in various Commission decisions. *See Snohomish County*, Decision 12826-A (PECB, 2018) and cases cited therein. Although the employer here could be perceived to have achieved some short-term gain by misleading the union regarding its intentions to repost the security sergeant position, the long-term costs to productive labor-management relations may outweigh any temporary benefit.

Discrimination

There is insufficient evidence to establish a causal connection between Johnson's protected activity and the employer's decision to award the security sergeant position to another applicant.

The complainant failed to establish a prima facie case. Even if it was established, however, the employer articulated a nondiscriminatory reason for its action. Johnson did not prove that the reason was pretextual or that union animus was a substantial motivating factor.

Johnson Cannot Establish a Prima Facie Case of Discrimination

Johnson met his burden to prove the first two elements of a prima facie case of discrimination. Following the employer's 2017 selection of another applicant for the campus security sergeant position, Johnson contacted the union, which then filed a grievance on his behalf. Seeking assistance from a union and filing a grievance is protected activity. *City of Pasco*, Decision 3804-A (PECB, 1992). Johnson was also denied an ascertainable right, benefit, or status when he was not offered a promotion to the security sergeant position. *See City of Vancouver*, Decision 10621-B (finding employer engaged in unlawful discrimination when it failed to select an employee for a new assignment).

Johnson's 2017 communications to HSAS&F leadership regarding proposed changes to security operations is not conduct protected by chapter 41.80 RCW. Activity undertaken by employees for mutual aid or protection unrelated to a labor organization is not protected by PSRA, or other statutes administered by PERC. *State – Corrections*, Decision 10998-A (PSRA, 2011), *aff'd, Teamsters Local Union 117 v. Department of Corrections*, 179 Wn. App. 110 (2014) (rejecting the contention that protected concerted activity described in the National Labor Relations Act is protected under chapter 41.80 RCW). There is no evidence that the proposal was submitted in conjunction with, or on behalf of, the union. Johnson was the sole author of the document. Johnson's claim that the employer harbored animus towards his activity creating a proposal regarding operational changes to the security program is thus irrelevant to determining whether he established a prima facie case of discrimination.

There is insufficient evidence to establish a causal nexus between Johnson's protected activity and his non-selection for the security sergeant position in 2019. Employees may establish a causal connection by showing that adverse action followed the employees' known exercise of a protected right under circumstances from which one can reasonably infer a connection. *City of Winlock*, Decision 4784-A (PECB, 1995). "[T]he burden to establish a causal connection increases for

activities that are remote from organizing and bargaining. In other words, the evidentiary and proof problems for a union leader and visible organizer are easier than for one who merely claims benefits under an existing contract." *Seattle School District*, Decision 5237-B (EDUC, 1996).

While not insignificant, Johnson's protected activity is not substantial. It is limited to the filing of a single grievance. In the context of its overall operation as one of the largest employers in the state, with a large number of grievances filed annually, there is no evidence that Johnson's grievance had any particular significance for the employer.

The timing of the employer's decision not to promote Johnson does not support finding a causal nexus. Johnson's non-selection for the security sergeant position is tied to the timing of the employer's recruitment for the job. The employer recruited for the security sergeant position shortly after Johnson's promotion grievance was settled. The reason for waiting until after the grievance was settled to post the position was credibly described by the employer's witnesses. Instead of being motivated by Johnson's protected activity, the employer waited to post the position in order to avoid having to "unwind" the hiring of a new candidate in the event the union prevailed at arbitration. The timing of the decision not to promote Johnson is explained by the employer's concern over potential operational issues in the event of an adverse arbitration award, rather than animus toward the activity itself.

Because Johnson cannot establish a causal nexus between his protected activity and his non-selection for the security sergeant position, he is unable to make a prima facie case of discrimination. This is sufficient to warrant dismissal of the allegation. Even if he were able to establish a prima facie case, the preponderance of the evidence still weighs in favor of dismissal.

The Employer Articulated a Legitimate, Nondiscriminatory Reason for Its Decision

After a complainant establishes a prima face case of discrimination, the burden of production shifts to the employer to produce a legitimate, nondiscriminatory reason for the adverse action. The employer has articulated such a reason here.

The employer's witnesses credibly testified that Johnson was not selected for the security sergeant position in 2019 because he was less qualified than the successful applicant and did not perform as well during the interview process.

The Employer's Articulated Reason Was Not Pretextual or Motivated by Anti-union Animus

The evidence does not establish that the reason proffered by the employer for selecting another candidate for the sergeant position was pretextual.

The résumé of the successful candidate, Ian Foster, confirms that he possessed more of the knowledge, skills, and abilities required for the security sergeant position than Johnson. Foster's résumé received a significantly higher score than that submitted by Johnson. Foster also had substantially more supervisory experience, a key requirement for the position. While Johnson had several years of supervisory experience, Foster had significantly more, with over 30 years as a sergeant for a law enforcement agency.

The scores given by the participants of the group interview corroborate Siscel's testimony that Johnson did not perform as well as other candidates during the interview itself. He received the lowest score among those interviewed, even after accounting for a mathematical error in the calculations of one of the interviewers. Foster, on the other hand, received the highest score. The fact that a number of individuals not involved in the management of HSAS&F's security operations also rated Foster higher than Johnson further strengthens the conclusion that the reason offered by the employer for its decision was not pretextual.

A comparison between the way Johnson was evaluated by the employer for the position in 2017 and 2019 undermines any claim that the articulated reasons for his non-selection served as cover for an unlawful motive. During the 2017 selection process, Johnson was selected for a phone interview. Based on his performance he was not chosen to continue to the in-person interview stage. In contrast, in 2019 not only was Johnson once again invited to participate in a phone interview but he was also one of the finalists selected for an in-person interview. Although the collective bargaining agreement requires the employer to interview one bargaining unit employee who possess the essential skills for the position per selection process, the contract does not

explicitly state that the interview must be in person rather than via telephone. One could assume that conducting a phone interview with a bargaining unit applicant satisfied the employer's contractual obligation under Article 14.6(E). If the employer was motivated by anti-union animus, advancing Johnson further in the process than it did before he engaged in protected activity seems an unlikely course of action. On the other hand, if the employer was contractually required to interview Johnson in person, the outcome of the process was the same as during the 2017 recruitment. The employer's equal treatment of Johnson before and after his protected activity undermines his claim that the asserted reason for his non-selection in 2019 was pretextual.

Finally, there is no evidence that the employer expressed or harbored animus toward Johnson's protected activity of filing a grievance contesting the employer's 2017 decision not to select him for the security sergeant position. Absent some evidence of animus, I cannot conclude that it was a motivating factor in the decision.

CONCLUSION

The employer's misrepresentation during the course of negotiations to settle Johnson's grievance does not rise to the level of unlawful interference with employees' statutory rights. There is also no causal nexus between Johnson's protected activity and the employer's decision not to promote him. Johnson failed to establish a prima facie case of discrimination. Even if there was a prima facie case, the employer articulated a legitimate, nondiscriminatory reason for its decision. There is insufficient evidence to show that the asserted reason is pretextual or that the decision was motivated by anti-union animus.

FINDINGS OF FACT

1. The University of Washington (employer) is an institution of higher education within the meaning of RCW 41.80.005(10).

2. Service Employees International Union Local 925 (union) is an employee organization within the meaning of RCW 41.80.005(7).

3. The employer operates a four-year institution of higher education. Its flagship campus is located in Seattle. The Health Sciences Academic Services and Facilities (HSAS&F) is a subdivision of the Health Sciences Administration.

4. The head of the department is HSAS&F Director Lacey Racich. Reporting to Racich is Assistant Director Steven Berard. Berard is responsible for oversight of the building management, security, and some instructional support functions. Paul Siscel is the manager of the HSAS&F building operations and security. His job functions include supervision of the department's security officers.

5. Many labor relations functions for the employer are managed by its Office of Labor Relations (OLR). Labor Negotiators employed in the OLR handle, among other things, grievances if they are not resolved at the first step in the process. The employer is a large organization. It processes a substantial number of grievances every year.

6. The union represents a bargaining unit composed of a wide range of classifications of employees. Security officers employed within HSAS&F are included in this bargaining unit and represented by the union. The union and the employer have been parties to a series of collective bargaining agreements. The 2017–19 collective bargaining agreement (CBA) contained provisions related to internal promotions. Article 14.6 of the CBA contained language dealing with the promotional process.

7. HSAS&F has a multistep hiring process applicable for security officer positions. Prior to posting a security officer position, managers and human resources staff review the job description for any needed changes. The position is then posted. After the posting period ends, the hiring manager screens the applications. Each applicant is rated A, B, or C. The ratings are based, in part, on the extent to which a given application shows the candidate meets the knowledge, skills and abilities as identified in the job description. Typically, applicants with an A rating are offered a phone interview.

8. The employer selects several of the applicants for an in-person interview based on their performance in the phone interview. During the in-person interview, the applicants meet

with several managers individually. They also participate in a panel interview. The panel is composed of HSAS&F leadership and outside stakeholders. The panel participants rate each applicant along a variety of metrics related to the knowledge, skills, and abilities required for the position. Based on those scores and the hiring manager's own opinion, the hiring manager determines who to hire.

9. Marques Johnson is employed as a security officer in HSAS&F. He works at the employer's Seattle campus. He was hired in 2008 and is currently in a position represented by the union. During most of the period relevant to the instant proceedings, he reported to Siscel.

10. Historically, security at the employer's health sciences complex was provided by HSAS&F security officers, with supplemental coverage provided by the University of Washington Police Department (UWPD). In 2017 HSAS&F reviewed the costs involved with its agreement with UWPD. HSAS&F determined it was more cost effective to control the entire security program itself. In order to ensure effective performance of the larger security role, HSAS&F determined a security sergeant position was needed. Commensurate with the higher level of responsibility, the position would also offer a higher rate of pay than that for other security officers.

11. At approximately the same time that HSAS&F leadership was making the determination to assume control of the entire security operation, Johnson submitted a proposal to a number of managers within the organization making the same suggestion. There is no evidence that the proposal was submitted in conjunction with, or on behalf of, the union.

12. The employer initiated the hiring process for the security sergeant position during fall 2017 in light of its new needs. Johnson applied for the position on September 19, 2017. His application was given a preliminary rating of "B." Normally, applicants who receive this rating are not invited to participate in a telephone interview. Because of Johnson's tenure with the employer, however, he had a phone interview with Siscel and another HSAS&F manager on October 13, 2017. The managers determined that Johnson's performance during the phone screen did not warrant moving him to the next stage of the hiring process.

13. Ultimately, three candidates participated in in-person interviews. At the end of the competitive hiring process, the employer offered the security sergeant position to Stefen Kaelber.

14. After Johnson was informed he was not selected for the sergeant position, the union filed a step one grievance on his behalf on December 28, 2017.

15. The employer disagreed with the union's interpretation of the contract so the grievance moved through steps one and two of the process. The employer was represented at step two by Labor Negotiator Mark Hansen, employed in the OLR.

16. On February 14, 2019, HSAS&F Human Resources staff informed Hansen that Kaelber had resigned. His last day as security sergeant was February 15, 2019. The email from HSAS&F staff to Hansen indicated that the position would be "reposted and recruited for as usual."

17. HSAS&F Human Resources staff had a conference call with Hansen about the grievance on March 19, 2019. The employer representatives discussed the extent to which the sergeant position would be reposted during the call.

18. Following the discussion Hansen called the union representative responsible for handling the grievance, Damian Kent. During their conversation Hansen told Kent that the sergeant position would not be reposted. He explained that he had learned HSAS&F believed the security officers were a self-sufficient group and might not need a sergeant. Hansen's comments regarding the future of the position were memorialized in an email he sent to HSAS&F Human Resources staff on April 1, 2019, as well as in a separate email he sent to Kent on the following day, April 2. Hansen's last day with the employer was on April 5, 2019.

19. Hansen's communications to Kent regarding whether the position would be posted in the future were incorrect. The employer had not decided to eliminate the security sergeant position. Rather, the employer determined that it would be more prudent to wait to post the position until after Johnson's grievance was resolved via either a settlement or at

arbitration. The employer reasoned that posting the position before the grievance was resolved could cause potential issues. In the event it was posted, a candidate other than Johnson was selected, and the union prevailed at arbitration, the employer could face the problem of having to separate or move the successful applicant.

20. In July, the union proposed settling the grievance by editing some language contained in Johnson's 2016–17 and 2017–18 performance appraisals. Kent did not testify as to why the union proposed resolving the grievance in this manner. He also did not discuss whether Hansen's April comments regarding the future of the security sergeant position had any effect on the union's approach to settlement. Kent and Denis discussed the union's proposal throughout the latter portion of July and into August. They eventually reached a conceptual agreement. Kent sent Denis an email on September 3, 2019, accepting an offer extended by the employer.

21. There is no evidence that the employer expressed or harbored animus towards Johnson's union activity in seeking the union's assistance to file and process the promotion grievance.

22. The security sergeant position was eventually posted on October 1, 2019.

23. The employer managed the 2019 hiring process for the security sergeant position in much the same way that it did in 2017.

24. Of the individuals selected to participate in the phone interview, Johnson's application received the lowest score. In contrast to his 2017 application, Johnson was among those selected for an in-person interview.

25. Siscel did not recommend Johnson, instead preferring Ian Foster, an external candidate. Siscel did not select Johnson for several reasons. Siscel felt Johnson did not perform as well as other candidates during the in-person interviews. Of the three applicants interviewed, Johnson received the lowest cumulative score. Siscel also determined that, in light of Foster's previous experience, which included 30 years working as a sergeant for the Seattle Police Department, he was the most qualified candidate. Foster also received the highest cumulative interview scores of those who participated.

26. Foster was ultimately offered the security sergeant position. He began work on January 13, 2020.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to chapter 41.80 RCW and chapter 391-45 WAC.

2. By its actions described in findings of fact 3–26, the employer did not interfere with employee rights in violation of RCW 41.80.110(1)(a) by threats of reprisal or force, or promises of benefit, made to Marques Johnson related to denying Johnson the Campus Security Sergeant position after Johnson filed a grievance.

3. By its actions described in findings of fact 3–26, the employer did not engage in discrimination in violation of RCW 41.80.110(1)(c) by hiring an external applicant into the Campus Security Sergeant position over Marques Johnson in reprisal for union activities.

ORDER

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

ISSUED at Olympia, Washington, this 27th day of May, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL SNYDER, 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 05/27/2021

DECISION 13352 - PSRA 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 132545-U-20

EMPLOYER:	UNIVERSITY OF WASHINGTON
REP BY:	BANKS EVANS III UNIVERSITY OF WASHINGTON 4300 ROOSEVELT WAY NE PO BOX 354960 SEATTLE, WA 98195-4960 bankse@uw.edu
	CHRISTINA L. THACKER OFFICE OF THE ATTORNEY GENERAL UNIVERSITY OF WASHINGTON DIVISION 4333 BROOKLYN AVE NE 18TH FL PO BOX 359475 SEATTLE, WA 98195 christina.thacker@atg.wa.gov
PARTY 2:	MARQUES JOHNSON
REP BY:	MARQUES JOHNSON 32621 4TH PL S FEDERAL WAY, WA 98003 marquesr.johnson@gmail.com