STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1384, Complainant, vs. KITSAP TRANSIT, Respondent.	CASE 21768-U-08-5554 DECISION 10657 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Rita C. DiIenno, President/Business Agent, for the union.

Summit Law Group, PLLC, by *Shannon E. Phillips*, Attorney at Law, for the employer.

On June 10, 2008, Amalgamated Transit Union, Local 1384 (union) filed an unfair labor practice complaint against Kitsap Transit (employer). The union alleged that the employer interfered with employee rights, refused to bargain, and engaged in discrimination by various actions involving two transit operators, George Hall and Joyce Peel.

The Commission appointed Jamie L. Siegel as examiner and I held a hearing on July 29 and 30, 2009. The parties filed post-hearing briefs, the last of which was received on October 12, 2009. In its brief, the union withdrew its discrimination and interference complaints relating to Peel's termination from employment and withdrew its request for make whole remedies for both Hall and Peel.

ISSUES

1. Did the employer interfere with employee rights or discriminate against George Hall in retaliation for his union activity in violation of RCW 41.56.140(1) when it terminated his employment for insubordination when he refused to sign releases for medical records?

2. Did the employer refuse to bargain changes to the status quo in violation of RCW 41.56.140(4) by:

   a. Not allowing George Hall and Joyce Peel to complete functional assessments after health care providers released them to return to work?

   b. Requiring, under threat of termination, George Hall to sign releases authorizing the employer's physician to obtain medical records and information from Hall's physicians and allowing the employer's physician to share medical information and records with the employer?

I dismiss the union's complaint in its entirety. The employer did not discriminate against Hall for engaging in union activity when it terminated his employment. Additionally, the union failed to establish that the employer refused to bargain in not allowing Hall and Peel to complete functional assessments. The collective bargaining agreement did not require the employer to administer a functional assessment under the facts presented in this case and the employer did not commit an unfair labor practice. Furthermore, with respect to requiring Hall to sign releases under threat of termination, the union failed to establish that a past practice existed relating to the sharing of medical records and information in the medical dispute process.

APPLICABLE LEGAL STANDARDS

Discrimination

An employer unlawfully discriminates when it takes action against an employee in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The union maintains the burden of proof in employer discrimination cases. To prove discrimination, the union must first set forth a prima facie case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, 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 a protected activity and the employer's action.

To prove an employer's motivation for an adverse employment action was discriminatory, the union must establish that the employer had knowledge of the employee's union activities. *Metropolitan Park District of Tacoma*, Decision 2272, *aff'd*, Decision 2272-A (PECB, 1986). Ordinarily, the union may use circumstantial evidence to establish its prima facie case because an employer does not typically announce a discriminatory motive for its actions. *Clark County*, Decision 9127-A (PECB, 2007).

Where the union establishes a prima facie case, it creates a rebuttable presumption of discrimination. In response to a union's prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the union to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County*, Decision 9127-A. The union meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Bargaining Obligation

Chapter 41.56 RCW requires a public employer to bargain with the exclusive bargaining representative of its employees. The duty to bargain extends to mandatory subjects of bargaining including wages, hours and working conditions. RCW 41.56.030(4). The Commission utilizes a balancing test under *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland),* 113 Wn.2d 197 (1989) to determine whether a particular proposal or topic is a mandatory subject. Unless a union clearly waives its right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. An employer must give a union sufficient notice of changes affecting mandatory subjects of bargaining and, upon request, bargain in good faith until reaching agreement or impasse.

When a union alleges that an employer made a unilateral change, it must establish that the dispute involves a mandatory subject of bargaining and that the employer's actions constituted an actual change to the status quo. *Kitsap County*, Decision 8292-B (PECB, 2007).

Past Practice

Parties to a collective bargaining agreement may maintain a well-established procedure relating to a mandatory subject of bargaining that they do not include in the bargaining agreement. *City of Pasco*, Decision 9181-A (PECB, 2008). Where provisions of a collective bargaining agreement are ambiguous or silent as to material issues, examiners may turn to past practice to construe provisions of the agreement. *Kitsap County*, Decision 8292-B. In such situations, the procedures relating to a mandatory subject of bargaining must be so well-understood and implemented by the parties that they constitute a past practice. *Whatcom County*, Decision 7288-A (PECB, 2002). To establish a past practice, a party must prove the following two basic elements: (1) a prior course of conduct; and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *Kitsap County*, Decision 8292-B.

ANALYSIS

The employer operates a public transit system. The union represents two bargaining units of employees within the transit system: Routed Service and ACCESS Service. The bargaining agreement provisions at issue in this case are identical for both bargaining units.

The collective bargaining agreement between the parties provides for a medical dispute process that covers situations involving employees who are either removed from duty or not permitted to return to work from leave, due to disabilities preventing the employees from performing their duties. Step one of the process provides that if the employer does not accept the employee's medical release authorizing the employee to perform the essential functions of the employee's position, the employer will, at its expense, refer the employee to a physician of the employer's choosing for a medical examination.

In 2006 the parties entered into a memorandum of understanding addressing return to work procedures for employees off work for more than 30 days due to medical reasons. The process

requires the returning employee to complete a functional assessment (FA). The process provides:

> When Kitsap Transit Human Resources receives a completed Return to Work form indicating that the operator has the ability to perform the essential functions of the job for a minimum of two hours per day, the Operations Department will schedule the FA as soon as possible.

George Hall

On September 27, 2007, George Hall, an ACCESS operator, submitted a Family Medical Leave Medical Certification form completed by Caroline Cogen, Hall's nurse practitioner, requesting three days of leave and intermittent medical leave for one year due to atrial fibrillation resulting in dizziness. These new medical issues, coupled with Hall's known diabetes and two reports of driving issues, caused the employer concern about Hall's ability to safely drive a bus.

The employer consulted with Dr. James Garrity, a physician the employer utilizes for fitness-for-duty issues. Garrity responded by letter, describing general information about the risks and concerns related to diabetes and atrial fibrillation. The employer placed Hall on paid leave as it began a process to determine whether Hall's conditions impacted his ability to safely perform his job as an ACCESS operator.

The employer sought additional information from Cogen. The employer sent Cogen the letter from Garrity, information on a recent minor accident Hall was involved in, information on the two reported concerns about Hall's driving, and several questions for Cogen to answer. Cogen responded but did not answer the employer's first two questions.[1] She answered the last two questions[2] stating: "I am not familiar with CDL [commercial driver license] regs. Evaluation by

---

1 These questions included: "In your opinion, does Mr. Hall's atrial fibrillation and dizziness create a substantial risk to himself and/or the public if he drives a public transit vehicle? Please explain." and "To the extent Mr. Hall is currently taking medication(s) for these conditions, do these medications create a safety risk to Mr. Hall and/or the public if he drives a public transit vehicle? Please explain."

2 These questions included: "Are you familiar with CDL requirements and, if so, do you believe that Mr. Hall meets those requirements in light of his atrial fibrillation and dizziness? If you do, please explain." and "Would you recommend that Mr. Hall avoid driving a public transit vehicle during any initial period of treatment? If so, for what period?"

his cardiologist states he does not pose a risk regarding his afib for driving. I agree to follow the requests of his cardiologist." After the employer followed up with Cogen, she answered the first two questions stating: "I agree with evaluation of cardiologist." The employer received a progress note from Hall's cardiologist with the following assessment:

> He seems to be clinically doing well. At this point he does not have any symptoms of atrial fibrillation. His pulse is irregular. I am not sure if this is PVCs or atrial fib at this time. He is anticoagulated appropriately. He wonders whether he is okay to go back to work.

The cardiologist noted "I think it is fine for him to go back to work driving commercially." To the employer's knowledge, the cardiologist had not received any information from the employer, including the information relating to Hall's recent minor accident or information on the two reported concerns about Hall's driving. The employer did not know to what extent the cardiologist understood CDL requirements.

As a result of the employer's concerns with its unanswered or inadequately answered questions from Hall's health care providers, the employer began step one of the medical dispute process, requiring Hall to be examined by Garrity, its selected physician. The employer required Hall to sign a release in advance of the appointment that allowed the employer to provide information to Garrity and that authorized the employer to contact Garrity's office as to the progress of rendering an opinion. Hall altered the release to note his concern about Garrity's bias[3] and to limit the information shared with the employer to "discuss progress only, not medical specifics."

Hall reported to Garrity's office as directed on October 30, 2007, but refused to undergo a fitness-for-duty examination. He signed a release provided by Garrity, but limited the information that his health care providers could share with Garrity to atrial fibrillation. Garrity reported the following to the employer by letter dated October 30, 2007:

> With the concerns posed for both atrial fibrillation and dizziness and his known medical history, I do feel it essential that the patient undergo a CDL exam to assure he meets the requirements performed by a physician familiar with professional driving requirements. Historically, he does have conditions that do pose a risk. A limited examination and review of materials provided by your

---

[3] Garrity was involved in a medical dispute process with Hall in 2005.

> office was performed. However, as indicated there is not enough information based on lack of records concerning atrial fibrillation and other known conditions and his unwillingness to undergo a CDL examination to make a determination on his fitness as a professional driver. Our office will request additional information from the patient's treating cardiologist and primary care provider and wait for an appropriate followup examination in order to assess his fitness for duty as a professional driver.

On November 9, 2007, the employer held a meeting with Hall and his union representatives. The employer clarified that it was invoking the medical dispute process and requiring Hall to attend a CDL examination with Garrity. The employer reviewed its expectations with Hall, including the expectation that he sign a medical release so that the employer's physician could review Hall's relevant medical records in conjunction with the examination to determine his fitness for duty. Hall signed a release at the meeting but subsequently revoked it. Near the end of the meeting, Hall informed the employer that he would need to delay the examination because he would be taking leave for cataract surgery.

As a result of Hall's cataract surgery and recovery period, the employer put the medical dispute process on hold. On November 26, 2007, while on leave, Hall and the union filed a grievance relating to the November 9 meeting. On January 4, 2008, Hall's eye doctor released him to return to work without restriction effective January 16, 2008. Upon receiving this release, the employer sought to continue the medical dispute process it had started in fall 2007 to ensure that Hall could safely perform his job duties. The union objected, arguing that Hall had an unrestricted release to return to work and that the employer was inappropriately "reaching back."

Because of Hall's concern about Garrity, in February 2008 the employer agreed to select a different physician to perform Hall's examination and secured the services of Dr. Alvin Thompson.

The employer held a meeting with Hall and his union representatives on March 20, 2008, to obtain signed releases. The employer advised Hall that he would be considered insubordinate if he did not participate in the examination with Thompson, including releasing records the physician considered relevant and releasing Thompson to share information with the employer. The employer presented Hall with four releases; he refused to sign them. Hall shared a prepared

statement at the March 20 meeting that detailed his concern with signing a release that provided the employer with access to his medical records.

The employer held a pre-termination meeting with Hall on March 26, 2008, and issued a termination letter on the grounds of insubordination for failing to comply with the directive to sign the medical releases.

The union filed a grievance on April 7, 2008, and an arbitration hearing was held on November 6 and 7, 2008.[4]

Joyce Peel

Joyce Peel worked for the employer as a routed operator when she suffered an on-the-job injury on December 4, 2006. The employer granted Peel two consecutive six-month periods of medical leave. Prior to the end of Peel's second six-month leave, the employer advised her of the steps she would need to take to return to work, and that if she was unable to return to work after being on leave for one year, her employment would be terminated.

Peel's physician, Alisa Blitz-Seibert, completed two forms on October 18, 2007. On the Physician Estimate of Physical Capacities form, Seibert marked that Peel was released to work effective November 11, 2007 but marked "never" next to the following: "squatting, kneeling, climb ladders, crawl." She also wrote "no kneeling or squating [sic] no ladders for life."

On the employer's Return to Work Release form dated October 18, 2007, Seibert marked "no" next to the eighth physical demand which stated:

> **Squatting, Lunging, Crouching, Kneeling, Bending Over (at waist or Golfer's Bend), or Stooping**: Prior to beginning shift, inspect lights, tires, lug and axle nuts of bus, install and remove tire chains. Attach and disconnect wheelchair-securing devices **several times daily**.

Seibert circled the number "8" and the words "and remove tire chains." Under "summary determination," the physician checked the box marked: "Worker ***can perform with the following restrictions***" and wrote "no kneeling or squating [sic] or crawling for life."

---

[4] The arbitrator concluded that the employer did not have just cause to terminate Hall's employment.

On November 5, 2007, the employer held a pre-termination meeting with Peel and her union representatives. Peel claimed that the only duty she could not perform related to tire chains. The employer believed that the physician's restrictions on squatting, kneeling, climbing, and crawling involved other essential job functions such as securing wheelchairs, pre-tripping the bus, checking lug nuts, and conducting emergency evacuations.

Subsequent to the meeting, the employer received a copy of a letter sent to the Washington State Department of Labor and Industries from the Vocational Rehabilitation Counselor Supervisor[5] that stated: "The job of injury job analysis was permanently disapproved and the attending physician's response to a transferable work skills job analysis remains pending."[6] On November 21, 2007, Peel's physician signed workers compensation forms indicating that Peel was permanently restricted from working in a variety of jobs, including shuttle bus driver.

The employer held another pre-termination meeting with Peel on December 10, 2007. At the meeting Peel requested an accommodation to have someone else install chains on the bus, if required. The employer, believing that Peel's physician permanently restricted her from returning to her position, terminated Peel's employment effective December 12, 2007. She filed a grievance on December 27, 2007 and an arbitration hearing was held on May 7, 2008.[7]

ISSUE 1: DISCRIMINATION

Union's Prima Facie Case

George Hall engaged in protected union activity when he filed a grievance on November 26 2007, and his employment was terminated on March 26, 2008, satisfying the first two elements of the union's prima facie case. The union failed, however, to establish the third required element, a causal connection between the union activity and the termination.

---

5 The supervisor works for Strategic Consulting Services, Inc., a firm contracted with the State to conduct vocational assessments.

6 This letter related to Peel's worker's compensation claim.

7 The arbitrator ruled that the employer did not have just cause to terminate Peel's employment.

The union argues that the employer blocked Hall's return to work in January 2008 when his eye doctor released him and then terminated his employment because of the November 2007 grievance. The union's evidence includes a March 5, 2008 e-mail from Rita DiIenno, union president and business agent, to Jeff Cartwright, the employer's human resources director, in which DiIenno purports to confirm statements made in a grievance meeting. The e-mail states: "Jeff, you said that the 1/16/08 RTW [return to work] was fine, but the reason George has not been returned to work is based on the prior grievance basis [sic] in November 2007, currently pending an arbitration scheduled for 5/9/08."

The union also points to the following testimony from Cartwright during the hearing:

> Q. [By DiIenno] You were asked under direct whether or not the union ever communicated to you about Mr. Hall's case, that this was about his prior grievance?
>
> A. [By Cartwright] I don't believe so.
>
> [By employer attorney] Objection, mischaracterized the prior question.
>
> Q. [By DiIenno] Isn't it true the union has communicated to you that the only reason you weren't accepting the return to work was because of his grievance in November, on the prior medical event different from the one he was absent from?
>
> [By Examiner] So you're re -- you're rephrasing your prior question that was objected to? Okay.
>
> A. [By Cartwright] Again, it's late in the day and I didn't follow it. She -- she had a question that mischaracterized my testimony and there was an objection, and now there's another question and I'm not sure where we're at.
>
> [By Examiner] All right. She's not asking that prior question now. She's asking you the question, and Michelle [reporter] will have to read it back.
>
> (REPORTER READS QUESTION)
>
> A. [By Cartwright] I think I understand it and I would say that it's not the only reason, it was one of the reasons. It was a reason -- I think that there was an '05 situation that I wasn't involved in. I wasn't in HR at the time and that involves my predecessor, Per Johnsen, Doctor Garrity was involved. It's one of the reasons why George expressed a reluctance to go to Garrity. But this issue I was involved in had no bearing on the '05, I wasn't involved in it, it had nothing to do. I do realize that you expressed that, but it had nothing to do with my actions.

The union believes Hall's employment was terminated because of the November 2007 grievance. However, the union introduced no credible evidence supporting a causal connection between Hall's grievance and his termination from employment.

The quoted testimony demonstrates confusing questions that Cartwright tried to understand and respond to. In his testimony, Cartwright confirmed that the union had alleged the employer's actions were because of the grievance, but he denied the allegation. Having observed the demeanor of the witness and having listened to and reviewed all of his testimony during the course of the hearing, I find Cartwright testified credibly that Hall's union activity was not a factor in the employer's decision to terminate his employment. The union failed to establish that Hall's union activity played any role in the employer's actions.

Although I find that the union failed to establish a prima facie case of discrimination, I complete the full analysis below.

Employer's Non-Discriminatory Reasons for Action

In discrimination cases, the employer need only produce non-discriminatory reasons for its action.

In this case, the employer learned that Hall had experienced atrial fibrillation resulting in dizziness. This caused the employer concern, particularly in light of his known diabetes and two reports of driving issues. Garrity, the employer's physician, advised the employer of risks and concerns such conditions posed. As a result, the employer sought information from Hall's health care providers on whether his medical conditions impacted his ability to safely perform his job as an ACCESS operator. After experiencing difficulty getting thorough answers to its questions from Hall's health care providers, the employer initiated the medical dispute process.

When Hall refused to be examined by Garrity and refused to sign releases allowing his health care providers to share medical information with Garrity, Garrity advised the employer that Hall should undergo a CDL examination performed by a physician familiar with CDL requirements to ensure his fitness for duty as a professional driver.

After Hall's eye doctor released him to return to work following cataract surgery, the employer sought to continue the medical dispute process to ensure that Hall could safely perform his job responsibilities. Due to Hall's concerns with Garrity, the employer secured the services of a different physician to perform the examination.

The employer made its expectations clear to Hall and informed him that his refusal to cooperate in signing releases would constitute insubordination which would be grounds for termination of his employment. When Hall refused to sign the releases, the employer terminated Hall's employment.

From the time the employer learned of Hall's atrial fibrillation resulting in dizziness at the end of September 2007, the employer focused its efforts on ensuring that Hall could safely perform his driving responsibilities. The employer did not want to place Hall, or itself, in a situation where Hall posed a danger to himself or to the public. Throughout the process, the employer relied on Garrity's advice that Hall needed to be examined by a physician familiar with professional driving requirements and that the physician would need Hall's pertinent medical records and information.

The employer articulated non-discriminatory reasons for its termination decision.

Union's Ultimate Burden of Proof

The union bears the ultimate burden of establishing that the employer's reason for termination was pretext or that union animus was a substantial motivating factor in the employer's decision. The union failed to establish either. Nothing in the record even hints at pretext or union animus on the part of Cartwright or any other employer representative.[8] Union animus played no role in the employer's decision to terminate Hall's employment.

ISSUE 2: UNILATERAL CHANGE

The union alleges that the employer was contractually required to administer functional assessments for both Hall and Peel and that the failure to do so was a unilateral change. The

[8] The fact that an arbitrator concluded that the employer did not have just cause to terminate Hall's employment is not evidence of discrimination.

union also asserts that by requiring Hall to sign releases of his medical records and information, the employer unilaterally changed the parties' past practice. The union, as the party asserting an unfair labor practice, bears the burden of proving these allegations. WAC 391-45-270(1)(a).

Arbitration Decisions

The employer asserts that the unilateral change unfair labor practices should be dismissed based upon the decisions of two arbitrators who ruled that the employer's actions with respect to the functional assessments and releases were protected by the collective bargaining agreement between the parties. WAC 391-45-110(3)(b) provides for the processing of unfair labor practice allegations following issuance of an arbitration award. That rule, as well as the case law cited by the employer, only applies when the Commission has exercised its discretion to defer an unfair labor practice complaint to arbitration. In this case, the employer's deferral request was denied. As a result, the arbitration decisions play no role in this decision.

Functional Assessments

The memorandum of understanding between the parties requires the employer to administer a functional assessment if an employee's return to work form indicates the employee can perform the essential functions of the position for a minimum of two hours per day.

With respect to Peel, the employer believed it was unclear whether she could perform the essential functions of the position for at least two hours per day. While Peel and her union representatives narrowly interpreted the physical restrictions identified by her physician, the employer interpreted the restrictions more broadly and had legitimate questions about the extent of her ability to perform the essential functions of the position. The evidence supports that the employer's interpretation was reasonable under the circumstances and that Peel was not clearly released to return to work for at least two hours per day. As a result, the employer did not change the status quo when it did not administer a functional assessment for Peel.

With respect to Hall, the union claims that Hall's return to work was clean and without discrepancies. The union focuses on Hall's return to work release from his eye doctor following cataract surgery. The union chooses to disregard the medical dispute process the employer had started the previous fall which was interrupted by the eye surgery. The employer was continuing that process after allowing Hall the time necessary for eye surgery and recovery. The parties

were not operating within the language of the memorandum of understanding concerning functional assessments. Instead, the parties were operating under the medical dispute process detailed in the collective bargaining agreement. That process did not involve a functional assessment and, as a result, the employer made no changes to the status quo requiring bargaining.

Medical Release

The union argues that the employer unilaterally changed the status quo when it required Hall to sign releases under threat of termination. To prevail, the union must first establish the relevant status quo, then, that the employer changed the status quo.

During the course of events, Hall was asked to sign releases on several occasions. The releases at issue in this case are the four he was asked to sign on March 20, 2008, three authorizing his health care providers to release records to the employer's physician, Alvin Thompson, and one authorizing Thompson to release information to the employer.[9]

The medical dispute process contained in the parties' collective bargaining agreement is silent on the topic of medical releases. As a result, the union must look to past practice to establish the relevant status quo. The union argues that Hall is the only employee who has been required to sign releases under threat of insubordination. DiIenno testified:

> We have not had the employer require the employee to release the medicals for Step II of the medical dispute process. But we have practiced that when it goes to the arbitrator, a third doctor specialist, that we then have released the files to that doctor by the two doctors, the employee's doctor and the company's doctor. And so Mr. Hall's case is the first of those that we had.

This evidence does not assist the union in establishing a relevant past practice. In this case, the parties never moved beyond step one of the medical dispute process. The union offered no specific evidence about how the parties have handled medical information with other employees in the medical dispute process.[10] The record contains no specific evidence about how medical information has been shared either between physicians, or between physicians and the employer, in the medical dispute process.

---

[9] Allegations involving earlier releases would be time-barred by RCW 41.56.160(1).

[10] Charlie Ely's testimony concerning releases did not relate to the medical dispute process.

To establish a past practice, the union must establish a prior course of conduct and an understanding by the parties that such conduct is the proper response to the circumstances. The union failed to do so. As a result, the union failed to establish a relevant status quo or that the employer changed the status quo.

FINDINGS OF FACT

1. Kitsap Transit is a public employer within the meaning of RCW 41.56.030(1).

2. Amalgamated Transit Union, Local 1384, is a bargaining representative within the meaning of RCW 41.56.030(3).

3. The employer and union are parties to collective bargaining agreements covering the ACCESS Service bargaining unit and the Routed Service bargaining unit.

4. The collective bargaining agreements contain a medical dispute process that allows the employer to require an employee to submit to a medical examination conducted by a physician of the employer's choosing.

5. A memorandum of understanding between the parties addresses return to work procedures for employees off work for more than 30 days due to medical reasons. The process requires the returning employee to complete a functional assessment provided the employee submits a Return to Work form indicating that the employee is able to perform the essential functions of the job for a minimum of two hours per day.

6. George Hall worked as an ACCESS operator for the employer.

7. In September of 2007, the employer learned that Hall needed three days of leave and one year of intermittent medical leave due to atrial fibrillation resulting in dizziness.

8. These new medical issues, coupled with Hall's known diabetes and two reports of driving issues, caused the employer concern about Hall's ability to safely drive a bus.

9. After the employer's physician advised the employer of risks and concerns posed by Hall's conditions, the employer placed Hall on paid leave as it began a process to determine whether Hall's conditions impacted his ability to safely perform his job as an ACCESS operator.

10. As a result of the employer's concerns with its unanswered or inadequately answered questions from Hall's health care providers about whether Hall's conditions impacted his ability to safely perform his job, the employer began step one of the medical dispute process, requiring Hall to be examined by its selected physician, Dr. Garrity.

11. Hall reported to Garrity's office as directed but refused to undergo a fitness-for-duty examination and limited the information that his health care providers could share with Garrity. Garrity wrote to the employer about what occurred, emphasizing that Hall needed to be examined by a physician familiar with professional driving requirements and that the physician would need Hall's pertinent medical records and information.

12. At a meeting on November 9, 2007, the employer clarified that it was invoking the medical dispute process, requiring Hall to attend a commercial driver license examination with Garrity, and requiring Hall to sign a medical release. Near the end of the meeting, Hall informed the employer that he would need to delay the examination because he would be taking leave for cataract surgery.

13. As a result of Hall's cataract surgery and recovery period, the employer put the medical dispute process on hold.

14. On November 26, 2007, while on leave, Hall and the union filed a grievance relating to the November 9, 2007 meeting. Hall engaged in protected union activity when he filed this grievance.

15. On January 4, 2008, Hall's eye doctor released him to return to work without restriction effective January 16, 2008.

16. Upon receiving the eye doctor's return to work release, the employer sought to continue the medical dispute process it had started in fall 2007 to ensure that Hall could safely perform his job duties.

17. Because of Hall's concern about Garrity, in February 2008 the employer agreed to select a different physician to perform Hall's examination and secured the services of Dr. Thompson.

18. On March 20, 2008, the employer held a meeting with Hall to obtain signed releases prior to sending Hall for his examination with Thompson. The employer advised Hall that he would be considered insubordinate if he did not participate in the examination, including releasing records the physician considered relevant and releasing Thompson to share information with the employer. The employer presented Hall with four releases; he refused to sign them.

19. On March 26, 2008, the employer terminated Hall's employment on the grounds of insubordination for failing to comply with the directive to sign the medical releases. The termination deprived Hall of an ascertainable right, benefit, or status under Chapter 41.56 RCW.

20. In Hall's situation, the parties were operating under the medical dispute process, not within the language of the memorandum of understanding. The medical dispute process did not involve a functional assessment and, as a result, the employer did not administer a functional assessment for Hall. The employer made no changes to the status quo.

21. Union animus played no role in the employer's decision to terminate Hall's employment. No causal connection exists between Hall's union activities described in Finding of Fact 14 and the employer's termination of his employment described in Finding of Fact 19.

22. The employer articulated nondiscriminatory reasons for its termination decision and the union failed to establish that it was pretext for discrimination.

23. The union failed to establish that union animus was a substantial motivating factor for Hall's termination.

24. Joyce Peel worked for the employer as a routed operator when she suffered an on-the-job injury on December 4, 2006. The employer granted Peel two consecutive six-month periods of medical leave.

25. Prior to the end of Peel's second six-month leave, the employer advised her of the steps she would need to take to return to work and that if she was unable to return to work after being on leave for one year, her employment would terminate.

26. Peel's physician completed two forms on October 18, 2007, each indicating that she was released to work effective November 11, 2007, but that she could never squat, crawl, kneel, or climb ladders.

27. At the November 5, 2007 pre-termination meeting with Peel and her union representatives, Peel claimed that the only duty she could not perform related to tire chains.

28. The employer believed that the physician's restrictions for Peel on squatting, kneeling, climbing, and crawling involved other essential job functions such as securing wheelchairs, pre-tripping the bus, checking lug nuts, and conducting emergency evacuations.

29. Subsequent to the November 5, 2007 meeting, the employer received additional information that indicated Peel had been permanently disapproved from returning to her driving position.

30. The employer held another pre-termination meeting with Peel on December 10, 2007, and terminated her employment effective December 12, 2007.

31. The evidence supports the employer's interpretation that Peel was not clearly released to return to work for at least two hours per day. As a result, the employer did not change the status quo when it did not administer a functional assessment for Peel.

32. The union offered no specific evidence about how medical information was handled with other employees in the medical dispute process. The record contains no specific evidence about how medical information has been shared either between physicians, or between physicians and the employer, in the medical dispute process.

33. The union did not establish a prior course of conduct relating to the medical dispute process. The union failed to establish a relevant status quo or that the employer changed the status quo.

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 6 through 19, and 21 through 23, the union failed to sustain its burden of proof to establish that Kitsap Transit interfered with employee rights or discriminated against George Hall or violated RCW 41.56.140(1).

3. As described in Findings of Fact 3 through 5, 20, and 24 through 33, Kitsap Transit did not refuse to bargain changes to the status quo or violate RCW 41.56.140(4) and (1).

ORDER

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

ISSUED at Olympia, Washington, this 26th day of January, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jamie Siegel

JAMIE L. SIEGEL, 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.