STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 286, Complainant,	)	CASE 18720-U-04-4757
vs.	)	DECISION 8956-A - PECB
DIERINGER SCHOOL DISTRICT, Respondent.	)	DECISION OF COMMISSION

Diana Rollins, Director of Organizing, for the union.

Dionne & Rorick, by *Jeffrey Ganson,* Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by Dieringer School District (employer) seeking to overturn a portion of the Order issued by Examiner David I. Gedrose.[1] The International Union of Operating Engineers, Local 286 (union), did not file a response to the appeal. We reverse the Examiner's decision and dismiss the complaint.

ISSUE PRESENTED

The union's original complaint asserts that the employer discriminated against and interfered with the protected rights of two employees, both of whom held the same position, and both of whom were supervised by the same individual. The Examiner dismissed the claims that employer discriminated against and interfered with one

[1] *Dieringer School District,* Decision 8956 (PECB, 2005).

of the employees, and neither party appeals that decision, but found that the employer committed an unfair labor practice by interfering with protected rights when it issued Kathi Wambach (Wambach) an unsatisfactory performance evaluation and letter of warning.[2]

Examining the applicable statutes, rules, and case law, we conclude that the Examiner incorrectly found that the union established a claim of improper interference and discrimination.

STANDARD OF REVIEW

This Commission does not conduct a de novo review of examiner decisions in unfair labor practice proceedings issued under Chapter 391-45 WAC. Rather, we review findings of fact to determine whether they are supported by substantial evidence and, if so, whether those findings of fact support the conclusions of law and the order. *Cowlitz County,* Decision 7007-A (PECB, 2000). Substantial evidence exists if the record contains competent, relevant and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings. *Ballinger v. Department of Social and Health Services,* 104 Wn.2d 323 (1985).

ANALYSIS

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, applies to this case, and the applicable provisions of that Act provide:

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[2] The union did not appeal the Examiner's decision dismissing similar allegations involving employee Laurie Garman.

> 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;
> . . .
> (3) To discriminate against a public employee who has filed an unfair labor practice charge[.]

Applicable Legal Standard - Interference Claims

An interference violation will be found 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 other employees. *King County,* Decision 6994-B (PECB, 2002). The burden of proof to establish an interference violation is not particularly high, but the complainant must still establish its claim by a preponderance of the evidence. *See Pasco Housing Authority,* Decision 5972-A (PECB, 1997).

Applicable Legal Standard - Discrimination Claims

In determining claims of discrimination, we have consistently used the three-prong burden-shifting test endorsed by the Washington State Supreme Court in *Wilmot v. Kaiser Aluminum,* 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority,* 118 Wn.2d 79 (1991):

1. The injured party must establish a prima facie case of retaliation by showing the exercise of a statutorily protected right or communicating to the employer an intent to do so; that the employee has been deprived of some ascertainable right, benefit or status; and that there is a causal connection between the exercise of the legal right and the discriminatory action.

2. To rebut the prima facie case, the employer must articulate legitimate, nonretaliatory reasons for its actions by producing evidence sufficient to warrant a finding that its action was taken for nondiscriminatory reasons.

3. The complainant must then show that the stated reason for the employer action was pretextual and was in fact in retaliation for the employee's exercise of statutory rights by direct or circumstantial evidence showing that the reasons given by the employer were pretextual or that union animus was nevertheless a motivating factor behind the employer's action.

City of Tacoma, Decision 8031-A (PECB, 2004); *Brinnon School District,* Decision 7210-A and 7211-A (PECB, 2001).

The exercise of protected activity has been found to include the filing of a grievance or unfair labor practice complaint, *Mukilteo School District,* Decision 5899-A (PECB, 1997); union organizing activity, *Asotin County Hosing Authority,* Decision 2471-A (PECB, 1987); and acting as the union president and participating in collective bargaining with the employer, *Oroville School District,* Decision 6209-A (PECB, 1998).

The evidence of protected activity must contain more than a mere allegation of engaging in protected activity. For example, in *Port of Seattle,* Decision 6854-A (PECB, 2001), an employee claimed that the employer discriminated against him for his exercise of protected activity, including the filing of mulitple grievances. The Commission dismissed the case, noting that the employee's claims were unsupported by any evidence such as the date, nature, and outcomes of the grievances, or any other corroborating information to support the employee's claims.

Application of the Standard

Here, the Examiner determined that Wambach had engaged in protected activity, that she was singled out and discriminated against for such activity, and that the employer's defense of its actions was pretextual. The Examiner also found that the employee's rights had been interfered with as she reasonably believed that the action taken against her was due to her union activities.

In finding for the union, the Examiner noted that Wambach participated in a survey of employees' negative opinion of Supervisor Frederick Streek, the results of which were presented to the superintendent in a letter. He also credited the testimony of Wambach's co-workers, who stated that she was the shop steward and would speak up for them to the supervisor.

Having found evidence of protected activity, the Examiner reviewed the employer's reasons for the negative actions and found them to be pretextual. At hearing, Streek testified that he based the unsatisfactory evaluation, the improvement plan and letter of warning on Wambach's record of lateness and failure to keep her bus clean. However, the Examiner found fault with Streek's testimony that Wambach had a record of lateness, specifically noting that the previous incidents cited by the supervisor were several years old, and that the only record of lateness was one hand-written page containing numbers and initials, and even then the Examiner found that the employer failed to adequately explain his formula for issuing a performance plan or letter of termination.

Finally, the Examiner found that the timing of the survey and the negative evaluation were critical, and he found that Streek did not adequately explain how a 25-year employee with one unsatisfactory evaluation was on the verge of losing her job. The Examiner

credited the testimony of Wambach's co-workers that they had also been late during the one-month period in question but had not been disciplined, and that they had observed her bus to be clean.

On appeal, the employer argues that the Examiner erred in his application of the discrimination test, that the employee did not engage in protected activities, that the employer was not aware of her union activities, and that the reasons for the negative evaluation were legitimate. The employer also argues that the interference claim fails on similar grounds.

We find that the union has not established that Wambach was engaged in a statutorily protected right, and substantial evidence on this record does not support the findings that Wambach was involved in any union activity. Having failed to establish any union activity, the inquiry stops there and an analysis of the remainder of the applicable tests for interference and discrimination are unnecessary.

The record reveals the existence of a "survey" which is a letter from the union business agent to the superintendent regarding Streek.[3] Wambach's name or participation in the preparation of the letter are not evident. The only involvement on her part was that she was present when the letter was given to the superintendent. Being present when a letter is delivered does not rise to the level of union activity contemplated by the statute. She was not acting in any official union capacity, she was not author of the letter, nor is any grievable or actionable matter identified in the letter.

There was also testimony in the record that Wambach stood up for her co-workers before the supervisor who was responsible for the

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[3] Exhibit 11.

negative evaluation. However, such evidence is too generalized and unspecific to rise to the level of union activity. Wambach was not identified by the union to the employer as a union representative or shop steward. No specific dates, times, or places of Wambach's defense of her co-workers were offered into evidence. The co-workers could not testify as to any particular issue or grievance or the specific manner in which Wambach was said to represent them. Allowing such generalized evidence to be accepted as union activity would open up a slippery slope of how union action would be defined. Any individual at any time could speak to a supervisor on a co-worker's behalf about anything and would be found to be engaged in protected activity. Such a broad definition is not contemplated by the statute.

Since the record fails to establish any union activity, it is unnecessary to proceed to the remainder of the tests for interference and discrimination. Without any union activity, Wambach could not have reasonably perceived that the negative actions were taken in retaliation and that any interference could have occurred. Also, it is unnecessary to examine whether the employer's actions were legitimate, although they appear suspect on several levels. If there had been evidence of union activity, the employer's action could be pretextual given the employee's employment history and the lack of action taken against other employees. However, without any evidence of union activity, the Commission does not have jurisdiction to remedy this injustice.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

1. The Dieringer School District is a public employer within the meaning of RCW 41.56.030(1).

2. The International Union of Operating Engineers, Local 286, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of classified employees within the transportation and maintenance departments of the Dieringer School District.

3. Kathi Wambach and Laurie Garman are classified employees of the Dieringer School District and are represented for collective bargaining purposes by International Union of Operating Engineers, Local 286.

4. The union failed to sustain its burden of proof for its claim that Laurie Garman engaged in activities protected by Chapter 41.56 RCW, between January 26, 2004, and July 26, 2004.

5. The union failed to sustain its burden of proof for its claim that Kathi Wambach engaged in activities protected by Chapter 41.56 RCW, between January 26, 2004, and July 26, 2004.

AMENDED 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. On the basis of Finding of Fact 4, the Dieringer School District did not discriminate against Laurie Garman or interfere with her collective bargaining rights in violation of RCW 41.56.140(1).

3. On the basis of Finding of Fact 5, the Dieringer School District did not discriminate against Kathi Wambach or interfere with her collective bargaining rights in violation of RCW 41.56.140(1).

AMENDED ORDER

The complaint alleging unfair labor practices filed in Case 18720-U-04-4757 is DISMISSED on the merits.

Issued at Olympia, Washington, the 11th day of April, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

Commission Douglas G. Mooney did not participate in the consideration or decision of this case.