STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIRK CALKINS, Complainant, vs. CITY OF SEATTLE, Respondent.	CASE 135977-U-22 DECISION 13735-A - PECB DECISION OF COMMISSION

Kirk Calkins, the complainant.

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

SUMMARY OF DECISION

The question before the Commission is whether Kirk Calkins met his burden to prove that the City of Seattle (the City) discriminated against him in violation of RCW 41.56.140(3) because he filed an unfair labor practice complaint. The Examiner concluded that Calkins did not establish a prima facie case of discrimination. We disagree. We conclude that the City's decision to place Calkins on administrative leave was a deprivation of a right, benefit, or status. However, while Calkins established a prima facie case of discrimination, he did not prove that the City's reason for placing him on administrative leave was a pretext or substantially motivated by Calkins filing an unfair labor practice complaint against the employer. We affirm dismissal of the unfair labor practice complaint.

PROCEDURAL BACKGROUND

On May 2, 2022, Calkins filed an unfair labor practice complaint against the City of Seattle. The Unfair Labor Practice Administrator dismissed the complaint for failure to state a cause of

action. *City of Seattle*, Decision 13532 (PECB, 2022). Calkins appealed that decision to the Commission. The Commission dismissed the complaint on September 13, 2022. *City of Seattle*, Decision 13532-A (PECB, 2022).

On October 13, 2022, Calkins filed this unfair labor practice complaint against the City of Seattle. The complaint alleged the employer placed Calkins on administrative leave for filing an unfair labor practice complaint. On December 16, 2022, the Unfair Labor Practice Administrator issued a preliminary ruling[1] finding a cause of action for the following:

> 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.

On June 23 and 29, 2023, the Examiner conducted a hearing at which Calkins and the City, both represented by counsel, had the opportunity to present evidence. In a decision issued on November 13, 2023, the Examiner concluded that the City of Seattle did not discriminate against Calkins when it placed him on administrative leave. *City of Seattle*, Decision 13735 (PECB, 2023). The Examiner found that Calkins engaged in protected activity when he filed the May 2, 2022, unfair labor practice complaint against the City, however the City did not deprive Calkins of a right, benefit, or status by placing him on administrative leave. *Id*. at 7-8. The Examiner further determined that the City articulated a legitimate, nondiscriminatory reason for placing Calkins on administrative leave and that Calkins did not present sufficient evidence to prove that the City's reason for placing him on administrative leave was pretextual or substantially motivated by union animus. *Id*. at 9.

On November 28, 2023, Calkins filed an email asking the agency to reconsider the decision. Calkins' email was accepted as a notice of appeal. The email did not identify the specific

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[1] When Calkins filed the unfair labor practice complaint, WAC 391-45-110 referred to this document type as a "preliminary ruling." WAC 391-45-110 has since been amended to identify this document type as a "cause of action statement."

findings of fact, conclusions of law, or order to be in error. The parties filed briefs to complete the record.

FACTUAL BACKGROUND

Kirk Calkins was employed by the City as a Street Use Inspector within the Seattle Department of Transportation (SDOT). On September 30, 2022, the City received a complaint about Calkins from a contractor. The complaint was elevated to the SDOT Street Use Division Director, Elizabeth Sheldon. While Sheldon is not typically involved in contractor complaints about inspectors, she was involved in the complaint against Calkins because of the nature of the allegations.

Sheldon discussed the complaint with Jesse Green, the SDOT Strategic Human Resources Director.[2] Green and Sheldon decided to place Calkins on administrative leave.[3] On October 5, 2022, the City placed Calkins on administrative leave because of the complaint received from the contractor alleging that Calkins had used threatening language in his work as an inspector.[4] The City of Seattle terminated Calkins' employment on February 14, 2023.[5]

ANALYSIS

Standard of Review – The examiner's findings of fact are verities on appeal.

Unchallenged findings of fact are verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014); *Brinnon School District*,

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2 *City of Seattle*, Decision 13735 at finding of fact 16.

3 *Id.* at finding of fact 18.

4 *Id.* at finding of fact 20.

5 Calkins' amended complaint did not include allegations about his termination. Therefore, the scope of the hearing was limited to whether the employer discriminated against Calkins by placing him on administrative leave.

Decision 7210-A (PECB, 2001). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

While the Commission permits self-represented litigants some leeway in the presentation of their case, the rights of other parties to the proceeding must also be considered. *Seattle Colleges*, Decision 9753-A (CCOL, 2008). An appealing party must identify "the specific rulings, findings of fact, conclusions of law, or orders claimed to be in error." WAC 391-45-350(3); *Puyallup School District*, Decision 12814-A (PECB, 2018). Compliance with this rule is not merely a technical issue; it is necessary to put the Commission and the opposing party on notice of the arguments that the appealing party intends to advance. *City of Kirkland*, Decision 6377-A (PECB, 1998). This specificity allows the Commission to review the record and modify, vacate, or substitute any findings of fact not supported by substantial evidence. *Puyallup School District*, Decision 12814-A. The Commission applies these rules equally to complainants represented by counsel and those appearing pro se. *City of Bellingham (Washington State Council of County and City Employees)*, Decision 11422-A (PECB, 2013).

The Examiner's decision included numbered findings of fact and conclusions of law. Calkins' notice of appeal did not identify which of the findings of fact he asserts are in error. Therefore, the Examiner's findings of fact are considered true on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 347; *Brinnon School District*, Decision 7210-A. That said, we review the appeal on its merits.

<u>The Commission has not considered evidence that was neither offered at nor accepted at the hearing.</u>

After filing the notice of appeal, Calkins filed additional documentation with the agency. The Commission does not consider new evidence on appeal that was not presented to an Examiner. *City of Seattle (Seattle Police Management Association)*, Decision 12091-A (PECB, 2014) at 2 (striking evidence attached to an appeal brief). When evidence could have been admitted at hearing but was not offered, the Commission does not accept the evidence later in the proceedings. *Chelan County*, Decision 5559-A (PECB, 1996) (rejecting affidavits submitted with an appeal brief).

Filing new evidence on appeal is, essentially, an attempt to reopen the hearing. Any such submission of new evidence on appeal must comply with the Commission's rules. WAC 391-45-270(2); *Washington State Department of Children, Youth, and Families*, Decision 13647-A (PSRA, 2023). Calkins has neither filed a motion to reopen the hearing nor submitted arguments as to why the evidence he submitted following the appeal could not have been offered at the hearing. Accordingly, the Commission has not considered evidence that was neither offered nor accepted at the hearing before the Examiner.

<u>The complainant established a prima facie case of discrimination.</u>

It is an unfair labor practice for an employer "[t]o discriminate against a public employee who has filed an unfair labor practice charge[.]" RCW 41.56.140(3). To prove discrimination, the complainant must first set forth a prima facie case by establishing the following:

1. The employee engaged in protected activity, such as filing an unfair labor practice complaint;

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

3. A causal connection exists between the protected activity and the respondent's action.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. at 348-349; *University of Washington*, Decision 11091-A (PSRA, 2012); *Education Service District 114*, Decision 4361-A (PECB, 1994).

If the complainant establishes a prima facie case, the burden shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may meet their burden of production by articulating a legitimate, nondiscriminatory reason for the adverse decision. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. If the respondent meets its burden of production, then the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or substantially motivated by union animus. *Id*.

The Examiner concluded that Calkins did not establish a prima facie case of discrimination. *City of Seattle*, Decision 13735 at 7-8. Specifically, the Examiner concluded that, taken alone, an employer investigating an employee is not a deprivation of a right benefit, or status. Further, because Calkins received "*no* reduction in pay, leave, or benefits," the investigation and administrative leave assignment didn't constitute a deprivation. *City of Seattle*, Decision 13735 at 8. We disagree.

In this case, the City did not merely investigate Calkins; the employer removed Calkins from the workplace. When an employer places an employee on administrative leave with pay, the employee's wages are not affected, but the employee's hours and working conditions are impacted. *Seattle School District*, Decision 5542-C (PECB, 1997). *Compare State – Corrections*, Decision 12002 (PSRA, 2014) (finding that questioning an employee about an incident did not amount to deprivation), *aff'd*, Decision 12002-A (PSRA, 2014), *with King County*, Decision 12582-B (PECB, 2018) (finding that an internal investigation into an employee's protected activity was an adverse action). Moreover, an employer continuing to pay an employee has "little bearing on the effect" of placing an employee on administrative leave, which can include other losses, such as the loss of opportunity for overtime. *Seattle School District*, Decision 5542-C; *Seattle School District*, Decision 8976 (PECB, 2005).

The Examiner further concluded that a causal connection exists between Calkins filing an unfair labor practice and the employer placing Calkins on administrative leave. He found that a temporal proximity existed between the two events. *City of Seattle*, Decision 13735 at 8. We agree and hold that Calkins thereby established a prima facie case of discrimination. Calkins did not prove that the City's stated reason for placing him on administrative leave was either a pretext or substantially motivated by union animus.

<u>There is insufficient evidence to meet the complainant's burden of persuasion.</u>

After Calkins established a prima facie case of discrimination, the burden of production shifted to the City to articulate a legitimate, non-discriminatory reason for placing Calkins on administrative leave. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Brinnon School District*, Decision 7210-A. As the Examiner found, the City placed

Calkins on administrative leave because it was investigating allegations that Calkins had engaged in behavior that violated workplace policies. The City met its burden of production to articulate a legitimate, nondiscriminatory reason for placing Calkins on administrative leave. *City of Seattle*, Decision 13735 at 8.

After the City articulated the legitimate, nondiscriminatory reason for placing Calkins on administrative leave, Calkins had the burden of persuasion to prove that filing the May 2, 2022, unfair labor practice complaint "triggered the adverse employment decision." *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. Calkins could meet his burden of persuasion in one of two ways. *Id*. First, Calkins could show that the employer's reason for placing him on administrative leave was pretextual. *Id*. Second, Calkins could show that, although "legitimate, animus toward [Calkins'] union activity 'was nevertheless a substantial motivating factor'" in the employer's decision. *Id*.

Calkins argued that the City placed him on administrative leave because he has a history of making complaints against supervisors and raising workplace issues, and he had a contentious relationship with management. During the hearing, Calkins did not offer evidence or testimony showing that the employer treated him differently from other employees that the City had placed on administrative leave. Other than Calkins' assertions that City officials harbored animus and ill will against him, there is no evidence in the record to support a conclusion that the City's decision to place Calkins on administrative leave was a pretext or that it was substantially motivated by Calkins filing an unfair labor practice complaint.

CONCLUSION

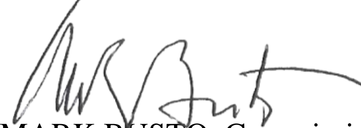
Although Calkins established a prima facie case of discrimination, he did not meet his burden of persuasion to prove the City of Seattle's reason for placing him on paid administrative leave was either pretextual or substantially motivated by union animus. We affirm the Examiner.

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 22nd day of March, 2024.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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.