STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BEN FRANKLIN TRANSIT, Complainant, vs. TEAMSTERS LOCAL 839, Respondent.	CASES 131976-U-19, 131977-U-19, 131978-U-19
TEAMSTERS LOCAL 839, Complainant, vs. BEN FRANKLIN TRANSIT, Respondent.	CASES 132082-U-19, 132083-U-19, 132084-U-19, 132085-U-19, 132086-U-19 DECISION 13409 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On August 7, 2019, Ben Franklin Transit (employer) filed unfair labor practice complaints against Teamsters Local 839 (union) alleging the union breached its good faith bargaining obligation through its conduct toward employer officials during negotiations.[1] On August 16, 2019, an Unfair Labor Practice Administrator for the Public Employment Relations Commission (PERC) issued a preliminary ruling and forwarded those matters to hearing. On September 9, 2019, the union filed unfair labor practice complaints alleging the employer breached its good faith bargaining

[1] Cases 131976-U-19 (Coach Operators); 131977-U-19 (Dial-A-Ride Drivers, Drivers-Dispatchers, and Reservation Clerks); and 131978-U-19 (Maintenance Workers).

obligation, revoked tentative agreements previously reached with the union, failed to respond to information requests, and attempted to dominate the union.[2] The employer's three complaints and the union's five complaints were consolidated, and hearings were held February 27–28, 2020; March 4–5, 2020; and October 28, 2020.[3] The parties filed post-hearing briefs and were also directed to file supplemental briefs.

ISSUES PRESENTED

1. Did the union breach its good faith bargaining obligation in violation of RCW 41.56.150(4) [and if so, derivative interference in violation of RCW 41.56.150(1)] through union secretary-treasurer Russell Shjerven's behavior during negotiations for a successor collective bargaining agreement?

The union breached its good faith bargaining obligation in violation of RCW 41.56.150(4) through Shjerven's conduct at the June 28, 2019, and July 22–24, 2019, bargaining sessions because Shjerven's behavior frustrated the collective bargaining process. Shjerven's extreme, over-the-top, and continual use of foul language and *ad hominem* and gender-based attacks were not protected by chapter 41.56 RCW, and his behavior precluded the parties from continuing to negotiate. Although the parties were able to negotiate during almost the entirety of the July 22–24, 2019, bargaining session despite Shjerven's offensive comments, his explicit, hostile, and intimidating statements and actions toward Warner were not reasonable, and they placed the employer in a position where it was no longer possible to continue bargaining with the union.

2. Did the employer breach its good faith bargaining obligation in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)]

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[2] Cases 132082-U-19 (Coach Operators); 132083-U-19 (Dial-A-Ride Drivers, Drivers-Dispatchers, and Reservation Clerks); 132084-U-19 (Maintenance Workers); 132085-U-19 (Dial-A-Ride Dispatchers); and 132086-U-19 (Administrative Assistants).

[3] The October 28, 2020, hearing was conducted via video conference due to the COVID-19 pandemic.

when Wendi Warner filed a protection order during bargaining for a successor collective bargaining agreement that precluded Shjerven from being in her presence?

The employer did not breach its good faith bargaining obligation when it supported Warner's restraining order, which precluded Shjerven from being in Warner's presence. Although Warner obtained the restraining order on her own, she was effectively acting as an agent of the employer and any breach of the collective bargaining laws through that act were attributable to the employer. Nevertheless, Warner's restraining order was objectively and subjectively reasonable based upon the totality of facts in this case.

3. Did the employer attempt to dominate the union in violation of RCW 41.56.140(2) [and if so, derivative interference in violation of RCW 41.56.140(1)] by assigning Wendi Warner to grievance meetings in August 2019 and thereby denying bargaining unit members from choosing Russell Shjerven as their bargaining representative at the meetings?

The employer attempted to dominate the union in violation of RCW 41.56.140(2) by instructing the union to provide a representative other than Shjerven during the period when Warner's restraining order was in effect. Once Warner obtained the restraining order, the employer had an obligation to work with the union to determine alternative methods for Shjerven to continue his role as the employees' representative of choice. Furthermore, the testimony demonstrates that, historically, Warner had not participated in *every* grievance meeting prior to the July 25, 2019, restraining order, although she did insist on participating in every one after that date. Warner's decision to participate in those grievance meetings for which she had not consistently participated effectively precluded Shjerven from representing bargaining unit employees.

4. Did the employer breach its good faith bargaining obligation in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)] by revoking tentative agreements the parties had previously reached during negotiations with the union?

The union failed to prove by a preponderance of the evidence that the employer breached its good faith bargaining obligation in violation of RCW 41.56.140(4) by revoking tentative agreements it previously reached with the union.

5. Did the employer breach its good faith bargaining obligation in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)] by refusing to provide relevant information requested by the union?

The union failed to demonstrate that the employer failed to respond to the union's information request because the information requested was associated with civil litigation.

BACKGROUND

The employer provides public transportation services for Benton and Franklin Counties in Washington State, including fixed-route, Dial-A-Ride, Van Pool, and demand-response services. Gloria Boyce is the employer's general manager. Warner is the employer's director of Human Resources and Labor Relations and participates in negotiations on behalf of the employer with all five of the union's bargaining units. Warner has served in her current position since 2016 and is the primary contact for labor relations matters. Debra Hughes served as the employer's previous director of Human Resources and Labor Relations, and Barbara Hayes held the position before Hughes.

The union represents five different bargaining units at the transit authority covering approximately 270 employees including Coach Operators; Dial-A-Ride Drivers, Drivers-Dispatchers, and Reservation Clerks; Maintenance Workers; Dial-A-Ride Dispatchers, and Administrative Assistants. Shjerven is the union's secretary-treasurer and has represented employees at the transit authority since 2013. He has served as the chief negotiator for the Coach Operators, Dial-A-Ride Drivers, Drivers-Dispatchers, and Reservation Clerks, and Maintenance Workers bargaining units since 2016. In addition to Shjerven, union business agent Austin DePaolo represents employees at the transit authority and is the chief negotiator for the Dial-A-Ride Dispatchers and Administrative Assistants bargaining units.

The relationship between Warner and Shjerven is contentious at best, and each have displayed a strong dislike for the other. Shjerven has directed, on numerous occasions, *ad hominem* attacks against Warner and routinely directs foul language at both Warner and other the transit authority staff. In response, Warner has accused Shjerven of making sexist and derogatory comments about her and other female staff of the transit authority. The employer has insisted on numerous occasions that Shjerven cease what the employer perceives to be hostile, harassing, and intimidating behavior toward Warner and other staff. Shjerven has repeatedly and emphatically declined to change his language or behavior claiming his speech is constitutionally protected.

At times, these conflicts impacted bargaining between the parties. The employer walked away from a June 28, 2019, bargaining session due to Shjerven's hostile, harassing, and intimidating behavior. Between July 22 and July 24, 2019, the parties conducted mostly successful negotiations despite Shjerven's use of offensive comments of a sexual nature. At the end of the third day of the July 22–24, 2019, session, Warner and Shjerven disagreed about whether they had a tentative agreement on a particular proposal. The disagreement devolved into a shouting match. Warner claimed that Shjerven attempted to assault her during their argument and on July 25, 2019, she obtained an ex parte restraining order against Shjerven.

Written Communication between Shjerven and Ben Franklin Transit Staff

Most, if not all of the following examples submitted by the employer fall outside the six-month statute of limitations. Nevertheless, these untimely examples provide context to the tone and tenor of the parties' interactions and, in particular, Shjerven's consistent use of explicit, hostile, and intimidating statements in his written communications with Warner and other employer representatives.

For example, on September 14, 2017, Warner sent an email to Shjerven with a request for a three-week abeyance on any hearing or discipline for the fixed-route and Dial-A-Ride employees. Shjerven wrote back stating if the employer agreed to double time for overtime hours as previously discussed, the union would agree to the abeyance. In Warner's reply, she explained the reasons for the request, rejected the union's proposal, and asked Shjerven to reconsider the request. Shjerven responded by accusing the employer of disrespecting employees and told Warner to expect a flood

of grievances. Warner replied again, reminding Shjerven that the request came from the operations management team and that his refusal demonstrated a lack of respect for those employees. Warner also reminded him that the employer had obliged the union on every request for an extension. Shjerven replied, "[The union] had a legitimate proposal on the table, and you told us to go fuck ourselves, and you say I'm disrespectful?" Shjerven admitted in his testimony that the employer never told the union to go "fuck" itself.

Another example occurred on May 1, 2018, when Shjerven sent an email to Operations Manager Ken Hamm concerning a shake-up committee process that had been started in 2014 as a result of a grievance filed by the union. In explaining the grievance and purpose of the committee to Hamm, Shjerven wrote that Hayes (a previous HR director) "held a grudge against the Teamsters and would try and fuck with us in any way that she could." Hamm responded by asking Shjerven to leave the "'F' bombs" out of their communication, as Hamm found it offensive.

On November 14, 2018, Dial-A-Ride shop steward Traci Bronson sent an email to Hamm concerning the employer's decision to change from a paper daybook to an electronic daybook that employees use to select vacations and days off. Bronson's email explained the problems with moving to an electronic daybook and requested a meeting with the employer to "work out a win-win solution for everyone." Without waiting for Hamm to respond, Shjerven sent Hamm a follow-up email stating that if the employer went through with its plan, the union would be forced to file a grievance and an unfair labor practice complaint. Shjerven also asked Hamm to explain why Hamm thinks he "can do whatever the fuck [he] want[s] to do without negotiating with Local 839." Shjerven also told Hamm that if Shjerven had "to shove all of these decisions of [Hamm's] up [his] ass to get [Hamm] to pay attention to the Union and realize that [he is] not running a plantation, that's what [Shjerven would] be forced to do."

Shjerven also sent emails that Warner perceived as directly attacking her as well as her abilities and professionalism. For example, in emails exchanged on April 28, 2017, concerning a step 1 grievance meeting, Shjerven accused Warner of being "easily confused" and of having a bad memory. In a September 28, 2017, email exchange between Warner and union shop steward Chris Lilyblade concerning delays in the ratification and implementation of a recently negotiated

collective bargaining agreement, Shjerven interjected himself into the exchange and asserted that Warner should "not blame the Union in any manner for HR's incompetence!" When Warner tried to explain herself in a follow-up email, Shjerven responded by claiming that Warner was "seriously delusional" and should "[s]pend less time trying to justify [her] incompetence and just do [her] work!"

Efren Avina Grievance Email Exchange

In a January 18 and 19, 2018, email exchange between Shjerven and Warner concerning employee Efren Avina, Shjerven asked Warner for the official notification that was sent to Avina placing him on paid administrative leave and for the date that his paid leave would be ending. Shjerven also asked Warner to waive the first two steps of the grievance process since those steps would "only be a waste of time since Bill and you have already made up your mind." Warner declined to waive any steps of the grievance procedure citing previous concerns raised by the union that the employer did not follow the contractual grievance process. Warner also informed Shjerven that the employer communicated verbally to Avina at his Loudermill hearing the date his paid administrative leave would be ending.

Shjerven responded immediately by chastising Warner for denying his request for a waiver and citing that as "another example of a piss poor working relationship" between the parties. Shjerven also claimed that Warner "totally misunderstood [his] information request" and told Warner to read his email closely, which stated that he wanted a copy of the letter placing Avina on administrative leave. Shjerven added that he hoped this request was clear and wrote, "[I]f not, I can hand write this request on paper using crayons. (I used to do that with Debra Hughes occasionally, and since you have decided to operate like she did, you should expect the same treatment)." Shjerven concluded this particular email by stating that if Warner had never put Avina's administrative leave in writing, then he would like an explanation as to why it was not and that he expected an answer by the end of the business day, January 19, 2018. Warner responded at 6:28 p.m. that same day explaining that the employer did not have written communication to Avina about his administrative leave because the employer had been in constant contact with Avina and that Avina understood the situation. Warner also informed Shjerven that the insulting comments directed toward her did not reflect the professionalism of the transit authority

maintenance employees that Shjerven represents. Shjerven responded that the employees were not happy with Warner's actions toward Avina and that Warner had no credibility with those employees.

Shjerven's Testimony Concerning the Tone of Communication

Although Warner credibly testified that she perceived Shjerven's communications as degrading and attacking her because of her gender, Shjerven testified that the tone of his emails was not intended to be misogynistic. Rather, Shjerven asserted that the tone and words chosen in these written communications were the result of frustration with Warner and other transit authority staff. Although Shjerven accused Warner of being easily confused and attacked her professional ability as part of the April 28, 2017, email exchange, Shjerven also expressed continued frustration about union shop stewards continually needing to remind Warner about the grievance process.

Another example occurred when Warner first started with the employer. Following negotiations, Warner asked to rearrange the collective bargaining agreement to make the document, in her opinion, more employee friendly. On June 28, 2017, Shjerven sent an email to Warner complaining about the state of the document that Warner had produced. Shjerven complained that the document was confusing and that it needed to demonstrate the changes between the old document and new document so employees could know what they were voting on. Shjerven wrote that Warner needed to create a real "vote document" and that if Warner did not understand what that was, she should let him know. Shjerven ended the email by stating that his patience was running out and complained that this was Warner's fault because she insisted upon controlling the document and rearranging the table of contents. Similarly, Shjerven's tone for at least part of the September 28, 2017, email exchange can be attributed to the delays created by Warner's insistence on rearranging the collective bargaining agreement.

Verbal Communication between Shjerven and Ben Franklin Transit Staff

Shjerven used foul language during conversations with Warner and also at the bargaining table. Warner testified that during a June 14, 2018, phone call Shjerven engaged in a hostile diatribe against Warner that resulted in Warner hanging up the phone. Shjerven also asserted that the

employer was "shoving the Dial-A-Ride Dispatchers up your ass," which was a reference to a representation petition the union had filed and the employer was challenging.

In a December 2018 meeting, Warner, Katherine Ostrom (the former director of operations), and Shjerven were discussing human resources issues. During the conversation, Shjerven referred to a female transit authority employee as a "snatch."[4] Union president Norma Nelson testified that she had also heard Shjerven use that term to describe women. Shjerven texted an apology to Ostrom and admitted that he used the term to describe a transit authority employee.

On January 14, 2019, bargaining unit employee Macario Chavez sent a letter to Warner detailing an incident that Chavez had with Shjerven concerning the union's pension fund. Chavez alleged that Shjerven approached him in an irritated and intimidating tone and told Chavez to stop talking with other employees about the fund because Chavez "[did] not know shit about" the state of the fund. Chavez alleged that Shjerven pointed his finger at him and swore repeatedly during this conversation, which lasted two to three minutes. At one point, Chavez told Shjerven that he was being unprofessional to which Shjerven responded, "I do not want to be professional." Chavez claimed Shjerven's actions created a hostile work environment and requested that Shjerven only meet with employees by appointment and that he should not be allowed to roam freely around the employer's campus due to his temper.

Employer Attempts to Temper Shjerven's Language and Conduct

On numerous occasions the employer requested that Shjerven to cease using explicit, hostile, and intimidating language during the parties' interactions. For example, as part of her email response to the June 14, 2018, phone call with Shjerven, Warner wrote that she would not engage in dialogue with Shjerven when he used "vulgarity, swearing, and name calling" and that she would be happy to meet with him, provided he was willing to be civil. Warner also informed Shjerven

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[4] In *Kahn v. Salerno*, 90 Wn. App. 110 (1998), the Court of Appeals of Washington, Division One, held that the trier of fact determines the context of the intended use of a word in speech. Here, among several different definitions, *Merriam-Webster* defines "snatch" as "*vulgar:* the female pudenda." *Snatch*, MERRIAM-WEBSTER.COM, https://merriam-webster.com/dictionary/snatch (last visited Sep. 7, 2021). While the term has other definitions, it is clear from the context of Shjerven's speech that he intended the vulgar use of this word when describing the female employee.

that if he acted in a hostile and unprofessional manner, she would immediately stop any meeting or call. Shjerven responded that same day and warned Warner that her unwillingness to speak with him or cancel any meeting because she did not like his language would be the equivalent of Shjerven telling Warner that he would not speak with her until she had a basic knowledge of labor law. Shjerven also threated to file unfair labor practice complaints if Warner ended any meeting or call due to Shjerven's language and that Warner did not get to determine what was and was not professional. Finally, Shjerven reminded Warner that the union and employer have a collective bargaining relationship that must be respected.

On June 19, 2018, Boyce sent a letter to Shjerven concerning the June 14, 2018, telephone call and email exchange. Boyce informed Shjerven that the employer is committed to providing a workplace for its employees that is free of harassment and bullying and that his conduct fit the Washington State Department of Labor & Industries' description of bullying behavior. Boyce also informed Shjerven that his conduct could be considered sexual harassment since it focused on the female members of the employer's staff. Finally, Boyce recognized that while Shjerven has a need to advocate on behalf of the employees he represents, that right is not a "license to bully and harass a management representative" and "there is now widespread awareness in our culture about what is and is not acceptable in a work environment, especially when it is directed at women." Boyce concluded her letter by informing Shjerven that the employer will not tolerate Shjerven's ongoing harassment and bullying of its employees and will take immediate action to ensure that its employees are not bullied or harassed in the workplace.

On March 26, 2019, Warner sent a letter to Shjerven concerning the January 11, 2019, Chavez incident. Warner's letter recapped the incident as described by Chavez and once again recognized that Shjerven had a need to advocate on behalf of the employees he represents. Warner also reminded Shjerven that the employer is committed to maintaining a workplace for its employees that is free of harassment and bullying. Warner asked that Shjerven use a professional tone and language when interacting with employees while on the employer's premises and that his communications do not impede employees' abilities to perform their duties.

Shjerven's Conduct during Bargaining

Shjerven's conduct at the bargaining table exhibits many of the same characteristics as his day-to-day written and verbal interactions with the employer.

The June 28, 2019, Bargaining Session

At a June 28, 2019, bargaining session, the employer's team was represented by Warner, Hamm, Maintenance Manager Jerry Otto, Assistant Director of Operations Steven Davis, and attorney John Lee. Shjerven represented the union along with stewards Norma Nelson, Traci Bronson, Melissa Rosado, Lisa Stewart, and Jeff Lahti.[5] According to the testimony, the meeting started out cordially, but Shjerven then stated that he needed to address a matter unrelated to bargaining. Shjerven believed that an employer official had leaked confidential information concerning a grievance. Shjerven was also irate that the room had not been set up and that the employer's bargaining team was late.

Shjerven lashed out at each employer official while continually pointing his finger and using profanity, particularly the words "fuck" or "fucking." Otto attempted to get Shjerven to calm down, which resulted in Shjerven directing a profanity-laden tirade against Otto. Otto then stated the parties were done negotiating, and the employer's negotiating team left the room. When Shjerven accused the employer's team of refusing to bargain with the union, Otto responded that no employees, including the employer's negotiating team, should have to sit and be berated by Shjerven.

Both Otto and Warner testified that, upon hearing this, Shjerven yelled "fuck you" while pointing his finger toward each member of the employer's bargaining team. Otto then stated that the employer's team was leaving, and testimony indicates that he used some variation of the word "fuck" when speaking. The employer team packed up their materials to leave the room. As the employer's team left the room, Shjerven yelled "fucking pussies" to the employer's negotiating

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[5] Administrative Assistant Amber Vance took notes on behalf of the employer.

team.[6] When the employer's team returned to inform the union that the negotiating session was over due to Shjerven's behavior, Shjerven again used profanity and accused the employer of refusing to bargain with the union. Lee assured Shjerven that the employer would return to the table and would be in touch with Shjerven concerning new bargaining dates.

The July 22–24, 2019, Bargaining Session

Following the June 28, 2019, aborted bargaining session, the parties scheduled three days of negotiations between July 22 and July 24, 2019. The July 22, 2019, session occurred at the union's hall in Pasco, Washington, and the other two sessions occurred at the employer's board room. The parties agreed that the sessions would end at 5:00 p.m. each day. On July 18, 2019, Vance sent an email to Shjerven with a copy to Warner stating the July 24, 2019, session needed to end by 4:00 p.m.

Warner testified to several of Shjerven's comments made in her presence over the course of the meeting that she found offensive. For example, Shjerven remarked that union president Nelson was so old that her first uniform was "gunny sack." When a female shop steward mentioned that she was involved in emergency manage training, Shjerven asked "[O]h, what's your job, bringing the cookies?" During a discussion about the employer's rules concerning drivers wearing their uniforms in pubs, taverns, and dispensaries, Shjerven stated to shop steward Bronson that "maybe if [she] took off [her] top [she] could get free booze." When Rosado missed part of a session, Shjerven asked if she was picking up her birth control pills. During a conversation about call-off procedures, Shjerven suggested that shop steward Lisa Stewart must have been drunk, to which Stewart responded, "Where did that come from?" At one point Shjerven remarked that women's uniforms are more expensive than men's because women's hips are wider. Shjerven did not deny making any of these statements.

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[6] Among several different definitions, *Merriam-Webster* defines the vulgar use of the word "pussy" as "vulva" or "the female partner in sexual intercourse." The slang use of the word means "a weak or cowardly man or boy." *Pussy*, MERRIAM-WEBSTER.COM, https://merriam-webster.com/dictionary/pussy (last visited Sep. 8, 2021). While other definitions exist, it is clear from the context of Shjerven's speech that he intended the vulgar and/or slang uses of this word when describing the employer's team as they left the June 28, 2019, bargaining session. *See supra*, note 4.

Warner testified that although she found these comments offensive, she did not say anything about them because she did not want to interfere with bargaining by calling out his behavior. Furthermore, and despite these concerns, Shjerven's comments did not hinder the parties' bargaining. Rather, Warner, Lee, and Shjerven all testified that the three days of bargaining were, for the most part, productive, and the parties had hoped to have several tentative agreements by the end of the three-day session.

On the last day of bargaining, Shjerven reminded everyone at the beginning of the day that the session needed to end by 4:00 p.m. as he had a 4:30 p.m. grievance meeting with a different employer, and he needed time to travel to that meeting. Shjerven scheduled this meeting consistent with Vance's July 18, 2019, email.

The witnesses agree that bargaining was productive, and at one point the employer presented the union a packaged "what if" proposal. The employer's bargaining team caucused around 3:20 p.m., and the union team caucused around 4:00 p.m. and did not return the board room until 4:13 p.m. Although the parties agreed that the session needed to end at 4:00 p.m. to accommodate Shjerven's schedule, Shjerven and Lee started to review the proposals to determine if any tentative agreements could be reached. Shjerven reminded Lee about Shjerven's 4:30 p.m. meeting, and Lee assured Shjerven that he would wrap up quickly but wanted to wrap up the session on a good note.

During these discussions Shjerven was seated at the end of table with Warner seated to his right, and Lee sat to the right of Warner. Lee and Shjerven could not agree on the actual number of agreements, with Lee counting eight agreements and Shjerven counting nine. One of the issues that was on the table was the union's proposal to allow employees to contribute to the union's political action committee, DRIVE. Shjerven stated that the employer might was well "TA DRIVE" because the union had that proposal in its Dial-A-Ride Dispatchers and Maintenance Workers groups. Warner then attempted to correct Shjerven by informing him that DRIVE was "not a done deal" for the Dial-A-Ride Dispatcher's contract and tried to explain that the DRIVE proposal was connected with the employer's three-step grievance proposal. She also notified Shjerven that the parties had yet to reach agreement on that issue. Lee testified that Shjerven responded to Warner in a raised voice, "I already told you that I'm going to fire that fucker,"

referring to DePaolo who was negotiating that agreement. Shjerven then allegedly stated that he "told that fucker not to agree to that and he did it anyway" again, referring to DePaolo.

Shjerven claims that Warner stated the package offers for the Coach Operators, Dial-A-Ride Drivers, Dispatch-Drivers, and Reservation Clerks, and Maintenance Workers bargaining units were "all or nothing" packages. Warner testified that she did not use this statement and denied saying to Shjerven that they were "all or nothing." Otto testified that immediately after the meeting, Warner told him that the proposal was all or nothing. Regardless of the words actually used, Warner told Shjerven that the parties did not have an agreement as of June 24, 2019. Shjerven responded by asking if the employer was taking all agreements off the table. He then stated, "Well, fucking fine. We're not agreeing to anything today," and said that the union was leaving with nothing after three days of negotiations and that they could revisit the matters in September.

At this point the situation quickly escalated out of control. Warner, Shjerven, and Lee each testified as to their version of events. Warner testified that she tried to explain to Shjerven why the other contracts had a three-step grievance procedure and that Shjerven responded by raising his voice and becoming more agitated. Shjerven testified that at one point Lee put his hand up near Warner's face in an apparent effort to get her to stop talking as Lee was attempting to work with Shjerven to determine which items the parties could tentatively agree. Lee testified that he may have waved his hand at Warner in an attempt to calm the situation. Lee also testified that he started to grab his personal items as Warner and Shjerven continued to talk at each other in case he needed to "pull Wendi out." Warner and Lee testified that Shjerven stated, "John, you gotta put a leash on her." Shjerven testified that he stated, "Hey, John, you have got to put a leash on her and get some control." Regardless of which version was actually stated, Lee responded to Shjerven that his statement was "uncalled for" and "not productive" to which Shjerven responded, "You're right, John, it's not productive. Put a leash on her."

Following this comment, Warner stated to Shjerven that she was done and attempted to leave the room. At the same time, she and Shjerven continued to verbally spar with each other. Warner testified that Shjerven was shaking his fist and pointing his finger in close proximity to her during this portion of the argument. Shjerven testified that Warner screamed toward Shjerven that she

was "tired of [his] 'fuck this, fuck that, fuck this, fuck you'" and accused Shjerven of making derogatory comments toward women. Shjerven also accused Warner of being a "fucking liar" and falsely accusing him of slashing training manager Rebecca McCord's tires. Warner testified that at one point she felt that Shjerven was so angry at her that he was going to hit her and almost ran into Lee while attempting to leave the room. Warner also testified that, as the employer's Human Resources manager, she felt she needed to stand up for the female employees, and as she was heading toward the door, she told Shjerven that his behavior had "been out of line." Warner said, "You're inappropriate. Your comments about women's hips and about Traci taking her top off to get free booze is inappropriate, and it's sexually inappropriate and you're out of line." Shjerven responded by accusing Warner of failing to investigate a manager who had allegedly open-mouth kissed a subordinate employee.

Shjerven was also attempting to exit the room at the same time as Warner, and while they each took different paths, they converged at the same exit point. Neither Warner nor Shjerven testified about what was said when they left the conference room, and no one in attendance in the meeting could provide a description of what occurred outside the conference room. What is known is that Shjerven left the building and Warner returned to her office. Warner appeared visibly shaken when she arrived a transit authority meeting later that evening.

Warner's Protection Order and Subsequent Interactions

On July 25, 2019, Warner obtained an ex parte restraining order from the Benton County Superior Court that precluded Shjerven from being within 500 feet of Warner's residence or place of employment at all times. Warner testified that she obtained this order because she felt physically threatened and intimidated by Shjerven's conduct. Warner also testified that she sought such an order due to Shjerven's refusal to change his behavior despite repeated requests. Although Warner initially obtained the restraining order herself, the employer supported Warner's position and paid for the attorney that represented Warner in the subsequent proceedings before the superior court.

On July 30, 2019, Boyce sent a letter to Shjerven explaining that the employer was aware of Warner's restraining order against Shjerven and the requirement that Shjerven remain at least 500 feet away from Warner. Boyce stated that the employer was committed to engaging in good

faith bargaining with the union as well as to contract administration and that the meetings set for July 25 and 26, 2019, needed to be rescheduled, as well as the grievance meetings set for August 2, 2019. The letter does not describe the purpose of the July 25 and 26, 2019, meetings but those meetings were not dates the parties had scheduled for contract negotiations. Boyce also informed the union that Warner would continue to be the employer's representative at all meetings involving the union and asked the union to identify its representative for future meetings so that the pending matters could be rescheduled. Despite this statement, the testimony demonstrates that Warner did not attend every single meeting that involved the union or Shjerven.

On August 2, 2019, the Benton County Superior Court extended the restraining order through August 16, 2019. The court also modified the terms of the restrictions to allow Shjerven access to the employer's property but precluded him from coming within 50 feet of or engaging in any contact with Warner. Based upon this order, Shjerven was still precluded from attending any meeting that Warner attended.

On August 5, 2019, Boyce sent an email to all employees of the transit authority reminding them of the employer's anti-harassment policy (3010) and that the employer's workplace is a harassment-free zone. According to policy 3010, harassment can take many forms, including:

- Verbal behavior such as slurs or epithets, jokes, innuendos, suggestive comments, threats or spreading rumors;
- Physical behavior such as pats, squeezes, repeatedly brushing against someone's body, following or stalking, impeding or blocking normal work movement, or other unwelcome physical contact;
- Visual harassment such as posting derogatory or sexually suggestive pictures, cartoons or drawings at one's work station or elsewhere in the workplace;
- Actions such as pranks, unwanted sexual advances towards employees, customers, children or the public;
- Sabotaging an employee's work.

Boyce's email also reminded employees that they are protected from harassment under Washington State law, that a zero-tolerance approach will be taken where harassment is confirmed, and that employees reporting harassment will not be retaliated against. Boyce included a copy of policy 3010 with her email.

On August 20, 2019, the union's counsel, acting on behalf of Shjerven, sent Lee an email requesting time to depose him about facts surrounding Warner's restraining order. The email stated that Lee's "testimony would be as a fact witness in [his] capacity as lead negotiator for Ben Franklin Transit in negotiations with Teamsters Local 839 and would not impinge upon any privileged communications between [Lee] and Ben Franklin Transit." The email then explained that they were operating on a short timeline and would like to coordinate schedules as quickly as possible. The email concluded by asking if Lee was willing to accept service of a subpoena or if personal service would be necessary and if Lee was willing to discuss dates during the subsequent two-week period. The employer's counsel was also copied on the email.

Lee was on vacation at the time the request was made, and his email sent an automated notification to the union's counsel stating that he was out of the office and would return to work on August 22, 2019. Neither Lee nor the employer's counsel responded to the union counsel's email. Lee subsequently learned that Ben Dow, Warner's personal attorney, objected to the deposition. On August 22, 2019, a process server attempted to serve Lee at his office but was informed that Lee was not in the office at that time. The process server completed a certified declaration of non-service.

On August 30, 2019, the Benton County Superior Court conducted a hearing concerning the merits of Warner's restraining order. Both Warner and Shjerven testified at this hearing, each giving their own version of the July 24, 2019, events. The superior court ultimately ruled that Warner failed to establish by a preponderance of the evidence that the version of events occurred as she alleged, and the court dismissed the petition.

On September 19, 2019, Boyce sent a letter to Shjerven notifying him of the employer's intent to request mediation for all five bargaining units and asked the union if it would like to join in the request. Shjerven responded on September 21, 2019, by stating that he was in disagreement with

the employer that mediation was required to resolve any of the five open contracts and explained why he believed none of the five agreements were ripe for mediation. Shjerven also stated that if the employer were to pursue mediation, it would only result in a more strained relationship between the parties. With respect to the coach and Dial-A-Ride contracts, Shjerven accused Warner of throwing a "temper tantrum" after three successful days of negotiations where the parties had reached several tentative agreements and also of regressively bargaining. Shjerven further suggested to Boyce that if the employer was "serious about a more positive labor relations atmosphere and reaching agreements that can be fully recommended to the membership for ratification," then the employer should remove Warner from the bargaining table and let the parties commence negotiations without her presence. Shjerven informed Boyce that this "suggestion, if taken seriously by the [employer], would improve the negotiations process."

ANALYSIS

Issue One: Did the Union Bargain in Bad Faith?

A public employer and a union representing public employees have a duty to bargain with each other over mandatory subjects of bargaining. RCW 41.56.030(4). "[N]either party shall be compelled to agree to a proposal or be required to make a concession . . . ." *Id*. While neither party is required to make a concession, nor is either party entitled to reduce collective bargaining to an exercise in futility. *City of Snohomish*, Decision 1661-A (PECB, 1984). Parties must negotiate with the goal of reaching an agreement, if possible. *Id*. (citing *National Labor Relations Board v. Highland Park Manufacturing Co.*, 110 F.2d 632 (4th Cir., 1940)).

Distinguishing between good faith bargaining and bad faith bargaining can be difficult in close cases. *Mansfield School District (Mansfield Education Association)*, Decision 4552-B (EDUC, 1995); *Spokane County*, Decision 2167-A (PECB, 1985). A party may violate its duty to bargain in good faith by one per se violation, such as refusing to meet at reasonable times and places or to make counterproposals. *Snohomish County*, Decision 9834-B (PECB, 2008). A party may also violate its duty to bargain in good faith through a series of questionable acts that, when examined as a whole, demonstrate a lack of good faith but none of which by itself would be a per se violation. *Id*. When analyzing conduct during negotiations, the Commission examines the totality of the

circumstances to determine whether an unfair labor practice has occurred. *Shelton School District*, Decision 579-B (EDUC, 1984).

Conduct indicative of bad faith bargaining is seen when a party engages in tactics that evidence an intent to frustrate or stall agreement. This includes setting "forth an 'entire spectrum' of proposals that would be predictably unpalatable to the other party, so that the proposer would know that agreement is impossible;" not explaining a position or offering untenable explanations of a position; increasing demands during bargaining or adding new demands; entering negotiations with a take-it-or-leave-it attitude; or approaching bargaining with an attitude that bargaining is from scratch. *City of Snohomish*, Decision 1661-A; *see also Mansfield School District (Mansfield Education Association)*, Decision 4552-B.

This case presents an extreme and rare set of facts. While this Commission has issued decisions concerning crass or offensive statements that are alleged to have interfered with protected employee rights, *see, e.g., Warden School District*, Decision 12778-A (EDUC, 2018), as well as instances where an employer allegedly discriminated against an employee who exercised protected rights, *see, e.g., King County*, Decision 7819 (PECB, 2002), the Commission has not recently ruled upon what kinds of explicit, hostile, and intimidating statements and conduct at the negotiating table are protected by chapter 41.56 RCW.

The employer asserts that the totality of Shjerven's conduct demonstrates bad faith bargaining because his explicit, hostile, and intimidating statements and conduct derailed the June 28, 2019, and the third day of the July 22-24, 2019, bargaining sessions and demonstrates a pattern of conduct that frustrated bargaining. The employer asserts it had an affirmative obligation to protect its staff, including the employees serving on the union's bargaining team, from Shjerven's comments and actions because they could create liability for the employer under the Washington Law Against Discrimination, chapter 49.60 RCW.

To support this argument, the employer points out that Washington courts have recognized that employee activity loses it protections when it is unreasonable. *Vancouver School District No. 37 v. Service Employees International Union, Local 92*, 79 Wn. App. 905, 922 (1995). Reasonableness is gauged by what a reasonable person would do in the midst of industrial strife and not by what a

reasonable person would do in the more ordinary affairs of life. *Id*. Irresponsible and abusive conduct falls outside the protections of the collective bargaining statutes, even when that activity is associated with other union activity. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 964, 711 (2001).

The employer also points to a recent National Labor Relations Board (NLRB) decision, which held that the National Labor Relations Act (NLRA) must be balanced against antidiscrimination laws and an employer's obligation to prevent hostile work environments. *General Motors LLC*, 369 NLRB No. 127 (July 21, 2020).[7] In *General Motors LLC*, the National Labor Relations Board recognized that NLRA precedent had been wholly indifferent to an employer's obligation under state and federal employment and antidiscrimination laws when it came to individuals engaging in abusive conduct that was associated with activity protected by the NLRA. The board held that "[a]busive speech and conduct (e.g., profane *ad hominem* attack or racial slur) is not protected by the Act and is differentiable from speech or conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line)." *Id*. Accordingly, an employee can be disciplined for abusive and hostile conduct even if that employee was otherwise engaged in protected activity. *Id*.

While the *General Motors LLC* case was decided on facts related to an allegation of discrimination for a protected case, the concepts are readily transferrable to cases decided under chapter 41.56 RCW, including allegations that a party's hostile and abusive conduct at the bargaining table constitutes bad faith bargaining. Similar to the standards announced in *General Motors LLC*, this Commission must recognize that civility is a common bond that holds together the individuals that come together in the modern workplace, each of whom may bring a different set of beliefs, background, and culture. Furthermore, while the collective bargaining relationship

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[7] The Washington Supreme Court has held that decisions construing the NLRA, while not controlling, are generally persuasive in interpreting state labor laws that are similar to or based upon the NLRA. *Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984). In situations where Commission law is similar to NLRB law, the Commission may rely upon NLRB decisions. *Lewis County Public Utility District*, Decision 7277-A (PECB, 2002); *King County (Washington State Nurses Association)*, Decision 10389-A (PECB, 2011) (citing *Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984)). NLRB law is particularly useful when the Commission is evaluating cases of first impression.

may produce heated, volatile, or intemperate behavior, the sometimes-heated nature of collective bargaining does not justify harassment, discrimination, or bullying. As such, the Commission's precedents—which relied upon the now rejected federal precedent to allow parties to freely use "intemperate, abusive or insulting language without fear of restraint"—must be rejected as archaic views of the kinds of behaviors once protected by chapter 41.56 RCW.[8]

This, however, does not end the analysis. The *General Motors LLC* decision only held that abusive and hostile statements were not protected by the NLRA, and in the context of that decision, the NLRB still needed to determine whether or not the employer unlawfully discriminated against the employee under the burden shifting test announced in *Wright Line*, 251 NLRB 1083 (1980).[9] Unlike *General Motors LLC*, the complained-of conduct in the instant case occurred at the bargaining table while the parties were engaged in collective bargaining negotiations. Ultimately, the first question to be answered is whether the complained-of conduct was protected or unprotected by chapter 41.56 RCW. If the conduct was protected, the analysis ends and the complaint must be dismissed. If the complained-of conduct was not protected, the question then becomes whether that conduct ultimately frustrated bargaining between the parties under the standards announced above.

Furthermore, these standards should not be read as allowing one party to dictate speech at the bargaining table. The manner in which negotiations are conducted relates neither to the employees' interest in wages, hours, and working conditions nor to the employer's entrepreneurial control. *Lincoln County (Teamsters Local 690)*, Decision 12844-A (PECB, 2018), *aff'd in part, rev'd in part, Lincoln County v. Public Employment Relations Commission*, 15 Wn. App. 2d 143 (2020). Neither the employer nor the exclusive bargaining representative may dictate ground rules for

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[8] *King County*, Decision 7819, is an example of such a case.

[9] The Commission does not apply the *Wright Line* test; rather, cases decided under chapter 41.56 RCW use the substantial motivating fact test presented in *Educational Service District 114*, Decision 4361-A (PECB, 1994).

collective bargaining. Nor can either party affirmatively regulate the conduct of the other party by announcing ground rules that limit activity that is otherwise protected by chapter 41.56 RCW.

While a public employer cannot unilaterally compel a nonemployee, such as a bargaining representative, to abide by its antidiscrimination and harassment policies, a public employer maintains an obligation to provide a workplace that is free from harassment, discrimination, and bullying.[10] At the same time, a public employer is obligated to bargain in good faith with the representative of the employees' choosing. Because the parties own the primary responsibility for regulating their own conduct during negotiations, it is important for a party to place the other on notice to allow an opportunity for the complained-of behavior to be corrected. Unlike the antidiscrimination laws that do not require the aggrieved person to ask the respondent to cease the complained-of behavior, the collective bargaining laws administered by this Commission encourage, and at times require, open discussions on all issues. *See, e.g.*, *Kitsap County*, Decision 9326-B (PECB, 2010) (requiring parties to engage in discussions concerning the relevancy and sufficiency of information requests). Consistent with this precedent, a party faced with hostile, discriminatory, or abusive conduct must communicate its opposition to the behavior to the respondent and provide an opportunity for corrective action. If, after notice, the respondent continues to engage in conduct that is hostile, discriminatory, or abusive, the complaining party may extricate itself from the situation. Either party is then free to file a complaint alleging bad faith bargaining, and this agency would then determine whether the conduct was protected activity and, if not, whether the conduct hampered the bargaining process.

The June 28, 2019, Bargaining Session

Shjerven's outburst at the start of the June 28, 2019, meeting was hostile, threatening, not reasonable, and not protected by chapter 41.56 RCW. The totality of the circumstances demonstrates that Shjerven's outburst negatively impacted the bargaining process to such a degree that it constitutes bad faith bargaining in violation of RCW 41.56.150(4) and (1). Hamm credibly

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[10] This record contains no evidence demonstrating that the union has similar antidiscrimination and anti-harassment policies. If a labor organization had adopted such policies, the labor organization possesses a similar obligation.

testified that he viewed Shjerven's outburst as if "someone ha[d] gotten in your face and out of control almost" and that "every member of the [employer's bargaining team] felt verbally assaulted and threatened." Hamm, Otto, Warner, and Lee all credibly testified that Shjerven's outburst was viewed a hostile personal attack against the employer's team that left them shaken and upset to the point that they could not continue bargaining that day.

While Shjerven testified that he was frustrated because he believed that an employer official had leaked confidential information concerning a grievance and failed to set up the conference room for bargaining, these perceived transgressions do not allow Shjerven the right to aggressively berate the employer in a hostile manner. Shjerven could have firmly and zealously discussed the incident with the employer without berating the employer's team in an explicit, hostile, and intimidating manner or using sexually pejorative terms. Shjerven's accusations and hostility toward the employer's team were unreasonable, and Shjerven's testimony attempting to downplay or mitigate his behavior were inconsistent with his historic pattern of unprovoked explicit, hostile, and intimidating behavior.[11]

Finally, the employer's response to Shjerven's outburst; i.e., asking Shjerven to cease his explicit, hostile, and intimidating conduct, and when that failed, leaving the meeting, was the appropriate course of action. In the event a party to a collective bargaining relationship believes they are being subject to hostile and abusive behavior that is not protected by chapter 41.56 RCW, the appropriate course of action is to ask the offending party to cease the inappropriate conduct and, if necessary, to extricate themselves from the perceived hostile situation. The duty to bargain does not require a party to subject themselves to inappropriate conduct.

The July 22–24, 2019, Bargaining Session

The employer's complaint identified two different sets of conduct that constituted bad faith bargaining during the July 22 through 24, 2019, bargaining session. The first set of identified

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[11] For example, as described above, Shjerven felt the need to interject and threaten Hamm during the November 14, 2021, email exchange between Hamm and Dial-A-Ride shop steward Traci Bronson. While Shjerven may view his statement as hyperbole, the reasonableness of the statement is viewed by the person receiving the statement, not the sender.

conduct involved Shjerven's comments toward the women on his bargaining team that Warner perceived as inappropriate.

During these sessions, Shjerven made several comments toward women on his bargaining team that Warner perceived as inappropriate. These included commenting that the union president was so old her first uniform was a "gunny sack;" asking a female shop steward attending an emergency management training if her job at the meeting was "bringing the cookies;" and suggesting to another shop steward that "maybe if [she] took off [her] top [she] could get free booze" in response to her questions about the employer's rules concerning drivers wearing their uniforms in pubs, taverns, and dispensaries. The fact that the female union shop stewards testified that they were not offended by Shjerven's comments has no relation to the offensiveness of the comments as anyone within earshot had the right to object.

Nevertheless, no one on the employer's negotiating team objected to the statements at the time they were made, and there is no evidence demonstrating that Shjerven's offensive comments impacted the bargaining process.[12] Rather, the facts demonstrate that the parties were able to meaningfully negotiate for almost the entirety of the July 22 through 24, 2019, bargaining session *despite* Shjerven's conduct. Although Warner credibly testified that she wanted Shjerven to stop making the inappropriate and misogynistic comments during the bargaining session, she stated that she did not say anything because she felt this would disrupt the bargaining session.[13] Further, no one else from the employer's team, including Lee, put Shjerven and the union's team on notice that it objected to his words. Shjerven, Lee, and Warner all testified that negotiations during these sessions were productive. Absent facts demonstrating that these comments were objected to and

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[12] The question of the impact or liability of Shjerven's conduct under the Washington Law Against Discrimination, chapter 49.60 RCW, is not before this agency. This agency does not have jurisdiction over that law, which prohibits sexual harassment. Under that law, an employer can be liable for a hostile work environment created by the harassment of an employee by a nonemployee, and a nonemployee's harassment of an employee can be imputed to the employer if the employer authorized, knew, or should have known of the harassment and failed to take adequate corrective action. *LaRose v. King County*, 8 Wn. App. 2d 90 (2019).

[13] While it is understandable that Warner did not want to disrupt the collective bargaining process by calling attention to Shjerven's offensive comments, as noted above, open communication is a central tenet of the collective bargaining process.

actually frustrated the bargaining process, the employer failed to demonstrate that the complained-of behavior and comments constituted bad faith bargaining.

Shjerven's conduct and behavior at the end of the July 24, 20219, bargaining constituted bad faith bargaining because his actions were hostile, abusive, and not reasonable. At the end of that session, Shjerven attempted to pressure the employer to agree to the union's DRIVE proposal based upon Shjerven's mistaken belief that the proposal had been accepted in the other contracts. When Warner politely corrected him, Shjerven responded by unnecessarily escalating the situation by engaging in an expletive-laden rant toward Warner. Contrary to Shjerven's assertion in his September 19, 2019, letter to Boyce claiming that Warner threw a temper tantrum, the preponderance of the evidence demonstrates Shjerven was the individual who threw the proverbial temper tantrum when Warner corrected him about the status of the DRIVE proposal. The union presented scant evidence demonstrating that the parties reached agreement on the DRIVE issue, thereby making Shjerven's reaction all the more unreasonable.

Although the union breached its good faith bargaining obligation through Shjerven's conduct, the parties should not construe all of Shjerven's conduct as having violated chapter 41.56 RCW. Bargaining representatives must be free to zealously advocate for their respective positions. Many of Shjerven's statements that were entered into evidence by the employer are protected by chapter 41.56 RCW when viewed in isolation. As referenced above, neither party can dictate ground rules for bargaining including the language used by the parties and this Commission will only redress unreasonable behavior that adversely affects the bargaining relationship.

Issue Two: Did the Employer Bargain in Bad Faith?

The union asserts that the employer breached its good faith bargaining obligation when Warner obtained a restraining order against Shjerven, which precluded him from being within 500 feet of Warner (and later reduced to 50 feet). The union also asserts that Warner fabricated facts to support her restraining order and that by subjecting Shjerven to criminal liability the employer has created an atmosphere of ill will that makes good faith bargaining impossible.

This is an issue of first impression. This agency has yet to issue a decision where a party's representative commenced a personal civil court action against the other party's representative for

conduct that occurred during negotiations and that civil court action was claimed to have violated chapter 41.56 RCW. While the Commission has yet to rule on this type of situation, decisions construing the NLRA have ruled upon the issue of access to the civil courts related to the exercise of collective bargaining rights.[14]

The filing of a civil suit, as opposed to the threat to file a civil suit, has been considered a lawful practice provided the suit is filed in good faith. *S. E. Nichols Marcy Corp.*, 229 NLRB 75 (1977). In *Bill Johnson's Restaurants v. National Labor Relations Board*, 461 U.S. 731 (1983), the U.S. Supreme Court held that a civil suit could violate the NLRA if the suit lacked reasonable basis in fact or law and was brought with a retaliatory motive. Following this decision, the NLRB adopted a preference of holding an unfair labor practice complaint in abeyance and letting the civil litigation resolve itself before ruling on the merits of the complaint. *Beverly Health & Rehabilitation Services, Inc.*, 331 NLRB 960 (2000).

In *BE & K Construction Co. v. National Labor Relations Board*, 536 U.S. 516 (2002), the U.S. Supreme Court rejected the NLRB's approach as overboard. It determined that its prior statements in *Bill Johnson's Restaurants* were *dicta*. Instead, the Supreme Court held that an unmeritorious civil suit that attacks activity protected by the NLRA is nevertheless protected by the First Amendment provided that suit is reasonably based. Importantly, in *BE & K Construction Co.*, the Supreme Court did not provide rule guidance as to whether a reasonably based but unsuccessful lawsuit would constitute an unfair labor practice.

On remand, the NLRB held "that the filing and maintenance of a reasonably based lawsuit does not violate the [NLRA], regardless of the motivation for bringing it." *BE & K Construction Co.*, 351 NLRB 451 (2007). A lawsuit lacks reasonable basis or is objectively baseless if "no reasonable litigant could realistically expect success on the merits." *Id*.

The standards announced in both the Supreme Court's decision and the NLRB's *BE & K Construction Co.* decision are readily applicable to cases decided under chapter 41.56 RCW. As

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[14] On March 9, 2021, the parties were specifically asked to brief this issue.

the NLRB stated in its decision, "Nothing in the Constitution restricts the right to petition to winning litigants." *Id*. This Commission should similarly protect the right of individuals to petition the courts even when the subject matter of the lawsuit is activity that is arguably protected by chapter 41.56 RCW. Finally, the NLRB's approach of examining whether a lawsuit was reasonably based or objectively baseless is a sound approach for determining whether the lawsuit constitutes an unfair labor practice.

Applying those standards here, Warner's suit was reasonably based and was not objectively baseless and, therefore, did not constitute an unfair labor practice.[15] Warner credibly testified that she believed Shjerven was threatening her with physical violence. Shjerven has a history of acting in an explicit, hostile, and intimidating manner toward individuals who challenge him. Warner was not only the subject of Shjerven's hostile and aggressive behavior; she also witnessed his behavior toward staff. The fact that the Benton County Superior Court did not find by a preponderance of the evidence that Warner's versions of events occurred does not diminish her reasonable belief. Warner's lawsuit was also not objectively baseless. The facts clearly establish that this employer repeatedly requested that Shjerven cease acting in an explicit, hostile, and intimidating manner toward the transit authority's staff, and Shjerven adamantly refused to change his behavior.

Finally, the overall conduct of the employer has not demonstrated that it breached its good faith bargaining obligation after Warner obtained the restraining order. There is no evidence that the employer did not stand ready to engage in good faith negotiations with the union; it even took

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[15] Warner's actions are attributable upon the employer because Warner is an agent of the employer. The Commission applies the common law rules of agency when determining if the actions of a purported agent can be imputed to the principal upon whose behalf they are acting. *See, e.g.*, *Community College District 13 (Lower Columbia College)*, Decision 8117-B (PSRA, 2005) (holding that nonmember union supporters' actions may be imputed upon the union). Washington courts have held that the "[a]uthority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services." *Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 351 (1966). Although Warner obtained the restraining order on her own, the facts surrounding the restraining order originated from Warner's official duties with the employer. This, coupled with the employer's legal support as well as through Boyce's July 30, 2019, letter, at a minimum would imply that Warner had the apparent authority to act on behalf of the employer.

steps to keep the bargaining process moving forward despite the difficulties between Warner and Shjerven.

Issue Three: Did the Employer Attempt to Dominate the Union?

It is an unfair labor practice for a public employer to "control, dominate, or interfere with a bargaining representative." RCW 41.56.140(2). For example, a public employer may not provide financial assistance to an exclusive bargaining representative. S*ee, e.g., State – Washington State Patrol*, Decision 2900 (PECB, 1988). Additionally, a public employer may not show preference for one exclusive bargaining representative over another during the representation process. *See, e.g., Renton School District No. 403*, Decision 1501-A (PECB, 1982). The union bears the burden of proof and must establish that the employer intended to control or interfere with the administration of the union and/or intended to dominate the internal affairs of the union. *King County*, Decision 2553-A (PECB, 1987). The element of intent in the case of control, domination, or interference in RCW 41.56.140(2) contrasts with the standard for interference previously discussed regarding RCW 41.56.140(1), where the showing of intent is not required. *See Community College District 13 (Lower Columbia College)*, Decision 8117-B (PSRA, 2005), *rev'd on other grounds, City of Bellingham (Washington State Council of County and City Employees)*, Decision 13299-A (PECB, 2021).

While Warner's obtaining a restraining order was both objectively and subjectively reasonable, it does not serve as a defense to this allegation. As noted above, even a lawfully obtained protective order does not necessarily protect a respondent from other unfair labor practices. Here, after Warner obtained the restraining order, Boyce sent the union a letter asking it to identify a new bargaining representative in light of the fact that Shjerven was precluded from being on the employer's property. The question that must be answered here is whether the employer's response demonstrated an intent to control the union.

Boyce's July 30, 2019, letter reaffirmed the employer's willingness to bargain while at the same time asked the union to identify a new staff representative who would be handling representation in Shjerven's absence. The problem with the employer's letter is that it assumed that the restraining order required Shjerven to cease all representational activities at the transit authority because he

was precluded from being within 500 feet of Warner. RCW 41.56.040 guarantees employees the right to designate a representative of their own choosing and, even when faced with a restraining order such as the one in this case, a public employer is still required to work with the employees' selected bargaining representative to ensure that those rights are guaranteed to the greatest extent possible.[16]

Here, Boyce's letter to the union requesting a new bargaining representative to replace Shjerven demonstrates an assumption on the part of the employer that Shjerven could not continue at least some of his functions. Furthermore, while the employer certainly could not have retaliated against Warner for exercising the right to petition the superior courts by reassigning her duties, the testimony and evidence do not demonstrate that Warner was present at every meeting prior to the order. Shjerven credibly testified that Warner did not attend every single meeting involving Shjerven prior to the restraining order. However, after obtaining the restraining order, Boyce then informed the union that Warner's attendance was necessary at all meetings involving the union. This inconsistent standard demonstrated a passive intent on the part of the employer to preclude Shjerven from representing bargaining unit employees. Finally, although the employer demonstrated a willingness to continue its good faith bargaining obligation, it did not attempt to work with union to determine alternative methods for Shjerven to continue his role as the employees' representative of choice.

Issue Four: Did the Employer Unlawfully Withdraw from a Tentative Agreement?

The union asserts that the employer negotiated in bad faith in violation of RCW 41.56.140(4) by withdrawing from a tentative agreement reached during bargaining concerning the union's DRIVE program. A major change of position that frustrates progress late in negotiations can be indicative of bad faith bargaining and is closely scrutinized. *Whatcom County*, Decision 7244-B (PECB, 2004); *Spokane County Fire Protection District 1*, Decision 3447-A (PECB, 1990). Withdrawing

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[16] For example, the employer could have arranged for employees to meet with Shjerven in a location that did not violate the restraining order. The employer could have set alternative means of communication for employees to discuss workplace issues, such as setting up a computer station in a private office for employees to meet with Shjerven via video conference.

from tentative agreements reached in bargaining may also indicate bad faith. *Fort Vancouver Regional Library (Washington Public Employees Association)*, Decision 2350-C (PECB, 1988).

As a general rule, whether parties in labor bargaining have reached a meeting of minds is an issue of fact when there is no contract to show agreement. *Ben Franklin National Bank*, 278 NLRB 986 (1986). The parties are deemed to have reached a meeting of the minds when the evidence shows that a party "understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon" by the party who made the offer. *City of Yakima*, Decision 3564-A (PECB, 1991). Public policy dictates that the representatives of employers and employees shall "participate fully and promptly" in PERC's efforts to promote the settlement of a dispute over the terms of a collective bargaining agreement. RCW 41.58.040(3).

Here, the union failed to demonstrate by a preponderance of the evidence that the employer and union had a meeting of the minds concerning the DRIVE language for any of the five collective bargaining agreements that were being negotiated. Shjerven's statement at the end of the third day of the July 22–24, 2019, bargaining session requesting the employer to "TA DRIVE . . . because we've got it with the other groups" clearly demonstrates that, at that point, the union and employer had not reached a meeting of the minds for the contracts being negotiated that day. Furthermore, Warner's immediate response to Shjerven's request and her assertion that the parties did not have an agreement on DRIVE further demonstrate that the parties did not have an agreement on the DRIVE language. When Warner explained to Shjerven that it was "not a done deal" for the contracts being negotiated by DePaolo as the DRIVE language was tied the employer's proposal for a three-step grievance process, Shjerven responded by threatening to fire DePaolo for agreeing to that language. This statement clearly shows that Shjerven did not have a clear understanding of the state of negotiations for the contracts that DePaolo was negotiating. While Shjerven's recollection and notes show a belief on his part that the parties had an agreement on this issue, these statements and notes by themselves do not demonstrate by a preponderance of the evidence that either an agreement or a meeting of the minds had been reached. The union also did not call DePaolo to testify about any tentative agreements he reached with the employer for the Dial-A-Ride Dispatchers or Administrative Assistants bargaining units, nor did the union enter

any documentary evidence such as a signed tentative agreement demonstrating the parties reached a meeting of the minds.

Commission precedents require more than just the subjective believe of the complainant to prove a regressive bargaining allegation. For example, in *Snohomish County Fire District 1 (International Association of Fire Fighters, Local 1828)*, Decision 12669 (PECB, 2017), the complainant entered into evidence email communications between the employer's and union's chief negotiators to show the actual state of negotiations between the parties and to demonstrate that the parties had a meeting of the minds for a tentative agreement. In *Shoreline School District*, Decision 9336-A (PECB, 2007), the respondent's chief negotiator testified that the parties had reached a tentative agreement that was contingent on ratification. Here, the union failed to demonstrate that that it had reached tentative agreement with the employer on the DRIVE language. This allegation must be dismissed.

Issue Five: Did the Employer Fail to Provide Information?

The duty to bargain includes an obligation to provide relevant information needed by the opposite party to properly perform its duties in the collective bargaining process. *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The flow of information between the parties must continue during the parties' preparation for interest arbitration. *City of Clarkston (International Association of Fire Fighters, Local 2299)*, Decision 3246 (PECB, 1989).

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

The allegation that the employer failed to respond to an information request must be dismissed as a matter of law because the union's information request was related to civil litigation, and the duty to provide information does not apply to requests related to discovery in civil litigation between parties to a collective bargaining relationship. For example, in *Highland School District*, Decision

2684 (PECB, 1987), a union took a termination dispute to civil court after exhausting the dispute resolution mechanisms available under the contract. The Examiner determined the parties had moved the dispute beyond the collective bargaining process regulated by the Commission under chapter 41.56 RCW. The decision concluded that the union's right of access to information was controlled by the rules and decisions of the civil court to which the dispute had been taken. *Id.* (citing *City of Tacoma*, Decision 322 (PECB, 1978) (finding negotiations for settlement of civil litigation were controlled by civil court rules and could not give rise to an unfair labor practice, despite underlying dispute originating as a collective bargaining dispute)).[17]

Here, the union clearly asked Lee to make himself available for questioning through a deposition related to the civil litigation initiated by Warner. As noted above, requesting or subpoenaing an individual to appear and provide testimony as part of civil litigation is not congruent to requesting information under chapter 41.56 RCW, and any failure on the part of Lee to respond to the request was governed by the civil litigation rules, not by chapter 41.56 RCW. The union correctly points out that parties receiving relevant information requests are obligated to respond to such requests and explain why they do not think the information requests are relevant or clear. *See, e.g., Pasco School District*, Decision 5384-A (PECB, 1996). But the *City of Tacoma* decision and its progeny clearly dictate that a party's failure to respond to information requests made in association with civil litigation are governed by the rules of civil procedure and not by chapter 41.56 RCW.

REMEDY

The fashioning of remedies is a discretionary action of the Commission. *University of Washington*, Decision 11075-A (PSRA, 2012); *see City of Seattle*, Decision 8313-B (PECB, 2004). When interpreting the Commission's remedial authority, the Washington State Supreme Court approved a liberal construction of the statute to accomplish its purpose. *Municipality of Metropolitan Seattle (METRO)*, Decision 2845-A (PECB, 1988), *aff'd, Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992). The purpose of the

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[17] The National Labor Relations Board has come to a similar conclusion: the duty to provide information does not apply where a party has taken the issue outside of the bargaining process. NLRB precedents apply that reasoning as well to requests made for information in the context of an unfair labor practice proceeding. *Huck Manufacturing Co.*, 254 NLRB 739, 755 (1981).

chapter 41.56 RCW is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right. *Municipality of Metropolitan Seattle*, 118 Wn.2d 621 (citations omitted). With that purpose in mind, the Washington State Supreme Court interpreted the statutory phrase "appropriate remedial orders" as including those remedies necessary to effectuate the purposes of the statute and to make the Commission's lawful orders effective. *Id*. The Commission's expertise in resolving labor-management disputes has also been recognized and accorded deference. *Id.* (citing *Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983)).

Here, in addition to the standard remedial order of ceasing from the complained-of activity, posting a notice in the workplace, and reading the notice at a regular meeting of the offending party, both parties requested that a representative be removed from the bargaining table. The employer requested that Shjerven be removed, and the union requested that Warner be removed. Needless to say, both requests are easily classified as extraordinary remedies, particularly in light of the Commission's preference to allow the parties to designate representatives of their own choosing. *See, e.g.*, *Kiona Benton School District (Kiona Benton Education Association)*, Decision 11862 (EDUC, 2013) (finding the bargaining representative committed an unfair labor practice by refusing to communicate with the employer's lawfully designated bargaining representative).

Both the employer's and union's requests for extraordinary remedies are denied. Ordering a bargaining representative to be removed from the bargaining table represents one of the most extreme remedies this Commission could order as it effectively denies either the employer or the employees of the representative of their choosing. As such, this remedy should be reserved for the most extreme situations, such as actual violence or threats of violence. While the employer certainly objected to Shjerven's conduct as described above, his conduct at the bargaining table did not raise to the level of physical threats or actual violence.[18] Armed with this decision, the

[18] However, as demonstrated above, Shjerven does have a history of threatening to shove several items "up the asses" of employer representatives. While these examples are not timely and could not form the basis of a remedial order, this kind of language is not necessarily hyperbole and could be viewed as an actual threat of violence depending on the recipient of the communication.

parties should have a greater expectation of the types of behaviors that will and will not be tolerated under chapter 41.56 RCW. The requests for extraordinary remedies are denied.

FINDINGS OF FACT

1. Ben Franklin Transit is a public employer within the meaning of RCW 41.56.030(13).

2. Teamsters Local 839 is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The employer provides public transportation services for Benton and Franklin Counties in Washington State, including fixed-route, Dial-A-Ride, Van Pool, and demand-response services. Gloria Boyce is the employer's general manager.

4. Wendi Warner is the employer's director of Human Resources and Labor Relations and participates in negotiations on behalf of the employer with all five of the union's bargaining units. Warner has served in her current position since 2016 and is generally the primary contact for labor relations matters.

5. The union represents five different bargaining units at the transit authority covering approximately 270 employees including Coach Operators; Dial-A-Ride Drivers, Drivers-Dispatchers, and Reservation Clerks; Maintenance Workers; Dial-A-Ride Dispatchers; and Administrative Assistants.

6. Russell Shjerven is the union's secretary-treasurer and has represented employees at the transit authority since 2013. He has served as the chief negotiator for the Coach Operators; Dial-A-Ride Drivers, Drivers-Dispatchers, and Reservation Clerks; and Maintenance Workers bargaining units since 2016.

7. Union business agent Austin DePaolo represents employees at the transit authority and is the chief negotiator for the Dial-A-Ride Dispatchers and Administrative Assistants bargaining units.

8. At a June 28, 2019, bargaining session, the employer's team was represented by Warner, Hamm, Maintenance Manager Jerry Otto, Assistant Director of Operations Steven Davis, and attorney John Lee. Shjerven represented the union along with stewards Norma Nelson, Traci Bronson, Melissa Rosado, Lisa Stewart, and Jeff Lahti.

9. The meeting started out cordially, but Shjerven then stated that he needed to address a matter unrelated to bargaining. Shjerven believed that an employer official had leaked confidential information concerning a grievance. Shjerven was also irate that the room had not been set up and that the employer's bargaining team was late.

10. Shjerven lashed out at each employer official while continually pointing his finger and using profanity, particularly the words "fuck" or "fucking." Otto attempted to get Shjerven to calm down, which resulted in Shjerven directing a profanity-laden tirade against Otto. Otto then stated the parties were done negotiating, and the employer's negotiating team left the room. When Shjerven accused the employer's team of refusing to bargain with the union, Otto responded that no employees, including the employer's negotiating team, should have to sit and be berated by Shjerven.

11. Shjerven yelled "fuck you" while pointing his finger toward each member of the employer's bargaining team. Otto then stated that the employer's team was leaving and the testimony indicates that he used some variation of the word "fuck" when speaking. The employer's team packed up their materials to leave the room. As the employer's team left the room, Shjerven yelled "fucking pussies" to the employer's negotiating team.

12. The parties scheduled three days of negotiations between July 22 and July 24, 2019. The July 22, 2019, session occurred at the union's hall in Pasco, Washington, and the other two sessions occurred at the employer's board room. The parties agreed that the sessions would end at 5:00 p.m. each day.

13. Warner testified to several of Shjerven's comments made in her presence over the course of the meeting that she found offensive. For example, Shjerven remarked that union president Nelson was so old that her first uniform was "gunny sack." When a female shop steward mentioned that she was involved in emergency manage training, Shjerven asked

"[O]h, what's your job, bringing the cookies?" During a discussion about the employer's rules concerning drivers wearing their uniforms in pubs, taverns, and dispensaries, Shjerven stated to Shop Steward Bronson that "maybe if [she] took off [her] top [she] could get free booze." When Rosado missed part of a session, Shjerven asked if she was picking up her birth control pills. During a conversation about call-off procedures, Shjerven suggested that Shop Steward Lisa Stewart must have been drunk, to which Stewart responded, "Where did that come from?" At one point Shjerven remarked that women's uniforms are more expensive than men's because women's hips are wider. Shjerven did not deny making any of these statements.

14. Warner, Lee, and Shjerven all testified that the three days of bargaining were, for the most part, productive, and the parties had hoped to have several tentative agreements by the end of the three-day session.

15. On the last day of bargaining, Shjerven reminded everyone at the beginning of the day that the session needed to end by 4:00 p.m. as he had a 4:30 p.m. grievance meeting with a different employer, and he needed time to travel to that meeting. Shjerven scheduled this meeting consistent with Vance's July 18, 2019, email.

16. The employer's bargaining team caucused around 3:20 p.m. and the union team caucused around 4:00 p.m. and did not return to the board room until 4:13 p.m. Although the parties agreed that the session needed to end at 4:00 p.m. to accommodate Shjerven's schedule. Shjerven and Lee started to review the proposals to determine if any tentative agreements could be reached.

17. One of the issues that was on the table was the union's proposal to allow employees to contribute to the union's political action committee, DRIVE. Shjerven stated that the employer might was well "TA DRIVE" because the union had that proposal in its Dial-A-Ride Dispatchers and Maintenance Workers groups. Warner then attempted to correct Shjerven by informing him that DRIVE was "not a done deal" for the Dial-A-Ride Dispatcher's contract and tried to explain that the DRIVE proposal was connected with the employer's three-step grievance proposal. She also notified Shjerven that the parties had yet to reach agreement in that issue.

18. Lee testified that Shjerven responded to Warner in a raised voice, "I already told you that I'm going to fire that fucker," referring to DePaolo who was negotiating that agreement. Shjerven then allegedly stated that he "told that fucker not to agree to that and he did it anyway" again, referring to DePaolo.

19. Shjerven claims that Warner stated the package offers for the Coach Operators, Dial-A-Ride Drivers, Dispatch-Drivers, and Reservation Clerks, and Maintenance Workers bargaining units were "all or nothing" packages. Warner testified that she did not use this statement and denied saying to Shjerven that they were "all or nothing." Otto testified that immediately after the meeting, Warner told him that the proposal was all or nothing.

20. Warner testified that she tried to explain to Shjerven why the other contracts had a three-step grievance procedure and that Shjerven responded by raising his voice and becoming more agitated. Shjerven testified that at one point Lee put his hand up near Warner's face in an apparent effort to get her to stop talking as Lee was attempting to work with Shjerven to determine which items the parties could tentatively agree upon.

21. Lee testified that he may have waved his hand at Warner in an attempt to calm the situation. He further testified that he started to grab his personal items as Warner and Shjerven continued to talk at each other in case he needed to "pull Wendi out."

22. Warner and Lee testified that Shjerven stated, "John, you gotta put a leash on her." Shjerven testified that he stated, "Hey, John, you have got to put a leash on her and get some control." Regardless of which version was actually stated, Lee responded to Shjerven that his statement was "uncalled for" and "not productive" to which Shjerven responded, "You're right, John, it's not productive. Put a leash on her."

23. Warner testified that Shjerven was shaking his fist and pointing his finger in close proximity to her during this portion of the argument. Shjerven testified that Warner screamed toward Shjerven that she was "tired of [his] 'fuck this, fuck that, fuck this, fuck you'" and accused Shjerven of making derogatory comments toward women.

24. Shjerven also accused Warner of being a "fucking liar" and falsely accusing him of slashing Training Manager Rebecca McCord's tires.

25. Warner testified that at one point she felt that Shjerven was so angry at her that he was going to hit her and almost ran into Lee while attempting to leave the room. Warner also testified that, as the employer's Human Resources manager, she felt she needed to stand up for the female employees, and as she was heading toward the door, she told Shjerven that his behavior had "been out of line."

26. On July 25, 2019, Warner obtained an ex parte restraining order from the Benton County Superior Court that precluded Shjerven from being within 500 feet of Warner's residence or place of employment at all times.

27. On July 30, 2019, Boyce sent a letter to Shjerven explaining that the employer was aware of Warner's restraining order against Shjerven and the requirement that Shjerven remain at least 500 feet away from Warner. Boyce stated that the employer was committed to engaging in good faith bargaining with the union as well as to contract administration and that the meetings set for July 25 and 26, 2019, needed to be rescheduled, as well as the grievance meetings set for August 2, 2019.

28. Boyce also informed the union that Warner would continue to be the employer's representative at all meetings involving the union and asked the union to identify its representative for future meetings so that the pending matters could be rescheduled. Despite this statement, the testimony demonstrates that Warner did not attend every single meeting that involved the union or Shjerven.

29. On August 2, 2019, the Benton County Superior Court extended the restraining order through August 16, 2019. The court also modified the terms of the restrictions to allow Shjerven access to the employer's property but precluded him from coming within 50 feet of or engaging in any contact with Warner.

30. On August 20, 2019, the union's counsel, acting on behalf of Shjerven, sent Lee an email requesting time to depose him about facts surrounding Warner's restraining order. The email stated that Lee's "testimony would be as a fact witness in [his] capacity as lead

negotiator for Ben Franklin Transit in negotiations with Teamsters Local 839 and would not impinge upon any privileged communications between [Lee] and Ben Franklin Transit."

31. Lee was on vacation at the time the request was made, and his email sent an automated notification to the union's counsel stating that he was out of the office and would return to work on August 22, 2019. Neither Lee nor the employer's counsel responded to the union counsel's email.

32. On August 22, 2019, a process server attempted to serve Lee at his office but was informed that Lee was not in the office at that time. The process server completed a certified declaration of non-service.

33. On August 30, 2019, the Benton County Superior Court conducted a hearing concerning the merits of Warner's restraining order. Both Warner and Shjerven testified at this hearing, each giving their own version of the July 24, 2019, events. The superior court ultimately ruled that Warner failed to establish by a preponderance of the evidence that the version of events occurred as she alleged, and the court dismissed the petition.

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. Based upon findings of fact 8 through 25, Teamsters Local 839 breached its good faith bargaining obligation in in violation of RCW 41.56.150(4) and derivatively interfered with protected employee rights in violation of RCW 41.56.150(1) through Russell Shjerven's explicit, hostile, and intimidating statements and by resorting to *ad hominem* and gender-based attacks against Ben Franklin Transit officials and employees during negotiations for a successor collective bargaining agreement.

3. Based upon findings of fact 8 thorough 27, Ben Franklin Transit did not breach its good faith bargaining obligation in violation of RCW 41.56.140(4) when Wendi Warner filed a

protection order during bargaining for a successor collective bargaining agreement based upon Russell Shjerven's explicit, hostile, and intimidating statements made during negotiations for a successor collective bargaining agreement.

4. Based upon findings of fact 26 through 29, Ben Franklin Transit attempted to dominate a union in violation of RCW 41.56.140(2) and derivatively interfered with protected employee rights in violation of RCW 41.56.140(1) by assigning Wendi Warner to grievance meetings in August 2019 and thereby denying bargaining unit members from choosing Russell Shjerven as their bargaining representative at the meetings.

5. Based upon findings of fact 8 through 25, Ben Franklin Transit did not breach its good faith bargaining obligation in violation of RCW 41.56.140(4) by revoking tentative agreements the parties had previously reached during negotiations for a successor collective bargaining agreement.

6. Based upon findings of fact 30 through 33, Ben Franklin Transit did not breach its good faith bargaining obligation in violation of RCW 41.56.140(4) by refusing to provide relevant information requested by the union needed for civil litigation.

ORDER

Teamsters Local 839, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

    a. Making explicit, hostile, and intimidating statements or resorting to *ad hominem* and gender-based attacks to Ben Franklin Transit officials and employees that place the employer in a position where it is no longer possible to continue bargaining with the union.

b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 41.56 RCW:

a. Give notice to and, upon request, negotiate in good faith with Ben Franklin Transit without making explicit, hostile, and intimidating statements or resorting to *ad hominem* and gender-based attacks during bargaining sessions.

b. Contact the compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice provided by the compliance officer into the record at a regular public meeting of the governing body or board of the Teamsters Local 839, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the compliance officer.

e. Notify the compliance officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same

time, provide the compliance officer with a signed copy of the notice the compliance officer provides.

Ben Franklin Transit, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Attempting to control, dominate, or interfere with Teamsters Local 839 by instructing the union to name a representative other than Russell Shjerven and failing to work with the union to determine alternative methods for Shjerven to continue his role as the employees' representative of choice.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 41.56 RCW:

   a. Give notice to and, upon request, negotiate in good faith with Teamsters Local 839 to determine alternative methods for Russell Shjerven to continue his role as the employees' representative of choice.

   b. Contact the compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

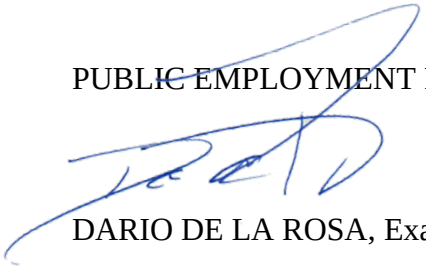
c. Read the notice provided by the compliance officer into the record at a regular public meeting of the governing body or board of Ben Franklin Transit, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the compliance officer.

e. Notify the compliance officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 30th day of September, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DARIO DE LA ROSA, 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 09/30/2021

DECISION 13409 - 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

CASES 131976-U-19, 131977-U-19, 131978-U-19, 132082-U-19, 132083-U-19, 132084-U-19, 132085-U-19, 132086-U-19

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