University of Washington, Decision 11199 (PSRA, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 23649-U-10-6033 DECISION 11199 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Younglove & Coker, by *Christopher J. Coker,* Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Mark K. Yamashita,* Assistant Attorney General, for the employer.

On November 22, 2010, the Washington Federation of State Employees (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The union's complaint alleged that the University of Washington (employer) interfered with employee rights in violation of RCW 41.80.110(1)(a), by threats of reprisal or force or promises of benefit made to Michael Lynne through its investigations of Lynne in connection with his union activities. The complaint also alleged that the employer discriminated in violation of RCW 41.80.110(1)(c), by its final counseling of Lynne in reprisal for union activities protected by Chapter 41.80 RCW. Unfair Labor Practice Manager David I. Gedrose reviewed the complaint under WAC 391-45-110 and issued a preliminary ruling on November 30, 2010, finding a cause of action to exist. On December 7, 2010, the Commission assigned the matter to Examiner Joel Greene, who presided over a hearing on March 24, 2011. The parties filed post-hearing briefs for consideration.

ISSUES

1. Did the employer discriminate against Michael Lynne by issuing him a final counseling in reprisal for union activities?

2. Did the employer interfere with employee rights by investigating Lynne in connection with his union activities?

Based on the record as a whole, I find that the employer neither discriminated against Lynne by issuing him a final counseling, nor interfered with employee rights by investigating Lynne.

APPLICABLE LEGAL STANDARDS

Discrimination

As expressed recently in *State – Corrections*, Decision 10998-A (PSRA, 2011), an employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by the Personnel System Reform Act of 2002, Chapter 41.80 RCW. *Central Washington University*, Decision 10118-A (PSRA, 2010); *see also 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).

In response to an employee's *prima facie* case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County*, Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

To prove discriminatory motivation, the employee must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. Circumstantial evidence consists of proof of facts or circumstances which according to the common experience gives rise to a reasonable inference of the truth of the fact sought to be proved. *State – Corrections*, Decision 10998-A.

Interference

RCW 41.80.110(1)(a) establishes that an employer commits an unfair labor practice when the employer interferes with, restrains, or coerces employees in the exercise of the rights guaranteed by Chapter 41.80 RCW. The rights guaranteed to employees are listed in RCW 41.80.050:

> RCW 41.80.050 Rights of employees. Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all such activities except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

The Commission stated in *Grays Harbor College*, Decision 9946-A (PSRA, 2009) that the burden of proving unlawful interference with the exercise of rights protected by Chapter 41.80 RCW rests with the complaining party. An interference violation exists when an employee could reasonably perceive the employer's statements or 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 union is not required to show how an employer intended or was motivated to interfere with collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

ANALYSIS

The employer's Harborview Medical Center employed Lynne as a campus security officer since 2001. Lynne has been a shop steward for the union for approximately eight years. Lynne works in the department of parking and security, which is managed by Administrative Director Bill Garber and Associate Director of Program Operations R.J. Angeles. Sergeant Duane Pederson was Lynne's immediate supervisor when the incidents that led to the union's unfair labor practice complaint occurred.

On March 12, 2010, Angeles informed Pederson that Malik Corbin, one of the employer's campus security officers, was on a list of employees who had not paid citations they had received for parking in restricted areas near the employer's facilities. When Corbin was reminded of his outstanding parking citation from June 23, 2009, he contacted Lynne and told Lynne that he thought he was being treated unfairly because supervisors had been parking in the same lot without repercussions.

On April 25, 2010, Lynne wrote and sent an e-mail to Sergeant Ruben Bonilla, titled "Illegal Parking":

> Ruben,
>
> It has come to my attention that our department is cracking down on an officer who received a parking ticket for being parked in the engineering lot, and demanding that he pay a $35 fine.
>
> I recall shortly after your job title changed from Lieutenant to Sergeant, I saw you with your vehicle parked in that lot just prior to your shift. I recall I took a photo of your vehicle with my cell phone and you made a comment about

> having to move or something like that. I deleted the photo, but you did not move your vehicle. I have seen your vehicle, and those of other supervisors parked in that lot on many other occasions.
>
> As a supervisor, you lead by example. If an officer sees you and other supervisors park your personal vehicles in that lot, the officer would naturally assume that it is ok to park there also. One has done so, and now faces a $35 fine.
>
> Simply because you did not "get caught", that is, receive a parking citation, does not mean that it was alright [sic] for you or other supervisors to park there.
>
> As a supervisor, it is your duty to notify your supervisor that you have illegally parked your personal vehicle in the engineering lot in the past, and offer to pay the $35 fine for each instance you can recall illegally parking there, so that everyone is treated equally. As a supervisor, you should also report to your supervisor if you have observed other supervisors also illegally parking there and request that he take appropriate action.
>
> I assume that you will take the appropriate action within the next few days.
>
> Thank you,
>
> Michael Lynne
> Shop Steward
> WFSE Local 1488

Four days later, Angeles notified Lynne that Lynne was scheduled for an investigatory meeting regarding Lynne's e-mail to Bonilla, and the meeting occurred on May 26, 2010. On August 2, 2010, Garber gave Lynne a final counseling letter, which mentioned the e-mail along with other incidents involving Lynne on May 12, June 2, and July 15 that the employer considered insubordinate and disrespectful.

On May 12, 2010, Lynne used the employer's security radio channel to question Pederson about a letter Lynne received from Pederson. Lynne asked Pederson what time of day Pederson received the letter and wanted to know who handed Pederson the letter. After Pederson informed Lynne that he received the letter at approximately 4:00 P.M. (1600 hours) from Angeles, Lynne asked Pederson, "And how come it took you from 1600 to 1735" to deliver it? Lynne and Pederson then met at the medical center, where Lynne asked Pederson about his whereabouts and what Pederson was doing that kept him from delivering the letter promptly.

On June 2, 2010, Lynne called Pederson after Lynne had been asked to search a patient's belongings prior to the patient's departure. Lynne informed Pederson that the belongings might contain narcotics. Lynne told Pederson that Lynne would give any narcotics discovered during the search to the medical staff for disposal. On three occasions, Pederson directed Lynne to take what was found in the search to the property room, log in the material, and fill out a report consistent with employer policy. Lynne was argumentative throughout the conversation, questioned the legality of transporting narcotics, and eventually refused to follow Pederson's directives while citing Article 26.2 of the collective bargaining agreement, which states in part that "All work shall be performed in conformity with applicable health and safety standards. Employees are encouraged to immediately report any unsafe working conditions to their supervisor."

On July 15, 2010, the night shift supervisor informed Pederson that changes needed to be made to a report Lynne had written. When Pederson shared the need for changes with Lynne, Pederson testified that Lynne took the report, angrily wrote an "F" on the report, and posted it on a bulletin board following a briefing involving the campus security officers.

In Lynne's final counseling letter, his performance and behavior problems included "arguing/unprofessional behavior toward a supervisor" and "poor judgment." Garber wrote that "Based on my investigation, I find that your continued disruptive, angry, and insubordinate behaviors are inconsistent with a professional security officer in a healthcare setting. As part of the action plan, I will enroll you in anger management and effective communications classes."

The union argues that Lynne was exercising his statutorily protected rights when he sent the e-mail to Bonilla on April 25, 2010, and that the employer's actions and investigations that culminated in the final counseling letter of August 2, 2010, were in reprisal for Lynne performing the duties of a shop steward.

I could perhaps more easily agree with the union's contentions if Lynne had acted in a manner reasonably expected of a shop steward when presenting an issue to a supervisor on a bargaining unit member's behalf. Instead, Lynne's e-mail launched into an attack on Bonilla's past behavior and questioned Bonilla's credibility. Lynne's e-mail made scant reference to Corbin's

parking infraction, other than to say that "our department is cracking down on an officer who received a parking ticket for being parked in the engineering lot, and demanding that he pay a $35 fine." To characterize Lynne's broadside on Bonilla as protected activity stretches the concept of protected activity past the breaking point. Being a shop steward or union official does not give employees *carte blanche* to engage in behavior that would ordinarily lead to discipline.

Lynne, who testified he had filed "a lot" of grievances during his time as a shop steward, considered his e-mail an attempt to resolve the issue at the lowest possible level. He also testified that his communication was in accordance with the written grievance procedure set forth in Article 24.5 of the collective bargaining agreement, which reads:

> 24.5 Contents. The written grievance shall include the following information:
> A. The date upon which the grievance occurred.
> B. The specific Article(s) and section(s) of the Agreement violated.
> C. The past practice, rule, policy violated.
> D. Specific remedy requested.
> E. The grievant(s) name.
> F. Name and signature of Union representative (Staff or Steward).
> G. If Employee chooses to self represent or a representative outside of the bargaining units, their name(s) and signature(s).

Lynne's e-mail provided none of this information as it relates to Corbin and his parking infraction. Lynne's e-mail did not mention Corbin's name. Lynne's e-mail contained no date when the grievance occurred. Lynne's e-mail did not mention the specific contract provision, past practice, rule, or policy violated. Lynne's e-mail requested a specific remedy that was tied to Bonilla's actions and had nothing to do with Corbin. Furthermore, Lynne testified that he was not certain that Bonilla was Corbin's immediate supervisor. Article 24.8 of the collective bargaining agreement requires that grievances be presented to the employee's immediate supervisor as the first step of the grievance procedure.

Lynne's e-mail to Bonilla led to Lynne's discipline. Lynne did not perceive the gravity of the situation or the necessity to change his approach to labor-management disputes. During his investigatory interview on May 26, 2010, the record indicates that Lynne believed his e-mail to Bonilla and his May 12, 2010 conversations with Pederson were appropriate. Despite facing the

potential of discipline for those incidents, Lynne continued to display a belligerent attitude toward his supervisor during interactions that led to further investigations and his final counseling. Lynne's discipline was tied to his inability to modify his behavior, not to his union activity.

CONCLUSION

I find that Lynne's e-mail to Bonilla was not a statutorily protected activity, and as a result, the union has not made its *prima facie* case that the employer discriminated against Lynne. In accordance with Commission precedent, an independent interference violation cannot be found under the same set of facts that failed to constitute a discrimination violation. *Reardon-Edwall School District*, Decision 6205-A (PECB, 1998). I therefore dismiss the union's complaint.

FINDINGS OF FACT

1. The University of Washington (employer) is an employer within the meaning of RCW 41.80.005(8).

2. The Washington Federation of State Employees (union) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

3. The employer's Harborview Medical Center employed Lynne as a campus security officer since 2001. Lynne has been a shop steward for the union for approximately eight years.

4. Lynne works in the department of parking and security, which is managed by Administrative Director Bill Garber and Associate Director of Program Operations R.J. Angeles. Sergeant Duane Pederson was Lynne's immediate supervisor when the incidents that led to the union's unfair labor practice complaint occurred.

5. On March 12, 2010, Angeles informed Pederson that Malik Corbin, one of the employer's campus security officers, was on a list of employees who had not paid citations they had received for parking in restricted areas near the employer's facilities.

6. When Corbin was reminded of his outstanding parking citation from June 23, 2009, he contacted Lynne and told Lynne that he thought he was being treated unfairly because supervisors had been parking in the same lot without repercussions.

7. On April 25, 2010, Lynne wrote and sent an e-mail to Sergeant Ruben Bonilla, titled "Illegal Parking":

> Ruben,
>
> It has come to my attention that our department is cracking down on an officer who received a parking ticket for being parked in the engineering lot, and demanding that he pay a $35 fine.
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> I recall shortly after your job title changed from Lieutenant to Sergeant, I saw you with your vehicle parked in that lot just prior to your shift. I recall I took a photo of your vehicle with my cell phone and you made a comment about having to move or something like that. I deleted the photo, but you did not move your vehicle. I have seen your vehicle, and those of other supervisors parked in that lot on many other occasions.
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> As a supervisor, you lead by example. If an officer sees you and other supervisors park your personal vehicles in that lot, the officer would naturally assume that it is ok to park there also. One has done so, and now faces a $35 fine.
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> I assume that you will take the appropriate action within the next few days.
>
> Thank you,
>
> Michael Lynne
> Shop Steward
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Lynne's e-mail to Bonilla was not a statutorily protected activity, and as a result, the union has not made its prima facie case the employer discriminated against Lynne.

8. On April 29, 2010, Angeles notified Lynne that he was scheduled for an investigatory meeting regarding the e-mail to Bonilla, and the meeting occurred on May 26, 2010.

9. On August 2, 2010, Garber gave Lynne a final counseling letter, which mentioned the e-mail along with other incidents involving Lynne on May 12, June 2, and July 15 that the employer considered insubordinate and disrespectful.

CONCLUSIONS OF LAW

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

2. By its actions described in Finding of Fact 9, the employer did not discriminate against Lynne or interfere with employee rights, and did not violate RCW 41.80.110(1)(a) or (c).

ORDER

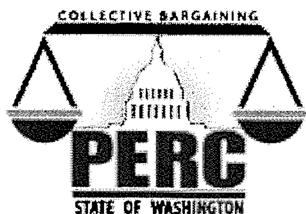
The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 11th day of October, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JOEL GREENE, 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.



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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

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DISPUTE:	ER DISCRIMINATE				
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