

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIRK CALKINS,

Complainant,

vs.

CITY OF SEATTLE,

Respondent.

CASE 135977-U-22

DECISION 13735 - PECB

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Rodney R. Moody, Attorney at Law, Law Office of Rodney R. Moody, for Kirk Calkins.

Kathryn Childers, Assistant City Attorney, Seattle City Attorney Ann Davison, for the City of Seattle.

On October 13, 2022, Kirk Calkins (complainant) filed an unfair labor practice complaint against the City of Seattle (employer or City) with the Washington State Public Employment Relations Commission (PERC). An Unfair Labor Practice Administrator issued a deficiency notice on November 15, 2022, and in response Calkins filed an amended complaint on December 6, 2022. A preliminary ruling¹ finding a cause of action was issued on December 16, 2022, and the City filed a timely answer on January 6, 2023. The undersigned Examiner conducted a virtual hearing on June 23 and 29, 2023. The parties filed timely post-hearing briefs on August 18, 2023, to complete the record.

ISSUE

The issue, as framed by the cause of action statement, is as follows:

¹ Revisions to the regulations administered by the Washington State Public Employment Relations Commission went into effect on January 1, 2023. As part of those revisions, the term “preliminary ruling” was changed to “cause of action statement” in WAC 391-45-110.

Employer discrimination in violation of RCW 41.56.140(3) [and if so, derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by placing Kirk Calkins on administrative leave for filing an unfair labor practice charge.

The complainant has failed to carry the burden of proof demonstrating employer discrimination in violation of RCW 41.56.140(3). To prove discrimination under the statute, a complainant must first establish a prima facie case by demonstrating that (1) the employee engaged in protected union activity or communicated an intent to do so; (2) the employee was denied an ascertainable right, benefit, or status; and (3) a causal connection exists between the protected activity and subsequent deprivation. Based on the evidence submitted into the record, the complainant has failed to establish a prima facie case.

If the complainant had established a prima facie case, the burden of production would have shifted to the respondent. In this case, the employer has successfully demonstrated a legitimate, nondiscriminatory reason for its actions, and the evidence does not prove that the employer's explanation was pretextual or disguised to cover an underlying union animus. Through either the failure to establish a prima facie case or the existence of a legitimate, nondiscriminatory reason for the administrative reassignment, the complainant's charge of discrimination is dismissed.

BACKGROUND

Calkins was employed by the City within the Seattle Department of Transportation (SDOT) for approximately 17 years as a Street Use Inspector. Calkins' total years of service with the City spanned 34½ years until his employment ended on February 14, 2023. As a Street Use Inspector, Calkins was primarily tasked with managing the public right-of-way during construction activities to ensure compliance with the City's laws and regulations. This work regularly involved interactions with property owners and contractors. The Street Use Inspectors are generally managed on a daily basis by Lead Inspectors. Above the inspectors and leads are both a supervisor and a manager classification, comprising the Inspection Group within the Street Use Division of SDOT. The Street Use Inspectors are represented by PROTEC17 (union) for purposes of collective bargaining.

Historically, SDOT utilized a rotational overtime system and maintained two separate rosters for street inspection work that needed to occur off-hours during weekdays or on weekends. Street Use Inspectors, Lead Inspectors, and Inspection Supervisors were included in the rotation; however, inspectors were given priority in overtime opportunities, with leads and supervisors only filling in if an inspector was unavailable. When a Street Use Inspector worked off-hours during the week, they were not also assigned to work the following weekend except in an emergency. Otherwise, the two rosters operated on a basic rotational system. Through April 2022, this system enabled Calkins to secure about three weekend overtime shifts each month. By May 2022, however, Calkins observed some noticeable changes in the rotational overtime system.

On May 12, 2022, Mark Watson, a representative of the union, arranged a meeting for the following Tuesday to discuss the rotational overtime system with Chris Luedke, the Inspections Manager, and Jesse Green, the Strategic Human Resources Director at the time. Street Use Inspectors also attended this meeting, during which Calkins learned that SDOT and union representatives had previously met and agreed upon certain changes to the rotational overtime system. The exact parameters of the old and new systems were not detailed in the record, but the new system appears to have merged the weekday off-hours and weekend rotational lists. As a result, whichever employee is next up in the rotation is offered the overtime assignment. Supervisors and leads also took on a more expansive role in filling off-hour overtime assignments. Among other changes, Calkins believed that the new overtime system resulted in a reduction of overtime shifts available to him and other Street Use Inspectors.

Calkins also believed that the process between SDOT and the union in making changes to the scheduled overtime rotation system was neither fair nor transparent. Calkins lodged his complaints regarding those changes in a series of emails with SDOT and City officials, including Lead Inspector Daniel Conn, Inspection Supervisor Jon Skinner, and Director of Equity Adiam Emery, as well as Luedke and Green. Calkins alleged that the process to change the rotational overtime system lacked transparency and that the changes primarily benefited a small group of leads and supervisors, created a toxic work environment, and caused Street Use Inspectors to lose out on significant overtime opportunities. From Calkins' standpoint, this process furthered a subversive pattern by SDOT officials, resulting in ongoing and enhanced tension between the parties.

Numerous SDOT officials responded to Calkins' emails and sought to temper his accusations by offering more specific explanations of the new overtime system, detailing the involvement of the union in developing that system, and advising Calkins on various avenues of recourse to address his concerns.

Simultaneous with his direct objections to various SDOT and City officials, on May 2, 2022, Calkins filed an unfair labor practice (ULP) complaint against the City with PERC. This complaint alleged that the City had unilaterally changed the overtime policies as they applied to Street Use Inspectors without input or consent from the employees in that job classification. A deficiency notice issued on May 31, 2022, allowed Calkins a period of 21 days to amend the complaint. Calkins did so on June 21, 2022. The complaint centered on an alleged unilateral change in the terms and conditions of employment, but PERC found that Calkins did not have standing to pursue a refusal to bargain charge against the employer, because such claims can only be made by the union representing the bargaining unit. Ultimately, the complaint was dismissed on July 19, 2022, for failure to state a cause of action. Calkins filed an appeal, but on September 13, 2022, the Commission affirmed the order of dismissal. The City did not file any brief regarding Calkins' appeal.

On September 30, 2022, Conn received a complaint about Calkins from one of the owners of Green Way Homes, a construction contracting company. Later that same day, Luedke and Elizabeth Sheldon, who was the Street Use Division Director at the time, were also made aware of the complaint. The complaint centered on interactions between Calkins and the contractor regarding the replacement of damaged sidewalk pavers at a particular construction site and the payment of fees. In the complaint, the contractor alleged that Calkins had called him a "rich kid" who could "afford" paying certain fines. The contractor also alleged that Calkins said, "[Y]ou don't want to fight with me cuz [sic] you will go down hard." Calkins denied making any of these statements.

Sheldon testified that she was immediately concerned by the alleged statements attributed to Calkins because, if true, they were inconsistent with workplace expectations and behaviors. The allegations also raised concerns about the possibility of further harm. Shortly thereafter, Sheldon reached out to Green to discuss the complaint. Green believed that Calkins may have violated

personnel rule 1.3.3, which outlines major disciplinary offenses, and he and Sheldon discussed the possibility of placing Calkins on administrative reassignment.

The City's personnel rules, specifically rule 1.3.4, permit the appointing authority to temporarily place an employee on administrative reassignment pending the outcome of an investigation into alleged misconduct. Green testified that it is a standard practice for SDOT to place some employees on paid administrative reassignment pending a full investigation and estimated that this occurs about six to ten times per year. An employee's rate of pay with the City remains the same while on administrative reassignment.

Following a review of the contractor's complaint and some initial consultations between Luedke, Green, and Sheldon, the situation was discussed with the contractor, who confirmed the original allegations against Calkins. Around this same time, Green and Sheldon also learned of an earlier complaint from a separate contractor that had been sent to SDOT officials regarding actions allegedly taken by Calkins.² Before learning of the second complaint, however, Green and Sheldon had already decided to place Calkins on administrative reassignment based on their consideration of the allegations, the level of possible discipline, and past comparable cases. The record fails to establish that the City factored Calkins' ULP complaint filing from the past spring into its analysis.³

On October 5, 2022, Green emailed Calkins a formal letter placing him on administrative reassignment and restricting him from performing any work on behalf of SDOT.⁴ The letter

² The evidence produced by the City does not confirm the identity of the second contractor who filed a complaint against Calkins or the date of that complaint. Calkins' testimony indicated that he believed the complaint was filed by a company called DLH Construction around June 2022. Similar to the situation with Green Way Homes, Calkins believed that the complaint filed by DLH Construction centered on his efforts to get that contractor to make repairs to a sidewalk that it had damaged during a construction project.

³ Green testified that by October 2022 he knew of Calkins' May 2022 ULP complaint filing but that this did not play a factor in determining the appropriateness of an administrative reassignment. Sheldon could not recall at what point she learned of Calkins' complaint filing, but she also testified it was not part of the conversation with Green in deciding upon an administrative reassignment.

⁴ Evidence introduced during the hearing showed that the outcome of the disciplinary investigation concerning Calkins resulted in his termination from employment, effective February 14, 2023. However, the details of the investigation and its outcome are not relevant to these proceedings for two reasons. First, Calkins'

specified that the administrative reassignment was due to an allegation that Calkins had used “threatening language” with a contractor during his work as a Street Use Inspector. The letter also specified that Calkins would have no loss of pay, paid leave, or benefits during his period of reassignment, but he was to remain available during the hours of his regular workday.

ANALYSIS

Applicable Legal Standards

A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by chapter 41.56 RCW. *City of Tacoma*, Decision 8031-B (PECB, 2004). Under RCW 41.56.140(3), it is an unfair labor practice for a public employer to discriminate against a public employee who has filed an unfair labor practice charge. The complainant has the burden of proof in a discrimination case. WAC 391-45-270(1)(a). To prove discrimination, the complainant must first establish a prima facie case by showing that

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 protected activity and the employer’s action.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. 333, 348–349 (2014); *Educational Service District 114*, Decision 4361-A (PECB, 1994).

Employer actions that do not result in a clear deprivation of a specific right, status, or benefit held by the employee are not sufficient to establish a prima facie case. In *City of Yakima*, Decision

amended complaint was filed on December 6, 2022, two months before the apparent termination of his employment. Calkins did not avail himself of any of the procedures detailed in WAC 391-45-070 to amend the complaint again. Second, the cause of action statement, which defines the scope of the proceeding in this case, specifically references the placement of Calkins on administrative leave as the lone alleged act of discrimination. Any final employment action taken by the City against Calkins is outside the jurisdictional scope of this proceeding.

10270-B (PECB, 2011), the Commission determined that the employer's decision to add negative comments to an employee's performance appraisal failed to prove a deprivation of an ascertainable benefit. The Commission noted that no evidence demonstrated the comments in an appraisal constituted discipline toward the employee or would impact their future employment. Similarly, in *State – Corrections*, Decision 12002-A (PSRA, 2014), the Commission determined that, in isolation, the act of investigating alleged misconduct does not constitute a deprivation of a right or benefit.

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). "Circumstantial evidence may consist of the timing of the [discipline], disparate treatment of other employees, whether established procedures (including contract procedures) were followed, the reasons given for the [discipline], whether those reasons were given to the employee, any shift in those reasons on the part of the employer, and evidence from prior unfair labor practice proceedings." *Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984); See THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT ch. 7, §7.II.B.1 (John E. Higgins ed., 2022) (ebook).

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 348.; *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.*

Application of Standards

The complainant has only satisfied his burden of proof on two of the three elements to demonstrate a prima facie case of discrimination. The record clearly establishes that Calkins engaged in protected activity when he filed his May 2, 2022, complaint against the City. The record also

clearly shows that on October 5, 2022, the City placed Calkins on administrative reassignment. Additionally, there is a causal nexus between this event—the filing of the ULP complaint—and the alleged discriminatory act of placing Calkins on administrative reassignment, based solely on the temporal proximity of these two events. Calkins was placed on administrative reassignment a mere five months after filing his ULP complaint and just a few weeks after the Commission dismissed his appeal in the matter. Although the City argues it had minimal involvement in the ULP complaint, SDOT officials had some knowledge of its filing. The relatively short gap in time between the filing of Calkins' complaint and his subsequent administrative reassignment sufficiently demonstrates a causal connection. Thus, two of the three elements for a prima facie case are met.

However, Calkins failed to show that he was deprived of a right, benefit, or status as a result of the alleged discriminatory act of placing him on administrative reassignment pending an investigation. As detailed in Calkins' complaint and the cause of action statement, the issue in this case is whether the employer discriminated against Calkins by placing him on administrative reassignment for filing an unfair labor practice charge. The act of investigating an employee alone does not constitute deprivation of a right, benefit, or status. The factual elements of this case reflect that legal reality: the City's reassignment letter clearly stated that Calkins would receive *no* reduction in pay, leave, or benefits. The City's existing personnel rules detail a process for administrative reassignment pending an investigation, and the evidence demonstrates that this is a tool the City regularly utilizes for SDOT employees. No evidence shows that Calkins was targeted with an atypical process unique to him; rather, the City exercised its right to investigate possible policy violations and to place an employee on administrative reassignment consistent with its existing policy.

Furthermore, even if the prima case were fully established, the complaint must ultimately be dismissed due to the existence of a legitimate, nondiscriminatory reason for placing Calkins on administrative reassignment. The nature of the allegations against Calkins, if proven, might warrant some level of discipline under the City's existing personnel rules. It is the City's obligation to investigate potential policy violations, and the City maintains a procedure to place some employees on administrative reassignment pending an investigation. Under the burden-shifting

framework, the City does not need to prove its actions were motivated primarily or exclusively by the contractor's complaint; rather, it only must produce a legitimate, nondiscriminatory reason. The contractor's complaint against Calkins satisfies that burden of production.

The evidence is insufficient to prove that the City's reason for placing Calkins on administrative reassignment was pretextual or unlawfully motivated by union animus. The tension between Calkins and numerous SDOT officials—not only with respect to the overtime process but dating back several years—is clear in the record, so the timing of the contractor's complaint appears quite convenient. However, some level of disdain between the parties is not evidence of pretext. If, for instance, the record demonstrated other similarly situated employees not being placed on administrative reassignment, then any differential treatment applied to Calkins may be evidence of pretext. But no such evidence exists in the record. Likewise, there is no convincing evidence that Calkins' ULP complaint filing or other protected acts motivated the City's decision on the administrative reassignment, which could have demonstrated a union animus. Based on the City's existing policy and the nature of the events herein, it cannot be demonstrated that the reason behind the administrative reassignment decision⁵ was a pretext or motivated by an underlying intent to discriminate against Calkins for filing a ULP complaint.

CONCLUSION

For the reasons articulated above, the complainant has failed to establish a prima facie case of discrimination through the lack of evidence demonstrating any deprivation of a right, benefit, or status. Further, the employer has successfully demonstrated a legitimate, nondiscriminatory reason for its administrative reassignment decision. No evidence supports a conclusion that the employer's stated reason was a mere pretext or principally driven by an underlying animus toward

⁵ Calkins may have an argument that the City's ultimate decision to discipline him or terminate his employment was pretextual and, in turn, discriminatory. However, as noted earlier, the ULP complaint in this matter identifies only the employer's act of placing Calkins on administrative leave, not the decision to terminate his employment, as the alleged discriminatory act. Additionally, the cause of action statement also identifies the placement of Calkins on administrative leave as the sole alleged act of discrimination. Calkins never sought to further amend his complaint after the final disposition on his employment status with the City; thus, the City's decision to ultimately terminate his employment is outside the scope of this case and cannot be part of the analysis herein.

the union. Therefore, the discrimination charge necessarily fails, and the complaint must be dismissed.

FINDINGS OF FACT

1. The City of Seattle (employer or City) is a public employer as defined by RCW 41.56.030(13).
2. Kirk Calkins is a public employee as defined by RCW 41.56.030(12).
3. Calkins was employed by the City within the Seattle Department of Transportation (SDOT) for approximately 17 years as a Street Use Inspector. Calkins' total years of service with the City spanned 34½ years until his employment ended on February 14, 2023.
4. As a Street Use Inspector, Calkins was primarily tasked with managing the public right-of-way during construction activities to ensure compliance with the City's laws and regulations. This work regularly involved interactions with property owners and contractors. The Street Use Inspectors are generally managed on a daily basis by Lead Inspectors. Above the inspectors and leads are both a supervisor and a manager classification, comprising the Inspection Group within the Street Use Division of SDOT.
5. The Street Use Inspectors are represented by PROTEC17 (union) for purposes of collective bargaining.
6. Historically, SDOT utilized a rotational overtime system and maintained two separate rosters for street inspection work that needed to occur off-hours during weekdays or on weekends. Street Use Inspectors, Lead Inspectors, and Inspection Supervisors were included in the rotation; however, inspectors were given priority in overtime opportunities, with leads and supervisors only filling in if an inspector was unavailable. When a Street Use Inspector worked off-hours during the week, they were not also assigned to work the following weekend except in an emergency. Otherwise, the two rosters operated on a basic rotational system. Through April 2022, this system enabled Calkins to secure about three weekend overtime shifts each month.

7. By May 2022, however, Calkins observed some noticeable changes in the rotational overtime system. On May 12, 2022, Mark Watson, a representative of the union, arranged a meeting for the following Tuesday to discuss the rotational overtime system with Chris Luedke, the Inspections Manager, and Jesse Green, the Strategic Human Resources Director at the time. Street Use Inspectors also attended this meeting, during which Calkins learned that SDOT and union representatives had previously met and agreed upon certain changes to the rotational overtime system.
8. The exact parameters of the old and new systems were not detailed in the record, but the new rotational overtime system appears to have merged the weekday off-hours and weekend rotational lists. As a result, whichever employee is next up in the rotation is offered the overtime assignment. Supervisors and leads also took on a more expansive role in filling off-hour overtime assignments.
9. Among other changes, Calkins believed that the new overtime system resulted in a reduction of overtime shifts available to him and other Street Use Inspectors.
10. Calkins also believed that the process between SDOT and the union in making changes to the scheduled overtime rotation system was neither fair nor transparent. Calkins lodged his complaints regarding those changes in a series of emails with SDOT and City officials, including Lead Inspector Daniel Conn, Inspection Supervisor Jon Skinner, and Director of Equity Adiam Emery, as well as Luedke and Green. Calkins alleged that the process to change the rotational overtime system lacked transparency and that the changes primarily benefited a small group of leads and supervisors, created a toxic work environment, and caused Street Use Inspectors to lose out on significant overtime opportunities. From Calkins' standpoint, this process furthered a subversive pattern by SDOT officials, resulting in ongoing and enhanced tension between the parties.
11. Numerous SDOT officials responded to Calkins' emails and sought to temper his accusations by offering more specific explanations of the new overtime system, detailing the involvement of the union in developing that system, and advising Calkins on various avenues of recourse to address his concerns.

12. Simultaneous with his direct objections to various SDOT and City officials, on May 2, 2022, Calkins filed an unfair labor practice (ULP) complaint against the City with PERC. This complaint alleged that the City had unilaterally changed the overtime policies as they applied to Street Use Inspectors without input or consent from the employees in that job classification. A deficiency notice issued on May 31, 2022, allowed Calkins a period of 21 days to amend the complaint. Calkins did so on June 21, 2022. The complaint centered on an alleged unilateral change in the terms and conditions of employment, but PERC found that Calkins did not have standing to pursue a refusal to bargain charge against the employer, because such claims can only be made by the union representing the bargaining unit. Ultimately, the complaint was dismissed on July 19, 2022, for failure to state a cause of action. Calkins filed an appeal, but on September 13, 2022, the Commission affirmed the order of dismissal. The City did not file any brief regarding Calkins' appeal.
13. On September 30, 2022, Conn received a complaint about Calkins from one of the owners of Green Way Homes, a construction contracting company. Later that same day, Luedke and Elizabeth Sheldon, who was the Street Use Division Director at the time, were also made aware of the complaint. The complaint centered on interactions between Calkins and the contractor regarding the replacement of damaged sidewalk pavers at a particular construction site and the payment of fees. In the complaint, the contractor alleged that Calkins had called him a "rich kid" who could "afford" paying certain fines. The contractor also alleged that Calkins said, "[Y]ou don't want to fight with me cuz [sic] you will go down hard."
14. Calkins denied making any of these statements about, or to, one of the owners of Green Way Homes.
15. Sheldon testified that she was immediately concerned by the alleged statements attributed to Calkins because, if true, they were inconsistent with workplace expectations and behaviors. The allegations also raised concerns about the possibility of further harm.
16. Shortly thereafter, Sheldon reached out to Green to discuss the complaint. Green believed that Calkins may have violated personnel rule 1.3.3, which outlines major disciplinary

offenses, and he and Sheldon discussed the possibility of placing Calkins on administrative reassignment.

17. The City's personnel rules, specifically rule 1.3.4, permit the appointing authority to temporarily place an employee on administrative reassignment pending the outcome of an investigation into alleged misconduct. Green testified that it is a standard practice for SDOT to place some employees on paid administrative reassignment pending a full investigation and estimated that this occurs about six to ten times per year. An employee's rate of pay with the City remains the same while on administrative reassignment.
18. Following a review of the contractor's complaint and some initial consultations between Luedke, Green, and Sheldon, the situation was discussed with the contractor, who confirmed the original allegations against Calkins. Around this same time, Green and Sheldon also learned of an earlier complaint from a separate contractor that had been sent to SDOT officials regarding actions allegedly taken by Calkins. Before learning of the second complaint, however, Green and Sheldon had already decided to place Calkins on administrative reassignment based on their consideration of the allegations, the level of possible discipline, and past comparable cases.
19. The record fails to establish that the City factored Calkins' ULP complaint filing from the past spring into its administrative reassignment analysis.
20. On October 5, 2022, Green emailed Calkins a formal letter placing him on administrative reassignment and restricting him from performing any work on behalf of SDOT. The letter specified that the administrative reassignment was due to an allegation that Calkins had used "threatening language" with a contractor during his work as a Street Use Inspector. The letter also specified that Calkins would have no loss of pay, paid leave, or benefits during his period of reassignment, but he was to remain available during the hours of his regular workday.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.56 RCW and chapter 391-45 WAC.
2. As described in findings of fact 3–20, the employer did not discriminate in violation of RCW 41.56.140(3), nor did it commit a derivative interference in violation of RCW 41.56.140(1), within six months of the date the complaint was filed.

ORDER

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

ISSUED at Olympia, Washington, this 13th day of November, 2023.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CHRISTOPHER J. CASILLAS, 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 11/13/2023

DECISION 13735 - PECB 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 135977-U-22

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