City of Tacoma, Decision 6793-A (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA POLICE UNION, LOCAL 6, Complainant,	)	CASE 13544-U-97-3306
vs.	)	DECISION 6793-A - PECB
CITY OF TACOMA, Respondent.	)	DECISION OF COMMISSION

Aitchison and Vick, by Roger C. Cartwright, Attorney at Law, appeared on behalf of the union.

Robin S. Jenkinson, City Attorney, by Cheryl Carlson, Assistant City Attorney, appeared on behalf of the employer.

This case comes before the Commission on an appeal filed by Tacoma Police Union, Local 6, seeking to overturn the Findings of Fact, Conclusions of Law, and Order issued by Examiner Kenneth J. Latsch.[1] We reverse.

BACKGROUND

The City of Tacoma (employer) and the Tacoma Police Union, Local 6 (union) are parties to a collective bargaining agreement covering a bargaining unit of uniformed employees in the ranks of patrol

[1] City of Tacoma, Decision 6793 (PECB, 1999).

officer, sergeant, lieutenant, captain, and detective. During the timeframe involved in this proceeding: Philip Arreola was the police chief, James Hairston was the deputy chief, and Michael J. Darland was an assistant chief; Robert Blystone was president of the union.

The Deadly Force Review Board -

In 1981, the employer adopted a policy establishing a "deadly force review board" to meet whenever there is a use of deadly force. The board is to provide an objective review of the incident, and make recommendations as to whether the use of deadly force was within the department guidelines. The board might also recommend training, discipline, or internal investigations. The department-level boards created under that policy include management officials, a citizen member, and a police officer appointed by the union.[2] Some of the members fluctuate by incident, depending on the particular officer and division involved. All members are full voting members.

The Lowry Board -

In October of 1997, a department-level deadly force review board was convened to investigate the death of Officer William Lowry, a bargaining unit member killed in an on-duty shooting incident. Blystone named Detective Steve Holmes as the union appointee on that board.

On October 24, 1997, Blystone received calls from union members who had been witnesses before the "Lowry" board, complaining about

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[2] Bureau-level boards are created when the use of force is less than deadly force, or does not involve a death or major assault, such as when an officer shoots an animal.

Holmes' actions in the review board process. They were concerned he was acting as an inquisitor, rather than as an advocate. Blystone immediately contacted Holmes, by telephone, during a recess of the board. Holmes became upset, and expressed a belief that Assistant Chief Darland had put Blystone up to making the telephone call. Blystone assured Holmes that was not the case, and said he did not want to be embarrassed as he had been when a union appointee on a previous board voted against an officer. Holmes expressed an opinion that Blystone was telling him how to vote.

On the same day, Holmes contacted Deputy Chief Hairston, indicating his belief that Darland had prompted Blystone's telephone call. Hairston advised Holmes to document his concerns. Holmes typed a two page statement indicating a belief that Blystone was trying to coerce him to vote a certain way, and that the coercion was supported by Assistant Chief Darland. A few days later, Hairston suspended the proceedings of the "Lowry" board until the question of improper contact with board members could be cleared.

The Internal Investigation -

Within approximately a week following the October 24 discussions, Blystone received a notice directing him to report to the internal affairs office for an interview regarding a complaint made by Holmes. That complaint alleged that Blystone attempted to influence the vote of the union appointee to the "Lowry" board.

In a conversation with Hairston on October 30, 1997, Blystone asserted that the role of the union member on a deadly force review board was to observe management in the board proceedings, and not to be an inquisitor. Hairston had not heard of that perception,

and did not have that understanding or definition of the union appointees' role on such boards.

The internal affairs interview on November 10 was conducted by Sergeant Mike Miller. Blystone was accompanied by the union's attorney, Christopher Vick. Blystone was given a form directing him to answer five questions, under threat of discipline if he did not answer. Blystone said that he did not understand how the form applied to him as a union official, but he signed the form "under protest" and "under duress".

At the opening of the interview,[3] Vick stated the union's position that the investigation itself violated RCW 41.56.140, and that asking Blystone any questions about his conduct as a union official or about union business would violate RCW 41.56.140 and RCW 41.56.040. Vick stated, however, that he would remain silent and let Miller ask questions.

Blystone stated that he had been trying to convey to Holmes that the union role was simply one of advocacy. Blystone said his interest was to make sure that the officers' rights are adhered to, that the system is fair and equitable, and that the union has oversight of the process. He said he was not trying to influence Holmes to vote either for or against the officers.

Miller asked who contacted Blystone prior to his telephone call to Holmes. Blystone stated that he was not allowed to answer that question, under the advice of counsel. Miller stated that failure

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[3] Exhibit 3 in this record is the employer's transcript of the interview.

to answer questions, and that one in particular, could lead to discipline, including dismissal.

Later in the interview, Miller asked what was told to Blystone that led him to contact Holmes. Blystone responded that the question involved privileged union communication, and that he was not prepared to answer the question. Miller stated that he was giving Blystone the fullest opportunity to cooperate, and asked Blystone whether he could say, in general terms, what was said. Vick interjected that the union was not going to divulge confidences, and Blystone confirmed that would be his response. Miller asked Blystone about the number of individuals he had heard from, and both Vick and Blystone again refused to respond on the basis the communication was privileged.

Blystone told Miller that he understood discipline might result from his refusal to cooperate, but that he didn't understand how the subject under inquiry applied to him as the union president. Blystone said to Miller:

> Well, as we stated early on, I--I--I would gladly answer about my actions. But I'm not prepared at this time to answer questions about other Union members coming to the Union President in confidence. That's clearly, uh- Union business. Clearly Union communication; so I'm interested, and I will answer questions about my actions.

[Transcript, p. 47.]

Blystone continued to answer some questions, but stated he would not answer those involving union members talking to him.

The Complaint -

The union filed a complaint charging unfair labor practices on November 17, 1997, alleging that the employer attempted to engage in interference with protected rights in violation of RCW 41.56.040 and RCW 41.56.140(1), and attempted to dominate the exclusive bargaining representative in violation of RCW 41.56.140(2), by compelling a bargaining unit representative to divulge communications between himself and the union president, and (2) attempting to compel the union president, to divulge communications between himself and bargaining unit members, made in relation to his role in representing those bargaining unit members. In addition, the union alleged that the employer violated RCW 41.56.040 and RCW 41.56.140, by attempting to interfere with the representational activities of bargaining unit members, including the union president and the union representative to the deadly force review board. The union requested an order requiring the employer to cease and desist from violating the collective bargaining statute, and requested reimbursement for its attorney fees.

Following a hearing, Examiner Kenneth J. Latsch issued his decision on August 17, 1999. The Examiner held that the union failed to sustain its burden of proof to establish that protecting the source of Blystone's information concerning the internal workings of the review board was an activity protected by RCW 41.56.040. The Examiner held that the union had not established the employer had either interfered with rights protected by RCW 41.56.140(1) or improperly involved itself in internal union affairs in violation of RCW 41.56.140(2), and he dismissed the complaint.

The union filed an appeal on September 7, 1999, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

The union maintains it acted within its statutory rights by refusing to reveal the identity of union members who spoke to Blystone in confidence, and that the employer committed an unfair labor practice by interfering with protected rights and attempting to dominate a bargaining unit representative. The union argues that the Examiner's conclusion eliminates statutory protection for members of law enforcement unions. It theorizes that, if employers can compel union officers to reveal confidential information, bargaining unit members could not confide in union officials. The union takes issue with the Examiner's finding that there was no evidence Blystone was protecting sources within the bargaining unit. It asks the Commission to overturn the Examiner's decision.

The employer contends that its investigation was lawful, and did not interfere with protected activity. It argues that the underlying controversy stemmed from Blystone's misperceptions about the role of the union appointee on the review board, and that those misperceptions led Blystone to act inconsistently with his duty as a police officer under the regular chain of command. The employer agrees with the Examiner's conclusion that it had the right to manage the conduct of its review board process, and argues that investigating a communication that compromises the integrity of a review board proceeding does not violate collective bargaining law. The employer claims that inappropriate conduct in an internal investigation based on internal policy is not protected by the collective bargaining statute, so that Blystone was attempting to exercise a non-existent privilege. It asks the Commission to uphold the dismissal of the union's unfair labor practice complaint.

DISCUSSION

The Legal Standards

RCW 41.56.040 delineates the rights of employees to organize and be free to exercise their collective bargaining rights without interference:

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

The Supreme Court of the State of Washington has ruled that Chapter 41.56 RCW is to be liberally construed to effect its purpose of implementing the right of public employees to join and be represented by labor organizations. Nucleonics Alliance v. Washington Public Power Supply System, 101 Wn.2d 24 (1984); Municipality of Metropolitan Seattle v. PERC, 118 Wn.2d 621 (1992). The Supreme Court has also held that Chapter 41.56 RCW prevails in a conflict with another statute. Rose v. Erickson, 106 Wn.2d 420 (1986). RCW 41.56.905 provides:

> Except as provided in RCW 53.18.015, **if any provision of this chapter conflicts** with any other statute, ordinance, rule or regulation of any public employer, **the provisions of this chapter shall control.**

[Emphasis by **bold** supplied.]

See, also, Peninsula School District v. Public School Employees of Peninsula, 130 Wn.2d 401 (1996).

Enforcement of the statutory rights in RCW 41.56.040 is through the unfair labor practice provisions of the statute. RCW 41.56.140 enumerates unfair labor practices by a public employer:

> 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;**
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
>
> (4) To refuse to engage in collective bargaining.

The Commission has jurisdiction to determine and remedy unfair labor practices. RCW 41.56.160. The burden of proof in an unfair labor practice proceeding under Chapter 391-45 WAC rests with the complaining party, and must be established by a preponderance of the evidence.

To establish an "interference" violation under RCW 41.56.140(1), a complainant need only establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. City of Seattle, Decision 3066 (PECB, 1989); affirmed, Decision 3066-A (PECB, 1989). See, also, City of Pasco, Decision 3804-A (PECB, 1992), and cases cited therein. A showing that the employer acted with intent or motivation to interfere is not

required. Nor is it necessary to show that the employees concerned were actually coerced. It is not even necessary to show anti-union animus for an interference charge to prevail. Clallam County v. Public Employment Relations Commission, 43 Wn.App. 589 (1986). An employer commits a violation if it creates the impression that it is engaged in surveillance of employees engaged in protected activities, even if there was no actual surveillance. City of Longview, Decision 4702 (PECB, 1994).

Employer interrogation of individuals about protected union activities has long been held to constitute an interference violation. See, e.g., Shelton School District, Decision 485-B (EDUC, 1979). In Port of Tacoma, Decision 4646-A and 4627-A (PECB, 1995), an employer committed a violation when, among other things, it asked questions about pending grievances and union privileges during the course of a promotional interview. Those actions could have been perceived by employees as stifling union activity. In North Valley Hospital, Decision 5809-A (PECB, 1997), employees could reasonably have perceived an employer's discussions about union-related issues as a threat of reprisal associated with the exercise of rights protected by collective bargaining laws. An interference violation was found in City of Longview, supra, where the employer interrogated employees concerning discussions at closed union meetings.

RCW 41.56.140(2) prohibits employers from involving themselves in the internal affairs of unions. Proof of intentional employer action is necessary to find such a violation. Pierce County, Decision 1786 (PECB, 1983).

Application of Legal Standards

The issue in this case is whether the employer committed an unfair labor practice by asking a union officer to divulge, under threat of discipline, both the sources and content of his information about the proceedings before the "Lowry" board. A union official must be free to conduct union business without interference from the employer, and RCW 41.56.040 protects employees from disclosure of confidential information shared with their statutory representatives. On the other hand, a union and its officers have no right to protect sources outside the bargaining unit.

In refusing to divulge the information sought by the employer, Blystone asserted a privilege that was only operative if his contacts came from within the bargaining unit. Blystone testified:

> I received some calls from union members basically complaining about Steve Holmes' actions on the shooting review board. They were concerned that Steve was not acting as an advocate, but, in fact, was acting as an inquisitor and were somewhat concerned because he was asking questions which he had no knowledge of, and it appeared to the members that were going before the board that they were confused as to what his role was. Was he there to be our advocate and do the things that we profess in the union meetings all the time, or was he there as just another inquisitor?
>
> [Transcript, p. 47.]

The employer's own report on the internal investigation indicates that a "bargaining unit employees" source was communicated. Vick is quoted as having stated:

> The reason that this question is not being answered is that you have no right to ask a union president **what his members talk to him about,**

and:

> You have no right to do what you're doing anyway, but we're absolutely not going to divulge **when an employee comes to talk to their Union President about anything".**

We find the evidence sufficient to conclude that the employer knew or should have known that Blystone was protecting the confidences of bargaining unit members.

Miller nevertheless pursued the inquiry, asking Blystone who contacted him, what they told him, what they said in general terms, and how many individuals had he heard from regarding what was going on with the "Lowry" board. The employer has not shown that it had a good reason to ask the questions, and particularly to ask the questions under threat of discipline, once it knew or should have known that Blystone was protecting bargaining unit members. Thus, the employer committed unfair labor practices when it continued questioning Blystone about contacts with bargaining unit members.

The Commission recently addressed a similar issue in City of Vancouver, Decision 6732-A (PECB, 1999). In that case, the employer was in the process of interrogating bargaining unit employees and union officials, under threat of discipline, regarding statements made at private union meetings. This was done in conjunction with an internal affairs investigation concerning allegations that a bargaining unit member was being shunned, harassed, and threatened by other officers. We stated there that

employees could reasonably perceive the future possibility of interrogation as limiting their ability to freely communicate with fellow bargaining unit employees and to freely conduct union business in the confines of private union meetings, so that interrogation interfered with their collective bargaining rights under Chapter 41.56 RCW.

The case at hand also involves employer interrogation of a union officer about private conversations with other bargaining unit employee. As in City of Vancouver, employees could reasonably perceive the employer's questioning as delving into internal union communications. Such an action chills employees' exercise of their collective bargaining rights, sending a message to union officers and bargaining unit employees that their ability to freely communicate with one another and to conduct union business is limited.[4]

Collective Bargaining Statute Paramount

The employer argues that the review board proceeding at issue is entirely a creature of the employer's policy, and falls outside the scope of collective bargaining, and that the union, in attempting to assert a privilege where none exists, seeks to stretch the protections of Chapter 41.56 RCW beyond their reach. The Commission is guided by the ruling in Rose v. Erickson, supra. Additionally, the rights and obligations of Chapter 41.56 RCW clearly

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[4] Our decision in this case is limited to the facts of the case. A different conclusion would be indicated if the record did not support a conclusion that Blystone was protecting (and communicated to the employer that he was protecting) sources of information within the bargaining unit represented by the union.

prevail over conflicting City of Tacoma and Tacoma Police Department policies. In addition, we find nothing in the "Deadly Force Review Board" policy that would indicate the inquiries made of Blystone by Miller would be relevant or helpful to the determination of a review of an application of deadly force by an officer. Nor did the employer make a showing as to the relevancy of the inquiries. The employer has not persuaded us that it had a sufficient basis for requiring Blystone to answer the questions about conversations between him and bargaining unit members about union affairs.

NOW, THEREFORE, the Findings of Fact, Conclusions of Law, and Order issued by the Examiner in the above-captioned matter are REVERSED, and the Commission makes the following:

AMENDED FINDINGS OF FACT

1. The City of Tacoma (employer) is a "public employer" within the meaning of RCW 41.56.030(1). Phillip Arreola served as chief of police, James Hairston served as the deputy chief of police, and Michael Darland served as assistant chief of police, at all times pertinent to these proceedings.

2. Tacoma Police Union, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of non-supervisory uniformed personnel of the Tacoma Police Department. At all times pertinent to this complaint, Robert Blystone served as president of the union.

3. A "Deadly Force Review Board" was convened under Tacoma Police Department policies after Officer William Lowry was killed in

the line of duty on August 28, 1997. The review board was co-chaired by Deputy Chief Hairston and Assistant Chief Darland. Other persons excluded from the union's bargaining unit were appointed to the review board under the department policy, including a citizen member not employed in the department. Acting under the department policy, Blystone appointed a bargaining unit member, Detective Steve Holmes, to serve as a member of that board.

4. The review board was convened on October 21, 1997. Near the end of the day, Holmes and Darland engaged in a brief argument about the appropriate use of tactics in situations such as the one in which Officer Lowry was killed. The review board met again on October 22, 1997, but did not complete its work. Hairston scheduled the next meeting for October 30, 1997.

5. On October 24, 1997, Blystone received calls from union members who were witnesses before the "Lowry" board complaining about Holmes' action on the board. They were concerned he was not acting as an advocate, but as an inquisitor, that he was asking questions about which he had no knowledge. Members wondered whether Holmes was on the board as an advocate or another inquisitor. Blystone immediately called Holmes to discuss the situation. Holmes became upset during the call, asserted a belief that Blystone's call had been prompted by an employer official outside the bargaining unit, and expressed an opinion that Blystone was telling him how to vote.

6. Hairston was concerned that the work of the review board had been compromised, and he suspended further proceedings.

Hairston then directed the department's Internal Affairs Division to begin an investigation into Holmes' accusations.

7. By an "Internal Affairs Response Form - Notification for Interview", Blystone was directed to report to the internal affairs office on November 5, 1997, for an interview regarding a complaint made by Holmes, which alleged that Blystone attempted to influence the vote of the union appointee to the Use of Deadly Force Review Board.

8. The internal affairs interview was conducted on behalf of the employer by Sergeant Mike Miller. Blystone attended the interview, during which he was represented by the union's attorney, Christopher Vick. Blystone was given an interview form in which he had to answer five questions under threat of discipline for not answering. Blystone said he did not understand how the form applied to him as a union official, and he signed the form "under protest" and "under duress".

9. When questioned about his conversation with Holmes, Blystone disclosed his conversation with that bargaining unit member.

10. During the interview, Miller asked Blystone who contacted him prior to the phone call to Holmes. Blystone responded that, under the advice of counsel, he could not answer that question. Miller advised him that failure to answer questions and that one in particular could lead to discipline in and of itself, which could include dismissal. The union's attorney said then that Miller had no right to ask a union president what his members talk to him about, and that they were not going to divulge that information. After having been told

that Blystone and the union were protecting the confidences of bargaining unit members, Miller nevertheless asked Blystone what the individuals told him that led him to make the call to Holmes, asked him to say in general terms what they said, and asked how many individuals he heard from. Blystone told Miller, "I would gladly answer about my actions. But I'm not prepared at this time to answer questions about other union members coming to the union president in confidence." Blystone continued to answer some questions, but in response to those that involved union members talking to him, he stated it was privileged union communication and he was not prepared to answer those questions.

12. As of the date of these proceedings, Blystone had not been disciplined for his refusal to provide the information sought by the employer concerning the deadly force review board.

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By interrogating a union president about discussions the union president had with bargaining unit employees, the City of Tacoma has interfered with, restrained and coerced its employees in the exercise of their rights under Chapter 41.56 RCW, and has committed an unfair labor practice in violation of RCW 41.56.140(1), and interfered with the internal affairs of a union in violation of RCW 41.56.140(2).

AMENDED ORDER

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

a. CEASE AND DESIST from:

(1) Interrogating union officers or employees concerning discussions with members of Tacoma Police Union, Local 6.

(2) In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

(1) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

(2) Read the notice attached hereto and marked "Appendix" aloud at the next public meeting of the City Council of the City of Tacoma and append a copy thereof to the official minutes of said meeting.

(3) Notify the Tacoma Police Union, Local 6, in writing, within 30 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 Tacoma Police Union, Local 6 with a signed copy of the notice required by the preceding paragraph.

(4) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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 Executive Director with a signed copy of the notice required by the preceding paragraph.

Issued at Olympia, Washington, on the 12th day of January, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT interrogate employees concerning discussions between union officers and members of the Tacoma Police Union, Local 6.

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

WE WILL read this notice into the record of the next public meeting of the City Council, and append a copy thereof to the official minutes of such meeting.

DATED: _____

CITY OF TACOMA

By: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P.O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

603 EVERGREEN PLAZA BUILDING
P. O. BOX 40919
OLYMPIA, WA 98504-0919

RECORD OF SERVICE

THE ATTACHED DOCUMENT, IDENTIFIED AS: DECISION 6793-A - PECB HAS BEEN SERVED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION BY DEPOSIT IN THE UNITED STATES MAIL, ON THE DATE ISSUED INDICATED BELOW, 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/ BETTY PASSMORE

CASE NUMBER: 13544-U-97-03306 FILED: 11/17/1997 ISSUED: 01/12/2000

FILED BY: PARTY 2 DISPUTE: ER INTERFERENCE DETAILS: Discrimination for engaging in protected activities.

COMMENTS:

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