STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117, Complainant, vs. STATE - CORRECTIONS, Respondent.	CASE 25011-U-12-6397 DECISION 12002 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Spencer Thal, General Counsel, for the union.

Attorney General Robert W. Ferguson, by *Kari Hanson*, Assistant Attorney General, for the employer.

On July 27, 2012, Teamsters Local 117 (union) filed an unfair labor practice complaint against the Washington State Department of Corrections (employer). The union alleged employer interference in violation of RCW 41.80.110(1)(a) and employer discrimination in violation of RCW 41.80.110(1)(c) and (a). On August 7, 2012, the Unfair Labor Practice Manager issued a deficiency notice indicating that the complaint was defective. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the defective allegations. On August 27, 2012, the union filed an amended complaint with two allegations. First, the union alleged employer interference with employee rights in violation of RCW 41.80.110(1)(a) by threats of reprisal or force or promises of benefit made to Jimmy Fletcher and Dave Roberts in connection with union activities. Second, the union alleged employer discrimination in violation of RCW 41.80.110(1)(c) and (a) by denying Fletcher a promotional opportunity and placing him under investigation, in reprisal for union activities. On August 31, 2012, the Unfair Labor Practice Manager issued a preliminary ruling stating a cause of action existed. Examiner Robin A. Romeo held a hearing on September 16 and 17, 2013. The parties submitted post hearing briefs to complete the record. The Commission subsequently reassigned

the case to Examiner Emily Whitney to issue a decision based upon the record, after the previously assigned examiner was no longer available.

ISSUES

1. Did the employer discriminate in violation of RCW 41.80.110(1)(c) and (a) by investigating Jimmy Fletcher, in reprisal for union activities?

The employer did not discriminate in violation of RCW 41.80.110(1)(c) and (a) by investigating Fletcher. The union was unable to establish a *prima facie* case because it failed to prove that Fletcher was deprived of an ascertainable right, benefit or status.

2. Did the employer discriminate in violation of RCW 41.80.110(1)(c) and (a) by denying Jimmy Fletcher a promotional opportunity, in reprisal for union activities?

The employer did not discriminate in violation of RCW 41.80.110(1)(c) and (a) by denying Fletcher a promotional opportunity. The union established a *prima facie* case of discrimination by proving Fletcher participated in protected activity, the employer deprived Fletcher of a right, and a causal connection existed between the two. The employer responded by presenting a legitimate, non-discriminatory reason for its actions. The union failed to produce evidence showing that the employer's stated reason was pretextual or that Fletcher's union activity was a substantial motivating factor in the employer's actions. Accordingly, the employer did not discriminate against Fletcher when he was denied a promotional opportunity.

3. Did the employer interfere with employee rights in violation of RCW 41.80.110(1)(a) by threats of reprisal or force or promises of benefit made to Jimmy Fletcher and Dave Roberts in connection with union activities?

The employer did not interfere with employees' rights in violation of RCW 41.80.110(1)(a) by threats of reprisal or force or promises of benefit to Fletcher and Roberts. The union was unable to prove that the statements that the employer allegedly made were threats in connection with union activity.

ISSUE 1

Did the employer discriminate by placing Jimmy Fletcher under investigation?

Conclusion

The union was unable to establish a *prima facie* case because it failed to prove that Fletcher was deprived of an ascertainable right, benefit or status. Because the union did not prove a *prima facie* case, the employer did not discriminate when it investigated Fletcher.

Background

The employer and union were parties to a collective bargaining agreement effective between July 1, 2011, and June 30, 2013. The union represents all non-supervisory classified employees and all supervisory classified employees of the State of Washington working for the Department of Corrections in correctional institutions including sergeants. Fletcher works for the employer as a sergeant at the employer's Monroe facility and is a member of the union.

Between February 2012 and March 2012, Fletcher received an e-mail with an attached video showing sensitive material titled "WSP pictures" (video). Around March or April 2012, the employer became aware of the circulation of the video at the Monroe facility. The employer was concerned with how the video was leaked and distributed to multiple employees at the Monroe facility. The employer tasked Associate Superintendent Mark Kucza with completing a fact finding investigation to determine how the employees began to circulate the video.

In the beginning of April, Kucza began his investigation and asked to speak with Fletcher in private about the circulation of the video. A few days later Kucza and Fletcher met, and Kucza asked Fletcher about Fletcher's involvement with the distribution of the video. Fletcher explained that he had received the video from an employee at a separate employer facility and deleted the e-mail. Later Fletcher noticed other employees watching the video and asked the employee from the employer's separate facility to resend Fletcher the e-mail with the video attachment. Fletcher received that video and forwarded the video to another employee at the Monroe facility. Fletcher then provided Kucza with evidence of the e-mails he had received and

sent. Once Kucza had the information from Fletcher, Kucza returned to the employer and advised the employer that the distribution of the video was an issue at multiple employer facilities and was not specific to the Monroe facility. The employer at the Monroe facility decided to abandon the investigation of the distribution of the video.

Applicable Legal Standard

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.80.110(1)(c). In *State - Corrections*, Decision 11571-A (PSRA, 2013), the Commission reiterated the legal principles applicable to prove employer discrimination under RCW 41.80.110(1)(c). The Commission stated that an employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of protected rights. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in discrimination cases. 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.

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). 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. *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*, Decision 4626-A.

Analysis

The first part of the *prima facie* case is to determine if Fletcher was involved in union activity. Testifying at a hearing before the Public Employment Relations Commission is protected activity. *See Grant County Hospital*, Decision 6673-A (PECB, 1999). The union argues that the investigation was in connection with Fletcher's participation in an unfair labor practice hearing before the Public Employment Relations Commission. Fletcher testified on behalf of the union in an unfair labor practice hearing on February 6, 2012, involving a separate issue alleged against the employer. The union satisfied the first part of the *prima facie* case.

The second part of the analysis is to determine whether the employee was deprived of some ascertainable right, benefit, or status. The union alleges that investigating Fletcher about the distribution of the video affected his status because it makes Fletcher more vulnerable to future corrective disciplinary actions. The union did not provide evidence in the record to show that any discriminatory action was taken against Fletcher.

Discriminatory action by an employer may be found when an employee is disciplined, but not as a result of an investigation without discipline. An examiner found the employer discriminatorily disciplined an employee in *City of Pullman*, Decision 11148 (PECB, 2011), *aff'd* Decision 11148-A (PECB, 2012). In *City of Pullman*, the employer initiated an investigation to determine whether a group of employees had submitted false accusations against two other employees in retaliation for the two employees' involvement in the employer's investigation. The examiner found that the employees were deprived of a right when, after the investigation, the employees were actually disciplined. The discipline was the deprivation, not the investigation.

The present case is distinguishable from *City of Pullman*. In the present case, the employer merely asked Fletcher questions about the distribution of the video. Fletcher was never disciplined or placed on leave during this investigation. As a result of the investigation, no action occurred against Fletcher. Thus there was no discriminatory action by the employer because no action occurred. The belief that this could lead to a future deprivation does not rise to the level of discrimination because the action has not yet occurred. Because the union did not prove there was a deprivation of a right, benefit, or status, the union did not prove a *prima facie* case. Consequently, there was no discrimination as to the video investigation.

ISSUE 2

Did the employer discriminate by denying Jimmy Fletcher a promotional opportunity?

Conclusion

The union established a *prima facie* case of discrimination. The employer responded with a legitimate, non-discriminatory reason for its action. The union failed to produce evidence showing that the employer's stated reason was pretextual or that Fletcher's union activity was a substantial motivating factor in the employer's actions. Thus, the employer did not discriminate against Fletcher when he was denied a promotional opportunity.

Background

Fletcher worked for the employer as a sergeant. As a sergeant, Fletcher was required to conduct evaluations on an annual basis for the employees he supervised.

In November 2011, Fletcher completed less than 75 percent of his staff's evaluations. On November 14, 2011, Fletcher received a letter from Superintendent Scott Frakes regarding the new evaluation completion requirements. The letter stated that by February 1, 2012, supervisors needed to complete 90 percent of their evaluations, and by March 1, 2012, supervisors must complete no less than 95 percent of their evaluations.

In November 2011, Frakes also directed the Lieutenants to have regularly scheduled documented supervisory conferences (DSC) with the sergeants they supervised. During these meetings the

Lieutenants would review the sergeant's progress toward completion of the goals on the sergeant's evaluations. Richard Samp was Fletcher's supervisor and upon direction began conducting DSC's with Fletcher regularly.

On February 20, 2012, Fletcher sent an e-mail to Samp requesting a letter of recommendation to apply for a lieutenant position. Fletcher did not receive a response from Samp before his DSC meeting scheduled for February 23, 2013.

For the regularly scheduled DSC meeting on February 23, 2012, Fletcher asked Dave Roberts to attend as his shop steward. Two topics were discussed during the DSC meeting. First, Samp asked Fletcher to sign off on Fletcher's evaluation, which had been completed in December 2011. Second, Samp responded to Fletcher's request for a letter of recommendation to apply for a lieutenant position. Samp verbally told Fletcher that he would not provide a recommendation letter because Fletcher was not at 100 percent compliance on the evaluations that Fletcher was required to complete. As of December 2011, Fletcher was at 80 percent compliance on evaluation completion. It is unclear as to Fletcher's exact evaluation completion rate in February 2012, but it was not even 95 percent. Roberts asked if the 100 percent compliance rate only applied to Fletcher, and Samp stated that yes, it only applied to Fletcher. The meeting then became adversarial and ended.

Analysis

The first part of the analysis is to determine whether the union has established the three part test of a *prima facie* case. Similar to the previous issue, testifying at a hearing before the Public Employment Relations Commission is protected activity. *See Grant County Hospital* , Decision 6673-A (PECB, 1999). The union showed that Fletcher provided testimony at the unfair labor practice hearing on February 6, 2012, and the employer had knowledge of this activity. Thus, the union met the first part of the test.

The second part of the analysis is to determine whether the employee was deprived of some ascertainable right, benefit, or status. The union alleges that Samp's denial of a letter of recommendation denied Fletcher a promotional opportunity. Based on the evidence, the letter of

recommendation was a requirement to apply for the lieutenant position, thus a denial of the letter was a denial of the possible promotion. The union met the second part of the test.

Third, the timing of the events creates circumstantial evidence of a causal connection between Fletcher testifying at the unfair labor practice hearing before the Public Employment Relations Commission and the denial of the letter of recommendation. "The timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between protected activity and adverse action." *North Valley Hospital,* Decision 5809-A (PECB, 1997). Fletcher testified at hearing on February 6, 2012. Samp was aware that Fletcher was involved in the February 6, 2012, unfair labor practice. Merely 17 days after the hearing, Samp denied Fletcher's request for a letter of recommendation on February 23, 2012. The close timing of these events establishes a *prima facie* case of discrimination.

In response, the employer argues it had a non-discriminatory reason (Fletcher's inability to complete his evaluations) for denying Fletcher's letter of recommendation. Samp testified that it was the employer's expectation that employees be at least 95 percent complete on their evaluations. Samp stated his expectation was a 100 percent completion rate when recommending an employee for a lieutenant position. Samp stated that if an employee was not at 100 percent completion on his or her evaluations, Samp would not recommend the employee for a lieutenant position. There was no evidence on the record as to Fletcher's percentage of completion at the time of the February 2012 meeting, but there was evidence that he did not meet the 95 percent completion rate.

The union argues that a 100 percent completion rate on evaluations is absurd, the completion rate does not prove employee diligence because there are other factors involved, and there was union animus because the 100 percent completion rate only applied to Fletcher. The reasonableness of the completion rate is not at issue before the Examiner. The Examiner must determine whether the employer's reason is pretextual or the employer had union animus.

The union's arguments that the employer's reason is pretextual or that the employer's union animus was a substantial motivating factor are not compelling for two reasons: (1) evidence in

the record showed that in November 2011, the Superintendent sent a letter to all employees that were below the necessary completion rate on evaluations. The letter listed in detail the requirements of 90 percent compliance on evaluations by February 1, 2012, and 95 percent compliance on evaluations by March 1, 2012. Thus, all employees had to be at 95 percent completion. Fletcher received the letter because at the time, he was below 75 percent compliance. (2) Samp testified that he supervises two employees, Fletcher and another employee. The other employee completed 100 percent of his evaluations in February 2012. Samp stated the reason he told Fletcher that the 100 percent completion rate only applied to Fletcher was because Fletcher was the only employee that Samp supervised who was below 100 percent. The union did not provide evidence that Samp had recommended someone for a lieutenant position who did not meet the requirements of the position. Because the union failed to meet its burden to prove pretext or union animus, there is no discrimination.

ISSUE 3

Did the employer interfere with employee rights by threats of reprisal or force or promises of benefit made to Jimmy Fletcher and Dave Roberts in connection with union activities?

Conclusion

The union was unable to establish that the statements the employer allegedly made were threats in connection with union activity. Because there was no evidence of threats made in connection with union activity, the employer did not interfere with Fletcher and Robert's rights.

Applicable Legal Standard

In *State - Corrections*, Decision 11571-A (PSRA, 2013), the Commission reiterated the legal principles applicable to prove employer interference under RCW 41.80.110(1)(a). It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Chapter 41.80 RCW. RCW 41.80.110(1)(a). 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 actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate that the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Analysis

The union alleges that the employer interfered with Fletcher and Robert's rights by threats of reprisal during the DSC meeting on February 23, 2012. The evidence is consistent that during the DSC meeting, Samp informed Fletcher that he was not going to provide Fletcher with a letter of recommendation because Fletcher was not at 100 percent compliance on his evaluations. However, the events that happened after this information was shared are in controversy. There are three different versions of the events that happened after Samp told Fletcher he would not recommend him for a promotion.

(1) Fletcher testified that Roberts then asked if this compliance rate only applied to Fletcher. Fletcher stated that Samp replied that it only applied to Fletcher. Fletcher testified that the next thing that happened was Fletcher challenged Samp. Fletcher stated to Samp "if you're going to discuss my evaluations, I'm fine with that but on the same sense, ensure that you're up to date on your own evaluations." Fletcher testified that Samp responded by saying, "I know what you're doing. And if you want me to take this to HR and make something of it, let's go."

(2) Roberts testified that Samp told Fletcher he would not be providing a letter of recommendation to Fletcher because he was not at 100 percent completion on his evaluations. Roberts then testified that he asked Samp if that requirement only applied to Fletcher. Samp responded, "yes, this is just for Fletcher." Roberts testified that Fletcher then said "you expect me to do this and you're not even doing it as a lieutenant." Roberts then said Samp responded by

saying, "well, you were insubordinate and I can take you to HR if you wanna make something outta that."

(3) Samp testified that the meeting did become adversarial, and that he was upset during the process. He did not remember making any references to taking Fletcher to HR. Samp believed when Fletcher challenged him, Fletcher was trying to hold Samp accountable for getting Fletcher's signature on Fletcher's evaluation and not completing his evaluations as required as a lieutenant. Samp also testified he may have said something about going to his supervisor, but did not threaten to take Fletcher to HR.

Although there are three versions of the events, the question is whether or not a reasonable person could conclude that Samp threatened Fletcher in association for his union activities.

Even if Samp made a statement regarding taking Fletcher to HR, according to Fletcher's own testimony, it was in response to Fletcher accusing Samp for not meeting Samp's own evaluation requirements. The statement was not a threat for a union activity, but a response to an inappropriate comment Fletcher made to his supervisor during a routine DSC meeting when Fletcher tried to attack Samp's performance. The alleged comment made by Samp does not rise to the level of an interference charge. It is not reasonable to believe that Fletcher and Roberts would perceive these statements as threats associated with union activity based on their own testimony of the conversation. The employer did not interfere with Fletcher and Robert's rights.

FINDINGS OF FACT

1. Washington State Department of Corrections (employer) is a public employer within the meaning of RCW 41.80.005(8).

2. Teamsters Local 117 (union) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

3. The union represents all non-supervisory classified employees and all supervisory classified employees of the State of Washington working for the Department of Corrections in correctional institutions, including sergeants. The employer and union were parties to a collective bargaining agreement effective between July 1, 2011, and June 30, 2013.

4. Jimmy Fletcher worked for the employer as a sergeant and was a member of the union. As a sergeant, Fletcher was required to conduct evaluations for employees he supervised.

5. Between February 2012 and March 2012, Fletcher received an e-mail with an attached video containing sensitive information titled "WSP pictures" (video).

6. Around March or April 2012 the employer became aware of the circulation of the video at the Monroe facility. The employer tasked Assistant Superintendent Mark Kucza with completing a fact finding investigation to determine how the employees began to circulate the video.

7. In the beginning of April, Kucza asked to speak with Fletcher in private about the circulation of the video. A few days later Kucza and Fletcher met, and Kucza asked Fletcher about his involvement with the distribution of the video.

8. Once Kucza had the information from Fletcher, the employer decided to abandon the investigation of the video's distribution.

9. In November 2011, Fletcher completed less than 75 percent of evaluations on his staff. On November 14, 2011, Fletcher received a letter from Superintendent Scott Frakes regarding the new evaluation completion requirements. The letter stated that by February 1, 2012, supervisors needed to complete 90 percent of their evaluations, and by March 1, 2012, supervisors must complete no less than 95 percent of their evaluations.

10. In November 2011, Frakes also directed the Lieutenants to have regularly scheduled documented supervisory conferences (DSC) with the sergeants they supervised. During these meetings the Lieutenants would review the sergeant's progress toward completion of the goals on the sergeant's evaluations.

11. On February 20, 2012, Fletcher sent an e-mail to Richard Samp requesting a letter of recommendation to apply for a lieutenant position.

12. On February 23, 2012, Samp held the regularly scheduled DSC with Fletcher. Dave Roberts attended as Fletcher's shop steward. In this meeting, Samp denied Fletcher's request for a letter of recommendation to apply for a lieutenant position. Samp verbally told Fletcher that he would not provide a recommendation letter because Fletcher was not at 100 percent compliance on the evaluations that Fletcher was required to complete. As of December 2011, Fletcher was at 80 percent compliance on evaluation completion.

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. Based upon Findings of Fact 4 through 8, the employer did not discriminate in violation of RCW 41.80.110(1)(c) and (a) by placing Fletcher under investigation, in reprisal for union activities.

3. Based upon Findings of Fact 4 and 9 through 12, the employer did not discriminate in violation of RCW 41.80.110(1)(c) and (a) by denying Jimmy Fletcher a promotional opportunity, in reprisal for union activities.

4. Based upon Findings of Fact 4 and 9 through 12, the employer did not interfere with employee rights in violation of RCW 41.80.110(1)(a) by threats of reprisal or force or

promises of benefit made to Jimmy Fletcher and Dave Roberts in connection with union activities.

ORDER

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

ISSUED at Olympia, Washington, this 7th day of March, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, 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

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ DIANE THOVSEN

CASE NUMBER:	25011-U-12-06397	FILED:	07/27/2012	FILED BY:	PARTY 2
DISPUTE:	ER DISCRIMINATE				
BAR UNIT:	ALL EMPLOYEES				
DETAILS:	Jimmy Fletcher 25207-S-12-00324				
COMMENTS:					

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