Port of Seattle, Decision 11848 (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117, Complainant, vs. PORT OF SEATTLE, Respondent.	CASE 24667-U-12-6305 DECISION 11848 – PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Spencer Nathan Thal, General Counsel, for the union.

Trish K. Murphy, Attorney at Law, for the employer.

On March 16, 2012, Teamsters Local 117 (union) filed an unfair labor practice complaint against the Port of Seattle (employer). The union alleged the employer interfered with employee rights in violation of RCW 41.56.140(1) and discriminated against an employee for union activities in violation of RCW 41.56.140(1). A preliminary ruling was issued on March 22, 2012, stating a cause of action existed. Examiner Emily Martin held a hearing on March 22, 2013. The parties submitted post-hearing briefs to complete the record.

ISSUES

1. Did the employer discriminate against the non-supervisory shop steward by documenting an incident where the employee's customer service might have been improved?

2. Did the employer interfere with employee rights when a supervisor, who was also a shop steward for the supervisory bargaining unit, gave advice to a shop steward in the non-supervisory unit?

Based on the arguments, testimony, and evidence presented by the parties, the Examiner rules that the employer did not discriminate when it documented an employee's interaction with a

customer where customer service might have been improved. Also, the employer did not interfere with employee rights when the supervisory shop steward provided unsolicited advice to the non-supervisory shop steward.

Background

The union and employer were parties to a collective bargaining agreement from January 1, 2009, to December 31, 2011, for a unit of police officers who work for the employer at the SeaTac Airport and the Seaport in downtown Seattle. From June 2011 through the first months of 2012 the employer and union bargained a successor contract. Officer Brian Torre served as a shop steward representing officers in the non-supervisory bargaining unit as well as on the union's bargaining team. By February 2012, the negotiations had become contentious and the parties had scheduled a meeting to negotiate on February 16, 2012.

Shortly before the parties February 16, 2012 negotiation session, Torre had a conversation with his second level supervisor, Commander Jon Hornbuckle, regarding a customer survey about his performance. Torre had been working at the SeaTac Airport when he had an interaction with a traveler in the baggage claim area. The traveler was missing a carry-on bag and sought assistance from Torre. Torre called the airline's agents at the gate but the bag was not found. The bag was discovered on the airplane a few days later. The traveler's customer survey rated her overall customer experience as average and made comments about how she felt that Torre and the airline could have done more to help find her bag. When Torre and Hornbuckle reviewed the survey, Hornbuckle coached Torre on ways to provide exceptional customer service and suggested he could have searched the airplane for the bag himself.

On the same day that Hornbuckle coached Torre on providing better customer service, Hornbuckle and Torre also had a discussion regarding Torre's role as a shop steward. This conversation began with Hornbuckle saying that he was "changing hats" from his role as a supervisor to his role as a union shop steward. In Torre's account of this conversation, Hornbuckle said that Torre's "very vocal" participation at the bargaining table had caused some concern and that Torre had become a topic of discussion with some command staff. In Hornbuckle's account, he flatly denied telling Torre to be careful in bargaining because command staff was paying attention. Rather he said that his comments were only about the

about the "roles of the shop steward." He explained the roles of a shop steward were to represent the interests of the bargaining unit, to provide historical background to union business agents or employer representatives that might not have the historical knowledge, and to determine objectives or strategies to accomplish the union members' goals.

On February 15, 2012, Hornbuckle notified his supervisor, Deputy Rodney Covey, who was participating on the management's bargaining team, that he had coached Torre on his customer service. Covey instructed Hornbuckle to document the customer service incident as a Non-Investigatory Matter (NIM). NIMs were not normally used to document customer survey responses. The employer's process for documenting feedback from customer surveys had not been established at this time.

Hornbuckle created the NIM document, and had Torre's direct supervisor, Sergeant Patrick Addison deliver it to Torre on February 27, 2012. Torre refused to sign the NIM. Two days later, his refusal to sign the document was discussed at the February 29, 2012 leadership meeting of command staff. At this meeting, the police chief decided to rescind the NIM and determined the document would be considered in Torre's next performance evaluation.

Issue 1: Did the employer discriminate against the non-supervisory shop steward by documenting an incident where the employee's customer service might have been improved?

Legal Standard for Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by the Chapter 41.56 RCW. *Seattle School District*, Decision 11045-A (PECB, 2011); *Educational Service District 114*, Decision 4361-A (PECB, 1994); *see also*, *University of Washington*, Decision 11199-A (PSRA, 2013).

To prove discrimination, the complainant must first set forth a prima facie case 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.

Educational Service District 114, Decision 4361-A and *University of Washington*, Decision 11199-A (PSRA, 2013).

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007) and *University of Washington*, Decision 11199-A. Circumstantial evidence consists of proof of facts or circumstances which, according to the common experience, give rise to a reasonable inference of the truth of the fact sought to be proved. *University of Washington*; *see Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

In response to a complainant's prima facie case of discrimination, the respondent need only articulate its non-discriminatory reasons for acting in such a manner. The respondent 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 complainant to prove 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* and *University of Washington*, Decision 11199-A.

Analysis

Although the union proved Torre was involved in protected activity, it did not prove the second prong of the prima facie test that Torre was deprived of an ascertainable right or benefit.

In *City of Yakima*, Decision 10270-B (PECB, 2011) the Commission ruled that an employer's negative comments added to an employee's performance evaluation was not a deprivation of a right, benefit, or status. Similarly, Torre's NIM is also not a deprivation of a right, benefit, or status. If the NIM had not been revoked, it would have been retained for a year. Only if three

NIMs are issued within a year, would a review be triggered to see if a pattern was occurring that could benefit from early intervention. It was a system intended to document minor complaints when education and supervisory intervention is possible. It was not intended to be disciplinary. In this situation, the employer's action was more akin to negative comments in a performance evaluation rather than a written reprimand, especially as it found that no policy was violated. Torre's NIM stated that a concern was addressed but it also found that Torre had acted within the department's policies. In the supervisor's remarks, Hornbuckle wrote that he asked Torre to focus more on customer service and if a similar situation occurred in the future, Torre was instructed to consider going to the airplane to look for the bag.

As in *City of Yakima*, the employer's action is not a form a discipline or otherwise depriving an employee of a right, benefit, or status. The union failed to prove the second prong of the *prima facie* test and therefore its discrimination allegation is dismissed.

Issue 2: Did the employer interfere with employee rights when a supervisor, who was also a shop steward for the supervisory bargaining unit, gave advice to a shop steward in the non-supervisory unit?

Legal Standard for Interference

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complainant. *Seattle School District*, Decision 10732-A (PECB, 2012). 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) and *Seattle School District*, Decision 10732-A.

Employer communications to employees could interfere with protected employee rights under one, any combination, or all of the following criteria:

1. Is the communication, in tone, coercive as a whole?
2. Are the employer's comments substantially factual or materially misleading?

3. Has the employer offered new "benefits" to employees outside of the bargaining process?
4. Are there direct dealings or attempts to bargain with the employees?
5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?
6. Did the union object to such communications during prior negotiations?
7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

Grant County Public Hospital District 1, Decision 8378-A (PECB, 2004). *Columbia Basin College*, Decision 11609-A (PSRA, 2013).

The complainant is not required to demonstrate that the employer's intent was to interfere, nor is it necessary for the complainant to demonstrate that the employee involved was actually coerced or that the employer had union animus. *Grant County Public Hospital District 1*, Decision 8378-A and *Columbia Basin College*, Decision 11609-A. The determination of whether an interference allegation has been committed is based on whether a typical employee could reasonably perceive the employer's action as discouraging the employee's union activity. *Grant County Public Hospital District 1* and *Columbia Basin College*.

Analysis

In order to determine if Hornbuckle's advice was interference, it is first necessary to make a credibility determination regarding the conflicting testimony about what Hornbuckle told Torre. I find the advice Hornbuckle made to Torre was a general comment on the roles of a shop steward. Hornbuckle's comments were unwelcome and unsolicited advice, but not a threat. From the testimony and demeanor of the witness, I believe Torre's version of the events were colored by his anger at the employer for issuing him a NIM to improve customer service, which he viewed as unwarranted and refused to sign. Torre testified that "[f]or the majority of my career I enjoyed coming to work. Now I come to work looking over my shoulder wondering who's going to try and stab me in the back from my command." Because Torre's version of the conversation was shaded by his anger, I find Hornbuckle's version of the conversation more credible. I find that Hornbuckle did not say that Torre's participation at the bargaining table raised concern among the command staff.

Although Hornbuckle was a supervisor, his role as a shop steward is important and further distinguishes this case. To find that a supervisory shop steward's unwelcome advice is interference would unnecessarily discourage discussions between shop stewards. It was undisputed that Hornbuckle's comment was made after he said he was "switching hats." Especially in light of this dual role, it is not reasonable to consider his general comments to be threats.

Hornbuckle's comment to Torre did not amount to interference under the standard articulated in *Grant County Public Hospital District 1*, Decision 8378-A. In the specific situation found here, there was no evidence to show that the communication was coercive or misleading. Hornbuckle's communication did not offer a new benefit outside of the bargaining process. It was not direct dealing. It did not paint the union in a bad light and the union did not object to such communications during prior negotiations. Lastly, the communication did not appear to have placed the employer in a position from which it cannot retreat.

The union failed to prove Hornbuckle's comments would be viewed by a typical employee as a threat of reprisal and discouraging Torre's union activities. The interference allegation is dismissed.

FINDINGS OF FACT

1. Port of Seattle is a "Port District" within the meaning of RCW 53.18.010 and therefore an employer within the meaning of RCW 41.56.030(12).

2. Teamsters Union Local 117 is an "employee organization" within the meaning of RCW 41.56.030(2).

3. The employer and union were parties to a collective bargaining agreement from January 1, 2009, to December 31, 2011, for a unit of police officers who work for the employer at the SeaTac Airport and the Seaport in downtown Seattle.

4. From June 2011 through early 2012, the parties bargained a successor collective bargaining agreement.

5. Officer Brian Torre served as a shop steward and represented officers in the non-supervisory bargaining unit as well as participated on the union's bargaining team.

6. Shortly before the parties' February 16, 2012, bargaining session, Commander Jon Hornbuckle coached Torre in ways to provide exceptional customer service in response to a customer survey submitted by an airport traveler who had sought Torre's help locating a missing carry-on bag.

7. On the same day as the meeting described the above finding of fact, Hornbuckle and Torre also had a conversation about the roles of a shop steward. This conversation began with Hornbuckle saying he was "changing hats" from his role as a supervisor to his role as a union shop steward. Hornbuckle explained to Torre that the roles of a shop steward are to represent the interests of the bargaining unit, provide historical background to union business agents or employer representatives that might not have the historical knowledge, and to determine objectives or strategies to accomplish the union members' goals

8. On February 27, 2012, Torre was issued a written "Non-Investigatory Matter" regarding the customer survey discussed in Finding of Fact 6 above. It stated that a customer survey concern was addressed and found that Torre had acted within the department's policies.

9. Torre's Non Investigatory Matter was revoked at the leadership meeting of command staff two days after it was issued.

CONCLUSIONS OF LAW

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

2. Based upon the Findings of Facts above, the employer did not discriminate in violation of 41.56.140(1) by issuing Torre a Non Investigatory Matter in response to a customer survey.

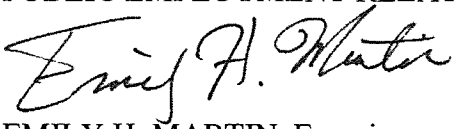
3. Based upon the Findings of Facts above, the employer did not interfere with employee rights in violation of 41.56.140(1) when Hornbuckle made comments to Torre about the roles of a stop steward.

ORDER

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

ISSUED at Olympia, Washington, this 14th day of August, 2013.

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	24667-U-12-06305	FILED:	03/16/2012	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	LAW ENFORCE				
DETAILS:	Officers				
COMMENTS:					

EMPLOYER: PORT OF SEATTLE
ATTN: GARY SCHMITT
2711 ALASKAN WAY
PO BOX 1209
SEATTLE, WA 98111
Ph1: 206-787-3775 Ph2: 206-419-2916

REP BY: ANNE PURCELL
PORT OF SEATTLE
2711 ALASKAN WAY
PO BOX 1209
SEATTLE, WA 98111
Ph1: 206-787-3773

REP BY: TRISH MURPHY
PORT OF SEATTLE
2711 ALASKAN WAY
PO BOX 1209
SEATTLE, WA 98111
Ph1: 206-787-3689 Ph2: 206-787-3000

PARTY 2: TEAMSTERS LOCAL 117
ATTN: TRACEY THOMPSON
14675 INTERURBAN AVE S STE 307
TUKWILA, WA 98168-4614
Ph1: 206-441-4860

REP BY: SPENCER NATHAN THAL
TEAMSTERS LOCAL 117
14675 INTERURBAN AVE S STE 307
TUKWILA, WA 98168
Ph1: 206-441-4860