

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICER'S GUILD,)	
)	
Complainant,)	CASE 19511-U-05-4950
)	
vs.)	DECISION 9420 - PECB
)	
CITY OF SEATTLE,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
)	
_____)	

Aitchison & Vick, by *Hillary McClure*, Attorney at Law, for the union.

Seattle City Attorney Thomas A. Carr, by *Daniel M. Berger*, Attorney at Law for the employer.

On May 26, 2005, the Seattle Police Officer's Guild (guild) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging the City of Seattle (employer) violated RCW 41.56.140(1) and (2). The guild represents a bargaining unit of law enforcement officers and sergeants. This controversy concerns a conflict between a captain and a street vice detective during a meeting.

The union's complaint was reviewed under WAC 391-45-110. A preliminary ruling was issued on July 5, 2005. It summarized the cause of action as employer interference with employee rights, discrimination, and domination of a bargaining representative by a captain's comments about the police officer's guild to a detective

who is also a guild board member, in reprisal for protected union activities.

The employer filed its answer on July 25, 2005. Examiner Starr Knutson held a hearing on April 25, 2006. The parties filed briefs to complete the record on June 20, 2006.

ISSUES

1. Did the employer interfere with, restrain, or coerce Tom Umporowicz in the exercise of his rights when Captain Fann raised his voice and threatened him during a meeting with the street vice unit?
2. Did the employer discriminate against Tom Umporowicz because he exercised his protected rights as a guild officer?
3. Did the employer attempt to control or dominate the bargaining representative?

Based on the evidence and arguments presented by the parties, I find that a reasonable employee would not perceive Fann's behavior as discouraging his or her union activities, the test for an interference violation. Umporowicz was not deprived of any ascertainable right or benefit, a threshold element for a discrimination violation under RCW 41.56.140(1). Without meeting these key tests, the employer cannot be found to have interfered with Umporowicz's rights nor to have discriminated against him for activities protected under Chapter 41.56 RCW. The employer did not involve itself in guild business or finances, and thus cannot be found to have attempted to dominate or control the bargaining

representative. Therefore, I dismiss the unfair labor practice complaint.

ANALYSIS

Under the Public Employees Collective Bargaining Act, Chapter 41.56 RCW, a public employer commits an unfair labor practice, as follows:

RCW 41.56.140 Unfair Labor Practices for Public Employer Enumerated. It shall be an unfair labor practice for a public employer:

(1) to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;

(2) to control, dominate or interfere with a bargaining representative;

ISSUE 1: Did the Employer Interfere?

Legal Standard

The Commission's test for an interference violation is:

Whether one or more employees could reasonably perceive employer actions as a threat of reprisal or force or promise of benefit associated with the pursuit of rights under Chapter 41.56 RCW. It is not necessary for a complainant to show that the employer intended to interfere, or even that the employees involved actually felt threatened.

City of Omak, Decision 5579-B (PECB, 1997); *City of Tacoma*, Decision 8031-A (PECB, 2004).

The Commission noted in its decision in *King County*, Decision 6994-B and 6995-B (PECB, 2002), that "the legal determination of interference is based not upon the *reaction of the particular employee involved*, but rather on whether a typical employee in a similar circumstance reasonably could perceive the actions as attempts to discourage protected activity." (emphasis added.)

The complainant has the burden of proof unfair labor practice claims. WAC 395-45-270(1)(a). The test for interference is whether a another employee could, in the same circumstances, reasonably perceive the employer's action as discouraging his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). A complainant is not required to show intent or motive for interference or that the employee involved was actually coerced, or that the respondent had an union animus. *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct interfered with protected employee rights.

Thus, my analysis turns to whether Umporowicz reasonably perceived Fann's actions as discouraging him from pursuing his right to participate in guild activities.

The Alleged Incident

On the evening of April 28, 2005, the street vice unit gathered in their office area. The street vice unit included: Detectives Tom Umporowicz, Salvatore Ditusa, Harry James, and Robert Kurosu; Sergeant Kelly; and Lieutenant Hybak. The officers had been asked by Hybak to attend a meeting with Captain Fann, the new commander of the special investigations section. As the section manager, Fann supervised two vice units, an auto theft unit and a fraud and

forgery unit, and the major crimes task force. He had been assigned as section captain approximately six months previously, in November 2004. Hybak had been assigned to the section for about five years. He retired from the Seattle Police Department prior to the hearing, but after the events at issue here. Kelly had been transferred to the street vice unit the month prior to the meeting. The detectives had each been assigned to the street vice unit for different periods of time running from six to fourteen years.

Prior to Fann's assignment to the section, he had been instructed by the three deputy chiefs to notify Sergeants Baily and Vela¹ of the chiefs' decision to change the focus of the vice units. As part of that change, the chiefs decided to transfer the two sergeants to new posts. Fann testified he gave each sergeant several months to choose a new assignment. Vela moved to the north precinct in February. Baily moved to the south precinct in April. Kelly moved to Vela's assignment sometime in March.

Hybak testified that during the months following the notice of the impending transfers of the two sergeants, he overheard the detectives "grumbling" a lot. He felt their attitudes were quite negative. Because of that perception he asked Fann to have a meeting with the vice unit to talk with them about the proposed changes so they would have some firsthand information. The detectives would then have the opportunity to ask questions and receive answers directly from Fann.

The vice detectives worked nights; Fann worked mostly days. Fann's turn as duty captain fell on April 28 which meant he would be on

¹ Sergeant Vela headed the street vice unit.

duty during the vice detectives' shift. Therefore, Fann thought that would be a good time to meet with the street vice unit, as requested by Hybak.

Umporowicz testified that he had a conversation with Hybak before the meeting that night. During that conversation, Hybak told Umporowicz that he asked Fann to talk to the street vice unit about how they were treating the new sergeant, Kelly, who "did not feel very welcomed by the unit." Umporowicz quoted Hybak as saying that the unit was "uncooperative, disgruntled, and borderline insubordinate." Umporowicz questioned Hybak about his perception of the unit's behavior. Umporowicz disagreed with Hybak's assessment, although he acknowledged the vice unit had expressed "concerns and resistance to some of the proposals they wanted us to do." At that point, Fann entered the area just outside his office where the four detectives had their desks. He began addressing the unit.

The testimony

The detectives all testified to a similar, but not exact, event pattern during the ensuing argument between Fann and Umporowicz. The detectives testified that they perceived a physical confrontation was imminent between Fann and Umporowicz. They observed Fann walk toward Umporowicz, stand next to him, lean down with his arm raised and hand extended. Fann yelled at him to shut up or leave. There were some vague recollections of Fann using the term "union bullshit" and calling Umporowicz a "cancer." One of the detectives did not remember Fann saying anything about the union. Only Umporowicz asserted that Fann used the term "union bullshit" or the word "guild." The detectives also testified they saw, or thought they saw, Fann's right hand hovering over his gun. They perceived this as additional evidence that the situation was escalating.

Hybak testified that he heard Umporowicz interrupt Fann twice. Hybak recalled that immediately after the second interruption, Fann went over to where Umporowicz was sitting and shouted at him to shut up or leave the meeting. Hybak did not remember Fann saying anything about unions or union activity nor that Fann's hand was in a position to draw his weapon.

Following this incident, Fann motioned to Umporowicz to join him in his office. When both men were inside the office Fann shut the door. Ditusa attempted to enter the office at that point. Fann told Ditusa he was not needed; then shut and locked the door. Thus, there were no witnesses to the meeting between Fann and Umporowicz. All the officers outside the office could hear loud voices, but could not decipher what was being said. I observed at the hearing that Fann does project his voice.

Both men testified that Fann began by telling Umporowicz not to interrupt him again. Fann also told him that if it had not been for Umporowicz's past good work, which Fann had observed, he might have suspended him for insubordination. Umporowicz said he did not intend to be insubordinate, apologized and left the office. Neither man testified that Fann made any comments concerning the guild or guild activities.

The detectives testified that immediately after Umporowicz came out of Fann's office, they all went to the union office and discussed the meeting. Each detective then wrote down his recollection of what had occurred. Two sets of those handwritten notes were presented and admitted into evidence. A third set of notes was mentioned, but not offered as evidence. One set of notes does not mention Fann making comments referring to the guild. The second

set of notes refers to Fann calling Umporowicz a "cancer." The second notes appear to add as an after thought a reference to hearing Fann say "he didn't care anything about the guild." Both authors testified that they made the notes after discussing the event with the other detectives. I believe the detectives' personal notes were influenced by their meeting together and discussing the incident directly afterward. That belief bolsters my reliance on Hybak's testimony.

Fann testified that his comments were in response to Umporowicz interrupting him while he was talking to the group. Fann acknowledged yelling, and calling Umporowicz a cancer, but denied saying anything about the union.

None of the comments made by Fann were coercive or threatening with regard to Umporowicz's guild activities. Hybak's testimony backs up Fann's assertion that Umporowicz interrupted him as he was speaking to the unit. Fann acknowledged his subsequent behavior was inappropriate. No action, disciplinary or corrective, was ever meted out to Umporowicz regarding the heated discussions that took place at the unit meeting. Umporowicz testified that he continued to file grievances and participate in labor management committee meetings after April 28.

No one testified that Fann discouraged any guild member from filing grievances. Umporowicz testified that he did not talk to Fann about the grievances. The grievance documents, presented as evidence of protected activities by Umporowicz, were signed by Kevin Hastings, the guild president. The employer dealt with Hastings, not Umporowicz, in attempting to resolve the issues. I heard very similar testimony concerning the events of April 28. I

rely upon Hybak's testimony about what Fann said as the most credible as he has no current employment relationship with the employer.

Based on the information above, I do not believe a typical employee would perceive that Fann's actions would discourage employees from exercising their protected rights.

ISSUE 2: Did the Employer Discriminate?

Legal Standards

Discrimination claims involve a more complex analysis than interference charges. The Commission decides discrimination allegations under standards drawn from decisions of the Supreme Court of the State of Washington. That formula is:

The injured party must make a prima facie case showing retaliation. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
2. The employee has been deprived of some ascertainable right, benefit, or status; and
3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee. The complainant carries the burden of proof throughout the entire matter, but there is a shifting of the burden of production to the employer. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions.

The employee 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 the protected right was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). See *Educational Service District 114*, Decision 4631-A (PECB, 1994) and its progeny.

Exercise of protected rights

In its complaint, the union states that in addition to his position as a guild executive board member, Umporowicz engaged in the following protected activities during the previous six months. He was the executive board officer who prepared and was responsible for administering two grievances concerning the transfer of two sergeants assigned to the vice section; as a guild official he represented the vice detectives' concern that Fann and the department were purging the unit; and he openly advocated that Fann and the department were violating the terms of the collective bargaining agreement by the transfer of the sergeants.

The testimony of both union and employer witnesses regarding Umporowicz's union activities indicates that it was common knowledge that he was a board member and representative of the guild. The fact that an employee is an executive board member implies union activism, however it does not insulate that employee from corrective or disciplinary action. If that were the case, all guild board members, by definition, would be immune to employer discipline without actually engaging in protected activity. No statute or Commission precedent supports such a position.

The union produced three witnesses who testified that in his role as a guild representative, Umporowicz intervened on other employees' behalf. James testified that Umporowicz "had assisted several people in our unit with problems that they had with Captain Fann and the administration." Ditusa testified "Detective Umporowicz interceded on the unit's behalf . . . in a couple of instances where some changes were trying to be implemented which were against our guild contract." Kurosu testified that Umporowicz "filed papers with the guild to stop it. I think he was, oh, I think he was making us take a holiday." No other evidence was presented concerning these examples of union activism except for the two involuntary transfer grievances filed by Hastings.

Testimony at the hearing established that the only connections Umporowicz had to the transfer grievances were: 1) his name on the guild letterhead as an executive board member and 2) his mentioning of them at a January labor management committee meeting. Fann testified without rebuttal that he did not talk to Umporowicz about the sergeants' grievances nor the holiday issue. Fann testified he heard from the sergeants themselves that they intended to grieve the transfers out of the street vice unit. The members of the vice unit testified that although they knew about the grievances, the holiday issues, and the department's proposed changes, they came to that knowledge only through shop talk. Fann testified he respected the right of bargaining unit members to grieve employer actions they found objectionable. No one testified that Fann said or implied he would take action to prevent guild members from exercising their contractual rights.

Mark McCarty, the employer's labor relations representative for the police department, testified that the employer expected the

sergeants to grieve their involuntary transfer. The subject of involuntary transfers had been a point of controversy between the guild and the employer for some time. He testified that Fann did not make the decision to transfer the two sergeants. McCarty affirmed the deputy chiefs made the transfer decision.

McCarty also testified that he heard about Fann's proposed change to holiday scheduling from Hastings and not Umporowicz. After speaking with Hastings, McCarty called Fann about the holiday issue. Once he informed Fann about the practice concerning holiday work for the street vice unit, Fann withdrew his previous directive about working on a holiday. Fann admitted he had received erroneous information from the previous captain. He had no problem with continuing with the established practice. No officer was denied holiday pay, holiday overtime or suffered any adverse action concerning Fann's rescinded directive on holiday work.

Deprivation of a Right or Benefit

The guild did not present testimony or evidence showing any adverse action was endured by Umporowicz. The union has failed to establish its prima facie case that Umporowicz was deprived of any ascertainable right, status, or benefit. It is clear that there was no discipline of Umporowicz - or even an internal investigation - related to the events on April 28, 2005. No additional evidence or testimony was presented to indicate Umporowicz was in some manner punished because of his conduct on April 28. Umporowicz did not cease participating in guild activities. He did not resign from the executive board. He continued to file grievances and participate in the labor management committee.

Because the union has not established that Umporowicz was deprived of an ascertainable right, status, or benefit, there is no discrimination violation.

ISSUE 3: Did the employer dominate or control?

Section 8(2)(a) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." The NLRA has long been interpreted to prohibit employer-dominated "company unions." In his March 1, 1934, speech upon introduction of the bill that eventually became the NLRA, Senator Wagner said:

The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of the [National Industrial R]ecovery [Act] law.

. . . Under the employer-dominated union, the worker, who cannot select an outside representative to bargain for him, suffers two fatal handicaps. In the first place, he has only slight knowledge of the labor market, or of general business conditions. . . . If forbidden to hire an expert in industrial relationships, he is entirely ineffectual in his attempts to take advantage of legitimate opportunities.

Thus, the "company union" was the very first evil to be addressed by the prime sponsor of the NLRA. *Pasco Housing Authority*, Decision 5927-A (PECB, 1997).

RCW 41.56.140(2) closely paraphrases the federal law, making it unlawful for a public employer in this state: "to control, dominate or interfere with a bargaining representative." Our legislative

history indicates that our Legislature intended to mimic the federal law. *City of Pasco*, Decision 3582 (PECB, 1990).

Here the complainant has apparently misconstrued the kind of employer activity that would sustain an allegation of employer control or domination of a union. The Commission has historically found a violation of RCW 41.56.140(2) when an employer has interfered in the finances or internal affairs of an employee organization or gave the appearance of doing so. *Washington State Patrol*, Decision 2900 (PECB, 1988); *Skamania County*, Decision 5088 (PECB, 1995) citing *City of Pasco*, Decision 4198-A (PECB, 1994); and *Pasco Housing Authority*, Decision 5927-A (PECB, 1997). The facts of this case do not support a finding that this employer attempted to control or dominate the bargaining representative as defined by Chapter 41.56 RCW.

FINDINGS OF FACT

1. The City of Seattle is a "public employer" within the meaning of RCW 41.56.030(1).
2. The Seattle Police Officers Guild is a "bargaining representative" within the meaning of RCW 31.56.030(3) and is the exclusive representative of certain employees of the employer.
3. Captain Fann, a police department middle manager, commands the special investigations section, which includes the street vice unit. Lieutenant Hybak was second in command.
4. Hybak requested Fann meet with the street vice unit to talk to them about their treatment of the newly assigned sergeant, Kelly. That meeting took place on April 28, 2005.

5. Tom Umporowicz is a detective assigned to the street vice unit. He is also a guild executive board member.
6. During the April 28 meeting, Fann moved toward Umporowicz and yelled at him to "shut up" when Umporowicz interrupted him for the second time.
7. Fann did not discipline or threaten to discipline Umporowicz. He did warn Umporowicz that his conduct was unacceptable.
8. No evidence of an employer attempt to dominate or control the guild or its officers was presented.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction of this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.
2. The heated discussion between Fann and Umporowicz described in Findings of Fact 6 did not rise to the level of a threat of reprisal or force associated with his exercise of rights under Chapter 41.56.
3. The employer did not interfere with employee rights in violation of RCW 41.56.140(1) by its conduct referenced in the foregoing findings of fact.
4. The employer did not discriminate against Tom Umporowicz in violation of RCW 41.56.140(1) by its conduct referenced in the foregoing findings of fact.

3. The employer did not attempt to dominate or control an employee organization in violation of RCW 41.56.140(2).

ORDER

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

ISSUED at Olympia, Washington, this 6th day of October, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in cursive script that reads "Starr Knutson".

STARR KNUTSON, 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.