State – Attorney General, Decision 10733 (PSRA, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. STATE – ATTORNEY GENERAL, Respondent.	CASE 21156-U-07-5399 DECISION 10733 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Anita Hunter, Staff Counsel, for the union.

Attorney General Robert M. McKenna, by *Otto G. Klein III*, Special Assistant Attorney General, joined on the brief by *Paige L. Dietrich*, Senior Assistant Attorney General, for the employer.

On July 9, 2007, the Washington Federation of State Employees (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The union alleged that the State Attorney General's Office (AGO or employer) interfered with union activities by failing to maintain the status quo while a representation petition filed by the union was pending before the Commission. The union's complaint specified that the interference occurred when the employer's Consumer Protection Division eliminated a petitioned-for position upon resignation of the employee holding the position, reallocated another petitioned-for position, and closed its Spokane Consumer Resource Center (CRC). The union further alleged that these actions resulted in changes in the working conditions of employees in the petitioned-for unit. A preliminary ruling was issued by the Commission on July 17, 2007, finding that the union's complaint stated a cause of action for employer interference under RCW 41.80.110(1)(a). Examiner Karyl Elinski conducted a hearing on the matter on November 1 and 7, 2007.

The parties postponed further processing of the complaint until the Public Employment Relations Commission issued a final decision on the underlying representation petition. The Executive Director issued her decision on January 11, 2008, finding that the petitioned-for unit was inappropriate.[1] *State – Attorney General*, Decision 9951 (PSRA, 2008). Upon appeal, on February 18, 2009, the Commission affirmed the Executive Director's decision. Decision 9951-A (PSRA, 2009). After a lengthy delay, the parties stipulated to facts pertaining to the status of one of the positions that was subject to objection on the underlying petition. The parties filed post-hearing briefs on September 25, 2009.

ISSUE PRESENTED

Did the employer interfere with employee rights by failing to maintain the status quo when it closed its Spokane CRC office, eliminated a position, and reallocated another position during the pendency of the union's representation petition?

Based upon all of the evidence and testimony presented at the hearing, as well as the stipulation of the parties and the legal analysis set forth below, the Examiner determines that the employer exercised management rights excluded from the obligation to bargain pursuant to Chapter 41.80 RCW. Thus, the employer did not interfere with employee rights.

LEGAL STANDARDS

Interference

RCW 41.80.110 prohibits an employer from interfering with the exercise of collective bargaining rights. This statute provides:

> Unfair labor practices enumerated.
>
> (1) It is an unfair labor practice for an employer:
>
> (a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter;

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[1] The union filed two separate representation petitions seeking to represent certain employees of the AGO. The petitions were consolidated for hearing. Only the petition concerning the CRC is relevant to this case.

The language contained in Chapter 41.80 RCW defining an interference violation is similar to the language contained in Chapter 41.56 RCW. Thus, the Commission will analyze interference violation claims pursuant to RCW 41.80.110(1) in the same manner as those under RCW 41.56.140(1). *Community College District 19 - Columbia Basin (Washington Public Employees' Association*, Decision 9210-A (PSRA, 2006); *State – Natural Resources*, Decision 8458-B (PSRA, 2005); RCW 41.58.005(1).

In order to prove an interference claim, the complainant must establish that:

1. One or more employees engaged in activity protected by Chapter 41.80, or communicated an intent to engage in such activity;
2. The employer made some statement or took some action;
3. One or more employees reasonably perceived that statement or action as a threat of reprisal or force, or promise of benefit, associated with that protected activity.

A showing of intent or motivation is not required to find an interference violation. *King County*, Decision 6063-A (PECB, 1998).

The Burden of Proof

The complaining party carries the burden of proof by a preponderance of the evidence that an unfair labor practice was committed. *Whatcom County*, Decision 7244-B (PECB, 2004); *City of Tacoma*, Decision 6793-A (PECB, 2000); WAC 391-45-270(1)(a).

Propriety of the Bargaining Unit

The propriety of a petitioned-for bargaining unit is largely irrelevant to the analysis of whether the employer interfered with the laboratory conditions for an election. "A union that files a representation petition thereby acquires some status in the employment relationship. Specifically, it is entitled to file and prosecute unfair labor practice charges on 'interference' or 'discrimination' claims under RCW 41.56.140(1), affecting employees in the petitioned-for bargaining unit." *King County*, Decision 6063-A.

Change in Status Quo

The employer must maintain the status quo with respect to mandatory subjects of bargaining once a representation petition is filed, and throughout the pendency of a representation petition. Failure to do so is prohibited interference. *King County*, Decision 6063-A; WAC 391-25-140(2). This rule applies from the date the petition is filed, to the date the petition fails or the bargaining unit is certified. *Val Vue Sewer District*, Decision 8963 (PECB, 2005). Changes by the employer in employee wages, hours and working conditions while a representation petition is pending improperly affect the laboratory conditions necessary to the employees' free exercise of their right to vote. *Mason County*, Decision 1699 (PECB, 1983).

The Dynamic Status Quo

The employer may make changes that were already in process prior to the filing of the petition, but must maintain all other wages, hours and working conditions. This concept has been described as the "dynamic status quo." *King County*, 6063-A.

However, an employer may not make additional changes to the dynamic status quo after the filing of a representation petition. In *Adams County*, Decision 7961 (PECB, 2003), an employer established a dynamic status quo by adopting a budget prior to the filing of a representation petition which established a specific date for reduction of employee work hours. When the employer delayed implementation of the reduction in work hours during the pendency of the petition, however, it was found to have committed an unfair labor practice. The examiner in that case reasoned that the delay of the implementation date could reasonably have been perceived by bargaining unit employees as related to their exercise of collective bargaining rights.

Mandatory Subjects of Bargaining

Commission rules prohibit an employer from making changes to mandatory subjects of bargaining while a representation petition is pending:

> WAC 391-25-140 NOTICE TO EMPLOYEES – LIMITATIONS ON EMPLOYER ACTIONS.
>
> . . . .
>
> (2) Changes of the status quo concerning wages, hours or other terms and conditions of employment of employees in the bargaining unit are prohibited

> during the period that a petition is pending before the commission under this chapter.

Prohibited Subjects of Bargaining

On the other hand, the statute governing collective bargaining for state employees prohibits bargaining enumerated subjects identified as "management rights." Unlike Chapter 41.56 RCW, management rights for state agencies are defined by statute. RCW 41.80.020 provides:

> Scope of Bargaining.
>
> (1) Except as otherwise provided in this chapter, the matters subject to bargaining include wages, hours, and other terms and conditions of employment, and the negotiation of any question arising under a collective bargaining agreement.
>
> . . . .
>
> (5) The employer and the exclusive bargaining representative shall not bargain over matters pertaining to management rights established in RCW 41.80.040.

RCW 41.80.040 prohibits bargaining over subjects falling under the rubric of management rights. Specifically, RCW 41.80.040 provides:

> Management rights — Not subject to bargaining.
>
> The employer shall not bargain over rights of management which, in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:
>
> (1) The functions and programs of the employer, the use of technology, and the structure of the organization;
>
> (2) The employer's budget and the size of the agency workforce, including determining the financial basis for layoffs;
>
> (3) The right to direct and supervise employees; . . .

Absent any ambiguity, the Commission interprets a statute according to its plain and ordinary meaning. *State - Transportation*, Decision 8317-B (PSRA, 2005). The Commission finds a statute ambiguous when it is subject to more than one reasonable interpretation. *Central Washington University*, Decision 8127-A (FCBA, 2004).

The Washington State Supreme Court has confirmed this approach:

> The court's fundamental objective is to ascertain and carry out the legislature's intent. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. We determine the plain meaning of a statutory provision based on the statutory language and, if necessary, in the context of related statutes which disclose legislative intent about the provision in question. If the statutory language is clear, our inquiry ends. However, if after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids of statutory construction, including legislative history. (Citation omitted)

Delyria v. State, 165 Wn.2d 559 (2009)

Any interpretation of RCW 41.80.040 should not ignore its specific language. It is neither necessary nor appropriate to engage in a statutory construction analysis in this case. RCW 41.80.20 and 41.80.40, read together, are clear and unambiguous – they are not susceptible to alternative meaning. Bargaining over matters which fall under statutorily defined "management rights" is prohibited by law. Moreover, the duty to bargain may not usurp the constitutional or statutory authority of state agencies.

Permissive Subjects of Bargaining

An employer may implement a non-mandatory subject of bargaining during the pendency of a representation petition without the requirement to bargain, but it may be required to bargain over the effects of its action if its actions affect wages, hours and working conditions.

ANALYSIS

The Petition and Subsequent Changes

On June 28, 2006, the union filed a petition to represent a bargaining unit at the AGO consisting of "all employees of the Consumer Protection Division of the Office of the Attorney General covered by RCW 41.06 and 41.80, excluding confidential employees, supervisors, and WMS employees." The proposed bargaining unit included these positions, among others: Customer

Service Specialist 1, 2, 3, and 4. The employer objected to the inclusion of Customer Service Specialist 4 in the petitioned-for unit. At no relevant time during the processing of the underlying petition were the employees represented for the purpose of collective bargaining. The union's status to pursue an interference claim is not dependent on having status as an exclusive bargaining representative. *Peninsula College*, Decision 5017 (CCOL, 1995).

The Consumer Resource Center (CRC) is a subdivision of the AGO's Consumer Protection Division. The CRC is designed to respond to calls and inquiries from the public with respect to consumer rights. Calls are answered by a combination of state employees, work study students and volunteers. At the time the petition was filed, there were five CRC offices in the state, including one in Spokane.

In order for a union seeking to represent state employees in a representation petition to prevail on a claim for interference for changes to the status quo, it must meet a two-pronged test: 1) the employer changed the status quo during the pendency of the petition; and 2) the employer's changes to the status do not fall under the non-bargainable management rights enumerated in RCW 41.80.040.

The Status Quo

In December 2006, Kathy Kostelec, who held the position of Customer Service Specialist 4 (CSS4), resigned from her position. Her position was included in the petitioned-for unit.[2] Upon her resignation, the employer decided to reorganize its delivery-service model. Concerned with the lack of enforcement capability on the east side of the state, the challenges it faced in recruiting volunteers for the Spokane office, and a desire to shift resources to the state's burgeoning Latino community, the employer restructured the delivery of its services in Eastern Washington. During the pendency of the petition, the employer eliminated the CSS4 position and replaced it with an assistant attorney general in the Spokane office. The employer then

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[2] The employer challenged the CSS4 position as "supervisory." After the Commission decision was issued on appeal, the parties entered into stipulations concerning the status of the position formerly held by Ms. Kostelec. The status of that position, however, is irrelevant insofar as the Commission determined that the petitioned-for unit was inappropriate.

reallocated the position of Customer Service Specialist 1, Ed Neigel, to a Communications Consultant 1, increasing his wages and hours, and altering his working conditions. The employer closed the Spokane CRC and consolidated its services in the consumer protection division. In addition, the CRC centers obtained updated technology allowing calls to be routed across the state.

The changes resulting from the reorganization of the employer's delivery-service model directly impacted the wages, hours and working conditions of the petitioned-for unit. Though its consequences may have been unintended, they had the impact of directly affecting the workload of the reallocated position, changing the position's supervisor, and affecting hours and working conditions (for example, adding a travel component to the duties and increasing the salary range from range 32 to 36). The elimination of a position may have resulted in an increase in the workload of the remaining employees, potentially impacting their working conditions. Last, the closure of the Spokane office impacted all potential positions in the bargaining unit, redistributing workload and increasing employee call loads.

Dynamic Status Quo

In addition, the CRC obtained new telephone technology which it selected in early 2006, prior to the filing of the petition, and installed in the Spokane office in September 2006. The updated technology was used to reroute Spokane CRC calls to the other CRC offices in the state, thereby increasing the remaining employees' call load. The employer presented testimony during the hearing that it closed its Kennewick CRC office in 2006 and its Olympia CRC office in 2002, based on similar considerations. The employer contended that its actions were part of the dynamic status quo. Since the changes in technology were introduced prior to the petition, they can be seen as part of the dynamic status quo. The re-routing of the calls, however, was not implemented or announced until after the petition was filed, altering the status quo. Moreover, the mere fact that the employer had closed two offices in the past did not create a dynamic status quo. The employer did not have a plan in place to make the changes complained of until after the petition was filed. The evidence presented at the hearing clearly indicated that the decision to close the Spokane office was not even considered until after the petition was filed. Thus, that decision was not part of the dynamic status quo.

Other than the employer's adoption of new technology, the changes described do constitute a change in the status quo. The union has proven that the employer violated the status quo and has met the first prong of the test.

Management Rights Under RCW 41.80.040

The second prong of the analysis which a union seeking representation of a bargaining unit of state employees must prove is that the changes to the status quo were not among the management rights enumerated in RCW 41.80.040, over which the parties are prohibited from bargaining. Pursuant to RCW 41.80.020 and 41.80.040, the parties may not bargain over "the functions and programs of the employer, the use of technology, and the structure of the organization." All of the changes complained of fall into these categories. The uncontroverted testimony presented at the hearing established the employer's underlying motives for the changes: to improve its delivery-service model. In closing the Spokane office, the employer followed a model used in the past: consolidate services and close offices. The eliminated and reallocated positions were a direct outgrowth of the closure of the Spokane office and management's decision to change its structure, programs, and use of technology. While the actions constitute a change in the status quo, they fall squarely under the management rights set forth in RCW 41.80.040, which are not subject to bargaining. Thus, the union failed to meet the second prong of the test, and its interference claim must be dismissed.

FINDINGS OF FACT

1. The Washington State Office of the Attorney General (AGO or employer) is an employer within the meaning of RCW 41.80.005(8).

2. The Washington Federation of State Employees (union) is an employee organization within the meaning of RCW 41.80.005(7).

3. The union filed a representation petition for a bargaining unit consisting of employees of the Consumer Protection Division of the AGO on June 26, 2006.

4. The proposed bargaining unit included these positions, among others; Customer Service Specialist 1, 2, 3, and 4. The employer objected to the inclusion of Customer Service Specialist 4 in the petitioned-for unit.

5. The Executive Director of the Commission dismissed the petition in its entirety on January 11, 2008. The Commission affirmed the Executive Director's decision on February 18, 2009.

6. Upon resignation of the incumbent employee in the Customer Service Specialist 4 position in December, 2006, the employer eliminated it. The petition was pending at that time.

7. While the petition was pending, the employer reallocated the position of Customer Service Specialist 1 to Communications Consultant 1.

8. While the petition was pending, the employer closed the Spokane CRC office, and re-routed incoming calls to the other CRC offices in the state.

9. In taking the actions described in Findings of Fact 6, 7, and 8, the employer changed the status quo.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.80 RCW and Chapter 391-45 WAC.

2. In taking in the actions described in Findings of Fact 6, 7 and 8, the employer was exercising management rights pursuant to RCW 41.80.020 and 41.80.040 and did not interfere with employee rights pursuant to RCW 41.80.110(1)(a).

ORDER

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

ISSUED at Olympia, Washington, this 16th day of April, 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.