STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RENTON POLICE OFFICERS' GUILD, Complainant,	)	CASE 15837-U-01-4020
vs.	)	DECISION 7476-A - PECB
CITY OF RENTON, Respondent.	)	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

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On June 21, 2001, the Renton Police Officers' Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Renton (employer) as respondent. Two additional unfair labor practice complaints filed at the same time were given consecutive case numbers. The complaints were reviewed under WAC 391-45-110, and an absence of facts supporting a "domination" claim in the above-captioned case was pointed out in a deficiency notice issued on July 17, 2001. In a letter filed on July 25, 2001, the union acknowledged the problems noted in the deficiency notice. An order was issued on August 1, 2001, finding a cause of action to exist in the above-captioned matter on allegations summarized as:

> Employer interference with employee rights and discrimination against Guild President Mike Luther in violation of RCW 41.56.140(1), by

> comments of Police Chief Garry Anderson to Luther critical of a April 4, 2001, memo Luther sent to union members, in reprisal for Luther's union activities protected by Chapter 41.56 RCW.

The "domination" allegation in the above-captioned case was dismissed, along with one of the companion cases and some of the allegations in the other companion case. *City of Renton*, Decision 7476 (PECB, 2001). The employer filed an answer. A hearing was held on February 6, 2002, before Examiner Martin Smith. Briefs were filed by the parties to complete the record in this case.

Based on the evidence and arguments, the Examiner concludes that the employer did not commit any unfair labor practice. The complaint is DISMISSED.

BACKGROUND

The employer offers municipal services to 52,000 residents in south central King County, Washington, including operation of a police department. Approximately 120 sworn law enforcement officers work in the Renton Police Department, which is organized along the lines of "paramilitary" and chain-of-command principles under Chief of Police Garry Anderson and Assistant Chief Kevin Milosevich.

The union is the exclusive bargaining representative of all law enforcement officers in ranks below "commander" employed by the employer. The vast majority of the employees in that bargaining unit fall within the "patrol officer" and "police sergeant" classifications. Sergeant Mike Luther is the president of the union. The complaint in this case involves two meetings at Renton in 2001, and the communications between the chief and Luther.

Sergeant Luther has been employed in the department for 11 years. He currently heads the traffic division, where he is responsible for the direction of officers in that division. Luther had been active in the union since 1991, and became the union president on February 1, 2001.

In March of 2001, the chief held a management workshop termed a "command staff retreat" with participation by the chief, assistant chief and commanders of the department. Chief Anderson testified in this proceeding that the purpose of the meetings was to:

> [S]pecifically discuss some of the successes we've had in previous years, to discuss some of the issues that we needed to address in the following year, to set the vision for the department for the next couple of years. . . ."
>
> Transcript 126.

In particular, the retreat was used to re-draft the mission statement for the department. Union officials Mike Luther and Allen Ezekiel were asked to participate on the second day of the retreat, March 30, 2001.

Luther testified about an exchange that occurred late in the day on March 30, 2001, when he sought to learn how many employees would be funded and hired in the future. Luther asked Chief Anderson, however, "Where he saw the Renton PD personally in two or three years down the road." There was room for some miscommunication, and Anderson thought he was being asked to formulate a vision statement for the department so that, as chief, he could provide it directly to the force in the near future.

The chief responded to his perception of the question posed to him by Luther on March 30, 2001, by means of a draft "mission state-

ment" provided to attendees at a regular meeting of supervisory personnel held on April 3, 2001. That draft, consisting of at least two pages, addressed (1) expectations for the supervisors, (2) morale in the department, (3) internal investigations and misconduct, and (4) double standards for command staff discipline. The draft did not address operations or future staffing issues. Luther was required to attend the April 3 meeting in his capacity as head of the traffic division.

Anderson also used the April 3 staff meeting as the forum to hand out two other documents:

First, a draft of a new "vision statement" that mentioned improvements in an 800 MHz radio communications system, enhanced "professional standards . . ." and enhanced "personal integrity" in the department; and

Second, a summary of the retreat held on March 29-30, which listed successes in jail staffing, nuisance abatement, major crimes, auto theft and advanced training, but listed "needs improvement" with respect to the radio system, truthfulness, supervision and staffing/resources.

Luther testified that he was not pleased with the Chief's pronouncements. He drafted an untitled memorandum on the union's letterhead under date of April 4, 2001, stating:

> As everyone knows, Alan Ezekiel and I were invited to attend Fridays Staff Workshop. The invitation allowing us to participate was appreciated. . . .
>
> At the Staff meeting Yesterday, . . . I was both pleased and disappointed. Pleased because it appeared, Chief Anderson was willing to listen to the Guild, . . . Disappointed, at the lack of substance in the answer.

> Disappointed that Chief Anderson attributed his perception of our departments Morale to any conversations we had. . . .

Luther's memo went on to state that the union would defend the discipline process, that the union did not endorse untruthfulness of its members when asked questions by management, and that union members ought to generally uphold the standards for truthfulness they had sworn to upon employment in Renton.

Luther's memo was broadcast through the employer's e-mail system, at about 9:30 AM on April 4, 2001. At that point, Luther had not met with the traffic officers. Although some union members had not seen the memo by noon of that day, Luther deleted the memo just after noon on April 4 because it had "caused such a stir . . ."

Chief Anderson responded to Luther's memorandum by means of an e-mail message sent at 11:57 AM on April 4, 2001. Among his comments were:

> I am sorry to learn that [union] president Sergeant Luther has emailed the membership information identifying the "hottest topic" as the issue of truthfulness. I don't believe that topic emerged as the number 1 topic and I recall agreeing with the Guild that the number 1 topic was the 800 MHz trunked radio system and finding an alternative that is reliable, dependable and safe.

The remainder of Anderson's e-mail message constituted a re-capitulation of the command staff retreat, a summary of the successes in calendar year 2000, a list of organizational issues, and a modified mission statement. Anderson also mentioned that he had shared those ideas with the supervisors at the meeting held on

April 3, and indicated that he would do so again in a labor-management meeting to be held later that day, April 4, 2001.

The labor-management meeting was held at about 2:30 PM on April 4, 2001. The minutes of that meeting reflect that Luther, another union officer named Teeler, the chief and the assistant chief were present at that meeting. There was testimony that Luther and Anderson had a "chat" before the labor-management meeting, during which Anderson expressed concern that Luther was being "nonsupportive" and "non-positive" with respect to issues that sergeants and managers ought to be pro-active about, apparently in reference to the morale and discipline issues mentioned at the retreat on March 30 and in the mission statement. Luther thought Anderson was "obviously upset," stern, but clear.

No discipline was handed down to Luther or any other member of the RPOG bargaining unit. When Luther met with his traffic division staff on April 5, 2001, he delivered a report that was supportive of the activities at the retreat held in March and of the chief's mission statement.

POSITIONS OF THE PARTIES

The union contends that the chief's actions constituted unfair labor practices under RCW 41.56.140(1) and (3), because they were directed towards a union official. It alleges that a perception was created that Mike Luther was being disciplined for insubordination, largely for raising union-related issues in meetings.

The employer contends that an independent interference violation cannot be found here under Chapter 41.56 RCW. It points out that

no discipline of Sergeant Luther for insubordination was ever discussed or threatened by Chief Anderson. The employer urges that the union was not harmed or threatened, and that its representation of bargaining unit members was not imperiled.

DISCUSSION

Narrow Scope of Issues

After the issuance of a deficiency notice and partial order of dismissal, the preliminary ruling in this case outlined two narrow issues:

1. Alleged employer interference with union official Mike Luther related to the e-mail message Luther sent to union members (but over the employer's e-mail system) on April 4, 2001; and

2. Alleged employer discrimination against Luther by comments directed to Luther by the chief.

Hence analysis of this case remains confined to the communications between the chief and that one union official.

Legal Standards

Chapter 41.56 RCW prohibits discrimination in reprisal for the exercise of collective bargaining rights (emphasis added):

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES 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.

Enforcement of that statutory protection is through the unfair labor practice provisions of Chapter 41.56 RCW (emphasis added):

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

The authority to hear, determine, and remedy unfair labor practices is vested in the Commission by RCW 41.56.160.

The Supreme Court of the State of Washington has established the "substantial motivating factor" test as the standard for "discrimination" cases. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A discrimination violation occurs under Chapter 41.56 RCW when an employer takes action as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994); *Mansfield School District*, Decision 5238-A (EDUC, 1996). Thus:

- A complainant has the burden to establish a prima facie case of discrimination, including that: (1) the employee has

participated in protected activity or communicated to the employer an intent to do so; (2) the employee has been deprived of some ascertainable right, benefit or status; and (3) there is a causal connection between those events.

- If a prima facie case is made out, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions.

- The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that: (1) the reasons given by the employer were pretextual; or (2) union animus was nevertheless a substantial motivating factor behind the employer's action.

In contrast to the complex standard and procedure for evaluating "discrimination" claims, an "interference" violation will be found under RCW 41.56.140(1) if an employer action is reasonably perceived by employees as a threat of reprisal or force or promise of benefit associated with the pursuit of lawful union activities protected by RCW 41.56.040. *City of Tukwila*, Decision 4968 (PECB, 1995); *Skagit County*, Decision 6348 (PECB, 1998).

Application of Standard

The Prima Facie Case - Exercise of Protected Right -
The union satisfied the first element of the prima facie case. Sergeant Luther was clearly identified as the union president, and the employer was aware that Luther spoke for the union on labor-management issues. Further, Luther was clearly "wearing his union hat" when he was invited to participate — as a union representative — at the meeting held on March 30, 2001. Even if his means of communication might have been called into question under

Commission precedents such as *City of Seattle*, Decision 3066 (PECB, 1989), Luther was clearly exercising rights protected by RCW 41.56.040 when he sent his e-mail to bargaining unit members on April 4, 2001.

The Prima Facie Case - Deprivation -

The union has failed to establish that Luther was deprived of any ascertainable right, status, or benefit. It is clear that there was no discipline of Luther — or even an internal investigation — related to the events in March and April of 2001. This case concerning an e-mail message voluntarily withdrawn by its author is not even comparable to *North Valley Hospital*, Decision 5809-A (PECB, 1997), where the Commission agreed that issuance of a written warning telling an employee that she was not to make any more phone calls (especially to the Public Employment Relations Commission) constituted an actionable deprivation. The Renton circumstances are more benign yet, and absence of any interrogation of other employees or related misconduct further distinguishes this case from *North Valley Hospital*.

The Prima Facie Case - Causal Connection -

A finding that the employer knew of Luther's union activity is not enough, standing alone, to establish a causal connection. In previous cases where the Commission has found a causal connection, there has generally been evidence of employer anti-union animus, such as:

- In *Mansfield School District*, Decision 5238-A (EDUC, 1996), the superintendent of schools exhibited strong anti-union sentiments through statements to a union activist in which he indicated that he saw her as the union, and that he would break her in order to break the union. Further support for finding an anti-union animus in that case was found in remarks

made by the same employer official to the effect that he and his wife were not in favor of unions (made to his secretary and to another bargaining unit member), and to the effect that unions were unimportant and a barrier to direct dealing with individuals. Additionally, a pattern of anti-union animus was indicated in that case by the record in an earlier unfair labor practice proceeding.

- In *City of Winlock*, Decision 4783-A (PECB, 1995), anti-union animus was inferred where the employer vigorously opposed a representation petition, an employer official told a union adherent, "you're making [the mayor] crazy with this union thing," the employer complained of "union problems," and testimony that the employer was "dealing with the union matter" indicated a negative reaction to employees' exercise of protected activity.

- In *City of Federal Way*, Decision 4088-A (PECB, 1993), *aff'd*, Decision 4088-B (PECB, 1994), an employer's letters to employees as part of a vigorous anti-union campaign leading up to an election campaign showed anti-union animus.

- In *Educational Service District 114*, *supra*, the employer engaged employees in discussions about the need for a union, the employer commented to a union activist that she had become a "rebel," and the employer warned an employee that there would be adverse employment consequences if he persisted in union activity.

Even though anti-union animus can be inferred from a wide variety of employer behavior, the Examiner finds no evidence here of the anti-union animus found in previous cases.

In some past cases, the timing of adverse actions in relation to protected union activity has provided circumstantial evidence of a

causal connection satisfying the prima facie case test. *See City of Winlock, supra; Mansfield School District, supra; Kennewick School District*, Decision 5632-A (PECB, 1996). While the events at issue in this case all occurred within a matter of a few days, that does not overcome the absence of any actionable deprivation and the absence of any correlating union animus.

Mixed Roles Contribute to Confusion

The Examiner rejects the union's assertion that an independent "interference" violation occurred because Sergeant Luther "wore his sergeant hat" at the right times and "wore his Guild president hat" at (different) right times. Indeed, the Examiner observes that the parties have fostered ambiguity and a potential for conflicts of interest by leaving the commander of the employer's traffic unit in the same bargaining unit with the rank-and-file employees in that unit. The "reasonably perceived" test must be applied in the context that Luther was called upon to wear two hats, and to keep his two roles separate.

The potential for supervisory personnel to be conflicted in their role(s) is not unique to this case. Under WAC 391-35-340, which was adopted to codify years of Commission and judicial precedents, persons who exercise supervisory authority on behalf of an employer over subordinate employees are routinely excluded from the bargaining units containing their subordinates. Even though "supervisors" are employees within the meaning of Chapter 41.56 RCW who have full collective bargaining rights under *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), the fundamental policy basis for the separation of supervisors from rank-and-file employees is the avoidance of conflicts of interest. *See City of Richland*, Decision 279

(PECB, 1977); *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981).

When Anderson and Luther had their various encounters on April 3 and 4, 2001, circumstances dictated that Sergeant Luther, who was new to his role as president of the union, be fully aware of when he wore a union hat and when he wore a supervisors' hat, and how his behavior would be interpreted vis-a-vis either role. A union official is never immune from criticism of his or her day-to-day work merely by reason of being a union official, and a union official who accepts the increased status and pay usually associated with being a supervisor should reasonably expect greater criticism and scrutiny concerning operational issues than if he or she was merely a rank-and-file employee. Hence, it is not the employer alone who muddied the waters or confused matters when Chief Anderson responded to criticism from Luther. The chief had a right to expect that his criticisms of Luther concerning operation-related issues would be perceived as such, and not as an attack on the union or any collective bargaining rights; under these ambiguous circumstances, the manager had a right to dictate which "hat" Luther should be wearing.

The fact pattern that ultimately distinguishes this case is the nature of the criticism of Luther. Chief Anderson was questioning Luther's commitment to management and supervisory authority using a very low level of criticism in his rhetoric. A sergeant in a police department should be accustomed to interacting with the chief and other managers in frank discussions; union officials should be accustomed to controversial situations, and can be expected to receive and interpret harsh words, criticism, and displeasure. For this reason, a local union president needs to be less worried about coercion and threats than does a patrol officer attending his or her first bargaining session. The longer a union

official is involved in representing the interests of bargaining unit employees, the less reasonable are their claimed perceptions of threats and coercion. This acquisition of thicker skin has been recognized by the National Labor Relations Board in cases such as *Premier Rubber Co.*, 272 NLRB 466; 117 LRRM 1406 (1984), where the employee who claimed to have been "targeted" overtly supported the union, and where the employer's alleged questions about attendance at union meetings or negative comments about his union badge were found to be innocuous questions and non-coercive expressions of opinion. The following circumstances persuade the Examiner that no "interference" violation occurred here:

- Chief Anderson's comments were opinions, not policies, and were in response to Sergeant Luther's opinions, not any particular action on Luther's part;

- Unlike the situation in *City of Omak*, Anderson's memo was not a general "storm warning" to all the officers on the force; he was not venting displeasure at general morale problems, displeasure, or crankiness;

- Luther's own testimony that Anderson was not angry calls into question whether any perception of a "threat of reprisal or force" could be deemed reasonable;

- Luther's own testimony was that he hoped he had conveyed the chief's concerns in a positive manner when he met with his traffic squad on April 5, 2001, and that he agreed "with everything on his [chief's] list so I would have no reason to take it back in a negative way," (Transcript 100) which calls into question whether he reasonably perceived any threat;

- Chief Anderson's testimony concerning the conversation held 10 minutes before the labor-management meeting on April 5 was that Luther had crossed the line in the April 4 e-mail

message, and that Luther was "on [the chief's] dime" when he was attending meetings as traffic supervisor, and that he was baffled by the comments that he had not made a substantive answer, all of which are found to be honest, benign opinion-setting in the context of the relationship between the department head and a supervisory employee, so that the response from Anderson had to be exactly what Luther expected;

- None of the comments made by Anderson were coercive or threatening, even if taken in the context of delivery between a department head and a union president; and
- No discipline, implied or inferred, was meted out against Sergeant Luther or other members of the traffic division.

The Examiner cannot find an independent "interference" violation on the part of the City of Renton from these facts.

FINDINGS OF FACT

1. The City of Renton, a public employer within the meaning of RCW 41.56.030, operates a police department under the direction of Chief of Police Garry Anderson.

2. The Renton Police Officers' Guild, a bargaining representative within the meaning of RCW 41.56.030, is the exclusive bargaining representative of law enforcement officers employed by the City of Renton below the rank of Commander. At the time relevant to this proceeding, Sergeant Mike Luther was both the president of the union and a supervisory employee heading the traffic division within the department.

3. In March of 2001, Luther and another union official attended a management retreat at the invitation of the employer. Near

the end of that meeting, Luther posed questions to the chief concerning the "direction of the department . . ." The chief did not respond to that question at that time.

4. Subsequent to the management retreat described in paragraph 3 of these findings of fact, and in response to the questions asked by Luther about the direction of the department, the chief prepared a draft of a mission statement for the department. That draft was presented at a staff meeting held on April 3, 2001, where Luther was in attendance in his capacity as head of the traffic division, and at a meeting held on April 4, 2001.

5. On April 4, 2001, Luther sent a memorandum to department employees by means of the employer's electronic mail system, in which he expressed disappointment with the level of response from Chief Anderson regarding the mission statement and morale issues in the department. Receipt of that e-mail message "caused a ruckus" within the department.

6. Chief Anderson responded to the e-mail message described in paragraph 5 of these findings of fact with his own e-mail, and also talked with Luther in the afternoon of April 4, 2001. Luther was told the chief interpreted the e-mail message as being non-supportive of the chief's direction for the police department.

7. Although the chief told Luther during the conversation described in paragraph 6 of these findings of fact that the chief thought that a mistake had been made, the chief did not order Luther to retract the message. Luther had already deleted the e-mail earlier in the day of April 4, 2001.

8. Luther and another union official met with the chief and assistant chief at a labor-management meeting held in the afternoon of April 4, 2001. Issues unrelated to the events of March 30, April 3 and April 4 were dealt with and resolved in the normal manner, and in good faith.

9. No discipline of Sergeant Luther was ever discussed or imposed in regard to the events of March 30, April 3 and 4, 2001.

CONCLUSIONS OF LAW

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

2. By its actions as described in paragraphs 3 through 9 of the foregoing findings of fact, the City of Renton did not discriminate against or interfere with union president Mike Luther in his exercise of rights guaranteed by RCW 41.56.040, and has not committed any unfair labor practice under RCW 41.56.140(1) or (3).

ORDER

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

Issued at Olympia, Washington, on the 8th day of November, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, 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.