

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE SCHOOL DISTRICT,)	
)	
Employer.)	
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ROBERT FEMIANO,)	
)	
Complainant,)	CASE 19944-U-05-5062
vs.)	
)	DECISION 9355-B - EDUC
SEATTLE EDUCATION ASSOCIATION,)	
)	
Respondent.)	ORDER OF DISMISSAL
)	
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ROBERT FEMIANO,)	
)	
Complainant,)	CASE 19945-U-05-5063
vs.)	
)	DECISION 9356-A - EDUC
SEATTLE SCHOOL DISTRICT,)	
)	
Respondent.)	ORDER OF DISMISSAL
)	
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Robert Femiano appeared on his own behalf.

Michael Gawley, Attorney at Law, for the Seattle Education Association.

Faye Chess-Prentice, Attorney at Law, for the Seattle School District.

On November 18, 2005, Robert Femiano filed complaints against the Seattle School District (employer) and the Seattle Education Association (union). Femiano is a teacher and the controversy concerns his transfer from one school to another within the district in May of 2005. He alleged that the union revealed to the employer that he had requested information regarding the school budget for substitute employees and that the employer had transferred him to another position in retaliation for requesting such information. Examiner Carlos R. Carrión-Crespo held a hearing on

the matter on June 26-28, 2007. The parties filed post-hearing briefs.

ISSUES PRESENTED

1. Was the complaint against the union filed in a timely fashion?
2. Did the union induce the employer to commit an unfair labor practice when it allegedly revealed to the employer that Femiano had requested budget information?
3. Did the employer discriminate against Femiano by transferring him to another school?
4. Did the employer interfere with Femiano's collective bargaining rights by transferring him to another school?

The Examiner rules that the union did not induce the employer to commit an unfair labor practice in violation of RCW 41.56.150(2), that the employer did not transfer Femiano as a result of his protected activities, and that neither the union or the employer interfered with his protected employee rights in violation of RCW 41.56.150(1). The charges against the union and the employer are dismissed.

DISCUSSION

Issue 1: Timeliness

The union argues that the complaint was filed fifteen months after the event that gives rise to this charge. That is, after the union had allegedly informed the employer that Femiano had initiated a request for information regarding the school budget.

Applicable Legal Principle

The Commission does not have jurisdiction over complaints filed more than six months after the alleged unfair labor practice

occurred. RCW 41.59.150(1). This period begins to run when the complainant knows, or should know, of the violation, or when the complainant received constructive notice of the action. *Seattle School District (Washington Education Association)*, Decision 9355-A (EDUC, January 31, 2007).

Application

On or around August 25, 2005, an investigator from the Washington Safety and Health Administration (WISHA) provided Femiano with a copy of a summary of a statement that the school's principal, Carol Coram, had provided on July 12, 2005. As Coram confirmed in the hearing, the statement included Coram's assertion that she felt harassed because Femiano had accused her of misuse of funds. Upon reviewing the statement, Femiano inferred that the union had told Coram that he had made the request for the budget information, and therefore the union had induced the employer to transfer him to another school. Femiano filed the present complaint against the union based on such inference on the above-mentioned date, less than six months after receiving the document, which constituted constructive notice of the alleged violation by the union. The Examiner rejects the union's contention on timeliness.

Issue 2: Union Inducing Employer to Discriminate Against and Interfere with Femiano

Applicable Legal Principles

The Commission determines and remedies unfair labor practice complaints involving certificated employees under RCW 41.59.140. RCW 41.59.140(2)(a) and (b) prohibit unions from restraining or coercing employees, or from inducing a public employer to discriminate against an employee. If a union requests an employer to take an action that is an unfair labor practice, the union would be in violation of RCW 41.59.140(2).

RCW 41.59.140(2)(a) prohibits a union from making threats of reprisal or force or promises of benefit in connection with the exercise by employees of their rights protected by the collective bargaining statute. The Commission has been guided by the more numerous precedents developed under Chapter 41.56 RCW, which covers local governments, in deciding unfair labor practice complaints filed under Chapter 41.59 RCW.

An interference violation occurs when an employee could reasonably perceive the disputed actions as being associated with their protected union activity. *Tacoma School District (Tacoma Education Association)*, Decision 5465-E (EDUC, 1997). The employee is not required to show an intention or motivation to interfere on the part of the respondent. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced. *King County*, Decision 6994-B (PECB, 2002). The complainant bears the burden of demonstrating that the complained-of conduct resulted in harm to protected employee rights. *King County*, Decision 8630-A (PECB, 2005).

ANALYSIS

Request for budget information

Femiano worked at Arbor Heights Elementary School during the 2003-04 school year, as a multi-age teacher. The principal of Arbor Heights Elementary School, Carol Coram, also worked during the 2003-04 school year as a sports official the National Collegiate Athletic Alliance (NCAA) on scheduled school days. On June 16, 2004, Femiano expressed concerns at a meeting of the Seattle School Board that a school principal, whom he did not name, had irregularly employed substitute employees for her absences. To substantiate these allegations Femiano asked the union on June 28, 2004, to request information regarding the budget of the school. Union representative Ben Ibale requested the information from the

employer, both through the budget office and through the public information office. On July 1, 2004, Coram called Ibale and inquired about the request, which had upset her. Ibale responded that the union had made the request and that it was a normal request. Femiano did not present evidence to contradict Ibale's testimony that he did not mention Femiano's name in his conversation with Coram.

Harassment and Retaliation Complaints

On July 8, 2004, Coram filed a complaint with the employer, alleging that Femiano was harassing her. In turn, Femiano filed a complaint under the employer's "whistle-blowing" policy on September 10, 2004, charging that Coram's complaint was filed to retaliate against him for questioning her conduct. As a result of these charges and counter-charges, the employer contracted with an independent investigator to look into the matter. The investigator issued a report on October 21, 2004, in which she agreed with Coram's complaint.

On November 16, 2004, the employer decided to transfer Femiano to another school at the end of the school year in order to stop the harassment. The employer's human resources director discussed the possible transfer with the union president, who attempted to safeguard Femiano's rights. On November 22, 2004, the employer notified Femiano of its conclusions regarding the harassment complaint, and that it was contemplating disciplinary action against him.

On May 20, 2005, the employer notified Femiano that it would transfer him to another school in the Fall of 2005 because of the harassment. As a result of the transfer, Femiano now teaches only one age level. The union grieved the employer's decision and took it to arbitration. The arbitrator ruled that the employer had not

followed the proper procedure, but did not reverse the transfer because he concluded that Femiano had in fact harassed Coram.

Conclusions

Femiano did not provide any direct or circumstantial evidence supporting his claim that the union had provided his name to Coram as the source of the request for information regarding the budget. Ibale credibly testified that he had told Coram that the union had made the request in the normal course of business. He also testified that he later told Femiano that Coram would be able to "connect the dots" regarding the ultimate source of the information request because Femiano had addressed the issue at the School Board meeting, which was open to the public.

Femiano attempted to prove through circumstantial evidence his allegation that there was collusion between the union and the employer to protect Coram, which included disclosing his name so that the employer would retaliate against him and silence him. In order to find that an employer and union unlawfully conspired or colluded, the representatives of those parties must have communicated regarding the subject. *Tacoma School District (Tacoma Education Association)*, Decision 5465-E. Although Ibale and Coram spoke about the request for information, Femiano did not prove that they had spoken about his participation. The evidence shows that the union asserted Femiano's rights through the request for information and utilized the grievance procedure to reverse the transfer. There is no indication that the union made any effort to undermine Femiano's rights throughout the process.

Dismissal of Charges Against the Union

Femiano did not meet his burden of proof regarding this allegation. Therefore, the Examiner dismisses the allegations related to the union contained in the complaint.

Issue 2: Discriminatory Transfer

Femiano alleges that his transfer from one school to another was motivated by discrimination for requesting information concerning the school budget.

Applicable Legal Principles

Commission precedent regarding RCW 41.59.140(1) indicates that in order to prevail in a complaint charging discrimination, Femiano must meet a "substantial motivating factor" standard. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The first step in this test is to establish the following:

- That he exercised a right protected by the collective bargaining statute, or communicated an intent to do so;
- That he was deprived of some ascertainable right, benefit or status; and
- That there was a causal connection between the exercise of his legal right and the deprivation.

Port of Tacoma, Decision 4626-A (PECB, 1995).

Femiano must establish this causal connection by showing that the adverse action followed his known exercise of a protected right under circumstances from which the Examiner can reasonably infer causality. *Port of Tacoma; City of Tacoma*, Decision 8031-B (PECB, 2004). The evidence supporting the existence of a prima facie case is often circumstantial in nature:

[I]n establishing the prima facie case, the employee need not attempt to prove the employer's sole motivation was retaliation or discrimination based on the worker's exercise of [protected rights]. Instead, the employee must produce evidence that pursuit of a [protected right] was a cause of the firing [or other deprivation of a right, benefit or status], and may do so by circumstantial evidence (Citation omitted)

Educational Service District 114, Decision 4361-A.

Circumstantial evidence is "[t]he proof of certain facts and circumstances in a given case, from which [the Examiner] may infer other connected facts which usually and reasonably follow according to the common experience of mankind." BLACK'S LAW DICTIONARY 243 (Sixth Ed. 1990). The Administrative Procedures Act directs the Examiner to issue findings of fact based on "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." RCW 34.05.461(4). This Examiner will consider any circumstantial evidence that meets this criterion.

Once a prima facie case has been established, it creates a rebuttable presumption that the employer has acted unlawfully. The employer then has an opportunity to articulate legitimate, non-discriminatory reasons for its actions. It does not have to prove them; it is a burden of production. If the employer is able to articulate such reasons, Femiano must then show, by a preponderance of the evidence, that the employer's reasons are mere pretexts or that the protected activity substantially motivated the employer's actions. *Educational Service District 114*, Decision 4631-A.

Application

Femiano alleges that the employer transferred him out of Arbor Heights for engaging in protected activity, namely addressing the School Board during the meeting held on July 16, 2004, and requesting documents related to the budget. Femiano bases his allegation on the alleged lack of foundation for the arbitrator's award as a result of the union's negligent representation. Femiano further argues that the union's negligence was part of its aforementioned collusion with the employer to keep him from accessing the budget information that he had requested.

School Transfer

Femiano fails to establish a prima facie case in his challenge of his transfer. His presentation before the school board did not

constitute protected activity under Chapter 41.59 RCW as he participated individually, not in a concerted fashion, and he did not utilize labor relations channels. The Commission does not hold individual activities in defense of co-workers to rise to the level of union activity, unless it is undertaken as a union representative or as part of a concerted activity like a grievance. *Dieringer School District*, Decision 8956-A (PECB, April 11, 2007). Further, Femiano initially sought protection under the employer's whistle-blower policy, which protects only individual employees. Collective bargaining statutes do not confer to the Commission jurisdiction over whistle-blowing activities. *City of Lynnwood*, Decision 6986 (PECB, 2000).

Request for Budget Information

On the other hand, Femiano met his burden of proof when he requested the budget information through the union, which was a concerted and protected activity as explained above. Femiano also established that he had been subject to adverse action, since the transfer deprived him of his status as a teacher for several grades.

Femiano, however, failed to show that there is a causal relationship between the protected activity and the adverse action. He did not prove that the union communicated to the employer that he was the source of the request for financial information. He also did not prove that the employer knew about his request to the union through any other means, and therefore he could not prove that the employer transferred him based upon such knowledge.

Evidentiary Standards

Femiano attempted repeatedly to introduce evidence obtained from the employer through public disclosure requests, alleging that his lawful possession of the documents amounted to authentication. While it is thus clear that Femiano knew that the employer

possessed the documents, such knowledge does not equate to authentication. Femiano neither asserted an ability to answer questions himself about the authenticity of the documents nor did he subpoena persons who could do so, and so did not provide testimony regarding their reliability.

Parties must introduce evidence in Commission hearings through normal evidentiary standards of authentication. *Brewster School District*, Decision 3047-A (EDUC, 1989). "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." BLACK'S LAW DICTIONARY 132 (Sixth Ed. 1990).

Conclusion Regarding Employer Retaliation

Femiano did not meet his burden of proof that the employer transferred him in retaliation for participating in a school board meeting or for requesting budget information. Therefore, the Examiner dismisses the allegations of discrimination contained in the complaint.

Issue 3: Interference by the Employer

The legal principles that guide interference complaints have already been explained. Femiano claims that besides the previously discussed discriminatory intent, he had reasonably perceived his transfer as a threat to keep him from speaking out against employer activities.

However, he did not establish the consequences that a reasonable employee would fear as a result of the exercise of requesting the budget information. The employer did not advise Femiano that it would take any adverse action for violating the harassment policy other than the transfer. Further, Femiano testified that the

transfer could not have precluded him from requesting the information regarding the budget, or from otherwise pursuing avenues of redress. Under these circumstances, the Examiner rules that a reasonable employee could not have interpreted the transfer as a threat to deprive him or her of ascertainable rights, benefits or status.

Conclusion Regarding Employer Interference

Femiano did not meet his burden of proof regarding the allegation that the employer interfered with his exercise of collective bargaining rights. The allegation concerning employer interference is dismissed.

Final Conclusion

Femiano did not prove that the union had induced the employer to transfer him or to establish that the employer transferred him in retaliation for engaging in protected activities, or that his transfer interfered with the continued exercise of protected rights. Therefore, the Examiner dismisses the charges of unfair labor practices against both the union and the employer.

FINDINGS OF FACT

1. The Seattle School District is an "employer" within the meaning of RCW 41.59.020(5).
2. The Seattle Education Association is an "employee organization" within the meaning of RCW 41.59.020(1), and is the "exclusive bargaining representative" within the meaning of RCW 41.59.020(6), of an appropriate bargaining unit of certificated employees.
3. At all pertinent times, Robert Femiano was a member of the bargaining unit described in Finding of Fact 2 above.

4. Femiano worked at Arbor Heights Elementary School during the 2003-04 school year, as a multi-age teacher.
5. On June 16, 2004, Femiano expressed concerns at a meeting of the School Board about an unnamed school principal who had irregularly employed substitute employees to fill in during her absences.
6. On June 28, 2004, Femiano asked the union to request information regarding the budget of the school.
7. Union representative Ben Ibale requested the information from the employer, both through the budget office and through the public information office.
8. On July 1, 2004, Coram called Ibale and inquired about the request, which had upset her. Ibale responded that the union had made the request and it was a normal request.
9. On July 8, 2004, Coram filed a complaint with the employer, alleging that Femiano had engaged in harassment against her.
10. The employer contracted with an independent investigator to look into the matter. Coram told the investigator that she felt harassed by Femiano for many reasons, among them that Femiano had accused her of misuse of funds. The investigator issued a report on October 21, 2004, in which she agreed with Coram's complaint.
11. In November 16, 2004, the employer decided to transfer Femiano to another school. The employer's human resources director discussed the possible transfer with the union president, who attempted to safeguard Femiano's rights.

12. In May 20, 2005, the employer notified Femiano that it would transfer him to another school where he would teach only one age level.
13. The union grieved the decision described in paragraph 12 of these findings of fact and took it to arbitration. The arbitrator ruled that the employer had not followed the proper procedure, but did not reverse the transfer because he concluded that Femiano had in fact harassed Coram.
14. On or around August 25, 2005, a WISHA investigator provided Femiano a copy of a summary of the statement that Coram made on July 12, 2005. Upon reviewing the statement, Femiano inferred that the union had told Coram that he had made the request for the budget information, and therefore the union had induced the employer to transfer him to another school.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.59 RCW and Chapter 391-45 WAC.
2. The complaint in the above-captioned matter was filed in a timely manner.
3. Femiano failed to meet his burden of proof to establish that the Seattle Education Association caused the Seattle School District to discriminate against him in violation of RCW 41.59.140(2)(b).
4. Femiano failed to meet his burden of proof to establish that the Seattle School District discriminated against him in violation of RCW 41.59.140(1)(d).

5. Femiano failed to meet his burden of proof to establish that the Seattle School District interfered with his protected rights in violation of RCW 41.59.140(1)(a).

ORDER

The complaints charging unfair labor practices filed in the above-captioned matter are dismissed.

ISSUED at Olympia, Washington, this 12th day of December, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CARLOS R. CARRIÓN-CRESPO, 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.