STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ANJELITA LONGORIA FORNARA, Complainant, vs. WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, Respondent.	CASE 135103-U-22 DECISION 13647-A - PSRA DECISION OF COMMISSION

Anjelita Longoria Fornara, the complainant.

Margaret C. McLean, Senior Counsel, and *Carl J. Gaul IV*, Assistant Attorney General, Attorney General Robert W. Ferguson, for the Washington State Department of Children, Youth, and Families.

PROCEDURAL BACKGROUND

On May 18, 2022, Anjelita Longoria Fornara filed an unfair labor practice complaint against the Washington State Department of Children, Youth, and Families (DCYF). An Unfair Labor Practice Administrator reviewed the complaint and issued a cause of action for employer discrimination in violation of RCW 41.80.110(1)(c).

Examiner Christopher J. Casillas conducted a hearing and concluded Fornara had failed to carry her burden of proof to establish a prima facie case of discrimination. *Washington State Department of Children, Youth, and Families*, Decision 13647 (PSRA, 2023). The Examiner found Fornara had engaged in protected activity when she communicated to her employer her intent to grieve discipline the employer imposed on her. *Id*. at 8. While Fornara established the first element of a prima facie case of discrimination, she failed to prove the employer had deprived her of an ascertainable right, benefit, or status. *Id*. In so finding, the Examiner acknowledged that the record contained evidence of the employer investigating Fornara. *Id*. at 8–9. Aside from Fornara's testimony that her pay was reduced, the record did not contain enough evidence to establish a

deprivation of an ascertainable right. *Id*. at 9. Despite the lack of evidence, the Examiner analyzed whether a causal connection existed and found the lack of a causal connection was "fatal to the complainant's prima facie case." *Id*. The Examiner dismissed the unfair labor practice complaint.

Fornara filed a timely appeal. On May 8, 2023, Fornara filed an appeal brief consistent with WAC 391-45-350(6). On May 22, 2023, the DCYF filed a response brief consistent with WAC 391-45-350(7).

On June 22, 2023, Fornara filed a motion to reopen the hearing in this case and to postpone a hearing in another case pending before the agency. The motion contained new facts and arguments about why Decision 13647 should be overturned.

ISSUES

This appeal presents two issues for the Commission's consideration:

1. Should the Commission consider Fornara's June 22, 2023, motion to reopen the hearing?

2. Does substantial evidence support the Examiner's conclusion that Fornara did not establish a prima facie case of discrimination?

ANALYSIS

The June 22, 2023, motion is dismissed.

On June 22, 2023, Fornara filed a motion under WAC 391-45-310(2), submitted evidence that she asserts was not available at the time of the hearing, and made additional arguments about the merits of the appeal.[1]

[1] In addition to the request to reopen the hearing in this case, Fornara requested that a hearing in another pending case be postponed until the Commission ruled on the appeal in this case. While we take administrative notice of the existence of cases 136327-U-23 and 136580-U-23c, we have neither reviewed those cases nor considered how this motion impacts those cases. Parties to matters currently at the Examiner stage may not bypass their Examiners by addressing motions to the Commission. Additionally, filing one

After a hearing is closed, "it may be reopened only upon the timely motion of a party that discovered new evidence which could not with reasonable diligence have been discovered and produced at the hearing." WAC 391-45-270(2). A motion to reopen a hearing is a two-step process. First, a party must file a motion to reopen the hearing. If the Commission or an examiner grants the motion, then a procedure may be established for the party to submit its new evidence to the examiner. *See Southwest Snohomish County Public Safety Communications Agency (SNOCOM)*, Decision 11149-A (PECB, 2011) (remanding a case to the Examiner to reopen the hearing to receive new evidence); *Kiona Benton School District (Kiona Benton Education Association)*, Decision 11862-A (EDUC, 2014) (dismissing a motion to reopen the hearing in part because it was filed after the appeal). The Commission does not consider new evidence for the first time on appeal. *City of Seattle (Seattle Police Management Association)*, Decision 12091-A (PECB, 2014), at 2 (striking evidence attached to an appeal brief).

The motion to reopen the hearing is denied. Fornara did not establish that the new evidence could not with reasonable diligence have been produced at the hearing. Much of the evidence referenced by Fornara was already in the hearing record, and no reason was given why the remainder could not have been discovered before the hearing. In reality, Fornara is attempting to supplement her post-hearing brief by making additional arguments framed as a motion to reopen the hearing. The Commission's rules are clear about the time limits for presentation of briefing in support of an appeal. *See* WAC 391-45-350(6) (establishing the deadline for briefing from the appealing party); WAC 391-45-350(7) (setting the time limit for the responsive briefing); *Kitsap County*, Decision 12163-A (PECB, 2015) (refusing to consider an untimely appeal brief filed simultaneously with a motion for an extension of the due date). To consider Fornara's argument would be effectively to allow additional briefing after the appellate record is closed.

Substantial evidence supports the Examiner's decision.

On appeal, the Commission reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings support the Examiner's conclusions of law.

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motion listing multiple, unconsolidated case numbers will not result in consolidation of the cases or transferal of cases pending before examiners to the Commission.

C-TRAN (Amalgamated Transit Union, Local 757), Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

While the Examiner found that Fornara did not establish a prima facie case of discrimination, the Examiner found that Fornara had engaged in protected activity when she communicated an intent to grieve discipline. Fornara argued that her protected activity was broader than what the Examiner found. We agree with the Examiner's conclusion that Fornara engaged in protected activity when she communicated an intent to grieve discipline.[2] In addition, we find substantial evidence to support the Examiner's conclusion that there was insufficient proof that the DCYF had denied Fornara a right, benefit or status as the result of that protected activity. We therefore affirm the Examiner.

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[2] To the extent that the standard used by the Examiner for determining protected activity suggests that chapter 41.80 RCW protects employees from retaliation for union activities only to the extent that those employees are actively working with a particular union, the Commission disagrees. Washington's collective bargaining laws extend beyond protection of the collective bargaining process or activity "taken on behalf of a union." Indeed, the statutes themselves separately protect "the right to self-organization" and "free exercise of [employees'] right to organize" distinct from bargaining collectively or designating a collective bargaining representative. RCW 41.80.050 and RCW 41.56.040; *see also* RCW 41.59.060 and RCW 28B.52.025. While this protection includes activities related to a particular union, there is activity necessary to self-organization that happens before an exclusive bargaining representative has been formed or designated. Although Division 2 of the Washington Court of Appeals held that Washington's collective bargaining laws do not require the same breadth of concerted activities protection as the National Labor Relations Act (NLRA), it did not limit protections to the collective bargaining process or to the period after a union has been formed or designated. *Teamsters Local Union No. 117 v. Department of Corrections*, 179 Wn. App. 110 (2014) (finding the legislature did not provide public employees with "concerted activities" as protected by the NLRA).

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Christopher J. Casillas are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 19th day of September, 2023.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK BUSTO, Commissioner

ELIZABETH FORD, Commissioner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under RCW 34.05.542.

RECORD OF SERVICE

ISSUED ON 09/19/2023

DECISION 13647-A - PSRA has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: VANESSA SMITH

CASE 135103-U-22

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