STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY REGIONAL AFIS GUILD, Complainant, vs. KING COUNTY, Respondent.	CASE 127743-U-15 DECISION 12582-E - PECB ORDER OF COMPLIANCE

James M. Cline and *Cynthia McNabb*, Attorneys at Law, Cline & Associates, for the King County Regional AFIS Guild.

Susan N. Slonecker and *Lynne J. Kalina*, Senior Deputy Prosecuting Attorneys, for King County.

This case concerns a request by the King County Regional AFIS Guild (union) to require King County (employer) to comply with a remedial order previously issued by the Commission. Compliance Officer Dario de la Rosa conducted a hearing and the parties filed briefs in support of their respective position.

BACKGROUND

In order to place this decision in its proper context a summation of the procedural history is necessary. The union filed a complaint alleging employer committed unfair labor practices. The union subsequently amended its complaint three separate times and causes of action for the following four issues were heard before Examiner Stephen Irvin:

1. Did the employer refuse to bargain by unilaterally changing vacation leave approval policies for bargaining unit employees?

2. Did the employer discriminate in reprisal for union activities by (a) revoking Marquel Allen's lead status and premium pay, (b) subjecting Allen to an internal investigation, (c) providing a written reprimand to Maquel Allen, (d) providing an unfavorable performance appraisal for Allen, and (e) providing a more unfavorable performance appraisal for Allen during the appeal process of her initial performance appraisal?

3. Did the employer interfere with employee rights by threats of reprisal or force, or promises of benefits made, in connection with union activities by (a) its statements made on November 19, 2015, (b) sending an email to bargaining unit employees that suspended leave requests for potential witnesses in this unfair labor practice hearing and asked bargaining unit employees to avoid discussion of matters related to the unfair labor practice hearing, and (c) providing a more unfavorable performance appraisal for Allen during the appeal process of her initial performance appraisal?

4. Should the union's allegation of employer interference in connection with the internal investigation of Allen be addressed on its merits?

Examiner's First Decision

The Examiner held the employer did not fulfill its duty to bargain with the union regarding changes to the vacation leave approval policies before implementing the changes. The Examiner ordered the employer to cease and desist from unlawfully announcing and implementing changes to the vacation leave approval policy without providing the guild with notice and opportunity to bargain.

The Examiner dismissed all allegations claiming the employer discriminated against Allen in retaliation for Allen's exercise of protected activity at a November 16, 2015, meeting. The Examiner held the union failed to demonstrate Allen was participating in an activity protected by the collective bargaining statute and therefore did not establish a prima facie case for discrimination.

For the third issue, the Examiner held the union proved by a preponderance of the evidence that the employer's statements during the November 19, 2015, meeting could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, associated with the union activity of employees represented by the union. The Examiner ordered the employer to cease and desist from unlawfully interfering with employee rights through statements made by the employer that are reasonably perceived as a threat of reprisal or force or a promise of benefit associated with the exercise of collective bargaining rights protected by chapter 41.56 RCW. The Examiner dismissed all other interference allegations associated within the third issue.

Finally, the Examiner dismissed the fourth issue as none of the preliminary rulings issued in this matter found a cause of action to exist for independent interference in connection with the internal investigation of Allen.

Commission's First Decision

The union filed a timely appeal of multiple rulings found within the Examiner's decision. The union claimed the remedial order issued by the Examiner for the employer's unilateral change of vacation leave approval policies was inadequate as it failed to make employees whole for any lost wages. The union also claimed the Examiner erred in ruling that Allen was not engaged in protected activity and therefore the union met its prima facie case for discrimination. In its appeal, the union asserted the preponderance of the evidence also demonstrated that employer discriminated against Allen in retaliation for her exercise of protected rights as alleged by the union. Finally, the union asserted the Examiner should have addressed allegation claiming that the employer interfered with Allen's rights by conducting an internal investigation.

On Appeal, the Commission reframed the issues on appeal as follows:

1. Should the Examiner have addressed the union's allegation that the employer interfered with Allen's rights by conducting an internal investigation?

2. Was the remedy appropriate and adequate for the employer's unilateral change to the vacation leave approval policy?

3. Did the employer interfere with employee rights by sending an email to bargaining unit employees that suspended leave requests for potential witnesses in the unfair labor practice hearing and asked bargaining unit employees to avoid discussing the unfair labor practice hearing?

4. Were Allen's actions at the November 16, 2015, Jail Identification Unit meeting so unreasonable to cause her activity to become unprotected? If not, did the employer discriminate against Allen when the employer revoked her lead status and premium pay; conducted an internal investigation into Allen's conduct at the November 16 unit meeting; and issued Allen a written reprimand?

5. Did the employer discriminate against Allen by providing an unfavorable performance appraisal and changing Allen's performance appraisal during the appeal process of her performance evaluation?

The Commission held the allegation claiming the employer interfered with Allen's rights by conducting an internal investigation was not properly before the Examiner and therefore sustained the Examiner's decision to dismiss that allegation.

The Commission also held the Examiner's remedy did not make the employees whole for the employer's unlawful acts and ordered the employer to make the employees' wages and benefits whole for the unlawful unilateral change. The Commission ordered the employer to "Ascertain the employees who would have worked overtime but for the employer's unlawful unilateral change and make those employees whole for the loss of overtime work opportunities by payment of overtime wages and benefits."

The Commission reversed the Examiner's decision finding Allen was not engaged in protected activity at the November 16, 2015, meeting and the employer's decision to end Allen's lead status following that meeting was based upon her protected activity. To make Allen whole, the Commission ordered the employer to pay Allen wages and benefits lost from the time it removed her lead status on November 19, 2015, until the lead status was scheduled to end on December 31, 2015.

The Commission found the employer discriminated against Allen when it subjected her to an internal investigation because of her protected union activity at the November 16, 2015, unit

meeting and issued a written reprimand and ordered the employer to destroy the internal investigation file and written reprimand.

Finally, because the Commission found that Allen was engaged in protected activity at the November 16, 2015, meeting, the Commission remanded the matter to the Examiner to make sufficient findings and apply the legal standard to determine if the employer discriminated against Allen by providing an unfavorable performance appraisal and changing Allen's performance appraisal during the appeal process of her performance evaluation.

Examiner's Second Decision

On remand to determine if the employer discriminated against Allen by providing an unfavorable performance appraisal and changing Allen's performance appraisal during the appeal process of her performance evaluation, the Examiner fount the union established its prima facie case. Allen was engaged in protected activity during a November 16, 2015, unit meeting and the employer's appraisal of Allen on March 16, 2016, deprived Allen of an ascertainable right, benefit, or status. The examiner also found the employer's actions were causally connected to Allen's protected activity.

The Examiner then found the employer met its burden of production by articulating a legitimate, nondiscriminatory reason for Allen's initial appraisal. Specifically, the Examiner held that the unfavorable portions of Allen's appraisal were based on a number of instances during the appraisal period in which Allen's workplace behavior did not meet the expectations her supervisor set for her in February 2015. The Examiner dismissed this allegation.

Commission's Second Decision

The union appealed the Examiner's decision on remand. The Commission reversed and found the employer discriminated against Allen when it issued unfavorable appraisals in retaliation for her exercise of protected activity.

Court

The Employer appealed the Examiner's decision to court. The superior court affirmed the Commission's decision.

Compliance

Based upon the two Examiner decisions and two Commission decisions issued in this matter, the employer was directed to take the following actions to remedy its unfair labor practices:

a) Restore the status quo ante by reinstating the vacation leave approval policy as it existed before the unilateral change in the fall of 2015.

b) Ascertain the employees who would have worked overtime but for the employer's unlawful unilateral change and make those employees whole for the loss of overtime work opportunities by payment of overtime wages and benefits.

c) Pay Marquel Allen back wages plus interest and benefits from November 19, 2015, the date the employer revoked Allen's lead status, until December 31, 2015, the date Allen's lead status was scheduled to end.

d) Delete IIU 2015-288, the internal investigation into Marquel Allen's conduct on November 16, 2015, and remove any and all references to the April 27, 2016, written reprimand from all personnel files or other employment records concerning Allen.

e) Remove the written reprimand dated April 27, 2016, from all personnel files or other employment records maintained by King County concerning employee Marquel Allen.

The employer was also required to post agency provided notices detailing its unfair labor practices and read that notice at a public meeting of the employer's governing body.

Areas of Agreement for Compliance

The employer restored the *status quo ante* by reinstating the vacation leave approval policy as it existed before the unilateral change in the fall of 2015 and was also required to give notice to and, upon request, negotiate in good faith with the union before changing the vacation leave approval policy. The employer has complied with these parts of the order as the parties have already

negotiated successor agreements. Accordingly, paragraph (a) of the remedial order has been complied with and this matter is not in dispute before the Commission.

The employer also paid Marquel Allen back wages plus interest and benefits from November 19, 2015, the date the employer revoked Allen's lead status, until December 31, 2015, the date Allen's lead status was scheduled to end. Accordingly, paragraph (c) of the remedial order has been complied with and this matter is not in dispute before the Commission.

Finally, the employer withdrew the written evaluation issued to Marquel Allen for the February 1, 2015, through January 1, 2016, review period and eliminate any reference to the evaluation in Allen's personnel files and employer files. The employer also conducted a new evaluation for the February 1, 2015, through January 1, 2016, review period that is not based on Allen's protected activity. Accordingly, paragraph (e) of the remedial order has been complied with and this matter is not in dispute before the Commission.

Areas of Disagreement for Compliance

The union asserts the employer failed to comply with the requirement to "Ascertain the employees who would have worked overtime but for the employer's unlawful unilateral change and make those employees whole for the loss of overtime work opportunities by payment of overtime wages and benefits." The union also asserts that the employer has failed to delete IIU 2015-288, the internal investigation into Marquel Allen's conduct on November 16, 2015.

Applicable Legal Standard - Compliance

Where the Commission finds that a party has committed an unfair labor practice, it must "issue [an] appropriate remedial order[ ]." *Amalgamated Transit Union v. Kitsap Transit*, 187 Wn. App 113 (2013) quoting RCW 41.56.160. An appropriate remedial order must require the offending party "to cease and desist from [the] unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of" chapter 41.56 RCW. *Id*. Orders issued under RCW 41.56.160 are intended to "restore the situation, as nearly as possible, to that which would have occurred but for the [unfair labor practice]" and must "restrain . . . and remove or avoid the consequences of [an unfair labor practice]." *Municipality of Metro. Seattle v. Pub. Emp. Relations*

Comm'n, 60 Wn. App. 232, 240, 803 P.2d 41 (1991), reversed on other grounds, 118 Wash.2d 621, 826 P.2d 158 (1992).

Application of Standards - Unilateral Change to Vacation Leave Approval Policy

The remedial order requires the employer to "ascertain the employees who would have worked overtime but for the employer's unlawful unilateral change and make those employees whole for the loss of overtime work opportunities by payment of overtime wages and benefits." The methodology used by the employer for ascertaining the employee who would have worked overtime but for the unilateral change fails to comply with the Commission's order.

The Examiner's first decision succinctly describes the unilateral change that occurred:

> Prior to November 1, 2015, the employer's longstanding practice on vacation leave requests made before April 1 was to approve multiple requests on a shift for a particular date, "as long as minimum staff requirements" were met. If the request dropped staffing below the minimum requirement on a shift for a particular date, the employer approved the request if another employee volunteered to work overtime to ensure minimum staffing.
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> When the employer implemented the new vacation leave approval policy on November 1, only one vacation request per shift per day would be approved during the vacation bidding period that ended on April 1. If an employee wanted to request vacation leave on a date already requested by a more senior employee on the same shift, the less senior employee would have to wait for approval until 30 days in advance of the requested absence, and the request could be denied if backfill overtime would be required to meet minimum staff requirements. The employer's implementation of the new policy was a meaningful change to a past practice concerning a mandatory subject of bargaining.

The employer claims that it has complied with the remedial order based upon the work of former Operations Manager Diana Watkins. Watkins testified that the Jail ID, Tenprint Examiners (TPE), and Tenprint Information Specialists (TIS) units, are essential work units that required a certain level of minimum staffing. If an employee scheduled to work takes leave, then the employer must backfill that position to meet the required minimum staffing.

To support its argument, the employer points out that when it committed its unilateral change, the employer had lowered the minimum staffing levels due to reduced workload for the TPE unit, therefore also reducing the need for backfill. Around the same time, the employer eliminated the requirement for 24/7 staffing in the TIS unit due to reduced workload which also reduced the opportunity for overtime for this unit.

Based upon these factual circumstances, Watkins examined three relevant datapoints to ascertain the lost overtime opportunities for the bargaining unit employees: (1) overtime charged before and after the policy change, (2) leave use before and after the policy change, and (3) staffing levels for those timeframes. The employer then compared the amount of overtime earned for each unit. According to the employer, the evidence demonstrated that overtime for the Jail ID unit increased the year following the policy change. The evidence also showed that overtime decreased for the TPE and TIS units but that decrease could be attributed to the changes in staffing levels and schedules. Based upon these factual circumstances, the claims that unilateral change did not impact bargaining unit employees *as a whole* and therefore the employer has complied with the remedial order.

The union disagrees with the employer's analysis and asserts that the employer's failed to ascertain anything about the actual losses suffered by the affected employees. The union asserts that the employer took no effort to arrive at actual compliance by examining vacation leave requests that would have resulted in overtime or finding a historical average of lost overtime opportunities. Instead, the union asserts the employer simply looked generally at the amount of overtime caused by any reason and determined that since the amount of overtime increased the employer was effectively in compliance.

To support its arguments, the union asserts the employer was aware of specific instances of harm. For example, the evidence demonstrates that Section Supervisor Carol Gillepsie sent a message to individual supervisors asking for examples of employees had been harmed by the change in leave policy. Two supervisors responded identifying specific employees who had been denied vacation under the new policy. Guild Board Member Marquel Allen testified the change in policy impacted bargaining unit employees through lost overtime opportunities and being denied time off. Allen

further testified that by looking at the minimum staffing shifts, and the number of vacation leave requests, along with the fill rates for overtime opportunities, the county could have ascertained the lost overtime opportunities. Accordingly, the union asserts that the appropriate remedy should include each individual instance where employees were either denied leave or lost an overtime opportunity.

To properly effectuate the remedial, the employer needs to take steps to ensure that each affected employee is returned to position they would have occupied but for the employer unlawful act. In cases such as this, the employer needed to examine each individual instance where an employee lost an overtime opportunity. Support for this conclusion can be found in in *Kitsap Transit*, Decision 11098-A (PECB, 2012).

In that case, an examiner found Kitsap Transit unilaterally changed employees' health insurance options in violation of chapter 41.56 RCW. In that case, the existing collective bargaining agreement allowed employees to choose from two separate plans: a preferred provider organization (PPO) plan offered by Premera Blue Cross and a health maintenance organization (HMO) plan provided by Group Health. An equal numbers of bargaining unit employees chose the PPO and HMO options. However, Kitsap Transit determined that the PPO option cost Kitsap Transit over a million dollars more a year and therefore Kitsap Transit directed its insurance broker to look for a less expensive PPO option. Ultimately, Kitsap Transit took steps that caused Premera to discontinue covering bargaining unit employees with the PPO plan. Kitsap Transit insurance broker was unable to find a comparable PPO coverage plan and bargaining unit employees lost the ability to choose PPO coverage and all bargaining unit employees members received HMO coverage.

The examiner's remedial order required Kitsap Transit to make bargaining unit employees whole by paying these employees the premium savings (difference in cost of the 2011 Premera and Group Health plans, minus employee contribution rates as described in the collective bargaining agreement), plus interest, from the time the employer terminated the Premera PPO plan on January 1, 2011, until the time that the employer either: (1) restores a comparable PPO plan option, (2) reaches a negotiated agreement with the union on health benefit plans, or (3) implements health

benefits as determined by an interest arbitration award. Kitsap Transit appealed and the Commission vacated the examiner's remedial order. *Kitsap Transit*, Decision 11098-B (PECB, 2013). The Commission held compliance with the examiner's order to reinstate the PPO coverage could prove impossible and the monetary remedies were punitive. The Commission modified the remedial order to require the employer to reimburse the employees the difference between what would have been paid under the Premera PPO plan less any payments made under the HMO plan for all medical expenses. The union appealed the Commission's order.

The Court of Appeal vacated the Commission remedial order and reinstated the examiner's order. In doing so, the Court of Appeals found the Commission's order did "little to put ATU's affected members in the position they occupied before Premera's PPO coverage ended" and at best "compensates ATU's members for their out-of-pocket expenses arising from the unfair labor practice." The Court of Appeals found the "Commission's order is not at all 'tailored' to these aspects of the unfair labor practice and leaves ATU's members in a worse position than they would have been in had Kitsap Transit not committed the unfair labor practice."

Here, the Commission's remedial order is similar to the remedial order in *Kitsap County* as it required the employer restore the status quo ante by placing bargaining unit employees in a position they would have been in but for the employer's unlawful unilateral change. A plain reading of the Commission's remedial order required the employer to ascertain the *employees* who lost overtime opportunities, not the bargaining unit as a whole and the employer's methodology does little to put bargaining unit employees in the position they occupied before the employer changes the vacation leave approval policies. However, the employer's methodology for ascertaining the lost overtime work opportunities for bargaining unit employees fails to identify the individual employees' losses suffered by bargaining unit employees and instead examined overtime opportunities for bargaining unit employees, as a whole, to conclude it complied with the remedial order. The employer's methodology fails to comply with the remedial issued by the Commission and the employer must ascertain each individual instance where an employee lost an overtime opportunity based upon the employer's unfair labor practice.

Application of Standard – Investigatory Files

The remedial order requires the employer to delete IIU 2015-288, the internal investigation into Marquel Allen's conduct on November 16, 2015, and remove any and all references to the April 27, 2016, written reprimand from all personnel files or other employment records concerning Allen. The employer decision to remove all references concerning the discipline from Allen's personnel file complies with the Commission's remedial order. The employer failure to "delete" IIU 2015-288 technical fails to comply with the Commission's remedial order.[1]

Records concerning Allen's employment are kept is multiple locations. In addition to Allen's paper personnel file, the employer also relies upon an electronic database (IAPro) for recordkeeping. Records stored within the system include, but are not limited to, documentation of complaints, classifications, investigations, commander reviews, findings, appeal process results if any, commendations, uses of force, driving review boards, critical incident review boards, and administrative review team investigations (critical incidents). Other branches of King County government such as the County Council, and by the County Auditor and Office of Law Enforcement Oversight rely upon the IAPro database to gather statistical information on an annual and sometimes monthly basis. The employer points out that its ordinances and policies require it to retain records to increase the level of public trust and transparency within the Sheriff's office.

To comply with the Commission's order, the employer removed the reprimand from both the IAPro file as well as Allen's paper personnel file. The employer also added the Commission's decision to the IAPro file and marked that file as "exonerated." The employer has not deleted IIU 2015-288 file as required by the remedial order.

To support its argument for retaining the IIU 2015-288 file in the IAPro database, the employer asserts that it is required to retain public records by county adopted ordinances and therefore it

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[1] During the compliance proceedings, the employer raised concerns about deleting any reference to Allen's discipline from litigation files. The Commission's remedial order does not speak to references about the discipline in litigation files and the protections from disclosure that are afforded to litigation files differ from other routinely kept documents or files.

cannot simply delete the file as directed by the Commission's order. The employer also points out that the Washington State Public Records Act, chapter 42.56 RCW, does not specifically allow it to destroy an investigatory file such as IIU 2015-288 but does require the county to adopt a records retention policy. The employer claims that it is unaware of any other instances where an entire investigatory file was deleted following the overturing of an employee's discipline. Finally, the employer asserts that the order to destroy the investigatory file is not routine and the employer is unaware of any instance where the Commission has ordered the destruction of an entire investigatory file.

The union asserts the Commission's order is unambiguous. The union points out that the word "delete" is not nuanced and has a simple meaning: to remove, erase, or expunge. The union also points out that the employer has provided no legal basis for refusing to delete IIU 2015-288 and points out that nothing in chapter 42.56 RCW precludes this agency from directing the employer to destroy its investigatory file as a remedial order under chapter 41.56 RCW.[2]

The remedial order unambiguously required the employer to delete IIU 2015-288, the internal investigation into Marquel Allen's conduct on November 16, 2015. Until the employer actually deletes IIU 2015-288, it is not in compliance with the Commission's order.

ORDER

1. To comply with the remedial order previously issued in this matter, and to avoid authorization of enforcement proceedings under RCW 41.56.160, King County must:

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[2] In its brief, the union cites to RCW 41.56.905 as standing for the proposition that the provisions of chapter 41.56 RCW prevail over the provisions chapter 42.56 RCW and therefore the Commission's remedial order supersedes the provisions of the public records act. RCW.41.56.905 states: "The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. . . . [I]f any provision of this chapter conflicts with any other statute, ordinance, rule, or regulation of any public employer, the provisions of this chapter shall control." The Washington State Public Records Act contains a nearly identical provision. RCW 42.56.030. This Commission's jurisdiction is limited to decided cases under chapter 41.56 RCW and the state's other collective bargaining statutes and the Commission has no authority to decide the operation of these statutes. That authority lies with the courts.

a. Ascertain the employees who would have worked overtime but for the employer's unlawful unilateral change and make those employees whole for the loss of overtime work opportunities by payment of overtime wages and benefits.

b. Delete IIU 2015-288, the internal investigation into Marquel Allen's conduct on November 16, 2015, and remove any and all references to the April 27, 2016, written reprimand from all personnel files or other employment records concerning Allen.

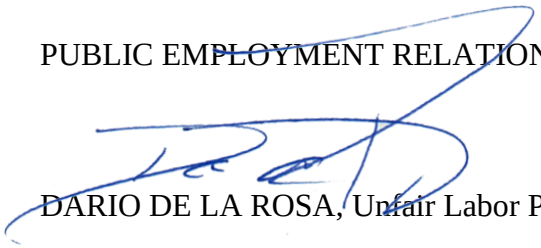
2. To avoid an authorization of enforcement proceedings under RCW 41.56.160, King County must:

a. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order.

b. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order.

ISSUED at Olympia, Washington, this 17th day of October, 2024.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DARIO DE LA ROSA, Unfair Labor Practice Administrator

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 10/17/2024

DECISION 12582-E - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 127743-U-15

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