City of Benton City, Decision 10956 (PECB, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 839, Complainant, vs. CITY OF BENTON CITY, Respondent.	CASE 23139-U-10-5892 DECISION 10956 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Reid, Pedersen, McCarthy & Ballew, L.L.P. by *David W. Ballew*, Attorney at Law, for the union.

Kerr Law Group by *Patrick J. Galloway,* Attorney at Law, for the employer.

On March 29, 2010, Teamsters Local 839 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC). The union alleged that the City of Benton City (employer) interfered with employee rights and discriminated by no longer allowing union representatives to meet with bargaining unit members during their work time, in reprisal for union activities protected by Chapter 41.56 RCW. A preliminary ruling was issued, finding the union's complaint stated a cause of action for employer interference and discrimination under RCW 41.56.140(1). Examiner Emily Martin conducted a hearing on July 21, 2010. The parties filed post-hearing briefs to complete the record.

ISSUE PRESENTED

Did the employer unlawfully discriminate and interfere with protected rights when it no longer allowed union representatives to meet with bargaining unit members during their work time in reprisal for union activities?

The Examiner finds the employer interfered and discriminated in reprisal for protected union activities.

APPLICABLE LEGAL STANDARD – DISCRIMINATION

An employer unlawfully discriminates against an employee when it takes action 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 complainant maintains the burden of proof in employer discrimination cases. To prove discrimination, the complainant must first set forth a *prima facie* case by establishing the following:

1. The employee, or employees, 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(s) of some ascertainable right, benefit, or status; and
3. A causal connection exists between the exercise of a protected activity and the employer's action.

If a complainant provides the evidence of a causal connection, a rebuttable presumption is created in favor of the complainant. While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the complainant establishes a prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions. The complainant may respond to an employer's defense in one of two ways:

1. By showing the employer's reason is pretextual; or

2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Port of Seattle, Decision 10097-A (PECB, 2009). Also see *Educational Service District 114,* Decision 4361-A; *Mansfield School District*, Decision 5238-A (EDUC, 1996); *Pasco Housing Authority*, Decision 6248-A (PECB, 1998).

The timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between the protected activity and the adverse action. *City of Winlock,* Decision 4784-A (PECB, 1995); *Mansfield School District*, Decision 5238-A. 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). To prove discriminatory motivation, the complainant 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. *Northshore Utility District*, Decision 10534-A (PECB, 2010). 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.

APPLICABLE LEGAL STANDARD – INTERFERENCE

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. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee, or employees, involved were 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. An independent interference violation cannot be found under the same set of facts that failed to constitute a discrimination violation. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

ANALYSIS

The union is the exclusive representative of a bargaining unit of all public employees in Benton City except the clerk-treasurer. The union and employer are parties to a collective bargaining agreement effective from November 1, 2007 – October 31, 2011. Lloyd Carnahan is the current mayor and Russell Shjerven is the union's business agent for Benton City. Carnahan was mayor during the entire timeframe relevant in this case.

Russell Shjerven became the business agent for the Benton City bargaining unit in 2008 and held his first meeting with Mayor Carnahan, and then a subsequent meeting with union employees, on March 14,

2008. Throughout 2008 and 2009, he held 12 meetings with union employees at city hall during work hours. These meetings were all scheduled and approved by Stephanie Hoegh, the clerk-treasurer who serves as the mayor's designee.

In December 2009, the employer terminated a bargaining unit employee. The union filed a grievance regarding the termination that was subsequently denied by the employer. Shjerven sent Carnahan a letter on January 5, 2010, demanding arbitration in the matter. On January 26, 2010, Hoegh contacted Shjerven to advise him that union meetings would no longer be allowed at City Hall during the business day. Shjerven sent Carnahan a letter on January 27, 2010, demanding an opportunity to bargain this change. The parties met to discuss the issue, but the issue was not resolved.

Prima Facie Case

In order to meet its burden of proof, the union must establish a *prima facie* case of employer discrimination. The evidence supports the finding that the termination of meetings during work hours occurred shortly after the demand for arbitration regarding the termination of the bargaining unit employee. The filing for arbitration was a protected union activity. The close timing between the arbitration demand and the meeting change supports an inference of motivation. The union established there was a causal connection between filing the arbitration for the bargaining unit employee and the employer ending the practice of union meetings occurring at City Hall during work hours.

Employer's Non-Discriminatory Reasons

If the union demonstrates a *prima facie* case of discrimination, the employer has the opportunity to articulate legitimate non-discriminatory reasons for its actions. The employer argued the reasons for its action were: the meetings violated the scope of the Mayor's verbal agreement with Shjerven; the Collective Bargaining Agreement, Article 17.3, makes any use of City time and resources for conducting of union business subject to the discretion of the mayor; meetings of all union employees interfere with the employer's ability to conduct business and are not a prudent use of public funds; and holding paid meetings was inconsistent with Carnahan's own experiences as a union member and interfered with the union members' privacy rights.

Shjerven testified he told Carnahan during their first meeting on March 14, 2008 that he would be meeting with union employees every four to six weeks at City Hall during work hours. Carnahan

testified that although he and Shjerven discussed union meetings occurring every four to six weeks, he believed they would be held during breaks or lunch periods. The record reflects that immediately following that meeting, Shjerven met with City employees. These employees began to arrive as Carnahan and Shjerven were finishing their discussion. Shjerven testified Carnahan excused himself from the meeting room saying, "I know you guys need your privacy." Carnahan did not dispute this testimony and it contradicts his testimony that he did not know the meetings occurred during work hours. He was aware of this first meeting between Shjerven and the bargaining unit employees and witnessed their arrival during work hours.

The Collective Bargaining Agreement states the decision to use city time and resources for conducting union business is subject to the discretion of the mayor or his *designee*. In testimony offered by the prior business agent, Russell Shjerven, Mayor Carnahan, and Stephanie Hoegh herself, it is clear that Hoegh is the designee for the part-time Mayor. The mayor stated "Stephanie takes care of daily business" and that she approved the union meetings. Hoegh said she was the "point of contact for the Mayor's office" and that she had approved the 12 meetings in 2008 and 2009. It is clear she acted as the Mayor's designee and had the authority to approve the meetings referred to in Article 17.3 of the Collective Bargaining Agreement. Because she was the only city employee who was not a member of the union, she scheduled the meetings around her work schedule to ensure her availability to answer the phones and greet customers.

Hoegh claimed that when she received the grievance for the bargaining unit employee, she read the Collective Bargaining Agreement to ensure she understood it thoroughly. She claimed that after reading Article 17.3, she realized it was not her call to make whether the meetings should take place and therefore notified Carnahan of his ability to make that decision. Although Hoegh may not have intentionally looked through the Collective Bargaining Agreement looking for an Article she could use to end the meetings, the timing is suspect. The real issue is not whether Hoegh could or did approve the meetings, but if ending the occurrence of those meetings was based on retaliation for the filing of the arbitration. Although the Collective Bargaining Agreement does allow discretion as to whether or not the meetings can be conducted during work hours, the timing of Hoegh's notification to Carnahan about this discretionary decision casts suspicion on the employer's motivation.

While the mayor testified that use of City resources was a primary concern, these meetings have been occurring for at least 2 years without any known concerns or complaints being made. The employer has agreed through the Collective Bargaining Agreement to allow these meetings to occur with approval from the Mayor or his designee; therefore, to argue about use of City resources at this time lacks credibility. The Mayor shifts from not knowing the meetings were occurring during work hours to worrying about the stewardship of public funds in a short period of time. While use of public funds and space can be a legitimate concern,[1] the sudden interest and timing of Carnahan's decision is the issue in this case.

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 employer's motives into question. The union successfully met its burden of proof to show that a protected activity was a substantial motivating factor for discontinuing the union meetings at City Hall during work hours and the justifications provided by Benton City are pretextual and retaliatory in nature.

FINDINGS OF FACT

1. The City of Benton City is a public employer within the meaning of RCW 41.56.030(12).

2. Teamsters Local 839 is a bargaining representative within the meaning of RCW 41.56.030(2) and is the exclusive bargaining representative for a bargaining unit of all public employees in Benton City except the clerk-treasurer.

3. The union and employer were parties to a collective bargaining agreement that was effective from November 1, 2007 – October 31, 2011.

4. Lloyd Carnahan is the current mayor of Benton City.

5. Russell Shjerven is the union's business agent for Benton City.

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[1] *Washington State Patrol*, Decision 2900 (PECB, 1988); *City of Pasco*, Decision 3582-A (PECB, 1991).

6. Shjerven became the business agent for Benton City in 2008 and held his first meeting with Mayor Carnahan, and then a subsequent meeting with union employees, on March 14, 2008.

7. Throughout 2008 and 2009, Shjerven held 12 meetings with union employees at city hall during work hours. These meetings were all scheduled and approved by Stephanie Hoegh, who serves as the mayor's designee.

8. In December 2009, the City terminated a bargaining unit employee.

9. The union filed a grievance regarding the termination that was subsequently denied by the employer.

10. Shjerven sent Carnahan a letter on January 5, 2010, demanding arbitration regarding the termination.

11. On January 26, 2010, Hoegh contacted Shjerven to advise him that union meetings would no longer be allowed at City Hall during work hours.

12. The employer's reasons for terminating the union meetings were pretextual.

13. The decision to terminate the union meetings was retaliatory based on the timing.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. As described in Findings of Fact 6 through 11, the City of Benton City interfered with employee rights and discriminated in violation of RCW 41.56.140(1) by no longer allowing union representatives to meet with bargaining unit members during work hours in retaliation for the union's filing a demand for arbitration.

ORDER

City of Benton City, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Interfering with employee rights and discriminating in violation of RCW 41.56.140 (1), by no longer allowing union representatives to meet with bargaining unit members during their work time, in reprisal for union activities protected by Chapter 41.56 RCW.

   b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Restore the *status quo ante* by allowing union representatives to meet with bargaining unit members during their work time in accordance with the terms of the Collective Bargaining Agreement.

   b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

   c. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Benton City, and permanently append a copy

of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

e. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 4th day of January, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

EMILY H. MARTIN, 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.

CASE 23139-U-10-5892
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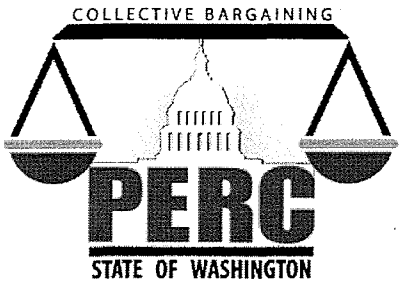

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE *CITY OF BENTON CITY* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY interfered with employee rights and discriminated in violation of RCW 41.56.140(1) by no longer allowing union representatives to meet with bargaining unit members during work hours in retaliation for the union filing a demand for arbitration.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL allow union representatives to meet with bargaining unit members during their work time.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23139-U-10-05892	FILED:	03/29/2010	FILED BY:	PARTY 2
DISPUTE:	ER DISCRIMINATE				
BAR UNIT:	MIXED CLASSES				
DETAILS:	Meetings with bargaining unit members				
COMMENTS:					

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