STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 120, Complainant,	)	CASE 16607-U-02-4328
vs.	)	DECISION 8031-B - PECB
CITY OF TACOMA, Respondent.	)	DECISION OF COMMISSION

Audrey B. Eide, General Counsel, for the union.

G. S. Karavitis, Senior Assistant City Attorney, for the employer.

This case comes before the Commission on a timely appeal filed by Washington State Council of County and City Employees, Local 120 (union) seeking to overturn a dismissal order issued by Examiner J. Martin Smith.[1] The City of Tacoma (employer) supports the Examiner's decision. We affirm the Examiner's result.

BACKGROUND

The union represents office-clerical, administrative and professional employees within the employer's Public Utilities Department.

On August 13, 2002, the union filed a complaint alleging that the employer committed unfair labor practices by suspending a bargain-

[1] *City of Tacoma*, Decision 8031-A (2004).

ing unit employee, Ingrid Fields, for contacting her union representative about workplace issues. The union argues that the suspension of Fields constituted interference with employee rights and discrimination for engaging in union activity, in violation of RCW 41.56.140(1).[2]

In his decision issued on March 15, 2004, the Examiner held that the record as a whole did not support a finding that the employer's instruction to Fields to contact her supervisor regarding workplace issues constituted employer interference with employee rights in violation of RCW 41.56.140(1). The Examiner also held that the union failed to make out a prima facie case of discrimination. The Examiner found that the record did not support a conclusion that Fields' discipline was based on her seeking out union assistance, rather than for her insubordinate conduct and poor attendance record. The union filed a timely appeal challenging the Examiner's dismissal of its case.

ANALYSIS

Standard of Review

This Commission reviews the findings of fact issued by examiners, to determine whether they are supported by substantial evidence

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[2] The union also checked boxes on the complaint form to allege violations of RCW 41.56.140(3) (employer discrimination for filing charges or giving testimony) and RCW 41.56.140(4) (employer refusal to bargain), but a deficiency notice issued on February 7, 2003, indicated it was not possible to conclude that a cause of action existed with respect to those two charges. The union did not respond within the 21 days allowed, and those two charges were dismissed. *See City of Tacoma*, Decision 8031 (PECB, 2003).

presented on the record as a whole. If the evidence supports the examiner's findings of fact, the Commission reviews the conclusions of law issued by examiners to determine whether they are supported by the findings of fact. *Cowlitz County*, Decision 7007-A (PECB, 2000).

Procedural Issues

Examiner's Decision to Allow Employer to Amend Its Answer - At the close of the hearing, the employer made a motion to amend its answer to conform with the evidence presented at hearing. The Examiner granted that motion. On appeal, the union contends the Examiner erred by allowing the employer to amend its answer after the opening of the hearing.

Paragraph 2 of the union's complaint referred to the employer's letter of July 2, 2002, notifying Fields of its intention to suspend and stating:

> On or about July 2, 2002, Ms. Fields received a Notice of Intent to Suspend outlining allegations of misconduct on her part. Included in the allegations was a citation that on February 7, 2002 Ms. Fields contacted her union representative about a problem rather than going directly to her supervisor, Sue Daulton, as she had been instructed, and that this constitutes insubordination.

In its answer filed on May 1, 2003, the employer admitted to the second paragraph of the union's complaint, but denied in paragraph 4 of its answer that Fields was suspended for contacting the union in advance of contacting her supervisor.

At the hearing, the union presented the July 2 letter as evidence, and claimed the letter indicated Fields' discipline was based on her contacting her union representative. Employer witnesses

testified that the suspension was based on Fields' insubordination, and was not based on her contacting her union representative.

The Commission's rules allow for an amendment to a respondent answer as follows:

> WAC 391-45-210 ANSWER -- CONTENTS -- AMENDMENT -- EFFECT OF FAILURE TO ANSWER. (1) An answer filed by a respondent shall specifically admit, deny or explain each fact alleged in the portions of a complaint found to state a cause of action under WAC 391-45-110. A statement by a respondent that it is without knowledge of an alleged fact, shall operate as a denial. An answer shall assert any affirmative defenses that are claimed to exist.
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> (2) Counterclaims by a respondent against a complainant shall be filed and processed as separate cases, subject to procedures for consolidation of proceedings.
>
> (3) Motions to amend answers shall be acted upon by the examiner, subject to the following limitations:
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> (a) Amendment shall be allowed whenever a motion to amend the complaint has been granted;
>
> (b) Amendment may be allowed prior to the opening of an evidentiary hearing, subject to due process requirements;
>
> (c) *After the opening of an evidentiary hearing, amendment may only be allowed to conform the pleadings to evidence received without objection, upon motion made prior to the close of the evidentiary hearing.*
>
> (4) If a respondent fails to file a timely answer or fails to specifically deny or explain a fact alleged in the complaint, the facts alleged in the complaint shall be deemed to be admitted as true, and the respondent shall be deemed to have waived its right to a hearing as to the facts so admitted. A motion for acceptance of an answer after its due date shall only be granted for good cause.

(emphasis added). The union asserts that it was prejudiced from fully presenting its case based upon its reliance of the employer's admission to paragraph 2 in union's complaint. Allowing that the union is correct in asserting that the Examiner erred in

allowing the employer to amend its answer over the union's objections in this case, that error does not affect the outcome of the case.

The record as a whole supports a conclusion that the employer did not need to amend its answer with respect to paragraph 2 of the complaint in this case:

- The July 2 letter which stated the employer *intended* to suspend Fields for failing "to seek out Daulton to mediate your disputes as [Fields had] been instructed to do previously" was only a preliminary *notice* of the potential charges against Fields. That it was not either the employer's findings of fact or an order suspending Fields is evidenced by the title of the letter ("Notice of Intent to Suspend") and by statements allowing Fields to respond orally or in writing to what was then only "*proposed*" discipline.
- An administrative hearing panel report issued on July 19, 2002, after Fields had an opportunity to present her case, was the final order suspending Fields.

Paragraph 4 of the employer's answer was sufficient to raise the defense, even without amendment of paragraph 2 of the answer.

Union's Interference Claim

Applicable Legal Standards -

Chapter 41.56 RCW prohibits employer interference with or discrimination against the exercise of collective bargaining rights. RCW 41.56.040 provides in part:

> [N]o 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.

RCW 41.56.140(1) enforces those statutory rights, by establishing that an employer who interferes with, restrains, or coerces public employees in the exercise of their collective bargaining rights commits an unfair labor practice.

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The employee is not required to show an intention or motivation to interfere on the part of the employer to demonstrate an interference with collective bargaining rights. *See City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced or that the employer had an anti-union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Application of Standard -

The union argues that the record supports a finding that the employer punished Fields for contacting her union representative when she felt threatened by a contract worker, rather than first going to her supervisor. However, careful examination of the record as a whole supports a conclusion that Fields was not punished for exercising her statutory rights under Chapter 41.56 RCW. Rather, she was punished for not also communicating with her supervisor, as instructed, about problems with an outside contractor.

At the time of the alleged interference, the employer had contracted with an independent company (Cap Gemini) to assist with several computer projects. The contractor's arrangements with the employer called for the contractor's employees to act as the "technical lead" for the contracted for work, meaning they were to assume responsibility for the completion and oversight of the project. However, the employer and its representative, Sue Daulton, retained all disciplinary and personnel authority. Daulton testified that, following a series of incidents involving Fields and contractor personnel, she instructed Fields to contact her first in the event of future conflicts to prevent work problems, including a loss of productivity.

The union asserts that Fields could reasonably have understood Daulton's statement to mean that Fields was not supposed to contact her union representative, and that she could reasonably perceive that she was punished because she did so. However, the testimony of Fields and Daulton, as well as the context in which Daulton's order was presented, demonstrate that a reasonable employee would not have viewed Dalton's instructions as ordering Fields to not contact her union. In fact, Fields testified that she understood Daulton's instruction to mean that she could always contact her union representative regarding workplace issues with contractor personnel, although Daulton wanted to be contacted first. The union's assertion about what a reasonable employee would have perceived is misplaced.

The documentary evidence supports the Examiner's finding that Fields was suspended because of her failure to follow a legitimate instruction, and not because of any action taken by Fields to exercise her rights under Chapter 41.56 RCW. The employer's July 19, 2002, Administrative Hearing Panel Report states that her suspension is based, in part, on a:

> Willful violation of . . . a reasonable regulation, order or direction made or given by a superior officer where such violation has amounted to insubordination or serious breach of proper discipline[.]

To support its conclusion that Fields was suspended for failing to follow a reasonable order or direction by her supervisor, the panel stated in its findings:

> With respect to calling the union prior to notifying the supervisor of the developing problem, the panel cannot agree with the attempt by the employee to call this an unfair labor practice. The usual practice in any workplace, except where personal safety is an issue, is to do the work ordered and then pursue the grievance.

Thus, the operative document behind the suspension evidence supports the Examiner's findings that the suspension was based on Fields' failure to follow a legitimate employer instruction, and that the discipline cannot be a basis for an interference claim.

Union's Discrimination Claim

Applicable Legal Standards -

A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. *See Educational Service District 114*, Decision 4361-A (PECB, 1994), where the Commission embraced the standard established by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A discrimination violation can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so;

2. The employee is discriminatorily deprived of some ascertainable right, benefit or status; and

3. There is a causal connection between the exercise of the legal right and the discriminatory action.

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. It does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995). 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 the reasons given by the employer were pretextual, or by showing that the union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Application of Standards -
The discrimination allegation arises from the union's belief that Fields was suspended for contacting her union representative. However, the Examiner properly found that the union failed to make out a prima facie case.

A prima facie case of discrimination requires proof of a causal connection between the employee's union activity and the disputed employer action. In this case, the union failed to demonstrate that the employer bore any sentiment against the collective bargaining process. Furthermore, nothing in this record establishes any generalized or specific animus by the employer or any of its officials against the union.

The union claims that the Administrative Panel Hearing Report speaks for itself, but that document issued on July 19, 2002,

clearly demonstrates that Fields was suspended for not following a reasonable order of her supervisor, and not for contacting her union representative. The union thus failed to provide sufficient evidence to support a causal connection between any of Fields' union activities and the suspension imposed by the employer.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner J. Martin Smith are affirmed and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission with the exception of Paragraph 8 of the Findings of Fact, which is stricken from the decision.

Issued at Olympia, Washington, the 29th day of October, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner

PAMELA G. BRADBURN, Commissioner