*State - Employment Security*, Decision 11962 (PSRA, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| WASHINGTON FEDERATION OF STATE EMPLOYEES,<br><br>Complainant,<br><br>vs.<br><br>STATE – EMPLOYMENT SECURITY,<br><br>Respondent. | CASE 25471-U-13-6520<br><br>DECISION 11962 - PSRA<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

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On February 15, 2013, the Washington Federation of State Employees (union) filed an unfair labor practice complaint alleging that the Washington State Employment Security Department (employer) interfered with the collective bargaining rights of Maria Pitts and other bargaining unit employees. In response to a deficiency notice issued by this agency on February 21, 2013, the union amended its complaint on March 11, 2013, to include the names of the alleged other bargaining unit employees: Laurie McMillan, Annette Arp, Anita Milavec, Madeleine Suffern, Kenn Sebastian, Emily John-Martin, and Kathie Harrison. A preliminary ruling was issued on March 19, 2013, to reflect the interference allegations under RCW 41.80.110(1)(a) for all eight employees indicated above. On April 9, 2013, the employer filed an answer to the amended complaint.

The union filed a second amended complaint on June 28, 2013, adding the allegation of employer refusal to bargain by its unilateral change to the cubicle posting policy, without providing an opportunity for bargaining. On July 9, 2013, this agency issued a second

preliminary ruling to add the union's June 28, 2013, refusal to bargain allegation under RCW 41.80.110(1)(e). On July 17, 2013, the employer filed an answer to the second amended complaint.

Examiner Page Garcia held a hearing on July 23 and 24, 2013. The parties filed timely post-hearing briefs.

## ISSUES

1. Did the employer interfere with employee rights in violation of RCW 41.80.110(1)(a), by directing employees to remove union posters from their work cubicles?

2. Did the employer refuse to bargain in violation of RCW 41.80.110(1)(e) [and if so, derivative interference in violation of RCW 41.80.110(1)(a)], by its unilateral change to the cubicle posting policy, without providing an opportunity for bargaining?

The employer's lack of a written cubicle ornamentation policy, allowance of postings within employees' cubicles of many other non-work related materials, its August 30, 2012 e-mail directive, and selective enforcement of which union-related posters or union-bearing insignia could be placed in employees' cubicles constitute an interference with protected employee rights under RCW 41.80.110(1)(a).

By its August 30, 2012 directive, the employer refused to bargain with the union over a mandatory subject of bargaining and unilaterally changed the past practice of allowing employees to post non-work materials, including union materials, in their cubicles without restrictions.

## BACKGROUND

The employer and union are parties to a collective bargaining agreement (CBA) which recognizes the union as the exclusive bargaining representative for state employees listed in its

Appendix A.[1] Included in Appendix A, along with several other state agency employees, are two bargaining units of the employer: 1) non-supervisory classified employees; and, 2) supervisory classified employees. Maria Pitts, Laurie McMillan, Annette Arp, Anita Milavec, Madeleine Suffern, Kenn Sebastian, and Emily John-Martin are in the non-supervisory bargaining unit; Kathie Harrison is in the supervisory bargaining unit. All eight of these employees work at the employer's Skagit office.

Several employees testified that they and their co-workers have posted non-work related materials in their cubicles for many years. Examples of personal items posted in their cubicles include pictures of family and friends, cartoons, religious or inspirational sayings from individuals such as Mother Teresa and Gandhi, and sports team memorabilia. Harrison, a 39-year employee with the employer, testified that during her tenure she has worked at several of the employer's offices. She stated, "In every office that I have visited, there is always some identity of some personal items in their work space." Citing examples of her own personal, non-work related items in her cubicle, Harrison described photos of a trip she took to China, photos of her grandchildren, and a variety of wind-up toys, including a monkey with cymbals and a chicken. Harrison also testified to the union poster and various union related buttons she'd posted in her cubicle over the years of her employment.

Several employees, including Harrison, posted a union-sponsored poster on their cubicle walls or cubicle metal furniture for many years which reads, "I AM A STATE EMPLOYEE." At the bottom of the poster is identified "Washington Federation of State Employees [WFSE] Local 304, AFSCME, AFL-CIO."[2] Dale Roberts, labor advocate for the union from February 2012, through March 2013, and a union council representative at the time of the hearing, testified that as a labor advocate with statewide responsibilities for union employees of the employer, including the employer's Skagit office, he observed union posters such as those in the instant dispute posted and other union materials posted in employees' cubicles. During the month of

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1 Collective Bargaining Agreement, The State of Washington and Washington Federation of State Employees, Effective July 1, 2011, through June 30, 2013.

2 Tim Welch, WFSE Director of Public Affairs and employee since 1987, testified that the WFSE "I AM A STATE EMPLOYEE" poster was produced originally in 1997 for a rally inspired by the 1968 Memphis sanitation strike -- a take-off of the "I am a man" rally cry of the sanitation workers and their Local of the American Federation of State, County and Municipal Employees (AFSCME). AFSCME is the international union over WFSE.

August 2012, the employer and union were engaged in bargaining over the successor master CBA, which would become effective July 1, 2013. Phyllis Naiad, a union council representative, held a union luncheon on August 9, 2012. At that time, Naiad made available a variety of union-sponsored posters or flyers. Per Naiad's testimony, she understood the purpose of employees taking the posters was to post them in their cubicles and she understood that usage to be "permissible." The five union posters, none larger than 8 1/2" x 11", read: "I AM Middle Class;" "Invest in the Middle Class;" "State Workers=Vital Services + Economic Growth/Fair Contract Now;" "Affordable healthcare for the middle class;" and, "Stand up for the Middle Class." With inclusion of the sixth union poster, "I AM A STATE EMPLOYEE," four of the posters identify clearly in at least two locations the union's name, Washington Federation of State Employees or WFSE, and AFSCME Council 28. The posters "I AM A STATE EMPLOYEE" and "State Workers=Vital Services + Economic Growth/Fair Contract Now" identify WFSE/AFSCME in only one location on the poster.

On August 29, 2012, the employer's then Northwest Area Director, Carole Jean (CJ) Seitz, advised the union's shop steward, Maria Pitts, that the union posters in employees' cubicles (indicated above) should come down. Pitts testified that when she asked Seitz the difference between the "I AM A STATE EMPLOYEE" poster and the other union posters, Seitz told her she probably didn't have a problem with the "I AM A STATE EMPLOYEE" poster, but the others had to go.[3] Pitts testified that her conversation with Seitz ended that day as "[Seitz] was . . . in conversation or was in the process of contacting our HR [Human Resource] department to get a reading on the signs [posters]."[4] On August 30, 2012, Seitz sent the following e-mail to all employees in the Skagit office:

> Good morning team,
>
> Yesterday I observed posters with union communication displayed in cubicles that are used to assist our customers.

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3 On direct examination, Seitz testified that she didn't recall Pitts posing the question to her of the difference between the "I AM A STATE EMPLOYEE" poster and the other union posters.

4 Seitz testified she had consulted with Ron Marshall and HR, but couldn't recall whom she spoke to in HR about the union posters. On cross-examination, Seitz testified, "I'm quite certain I didn't – don't know if I talked to Mr. Marshall . . . ." When asked about the timing of her conversation with Pitts prior to the August 30, 2012 e-mail, Seitz testified that she had "Vague recollections – vague recollections is that I was probably likely very swift to make a decision on this issue."

> I strongly support local union efforts and the contract allows for these types of communications to be displayed on the union bulletin board.
>
> Please ensure that they are all reposted on the bulletin boards today.
>
> If you have any questions please email me or give me a call.
>
> Thank you,
>
> CJ Seitz
> Northwest Area Director
> Employment Security Department

On September 19, 2012, the union filed a grievance under the parties' CBA in response to the employer's August 30, 2012 directive to remove the union posters from employees' cubicles. On October 18, 2012, Ron Marshall, Assistant Commissioner for the employer's Human Resource Services Division, provided a written Step 3 grievance response indicating that the only union poster allowed in employees' cubicles was the "I AM A STATE WORKER[sic]" sign; all other union posters were directed by Marshall not to be placed anywhere in the workplace except the union bulletin board.

Tina Peterson, labor negotiator for the State's Office of Financial Management, Labor Relations Division, and Marshall both testified that unlike other state agencies, the employer does not have a written policy regarding what materials are allowed to be posted in employees' cubicles.

ISSUE 1: Did the employer interfere with employee rights in violation of RCW 41.80.110(1)(a), by directing employees to remove union posters from their work cubicles?

APPLICABLE LEGAL STANDARDS FOR INTERFERENCE

Under RCW 41.80.110(1)(a), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Chapter 41.80 RCW. Under RCW 41.80.050, employees are guaranteed "the right to self-organization, to form, join,

or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion."

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.80 RCW rests with the complaining party. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).[5] The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

ANALYSIS

The threshold question is whether the posting of the six disputed union posters in the employees' cubicles was a protected activity.

The union's post-hearing brief asserts that the employer interfered with employee rights protected by Chapter 41.80 RCW by its selective prohibition of certain union posters being displayed in employee cubicles.

The employer's post-hearing brief does not dispute that: 1) the employer directed the employees in the Skagit office to take down union-related posters posted in their cubicles, or, 2) those employees reasonably perceived that if they did not comply with the directive, they could be disciplined. Rather, the employer's post-hearing brief only disputes whether the employees named in the complaint engaged in protected activity under Chapter 41.80 RCW.

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[5] Decisions under Chapter 41.56 RCW [PECB] apply to cases under Chapter 41.80 RCW [PSRA] when the statutes are similar, as they are here. *University of Washington*, Decision 11414-A (PSRA, 2013). RCW 41.56.140(1) provides for an unfair labor practice violation to be found where a public employer interferes with, restrains, or coerces public employees in the exercise of their rights guaranteed by Chapter 41.56 RCW.

There is no assumption of a right to use state property by employees or the union. The Washington State Constitution, Article VIII, Section 7 holds:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

Neither employees nor bargaining representatives hold a statutory right to use an employer's property. *Central Washington University*, Decision 10118 (PSRA, 2008), *aff'd*, Decision 10118-A (PSRA, 2010). See also *Whatcom County*, Decision 8245-A (PECB, 2004), *citing City of Seattle*, Decision 1355 (PECB, 1982). While there is no statutory right of employees to use an employer's bulletin board, the National Labor Relations Board (NLRB) has held that where an employer permits employee access to its bulletin boards for personal messages and notices of organizations and activities, employees have a right to post union-related materials there as well. *Honeywell, Inc.,* 262 NLRB 1402 (1982), *enf'd,* 722 F.2d 405 (8th Cir. 1983).[6] See also *King County,* Decision 9692 (PECB, 2007). The Board in *Honeywell* emphasized:

> Where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any non[-]work[-]related matters, it may not "validly discriminate against notices of union meetings which employees also posted."

In *Clallam County,* Decision 4011 (PECB, 1992), a statement by union officers that the employer's workplace was being run like a "feudal empire" in response to a county resolution highly opposed by the union in the midst of contentious contract negotiations, was deemed clearly related to the interests of bargaining unit employees, and therefore was protected activity under Chapter 41.56 RCW.

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[6] The Supreme Court of the State of Washington has ruled that decisions construing the National Labor Relations Act (NLRA), while not controlling, are persuasive in interpreting state labor acts which are similar to the NLRA. *Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984).

In the instant case, the bargaining unit employees testified that they posted the aforementioned posters out of pride as state employees, as union members, and to support the union's collective bargaining and contract negotiations. By the nature of the content of the posters and the fact that the union distributed them to employees at a union luncheon during a time when contract negotiations were occurring (with the exception of the "I AM A STATE EMPLOYEE" poster, which was distributed by the union years earlier), there is little doubt that the disputed posters were meant to "assist" the union as provided for under RCW 41.80.050. As such, I find that the employees' posting of any of the six disputed posters listed above was protected activity under RCW 41.80.050.

As Seitz's directive was e-mailed to all employees, and Pitts, the shop steward, advised employees to take down all of the union posters from their cubicles, an employee generally who either posted the disputed union posters or in the future wished to post union posters in their cubicle, would be chilled from engaging in protected activity by the threat of discipline, up to and including termination. The Examiner includes the additional analysis of the applicable law beyond whether one or more employees engaged in protected activity under Chapter 41.80 RCW for the sake of clarity.

Finding a protected activity, the next puzzle piece is whether the employer made a threat of reprisal or force, or promise of benefit, related to the pursuit of that protected activity. In affirming the examiner's decision that the employer did not interfere with protected employee rights by refusing to allow use of its e-mail system for a union organizing campaign, the Commission emphasized that the employer had a policy regarding acceptable use of its e-mail system, and, that there was no evidence demonstrating that the employer applied its e-mail policy disparately with respect to non-work related messages. *Central Washington University,* Decision 10118-A:

> With respect to the posting of information on bulletin boards, this Commission has followed the National Labor Relations Board rule that bulletin boards are not automatically available for protected literature. *See King County*, Decision 7819 (PECB, 2002). An employer may adopt a rule that prohibits *all* non-work related materials from being posted on its bulletin board and not be in violation of Chapter 41.80 RCW. However, an employer may not prohibit union related notices or discriminate against employees who post them when it allows non-

> work related materials, such as personal items for sale, non-work related services that are being offered or requested, or announcements about outside clubs or events, to be posted by employees on employer-owned bulletin boards. *King County*, Decision 8630-A (PECB, 2005). An employer who disparately applies its rules to prohibit union related materials commits an unfair labor practice.

(emphasis in original)

The NLRB found that an employer violated Section 8(a)(1) of the NLRA, interfering with protected employee rights when it cited an unpublished, unenforced "two item per cubicle" rule and allowed its supervisors to remove pictures from the movie "Norma Rae" depicting the lead female character, played by Sally Fields, holding a sign that said "UNION" from the employees' cubicles. The Board adopted the Administrative Law Judge's rulings, findings, and conclusions, which included the following regarding the employer's rule: "The selective enforcement of such rules upon the advent of union items appearing in cubicles constitutes disparate, selective enforcement. I find that by enforcing this rule selectively, Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights."[7] *Teletech Holdings, Inc.*, 342 NLRB 924 (2004).

Several union witnesses testified that if they did not follow the employer's August 30, 2012 e-mail directive to remove the disputed posters, including the long-standing "I AM A STATE EMPLOYEE" poster, they feared being found insubordinate and subject to discipline. Some employees understood that discipline could include termination of their employment. Seitz, who issued the e-mail directive, testified that employees who disregarded her directive could have been subject to discipline, including failure to comply with a directive or insubordination. The employer's lack of a written cubicle ornamentation policy, allowance of postings within employees' cubicles of many other non-work related materials, its August 30, 2012 e-mail directive, and selective enforcement of which union-related posters or union-bearing insignia could be placed in employees' cubicles constitute interference with protected employee rights under RCW 41.80.110(1)(a).

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[7] NLRA Section 8(a)(1) holds that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. NLRA Section 7 reads in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing. . . ."

ISSUE 2: Did the employer refuse to bargain in violation of RCW 41.80.110(1)(e) [and if so, derivative interference in violation of RCW 41.80.110(1)(a)], by its unilateral change to the cubicle posting policy, without providing an opportunity for bargaining?

## APPLICABLE LEGAL STANDARDS FOR UNILATERAL CHANGE

### Refusal to Bargain

RCW 41.80.005(2) defines collective bargaining as "the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020." The mandatory subjects of bargaining enumerated in RCW 41.80.020(1) include wages, hours, and other terms and conditions of employment, and the negotiation of any question arising under a CBA. The employer is not required to bargain over matters pertaining to health care benefits or other employee insurance benefits,[8] retirement system or benefits, or rules of the Human Resources Director, Director of Enterprise Services, or Washington Personnel Resources Board. RCW 41.80.020(2).

The employer's duty to bargain is enforced through RCW 41.80.110(1)(e), and unfair labor practice complaints are processed by the Commission under RCW 41.80.120 and Chapter 391-45 WAC. A complainant raising an unfair labor practice allegation has the burden of proof. WAC 391-45-270(1)(a).

There are three potential bargaining subjects between an employer and union: mandatory, permissive, and illegal. *Kitsap County,* Decision 8292-B (PECB, 2007). Those subjects indicated in RCW 41.80.020(1) – wages, hours, and other terms and conditions of employment, are mandatory subjects of bargaining. Permissive subjects are matters considered to be remote from employee wages, hours and working conditions, including matters which are regarded as prerogatives of employers or of unions. Illegal subjects are matters where an agreement between a union and employer would contravene other statutes or court decisions. *Kitsap County,* Decision 8292-B.

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8 Exceptions are carved out under RCW 41.80.020(3).

When called upon to determine whether a particular proposal or topic is a mandatory subject of bargaining, the Commission applies a balancing test under *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197 (1989) *(City of Richland)* on a case-by-case basis. On one side of the balance is the relationship the subject bears to "wages, hours and working conditions." On the other side is the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates.

The bargaining obligation applies to a decision on a mandatory subject of bargaining and the effects of that decision, but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University*, Decision 10413-A (PSRA, 2011), *citing Skagit County*, Decision 6348 (PECB, 1998); *City of Kelso (Kelso I)*, Decision 2120-A (PECB, 1985)(the decision to contract out bargaining unit work and the effects of the decision on the employees are mandatory subjects of bargaining); *City of Kelso (Kelso II)*, Decision 2633-A (PECB, 1988)(the decision to merge operations with another employer is an entrepreneurial decision that is a permissive subject of bargaining and only the effects of the decision on wages, hours, and working conditions are mandatory subjects of bargaining). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decision could be mandatory subjects of bargaining. *See Wenatchee School District*, Decision 3240-A (PECB, 1990). *Kitsap County,* Decision 11613-A (PECB, 2013).

The duty to bargain imposes a duty to give notice and provide an opportunity for good faith bargaining prior to implementing any change of past practices concerning the wages, hours, and other terms and conditions of employment of bargaining unit employees. RCW 41.80.005(2); *Kitsap County,* Decision 8292-B, *citing METRO (Amalgamated Transit Union, Local 587),* Decision 2746-B (PECB, 1990).

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making that decision. *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). To be timely, notice must be

given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). Formal notice is not required; however, in the absence of formal notice, it must be shown that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A. *Kitsap County,* Decision 11613-A.

*Fait Accompli*

The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A. If the employer's action has already occurred when the employer notifies the union (*a fait accompli*), the notice would not be considered timely, and the union will be excused from the need to demand bargaining. *Washington Public Power Supply System*, Decision 6058-A. If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found. *Washington Public Power Supply System*, Decision 6058-A, *citing Lake Washington Technical College*, Decision 4721-A. *Kitsap County,* Decision 11613-A. An employer who presents a union with a change of a mandatory subject as a *fait accompli* commits an unfair labor practice. *Lake Stevens School District,* Decision 9840-A (PECB, 2009), *citing City of Seattle,* Decision 3654 (PECB, 1990).

Unilateral Change

An employer is prohibited from making changes to mandatory subjects of bargaining until it has satisfied its collective bargaining obligations. A complainant alleging a unilateral change must establish the following:

1. The existence of a relevant status quo or past practice.
2. That the relevant status quo or past practice was a mandatory subject of bargaining.

3. That notice and an opportunity to bargain the proposed change was not given, or that notice was given but an opportunity to bargain was not afforded and/or the change was a *fait accompli*.

4. That there was an actual change to the status quo or past practice.

*Val Vue Sewer District*, Decision 8963 (PECB, 2005); *City of Tukwila,* Decision 10536-A (PECB, 2010).

Past Practice

A complainant alleging a unilateral change must establish the existence of a relevant status quo or past practice. Generally, the past practices of the parties are properly utilized to construe provisions of a CBA that may be rationally considered ambiguous or where the CBA is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a CBA is deemed superfluous. *Kitsap County,* Decision 8292-B.

For a "past practice" to exist, two basic elements are required: (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, citing generally, *Whatcom County,* Decision 7288-A (PECB, 2002) (no unilateral change violation found where employer lacked knowledge of past practice). A complaining party must also prove that the conduct was known and mutually accepted by the parties. *Kitsap County,* Decision 8292-B. When a unilateral change is alleged, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain.

Waiver by Contract

Article 39.6 of the parties' CBA states:

> **Bulletin Boards and Newsstands**
> The Employer will maintain bulletin board(s) or space on existing bulletin boards currently provided to the Union for union communication. In bargaining units where no bulletin board or space on existing bulletin boards has been provided, the Employer will supply the Union with adequate bulletin board space in

> convenient places. Material posted on the bulletin board will be appropriate to the workplace, politically non-partisan, in compliance with state ethic laws, and identified as union literature. Union communications will not be posted in any other location in the agency. If requested by the Union, the Employer will identify areas where Union provided newsstands can be located in their offices/facilities

A party may waive its right to bargain through the language in its collective bargaining agreement. A contractual waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima,* Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *University of Washington,* Decision 11600-A (PSRA, 2013). When the contract terms themselves evidence a meeting of the minds, the Commission does not go further to determine what was intended. *City of Wenatchee,* Decision 8802-A (PECB, 2006).

ANALYSIS

The union's post-hearing brief asserts: 1) the employer presented a *fait accompli* when it changed its practice which formerly allowed employees to post personal material, including union material, in their personal cubicles; 2) the union did not waive its members' constitutional 1st Amendment rights;[9] 3) the union did not waive the right to a consistent practice with regard to personal material posting in employee cubicles by the CBA's management rights clause (Article 35),[10] nor the union bulletin board provision (Article 39.6).

The employer admits three of the four elements of *Val Vue Sewer District,* Decision 8963, in its post-hearing brief: 1) the posting of union-related materials is a mandatory subject of

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9 The Commission, as an administrative agency, has no jurisdiction to enforce constitutional rights. *Whatcom County,* Decision 7643-A (PECB, 2003).

10 The employer did not raise Article 35 in its affirmative defense of waiver by contract.

bargaining;[11] 2) the employer did not give notice or an opportunity to bargain the decision to direct employees to remove the signs; and 3) if there had been a past practice of allowing the union posters in employee cubicles, the employer's August 30, 2012 directive would have constituted a change to that practice. The employer argues, rather, that the union did not establish a past practice. As an affirmative defense, the employer asserts that by the CBA's Article 39.6, the union has waived its right to bargain over the posting of the union posters.

Mandatory Subject of Bargaining

The Commission applied the *City of Richland* balancing test and distinguished the union's bargaining proposal for paid release time for union training, noting there was no evidence that the proposal concerned necessary training for the bargaining unit employees to perform their work, nor evidence that the employees would be disciplined for not attending the training. As such, the Commission found the union's proposal for discretionary release time for union travel and conferences a permissive subject of bargaining. *Yakima County,* Decision 10204-A (PECB, 2011), *aff'd in part, vacated in part, rev'd in part,* 174 Wn. App. 171 (2013), *review denied,* 178 Wn.2d 1012 (2013). In affirming the Commission's findings on the discretionary leave time, the Court of Appeals emphasized, "[I]f the County required Guild members to attend training on labor and law enforcement issues[,] but provided no paid leave or disciplined employees for failure to meet standards for which no training was provided, a proposal for paid release time to attend the training would be a mandatory subject of training. But that is not the case here." *Yakima County,* 174 Wn. App. 171 (2013), *citing Spokane County Fire District 9,* Decision 3661-A (PECB, 1991).

Similarly, in evaluating a refusal to bargain complaint on appeal, the Commission reversed the Examiner's findings that the employer's change to the employee evaluation practices was a mandatory subject. Applying the *City of Richland* balancing test, the Commission advised "There is no evidence in this record demonstrating that [the supervisor's] written comment had any impact on the terms and conditions of employment, such as employee discipline." *City of Yakima,* Decision 10270-B (PECB, 2011).

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[11] While the Examiner takes note of the employer's willingness to label the underlying cubicle posting policy as a mandatory subject of bargaining, the determination as to whether a duty to bargain exists is a question of law and fact for the Commission to decide, and is not subject to waiver by the parties by their action or inaction. WAC 391-45-550.

The NLRB found an unlawful unilateral change to a mandatory subject of bargaining by a supervisor's announcement at a unit meeting that required employees to obtain supervisory approval prior to posting signs, letters, or printed materials in the employer's facility. *Tenneco Automotive, Inc.,* 357 NLRB No. 84 slip op. 1 (2011), 2011 WL 4590190, *enf'd in rel. part, rev'd in part, and vacated in part, Tenneco v. NLRB,* 716 F.3d 640 (2013). The directive covered *all* postings by employees (not specifically referencing the union bulletin board). An employee and union vice president testified that prior to the employer's announced rule of pre-approval for all postings, employees posted newspaper articles, family events notices, items for sale, union meetings, and food menus without supervisory pre-approval. Another employee testified that prior to the employer's announced rule employees could post on both union and employer bulletin boards "pretty much" whatever they wanted.

The employer asserts that management has an interest in not offending the clients who meet with bargaining unit employees in their cubicles. As the clients are seeking unemployment benefits or job-seeker resources, Seitz testified to concerns about clients perceiving certain signs such as "I AM Middle Class" as offensive since the clients may see themselves in a lower socioeconomic status. Marshall, however, testified that absent the small crescent stating "Fair Contract Now," he would be "okay" with the "I AM Middle Class" poster in an employee's cubicle. The employer draws a distinction between those items allowed to be posted in cubicles with public access and those where the public does not interact with employees; however, the employer's own interpretation and allowance of which union posters are acceptable are mixed even within its own ranks.

The union's witnesses, many whose cubicles have public access, have pictures of trips to China, religious or inspirational sayings, or humorous sayings and depictions, testified that no supervisor has ever asked them to take down such materials because they might by offensive to the clients in the public-accessible areas or cubicles. The Board in *Tenneco* was not persuaded by the employer's concerns over "vituperative postings."[12] Like *Tenneco*, the employer's sudden interest and concern of offending clients by the employees' cubicle ornamentation, (here the six

[12] Vituperative is defined as "uttering or given to censure: containing or characterized by verbal abuse." www.merriam-webster.com/dictionary/vituperative, visited on December 13, 2013.

union posters) is spurious at best. Regarding the disputed union posters, Seitz testified that she was not aware of *any* customer complaints; Marshall testified that in response to the union information request, the employer determined there had not been *any* customer complaints about the disputed posters.[13] In evaluating whether a poster is a "union communication" that should only be allowed on the union bulletin board, and not in an employee's cubicle, Marshall testified that as the agency does not have a written policy on cubicle ornamentation, the employer would make the determination of whether a union poster was allowed on a case-by-case basis. On cross-examination, Marshall testified that if an employee wrote down "I want a fair union contract," he "[doesn't] believe that's a union communication at that point." Marshall explained that the words "Fair Contract" alone would not, in his opinion, be offensive to the public or clients of the agency.

The bargaining unit employees described working conditions where, with the exception of two instances highlighted at the hearing,[14] they have been allowed to post a wide variety of non-work related materials in their cubicles. As noted by Harrison, "In every office that I have visited, there is always some identity of some personal items in their work space." Like the employees in *Tenneco*, the bargaining unit employees have been able to post "pretty much" whatever they want in their cubicles, regardless of whether the public has access to them or not. Unlike the employees in *Yakima County* and *City of Yakima,* the bargaining unit employees understood, and Seitz even testified, that disciplinary action could be taken for noncompliance with the working condition. Applying the *City of Richland* balancing test to this case, taking into account the managerial prerogatives of the employer and the interests of the employees' working conditions, the Examiner finds that the employee cubicle posting of non-work related items, including union posters and other union-bearing insignia, is a mandatory subject of bargaining.

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13 Having statewide responsibilities for labor relations, it is assumed that Marshall's testimony reflects no complaints in the agency statewide.

14 Not including Seitz's August 30, 2012 directive, Pitts' testimony indicates that in 2006, following a complaint by a Northwest Development Council employee (who works in the same building), bargaining unit employees were required to remove the "I AM A STATE EMPLOYEE" poster from their cubicle; shortly thereafter, former Area Director Sheila Burleson allowed the employees to post the posters again. Another example addressed in the testimony of both Tim Welch, WFSE Director of Public Affairs, and Harrison, was the removal of the "No FUrloughs" buttons from employees' workspaces due to the font style of the letters "F" and "U" on the button. Welch testified that he did not recall an agreement with management to take the buttons down, but rather that the union was responding to complaints that some people were offended by the button. The button was revised to state, "Furloughs Hurt."

Past Practice

In *Edmonds Community College,* Decision 10250-A (CCOL, 2009), no consistent past practice existed creating any kind of enforceable expectation between the parties. The union failed to establish that the employer maintained a consistent practice of informing long-term, part-time academic employees of concerns and working with them to correct the concerns prior to the employer's decision to not renew their future contracts. Here, the employees had a long-standing expectation that they could post unlimited non-work related items, including union posters, in their cubicles. Welch testified that the union's "I AM A STATE EMPLOYEE" poster has been in existence since 1997 and was produced for a union rally. The union's witnesses unequivocally testified that they had, at a minimum, placed the union's "I AM A STATE EMPLOYEE" poster in their cubicle for many years (Pitts stated six years; McMillan stated three years; Suffern stated "a number of years;" Harrison stated eight years). The poster clearly includes the union logo across the bottom. The employer's post-hearing brief acknowledges "testimony that union-related buttons, other small items, and signs and posters had been allowed in various WorkSource office cubicles and other state agency offices around the state." Ginger Bernethy, a thirteen-year employee with the agency, and chief shop steward for the union, testified that bargaining unit employees in the employer's Maple Park and Lacey facilities have non-work related items in their cubicles including: university and sports team memorabilia, a beer sign, a union "Respect" pin, a union cup/pen holder, and a union "Furloughs Hurt" sign. The latter item, Bernethy testified, had been up in the employee's cubicle for "some time," and employees had put up the sign since the state furloughs were implemented, approximately two to three years earlier. The employees do not meet with the public in the Maple Park or Lacey facilities. However, Bernethy testified that in her work at WorkSource facilities elsewhere during her tenure, including Seattle and Spokane, she had seen similar non-work, including union, items in employee cubicles where the employees meet with the public.

The employer's post-hearing brief asserts that the employer did not know that the "I AM A STATE EMPLOYEE" poster was a union poster until "long after they first saw it." Seitz testified that the "I AM A STATE EMPLOYEE" poster was up in employee cubicles when she came to the agency in 2009 and that she visited the Skagit office at least twice a month and would often make a point to visit employees' cubicles. On direct examination, Seitz testified

that she thought that poster was issued by the employer; later on direct, when asked whether she considered that poster to be a "union communication," she responded:

> I don't. I don't. I'm a state employee and I've never been part of WFSE [union]. And for me, the call to action is different. Because that's what communication -- you know, yeah. The call to action is different. So I didn't, you know. I had -- like I said, at the time before -- gosh, before I think I met with you I thought they were ESD [employer] issued, the bumper sticker thingy -- sign.

On cross-examination regarding the "I AM A STATE EMPLOYEE" poster, Seitz testified:

> Q: You were aware -- I assume you were aware that your -- the employees in the workforce specialist job classification were in a bargaining unit represented by the Washington Federation of State Employees?
>
> A: Yes.
>
> Q: And even though it says Washington Federation of State Employees, you thought it was issued by Employment Security?
>
> A: I did. I did. I mean, yeah. So it seems.

On cross-examination, Seitz indicated that when she first saw the poster, she had an issue with it and discussed it several times prior to August 2012, with her colleagues. At the hearing, by her tone and body language, Seitz seemed hostile to questions posed to her, both on direct and cross-examination. That observation by the Examiner, combined with Seitz's equivocal testimony about consulting with Marshall and HR prior to the August 30, 2012 directive, her conversation with Pitts, and the testimony regarding whether and when she knew the "I AM A STATE EMPLOYEE" poster was produced by the union, leads the Examiner to determine that Seitz was not a credible witness. As such, the employer's distinction drawn between a poster Seitz allegedly believed to be employer-produced being allowed in public-accessible cubicles, versus the other disputed posters not being allowed in public-accessible cubicles because of their union affiliation, does not hold merit.

The union sufficiently established a prior course of conduct in posting non-work related items, including union posters, pins, and other union-produced items in employees' cubicles, regardless

of whether the cubicles were accessible to members of the public or not. The employer may not feign lack of knowledge through the employer's equivocal testimony given the union's testimony and exhibits admitted at the hearing consistent with the practice asserted. The proper "response to the circumstances" element of a past practice from *Kitsap County,* Decision 8292-B, is clear in that the employer not once, but twice, allowed the union to return the "I AM A STATE EMPLOYEE" poster with the union's insignia on the bottom to the employees' cubicles shortly after a dispute – once by the former area director in 2006, and then again in the more recent dispute in 2012. The employer cannot argue that it has a consistent "non-offensive" ad-hoc policy for non-work postings in public-accessible employee cubicles. In regard to the August 30, 2012 directive, no evidence was presented that there were any complaints from clients or otherwise regarding the disputed posters. The only other evidence the employer could attempt to assert is the removal of the "No FUrloughs" buttons from employees' cubicles; however, the employer did not present evidence that the removal of those buttons was employer-directed. In light of the above, combined with the employer's lack of a written policy on cubicle ornamentation, the Examiner finds that the union established a past practice.

Waiver by Contract

The employer avers that the union contractually waived its right to post union-related materials by way of the parties' CBA, Article 39.6. The employer believes that the six disputed union posters posted in the employees' cubicles constitute "union communication" and the contract language should be narrowly construed to only allow posting of such materials on the designated union bulletin boards.

The employer's brief admits that the parties did not specifically discuss the meaning of Article 39.6's term "union communication" during the initial bargaining in 2004. In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer. *City of Yakima,* Decision 3564-A (PECB, 1991). The Commission found no waivers in *City of Yakima*, because the contract provisions were either ambiguous or added no substance to the matters at issue. Given the established past practice of

allowing employees to post non-work items in their cubicles, including union posters and other items with union insignia, the employer has not established a waiver by contract defense.

In finding a unilateral change violation in *Tenneco*, the Board was not persuaded by the employer's concerns over its long-established working rule which prohibited employees from posting anything without the approval of management unless otherwise provided by agreement. Nor was the Board persuaded by the parties' CBA provision which provided the union with a bulletin board for its exclusive use. Rather, the Board found an unlawful unilateral change violation because the employer's "longstanding practice allowed employees to freely post materials without obtaining prior approval." *Tenneco Automotive, Inc.*, 357 NLRB No. 84 slip op. 1 (2011), 2011 WL 4590190. Similarly, the Examiner is not persuaded by the employer's ad-hoc application of an unpublished rule, nor that the CBA's Article 39.6 constitutes a contractual waiver by the union.

*Fait Accompli*

The employer readily admits, both in its post-hearing brief and through many of its witnesses, that no notice was provided to the union for the change implemented in the employer's August 30, 2012 directive. Reviewing the circumstances as a whole and given the complete lack of opportunity for meaningful bargaining, the Examiner finds the employer committed a *fait accompli.*

Unilateral Change

By its August 30, 2012 directive, the employer refused to bargain with the union over a mandatory subject of bargaining and unilaterally changed the past practice of allowing employees to post non-work materials, including union materials, in their cubicles without restrictions.

## FINDINGS OF FACT

1. The Washington State Employment Security Department is an employer within the meaning of RCW 41.80.005(8).

2. The Washington Federation of State Employees is an employee organization within the meaning of RCW 41.80.005(7).

3. The employer and union are parties to a collective bargaining agreement (CBA), effective July 1, 2011, through June 30, 2013, which recognizes the union as the exclusive bargaining representative for two bargaining units of the employer: 1) non-supervisory classified employees; and, 2) supervisory employees.

4. Maria Pitts, Laurie McMillan, Annette Arp, Anita Milavec, Madeleine Suffern, Kenn Sebastian, Emily John-Martin, and Kathie Harrison are bargaining unit employees who work at the employer's Skagit office.

5. Several employees testified that they and their co-workers have posted non-work related materials in their cubicles for many years.

6. Examples of personal items posted in employee cubicles include pictures of family and friends, cartoons, religious or inspirational sayings from individuals such as Mother Teresa and Gandhi, and sports team memorabilia.

7. Several employees, including Harrison, posted a union-sponsored poster on their cubicle walls or cubicle metal furniture for many years which reads, "I AM A STATE EMPLOYEE." At the bottom of the poster is identified "Washington Federation of State Employees [WFSE] Local 304, AFSCME, AFL-CIO."

8. During the month of August 2012, the employer and union were engaged in bargaining over the successor master CBA, which would become effective July 1, 2013.

9. Phyllis Naiad, a union council representative, held a union luncheon on August 9, 2012. At that time, Naiad made available a variety of union-sponsored posters or flyers.

10. The five union posters, none larger than 8 1/2" x 11", read: "I AM Middle Class;" "Invest in the Middle Class;" "State Workers=Vital Services + Economic Growth/Fair Contract Now;" "Affordable healthcare for the middle class;" and, "Stand up for the Middle Class."

11. With inclusion of the sixth union poster, "I AM A STATE EMPLOYEE," four of the posters identify clearly in at least two locations the union's name, Washington Federation of State Employees or WFSE, and AFSCME Council 28.

12. The posters "I AM A STATE EMPLOYEE" and "State Workers=Vital Services + Economic Growth/Fair Contract Now" identify WFSE/AFSCME in only one location on the poster.

13. On August 29, 2012, the employer's then Northwest Area Director, Carole Jean (CJ) Seitz, advised the union's shop steward, Maria Pitts, that the union posters in employees' cubicles (indicated above) should come down. Pitts testified that when she asked Seitz the difference between the "I AM A STATE EMPLOYEE" poster and the other union posters, Seitz told her she probably didn't have a problem with the "I AM A STATE EMPLOYEE" poster, but the others had to go.

14. On August 30, 2012, Seitz sent an e-mail to all employees in the Skagit office directing posters with union communication displayed in cubicles used to assist customers to be removed and reposted on the union bulletin board that same day.

15. On September 19, 2012, the union filed a grievance under the parties' CBA in response to the employer's August 30, 2012 directive to remove the union posters from employees' cubicles.

16. On October 18, 2012, Ron Marshall, Assistant Commissioner for the employer's Human Resource Services Division, provided a written Step 3 grievance response indicating that the only union poster allowed in employees' cubicles was the "I AM A STATE

WORKER[sic]" sign; all other union posters were directed by Marshall not to be placed anywhere in the workplace except the union bulletin board.

17. Tina Peterson, labor negotiator for the State's Office of Financial Management, Labor Relations Division, and Marshall both testified that unlike other state agencies, the employer does not have a written policy regarding what materials are allowed to be posted in employees' cubicles.

18. Several union witnesses testified that if they did not follow the employer's August 30, 2012 e-mail directive to remove the disputed posters, including the long-standing "I AM A STATE EMPLOYEE" poster, they feared being found insubordinate and subject to discipline.

19. Seitz, who issued the e-mail directive, testified that employees who disregarded her directive could have been subject to discipline, including failure to comply with a directive or insubordination.

## CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-45 WAC.

2. The employees' posting of any of the six disputed posters indicated in Findings of Fact 10 and 11 was protected activity under RCW 41.80.050.

3. Based on Findings of Fact 5 through 19, the employee cubicle posting of non-work related items, including union posters and other union-bearing insignia is a mandatory subject of bargaining under RCW 41.80.020(1).

4. By the actions set forth Findings of Fact 13 through 19, the employer interfered with employee rights in violation of RCW 41.80.110(1)(a).

5. By the actions set forth in Findings of Fact 5 through 19, the employer refused to bargain in violation of RCW 41.80.110(1)(e) [and committed a derivative interference in violation of RCW 41.80.110(1)(a)], by its unilateral change to the cubicle posting policy, without providing an opportunity for bargaining.

## ORDER

The Washington State Employment Security Department, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Selective enforcement of which union-related posters or union-bearing insignia may be placed in employees' cubicles.

   b. Making unilateral changes to the past practice for its cubicle posting policy, without providing the union notice and the opportunity for bargaining.

   c. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.80 RCW:

   a. Restore the *status quo ante* by reinstating the working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change to the past practice for the cubicle posting policy found unlawful in this order.

   b. Give notice to and, upon request, negotiate in good faith with the Washington Federation of State Employees, before changing the cubicle posting policy.

c. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Notify the complainant, 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 complainant with a signed copy of the notice provided by the Compliance Officer.

e. Notify the Compliance Officer, 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 him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 24th day of December, 2013.

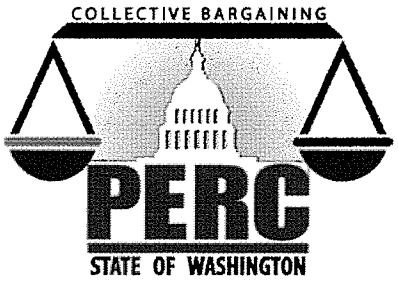
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Page A Garcia

PAGE A. GARCIA, 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.

CASE 25471-U-13-6520
DECISION 11962 - PSRA




## PUBLIC EMPLOYMENT RELATIONS COMMISSION

# NOTICE

**STATE LAW GIVES YOU THE RIGHT TO:**

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

**THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT THE *WASHINGTON STATE EMPLOYMENT SECURITY DEPARTMENT* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE UNLAWFULLY selectively enforced which union-related posters or union-bearing insignia may be placed in employees' cubicles.

WE UNLAWFULLY made unilateral changes to the past practice for our cubicle posting policy, without providing the union notice and the opportunity for bargaining.

**TO REMEDY OUR UNFAIR LABOR PRACTICES:**

WE WILL reinstate the past practice for our cubicle posting policy that existed prior to the August 30, 2012 employer directive.

WE WILL give notice to and upon request, negotiate in good faith with the Washington Federation of State Employees before changing the cubicle posting policy.

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

## DO NOT POST OR PUBLICLY READ THIS NOTICE.

## AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

# PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
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## RECORD OF SERVICE - ISSUED 12/24/2013

The attached document identified as: DECISION 11962 - PSRA has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

| | | | | | |
|---|---|---|---|---|---|
| CASE NUMBER: | 25471-U-13-06520 | FILED: | 02/15/2013 | FILED BY: | PARTY 2 |
| DISPUTE: | ER INTERFERENCE | | | | |
| BAR UNIT: | ALL EMPLOYEES | | | | |
| DETAILS: | 25694-S-13-0351 | | | | |
| COMMENTS: | | | | | |

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