Central Washington University, Decision 10118 (PSRA, 2008)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON,	)	
Complainant,	)	CASE 21259-U-07-5423
vs.	)	DECISION 10118 - PSRA
CENTRAL WASHINGTON UNIVERSITY,	)	
Respondent.	)	ORDER OF DISMISSAL

Eric Nordlof, General Counsel, for the union.

Attorney General Rob McKenna, by *Rachelle L. Wills*, Assistant Attorney General, for the employer.

On September 21, 2007, the Public School Employees of Washington (union) filed an unfair labor practice complaint charging Central Washington University (employer) with interference with employee rights and discrimination in violation of RCW 41.80.110(1)(a) and (c).

A preliminary ruling was issued on September 25, 2007, finding a cause of action existed for employer interference in violation of RCW 41.80.110(1)(a) and discrimination in violation of RCW 41.80.110(1)(c) by refusing to allow its employees the use of employer provided electronic mail (e-mail) and electronic bulletin boards for the purpose of organizing, while at the same time allowing its employees the use of employer provided e-mail and electronic bulletin boards for a wide variety of other non-employer purposes.

An answer was received and filed October 16, 2007. Hearing Examiner Claire Nickleberry conducted a hearing on January 24, 2008. Both parties filed post-hearing briefs.

ISSUES

1. Did the employer commit interference in violation of RCW 41.80.110(1)(a) when it refused to allow employees the use of employer provided e-mail and electronic bulletin boards for the purpose of union organizing?

2. Did the employer discriminate in violation of RCW 41.80.110(1)(c) when it refused to allow employees the use of employer provided e-mail and electronic bulletin boards for the purpose of union organizing?

For the reasons set forth below, the Examiner finds that the employer did not interfere with employee rights in violation of RCW 41.80.110(1)(a) or discriminate in violation of RCW 41.80.110(1)(c) when it refused to allow employees the use of employer provided e-mail and electronic bulletin boards.

Issue 1: Did the employer commit interference in violation of RCW 41.80.110(1)(a) when it refused to allow employees the use of employer provided e-mail and electronic bulletin boards for purposes of union organizing?

Applicable Legal Principles

Under RCW 41.80.110(1)(a), an employer may not interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Chapter 41.80 RCW.

The standard for establishing an interference violation is whether the typical employee in similar circumstances reasonably could perceive the conduct as a threat of reprisal or force or promise of benefit related to the pursuit of rights protected by the chapter. It is not necessary to show that the employee was actually interfered with or restrained in order to prevail on an interference allegation. No showing of intent or motivation is necessary to find an interference violation. *Community College District 13 (Columbia Basin)*, Decision 9628-A (PSRA, 2007).

Under the Washington Constitution, an individual or association cannot assume it has the right to use the property of the state or a political subdivision of the state. Const. art. VIII, §§ 5 and 7. This Commission has held that a union and its supporters cannot assume they have the right to use the employer's computers or computer systems. *Snohomish County*, Decision 9799 (PECB, 2007); *King County*, Decision 6734-A (PECB, 2000). If an employer allows other non-work related materials to be posted on bulletin boards, but denies the right to post materials protected under RCW 41.56, the employer commits an unfair labor practice. *King County*, Decision 9692 (PECB, 2007). Nonetheless, employees do not have a statutory right to use an employer's property.

Conversely, an employer allowing a union to use employer property may also commit an interference violation. *Pierce County*, Decision 1786 (PECB, 1983). In *Pierce County* a union used, without the employer's knowledge, employer office space, telephones, and time for union purposes. Upon learning of the use, the employer took steps to terminate the use. Despite lack of knowledge, the employer still committed a technical interference violation because the employer *appeared* to assist, support, or show preference for the union using the employer's resources.

In contrast, the Executive Director dismissed a complaint alleging interference when the employer gave an employee notice that the employee was not to use the employer's letterhead, typewriter, or copy machines to process labor relations matters. *City of Seattle*, Decision 1355 (PECB, 1982). In that case, the Executive Director held that neither Chapter 41.56 RCW nor WAC 391-45 entitles individuals or associations to use public property for purposes of initial processing of ULP allegations. Further, the Executive Director cited Const. art. VIII, § 7, as prohibiting a gift of public funds.

Analysis

In 2007, the union began an organizing campaign at the employer's facility. At the time the union filed the complaint, the union was not a certified representative of any of the employer's employees.

The employer maintains an e-mail communication system and an intranet site. The intranet, where the employer provides links for employees and students to get information, is for internal use. The intranet is a place for announcements and information to be posted in lieu of sending messages by mass e-mail. E-mail and intranet guidelines are posted on the intranet. The intranet has two components: an announcement section and a classified section. All postings to the intranet are reviewed by a moderator in the Information Technology department before they are viewable. In order to be posted in the announcement section, the announcement must be related to a department or recognized organization, such as a student group, of the employer. In order for a business or charity to post on the intranet, the business or charity must be affiliated with the employer. Classified ads of a personal nature, such as looking for moving boxes, are allowed in the classified section. All postings to the intranet must comply with the

Acceptable and Ethical Use of Information Technology Resources Policy (Acceptable Use Policy).

The employer's Acceptable Use Policy states that "information technology resources can be used for activities that support the mission of the University." The list of acceptable uses include: learning, teaching, research, and university business. According to the employer's Electronic Communication Policy, the electronic communication addresses, mailboxes, or accounts assigned by the employer are the employer's property.

Included in the employer's policy is a prohibition on the use of employer intranet and e-mail to support an outside organization. As a state employer, the employer must comply with state ethics regulations and laws governing the use of state resources. Soliciting for an outside organization is a prohibited use of the employer's resources, according to Margaret Smith, the employer's internal auditor and ethics officer.

According to Carmen Rahm, Assistant Vice-President for Information Technology, a classified posting looking for people to form a union would likely be brought to his attention and would be analyzed under the Acceptable Use Policy. The standard applied by Rahm and his staff is whether there is a business, and whether the state ethics law and the RCWs permit the use of state resources for the posting.

Rahm testified that appropriate use of technology is defined as related to university business, but that a de minimis use is allowed for personal e-mail. Smith testified that de minimis use is the occasional and infrequent use of resources, such as an occasional e-mail to one's child. De minimis use would include anything personal that is not for an outside business. Smith also

testified that any use that is a prohibited use, *i.e.* not related to the employer's business, cannot be de minimis.

The employer has collective bargaining agreements with two other unions. The agreement between the employer and the United Faculty of Central (UFC) contains a provision allowing union officers and stewards de minimis use of state-owned resources for contract administration. The agreement between the employer and the Washington Federation of State Employees contains provisions allowing employee use of e-mail to request union representation and allowing shop stewards use for contract administration.

The employer has consistently applied its policy prohibiting the use of e-mail to support outside organizations to other unions. Smith testified that during UFC organizing, the UFC was using e-mail. The employer took the matter to the Assistant Attorney General, and it was determined that the UFC's use of e-mail was an inappropriate use of employer resources. The Assistant Attorney General advised the employer and the UFC that it was inappropriate for the UFC to use the employer's resources for organizing.

In *Snohomish County*, Decision 9799, the employer had a signed collective bargaining agreement with Teamsters Union Local 763 (Teamsters) when the Snohomish County Corrections Guild (Guild) filed a representation petition. Prior to filing of the petition, the employer sent an e-mail admonishing employees that employer e-mail systems were not to be used for non-county business. The employer's e-mail policy stated appropriate use of the employer's e-mail system was conducting official county business and defined county business. The employer allowed the Teamsters to use e-mail for purposes related to labor-management relations. The employer admonished employees for using e-mail to debate which union should represent the employees. The employer did not commit interference

when it enforced its e-mail use policy, nor did it commit interference when it allowed the Teamsters to use the e-mail system. Further, there was no interference or discrimination because the Guild was not yet a recognized representative.

This case, like *Snohomish County*, Decision 9799, and *King County*, Decision 6734-A, involves an employer that maintains an e-mail system for the purpose of conducting the employer's business. The employer maintains multiple policies on what is acceptable use of information technology resources, and the employer provides ethics training for employees. In summary, the employer allows use of its resources for the employer's business and does not allow its resources to be used to support an outside organization.

The union argues the employer committed interference because an employee learning that the employer does not permit communications about forming a union on the employer's e-mail and intranet, but does allow communications about other non-employer related topics, would be discouraged from engaging in union organizing activities protected by law. In light of the employer's policy prohibiting the use of its electronic resources to support an organization not affiliated with the employer, it seems reasonable that an employee would recognize that the employer was enforcing its policy rather than prohibiting or discouraging union organizing. Smith testified that employees could still hand out information about the union and discuss the union during their breaks. The employer did not commit interference when it sought to enforce its policy.

The employer has demonstrated that it makes an effort to uniformly apply its policies. Rahm credibly testified that inappropriate postings do occasionally make it past the intranet monitors, but will be removed if discovered or brought to his attention. The union provided examples of classified postings from the intranet,

some of which were allegedly supporting outside businesses. Rahm admitted that one of the postings was inappropriate and should not have been posted. Other postings, for a bank and a charity, were permissible postings because the bank was located on campus and had an agreement with the employer, and the charity was affiliated with a student group. The employer provided examples of postings that were found to be inappropriate, and either were not posted or were removed after posting.

Conclusion

The employer did not commit interference when it refused to allow the union to use e-mail and the intranet for organizing purposes. The employer enforces its technology use policies, and attempts to prevent postings for non-employer related outside organizations. Further, the employer has not permitted other unions to use e-mail or the intranet for organizing purposes. Use of the employer's resources by other unions has been bargained for and limited to contract administration.

Issue 2: Did the employer discriminate in violation of RCW 41.80.110(1)(c) when it refused to allow employees the use of employer provided e-mail and electronic bulletin boards for purposes of union organizing?

Applicable Legal Principles

An employer commits an unfair labor practice when it encourages or discourages membership in any employee organization by discrimination in regard to hiring, tenure of employment, or any term or condition of employment. RCW 41.80.110(c)

A discrimination violation occurs when: (1) the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so; (2) the employee was discriminatorily deprived of some ascertainable right, benefit, or status; and (3) a causal connection exists between the exercise of the legal right and the discriminatory action. *Brinnon School District*, Decision 7210-A (PECB, 2001).

The complainant has the burden of establishing a prima facie case of discrimination. If the complainant establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for its action. At all times, the complainant has the burden to prove by a preponderance of the evidence that the employer action was in retaliation for the employee's exercise of statutorily protected rights. *Brinnon School District*, Decision 7210-A.

Analysis

In summer 2007, the union's General Counsel, Eric Nordlof, and the employer's Director of Operations, Angela Beaudry, exchanged letters and e-mails regarding the union's request to use the employer's e-mail and intranet for organizing. On August 3, 2007, Beaudry responded by letter, informing Nordlof that she was unaware of any circumstances in which faculty or staff were allowed to use the intranet to support an outside organization whether public, private, union, or non-union. In an e-mail, Beaudry stated that employees are not allowed to communicate on the intranet to support an outside entity. She confirmed that another union representing some of the employer's employees had negotiated the right for employees to use the employer's e-mail to request union representation.

In this case, the employees, with the help of the union, were attempting to organize for the purpose of collective bargaining, which is a right protected by the Chapter 41.80 RCW. Through its letters, the union put the employer on notice that the employees were organizing.

The employer denied the union permission to use the employer's e-mail and intranet for purposes of organizing. In the past, as discussed in Issue 1, the employer prevented the UFC from using e-mail for organizing. As discussed in Issue 1, unions and employees do not have a statutorily protected right to use the employer's resources for purposes of organizing. *See Snohomish County,* Decision 9799; *King County*, Decision 6734-A; *Pierce County*, Decision 1786; *City of Seattle*, Decision 1355 (PECB, 1982).

The employer did not discriminate because the employer excludes, or attempts to exclude, use of its electronic communications resources by all outside organizations and consistently applies this policy.

CONCLUSION

The employer did not commit interference or discrimination by refusing to allow the union to use its e-mail and intranet systems for organizing purposes.

FINDINGS OF FACT

1. Central Washington University is an employer within the meaning of RCW 41.80.005(8).

2. The Public School Employees of Washington is an employee organization within the meaning of RCW 41.80.005(7).

3. The employer maintains an e-mail system and internal intranet system.

4. The employer maintains policies for appropriate use of the employer's information technology. Appropriate use includes activities that support the employer's mission, but does not include the use of information technology resources to support an outside organization.

5. In order to post a message on the intranet, the message must be approved by a moderator. While some inappropriate postings have been posted, the employer attempts to uniformly enforce the policy and removes inappropriate postings.

6. The union began an organizing campaign in 2007. In the summer of 2007, the union sought permission to use the employer's e-mail to communicate about the organizing campaign. The employer denied the union use of its e-mail system for that purpose.

7. When the United Faculty of Central used the employer's e-mail system during an organizing campaign, the employer requested that organization to cease using the employer's e-mail.

8. Through the collective bargaining process, the employer has negotiated use of its e-mail system for contract administration or employee representation matters with unions that currently represent employees.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW.

2. The employer did not interfere with employee rights in violation of RCW 41.80.110(1)(a).

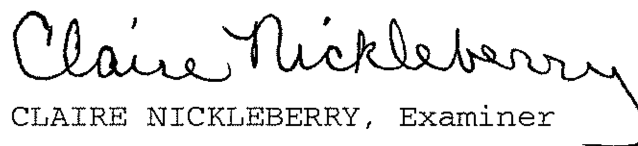
3. The employer did not discriminate in violation of RCW 41.80.110(1)(c).

ORDER

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

ISSUED at Olympia, Washington, this 1st day of July, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CLAIRE NICKLEBERRY, 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

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

CASE NUMBER:	21259-U-07-05423	FILED:	09/21/2007	FILED BY:	PARTY 2

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