State – Corrections, Decision 11571 (PSRA, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117, Complainant, vs. STATE – CORRECTIONS, Respondent.	CASE 24001-U-11-6138 DECISION 11571 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

James V. Smith II, Staff Attorney, and *Spencer Nathan Thal*, General Counsel, for the union.

Attorney General Robert M. McKenna, by *Kari Hanson*, Assistant Attorney General, for the employer.

On May 23, 2011, Teamsters Local 117 (union) filed an unfair labor practice complaint against the Washington State Department of Corrections (DOC or employer). The union represents a supervisory bargaining unit and a non-supervisory bargaining unit of corrections employees working at DOC facilities throughout the State of Washington. The complaint alleges twenty-one separate discrimination and interference allegations by the employer at five different DOC facilities. The complaint was reviewed under WAC 391-45-110 and a preliminary ruling was issued on June 1, 2011.

The Public Employment Relations Commission appointed Jessica J. Bradley as the Examiner. An eight-day hearing was conducted at four different locations: November 17 and 18, 2011 (Vancouver), December 5, 2011 (Spokane), December 6 and 7, 2011 (Walla Walla), and February 6, 7, and 8, 2012 (Tukwila). The parties completed the record by filing post-hearing briefs.

ISSUES

Larch Corrections Center

1. Did the employer interfere with James Hutchison's right to engage in protected union activity on December 1, 2010?

By threatening to deny all leave requests to use "CBA leave days" if employees continued to appeal denials of leave requests as provided for in the parties collective bargaining agreement (CBA), the employer interfered with employee rights in violation of RCW 41.80.110(1)(a).

2. Did the employer interfere with Susan Reid's right to engage in protected union activity on May 3, 2011?

The employer's statement to Reid did not constitute interference. Accordingly, this allegation is dismissed.

Airway Heights Corrections Center

3. Did the employer discriminate against Darren Kelly by removing him from his seniority bid position and placing him on home assignment in reprisal for union activities?

The employer presented a legitimate, non-retaliatory reason for placing Kelly on home assignment. The union did not establish that the employer's reason was pretextual or that Kelly's union activity was a substantial motivating factor in placing him on home assignment. Accordingly, this discrimination violation is dismissed.

4. Did the employer interfere with Darren Kelly's right to engage in protected union activity on April 27, 2011, and/or May 21, 2011?

The employer did not interfere with Kelly's exercise of protected activities. The interference allegations are dismissed.

Coyote Ridge Corrections Center

5. Did the employer interfere with Katrina Ortiz's right to engage in protected union activity on November 24, 2010, and/or March 7, 2011?

By prohibiting Ortiz from discussing a union tactic called "blue flu," the employer interfered with Ortiz's right to engage in protected union activity in violation of RCW 41.80.110(1)(a).

The employer's conversation with Ortiz on March 7, 2011, concerning the safety of employer-mandated training and Ortiz's ability to complete the training did not constitute employer interference. However, the March 7, 2011 directive from the employer that Ortiz could not discuss the contents of the meeting with anyone outside of the meeting was coercive and is reasonably perceived to interfere with Ortiz's ability to discuss these same safety concerns with other union representatives and fellow bargaining unit employees in violation of RCW 41.80.110(1)(a).

Washington State Penitentiary

6. Did the employer interfere with employee rights on March 2, 2011, by making statements that discouraged or prohibited employees from contacting their union about workplace injuries or violence?

The employer's statements to employees at the March 2, 2011 roll call meeting did not interfere with employees' rights to engage in union activity.

7. Did the employer discriminate against Jared Crum by removing him from his seniority bid position April 28, 2011, reassigning him to the mail room, and ultimately placing him on home assignment in reprisal for union activities?

The employer had a legitimate, non-retaliatory reason for removing Crum from his bid position and reassigning him to work in the mail room while he was under investigation for excessive use

of force against an inmate. The union did not establish that the employer's reason was pretextual or that Crum's union activity was a substantial motivating factor in the employer's decision to remove him from his bid post and place him on home assignment.

Crum's attempts to sign-up to work overtime while he was under investigation and reassigned to work in the mail room did not constitute protected union activity. The employer felt it was important to avoid allowing Crum to be in a position where he had control over inmates because of the use-of-force complaint against Crum that was under investigation. The employer did not unlawfully discriminate against Crum when it told Crum not to sign-up to work overtime and told Crum that he was being placed on home assignment because he was continuing to sign-up to work overtime while he was under investigation and was temporarily reassigned to work in the mail room. Accordingly, the union's discrimination allegation is dismissed.

8. Did the employer interfere with Jared Crum's right to engage in protected union activity on May 20, 2011?

This allegation stems from the same facts as the discrimination allegation over Crum's home assignment. The Commission will not consider an independent interference allegation based on the same facts as a discrimination allegation. Accordingly, this interference violation is dismissed.

Monroe Correctional Complex

9. Did the employer discriminate against Jimmy Fletcher by temporarily restricting Fletcher's work assignment areas in reprisal for union activities?

The employer proved a legitimate, non-retaliatory reason for temporarily restricting what work areas Fletcher could work in on certain days. The union was unable to show that the employer's stated reason of the temporary restriction on Fletcher's work area was pretextual or that union animus was a substantial motivating factor in the employer's decision. Accordingly, the discrimination allegation is dismissed.

10. Did the employer interfere with Jimmy Fletcher's right to engage in protected union activity on one or more of the following dates: February 17, 22, 27, 2011, or March 21, 2011?

The employer did not make any statements to Fletcher on February 17 that would constitute interference.

The February 22 interference allegation cannot be analyzed as independent interference because it is based on the same facts used to support Fletcher's discrimination allegation, which are addressed separately in this decision.

Samp's February 27, 2011, comment to Fletcher was unlawful because it communicated a coercive message: that you cannot be a leader with the union if you want to be promoted to lieutenant. The employer's February 27 statement to Fletcher constituted a threat of retaliation for union activity and interfered with Fletcher's protected union activity in violation of RCW 41.80.110(1)(a).

Decisions about who would be allowed to attend the Governor's March 21 press conference were made by the Governor's security team. The employer was not the decision-maker in this instance. The Governor's security team told DOC employees who were assisting with event security that only a limited number of on-duty employees would be allowed to attend. Fletcher was off-duty when he tried to attend the press conference. The March 21 interference allegation concerning Fletcher being removed from the governor's press conference is dismissed.

11. Did the employer interfere with Derek Kolb's right to engage in protected union activity on March 15, 2011?

A statement by Kolb's supervisor that Kolb, a bargaining unit employee, could no longer be trusted because he talked to his union, interfered with Kolb's right to engage in protected union activity in violation of RCW 41.80.110(1)(a).

12. Did the employer discriminate against James Palmer by removing him from his seniority bid position on March 18, 2011?

The union established a *prima facie* case of discrimination. The employer responded by presenting a legitimate, non-retaliatory reason for its actions. Specifically, the employer received a written complaint from a visitor about Palmer's conduct in the visiting room. The employer was successful in showing the timing of its actions was based on the timing of when it received the complaint and Palmer's work schedule. The union failed to produce evidence showing that the employer's stated reason was pretextual or that Palmer's union activity was a substantial motivating factor in the employer's decision to place Palmer on paid administrative leave while it completed its investigation. Accordingly, the union's discrimination allegation is dismissed.

13. Did the employer interfere with James Palmer's right to union representation (*Weingarten* rights) and/or interfere with Jimmy Fletcher's right to engage in protected union activity in connection with an investigatory interview on April 1, 2011?[1]

During an investigatory interview the employer instructed Fletcher, the shop steward who was serving as Palmer's *Weingarten* representative, that he was there to be as "observer" only. By limiting the shop stewards' ability to act in the full capacity of a *Weingarten* representative the employer interfered with Palmer's *Weingarten* rights in violation of RCW 41.80.110(1)(a).

14. Did the employer interfere with Carl Beatty's right to engage in protected union activity on or about April 29, 2011?

The discrimination complaint against Beatty that the employer was investigating was filed by a non-supervisory employee of the employer. The employer was following its policies in investigating the complaint against Beatty. The employer's investigation into the discrimination complaint against Beatty did not constitute interference with Beatty's protected union activities.

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[1] The preliminary ruling also listed an interference allegation on April 1, 2011, regarding Palmer and an information request. The union withdrew this allegation at the hearing.

15. Did the employer interfere with Brad Waddell's right to engage in protected union activity on March 2, 2011?

The employer did not engage in any action towards Waddell on March 2, 2011, that could reasonably be perceived as a threat of reprisal or force of benefit in association with protected activities. Accordingly, the allegation is dismissed.

APPLICABLE LEGAL STANDARDS

Right to Engage in Protected Union Activity

The corrections employees at issue in this case have the right to organize and select a collective bargaining representative under RCW 41.80.050:

> Rights of employees.
> Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all such activities except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

Discrimination

Under RCW 41.80.110(1)(a) it is an unfair labor practice for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter." Unlawful discrimination occurs when an employer takes action in reprisal for an employee's exercise of rights protected by Chapter 41.80 RCW. *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A (PECB, 2009), citing *Educational Service District 114*, Decision 4361-A (PECB, 1994).[2] It is unlawful to retaliate or discriminate against employees for

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[2] These decisions interpreted the provisions of Chapter 41.56 RCW. In *Western Washington University (Washington Public Employees Association)*, Decision 8849-B (PSRS, 2006) the Commission held that in order to achieve its established mission of uniform administration of collective bargaining law, unless specific legislative intent directs otherwise, cases decided under PECB, Chapter 41.56 RCW, are applicable to cases decided under PSRA, Chapter 41.80 RCW.

engaging in protected union activities, such as filing grievances and participating in contract negotiations on behalf of the union.

In discrimination cases, the complainant maintains the burden of proof. To prove discrimination, the complainant must first set forth a *prima facie* case by establishing the following:

1. The employee, or employees, 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(s) of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish a *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). "The timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between protected activity and adverse action." *North Valley Hospital,* Decision 5809-A (PECB, 1997), citing *City of Winlock*, Decision 4784-A (PECB, 1995) and *Mansfield School District*, Decision 5238-A (EDUC, 1996).

While the complainant carries the burden of proof, there is a shifting of the burden of production. Once the complainant establishes a *prima facie* case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The complainant may respond to an employer's defense in one of two ways:

1. By showing that the employer's reason is pretextual; or
2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Port of Seattle, Decision 10097-A (PECB, 2009).

In the end, the burden remains on the complainant to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights.

Tacoma-Pierce County Employment and Training Consortium, Decision 10280-A, citing *Clark County*, Decision 9127-A.

Interference

Under RCW 41.80.110(1)(a) it is an unfair labor practice for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter." An employer commits an interference violation if its actions or the statements of its officials are reasonably perceived by employees as a threat of reprisal or force, or promise of benefit, associated with the exercise of rights protected by Chapter 41.80 RCW. *Skagit County*, Decision 6348 (PECB, 1998); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd,* 98 Wn. App. 809 (2000); *King County*, Decision 4893-A (PECB, 1995). The burden of proving unlawful interference rests with the complaining party or individual. *Grays Harbor College*, Decision 9946-A (PSRA, 2009).

The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. Nor is it necessary to show that the employee, or employees, involved were actually coerced by the employer or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A (PECB, 2000). The determination is based on whether a typical employee in the same circumstances could reasonably view the employer's actions as discouraging his or her protected union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004).

Claims of unlawful interference with the exercise of collective bargaining rights must be established by a preponderance of the evidence, though the standard is not particularly high. *Pasco Housing Authority,* Decision 5927-A (PECB, 1997); *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012).

Interference - *Weingarten* Rights

A public employer commits an interference violation under RCW 41.80.110(1)(a) if it interferes with an employee's request for union representation at an investigatory interview. The Commission explained an employee's right of union representation during an investigatory

meeting, commonly called *Weingarten* rights, in *Methow Valley School District*, Decision 8400-A (PECB, 2004) (footnotes omitted):

> In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court of the United States affirmed a National Labor Relations Board decision that Section 7 of the National Labor Relations Act (NLRA) provides employees the right to be accompanied and assisted by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action.
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> The U.S. Supreme Court explained that a lone employee may be too fearful or may not be articulate enough to present his side of the story during an investigatory interview. *Weingarten*, 420 U.S. at 263. An employee-representative's presence at an investigatory interview protects the individual employee from being overpowered or out maneuvered by the employer. *Weingarten*, 420 U.S. at 265 n. 10. *Weingarten's* language clearly indicates that the protected right is an individual employee right, not a union right. *Weingarten*, 420 U.S. at 256-257; *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), enforced, 338 F.3d 267 (4th Cir. 2003). Once an employee requests union representation, the employer must either grant the request or end the interview.
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> This Commission and Washington Courts interpret issues arising under Chapter 41.56 RCW by examining federal decisions construing the NLRA, as amended by the Labor Management Act of 1947 (Taft-Hartley Act), when the language between the two statutes is similar. *State ex rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wn.2d 60, 67-8 (1980). Although the language of Section 7 of the Act and RCW 41.56.040(1)(3) are not identical, the Commission has previously held that the rights granted in Section 7 may be inferred in RCW 41.56.040. *Okanogan County*, Decision 2252-A (PECB, 1986).

As examiners explained in *Washington State Patrol*, Decision 4040 (PECB, 1992) and *Seattle School District*, Decision 10066-B (PECB, 2010), there are four elements necessary for *Weingarten* rights to be applicable:

1. The right to representation attaches only where the employer compels the employee to attend an investigatory meeting.
2. A significant purpose of the interview must be (or becomes) to obtain facts related to a disciplinary action.
3. The employee must reasonably believe potential discipline might result from the information obtained during the interview.
4. The employee must request the presence of a union representative.

After an employee makes a valid request for union representation in an investigatory interview, "an employer has three options: 1) grant the request; 2) discontinue the interview; 3) offer the

employee the choice of continuing the interview unrepresented, or of having no interview at all, thereby foregoing any benefit that the interview might have conferred upon the employee." *Seattle School District*, Decision 10732-A (PECB, 2012) citing *Roadway Expr*ess, 246 NLRB 1127 (1979).

When an employee asserts his or her *Weingarten* rights, an employer may only schedule the investigatory meeting at a future time and place that provides an opportunity for the employee to consult with his or her union representative on their own time in advance of the meeting. *Seattle School District*, Decision 10732-A, citing *King County*, Decision 4299 (PECB, 1993), *aff'd*, Decision 4299-A (PECB, 1993), citing *Climax Molybdenum Co.*, 227 NLRB 1189 (1977).

Larch Corrections Center

Issue 1: Did the employer interfere with James Hutchison's right to engage in protected union activity on December 1, 2010?

James Hutchison is a corrections sergeant at the Larch Corrections Center in Yacolt, Washington, where he has been employed for approximately ten years. Hutchison has served as a union shop steward since 2008. At the time the relevant events took place, Hutchison reported to Lieutenant Lawrence Miller, who in turn reported to Superintendent Eleanor Vernell.

The union and the employer were parties to a collective bargaining agreement (CBA) effective July 1, 2009, through June 30, 2011. In the fall of 2010, several bargaining unit employees applied to use their "CBA-days" and had their requests denied by the employer. Section 21.12 of the CBA defines "CBA days" and states:

> **Additional Approved Vacation Leave ("CBA Days")**
> Accrued vacation time, not to exceed two (2) shifts in any calendar year, will be granted to an employee with thirty (30) calendar days written notification by the employee. Such time off must normally be granted provided:
> A. Such leave will be used in increments of not less than one (1) shift.
> B. Denials of the use of such leave are subject to the review of the Appointing Authority at the employee's written request.

In accordance with Section 21.12B of the CBA, some employees appealed the denial of their CBA-day requests to Superintendent Vernell, because she is the appointing authority.

On December 1, 2010, Lieutenant Miller asked to meet with Hutchison in his capacity as a union steward to discuss a recent spike in appeals sent to Superintendent Vernell concerning CBA-days. During their meeting it became clear that Hutchison and Miller had conflicting understandings of how the employer processed CBA-day requests. According to Hutchison, Lieutenant Miller told him that employees needed to stop sending appeals to Superintendent Vernell and that if staff continued "to play games" with the CBA-days, Superintendent Vernell would deny all the requests.

Hutchison testified he believed that Lieutenant Miller's threat was a credible due both to Miller's role as a manager and his perceived close relationship with Superintendent Vernell. Miller is a lieutenant. In this position, Miller is a supervisor and agent of the employer.

Lieutenant Miller denied making any such threat or statement. In discussing the incident Miller explained that a process had been in place since 2009 where an employee's CBA-day request would be authorized unless relief staff were unavailable, or the leave would cause an operational issue. The appeal of a denied request was set up to be automatic and is logged by the employer. Any unapproved CBA-day requests were held and forwarded to Superintendent Vernell seven days before the requested leave date. Bargaining unit employees, including Hutchinson, were not aware of this automatic review the employer was conducting seven days before the date of the requested leave. As a result, employees were following the language in the CBA and submitting written appeals to Superintendent Vernell when their CBA-day leave was not approved.

On December 1, 2010, at 2:35 P.M., Hutchison sent an e-mail to shop steward Sid Clark. In the e-mail Hutchison described the meeting he had earlier in the day with Miller:

> During the course of the conversation he [Miller] made the statement "if staff wanna keep playing games with this CBA day thing, the Superintendent [Vernell] will just deny all of them, that is her right." He made this statement and/or some

> variation of it at least three times. I take this statement as a threat of retaliation not just to me but to all staff for attempting to do what they thought was correct and exercising their CBA rights.

On December 1, 2010, at 3:02 P.M., shop steward Clark sent Superintendent Vernell an e-mail, and attached the 2:35 P.M. e-mail from Hutchison. Clark requested to meet with Superintendent Vernell to talk about the threatening statements that Lieutenant Miller had made on Superintendent Vernell's behalf.

Hutchison's e-mail to shop steward Clark shortly after the meeting with Lieutenant Miller serves a similar role as personal notes taken on the day of the event, and supports Hutchison's testimony at the hearing. The employer did not offer contemporaneous notes or e-mails into evidence. Lieutenant Miller testified that he could not remember making a statement similar to the one Hutchison described in his December 1, 2010 e-mail.

After considering the testimony of the witnesses and documents admitted into evidence, I find Hutchison's testimony to be more reliable than Miller's. During the hearing Hutchison offered clear testimony with a better overall recollection of the conversation. His contemporaneous e-mail also supports his testimony.

Conclusion

An employee's ability to seek review of a denied CBA-day request is an established right per the governing contract. Appeals of denied CBA-day requests are a form of protected union activity. Telling a shop steward that if employees continue to file appeals over the denial of CBA-days the employer will start denying all employee requests to use CBA-day leave is coercive and interferes with employees' collective bargaining rights. Lieutenant Miller is a supervisor and agent of the employer. Miller's statement to shop steward Hutchinson can reasonably be perceived as a threat of retaliation against bargaining unit employees. As a manager, Miller was an agent of the employer. I find that the employer unlawfully interfered with Hutchison's right to participate in protected union activities in violation of RCW 41.80.110(1)(a) on December 1, 2010, by threatening to deny all CBA-day requests if bargaining unit employees continued to appeal the denial of such requests to Superintendent Vernell.

Issue 2: Did the employer interfere with Susan Reid's right to engage in protected union activity on May 3, 2011?

Susan Reid is employed as a corrections officer at the Larch Corrections Center, where she had worked approximately four months at the time of the alleged incident on May 2, 2011. Reid has worked for DOC for approximately ten years. Prior to transferring to the Larch Corrections Center, Reid worked at other DOC prison facilities. Reid is a union member and does not hold any office with the union.

On May 3, 2011, Reid was called for two meetings with Lieutenant Miller concerning an incident that took place in the visiting room while she was working. The incident resulted in a visitor complaint. In the first meeting, the union alleges that Miller initially asked about the visitor complaint and told Reid that she could be in serious legal trouble for the incident. Reid testified that Miller also proceeded to aggressively question her about why there was a leave slip on Superintendent Vernell's desk with her name on it. Reid described Miller's body language as tense and unprofessional.

In testimony, Reid explained that she had submitted a leave slip to the employer seeking to use one of her CBA-days for an emergency situation. When Reid learned that her request had not been approved she contacted shop steward Clark for assistance. Clark contacted the employer and resolved the issue. Ultimately Reid's leave was approved.

In Reid's second meeting with the employer on May 3, 2011, Reid, Lieutenant Miller, and Sergeant Barb Olson met to discuss the visitor complaint. During this meeting, Lieutenant Miller recalls talking with Reid about the fact that she had not filed her request to use a CBA-day in the employer's electronic leave request system. Miller did not understand how Reid could be going to the union to appeal denial of her CBA-day request if she had never properly filed the request in the first place. Reid alleges that during the meeting Lieutenant Miller told her that "she should know better than to go to Sid Clark" and that if "[she were] smart that it wouldn't happen again." Reid took this as a management attempt to intimidate her from going to her union shop steward when she had problems in the workplace.

Lieutenant Miller testified that he did not remember shop steward Clark being mentioned during his conversation with Reid on May 3, 2011. Miller acknowledges that he talked with Reid about leave slips and the leave request process during this meeting.

Olson testified that she could not recall Lieutenant Miller mentioning shop steward Clark during the meeting with Reid. However, Olson also acknowledged that she did not have a clear recollection of the meeting. Olson could not remember some parts of the conversation that both Reid and Miller testified to. Based on the inconsistencies in Olson's testimony and Olson's own acknowledgement that she did not have a clear recollection, Olson's testimony should be given very little weight.

Based on the testimony, it appears that Reid was under a lot of stress during both of the May 3 meetings. The stress stemmed both from her urgent need to get her CBA-day leave approved and from being subject to the visiting room incident investigation. Reid's lack of familiarity with Larch Corrections Center's electronic leave request process lead to further confusion about how to file her leave request and the need to appeal a denial. The second meeting with Lieutenant Miller on May 3, 2011, was more emotional for Reid because Miller made a statement to Reid that she could potentially be taken away in handcuffs for not allowing visitors to leave when they wanted. This reference to potentially having committed a criminal act further compounded Reid's anxiety about the incident in the visiting room.

In reviewing the totality of the situation it appears that the conversation between Reid and Lieutenant Miller surrounding Reid's request to use CBA-days stemmed largely from the fact that Reid had not submitted her leave request electronically, the method the employer used to process requests. Reid had the right to go to her union for help at any point. Miller was confused that Reid would go to the union to try to appeal a leave denial when the employer had never even received Reid's leave request in its electronic system.

Conclusion

Lieutenant Miller's statement that Reid should have known better than to go to shop steward Clark could be interpreted in many ways. In the context of this discussion about leave requests,

Miller's comments could reasonably imply that Reid should have known better than to go to the union to appeal a decision that the employer had not yet made. Based on the totality of the record, it is likely Miller's comments were made in the process of explaining the electronic process for submitting leave slips to Reid. Although the language Miller used to communicate with Reid was ultimately upsetting to Reid, it did not constitute an interference violation. Accordingly the union's interference allegation is dismissed.

Airway Heights Corrections Center

Background

Darren Kelly is a response and movement officer at the Airway Heights Corrections Center where he has been employed for approximately eighteen years. As a response and movement officer Kelly is responsible for responding to critical incidents inside the prison, including staff assaults.

Kelly has served as union shop steward for approximately eight to ten years. As a shop steward Kelly was visibly active in a variety of union activities.

On April 24, 2011, Kelly was called to respond to an inmate fight in the kitchen of the Airway Heights facility. When attempting to respond to the call, Kelly was unable to enter the kitchen as it was locked, and called for one of the officers in the kitchen to open the locked door. After what Kelly believed to be an inappropriately long time period, A/C Cook Tom Dobbels opened the door. Dobbels and Kelly entered into a brief verbal argument where Kelly told Dobbels that he was a "fat fuck" who should "get on a treadmill." Dobbels responded with, "I will get a treadmill when you join AA." Kelly then reported the incident, including his complaint about Dobbels' response time, to his supervisor.

Later that morning, Dobbels approached Kelly in the staff dining room and the two had another verbal altercation that included various insults, swearing, and sexual references. Witnesses describe Dobbels as the instigator of the incident but acknowledge that Kelly responded with similarly insulting, swearing, and sexual comments. Kelly made a remark or question about whether Dobbels was asking to, or wanted to, fight out in the parking lot.

Kelly reported the second incident with Dobbels to Lieutenant Paul Dunich. Additionally, the Food Services Supervisor, who supervises Dobbels, reported the incident after speaking with Dobbels. Dunich took steps to keep Dobbels and Kelly separated, located witnesses, and had Kelly tested for alcohol consumption based on a statement by Dobbels that he could smell alcohol on Kelly's breath. The test results indicated Kelly had not consumed alcohol. Dunich called Superintendent Maggie Miller-Stout at home to report the incident. During this call Miller-Stout determined that Dobbels was not scheduled to work for the next two days.

On April 25, the day after the incident, Miller-Stout reviewed incident reports about the fight that had been completed by various staff members. These reports from witnesses stated that during the second verbal altercation Dobbels approached Kelly in the staff dining room. Both men insulted each other. Dobbels also made a derogatory statement about the size of Kelly's genitals and made suggestive pelvic thrusts. Kelly responded that Dobbels was "so fat [he] cannot see [his]." On multiple occasions Dobbels told Kelly to hit him and that nobody liked him. Kelly called Dobbels a "fat fuck" and Dobbels called Kelly "a fucking drunk." Kelly told Dobbels that, "we can settle this outside in the parking lot after work" and Dobbels said "we can settle it right here." The argument ended when another officer reported that a sergeant was coming to the staff dining room.

After reviewing the reports, Miller-Stout determined that Kelly and Dobbels should both be assigned to home during an investigation of the incident. Miller-Stout testified that she made this determination because of the severity of the incident, the proximity of the argument to offenders, to maintain the integrity of the investigation, and for concerns about officer safety.

On April 26, 2011, the employer notified Kelly and Dobbels that they were being placed on home assignment while the employer investigated the altercation that had occurred.

Kelly serves as the president of the Washington Staff Assault Taskforce (Taskforce). The Taskforce is a non-profit entity that works to assist corrections staff assaulted in the course of their duties. The Taskforce shares the union's goal of reducing assaults on employees, but is not directly affiliated with the union. During the time period Kelly was assigned to home, Kelly was

scheduled to participate in an employee recruitment event for the Taskforce at the Coyote Ridge Corrections Center.

After Miller-Stout was informed of Kelly's scheduled event she contacted Coyote Ridge Superintendent Jeff Uttech. Miller-Stout and Uttech determined that the Taskforce event did not warrant an exception to the employer's policy of prohibiting employees on home assignment from visiting any DOC facility. On April 27, Miller-Stout directed a staff member to inform Kelly that he would not be granted an exception to participate in the recruitment event at Coyote Ridge. At the employer's direction, Kelly did not participate in the Taskforce events at Coyote Ridge on April 28 and 29, 2011.

Prior to the incident with Dobbels, Kelly had participated in several union-sponsored events focused on safety concerns including informational pickets, testifying before the Washington State Legislature, sending letters to state legislators about safety concerns, and being interviewed by a local paper in which he was identified by name. In a March 31, 2011 article in the Spokesman Review, Kelly criticized DOC management. Miller-Stout was aware of the article in the local paper and of the union's safety-related activities.

Issue 3: Did the employer discriminate against Darren Kelly by removing him from his seniority bid position and placing him on home assignment in reprisal for union activities?

The union alleges that Kelly was placed on home assignment because of his active participation in various union activities. Kelly participated publicly in union activities. The employer took an adverse action (placed Kelly on home assignment) that deprived Kelly of overtime opportunities and prohibited him from visiting DOC facilities. The closeness in timing between Kelly's union activities and his home assignment suggests a causal connection between the two. The union established a *prima facie* case of discrimination.

The employer stated that the reason it placed Kelly on home assignment was because it was investigating the altercation between Kelly and Dobbels and was concerned for officer safety. On its face, these appear to be legitimate and non-retaliatory reasons. The union must now

establish that the employer's stated reasons were pretextual or that the employee's participation in union activities was a substantial motivating factor for the employer's adverse action. The union failed to prove that the employer placed Kelly on home assignment in retaliation for his exercise of statutory rights.

Kelly admitted that he and Dobbels engaged in two verbal altercations and that during those altercations he used profanity and engaged in unprofessional behavior. Miller-Stout's preliminary review of the incident reports from that day suggested a safety concern for both Dobbels and Kelly and that an investigation was necessary and would involve speaking with numerous employees. Concerns about officer safety and the need to maintain the integrity of an on-going investigation were the reasons the employer gave for placing both Kelly and Dobbels on home assignment. The employees were placed on home assignment two days after the incident. Kelly and Dobbels were not scheduled to work on the same shift prior to the time they were placed on home assignment.

Ultimately, the employer's investigation showed that Kelly engaged in unprofessional behavior when he told Dobbels that he needed to "get on a treadmill" and that Dobbels instigated a second fight when he approached Kelly later that day. The investigation also showed that during the second altercation Kelly responded in a manner which caused the argument to escalate. Discipline that resulted from the investigation occurred after the filing of this complaint and is not addressed in this decision.

The union alleges that Miller-Stout had spoken with Officer Carl McLeod and attempted to manipulate him into saying something negative about Kelly. At the hearing, McLeod stated several times that he couldn't remember much of the conversation. During testimony and in an e-mail he sent to the union a few days after the conversation, McLeod was unable to offer many specifics of the conversation with Miller-Stout; rather, he had a general feeling of being manipulated. I credit Miller-Stout's testimony that she told McLeod that the incident report forms she reviewed had numerous details about what Dobbels said, but said virtually nothing about what Kelly did during the altercation. She made reference to McLeod's participation in previous investigations to highlight the importance of a complete investigation. I find that

Miller-Stout's questions to McLeod about Kelly's conduct are reasonably viewed as an attempt to do a complete investigation.

During the second altercation Kelly and several witnesses stated that Dobbels told Kelly that management was looking for a reason to fire him. This was a statement made by Dobbels who is a bargaining unit employee, not a member of management or otherwise an agent of the employer. There was no evidence showing that Dobbels received this message from management or was instructed by management to pick a fight with Kelly to provide the employer with an excuse to fire Kelly.

Conclusion

The union was unable to show that the employer's stated reasons for placing Kelly on home assignment, because of verbal altercations with a co-worker, was pretextual or that union animus was a substantial motivating factor in the employer's investigation and decision. Accordingly, the union's discrimination allegation is dismissed.

Issue 4: Did the employer interfere with Darren Kelly's right to engage in protected union activity on April 27, 2011, and May 21, 2011?

April 27, 2011

The employer denied Kelly access to the Coyote Ridge Corrections Center on April 27 because he was on home assignment while he was under investigation for an altercation with a co-worker. Kelly had sought entry to the facility in order to participate in a pre-planned recruitment event for the Taskforce. Although the Taskforce worked on safety concerns that are interrelated with demands the union was making for safety improvements, Kelly's activities for the non-profit Taskforce were not union activity.

May 21, 2011

The preliminary ruling listed an interference allegation involving Kelly on May 21, 2011. The union did not put testimony on the record about events involving Kelly on this date or provide an explanation of this allegation in its post-hearing brief.

Conclusion

The employer was following its established protocol when it restricted Kelly from accessing DOC facilities while on home assignment. The employer did not interfere with Kelly's union activity when on April 27, 2011, it told Kelly that he could not go to Coyote Ridge Corrections Center while he was on home assignment. The union did not put forth evidence concerning events involving Kelly on May 21, 2011. Accordingly, the union's interference allegations concerning Kelly on April 27, 2011, and May 21, 2011, are dismissed.

Coyote Ridge Corrections Center

Issue 5: Did the employer interfere with Katrina Ortiz's right to engage in protected union activity on November 24, 2010, and/or March 7, 2011?

November 24, 2010

Katrina Ortiz is employed as a corrections officer at the Coyote Ridge Corrections Center, located in Connell, Washington. Ortiz has worked for the employer at the same facility since February 2006. Ortiz does not hold an official position with the union, but is an active union member.

Sometime in November 2010, before Thanksgiving, Ortiz talked with a co-worker about different methods unions use to influence employers. One of the tactics Ortiz described that was being used by unions in California was blue flu. The phrase "blue flu" often means that employees engage in a sickout and that the employees participating are uniformed officers, the blue being a reference to the color of the officers' uniforms. During a blue flu or sickout, employees simultaneously call in to work sick even though they are not really sick, resulting in a work slowdown or stoppage. Ortiz was not actively organizing a blue flu or sickout, but was talking with a co-worker about the use of such a tactic by a corrections union in California. Ortiz explained that she raised the issue when she and a co-worker were discussing strategies that unions in general use to put pressure on employers.

On November 24, 2010, Coyote Ridge Superintendent Uttech called Ortiz into his office for a meeting concerning a report he had received that Ortiz was discussing a blue flu. Cindy Benton,

Human Resource Manager, was present during the meeting as an observer. Prior to this meeting, Ortiz had never met Uttech or been called to the superintendent's office.

Both Ortiz and Uttech agree that Uttech questioned Ortiz about why she was discussing a blue flu and asked if she was organizing a strike. Ortiz informed Uttech that she had explained to another officer what a blue flu was, because he was unfamiliar with the term. Ortiz told Uttech that it was a union tactic she had heard of being used in California. Ortiz informed Uttech that she was not organizing a strike.

Ortiz and Uttech have somewhat different recollections of what took place at the meeting after this point.

In describing her exchange with Uttech, Ortiz testified:

> [H]e said you can't even talk about the blue flu. And I said, yes, I can. He said, no, you can't. I said, I can talk about it, I just can't organize it. He said no, you cannot talk about it. And this went back and forth. . . . He said, so if there was a strike tomorrow or a blue flu, would you call in sick? I said, yes, I'd be the first one. He said that's abusing sick leave and you can't do that.

Ortiz also stated that the conversation was heated and that Uttech had raised his voice when speaking with her. In contrast, Uttech described the conversation as professional and direct. Uttech testified that he could not remember raising his voice.

In its answer to the complaint, the employer stated: "Respondent admits that Superintendent Uttech told Officer Ortiz that she was prohibited from discussing a strike or work stoppage in the workplace." [3]

In describing the conversation Uttech testified:

> Well, I called her into my office and I asked her if she was having conversations and talking about coordinating a sick out or a work strike. And she indicated that – that there was conversation related to that. I indicated to her that it would be

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[3] Uttech testified that this answer was "not 100 percent" accurate but acknowledged that he made some similar statements.

> inappropriate to organize a work strike, that she's prohibited from organizing a work strike, and I cautioned her about her behavior associated with that.

During the meeting Uttech also asked Ortiz how she would respond if the union hypothetically organized a blue flu. Ortiz she would be the first to participate if the union were to organize one. Uttech told her that participating in a blue flu would be an abuse of sick leave. Uttech went on to ask Ortiz if she thought it was OK to call in sick when she was not really sick and explained that it would not be acceptable to do so. Uttech asked Ortiz if she had ever called in sick when she wasn't really sick. Ortiz said yes. Uttech told Ortiz that was sick leave abuse and went on to tell Ortiz that he had never personally called in sick when he wasn't really sick. Uttech instructed Ortiz that she was not allowed to use sick leave when she was not sick.

Ortiz testified that during the course of the meeting she made it clear that she was a strong union supporter. She told Uttech that she had been "union" for 26 years and knew her rights. Ortiz insisted that she had the right to discuss union issues, such as what blue flu is, with her co-workers. Uttech could not recall Ortiz talking about her involvement or history with unions. On this point I credit Ortiz's recollection.

In explaining why she had been so insistent about asserting her union rights in the meeting with Uttech, Ortiz explained:

> That's my right as being a member of the union. That's everything, you know. I mean, you can't -- you can't put a gag order on somebody because you don't like what they're saying, you know. I felt it was intimidation, he was threatening me or something. I didn't know what he was trying to do, I really didn't. I couldn't figure out why he passed my chain of command, my sergeant. My sergeant wasn't even informed about this. Why did he go past -- clear past my sergeant, not talk to my sergeant, my shift sergeant, my lieutenant, the CPM [Correctional Programs Manager], the captain? Why was all these chain of commands skipped? You know, they wanted me to use my chain of command, but they didn't use theirs. I felt he -- he pulled me in there for a reason. You're not going to talk about it, he thought I was trying to organize a strike and I wasn't.

Ortiz estimates the conversation lasted 20-25 minutes and described the conversation as heated. Ortiz said that by the end of the meeting both she and Uttech were angry and Uttech raised his voice. Ortiz described the end of the meeting as follows:

> He said that's abusing sick leave and you can't do that. I said, you have to prove I'm not sick, I don't have to prove to you I'm sick, okay. And he said that's abusing sick leave. And we went back and forth at this for a few minutes. He finally stated, you can't do this. I said, if I'm doing something wrong write me up. He then got really loud and pointed his finger towards the door with his hand and said, get out. Get out of my office now, get out, and then I just left.

I do not credit Benton's testimony about the November 24, 2010, meeting between Uttech and Ortiz. Benton, who attended the meeting as an observer, acknowledged that her recollection of the conversation was unclear. When asked specific questions about the meeting, Benton appeared to be very unsure and repeatedly testified that she could not remember or could not recall. Much of Benton's testimony about what occurred at the meeting was not consistent with Ortiz's or Uttech's testimony. Both Ortiz and Uttech appeared to have much more specific recollections of the meeting than Benton.

Utrecht acknowledges that he did not contact any agent of the union to ask whether the union was organizing any type of strike, work stoppage, or blue flu. Uttech decided to question Ortiz directly because someone told him that they heard her discussing a blue flu.

An employer commits an interference unfair labor practice violation if its actions or the statements of its officials are reasonably perceived by employees as a threat of reprisal associated with protected union activity. The National Labor Relations Board has been clear that an employer may not prohibit a union member from engaging in union talk while allowing other non-work subjects to be discussed. *Jensen Enterprises, Inc.,* 339 NLRB 877 (2003), *Willamette Industries, Inc.,* 306 NLRB 1010 (1992), *Orval Kent Food Company, Inc.*, 278 NLRB 402 (1986). The Board's articulated standard is consistent with the statutory scheme of Chapter 41.80 RCW and thus appropriate to apply in this instance. *State - Corrections*, Decision 10998-A (PSRA, 2011).

The commission discussed an employer's interrogation of employees with respect to their union activity in *Seattle School District*, Decision 9982-A (PECB, 2009), stating:

> In *PERC v. City of Vancouver*, 107 Wn. App. 694 (Div. II, 2001) *rev. denied*, 145 Wn. 2d 1021 (2002) (*City of Vancouver*), the Washington State Court of Appeals

held that "an employer with a legitimate reason to inquire may interrogate employees on matters that relate to their collective bargaining rights without incurring liability under the [National Labor Relations Act (NLRA)]." *City of Vancouver*, 107 Wn. App. at 706 citing *NLRB v. Ambox, Inc.*, 357 F.2d 138 (5th Cir. 1966). Thus, an employer's investigation into an employee's union activities is not per se unlawful. *City of Vancouver*, 107 Wn. App. at 705. The interrogation becomes illegal when the words themselves or the context in which they are used suggests an element of coercion or interference with protected union-related activities. *City of Vancouver*, 104 Wn. App. at 706 citing *NLRB v. Ambox, Inc.*, 357 F.2d at 141.

The *City of Vancouver* court also adopted the NLRA test to determine whether an employer's interrogation of employees with respect to their union activity constitutes interference. That test examines the totality of the circumstances and states:

> (1) the history of the employer's attitude toward its employees; (2) the type of information sought; (3) the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer had a valid purpose for obtaining the information; (7) if so, whether the employer communicated it to the employee; and (8) whether the employer assured the employee that no reprisals would be forthcoming should he or she support the union.

City of Vancouver, 107 Wn. App. at 706 citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). Even where all eight factors weigh in the employer's favor, a violation may still be found if, under the totality of the circumstances, the interrogation tends to restrain, coerce, or interfere with protected employee rights. *Seattle School District*, Decision 9982-A (PECB, 2009) citing *City of Vancouver*, 107 Wn. App. at 706-7 citing *V & S ProGalv. Inc. v. NLRB*, 168 F.3d 270 (6th Cir. 1999).

In evaluating the facts in this case as they relate to the eight factor test I find:

1. The employer does not have a history of hostility or discrimination against employees for union activity.
2. The employer was seeking information about whether an employee was involved in organizing a blue flu or sickout (a work slowdown or stoppage). Such a work slowdown is prohibited by Article 38.1 of the parties CBA:

> It is mutually agreed that neither party will directly or indirectly authorize, cause, assist, encourage, participate in, ratify or condone any strike

> (whether economic, unfair labor practice, or sympathy strikes) lockouts, or other slowdown or cessation of work.

RCW 41.80.060 also addresses strikes and provides as follows:

> Right to strike not granted.
> Nothing contained in chapter 354, Laws of 2002 permits or grants to any employee the right to strike or refuse to perform his or her official duties.

The employer also sought information on how this particular employee, Ortiz, would respond if the union were to organize a blue flu and asked Ortiz whether she had ever called in sick when she wasn't really sick.

3. The questioner, Uttech, was the superintendent of the Coyote Ridge Corrections Center. The superintendent is the top level administrator at the facility. In this position, Uttech is a supervisor and agent of the employer. Ortiz held a non-supervisory bargaining unit corrections officer position. Ortiz had never met or spoken with Uttech prior to this meeting. There were five levels of supervisory reporting structure between Ortiz and Uttech (sergeant, shift sergeant, lieutenant, CPM, captain). Uttech skipped over all of these levels in the chain of command to talk with Ortiz directly.

4. Uttech questioned Ortiz in his superintendent's office. When a lieutenant told Ortiz to report to the superintendent's office Ortiz commented: "I have never been to the superintendent's office . . . this doesn't sound good." The lieutenant responded "it usually isn't." The manner of the conversation during the meeting was formal. Benton, the facility's Human Resource Manager, was also present throughout the meeting. At some point the exchange between Uttech and Ortiz became heated. According to Ortiz, Uttech raised his voice at her and ultimately pointed at the door and ordered her to leave his office. According to Uttech, the meeting just ended.

5. Ortiz truthfully answered the employer's questions. Ortiz acknowledged that she had talked with a co-worker about what a blue flu was in the context of discussing a tactic used by a corrections union in California. Ortiz explained that she was not involved in organizing one. Ortiz even answered the employer's hypothetical questions about

whether she would support the union and participate in a blue flu if the union were to organize one. Ortiz also admitted that she had called in sick before when she was not really sick.

6. At the hearing the employer explained that the reason it conducted the interview was to determine if Ortiz was organizing a blue flu. Early in the meeting, Ortiz explained that she was not organizing a blue flu. At that point the employer had fulfilled the purpose of its interview. It is not clear why the employer decided to proceed with further questioning of Ortiz.

7. The employer did not tell Ortiz the purpose of the meeting before questioning her.

8. The employer did not provide any assurances to Ortiz that she would not suffer reprisal or retaliation for engaging in protected union activity. On the contrary, the employer informed Ortiz that she was not allowed to talk about the blue flu and that it would be abuse of sick leave if she participated in a blue flu or called in sick when she was not really sick.

In the instant case, Ortiz was called away from her normal duties to the superintendent's office where she was questioned about her discussion with a co-worker about blue flu, a form of work slowdown or strike. The fact that the questioning was conducted by the superintendent, the head of the facility numerous steps above her in the chain of command, in his office created an atmosphere that would be intimidating to a typical employee. The employer had a legitimate reason to investigate the potential of a work slowdown in a facility where employees are contractually and statutorily prohibited from striking.

The employer did not interfere with Ortiz's statutory collective bargaining rights by telling her that she was prohibited from organizing a work strike and by asking her if she was organizing a strike. Participation by employees in a strike is prohibited by the parties CBA and by Chapter 41.80 RCW. Participation by employees in a blue flu or sickout in this context would not constitute protected union activity. The employer also did not interfere with Ortiz's bargaining

rights by informing her that it would be an abuse of sick leave to call in sick when she was not really sick. Article 23.2 of the CBA limits the use of sick leave to various health-related reasons.

Although Ortiz cannot legally organize a blue flu the employer cannot prohibit an employee from talking about the fact that a work stoppage tactic called the blue flu exists and has been used by corrections unions in other states in the past. Discussing labor history as a means of explaining what unions do and why they exist is a form of protected union activity. The employer's directive to Ortiz that she could not to discuss the concept of a blue flu was ultimately a form of intimidation and coercion that interfered with Ortiz's right to engage in union activity under RCW 41.80.110(1)(a).

March 7, 2011

In March 2011, Ortiz participated in a defensive tactics training class conducted by employees of DOC at the Coyote Ridge facility. Completion of the training is a job requirement for Ortiz's position. During the training on March 6, 2011, Ortiz expressed concern about the way the training was being delivered. Specifically, Ortiz was concerned that the practicing of maneuvers was especially physical and included rough-housing by many of the young male participants in the training. Ortiz was afraid she might get injured if she practiced the techniques in such a physical and rough manner and sat out for part of the day due to these concerns. Ortiz expressed her concerns to the trainers, one of whom is also a shop steward. Ortiz also voiced her opinion that many of the tactics were not practical and useful for women. She suggested that the class include tactics for women, especially in light of the recent murder of Jayme Biendl, a female corrections officer at a DOC facility in Monroe.

On March 7, 2011, the employer called Ortiz into the superintendent's office for a meeting with Uttech and Benton to discuss what had occurred at the defensive tactics training. Ortiz was accompanied by a shop steward, Levi Dean (L. Dean). The employer asked Ortiz if she was physically able to complete the training, which is a requirement of her job position. Ortiz indicated that she could complete the training the way it had been delivered in past years, but felt that this time the training was not being conducted properly. Specifically, Ortiz explained the way in which the exercises were being practiced was too rough and much more physical than in

past years. Ortiz also expressed her opinion that the training should include more tactics that would specifically be helpful to female officers.

Benton testified that the meeting was called in response to a report from DOC's training manager indicating that Ortiz was not able to complete the defensive tactics training. The completion of this training is an essential function of Ortiz's job and consequently the meeting was about whether Ortiz could complete the essential functions of her position with reasonable accommodation.

At the conclusion of the meeting, Ortiz was instructed by Uttech to complete the training.

Ortiz testified that Uttech told her she was not allowed to discuss what had occurred during the meeting. Shop Steward L. Dean also testified that Uttech told Ortiz that there could be an investigation and that she could not talk about the meeting with anyone, other than the people who were in the office for the meeting. As L. Dean described it, Uttech told Ortiz "she could no longer talk about the issue once the meeting was over." L. Dean explained Uttech told Ortiz "that there could be an ongoing investigation, and that she was not to talk about it, outside of anybody who was in the office at that point." When the employer's attorney asked L. Dean if Ortiz was told not to talk about safety concerns, L. Dean responded, "Anything that happened in the meeting . . . Anything that was said." Ortiz testified that Uttech told her not to speak about her concerns about the training. Ortiz's and L. Dean's testimony are generally consistent with each other. Uttech denied making any such statement.

When asked about whether Ortiz was told that she was being placed under investigation or told she could not talk about the meeting, both Benton and Uttech testified that Uttech did not make any such statement. This testimony directly contradicts the testimony of shop steward L. Dean and Ortiz.

On March 7, after the meeting with Uttech and Benton, Ortiz called the Director of Prisons, Dan Pacholke. Ortiz spoke with Pacholke and expressed concerns about her two meetings with Uttech. Pacholke conveyed his belief that Uttech had acted properly.

On March 7 Ortiz also contacted the union's business representative, Eydie Dean (E. Dean) and told her about the meeting she had earlier that day with Uttech and Benton. On March 7 or 8 union representative E. Dean spoke to Uttech and expressed concern about the way the defensive tactics training was being delivered. E. Dean asked that the defensive tactics training be less physical. According to E. Dean, the union believed that the remainder of training was less physical and did not file a grievance because it thought the problem had been resolved. Ortiz also testified that E. Dean talked with Uttech about Ortiz's concerns that the training was too rough. Ortiz testified that the second day of defensive tactics training was not rough like it had been on the first day. When Uttech was asked about the conversation with E. Dean concerning the defensive tactics training shortly after the meeting with Ortiz, Uttech testified "I do not recall having a conversation with Eydie Dean on this, no."

With regards to the March 7 or 8, conversation between union representative E. Dean and superintendent Uttech, I credit E. Dean's testimony. Ortiz's testimony also supports E. Dean's recollection of events. It appears that Uttech does not have a clear recollection of conversations from this time period. E. Dean's testimony about the meeting was clear and credible.

In reviewing the conflicting testimony about whether the employer told Ortiz she could not discuss the contents of the meeting with anyone outside of the meeting, I credit the testimony of shop steward L. Dean and Ortiz on these issues. In evaluating the demeanor of the witnesses and the totality of the testimony, it seems much more likely that the employer forgot that it had made these statements than it does that the union's witnesses would fabricate them. Both L. Dean and Ortiz appeared to have strong and credible recollections. Benton's recollection of this second meeting appeared to be clearer than her recollection of the meeting on November 24, 2010, but still appeared tentative and unsure. Uttech seemed to struggle with remembering specifics of conversations during this time period, as evidenced by the fact that it appears he totally forgot about the conversation he had with union representative E. Dean on these same issues during the same time period.

The employer's stated reason for calling a meeting with Ortiz was to discuss whether Ortiz was able to complete the required training. The employer was concerned that if Ortiz could not

perform the defensive tactics in the training, she might not be in physical condition to do her job as a corrections officer. The employer also perceived that Ortiz's comments about concerns of the safety of the training and it being inadequate for women employees and references to the murder of Jayme Biendl's, a correctional officer in the Monroe Correctional Complex, as disruptive to the training process, and did not want Ortiz to interrupt the training of her co-workers. These were reasons to meet with Ortiz.

Commission case law is clear that the right to discuss and bargain about working conditions includes the right to express concerns about workplace safety to other employees and union shop stewards. *City of Centralia*, Decision 5282-A (PECB, 1996). By telling Ortiz that she was not allowed to talk about the meeting she had with the employer, much of which related to concerns about the safety and effectiveness of an employer-mandated defensive tactics training, a typical employee could perceive that the employer was directing Ortiz not to speak about the safety concerns that she raised during the meeting with Uttech and Benton. Although the employer may not have intended for its instruction not to talk about the meeting to include discussing safety concerns raised in the meeting, intent is not a necessary element of an interference violation. I find that the employer's statement prohibiting Ortiz from discussing the contents of the meeting she had with the employer on March 7 constituted unlawful interference, because the statement could reasonably be perceived to prohibit Ortiz from discussing the safety concerns she raised in the meeting with co-workers and union representatives.

Testimony outside of scope of complaint

During the hearing the union also offered testimony about a DOC employee who approached Ortiz in June 2011 to tell her it wasn't a good idea to speak with the union. This event occurred after the complaint was filed. It is not properly before the Commission in this case and is not addressed in this decision.

Conclusion

I find that the employer interfered with Ortiz's right to participate in protected union activities in violation of RCW 41.80.110(1)(a) on November 24, 2010, by prohibiting Ortiz from discussing a union tactic called "blue flu" in the workplace.

The portion of the employer's conversation with Ortiz on March 7, 2011, concerning the safety of employer-mandated training and Ortiz's ability to complete the training did not constitute employer interference. However, the directive from the employer that Ortiz could not discuss the contents of the meeting with anyone outside of the meeting was coercive and could reasonably be perceived to interfere with Ortiz's ability to discuss safety concerns with union representatives and fellow bargaining unit employees in violation of RCW 41.80.110(1)(a).

Washington State Penitentiary

Background

Jared Crum is employed as a corrections officer at the Washington State Penitentiary where he has been employed since October 2007. In January 2011, Crum was assigned to work in the special offenders unit at the Penitentiary. On March 1, 2011, Crum responded to an alert call for an officer stabbing. Officer Jim Nored, a co-worker and friend of Crum's, had been stabbed in the face with a pen by an inmate. That evening Crum contacted the union to report the stabbing and to express his concerns about officer safety and whether the facility was understaffed. Crum had never contacted the union with concerns prior to this call.

The next day, March 2, 2011, Penitentiary Superintendent Steve Sinclair attended roll call, which was unusual, and spoke about the assault. Crum and Officer Jeff Preas were present for this meeting. Preas is employed as a corrections officer at the Penitentiary where he has been employed for approximately thirteen years. Preas is also a union shop steward. Sinclair updated the staff about Nored's medical condition and indicated that someone had contacted the media with personal information about Nored. Sinclair explained that this was inappropriate because media contacts should go through the employer's public relations department.

Crum testified that he heard Sinclair mention the union at the roll call meeting. In describing Sinclair's statements at the meeting Crum testified:

> [Sinclair] had brought up the fact that -- he had asked that no one -- something to the degree that, you know, we had had a staff assault, and someone had contacted the press or the radios and the union. And you know, just we had a public

> relations department, you know, people needed to go through them before information is passed. Because due to the fact that they didn't -- information didn't need to be passed out without, you know, not knowing the facts.

However, Crum acknowledged that his memory of the incident was "a little sketchy." Crum testified that he took Sinclair's comments to mean "don't contact the union, don't contact the press. We have a public relation[s] department, they'll take care of it. I mean, if you have a question come talk to us first."

Union shop steward Preas attended the same roll call meeting and also testified at the hearing. Preas remembered Sinclair telling employees not to give out an employee's personal information to the press. Preas testified that he did not remember Sinclair mentioning the union during the roll call meeting.

On March 8, 2011, Crum was removed from his bid position in the special offenders unit due to a concern that he had failed to appropriately monitor and stop an inmate from engaging in debt collection while the inmate collected laundry from other inmate cells. The employer testified that it had reviewed video footage showing the inmate going from cell to cell to collect laundry, but the inmate also appeared to be gathering other goods. This prompted the employer to investigate Crum, because he was the officer monitoring the collection of the laundry and controlling the opening and closing of the cell doors as the inmate collected the laundry. While the employer was conducting its investigation, the employer reassigned Crum from his bid position to a leave relief position where he was assigned to a new location every day to cover for officers who were absent.

On March 18, 2011, the union filed a grievance on Crum's behalf over his reassignment. In late March 2011, the union and employer met to discuss Crum's reassignment. Sinclair, Crum, union business representative Analtha Moroffko and Human Resource Consultant Nancy Waldo participated in the meeting. During the meeting Moroffko accused Sinclair of reassigning Crum because he had contacted the union. Sinclair responded that he hadn't known Crum had been in contact with the union prior to Moroffko informing him of such. After the meeting Crum

withdrew his grievance and apologized to the employer. Sometime shortly after this meeting the employer returned Crum to his bid position.

On April 21, 2011, Crum used force against an inmate. At the time of the incident Crum completed the proper use of force paperwork, which was subsequently signed off on by his supervisors.

On April 28, 2011, the employer removed Crum from his bid position again. This time Crum was reassigned to work in the mail room. Sinclair explained that the employer removed Crum in order to investigate an allegation of excessive force against an inmate.

Issue 6: Did the employer interfere with employee rights on March 2, 2011, by making statements that discouraged or prohibited employees from contacting their union about workplace injuries or violence?

An employer commits an interference violation if its actions or the statements of its agents are reasonably perceived by employees as a threat of reprisal or force, or promise of benefit, associated with protected union activity. The union alleges that during the roll call on March 2, 2011, the day after the officer stabbing, Sinclair told employees not to contact their union or the press concerning an officer assault but instead to go through the employer's public relations department.

The employee witnesses who attended the meeting provided conflicting testimony on this allegation. Crum testified that he took the employer's comments to mean that the employees were not to contact the union about staff assaults. In trying to recall what specifically the employer said at the meeting, Crum acknowledged that his memory of the incident was "a little sketchy."

The second witness, Preas, testified that Sinclair did not mention the union or contacting the union during the roll call meeting on March 2, 2011. As a shop steward, Preas had received training from the union and likely would have known to pay attention to any message from the employer about limiting employee contact with the union or other illegal interference. Preas

testified that Sinclair's instruction was that personal contact information for the officer assaulted should not have been released to the press and that these communications should be directed to the public relations department.

Conclusion

The employer's directive to staff that they not share other employees' personal contact information with the press was a lawful request for Sinclair to make and typical employees in the same circumstances could not reasonably view the employer's actions as discouraging protected union activities. The totality of the witness testimony does not support a finding that the employer told employees they could not contact their union about safety problems or engage in other protected union activities to draw attention to safety concerns. Accordingly, the union's interference allegation is dismissed.

Issue 7: Did the employer discriminate against Jared Crum by removing him from his seniority bid position, reassigning him to the mail room, and ultimately placing him on home assignment in reprisal for union activities?

The union alleges that on April 28, 2011, the employer removed Crum from his bid position and assigned him to temporarily work in the mail room in retaliation for contacting the union. The union further alleges that the employer discriminated against Crum in reprisal for his union activities by removing Crum from his temporary mail room position and placing him on home assignment on May 23, 2011.

On April 28, 2011, Crum was removed from his bid position for a second time in 2 months. The employer informed Crum it was investigating concerns about his use of force against an inmate. Pending completion of the investigation, Crum was moved from his bid position to a position in the mail room, where he was not responsible for supervising inmates. After consulting with the union, Crum continued to sign up for overtime opportunities in the facility.

On May 20, 2011, Human Resource Consultant Waldo contacted Crum about signing up for voluntary overtime. Article 17 of the parties' CBA addresses overtime. Crum believed that

under Article 17.1.I of the CBA, Ability to Deny Overtime Assignment, the employer did not have a basis to deny his request to work overtime while he was assigned to the mail room.

At the hearing Crum testified about his conversation with Waldo on May 20, explaining:

> And she had called me, this would have been around, oh, three o'clock, and said why are you signing up for overtime. I said it's within my rights within the CBA. And she said, well, if you're going to do this I'm going to have to call the superintendent. And I said okay, well, why is that. She said well, if you're going to do this I'm going to call him and he's probably going to just send you home.

Crum testified that he couldn't recall if Waldo had mentioned any concern about his working with offenders. This recap is similar to Waldo's testimony about the conversation. Waldo testified:

> So I called Officer Crum and I asked him if he was really working overtime and he said yes. And so he -- the union had told him he should continue to sign up for overtime. And so I said, okay, the superintendent is probably going to assign you to home and because he doesn't want you working around offenders. And he said the superintendent is going to do what he's going to do, and I was like okay.

After this conversation, Waldo informed Sinclair that Crum intended to continue signing up for overtime. Sinclair decided that Crum should be assigned to home since he had made it clear he was going to continue to sign up to work overtime.

Meanwhile, Crum contacted Joe Kuhn, business representative for the union. Kuhn testified that Crum, "told me that she [Waldo] had called and asked him why he was still signing up for overtime." Kuhn then called Waldo and spoke with her about the issue. Kuhn testified:

> I immediately -- or in a very close proximity -- called the facility and spoke with Ms. Waldo myself, and asked her about the conversation. And she confirmed that, yes, she did make contact with him [Crum] and advised him that -- that whole conversation prior with Mr. Crum. And I advised her at that point that if she did contact the superintendent, and then if he did in fact reassign him to home, that I would file another grievance for retaliation because he has a contractual right to do so. . . . There was no mention of anything else, just that they didn't like the fact that he was continuing to sign up for overtime.

On May 23, 2011, Sinclair was scheduled to be out of the office so Associate Superintendent Chris Bowman gave a letter to Crum placing him on home assignment. Waldo, Bowman, and Crum met and Crum received his home assignment letter.[4]

When Waldo was questioned about whether the safety concern was explained to Crum she replied, "Did Associate Superintendent Bowman explain to him specifically, I don't know for sure." Bowman did not testify at the hearing.

The union established a *prima facie* case of discrimination by showing: 1) Crum engaged in protected union activity by calling the union about safety concerns involving the officer Nored stabbing incident and by filing a grievance on March 18, 2011; 2) The employer's action of removing Crum from his bid position and ultimately placing him on home assignment deprived Crum of an ascertainable right, benefit, or status by preventing him from being able to select and work overtime; 3) The close proximity in the timing of Crum's union activity and the employer's decision to assign him to the mail room and later place him on home assignment provides circumstantial evidence of a causal connection.

Sinclair testified that the employer was not aware that Crum had been in contact with the union prior to the union informing him of such at Crum's grievance meeting that took place in late March 2011. There is no dispute that the employer had knowledge of Crum's union activity when it removed him from his bid position the second time on April 28, 2011 and placed him on home assignment on May 23, 2011.

The employer further responded by providing a non-retaliatory reason for its decision to remove Crum from his bid position on April 28 and assign him to the mail room, and ultimately to place him on home assignment on May 23. Specifically, the employer alleges that it was concerned about a use of force report it received involving Crum's use of force against an inmate. Crum's supervisors initially signed off on Crum's report, indicating their acceptance of the report. According to Superintendent Sinclair, Sergeant Morgan, one of Crum's supervisors, learned of

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[4] Neither party offered a copy of the home assignment letter into evidence at the hearing.

information that caused him to have concerns about Crum's use of force shortly after signing the report. According to Sinclair, Morgan wrote up his concerns in a separate incident report which he submitted to the employer. Morgan did not testify at the hearing. After seeing Morgan's report and talking with the lieutenant who was on duty at the time of the incident, Sinclair decided to launch an investigation into possible unauthorized use of force by Crum.

Superintendent Sinclair testified that the reason Crum was assigned to home was because of the safety and security concerns related to the use of force complaint filed against him. The employer felt strongly that during the investigation into the use of force complaint Crum should not be in a position to supervise inmates. The employer temporarily assigned Crum to the mail room on April 28, 2011. Sinclair explained that the reason Crum was assigned to the mail room first was because in this location his interaction with inmates would be minimal, he would not be responsible for monitoring offenders, and he would not be in uniform.

The employer decided to place Crum on home assignment after the union filed a grievance and argued that under the CBA the employer could not deny Crum's request to work overtime, which would place Crum in direct control of inmates. Superintendent Sinclair testified that if Crum was allowed to work overtime the mitigating effects of mail room placement would disappear, which is why the employer notified Crum on May 20, 2012, that he would be placed on home assignment if he continued to sign up for overtime. The employer had the right under the CBA to place Crum on home assignment while investigating the use of force complaint involving Crum.

Conclusion

The employer had a legitimate, non-retaliatory reason for removing Crum from his bid position, reassigning him to work in the mail room on April 28, 2011, and ultimately to home assignment on May 23, 2011, while he was under investigation for use of force against an inmate. The employer felt it was important to avoid allowing Crum to be in a position where he had control over inmates because of the use of force complaint against him that was under investigation. The union was not able to establish that the employer's reason was pretextual or that Crum's union activity was a substantial motivating factor in the employer's decision to remove him from

his bid post and later place him on home assignment. Accordingly, the union's discrimination allegation is dismissed.

Issue 8: Did the employer interfere with Crum's protected union activity on May 20, 2011?

The union alleges that the employer interfered with Crum's union activity on May 20, 2011, by telling Crum that if he continued to sign up for overtime he would be placed on home assignment. "[A]n independent interference violation cannot be found under the same set of facts that failed to constitute a discrimination violation." *Seattle School District*, Decision 9355-C (EDUC, 2010) citing *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

Conclusion

This interference allegation stems from the same facts as the discrimination allegation. The Commission will not find an independent interference violation for the same facts where the discrimination allegation is dismissed. Accordingly, this interference allegation is dismissed.

Monroe Correctional Complex

Background

Jimmy Fletcher is employed as a sergeant at the Monroe Correctional Complex. Fletcher has worked for the employer since November 2000. Fletcher became a shop steward for the union in January 2011. Prior to becoming a shop steward, Fletcher was active in the union. In the fall of 2010, Fletcher participated in a series of union events designed to highlight safety concerns in DOC facilities. A delegation from the union, including Fletcher, spoke before the Monroe Chamber of Commerce in November 2010, about how cutbacks and resulting loss of staff would impact officer safety and ultimately community safety. An article about the event was published in a local paper. Fletcher also participated in two informational pickets about safety at the Monroe facility. In December 2010, Fletcher was invited to speak before the Washington State Legislature about a bill concerning staff assaults. Fletcher informed Superintendent Scott Frakes about this invitation.

On January 29, 2011, Jayme Biendl, a correctional officer at the Monroe facility, was murdered by an inmate while she was working in the Washington State Reformatory Unit (Reformatory Unit) of the Monroe Correctional Complex. Fletcher had worked closely with Biendl, served as a mentor to her, and also considered her a friend.

Biendl's murder was the subject of a significant amount of media reporting. At a press conference, Fletcher heard an employer official state that the employer had no reason to think that Biendl did not feel safe while working in the Reformatory Unit.

Fletcher was concerned that the information the employer was sharing with the press in late January about how safe Biendl felt was not accurate. A day or two after her murder, Fletcher told union staff that he had previously received a work order request from Biendl requesting that a surveillance camera be installed in the chapel. Fletcher said he signed off on Biendl's request and passed it up the chain of command. The camera was never installed. The location where Biendl had requested a camera was in the proximity of where she was murdered. On January 31, 2011, Fletcher met with the union and signed an affidavit documenting his knowledge of Biendl's work order request. The same day, the union sent out a press release about the affidavit. The resulting media coverage was critical of information being provided by the employer surrounding the safety of Biendl's working environment.

February 17, 2011

On February 17, 2011, Sergeant Fletcher and Lieutenant Rodney Shimogawa had a discussion about Biendl's murder. The two agreed that the conversation would be private. Shimogawa had been working as the on-duty lieutenant the night of the murder. Fletcher was Biendl's immediate supervisor. Fletcher was not working the night Biendl was murdered.

Fletcher and Shimogawa offered conflicting accounts of their conversation. Both acknowledge that the conversation was emotional and concerned possible culpability that Shimogawa may have had for events that took place the night of Biendl's murder. Ultimately, Fletcher told Shimogawa that he had reservations about whether Shimogawa was being honest. Fletcher specifically voiced concerns that Biendl was left dead for over an hour before staff found her. Fletcher acknowledged that he told Shimogawa that he would never forgive him for that.

According to Shimogawa, the next day several staff came up to him and asked him about the conversation he had with Fletcher. As Shimogawa described, "there was a rumor Sergeant Fletcher had chewed my ass last night." After hearing these questions and comments from staff, Shimogawa reported the conversation to Superintendent Frakes.

February 22, 2011

On February 22, 2011, Superintendent Frakes' called Fletcher into his office. Frakes expressed concern about the conversation that Fletcher had with Shimogawa a few days earlier. Superintendent Frakes informed Fletcher that he would no longer be assigned to work in the same areas of the prison as Lieutenant Shimogawa when Shimogawa was on duty, but would otherwise continue his regular duties according to his regular schedule. Fletcher was informed that this restriction was to keep him separate from Shimogawa in order to avoid further personal confrontation. This restriction was to last through the investigation resulting from Biendl's murder.

During the meeting, the employer gave Fletcher two different versions of a letter explaining the temporary restrictions on Fletcher's work assignments. Both versions of the letter stated "I am concerned about your ability to perform your duties while you are assigned inside WSRU [Reformatory Unit], or under Lieutenant Shimogawa. You have demonstrated behaviors that suggest your emotions around the death of Officer Biendl are impacting your judgment and objectivity."

The letter the employer initially gave to Fletcher went on to state: "I am directing that you not be assigned to relieve posts inside WSRU [Reformatory Unit], MSU [Minimum Security Unit] on Fridays and TRU [Twin Rivers Unit] on Mondays." After handing this letter to Fletcher, Frakes asked for the letter back. Frakes gave Fletcher a second letter that stated "I am directing you not be assigned to relieve posts inside WSRU [Reformatory Unit] or TRU [Twin Rivers Unit] on Mondays."

In testimony the union points out, and the employer acknowledges, that the restrictions in either letter were not adequate to ensure that Fletcher would not work with Shimogawa. Both letters

prohibited Fletcher from working in the Reformatory Unit, the location where Biendl was murdered.

Prior to February 22, 2011, when Superintendent Frakes placed restrictions on Fletcher's work assignment areas, Fletcher had used his seniority bid to obtain a sick leave relief sergeant position. In this position Fletcher could be assigned to fill in for a sergeant who called in sick in any of the five units that make up the Monroe Correctional Complex. Word of the employer's restriction on Fletcher's work assignment areas, including blanket exclusion on working in the Reformatory Unit, quickly spread amongst staff at the Monroe Correctional Complex. At least some staff saw the restriction as an effort by the employer to remove Fletcher from his bid position.

Fletcher promptly contacted the union and filed a grievance over the restriction to his work assignment areas. A few days later Fletcher and his union representative had a follow-up conversation with Superintendent Frakes about the restrictions to Fletchers work assignments areas. Superintendent Frakes decided the reassignment was no longer necessary and revoked the restriction on Fletcher's work areas.

Issue 9: Did the employer discriminate against Jimmy Fletcher by temporarily restricting Fletcher's work assignment areas in reprisal for union activities?

The union presented evidence establishing a *prima facie* case of discrimination. Fletcher's active role in addressing safety concerns, both before and after Biendl's murder, were forms of protected union activity. Fletcher's decision to release information about Biendl's work order request for a surveillance camera thorough his union was also protected union activity. The employer's action limiting Fletcher's work assignment areas deprived Fletcher of his normal status of being able to work as a relief sergeant in any of the employer's facilities. The close proximity in the timing of Fletcher's union activity and the work assignment restriction provide circumstantial evidence of a causal connection.

The employer responded by providing a non-retaliatory reason for its decision to limit the locations of Fletcher's work assignments. I credit Superintendent Frakes' testimony that his decision to not assign Fletcher to locations where Shimogawa was assigned was made to promote the best interests of Fletcher and Shimogawa and give them time to deal with emotions related to Biendl's murder. Frakes explained that he made this adjustment in work assignment areas in response to the emotionally-charged environment resulting from the murder of another employee. Fletcher's reassignment did not result in a change to his work hours or pay. The temporary restriction preventing Fletcher from working with Shimogawa was not disciplinary in nature and was reversed promptly when Fletcher grieved the employer's decision, pointing out that it was not permitted under the CBA.

Conclusion

The employer provided a legitimate, non-retaliatory reason for temporarily restricting what work areas Fletcher could work in on certain days. The union was unable to show that the employer's stated reason for the temporary restriction on Fletcher's work area was pretextual or that union animus was a substantial motivating factor in the employer's decision. Accordingly, the discrimination allegation is dismissed.

Issue 10: Did the employer interfere with Jimmy Fletcher's right to engage in protected union activity on one or more of the following dates: February 17, 22, 27, 2011, or March 21, 2011?

February 17, 2011

February 17, 2011, was the date of the conversation between Fletcher and Shimogawa. The role this conversation played in the employer's decision to temporarily restrict Fletcher's work locations has already been addressed in analyzing the discrimination allegation above. There are no specific statements by Shimogawa on February 17, 2011, that the union alleges constitute interference. Accordingly, the February 17, 2011 interference allegation is dismissed.

February 22, 2011

Superintendent Frakes' meeting with Fletcher on February 22, 2011, and the letter temporarily restricting Fletcher's work locations are the basis of the discrimination allegation involving

Fletcher that is addressed above. There are no other actions or specific statements by Frakes on this date that the union alleges constitute interference.

"[A]n independent interference violation cannot be found under the same set of facts that failed to constitute a discrimination violation." *Seattle School District*, Decision 9355-C. The same facts from February 22, 2011, involving Fletcher have already been addressed in the discrimination section above. Accordingly, the February 22, 2011, independent interference allegation is dismissed.

February 27, 2011

The evening of February 27, 2011, Fletcher had a discussion with his supervisor, Lieutenant Richard Samp. The conversation took place in the locker room around the time of a shift change. No other employees were present for the conversation. The accounts of the two witnesses/participants in the conversation differ.

Fletcher testified:

> A. Lieutenant Samp indicated something to the effect, I've got something to address to you, and I said what is that. He made reference that the department feels that I have too much clout with the officers. Sergeants and even some lieutenants now are listening to what I have to say. And that the department feels that [it's] extremely dangerous for one sergeant to have that much power. He further indicated that I should take that into consideration if I wanted to promote in the future.
>
> Q. What did you take that to mean?
> A. I took that as a threat to my livelihood and my career.

When asked about the same conversation, Samp testified:

> Q. Now, would you look at page 6 of the ULP, please, paragraph 2.7. This references a conversation on -- between you and Sergeant Fletcher on February 25th[sic], do you see that?
> A. Uh-huh, yes.
>
> Q. Do you recall that conversation?

A. Generally. I didn't -- it wasn't a remarkable conversation that I thought we were going to have to revisit at any point, so I didn't try to make any notes or try to etch it into my memory in any way, but I remember the gist of it.

Q. Well, could you start by telling us what you recall about where the conversation occurred?
A. I was coming off duty having worked day shift and Sergeant Fletcher was coming on duty preparing to work swing shift. We were in the sergeants area of the locker room. And he came in, I believe he told me that they had rescinded the restrictions on where he could work, and that that had all been lifted. And it seems to me that it was -- his feeling on that was that it had been a retaliatory kind of thing, that they had done it to begin it. And I simply explained to him that from my experience, and what I had remembered from the meeting with Mr. Frakes, that there wasn't any retaliation. This was simply giving him space to deal with the grieving process.

Q. In paragraph 2.17 it says, Lieutenant Samp stated that DOC management felt that Sergeant Fletcher had too much clout with the officers, sergeants and even some of the lieutenants. Is that accurate?
A. I made no statement like that at all.

Q. Then the next sentence it says, Lieutenant Samp said that was very dangerous for a sergeant, and if Sergeant Fletcher wanted to promote it was something that Sergeant Fletcher needed to think about. Is that statement accurate?
A. Not at all. I didn't make any kind of statement like that.

Q. Was there any discussion around issues of promotion?
A. No.

Q. Was there any discussion of -- of any kind in addition to what you have already described?
A. No.

There is also some tension between Samp's testimony and the employer's answer to the complaint. In the employer's answer to paragraph 2.17 of the complaint, the employer admitted that a conversation between Samp and Fletcher took place and stated: "Respondent admits that Lieutenant Samp addressed with Sergeant Fletcher considerations related to his ability to be promoted. Respondent denies all different and remaining allegations. . . ." In testimony, Samp denied discussing the subject of promotion with Fletcher.

Having seen the live testimony and reviewed the record in its entirety, I credit Fletcher's testimony with regards to the content of the conversation on February 27 between Fletcher and

Samp. It was clear from the testimony that this was a significant conversation in Fletcher's mind that he took quite seriously. Fletcher appeared to have a clear and confident recollection and appeared to be credible throughout his testimony. On other issues, Fletcher's testimony was consistent with other witnesses. In contrast, Samp acknowledged that "it wasn't a remarkable conversation that I thought we were going to have to revisit at any point, so I didn't try to make any notes or try to etch it into my memory in any way. . . ." On other topics in the same general time period, such as coordinating with Lieutenant Jack Warner to talk with all sergeants about performance issues, Samp could not recall events described by other employer witnesses. In general, Samp was not able to provide as clear and specific recollection of events during this time period. I think it is highly possible that Samp did not perceive the advice he was sharing with Fletcher on February 27, 2011, as significant, and ultimately forgot about this portion of his conversation with Fletcher.

Fletcher was an active leader in the union and a very public advocate for his co-workers' safety. On January 31, 2011, Fletcher worked with the union to release information about the way his co-worker, Biendl, had communicated safety concerns and recommendations to the employer.

The timing and context of Samp's comments are significant. On February 22, 2011, the employer gave Fletcher a letter explaining the temporary restrictions on his work assignments. Fletcher promptly contacted his union representative, Serena Davis, and requested that the union file a grievance over the employer's action, arguing it violated the CBA. Union representative Davis promptly notified the employer of Fletcher's grievance. By contacting the union and filing a grievance, Fletcher was clearly engaged in protected union activity.

On February 24, 2011, Fletcher and Davis met with Superintendent Frakes to discuss the temporary restrictions on Fletcher's work assignments. Fletcher explained in detail why he felt the employer's actions violated the CBA and department policy. Fletcher also expressed his commitment to work with Shimogawa in a professional capacity. Frakes agreed to send out an e-mail retracting the temporary restrictions on Fletcher's work assignments and allow Fletcher to work in any location on the facility. Fletcher proceeded to work his shift.

On February 27, 2011, after the shift change roll call meeting, Samp and Fletcher had their conversation in the locker room. Fletcher testified that Samp told him "the department feels that I [Fletcher] have too much clout with the officers. Sergeants and even some lieutenants now are listening to what I [Fletcher] have to say. And that the department feels that [it's] extremely dangerous for one sergeant to have that much power." Although Samp did not specifically reference Fletcher's union activities, the timing and context of his comments implies that the power Samp is referring to is Fletcher's power to speak out, mobilize other employees, and successfully grieve and ultimately reverse the employer's actions in a short time period. The fact that their conversation was also about Fletcher's union activity is evident in Samp's testimony when Samp explained "I believe he [Fletcher] told me that they had rescinded the restrictions on where he could work, and that that had all been lifted. And it seems to me that it was -- his feeling on that was that it had been a retaliatory kind of thing. . . ." I find that a typical employee in this context could reasonably interpret Samp's comments to be a threat discouraging protected union activities. Samp is a lieutenant. In this position, Samp is a supervisor and agent of the employer.

Lieutenant Samp may have been trying to give Fletcher some friendly advice with no intention of making an unlawful threat, but intent is not necessary to find an interference violation. The focus of an interference analysis is on how a typical employee could reasonably interpret the employer's comments or actions. Samp communicated a message that the employer was concerned that Fletcher had too much power and influence over other employees through his union activity, and Fletcher should think about his decision to participate in these activities and offer leadership to the union because it could prevent him from a future promotion to lieutenant.

Employees have the right to join unions, serve as shop stewards, publicly speak out about workplace safety concerns, file grievances, and mobilize their co-workers to participate in protected union activities. Samp's comment to Fletcher on February 27, 2011, was unlawful because it communicated a coercive message: that you cannot be a leader with the union if you want to promote to a management position.

March 21, 2011

On March 21, 2011, Fletcher was not scheduled to work. Fletcher came to the Monroe Correctional Complex to attend a press conference with the Governor about Biendl's murder. Fletcher heard about the press conference from other staff members. Fletcher was not in uniform, but had his DOC security credentials and identification with him. A few minutes after entering the press conference room, Fletcher was directed to the hallway outside the conference room by an officer monitoring the event. Fletcher was informed that the event was not open to the public and that he would not be able to attend. Fletcher responded that he wasn't a member of the public and was displaying his DOC credentials as required. The officer told Fletcher that per a management briefing that morning, he would not be able to attend the conference.

Soon after the press conference Fletcher talked with Superintendent Frakes. Fletcher expressed his concern about being asked to leave the press conference. Frakes took responsibility and told Fletcher that "you can blame me." Frakes testified that the Governor's security detail was in charge of the event, and that he had been informed of the event approximately 24 hours in advance. Frakes was also told that it was not an open meeting and that only a few uniformed staff members would be allowed to attend.

Fletcher heard about the press conference, but was never told by management that he would be able to attend the press conference with the Governor. Fletcher got the misimpression that staff would generally be allowed to attend the press conference. It appears that the removal of Fletcher from the Governor's press conference was a result of security directives that were imposed by the Governor's security team. The Governor's security team had directed that a few on-duty uniformed employees be permitted to attend. Fletcher was wearing plain clothes and was off-duty.

The union points out that another DOC employee, who was not a uniformed staff member but who was scheduled to work that day and was wearing plain clothes, attended the press conference on his own initiative and was not removed. The other employee was on duty and worked in a position that did not require a uniform. The union was unable to show that Fletcher was discriminatorily targeted for removal.

As discussed above, an interference violation occurs when an employer's actions are reasonably perceived by employees as a threat of reprisal or force, or promise of benefit, associated with protected union activity.

The Governor's security team was responsible for directing security at the Governor's press conference. Although it took place at a DOC facility, the event was not controlled by DOC management. Some on-duty DOC employees were assigned to provide additional security support for the event, but determinations about who could attend the event were made by the Governor's security team. The press conference was not a public event and was not open to all staff at the Monroe Correctional Complex. The union was unable to show that the employer was responsible for Fletcher's removal from the press conference. Fletcher was removed based on directives from the Governor's security team as to who was permitted to attend the press conference.

When Superintendent Frakes told Fletcher after the incident that "you can blame me," Frakes was accepting responsibility for the misunderstanding that staff had about being able to attend the press conference. Frakes did not say anything to imply that Fletcher's removal from the press conference was in any way related to his protected union activities.

Conclusion

The employer did not make any statements to Fletcher on February 17, 2011, that would constitute interference.

The February 22, 2011 interference allegation is based on the same facts used to support Fletcher's discrimination allegation. Since those discrimination allegations failed to constitute a discrimination violation, an interference violation cannot be found under the same set of facts. Lieutenant Samp's February 27, 2011 comment to Fletcher was unlawful because it communicated a coercive message: that you cannot be a leader with the union if you want to promote to lieutenant. The employer's February 27, 2011 statement to Fletcher constituted a threat of retaliation for protected union activity and interfered with Fletcher's employee rights in violation of RCW 41.80.110(1)(a).

Decisions about who would be allowed to attend the Governor's March 21, 2011 press conference were made by the Governor's security team. The employer was not the decision-maker in this instance. The Governor' security team and assisting DOC staff were told that only a limited number of on-duty employees would be allowed to attend. Fletcher was off-duty when he tried to attend the press conference. The March 21, 2011 interference allegation concerning Fletcher's removal from the Governor's press conference is dismissed.

Issue 11: Did the employer interfere with Derek Kolb's right to engage in protected union activity on March 15, 2011?

Derek Kolb is employed as a corrections officer at the Monroe Correctional Complex where he has worked for almost four years. On March 6 and 15, 2011, Kolb witnessed instances of a prisoner not following a directive given by a corrections officer. On March 6, after the first incident, Kolb had a conversation with Lieutenant Ken Hellman about Hellman's alleged directive to another officer not to issue an infraction report to the inmate who, from Kolb's perspective, had ignored the officer's order. Kolb testified that the normal procedure was for the prisoner to be segregated immediately and the officer to complete an infraction report. Kolb stated that he did not agree with Lieutenant Hellman's reasoning for directing the officer not to write up an infraction. Later that day Kolb discussed the exchange he had with Hellman with Sergeant James Palmer. Palmer is also a shop steward. The employer and the union offered contradictory testimony about who Kolb's immediate supervisor was at the time, though it is clear Kolb believed that he had a direct reporting relationship to Sergeant Palmer at time of the conversation.

On March 15, there was a second incident of an inmate ignoring the order of a corrections officer. Kolb was concerned about how Hellman instructed employees to handle the incident and spoke to Hellman afterwards about his concerns. Hellman told Kolb that he knew Kolb had gone to talk with Palmer after their last conversation. Hellman told Kolb that he thought their first conversation would remain private and that Kolb could no longer be trusted with information because he got on the phone and ran to the union. Hellman also said that he would not discuss his decision-making process with Kolb again or if he did someone else would need to be present for the conversation.

Hellman acknowledged that he expected the conversation that he had with Kolb on March 6 to stay private. Hellman testified:

> A. The next thing I know I was getting a call from Sergeant Palmer.
>
> Q. And why was that of concern to you?
> A. Because I knew at that time Sergeant Palmer was a steward, a shop steward.
>
> Q. Why would that concern you?
> A. I don't know, I guess it just did. One of the – it's just something that I thought about at that time.
>
> Q. Is that when you said you can -- something to the effect, you can no longer be trusted with information since you got on the phone and ran to your union?
> A. Yeah.

It does not matter if Kolb was actually talking to Palmer in Palmer's capacity as his immediate supervisor or in Palmer's capacity as a shop steward. Hellman's comment could reasonably interfere with an employee's right to discuss a work place problem with a union shop steward or the union generally.

Conclusion

Kolb had the right to talk with his union shop steward about conversations he had with supervisors and co-workers in the workplace. Hellman's statements to Kolb that he could no longer be trusted because he went to the union, and could no longer hear explanations of decision-making processes without another person present could reasonably be perceived as a threat of reprisal or force associated with Kolb's right to engage in protected union activity. I find that this threat interfered with Kolb's employee rights in violation of RCW 41.80.110(1)(a).

Issue 12: Did the employer discriminate against James Palmer by removing him from his seniority bid position on March 18, 2011?

James Palmer is employed as a sergeant at the Monroe Correctional Complex where he has worked since 2001. Palmer has been a shop steward since January 2011. In March 2011 Palmer was asked to be part of a panel, which included union staff and officers, who spoke on a local television program about safety concerns. The program, entitled "Inmates in Charge, Our

Prisons Exposed" was recorded on March 9, 2011, and aired on March 17, 2011. During this program Palmer spoke about specific management actions and policies that he believed put corrections officers at risk. Some of Palmer's comments pertained to the visiting room at the Monroe facility.

On March 18, 2011, Palmer was temporarily removed from his bid post in the prison visiting room. Soon after, Palmer was contacted by other DOC employees, at Monroe and across the state, asking whether he had been removed from his bid post. The union argues that the timing of the events indicates a causal connection between Palmer's union activity of talking to the media about safety concerns and the employer's decision to remove him from his bid post.

The union established a *prima facie* case of discrimination. The union established that Palmer was engaged in protected union activity, by participating in the television program to speak about union safety concerns, and that Palmer suffered an adverse action when the employer removed him from his bid post position. The timing of the events creates circumstantial evidence of a causal connection between Palmer's participation in the program and his removal from his position.

The employer argues it had a non-retaliatory reason for removing Palmer from his bid post in the visiting room. Specifically, the employer argues that Palmer was removed from his post as a result of a complaint the employer received from a member of the public a few days earlier. On March 14, 2001, Superintendent Frakes received an e-mail complaint from a visitor about alleged misconduct by Palmer in the visiting room the previous day.

On March 17, 2011, Frakes issued a memorandum to Palmer informing him that he would be reassigned effective his next working day, March 18. Frakes instructed Jim McGinnis, Associate Superintendent, to investigate allegations of inappropriate behavior in the visiting room, not following supervisor directives, and attempts to sabotage the visitor program. Palmer had not worked on March 15 or 16 in accordance with his regular schedule.

While the timing of the employer's removal of Palmer from his position the day after the television program aired is suspect, the employer produced evidence that Palmer's removal from

his bid post on March 17 was prompted by an unrelated investigation into a complaint by a visitor that the employer received on March 14.

The union was unable to establish that the employer's non-retaliatory reason for removing Palmer from his bid post was pretextual or that union animus was a substantial motivating factor in the employer's decision to temporarily remove Palmer from his bid position.

Conclusion

The union established a *prima facie* case of discrimination. The employer responded by presenting a legitimate, non-retaliatory reason for its actions. Specifically, the employer received a written complaint from a visitor about Palmer's conduct in the visiting room. The employer was successful in showing the timing of its actions was based on the timing of when it received the complaint and Palmer's work schedule. The union failed to produce evidence showing that the employer's stated reason was pretextual or that Palmer's union activity was a substantial motivating factor in the employer's decision to place Palmer on paid administrative leave while it completed its investigation. Accordingly, the union's discrimination allegation is dismissed.

Issue 13: Did the employer interfere with James Palmer's right to union representation (*Weingarten* rights) and/or interfere with Jimmy Fletcher's right to engage in protected union activity in connection with an investigatory interview on April 1, 2011?

As discussed above, Palmer was temporarily removed from his bid post position in the visiting room on March 18, 2011. Associate Superintendent McGinnis was tasked with the responsibility of investigating Palmer's alleged misconduct. In the course of his investigation he scheduled an investigatory interview with Palmer on April 1, 2011.

McGinnis e-mailed Palmer and union representative Davis to arrange the meeting. McGinnis testified that in the course of scheduling Palmer's interview, Davis informed him that she was unable to attend Palmer's interview and suggested that a shop steward sit in as the union representative so that the investigation could move forward.

At the April 1, 2011 investigatory interview Fletcher attended as Palmer's union representative. McGuiness and Lieutenant Shimogawa attended on behalf of the employer. At the beginning of the interview, Fletcher told McGuiness that "Sergeant Palmer had not received any formal letter yet stating why he was removed from his position. What the allegations were, what was the scope of the investigation." McGinnis made reference to Sergeant Palmer seeking some documents through a public disclosure request and then began the meeting.

In describing the exchange, Fletcher testified:

> A. At that point Mr. McGinnis proceeded to ask Sergeant Palmer various questions as were you in the military? Would you ever refuse a direct order from a commanding officer in the military? What would happen if you did that? And this went on for probably a good 10 minutes, 12, 15 minutes, as where at that point I didn't see the relevancy of the alleged allegations and this investigation, and the relevancy of these questions that were being asked. At that point I politely asked Mr. McGinnis if I may ask a question, he said yes. And I directed my concerns at the relevancy of his questions pertaining to the scope of the investigation.
>
> Q. How did he respond?
> A. He said, you need to sit there and just listen and not speak.

In describing the exchange, Palmer testified:

> At that point in time CPM McGinnis became angry and told him [Fletcher] that he's in here as the capacity of a shop steward and that he needs to – he's only in there as an observer and he needs to shut his mouth and sit down. Therefore, inhibited him from advising me on what steps I should take, or as a shop steward should do during these times of investigation.

McGinnis acknowledged that he felt Fletcher was interrupting quite a bit and told Fletcher that he "was an observer for the union and asked that he allow the investigation to go on." Fletcher did not attempt to talk after McGuiness made this comment and acted as a silent observer for the remainder of the meeting.

Weingarten rights belong to employee being interviewed

In an investigatory interview, it is the employee who is being interviewed that has the right to have a union representative assist them in the interview. If the designated union representative is

not allowed to serve in the role of a representative, ask clarifying questions, and otherwise help the employee who is being interviewed, it is the employee who is being interviewed whose rights are violated. In this situation the *Weingarten* rights belong to Palmer, the employee. Fletcher was serving as the union representative. Fletcher was not the subject of the investigatory interview and did not have *Weingarten* rights in this situation.

Palmer entitled to union representation

Palmer was being interviewed by McGinnis as part of a disciplinary investigation. Palmer had a reasonable belief that discipline could result from the meeting and was entitled to union representation under *Weingarten*. Palmer exercised his right to representation by asking that a union representative to be present at the investigatory interview.

Employer interfered with Palmer's union representation

The Commission has clearly stated that a union representative must have the opportunity to be more than a witness in the investigatory interview process. The role a union representative plays in the investigatory interview process was addressed by an examiner in *King County,* Decision 4299 (PECB, 1993):

> The Supreme Court's *Weingarten* opinion does not paint a picture of a passive role for a union representative at an investigatory interview. The use of terms such as "assist", "assistance", "clarify", "eliciting favorable facts", "getting to the bottom of the incident", "raise extenuating factors" and "suggest", indicate the Court's belief that a union representative must have the opportunity to be more than a witness to the interview process. From its numerous uses of active verbs when describing the role of a union representative during an investigatory interview, it is clear that the Supreme Court in *Weingarten* envisioned that role as including the ability to ask questions, to bring out additional facts, counsel the employee under investigation, and to provide information concerning past employment practices.

The Commission affirmed the examiner's analysis, as quoted above, in *King County,* Decision 4299-A (PECB, 1993), and repeated its "concurrence with that analysis, and with the conclusion that a union representative cannot be completely silenced" in *City of Bellevue,* Decision 4324-A (PECB, 1994).

While the Commission recognizes that a union representative must be allowed to actively represent an employee who requests representation, the Commission also recognizes that the ability to represent an employee is not without limitation. "A union representative is present to assist the employee at an investigatory interview, not to speak in place of that individual. An employer is entitled to ensure that the responses it gets are those of the employee, and it can rightfully insist that a union representative not answer the questions directed to an employee." *City of Bellevue,* Decision 4324-A. The union representative is there to assist the employee, who may be unfamiliar with and/or intimidated by the situation.

McGinnis' order that Fletcher act as an observer prevented Fletcher from assisting Palmer, asking clarifying questions, eliciting favorable facts, or raising extenuating factors. By instructing Fletcher that he was to be an observer, McGinnis interfered with Fletcher's ability to provide Palmer with effective union representation.

Conclusion

Fletcher was serving as Palmer's union representative. By directing Fletcher to act only as an observer during Palmer's interview on April 1, 2011, the employer interfered with Palmer's right to union representation in violation of RCW 41.80.110(1)(a).

Issue 14: Did the employer interfere with Carl Beatty's right to engage in protected union activity on or about April 29, 2011?

Carl Beatty is employed as a corrections officer at the Monroe Correctional Complex where he has worked since 2003. Beatty has served as a union shop steward for approximately six years. Beginning in mid-2010, Beatty was active with a variety of union activities including: a meeting with state legislators, assisting with the organization of informational pickets occurring on November 17, 2010, and March 2, 2011, and spearheading a no-confidence petition drive that named several administrators of the Monroe facility. One of the named parties targeted by the petition was Melida Ferrell. At the time of the petition, Ferrell worked as a non-represented hearing officer. Ferrell was not a member of the Monroe facility management and was not a supervisor.

Beatty's union activity was quite public and the record shows that the employer was aware of Beatty's union activity. In the spring of 2011, Beatty was contacted by Max Carrera, a DOC employee, who was tasked to investigate a discrimination complaint filed by Ferrell against Beatty. Ferrell, as an individual employee of DOC, filed an internal complaint of race and color-based discrimination against Beatty. The employer investigated the complaint. On or about April 29, 2011, Carrera interviewed Beatty. No discipline of Beatty resulted.

The union argues that the employer's investigation of the discrimination complaint against Beatty interfered with Beatty's protected union activity. There is no evidence that the employer instructed Ferrell to file a discrimination claim against Beatty or was otherwise involved in initiating the complaint.

Conclusion

Ferrell was acting as an individual employee, not as an agent of the employer, when she filed a workplace discrimination complaint against Beatty. The employer's investigation into Beatty's conduct, including the interview of Beatty on or about April 29, 2011, was prompted by Ferrell's complaint. The employer was following standard protocol when it investigated Ferrell's discrimination complaint and interviewed Beatty. The employer's decision to investigate Ferrell's complaint and interview Beatty did not interfere with Beatty's right to engage in protected union activity. Accordingly, this interference allegation is dismissed.

Issue 15: Did the employer interfere with Brad Waddell's right to engage in protected union activity on March 2, 2011?

Brad Waddell is employed as a corrections sergeant at the Monroe Correctional Complex where he has worked since 1991. Waddell is not a shop steward; however he is active in union activities. Waddell helped lead the organization of the union's November 17, 2010 and March 2, 2011 informational pickets. Waddell publically participated in both informational pickets and gave media interviews about the goal of the pickets. The employer had knowledge of Waddell's union activity.

Following the March 2, 2011 informational picket, Waddell and several other sergeants were directed to attend a meeting with Lieutenant Warner. During this meeting Warner expressed criticism of the sergeants' performance in their roles. According to the employer, this meeting was part of an ongoing series of meetings conducted by various lieutenants at the Monroe facility as a way to motivate sergeants to perform better. Nearly all sergeants took part in a meeting like this with one of the lieutenants. The union does not cite any specific statements made by management that would constitute unlawful interference. Rather, the union argues that the meeting itself constituted interference because it was conducted to get back at employees who had participated in the picket. The meeting was critical of sergeants' work performance. According to Waddell, the employer was chastising sergeants.

Testimony shows that the March 2, 2011 meeting was part of a series of meetings that the employer's lieutenants were conducting in order to deliver a message about performance expectations to all of its sergeants. The employer conducted these meetings with various shifts of employees in the time period before and after the informational picket. The employer's meetings targeted all sergeants, not just Waddell or persons participating in the union's informational picketing.

Conclusion

In reviewing the totality of the circumstances, it appears that the meeting's proximity to a significant union event was merely a coincidence. The employer has a right to meet with its sergeants and provide them with feedback and coaching. The fact that this message was delivered to the sergeants in a critical manner was not unlawful. There was no evidence that the employer made any statement that interfered with employees' protected union activities. Accordingly, this interference allegation is dismissed.

REMEDIES

The fashioning of remedies is a discretionary action of the Commission. *City of Seattle*, Decision 10249-A (PECB, 2009), citing *City of Seattle*, Decision 8313-B (PECB, 2004). The standard remedies for interference violations are a cease and desist order, posting of a notice of

employees, and, if the respondent is an employer headed by a public board or commission, a public reading of the notice at a meeting of the governing body of the employer. In this case the employer is not headed by a public board or commission.

Attorney Fees

In its complaint the union requested attorney fees. The Commission may award attorney fees to a party when there is a continuing course of conduct that shows an intentional disregard of the union's or employee's collective bargaining rights. *Seattle School District,* Decision 5733-B (PECB, 1998); *Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982), *review denied*, 97 Wn.2d 1034 (1982). Attorney fees have been awarded as a punitive remedy in response to egregious conduct, recidivist conduct, or to frivolous defenses asserted by a party. *City of Tukwila*, Decision 10536-B (PECB, 2010), citing *Western Washington University*, Decision 9309-A (PSRA, 2008) and *Lewis County*, Decision 644-A (attorney fees awarded where it is clear that history of underlying conduct evidenced patent disregard for statutory mandate to engage in good faith negotiations).

There is no historical pattern of this employer failing to abide by its collective bargaining obligations with this union. *City of Tukwila,* Decision 10536-B, citing *City of Seattle*, Decision 4164-A (PECB, 1993) (denying attorney fees where union failed to demonstrate a pattern of recidivist conduct by the employer with the complainant bargaining unit). Although the employer's conduct was unlawful and unacceptable on several accounts, the employer presented a defense that was not frivolous and prevailed in refuting many of the allegations at issue in this hearing. Accordingly, the union's request for attorney fees is denied.

FINDINGS OF FACT

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

2. Teamsters Local 117 is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

3. The union and the employer were parties to a collective bargaining agreement effective July 1, 2009, through June 30, 2011.

4. James Hutchison is employed as a corrections sergeant at the Larch Corrections Center in Yacolt, Washington. Hutchison has served as a union shop steward since 2008.

5. Lawrence Miller is employed as a lieutenant at the Larch Corrections Center. In this position, Miller is a supervisor and agent of the employer.

6. In the fall of 2010, several bargaining unit employees at the Larch Corrections Center applied to use their "CBA-days" and had their requests denied by the employer. Section 21.12 of the CBA defines "CBA days." In accordance with Section 21.12B of the parties CBA, some employees appealed the denial of their CBA-day requests to Superintendent Eleanor Vernell, because she is the appointing authority. Appeals of denied CBA-day requests are a form of protected union activity.

7. On December 1, 2010, Lieutenant Miller asked to meet with Sergeant Hutchison in his capacity as a union steward to discuss a recent spike in appeals sent to Superintendent Vernell concerning CBA-days. During the conversation Lieutenant Miller told Sergeant Hutchinson that employees needed to stop sending appeals to Superintendent Vernell and that if staff continued "to play games" with the CBA-days, Superintendent Vernell would deny all the requests.

8. Susan Reid is employed as a corrections officer at the Larch Corrections Center, where she had worked approximately four months at the time of the alleged incident on May 3, 2011. Reid has worked for DOC for approximately ten years. Prior to transferring to Larch Corrections Center, Reid worked at other DOC prison facilities. Reid is a union member and does not hold any office with the union.

9. On May 2, 2011, Reid was called for two meetings with Lieutenant Miller concerning an incident that took place in the visiting room while she was working. The incident

resulted in a visitor complaint. During the second meeting Miller asked Reid about a CBA-day request that Reid has appealed to Vernell. Lieutenant Miller told Reid that she should have known better than to go to shop steward Sid Clark. The conversation between Reid and Lieutenant Miller surrounding Reid's request to use CBA-days stemmed largely from the fact that Reid had not submitted her leave request electronically, the method the employer used to process requests. Miller was confused that Reid would go to the union to try to appeal a leave denial, when the employer had never even received Reid's leave request in its electronic system.

10. Darren Kelly is employed as a response and movement officer at the Airway Heights Corrections Center. Kelly has served as union shop steward for approximately eight to ten years. As a shop steward Kelly was visibly active in a variety of union activities.

11. On April 24, 2011, Kelly was called to respond to an inmate fight in the kitchen of the Airway Heights facility. When attempting to respond to the call, Kelly was unable to enter the kitchen as it was locked, and called for one of the officers in the kitchen to open the locked door. After what Kelly believed to be an inappropriately long time period, A/C Cook Tom Dobbels opened the door. Kelly and Dobbels had a brief verbal altercation. Later in the day Kelly and Dobbels had a second verbal altercation that included various insults, swearing, and sexual references. Witnesses describe Dobbels as the instigator of the incident but acknowledge that Kelly responded with similarly insulting, swearing, and sexual comments. Kelly made a remark or question about whether Dobbels was asking to, or wanted to, fight out in the parking lot.

12. During the second altercation Kelly and several witnesses stated that Dobbels told Kelly that management was looking for a reason to fire him. This was a statement made by Dobbels who is a bargaining unit employee, not a member of management or otherwise an agent of the employer. There was no evidence showing that Dobbels received this message from management or was instructed by management to pick a fight with Kelly to provide the employer with an excuse to fire Kelly.

13. On April 26, 2011, the employer notified Kelly and Dobbels that they were being placed on home assignment while the employer investigated the altercation that had occurred.

14. Kelly serves as the president of the Washington Staff Assault Taskforce (Taskforce). The Taskforce is a non-profit entity that works to assist corrections staff assaulted in the course of their duties. The Taskforce shares the union's goal of reducing assaults on employees, but is not directly affiliated with the union. During the time period Kelly was assigned to home, Kelly was scheduled to participate in an employee recruitment event for the Taskforce at the Coyote Ridge Corrections Center. After Maggie Miller-Stout was informed of Kelly's scheduled event she contacted Coyote Ridge Superintendent Jeff Uttech. Miller-Stout and Uttech determined that the Taskforce event did not warrant an exception to the employer's policy of prohibiting employees on home assignment from visiting any DOC facility. On April 27, Miller-Stout directed a staff member to inform Kelly that he would not be granted an exception to participate in the recruitment event at Coyote Ridge. At the employer's direction, Kelly did not participate in the Taskforce events at Coyote Ridge on April 28 and 29, 2011.

15. The union did not put testimony on the record about events involving Kelly on May 21, 2011, or provide an explanation of this allegation in its post-hearing brief.

16. Prior to the incident with Dobbels, Kelly had participated in several union-sponsored events focused on safety concerns including informational pickets, testifying before the Washington State Legislature, sending letters to state legislators about safety concerns, and being interviewed by a local paper in which he was identified by name. In a March 31, 2011 article in the Spokesman Review, Kelly criticized DOC management. Miller-Stout was aware of the article in the local paper and of the union's safety-related activities.

17. Katrina Ortiz is employed as a corrections officer at the Coyote Ridge Corrections Center (Coyote Ridge), located in Connell, Washington. Ortiz has worked for the employer at the same facility since February 2006. Ortiz does not hold an official position with the union, but is an active union member.

18. Jeff Uttech is employed as the superintendent at Coyote Ridge. In this position, Uttech is a supervisor and agent of the employer.

19. Sometime in November 2010, before Thanksgiving, Ortiz talked with a co-worker about different methods unions use to influence employers. One of the tactics Ortiz described that was being used by unions in California was blue flu. Ortiz was not actively organizing a blue flu or sickout and raised the issue when she and a co-worker were discussing strategies that unions in general use to put pressure on employers.

20. On November 24, 2010, Coyote Ridge Superintendent Uttech called Ortiz into his office for a meeting concerning a report he had received that Ortiz was discussing a blue flu. Cindy Benton, Human Resource Manager, was present during the meeting as an observer. Prior to this meeting, Ortiz had never met Uttech or been called to the superintendent's office. Uttech questioned Ortiz about why she was discussing a blue flu and asked if she was organizing a strike. Ortiz informed Uttech that she had explained to another officer what a "blue flu" was, because he was unfamiliar with the term. Ortiz told Uttech that it was a union tactic she had heard of being used in California. Ortiz informed Uttech that she was not organizing a strike. Uttech told Ortiz that she could not to discuss the concept of a blue flu.

21. In March 2011, Ortiz participated in a defensive tactics training class conducted by employees of DOC at the Coyote Ridge facility. Completion of the training is a job requirement for Ortiz's position. During the training on March 6, 2011, Ortiz expressed concern about the way the training was being delivered. Specifically, Ortiz was concerned that the practicing of maneuvers was especially physical and included rough-housing by many of the young, male participants in the training. Ortiz was afraid she might get injured if she practiced the techniques in such a physical and rough manner and sat out for part of the day due to these concerns. Ortiz expressed her concerns to the trainers, one of whom is also a shop steward. Ortiz also voiced her opinion that many of the tactics were not practical and useful for women.

22. On March 7, 2011, the employer called Ortiz into the superintendent's office for a meeting with Uttech and Benton to discuss what had occurred at the defensive tactics training. Ortiz was accompanied by a shop steward, Levi Dean (L. Dean). The employer asked Ortiz if she was physically able to complete the training, which is a requirement of her job position. Ortiz indicated that she could complete the training the way it had been delivered in past years, but felt that this time the training was not being conducted properly. Specifically, Ortiz explained that the way in which the exercises were being practiced was too rough and much more physical than in past years. Ortiz also expressed her opinion that the training should include more tactics that would specifically be helpful to female officers.

23. At the conclusion of the March 7, 2011, meeting, Uttech told Ortiz she was not allowed to discuss what had occurred during the meeting with anyone, other than the people who were in the office for the meeting. By telling Ortiz that she was not allowed to talk about the meeting she had with the employer, much of which related to concerns about the safety and effectiveness of an employer-mandated defensive tactics training, a typical employee could perceive that the employer was directing Ortiz not to speak about the safety concerns that she raised during the meeting with Uttech and Benton.

24. Jared Crum is employed as a corrections officer at the Washington State Penitentiary where he has been employed since October 2007.

25. Jeff Preas is employed as a corrections officer at the Penitentiary where he has been employed for approximately thirteen years. Preas is also a union shop steward.

26. On March 1, 2011, Crum responded to an alert call for an officer stabbing. Officer Jim Nored, a co-worker and friend of Crum's, had been stabbed in the face with a pen by an inmate. That evening Crum contacted the union to report the stabbing and to express his concerns about officer safety and whether the facility was understaffed.

27. On March 2, 2011, Penitentiary Superintendent Steve Sinclair attended roll call, which was unusual, and spoke about the assault. Crum and Preas were present for this meeting. Sinclair updated the staff about Nored's medical condition and indicated that someone had contacted the media with personal information about Nored. Sinclair explained that this was inappropriate because media contacts should go through the employer's public relations department.

28. On March 8, 2011, Crum was removed from his bid position in the special offenders unit due to a concern that he had failed to appropriately monitor and stop an inmate from engaging in debt collection while the inmate collected laundry from other inmate cells. The employer testified that it had reviewed video footage showing the inmate going from cell to cell to collect laundry, but the inmate also appeared to be gathering other goods. This prompted the employer to investigate Crum, because he was the officer monitoring the collection of the laundry and controlling the opening and closing of the cell doors as the inmate collected the laundry. While the employer was conducting its investigation, the employer reassigned Crum from his bid position to a leave relief position where he was assigned to a new location every day to cover for officers who were absent.

29. On March 18, 2011, the union filed a grievance on Crum's behalf over his reassignment. In late March 2011, the union and employer met to discuss Crum's reassignment. Sinclair, Crum, union business representative Analtha Moroffko and Human Resource Consultant Nancy Waldo participated in the meeting. During the meeting Moroffko accused Sinclair of reassigning Crum because he had contacted the union. Sinclair responded that he hadn't known Crum had been in contact with the union prior to Moroffko informing him of such. After the meeting Crum withdrew his grievance and apologized to the employer. Sometime shortly after this meeting the employer returned Crum to his bid position.

30. On April 21, 2011, Crum used force against an inmate.

31. On April 28, 2011, the employer removed Crum from his bid position again. This time Crum was reassigned to work in the mail room. Sinclair explained that the employer removed Crum in order to investigate an allegation of excessive force against an inmate.

32. On May 20, 2011, Human Resource Consultant Waldo contacted Crum about signing up for voluntary overtime. Article 17 of the parties' CBA addresses overtime. Crum believed that under Article 17.1.I of the CBA, Ability to Deny Overtime Assignment, the employer did not have a basis to deny his request to work overtime while he was assigned to the mail room. Waldo told Crum that if he continued to sign up for overtime "the superintendent is probably going to assign you to home and because he doesn't want you working around offenders."

33. On May 23, 2011, Associate Superintendent Chris Bowman gave a letter to Crum placing him on home assignment.

34. Jimmy Fletcher is employed as a sergeant at the Monroe Correctional Complex. Fletcher has worked for the employer since November 2000. Fletcher became a shop steward for the union in January 2011. Prior to becoming a shop steward, Fletcher was active in the union.

35. On January 29, 2011, Jayme Biendl, a correctional officer at the Monroe facility, was murdered by an inmate while she was working in the Washington State Reformatory Unit (Reformatory Unit) of the Monroe Correctional Complex. Biendl's murder was the subject of a significant amount of media reporting. At a press conference, Fletcher heard an employer official state that the employer had no reason to think that Biendl did not feel safe while working in the Reformatory Unit.

36. Fletcher was concerned that the information the employer was sharing with the press in late January 2011 about how safe Biendl felt was not accurate. A day or two after her murder, Fletcher told union staff that he had previously received a work order request from Biendl requesting that a surveillance camera be installed in the chapel. Fletcher

said he signed off on Biendl's request and passed it up the chain of command. The camera was never installed. The location where Biendl had requested a camera was in the proximity of where she was murdered.

37. On January 31, 2011, Fletcher met with the union and signed an affidavit documenting his knowledge of Biendl's work order request. The same day, the union sent out a press release about the affidavit. The resulting media coverage was critical of information being provided by the employer surrounding the safety of Biendl's working environment.

38. On February 17, 2011, Sergeant Fletcher and Lieutenant Rodney Shimogawa had a discussion about Biendl's murder. The two agreed that the conversation would be private. Shimogawa had been working as the on-duty lieutenant the night of the murder. Fletcher was Biendl's immediate supervisor. Fletcher was not working the night Biendl was murdered. Both acknowledge that the conversation was emotional and concerned possible culpability that Shimogawa may have had for events that took place the night of Biendl's murder. Ultimately, Fletcher told Shimogawa that he had reservations about whether Shimogawa was being honest. Fletcher specifically voiced concerns that Biendl was left dead for over an hour before staff found her. Fletcher told Shimogawa that he would never forgive him for that.

39. On February 22, 2011, Superintendent Frakes' called Fletcher into his office. Frakes expressed concern about the conversation that Fletcher had with Shimogawa a few days earlier. Superintendent Frakes informed Fletcher that he would no longer be assigned to work in the same areas of the prison as Lieutenant Shimogawa when Shimogawa was on duty, but would otherwise continue his regular duties according to his regular schedule. Fletcher was informed that this restriction was to keep him separate from Shimogawa in order to avoid further personal confrontation. This restriction was to last through the investigation resulting from Biendl's murder. Fletcher promptly contacted the union and filed a grievance over the restriction to his work assignment areas.

40. On February 22, 2011, the employer gave Fletcher a letter explaining the temporary restrictions on his work assignments. Fletcher promptly contacted his union representative, Serena Davis, and requested that the union file a grievance over the employer's action, arguing it violated the CBA. Davis promptly notified the employer of Fletcher's grievance. By contacting the union and filing a grievance, Fletcher was clearly engaged in protected union activity.

41. Prior to February 22, 2011, when Superintendent Frakes placed restrictions on Fletcher's work assignment areas, Fletcher had used his seniority bid to obtain a sick leave relief sergeant position. In this position Fletcher could be assigned to fill in for a sergeant who called in sick in any of the five units that make up the Monroe Correctional Complex.

42. Superintendent Frakes' testified that his decision to not assign Fletcher to locations where Shimogawa was assigned was made to promote the best interests of Fletcher and Shimogawa and give them time to deal with emotions related to Biendl's murder. Frakes explained that he made this adjustment in work assignment areas in response to the emotionally-charged environment resulting from the murder of another employee. Fletcher's reassignment did not result in a change to his work hours or pay.

43. On February 24, 2011, Fletcher and Davis met with Superintendent Frakes to discuss the temporary restrictions on Fletcher's work assignments. Fletcher explained in detail why he felt the employer's actions violated the CBA and department policy. Fletcher also expressed his commitment to work with Shimogawa in a professional capacity. Frakes agreed to send out an e-mail retracting the temporary restrictions on Fletcher's work assignments and allow Fletcher to work in any location on the facility.

44. The evening of February 27, 2011, Fletcher had a discussion with his supervisor, Lieutenant Richard Samp. The conversation took place in the locker room around the time of a shift change. Samp communicated a message that the employer was concerned that Fletcher had too much power and influence over other employees through his union activity, and Fletcher should think about his decision to participate in these activities and

offer leadership to the union because it could prevent him from a future promotion to lieutenant. Samp told Fletcher "the department feels that I [Fletcher] have too much clout with the officers. Sergeants and even some lieutenants now are listening to what I [Fletcher] have to say. And that the department feels that [it's] extremely dangerous for one sergeant to have that much power." Although Samp did not specifically reference Fletcher's union activities, the timing and context of his comments implies that the power Samp is referring to is Fletcher's power to speak out, mobilize other employees, and successfully grieve and ultimately reverse the employer's actions in a short time period.

45. Samp is employed as a lieutenant. In this position, Samp is a supervisor and agent of the employer.

46. In the employer's answer to paragraph 2.17 of the complaint, the employer admitted that a conversation between Samp and Fletcher took place and stated: "Respondent admits that Lieutenant Samp addressed with Sergeant Fletcher considerations related to his ability to be promoted."

47. On March 21, 2011, Fletcher was not scheduled to work. Fletcher came to the Monroe Correctional Complex to attend a press conference with the Governor about Biendl's murder. Fletcher heard about the press conference from other staff members. Fletcher was not in uniform, but had his DOC security credentials and identification with him. A few minutes after entering the press conference room, Fletcher was directed to the hallway outside the conference room by an officer monitoring the event. Fletcher was informed that the event was not open to the public and that he would not be able to attend. Fletcher responded that he wasn't a member of the public and was displaying his DOC credentials as required. The officer told Fletcher that per a management briefing that morning, he would not be able to attend the conference.

48. Fletcher heard about the March 21, 2011, press conference, but was never told by the employer that he would be able to attend the press conference with the Governor. It appears that the removal of Fletcher from the Governor's press conference was a result of

security directives that were imposed by the Governor's security team. The Governor's security team had directed that a few on-duty uniformed employees be permitted to attend. Fletcher was wearing plain clothes and was off-duty.

49. On March 21, 2011, shortly after the conclusion of the press conference Frakes told Fletcher "you can blame me." Frakes was accepting responsibility for the misunderstanding that staff had about being able to attend the press conference. Frakes did not say anything to imply that Fletcher's removal from the press conference was in any way related to his protected union activities.

50. Derek Kolb is employed as a corrections officer at the Monroe Correctional Complex where he has worked for almost four years.

51. Ken Hellman is employed as a lieutenant. In this position, Hellman is a supervisor and agent of the employer.

52. On March 6, 2011, Kolb witnessed a prisoner not following a directive given by a corrections officer. Kolb had a conversation with Lieutenant Hellman about Hellman's alleged directive to another officer not to issue an infraction report to the inmate who, from Kolb's perspective, had ignored the officer's order. Later that day Kolb discussed the exchange he had with Hellman with Sergeant James Palmer. Palmer is also a shop steward.

53. On March 15, 2011, there was a second incident of an inmate ignoring the order of a corrections officer. Kolb was concerned about how Hellman instructed employees to handle the incident and spoke to Hellman afterwards about his concerns. Hellman told Kolb that he knew Kolb had gone to talk with Palmer after their last conversation. Hellman told Kolb that he thought their first conversation would remain private and that Kolb could no longer be trusted with information because he got on the phone and ran to the union. Hellman also said that he would not discuss his decision-making process with Kolb again or if he did someone else would need to be present for the conversation.

54. James Palmer is employed as a sergeant at the Monroe Correctional Complex where he has worked since 2001. Palmer has been a shop steward since January 2011.

55. In March 2011 Palmer was asked to be part of a panel, which included union staff and officers, who spoke on a local television program about safety concerns. The program, entitled "Inmates in Charge, Our Prisons Exposed" was recorded on March 9, 2011, and aired on March 17, 2011. During this program Palmer spoke about specific management actions and policies that he believed put corrections officers at risk. Some of Palmer's comments pertained to the visiting room at the Monroe facility.

56. On March 14, 2001, Superintendent Frakes received an e-mail complaint from a visitor about alleged misconduct by Palmer in the visiting room the previous day.

57. On March 17, 2011, Frakes issued a memorandum to Palmer informing him that he would be reassigned effective his next working day, March 18. Frakes instructed Jim McGinnis, Associate Superintendent, to investigate allegations of inappropriate behavior in the visiting room, not following supervisor directives and attempts to sabotage the visitor program. Palmer had not worked on March 15 or 16 in accordance with his regular schedule. Palmer was temporarily removed from his bid post in the prison visiting room.

58. In the course of McGinnis' investigation he scheduled an investigatory interview with Palmer on April 1, 2011. Fletcher attended as Palmer's union representative. McGuiness and Lieutenant Shimogawa attended on behalf of the employer. At the beginning of the interview, Fletcher told McGuiness that "Sergeant Palmer had not received any formal letter yet stating why he was removed from his position. What the allegations were, what was the scope of the investigation." McGinnis made reference to Sergeant Palmer seeking some documents through a public disclosure request and then began the meeting. McGinnis acknowledged that he felt Fletcher was interrupting quite a bit and told Fletcher that he "was an observer for the union and asked that he allow the investigation

to go on." Fletcher did not attempt to talk after McGuiness made this comment and acted as a silent observer for the remainder of the meeting.

59. By instructing Fletcher that he was to be an observer, McGinnis interfered with Fletcher's ability to provide Palmer with effective union representation.

60. Carl Beatty is employed as a corrections officer at the Monroe Correctional Complex where he has worked since 2003. Beatty has served as a union shop steward for approximately six years.

61. Beginning in mid-2010, Beatty was active with a variety of union activities including: a meeting with state legislators, assisting with the organization of informational pickets occurring on March 2, 2011, and November 17, 2010, and spearheading a no-confidence petition drive that named several administrators of the Monroe facility. One of the named parties targeted by the petition was Melida Ferrell. At the time of the petition, Ferrell worked as a non-represented hearing officer. Ferrell was not a member of the Monroe facility management and was not a supervisor.

62. In the spring of 2011, Beatty was contacted by Max Carrera, a DOC employee, who was tasked to investigate a discrimination complaint filed by Ferrell against Beatty. Ferrell, as an individual employee of DOC, filed an internal complaint of race and color-based discrimination against Beatty. The employer investigated the complaint. Or around April 29, 2011, Carrera interviewed Beatty. No discipline of Beatty resulted.

63. Ferrell was acting as an individual employee, not as an agent of the employer, when she filed a workplace discrimination complaint against Beatty. The employer's investigation into Beatty's conduct, including the interview of Beatty on or around April 29, 2011, was prompted by Ferrell's complaint. The employer was following standard protocol when it investigated Ferrell's discrimination complaint and interviewed Beatty.

64. Brad Waddell is employed as a corrections sergeant at the Monroe Correctional Complex where he has worked since 1991.

65. Waddell is active in union activities. Waddell helped lead the organization of the union's November 17, 2010 and March 2, 2011 informational pickets. Waddell publically participated in both informational pickets and gave media interviews about the goal of the pickets. The employer had knowledge of Waddell's union activity.

66. Following the March 2, 2011 informational picket, Waddell and several other sergeants were directed to attend a meeting with Lieutenant Warner. During this meeting Warner expressed criticism of the sergeants' performance in their roles. This meeting was part of an ongoing series of meetings conducted by various lieutenants at the Monroe facility as a way to motivate sergeants to perform better. Nearly all sergeants took part in a meeting like this with one of the lieutenants.

CONCLUSIONS OF LAW

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

2. As described in Findings of Fact 4 through 7, the employer, by and through its agent Miller, interfered with Hutchison's right to engage in protected union activity on December 1, 2010, in violation of RCW 41.80.110(1)(a).

3. As described in Findings of Fact 8 and 9, the employer did not interfere with Reid's right to engage in union activity in violation of RCW 41.80.110(1)(a) on May 3, 2011.

4. As described in Findings of Fact 10 through 13, the employer did not discriminate against Kelly in violation of RCW 41.80.110(1)(c) when it placed Kelly on home assignment on April 26, 2011.

5. As described in Finding of Fact 14, the employer did not interfere with Kelly's right to engage in union activity in violation of RCW 41.80.110(1)(a) on April 27, 2011.

6. As described in Finding of Fact 15, the employer did not interfere with Kelly's right to engage in union activity in violation of RCW 41.80.110(1)(a) on May 21, 2011.

7. As described in Findings of Fact 17 through 20, by informing to Ortiz that she could not to discuss the concept of a blue flu the employer, by and through its agent Uttech, interfered with Ortiz's right to engage in protected union activity on November 24, 2010, in violation of RCW 41.80.110(1)(a).

8. As described in Findings of Fact 17 through 20 the employer did interfere with Ortiz's right to engage in protected union activity on November 24, 2010, in violation of RCW 41.80.110(1)(a) by telling her that she was prohibited from organizing a work strike and by asking her if she was organizing a strike.

9. As described in Findings of Fact 17, 18, 21, 22 and 23, the directive from the employer that Ortiz could not discuss the contents of the meeting with anyone outside of the meeting was coercive and could reasonably be perceived to interfere with Ortiz's ability to discuss safety concerns with union representatives and fellow bargaining unit employees. The employer, by and through its agent Uttech, interfered with Ortiz's right to engage in protected union activity on March 7, 2011, in violation of RCW 41.80.110(1)(a).

10. As described in Findings of Fact 17, 18, 21, 22 and 23, the portion of the employer's conversation with Ortiz on March 7, 2011, concerning the safety of employer-mandated training and Ortiz's ability to complete the training did not constitute employer interference in violation of RCW 41.80.110(1)(a).

11. As described in Findings of Fact 24 through 27, the employer did not interfere with its employees' right to engage in union activity in violation of RCW 41.80.110(1)(a) on March 2, 2011.

12. As described in Findings of Fact 24, 26, and 28 through 31, the employer did not discriminate against Crum in violation of RCW 41.80.110(1)(c) when it temporarily removed Crum from his bid position and assigned him to work in the mail room on April 28, 2011.

13. As described in Findings of Fact 24, 26, and 28 through 33, the employer did not discriminate against Crum in violation of RCW 41.80.110(1)(c) when it removed Crum from his bid position and placed him on home assignment on May 23, 2011.

14. As described in Finding of Fact 32, the employer did not interfere with Crum's right to engage in union activity in violation of RCW 41.80.110(1)(a) on May 20, 2011.

15. As described in Findings of Fact 34 through 43, the employer did not discriminate against Fletcher in violation of RCW 41.80.110(1)(c) on February 22, 2011, when it temporarily restricted Fletcher's work areas.

16. As described in Finding of Fact 38, the employer did not interfere with Fletcher's right to engage in union activity in violation of RCW 41.80.110(1)(a) on February 17, 2011.

17. The February 22, 2011, interference allegation cannot be analyzed as independent interference because it is based on the same facts used to support Fletcher's discrimination allegation addressed in Conclusion of Law 15. The employer did not interfere with Fletcher's right to engage in union activity in violation of RCW 41.80.110(1)(a) on February 22, 2011.

18. As described in Finding of Fact 44 through 46, the employer, by and through its agent Samp, interfered with Fletcher's right to engage in protected union activity on February 27, 2011, in violation of RCW 41.80.110(1)(a).

19. As described in Findings of Fact 47 through 49, the employer did not interfere with Fletcher's right to engage in union activity in violation of RCW 41.80.110(1)(a) on March 21, 2011.

20. As described in Findings of Fact 50 through 53, the employer, by and through its agent Hellman, interfered with Kolb's right to engage in protected union activity on March 15, 2011, in violation of RCW 41.80.110(1)(a).

21. As described in Findings of Fact 54 through 57, the employer did not discriminate against Palmer in violation of RCW 41.80.110(1)(c) when it temporarily removed Palmer from his bid position on March 18, 2011.

22. As described in Findings of Fact 54, and 57 through 59, the employer, by and through its agent McGuiness, interfered with Palmer's *Weingarten* rights on April 1, 2011, in violation of RCW 41.80.110(1)(a).

23. As described in Findings of Fact 60 through 63, the employer did not interfere with Beatty's right to engage in union activity in violation of RCW 41.80.110(1)(a) on or about April 29, 2011.

24. As described in Findings of Fact 64 through 66, the employer did not interfere with Waddell's right to engage in union activity in violation of RCW 41.80.110(1)(a) on March 2, 2011.

ORDER

The Washington State Department of Corrections, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices.

1. CEASE AND DESIST from:

   a. Unlawfully interfering with employee rights through statements made by the employer or agents of the employer.

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

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

a. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit employees 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.

b. 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.

c. Notify the Compliance Officer, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 10th day of December, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JESSICA J. BRADLEY, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

CASE 24001-U-11-6138
DECISION 11571 - PSRA

COLLECTIVE BARGAINING

PERC

STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

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

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

WE UNLAWFULLY:

- Interfered with employees' ability to appeal denied requests for use of CBA-days by telling Sergeant James Hutchison, Larch Corrections Center, that we would deny all CBA-days if employees continued to appeal denials of CBA-day requests.

- Interfered with employees' ability to discuss union tactics with other employees by telling Corrections Officer Katrina Ortiz at the Coyote Ridge Corrections Center that she could not talk about unions in California using a tactic called the blue flu (sick-out, work stoppage).

- Interfered with employees' right to discuss workplace safety and training safety by telling Ortiz that she could not discuss the contents of a meeting with Coyote Ridge Corrections Center management with anyone outside of the meeting. During the meeting Ortiz raised concerns that the defensive tactics training provided by the employer was not being conducted safely and was not adequate for female employees.

- Interfered with employees' right to participate in union activities by making statements to Sergeant Jimmy Fletcher, Monroe Correctional Complex, which implied his power and involvement with the union could prevent him from receiving a promotion to lieutenant.

- Interfered with employees' ability to communicate with the union by telling Corrections Officer Derek Kolb, Monroe Correctional Complex, that he could no longer be trusted because he talked to his union about workplace concerns.

- Interfered with Sergeant James Palmer's right to union representation (*Weingarten* rights) during an investigatory interview at the Monroe Correctional Complex by instructing his accompanying shop steward that he was there as an observer only.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL respect your right to appeal the use of CBA-days if your initial request is denied.

WE WILL respect your right to discuss union related matters and workplace safety concerns with your union and co-workers.

WE WILL respect your right to engage in union activities including, but not limited to: filing grievances, participating in informational picketing, talking with the press about workplace safety concerns on behalf of your union and co-workers, and serving as a union shop steward.

WE WILL respect your right to discuss workplace concerns with your union shop steward.

WE WILL honor your requests to have union representation during an investigatory interview and allow your union representative to assist you.

WE WILL cease and desist from unlawfully interfering with employee rights through statements made by the employer or individuals speaking for management.

WE WILL NOT interfere with appeals of CBA-days as provided for in your collective bargaining agreement.

WE WILL NOT interfere with you ability to communication with your union officers or interfere with your union officers' ability to communication with you.

WE WILL NOT interfere with your ability to communicate with your union or co-workers about union-related matters or workplace safety concerns.

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

DO NOT POST OR PUBLICLY READ THIS NOTICE.

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

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 12/10/2012

The attached document identified as: DECISION 11571 - PSRA has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	24001-U-11-06138	FILED:	05/23/2011	FILED BY:	PARTY 2
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BAR UNIT:	ALL EMPLOYEES				
DETAILS:	-				
COMMENTS:					

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