Colfax School District, Decision 10774 (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

COLFAX EDUCATIONAL SUPPORT PERSONNEL, Complainant, vs. COLFAX SCHOOL DISTRICT, Respondent.	CASE 22609-U-09-5781 DECISION 10774 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Eric R. Hansen, Attorney at Law, for the union.

Stevens, Clay & Manix, P.S. by *Gregory L. Stevens,* Attorney at Law, for the employer.

On July 24, 2009, the Colfax Educational Support Personnel (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The union alleged that the Colfax School District (employer) interfered with employee rights and discriminated against the union by demoting the union president, Barbara Strevy (Strevy) and eliminating her stipend in reprisal for union activities. A preliminary ruling was issued by the Commission, finding that the union's complaint stated a cause of action for employer interference and discrimination under RCW 41.56.140(1). Examiner Karyl Elinski conducted a hearing on November 17, 2009. The parties filed post-hearing briefs to complete the record.

ISSUE PRESENTED

Did the employer unlawfully discriminate and interfere with protected employee rights when it reassigned union president Strevy from a position at the high school to a position at the elementary school?

The union did not prove that the employer's budgetary reasons for Strevy's reassignment were pretextual, or that union animus was a substantial motivating factor for the reassignment. The employer did not commit an interference or discrimination violation.

APPLICABLE LEGAL STANDARD – DISCRIMINATION

In two recent decisions, the Commission set forth the standards a complainant must meet to prevail on a discrimination claim. *Northshore Utility District*, Decision 10534-A (PECB, 2010); *Central Washington University*, Decision 10118-A (PSRA, 2010). An employer unlawfully discriminates when it takes action against an employee in reprisal for the employee's exercise of rights protected by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complaining party bears the burden of proof in employer discrimination cases. To prove discrimination, the employee must first set forth a *prima facie* case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. The employer deprived the employee of some ascertainable right, benefit, or status; and

3. There is a causal connection between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007); *Northshore Utility District*, Decision 10534-A.

In response to an employee's *prima facie* case of discrimination, the employer need only articulate its non-discriminatory reasons for taking the alleged discriminatory act. The employer does not bear the burden of proving those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark*

County, Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A; *Northshore Utility District*, Decision 10534-A; *Central Washington University*, Decision 10118-A.

To prove discriminatory motive, the employee must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. Circumstantial evidence consists of proof of facts or circumstances which, according to the common experience, gives rise to a reasonable inference of the truth of the fact sought to be proved. *Northshore Utility District*, Decision 10534-A; *Central Washington University*, Decision 10118-A.

ANALYSIS

The union represents a bargaining unit of certain classified employees, including employees in the job classifications of teacher assistant and secretary. The employer and union are parties to a collective bargaining agreement effective from September 1, 2007, through August 31, 2011. Strevy has been employed as an office assistant with the Colfax School District for approximately twenty-six years.[1] For the seventeen years prior to the 2008-2009 school year, Strevy was assigned to work as an office assistant at the District's only high school. Her regular duties in the position included tracking student attendance, answering the phone, providing assistance to parents and others who entered the school, writing receipts, and tracking emergency treatment forms. In addition to her regular duties, for the prior six years, she earned an additional stipend for performing duties for the associated student body (ASB). The duties associated with ASB included transmitting deposits, arranging for and tracking accounts payables, collecting concessions money, reconciling bills, arranging for and scheduling athletic events, and tracking medical and insurance physicals. Strevy worked seven hours per day. She completed a portion of her ASB duties during her regular work day (roughly 2.75 hours per day),

[1] At the start of the 2009-2010 school year, and continuing through the hearing, Strevy was out on an extended disability leave due to an accident.

and the rest after hours. She earned a stipend of $2,121.00 per year for the performance of ASB-related duties.

During the last twelve years of her employment with Colfax School District, Strevy was active in union activities, serving as the secretary treasurer for approximately ten years before becoming union president in 2007. Strevy engaged in a variety of union activities. She became president at a time when the union and employer were engaged in contentious contract bargaining. In addition to serving on the bargaining committee, Strevy filed six grievances and a unit clarification petition. She also wrote a letter to the school board on behalf of the union requesting that union members be permitted to evaluate the job performance of the District Superintendent, Michael Morgan (Morgan). In addition, she wrote a letter to bargaining unit members criticizing the employer's expenditures, including attorney fees the employer incurred when it participated in a unit clarification proceeding before the Commission. Portions of that letter were later published in the local newspaper.

In April 2009, Morgan notified Strevy that her position would be eliminated in the upcoming school year, and that he intended to reassign her from her duties as teacher assistant at the high school, where she worked as an aide to the secretary, to the position of playground supervisor at the elementary school. The playground supervisor is a teacher assistant position. Strevy would retain the same hours and schedule. As a consequence, however, although Strevy did not technically lose her ASB stipend, she was unable to perform any portion of these duties during her regularly assigned working hours. Morgan explained that an upcoming reduction in force, as well as the employer's adoption of an electronic attendance tracking system which would reduce the workload of the high school secretary, made the reassignment necessary. He admonished Strevy not to tell elementary teacher assistant Rhonda Pittman, who worked as an aide to the secretary, whom he also intended to reassign.

At the time Morgan notified Strevy of her reassignment, there was no general announcement of the reduction in force, and the collective bargaining agreement did not require notification until mid-May. In addition, the District had not yet adopted its final budget, nor did it know how much money it would receive from the state. Ultimately, when formal layoff notices did go out, the District laid off two teacher assistant positions at the elementary school, one-half of a

teaching position, and a part-time special education director position. Teachers, principals, and administrators all took a one-day pay reduction. Pittman was not reassigned from her four-hour per day position, and continued to work as a teacher assistant at the elementary school. Though Pittman worked for the District for seventeen years, she had less seniority than Strevy. Strevy was reassigned to the playground supervisor position at the elementary school.

Prima Facie Case

In order to meet its burden of proof, the union must establish a *prima facie* case of employer discrimination against Strevy in her reassignment. The union met this burden. The evidence overwhelmingly supports the finding that the reassignment followed Strevy's significant involvement in protected union activities. There was no effort to deny that the employer was aware of Strevy's union activities. Although the reassignment was not technically a demotion, it did appear that employees who were classified as teacher assistants "worked up" to particular jobs within the District. Strevy continued in her high school teacher assistant position for seventeen years. Although nothing in the collective bargaining agreement prevented the employer from reassigning Strevy, the major shift in career focus and responsibility from a teacher assistant in charge of attendance to a playground supervisor could support a charge of discrimination as a change in ascertainable benefit or status. *Mansfield School District*, Decision 5238-A (EDUC, 1996). In addition, the loss of the ability to complete a portion of her stipend duties during her regular work hours supports a claim of loss of benefits. The union established there was a causal connection between Strevy's exercise of union activities and her reassignment from the high school to the elementary school.

Employer's Non-Discriminatory Reasons

If the union demonstrates a *prima facie* case of discrimination, the employer must articulate legitimate non-discriminatory reasons for its actions. The employer articulated several non-discriminatory reasons for Strevy's reassignment. In looking at the upcoming school year in 2009-2010, the District faced decreasing student enrollment and a decrease in its fund balance. It also anticipated decreases in state funding, including I-728 funds, and other revenues. Based upon the advice of the state auditor's office, the employer's school board policies required the District to maintain a cash reserve equal to at least one month of operating expenses.

To address these concerns, the District took a number of cost cutting measures. For example, it imposed non-staff reductions, including reductions in funding for extracurricular activities, maintenance, and capital projects. When formal layoff notices did go out, the District laid off two teacher assistant positions at the elementary school, a half-time teaching position, eliminated one hour per day of custodial time, and the part-time position of director of special education. The District eliminated the position of high school teacher assistant to which Strevy had been assigned. The reductions left a need for the assignment of additional teacher assistant time at the elementary school. All but two of the District's teaching assistants have taken the Praxis test, at the District's expense, making them "highly qualified" as required under the federal No Child Left Behind Act. Strevy was one of two teacher assistants who declined to take the test, leaving her unqualified for most teacher assistant positions working directly with the students. After the budget cuts, only two assistants were left at the high school, both of whom were "highly qualified," and worked directly with students. Strevy was simply unqualified for most teacher assistant positions with the employer. Under the contract, the employer was required to consider seniority in layoffs, but not for reassignments.

Pretext

The union bears the burden of proving, by direct or circumstantial evidence, that the employer's justifications for its actions were pretextual or that its actions were retaliatory. In order to meet this burden, the union presented extensive evidence calling the District's financial projections into question. Andrea Hardy, the union's compensation and financial field representative, testified that the employer had significant financial revenues, and thus did not lack funds necessitating elimination of job positions, reallocations, layoffs, and transfers. The employer's financial expert, Reece Jenkin, testified about the District's practice of fiscal restraint and caution. Even if the union could demonstrate that the employer was in sound financial condition, it did not and could not demonstrate that the employer's budgetary decisions concerning cuts, layoffs and reassignments were taken for discriminatory reasons. The teachers, principals, and administrators all took a one-day reduction in pay to help address the employer's budgetary concerns. Although the union may disagree with the employer's philosophy of conservative budgetary restraint, that disagreement does not in and of itself lend credence to its assertion of pretext. Nothing in the record supports the union's implied assertion that the district exaggerated its fiscal difficulties so that it could target the union and/or Strevy. Without such a connection, there can be no finding of pretext.

While there is no question that Strevy's actions as union president were potentially frustrating and/or upsetting to management, there is scant evidence in the record to demonstrate union animus or discrimination on the basis of union activity. Although the record reflects a union complaint about the denial of Strevy's request for release time to attend a union-sponsored training, it was not enough evidence to sustain a discrimination finding. Two employees in two different unions operating under different contractual language requested time off. There was no evidence that the union filed an unfair labor practice complaint or grievance, or the outcome of any such action. The high school secretary, Anna Schluneger, who had been active in the union, also testified at the hearing. After Strevy was reassigned to the elementary school, Schluneger's work load increased. Again, while this might lead to the suspicion about the employer's motives, it does not amount to enough evidence to overcome the employer's non-discriminatory reasons for Strevy's reassignment. The union has not met its burden of proof to show that protected activity was a substantial motivating factor for Strevy's reassignment.

APPLICABLE LEGAL STANDARD - INTERFERENCE

Generally, the burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party or individual. 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 complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected 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 by the employer or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A; *Northshore Utility District*, Decision 10534-A; *Central Washington University,* Decision 6793-A.

An independent interference violation cannot be found, however, under the same set of facts that fail to constitute a discrimination violation. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998); *Northshore Utility District*, Decision 10538-A; *Central Washington University*, Decision 10118-A.

FINDINGS OF FACT

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

2. Colfax Educational Support Personnel (union) is a bargaining representative within the meaning of RCW 41.56.030(3) for a bargaining unit including employees of the Colfax School District, including employees in the job classifications of teacher assistant and secretary.

3. The employer and union are parties to a collective bargaining agreement, effective from September 1, 2007, through August 31, 2011.

4. Barbara Strevy (Strevy) has been employed as a teacher assistant with the employer for approximately twenty-six years. For the seventeen years prior to the 2008-2009 school year, Strevy was assigned to work at the District's only high school. Strevy worked seven hours per day.

5. During the last twelve years of her employment with Colfax School District, Strevy was active in union activities, serving as the secretary treasurer for approximately ten years before becoming union president in 2007.

6. In addition to her regular duties, for the prior six years, Strevy earned an additional stipend for performing duties for the associated student body (ASB). She completed a portion of her ASB duties during her regular work day (roughly 2.75 hours per day), and the rest after hours. She earned a stipend of $2,121.00 per year for the performance of ASB-related duties.

7. Strevy became union president at a time when the union and employer were engaged in contentious contract bargaining. In addition to serving on the bargaining committee, Strevy filed six grievances and a unit clarification petition. She also wrote a letter to the

school board on behalf of the union requesting that union members be permitted to evaluate the job performance of the District Superintendent, Michael Morgan (Morgan). In addition, she wrote a letter to bargaining unit members criticizing the employer's expenditures, including attorney's fees the employer incurred when it participated in a unit clarification proceeding before the Commission. Portions of that letter were later published in the local newspaper.

8. In April 2009, Morgan notified Strevy that her position would be eliminated in the upcoming school year, and that he intended to reassign her from her duties as a teacher assistant at the high school to the position of playground supervisor at the elementary school. The playground supervisor is a teacher assistant position. Strevy would retain the same hours and schedule. As a consequence, however, although Strevy did not technically lose her ASB stipend, she was unable to perform any portion of these duties during her regularly assigned working hours.

9. In looking at the upcoming school year in 2009-2010, the District faced a decrease in student enrollment and a decrease in its fund balance. It also anticipated decreases in state funding, including I-728 funds, and revenues. To address these concerns, the District took a number of cost cutting measures. For example, it imposed non-staff reductions, including reduction in funding for extracurricular activities, maintenance, and capital projects.

10. When formal layoff notices did go out, the District laid off two teacher assistant positions at the elementary school, one-half of a teaching position, and a part-time special education director position. Teachers, principals, and administrators all took a one-day reduction in pay. The District eliminated the position of high school teacher assistant to which Strevy had been assigned. Strevy was reassigned to the playground supervisor position at the elementary school.

11. The reductions left a need for the assignment of additional teacher assistant time at the elementary school. All but two of the District's teacher assistants have taken the Praxis

test, at the District's expense, making them "highly qualified" as required under the federal No Child Left Behind Act. Strevy was one of two teacher assistants who declined to take the test, leaving her unqualified for most teacher assistant positions working directly with the students.

12. Under the contract, the employer was required to consider seniority in layoffs, but not for reassignments.

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 the foregoing Findings of Fact, Colfax Educational Support Personnel failed to sustain its burden of proof to establish that the Colfax School District discriminated or interfered with protected employee rights under RCW 41.56.140(1) when it reassigned Barbara Strevy from a position at the high school to a position at the elementary school.

ORDER

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

ISSUED at Olympia, Washington, this 28th day of May, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

CASE NUMBER:	22609-U-09-05781	FILED:	07/24/2009	FILED BY:	PARTY 2
DISPUTE:	ER DISCRIMINATE				
BAR UNIT:	ALL EMPLOYEES				
DETAILS:	see also case 22647-S				
COMMENTS:					

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