

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PIERCE COUNTY DEPUTY SHERIFF'S
INDEPENDENT GUILD,

Complainant,

vs.

PIERCE COUNTY,

Respondent.

CASE 132989-U-20

DECISION 13397 - PECB

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Leann K. Paluck, Attorney at Law, Lombino Martino, P.S., for Pierce County Deputy Sheriff's Independent Guild.

Jana R. Hartman, Deputy Prosecuting Attorney, Civil Division, Pierce County Prosecuting Attorney Mary E. Robnett, for Pierce County.

On August 21, 2020, Shaun Darby filed an unfair labor practice complaint with the Public Employment Relations Commission, and later amended the complaint on September 17, 2020, following a deficiency notice from the Unfair Labor Practice Administrator. His amended complaint alleged that Pierce County discriminated against him based on protected activity and, following an initial review, a preliminary ruling issued on September 25, 2020. Pierce County filed its answer on November 6, 2020, and denied the allegations.¹ The Pierce County Deputy Sheriff's Independent Guild, through its attorney, appeared on Darby's behalf on February 1, 2021. The matter proceeded to hearing on March 17 and 18, 2021, which was conducted by video conference before Examiner Daniel Comeau. The parties filed post-hearing briefs on May 24, 2021, to complete the record.

¹ There were issues concerning service of the complaint upon Pierce County.

ISSUE

The issue in this matter, as set forth in the preliminary ruling, is as follows:

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 extending Shaun Darby's administrative leave and bringing two additional IA investigations against him in reprisal for union activities protected by chapter 41.56 RCW.

Based on the record, the employer did not discriminate against Darby by extending his administrative assignment and adding two additional internal investigations against him. There was no causal connection between his protected activity and the employment actions taken against him. Therefore, this case must be dismissed.

BACKGROUND

Detective Shaun Darby has been employed with the Pierce County Sheriff's Department since 1999 and was promoted to the rank of detective in 2010. He began working in the Special Investigations Unit (SIU) in 2013 and is a member of a bargaining unit represented by the Pierce County Deputy Sheriff's Independent Guild (union). The union was a party to a collective bargaining agreement (CBA) with Pierce County (employer) that was effective until December 31, 2021.

There were approximately 13 bargaining unit employees in the SIU, whose responsibilities, generally, were the investigation of narcotics. Specifically, SIU employees were responsible for conducting surveillance, preparing and executing search warrants, making arrests, seizing property, and engaging in other investigative activities. As a member of SIU, Darby was expected to perform these functions.

Prior to 2020, Darby's performance evaluations indicate that he had been meeting or exceeding performance expectations. His individual performance components ranged from a rating of "Success" to "Excellence," with three exceptions during the 2017–19 evaluation period. The three

performance areas marked “Needs Improvement” were “Is a Team Player,” “Communication Skills,” and “Overall Performance.”² For his 2020 evaluation (completed in November 2020), Darby’s Communication Skills and Overall Performance rating improved to the level of “Success.”³ Darby received several awards and commendations throughout his career.

Also prior to 2020, Darby had never been placed on administrative assignment for any reasons relating to his work performance. On February 24, 2020, however, Darby was placed on administrative assignment during an internal investigation (IA) into his involvement with the execution of search warrants. The employer’s policy regarding administrative assignments provided the following:

1020.7 ADMINISTRATIVE ASSIGNMENT

When a complaint of misconduct is of a serious nature or when circumstances practically dictate that it would impose an unreasonable risk to the Department, the member, or other members or the public, the Sheriff or Sheriff’s designee may assign the accused member to administrative assignment pending completion of the investigation.

An employee placed upon administrative assignment is also subject to certain rules and guidelines set forth in the policy. The relevant rules and guidelines are as follows:

1020.7.1 ADMINISTRATIVE ASSIGNMENT GUIDELINES

- (c) A member may be ordered to refrain from taking any action as a departmental member or in an official capacity. The member shall be required to continue to comply with all policies and lawful orders of a supervisor and to remain available during the Department’s normal business hours to participate in the investigation or for any purpose as may be assigned.

² Darby’s “team player” rating reflected that he needed to improve his performance in working with other officers, following directions, prioritizing team first, exhibiting flexibility, and working well with community organizations.

³ There was a gap of almost two years between the 2019 and 2020 evaluations. During that time, there was management turnover in the sheriff’s department, several internal affairs investigations ongoing in 2020, a pandemic, and Darby’s administrative assignment.

- (d) A member may be temporarily assigned to a different shift (generally normal business hours) during the pendency of the investigation. The member will be required to remain available for contact and fit for duty at all times during such shift and will report as ordered.
- (e) A member is not authorized to work in any law enforcement off duty status at any time.
- (f) A member is not authorized to work any other type of employment during the hours the member is required to be available for duty.

Thus, Darby was not authorized to perform any of his normal duties during his administrative assignment, nor was he authorized to work any outside law enforcement employment or to work any additional overtime shifts. According to Darby, the latter restriction resulted in a significant loss in earnings in 2020.

There was a total of four internal investigations specifically concerning Darby, and an additional investigation concerning the entire SIU, in which Darby was specifically mentioned. Thus, there were a total of five investigations concerning Darby throughout 2020. Each investigation is outlined below.⁴

Criticism Report 20CRT-0054 (Sams)

On January 2, 2020, citizen Melissa Sams filed a complaint against Darby for cursing at her during a phone conversation between them. Darby testified that he self-reported the incident to his supervisor and admitted some responsibility for his communications toward Sams. Nonetheless, an internal investigation was opened and the investigation was assigned to Chief Gerald Lawrence. At the time, Lawrence was considered one of Darby's higher ranking supervisors.

⁴ The merits of the internal investigations are not before the Commission and, therefore, not relevant to these proceedings. The detail provided in this decision is focused solely upon what is relevant to Darby's claim under RCW 41.56.140(1).

The investigation concluded and Darby received verbal counseling.⁵ Later, in August 2020, this matter arose during conversations between management and the union at a labor relations meeting. The union requested that the designation of the complaint as an “Inquiry” was incorrect and that it be changed to “Criticism.” Upon changing the designation, management entered an additional verbal counseling into Darby’s file, which Darby grieved. In response to the grievance, management corrected the mistake and amended the discipline to note that he had already received the verbal counseling.

Criticism Report 20CRT-0009 (Wales)

Also in January 2020, Darby was investigating a suspect identified by the name of Wales. Because of the threat level of the suspect, Darby authored a search warrant and handed the search warrant to the Pierce County SWAT for service. When SWAT scouted the location, members of SWAT determined there was an issue with the described target location. They asked Darby to rewrite the warrant, which he did, and the SWAT enforced the second warrant. The location in the second warrant turned out to be the wrong door.⁶

Following the breach of the wrong door, Darby advised those on scene that the original warrant was still valid, but SWAT did not believe that to be the case and began discussing the issue with Darby’s supervisor, Lieutenant Cynthia Fajardo, who was also on the scene. During that conversation, Darby, believing the original warrant to be valid and noticing the door of the original warrant was ajar, entered through that door with another deputy. (SWAT was unwilling to serve the warrant and departed.) Darby testified that he entered the door of the initial warrant believing it to be an officer safety issue. At the time Darby entered, the suspect had already been apprehended, as Darby testified Wales had already walked out of the same door Darby entered.

Later that day, Fajardo met with the prosecutor’s office to discuss the warrant, and she indicated that the warrants were legally sound. She also informed Chief Lawrence that the issue arose from

⁵ Darby was not placed on administrative assignment during the pendency of this investigation.

⁶ The door was correctly described in the warrant, but apparently the suspect, Wales, did not live there.

miscommunications and information gaps and that, moving forward, the matter could be avoided by ensuring the SIU case officer was present at SWAT briefings. At this point, the matter appeared to have been resolved.

Undersheriff Brent Bomkamp, however, testified that he continued to hear from multiple sources that both SWAT and the prosecutor's office had concerns about Darby (and others in SIU) and that they did not trust him, nor would they serve warrants issued by him.⁷ Because of this, and after Bomkamp consulted with Sheriff Paul Pastor, Darby was placed on administrative assignment pending an investigation into the matter. Bomkamp testified that the reason Darby was placed on administrative assignment, even though the initial allegations related to performance, was due to Darby's purported disregard for the known controversy over the warrant and his decision to enter the dwelling anyway.

The investigation was assigned to Lieutenant Brian Lund, a bargaining unit member and an experienced internal affairs investigator. At the beginning of the investigation, there were two performance claims against Darby. But on or before April 28, 2020, Lieutenant Karr,⁸ the internal affairs supervisor, directed Lund to add a possible constitutional violation based on a belief that the warrant Darby acted upon was invalid. Lund testified that this was not unusual and that, being a reviewer, he believed Karr had "the ability to add a policy violation if they – if they believe it's applicable."

Lund completed his investigation on May 5, 2020. Darby was given the opportunity to file a written statement, and the case was then forwarded for review to Lieutenant Micah Lundborg. Lundborg completed his review on June 19, 2020, concluding only that Darby's policy violation of "Unsatisfactory Performance" be sustained. Lundborg found that there was no malice involved in Darby's actions and recommended that Darby receive a counseling as a result of his actions. At

⁷ Bomkamp also testified that, after reviewing the case files, he was concerned that Darby's execution of the original warrant, if the warrant was invalid, was a constitutional violation (Fourth Amendment) and posed significant liability to the department.

⁸ Bomkamp testified that Karr advised him that he (Bomkamp) should seek outside review of the warrant; so Bomkamp contacted Pam Loginsky.

the time, Darby had already been removed from the SIU for reasons explained below, and Lundborg felt that further discipline might make Darby feel as though he was being punished.

However, Chief N. J. Hausner⁹ disagreed with Lundborg's assessment. In Hausner's view, Darby's inability to recognize that the warrant he was acting upon lacked specificity (along with his determination that it was valid simply because it was not negated by the second warrant) "missed the mark" in relation to the department's mission to protect property and uphold community rights. Thus, contrary to Lundborg, Hausner found that Darby did violate the policy manual regarding constitutional requirements in addition to exhibiting unsatisfactory work performance.

Darby testified that he was told by Chief Lawrence that the Wales investigation would be "fast-tracked" and that he would be removed from administrative assignment once the matter was closed. Lawrence denies this assertion and testified that he told Darby the matter was a priority for the department and that the investigator was told to complete the investigation as quickly as possible. Lawrence also testified that he did not tell Darby that he would be removed from administrative assignment once the Wales matter was concluded.

Darby served his suspension for his involvement in the Wales matter from August 24 through August 27, 2020. On August 27, 2020, union attorney Leann Paluck asked Bomkamp whether Darby would be removed from administrative assignment. Bomkamp replied on the same day, stating that Darby would remain on administrative assignment "as [they] work[ed] through the three additional IA investigations of which he [was] the subject." Those internal investigations are explained below.

⁹ On April 13, 2020, Paluck emailed Bomkamp detailing the union's concern about the review chain of the investigation. Specifically, the review path would have included superiors who were either subjects of the investigation (Fajardo) or who were involved in directing the investigation (Bomkamp and Lawrence). The union suggested the review process end with either Chief Hausner or Chief Heishman. Chief Hausner was the selected reviewer.

Criticism Report 20CRT-0015 (SIU Investigation)

On or before March 20, 2020, the employer was “alerted by a number of Sheriff’s Deputies and Deputy Prosecutors raising questions about procedures and practices” within the SIU.¹⁰ According to Bomkamp, the concerns were raised by Deputy Prosecuting Attorney (DPA) Lisa Wagner and Deputy Derek Nielsen, and they involved accusations of filing false police reports in regard to pending investigations; one of which, the Peres Case, was assigned to Darby. Although the issues were not criminal in nature, on March 20, 2020, Bomkamp notified Chief Lawrence and Lieutenant Fajardo that the SIU was “to immediately cease all investigations and investigative planning and operations.” This cessation precluded any SIU member from initiating any investigations, following up on cases, contacting/communicating with suspects, preparing or serving search warrants, conducting surveillance, or any other type of investigative activities. At the time of this decision, Darby was already on administrative assignment under the Wales investigation and was not authorized to perform any of these functions.

The employer opened an investigation. The parties agreed that Kitsap County would conduct the initial investigation, which would then be reviewed by Clark County. On April 1, 2020, Darby was notified that he was a subject of the SIU investigation and that the Kitsap County Sheriff’s Office would be conducting the investigation, with assistance from the Pierce County Sheriff’s Department Internal Affairs Unit. Following Darby’s notification, and effective April 27, 2020, the entire SIU, with the exception of Darby and Detective Shaw,¹¹ was temporarily reassigned pending the outcome of the investigation. Darby, again, was still serving on administrative assignment pending the Wales investigation.

At the outset of the SIU investigation, Darby was being investigated for “Unsatisfactory Performance.” Later, on May 19, 2020, Darby was notified that Kitsap County Lieutenant John

¹⁰ A few weeks later, on April 13, 2020, Bomkamp was notified by the prosecutor’s office that there was potential impeachment or *Brady* evidence relating to criminal investigations. Darby was assigned to two of the cases under criminal investigation.

¹¹ Detective Shaw had what appeared to be a dual assignment by which, while on paper he was assigned to the SIU, he was really assigned to the Tahoma Narcotics Enforcement Team. He was not placed on administrative assignment during the investigation because the investigation did not apply to him.

Van Gesen had identified three potential policy violations. These alleged violations were identified as (1) failing to obey lawful orders, (2) failing to disclose material fact(s) or making false or misleading statements(s), and (3) exceeding lawful peace officer powers. Specifically, Darby was accused of booking a confidential informant into jail on a Friday, right before the weekend, without any intention of having him charged with a crime. Kitsap County concluded its investigation and, per agreement between the parties, its investigative report was forwarded to Clark County for review.

Clark County found no serious violations. Instead, the county “found minor violations during the execution of several search warrant operations and subsequent arrests.” With respect to Darby, Clark County found that he was, in fact, in violation of several policies including unsatisfactory work performance, failure to obey lawful orders, violation of department manual and procedures, confidential informants, and administrative assignment guidelines. In summary, he was in violation of these policies because he failed to communicate to the prosecutor his booking the confidential informant into jail, continuing to have contact with the informant while on administrative assignment, and entering into a verbal contract with the informant.¹²

As of the date of the hearing in this case, the SIU investigation as it pertained to Darby had not been concluded, although the investigation had concluded for the other SIU employees who had already served discipline. Bomkamp testified that the 1,200-page investigative report and documentation arrived in December and, with the newly elected Sheriff Troyer taking over, meetings on this matter in relation to Darby had yet to occur.

Criticism Reports 20CRT-0023 (Humphrey) and 20CRT-0024 (Sauceda)

During the investigation of the SIU matter, Deputy Nielsen came forward with additional allegations against Darby. DPA Wagner, Nielsen, and Deputy Kris Nordstrom attended a meeting with Bomkamp for the purpose of discussing false police reports being filed in the SIU. According to Bomkamp, at the conclusion of that meeting, Nielsen asserted, “I’ve seen [Darby] cross a

¹² Recall that, as part of his administrative assignment, Darby was prohibited from performing any of these functions.

threshold. And I've seen him kidnap someone when he didn't have cause to do so." This led to the additional internal investigations of Darby's conduct, which became the Humphrey and Saucedo investigations.

Humphrey Investigation

The Humphrey matter involved Nielsen's allegation that Darby unlawfully arrested an individual and unlawfully seized that individual's vehicle without probable cause. Lund was assigned to investigate the matter on April 23, 2020, and Darby was notified of the investigation on May 6, 2020. The complained of events, however, occurred on or about October 8, 2019, which was several months before Nielsen's initial complaint to Bomkamp. Nielsen had not complained of any of this in any of his previous reports of the incident.¹³

The investigation centered on claims that Darby engaged in policy violations relating to constitutional requirements, search and seizure policy, and unsatisfactory job performance. As part of his investigation, Lund interviewed Darby, Nielsen, Detective Darrin Rayner, Detective Ryan Olivarez, and Detective Elizabeth Reigle. Each employee, with the exception of Rayner, had union representation during the interviews. The main issue with Darby's conduct was that he had allegedly detained an individual named Humphrey and seized his van but did not have warrants to do either. Ultimately, the investigation found the allegations against Darby to be "Not Sustained," and he was notified of this on December 16, 2020.

Saucedo Investigation

Nielsen also alleged that Darby unlawfully entered the dwelling belonging to an individual named Saucedo. Darby had a purported agreement with Saucedo to act as a confidential informant but was later notified by Saucedo's attorney that Saucedo did not want to serve as a confidential informant. On or about January 31, 2020, Darby and Nielsen went to Saucedo's residence and,

¹³ The union also elicited testimony from Bomkamp that Nielsen had a complaint of dishonesty against him, but Bomkamp (and Lund) testified that the employer would still be obligated to investigate the claims in any event.

according to Nielsen, a woman (“Ms. Sauceda”) answered the door. Nielsen alleged that Darby entered the dwelling to arrest Sauceda without invitation and without legal authority.

As with the others, the investigation of this matter was assigned to Lund, and the alleged policy violations were, again, constitutional requirements, search and seizure policy, and unsatisfactory job performance. Darby was also notified about this investigation on May 6, 2020. During the review process, Paluck raised concerns about the findings and recommendations by reviewer Chief Kevin Roberts. Specifically, she noted that a key witness, Ms. Sauceda, was not interviewed and she was material to the allegations and could provide exculpatory evidence regarding Darby’s entrance into the Sauceda residence. On December 21, 2020, Bomkamp agreed. He replied to Paluck that he would direct Lund to contact Ms. Sauceda, if she could be identified and located, to see if she agreed to be interviewed. At the time of the hearing, Lund had been unable to locate and interview Ms. Sauceda, so the investigation remained open and pending.

Darby’s Protected Activity and Allegations of Discrimination

The evidence concerning Darby’s protected activity is largely undisputed. Darby requested union representation during the initial investigation of the Wales matter, and he continued to engage the union throughout his service on administrative assignment. Bomkamp testified that Paluck requested ongoing updates from him on Darby’s administrative assignment status, and Bomkamp agreed to do so. Lynelle Anderson, union president, also routinely requested updates on Darby’s administrative assignment status.

Darby testified that in 2019 he began contacting Human Resources, specifically Human Resources Senior Labor Relations Specialist Brent Long, concerning what Darby believed to be an ongoing hostile work environment.¹⁴ His claim was that Nielsen and Wagner had a vendetta against him and Wagner, specifically, wanted to physically confront him. In an email to Long on February 23, 2020, Darby claimed that SWAT Sergeants Delgado and Berry, “in a coordinated and out of policy attack with DPA Fred Wist,” were a part of a “continued and calculated

¹⁴ The employer does dispute the relevance of Darby’s activities in this regard and argues that claims of retaliation for a hostile work environment are beyond the jurisdiction of the Commission.

vendetta/discrimination against [him].” Long, in two separate and subsequent emails, encouraged Darby to work with his union, and the evidence at hearing established that Long was not a part of any decision-making process regarding Darby’s administrative assignment, upon which he had already been placed.

In regard to Nielsen, Darby testified to the tense nature of their relationship. Specifically, Darby testified that he and Nielsen, Darby’s former partner, did not get along. Darby testified that he questioned Nielsen’s work product, which upset Nielsen to the point that Nielsen requested to be moved to a different part of the office. At that point, according to Darby, Nielsen began making accusations against him. Darby testified to an intense interaction between he and Nielsen, during which Nielsen “became quite enraged, angry, and had several four-letter words for [Darby], pushed his chair back stepped away from the table, called [Darby] all sorts of derogatory names in view of twelve other coworkers.”

The union also presented evidence that Darby, being the only one in his unit placed on administrative assignment, was also placed on administrative assignment in a break with historical practice. Fajardo, Detective Vance Tjossem, and Anderson, each testified that they were unaware of any other employee being placed on administrative assignment for performance-related issues. They testified, instead, that their understanding was that administrative assignment was limited to serious/criminal allegations and that once those investigations were complete and the employee was exonerated, the employee was placed back into normal duties.

The employer, however, presented evidence of employees who were placed on administrative assignment for policy violations that were not criminal in nature. In 2016, an employee was placed on administrative assignment for one month and 25 days for excessive tardiness. In another example, a different employee was placed on administrative assignment for failing to properly wear safety equipment—although this employee’s placement on administrative assignment postdated Darby’s placement on administrative assignment.¹⁵

¹⁵ The evidence established that this employee was placed on administrative assignment on August 19, 2020, and, as of the date of the hearing, the evidence shows that the administrative assignment had not yet

The other SIU employees subject to the investigation into false police reports were not placed on administrative assignment. Since none were placed on administrative assignment, none had an administrative assignment subject to any extensions. Bomkamp testified that while he could not specifically recall any conversations related to placing other SIU employees on administrative assignment, he assumed that such conversations occurred. Furthermore, the record does not indicate the total number of investigations opened for each of the other SIU employees, in comparison to Darby's five investigations in 2020.

ANALYSIS

Applicable Legal Standard

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.

concluded. That equates to approximately seven months of administrative assignment for this employee. There is no evidence in the record as to whether the employee used union representation.

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 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. at 349. 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 Standard

The issue in this matter, as set forth in the preliminary ruling, is quite narrow. Specifically, the issue is whether the *extension* of Darby's administrative assignment and the employer's *addition* of two internal investigations were discriminatory and in retaliation for Darby's protected activity. The union's testimony at hearing and its argument focus significantly upon Darby's *placement* upon administrative leave, rather than the extension. However, the employer's initial placement of Darby onto administrative assignment is not before the Examiner.

The Union Failed to Establish a Prima Facie Case

The employer does not dispute that Darby engaged in protected activity when he engaged the union to assist him through his internal investigation process, and there is no dispute that management was aware of this activity. The evidence also establishes that Darby was deprived of an ascertainable right, status, or benefit as he continued to serve on administrative assignment and was restricted from performing his normal duties or accepting any additional off-duty work assignments or overtime. The union's evidence fails to establish, however, that a causal connection exists between Darby's protected activity and either the employer's decision to extend Darby's administrative assignment or the addition of two internal investigations against him.

To establish a causal connection, the union may rely upon circumstantial evidence or upon circumstances from which one can reasonably infer a causal connection. *City of Federal Way*, Decision 5183-A (PECB, 1996). In this case, there is insufficient evidence or circumstances that would lead to a reasonable conclusion that Darby's protected activity caused the employer to extend his administrative assignment and initiate two additional investigations against him. The lack of causation stems mainly from the source of the complaints against Darby and the employer's obligation to investigate those complaints.

Additional Investigations. The record is unclear as to which of the additional investigations into Darby's conduct constitute the *two additional* investigations referenced in the preliminary ruling. Given that Darby was already on administrative assignment while being investigated for his involvement in the Wales matter, the additional violations were the SIU investigation, the Humphrey investigation, and the Saucedo investigation. Even assuming all three investigations were alleged to have been caused by Darby's protected activity, the evidence does not support the conclusion that *any* of them were so caused.

The SIU investigation stemmed from reports to the sheriff's department by other officers and the prosecutor's office that the SIU was engaging in filing false police reports. These accusations were not limited to Darby; they were directed at all SIU employees. Furthermore, the allegations were serious enough that then-Sheriff Pastor ceased all SIU operations and each SIU employee was subject to investigation.¹⁶ At this time, Darby was already on administrative assignment, and there is no evidence in the record linking management, Pastor or Bomkamp, to the origins of these complaints.

The same is true regarding the source of the Humphrey and Saucedo matters. Both matters originated when Nielsen—during a meeting with Bomkamp, Nordstrom, and DPA Wagner regarding the false police reports—claimed that he had seen Darby “cross a threshold” and “kidnap

¹⁶ This meant that, though not on administrative assignment, all SIU employees were not permitted to perform any work for the unit: essentially putting them on par with Darby, who was not permitted to perform any work for the unit while on administrative assignment.

somebody when he didn't have cause to do so." No evidence in the record establishes here, either, that Nielsen conspired with management in a scheme to discriminate against Darby for his protected activity.¹⁷

Most importantly, management had an obligation to investigate the claims regardless of whether Darby had engaged in protected activity. Lund, the investigator, credibly testified that, in his experience, the types of complaints raised by Nielsen against Darby were those that would typically result in an investigation, even if those complaints later proved invalid. Lund further testified credibly that, during his investigation of these matters, he found nothing out of the ordinary with the process or protocols. Under these circumstances, it is unreasonable to conclude that Darby's protected activity caused the additional investigations against him.

Extension of Darby's Administrative Assignment. The extension of Darby's administrative assignment was too attenuated to conclude that Darby's protected activity caused the extension. Darby was originally placed on administrative assignment on February 24, 2020, for the investigation into the Wales matter. Following the entirety of the investigation, the review process, and the final discipline, that matter did not officially conclude until August 27, 2020. August 27, therefore, is the date by which to determine whether the extension was unlawfully caused by Darby's protected activity.

By August 27, 2020, it had been at least four months (April to August) since Darby's last documented communication with Long in Human Resources, and Darby had union representation throughout all of his investigations. The evidence demonstrates that, also throughout that time, other SIU employees (e.g., Reigle) had union representation as well but had *not* been placed on administrative assignment.¹⁸ The Humphrey investigation provides a good example regarding the

¹⁷ As explained below, Darby acknowledged that tension existed between he and Nielsen, as well as between he and the prosecutor's office.

¹⁸ Indeed, two key union witnesses, Reigle and Anderson, were never asked whether any other SIU employees engaged the union while being under internal investigations—even to rebut Bomkamp's testimony that bargaining unit employees consistently engaged their union. The assumption as to why those questions were not asked is because the union witnesses knew the answer would be "yes." Anderson was Reigle's union representative during Reigle's SIU investigation process, which was also the subject of her own unfair labor practice complaint. *See Pierce County*, Decision 13371 (PECB, 2021). Therefore, the union's case rests on

union's involvement in the matter; SIU employees Nielsen, Reigle, and Olivarez all had union representatives with them during their investigatory interviews. Reigle, who was also involved in the Saucedo arrest, used her union representative during her investigatory interview. Thus, with Darby's fellow SIU employees prevalently using union representatives at or around the same time he was, combined with the fact that they were *not* placed on administrative assignment, it does not logically follow that his union representation was the cause of him being the only one on administrative assignment. As of Darby's December 3, 2020, email to newly elected Sheriff Troyer, Darby had served on administrative assignment for 283 days. It is understandable that Darby would be frustrated and want answers as to why he has served such a lengthy administrative assignment. Given the facts presented however, the seriousness of the multiple allegations against him and the sequential timing of those allegations, combined with an extension that *was requested by the union*, are more than likely the cause of his lengthy administrative assignment.

Most importantly, the employer's decision to extend Darby's administrative assignment was based on the number of open investigations against Darby. Since the additional investigations were not caused by, and were independent of, management, it is unreasonable to conclude that the decision to extend his administrative assignment as a result of those additional investigations was caused by Darby's protected activity. Therefore, the employer did not discriminate against Darby by extending his administrative assignment and adding two additional internal investigations, because there was no causal connection between them and Darby's protected activity.

Even with a Prima Facie Finding, Evidence Supports the Employer's Reasons

Assuming, arguendo, that the union had made a prima facie case, the employer's articulated reasons for its desire to keep Darby from investigatory work and authoring warrants are supported by the evidence. While Darby's initial placement on administrative assignment is not before the Examiner, the reasons for originally placing him there remained consistent throughout the multiple

the Examiner *assuming* that Darby was similarly situated to all other SIU employees in all other respects, *except* that Darby engaged his union. However, this is not the case.

investigations into his conduct.¹⁹ The Humphrey and Saucedo investigations involved additional claims that he was conducting improper searches and seizures without probable cause. Plus, one of Darby's sustained violations in the SIU matter was that he continued to perform investigative work with confidential informants while he was on administrative assignment, which was a violation of the guidelines for such assignments. (Thus, the record supports the employer's stated concern that Darby was potentially engaging in reckless disregard for rules and authority, thereby exposing the employer to liability.

The union argues, almost exclusively, that Darby's lengthy administrative assignment and multiple investigations must have been caused by his union activity. The placement of Darby on administrative assignment notwithstanding, the union failed to probe deeply, if at all, into the circumstances of the other SIU employees that would rule out any other explanations for Darby's assignment. Instead, the union focuses virtually all of its energy on attempting to establish that the practice was to place employees on administrative assignment *only* for investigations into possible criminal matters. This is not completely true as the employer rebutted this claim with two independent examples of employees on administrative assignment for excessive tardiness and failing to wear protective equipment properly.

Darby's Strained Relationship with SWAT, the Prosecutor's Office, and Nielsen

More importantly, it is difficult to conclude that Pastor and Bomkamp were making decisions regarding Darby's employment status based upon his protected activity when the evidence strongly suggests that they were reacting to a multitude of complaints arising from independent sources. Although Darby admitted there was a strained relationship between he and his former partner, Nielsen, and with the prosecutor's office, that doesn't minimize the employer's obligation to investigate the claims they brought forward. Regardless of whether the complaints were ultimately founded or unfounded, the Examiner's obligation is to determine whether sufficient evidence in the record supports the employer's articulated reasons for its actions. To the extent a *prima facie*

¹⁹ Bomkamp testified that he originally placed Darby on administrative assignment because he disregarded the controversy over a potentially invalid warrant and proceeded anyway.

showing would have been established, there is sufficient evidence to support the employer's reasons in this regard.

CONCLUSION

Based on the foregoing, the employer did not discriminate against Darby by extending his administrative assignment and introducing two additional internal investigations against him. There was no causal connection between his protected activity and the employment actions taken against him. Therefore, this case must be dismissed.

FINDINGS OF FACT

1. Pierce County (employer) is a public employer within the meaning of RCW 41.56.030(13).
2. The Pierce County Deputy Sheriff's Independent Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2).
3. The union was a party to a collective bargaining agreement (CBA) with Pierce County (employer) that was effective until December 31, 2021.
4. Detective Shaun Darby has been employed with the Pierce County Sheriff's Department since 1999 and was promoted to the rank of detective in 2010. He began working in the Special Investigations Unit (SIU) in 2013 and is a member of a bargaining unit represented by the Pierce County Deputy Sheriff's Independent Guild (union).
5. There were approximately 13 bargaining unit employees in the SIU, whose responsibilities, generally, were the investigation of narcotics. Specifically, SIU employees were responsible for conducting surveillance, preparing and executing search warrants, making arrests, seizing property, and engaging in other investigative activities.
6. Prior to 2020, Darby's performance evaluations indicate that he had been meeting or exceeding performance expectations. His individual performance components ranged from a rating of "Success" to "Excellence," with three exceptions during the 2017–19 evaluation

period. The three performance areas marked “Needs Improvement” were “Is a Team Player,” “Communication Skills,” and “Overall Performance.”

7. For his 2020 evaluation (completed in November 2020), Darby’s Communication Skills and Overall Performance rating improved to the level of “Success.” Darby received several awards and commendations throughout his career.
8. In 2019, Darby began contacting Human Resources, specifically Human Resources Senior Labor Relations Specialist Brent Long, concerning what Darby believed to be an ongoing hostile work environment.
9. Darby’s claim was that Deputy Prosecuting Attorney (DPA) Lisa Wagner and Deputy Derek Nielsen had a vendetta against him and that Wagner, specifically, wanted to physically confront him. In an email to Long on February 23, 2020, Darby claimed that SWAT Sergeants Delgado and Berry, “in a coordinated and out of policy attack with DPA Fred Wist,” were a part of a “continued and calculated vendetta/discrimination against [him].”
10. Nielsen and Darby did not get along. After being removed as Darby’s partner, Nielsen began making accusations against him. Darby testified to an intense interaction between he and Nielsen, during which Nielsen “became quite enraged, angry, and had several four-letter words for [Darby], pushed his chair back stepped away from the table, called [Darby] all sorts of derogatory names in view of twelve other coworkers.”
11. On February 24, 2020, Darby was placed on administrative assignment during an internal investigation (IA) into his involvement with the execution of search warrants to apprehend a suspect named Wales. The employer’s administrative assignment policy permits the employer to place an employee on administrative assignment when a complaint of misconduct is of a serious nature or when circumstances practically dictate that it would impose an unreasonable risk to the department, the member, or other members or the public, the sheriff or sheriff’s designee may assign the accused member to administrative assignment pending completion of the investigation.

12. The employer's administrative assignment policy also permits the employer to direct an employee to refrain from taking any action as a departmental member or in an official capacity. As a result of the administrative assignment, Darby was not authorized to perform any of his normal duties, nor was he authorized to work any outside law enforcement employment or to work any additional overtime shifts.
13. The employer's reasons for placing Darby on administrative assignment were the serious nature of the potential constitutional violations, the distrust between SWAT and Darby regarding Darby's warrants, and Darby's proceeding with the execution of the warrants was in disregard to the controversy over the validity of said warrants. Undersheriff Brent Bomkamp continued to hear from multiple sources that both SWAT and the prosecutor's office had concerns about Darby (and others in SIU) and that they did not trust him, nor would they serve warrants issued by him.
14. The investigation was assigned to Lieutenant Brian Lund, a bargaining unit member and an experienced internal affairs investigator. The matter concluded in August 2020 when Darby served his suspension from August 24 to August 27.
15. During this investigation and throughout Darby's administrative assignment, the employer was "alerted by a number of Sheriff's Deputies and Deputy Prosecutors raising questions about procedures and practices" within the SIU. The concerns were raised by Deputy Prosecuting Attorneys Wagner and Nielsen, and they involved accusations of filing false police reports in regard to pending investigations; one of which, the Peres Case, was assigned to Darby.
16. On March 20, 2020, Bomkamp notified Chief Lawrence and Lieutenant Fajardo that the SIU was "to immediately cease all investigations and investigative planning and operations." This cessation precluded any SIU employee from initiating any investigations, following up on cases, contacting/communicating with suspects, preparing or serving search warrants, conducting surveillance, or any other type of investigative activities.
17. The allegations against Darby were (1) failing to obey lawful orders, (2) failing to disclose material fact(s) or making false or misleading statements(s), and (3) exceeding lawful

peace officer powers. Specifically, Darby was accused of booking a confidential informant into jail on a Friday, right before the weekend, without any intention of having him charged with a crime. At the conclusion of the investigation, Darby was found in violation of the employer's policy. He violated the policy because he failed to communicate to the prosecutor his booking the confidential informant into jail, continued to have contact with the informant while on administrative assignment, and entered into a verbal contract with the informant.

18. During the investigation of the SIU matter, Deputy Nielsen came forward with additional allegations against Darby. Nielsen asserted, "I've seen [Darby] cross a threshold. And I've seen him kidnap someone when he didn't have cause to do so." This led to the additional internal investigations of Darby's conduct, which became the Humphrey and Saucedo investigations.
19. These allegations also involved alleged constitutional violations, and these matters were also assigned to Lund. Darby was notified of both investigations on May 6, 2020. The Humphrey investigation concluded on December 16, 2020, with a finding of "Not Sustained," and the Saucedo investigation was ongoing, at the request of the union, so that Lund could locate and interview a material witness.
20. Lund, the investigator, credibly testified that, in his experience, the types of complaints raised by Nielsen against Darby were those that would typically result in an investigation, even if those complaints later proved invalid. Lund further testified that, during his investigation of these matters, he found nothing out of the ordinary with the process or protocols.
21. Leading up Darby's August 24-27 suspension, he was under investigation for four separate matters: (1) the Wales matter, (2) the SIU matter, (3) the Humphrey matter, and (4) the Saucedo matter. At the conclusion of Darby's suspension, the union asked the employer whether Darby would be returned to full duty, and the employer responded to the union indicating that Darby would remain on administrative assignment pending the conclusion of the other matters.

22. Darby engaged his union from the beginning of the Wales investigation and continued to do so throughout each of the open investigations against him, and there is no dispute that Darby engaged in protected activity.
23. During these investigations, including the SIU investigation that involved the entire unit, other bargaining unit members utilized their union representatives but were not placed on administrative assignment.
24. There is no evidence in the record that either Nielsen or Wagner was involved in any decision regarding the extension of Darby's administrative assignment or opening the investigations additional investigations against him. There is also no evidence in the record that the employer solicited Nielsen or Wagner for these allegations.
25. Due to competing testimony, I do not find that Darby was told that the Wales investigation was going to be fast-tracked nor do I find that Darby was told that he would be immediately returned to full duty at the conclusion of the investigation.
26. There was no causal connection between Darby's protected activity and the employer's decision to open two additional investigations against him, and there was no causal connection between Darby's protected activity and the employer's decision to extend his administrative assignment. Therefore, there is no prima facie finding of discrimination.
27. I do find that there is sufficient evidence in the record to support the employer's stated reasons for extending Darby's administrative assignment.

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. By extending Shaun Darby's administrative assignment as described in findings of fact 11 through 26, Pierce County did not discriminate against Darby or violate RCW 41.56.140(1).

3. By opening two additional investigations against Shaun Darby as described in findings of fact 18 through 20 and 24, Pierce County did not discriminate against Darby or violate RCW 41.56.140(1).

ORDER

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

ISSUED at Olympia, Washington, this 23rd day of August, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DANIEL J. COMEAU, 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 08/23/2021

DECISION 13397 - 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 132989-U-20

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