Seattle School District, Decision 11045 (PECB, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 23073-U-10-5874 DECISION 11045 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, by *Kathleen Phair Barnard*, Attorney at Law, for the union.

John M. Cerqui, Senior Assistant General Counsel, for the employer.

On February 26, 2010, the International Union of Operating Engineers, Local 609 (union) filed an unfair labor practice complaint against the Seattle School District (employer). The complaint alleges the employer took actions which constituted interference with employee rights, discrimination, and refusal to bargain in violation of RCW 41.56.140(1) and (4). A preliminary ruling was issued on March 3, 2010. The union filed an amended complaint on May 25, 2010. The employer filed an answer to the amended complaint on June 18, 2010. Examiner Philip Huang held the hearing on October 13 and 14, 2010. The parties submitted post-hearing briefs to complete the record.

ISSUES PRESENTED

1. Did the employer interfere with employee rights and discriminate against Vilando Wynter in reprisal for engaging in protected union activities?

2. Did the employer interfere with employee rights and refuse to bargain by refusing to provide relevant information requested by the union?

I find the employer discriminated in violation of RCW 41.56.140(1) by issuing a reprimand to Wynter in reprisal for his union activities. I also find the employer's response to the union's information request was false and misleading and constituted a violation of the duty to bargain in good faith.

ISSUE 1: Did the employer interfere with employee rights and discriminate against Vilando Wynter in reprisal for engaging in protected union activities?

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 employee maintains 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. A causal connection exists 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).

If a prima facie case is established, the employer has the opportunity to articulate legitimate, non-discriminatory reasons for its actions by producing relevant evidence of another motivation.

Educational Service District 114, Decision 4361-A. 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: 1) the employer's reasons were pretextual; or 2) although some or all of the employer's stated reason may be 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).

ANALYSIS

Vilando Wynter, a security specialist employed by the Seattle School District, worked at Nathan Hale High School during the 2008-09 and 2009-10 school years. Jill Hudson, a principal at the Seattle School District, became principal at Nathan Hale during the 2009-10 school year.

On October 16, 2009, Wynter conducted a search involving a student suspected of stealing a cell phone. He asked the other security specialist to observe the search, and took the student to the Activity Center room. Hudson decided to watch how the search was conducted and at some point made her presence known. Before the search was concluded, the other specialist left. After the search was over, Hudson and Wynter engaged in a conversation over search procedures. In particular, they discussed whose obligation it was to report this search to the student's parents and whether the search occurred in an appropriate space. Hudson told Wynter he should have called the parents before conducting the search. Wynter disagreed, saying that after a search he reported to an administrator who then would inform the parents. Hudson also believed that the search took place in an open space that violated the student's privacy. Wynter replied that there was no other room he felt that he could perform the search in at that time. He added that his procedures came from the district security manual, and suggested they could talk to a union representative if she disagreed with these security procedures. Hudson then ended the conversation.

On October 19, Hudson and vice principal Ron Newton met with Wynter to discuss the search as well as an attendance-related issue. They spoke briefly about his recent tardiness, which was the

result of taking his son to school. Again they disagreed about the search issue. Hudson again told him what her policies were, and again Wynter referred her to the policy manual. At that point Wynter asked for union representation and the meeting ended.

On October 26, 2009, Hudson and Newton met with Wynter and David Westberg, his union representative. Again, they discussed and disagreed about whose job it was to contact parents, and whether the search location was appropriate. This time, Hudson offered a third criticism of Wynter's search: that a second person was not present for the entire duration of the search. This point was disputed. Westberg asked whether a second person was required by policy. Hudson replied that having a second person was a best practice, and that she would require it at Nathan Hale. Wynter responded that in fact there were two people for the cell phone search, the other security specialist and later Hudson. The conversation was already animated when he then asserted that Hudson had also not followed policy during an incident earlier that month, when she had seen drug paraphernalia next to a few students and seized the items. This reference upset Hudson, who then walked out of the room.

Following the meeting, Hudson sent an e-mail to district administrators Pegi McEvoy and Michael Tolley[1] with the subject headline "out of control." It began, "Lando Wynter would not take feedback and in fact accused me of inappropriate behavior. I will write him up but he needs to be moved immediately from Nathan Hale." On the same day, Hudson also drafted a letter of expectations regarding search procedures. This letter sets out the feedback that Hudson says she was unable to convey at the meeting, because Wynter "argued with me and failed to allow me to present the feedback." The letter repeats Hudson's expectations to have a second person present at the search, to conduct the search in a private place, and to notify Newton or a second administrator of the search and its results. It then notes that Wynter should be on site and available at 8:00 A.M. Finally, it returned to the feedback problems, stating:

> In the future if we have to have a feedback session it is my expectation that you listen to the feedback and not interrupt not argue [sic] with your supervisor. This is an example cooperation [sic] that is part of your evaluation.

[1] During the 2009-10 school year, McEvoy was the District's head of security and supervised the security specialists. Tolley was education director and supervised the principals.

Two days later, on October 28, Newton prepared a half-page "letter of reprimand" for "excessive tardiness, leaving work early and insubordination."[2] The letter focuses on tardiness, specifically to check in at the Main Office and also to follow Hudson and Newton's instructions to be stationed at a certain corner, adding, "Not following directions is an example of insubordination." On November 3, Newton issued Wynter a two-page "written reprimand" for "excessive tardiness, leaving work early and acts of insubordination." This letter used similar language to the October 28 letter but was more expansive. It included several specific dates of arrivals after 8:00 A.M. and departures before 4:00 P.M. The November 3 letter now said, "Failure to follow my directive is considered insubordination and will result in the imposition of additional discipline, including the termination of your employment." The letter now explained that the purpose of the October 26 meeting was to issue "an oral warning that leaving work early, arriving late and not following instructions, was unacceptable behavior and that it had to change immediately." Finally, the letter set out new attendance and reporting requirements for Wynter, adding that "three or more unexcused absences, late arrivals or early departures in the next 12 months" would lead to "additional discipline, up to and including termination of your employment."

The same morning, Westberg had contacted several officials including McEvoy, attempting to schedule a meeting pursuant to a Memorandum of Understanding with the employer, and later signaled to the employer the existence of a potential grievance.[3] On November 18, the union filed a grievance alleging the November 3 letter was issued to Wynter without proper cause and in retaliation for the October 26 meeting. On December 2, Westberg attended a step 2 grievance meeting with three district administrators. The same day he received another letter from Newton, titled "Continuing attendance issues." It listed the dates Wynter was reported to have not checked in and out according to the procedure laid out in the November 3 letter, and acknowledged he was grieving the earlier letter.[4] On December 3, Hudson wrote an e-mail

---

2 It is unclear whether the October 28 letter was actually delivered. Wynter recalled receiving a letter similar to it, while Hudson characterized it as a draft.

3 The Memorandum of Understanding outlines a procedure whereby the employer and union could meet to discuss alleged retaliatory behavior between a union member and a building principal. It arose out of a settlement of an unfair labor practice charge filed with PERC.

4 When the union filed the grievance, it was aware of only one letter of reprimand, from November 3.

expressing her dissatisfaction with the handling of the Wynter situation, and calling for him to be given the "next step of discipline." The same day, the union filed an information request in pursuit of the grievance.

On December 4, Wynter had an incident with a student. The student had fled from Wynter and entered a classroom to hide. Wynter followed him and physically removed him from the classroom. On December 7, a verbal confrontation occurred between Wynter and another student. The next day he was put on administrative leave.

The employer investigated both the issues that prompted the administrative leave and the letter of reprimand. On February 1, 2010, Wynter was transferred to a new school. On February 23, the employer issued a memorandum confirming that it would take no disciplinary action based on the December incidents, and withdrawing the November 3 reprimand.

The underlying situation appears to be resolved at this point, through the grievance procedure of the parties' collective bargaining agreement. However, the issue of alleged retaliation remains.

The Prima Facie Case

Protected Activity

An employee requesting union representation in a possible disciplinary interview is clearly exercising a protected right. *Okanogan County*, Decision 2252-A (PECB, 1986), citing *NLRB v. Weingarten*, 420 U.S. 251 (1975); *see also Methow Valley School District,* Decision 8400-A (PECB, 2004). The Commission also has long held that filing grievances pursuant to a collective bargaining agreement is an activity protected by Chapter 41.56 RCW. *Valley General Hospital*, Decision 1195-A (PECB, 1981).

Wynter engaged in a variety of protected union activities during October and November 2009. Wynter raised that this was an union issue. After the employer met with Wynter to discuss search procedures as well as his attendance, he realized this was an investigatory meeting that could lead to discipline, and invoked his *Weingarten* right, requesting that his union

representative be present. This fact the parties do not dispute. The meeting was then postponed until October 26, when Wynter's union representative was present and assisted him during the interview. The union representative filed a grievance on his behalf on November 18, alleging that a written reprimand was without just cause and in retaliation for his behavior in the October 26 meeting.

Deprivation of Right, Benefit or Status

On November 3, 2009, the principal issued Wynter a written reprimand for "excessive tardiness, leaving work early and insubordination." On December 7, Wynter was placed on administrative leave. He was transferred to another school in February 2010.

Both the written reprimands and the administrative leave constitute deprivations of Wynter's employee rights, benefits, or status. In some circumstances an administrative transfer may amount to harm or otherwise evidence of discrimination. *King County*, Decision 3318 (PECB, 1989); *Mansfield School District*, Decisions 5238, 5239 (EDUC, 1995); *Seattle School District*, Decision 9355-B (PECB, 2007). In this case, while the employer initially desired to transfer Wynter, the transfer was also sought by Wynter. In the cases cited, the transfer amounted to a loss of prestige or some other specific harm. The union did not show particular harm resulting from this transfer. Overall, Wynter did suffer harm to his employee rights, benefits or status.

Causal Connection

The timing and sequence of events may be a basis for finding a causal connection between protected activity and adverse action. *City of Winlock*, Decision 4784-A (PECB, 1995). The timing must be in reasonable proximity, and not so attenuated that no reasonable trier of fact could find a causal connection. *See Reardon-Edwall School District*, Decision 6205-A (PECB, 1998). In this case, the proximity between the October 26, 2009 meeting and the disciplinary letters on November 3 and December 2, 2009, as well as his placement on administrative leave supports an inference of causal connection. The record also contains corroborating evidence. It shows that Hudson was very upset by the conversation with Westberg and Wynter, and wanted to "move him now." Finally, Hudson and Newton drafted a letter of reprimand that was dated October 28, only two days after the meeting at issue.

Shortly after the grievance was filed, Hudson continued to e-mail her superiors urging a more severe course of action against Wynter. On December 3, Hudson called on her superiors to give Wynter the "next step of discipline." Wynter was placed on administrative leave four days after this e-mail. The complainant has established a prima facie case for unlawful discrimination.

The Employer's Burden of Production

The burden of production now shifts to the employer to articulate legitimate, non-discriminatory reasons for its actions. First, the employer states that its actions were motivated by concerns over Wynter's attendance issues, which date back to the previous school year. It points out that Wynter often arrived late at, and left as much as a half-hour early, from work. Second, the employer argues that Hudson acted appropriately in ending the October 26 meeting. Third, the employer argues that Wynter was placed on administrative leave because of his alleged conduct towards two students.

Substantial Factor Analysis

1. Reprimand

The union argues that due to his protected activity the employer treated Wynter's attendance very differently from the previous school year and the month prior to the meeting.

During the 2008-09 school year, the employer documented Wynter's attendance issues once, in the letter which Newton attached to the June 2009 performance evaluation. That letter explained both the employer's concerns as well as Wynter's reasons. The main attendance issue was the employee's extensive use of leave for his daughter's health care. Reference to tardiness was secondary, and focused on the need to notify the employer before missing all or part of the school day, again for child health care purposes. Wynter's testimony that he had a child care scheduling arrangement with Newton and the previous principal is consistent with this document. He was never counseled or disciplined for these issues.

At the beginning of the 2009-10 school year, Wynter and Newton had an agreement that he could pick up his son from school, skip his lunch break, and leave up to a half-hour early.[5] The evidence does not support Hudson's claim that Wynter was assigned an 8:00 A.M. to 4:00 P.M. work schedule in September. The September expectations letter was actually a list of general expectations and responsibilities, with specific duties and assignments for morning and afternoon. The letter did not include specific work hours. At the hearing, Hudson was presented with this letter and appeared genuinely surprised that it did not include work hours.

Hudson and Newton apparently changed his work hours on November 3. If that had been the extent of their actions, a different result may, but not necessarily, be dictated. However, in the week between the meeting on October 26 and November 3, the following happened:

- On October 26 at 9:22 am, Hudson e-mailed her supervisor with the subject "out of control." She wrote that Wynter would not take feedback and she would write him up.
- On the same day, Hudson drafted a letter of expectations on search procedures, and stating Wynter would be evaluated on cooperating and not arguing.
- On October 28, Newton prepared a short "letter of reprimand" for "excessive tardiness, leaving work early and insubordination." The letter focuses on aspects of punctuality, check in procedures and stationing instructions, and added "Not following directions is an example of insubordination."
- On November 3, Newton issued a long "written reprimand" for "your excessive tardiness, leaving work early and acts of insubordination." Using similar language to the October 28 letter, it alleged multiple instances of late arrivals and early departures, and set new rules for Wynter. It concluded, "Failure to follow my directive is considered insubordination and will result in the imposition of additional discipline, including the termination of your employment." It retroactively described the October 26 meeting as intended to issue "an oral warning" about attendance and not following instructions. Finally, the letter set out new attendance and reporting requirements for Wynter, adding

---

[5] Wynter's testimony was corroborated by the following exchange between Newton and the employer's attorney:
Q: What were Mr. Wynter's work hours during the 2009-2010 school year, if you recall?
A: I think we asked him to stay from eight to three-thirty or 3:45. I don't recall exactly.

> that "three or more unexcused absences, late arrivals or early departures in the next 12 months" would lead to "additional discipline, up to and including termination of your employment."

The rapid and result-oriented evolution of messages in these letters supports the conclusion that the reasons advanced by the employer are clearly pretextual. Hudson's October 26 e-mail to her superiors also indicates her intent to punish Wynter for not agreeing with her at the meeting. The second communication indicates she did so vaguely, stating his "cooperation" would affect her evaluation of him. The October 28 letter now introduces the term "insubordination," but shifts the reason to something more legitimate – "not following directions." The November 3 letter uses the word "insubordination" three times and "termination" twice, and in a bit of revisionism, changes the subject of the heated meeting from search procedures to attendance and following directions. The shifting reasons that are given for discipline support a finding of retaliation. The anger displayed in the October 26 e-mail following the union-represented meeting, as well as subsequent e-mails to her superiors, are further evidence of retaliatory intent. Finally, negative inferences can be drawn when an employer resorts to an overly severe disciplinary response. *See City of Winlock*, Decision 4784-A (PECB, 1995). Here, the use of termination language where the employee had not been warned or counseled prior to October 26 further supports the inference.

2. October 26, 2010 Meeting and *Weingarten* Rights

There is no dispute that an employer may end a meeting it has called, regardless of *Weingarten* representation rights. That is not the issue. The issue is whether the employer's actions were in retaliation for the events of the October 26, 2010 meeting, and whether the exercise of protected employee rights was a substantial factor in the employer's actions.

Because the union argues that the alleged discrimination stemmed from discussion of the search at the October 26 meeting, it is necessary to examine the purpose of *Weingarten* rights. The representative is there to "assist the employee," "attempt to clarify the facts," and "suggest other employees who may have knowledge" of those facts. *Weingarten*, 420 U.S. at 260. In other words, the union representative is not merely a passive observer. Both PERC and the NLRB

have consistently rejected attempts by employers to silence union representatives at investigatory interviews. *King County*, Decision 4299 (PECB, 1993), *aff'd King County*, Decision 4299-A (PECB, 1993); *NLRB v. Texaco, Inc.*, 659 F.2d 124 (9th Circuit, 1981) ("the representative should be able to take an active role in assisting the employee to present the facts"). There is no duty to bargain, and no employer obligation to interview. To the extent the representative's role is limited, it is to facilitate hearing from the employee himself. *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470 (5th Circuit, 1982) (employer may insist it is "only interested at that time in hearing the employee's own account of what occurred"). In sum, *Weingarten* rights are individual rights intended to benefit the employee. *See Methow Valley School District,* Decision 8400-A (PECB, 2004). These benefits also accrue to the employer, who saves time and effort if they obtain information that helps get to the bottom of the incident, before the issue becomes a complex labor dispute. As the examiner in *City of Puyallup*, Decision 6784 (PECB, 1999) emphasized in his *Weingarten* analysis:

> The Court then listed the many benefits that occur when union representation is allowed at investigatory interviews, stating:
>
> > The Board's construction also gives recognition to the right **when it is most useful** to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate **to relate accurately** the incident being investigated, or too ignorant **to raise extenuating factors**. A knowledgeable union representative could assist the employer by **eliciting favorable facts**, and save the employer production time by getting to the bottom of the incident occasioning the interview.
>
> *Weingarten*, at pages 262-63. [Emphasis by **bold** supplied.]

Both Westberg and Wynter attempted to reap the benefits of representation precisely in the way outlined by the *Weingarten* decision. Together, they tried to relate accurately that two people were present during the entire search. They raised extenuating factors for conducting the search in a less private area, mentioning that no other spaces appeared available. Finally, both elicited favorable facts about the search: Westberg pointed out that notifying parents was not required, while Wynter recognized it as a best practice, and also offered an instance where Hudson had possibly departed from that practice.

The right to *Weingarten* representation at an investigatory meeting necessarily encompasses its attendant safeguards and benefits. For example, it normally includes the right of the employee to consult with his union representative prior to the hearing. *Climax Molybdenum Company*, 227 NLRB 1189 (1977). It also includes the right to know the subject matter of the meeting. "Without such information and such conference, the ability of the union representative effectively to give the aid and protection sought by the employee would be seriously diminished." *Pacific Tel. & Tel. Co. v. NLRB*, 711 F.2d 134 (9th Circuit, 1983). Finally, the Board has found that failure to conduct a "meaningful" investigation and to give the employee, who is the subject of the investigation, an opportunity to explain his position are clear indicia of discriminatory intent. *New Orleans Cold Storage Co.*, 326 NLRB 1471, 1477 (1998).Our case law is silent on whether it protects from discrimination the employee's attempt to explain oneself during such a meeting. But the Commission has similarly recognized what the representative says and does as protected activity.

Based on the Board precedents, and the representative's identical role here of effectively assisting the employee, the Examiner finds the employee is similarly protected from discrimination. *See Iroquois Nursing Home, Inc.*, 2009 WL 4055342 (N.L.R.B. Div. of Judges Nov 25, 2009) (if employee "had been permitted a representative to accompany and presumably assist her, she, too, would have had a better opportunity to explain or justify her actions that day, and perhaps avoid the proposed discipline. This appears to me to be the essence of the protection of Weingarten. . . ."). To silence the employee after he has consulted with his union would seriously diminish the effectiveness of the union's representation. In the instant case, it does not matter whether it was Westberg or Wynter's words that prompted Hudson's subsequent actions. Both Westberg's representation and Wynter's attempt to explain his actions were each substantial factors in the employer's response, and factually it would be fruitless to attempt to separate their effects.

The particular facts of this case also militate toward a finding of protected activity. Before October 26, Wynter had asserted that he was following correct search procedure from a collectively bargained district manual, and that he would be seeking union assistance on the issue. It is well-known that this union has a keen interest in issues of work jurisdiction. *See e.g.*,

Seattle School District, Decision 9628-A (PECB, 2008); *Seattle School District*, Decision 10732 (PECB, 2010). The employer must have been aware that this dispute was becoming a "union issue." He does not lose the protection afforded by these protected union activities merely because he participates in an investigatory interview. In addition to the aforementioned decisions, an 2005 internal memorandum from the employer's Director of Labor Relations and Assistant General Counsel was issued to education directors and principals on the concept of retaliation and included examples of retaliation.[6] That directive establishes the employer's awareness of its legal obligations, and what actions may violate them. *See City of Seattle*, Decision 3593-A (PECB, 1991).

Limits of Protected Activity

There are certainly occasions where an employee or union agent's conduct or speech during otherwise protected activity may exceed the bounds of protection. Washington courts have adopted a reasonableness test for union activity in general, while the NLRB and federal courts have articulated a four-factor test they have applied to speech in particular.

Reasonableness Test

Both the Commission and state courts have applied the reasonableness test to govern union activity generally. *Vancouver School District v. SEIU, Local 92*, 79 Wn. App 905 (1995); *State v. Fox*, 82 Wn.2d 289 (1973) ("a union organizer has a right to go where necessary to meet with workers, as long as his exercise of that right is reasonable"). Employee activity including speech loses its protection when it is "unlawful, violent, in breach of contract, or 'indefensibly' disloyal." *Vancouver School District v. SEIU, Local 92*, citing *Washington Aluminum Co.*, 370 U.S. 9, 17 (1973).

In short, the test is whether the activity is reasonable in the context of labor relations. As Justice Marshall stated in a case involving federal workers who had published a "List of Scabs," while a

[6] Among the examples given are "Disciplining an employee after they filed a grievance for behavior that was previously tolerated, particularly when the grievance was a substantial and motivating factor in disciplining the union employee" and "Lowering the annual evaluation for an employee because the employee raised collective bargaining concerns or had a union representative talk to the manager or principal about work related concerns."

law governing public employees might "regulate the location or form of employee speech to a somewhat greater extent than under the NLRA, we do not perceive any intention to curtail in any way the content of union speech." *Letter Carriers v. Austin*, 418 U.S. 264, 278 (1974).[7] State courts have applied a similar standard. For example, they have held it was unreasonable to allow a grievant and union representative to interview children under twelve unsupervised, but reasonable for them to contact the parents, as well as interview children twelve and older. *Vancouver School District v. SEIU, Local 92,* 79 Wn. App 905 (1995). *See also PERC v. City of Vancouver*, 107 Wn. App. 694 (2001) (internal union discussion lost protection where members allegedly conspired to harass a fellow officer).

In a recent decision, an examiner found that a union letter which described the employer's actions as "disgusting and reprehensible" deserved protection. He concluded:

> [T]he letter may be misguided and emotionally charged, but it could be considered to be the kind of communication that would be protected under Chapter 41.56 RCW. While the union did not have the authority to make work assignments, it appears that Local 2898 was working on behalf of one of its members, and attempted to make an accommodation for that individual.

City of Seattle, Decision 10803-A (PECB, 2011).

While some of Wynter's comments may have been impolite or provocative, they were rooted in his attempt to defend his search procedures as appropriate, both under the employer's policies and in comparison to Hudson's own conduct. Therefore, his conduct does not rise to this level of unreasonableness.

Four-factor Test

The NLRB has consistently applied a four-factor test set to determine whether employee speech or conduct that occurs during the course of otherwise protected activity is so opprobrious as to lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Kiewit Power Constructors Co.*, 355 NLRB No. 150 (August 27, 2010). The four factors are: (1) the place of

---

[7] Like 41.56 RCW, the Executive Order governing represented federal employees in *Letter Carriers* lacks the Section 7 right granted to private sector employees, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

the discussion; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice, or otherwise unlawful act. The Atlantic Steel test has been applied in over 100 cases by the Board and federal courts, often relating to communications between labor and management. Examiners have previously applied NLRB precedent to determine whether employee speech and conduct exceeded the bounds of protected activity. *Pierce County Fire District No.9*, Decision 3334 (PECB, 1989); *University of Washington*, Decision 9633 (PSRA, 2007).

As to the first factor, the place of discussion weighs in favor of protection. Wynter's remarks occurred during the type of meeting where an employee has the opportunity and obligation to explain his actions. Further, the meeting was held in a private location, so other employees were not disturbed. *See Noble Metal Processing*, 346 NLRB 795, 800 (2006) (place of discussion weighs in favor of protection where outburst occurred during employee meeting held away from employees' work area, and thus did not disrupt the work process).

Second, the subject matter of Wynter's discussion with Hudson also weighs in favor of protection. Wynter's remark about Hudson's "search" and further comments occurred during a discussion of search procedure that was collectively bargained and implicated work jurisdiction issues that are of constant interest to this union.

Third, the nature of Wynter's remarks favors protection as well. His comments did not contain profane language. They were brief, spontaneous, and unaccompanied by physical contact or threat of physical harm. It is helpful to contrast this case with *Pierce County Fire District No.9*, Decision 3334 (PECB, 1989), where an employee in a disciplinary meeting exceeded the bounds of protection when he used profanity and was primarily confrontational toward management, rather than sticking to the issue at hand. When told to calm down, he replied, "Goddamit, don't tell me to calm down, I'm acting as a union officer." Since the outburst in *Pierce County Fire District No. 9* had nothing to do with the reason for the meeting, it also failed to meet the second factor. The examiner recognizes that Wynter's statement and pointing could reasonably be viewed as rude, but the brief nature of the "outburst," made in context of the search procedure

discussion and constant work jurisdiction concerns of this union's employees, does not weigh against Wynter.

Finally, the fourth factor is whether Wynter's outburst was provoked by the employer's unfair labor practices. Hudson's comment that Wynter was being "ridiculous" does not rise to an unlawful threat. However, Hudson testified that she had intended to set her own policy on search procedure. That detail was not obvious at the October 26 meeting, and the record does not indicate search policy changes occurred at Nathan Hale. Therefore, the fourth factor does not weigh in favor of or against protection.

Applying the four factors to the facts here establishes that Wynter did not lose the protection of the collective bargaining laws by his statements at the investigatory meeting. Therefore, the employer's discipline of Wynter for engaging in that conduct was unlawful.

3. Administrative Leave

The union argues that the administrative leave, too, was part of the retaliation for union activities. It points out that the investigation ultimately did not find evidence to substantiate the charges. But that decision does not tend to prove or disprove, whether the investigation and administrative leave was substantially motivated by the employer's reaction to protected activity. The union cites in support *City of Mill Creek,* Decision 5699 (PECB, 1996), where the examiner said, "An employer which blurs the distinctions between its employees' job-related activity and their protected activity does so at is peril." This is certainly true of the issues over attendance and resolving the search protocol dispute. But it does not apply to the events leading to the administrative leave. E-mail records indicate that by mid-November, decision-making over Wynter's performance and conduct had shifted to include district-level administrators, during Hudson's continued opposition to Wynter's presence at Nathan Hale. These administrators stepped in to independently evaluate the situation.

This independence is supported by the human resource department's move to conduct its own investigation of the December 4 incident, and by the employer's decision to refrain from immediate discipline or administrative action. Wynter was placed on administrative leave only

after the second incident of alleged verbal altercation. Finally, Wynter's version of the two events were substantially similar to the employer's, lending support to the objectivity of the investigation itself. The timing of these events was unfortunate, but the union offers no evidence that on December 7, Wynter was treated differently than anyone else who faced similar allegations.

ISSUE 2: Did the employer interfere with employee rights and refuse to bargain by refusing to provide relevant information requested by the union?

LEGAL STANDARD – DUTY TO PROVIDE INFORMATION

Under RCW 41.56.030(4), the parties have an obligation to negotiate in good faith. This duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd, City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The Commission has found that the employer committed an unfair labor practice when it failed to provide information requested by the union concerning allegations of misconduct against bargaining unit members, and when it failed to explain and negotiate with the union over any concerns it had about providing that information. *Seattle School District*, Decision 5542-C (PECB, 1997). Unreasonable delay in providing necessary information may also constitute an unfair labor practice. *Seattle School District*, Decision 10664-A (PECB, 2010), citing *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988).

Starting December 2009, the union made six information requests and follow-up requests in response to the letter of reprimand, the administrative leave, and the performance evaluation generated by an earlier information request. The union continued to file information requests through March 2010. The union argues that the delay in response to its requests is an unfair labor practice. It also asserts that the performance evaluations eventually produced in March and June are false and thus violate the law.

Specifically, the union requested on December 3, 2009 that the employer provide documents it relied on to support Wynter's reprimand. On March 16, 2010, three weeks after the resolution of the administrative leave issue and the earlier grievance, the employer issued a formal written response to the union's information request. Included in the response was an unsigned copy of a June 19, 2009 performance evaluation. This document differed somewhat from the copy, signed by Newton, that the union had received from Wynter. The union made a follow-up request on March 31, 2010, for further information relating to this performance evaluation. It received an response and another copy of the evaluation on June 10, 2010. This third copy contained a second page signed by Newton, but still differed from Wynter's copy. It included two extra handwritten marks on the typewritten document.

Delay

Regarding the delay, the examiner finds that the District did not unreasonably delay its responses. The employer believed that the grievance was in abeyance, as the effort to resolve the administrative leave issue took immediate precedence for both parties. In February, the administrative leave issue was moving toward resolution and the union requested that the grievance should move forward. The employer responded five weeks after re-activation of the grievance, and three weeks after resolving the leave and reprimand grievances. There was a delay, but the reasons for the delay were legitimate – to reach a resolution on other issues between the parties, whose outcome was not unsatisfactory to the union.

No significant delay affected the other requests, except the final March 31 request. The employer's completion of this request, by finding a signed copy of the performance evaluation, and the lack of harm shown from any delay, are evidence that the employer's delay was not unlawful. *See City of Seattle*, Decision 10249 (PECB, 2008).

False or Misleading Documents

Carelessly or knowingly providing false information in response to an information request violates the duty to bargain in good faith. *Seattle School District*, Decision 9628-A (PECB, 2008). In that decision, the Commission cited *Sony Corp.*, 313 NLRB 420 (1993), where an

employer was found to have violated that duty when it gave a union false and misleading information in response to an information request.

Here the union requested a specific document relevant to its role as a collective bargaining representative. It had requested, in pursuit of a grievance, documents that the employer relied on to discipline Wynter. This request included annual performance evaluations.

In March 2010, the employer provided the union with a copy of Wynter's performance evaluation that was generated in response to the request for information. This copy was inadequate, as it lacked the necessary second page that was signed by Newton and Wynter, as well as the attachment explaining the leave issue. This part of the evaluation had been stored in the employer's database, and contained the same consistent "Average" ratings as on Wynter's copy.[8] However, where the "Punctuality and Attendance" had originally been left blank, someone had marked "Below Average."

In June 2010, the employer provided the union with another copy of the evaluation. This copy contained the same ratings as Wynter's, and also included a second page signed by both Newton and Wynter. However, there are material alterations. On this copy, someone added handwritten ratings of "Unsatisfactory" to the "Punctuality & Attendance" and "Public Contacts." Public Contacts still retains the typewritten X on "Average" as well as the new "Unsatisfactory" rating. According to the document itself, any below average ratings must be explained on page 2. None are. All documents still retain the overall "Satisfactory" rating for Wynter. The examiner finds that the employer's two versions are inconsistent with Wynter's copy, as well as inconsistent with each other, and are unlikely to be authentic. The employer materially altered the document by retroactively giving Wynter a "Unsatisfactory" rating he did not have before.

CONCLUSION

In conclusion, the employer discriminated against Wynter for exercising his rights under RCW 41.56.140(1) by issuing a written reprimand to Wynter in reprisal for his union activities. The

---

[8] The annual evaluations listed the following ratings: Exceptional, Above Average, Average, Below Average, and Unsatisfactory. Exceptional, Below Average, and Unsatisfactory ratings require explanatory comments from the evaluator.

union established a prima facie case of discrimination and the employer articulated non-discriminatory reasons for its actions. The union met its burden of proof by showing that the reasons given were unfounded or pretextual, and that Wynter's protected activity at the October 26 meeting was a substantial motivating factor for the employer's actions. In doing so, the employer also interfered with the ability of Wynter to exercise his collective bargaining rights. The employer did not discriminate against Wynter by placing him on administrative leave and ultimately transferring him to another school.

The employer also violated RCW 41.56.140(4) by failing and refusing to provide accurate information to the union that was necessary and relevant to collective bargaining. The employer's response to the union's information request was false and misleading, and constituted a violation of the duty to bargain in good faith.

REMEDIES

Fashioning remedies is a discretionary act of the Commission. *City of Seattle*, Decision 10249-A (PECB, 2009), *citing City of Seattle*, Decision 8313-B (PECB, 2004). Attorney's fees are appropriate when there is a continuing course of conduct that shows an intentional disregard of the union's collective bargaining rights. *Seattle School District*, Decision 5733-B (PECB, 1998); *Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, *Lewis County v. Public Employment Relations Commission,* 31 Wn. App. 853 (1982).

The employer has been involved in a series of information request violations. In *Seattle School District*, Decision 8976, (PECB, 2005), the employer was found to have failed to provide the union with requested documents concerning allegations of misconduct against a bargaining unit member. Attorney's fees were awarded in that case due to previous Commission decisions determining that the employer had committed a failure to bargain. *See also Seattle School District*, Decision 9628-A, (PECB, 2008); *Seattle School District*, Decision 10410 (PECB, 2009); *Seattle School District*, Decision 10664-A (PECB, 2010).

"[I]n crafting extraordinary remedies for cases [involving repetitive violations], our responsibility should focus not only on ensuring that the employees' free exercise of collective bargaining rights is protected, but also to educate the offending party on how to comply with its statutory responsibility." *Western Washington University*, Decision 9309-A (PSRA, 2008). In Seattle School District, Decision 10664-A, the examiner ordered training for the employer's managers, which took place in the spring of 2010, the same time as the information requests in this case were being filled. Because the previous remedy should be afforded time to take full effect, the Examiner declines to grant extraordinary remedies.

FINDINGS OF FACT

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

2. The International Union of Operating Engineers, Local 609, is a bargaining representative within the meaning of RCW 41.56.030(3). The bargaining unit includes security specialists.

3. On October 16, 2009, Vilando Wynter, a security specialist, conducted a search of a student.

4. Jill Hudson, principal, observed Wynter's search and engaged in a discussion with Wynter about search procedures.

5. On October 19, 2009, Hudson and Wynter met to discuss how he handled the search on October 16. During this discussion, Wynter asked to have his union representative present for the discussion.

6. Subsequently, an investigatory interview that might lead to disciplinary action was held on October 26, 2010. This meeting included Hudson, the vice-principal, Wynter, and the union representative.

7. On October 26 at 9:22 A.M., Hudson e-mailed her supervisors with the subject "out of control." She wrote that Wynter would not take feedback during the October 26, 2010 meeting and she would write him up.

8. On October 26, 2010, Hudson issued a letter of expectations to Wynter dealing with attendance issues.

9. On October 28, Hudson and Newton drafted a written reprimand for Wynter. They revised it and, on November 3, 2010, issued a written reprimand to Wynter.

10. On November 18, the union filed a grievance on behalf of Wynter.

11. On December 7, following two alleged incidents involving students within a week, Wynter was placed on administrative leave. In February 2010, the investigation concluded and he was transferred to another school.

12. In several information requests between December 2009 and March 2010, the union requested considerable information from the employer regarding the written reprimand in November and the administrative leave in December. The requests asked for documents which the employer relied on to discipline Wynter.

13. In March 2010, the employer provided a 2008-09 annual performance evaluation that did not match the one Wynter received. In June 2010, the employer provided a second copy of the evaluation, but it also did not match Wynter's copy. Both employer-generated copies contain ratings identical to those in Wynter's copy, except for the addition of some "below average" and "unsatisfactory" ratings that he did not have before.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The evidence, as described in paragraphs 3 through 10 of the foregoing findings of facts, establishes that union activity was a substantial factor in the disciplinary letters of Vilando Wynter. By disciplining Wynter in reprisal for union activities protected by Chapter 41.56 RCW, the employer discriminated against Wynter and violated RCW 41.56.140(1).

3. By failing to provide information requested by the International Union of Operating Engineers, Local 609, and by providing the union with false information as described in Findings of Fact 12 and 13, the Seattle School District violated RCW 41.56.140(4) and (1).

ORDER

SEATTLE SCHOOL DISTRICT, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Discriminating against or interfering with employee rights against Vilando Wynter in reprisal for engaging in union activities that are protected under Chapter 41.56 RCW.

   b. Failing to provide the International Union of Operating Engineers, Local 609, relevant requested collective bargaining information in a timely manner.

   c. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under by 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. Remove the letters of reprimand dated October 28, 2009, November 3, 2009, and December 2, 2009, from his personnel file, if they have not already been removed.

b. Upon request, make a reasonable effort to locate and provide relevant collective bargaining information to the International Union of Operating Engineers, Local 609.

c. Permanently remove the March 2010 and June 2010 copies of Vilando Wynter's personnel evaluation from his personnel file, and substitute the evaluations with the June 19, 2009, signed version.

d. 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.

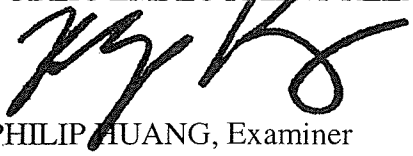
e. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the School Board of the Seattle School District, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

f. 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.

g. 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 6th day of May, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



PHILIP HUANG, 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 23073-U-10-5874
DECISION 11045 - PECB

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 *RESPONDENT* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY discriminated against or interfered with employee rights against Vilando Wynter in reprisal for engaging in union activities that are protected under Chapter 41.56 RCW.

WE UNLAWFULLY failed to provide the International Union of Operating Engineers, Local 609, relevant requested collective bargaining information in a timely manner.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL remove the letters of reprimand dated October 28, 2009, November 3, 2009, and December 2, 2009, from his personnel file, if they have not already been removed.

WE WILL permanently remove the March 2010 and June 2010 copies of Vilando Wynter's personnel evaluation from his personnel file, and substitute the evaluations with the June 19, 2009, signed version.

WE WILL, upon request, make a reasonable effort to locate and provide relevant collective bargaining information to the International Union of Operating Engineers, Local 609.

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

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 05/06/2011

The attached document identified as: DECISION 11045 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23073-U-10-05874	FILED:	02/26/2010	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	SECURITY				
DETAILS:	Vilandro Wynter				
COMMENTS:					

EMPLOYER: SEATTLE S D
ATTN: SUSAN ENFIELD
PO BOX 34165
MS 32-151
SEATTLE, WA 98124-1165
Ph1: 206-252-0180

REP BY: JOHN CERQUI
SEATTLE S D
PO BOX 34165
MS 32-151
SEATTLE, WA 98124-1165
Ph1: 206-252-0110 Ph2: 206-252-0115

PARTY 2: IUOE LOCAL 609
ATTN: DAVID WESTBERG
2800 1ST AVE STE 311
SEATTLE, WA 98121
Ph1: 206-441-8544 Ph2: 206-255-7452

REP BY: KATHLEEN PHAIR BARNARD
SCHWERIN CAMPBELL BARNARD
18 W MERCER ST STE 400
SEATTLE, WA 98119-3971
Ph1: 206-285-2828 Ph2: 800-238-4231