STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| COLETTE SWENSON,<br>Complainant,<br>vs.<br>SEATTLE SCHOOL DISTRICT,<br>Respondent. | CASE 131494-U-19<br>DECISION 13443 - EDUC<br>CORRECTED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| COLETTE SWENSON,<br>Complainant,<br>vs.<br>SEATTLE EDUCATION ASSOCIATION,<br>Respondent. | CASE 131495-U-19<br>DECISION 13058-A - EDUC<br>CORRECTED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

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Colette Swenson was a counselor at West Seattle High School (West Seattle), in the Seattle School District. At the end of the 2016–17 school year, her first full year at West Seattle, Swenson received a "Basic" rating (2 out of 4) on her performance evaluation. Swenson received a "Basic" rating again for the 2017–18 school year. During the 2018–19 school year, Swenson filed a grievance challenging her 2017–18 rating; a Harassment, Intimidation, and Bullying (HIB) complaint; and the original unfair labor practice (ULP) complaints in this matter. Swenson claims that when she

again received a "Basic" performance rating for 2018–19, it was retaliation for her grievance, HIB complaint, and ULP complaints.

In 2018, the Seattle School District (district, employer) and the Seattle Education Association (union) negotiated a new collective bargaining agreement. After the membership ratified the tentative agreement, the district and the union worked together to finalize the rough tentative agreement into a complete document. In the course of this process, language relating to the evaluation process that was in the tentative agreement was altered. Swenson claims this amounted to the parties continuing to bargain with each other following ratification, and thereby the employer unlawfully interfered with employee rights and the union breached its duty of fair representation.

In 2019, the union and the district again negotiated a new collective bargaining agreement. Again, after the membership ratified the tentative agreement, the union and the district finalized the rough tentative agreement into a complete document. During this process, the union and the district agreed to restore, with modification, the previously altered evaluation language. Swenson again claims that the employer continued to bargain with the union following ratification and committed unlawful interference with employee rights.

Swenson does not carry her burden of proof on any of these claims, and the complaints are dismissed.

## ISSUES

As summarized in the second amended preliminary ruling dated April 23, 2020, the issues to be decided in these consolidated cases are as follows:

> Employer discrimination in violation of RCW 41.59.140(1)(c) [and if so derivative interference in violation of RCW 41.59.140(1)(a)] within six months of the date the complaint was filed, by discriminating against Colette Swenson in retaliation for her exercising protected activity.
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> Employer interference in violation of RCW 41.59.140(1)(a) within six months of the date the complaint was filed, by continuing to bargain with the Seattle Education Association over terms and conditions of employment after a 2018- 2019

tentative agreement had been ratified by the Seattle Education Association's membership.

Employer interference in violation of RCW 41.59.140(1)(a) within six months of the date the third amended complaint was filed, by continuing to bargain with the Seattle Education Association over terms and conditions of employment after a 2019-2022 tentative agreement had been ratified by the Seattle Education Association's membership.

Union interference in violation of RCW 41.59.140(2)(a), within six months of the date the complaint was filed, by breaching its duty of fair representation by aligning its interests against bargaining unit members during negotiations with the Seattle School District.

The scope of the hearing and decision is limited to these issues.[1]

[1] The preliminary ruling issued under WAC 391-45-110 limits the issues that agency examiners may consider or rule upon. *King County*, Decision 9075-A (PECB, 2007); WAC 391-45-110(2)(b). Swenson raised a number of other issues that are beyond the scope of the preliminary ruling and cannot be considered here, such as: violation of the union's bylaws or rules; violation of the collective bargaining agreement's grievance procedure or evaluation provisions; whether Swenson's grievance(s) had merit or was appropriately processed by the union or district; allegations of employer discrimination postdating the second amended complaint and the September 20, 2019 amended preliminary ruling; failure to notify the union membership of changes to the collective bargaining agreement; the quality of the union's representation of Swenson postdating the second amended complaint and the September 20, 2019 amended preliminary ruling; the quality of the union's representation of Swenson beyond the scope of the preliminary ruling (which only finds a duty of fair representation cause of action for conduct "during negotiations"); violations of RCW 41.58.040; and generalized complaints of incivility, unprofessionalism, unfairness, bias, or failure to establish "a welcoming and supportive environment" outside of the specific issues identified in the preliminary ruling.

## BACKGROUND[2]

### The 2015–16 School Year, in Which Swenson Transferred to West Seattle High School

Colette Swenson began her service as a full-time school counselor for the Seattle School District in 2001.[3] From 2001 until the fall of 2015, Swenson worked full-time at elementary schools, middle schools, and K–8 schools.

As a counselor, Swenson is among the employees categorized as Educational Staff Associates (ESAs), which also includes nurses, occupational therapists, physical therapists, school psychologists, and speech/language pathologists. ESAs are a distinct category from classroom teachers. The Seattle Education Association (SEA) represents the ESAs as well as classroom teachers and other staff at the district.

Swenson transferred to West Seattle High School for the 2015–16 school year. Swenson found the counselor's role at West Seattle "very, very different" from her prior experiences at primary and middle schools, and there was "an awful, awful lot to learn."

Assistant Principal Garth Reeves was responsible for evaluating all the counselors at West Seattle.[4] Soon after Swenson moved to West Seattle, Reeves became concerned with Swenson's performance. Reeves found that Swenson "struggled . . . right out of the gate. . . . [t]here were, I think, job duty areas that she was not clear on or had not had experience with. There were also . . . routines and procedures . . . timeliness, communication responsiveness. It was a pretty comprehensive struggle from the beginning."

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[2] This case produced a voluminous record, with eight days of testimony; over 1,000 pages of transcript; and 69 exhibits. Although the entire record was thoroughly reviewed and considered, only the facts necessary to understand and resolve the issues are recounted here.

[3] Prior to 2001, Swenson had worked as a substitute counselor at elementary and middle schools, and as a drug and alcohol intervention specialist at Franklin and Ballard High Schools.

[4] Reeves was responsible for evaluating about 22–25 employees each year.

Over winter break, Swenson had a family medical issue, and she went on leave for the rest of the school year. Swenson's leave began right before the midyear evaluation conference with Reeves was scheduled to occur. Reeves had already completed Swenson's midyear evaluation, and rated her as "unsatisfactory" overall.[5] Because of her absence, Swenson did not receive a final summative evaluation for the year.

West Seattle teacher and SEA building representative Kim Depew became aware that Swenson was having job performance difficulties "immediately after her being hired." Depew, along with fellow building representatives Judy Deignan and Jennifer Hall, and SEA UniServ Director Tim Kopp, met in late fall of 2015 to discuss Swenson's midyear evaluation. They believed that Reeves, who was relatively new to West Seattle, had failed to follow the collective bargaining agreement and established practices when he evaluated Swenson. Hall, Deignan, and UniServ Director Temple Robinson met with Reeves to discuss Swenson's midyear evaluation. Hall and Deignan recalled that Robinson ripped up Swenson's midyear evaluation, and that this action did not amuse Reeves (Reeves did not recall this incident).

The 2016–17 School Year, in Which Swenson First Received a "Basic" Evaluation Rating

Swenson returned to West Seattle full-time for the 2016–17 school year. Throughout the year, Reeves continued to have concerns with Swenson's performance. Reeves felt that Swenson's performance was "not satisfactory or below proficient," and that she had issues with "routines and procedures, knowledge of job-expected duties, and communication." Reeves and Swenson met approximately every other week to discuss her performance. Depew attended these meetings, where she would "point out when possibly [Reeves was] not making ethical decisions or perhaps being unfairly judgmental in the terms or when he's possibly not following the contract and violating someone's contractual rights." Depew believed that Swenson was "under attack" by Reeves, and also recalled that Reeves consistently said that Swenson was making improvements in her performance. She recalled that Reeves had suggested that Swenson should go to other counselors at West Seattle for help and guidance with issues she was having.

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[5] There are four possible performance ratings: Unsatisfactory, Basic, Proficient, and Distinguished.

In her annual summative evaluation at the end of the 2016–17 school year, Reeves gave Swenson an overall rating of "Basic." On the summative evaluation, Reeves noted examples of good performance, and also provided examples of Swenson's performance that he believed were "Basic," including: Swenson did not have routines and procedures in place to support Running Start students in preparing to take the SAT (resulting in the students being unaware of requirements relating to the SAT); Swenson did not have a sufficient or effective process for checking concerns with student schedules; Swenson had missed important deadlines regarding junior audits; Swenson made mistakes or had been untimely with scheduling; Swenson had not attended required meetings; and Swenson had demonstrated only a "basic" level of knowledge in counseling program issues such as state-level requirements for Washington state history.

On the evaluation, Swenson did not dispute any of Reeves' examples, but provided other examples that she felt demonstrated proficient performance. Swenson wrote, "I recognize that I need to continue my growth." At the hearing, Swenson agreed that she made mistakes during the 2016–17 school year, but felt, "I was not the only one making mistakes. I mean, everyone does." She felt that Reeves had a "closed mindset" and that her mistakes were "always highlighted." Swenson "didn't really think it was fair."

Depew was "okay with" Reeves' summative evaluation of Swenson, stating, "[W]e weren't happy, of course. . . but the items that were listed appeared to be something that we could probably fix . . . ."

The 2017–18 School Year, in Which Swenson Continued to Receive a "Basic" Evaluation Rating

Reeves continued to meet with Swenson throughout 2017–18 school year, providing her with feedback about her performance. In September 2017, Reeves arranged for Swenson to be paired with Andrew Dillhunt, an Evaluation Support Consulting Teacher (ESCT). Dillhunt and Swenson met five or six times throughout the year. Dillhunt had previously been a high school math and

science teacher,[6] but as an ESCT, he was on full-time release from the classroom and tasked with coaching, mentoring, modeling, and supporting employees needing performance support.

On or about June 8, 2018, Reeves issued Swenson her summative evaluation for the year. Reeves again gave Swenson an overall "Basic" rating. Reeves recalled that Swenson continued to have issues with "routines and procedures," and stated that it was "a continued struggle, particularly with scheduling and communication."

On the evaluation, Reeves again noted examples of Swenson's performance that he found proficient, and he also gave specific examples of what he regarded as a "Basic" level of performance, including instances of: failing to follow up with students and parents when students did not show up for appointments; losing track of a student's request for a "504 plan"; problems relating to Running Start scheduling; failure to timely register students for new classes as needed to address overcrowding; missing meetings; lack of communication or response to student scheduling needs, PE waivers, community service hours, and denial of access to honors classes; problems being prepared for student intervention team (SIT) meetings; failure to properly support students; lack of awareness as to student post-high school plans or graduation needs; and improperly scheduling students (thus creating overloaded classes).

On the evaluation, Swenson did not dispute any of the specific examples provided by Reeves, but in an "End-of-Year Reflection" she stated, "I believe I have improved greatly in my knowledge, skills, and performance, relative to last school year," and "In the next school year, I will make every effort to make continued growth in all areas of my work as a high school counselor." In the signature area of the evaluation, Swenson wrote, "I do <u>not</u> agree with the contents of this eval!"

At the hearing, Swenson said that she felt that the evaluation score given by Reeves was unfair and that her performance for 2017–18 was proficient. She believed that throughout the 2017–18 school year, Reeves continued to "make mountains out of mole hills." Swenson believed that Reeves had a "closed mindset," and that "[m]y job performance didn't matter. My artifacts weren't

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[6] ESCTs have always been classroom teachers, as opposed to ESAs.

going to matter. Evidence of my growth didn't matter. My proficiency doesn't matter," and that Reeves would "use the evidence he selects to rate me as he wishes, as he's predetermined."

Depew believed that the evaluation was "punitive and unreasonable." She stated that, "[n]o one's perfect, and . . . we're making mistakes out there once in a while." Depew believed Reeves had given inappropriate weight to Swenson's mistakes and that he had failed to follow proper evaluation processes.

Deignan also believed that the evaluation process was not fair, and that Reeves had not properly followed the collective bargaining agreement regarding Swenson's evaluation. She was "entertaining the fact that there was going to be some payoff for Mr. Reeves if he was able to eliminate Ms. Swenson."

In contrast, West Seattle Principal Brian Vance testified that Reeves' 2017–18 evaluation of Swenson was "done professionally, in good faith, with multiple opportunities for input. From what I could tell, it was a perfectly legitimate evaluation, finding, and process."

The Summer and Fall of 2018, in Which the District and the Seattle Education Association Bargained and Finalized the 2018–19 Collective Bargaining Agreement

During the 2017–18 school year and throughout the summer of 2018, the district and the SEA negotiated for a new collective bargaining agreement. Sheryl Anderson-Moore was the Chief Negotiator for the district, and SEA Executive Director John Donaghy was the lead negotiator for the union. The SEA bargaining team had about 35–40 members, and the district team had about 20 members. One member of the SEA bargaining team was a school counselor, who advocated for the counselors' interests during negotiations.

Among numerous other issues, during this round of negotiations the parties agreed to significantly revise the evaluation process in Article XI. The district and the SEA had been developing a new concept for teacher evaluations, which they called Peer Assistance and Review (PAR), for several years. The SEA and the district had a joint subcommittee that came up with new contract language

for the PAR process that involved substantial changes to Article XI.[7] The subcommittee brought its proposed language, which was largely complete, to the full bargaining table in late summer of 2018. The Article XI proposal was reviewed and adopted by the full bargaining teams at the main table. Anderson-Moore was not part of the multiyear PAR development process, nor was she part of the subcommittee that dealt with PAR.

On the final days of negotiations, each topic ("brick") of the new agreement[8] was voted on by the union and district bargaining teams. The parties reached a tentative agreement on a complete successor collective bargaining agreement the evening of August 31, 2018. The deal was for a one-year agreement, covering the 2018–19 school year.

The union and district developed a summary of the tentative agreement in order to hold ratification votes. This document was not in final contract language form; rather, it was apparently an amalgamation of the "bricks" that had been approved by the bargaining teams. Using the summary document, the union membership voted to ratify the new agreement on September 8, 2018.

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[7] The PAR process was a revision in the way classroom teachers were evaluated and involved the creation of a "PAR panel" made up of teachers and principals. Classroom teachers needing performance improvement would participate in the PAR panel and receive one-on-one support from a Consulting Teacher (CT). Dr. Clover Codd, the district's chief Human Resources officer at that time, was the lead on the multiyear committee that developed the PAR language. She explained that the PAR panel would review final summative evaluations of classroom teachers and would make recommendations to the superintendent about whether a teacher should continue to receive support from the PAR program or have their contract not renewed. Codd testified that ESAs such as counselors could not participate in the PAR panel program: "We made a very intentional decision as a committee . . . if you were in PAR, you were a classroom teacher. It was for classroom teachers. It didn't mean we wouldn't provide support to people who were not classroom teachers, but they wouldn't be in the PAR program."

The new Article XI language replaced the prior "STAR Mentor" program with a new "Professional Growth & Educator Support Committee." In the prior contract, employees with deficient performance evaluations could get the support of an ESCT and STAR Mentors. In the new agreement these roles were combined and renamed "Consulting Teacher."

[8] The parties used an interest-based style of negotiations for the new contract. Using the story of *The Three Little Pigs* as a model, the parties would initially develop solutions in a "straw" or conceptual form. A "straw" concept would be refined into "wood" and, ultimately, a "brick." The "brick" represented the final work of the parties, which could become new contract language. The final collection of "bricks" was the subject of discussion and voting at the end of the negotiation process. This was the first year that the parties tried this process.

The district was under a pressing timeline to have the new agreement approved so that the agreed-upon wage increases could be implemented in the September payroll. On September 9, 2018, the tentative agreement summary was presented to the school board for ratification and implementation of the wage increases. On September 18, 2018, the school board ratified the agreement based on the summary.

Once the agreement was ratified, the parties needed to incorporate their rough tentative agreement into a complete collective bargaining agreement. Creating a complete version of the contract was not as simple as editing the prior contract, because the district could not locate an electronic copy of the prior contract. The 2015–18 contract had to be rekeyed manually, and then the changes that the parties agreed to make for the 2018–19 contract had to be incorporated.[9]

Anderson-Moore took the primary responsibility for the final editing task, and her work was reviewed by SEA Executive Director Donaghy. Anderson-Moore viewed the process as a "partnership." Anderson-Moore and Donaghy did not intend to make substantive changes to the agreement during this collaborative final editing process. Rather, the intent was to accurately rekey the existing contract, finalize and transmute the "bricks" into the ultimate contract language, incorporate this new contract language into the prior contract, and if necessary, perform final copy editing-type tasks such as fixing spelling and grammar errors and harmonizing inconsistent terminology.

Anderson-Moore recalled that with respect to the modifications to Article XI, "I just inserted that section into the agreement. We tried to cross-check it to make sure we had done it accurately, but as I recall, we basically inserted the work from the PAR committee into the agreement." Dr. Clover Codd, the employer's former chief Human Resources officer who was more involved with the negotiated changes to Article XI, explained that not all of the language from the PAR

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[9] Anderson-Moore testified that this was "a massive effort" that produced about 3,000 pages. Technically, three separate contracts had to be produced, one for each of the three bargaining units represented by SEA (the certificated unit, the classified unit, and the office professionals unit). For each of the three contracts, the school board needed a copy of the 2015–18 contract; a marked-up copy of the 2015–18 contract showing the changes that would be made; and a final version of the 2018–19 contract, fully incorporating the negotiated changes to the 2015–18 contract.

"brick" document actually became final contract language, and she did not believe it was all intended to be incorporated:

> [T]he brick proposal was the entire program design that we had been working on for the three years collectively and collaboratively with SEA, past and central office leadership. And some of the contents of the brick proposal wasn't appropriate for contract language but would have been put in perhaps to the bylaws of the PAR panel or bylaws of the PG&E committee or would influence just sort of program-added design; so not all of the language in the brick is intended to be contract language.

After Anderson-Moore and Donaghy concluded their process, the final version of the new collective bargaining agreement was submitted to the school board for review and approval on October 26, 2018.[10] The board voted to approve the final version on November 14, 2018.

The final contract that was submitted to the school board on October 26, 2018, and subsequently approved, contained differences from the tentative agreement document. A month or two after the contract was finalized, Anderson-Moore learned of some errors in the contract relating to special education: "[A] sentence had been left out or something wasn't clear. In special education, we discovered one sentence that we had written wasn't really clear at all." Anderson-Moore offered to correct the errors with Donaghy, but Donaghy said, "[T]his contract only has a one-year shelf life. We're good. We just made a notation. . . . We'll just catch it at the next go-around."

The final version of the 2018–19 contract also contained some differences from the tentative agreement document in Article XI, regarding support for employees in the performance evaluation process:

- The tentative agreement and the 2015–18 collective bargaining agreement included the language, "All non-classroom certificated employees will have the same rights as teachers listed in this article including but not limited to: ESCT support,

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[10] The final version of the contract was attached to a "School Board Action Report," a publicly available document that proposed action by the school board; i.e., approval of the contract.

professional growth documents, performance improvement plans, and the probation process." In the final draft submitted to the school board, this language was struck out.

- The tentative agreement proposed to add language stating that when certain employees received a "Basic" summative evaluation rating, "A Consulting Teacher will be assigned to support the employee." In the final draft submitted to the school board, this language was not included.

- The tentative agreement provided that certificated employees whose work was not judged satisfactory in their comprehensive summative evaluation "will be offered the support of a Consulting Teacher." In the final draft submitted to the school board, this language read, "Classroom teachers will be offered the support of a Consulting Teacher."

Regarding these discrepancies[11] in Article XI, Anderson-Moore testified,

> I have no memory of what happened during the editing process. In review, to me, it appeared that some issues – some sentences had been left out. And given the volume of rekeying that agreement, I'm – I could see that happen very easily. . . .
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> There was some language changes [sic] that occurred from the 2015-'18 contract for the '18-'19 contract such as consulting teacher being the new term for what used to be called the . . . ESCT . . . so that needed to be changed. So there were updates done by the PAR group, the subcommittee, that needed to be changed in Article XI.

Anderson-Moore did not believe that the language was intentionally changed, and at the time, she was not aware of Swenson at all. Donaghy also did not believe that the language was intentionally changed, and said that Swenson was never mentioned in the bargaining process.

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[11] Hereinafter, these changes from Article XI in the tentative agreement are referred to as "the discrepancies."

SEA did not bring the discrepancies to Anderson-Moore's attention. She did not know the discrepancies existed at all until May or June of 2019, when Swenson and her supporters[12] pointed them out during the processing of Swenson's grievance (discussed below). Donaghy did not learn of the discrepancies until SEA UniServ Directors brought them to his attention while they were arranging support for Swenson. Once the SEA and the District learned of the discrepancies, they "were proceeding just as if the language still existed," and attempted to find appropriate supports for Swenson.

The Fall of 2018, in Which Swenson Filed a Grievance Regarding Her 2017–18 Summative Evaluation

On October 29, 2018, Swenson and Deignan filed a Step 1 grievance with Principal Vance, challenging Swenson's 2017–18 evaluation. The grievance claimed that Reeves violated numerous provisions of the 2015–18 collective bargaining agreement. It also asserted "discrimination, and harassment, intimidation and bullying by the administration toward [Swenson]." Among other remedies, the grievance requested that Reeves be removed as Swenson's evaluator, and that Swenson's Performance Improvement Plan be removed.[13] Deignan felt the PIP should be removed because

> [S]he was doing a definitely adequate job. I could even go so far as to say a proficient job. Yes, there were mistakes. Every week there were one or two mistakes pointed out.
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> To me, having worked in the building since 1997, I did not consider these mistakes to be major mistakes.

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[12] For simplicity's sake, Judy Deignan, Kim Depew, Jennifer Hall, and Olga Addae are referred to herein as "Swenson's supporters." This is not to imply that other individuals affiliated with the district or SEA did not support Swenson as well.

[13] The "Basic" evaluation rating for 2017–18 meant that Swenson was placed on a Performance Improvement Plan in the fall of 2018.

On November 9, 2018, Reeves denied the grievance on the basis that it was untimely.[14] Reeves also directed Swenson to the district's procedure for filing harassment, intimidation, and bullying claims.

On March 11, 2019, Executive Director of Secondary Schools Sarah Pritchett denied the grievance at Step 2.[15] Labor/Employee Relations Manager Sue Means drafted the Step 2 response for Pritchett, and Anderson-Moore reviewed it. In the Step 2 letter, the district reiterated that the grievance was untimely, but also addressed the merits of Swenson's grievance, finding that Reeves and the district did not violate the collective bargaining agreement.

In May or June of 2019, Anderson-Moore held a Step 3 meeting with Swenson as well as Means, UniServ Director Reiko Dabney, and Swenson's advocate and former SEA president Olga Addae. At the meeting, the attendees discussed the timeliness of the grievance, the evaluation process, and mentor support for Swenson.

At some point during the processing of the grievance, Swenson and her supporters discovered the discrepancies in Article XI. They brought up the discrepancies during the Step 3 meeting, but Anderson-Moore did not understand the references at the time. This was the first time that she or Means had heard about the discrepancies. The discussion at the Step 3 meeting focused on how to provide more support and future opportunities for Swenson, and Anderson-Moore's understanding

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[14] Reeves explained that the collective bargaining agreement stated that "the grievance shall be initiated within sixty (60) days following the events or occurrences upon which it is based." Reeves noted that Swenson received her evaluation on May 29, 2018, and so the October 29, 2018, grievance was not timely.

[15] On November 21, 2018, Swenson filed another grievance document with Vance. This document was at least in part duplicative of the October 29, 2018, grievance, as it concerned the 2017–18 evaluation and the resulting PIP, requested similar remedies, and even referenced the October 29, 2018, grievance. Initially, Pritchett believed that the November 21, 2018, document was a Step 2 request for the October 29, 2018, grievance, but Swenson asserted it was actually Step 1 of a second grievance. The fact that there were supposedly two simultaneous grievances about overlapping subject matter created confusion on the part of the district. Swenson apparently believed the district's conflating of the two grievances was evidence of Reeves' and the district's vendetta against Swenson. At the hearing, considerable time was spent trying to untangle which meeting corresponded with which grievance, but it is not necessary for me to devote time here to that adventure. Swenson has not shown that the grievances are relevant to anything except establishing that protected activity occurred, and for this purpose it matters not whether there was one grievance or two.

was that the union did not expect a formal Step 3 response from the district. Eventually, Deignan dropped Swenson's grievances.

The 2018–19 School Year, in Which Swenson Filed an HIB complaint and a ULP complaint, and Continued to Receive a "Basic" Rating

Per the collective bargaining agreement, Swenson's "Basic" rating for 2017–18 meant that Swenson would be placed on a Performance Improvement Plan for the 2018–19 school year. Swenson believed that being on the PIP meant, "I'm probably going to be placed on probation in January and possibly terminated in June."

Deignan testified that after Swenson was put on the PIP, she was walking in the hallway with Reeves one day, and Reeves said, "You know, none of this would be happening now if Temple had not torn up that evaluation." Deignan said she did not ask Reeves what he meant about that, but she was surprised. Deignan told Swenson about this interaction, and Swenson "took it to mean that [Reeves] had intended to get where we were then on a PIP. He had intended to get there so much quicker, way back in 2015, when I had been on the job for about six weeks." Reeves did not recall this interaction.[16]

Means had been reaching out to retired counselors to see if they could find someone to support Swenson. Means had heard about Jane Maurer, a former counselor, and had been trying to contact Maurer since October 2018. Maurer was out of the country, so Means and Maurer did not connect until November 2018. The district hired Maurer to be a mentor and support for Swenson. Around December 12 or 13, 2018, Swenson first met with Maurer, and for the rest of the 2018–19 school year, Maurer regularly met with Swenson to provide her with support and guidance.

Deignan and Swenson had discussed filing a Harassment, Intimidation, and Bullying (HIB) Complaint, and Dabney had encouraged her to file one. On December 21, 2018, Swenson filed an HIB complaint with Human Resources. John Nicholson, of the law firm Freimund Jackson &

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[16] It appears from the record that both the issuance of the PIP and this alleged interaction in the hallway occurred prior to Swenson filing the grievance on October 29, 2018.

Tardif, PLLC, conducted an investigation. This involved interviewing several people including Swenson, Reeves, Maurer, and Vance. Deignan accompanied Swenson to interviews for her HIB complaint. On July 23, 2019, Nicholson issued a report in which he found the HIB complaint was unfounded.

On January 11, 2019, Swenson met with Reeves, and Reeves decided that although there were still performance issues, Swenson would not be put on probation at that time. Since Maurer had just started working with Swenson, Reeves decided that the PIP should be extended instead.

On May 10, 2019, Swenson filed the original unfair labor practice complaint in this matter.[17]

In June 2019, Reeves rated Swenson's performance as overall "Basic" for the year. Reeves testified that Swenson's grievance(s), ULP, and HIB complaints did not play any role in his evaluation of her, and he believed the "Basic" rating accurately described her performance for the school year.

On the 2018–19 evaluation, Reeves listed several specific examples of Swenson's performance that he found proficient. He also provided examples that he found warranted the "Basic" rating. This included: failing to follow practices and procedures involving a student dropping an advanced placement biology class; failing to properly support a student who had a long absence from school; failing to address a student's scheduling concerns that were raised by the student's mother; failing to support a student who needed to complete McKinney-Vento forms; registering a student for a class that was already full; failing to properly integrate a new student into his or her classes; making numerous errors in a student's transcript audit (failing to maximize the student's schedule for his individual credit needs, and failing to timely register the student for a graduation-required class); registering students in advanced classes without ensuring that they had completed the prerequisites; and failing to effectively communicate with other staff about student placements.

On the evaluation, Swenson did not dispute any of the examples provided by Reeves, but said:

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[17] See below for the procedural history relating to Swenson's ULP complaints.

> I object to this biased evaluation by Garth Reeves. I have been harassed and scapegoated for four years. I have improved tremendously and that is not being acknowledged. I know that I am proficient in both Domains 2 and 3,[18] because I serve my students and families well and because of the positive feedback that I receive from my students and families.

Deignan "did not feel [Reeves] took into account all of [Swenson's] artifacts. Certainly the feedback from the families and the students that she worked with was extremely positive." Deignan believed that Reeves had considered Swenson's mistakes that had come to his attention from other staff and parents, and asserted that he was only allowed to consider mistakes that he personally observed firsthand. Deignan believed that the evaluation represented a "flawed implementation of the evaluation project – process."[19] Deignan believed the overall "Basic" rating was partly based on "a clerical error which Collette had made on June 6th. I would call it—I would describe it as she transposed two numbers when she was typing. . . . [I]t was a clerical error that I'm sure many people have made."

Principal Vance consulted with Reeves while Reeves was evaluating Swenson in 2018–19, and found, "It was based on the evidence and observations from Mr. Reeves over the course of the school year, weighted against the rubric that's in place to determine levels of proficiency." Vance testified that Swenson's grievances, HIB complaint, and ULP complaint were "never a part of any conversation that I've ever had with Mr. Reeves regarding the evaluation. . . . I feel like Mr. Reeves was . . . looking very closely to make sure that he was taking everything into account to make sure that it was a fair and accurate evaluation."

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[18] Certificated staff are given evaluation ratings in four domains: Planning & Preparation; The Environment; Delivery of Service; and Professional Responsibilities. In 2018–19, Reeves rated Swenson as "Basic" in domains two and three. This could be viewed as an improvement from the 2017–18 school year, where Reeves rated Swenson as "Basic" in domains two, three, and four.

[19] In August 2019, Deignan apparently filed another grievance challenging Swenson's 2018–19 summative evaluation.

The Summer and Fall of 2019, in Which the District and SEA Bargained and Finalized the 2019–22 Contract.

Bargaining for a successor to the 2018–19 collective bargaining agreement began in March or April 2019. Anderson-Moore was the district's chief negotiator again. The parties reached a tentative agreement for a successor agreement in late August 2019, agreeing to a new contract with an effective term of 2019–22. During the entire bargaining process, no one from the SEA nor the district brought up the previous discrepancies related to Article XI, and the new tentative agreement did not address the discrepancies. As with the previous contract, after the tentative agreement was ratified by the SEA membership, Anderson-Moore worked with the SEA staff to incorporate the tentative agreement into final contract language. Donaghy had left the SEA, so Anderson-Moore reviewed everything jointly with SEA UniServ Director and SEA Vice President Michael Tamayo, to incorporate the tentative agreement into a final version of the new contract.

At some point during this finalization process, Anderson-Moore reviewed Swenson's grievance and ULP charge, and recalled the discrepancy regarding Article XI. Anderson-Moore and Codd worked with Bishop, Tamayo, and SEA interim Executive Director Peter Aiau, to address how to get the language back into the contract in a way that was agreeable to the parties. They ended up agreeing to language that was still different from that which was originally in the 2018 tentative agreement.[20] Anderson-Moore believed that the errors had to be addressed in order for the contract to be as accurate as possible. After finalization was completed, the school board approved the new contract in mid-October 2019.

In early 2020, Swenson discovered the new language in Article XI.

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[20] The 2018–19 tentative agreement said, "All non-classroom certificated employees will have the same rights as teachers listed in this article including but not limited to: ESCT support," but as part of the new PAR program, ESCTs had been replaced by CTs. The group decided to change the language to reference "consulting teacher support" instead.

The 2018–19 tentative agreement also had said that when employees receive a "Basic" rating, a "Consulting Teacher will be assigned to support the employee." The group noted that Consulting Teachers were intended to support classroom teachers, and so this language didn't make sense with respect to ESAs. The group decided to change the language to say, "Classroom teachers will be offered the support of a CT; non-classroom certificated employees will be offered coaching by a subject matter specialist."

The 2019–20 School Year, in Which Swenson Was Rated "Proficient"

For the 2019–20 school year, Reeves moved to a different school, so Principal Vance became Swenson's evaluator. Swenson was removed from the PIP in December. In June 2020, Vance rated Swenson as "Proficient" overall for the 2019–20 school year.[21] Vance testified that he had been aware of Swenson's growth[22] during the prior years, and he found that by the end of the 2019–20 school year, her growth had continued to the point where she was proficient. Vance did not believe that his replacing Reeves as Swenson's evaluator was a factor: "I would imagine that we would have potentially reached the same spot if Mr. Reeves was still the evaluator into the '19-'20 school year."

Swenson retired from the district effective September 2020.

Procedural History

Swenson filed the original complaint in this matter on May 10, 2019, alleging unfair labor practices against both the district and the union. Swenson filed an amended complaint changing the contact information for the union on May 13, 2019. On June 7, 2019, an Unfair Labor Practice Administrator issued a deficiency notice finding that Swenson's complaints failed to allege facts that would constitute unfair labor practices, and ordered Swenson to file an amended complaint within 21 days.

On June 28, 2019, Swenson filed a cover sheet for an amended complaint, but did not attach an amended statement of facts. Instead, attached was an undated document that appeared to be an excerpt from a collective bargaining agreement or tentative agreement. On July 26, 2019, Swenson filed the same amended complaint cover sheet, now including an amended statement of facts.

On August 26, 2019, the Unfair Labor Practice Administrator issued a preliminary ruling in case no. 131494-U-19 (the case against the district), finding that Swenson stated claims of

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[21] This occurred after the third amended complaint was filed, but may be considered as background information. *Snohomish County Police Staff and Auxiliary Service Center*, Decision 12342-A (PECB, 2016).

[22] Reeves had rated Swenson as "Basic" in three domains for 2017–18, but "Basic" in only two domains for 2018–19.

interference and discrimination against the district. On August 26, 2019, the Unfair Labor Practice Administrator also issued a preliminary ruling and order of partial dismissal in case no. 131495-U-19 (the case against the union) finding that Swenson stated a claim of interference by breaching the duty of fair representation against the union. *Seattle School District (Seattle Education Association)*, Decision 13058 (EDUC, 2019).

On September 13, 2019, the union filed an answer. On September 16, 2019, the district filed an answer. On September 20, 2019, the unfair labor practice administrator issued an amended preliminary ruling. On September 27, 2019, I was assigned as the Examiner for the cases. On October 7, 2019, the union filed a motion to dismiss on the grounds that Swenson had failed to properly file and serve her complaint and amended complaint. On October 16, 2019, I denied the union's motion to dismiss, waiving Swenson's failure to strictly comply with the service and filing rules pursuant to WAC 391-08-003. On January 30, 2020, I issued a notice that the cases against the union and district would be consolidated and set a date for the hearing.

On April 21, 2020, Swenson filed a third amended complaint. On April 23, 2020, I issued a second amended preliminary ruling. I found that the third amended complaint did not state any additional claims against the union, but it did add another interference cause of action against the district relating to the 2019–22 tentative agreement. [23] On May 12, 2020, and May 14, 2020, the union and district, respectively, filed answers to the third amended complaint.

Due to the COVID-19 pandemic, the hearing was repeatedly postponed. By mutual consent of the parties, a hearing was held over Zoom, a videoconferencing computer program, on April 26, 27, 28, 29, 30, May 28, and June 1 and 2, 2021. Briefs were filed on September 3, 2021.

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[23] If Swenson believed that my amended preliminary ruling failed to address causes of action she sought to advance, the Commission's rules required her to seek clarification from me before the issuance of the notice of hearing. WAC 391-45-110(2)(b). No such request was made.

## ANALYSIS

### Applicable Legal Standards

*Discrimination*

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.59.140(1); *Tacoma School District*, Decision 5466-D (EDUC, 1997); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 349 (2014) (citing *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46 (1991)). To prove discrimination, the complainant must first establish a prima facie case by showing the following:

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

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

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

*City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *Id.*; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate nondiscriminatory reason for the adverse employment action. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. The respondent bears the burden of production, not of persuasion. *Id*. If the respondent meets its burden of production, the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or that union animus was a substantial motivating factor for the employer's actions. *Id.*

*Interference*

To prove an interference violation, the complainant must prove, by a preponderance of the evidence, that the employer's conduct interfered with protected employee rights. *State – Ecology*, Decision 12732-A (PSRA, 2017) (citing *Grays Harbor College*, Decision 9946-A (PSRA, 2009);

*Pasco Housing Authority*, Decision 5927-A (PECB, 1997)); *Tacoma School District*, Decision 5466-D. An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A, *remedy aff'd*, *Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn. App. 802 (2000). The legal determination of interference is based not upon the reaction of the particular employee involved but rather on whether a typical employee under similar circumstances could reasonably perceive the actions at issue as attempts to discourage protected activity. *State – Ecology*, Decision 12732-A (citing *King County*, Decision 6994-B (PECB, 2002); *University of Washington*, Decision 11091-A (PSRA, 2012)).

*Duty of Fair Representation*

The duty of fair representation arises from the rights and privileges held by a union when it was certified or recognized as the exclusive bargaining representative under a collective bargaining statute. *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 367 (1983); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002) (citing *City of Seattle (International Federation of Professional and Technical Engineers, Local 17)*, Decision 3199-B (PECB, 1991)); *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004).

A union breaches its duty of fair representation when its conduct is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d at 366; *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012). The employee claiming a breach of the duty of fair representation has the burden of proof. *City of Renton (Washington State Council of County and City Employees)*, Decision 1825 (PECB, 1984).

An exclusive bargaining representative must not align itself in interest against an employee it has a duty to represent. *City of Redmond (Redmond Employees Association)*, Decision 886 (PECB, 1980); *Pierce County Fire Protection District 2*, Decision 4307 (PECB, 1993). That restriction obligates a union to exercise good faith, but does not obligate a union to satisfy all bargaining unit members or to entirely eliminate all differences in the way employees are treated. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

Application of Standards

*Employer Discrimination*

Swenson argues that her 2018–19 performance evaluation was discrimination for her filing a grievance, an HIB complaint, and the original unfair labor practice complaint in this case.[24]

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[24] It is not actually clear from the complaint or the preliminary ruling what the specific discrimination claim is. The Unfair Labor Practice Administrator found that Swenson stated a cause of action for discrimination in his amended preliminary ruling of September 20, 2019, based on the second amended complaint filed June 28, 2019. The preliminary ruling stated that there was a cause of action for "discrimination . . . within six months of the date the complaint was filed, by discriminating against Colette Swenson in retaliation for her exercising protected activity."

Besides the theory that the discriminatory act was the 2018–19 performance evaluation, I see two other theories that could potentially be derived from the second amended complaint and amended preliminary ruling.

*The "Continuation of Bargaining" as a Discriminatory Action.* At first blush, the second amended complaint suggests Swenson's discrimination claim is that the union and district "continued to bargain" and modified contract language in Article XI to retaliate against Swenson for filing a grievance. The gravamen of the entire complaint deals with the union and district's continuation of bargaining after the 2018–19 tentative agreement was ratified. The third paragraph deals entirely with this issue and is the only place in the complaint to mention "discrimination." In this paragraph, Swenson alleges that the district and the union's "continuing to bargain" following the 2018 tentative agreement constitutes interference. She then states, "Furthermore, the complainant asserts the Employer discriminated against the complainant because she exercised her rights by filing a grievance which is a protected collective bargaining activity." However, Swenson did not appear to pursue this theory during the hearing or in her brief. If this was her theory, she would not be able to state a prima facie case because she cannot prove causation. The finalization of the 2018–19 contract, which contained the complained-of discrepancies, was completed no later than October 26, 2018, when the final language was presented to the school board. Swenson's grievance was not filed until October 29, 2018. Although there would be other issues with Swenson's prima facie case, the timing of events alone would preclude Swenson from establishing that there was a causal link. Additionally, I would find that the district produced a legitimate nondiscriminatory reason: the discrepancies were unintentionally made as part of the considerable final editing process. I would find that Swenson does not establish that this is a pretext or that the district's true motivation behind the discrepancies was union animus or retaliation against Swenson's grievance.

*The 2019–20 Evaluation as a Discriminatory Action.* As with the entirety of the second amended complaint, the 14th paragraph dealt mostly with the "continuation of bargaining" issue, but concluded, "[w]e also believe the complainant's evaluator has shown through actions implicit bias towards her because she filed 2 grievances, an HIB complaint and this ULP. Her 2019-2020 Summative Evaluation was rated overall basic. We believe this was retaliatory in nature, and not a true assessment of her performance." This appeared to be an afterthought, as the main focus of the complaint was the continuation of bargaining. The second amended complaint did not mention the 2019–20 summative evaluation or an "HIB Complaint" anywhere else. Again, Swenson does not pursue this theory in her brief or at the hearing, and she would not be able to establish a prima facie case on this theory, either. The uncontroverted evidence is that Swenson was rated "proficient" on her 2019–20 summative evaluation, and so Swenson would not establish that she was deprived of any right, benefit, or status. More importantly, the record indicates that the 2019–20 summative evaluation was issued in June 2020—after the complaints in this case were filed and therefore outside of the statute of limitations.

*The 2018–19 Evaluation as a Discriminatory Action.* It seems that Swenson probably wrote "2019-20" in the second amended complaint by mistake, and meant to say "2018-19." In her third amended complaint, dated April 21, 2020, Swenson changed paragraph 14 to reference the 2018–19 evaluation. However, in issuing the preliminary ruling of September 20, 2019, in which the discrimination claim was found to exist, the Unfair Labor Practice Administrator was relying on the second amended complaint, which only references the 2019–20 evaluation. In the amended preliminary ruling following Swenson's April 21, 2020, amended complaint, I clearly stated that I was only finding a new cause of action for interference, and that the discrimination claim was as stated in the September 20, 2019, preliminary ruling. As indicated above, it initially seemed to me that if Swenson stated any claim for discrimination, as the Unfair Labor Practice Administrator found, it must have been about the "continuation of bargaining." Although Swenson changed paragraph 14 to reference "2018-19" in her third amended complaint, I did not think that this paragraph stated a cause of action. I did not believe that these two conclusory sentences referencing a retaliatory performance evaluation, where the complaint did not mention the evaluation or HIB complaint anywhere else, met our standards requiring "[c]lear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences." WAC 391-45-050(2).

The discrimination cause of action is controlled by the September 20, 2019 preliminary ruling and the second amended complaint. The second amended complaint did not mention a 2018–19 summative evaluation anywhere and so, unlike the other two theories, this theory does not have a readily apparent basis in the second amended complaint.

If it were to make a difference in the outcome of this case, I would have to grapple with serious concerns about recognizing such a claim as properly before me. Complaints are required to contain "[c]lear and concise statements of the facts constituting the alleged unfair labor practices, including times, *dates*, places and participants in occurrences." WAC 391-45-050(2) (emphasis added). Specificity is required, to "provide sufficient notice to the responding party regarding complained-of facts and issues to be heard before an examiner." *King County*, Decision 9075-A (PECB, 2007). The 2019–20 and 2018–19 evaluations were based on different years of performance and were conducted by different evaluators, and so would involve different testimony and evidence. There would be serious due process issues raised by finding that the complaint, which only talked about the 2019–20 evaluation, stated a claim for a discriminatory 2018–19 evaluation.

*Swenson's Prima Facie Case*

Swenson would satisfy the first prong of the prima facie case. Her actions of filing a grievance and the ULP complaint are clearly protected activity. *Seattle School District*, Decision 5237-B (EDUC, 1996). The filing of the HIB complaint also constitutes protected activity in this case because Swenson worked with the union building representatives during this process. *Id.*[25]

I can assume, for sake of argument in the instant case, that Swenson would satisfy the second prong of the prima facie case—that she was deprived of some ascertainable right, benefit, or status. As the district points out, the Commission's precedent has been mixed as to whether a negative performance evaluation can establish the second prong of the prima facie case. *See King County*, Decision 12582-D (PECB, 2018); *City of Yakima*, Decision 10270-B (PECB, 2011).

I do not find that Swenson satisfies the third prong of the prima facie case—that there is a causal connection between the 2018–19 evaluation and her protected activity.

Swenson's evidence that does support a finding of causation is minimal. "An employee may establish the requisite causal connection by showing that adverse action followed the employee's known exercise of a right protected by the collective bargaining statute . . . ." *Seattle School*

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Nonetheless, this is the theory that Swenson pursues in the hearing and in her brief. Likely also perplexed by the preliminary ruling and the complaints, this is the theory that the district also thought was at issue (although, evidencing the confusing nature of Swenson's complaint, the district also believed that there might have been a cause of action that the alleged ripping-up of the 2015 midyear evaluation was part of Swenson's discrimination claim, and the district devoted several pages of its brief to this issue). This is therefore the discrimination theory that warrants a full examination here. It is ultimately unnecessary to address the due process issue mentioned in the preceding paragraph because even if there was a proper claim for a discriminatory 2018–19 evaluation, as explained below, Swenson would not carry her burden of proof.

[25] In *Seattle School District*, Decision 5237-B, the Commission noted that "individual activity in the presentation of grievances to an employer constitutes protected activity under state law and Commission precedent only when it takes place in a collective bargaining context." The Commission discussed how individual complaints that did not involve the union might not be protected, but where employees involve the union (as Swenson did with her HIB complaint), the activity has been found to be protected. *Id.*

In her brief, Swenson made generalized assertions that Reeves was retaliating against Swenson even through his actions predating this specific protected activity, which occurred during the 2018–19 school year (e.g., "the impetus for this retaliation began at a meeting in Jan 2016"). It is worth emphasizing that the discrimination claim properly before me concerns whether the district discriminated against Swenson in retaliation for *this* protected activity.

*District*, Decision 5237-B. Here, the adverse action did follow Swenson's known exercise of protected activity. However, I do not find that this is enough for Swenson to carry her burden of establishing a causal connection. "[T]he burden to establish a causal connection increases for activities that are remote from organizing and bargaining. In other words, the evidentiary and proof problems for a union leader and visible organizer are easier than for one who merely claims benefits under an existing contract." *Seattle School District*, Decision 5237-B. Swenson's activities are "remote from organizing and bargaining," and so her burden in establishing causation is higher.

The record shows that Reeves gave Swenson "Basic" performance evaluations for two years prior to her filing the grievances, HIB complaints, and ULP complaints. The record shows that the prior performance evaluations were based on Reeves' articulated concerns about Swenson's actual performance. Swenson believed that in 2016–17 and 2017–18, Reeves' evaluations were unfair, but obviously, the 2016–17 and 2017–18 "Basic" evaluations could not have been caused by the 2018–19 protected activity. The 2018–19 evaluation was a continuation of Reeves' actions from the prior years. Indeed, in the fall of 2018, before her grievance was even filed, Swenson believed that another "Basic" performance evaluation was inevitable: "I'm now on a PIP. I know what's coming. I see what he intends to do, and it feels like a train, you know, coming at me that I don't know how to stop, and I don't know how to get out of the way." Swenson's decision to file grievances and complaints during 2018–19 did not stop the train.

The case might be different if Swenson had received better evaluations prior to her protected activity, and then received a worse evaluation following the protected activity. *Cf. Oroville School District*, Decision 6209-A (PECB, 1998) (finding evaluation was discriminatory, where, among other things, the union proved that the employee received satisfactory evaluations up until he engaged in protected activity). Here, the 2018–19 "Basic" evaluation was consistent with the evaluations predating her protected activity. There is no evidence that the 2018–19 evaluation was caused by the protected activity as opposed to Reeves' continuing concerns with Swenson's performance. The preponderance of evidence indicates that Reeves would have continued to

evaluate Swenson as "Basic" for 2018–19 even if the intervening flurry of protected activity had not occurred.[26]

A similar situation was presented in *Seattle School District*, Decision 5237-B. There, the adverse action (nonrenewal of employment as a teacher) followed the employee's protected activity, and the Examiner found that this timing of events established causation. The Commission reversed, observing:

> The employer exhibited concerns about Nagi's performance long before his participation in the grievance, however, and long before he was advised there was probable cause of the nonrenewal of his employment contract…. [T]he December 2, 1992 grievance occurred subsequent to at least two meetings concerning Nagi's performance. . . . From this sequence of events, we are unable to infer any retaliatory motive on the part of the employer toward Nagi's participation in the December 2, 1992 grievance. The timing shows Nagi was reacting to the employer's actions. A finding of union animus necessarily includes a finding that the employer has reacted to an employee's actions.

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[26] Along the same lines, in the years before Swenson had engaged in the protected activity, Swenson, Depew, and Deignan believed variously that Reeves' evaluations were unfair and biased, that he had not been properly following the contract, and even that he would receive some "payoff" for getting rid of Swenson. In her brief, Swenson argues that Reeves' "bias" against Swenson in the years before her protected activity supports her claim of discrimination (e.g., "We believe Mr. Reeves demonstrated implicit bias throughout all the years that he was her evaluator at West Seattle High School (2015-2019). . . . We contend that the impetus for this retaliation began at a meeting in Jan 2016"). This undermines rather than supports the finding of a causal link between Swenson's protected activity and her 2018–19 evaluation. This testimony would tend to establish that if Reeves did have hostility or generalized "animus" to Swenson (which I do not find to be the case), it would have predated, and been independent of, Swenson's 2018–19 protected activity. As the Commission noted in *Tacoma School District*, Decision 5466-D, "it would be an unwarranted extension of the case law to consider evidence of 'animus' on grounds other than union activity when finding a causal connection between employee activities protected under a collective bargaining law and adverse actions of an employer."

Similarly, Swenson notes that Deignan testified she heard Reeves say, "you know, none of this would be happening now if Temple had not torn up that evaluation." It is not necessary for me to make a finding of whether Reeves actually said this but, if true, this statement would suggest that Reeves was motivated by Robinson's action in 2015 rather than Swenson's 2018–19 grievance, HIB complaint, or ULP complaint (Swenson's second amended complaint asserts that the evaluation was retaliation for Swenson's grievance, HIB complaint, and ULP complaint, and any claim that it was actually retaliation for the 2015 evaluation-tearing would be beyond the scope of the preliminary ruling).

*Id.* Swenson has the burden of proof to establish causation, *Id.*, and I find that she does not carry her burden.

*District's Nondiscriminatory Reasons*

Even if Swenson did establish a prima facie case, the employer met its burden of producing a legitimate nondiscriminatory reason for Swenson's evaluation rating of "Basic" in her 2018–19 summative evaluation: the record shows that Reeves assigned Swenson the "Basic" rating based on his observations and perceptions of her performance.

*Swenson's Ultimate Burden to Prove Pretext or Union Animus*

Because the district produced legitimate nondiscriminatory reasons for its actions, Swenson must satisfy the ultimate burden of persuasion by showing that the reasons articulated by the district were merely a pretext for what, in fact, was a discriminatory purpose, or that protected activity was nevertheless a substantial motivating factor behind the discriminatory action. *King County*, Decision 6994-B.

An articulated reason is a pretext when it is not the real reason for the adverse action and there is no legitimate business justification for the action, or when the employer's proffered explanation is unworthy of credence. *Educational Service District 114*, Decision 4361-A.

Swenson does not dispute that the communication, scheduling, and other examples provided by Reeves were accurate. Despite Swenson and her supporters' quixotic suspicions that Reeves had ulterior motives for rating Swenson "Basic," Swenson does not actually present any evidence that Reeves' reasons for giving the "Basic" rating were pretextual. Nor does she present any evidence that Reeves' true motivation was to retaliate for Swenson's protected activity. *Compare Moses Lake School District*, Decision 8770-A (PECB, 2005) (finding that where employer showed that negative performance evaluation was based on evaluator's observations of employee's performance, union needed to prove that evaluator "did not rate [the employee] as a poor performer because it was below standard or that it was motivated by her union activity," and union failed to present evidence that the evaluator "was concerned with issues other than [the employee's] productivity") *with King County*, Decision 12582-D (PECB, 2018) (finding that performance

evaluation was discriminatory, where the evaluation explicitly referenced protected activity; and evaluator admitted that the evaluation was influenced by the protected activity).

Swenson disagrees that her performance errors were significant or warranted a "Basic" evaluation. However, the question here is not to second-guess what rating Reeves should have given to Swenson. The sole issue at this point is whether the reasons for Reeves' rating were pretextual or whether Reeves was motivated by Swenson's protected activity or union animus. *See East Wenatchee Water District*, Decision 1392 (PECB, 1982); *City of Vancouver*, Decision 10621-B (PECB, 2012), *aff'd in part, City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333 (2014).

Although Swenson argues that Reeves was too harsh or should have weighted Swenson's mistakes differently, Swenson has not proven that the Reeves' stated reasons for the "Basic" rating were pretextual. Swenson does not present any evidence to show that Reeves treated Swenson any differently than anyone else. Indeed, Swenson's witness, Jennifer Hall, testified that she believed Reeves had disdain for other employees besides Swenson and that he was a harsh evaluator with others besides Swenson. *Cf. Oroville School District*, Decision 6209-A (finding evaluation was discriminatory, where, among other things, union proved that "the [employee's] evaluation is different than evaluations of other employees"). Similarly, Swenson argued that Reeves' evaluation process violated the contract or district policy, asserting that the contract required him to weigh his observations of Swenson's performance differently; that his observations were conducted at the wrong time of year; and that Reeves was not allowed to consider examples of poor performance that came to his attention from other staff or from parents. The question before me is not whether Reeves correctly followed the collective bargaining agreement or policy. Rather, the question before me is only whether he singled Swenson out for discrimination based on her protected activity. Swenson does not show that Reeves interpreted the collective bargaining agreement differently for Swenson than he did for anyone else, so Swenson's arguments in this regard fall flat.

Swenson also does not establish that antiunion animus was a substantial motivating factor. Swenson points to Deignan's testimony that she once had heard Reeves once make a comment

about the seniority provisions' effect on the district's diversity. Reeves did not recall this, but even if it did happen, this isolated observation about the impacts of contractual seniority would not demonstrate animus against Swenson's union activity.

Similarly, Swenson argues that "[i]n his testimony, Mr. Reeves described the meetings with Ms. Swenson as hostile, due to the presence of the Building Representatives." Reeves testified that he found the SEA building representatives' participation in Swenson's evaluation meetings "fairly uncomfortable" and "awkward." Reeves testified that it was "out of the ordinary to have that level of involvement given it was an evaluative process, not a disciplinary process," and "the building reps did most of the talking." I do not find that Reeves' discomfort with the building representatives' participation in the evaluation meeting demonstrates antiunion animus on his part. Swenson's supporters believed that Reeves had a baseless vendetta and conspiracy against Swenson since 2015, and it would be surprising if Reeves always found their presence friendly and comforting.

Swenson pointed to Deignan's testimony that, in 2018, Deignan heard Reeves say, "You know, none of this would be happening now if Temple had not torn up that evaluation." I do not find that this is credible evidence that Reeves was motivated by antiunion animus. Reeves denied that he made this statement, and Deignan said that she did not ask Reeves what he meant. Even if this statement was made, I am not persuaded that this single comment would show specifically that Reeves had an agenda to give Swenson a "Basic" evaluation in reprisal for her grievance, HIB complaint, or ULP.

In sum, the preponderance of evidence indicates that Reeves was motivated by his observation of Swenson's performance when he rated her "Basic" for 2018–19, and was not motivated by her protected activity. Swenson has not carried her burden of proof on her claim that her 2018–19 "Basic" evaluation was discriminatory.

*Interference*

In the amended preliminary ruling of September 20, 2019, the Unfair Labor Practice Administrator found that Swenson stated a claim for independent interference "by continuing to bargain with the

Seattle Education Association over terms and conditions of employment after a 2018-2019 tentative agreement had been ratified by the Seattle Education Association's membership."

In her third amended complaint of April 21, 2020, Swenson asserted that the district had again continued to bargain with the SEA after the 2019–22 contract was ratified (by restoring the language that was omitted in 2018), committing further interference.[27]

It is difficult to see how merely continuing to bargain[28] with the union after ratification could constitute unlawful interference. The Commission has previously held quite clearly that "[n]o statute compels employee ratification votes on tentative agreements reached by unions and employers in collective bargaining." *Shoreline Community College (Community College District 7) (Washington Federation of State Employees*), Decision 9094-A (PSRA, 2006) (citing *Naches Valley School District*, Decision 2516-A (EDUC, 1987); *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958)). *See also Seattle School District*, Decision 9359 (EDUC, 2006), *aff'd*, Decision 9359-A (EDUC, 2007) ("Inclusion of language in a collective bargaining agreement that has not been ratified by union members is not an unfair labor practice"). Employees have no statutory right to ratify contracts at all, and so it is difficult to see how continuing to bargain after ratification would create any problem per se. *Cf. City of Tukwila*, Decision 2434-A (PECB, 1987) (finding that making false and misleading statements about the Public Employment Relations Commission relating to a decertification campaign was interference

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[27] In the third amended complaint, Swenson asserted, "We believe this action is cause for a new ULP, for the same reason: bargaining and changing the meaning of a TA or TA summary after ratification of a contract is unlawful and constitutes a ULP" (underlines in original).

As the Unfair Labor Practice Administrator had already found this theory to state a cause of action with respect to the 2018–19 contract, I felt compelled to find that Swenson's restating the exact same theory for the subsequent contract also stated a cause of action. The preliminary rulings find that the facts alleged *may* constitute an unfair labor practice, WAC 391-45-110, and do not compel a particular result.

[28] Swenson urges that the finalization and editing process that occurred post-ratification constituted "bargaining." Depew asserted that the parties are allowed to continue to make changes after ratification, but only those that are "nonsubstantial." Anderson-Moore believed that the process between the district and SEA was not bargaining. It is unnecessary to decide whether the district and SEA's process constituted "bargaining," or crossed a line into making "substantial" changes, because whether or not the activity was "bargaining" or the changes were "substantial," Swenson does not establish that any unlawful interference occurred.

per se). As Swenson does not present any authority that continuing to bargain after ratification could somehow constitute interference per se, the generally applicable test for independent interference should be applied.[29]

As stated above, to prove an interference violation, the complainant must prove that the employer's conduct interfered with protected employee rights. The district's "continuing to bargain" post-ratification did not interfere with any right to ratification, because employees have no protected statutory right to ratify contracts.

An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or other employees. In her second amended complaint, third amended complaint, and brief, Swenson alleges that "one (Ms. Swenson) or more employees reasonable perceived were a threat to a promise of benefit [sic] . . . ." Swenson does not ever discern whether the action was a threat of reprisal or whether it was a promise of benefit. Nor does she ever explain *how* a reasonable employee[30] would perceive the employer's action as either a threat of reprisal or promise of benefit, or how it interfered with protected activities.

The record does not indicate that any employees were even specifically aware of the "continuation of bargaining" or the discrepancies in the 2018–19 contract prior to Swenson and her supporters

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[29] In her brief, instead of addressing how this could possibly satisfy the elements of an interference claim under RCW 41.59.140, Swenson asserts that "SEA and SSD continued to bargain and failed to notify the members of the significant modifications they made as required by RCW 41.58.040" (RCW 41.58.040 provides that employers and employee representatives shall provide for "adequate notice of any proposed change in the terms of [collective bargaining agreements]"). I cannot consider such a claim. First, no such cause of action for violation of RCW 41.58.040 was recognized in the preliminary ruling and so would be beyond the scope of these proceedings. Second, RCW 41.58.040 does not provide for a source of rights and obligations separate from the unfair labor practice provisions. *See Seattle School District (Seattle Education Association)*, Decision 9355 (EDUC, 2006). Additionally, it appears the employees were actually put on notice of the changes when the proposed final contracts, containing the discrepancies, were publicized as part of the school board's ratification process.

[30] Swenson asserts here that she personally perceived the action as a "threat to a promise of benefit." Again, the legal determination of interference is based not upon the reaction of the particular employee involved but rather on whether a typical employee under similar circumstances could reasonably perceive the actions at issue as attempts to discourage protected activity. *State – Ecology*, Decision 12732-A

discovering it in the course of their grievance processing. When they brought it to Means' and Anderson-Moore's attention during the Step 3 meeting, the district representatives did nothing to suggest that the changes were related to protected activity, nor did they do anything remotely resembling a threat of reprisal or a promise of benefit. Rather, they did not understand what Swenson's supporters were talking about, because they were not specifically aware of the discrepancies at that point. And it was apparently Swenson's supporter Jennifer Hall, rather than someone representing the district, who made efforts to make the rank and file aware of the discrepancy.[31] Under these circumstances, where there were no district communications relating to the "continuation of bargaining" and employees generally did not even know about it, I do not see how the conduct could possibly constitute interference. *See Ben Franklin Transit*, Decision 13249 (PECB, 2020) (finding that where there was no evidence that employees were aware of employers' conduct, "[w]ithout such evidence it is not possible to conclude that the employees would perceive the [conduct] . . . as a threat of reprisal or force, or a promise of benefit, associated with their union activity"); *Public Utility District 1 of Clark County*, Decision 3815 (PECB, 1991), *aff'd*, Decision 3815-A (PECB, 1992) (finding that, even assuming that employer's conduct could constitute interference, "[t]he missing link here is evidence that the employees were made aware of the employer's [conduct]"). Further, even if the changes were known, I do not see how any reasonable employees would connect it with protected activity or interpret it as a promise of benefit or a threat of reprisal connected to protected activity. "No cause of action is made out where no reference to a threat or promise is made to any bargaining unit employee." *Yakima County*, Decision 5790 (PECB, 1996) (citing *Spokane Transit Authority*, Decision 5742 (PECB, 1996)).

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[31] Hall distributed flyers outside of an SEA representative assembly meeting, calling attention to the discrepancies and the fact that Swenson had filed her ULP complaint. Although her testimony about when she did this was conflicting, it appears she distributed the flyer in June 2019.

Swenson does not meet her burden of proof in establishing that the 2018 "continuation of bargaining" was unlawful interference.[32]

Similarly, the record does not show that the district communicated to employees about the "continuation of bargaining" to restore the evaluation support language in the 2019–22 contract, or that any employees were specifically aware of this action. Again, if the action was not known, then I do not see how a reasonable employee could have perceived the action as a threat of reprisal or a promise of benefit. The restoration of the language was prompted by Swenson's ULP complaint, which brought the omission to the district's attention. Swenson's second amended complaint sought as a remedy: "The language omitted from the TA shall be reinstated immediately in the 2018-19 CBA." (asterisk omitted).[33] There is nothing in the record indicating that the restoration of the language was anything other than the district's attempt to correct a previous error, as Anderson-Moore and Codd credibly testified. There is nothing in the record suggesting

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[32] It appears that Swenson's theory may be that the employer intentionally changed the evaluation language in order to thwart Swenson's ability to grieve her performance evaluation process. I find this implausible. As explained above, the discrepancies occurred, and the final contract was publicized, *before* Swenson filed her grievance. The record also shows that the changes were made long after the timeline for Swenson to grieve her 2018–19 evaluation had passed. It is also implausible that the district would have intentionally taken rights away from the entire class of ESAs—counselors, nurses, therapists, psychologists—in order to interfere with Swenson's ability to file a grievance. Finally, this theory makes no sense because during 2018–19, Swenson actually received the support of Maurer, a retired counselor. The district's hiring Maurer to support Swenson appears to be more favorable than the tentative agreement language (the TA language provided for a "consulting teacher" and "ESCT"). In 2017–18, Swenson received the support of an ESCT (Dillhunt), and Swenson complained that having a *teacher* was inadequate as she wanted a support person with *counseling* experience—someone like Maurer. Given the fact that during 2018–19 the district appears to have provided exactly what Swenson initially wanted, and more than what the TA required, the idea that the district purposefully changed the TA language to impede Swenson's grievance is nonsensical.

For the same reasons, if Swenson's theory is that the change was made in order to remove her rights to evaluation support in order to further Reeves' conspiracy to get rid of her, I also find this is not supported by the record; is implausible; and also would not establish interference. Despite the omission of the evaluation support language, the district did make efforts to provide her with support from Maurer during the 2018–19 school year. I also don't see how this far-fetched theory—that the language was omitted in order to help Reeves get rid of Swenson—would implicate *protected activity* so that it could constitute interference. As discussed above, Swenson and her supporters' testimony would suggest that if Reeves did have an agenda to get rid of Swenson, it predated and was independent of any protected activity on the part of Swenson.

[33] However, Swenson specifically sought to have the Commission rewrite the contract to provide for different terms than were in the prior contract or in the tentative agreement.

that any reasonable employee would perceive this action as threatening reprisal or promising benefits associated with protected activity.

Swenson does not carry her burden of proof in establishing independent interference under either of her interference causes of action.

*Duty of Fair Representation*

Based on Swenson's second amended complaint, the Unfair Labor Practice Administrator found that Swenson stated a cause of action for whether the union breached its duty of fair representation "by aligning its interests against bargaining unit members during negotiations with the Seattle School District."[34] Swenson stated that this claim was a companion to the first interference charge against the district, and concerns whether the changes made to the contract following ratification of the tentative agreement in 2018 were unlawful. Swenson does not carry her burden of proof on her claim against the union.

The commission has noted that a cause of action can exist where unions have been accused of aligning themselves in interest against an employee or class of employees within the bargaining unit it represents on *some improper or invidious basis*. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002) (citing *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983)); *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A.

Although Swenson argued that the discrepancies between the 2018–19 tentative agreement and the final agreement were detrimental to counselors and other ESAs, the Commission has distinguished between "unequal" and "unfair" treatment of employees. *Clark Public Transportation Benefit Area (ATU Local 757)*, Decision 7087-B. A union is not required to bargain provisions of equal benefit to all bargaining unit members. *Id.*

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[34] Necessarily, this must refer to the 2018–19 negotiations, because the preliminary ruling finding this cause of action was based on Swenson's second amended complaint, which dealt with the 2018–19 contract.

Swenson simply did not present any evidence that SEA aligned itself against a subset of members for impermissible reasons. In order for the union to have "aligned itself" against a subset of employees, some intentional action must be involved. The preponderance of evidence established that the 2018 discrepancies were unintentional and so the SEA did not "align itself" against the ESAs, counselors, or Swenson in particular during negotiations with the district. Further, even if the changes were the result of intentional, mutual agreement to reduce the rights of ESAs (which I do not find to be the case), the fact that there are winners and losers in collective bargaining does not establish a breach of the duty of fair representation. Swenson does not have any evidence for (or even *articulate*, in her brief or anywhere else), any invidious reason why the SEA would have aligned itself against the ESAs, which is an essential element of her claim.

In her brief, Swenson argues,

> Once both parties were made aware of the errors in February or March of 2019, they should have made every reasonable effort to notify the SEA membership that substantive changes in finalizing the 2018-2019 CBA had occurred. They should have immediately remedied the errors . . . .
>
> . . . [T]hey were required to make notice to the SEA membership of proposed changes to a CBA, even if they are corrections. For this example she talks about creating a Memorandum of Understanding (MOU), and according to her John Donaghy's response was "This contract only has a one year shelf life. We are good." "We will catch it in the next go around."[35] . . . John Donaghy, in failing to act, aligned the union with the District's interests and not with the members of SEA.

(citations to exhibits and transcript omitted; footnote added). This deals with conduct that occurred well after negotiations had concluded and so appears beyond the scope of the preliminary ruling, which states a claim for breach of duty of fair representation "during negotiations." Moreover, I do not find that Donaghy's decision to not draft an MOU or publicize the discrepancies, once discovered, was unreasonable, in bad faith, dishonest, arbitrary, or otherwise a breach of the duty of fair representation—particularly since the parties had agreed that they would operate as if the

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[35] This refers to an interaction, described above at p. 11, where Anderson-Moore discovered poorly drafted language regarding special education.

discrepancies did not exist. "A wide range of reasonableness must be allowed a statutory representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)) (emphasis omitted).

Swenson argues that SEA did not appreciate her filing a ULP complaint or a grievance, that the SEA did not follow its own rules and practices relating to negotiations, and that SEA did not do enough to support her with Reeves' evaluations of her. The Unfair Labor Practice Administrator recognized only a very specific cause of action against the union: Did SEA breach its duty of fair representation "by aligning its interests against bargaining unit members during negotiations with the Seattle School District"? The answer to that specific issue is "no."[36] Other issues relating to the quality of the union's representation[37] or the union's internal affairs are, at the very least, beyond the scope of the preliminary ruling and cannot be considered.

In summary, Swenson does not carry her burden of proof that the union breached its duty of fair representation by aligning its interests against bargaining unit members during negotiations with the Seattle School District.

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[36] To the extent that the preliminary ruling leaves open a possible claim for the union's generalized bad faith, arbitrary, or discriminatory conduct relating to the negotiation, separate and apart from the question of whether the union "aligned its interests against bargaining unit members," I find that Swenson would not carry her burden of proof in establishing this either. The record shows that the SEA and district were involved in virtually a complete rewrite of Article XI, and inadvertently changed some additional language relating to evaluation supports. When the errors were discovered, the parties resolved to continue to operate as if the language was still there. As the discrepancies were the result of an oversight or mistake, Swenson has not established bad faith or discrimination on the part of the union. It has been previously affirmed that mere mistakes by the union do not rise to the level of unlawful "arbitrary" conduct. *See Washington State Liquor and Cannabis Board Washington Federation of State Employees)*, Decision 13333 (PSRA, 2021), *aff'd*, Decision 13333-A (PSRA, 2021), and cases cited therein.

[37] For example, in her brief, Swenson alleges that Dabney did not adequately support her in the handling of her grievance in 2019, and therefore she "fails in her duty of fair representation and appears to align herself with the District's interest." This is beyond the time frame of the DFR cause of action as well as beyond its scope.

## CONCLUSION

Swenson has not carried her burden of proof that the employer committed unlawful discrimination or interference, or that the union breached its duty of fair representation. The complaints are dismissed.

## FINDINGS OF FACT

1. The Seattle School District (employer) is a public employer within the meaning of RCW 41.59.020(5).

2. The Seattle Education Association (SEA, union) is an employee organization within the meaning of RCW 41.59.020(1) and is the exclusive bargaining representative of Educational Staff Associates (which includes school counselors, classroom teachers, and other staff at the district).

3. Colette Swenson began her service as a full-time school counselor at West Seattle High School (West Seattle) in the 2015–16 school year.

4. Garth Reeves was the assistant principal at West Seattle from 2015 to 2019, and was responsible for evaluating Swenson's performance.

5. During the 2015–16 school year, Reeves perceived that Swenson's performance was not satisfactory. Swenson was on leave for a portion of the 2015–16 school year and was not issued an annual summative evaluation for that school year.

6. During the 2016–17 school year, Reeves perceived that Swenson's performance was not proficient, and on her annual summative evaluation, Reeves rated Swenson's performance as "Basic" overall.

7. During the 2017–18 school year, Reeves perceived that Swenson's performance was not proficient, and on her annual summative evaluation, Reeves rated Swenson's performance as "Basic" overall.

8. During the 2018–19 school year, Reeves perceived that Swenson's performance was not proficient, and on her annual summative evaluation, Reeves rated Swenson's performance as "Basic" overall.

9. During the 2017–18 school year and throughout the summer of 2018, the district and SEA negotiated for a new collective bargaining agreement. Sheryl Anderson-Moore was the chief negotiator for the district, and SEA Executive Director John Donaghy was the chief negotiator for the union.

10. The parties reached a tentative agreement on a complete successor collective bargaining agreement the evening of August 31, 2018, for a one-year agreement covering the 2018–19 school year.

11. The union and district developed a summary of the tentative agreement in order to hold ratification votes. Using the summary document, the union membership voted to ratify the new agreement on September 8, 2018. On September 9, 2018, the tentative agreement summary was presented to the school board, and on September 18, 2018, the school board ratified the agreement based on the summary.

12. Once the agreement was ratified, Anderson-Moore and Donaghy worked to incorporate their rough tentative agreement into a complete collective bargaining agreement. After Anderson-Moore and Donaghy concluded their process, the final version of the new collective bargaining agreement was submitted to the school board for review and approval on October 26, 2018. The school board voted to approve the final version on November 14, 2018.

13. The final version of the 2018–19 contract contained some discrepancies from the tentative agreement summary in Article XI, regarding support for employees in the performance evaluation process.

14. Anderson-Moore did not believe that the language in Article XI was intentionally changed, and at the time, she was not aware of Swenson's concerns regarding the changes. Donaghy also did not believe that the language was intentionally changed, and recalled that Swenson was never mentioned in the bargaining process.

15. On October 29, 2018, Swenson and Deignan filed a Step 1 grievance with Principal Vance, challenging Swenson's 2017–18 evaluation.

16. On December 21, 2018, Swenson filed a Harassment, Intimidation, and Bullying complaint with the district's Human Resources office.

17. On May 10, 2019, Swenson filed the original unfair labor practice complaint in this matter.

18. Beginning in March or April 2019, the district and the union began bargaining for a successor to the 2018–19 collective bargaining agreement.

19. The parties reached a tentative agreement for a successor agreement in late August 2019, agreeing to a new contract with an effective term of 2019–22. The new tentative agreement did not address the discrepancies in Article XI.

20. After the tentative agreement was ratified by the SEA membership, Anderson-Moore worked with the SEA staff to incorporate the tentative agreement into final contract language. During this process, Anderson-Moore and other district and union representatives recalled the discrepancies in Article XI, and agreed to restore the language with some modifications. After finalization was completed, the school board approved the new contract in mid-October 2019.

## CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.59 RCW and chapter 391-45 WAC.

2. As described in findings of fact 3 through 20, the employer did not discriminate in violation of RCW 41.59.140(1)(c) by discriminating against Colette Swenson in retaliation for her exercising protected activity.

3. As described in findings of fact 9 through 14, the employer did not interfere with employee rights under chapter 41.59 RCW and violate RCW 41.59.140(1)(a) by continuing to bargain with the Seattle Education Association over terms and conditions of employment

after a 2018–19 tentative agreement had been ratified by the Seattle Education Association's membership.

4. As described in findings of fact 18 through 20, the employer did not interfere with employee rights under chapter 41.59 RCW and violate RCW 41.59.140(1)(a) by continuing to bargain with the Seattle Education Association over terms and conditions of employment after a 2019–22 tentative agreement had been ratified by the Seattle Education Association's membership.

5. As described in findings of fact 9 through 14, the union did not interfere with employee rights under chapter 41.59 RCW and violate RCW 41.59.140(2)(a) by breaching its duty of fair representation by aligning its interests against bargaining unit members during negotiations with the Seattle School District.

## ORDER

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

ISSUED at Olympia, Washington, this 3rd day of December, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEAN M. LEONARD, Examiner

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

# RECORD OF SERVICE

ISSUED ON 12/07/2021

CORRECTED DECISION 13443 - EDUC has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 131494-U-19

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# RECORD OF SERVICE

ISSUED ON 12/07/2021

CORRECTED DECISION 13058-A - EDUC has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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