City of Seattle, Decision 9945 (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS GUILD, Complainant,	CASE 20235-U-06-5159
vs.	DECISION 9945 - PECB
CITY OF SEATTLE, Respondent.	ORDER OF DISMISSAL

Aitchison & Vick, Inc., by *Hillary McClure* and *Derrick Isackson*, Attorneys at Law, for the union.

City Attorney Thomas A. Carr, by *Fritz E. Wollett*, Assistant City Attorney, for the employer.

The Seattle Police Officers Guild (union) filed a complaint on March 3, 2006, with the Public Employment Relations Commission charging the City of Seattle (employer) with unfair labor practices. A preliminary ruling was issued on April 27, 2006, identifying the allegations of the complaint as follows:

> Employer interference with employee rights in violation of RCW 41.56.140(1), by surveillance of union through questioning former Seattle Police Officers Guild president Mike Edwards concerning the protected union activities of former Guild vice president Stuart Colman, and through issuance of a subpoena seeking internal union records concerning Coleman's union activities.

A hearing was held on March 13, 2007, before Examiner Sally B. Carpenter. The parties filed post-hearing briefs.

ISSUES PRESENTED

1. Did the employer's interview of union president Mike Edwards interfere with protected union activities?

2. Did the employer's subpoena of internal union documents interfere with protected employee rights?

The Examiner finds there was no interference violation by the employer.

FACTS

In October 2005, police officer Stuart Colman filed a lawsuit against the employer in United States District Court, Western District of Washington, alleging violation of his civil rights. The union was not a party to Colman's private civil litigation.

In preparing its defense to the federal court lawsuit, the employer interviewed union president Mike Edwards about union events relevant to the lawsuit. The employer also issued a subpoena for union documents.

The Lawsuit Allegations

Colman's claims in his lawsuit against the employer were:

1. Violation of Chapter 41.56 RCW and RCW 49.32.020 "by interfering with, restraining and coercing Officer Colman in retaliation for exercising his right to organize and designate representatives of his own choosing for the purpose of collective bargaining" through Colman:
   a. Becoming vice president of the Seattle Police Officers Guild.

b. Using extensive union leave time to take care of union business.

c. Zealously representing police officers in internal investigations performed by the police department.

d. Publicly representing police officers' interests in the press and elsewhere, and

e. Filing grievances against the police department.

2. Violation of Colman's free speech rights guaranteed by the First and Fourteenth Amendments of the U.S. Constitution.

Facts asserted in Colman's lawsuit were:

1. Colman was elected vice president of the Seattle Police Officers Guild in early 2001.
2. His union duties often took him away from his bike squad street assignment.
3. Colman used local and national print and electronic media to criticize the police chief's refusal to allow police intervention during Mardi Gras violence in Pioneer Square in February, 2001. During the unrestrained violence, a citizen was murdered and several people were beaten. Colman's criticism made the news for several months.
4. During the summer of 2001, Colman continued his outspoken public criticisms. He took issue with the membership composition of the civilian review board. Later he wrote an article in the union's newsletter vigorously opposing Nordtrom's video and audio taping on downtown streets.
5. In January 2002, Colman publicly criticized discipline imposed by the police chief on a fellow union member.
6. In early February 2002, Colman ran for the office of president of the Seattle Police Officers Guild. He lost the election but remained briefly as vice president.
7. "On or about February 28, 2002, Colman resigned from his position with the Union. He resigned because he was concerned that he would not be able to keep his job in the bike squad and maintain his high profile responsibilities to the Guild."
8. A long series of additional factual allegations detailed Colman's view that the employer was treating him unfairly in work assignments, training requests, use of leave, and the like through September, 2004.

Employer's Reliance on Previous Court Order

The employer responded to Colman's lawsuit by seeking information from the union regarding the union's knowledge of factual allegations made in the lawsuit. The employer relied in part on a June 2000, order by Chief Judge Coughenour in United States District Court, Western District of Washington, *Simmons v. City of Seattle*, Case No. C99-1511-C. The plaintiff in *Simmons* was a paramedic suing the employer for discrimination and other law violations. Simmons' union, Seattle Fire Fighters' Union, Local 27, was not a party to the case, just as in the Colman case. The employer had issued a subpoena to Simmons' union for documents. The union moved to quash the subpoena, arguing the subpoena interfered with members' associational rights and violated Chapter 41.56 RCW. The court ruled that a union has no absolute protection from discovery of relevant information in private civil litigation.

Interview with Union President Mike Edwards

In February 2006, the employer interviewed witnesses who had been listed by Colman as having evidence relevant to his lawsuit.

Assistant City Attorney Amy Lowen requested an interview with Mike Edwards, who was president of Seattle Police Officers Guild from March 1996, through February 2002. Edwards had also been on the union board, and had served as a shop steward and union vice president. After Edwards was promoted to the position of lieutenant in November 2005, he was no longer eligible to be a member of the police officers' union.

On February 27, 2006, Lowen interviewed Edwards. There were several items about which Lowen wished to question Edwards. One was a meeting with Colman and his supervisor in February 2002.

Edwards was present at that meeting as union representative for Colman. Colman told the employer in a deposition that this meeting regarding his work attendance issues on the bike patrol, was the beginning of the employer's retaliation against Colman for his union activities.

Lowen also had questions about why Colman resigned from the union vice presidency later in February 2002. The lawsuit asserts the resignation was caused by the employer's actions, but the union newsletter carried a resignation article written by Colman giving a quite different reason for his resignation.

Another item of inquiry by Lowen was whether there had been any employer retaliation against any police officer, including Colman, who spoke out publicly against several decisions made by the police chief.

Edwards answered Lowen's questions where he had personal knowledge but declined to respond where he believed the question dealt with the internal workings of the union or with individual members other than Colman. Edwards testified in this hearing that he did not feel pressured to answer any question he declined to answer. Edwards agreed that Lowen could draft a declaration containing his statement of facts for him to sign, subject to review by the union and approval by the union attorney.

Lowen prepared a proposed declaration summarizing Edwards' statements and submitted it to the union attorney. There was an exchange of e-mails and proposed changes. The changes offered by the union attorney were all adopted by Lowen. Edwards signed the

declaration, which was filed in support of the employer's motion for summary judgment to dismiss Colman's lawsuit.

Subpoena of Union Documents

On March 3, 2006, the employer issued a subpoena to the union records custodian. The subpoena requested copies of (1) Mike Edwards' notes, if any, concerning meetings he attended between Colman and his supervisors; (2) Colman's written reasons for resignation from his position as union vice president; (3) any documents by Colman concerning his dissatisfaction with the union; and (4) timekeeping documents, if any, indicating Colman's hours as a union representative during his vice presidency. All of these requests were limited to the time frames and issues identified by Colman in his lawsuit.

The union attorney responded by stating the union would refuse the subpoena and file an unfair labor practice charge. On March 10, 2006, the union attorney sent a letter to the employer concerning the subpoena, asserting "Objection. Privileged." to each of the four requests. The letter explained the union had diligently searched its records and was attaching the few documents it found which responded to the subpoena. The union records custodian signed a declaration that there were no records responsive to the subpoena other than those attached to the letter. Neither the union nor the employer asked the court for protection from or enforcement of the subpoena.

APPLICABLE LAW

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, protects employees' free exercise of their collective bargaining rights:

> 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.

Employees' collective bargaining rights are enforced through the provisions of 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;

To sustain an interference violation, the complainant bears the burden of demonstrating that a typical employee, in the same circumstances, could reasonably perceive the employer's action as discouraging his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004).

The Commission's *City of Vancouver*, Decision 6732-A (PECB, 1999) was reversed in *PERC v. City of Vancouver*, 107 Wn.App. 694 (2001), *review denied*, 145 Wn.2d 1021 (2002). In the court of appeals, the union and police amicus unions argued that <u>any</u> employer questioning regarding conduct or discussions within a union is prohibited. The court rejected that argument, holding there is no per se rule regarding employer questioning. Rather, "the evidence must demonstrate that, taken from the point of view of the employees, the reasonable tendency of an employer's conduct or statements is coercive in effect." *City of Vancouver* at 705, citations omitted.

The court in *City of Vancouver* reaches its decision after a thorough analysis of federal court cases and National Labor Relations Board (NLRB) precedent. *City of Vancouver* recites the eight tests typically used by federal courts and the NLRB as:

> (1)the history of the employer's attitude toward its employees; (2)the type of information sought; (3)the company rank of the questioner; (4)the place and manner of the conversation; (5)the truthfulness of the employee's responses; (6)whether the employer had a valid purpose for obtaining the information; and (7)if so, whether the employer communicated it to the employees; and (8)whether the employer assured the employee that no reprisals would be forthcoming should he or she support the union.

City of Vancouver at 706, citations omitted.

"In sum, the basic test used by the NLRB for evaluating the legality of an interrogation is 'whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.'" *City of Vancouver* at 707, citations omitted.

The court also analyzed Commission precedent and summarized that precedent as "an employer commits a violation of RCW 41.56.140(1) '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 Vancouver* at 708 citing *City of Longview*, Decision 4702 (PECB, 1994).

ANALYSIS

Issue 1 - Interview of Union President Edwards The employer explained the reason for its questions. An employer e-mail sent to

Edwards on February 23, 2006, states, "you have been identified by the Plaintiff (Colman) in *Colman v. City of Seattle* . . . as an individual likely to have discoverable information that the disclosing party may use to support its claims or defenses . . . ." The e-mail continues that counsel for the employer "would like to have an informal meeting with you about such information." Colman's lawsuit was shown to Edwards during the questioning.

There is no testimony suggesting the employer's questions indicated any potential for reprisal if questions were not answered. Edwards felt free to decline to answer some questions; there was no pressure to answer questions when he declined to answer. Edwards signed a declaration in support of the employer's motion to dismiss the lawsuit, after the contents of the declaration were negotiated between the employer and union attorneys.

The employer had a valid purpose for questioning Edwards. He had been named as a potential witness by Colman. Questions were focused on the events identified by Colman as relevant to his lawsuit.

Issue 2 - Subpoenaed Union Documents The employer's subpoena was tailored to seek only documents relating to specific allegations in Colman's lawsuit, not a general investigation into union activity, policy or strategy. When the union objected to the requests, the employer responded that information not directly relevant to Colman's claims could be redacted by the union prior to production of documents. The union attorney, Christopher Vick, testified that the few documents produced by the union were not confidential documents because they were documents that had passed between the employer and the union and could hardly be expected to be an

expression of internal union security. There were no other documents found in response to the subpoena.

Defense of Colman's lawsuit is justification for the employer's actions. The documents sought, had they existed, may have provided information relevant to Colman's claims. The manner in which the employer sought information was appropriate. The employer had a valid purpose for seeking information, it had a narrow focus in the type of information sought, and it responded to the union's initial concerns with offers and suggestions to narrow the information requested for production.

CONCLUSION

The Commission decides interference cases by asking the question: Is there substantial evidence that a typical employee would reasonably perceive that the employer was interfering with his or her collective bargaining rights?

There is no evidence the employer created an impression of surveillance of employees engaged in protected union activities. Nor is there any evidence demonstrating that employees could reasonably perceive that their union activity was threatened. The complaint is dismissed.

FINDINGS OF FACT

1. The City of Seattle is a public employer within the meaning of RCW 41.56.030(1).

2. The Seattle Police Officers Guild, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive

representative of a bargaining unit of police officers of the employer.

3. Police officer Stuart Colman filed a private civil rights lawsuit against the employer in October 2005. Claims asserted in the lawsuit arose from the employment relationship, from Colman's activities as vice president of the union in 2001-2002, and from claimed retaliation by the employer beginning in February 2002.

4. The employer interviewed former union president Mike Edwards on February 27, 2006, asking him questions about the union, police officers represented by the union, and events referenced in Colman's lawsuit. Edwards declined to answer many questions. Edwards did not feel pressure when he refused to answer some questions.

5. The employer prepared a draft declaration for Edwards' signature. The union and employer negotiated some changes in the contents of the declaration, which was filed in support of the employer's motion for summary judgment to dismiss Colman's lawsuit. Edwards voluntarily signed the declaration.

6. The employer subpoenaed union documents on March 3, 2006. The union objected to the requests made, but responded with the few documents which it had in its possession.

7. By interviewing union president Mike Edwards, as described in Finding of Fact 4, the employer did not create an impression of surveillance of employees engaged in protected union activities.

8. By issuing a subpoena for union documents, as described in Finding of Fact 6, the employer did not demonstrate that employees could reasonably perceived that their union activity was threatened.

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 interviewing union president Mike Edwards, as described in Finding of Fact 4, the City of Seattle did not interfere with employee rights or violate RCW 41.56.140(1).

3. By issuing a subpoena for union documents, as described in Finding of Fact 6, the City of Seattle did not interfere with employee rights or violate RCW 41.56.140(1).

ORDER

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

ISSUED at Olympia Washington this 28th day of December, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SALLY B. CARPENTER, 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.