Washington State University, Decision 11749-A (PSRA, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. WASHINGTON STATE UNIVERSITY, Respondent.	CASE 24321-U-11-6232 DECISION 11749-A – PSRA CASE 24576-U-12-6289 DECISION 11750-A - PSRA DECISION OF COMMISSION

Jason K. MacKay, Staff Attorney, the union.

Attorney General Robert W. Ferguson, by *Donna J. Stambaugh*, Senior Counsel, for the employer.

On October 10, 2011 Public School Employees of Washington (union) filed an unfair labor practice complaint alleging that Washington State University (employer) interfered with employee rights and refused to bargain by not paying two temporary employees bargaining unit wages. The Unfair Labor Practice Manager reviewed the complaint and issued a preliminary ruling finding a cause of action existed.

On February 21, 2012, the union filed a second unfair labor practice complaint. The union alleged that the employer interfered with employee rights, discriminated against an employee when it terminated his employment, and refused to bargain. The Unfair Labor Practice Manager reviewed the complaint and issued a preliminary ruling finding causes of action existed. On April 23, 2012, the union filed an amended complaint alleging new facts related to the employer's refusal to bargain by altering the *status quo* during contract negotiations. Examiner Lisa A. Hartrich reviewed the complaint and determined that a cause of action existed.

Examiner Hartrich conducted a hearing and issued a decision.[1] The Examiner dismissed the union's complaints. The union appealed.

ISSUES

1. Did the employer breach its good faith bargaining obligations by failing to meet regularly, by advancing unpalatable proposals, and by negotiating without authority to reach agreement?
2. Did the employer skim bargaining unit work when it assigned non-bargaining unit employees to set up rooms for events?
3. Did the employer interfere with employee rights when it terminated a bargaining unit employee?
4. Did the employer unilaterally change the *status quo* during negotiations for a first collective bargaining agreement by failing to pay temporary employees the permanent employee wage rate and by terminating an employee during his probationary period?
5. Did the employer discriminate against Matthew Borchers when it terminated him during his probationary period?

We affirm the Examiner. The employer did not breach its good faith bargaining obligations, did not skim bargaining unit work, and did not interfere with employee rights when it terminated a bargaining unit employee. The employer did not unilaterally change the *status quo* when it refused to pay temporary employees a higher wage. The union failed to meet its burden of proving that the employer changed the *statu quo* in the manner in which it terminated a probationary employee. The employer did not discriminate against Matthew Borchers when it terminated him during his probationary period.

STANDARD OF REVIEW

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law.

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[1] *Washington State University*, Decision 11749 (PSRA, 2013).

C-Tran, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College,* Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-Tran,* Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County,* Decision 7210-A (PECB, 2001).

ISSUES 1, 2, and 3

Did the employer breach its good faith bargaining obligations by failing to meet regularly, by advancing unpalatable proposals, and by negotiating without authority to reach agreement?

Did the employer skim bargaining unit work when it assigned non-bargaining unit employees to set up rooms for events?

Did the employer interfere with employee rights when it terminated a bargaining unit employee?

CONCLUSION

The Examiner stated the correct legal standard. Substantial evidence supports the Examiner's findings of fact, which support the conclusions of law. We affirm the Examiner's conclusions that the employer did not breach its good faith bargaining obligations by failing to meet regularly, by advancing unpalatable proposals, and by negotiating without authority to reach agreement; did not skim bargaining unit work when it assigned non-bargaining unit employees to set up rooms for events; and did not interfere with employee rights when it terminated a bargaining unit employee.

ISSUES 4 and 5

Did the employer unilaterally change the status quo during negotiations for a first collective bargaining agreement by failing to pay temporary employees the permanent employee wage rate and by terminating an employee during his probationary period?

Did the employer discriminate against Matthew Borchers when it terminated him during his probationary period?

RELEVANT FACTS

The union was certified as the exclusive bargaining representative of all full-time and regular part-time custodians and maintenance custodians at the Washington State University Tri-Cities Campus on April 20, 2011. *Washington State University*, Decision 11039 (PSRA, 2011). At the time the union filed its complaints, the parties had not reached an agreement on an initial collective bargaining agreement.

In April 2011, the employer hired two temporary employees, Alida Chavez (Chavez) and Matthew Borchers (Borchers), to perform custodial work. The employees were classified as Service Worker I and paid $9.50 per hour. As temporary employees, Chavez and Borchers were not included in the bargaining unit until they worked 350 hours. By August 2011, Chavez and Borchers had worked at least 350 hours and were included in the bargaining unit.

On August 22, 2011, Cecily Hutton (Hutton), union negotiator, wrote to Kendra Wilkins-Fontenot, the employer's labor relations officer. Hutton requested that the employer pay the temporary Service Worker I employees the Custodian I pay rate of $11.09 per hour. The union asserted that once the employees became bargaining unit employees under WAC 357-04-045, they should have been paid bargaining unit wages. The union alleged that the employer was "acting in contravention of the *status quo* . . ." when it did not increase the employees' wages once they became bargaining unit employees. The employer disagreed and continued to classify the two temporary employees as Service Worker I and continued to pay them $9.50 per hour.

In the fall of 2011, the employer decided to fill a vacant Custodian I position. On November 10, 2011, the employer hired Borchers as a permanent full-time Custodian I. Borchers was placed on a probationary period for six months. Borchers' pay was increased to $11.09 per hour, the lowest pay rate for a Custodian I.

Tami Farley (Farley) supervised Borchers when he was a temporary employee and as a Custodian I. Farley observed a change in Borchers' performance after he became a permanent employee.

As a Custodian I, Borchers was assigned to clean the Bioproducts Sciences, and Engineering Laboratory (BESL) building first and second floors; the atrium stairs; East Commons; and outside trash. Borchers duties included cleaning offices, floors, kitchen, restrooms, labs, classrooms, stairwell, entryway, and emptying the trash. Despite directives not to, Borchers spent time away from his work area and worked with another custodian in an area Borchers was not assigned to.

During Borchers' employment, another employee was on leave. Borchers was assigned to clean a portion of the absent employee's work area. On January 9, 2012, Farley e-mailed Borchers identifying which additional areas were to be cleaned. Farley prioritized the work assignments.

Borchers did not follow directives from Farley. A badge was necessary to access some of the area Borchers was assigned to clean. Farley directed Borchers to obtain the badge. Borchers did not obtain a badge.

Coffee was spilled on a stairwell in Borchers' assigned area. The spill was not cleaned promptly. On January 3, 2012, Farley sent Borchers an e-mail reminding him to clean a coffee spill on the stairs in the BESL building.

The employer received complaints about the cleanliness of the areas Borchers was assigned to clean. On January 5, 2012, Farley received a request that the BESL building be cleaned on a regular basis. The request indicated that the garbage had not been emptied and the floors had not been cleaned. Farley discussed the complaint with Borchers.

On January 30, 2012, Farley sent Borchers an e-mail that she had received a request that the lab floors in BESL be swept and mopped. Farley told Borchers that the task could be performed the following week if he did not have time that week.

On February 5, 2012, Farley received another complaint about the cleanliness of the area of the BESL building Borchers was assigned to. Farley addressed the concern with Borchers. Farley walked through the building with Borchers and identified areas that Borchers was not cleaning. Farley also instructed Borchers not to work in areas assigned to other custodians.

On February 8, 2012, Farley e-mailed Vice Chancellor Lori Selby regarding Borchers' inadequate performance. Farley was working on Borchers' three month evaluation. The evaluation was never completed.

On February 14, 2012, Borchers was asked to attend a meeting in Selby's office. Selby informed Borchers that the employer was ending Borchers' employment during his probationary period. Selby provided Borchers a separation letter.

ISSUE 4

Did the employer unilaterally change the status quo during negotiations for a first collective bargaining agreement by failing to pay temporary employees the permanent employee wage rate and by terminating an employee during his probationary period?

LEGAL PRINCIPLES

Collective bargaining is "the mutual obligation of the representatives of the employer and exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement." RCW 41.80.005(2). The scope of bargaining includes wages, hours, and working conditions. RCW 41.80.020(1). The determination as to when a duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer commits an unfair labor practice when it refuses to engage in collective bargaining. RCW 41.80.110(1)(e).

Once employees have exercised their statutory right to select an exclusive bargaining representative, an employer is prohibited from taking unilateral action in regard to the wages, hours, and working conditions of those employees and has an obligation to maintain the *status*

quo. *Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994), *citing Franklin County*, Decision 1890 (PECB, 1984). An employer is required to maintain the *status quo* regarding mandatory subjects of bargaining during contract negotiations. *Asotin County*, Decision 9549-A (PECB, 2007). The pre-existing terms and conditions of employment are the starting point for any negotiations between parties. *Shelton School District*, Decision 579-B (PECB, 1984).

ANALYSIS

Status Quo for Wages

The union asserted that once the employees were included in the bargaining unit, their pay should have been based on the unrepresented classified higher education pay schedule. The union argued that the *status quo* for wages was the unrepresented classified salary schedule for higher education established by the State Human Resources Director. The employer countered that the employer maintained the *status quo* for wages and the unrepresented classified salary schedule does not apply to temporary employees.

The employer hired Chavez and Borchers as temporary employees. Under the state's personnel rules, the employees were classified as temporary employees, not civil service employees. The state's personnel rules allow temporary employees to be included in the appropriate bargaining unit once the temporary employee works 350 hours in a 12 month period. WAC 357-04-045. Reaching the 350 hour threshold for inclusion in an appropriate bargaining unit does not transform a temporary employee into a civil service employee.

The *status quo* for temporary employees would have been the Washington Administrative Code governing temporary employees. The *status quo* for wages for the temporary employees was the Service Worker I wage at which the employees were hired, not the higher wage rate of Custodian I. The employer maintained the *status quo* when it continued to pay the temporary employees the Service Worker I wage. Eligibility for inclusion in the bargaining unit did not change that Chavez and Borchers were hired as and classified as temporary employees.

Discharge in violation of WAC 357-37-035

The union argued that the employer violated the *status quo* when it terminated Borchers' employment during his probationary period because the employer failed to comply with WAC 357-37-035. The rule establishes a procedure for notifying an employee of unsatisfactory performance. The employer argued that the union failed to establish a past practice and show that the employer deviated from that past practice.

Whether the employer properly followed WAC 357-37-035 is not in the purview of the Commission. The Commission has jurisdiction to enforce the laws specifically assigned to its administration, and interprets parallel statutes to the extent necessary to determine latent or patent conflicts with collective bargaining laws. *Renton School District*, Decision 6300-A (PECB, 1998). The Commission does not administer Chapter 357-37 WAC. The Personnel Resources Board administers the state's civil service statutes and rules. An employee's right to contest the employer's compliance with WAC 357-37-035 must be pursued at the Personnel Resources Board. [2]

The question before the Commission is whether the employer violated the status quo by the manner in which it terminated Borchers' employment. The *status quo* for ending an employee's employment during the probationary period would be the employer's practice for ending employment during the probationary period. The union failed to establish the employer's procedure for terminating employees during their probationary period. Thus, the union has failed to meet its burden to prove the employer changed the *status quo* when it provided direction to Borchers in e-mail messages, verbally, and terminated his employment on February 14, 2012.

CONCLUSION

The employer did not violate the *status quo* when it maintained the temporary employees' wage rates consistent with the rate at which those employees were hired. The union failed to establish the past practice on how the employer terminated a probationary employee's employment. The union failed to establish the employer unilaterally changed the *status quo* when the employer terminated Borchers' employment during the probationary period.

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[2] Per Exhibit 16, Borchers pursued his appeal rights through the PRB.

ISSUE 5

Did the employer discriminate against Matthew Borchers when it terminated his employment during his probationary period?

LEGAL PRINCIPLES

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.80 RCW. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in discrimination cases. To prove discrimination, the complainant must first set forth a *prima facie* case 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.

Ordinarily, an employee may use circumstantial evidence to establish the *prima facie* case because respondents do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to the common experience give rise to a reasonable inference of the truth of the fact sought to be proved. *See Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

In response to a complainant's *prima facie* case of discrimination, the respondent need only articulate its non-discriminatory reasons for acting in such a manner. The respondent 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 complainant to prove 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.

ANALYSIS

The union alleged that the employer discriminated against Borchers when it terminated him during his probationary period. The union alleged that Borchers was engaged in protected activity when the union filed an unfair labor practice complaint on his behalf, Borchers met with a union organizer, and Borchers reported to the union that Farley performed bargaining unit work.

The Examiner concluded that the union did not establish a *prima facie* case of discrimination with respect to filing an unfair labor practice complaint. The Examiner concluded that the union established a *prima facie* case of discrimination with respect to Borchers meeting with a union organizer and Borchers reporting the skimming of bargaining unit work. We agree with the Examiner.

The union asserts that the Examiner erred when she concluded that the employer articulated a non-discriminatory reason for terminating Borchers' employment and that decision was neither pre-textual nor substantially motivated by union animus.

The employer presented non-discriminatory reasons for terminating Borchers during his probationary period: inadequate performance. As discussed above, the employer received complaints about Borchers' performance. Farley coached Borchers. Borchers failed to follow directives, such as no working in another employee's area and obtaining the necessary badge for entering his own work area. The union has not established the employer's reason for terminating Borchers was either pretextual or substantially motivated by union animus.

CONCLUSION

The union established a *prima facie* case of discrimination. The employer articulated a non-discriminatory reason for terminating Borchers. The union failed to establish that the employer's

non-discriminatory reason was pretextual or substantially motivated by union animus. The employer did not discriminate against Borchers when it terminated his employment during the probationary period.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Lisa A. Hartrich are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 20th day of December, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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The attached document identified as: DECISION 11749-A - 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/ MAJEL C. BOUDIA

CASE NUMBER:	24321-U-11-06232	FILED:	10/10/2011	FILED BY:	PARTY 2
DISPUTE:	ER UNILATERAL				
BAR UNIT:	CUSTOD/MAINT				
DETAILS:	-				
COMMENTS:					

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	24576-U-12-06289	FILED:	02/21/2012	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	CUSTOD/MAINT				
DETAILS:	Matt Borchers				
COMMENTS:					

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