STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, UFCW LOCAL 365,	)	
Complainant,	)	CASE 17397-U-03-4511
	)	DECISION 8117-B - PSRA
vs.	)	
	)	CASE 17629-U-03-4564
COMMUNITY COLLEGE DISTRICT 13 (LOWER COLUMBIA COLLEGE),	)	DECISION 8637-A - PSRA
Respondent.	)	
COMMUNITY COLLEGE DISTRICT 13 (LOWER COLUMBIA COLLEGE),	)	
Employer.	)	
WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, UFCW LOCAL 365,	)	CASE 17419-U-03-4515
	)	DECISION 8118-B - PSRA
Complainant,	)	CASE 17628-U-03-4563
	)	DECISION 8638-A - PSRA
vs.	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES,	)	DECISION OF COMMISSION
Respondent.	)	

Mark S. Lyon, General Counsel, for the Washington Public Employees Association.

Attorney General Christine O. Gregoire, by *Michael P. Sellars*, Senior Assistant Attorney General, for the employer.

Parr and Younglove, by *Edward Younglove*, Attorney at Law, for the Washington Federation of State Employees.

This case comes before the Commission on a timely appeal filed by the Washington Federation of State Employees (WFSE) and a timely

cross-appeal filed by the Washington Public Employees Association, UFCW Local 365 (WPEA), each seeking to overturn portions of the findings of fact, conclusions of law, and order issued by Examiner Starr H. Knutson.[1] Community College District 13 (employer) opposes the WPEA's cross-appeal, but does not appeal the Examiner's ruling that it violated RCW 41.56.140(1).[2]

We affirm the Examiner's ruling that the WFSE committed unfair labor practices when it interfered with the WPEA's rights as the incumbent exclusive representative of the employees, but modify the Examiner's remedial order concerning the authorization cards signed by employees in support of the WFSE. We affirm the Examiner's ruling that the WPEA failed to sustain its burden of proof as to other allegations against the WFSE and the employer which the WPEA reasserts on appeal.

BACKGROUND

The employer is a state institution of higher education. The WPEA has represented classified employees of the employer for at least 30 years. The bargaining unit traditionally included a mix of supervisory and non-supervisory employees. The employer and WPEA were parties to a collective bargaining agreement that expired June 13, 2003. WFSE has not represented any employees of this employer.

Some time in late 2002, the bargaining unit employees who held office as WPEA local chapter officers decided that the WPEA was not

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[1] *Community College District 13*, Decision 8117-A (PECB, 2004).

[2] The employer tendered compliance with the portions of the Examiner's remedial order that were directed to it. Acceptance of that tender of compliance has been deferred pending the outcome of the WPEA appeal.

adequately serving their needs, and they began investigating other labor organizations that could provide representation. Those employees concluded that the WFSE would best serve their interests, and they contacted WFSE about petitioning this Commission to have the WFSE certified as their exclusive bargaining representative. Throughout late 2002 and early 2003, while still serving in their official elected capacities within the WPEA and maintaining WPEA membership, those employees actively solicited showing of interest cards from other employees within the bargaining unit. Without disclosing their intentions, those WFSE sympathizers also used their apparent authority as WPEA local chapter officers to both: (1) call a regular meeting of the WPEA chapter for March 13, 2003; and (2) arrange for two WFSE staff members to attend that meeting.

On March 11, 2003, all four local WPEA chapter officers who had become WFSE sympathizers submitted paperwork to the employer to cancel their payroll deduction of union dues favoring the WPEA. News of that action by the local WPEA chapter officers was not widely disseminated.

At the regular WPEA chapter meeting on March 13, the WPEA chapter officers announced they had resigned their WPEA positions. They then introduced two WFSE representatives who were invited by the now former WPEA chapter officers to answer questions.

On April 3, 2003, the WPEA filed unfair labor practice complaints, naming the employer and WFSE as respondents. (Case 17397-U-03-4511 and Case 17419-U-03-4515.) A deficiency notice was issued on April 10, 2003. The WPEA filed an amendment on April 16, alleging the employer interfered with employee rights in violation of RCW 41.56.140(1) and (2), by permitting WFSE supporters use of the employer's time, facilities and e-mail system for purposes of organizing in support of a change of exclusive bargaining represen-

tative, and that the WFSE interfered with the WPEA's rights as the exclusive bargaining representative and induced the employer to commit unfair labor practices in violation of RCW 41.56.150(1) and (2). The WPEA also alleged that the employer discriminated against bargaining unit employee Carol Jordan, in violation of RCW 41.56.140(1), when it disciplined her for requesting a meeting through her union representative.[3] A partial dismissal and order for further proceedings was issued on June 19, 2003.[4]

On June 25, 2003, the WPEA filed two additional complaints against the WFSE and the employer. (Case 17628-U-03-4563 and Case 17629-U-03-4564.) The WPEA alleged the WFSE interfered with employee rights and induced the employer to commit an unfair labor practice when a WFSE organizer attended and distributed WFSE information at an employer-sponsored Department of Personnel information session on the employer's premises, and through surveillance by Sharry Hilton (who was described as a WFSE supporter) and Jim Woodruff (who was described as a supervisor) attending a WPEA meeting at a non-work location. The WPEA alleged the employer committed the same interference violations as alleged against the WFSE, and that the employer interfered with the rights of bargaining unit employee Ina Rae Leonard, when it increased its scrutiny of her leave and conducted an unusual disciplinary meeting.

The four cases were consolidated for processing. In her decision issued on June 30, 2004, the Examiner ruled that the WFSE interfered with employee rights when its supporters campaigned in a

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[3] The Commission obtained jurisdiction over these cases by operation of RCW 41.06.340(2), as amended by 2002 Laws of Washington, ch. 354 sec. 232(2). Thus, the unfair labor practice provisions contained within Chapter 41.56 RCW are applicable here.

[4] *Community College District 13*, Decision 8117 (PSRA, 2003).

manner that caused bargaining unit members to feel coerced into supporting the WFSE, and that the WFSE interfered with WPEA's rights when it co-opted the WPEA chapter meeting. The Examiner ruled that the employer interfered with employee rights when it scrutinized Leonard's leave use and conducted an unusual disciplinary meeting. The Examiner dismissed all other allegations.

DISCUSSION

Standard of Review

This Commission does not conduct a de novo review of examiner decisions in unfair labor practice proceedings under Chapter 391-45 WAC. Rather, we review the findings of fact to determine whether they are supported by substantial evidence and, if so, whether those findings of fact support the conclusions of law and order. *Cowlitz County*, Decision 7007-A (PECB, 2000). Substantial evidence exists if the record supports a finding of any competent, relevant and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings. *Ballinger v. Department of Social and Health Services*, 104 Wn.2d 323 (1985).

WAC 391-45-350(3) requires that a notice of appeal or cross-appeal shall identify, in separate numbered paragraphs, the specific rulings, findings of fact, conclusions of law, or orders claimed to be in error. Unchallenged findings of fact are considered as a verity by the Commission on appeal. *Brinnon School District*, Decision 7210-A (PECB, 2001).

The WFSE'S Appeal

The WFSE asserts that the Examiner incorrectly found that it violated RCW 41.56.150(1) and (2). Additionally, the WFSE objects

to the portion of the Examiner's remedial order that compels it to destroy the showing of interest cards.

WFSE Interfered with Rights of Exclusive Bargaining Representative

RCW 41.56.150(1) makes it an unfair labor practice for a bargaining representative to interfere with, restrain, or coerce public employees in the exercise of the rights guaranteed within Chapter 41.56 RCW. Included among those are the rights of employees to: (1) organize and designate representatives of their choosing; (2) deal with their employer through the labor organization they have selected to represent them; and (3) change or decertify their exclusive bargaining representative. Importantly, any organizational activity in pursuit of that third set of rights must not impede the ability of the incumbent union to conduct business as the exclusive bargaining representative implementing the second set of rights.[5] The employer is not required to recognize the petitioning union for any purpose. Once a valid representation petition involving two or more unions is filed with this agency, the employer may not align itself with one union over another and must remain strictly neutral. *See Whatcom County*, Decision 8245-A (PECB, 2004).

The WFSE contends that the evidence fails to support either a finding that it interfered with WPEA's rights guaranteed under Chapter 41.56 RCW when it attempted to organize the employees, or that WFSE supporters "co-opted" the WPEA chapter meeting for purposes of campaigning. We disagree.

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[5] While WAC 391-25-140 requires an employer to shut down bargaining on a successor contract, an employer is expected to recognize and deal with the incumbent exclusive bargaining representative for purposes of contract administration until and unless a certification terminates the bargaining relationship.

WFSE Sympathizers Were Special Agents of WFSE

The WFSE argues that the actions of the WFSE sympathizers within the bargaining unit cannot be attributed upon the WFSE. Because the actions of bargaining unit employees who became WFSE sympathizers form part of the basis of the WPEA's allegations against WFSE in these cases, it must first be determined whether the WFSE is responsible for the conduct of its sympathizers. RCW 41.56.150(1) does not specifically define the term "agent" or specify what actions of an individual employee can be attributed to a union the employee supports, but the statute we administer does not exist in a vacuum. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) similarly provides that "it shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in Section 7." RCW 41.56.150(1) paraphrases Section 8(b)(1)(A) of the NLRA, and both are substantially similar in function. To the extent that Chapter 41.56 RCW and the NLRA are similar, this Commission may look to federal decisions and analysis for guidance. *Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn. App. 809, 815 (2000).

The National Labor Relations Board (NLRB) applies the fundamental rules of agency for the purpose of deciding whether a person was acting, in a particular instance, as an agent of a union. *See Sunset Line & Twine Co.*, 79 NLRA 1487 (1948). The common law principals of agency will therefore dictate whether the conduct of WFSE supporters can properly be imputed upon WFSE. An agent's authority to bind his principal may be of two types, either actual or apparent. *Deers, Inc. v. DeRuyter*, 9 Wn. App. 240, 242 (1973)(citing 3 Am.Jur.2d *Agency* sec. 71 (1962)). With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person or party. *Smith v. Hansen, Hansen, Johnson, Inc.*, 63 Wn. App. 355,

363 (1991) *review denied*, 118 Wn.2d 1023 (1992). Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. Washington courts have held that the "authority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services." *Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 351 (1966).

In regard to employees soliciting showing of interest cards on behalf of a union, the NLRB holds that such employees are special agents of the union. In *Davlan Engineering*, 283 NLRB 803 (1987), the NLRB held that a union's action of giving authorization cards to sympathizers with the understanding that they will solicit other employees to sign them made the union responsible for the actions of the employees soliciting on its behalf. We agree with the *Davlan* logic, and find that the WFSE sympathizers involved in these cases were special agents of the WFSE for the purposes of the organizing effort at Lower Columbia College. There is substantial evidence that WFSE organizers gave WFSE authorization cards to the bargaining unit employees, instructed those employees on how and when to gather signatures, and collected the signed cards from employees supporting the WFSE.

It is clear that the four employees who spearheaded the effort to change representation from the WPEA to WFSE were then serving as the WPEA local chapter officers. Sandi Brockway served as president, Sharry Hilton served as vice-president, and Diane Plomedahl and Joyce Niemi served on the local chapter executive board. While there is no doubt that those four employees had a statutory right to seek a change of their exclusive bargaining representative, they stepped over the line when they continued to

hold office in (and even convene a meeting of) the WPEA chapter for the purpose of advancing their efforts on behalf of the WFSE:

- Even when all four of those employees submitted notices on March 11 to cancel their dues checkoff favoring the WPEA, the evidence does not support a conclusion that other bargaining unit employees were made aware of their action in that regard.

- It is troubling that the WFSE sympathizers converted the WPEA's email lists to their organizing efforts on behalf of the WFSE. That list belonged to the WPEA local chapter, not to the individual employees.

- It is even more troubling that one or more of them disabled access to the WPEA's website, which would have directly impeded the ability of the WPEA to perform its ongoing functions as the exclusive bargaining representative. Even though Hilton had created that website, it was established for the benefit of the WPEA local chapter. Upon resignation of her office in the WPEA, she should have turned control of the website over to the WPEA.[6]

- The WFSE sympathizers then convened the meeting of the WPEA local chapter on March 13 before announcing their intentions. The collective bargaining agreement between WPEA and the employer clearly entitled employees to attend "WPEA Chapter activities" and that right was specifically granted to the WPEA as the incumbent exclusive bargaining representative. Once Brockway, Hilton, Plomedahl, and Niemi canceled their dues checkoff, they lost their positions as WPEA officers, lost the ability to moderate or control the agenda of a WPEA

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[6] We note that Hilton merely disabled access to the website, and did not delete the information. There is no evidence that any WPEA supporters made timely efforts to restore the website.

> meeting, and lacked the authority to invite anyone outside of WPEA to attend or speak at a WPEA chapter meeting. Bargaining unit employees who attended that WPEA meeting were responding to notices published under color of authority as WPEA officials, and were entitled to expect that they were attending to do the business of the WPEA as their exclusive bargaining representative.

Employees who become officers of a bargaining unit must publicly resign their positions before changing their loyalties so other unit employees cannot question the motives of those employees seeking a change in representation. Here, any actions by which the four WFSE sympathizers purported to continue acting as WPEA leaders on and after March 11 created a conflict of interest between those "special agents" of the WFSE and the employees still represented by the WPEA.[7] The Examiner correctly found that the WFSE sympathizers "co-opted" the WPEA meeting and interfered with its role as exclusive bargaining representative.

WFSE Agents Interfered With WPEA

Even if the WFSE were not being held responsible for the actions of its special agents from within the bargaining unit, it was and is clearly responsible for the actions of its own paid staff members. The Examiner held that WFSE interfered with the WPEA's rights as the exclusive bargaining representative when the WFSE organizers attended the WPEA local chapter meeting on March 13, 2003. They did not have the right to interfere with the WPEA's right as the exclusive representative of the employee, or to interfere with the rights of employees who still supported the WPEA. At a minimum, logic dictates that the WPEA had a right to select replacement

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[7] Some of the Examiner's findings of fact on these allegations are not challenged on appeal, and are taken as verity.

officers immediately after the four WFSE sympathizers resigned, and to control the rest of the agenda for the meeting of its local chapter held on March 13, 2003. The presence of the WFSE organizers at the WPEA local chapter meeting can only have been intended to take over the meeting. Through the actions of its own organizers, the WFSE interfered with the rights of the WPEA and the employees it represents as their exclusive bargaining representative. We agree with the Examiner that the evidence supports finding a violation of RCW 41.56.150(1).

Coercion Charges Not Properly Pleaded or Factually Supported

WFSE argues that none of the WPEA's complaints sufficiently put the WFSE on notice of any allegations that WFSE supporters coerced employees into signing showing of interest cards. The WFSE also argues that the Examiner's findings of fact do not support the conclusion of law that WFSE coerced employees into signing showing of interest cards. We agree, and we modify those portions of the decision.

In unfair labor practice proceedings, the ultimate burdens of pleading, prosecution, and proof all lie with the party that files the complaint. *City of Seattle*, Decision 8313-B (PECB, 2004). As quasi-judicial decision makers, the Commission and its staff maintain an impartial posture in unfair labor practice proceedings:

- WAC 391-45-050(2) specifically requires that an unfair labor practice complaint must contain, in separate numbered paragraphs, a clear and concise statement of the facts constituting the alleged unfair labor practice, including the time, place, date and participants in occurrence. *See also Bethel School District*, Decision 6848-A (PECB, 2000).

- The agency does not "investigate" charges or draft complaints in the manner familiar to those who practice before the NLRB.

The complainant must file and serve a complaint that is sufficiently detailed to be the basis of a formal adjudicative proceeding under the Administrative Procedure Act, Chapter 34.05 RCW. The facts set forth in the complaint also must be sufficient to make intelligible findings of fact in a "default" situation. *See* WAC 391-45-110; *Apostolis v. City of Seattle*, 101 Wn. App. 300 (2000).

- An examiner must then decide the case within the issues framed by the preliminary ruling issued under WAC 391-45-110.

Nowhere in any of the complaints filed by the WPEA is there specific mention of alleged "coercion" by WFSE supporters. The only allegation that potentially relates to the solicitation of cards was in the WPEA's April, 3, 2003, complaint, where it simply alleged the WFSE supporters "solicited" and "had signed" WFSE authorization cards.

Even if the complaints had contained more specific allegations about employees feeling coerced into signing authorization cards, the evidence presented by the WPEA does not support a finding that the WFSE organizers or sympathizers threatened employees with reprisal or force to obtain their signatures on authorization cards. The NLRB has taken the position that Congress did not intend for Section 8(b)(1)(A) of the NLRA (prohibiting union interference with employee rights) to be given the broad application accorded to Section 8(a)(1) (prohibiting employer interference with employee rights). *See NLRB v. Drivers Local 639*, 362 U.S. 274 (1960). Section 8(b)(1)(A) of the NLRA has been limited to proceedings against union tactics involving violence, intimidation and reprisals. RCW 41.56.150(1) paraphrases Section (b)(1)(A) of the NLRA and, with the approval of the Washington Courts, we look to federal precedents for guidance in interpreting similar state

laws. *See Skagit Valley Hospital v. PERC*, 55 Wn. App. 348 (1989). We therefore conclude that union interference and coercion findings under RCW 41.56.150(1) should also be limited to union tactics involving violence, intimidation, and reprisals.

The WPEA offered some testimony that some employees felt "pressured" into signing authorization cards favoring the WFSE. For example, Ina Rae Leonard testified that Brockway (who was her supervisor) approached her to sign a WFSE authorization card, and that Leonard did so, but that falls far short of intimidation. Similarly, Nancy Almstrum testified that Brockway "hurriedly chased after" to get Almstrum and her sister to sign WFSE authorization cards, and that Brockway emailed asking if she had signed the authorization card, but there was no mention of threats or coercion. Aggressive solicitation of authorization cards is not coercion for purposes of finding a violation of RCW 41.56.150(1), unless it is accompanied by some other, illegal, action.[8] *Lewis County*, Decision 4691-A (PECB, 1994). The conclusion of law that WFSE "coerced" employees must therefore be reversed.

Destruction Of Authorization Cards Was Excessive Remedy

RCW 41.56.160 empowers this Commission to issue a remedial order when an unfair labor practice violation is found. The typical remedy is to order the offending party to cease and desist from the illegal activity and, if necessary, return the aggrieved party to the conditions that existed before the unfair labor practice violation occurred. This Commission and the Washington courts have

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[8] We are mindful that supervisors wield authority in the workplace. In cases such as this where the bargaining unit consists of supervisory and rank-and-file employees, any organizational activity conducted by supervisors must be closely scrutinized for coercive behavior or conduct against the rank-and-file employees.

upheld extraordinary remedies in special cases where frivolous defenses are advanced, or where a respondent has engaged in a pattern of conduct showing patent disregard of the statute. *See Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982), *review denied*, 97 Wn.2d 1034 (1982); *Municipality of Metropolitan Seattle*, Decision 2845-A (PECB, 1988), *aff'd, Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992).

An examiner may exercise some creativity when crafting a remedial order, but needs to fit the remedy to the violation and needs to use extraordinary remedies sparingly. When asked to review an extraordinary remedy that has been properly explained in an examiner's decision, we generally will not disturb a remedial order that is consistent with the purposes of Chapter 41.56 RCW. *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621, 633.

In this case, the Examiner ordered the WFSE to withdraw its representation petition and to destroy all of the showing of interest cards it had collected in late 2002 and early 2003. The basis for that order was not detailed, and we can only infer that it was intended to restore the status quo in light of BOTH: (1) the Examiner's conclusion that the WFSE coerced some of the employees into signing authorization cards; and (2) the Examiner's conclusion that the WFSE co-opted the WPEA local chapter's list, resources and meeting. Because we are reversing the first of those presumed bases for the remedial order, we must re-evaluate what is needed to return the parties to the status quo that existed before the second of those presumed bases occurred.

Chapter 41.56 RCW grants public employees the right to select a bargaining representative of their choosing, and the evidence in this case suggests that a large number of bargaining unit employees signed showing of interest cards. In light of our reversal of the finding that the WFSE coerced bargaining unit members into signing authorization cards, we are unable to support the Examiner's apparent assumption that ALL of the WFSE authorization cards were tainted. At the same time, we accept as likely that some, but not all, of those authorization cards may have been tainted by the "co-opting" misconduct. There is evidence that some of the employees who signed cards for the WFSE may have later had second thoughts. In order to enable individual employees to withdraw their authorization cards if they choose to do so,[9] we order that the processing of the related representation petition (Case 17319-E-03-2821) be suspended for an additional period while the WFSE posts notices acknowledging its violation of Chapter 41.56 RCW and giving bargaining unit employees a period of 30 days in which to withdraw their authorization cards. Employees wishing to withdraw their support of the WFSE shall notify the agency in writing pursuant to WAC 391-25-410(2). Apart from exclusion of the four former WPEA officials from its ongoing organizing effort (in order to avoid any suggestion of ongoing misconduct on their part), the WFSE will not be prevented from soliciting authorization cards from other bargaining unit employees. Once compliance with this remedial order is tendered and accepted, the WFSE will be entitled to proceed with its representation petition if it still has a sufficient showing of interest.

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[9] WAC 391-25-110(2) would ordinarily preclude an individual employee from withdrawing their authorization card, and would preclude one union from attempting to undermine the showing of interest submitted by another union.

The WPEA'S Cross-Appeal

The WPEA's cross-appeal asserts that the Examiner incorrectly dismissed several of its interference and unlawful assistance claims against the employer and WFSE, but the WPEA did not appeal the Examiner's dismissal of the surveillance allegations or the allegation concerning the Department of Personnel meeting. The employer filed a brief opposing WPEA's cross-appeal.

Supervisor's Participation in Campaign Not Unlawful

WPEA argues that participation by two supervisors in the representation petition "taints the election" and makes it invalid.[10] WPEA would have us adopt an NLRA precedent, by which an organizing effort will be invalidated if it is demonstrated that conduct by a supervisor was reasonably perceived as tending to impair the freedom of choice by the non-supervisory employees eligible to vote in an election, and that the party challenging the election need not introduce proof of actual coercion. *See Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 874 (6th Cir. 1997). However, the test proposed by the WPEA grew out of a statutory structure substantially different from the statute that governs collective bargaining for state civil service employees: Where all supervisors are entirely excluded from the coverage of the NLRA, supervisors have bargaining rights under the Personnel System Reform Act of 2002 (PSRA), Chapter 41.80 RCW. While we generally agree that supervisor misconduct could have a chilling effect upon employee freedom of choice, we conclude that the "per se" approach supported by the WPEA is inapposite under state law.

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[10] WPEA devoted a considerable portion of its appeal brief to arguing that the WFSE violated WAC 391-25-070(5)(c) by petitioning for a bargaining unit that included both supervisory and non-supervisory employees. That issue was not properly raised in any of the complaints or preliminary rulings, and will not be considered here.

Long before the enactment of the PSRA, the Supreme Court of the State of Washington ruled that supervisors are employees within the meaning and coverage of Chapter 41.56 RCW. *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977). Supervisors under Chapter 41.56 RCW are normally placed in separate bargaining units in order to avoid the potential for conflicts of interest that would otherwise exist within mixed bargaining units. *City of Richland*, Decision 279-A (PECB, 1979), *aff'd* 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981).

Immediately prior to the enactment of the PSRA, the determination of bargaining units for state civil service employees was delegated to the Washington Personnel Resources Board (WPRB). Prior to a consolidation of two civil service systems that occurred in 1993, the unit determination function had been delegated to the State Personnel Board (SPB) for general government agencies, and to the Higher Education Personnel Board (HEPB) for institutions of higher education. In varying degrees, the WPRB and HEPB kept supervisors separate from rank-and-file employees in the institutions of higher education. When the Legislature adopted the PSRA, it transferred the unit determination function to this Commission, effective June 13, 2002,[11] and it clearly required a separation of supervisors from rank-and-file bargaining units.

The bargaining unit at Lower Columbia College was created by the HEPB on October 12, 1970. It was modified on June 22, 1979, to exclude a "personnel assistant" class based on confidential status. In 1993, the HEPB modified the unit description to use current classification titles, but it continued to include all classified

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[11] RCW 41.06.340 and RCW 41.80.070.

employees of the employer.[12] Thus, the WPEA knew or should have known that, as of June 13, 2002, the bargaining unit it had historically represented at Lower Columbia College was inappropriate under the PSRA.

Rather than promptly taking steps to have that bargaining unit "divided" under a special rule adopted by this Commission,[13] the WPEA waited for more than nine months, until a party outside of the historical bargaining relationship (*i.e.*, the WFSE) filed a representation petition seeking a change of representation for the entire unit the WPEA was claiming to represent. Only then did the WPEA take steps to have the historical unit divided.[14] We thus find it difficult to overlook the fact that the WPEA perpetuated the problem by failing to properly divide the mixed unit and the mixed local chapter leadership. We also reject the WPEA's claim that the WFSE did something wrong with regard to petitioning for the historical bargaining unit.

In the absence of proof of unlawful activity prohibited by RCW 41.56.150(1), participation by the supervisors in the organizing effort was not prohibited in the circumstances of this case. The WPEA presented no evidence that any supervisor used intimidation or even threats of reprisal or force as part of their organizing efforts on behalf of the WFSE. The only actions that potentially could rise to a violation of RCW 41.56.150(1) were the disciplinary

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[12] This formal order, identified as HEPB-BUM #150 (April 5, 1993), was introduced into evidence in these cases.

[13] WAC 391-35-026 created a streamlined process to separate mixed units into separate units of supervisors and non-supervisory employees.

[14] *Community College District 13*, Decision 8414 (PSRA, 2004).

actions that Brockway took against Leonard, but those actions were outside the limited "special agent" relationship between the WFSE sympathizers and WFSE. The Examiner properly attributed Brockway's conduct against Leonard to the employer, and found a violation accordingly.[15]

The Employer Did Not Render Unlawful Support To WFSE

The WPEA argues that the Examiner erred when she dismissed allegations that the employer unlawfully assisted the WFSE organizing effort, by tacitly allowing WFSE supporters to use the employer's email facilities. We agree with the Examiner that the evidence does not support a finding that the employer assisted WFSE's organization effort, and affirm the Examiner's dismissal of these claims against the employer.

An "assistance" violation requires proof of employer intent to assist the beneficiary union. *King County*, Decision 2553-A (PECB, 1987). If employees seek a change of their representation, an employer that permits the incumbent union to use its facilities for communication with employees during the representation election must then grant any rival union the same benefit of access granted to the incumbent union. This requirement naturally stems from the employer's obligation to remain neutral, and to not render aid to any one of two or more competing unions. *See Renton School District*, Decision 1501-A (PECB, 1982). Exclusive use of employer facilities cannot be permitted by one union alone during the pendency of a representation election, and contractual clauses granting an incumbent union exclusive access to the employer's facilities may not be enforced while a question concerning

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[15] The employer did not challenge this finding.

representation exists. *Whatcom County*, Decision 8245-A (PECB, 2004).

Here, the WPEA has shown that WFSE sympathizers used the employer's facilities to communicate with bargaining unit members regarding the WFSE representation petition, but that evidence does not support a conclusion that the employer intended to assist the WFSE. Even by an "interference" standard, there is no evidence that any of those email messages could reasonably have been interpreted by bargaining unit employees as indicating employer support for either of the competing unions.

The WPEA cites a letter sent by Brockway on March 18, 2003, containing an attachment on the employer's letterhead, as an example of the employer's tacit support for the WFSE. The record demonstrates, however, that Brockway did not know the letter would appear on the employer's letterhead, and that the employer did not direct Brockway to publish the letter on the employer's letterhead. The Examiner properly dismissed this claim.

All of the other examples of the use of employer facilities by WFSE sympathizers occurred after the WFSE filed its representation petition, and there was no evidence that the employer denied the WPEA similar use of the employer's facilities in responding to that petition. Those allegations of unlawful employer assistance were thus also properly dismissed.

WPEA's Discrimination Claim Against Employer Properly Dismissed

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. *Educational Service*

District 114, Decision 4361-A (PECB, 1994). A discrimination violation can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so;

2. The employee is discriminatorily deprived of some ascertainable right, benefit, or status; and

3. There is a causal connection between the exercise of the legal right and the discriminatory action.

Where a complaint establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. *City of Tacoma*, Decision 8031-A (PECB, 2004). The employer does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The burden remains on the complainant to prove, by a preponderance of the evidence, that the action was taken in retaliation for an employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that the union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

WPEA argues that the Examiner erred by not finding the employer discriminated against Carol Jordan, and that the Examiner misunderstood the evidence presented. WPEA asserts that the evidence demonstrates that the employer's reprimand of Jordan was in reprisal for her requesting a meeting (through her WPEA representative) to address concerns raised at an earlier employer/employee meeting. Although we agree with WPEA that the alleged discrimination related to Jordan's request for a meeting (and not for her

participation as a union official), we nevertheless find that the discrimination allegation was properly dismissed.

A prima facie case of discrimination requires proof of a causal connection between protected union activity and the disputed employer action. In this case, the union failed to demonstrate the existence of such a causal connection. The union did not establish that the employer bore any sentiment against the collective bargaining process. Nothing in the record demonstrates any union animus on the part of the employer against the union. The letter of reprimand issued against Jordan was for her behavior, not for her seeking union representation. The Examiner properly held that no causal connection between Jordan's discipline and union animus on the part of the employer existed.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact issued by Examiner Starr Knutson are adopted by the Commission except paragraph 11, which is amended as follows:

11. On March 11, 2003, several employees signed forms to cancel their payroll deduction favoring the WPEA officers, including Brockway, Hilton, and Executive Board Members Diane Plomedahl and Joyce Niemi.

The Conclusions of Law issued by Examiner Starr H. Knutson are adopted by the Commission except for paragraph 3, which is amended to read as follows:

3. By the actions of its supporters in conflict of interest with their roles as former officers of the incumbent exclusive bargaining representative following cancellation of their dues-checkoff, in co-opting the local WPEA chapter meeting on March 13, 2003, the Washington Federation of State Employees interfered with the rights of employees in the bargaining unit represented by the Washington Public Employees Association, and committed unfair labor practices in violation of RCW 41.56.150(1).

The Order issued by Examiner Starr H. Knutson is adopted by the Commission except paragraph 2, which is amended to read as follows:

2. The Washington Federation of State Employees, its officers and agents, shall immediately:

A. CEASE AND DESIST from appearing at meetings of any other organization involved with collectively representing employees at Lower Columbia College.

B. CEASE AND DESIST from permitting Sandi Brockway, Sharry Hilton, Diane Plomedahl, and Joyce Niemi from assisting in ongoing organizational efforts of the Washington State Federation of State Employees at Lower Columbia Community College.

C. CEASE AND DESIST from interfering with, restraining or coercing employees in the exercise of their collective bargaining rights secured by the laws of the state of Washington.

D. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of RCW 41.56.150:

(I) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix B." Such notices shall be duly signed by an authorized representative of the WFSE, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

(ii) Read the notice attached to this order aloud at the next regular meeting of the Executive Board of the Washington Federation of State Employees and permanently append a copy of the notice to any official or unofficial minutes of the meeting where the notice is read as required by this paragraph.

(iii) Read the notice attached to this order aloud at the next regular meetings of the field and organizing staff of the Washington Federation of State Employees, and permanently append a copy of the notice to any minutes of the meeting where the notice is read as required by this paragraph.

(iv) Notify the WPEA, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the WPEA with a signed copy of the notice attached to this order.

(v) Notify the Compliance Officer 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, and at the same time provide the Compliance Officer with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, the 13th day of April, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner

APPENDIX B

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL read this notice into the record at the next meeting of the Executive Board of the Washington Federation of State Employees, and will append a copy thereof to any official or unofficial minutes of that meeting.

WE WILL read this notice into the record at the next meeting of the field and organizing staff of the Washington Federation of State Employees, and will append a copy thereof to any official or unofficial minutes of that meeting.

Any bargaining unit employee wishing to retract any showing of interest card in favor of the Washington State Federation of State Employees may do so within 30 days of the posting of this notice by filing written notice of such intent with the Public Employment Relations Commission, 112 Henry Street NE, PO Box 40919, Olympia, Washington 98504-0919.

DATED: _____

WASHINGTON FEDERATION OF STATE EMPLOYEES

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 112 Henry Street NE, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300.