City of Brier, Decision 10013 (PECB, 2008)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PAUL GRASS,	)	
	)	
Complainant,	)	CASE 20933-U-07-5342
	)	
vs.	)	DECISION 10013 - PECB
	)	
CITY OF BRIER,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	

Emmal Skalbania & Vinnedge, by *Alex J. Skalbania*, Attorney at Law, for the complainant employee.

Davis Grimm Payne & Marra, by *Eileen M. Lawrence*, Attorney at Law, for the employer.

On February 22, 2007, Paul Grass (Grass) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, naming the City of Brier (employer) as respondent. A preliminary ruling was issued finding that the complaint stated causes of action for interference with employee rights and discrimination in reprisal for union activities protected by Chapter 41.56 RCW.

A hearing was held on August 14 and 15, 2007, before Examiner Karyl Elinski. The parties filed post-hearing briefs.

ISSUES PRESENTED

1. Did the employer discriminate against Grass in violation of RCW 41.56.140(1) by terminating him in reprisal for engaging in protected union activities?

2. Did the employer interfere with Grass's rights in violation of RCW 41.56.140(1) when Chief of Police Don Lane warned Grass about his union association?

3. Did the employer interfere with Grass's rights in violation of RCW 41.56.140(1) by refusing his request for union representation during his termination meeting?

The Examiner rules that the employer retaliated against Grass for participating in union activities, including serving as union vice president, participating in contract negotiations, and "aligning himself" with the activities of union president Pat Murphy. The employer interfered with Grass's rights and discriminated against him for engaging in activities protected by Chapter 41.56 RCW. The employer did not commit an unfair labor practice when it failed to honor Grass's request for union representation at his termination meeting.

ISSUE 1: Did the employer discriminate against Grass in violation of RCW 41.56.140(1) by terminating him in reprisal for engaging in protected union activities?

The burden of proving any unfair labor practice claim rests with the complaining party and must be established by a preponderance of the evidence. *Okanogan-Douglas County Hospital*, Decision 5830 (PECB, 1997). WAC 391-45-270(1)(a) provides: "The complainant shall be responsible for the presentation of its case, and shall have the burden of proof."

It is an unfair labor practice for a public employer to "discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate

representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter." RCW 41.56.040. The Commission decides discrimination allegations under standards drawn from decisions of the Supreme Court of the State of Washington. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). First, 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 is a causal connection between the exercise of the legal right and the discriminatory action.

If an employee claiming discrimination provides evidence of a causal connection then he/she creates a rebuttable presumption in his or her favor. 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 or 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. *Educational Service District 114*, Decision 4361-A (PECB, 1994); *Brinnon School District*, Decision 7210-A (PECB, 2001); and *Dieringer School District*, Decision 8956-A (PECB, 2007).

Accordingly, an employee must first prove that he or she was engaged in the exercise of a statutorily protected right, or communicated to the employer an intent to do so. The "mere assertion that one is engaged in a protected activity does not extend statutory permission to that specific act. Unless the underlying activity is a 'protected activity,' actions arising from the disputed activity cannot be defined as protected activities. . . ." *City of Tacoma*, Decision 6793 (PECB, 1999). Additionally, an employer must be aware of an employee's protected activities in order to form the requisite motivation and intent to react against that conduct. *Seattle Public Health Hospital*, Decision 1911 (PECB, 1984), *aff'd*, Decision 1911-C (PECB, 1984); *Metropolitan Park District of Tacoma*, Decision 2272 (PECB, 1986), *aff'd*, Decision 2272-A (PECB, 1986).

Analysis

The employer maintains a small police force, which fluctuates in size from four to seven police officers. The officers are members of the Brier Police Association (union). Chief Lane is the only member of the force who is not in the police officer bargaining unit. Grass first began working as a temporary police officer for the employer in August 2005. On October 1, 2005, Lane hired Grass as a full-time police officer after Grass served approximately one month as a reserve officer. Pursuant to the collective bargaining agreement in effect between the employer and union at that time, all newly-hired police officers, including Grass, were subject to

a twelve-month probationary period. During the probationary period, the employer did not need "just cause" to terminate an employee. Grass's probation was slated to end on September 30, 2006.[1]

a. The Union's Prima Facie Case

In December 2005, during a meeting that Lane initiated, Grass advised Lane that he had been elected vice president of the union. At that time, Lane warned Grass that "new hires in union positions get the short end of the stick." Lane also asked Grass about his relationship with union president Murphy. Lane expressed his concern to Grass that Grass was aligning himself with Murphy. From all testimony presented, Lane had a very difficult relationship with Murphy. Shortly after Mayor Bob Colinas took office in November 2005, Murphy aired some of his concerns regarding Lane with Colinas. Grass eventually did too. Although Lane denied warning Grass about his involvement with the union or Murphy, two other former officers testified that Lane made similar comments to them during their probationary periods. Lane's testimony is simply not credible on this point.

Grass was undoubtedly engaged in protected union activity. His uncontroverted testimony was that he supported Murphy in his union activities. In the summer and fall of 2006, the union and the employer engaged in contract negotiations. Grass participated in the preparation of the union's proposal in the summer of 2006, as

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[1] According to the terms of the collective bargaining agreement, the employer must have "just cause" to terminate an employee who has completed his or her probationary period.

well as two or three negotiation sessions.[2] On August 30, 2006, Grass was "vocal" at a union meeting concerning contract negotiations. On August 31, 2006, Lane requested a meeting with Grass. At their August 31 meeting, Lane summarily dismissed Grass, just one month short of the end of his probationary period. During the meeting, Grass requested union representation but his request was denied. Lane brought in Batiot to witness the meeting, but she advised Grass that she was not acting in the capacity of a union representative.

Shortly after terminating Grass's employment, the employer presented a proposal in negotiations to prohibit probationary employees from participating in contract negotiations. The employer later withdrew its proposal after protest from the union. Grass met his prima facie burden of proving that his protected union activities led to his termination.

b. The Employer's Burden of Production

In order to refute Grass's prima facie case, the employer must articulate legitimate, non-retaliatory reasons for its actions. The employer presented evidence that Grass's employment was marred by complaints about his attitude when handing out tickets, his request for cell phone numbers from teens who agreed to participate in an "essay program,"[3] and a few other matters. Officer Michael

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[2] Detective Lori Batiot, an apparent confidante of Lane, was aware that Grass participated in preparing the proposal. Given the small size of the department, it is not a stretch to assume that Chief Lane was also aware of that fact.

[3] Under the terms of the program, teens stopped for traffic infractions could have their tickets eliminated if they wrote an essay.

Javorsky and Detective Batiot testified on the employer's behalf. Both expressed strong opinions about how officers serving their probationary period should act. Batiot stated that they should be "humble." Javorsky stated that they "should keep their mouth shut." Both testified that Grass did not act as they believed he should have given his probationary status.

Although the employer conducted a background check prior to hiring Grass, it re-investigated Grass's prior employment just before terminating him. Lane contacted the Duvall Chief of Police to find out why the City of Duvall did not retain Grass. During the termination meeting, Lane also mentioned that he had someone "tailing" Grass, and that he suspected that Grass slept while on duty.

Given the perceived challenges Grass presented, the employer met its burden of production to articulate non-retaliatory reasons for its decision to terminate Grass.

c. Substantial Motivating Factor

During Grass's employment, the City's police department was subject to rampant turnover and was marred by poor relationships within the force. Union president Murphy had a tumultuous relationship with Lane. Lane warned Grass, as well as two other officers, not to align themselves with Murphy. Grass supported Murphy in union activities and in several complaints against Murphy. Both Colinas and Lane served on the employer's bargaining team for contract negotiations in the summer of 2006. Both admitted dissatisfaction with the union's opening proposal, and expressed frustration that the union's proposal represented a complete rewrite of the existing contract. Batiot, who served as Lane's witness during Grass's

termination meeting, was aware that Grass helped to prepare the union proposal. She described the negotiations as "contentious." A day after Grass was "vocal" during a union meeting, he was terminated.[4]

The employer presented weak evidence to buttress its claim of non-retaliatory reasons for terminating Grass. During his tenure with the police department, Grass was never disciplined and he was never advised that he needed to improve his performance. Shortly after the union presented its initial bargaining proposal, Lane began to build his case against Grass. Lane met with Duvall's Chief of Police for the sole purpose of determining why Duvall did not retain Grass, despite the employer's thorough pre-hire investigation of Grass. Lane also appeared to have clandestinely followed Grass on his graveyard shift. During the termination meeting, Lane claimed, for the first time, that Grass slept while on duty. Lane also brought up previous matters which were investigated, but which did not result in discipline, to justify Grass's termination.[5]

Grass's exercise of protected union activities was a substantial motivating factor in the employer's decision to terminate his employment. Grass has shown that the employer discriminated

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[4] Although Javorsky and Colinas testified that Javorsky was more vocal than Grass during contract negotiations, Javorsky expressed his opinion that the union focused on the "bells and whistles" instead of keeping their jobs. Javorsky stated that he attempted to re-focus the union's efforts. Although Javorsky may have been more vocal than Grass during negotiations, he did not fully support the union's proposal.

[5] Even Lane's testimony confirms that it is not unusual for irate citizens to complain about police officers who have given them a ticket.

against him in reprisal for protected union activities in violation of RCW 41.56.140(1).

ISSUE 2: Did the employer interfere with Grass's rights in violation of RCW 41.56.140(1) when Chief of Police Lane warned Grass about his union association?

Interference claims involve a less complex analysis than discrimination charges. To sustain an interference violation, the complainant bears the burden of demonstrating that a typical employee, in the same circumstances, could reasonably perceive the employer's action as discouraging his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). 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, 1998); *City of Tacoma*, Decision 8031-B (PECB, 2004).

Analysis

As discussed in the discrimination analysis, Grass engaged in protected union activity through his service as vice president of the union, his support of union president Murphy and his participation in contract negotiations. Lane warned Grass that probationary employees serving in union leadership get the "short end of the stick." Lane also cautioned Grass about "aligning himself" with Murphy. Any typical employee could reasonably perceive these remarks as intimidating and coercive. These remarks present clear evidence of an intent to discourage Grass from engaging in protected union activity. The employer interfered with Grass's rights in violation of RCW 41.56.140(1).

ISSUE 3: Did the employer interfere with Grass's rights in violation of RCW 41.56.140(1) by refusing his request for union representation during his termination meeting?

Employees have a right to union representation at an investigatory interview where the employee reasonably believes the interview might result in disciplinary action. Denial of a request for such union representation is an unfair labor practice in the private sector, under the National Labor Relations Act. *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975). The same right has been found applicable to public employees in this state under Chapter 41.56 RCW. An employer's denial of this right constitutes interference with employee rights in violation of RCW 41.56.140(1). *Cowlitz County*, Decision 6832-A (PECB, 2000); *Okanogan County*, Decision 2252-A (PECB, 1986); *Washington State Patrol*, Decision 4040 (PECB, 1992); *King County*, Decision 4299 (PECB, 1993), *aff'd*, Decision 4299-A (PECB, 1993).

> An investigatory interview is one in which the employer seeks information from an employee. The purpose of having a union representative present at such times is to assist employees who may be unfamiliar with and intimidated by the situation. When an employer questions an employee, a union representative might be able to point out ambiguous or misleading questions, intercede if the questioning invades a statutory privilege the employee has the right to invoke or, if the questioning becomes harassing or intimidating, keep the interviewer and/or employee on task,[6] or bring out all of the facts (or at

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[6] Close reading of the decision in *Weingarten* discloses that, while being questioned without union assistance about an allegation of improperly giving away food to a customer, the employee at issue in that case blurted out an unrelated fact which led to discipline. The Supreme Court saw the value of union representation in such as situation.

> least facts unknown to or overlooked by the employer official). Historically, the Commission has firmly protected the rights of employees in this area. An employer official who dissuades an employee from exercising this statutory right takes on a substantial risk, and extraordinary remedies have been awarded in such cases. *City of Seattle*, Decision 3593-A (PECB, 1991).

Cowlitz County, Decision 6832-A (PECB, 2000)

Analysis

The existence of a right to union representation for Grass turns on whether the termination meeting was of an investigatory nature. During the termination meeting, at Grass's request, Lane gave Grass the option of resigning rather than being terminated. Faced with the uncertainty of whether he should resign or be terminated, Grass requested the opportunity to place a telephone call to his union representative. Lane denied his request. Grass requested permission to contact his wife. Lane also denied that request. Grass requested to meet with Batiot alone. Although this request was granted, Batiot advised him that she was not acting in the capacity of a union representative. Lane demanded that Grass immediately submit a written resignation, or, alternatively, Lane would summarily terminate his employment. Grass opted to resign. Shortly thereafter on the same day, Grass rescinded his resignation. He was then terminated.

The disputed meeting was not investigatory. The evidence established that Lane called Grass into his office to terminate his employment. The decision had been made prior to the meeting. Grass pleaded with Lane to reconsider his decision, but the unrefuted testimony established that Lane had already made his decision. The employer did not interfere with Grass's rights or violate RCW 41.56.140(1), by refusing Grass's request for union representation during his termination meeting.

FINDINGS OF FACT

1. The City of Brier is a public employer within the meaning of RCW 41.56.030(1).

2. The Brier Police Association (union) is a bargaining representative within the meaning of RCW 41.56.030(3).

3. The employer maintains a small police force, which fluctuates in size from four to seven police officers.

4. On October 1, 2005, Chief of Police Don Lane hired Paul Grass as a full-time police officer with the employer after Grass served approximately one month as a reserve officer.

5. Pursuant to the collective bargaining agreement in effect between the employer and union at the time of Grass's hire, all newly-hired police officers, including Grass, were subject to a twelve month probationary period. During his probationary period, the employer did not need "just cause" to terminate Grass's employment.

6. Grass's probationary period was slated to end on September 30, 2006.

7. In December 2005, Lane initiated a meeting with Grass. During that meeting, Grass advised Lane that he had been elected vice president of the union. At that time, Lane warned Grass that "new hires in union positions get the short end of the stick."

8. During the December 2005 meeting, Lane asked Grass about his relationship with union president Pat Murphy. Lane expressed

his concern to Grass that Grass was aligning himself with Murphy.

9. Lane had a very difficult relationship with Murphy. Shortly after Mayor Bob Colinas took office in November 2005, Murphy aired some of his concerns regarding Lane with Colinas. Grass eventually did too.

10. Grass supported Murphy in his union activities.

11. Grass helped to prepare the union's initial bargaining proposal for contract negotiations in the summer of 2006.

12. Grass served on the union's bargaining team in the summer and fall of 2006, and was an active participant in contract negotiations during that time.

13. Lane and Colinas served on the employer's bargaining team for contract negotiations in the summer of 2006.

14. Both Lane and Colinas were dissatisfied with the union's opening proposal during contract negotiations in the summer of 2006.

15. Contract negotiations between the employer and union during the summer of 2006 were "contentious."

16. On August 30, 2006, Grass was "vocal" at a union meeting concerning contract negotiations.

17. On August 31, 2006, Lane requested a meeting with Grass. At their August 31 meeting, Lane summarily dismissed Grass.

Grass was one month away from completing his probationary period. During the meeting, Grass requested union representation but his request was denied.

18. Shortly after terminating Grass's employment, the employer presented a proposal in negotiations to prohibit probationary employees from participating in contract negotiations. The employer later withdrew its proposal after protest from the union.

19. Grass was the subject of several citizen complaints regarding his performance. None of these resulted in discipline or corrective action.

20. The employer conducted a thorough background investigation of Grass prior to extending him an offer of full-time employment.

21. Just before terminating Grass, Lane contacted the City of Duvall to determine why Grass was not retained as a police officer there.

22. During the termination meeting of August 31, 2006, Lane accused Grass of sleeping on the job. The employer did not make any such allegation to Grass prior to this meeting.

23. During his tenure with the police department, Grass was never disciplined and he was never advised that he needed to improve his performance.

24. A causal connection exists between Grass's union activities described in Findings of Fact 7, 10 through 12 and 16, and the employer's termination of Grass's employment described in Finding of Fact 17.

25. Grass's protected union activities were a substantial motivating factor for his termination.

26. The termination meeting of August 31, 2006, described in Findings of Fact 17 and 22 was not investigatory in nature.

CONCLUSIONS OF LAW

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

2. The employer unlawfully discriminated against Paul Grass in violation of RCW 41.56.040 and 41.56.140(1) when it terminated him in reprisal for his participation in protected union activities.

3. The employer unlawfully interfered with Paul Grass' rights in violation of RCW 41.56.140(1) when Chief of Police Don Lane advised Grass that probationary employees in union positions "get the short end of the stick," and warned Grass not to align himself with union president Pat Murphy.

4. The employer did not commit an unfair labor practice under RCW 41.56.140(1) when it denied Grass union representation during a meeting in which his probationary employment was summarily terminated.

ORDER

The City of Brier, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Discriminating against Paul Grass in reprisal for his participation in protected union activities;

   b. Interfering with Paul Grass's employee rights under Chapter 41.56 RCW;

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

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Offer Paul Grass immediate and full reinstatement to his former position or a substantially equivalent position, as though he had fully completed his probationary period, and make him whole by payment of back pay and benefits in the amounts he would have earned or received from the date of the unlawful termination to the effective date of the unconditional offer of reinstatement made pursuant to this order. Back pay shall be computed in conformity with WAC 391-45-410.

   b. Post copies of the notice attached to this order in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of

initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice attached to this order into the record at a regular public meeting of the City Council of the City of Brier, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

e. Notify the Compliance Officer of the Public Employment Relations Commission, 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 Compliance Officer with a signed copy of the notice attached to this order.

ISSUED at Olympia, Washington, this 21st day of March, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY discriminated against Paul Grass in violation of RCW 41.56.140(1) by terminating him in reprisal for engaging in protected union activities.

WE UNLAWFULLY interfered with Paul Grass's rights in violation of RCW 41.56.140(1) when Chief Lane warned Paul Grass about his union association.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Offer Paul Grass immediate and full reinstatement to his former position or a substantially equivalent position, as though he had fully completed his probationary period, and make him whole by payment of back pay and benefits in the amounts he would have earned or received from the date of the unlawful termination to the effective date of the unconditional offer of reinstatement made pursuant to this order. Back pay shall be computed in conformity with WAC 391-45-410.

b. Read this notice into the record at a regular public meeting of the City Council of the City of Brier, and permanently append a copy of this notice to the official minutes of the meeting where the notice is read as required by this paragraph.

WE WILL NOT discriminate against Paul Grass in reprisal for his union activities;

WE WILL NOT interfere with Paul Grass's employee rights under Chapter 41.56 RCW;

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.

DATED: _____ City of Brier

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.