STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY REGIONAL AFIS GUILD, Complainant, vs. KING COUNTY, Respondent.	CASE 127743-U-15 DECISION 12582-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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Diane Hess Taylor, Labor Relations Legal Advisor, for King County.

On December 1, 2015, the King County Regional AFIS Guild (union) filed a complaint with the Public Employment Relations Commission alleging unfair labor practices against King County (employer). The union filed an amended complaint on December 4, 2015, and Unfair Labor Practice Manager Jessica J. Bradley issued a preliminary ruling on December 16, 2015, finding causes of action to exist for allegations of employer refusal to bargain and employer discrimination in violation of Chapter 41.56 RCW. On December 18, 2015, the Commission assigned the matter to Stephen W. Irvin.

On April 5, 2016, the union filed a second amended complaint charging the employer with additional unfair labor practices. I reviewed the second amended complaint under WAC 391-45-070 and WAC 391-45-110 and granted the union's motion to amend its complaint. I issued an amended preliminary ruling[1] on April 11, 2016, that found a cause of action to exist for an additional allegation of employer discrimination and employer interference in violation of Chapter 41.56 RCW.

[1] The preliminary ruling issued on April 11, 2016, was erroneously labeled as the second amended preliminary ruling.

On May 19, 2016, the union filed a third amended complaint charging the employer with additional unfair labor practices. On May 23, 2016, the union filed a fourth amended complaint that charged the employer with additional unfair labor practices and provided additional facts for the allegations contained in the third amended complaint.

I reviewed the third and fourth amended complaints under WAC 391-45-070 and WAC 391-45-110, and granted the union's motions to amend its complaint. I issued a second amended preliminary ruling on June 2, 2016, that found a cause of action to exist for additional allegations of employer discrimination and employer interference, dismissed other allegations for a failure to state a cause of action, and framed the issues for hearing. *King County*, Decision 12582 (PECB, 2016).

The matter was scheduled for hearing on June 28, 29, and 30, 2016, in Seattle. On June 13, 2016, the parties mutually sought a continuance for the hearing in order to pursue mediation. I granted the motion for continuance on June 14, 2016. The parties were unable to reach a settlement, and the hearing was rescheduled.

At the end of the sixth day of the seven-day hearing (October 5, 6, and 7, 2016; and January 9, 10, 11, and 12, 2017), the union moved to amend its complaint to conform the pleadings to evidence received without objection, in accordance with WAC 391-45-070(2)(c). The union's motion included additional allegations of employer discrimination and employer interference. The employer objected to the motion at hearing, but withdrew its opposition to the motion as part of the post-hearing briefs the parties filed on April 7, 2017, and April 10, 2017, to complete the record. The motion to amend the complaint is granted, and the additional allegations are addressed in this decision.

ISSUES

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

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

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

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

Issue 1

The employer did not fulfill its duty to bargain with the union regarding changes to the vacation leave approval policies before implementing the changes on November 1, 2015. The union met its burden to prove that the employer neither bargained to agreement nor a lawful impasse before implementation. The employer did not meet its burden to prove that the union waived its right to bargain, either by contract or by inaction.

Substantial evidence indicates that the union did not attempt to alter the parties' past practice on vacation leave approval during bargaining for their first CBA. Substantial evidence also indicates that, after initially rejecting the employer's proposed policy changes, the parties engaged in discussions regarding the policies and had another meeting scheduled when the employer implemented the policies over the union's objections.

Issue 2

The union was unable to meet its burden of showing that Allen was participating in an activity protected by the collective bargaining statute, and therefore did not establish a prima facie case for discrimination. Although Allen was acting on behalf of the union, her excessively confrontational behavior during the November 16, 2015, unit meeting was unreasonable and therefore not protected activity. The union's allegations of discrimination are dismissed.

Issue 3

The union met its burden of proving, by a preponderance of the evidence, that the employer's statements during the November 19, 2015, meeting could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, associated with the union activity of Allen, Roberts, or other employees.

The union did not meet its burden of proving, by a preponderance of the evidence, that the employer's e-mail to Jail Identification unit employees on February 24, 2016, could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, associated with union activity. The union's allegation is dismissed. The interference allegation regarding Allen's performance appraisal is also dismissed, because Commission case precedent precludes finding an interference violation under the same set of facts that fail to constitute a discrimination violation.

Issue 4

Neither the Unfair Labor Practice Manager's preliminary ruling nor my two amended preliminary rulings that followed found a cause of action to exist for independent interference in connection with the internal investigation of Allen. In accordance with WAC 391-45-110(2)(b), a complainant who claims that the preliminary ruling failed to address one or more causes of action it sought to advance in the complaint must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling.

The union sought no such clarification from the Unfair Labor Practice Manager prior to issuance of the original notice of hearing on February 25, 2016. As it pertains to the internal investigation, the union did not seek clarification of either of my preliminary rulings prior to the issuance of an

amended notice of hearing on July 14, 2016, or the second amended notice of hearing on August 17, 2016. As a result, the interference allegation regarding the internal investigation of Allen will not be addressed.

ANALYSIS

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

Background

The King County Regional Automated Fingerprint Identification System (AFIS) provides fingerprint identification services and technology for criminal justice agencies of all 39 cities and unincorporated areas in King County. The program is managed by the King County Sheriff, and has been funded through voter-approved property tax levies since its inception in 1988. The King County Regional AFIS Advisory Committee, which consists of representatives from member jurisdictions, oversees the program's operations and funding.

Manager Carol Gillespie directs the AFIS program's day-to-day operations. Identification Operations Manager Diana Watkins reports to Gillespie and supervises three identification supervisors: Lisa Wray in the Jail Identification unit, Laurie Ordonia in the Tenprint Examiners unit, and Jennifer Ingram in the Tenprint Identification Specialists unit. All three units, also called essential units, operate 24 hours a day and seven days a week.

The union represents "all non-commissioned non-supervisory professional employees of the King County Sheriff's Office [KCSO] in the AFIS Section, excluding administrative employees, information technology employees, Photo Lab employees, commissioned officers, confidential employees, supervisors and all other employees." *King County*, Decision 11697 (PECB, 2013).

Following certification in March 2013, the union and the employer bargained for more than two years before reaching agreement on their first collective bargaining agreement (CBA). The union

ratified the parties' tentative agreement on May 5, 2015.[2] The agreement went into effect on July 23, 2015, and expired on December 31, 2016.

The union bargaining team included attorney Chris Casillas, President Scott Verbonus, First Vice President Mark Roberts, and Second Vice President Marquel Allen. The employer bargaining team included Gillespie, Labor Negotiator Bob Railton, Labor Relations Legal Advisor Diane Taylor, and Robin Fenton, who was KCSO's Chief of Technical Services. At the time of the hearing, Patti Cole-Tindall was the Chief of Technical Services.

Section 5.9 of the CBA covers the parties' agreement regarding requests for vacation approval. The first two sentences of Section 5.9 were not part of the 2009-2012 CBA, when the bargaining unit was represented by the Public Safety Employees Union (PSEU).

> Vacation approvals for requests made prior to April 1st of each calendar year shall [be] made on the basis of classification seniority within each unit. Vacation requests submitted after April 1st shall be granted dependent upon operational requirements and on a first-come, first-served basis. Employees who are transferred involuntarily, and who have already had their vacation request approved as specified above, will be allowed to retain that vacation period regardless of their seniority within the new unit to which they are transferred.

(emphasis by underline added).

The new language in the parties' CBA reflected language in the King County Sheriff's Office General Orders Manual (GOM) regarding vacation approval and the AFIS program's Standard Operating Procedures (SOP) regarding vacation and compensatory time requests. Section 1.15 of the SOP for the Jail Identification unit covers vacation and compensatory time requests, and is shown below. The SOP for the Tenprint Information and Tenprint Examiner units contain similar language, but are not identical.

> This attendance policy is in accordance with past practice. Comp-time and vacation requests will be granted subject to the operational needs of the unit, section, and department, the current CBA, and applicable county ordinances regarding time off.

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[2] Unless otherwise noted, the events in Issue 1 occurred in 2015.

A. There is no limit to the number of employees who may choose a particular time frame, as long as minimum staff requirements are met.

B. Requests for vacation time falling after April 1 will be taken on a first come, first serve basis.

C. If a conflict arises, the decision of which request to grant will rest on the supervisor as to fairness; the main consideration for this decision will be the comparison of both employees' opportunities and use of the type of leave time granted.

Shift minimums and scheduled annual vacations will be taken into consideration when granting discretionary vacation. During the annual vacation selection process, requests for discretionary time off will be checked for possible conflict with annual vacation selection for remaining employees.

NOTE: Annual vacation absence request forms should be turned in to the supervisor at the beginning of the quarter that the leave will be taken, to allow for quarterly scheduling. Discretionary vacation (absence requests other than the annual selection) will be accepted and granted "pending coverage if necessary" **or** no more than 60 days in advance of the requested date(s). These will be granted on a first-received, first-granted basis.

In practice, an employee in the Jail Identification unit who made a vacation leave request before April 1 would have the request approved if the employee had the most seniority on his or her shift. Multiple employees on a shift could request the same days off. If an employee wanted the same days off as an employee with more seniority, the less-senior employee's vacation leave request would be granted if (a) the request would not bring the number of employees on shift below minimum staffing, or (b) an employee volunteered for overtime in order to maintain minimum staffing on the shift. Requests made after the April 1 deadline would be granted on a first-come, first-served basis if (a) the request would not bring the number of employees on shift below minimum staffing, or (b) an employee volunteered for overtime in order to maintain minimum staffing on the shift.

Watkins testified that she was preparing for the 2012 operating levy when she realized the three units she oversaw seldom denied vacation leave requests, because there was either enough staff to accommodate multiple vacation requests, or sufficient volunteers for overtime to ensure minimum staffing. Furthermore, Watkins testified that there were instances in the Tenprint Examiners unit

where the supervisor used mandatory overtime to backfill for employees whose vacation leave requests left the unit below minimum staffing.

Watkins testified that the practice for vacation leave approval was problematic for the employer, but the employer made no proposals to change it while the parties were engaged in bargaining. After discussing the issue with the three unit supervisors, Watkins created a revised policy during the first half of 2015, and e-mailed a draft of the new policy to Gillespie on July 8. Gillespie forwarded Watkins' e-mail and draft to union officers Verbonus, Roberts, and Allen on July 14, more than two months after the union ratified the parties' tentative agreement on the CBA. Gillespie's e-mail read:

> During contract negotiations, a few things were brought to my attention (by the Chief and Diane) that – embarrassingly – were off my radar and I need to handle. Approving Leave Requests is one of them, so I asked Diana to work on a policy with her 24/7 supervisors.
>
> Please review and see what you think. I understand Marquel is on vacation, and that you'll want to wait for her to return. We'll just need to get it in place before October 1, 2015.

Watkins' e-mail stated that the draft policy detailing procedures for vacation leave approval and backfill overtime was designed to "better distribute the use of leave, and limit backfill overtime for units with essential staffing," as well as to bring AFIS' backfill overtime practices in line with those of other KCSO essential units. Key elements of the attached policy draft were:

- For each essential unit, only one leave request will be approved per shift, per day, in an annual bid by seniority.
- Additional requests for leave on the same shift/day can be approved if, 45 days in advance of the absence, backfill overtime would not be required (i.e. minimum staffing levels are met even with the additional leave).
- The use of backfill overtime is authorized only for the purpose of maintaining minimum essential staffing levels. When a shift regularly operates above minimum levels, overtime will not be authorized for any leave requests.
- Leave requests received during the annual bidding period between October 1st and April 1st shall be reviewed and approved on the basis of seniority within

> each unit following the April 1st deadline. One selection of a continuous period will be honored by seniority for each unit member on a rotating basis until all requests have been either approved or denied. Each employee will prioritize their submitted leave requests.
>
> - Leave requests made outside of the annual bidding period may be held or approved subject to the guidelines above. These requests are approved on a "first submit-first approve" basis.

More than three weeks later, Gillespie had not received a response from the union on the proposed policy changes. She e-mailed Verbonus on August 10, asking, "Is it fair to assume there aren't any issues, and we're good to go?" Verbonus responded that day that the union had sent the proposal to Casillas for review, and informed Gillespie of the union's position via e-mail a day later.

> The Guild is comfortable with the current practice. Most of the items listed are mandatory subjects of bargaining and should have been addressed during negotiations not presented as a policy.
>
> We go back to the negotiation table next year and we are willing to address it then. We feel more comfortable having Chris [Casillas] negotiate contract items.

The record indicates that the parties did not revisit the vacation leave approval policy until early October. On October 8, Gillespie sent the union a meeting request for October 19, and Watkins e-mailed Verbonus a revised version of the policy on October 9 that did not significantly alter the key elements of the proposal the employer made in July.

Casillas was unavailable for the proposed meeting, so the parties attempted to find a mutually agreeable alternate date. A lack of corresponding availability for the parties' legal representatives pushed a meeting into late November, but Allen informed the employer via e-mail on October 14 that the union "wouldn't be opposed to meeting earlier for a preliminary discussion as long as all parties know we would not move forward without discussing all of the findings with Chris."

On October 23, Verbonus and Allen met with Gillespie, Watkins, and Taylor to discuss the vacation leave approval policy. As a result of the discussion, the employer honored the union's request to remove language that would have rotated vacation leave bids in a manner similar to shift

bids. The parties did not reach an agreement on the vacation leave approval policy, but the employer informed Verbonus and Allen at the end of the meeting that the employer was prepared to implement the policy on November 1 over the union's objections.

On October 26, Gillespie sent an e-mail to the employees in the essential units "to clarify expectations, summarize the reasons behind them, and give notice that going forward we will follow the applicable policies for leave approvals." The e-mail included the revised vacation leave approval policy, and Gillespie wrote that the policy would go into effect on November 1.

> **Approving Leave Requests and Use of Backfill Overtime for Essential Personnel**
>
> Vacation and comp-time requests will be granted subject to operational needs, the current Collective Bargaining Agreement (CBA), and applicable department/county policies or ordinances.
>
> Although it will sometimes result in backfill overtime, essential units will approve one vacation request per shift, per day, using the procedures below.
>
> Additional requests for vacation on the same shift/day may be approved no more than 30 days in advance of the absence, provided that backfill overtime would not be required (i.e. minimum staffing levels are met even with the additional leave).
>
> The use of backfill overtime is authorized only for the purpose of maintaining minimum staffing levels. When a shift regularly operates above minimum levels, overtime will not be authorized for any vacation requests.
>
> Shift swapping may be allowed, with prior approval, provided it does not result in overtime.
>
> <u>Vacation requests submitted prior to April 1, for the upcoming year beginning April 1:</u>
>
> - Per the CBA, leave requests for the upcoming year beginning April 1, and submitted by March 31, are granted based upon seniority.
> - Following the March 31 deadline, leave requests received shall be reviewed and approved on the basis of seniority within each unit.
> - Employees will be informed of the approval or denial of their pending annual leave requests as quickly as possible. In cases where a more senior

employee has already been approved to take leave, employees may ask to have their request held pending any changes or additional approvals 30 days prior to the absence.

Vacation requests submitted on or after April 1, for the current year:

- Per the CBA, leave requests submitted on or after April 1 for the current year shall be granted based on operational needs and on a "first submit-first approve" basis. The same approval guidelines will apply (i.e. one person per shift if not already taken during the pre-April 1 bid; additional requests may be approved 30 days in advance if minimum staffing levels are met.)

- Per county guidelines, leave requests that are in excess of one (1) day should be requested at least two weeks in advance; requests for one (1) day or less should be requested at least three (3) days in advance.

Requesting Use of Accrued Compensatory Time

Employees may request to use accrued compensatory time at any time, with sufficient notice (see county guidelines above). Per the CBA, it will be granted within a reasonable period of time, unless it would unduly disrupt operations.

Backfill Overtime for Training

Backfill overtime for mandatory training is authorized if no other viable option is available. Mandatory training that can be delayed until more favorable staffing conditions will be rescheduled when possible. Backfill overtime is not authorized for discretionary training or continuing education unless approved by the Section Manager.

On November 3, Roberts filed a grievance on behalf of the union regarding the employer's implementation of the vacation leave approval policy. The union contended that the policy violated Article 5, Section 9 of the CBA and changed a past practice. Roberts added that the remedy sought by the union was a restoration of the status quo that existed prior to implementation. In an e-mail to Watkins on November 4, Roberts reiterated that the union was open to bargaining about the issue once the policy changes were rescinded.

Watkins met with Roberts, Verbonus, and Allen to discuss the grievance on November 16. One week later, Watkins' official response to the grievance was that there was no "consistently documented and applied past practice that was shared between units," and that she could neither

restore the status quo nor initiate bargaining on the vacation leave approval policy. The union then moved the grievance to Gillespie, who also refused to adopt the union's remedy in her grievance response. In the time between Watkins' response and Gillespie's response on December 31, the union filed its unfair labor practice complaint.

Applicable Legal Standards

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.030(4); *King County*, Decision 12451-A (PECB, 2016). "[N]either party shall be compelled to agree to a proposal or be required to make a concession . . . ." *Id.* Thus, a balance must be struck between the obligation of the parties to bargain in good faith and the requirement that parties not be forced to make concessions. *City of Snohomish*, Decision 1661-A (PECB, 1984). This fine line reflects the natural tension between the obligation to bargain in good faith and the statutory mandate that there is no requirement that concessions be made or an agreement be reached. *Walla Walla County*, Decision 2932-A (PECB, 1988).

Distinguishing between good faith and bad faith bargaining can be difficult. *Mansfield School District*, Decision 4552-B (EDUC, 1995); *Spokane County*, Decision 2167-A (PECB, 1985). A party may violate its duty to bargain in good faith by one per se violation, such as a refusal to meet at reasonable times and places or refusing to make counterproposals. *Snohomish County*, Decision 9834-B (PECB, 2008). A party may also violate its duty to bargain in good faith through a series of questionable acts which when examined as a whole demonstrate a lack of good faith bargaining but none of which by themselves would be per se violations. *Id.* When analyzing conduct during negotiations, the Commission examines the totality of the circumstances to determine whether an unfair labor practice has occurred. *Kitsap County*, Decision 11675-A (PECB, 2013), *citing Shelton School District*, Decision 579-B (EDUC, 1984).

Good faith is inconsistent with a predetermined resolve not to budge from an initial position. However, a party may stand firm on a position and an adamant insistence on a bargaining position

is not, by itself, a refusal to bargain. *Mansfield School District*, Decision 4552-B, *citing Atlanta Hilton and Tower*, 271 NLRB 1600 (1984).

Unilateral Change

The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except when any changes to mandatory subjects of bargaining are made in conformity with the statutory collective bargaining obligation or terms of a collective bargaining agreement. *King County*, Decision 12451-A, *citing City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith, upon request; and bargains to agreement or to a good faith impasse concerning any mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010), *citing Skagit County*, Decision 8746-A (PECB, 2006).

To prove a unilateral change, 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. *Kitsap County*, Decision 8292-B (PECB, 2007). A complaint alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

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 (PECB, 1998). 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 would be excused from

the need to demand bargaining. *Id.* 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. *Id.*, *citing Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

Impasse

The "impasse" concept grows out of the premise that the duty to bargain does not impose upon the parties an obligation to agree. Circumstances exist in which a party may lawfully conclude that further negotiations will not result in an agreement. If the party declaring impasse has bargained in good faith, and if its conclusion about the status of negotiations is justified by objectively established facts, then the party's duty to bargain is satisfied. *Yakima Valley Community College*, Decision 11326-A (PECB, 2013), *citing Skagit County*, Decision 8746-A. A lawful impasse creates only a temporary hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." *Yakima Valley Community College*, Decision 11326-A, *citing Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982).

The Commission analyzes at least five factors when determining whether the parties have reached a good faith impasse: (1) the bargaining history, (2) the parties' good faith in negotiations, (3) the length of the negotiations, (4) the importance of the issue(s) on which the parties disagree, and (5) the contemporaneous understanding of the parties as to the state of negotiations. *Skagit County*, Decision 8746-A, *citing Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). These factors are not exclusive and provide a useful basic framework for guidance in determining whether impasse existed. *Skagit County*, Decision 8746-A.

Applying the five *Taft Broadcasting* factors to the record in the particular case, the Commission will find an impasse exists (so that unilateral changes based on that impasse are lawful) only if there was no realistic possibility that continued negotiations would have been fruitful for the parties. *Id. See also Mason County*, Decision 3706-A (PECB, 1991); *American Fed'n of Television and Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

Application of Standards

Whether a particular subject is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *Washington State Ferries*, Decision 12134-C (MRNE, 2016), *citing International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.*

The scheduling of vacation and other leave has long been held to be a mandatory subject of bargaining. *Snohomish County Police Staff and Auxiliary Services Center*, Decision 12342 (PECB, 2015), *aff'd*, *Snohomish County Police Staff and Auxiliary Services Center*, Decision 12342-A (PECB, 2016). It is no different in the instant case, because the vacation leave approval policy has a direct impact on wages, hours, and working conditions. That impact predominates over the employer's professed operational need to change the policy, which was not expressed to the union during more than two years of negotiations for the parties' first CBA, and was first shared with the union more than two months after the union ratified the parties' tentative agreement.

Prior to November 1, 2015, the employer's longstanding practice on vacation leave requests made before April 1 was to approve multiple requests on a shift for a particular date, "as long as minimum staff requirements" were met. If the request dropped staffing below the minimum requirement on a shift for a particular date, the employer approved the request if another employee volunteered to work overtime to ensure minimum staffing.

When the employer implemented the new vacation leave approval policy on November 1, only one vacation request per shift per day would be approved during the vacation bidding period that ended on April 1. If an employee wanted to request vacation leave on a date already requested by a more senior employee on the same shift, the less senior employee would have to wait for approval until 30 days in advance of the requested absence, and the request could be denied if backfill overtime would be required to meet minimum staff requirements. The employer's implementation

of the new policy was a meaningful change to a past practice concerning a mandatory subject of bargaining.

The employer fulfilled its duty to provide the union notice of the proposed changes to the vacation leave approval policy on July 14, via an e-mail from Gillespie which also stated that the employer wanted to implement the revised policy on October 1. Even if the union had not initially balked at discussing the proposal, it is questionable whether the employer's notice was sufficient to allow time to bargain a change of the magnitude the employer proposed.

The parties discussed the union's concerns about the proposed policy in a meeting on October 23, and the employer made alterations to the policy as a result of that meeting. However, the parties did not reach agreement about the policy changes before the employer stated at the end of the October 23 meeting that it was changing the policy over the union's objections, followed by its announcement of the changes to bargaining unit employees on October 26, and implementation of the changes on November 1. Absent agreement, the question of whether the parties reached a lawful impasse before the employer implemented the policy changes requires analysis of the five *Taft Broadcasting* factors.

The Bargaining History – After its certification as the exclusive bargaining representative in 2013, the union and the employer negotiated for two years before reaching agreement on their first CBA, which was fully ratified and went into effect on July 23. During negotiations for the first CBA, the employer did not propose to alter the manner in which vacation leave was approved. On July 14, the employer approached the union with a vacation leave approval policy proposal that was devised during negotiations but never presented to the union. The employer also expressed a desire to have the change take effect on October 1.

The union stated on August 10 that it wanted to maintain the existing vacation leave approval practice until the parties began negotiations on a successor agreement. The parties did not discuss the proposed policy changes again until early in October, when the parties attempted to schedule a meeting. When scheduling conflicts pushed the meeting to late November, the union agreed to meet with the employer on October 23 to discuss the proposal, with the understanding that the

union would have to consult with Casillas before reaching an agreement. The employer made changes to the policy based on the October 23 meeting, which ended without agreement and with the employer stating that it would implement the policy change on November 1.

The parties' bargaining history weighs against finding a lawful impasse existed because the parties were engaged in discussions over the policy change in October and had a meeting scheduled in late November before the employer implemented the policy on November 1 over the union's objections.

Good Faith in Negotiations – Two months after the parties completed bargaining for their first CBA, the employer approached the union with a vacation leave approval policy proposal that was in the works during the negotiation process but never presented to the union. The employer made its proposal with a predetermined outcome in mind, namely to spread leave usage throughout the year, reduce overtime expenditures, and bring AFIS' vacation leave approval policy in line with other KCSO departments. To do so, the employer insisted on limiting vacation leave approval to one employee per shift per day for requests made prior to April 1, as opposed to the past practice of approving unlimited requests as long as the shift was covered by voluntary overtime. Approaching negotiations with a predetermined outcome is not evidence of good faith bargaining. *Yakima Valley Community College*, Decision 11326-A. The employer's lack of good faith weighs against finding that the parties were at lawful impasse.

Length of Negotiations – Three and a half months elapsed between the time the employer sent the union its vacation leave approval policy proposal on July 14 and its implementation of the policy on November 1. During that time, the parties held one informal meeting on October 23 without Casillas and scheduled another meeting in late November that included both parties' legal representatives. The brief length of negotiations weighs against finding that the parties were at a lawful impasse.

Importance of the Issue – The issue of vacation leave approval is important to both parties. For the union, the change to vacation leave approval affected employees' ability to obtain vacation leave during desirable times of the year, and their ability to earn more money via overtime

opportunities. For the employer, the change to vacation leave approval was necessary to spread vacation leave use through the year in order to make the most of its staffing and limit overtime expenses. The importance of the issue to both parties weighs against finding that the parties were at a lawful impasse.

The Parties' Understanding of the State of Negotiations – Before the employer announced to union officers on October 23 that it would implement the new vacation leave approval policy on November 1, the union understood that a meeting including Casillas was scheduled in late November to discuss the policy. The union clearly stated to the employer that it would not make any decisions regarding the policy without Casillas' participation and/or input. The employer perceived the union's reluctance to proceed without Casillas as evidence that the union was unwilling to make any effort to bargain the impacts of the employer's decision to change the policy. The parties' differing views of the state of negotiations weigh against finding that the parties were at a lawful impasse.

Analysis of the parties' bargaining history, their good faith in negotiations, the length of the negotiations, the importance of the issue, and the parties' understanding of the state of the negotiations, leads to the conclusion that the parties were not at lawful impasse when the employer implemented the new vacation leave approval policy on November 1. As a result, the union has established that the employer committed an unfair labor practice violation.

The employer advances two arguments in its affirmative defense. First, the employer contends that the language in Section 5.9 of the CBA supplants any past practice, including past practice language that still exists in the SOP, and amounts to a waiver by contract. Second, the employer argues that the union waived by inaction its right to bargain by refusing to bargain after August 10, 2015, and thereafter, which resulted in implementation with limited input from the union.

The relevant portions of Section 5.9 are:

> Vacation approvals for requests made prior to April 1st of each calendar year shall [be] made on the basis of classification seniority within each unit. Vacation

> requests submitted after April 1st shall be granted dependent upon operational requirements and on a first-come, first-served basis.

Both of the sentences above were proposed by the union during negotiations, and replaced language in the previous CBA with PSEU that read:

> In accordance with past practice, vacation shall be granted on a seniority basis within each shift, squad, or unit and shall be taken at the request of the employee with the approval of the Division Commander for the King County Sheriff's Office.

The employer contends that the union, by omitting the phrase "in accordance with past practice," intended to negate the past practice regarding vacation leave approval, including past practice language in the SOP. The record indicates the opposite. The union had no intention to change the longstanding past practice regarding vacation leave approval, did not propose to do so during bargaining, and clearly expressed its opposition to the employer after the employer proposed its changes to the vacation leave approval policy in July 2015.

The employer's argument that the union waived by inaction its right to bargain is also unsupported by the facts. After receiving the employer's proposed vacation leave approval policy in July, the union responded in August that it wanted to maintain the past practice, but would be willing to address it during negotiations for the successor agreement. The employer made no effort to raise the issue again until October, at which point the parties attempted to schedule a meeting with their respective legal representatives, who were not mutually available before late November. In the meantime, the parties met for a preliminary discussion of the issue in late October, which led to changes in the policy but no agreement prior to the employer's implementation on November 1.

To meet its burden of proof that the union waived by inaction its right to bargain, the employer must prove that the union's conduct is such that the only reasonable inference is that the union has abandoned its right to negotiate. *City of Walla Walla*, Decision 12348-A (PECB, 2015), *citing Clover Park Technical College*, Decision 8534-A (PECB, 2004). The right to negotiate includes the right to say no, and the union's actions after it rejected the employer's proposal in August further indicate that it was unwilling to abandon its right to negotiate.

Conclusion

The employer did not fulfill its duty to bargain with the union regarding changes to the vacation leave approval policy before implementing the changes on November 1, 2015. The union met its burden to prove that the employer neither bargained to agreement nor a lawful impasse before implementation. The employer did not meet its burden to prove that the union waived its right to bargain, either by contract or by inaction. Substantial evidence indicates that the union did not attempt to alter the parties' past practice on vacation leave approval during bargaining for their first CBA. Substantial evidence also indicates that, after initially rejecting the employer's proposed policy changes, the union engaged in discussions regarding the policy and had another meeting scheduled when the employer implemented the policy over the union's objections.

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

Background

Allen has worked in the AFIS program since 1998 and has been a Jail Identification Technician since 1999. Jail Identification Technicians work at the King County Correctional Facility in Seattle, the Maleng Regional Justice Center in Kent, the Youth Service Center in Seattle, and the South Correctional Entity in Des Moines. As a member of the Jail Identification unit, Jail Identification Technician duties include obtaining fingerprints, palm prints, photographs, and DNA samples of inmates that are then entered into the Regional AFIS database.

In 2005, the employer assigned Allen lead worker duties within the Jail Identification unit. Lead worker duties are a one-year special duty assignment that includes a five percent pay increase over the lead worker's regular pay rate, in accordance with Section 7.3 of the parties' CBA. Section 7.3.A of the CBA states that the assignment "may be revoked at any time at the sole discretion of the Sheriff/designee."

After becoming a lead worker, Allen's assignment was renewed each year. Allen's last assignment ran from January 1, 2015, through December 31, 2015, under Jail Identification unit Supervisor Lisa Wray. Allen's primary responsibilities as a lead worker included overseeing unit operations when supervisors were absent, helping co-workers prioritize duties and workload, creating payroll reports, and monitoring staff hours.

On March 5, 2015, Gillespie sent an e-mail to bargaining unit employees stating that she was changing how lead workers were assigned in the AFIS section and providing guidelines for supervisors to use in rotating lead workers. Gillespie's e-mail stated that "Leads are not meant to be permanently assigned," and further stated that the employer would use a "3-5 year range as a maximum." The e-mail was sent as a general notification of the change, and stated that leads affected by reassignment would be notified separately. Allen testified that she and fellow Jail Identification unit lead worker Jody Tamura-Deering were notified in August that their lead assignments would end on December 31, 2015.

Allen has been involved in union leadership since approximately 2010, when AFIS employees were part of a bargaining unit of non-commissioned professional employees in the Sheriff's Office represented by PSEU. Allen was an elected member of PSEU's executive board, and she became a member of the contract negotiation team as second vice president after the King County Regional AFIS Guild was certified as the AFIS employees' exclusive bargaining representative in 2013.

The background from Issue 1 will not be repeated in its entirety here, but it suffices to state that Allen was part of the union negotiating team that took issue with the employer's decision to implement a revised vacation leave approval policy on November 1, 2015. The union filed a grievance over the implementation on November 3, 2015, and sought a return to the status quo as a remedy for the employer's action. Watkins denied the union's grievance and proposed remedy on November 23, 2015, and Gillespie did the same after the union moved the grievance forward to her on November 30, 2015.

The unfair labor practice charges in this issue stem from actions that began on November 16, 2015, during a Jail Identification unit meeting attended by Gillespie, Watkins, and Wray. The meeting

agenda included discussion of the disputed vacation leave approval policy, as well as an announcement of the new lead workers who would replace longtime leads Allen and Tamura-Deering on January 1, 2016, as part of a previously announced decision to periodically rotate lead worker assignments in all three essential units.

On November 13, 2015, Wray met with Allen and Tamura-Deering to discuss the agenda for the unit meeting. Wray credibly testified that she added the vacation leave approval policy to the agenda at Allen's request, primarily because Allen showed Wray the October 26, 2015, e-mail Gillespie sent to essential unit employees that contained the revised policy and said the policy could be discussed at unit meetings. The vacation leave approval policy was the penultimate topic on the unit meeting agenda, prior to the roundtable entry, which typically involves each meeting participant having an opportunity to discuss topics that have arisen before or during the meeting.

Wray testified that Allen and Tamura-Deering informed her that employees were upset about the policy, and she was concerned that the conversation about the policy "definitely had the potential, for lack of better words, to go sideways." As a result, Wray advised Allen and Tamura-Deering that the discussion of the policy should be limited to how it took shape in addition to its implementation and application.

Allen participated in two meetings on November 16, 2015, prior to the unit meeting. Allen, Verbonus, and Roberts met with Watkins to discuss the union's grievance over implementation of the vacation leave approval policy. Allen and Tamura-Deering later met with Wray to discuss the unit meeting agenda, and Wray said she reiterated her instructions from November 13, 2015, about how the policy should be discussed at the meeting.

The discussion of vacation leave approval at the unit meeting began with employees receiving a copy of the policy that Gillespie e-mailed on October 26, 2015, followed by an invitation to ask questions or comment on the policy. A number of employees were apprehensive about the restrictions they perceived in the policy, and testimony indicates that there was a considerable amount of agitation expressed in the questions, comments, and non-verbal communication that followed.

The record shows that Allen was the most vocal of the policy's critics. She testified that she was upset about the policy, and that she was "very active" during an approximately 15-minute discussion of the policy's genesis, the rationale behind it, and its effects on employees. At some point during the discussion, one or more of the supervisors stated that the policy change was designed to reduce the expense that accompanies the use of backfill overtime, to balance leave usage throughout the year in order to make the most of current staffing levels, and to bring the units in line with other essential units within the Sheriff's office.

Witnesses testified that what began as a group discussion became primarily a back-and-forth exchange between Allen and Gillespie that grew more intense and argumentative as it progressed. Allen questioned Gillespie about management decisions regarding staffing of the Jail Identification unit, staff safety, the ratio of supervisors to employees in some AFIS units, and how AFIS funds were spent. Many witnesses testified that Allen's questions seemed accusatory, and that she interrupted Gillespie on a number of occasions or asked follow-up questions without taking the time to fully consider Gillespie's answers.

Revocation of lead status and premium pay

On November 17, 2015, Wray discussed the unit meeting with Allen and Tamura-Deering. Wray testified that she was concerned about receiving discipline of her own for placing the vacation leave approval policy on the meeting agenda, and then not intervening when discussion of the subject became contentious. Wray credibly testified that Allen and Tamura-Deering appeared surprised about Wray's concerns, and that Allen had no misgivings about her interactions with her supervisors during the unit meeting.

Later that day, Wray met with Watkins to discuss the meeting with Allen and Tamura-Deering. In addition to reporting that she had raised her voice and cursed during the meeting with Allen and Tamura-Deering, Wray shared her doubts that she could work with Allen as a lead. Wray testified that she was particularly troubled by Allen's lack of insight into how her behavior during the unit meeting was perceived and Allen's reluctance to consider how she could have handled the situation differently.

On November 18, 2015, Gillespie, Watkins, and Wray were among those attending training at the Criminal Justice Training Center in Burien. During the day, the supervisors discussed what the best course of action regarding Allen would be, taking into account Allen's behavior during the unit meeting, and Wray's concerns after her meeting with Allen and Tamura-Deering the following day.

The supervisors decided to end Allen's lead assignment immediately rather than wait until the end of the year as previously planned, and on November 19, 2015, Watkins instructed Allen to meet with her at 12:30 p.m. In a meeting that included Watkins, Wray, Allen, and Roberts, Watkins informed Allen that her lead assignment was ending. Less than two hours later, Wray notified the KCSO personnel and payroll departments via e-mail that Allen was no longer assigned lead duties and would no longer receive the five percent wage increase that accompanied the assignment.

Internal investigation and written reprimand

On November 19, 2015, Gillespie made a BlueTeam entry regarding Allen's behavior during the November 16, 2015, unit meeting. BlueTeam is a system the employer uses for entering commendations or complaints regarding an employee. As it pertains to complaints, BlueTeam entries are reviewed by KCSO's Internal Investigation Unit (IIU) Commander, who determines whether the complaint will proceed to an investigation that could result in discipline. Gillespie's entry read, in relevant part:

> During the meeting, Marquel Allen / Lead ID Technician asked questions that Supervisor Lisa Wray, Operations Manager Diana Watkins, and I attempted to address. She did not appear to listen to our responses, and repeatedly interrupted and jumped topics. Her questions became accusations of my decisions and on why specific AFIS positions existed at all. She named several people whose jobs she felt shouldn't exist. When talking about my decisions on what positions to staff/not staff, she made a comment along the lines of, "If the public (taxpayers?) only knew …" When talking about numbers of staff, she also said, "It's like you don't even care about our safety," to which I indignantly mouthed to her, "take that back". She changed the subject. …
>
> Marquel often appears anxious in other settings, and I understand that she is passionate about her beliefs and perceptions. I also understand the changes discussed in the 11/16/2015 meeting were stressful for some staff. However, I felt Marquel's demeanor and accusations in this meeting were out of line; especially

> since she knows we are already working on morale issues with this group. I believe her emotional reactions helped to "rally the troops" as the accusations became an attack on management. ...
>
> I felt Marquel's remarks were 1) disparaging of the other AFIS Section members whose positions she stated we don't need, 2) ridiculing and disrespectful towards her management team including myself, and 3) overall discourteous to everyone in the room.
>
> A lead's function is to support the supervisor, provide direction to staff, and facilitate positive communications between staff and management. Marquel's behavior fell below my expectations of any staff member of *any* rank.

On November 24, 2015, Allen received an IIU complaint notification that her "conduct during a staff meeting was disrespectful," referring to the November 16, 2015, unit meeting. Sergeant Pat Raftis was the assigned investigator, and Allen was directed to attend an interview on December 3, 2015. Allen was one of 13 employees Raftis interviewed during the course of the initial investigation, which was completed on December 11, 2015, and sent to Gillespie by IIU Commander Jesse Anderson for her review on December 15, 2015.

Because she had entered the BlueTeam complaint that led to the investigation, Gillespie forwarded the investigation file to Cole-Tindall for her review, findings, and recommendations. After Cole-Tindall received the file, she directed Raftis to conduct recorded interviews with witnesses who had previously provided written statements as part of the investigation. Raftis completed the investigation on March 25, 2016, and Cole-Tindall found that the allegations against Allen should be sustained.

As a result of the sustained finding, Allen received a written reprimand on May 11, 2016, for violating GOM 3.00.015(2)(i), which states that "[m]embers shall conduct themselves in an orderly, courteous, and civil manner towards others." The reprimand from Anderson, which was approved by Cole-Tindall and Chief Deputy Jim Pugel, also read:

> In that on November 16, 2015, you were disrespectful towards [sic] your management team and other co-workers during a staff meeting. You made disparaging comments to discount the value of other staff and management positions, naming specific individuals in the process. You raised your voice when speaking with the program manager and made accusations about her decisions,

> becoming both argumentative and disruptive while the accusations were being addressed.

The union filed a grievance regarding Allen's written reprimand, alleging that the employer violated Section 12.9 of the CBA, which covers just cause and progressive discipline.

Performance appraisals

On March 16, 2016, Wray provided Allen a performance appraisal that covered the period beginning February 1, 2015, through January 31, 2016. The performance appraisal used by KCSO has seven categories for non-supervisory personnel: leadership, professionalism, service, teamwork, communications, seeks to improve performance, and policies and procedures. Within each category, there are three ratings – exceeds standards, meets standards, or needs improvement – and a comments section that the reviewer must use to provide context for the ratings.

Allen received "exceeds standards" ratings in the categories of service and seeks to improve performance. She received a "meets standards-plus" rating in teamwork, and received "meets standards" ratings in the other four categories. Wray took over as Allen's supervisor in spring of 2014, and her first performance appraisal of Allen on February 25, 2015, included "exceeds standards" ratings in five categories, and "meets standards" ratings in seeks to improve performance, and policies and procedures.

The appraisal Allen received on March 16, 2016, included the following language in the comments section of the leadership category:

> [A]s a long-term lead in the unit, you are self-motivated and require little direction to accomplish the primary responsibilities as an Identification Technician. You maintain high standards for yourself and others, and encourage employee development and responsibility. For these reasons, I have given you a Meets Standards in this category, even though you've sometimes struggled to channel your passion in a positive way.
>
> In February 2015, I clarified lead expectations and roles. As a lead, you were expected to set the tone for the unit by limiting venting, negativity, general distrust, and distractions. I asked that you be cognizant of the message you share with staff

> regarding management, and ensure you were not being critical, or questioning anyone's integrity or leadership. ... Unfortunately, after I observed you continue to struggle with maintaining a positive and collaborative tone, and openly question my leadership and integrity, I lost confidence in your ability to be an effective lead in the unit.

The professionalism category included the following comments:

> You are direct, hold others accountable for their actions, and do not hesitate to address a situation that is inappropriate or is in need of immediate attention. You are reliable, well respected seen as an authority, and are held in high regards [sic]. You're a fierce advocate for what you believe in, but in doing so I encourage you to always use a respectful tone, and a professional demeanor.

The communications category included the following comments:

> While you typically address co-workers, supervisors, and the public in a positive and constructive manner, I have observed you in situations where you failed to demonstrate respect and courtesy when communicating your position in regards [sic] to training opportunities, unit, section, and program policies and practices.

Section 21.1 of the CBA allows employees to challenge the fairness or accuracy of performance appraisals by filing a written appeal within 10 days of receiving the appraisal. If a suitable solution cannot be reached, employees can appeal to the manager of the unit, whose decision can then be appealed to a three-member panel that includes a department representative, a labor representative, and a representative from the King County Office of Alternative Dispute Resolution for a final determination.

Section 21.3 of the CBA states that the panel cannot include anyone from the department who was involved in the review of the appeal. The affected employee is responsible for presenting his or her perspective of the appraisal to the panel, and the employee's evaluator (in this case, Wray) is responsible for providing his or her perspective. As stated in Section 21.4, the panel can either modify or preserve the original appraisal after hearing evidence.

Allen filed her initial appeal with Wray, challenging wording in the leadership category, her "meets standards" ratings and wording in the professionalism category, her "meets standards-plus" rating

in teamwork, and wording in the communications category. In her initial response to Allen's appeal, Wray highlighted the language she understood Allen to be challenging. In an e-mail dated March 30, 2016, Wray asked Allen to review the highlighted portions of the appraisal in order to ensure that she understood which areas Allen was appealing in each category. Wray also asked Allen if she had any suggestions regarding the wording in the highlighted areas. Allen responded later in the day that she wanted Wray to remove all of the highlighted language in addition to portions of the language contained in a section listing goals for the upcoming review period.

On April 7, 2016, Wray formally responded to Allen's appeal via e-mail. She indicated in her response that she was not willing to change Allen's rating in professionalism and teamwork, nor was she willing to make all of the language revisions Allen requested in leadership, professionalism, communications, and goals. Wray stated instead on nine occasions that she was "[n]ot willing to strike entire comment as stated – Willing to strike in part or work with you to revise." Wray's response included her suggestions for language that could be removed from Allen's initial performance appraisal.

Allen then sent Wray a second appeal letter, in which she sought additional language changes to her performance appraisal in the leadership, professionalism, and communications categories, and also continued to challenge her rating in the teamwork category. On April 13, 2016, Wray acknowledged receipt of Allen's second appeal letter via e-mail. Wray indicated a desire to discuss the appraisal in person or by telephone, but Allen responded via e-mail on April 18, 2016, that she preferred to keep their interactions on the matter in writing.

Wray responded by e-mail on April 21, 2016, that she was unwilling to make further changes to Allen's performance appraisal. Wray stated that Allen's options included meeting in person to work on alternative language instead of continuing over e-mail, or appealing the evaluation to Gillespie as the second step in the process detailed in Section 21.1 of the CBA.

On April 29, 2016, Allen e-mailed Gillespie to inform her that she was moving her performance appraisal appeal to the second step. Allen attached a letter to the e-mail that reiterated the changes

she sought in her second appeal letter to Wray, and added a request for the goals section to be rewritten.

Gillespie used Wray's revisions to Allen's performance appraisal from April 7, 2016, and made proposed revisions of her own in four categories and the goals section before e-mailing it to Allen for her review on May 13, 2016, two days after Allen received her written reprimand. Gillespie did not change Allen's ratings in any category, but she added a reference to Allen's behavior in the November 16, 2015, unit meeting to the leadership category.

Gillespie also responded to the letter Allen attached to her April 29, 2016, e-mail. Gillespie wrote that she added the reference to Allen's behavior in the November unit meeting because she was surprised that it was not specifically addressed by Wray. In response to Allen's contention that it was premature to mention the incident in an evaluation when there were pending IIU and ULP proceedings, Gillespie wrote that "[r]egardless of any action that is pending, it is the supervisor's responsibility to address any behaviors they have observed that go against expectations."

On May 16, 2016, Allen informed Gillespie via e-mail that she did not accept Gillespie's proposed revision to her performance appraisal, and inquired about who would represent the employer on the three-person appeal panel. In e-mails exchanged on May 17 and 18, Gillespie and Allen indicated a willingness to reach resolution on changes to the appraisal.

On May 19, 2016, Allen e-mailed Gillespie a revised version of the letter that proposed changes to her performance appraisal. In addition to suggesting some inconsequential language changes, Allen sought to strike any mention of the November unit meeting from the leadership category, continued to seek an "exceeds standards" rating in the teamwork category, and continued to dispute language in the communications category.

On June 1, 2016, Gillespie e-mailed a second proposed performance appraisal to Allen. Gillespie incorporated some of the changes Allen requested on May 19, 2016, including changing Allen's teamwork rating to "exceeds standards." Gillespie wrote in the accompanying e-mail that she also

adjusted the language in the communications category "to help clarify how you came across to the others, not to be confused with intent."

However, Gillespie did not strike references to the November unit meeting from the leadership category. Gillespie also downgraded Allen's rating in that category to "needs improvement," a fact Allen highlighted when she responded via e-mail on June 4, 2016.

> Carol,
> I am not willing to take NI in any category, I am unclear how this even became an option. I am asking you to rate me according to Guidelines of KCSO Performance Evaluation and EIS/Blue Team System. If I was in anyway [sic] in a "needs improvements" category I would expect to have received some sort of documentation of what I was doing wrong, or a performance plan to give me a chance to correct it. As I stated before, I shouldn't be finding this out in my annual review. It also states in the guideline under Rating Pitfalls-Beware don't reference corrective counseling memos, I took that to mean since it has been addressed in another forum it shouldn't be added to the evaluation.

Allen's e-mail to Gillespie stated that she "continued to struggle" with the comments made in the communications category, but that she was in agreement with other changes Gillespie proposed. On June 6, 2016, Allen e-mailed Gillespie to ask that the time frame for appealing her performance appraisal be suspended because the appraisal was part of the ULP proceedings, and the parties had scheduled mediation later in the month to attempt to resolve issues involved in the hearing.

Applicable Legal Standards

Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *Jefferson County Public Utility District No. 1*, Decision 12332-A (PECB, 2015). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing:

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.

City of Vancouver, Decision 10621-B (PECB, 2012), *aff'd in part*, *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348-349 (2014); *Educational Service District 114*, Decision 4361-A (PECB, 1994).

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 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).

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Id.* If the respondent meets its burden of production, the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or that union animus was a substantial motivating factor for the employer's actions. *Id.*

Application of Standards

In order to establish its prima facie case for employer discrimination, the union must first show that Allen was participating in an activity protected by Chapter 41.56 RCW during the November 16, 2015, unit meeting that was the backdrop for the revocation of her lead status and loss of premium pay, her internal investigation and written reprimand, and her disputed performance appraisal.

RCW 41.56.040 protects employee rights as follows:

> No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

These rights are not absolute, however, and an employee is not immune from disciplinary actions just because he or she has engaged in union activity. *University of Washington*, Decision 11199-A (PSRA, 2013), *citing Public Employment Relations Commission v. City of Vancouver*, 107 Wn. App. 694 (2001); *Vancouver School District v. SEIU Local 92*, 79 Wn. App. 905 (1995), *review denied*, 129 Wn.2d 1019 (1996).

When determining whether activity is protected, we first look at whether, on its face, the activity was taken on behalf of the union. *University of Washington*, Decision 11199-A, *citing City of Seattle*, Decision 10803-B (PECB, 2012) (a letter written by the union president to the employer was protected because the union was working on behalf of one of its members); *Renton Technical College*, Decision 7441-A (CCOL, 2002) (contacting a state legislator to inquire about use of particular funding for employee salaries was protected activity); *Atlantic Steel Co.*, 245 NLRB 814 (1979) (complaint made on plant floor, rather than in company office or across table at formally convened and structured grievance meeting was protected activity).

If the activity appears to be union activity on its face, Washington courts have adopted a "reasonableness" standard. *University of Washington*, Decision 11199-A, *citing Vancouver School District v. SEIU Local 92*, 79 Wn. App. 905 (1995); *Public Employment Relations Commission v. City of Vancouver*, 107 Wn. App. 694 (2001). "Employee protected activity loses its protection when it is unreasonable — but reasonableness is gauged by what a reasonable person would do in the midst of industrial strife, and not by what a reasonable person would do in the more ordinary affairs of life." *Vancouver School District v. PERC*, 79 Wn. App. 905 at 922; *see also Vancouver School District*, Decision 3779 (PECB, 1991), *rev'd, Vancouver School District*, Decision 3779-A (PECB, 1992). "Conduct may fall outside of the protections of labor statutes if the conduct is irresponsible and abusive." *City of Vancouver*, 107 Wn. App. at 711 (even when it

was claimed the actions were taken as part of union duties, actions that amounted to a conspiracy to retaliate against a fellow employee were unprotected).

The culture of the work environment is also relevant. For example, the use of profanity may be unreasonable if it is not normally acceptable in the work place and if it is used confrontationally. *University of Washington*, Decision 11199-A, *citing Pierce County Fire District No. 9*, Decision 3334 (PECB, 1989). If profanity and disrespectful language are regularly used at the work place, then such language does not become unreasonable when used during union activities. *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Crown Central Petroleum Co. v. NLRB*, 430 F.2d 724 (1970).

Depending on the context and delivery, confrontational statements may or may not be protected activity. *University of Washington*, Decision 11199-A. Telling a supervisor that "this could be settled out in back of the warehouse" was unreasonable and unprotected. *City of Pasco*, Decision 3804 (PECB, 1991), *aff'd*, Decision 3804-A (PECB, 1992). On the other hand, the use of defiant language in a written letter is inherently less confrontational than in face-to-face interaction and is not necessarily unreasonable. *Lewis County*, Decision 4691-A (PECB, 1994). It is not strictly unreasonable to question a supervisor's veracity or even make unsubstantiated allegations, as long as these are relevant to union activity. *Atlantic Steel Co.*, 245 NLRB 814 (holding that union activity is unprotected when statements are so opprobrious as to make an employee unfit for further service).

As evidenced by testimony from Allen, her supervisors, and her co-workers, Allen's actions during the November 16, 2015, unit meeting were on behalf of the union. In her role as a union officer, Allen sought answers about vacation leave approval policy changes that the employer had implemented over the union's objection on November 1, 2015, and was among those expressing concerns about how the changes would affect employees' ability to take time off. Allen's supervisors fully understood that Allen was advocating for bargaining unit employees, and it was something they should have reasonably expected to occur when they added vacation leave approval to the meeting agenda at Allen's request. Finally, several of Allen's co-workers credibly testified that they believed Allen was advocating for them as a union officer when the discussion turned to the vacation leave approval policy.

Allen's conduct during the unit meeting appears to constitute union activity on its face, so the question of whether her activity was protected turns on whether it was reasonable under the circumstances that existed in the workplace at the time of the meeting. The employer's implementation of the vacation leave approval policy on November 1, 2015, had created a considerable amount of angst among employees, and Allen was part of a union leadership team that opposed changing the policy before and after its implementation. Considering the dynamic that existed before the unit meeting, it was inevitable that a discussion of the vacation leave approval policy would lead to some form of strife.

Allen testified that it was "a normal unit meeting" that included the ability for employees to express opinions and ask questions. Allen characterized the exchanges with the supervisors as "just a heated discussion. . . . Management had comments. I had comments. Some other people did have comments. Was I actually the one that said the most? Absolutely."

Witnesses for the union and the employer credibly testified that there was little normal about the unit meeting, especially as it pertained to the discussion of the vacation leave approval policy and the subsequent sparring about other topics that preceded the end of the meeting. Union witness Pamela Lyne said it was the most contentious unit meeting she had ever attended. Union witness Felicia Guidry referred to "fireworks going between the two" in describing the interactions between Allen and Gillespie, and added later in her testimony that "I was just shocked, because we never had meetings that were just – you know, so outlandish. That day just felt uncomfortable."

Gillespie, Watkins, Wray, and other witnesses credibly testified that Allen became more confrontational and disrespectful as the conversation veered further away from the vacation leave approval policy and toward Gillespie's management of the program. Gillespie testified that she had experienced conflict with Allen prior to the unit meeting, but "nothing like that." Gillespie said she felt Allen attacked her with accusatory questions, questioned her integrity, and continually interrupted her. As a result, Gillespie made the BlueTeam complaint that led to the internal investigation and Allen's written reprimand.

> Because I would have put anybody in BlueTeam; if it were one of my direct reports or anybody, I would have put them in, because it was such inappropriate behavior.

> It really – it, again, it was accusatory towards me. And then it also was in that kind of forum, and just riled the troops up. It was terrible. And again, this is not a first-line employee. It would have been terrible if it were a first-line employee. It's also a lead, somebody who I've assigned paying 5 percent more to – to help bridge the gap between management and employees, and that was absolutely unacceptable.

Gillespie's perceptions were supported by credible testimony of Mark Scairpon, a latent print examiner who worked in the Jail Identification unit at the time of the unit meeting and was the note-taker for the meeting.

> Q. What did you notice as [Allen] became more involved?
>
> A. She was pretty upset about several of the topics that were brought up.
>
> Q. And what do you mean by that?
>
> A. She kind of – when something came up that she disagreed with, she spoke up immediately, and started making an argument against why it should be, or talking about her opinions or her feelings on the various topics.
>
> Q. And did the topics go beyond – or did her statements go beyond the vacation leave approval policy?
>
> A. Yeah. She brought up the top-heavy nature of our management system, or of our organizational structure. She brought up different positions that she didn't believe needed to exist in our unit. She brought up safety concerns about people working alone at various facilities. She brought up her opinion of waste in our organization, and how that was wasting taxpayer money. So yeah, that went quite beyond the scope of vacation policies.
>
> Q. And can you describe the manner in which she was raising those issues?
>
> A. It was confrontational. It was – it was inappropriate for an all-hands meeting with managers and employees present. It was done in such a way that it was not so much geared towards resolution, but it was geared towards conflict.
>
> Q. Did it appear that Marquel was trying to get questions answered about some of those topics?
>
> A. Not really.
>
> Q. What did it look like to you?

> A. Well, when you want questions answered, you ask a question and you wait for the answer. And that didn't occur. She would ask a question or make a statement, and then talk over the person, or immediately rebut the answer that was given, without giving a moment to actually reflect on the answer. It looked like she was upset. And it looked more like asking "got-you's," or attempting to embarrass, than trying to understand and get information and move the process forward.

Scairpon's recollection of Allen's behavior was not reflected in the meeting notes provided to employees afterward. Scairpon testified that "[s]ince the notes were going out to our entire unit and that is a professional document, I included the topics that were discussed and the general results of each of those topics. I did not include the exact wording and behaviors that I witnessed, because I didn't feel that those were things that needed to be included in meeting minutes."

It is apparent that Allen was one of a number of employees in the unit meeting who had questions and concerns about the vacation leave approval policy, and that she was the most vocal opponent of the policy. Taken alone, those facts could lead to a finding that Allen's behavior was protected activity. However, Allen's advocacy against the vacation leave approval policy became unreasonable as the meeting wore on, and her behavior became less about the policy and more about asserting that Gillespie was mismanaging the program. As stated in *Pierce County Fire District No. 9*, Decision 3334 (PECB, 1989), "There is a point where an employee's conduct becomes primarily confrontational, and exceeds the scope of protected activity." As emotions escalated and the discussion morphed into a testy exchange between Allen and Gillespie on tangentially related topics, Allen reached that point, and her behavior was no longer protected activity.

Conclusion

The union was unable to meet its burden of showing that Allen was participating in an activity protected by Chapter 41.56 RCW, and therefore did not establish a prima facie case for discrimination. Although Allen was acting on behalf of the union, her excessively confrontational behavior during the November 16, 2015, unit meeting was unreasonable and therefore not protected activity. The allegations of discrimination are dismissed.

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

Background

November 19, 2015, meeting

As touched upon in the discussion of Issue 2, Watkins e-mailed Allen and asked to meet with her at 12:30 p.m. on November 19, 2015. When Allen asked what the meeting was about, Watkins replied that it concerned potential changes, but she did not provide further detail. On the way to the meeting, Allen asked Roberts to accompany her as her representative.

Watkins and Wray were in Watkins' office when Allen and Roberts arrived. Allen and Roberts credibly testified that Watkins stated that the meeting was not a disciplinary meeting, and that management should be able to talk to employees without employees "guilding up." They also testified that Watkins said Roberts could stay because Watkins liked him. Watkins and Wray testified that the gist of the conversation was as described by Allen and Roberts, but they testified that Watkins did not use the term "guilding up," and that Watkins' comment about Roberts was meant in a light-hearted way.

The meeting continued with Wray stating that nothing Allen could say would justify her behavior at the November 16, 2015, unit meeting. Watkins then said that despite Allen's strengths, aspects of Allen's performance as a lead fell short of management's expectations, and that Allen's lead assignment was ending immediately instead of at the end of the year.

E-mail to bargaining unit employees

On February 24, 2016, Wray sent an e-mail with the subject line of "Unfair Labor Practice Hearing – June 28-30, 2016." The exhibit the union entered into evidence does not show the

addressees for the e-mail, but Allen's unrefuted testimony was that it was sent to all employees in the Jail Identification unit.

> All,
>
> The AFIS Guild has filed an unfair labor practice charge against the KCSO with the Public Employment Relations Commission and a hearing has been scheduled for June 28-30, 2016. This is an informal administrative hearing that will take place in a conference room at the Chinook building. Potential witnesses need to ensure that they are available on these dates. You are on this email because you are a potential witness. As the time draws closer, leave requests for this time frame will be held until final determinations are made about who is needed by the Guild and the KCSO to testify at the hearing. A mediation session is scheduled in May, at which time one or all issues may be resolved. For now, please make sure you are available these three days. In order to ensure a comfortable work environment for everyone and protect confidentiality of a related IIU investigation, please maintain the confidentiality of substantive testimony, and avoid unnecessary discussion of these matters that may make co-workers uncomfortable. See GOM 3.03.090 which outlines the requirement for confidentiality of investigations. This does not preclude you from discussing the case with a legal representative in this ULP process, or appropriate command staff or legal advisor with regard to the pending IIU investigation.
>
> If you would like further clarification or have any questions, you may contact KCSO legal advisor, Diane Taylor.

Allen's performance appraisal

Allen's performance appraisal was covered in detail in the discussion of Issue 2, and will not be repeated here.

Applicable Legal Standards

Interference

Employees covered by Chapter 41.56 RCW have the right to organize and designate representatives of their own choosing for purposes of collective bargaining or exercise other rights under the chapter free from interference, restraint, coercion, or discrimination. RCW 41.56.040; *Kitsap County*, Decision 12022-A (PECB, 2014). It is an unfair labor practice for a public employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by Chapter 41.56 RCW. RCW 41.56.140(1).

To prove an interference violation, the complainant must prove, by a preponderance of the evidence, the employer's conduct interfered with protected employee rights. *Washington State Patrol*, Decision 11863-A (PECB, 2014), *citing Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *remedy aff'd*, *Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn. App. 809 (2000). An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

An employer may interfere with employee rights by making statements, through written communication, or by actions. *Washington State Patrol*, Decision 11863-A, *citing Snohomish County*, Decision 9834-B; *Pasco Housing Authority*, Decision 5927-A. The complainant is not required to demonstrate that 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. *Id.*

Application of Standards

November 19, 2015, meeting

The union argues that the employer interfered with employee rights by disparaging the union and its representatives, first through Watkins' statement that management should be able to talk to employees without employees "guilding up," and then by Watkins' statement that Roberts could remain at the meeting because the supervisors liked him. The employer counters that Watkins was simply stating that the meeting was a non-disciplinary meeting without making any attempt to deny Allen representation, and that Watkins' comments regarding Roberts were an attempt to lighten the mood rather than limit Allen's rights.

When Watkins summoned Allen to the meeting, it was three days after the contentious unit meeting and two days after Allen and Tamura-Deering met with Wray to discuss what occurred at the unit meeting. Allen credibly testified that the tension existing in the workplace after the previous days'

meetings led her to believe she might need representation when she met with Watkins, so she asked Roberts to accompany her.

After Allen arrived at the meeting with Roberts, they were greeted with opposition to Roberts' presence in the form of an overarching statement from Watkins that the employer should be able to discuss matters with employees without employees "guilding up." Allowing Roberts to stay because he was liked added to the reasonable perception that there was a limit to the union's ability to represent its members. Roberts testified that he was pleased to be liked, but Watkins' statements left him with the impression that another union representative might not be welcome in a similar situation.

Watkins credibly testified that her statements during the meeting were not intended to interfere with employee rights, but the union need not demonstrate that she intended to interfere with those rights in order to prove an interference violation.

Allen testified that, after hearing Watkins' statements, "I was under the impression that they were telling me I couldn't have my representation there," and Roberts' testimony also indicates that he believed there was a limit to union representation. Watkins' statements could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, associated with the union activity of Allen, Roberts, or other employees. The union met its burden of proving, by a preponderance of the evidence, that the employer's conduct interfered with protected employee rights.

E-mail to bargaining unit employees

The union contends that Wray's e-mail to Jail Identification unit employees on February 24, 2016, interfered with employee rights by creating the perception that access to leave during the original dates for the ULP hearing was suspended in direct response to the union filing a ULP complaint. The union also contends Wray's e-mail amounted to a gag order that prevented the union from effectively communicating with its members about the ULP proceedings.

Allen testified that she was concerned that "it was almost like blaming us that they [Jail Identification unit employees] couldn't get a leave request if they wanted to, during this time frame, because the guild filed this ULP," but Wray's e-mail was far more neutral than the union portrays.

The union paints Wray's e-mail as a blanket denial of employee leave rights during the three scheduled days of the hearing, but that is not a reasonable perception based on the e-mail's language. The e-mail stated that "leave requests for this time frame will be held until final determinations are made about who is needed by the Guild and the KCSO to testify at the hearing." The e-mail's language would lead to the reasonable conclusion that leave requests for that time period would be approved once the final witness determinations had been made, or once the parties reached agreement in mediation.

The union claims Wray's e-mail prevented the union from effectively communicating with its members about the scheduled ULP proceedings. Although Allen's ability to discuss the case with Jail Identification unit employees was limited by the confidentiality requirements of the IIU investigation, Roberts testified that he surveyed employees in the Jail Identification unit regarding the unit meeting associated with many of the union's allegations. The record also indicates that the union's legal representatives were able to communicate freely with bargaining unit employees.

Wray's e-mail to Jail Identification unit employees on February 24, 2016, could not reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, associated with union activity. The union did not meet its burden of proving, by a preponderance of the evidence, that the employer's conduct interfered with protected employee rights.

Allen's performance appraisal

The union's interference allegation connected to employer actions taken during the appeal of Allen's performance appraisal was based on the same set of facts as its discrimination allegation described in Issue 2. The union did not establish a prima facie case for discrimination, and the allegation of discrimination was dismissed. An independent interference violation cannot be found under the same set of facts that fail to constitute a discrimination violation. *Seattle School District*,

Decision 10732-A (PECB, 2012); *see Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

Conclusion

The union met its burden of proving, by a preponderance of the evidence, that Watkins' statements during the November 19, 2015, meeting could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, associated with the union activity of Allen, Roberts, or other employees.

The union did not meet its burden of proving, by a preponderance of the evidence, that Wray's e-mail to Jail Identification unit employees on February 24, 2016, could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, associated with union activity. The union's allegation is dismissed. The interference allegation regarding Allen's performance appraisal is also dismissed, because Commission case precedent precludes finding an interference violation under the same set of facts that fail to constitute a discrimination violation.

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

The union's original complaint filed December 1, 2015, and its amended complaint filed December 4, 2015, sought causes of action for employer discrimination and independent interference by subjecting Allen to an internal investigation in reprisal for union activities protected by Chapter 41.56 RCW. On December 16, 2015, the Unfair Labor Practice Manager issued a preliminary ruling that found a cause of action to exist for employer discrimination. The preliminary ruling neither found a cause of action to exist for independent interference in connection with the internal investigation nor dismissed the allegation.

The preliminary ruling limits the causes of action before an examiner and the Commission. A complainant who claims that the preliminary ruling failed to address one or more causes of action it sought to advance in the complaint must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling. WAC 391-45-110(2)(b). The

union sought no such clarification from the Unfair Labor Practice Manager prior to the issuance of the original notice of hearing on February 25, 2016.

The union filed its second amended complaint on April 5, 2016, and I issued an amended preliminary ruling on April 11, 2016, that did not include a cause of action for independent interference in connection with the internal investigation. On April 22, 2016, the union made a motion for clarification of the amended preliminary ruling, stating that the ruling failed to address three paragraphs of the second amended complaint, none of which pertained to the internal investigation.

The union filed a third amended complaint on May 19, 2016, and a fourth amended complaint on May 23, 2016. On June 2, 2016, I issued a second amended preliminary ruling and order of partial dismissal, which again did not include a cause of action for independent interference in connection with the internal investigation. In accordance with WAC 391-45-350, the parties had 20 days to submit a notice of appeal, and neither party did so.

Following the parties' request for a continuance to pursue mediation, I issued an amended notice of hearing on July 14, 2016, and later issued a second amended notice of hearing on August 17, 2016. The union made no motions for clarification of the second amended preliminary ruling and order of dismissal prior to issuance of the amended notices of hearing.

Conclusion

Neither the Unfair Labor Practice Manager's preliminary ruling nor my two amended preliminary rulings that followed found a cause of action to exist for independent interference in connection with the internal investigation of Allen. In accordance with WAC 391-45-110(2)(b), a complainant who claims that the preliminary ruling failed to address one or more causes of action it sought to advance in the complaint must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling.

The union sought no such clarification from the Unfair Labor Practice Manager prior to issuance of the original notice of hearing on February 25, 2016. As it pertains to the internal investigation,

the union did not seek clarification of either of my preliminary rulings prior to the issuance of an amended notice of hearing on July 14, 2016, or the second amended notice of hearing on August 17, 2016. As a result, the interference allegation regarding the internal investigation of Allen will not be addressed.

REMEDY

The employer refused to bargain by making unilateral changes to its vacation leave approval policies in November 2015. The standard remedy for a unilateral change violation is restoring the status quo that existed prior to the unilateral change, making employees whole for any loss to wages, benefits, or working conditions as a result of the employer's unlawful act, posting a notice of the violation, and reading that notice into the record at a public meeting of the employer's governing body. *Kitsap County*, Decision 10836-A (PECB, 2011), *citing City of Anacortes*, Decision 6863-A (PECB, 2000); *Seattle School District*, Decision 5733-A (PECB, 1997), *aff'd*, Decision 5733-B (PECB, 1998). The typical order also instructs the employer to cease and desist from making unilateral changes to mandatory subjects of bargaining unless the employer first provides the complainant union with notice of such changes and the opportunity to request bargaining over the proposed change. *Kitsap County*, Decision 10836-A.

The employer is ordered to return to the *status quo ante* regarding vacation leave approval until such time as the parties are able to bargain in good faith over the issue. As they did prior to the employer's unilateral change in November 2015, bargaining unit employees who make a vacation leave request before April 1 will have the request approved if the employee has the most seniority on his or her shift. Multiple employees on a shift can request the same days off. If an employee wants the same days off as an employee with more seniority, the less-senior employee's vacation leave request will be granted if (a) the request does not bring the number of employees on shift below minimum staffing, or (b) an employee volunteers for overtime in order to maintain minimum staffing on the shift. Requests made after the April 1 deadline will be granted on a first-come, first-served basis if (a) the request does not bring the number of employees on shift below minimum staffing, or (b) an employee volunteers for overtime in order to maintain minimum staffing on the shift.

This remedy does not change vacation leave requests that have been previously approved. The employer is also ordered to cease and desist from making unilateral changes to mandatory subjects of bargaining without first providing the union notice of such changes and the opportunity to request bargaining.

A cease and desist order is also appropriate in connection with the employer's statements during the November 19, 2015, meeting that could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, associated with the union activity of Allen, Roberts, or other employees. In addition, the employer is required to post a notice of the violation and read the notice at the King County Regional AFIS Advisory Committee meeting.

FINDINGS OF FACT

1. King County (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The King County Regional AFIS Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The King County Regional Automated Fingerprint Identification System (AFIS) provides fingerprint identification services and technology for criminal justice agencies of all 39 cities and unincorporated areas in King County. The program is managed by the King County Sheriff, and has been funded through voter-approved property tax levies since its inception in 1988. The King County Regional AFIS Advisory Committee, which consists of representatives from member jurisdictions, oversees the program's operations and funding.

4. Manager Carol Gillespie directs the AFIS program's day-to-day operations. Identification Operations Manager Diana Watkins reports to Gillespie and supervises three identification supervisors: Lisa Wray in the Jail Identification unit, Laurie Ordonia in the Tenprint Examiners unit, and Jennifer Ingram in the Tenprint Identification Specialists unit. All three units, also called essential units, operate 24 hours a day and seven days a week.

5. The union represents "all non-commissioned non-supervisory professional employees of the King County Sheriff's Office [KCSO] in the AFIS Section, excluding administrative employees, information technology employees, Photo Lab employees, commissioned officers, confidential employees, supervisors and all other employees." *King County*, Decision 11697 (PECB, 2013).

6. Following certification in March 2013, the union and the employer bargained for more than two years before reaching agreement on their first collective bargaining agreement (CBA). The union ratified the parties' tentative agreement on May 5, 2015. The agreement went into effect on July 23, 2015, and expired on December 31, 2016.

7. The union bargaining team included attorney Chris Casillas, President Scott Verbonus, First Vice President Mark Roberts, and Second Vice President Marquel Allen. The employer bargaining team included Gillespie, Labor Negotiator Bob Railton, Labor Relations Legal Advisor Diane Taylor, and Robin Fenton, who was KCSO's Chief of Technical Services. At the time of the hearing, Patti Cole-Tindall was the Chief of Technical Services.

8. Section 5.9 of the CBA covers the parties' agreement regarding requests for vacation approval. The first two sentences of Section 5.9 were not part of the 2009-2012 CBA, when the bargaining unit was represented by the Public Safety Employees Union (PSEU).

> Vacation approvals for requests made prior to April 1st of each calendar year shall [be] made on the basis of classification seniority within each unit. Vacation requests submitted after April 1st shall be granted dependent upon operational requirements and on a first-come, first-served basis. Employees who are transferred involuntarily, and who have already had their vacation request approved as specified above, will be allowed to retain that vacation period regardless of their seniority within the new unit to which they are transferred.

9. The new language in the parties' CBA reflected language in the King County Sheriff's Office General Orders Manual (GOM) regarding vacation approval and the AFIS program's Standard Operating Procedures (SOP) regarding vacation and compensatory

time requests. Section 1.15 of the SOP for the Jail Identification unit covers vacation and compensatory time requests.

10. In practice, an employee in the Jail Identification unit who made a vacation leave request before April 1 would have the request approved if the employee had the most seniority on his or her shift. Multiple employees on a shift could request the same days off. If an employee wanted the same days off as an employee with more seniority, the less-senior employee's vacation leave request would be granted if (a) the request would not bring the number of employees on shift below minimum staffing, or (b) an employee volunteered for overtime in order to maintain minimum staffing on the shift. Requests made after the April 1 deadline would be granted on a first-come, first-served basis if (a) the request would not bring the number of employees on shift below minimum staffing, or (b) an employee volunteered for overtime in order to maintain minimum staffing on the shift.

11. Watkins testified that she was preparing for the 2012 operating levy when she realized the three units she oversaw seldom denied vacation leave requests, because there was either enough staff to accommodate multiple vacation requests, or sufficient volunteers for overtime to ensure minimum staffing. Furthermore, Watkins testified that there were instances in the Tenprint Examiners unit where the supervisor used mandatory overtime to backfill for employees whose vacation leave requests left the unit below minimum staffing.

12. Watkins testified that the practice for vacation leave approval was problematic for the employer, but the employer made no proposals to change it while the parties were engaged in bargaining.

13. After discussing the issue with the three unit supervisors, Watkins created a revised policy during the first half of 2015, and e-mailed a draft of the new policy to Gillespie on July 8, 2015. Gillespie forwarded Watkins' e-mail and draft to union officers Verbonus, Roberts, and Allen on July 14, 2015, more than two months after the union ratified the parties' tentative agreement on the CBA.

14. Watkins' e-mail stated that the draft policy detailing procedures for vacation leave approval and backfill overtime was designed to "better distribute the use of leave, and limit backfill overtime for units with essential staffing," as well as to bring AFIS' backfill overtime practices in line with those of other KCSO essential units.

15. More than three weeks later, Gillespie had not received a response from the union on the proposed policy changes. She e-mailed Verbonus on August 10, 2015, asking, "Is it fair to assume there aren't any issues, and we're good to go?" Verbonus responded that day that the union had sent the proposal to Casillas for review, and informed Gillespie on August 11, 2015, that the union was comfortable with the current practice, but would be willing to address the issue once the parties returned to the bargaining table.

16. The parties did not revisit the vacation leave approval policy until early October. On October 8, 2015, Gillespie sent the union a meeting request for October 19, 2015, and Watkins e-mailed Verbonus a revised version of the policy on October 9, 2015, that did not significantly alter the key elements of the proposal the employer made in July.

17. The parties attempted to find a mutually agreeable alternate date to meet. A lack of corresponding availability for the parties' legal representatives pushed a meeting into late November, but Allen informed the employer via e-mail on October 14, 2015, that the union "wouldn't be opposed to meeting earlier for a preliminary discussion as long as all parties know we would not move forward without discussing all of the findings with Chris."

18. On October 23, 2015, Verbonus and Allen met with Gillespie, Watkins, and Taylor to discuss the vacation leave approval policy. As a result of the discussion, the employer honored the union's request to remove language that would have rotated vacation leave bids in a manner similar to shift bids.

19. The parties did not reach an agreement on the vacation leave approval policy, but the employer informed Verbonus and Allen at the end of the meeting that the employer was prepared to implement the policy on November 1, 2015, over the union's objections.

20. On October 26, 2015, Gillespie sent an e-mail to the employees in the essential units "to clarify expectations, summarize the reasons behind them, and give notice that going forward we will follow the applicable policies for leave approvals." The e-mail included the revised vacation leave approval policy, and Gillespie wrote that the policy would go into effect on November 1, 2015. The employer implemented the policy.

21. On November 3, 2015, Roberts filed a grievance on behalf of the union regarding the employer's implementation of the vacation leave approval policy. The union contended that the policy violated Article 5, Section 9 of the CBA and changed a past practice. Roberts added that the remedy sought by the union was a restoration of the status quo that existed prior to implementation. In an e-mail to Watkins on November 4, 2015, Roberts reiterated that the union was open to bargaining about the issue once the policy changes were rescinded.

22. Watkins met with Roberts, Verbonus, and Allen to discuss the grievance on November 16, 2015. One week later, Watkins' official response to the grievance was that there was no "consistently documented and applied past practice that was shared between units," and that she could neither restore the status quo nor initiate bargaining on the vacation leave approval policy. The union then moved the grievance to Gillespie, who also refused to adopt the union's remedy in her grievance response. In the time between Watkins' response and Gillespie's response on December 31, 2015, the union filed its unfair labor practice complaint.

23. Allen has worked in the AFIS program since 1998 and has been a Jail Identification Technician since 1999. Jail Identification Technicians work at the King County Correctional Facility in Seattle, the Maleng Regional Justice Center in Kent, the Youth Service Center in Seattle, and the South Correctional Entity in Des Moines. As a member of the Jail Identification unit, Jail Identification Technician duties include obtaining fingerprints, palm prints, photographs, and DNA samples of inmates that are then entered into the Regional AFIS database.

24. In 2005, the employer assigned Allen lead worker duties within the Jail Identification unit. Lead worker duties are a one-year special duty assignment that includes a five percent pay increase over the lead worker's regular pay rate, in accordance with Section 7.3 of the parties' CBA. Section 7.3.A of the CBA states that the assignment "may be revoked at any time at the sole discretion of the Sheriff/designee."

25. After becoming a lead worker, Allen's assignment was renewed each year. Allen's last assignment ran from January 1, 2015, through December 31, 2015, under Jail Identification unit Supervisor Lisa Wray. Allen's primary responsibilities as a lead worker included overseeing unit operations when supervisors were absent, helping co-workers prioritize duties and workload, creating payroll reports, and monitoring staff hours.

26. On March 5, 2015, Gillespie sent an e-mail to bargaining unit employees stating that she was changing how lead workers were assigned in the AFIS section and providing guidelines for supervisors to use in rotating lead workers. Gillespie's e-mail stated that "Leads are not meant to be permanently assigned," and further stated that the employer would use a "3-5 year range as a maximum."

27. The e-mail was sent as a general notification of the change, and stated that leads affected by reassignment would be notified separately. Allen testified that she and fellow Jail Identification unit lead worker Jody Tamura-Deering were notified in August that their lead assignments would end on December 31, 2015.

28. Allen has been involved in union leadership since approximately 2010, when AFIS employees were part of a bargaining unit of non-commissioned professional employees in the Sheriff's Office represented by PSEU. Allen was an elected member of PSEU's executive board, and she became a member of the contract negotiation team as second vice president after the King County Regional AFIS Guild was certified as the AFIS employees' exclusive bargaining representative in 2013.

29. Allen, Gillespie, Watkins and Wray were in attendance during a Jail Identification unit meeting on November 16, 2015. The meeting agenda included discussion of the disputed vacation leave approval policy, as well as an announcement of the new lead workers who

would replace longtime leads Allen and Tamura-Deering on January 1, 2016, as part of a previously announced decision to periodically rotate lead worker assignments in all three essential units.

30. On November 13, 2015, Wray met with Allen and Tamura-Deering to discuss the agenda for the unit meeting. Wray credibly testified that she added the vacation leave approval policy to the agenda at Allen's request, primarily because Allen showed Wray the October 26, 2015, e-mail Gillespie sent to essential unit employees that contained the revised policy and said the policy could be discussed at unit meetings. The vacation leave approval policy was the penultimate topic on the unit meeting agenda, prior to the roundtable entry, which typically involves each meeting participant having an opportunity to discuss topics that have arisen before or during the meeting.

31. Allen and Tamura-Deering informed Wray that employees were upset about the policy, and she was concerned that the conversation about the policy "definitely had the potential, for lack of better words, to go sideways." As a result, Wray advised Allen and Tamura-Deering that the discussion of the policy should be limited to how it took shape in addition to its implementation and application.

32. Allen participated in two meetings on November 16, 2015, prior to the unit meeting. Allen, Verbonus, and Roberts met with Watkins to discuss the union's grievance over implementation of the vacation leave approval policy. Allen and Tamura-Deering later met with Wray to discuss the unit meeting agenda, and Wray reiterated her instructions from November 13, 2015, about how the policy should be discussed at the meeting.

33. The discussion of vacation leave approval at the unit meeting began with employees receiving a copy of the policy that Gillespie e-mailed on October 26, 2015, followed by an invitation to ask questions or comment on the policy. A number of employees were apprehensive about the restrictions they perceived in the policy, and testimony indicates that there was a considerable amount of agitation expressed in the questions, comments, and non-verbal communication that followed.

34. Allen was the most vocal of the policy's critics. She was upset about the policy, and was "very active" during an approximately 15-minute discussion of the policy's genesis, the rationale behind it, and its effects on employees. At some point during the discussion, one or more of the supervisors stated that the policy change was designed to reduce the expense that accompanies the use of backfill overtime, to balance leave usage throughout the year in order to make the most of current staffing levels, and to bring the units in line with other essential units within the Sheriff's office.

35. What began as a group discussion became primarily a back-and-forth exchange between Allen and Gillespie that grew more intense and argumentative as it progressed. Allen questioned Gillespie about management decisions regarding staffing of the Jail Identification unit, staff safety, the ratio of supervisors to employees in some AFIS units, and how AFIS funds were spent. Many witnesses credibly testified that Allen's questions seemed accusatory, and that she interrupted Gillespie on a number of occasions or asked follow-up questions without taking the time to fully consider Gillespie's answers.

36. On November 17, 2015, Wray discussed the unit meeting with Allen and Tamura-Deering. Wray was concerned about receiving discipline of her own for placing the vacation leave approval policy on the meeting agenda, and then not intervening when discussion of the subject became contentious. Wray credibly testified that Allen and Tamura-Deering appeared surprised about Wray's concerns, and that Allen had no misgivings about her interactions with her supervisors during the unit meeting.

37. Later that day, Wray met with Watkins to discuss the meeting with Allen and Tamura-Deering. In addition to reporting that she had raised her voice and cursed during the meeting with Allen and Tamura-Deering, Wray shared her doubts that she could work with Allen as a lead. Wray testified that she was particularly troubled by Allen's lack of insight into how her behavior during the unit meeting was perceived and Allen's reluctance to consider how she could have handled the situation differently.

38. On November 18, 2015, Gillespie, Watkins, and Wray were among those attending training at the Criminal Justice Training Center in Burien. During the day, the supervisors

discussed what the best course of action regarding Allen would be, taking into account Allen's behavior during the unit meeting, and Wray's concerns after her meeting with Allen and Tamura-Deering the following day. The supervisors decided to end Allen's lead assignment immediately rather than wait until the end of the year as previously planned.

39. On November 19, 2015, Watkins instructed Allen to meet with her at 12:30 p.m. In a meeting that included Watkins, Wray, Allen, and Roberts, Watkins informed Allen that her lead assignment was ending. Less than two hours later, Wray notified the KCSO personnel and payroll departments via e-mail that Allen was no longer assigned lead duties and would no longer receive the five percent wage increase that accompanied the assignment.

40. On November 19, 2015, Gillespie made a BlueTeam entry regarding Allen's behavior during the November 16, 2015, unit meeting. BlueTeam is a system the employer uses for entering commendations or complaints regarding an employee. As it pertains to complaints, BlueTeam entries are reviewed by KCSO's Internal Investigation Unit (IIU) Commander, who determines whether the complaint will proceed to an investigation that could result in discipline. Gillespie's entry stated that Allen's behavior fell below her expectations of any employee in any rank.

41. On November 24, 2015, Allen received an IIU complaint notification that her "conduct during a staff meeting was disrespectful," referring to the November 16, 2015, unit meeting. Sergeant Pat Raftis was the assigned investigator, and Allen was directed to attend an interview on December 3, 2015. Allen was one of 13 employees Raftis interviewed during the course of the initial investigation, which was completed on December 11, 2015, and sent to Gillespie by IIU Commander Jesse Anderson for her review on December 15, 2015.

42. Because she had entered the BlueTeam complaint that led to the investigation, Gillespie forwarded the investigation file to Cole-Tindall for her review, findings, and recommendations. After Cole-Tindall received the file, she directed Raftis to conduct recorded interviews with witnesses who had previously provided written statements as part

of the investigation. Raftis completed the investigation on March 25, 2016, and Cole-Tindall found that the allegations against Allen should be sustained.

43. As a result of the sustained finding, Allen received a written reprimand from Anderson on May 11, 2016, for violating GOM 3.00.015(2)(i), which states that "[m]embers shall conduct themselves in an orderly, courteous, and civil manner towards others." The reprimand was approved by Cole-Tindall and Chief Deputy Jim Pugel.

44. The union filed a grievance regarding Allen's written reprimand, alleging that the employer violated Section 12.9 of the CBA, which covers just cause and progressive discipline.

45. On March 16, 2016, Wray provided Allen a performance appraisal that covered the period beginning February 1, 2015, through January 31, 2016. The performance appraisal used by KCSO has seven categories for non-supervisory personnel: leadership, professionalism, service, teamwork, communications, seeks to improve performance, and policies and procedures. Within each category, there are three ratings – exceeds standards, meets standards, or needs improvement – and a comments section that the reviewer must use to provide context for the ratings.

46. Allen received "exceeds standards" ratings in the categories of service and seeks to improve performance. She received a "meets standards-plus" rating in teamwork, and received "meets standards" ratings in the other four categories. Wray took over as Allen's supervisor in spring of 2014, and her first performance appraisal of Allen on February 25, 2015, included "exceeds standards" ratings in five categories, and "meets standards" ratings in seeks to improve performance, and policies and procedures.

47. Section 21.1 of the CBA allows employees to challenge the fairness or accuracy of performance appraisals by filing a written appeal within 10 days of receiving the appraisal. If a suitable solution cannot be reached, employees can appeal to the manager of the unit, whose decision can then be appealed to a three-member panel that includes a department representative, a labor representative, and a representative from the King County Office of Alternative Dispute Resolution for a final determination.

48. Section 21.3 of the CBA states that the panel cannot include anyone from the department who was involved in the review of the appeal. The affected employee is responsible for presenting his or her perspective of the appraisal to the panel, and the employee's evaluator (in this case, Wray) is responsible for providing his or her perspective. As stated in Section 21.4, the panel can either modify or preserve the original appraisal after hearing evidence.

49. Allen filed her initial appeal with Wray, challenging wording in the leadership category, her "meets standards" ratings and wording in the professionalism category, her "meets standards-plus" rating in teamwork, and wording in the communications category. In her initial response to Allen's appeal, Wray highlighted the language she understood Allen to be challenging.

50. In an e-mail dated March 30, 2016, Wray asked Allen to review the highlighted portions of the appraisal in order to ensure that she understood which areas Allen was appealing in each category. Wray also asked Allen if she had any suggestions regarding the wording in the highlighted areas. Allen responded later in the day that she wanted Wray to remove all of the highlighted language in addition to portions of the language contained in a section listing goals for the upcoming review period.

51. On April 7, 2016, Wray formally responded to Allen's appeal via e-mail. She indicated in her response that she was not willing to change Allen's rating in professionalism and teamwork, nor was she willing to make all of the language revisions Allen requested in leadership, professionalism, communications, and goals. Wray stated instead on nine occasions that she was "[n]ot willing to strike entire comment as stated – Willing to strike in part or work with you to revise." Wray's response included her suggestions for language that could be removed from Allen's initial performance appraisal.

52. Allen then sent Wray a second appeal letter, in which she sought additional language changes to her performance appraisal in the leadership, professionalism, and communications categories, and also continued to challenge her rating in the teamwork category. On April 13, 2016, Wray acknowledged receipt of Allen's second appeal letter via e-mail. Wray indicated a desire to discuss the appraisal in person or by telephone, but

Allen responded via e-mail on April 18, 2016, that she preferred to keep their interactions on the matter in writing.

53. Wray responded by e-mail on April 21, 2016, that she was unwilling to make further changes to Allen's performance appraisal. Wray stated that Allen's options included meeting in person to work on alternative language instead of continuing over e-mail, or appealing the evaluation to Gillespie as the second step in the process detailed in Section 21.1 of the CBA.

54. On April 29, 2016, Allen e-mailed Gillespie to inform her that she was moving her performance appraisal appeal to the second step. Allen attached a letter to the e-mail that reiterated the changes she sought in her second appeal letter to Wray, and added a request for the goals section to be rewritten.

55. Gillespie used Wray's revisions to Allen's performance appraisal from April 7, 2016, and made proposed revisions of her own in four categories and the goals section before e-mailing it to Allen for her review on May 13, 2016, two days after Allen received her written reprimand. Gillespie did not change Allen's ratings in any category, but she added a reference to Allen's behavior in the November 16, 2015, unit meeting to the leadership category.

56. Gillespie also responded to the letter Allen attached to her April 29, 2016, e-mail. Gillespie wrote that she added the reference to Allen's behavior in the November unit meeting because she was surprised that it was not specifically addressed by Wray. In response to Allen's contention that it was premature to mention the incident in an evaluation when there were pending IIU and ULP proceedings, Gillespie wrote that "[r]egardless of any action that is pending, it is the supervisor's responsibility to address any behaviors they have observed that go against expectations."

57. On May 16, 2016, Allen informed Gillespie via e-mail that she did not accept Gillespie's proposed revision to her performance appraisal, and inquired about who would represent the employer on the three-person appeal panel. In e-mails exchanged on May 17 and 18, Gillespie and Allen indicated a willingness to reach resolution on changes to the appraisal.

58. On May 19, 2016, Allen e-mailed Gillespie a revised version of the letter that proposed changes to her performance appraisal. In addition to suggesting some inconsequential language changes, Allen sought to strike any mention of the November unit meeting from the leadership category, continued to seek an "exceeds standards" rating in the teamwork category, and continued to dispute language in the communications category.

59. On June 1, 2016, Gillespie e-mailed a second proposed performance appraisal to Allen. Gillespie incorporated some of the changes Allen requested on May 19, 2016, including changing Allen's teamwork rating to "exceeds standards." Gillespie wrote in the accompanying e-mail that she also adjusted the language in the communications category "to help clarify how you came across to the others, not to be confused with intent."

60. Gillespie did not strike references to the November unit meeting from the leadership category. Gillespie also downgraded Allen's rating in that category to "needs improvement."

61. On June 4, 2016, Allen sent an e-mail to Gillespie that stated that she "continued to struggle" with the comments made in the communications category, but that she was in agreement with other changes Gillespie proposed. On June 6, 2016, Allen e-mailed Gillespie to ask that the time frame for appealing her performance appraisal be suspended because the appraisal was part of the ULP proceedings, and the parties had scheduled mediation later in the month to attempt to resolve issues involved in the hearing.

62. Watkins asked Allen to meet with her at 12:30 p.m. on November 19, 2015. When Allen asked what the meeting was about, Watkins replied that it concerned potential changes, but she did not provide further detail. On the way to the meeting, Allen asked Roberts to accompany her as her representative.

63. Watkins and Wray were in Watkins' office when Allen and Roberts arrived. Allen and Roberts credibly testified that Watkins stated that the meeting was not a disciplinary meeting, and that management should be able to talk to employees without employees

"guilding up." They also testified that Watkins said Roberts could stay because Watkins liked him.

64. On February 24, 2016, Wray sent an e-mail with the subject line of "Unfair Labor Practice Hearing – June 28-30, 2016." The exhibit the union entered into evidence does not show the addressees for the e-mail, but Allen's unrefuted testimony was that it was sent to all employees in the Jail Identification unit.

> All,
>
> The AFIS Guild has filed an unfair labor practice charge against the KCSO with the Public Employment Relations Commission and a hearing has been scheduled for June 28-30, 2016. This is an informal administrative hearing that will take place in a conference room at the Chinook building. Potential witnesses need to ensure that they are available on these dates. You are on this email because you are a potential witness. As the time draws closer, leave requests for this time frame will be held until final determinations are made about who is needed by the Guild and the KCSO to testify at the hearing. A mediation session is scheduled in May, at which time one or all issues may be resolved. For now, please make sure you are available these three days. In order to ensure a comfortable work environment for everyone and protect confidentiality of a related IIU investigation, please maintain the confidentiality of substantive testimony, and avoid unnecessary discussion of these matters that may make co-workers uncomfortable. See GOM 3.03.090 which outlines the requirement for confidentiality of investigations. This does not preclude you from discussing the case with a legal representative in this ULP process, or appropriate command staff or legal advisor with regard to the pending IIU investigation.
>
> If you would like further clarification or have any questions, you may contact KCSO legal advisor, Diane Taylor.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By its actions described in Findings of Fact 19 and 20, the employer refused to bargain in violation of RCW 41.56.140(4) and (1) by making unilateral changes to vacation leave approval, a mandatory subject of bargaining.

3. By its actions described in Findings of Fact 39, the employer did not discriminate in reprisal for union activities in violation of RCW 41.56.140(1) by revoking Marquel Allen's lead status and premium pay.

4. By its actions described in Findings of Fact 40 through 42, the employer did not discriminate in reprisal for union activities in violation of RCW 41.56.140(1) by subjecting Allen to an internal investigation.

5. By its actions described in Finding of Fact 43, the employer did not discriminate in reprisal for union activities in violation of RCW 41.56.140(1) by providing a written reprimand to Allen.

6. By its actions described in Findings of Fact 45, 46, 51, and 53, the employer did not discriminate in reprisal for union activities in violation of RCW 41.56.140(1) by providing an unfavorable performance appraisal for Allen.

7. By its actions described in Findings of Fact 55, 56, 59, and 60, the employer did not discriminate in reprisal for union activities in violation of RCW 41.56.140(1) by providing a more unfavorable performance appraisal for Allen during the appeal process of her initial performance appraisal.

8. By its actions described in Finding of Fact 63, the employer interfered with employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of benefit, associated with the union activity of Allen, Roberts, or other employees.

9. By its actions described in Finding of Fact 64, the employer did not interfere with employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of

benefit, associated with union activity, regarding Lisa Wray's e-mail to Jail Identification unit employees on February 24, 2016.

10. By its actions described in Findings of Fact 55, 56, 59, and 60, the employer did not interfere with employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of benefit, associated with union activity, regarding a more unfavorable performance appraisal for Allen during the appeal process of her initial performance appraisal.

ORDER

KING COUNTY, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Unlawfully announcing and implementing changes to the vacation leave approval policy (a mandatory subject of bargaining) for employees represented by the King County Regional AFIS Guild without providing the guild with notice and opportunity to bargain.

   b. Unlawfully interfering with employee rights through statements made by the employer that are reasonably perceived as a threat of reprisal or force or a promise of benefit associated with the exercise of collective bargaining rights protected by Chapter 41.56 RCW.

   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 41.56 RCW:

a. Restore the *status quo ante* for vacation leave approval by reinstating the vacation leave approval policy which existed for the employees in the affected bargaining unit represented by the King County Regional AFIS Guild prior to the unilateral change to vacation leave approval in November 2015 found unlawful in this order and detailed in Findings of Fact 19 and 20.

b. Give notice to and, upon request, negotiate in good faith with the King County Regional AFIS Guild, before changing the vacation leave approval policy.

c. Contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice posting. Post copies of the notice provided by the Compliance Officer 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.

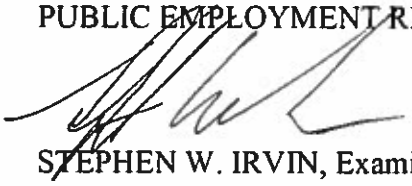
d. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the King County Regional AFIS Advisory Committee, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. 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.

f. 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 her with a signed copy of the notice she provides.

ISSUED at Olympia, Washington, this 6th day of July, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



STEPHEN W. IRVIN, 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.

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 STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING, RULED THAT *KING COUNTY* COMMITTED AN UNFAIR LABOR PRACTICE, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY announced and implemented changes to the vacation leave approval policy (a mandatory subject of bargaining) for employees represented by the King County Regional AFIS Guild without fulfilling our duty to bargain in good faith with the guild.

WE UNLAWFULLY interfered with employee rights by making statements during a meeting with union officers Marquel Allen and Mark Roberts on November 19, 2015, that were reasonably perceived as a threat of reprisal or force or a promise of benefit associated with the exercise of employees' collective bargaining rights.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL reinstate the vacation leave approval policy that existed for the employees in the affected bargaining unit prior to November 2015.

WE WILL give notice to and, upon request, negotiate in good faith with the King County Regional AFIS Guild before changing the vacation leave approval policy.

WE WILL cease and desist from unlawfully interfering with employee rights by making statements that could reasonably be perceived as a threat of reprisal or force or a promise of benefit associated with the exercise of employees' collective bargaining rights.

WE WILL NOT unilaterally implement changes to vacation leave approval or any other mandatory subject of bargaining.

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.

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 07/06/2017

DECISION 12582-A - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBER: 127743-U-15

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