Spokane County, Decision 12318 (PECB, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SPOKANE COUNTY DEPUTY SHERIFF ASSOCIATION, Complainant, vs. SPOKANE COUNTY, Respondent.	CASE 26263-U-14-6706 DECISION 12318 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On January 31, 2014, the Spokane County Deputy Sheriff Association (union) filed an unfair labor practice complaint against Spokane County (employer). The union filed an amended complaint on February 5, 2014. In the amended complaint, the union alleged the employer refused to bargain, interfered with employee rights, and discriminated against both Scott Kenoyer and the union. On February 20, 2014, the Unfair Labor Practice Manager issued a preliminary ruling stating a cause of action existed. Examiner Emily Whitney held a three-day hearing on October 7 through 9, 2014. On January 26, 2015, the parties submitted post-hearing briefs to complete the record.

ISSUES

As framed by the preliminary ruling, the issues presented by the complainant are as follows:

1. Did the employer breach its good faith bargaining obligations with the union in violation of RCW 41.56.140(4) and (1) regarding the negotiations of Kenoyer's last chance agreement?

The employer did not refuse to bargain in good faith regarding the negotiations of Kenoyer's last chance agreement. Kenoyer's last chance agreement involved an individual disciplinary determination made by the employer based on Kenoyer's conduct and was not a mandatory subject of bargaining. Because the last chance agreement was not a mandatory subject of bargaining, the employer did not have a duty to bargain the terms of the agreement with the union.

2. Did the employer circumvent the union in violation of RCW 41.56.140(4) and (1) when Sheriff Ozzie Knezovich discussed Kenoyer's discipline directly with Kenoyer without notice to the union?

The employer did not circumvent the union when Knezovich had a meeting with Kenoyer and discussed possible disciplinary options with him. The union was unable to prove that the comments made by Knezovich during a meeting Kenoyer initiated without union representation rose to the level of circumvention.

3. Did the employer refuse to provide relevant information requested by the union in negotiations regarding Kenoyer in violation of RCW 41.56.140(4) and (1)?

The employer did not refuse to provide information to the union regarding Kenoyer's violation. The union failed to prove that it requested a copy of the last chance agreement prior to the *Loudermill* hearing on August 15, 2013. When the union requested a copy of the last chance agreement on August 15, 2013, the employer immediately provided the union with a copy.

4. Did the employer discriminate against Kenoyer and the union in violation of RCW 41.56.140(1) by terminating Kenoyer in reprisal for Kenoyer's union activities and the union's activities?

The employer did not discriminate against Kenoyer or the union by terminating Kenoyer in reprisal for union activities. The union established a *prima facie* case, but it did not prove that the employer's nondiscriminatory reason was pretextual or substantially motivated by union animus.

5. Did the employer interfere with employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of benefit made by Knezovich to (a) Kenoyer in connection with his union activities, or (b) all bargaining unit members by Knezovich's actions toward Kenoyer in connection with the union's representation of Kenoyer?

The employer interfered with employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of benefit to Kenoyer. The union was able to prove that Knezovich's statements made to Kenoyer were promises of benefit in connection with union activity. The employer did not interfere with the rights of all bargaining unit members in violation of RCW 41.56.140(1) by Knezovich's actions toward Kenoyer. The union was unable to prove that the statements Knezovich directed to Kenoyer affected any other bargaining unit member in connection with union activity.

BACKGROUND

The employer and union were parties to a collective bargaining agreement effective from January 1, 2008, through December 31, 2010. The parties rolled over the agreement to December 31, 2011. The parties had not reached agreement on a successor collective bargaining agreement, so an interest arbitration was scheduled but had not occurred prior to the hearing on this matter. The parties agreed they were operating under the terms and conditions of the contract that had expired on December 31, 2011.

In the spring of 2013 the Spokane County Sheriff's Department was assisting in an investigation involving the City of Spokane. During that investigation a witness stated that Spokane County Deputy Sheriff Scott Kenoyer had come to her apartment, while on duty and in uniform, and asked her to perform oral sex on him. Because of the witness's statements, the Spokane County Sheriff's Department initiated an investigation into this incident involving Kenoyer.

Kenoyer was notified that he would have an interview with Tim Hines from the Office of Professional Standards on June 27, 2013. Kenoyer had union Vice President Michael Wall with him during the interview on June 27. During the interview, Kenoyer "fell on his sword" admitting that he had engaged in consensual sexual activity while on duty.

Immediately after the initial June 27 investigation interview with Kenoyer, Wall met with the investigators and stated he believed Sheriff Ozzie Knezovich would think this was a "slam dunk" case. Later that day Wall spoke with Knezovich who agreed that once the investigation was complete he would consider resignation in lieu of termination as an option for discipline. Following that conversation, Wall called Kenoyer to relay the discussion he had with Knezovich about Kenoyer's possible resignation in lieu of termination. Wall told Kenoyer they could discuss the situation further when Wall returned from vacation.

While Wall was on vacation, Kenoyer spoke with his sergeants and determined that he wanted to speak with Knezovich "man-to-man" without union representation. Kenoyer testified that he "chose to [speak with Knezovich without representation] simply because I was the one who screwed up. So, I should be the one who stands for it." By explaining the circumstances to Knezovich, Kenoyer hoped that Knezovich would change his mind about terminating him, and by owning up to his actions he might receive a lower level of discipline.

Kenoyer scheduled a meeting with Knezovich on July 2, 2013, and a union representative did not appear at this meeting. Prior to starting the meeting, Knezovich asked Kenoyer twice if he wanted a union representative with him. Kenoyer responded that he did not want a union representative, and he wanted to deal with the situation on his own. Kenoyer told Knezovich that he had spoken with Wall and had been advised that engaging in sexual activity on duty was a terminable offense, but Knezovich would allow Kenoyer to resign in lieu of termination. Kenoyer relayed the facts of his violation as he had in the investigation interview. Knezovich credibly testified that Kenoyer was upset off and on during the July 2 meeting with Knezovich. After Kenoyer relayed the facts, Knezovich stated that this was a very serious situation but he was willing to work with Kenoyer.

During the discussion about possible termination, Knezovich told Kenoyer that he had never seen the union propose resignation in lieu of termination so early in the process. Knezovich then stated it was "almost like they threw you under the bus." The union and employer provided testimony that they have a history of a strained relationship. Kenoyer testified that he knew there was strife between the employer and union and believed Knezovich meant that the union was sacrificing

Kenoyer. Knezovich talked with Kenoyer about possible discipline but stated that the investigation would need to be complete before he determined what discipline to impose.

The investigation was completed on July 15, 2013. At the completion of the investigation, the employer determined that the violation was a terminable offense, but it would attempt to save Kenoyer's job by offering a last chance agreement in lieu of terminating him.

When Wall returned from vacation he learned that Kenoyer met with Knezovich without union representation. Wall contacted Kenoyer and Kenoyer relayed that he believed from his conversation with Knezovich that he would receive a 60-day suspension but couldn't remember Knezovich's exact words. Kenoyer told Wall he did not want the union representing him in this process.

On August 6, 2013, the employer prepared a *Loudermill* notice and last chance agreement and notified Kenoyer that they were available for review. On or around August 7, 2013, the union became aware of the last chance agreement. Because the employer believed the last chance agreement required a signature from the union, Hines relayed this information to Kenoyer.

On August 7, 2013, Wall contacted Hines and informed him that the union would no longer be representing Kenoyer. Wall followed up his phone call to Hines with an e-mail that stated the same. In the e-mail Wall stated that he was willing to review the employer's last chance agreement. After Wall sent the e-mail to the employer, Kenoyer changed his mind and decided he did want union representation because he understood the last chance agreement required the union's signature. The union notified the employer that it would need to move the date of the *Loudermill* hearing so the union could be present, and the employer obliged.

The parties met on August 15, 2013, for the *Loudermill* hearing. The union requested and the employer provided a copy of the last chance agreement. The parties spent approximately four to five hours, with breaks for caucus time, negotiating the terms of the agreement but were unable to agree. Because the employer determined the violation was a terminable offense and the parties

were unable to agree to terms of lesser discipline, Kenoyer was terminated. The union grieved Kenoyer's termination.

ISSUE 1

Did the employer breach its good faith bargaining obligations with the union regarding the negotiations of Kenoyer's last chance agreement?

Conclusion

The employer did not refuse to bargain in good faith regarding the negotiations of Kenoyer's last chance agreement. Kenoyer's last chance agreement involved an individual disciplinary determination made by the employer based on Kenoyer's conduct and was not a mandatory subject of bargaining. Because the last chance agreement was not a mandatory subject of bargaining, the employer did not have a duty to bargain the terms of the agreement with the union.

Applicable Legal Standard

A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). The duty to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *University of Washington*, Decision 11414-A (PSRA, 2013).

The determination as to whether a duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. In deciding whether a duty to bargain exists, the Commission applies a balancing test on a case-by-case basis. The Commission balances two principal considerations: (1) "the relationship the subject bears to the wages, hours, and working conditions" of employees, and (2) "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. PERC* (*City of Richland*), 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.*

"The scope of mandatory bargaining . . . is limited to matters of direct concern to employees," while "managerial decisions that only remotely affect 'personnel matters,' and decisions that are predominately 'managerial prerogatives,' are classified as nonmandatory subjects." *City of Richland*, 113 Wn.2d 200, *citing Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 341 (1986). Mandatory subjects of bargaining include grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4). Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which the parties may negotiate. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1). A finding that a party has refused to bargain in good faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *Spokane School District*, Decision 310-B (EDUC, 1978).

While discipline has generally been found to be a mandatory subject of bargaining, individual disciplinary determinations have not. *City of Seattle*, Decision 9938-A (PECB, 2009), *citing City of Auburn*, Decision 4896 (PECB, 1994). Changes in disciplinary procedures are mandatory subjects of bargaining. *Community Transit*, Decision 6375 (PECB, 1998), *citing City of Spokane*, Decision 5054 (PECB, 1995).

Analysis

Discipline in general is a mandatory subject of bargaining because it relates to wages, hours, and working conditions. The parties bargained a discipline and discharge article in the collective bargaining agreement. The article specified the types of discipline and the grievance procedure the parties were to follow. The parties provided evidence that there was a history of the employer using a last chance agreement in lieu of termination as a disciplinary measure.

In this particular instance the employer was determining whether to impose a last chance agreement or termination for an individual employee. Individual disciplinary determinations are not mandatory subjects of bargaining. Similarly, a last chance agreement issued as discipline for an individual employee, which does not affect other members of the bargaining unit, is also an individual disciplinary determination. While individual disciplinary actions are not mandatory subjects of bargaining, an employer must maintain the existing discipline standards and appeal process, and bargain changes with the union. *City of Seattle*, Decision 9938-A.

After completing the investigation into the Kenoyer matter, the employer determined Kenoyer's violation to be a terminable offense. Even though the employer believed it was a terminable offense, the employer felt there may be mitigating factors and it could offer a last chance agreement in lieu of termination. This determination of discipline only affected Kenoyer.

The union did not agree to the terms, nor did it sign the last chance agreement. Since there was no agreement, and the employer had determined the violation was a terminable offense, the employer terminated Kenoyer.

The parties had already agreed to a grievance procedure in their collective bargaining agreement, and the union had the ability to grieve Kenoyer's termination. In fact, the union did grieve Kenoyer's termination, and the parties followed the agreed upon discipline process.

In *City of Yakima*, Decision 9062-A (PECB, 2006), the Commission affirmed an examiner's determination that a return to work agreement changed the employer's drug testing policy and because it changed the employer's policy, was a mandatory subject of bargaining. In that case, an employee informed the employer that he had a substance abuse problem. The employer immediately placed the employee on administrative leave. The employer offered a return-to-work agreement to the employee that included a requirement that the employee submit to a drug test procedure prior to returning to work. The drug test procedure was different than the procedure in the employer's policy and the parties' past practice. Because the terms of the return to work agreement would change the employer's policy for the members of the bargaining unit, there was a duty to bargain the change. The Commission affirmed the examiner's analysis that the

return-to-work agreement for one employee's discipline changed the drug testing procedure, which also would affect the members of the bargaining unit.

The present case is distinguishable from *City of Yakima*. Here the employer offered a last chance agreement that only affected Kenoyer. The agreement was non-precedent setting. The proposed agreement did not change the discipline process and was an individual discipline determination. The union used the discipline process and grieved Kenoyer's termination.

On balance the employer's managerial prerogative predominates. The last chance agreement did affect Kenoyer's working conditions, but it did not affect any other bargaining unit members' working conditions. The employer has a managerial prerogative to discipline its employees for violations of rules and policies. Because the last chance agreement was individual discipline, the employer did not have a duty to bargain with the union. Thus the employer did not bargain in bad faith.

ISSUE 2

Did the employer circumvent the union when Sheriff Ozzie Knezovich discussed Kenoyer's discipline directly with Kenoyer?

Conclusion

The employer did not circumvent the union when Knezovich had a meeting with Kenoyer and discussed possible disciplinary options with him. The union was unable to prove that the comments made by Knezovich during a meeting Kenoyer initiated without union representation rose to the level of circumvention.

Applicable Legal Standard

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees concerning mandatory subjects of bargaining. *Royal School District*, Decision 1419-A (PECB, 1982). In order for a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations

with one or more employees concerning a mandatory subject of bargaining. *City of Seattle*, Decision 3566-A (PECB, 1991).

The law does not completely preclude direct communications between employers and their union-represented employees. *City of Seattle*, Decision 3566-A. Employers maintain the right to communicate directly with their employees who are represented, provided the communication does not amount to bargaining or other unlawful activity. *State – Social and Health Services*, Decision 9690-A (PSRA, 2008). Sharing information or listening to employee concerns does not rise to the level of circumvention. *See Kitsap Transit*, Decision 11098-A (PECB, 2012), *aff'd on other grounds*, Decision 11098-B (PECB, 2013) (employer memorandum to employees announcing a unilateral change was not circumvention); *Vancouver School District*, Decision 10561 (EDUC, 2009), *aff'd*, Decision 10561-A (EDUC, 2011) (employer communication of the employer's bargaining proposal to bargaining unit employees was not circumvention or direct dealing); *University of Washington*, Decision 10490-C (PSRA, 2011) (employer did not circumvent the union when it met with bargaining unit employees and listened to their concerns).

Analysis

The employer did not circumvent the union when Knezovich had a conversation with Kenoyer on July 2, 2013. Kenoyer initiated a meeting with Knezovich. Kenoyer was adamant that he did not want a union representative present when Knezovich asked twice if he wanted representation. Knezovich did not intend this meeting to be a part of the investigation process, nor did Knezovich issue discipline in the meeting.

The union points to *Washington State Patrol*, Decision 4757-A (PECB, 1995) in its brief as relevant to prove circumvention when an employer directly negotiates a last chance agreement with an employee. In *Washington State Patrol*, the Commission found that when an employer called an employee into a meeting, discussed the terms of a last chance agreement, and directed the employee to sign it, the employer circumvented the union.

Washington State Patrol was decided based on the complaint only because an answer was never filed in the case. The Commission clearly pointed out that case was decided in a default setting

and the decision lacked the precedential value of a case decided based on full litigation. The Commission stated they were not giving veto power over all proposed disciplinary actions of the employer. The Commission also stated:

> If an employer proposes a disciplinary action, gives the union notice of that action, if it is clear the employee exercised free choice in signing an agreement as to the disciplinary action, and if the employer makes clear that the settlement is a non-precedential one so there is no detrimental impact on other members of the bargaining unit, the result before the Commission may be a different one.

While the employer did have a meeting with Kenoyer without representation, Kenoyer initiated the meeting and specifically stated twice that he did not want union representation. Kenoyer did share the events of the incident with Knezovich, and Knezovich listened. Knezovich told Kenoyer the violation was a serious offense, and he had "never seen anybody survive sex on duty."

There was conflicting testimony as to the exact statements made at this meeting regarding what terms could be included in a last chance agreement if Kenoyer was not terminated. Knezovich testified that he was very clear when he stated the terms of the possible last chance agreement. Kenoyer testified that he was offered a number of days of suspension. He later relayed to Wall, based on his meeting with Knezovich, there would be a 60-day suspension. He did not recall whether he heard Knezovich talk about a last chance agreement. The best he could recall was that he first learned of the last chance agreement in August 2013. The evidence shows that Kenoyer was upset during the meeting with Knezovich. Both parties credibly testified what their memory was of the July 2 meeting. The specifics of exactly what was stated as possible discipline options are not necessary to determine at this time. The relevant fact is that some topics of potential discipline were discussed. A key to the conversation is that Knezovich told Kenoyer the investigation would need to be complete before he made a final discipline determination. Kenoyer and Knezovich never agreed to any specifics of the discipline, and Knezovich did not direct Kenoyer to sign any agreements because the investigation was not yet complete.

After the investigation was complete the employer offered the last chance agreement to Kenoyer and the union. Kenoyer continued to not want the union to be involved in the process, and the union obliged and notified the employer that they were no longer representing Kenoyer.

Later that same day, after learning the union needed to sign the last chance agreement for it to be valid, Kenoyer asked the union to represent him at the *Loudermill* hearing and in the negotiations of the last chance agreement. The union did represent Kenoyer at the *Loudermill* hearing and read through the terms of the last chance agreement.

The parties spent four to five hours, including caucus time and breaks, discussing ways to make changes to the last chance agreement so they could agree. The employer was very clear that this last chance agreement would not be precedent setting. In the end, the parties were unable to agree to language, and Kenoyer was terminated for engaging in sexual activity on duty. Based on the facts of this case, the employer did not circumvent the union.

ISSUE 3

Did the employer refuse to provide relevant information requested by the union in negotiations regarding Kenoyer?

Conclusion

The employer did not refuse to provide information to the union regarding Kenoyer's violation. The union failed to prove that it requested a copy of the last chance agreement prior to the *Loudermill* hearing on August 15, 2013. When the union requested a copy of the last chance agreement on August 15, 2013, the employer immediately provided the union with a copy.

Applicable Legal Standard

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4).

The duty to bargain includes an obligation to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The flow of information between the parties must continue during the parties' preparation for interest arbitration. *City of Clarkston (IAFF, Local 2299)*, Decision 3246 (PECB, 1989).

In evaluating information requests, the Commission considers whether the requested information appears reasonably necessary for the performance of the union's function as bargaining representative. *City of Bellevue*, Decision 4324-A (PECB, 1994). Failure to provide relevant information upon request constitutes a refusal to bargain unfair labor practice. *University of Washington*, Decision 11414-A.

Communication is essential to fulfilling the obligation to provide information. Upon receiving a relevant information request, the receiving party must provide the requested information or engage in negotiations about the information request. *City of Yakima*, Decision 10270-B (PECB, 2011); *Seattle School District*, Decision 9628-A (PECB, 2008); and *Port of Seattle*, Decision 7000-A (PECB, 2000). During those negotiations, the receiving party must timely explain why it does not think the information request is relevant or clear. *Pasco School District*, Decision 5384-A (PECB, 1996).

After receiving a response, if the requesting party does not believe the information provided sufficiently responds to the original request, the requesting party has a duty to contact the responding party and engage in meaningful discussions about what type of information the requestor is seeking. *Kitsap County*, Decision 9326-B (PECB, 2010). Delay in providing requested information can constitute an unfair labor practice. *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988). One factor to be considered when determining whether a delay constitutes an unfair labor practice is the preparation required for the response. *City of Seattle*, Decision 10249 (PECB, 2008), *remedy aff'd*, Decision 10249-A (PECB, 2009). If the response will be delayed due to the time required to prepare the response, such a delay must be communicated.

Analysis

On August 6, 2013, the employer informed Kenoyer that his *Loudermill* letter and last chance agreement were available for review. On or around August 7, 2013, the union became aware of the last chance agreement.

Initially Kenoyer did not want to have the union involved in a settlement agreement with the employer. He specifically told Wall that he did not want union representation. Later, the employer informed Kenoyer that the union's signature would be needed for the last chance agreement to be valid.

After the employer informed Kenoyer about the need for union representation, the employer received a call from Wall. During the call Wall stated that the union no longer represented Kenoyer in this matter. Wall followed up the call with an e-mail stating the same information. Later that same day, Kenoyer decided he again wanted union representation and requested that Wall represent him.

The union makes mention of the fact that Wall stated in the e-mail he sent to the employer that he "[had] no problem reviewing [the employer's] document," and alludes Wall's statement in the e-mail amounted to a request for the last chance agreement. This statement was made within an e-mail sent from Wall to Hines stating that the union was abiding by Kenoyer's request and no longer representing him in the matter. The union's statements within the e-mail to Hines cannot be taken as a request for information. The union clearly was stating it was no longer representing Kenoyer which meant there would be no need for the union to request a copy of the last chance agreement. Between August 7, 2013, and prior to the *Loudermill* hearing on August 15, 2013, the union made no other request for a copy of the last chance agreement.

The union had a duty to request a copy of the last chance agreement. The first time the union requested a copy of the last chance agreement was the morning of the *Loudermill* hearing on August 15, 2013. Upon request, the employer immediately provided a copy of the last chance agreement. Because the union did not request a copy of the last chance agreement until the day of

the *Loudermill* hearing, and the employer provided a copy immediately upon request, the employer did not fail to provide information.

ISSUE 4

Did the employer discriminate against Kenoyer and the union by terminating Kenoyer in reprisal for Kenoyer's union activities and the union's activities?

Conclusion

The employer did not discriminate against Kenoyer or the union by terminating Kenoyer in reprisal for union activities. The union established a *prima facie* case, but it did not prove that the employer's nondiscriminatory reason was pretextual or substantially motivated by union animus.

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). An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.80 RCW. *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 a discrimination case. 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, a complainant may use circumstantial evidence to establish their *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 common experience, give rise to a reasonable inference of the

truth of the fact sought to be proved. *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 nondiscriminatory 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. *Id.*

To prove an employer's stated nondiscriminatory reason was pretextual or substantially motivated by union animus, a union must "prove by a preponderance of the evidence that the disputed action was in retaliation for" exercising statutorily protected rights. *Central Washington University*, Decision 10118-A (PSRA, 2010), *citing Clark County*, Decision 9127-A (PECB, 2007).

Analysis

The first step in the discrimination analysis is to determine whether the complainant established its *prima facie* case. The first step in establishing a *prima facie* case is to determine if the involved employee engaged in protected activity. The exercise of protected activity includes the filing of a grievance or unfair labor practice complaint (*Mukilteo School District*, Decision 5899-A (PECB, 1997)); union organizing activity (*Asotin County Housing Authority*, Decision 2471-A (PECB, 1987)); acting as the union president and participating in collective bargaining with the employer (*Oroville School District*, Decision 6209-A (PECB, 1998)); and representing an employee in an investigatory meeting (*Okanogan County*, Decision 2252-A (PECB, 1986)). These rights are not absolute, however, and an employee is not immune from disciplinary actions just because he or she has engaged in union activity. *PERC v. City of Vancouver*, 107 Wn. App. 694 (2001); *Vancouver School District v. SEIU Local 92*, 79 Wn. App. 905 (1995), *review denied*, 129 Wn.2d 1019 (1996).

The union provided evidence that established a *prima facie* case. First, Kenoyer requested union representation for his August 15, 2013, *Loudermill* hearing. Requesting union representation for

an investigatory or disciplinary meeting is a protected activity. *Seattle School District*, Decision 11045-A (PECB, 2011). Next, Kenoyer was terminated at the end of the *Loudermill* hearing after he refused to agree to and sign the last chance agreement. Finally, there is a causal connection between Kenoyer seeking representation and his termination.

Even though a *prima facie* case is met under these facts, the union fails to prove discrimination because it fails to prove that the employer's nondiscriminatory reason for terminating Kenoyer was pretextual or that union animus was a substantial motivating factor. The employer's nondiscriminatory reason for terminating Kenoyer was because Kenoyer engaged in sexual activity while on duty. The employer provided evidence and testimony that historically in this line of work engaging in sexual activity on duty was a terminable offense. The employer attempted to impose a lower level of discipline by offering a last chance agreement. The union and Kenoyer were unable to agree to the terms of the last chance agreement. Because there was no agreement, the employer followed through with its original determination that Kenoyer's violation was a terminable offense and terminated him.

There is evidence in the record that there is a history of strife between the union and Knezovich. The evidence of the strife did not prove that Knezovich was motivated by union animus. The employer determined that Kenoyer violated a policy, that violation was so egregious that it was terminable, and the employer terminated Kenoyer. The union did not meet its burden of proof.

ISSUE 5

Did the employer interfere with employee rights by threats of reprisal or force or promises of benefit made by Knezovich to (a) Kenoyer in connection with his union activities, or (b) all bargaining unit members by Knezovich's actions toward Kenoyer in connection with the union's representation of Kenoyer?

Conclusion

The employer interfered with employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of benefit to Kenoyer. The union was able to prove that Knezovich's statements made to Kenoyer were promises of benefit in connection with union activity. The

employer did not interfere with the rights of all bargaining unit members in violation of RCW 41.56.140(1) by Knezovich's actions toward Kenoyer. The union was unable to prove that the statements Knezovich directed to Kenoyer affected any other bargaining unit member in connection with union activity.

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.

To prove an interference violation, the complainant must prove, by a preponderance of the evidence, the employer's conduct interfered with protected employee rights. 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. *Washington State Patrol*, Decision 11863-A (PECB, 2014); *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

Kenoyer hoped he would receive a lower level of discipline if he talked with Knezovich on his own during the July 2, 2013, meeting. After Knezovich made the statement about the union throwing Kenoyer "under the bus," Kenoyer continued to believe he would have a better chance of saving his job without the union. It was not until the *Loudermill* hearing on August 15, 2013,

that Kenoyer requested union representation. Seeking union assistance regarding workplace disputes is union activity. *Seattle School District*, Decision 9628-A.

Kenoyer was a bargaining unit member. He did not hold a board position within the bargaining unit. Prior to the meeting, Kenoyer believed Knezovich intended to terminate him. After talking with his peers, Kenoyer chose to not have a union representative with him during the meeting. During the meeting Knezovich made negative statements about the union and discussed a possible lower level of discipline with Kenoyer. Kenoyer could reasonably believe he would receive this benefit of a lower level of discipline if he continued to not be represented by the union. Even after the conversation, Kenoyer believed that he should not have union representation when he told Wall he no longer wanted union representation. It was only when Kenoyer was informed that he needed the union's signature on the last chance agreement that he requested union representation. Based on the facts of the case, the employer interfered with Kenoyer's rights to union representation when Knezovich made negative statements about the union during the July 2 meeting.

The preliminary ruling states a violation of interference by threats of force or promises of benefit made by Knezovich to all bargaining unit members by his actions toward Kenoyer in connection with the union's representation of Kenoyer. The union did not meet its burden of proof to show that there were other bargaining unit members affected by Knezovich's actions toward Kenoyer. There was no evidence in the record to show that any other bargaining unit members were present in the July 2 meeting between Kenoyer and Knezovich. Knezovich provided testimony that a few members had conveyed to him that they believed they would get more leniency from him if they attended a meeting without union representation. There was no evidence that Knezovich actually provided leniency. There was also no evidence that these statements were tied to Knezovich's actions toward Kenoyer. Thus the interference charge relating to all bargaining unit members is dismissed.

FINDINGS OF FACT

1. Spokane County (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The Spokane County Deputy Sheriff Association (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and is the exclusive bargaining representative for all fully commissioned law enforcement officers through the rank of Sergeant.

3. The employer and union were parties to a collective bargaining agreement effective from January 1, 2008, through December 31, 2010. The parties rolled over the agreement to December 31, 2011. The parties had not reached agreement on a successor collective bargaining agreement, so an interest arbitration was scheduled but had not occurred prior to the hearing on this matter. The parties agreed they were operating under the terms and conditions of the contract that had expired on December 31, 2011.

4. The parties bargained a discipline and discharge article in the collective bargaining agreement. The parties had agreed to a grievance procedure in their collective bargaining agreement, and the union had the ability to grieve Kenoyer's termination. The parties provided evidence that there was a history of the employer using a last chance agreement in lieu of termination as a disciplinary measure.

5. The employer offered Kenoyer a last chance agreement that only affected Kenoyer. The agreement was non-precedent setting. Disciplining Kenoyer did not change the discipline process.

6. In the spring of 2013 the Spokane County Sheriff's Department was assisting in an investigation involving the City of Spokane. During that investigation a witness stated that Spokane County Deputy Sheriff Scott Kenoyer had come to her apartment, while on duty and in uniform, and asked her to perform oral sex on him. Because of the witness's statements, the Spokane County Sheriff's Department initiated an investigation into this incident involving Kenoyer.

7. Kenoyer was notified that he would have an interview with Tim Hines from the Office of Professional Standards on June 27, 2013. Kenoyer had union Vice President Michael Wall

with him during the interview on June 27. During the interview Kenoyer admitted that he had engaged in consensual sexual activity while on duty.

8. Immediately after the initial June 27 investigation interview with Kenoyer, Wall met with the investigators and stated he believed Sheriff Ozzie Knezovich would think this was a "slam dunk" case.

9. Later that day Wall spoke with Knezovich who agreed that once the investigation was complete he would consider resignation in lieu of termination as an option for discipline. Following that conversation, Wall called Kenoyer to relay the discussion he had with Knezovich about Kenoyer's possible resignation in lieu of termination. Wall told Kenoyer they could discuss the situation further when Wall returned from vacation.

10. While Wall was on vacation, Kenoyer spoke with his sergeants and determined that he wanted to speak with Knezovich "man-to-man" without union representation. Kenoyer testified that he "chose to [speak with Knezovich without representation] simply because I was the one who screwed up. So, I should be the one who stands for it." By explaining the circumstances to Knezovich, Kenoyer hoped that Knezovich would change his mind about terminating him, and by owning up to his actions he might receive a lower level of discipline.

11. Kenoyer scheduled a meeting with Knezovich on July 2, 2013, and a union representative did not appear at this meeting. Prior to starting the meeting, Knezovich asked Kenoyer twice if he wanted a union representative with him. Kenoyer responded that he did not want a union representative, and he wanted to deal with the situation on his own. Kenoyer told Knezovich that he had spoken with Wall and had been advised that engaging in sexual activity on duty was a terminable offense, but Knezovich would allow Kenoyer to resign in lieu of termination. Kenoyer relayed the facts of his violation as he had in the investigation interview. Knezovich credibly testified that Kenoyer was upset off and on during the July 2 meeting with Knezovich. After Kenoyer relayed his story, Knezovich stated that this was a very serious situation but he was willing to work with Kenoyer.

12. During the discussion about possible termination Knezovich told Kenoyer that he had never seen the union propose resignation in lieu of termination so early in the process. Knezovich then stated it was "almost like they threw you under the bus." The union and employer provided testimony that they have a history of a strained relationship. Kenoyer testified that he knew there was strife between the employer and union and believed Knezovich meant that the union was sacrificing Kenoyer. Knezovich talked with Kenoyer about possible discipline but stated that the investigation would need to be complete before he determined what discipline to impose.

13. The investigation was completed on July 15, 2013. At the completion of the investigation, the employer determined that the violation was a terminable offense, but it would attempt to save Kenoyer's job by offering a last chance agreement in lieu of terminating him.

14. When Wall returned from vacation he learned that Kenoyer met with Knezovich without union representation. Wall contacted Kenoyer and Kenoyer relayed that he believed from his conversation with Knezovich that he would receive a 60-day suspension but couldn't remember Knezovich's exact words. Kenoyer told Wall he did not want the union representing him in this process.

15. On August 6, 2013, the employer prepared a *Loudermill* notice and last chance agreement and notified Kenoyer that they were available for review. On or around August 7, 2013, the union became aware of the last chance agreement. Because the employer believed the last chance agreement required a signature from the union, Hines relayed this information to Kenoyer.

16. On August 7, 2013, Wall contacted Hines and informed him that the union would no longer be representing Kenoyer. Wall followed up his phone call to Hines with an e-mail that stated the same. In the e-mail Wall stated that he was willing to review the employer's last chance agreement. After Wall sent the e-mail to the employer, Kenoyer changed his mind and decided he did want union representation because he understood the last chance agreement required the union's signature. The union notified the employer that it would

need to move the date of the *Loudermill* hearing so the union could be present, and the employer obliged.

17. The parties met on August 15, 2013, for the *Loudermill* hearing. The union, for the first time, requested and the employer provided a copy of the last chance agreement. The parties spent approximately four to five hours, with breaks for caucus time, negotiating the terms of the agreement but were unable to agree. Because the employer determined the violation was a terminable offense and the parties were unable to agree to terms of lesser discipline, Kenoyer was terminated. The union grieved Kenoyer's termination.

CONCLUSIONS OF LAW

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

2. Based on Findings of Fact 3 through 7, 13, and 17, the employer did not breach its good faith bargaining obligations with the union in violation of RCW 41.56.140(4) and (1) regarding the negotiations of Kenoyer's last chance agreement.

3. Based on Findings of Fact 6 through 12 and 14 through 17, the employer did not circumvent the union in violation of RCW 41.56.140(4) and (1) by Sheriff Ozzie Knezovich discussing Kenoyer's discipline directly with Kenoyer without notice to the union.

4. Based on Findings of Fact 15 through 17, the employer did not refuse to provide information requested by the union in negotiations regarding Kenoyer in violation of RCW 41.56.140(4) and (1).

5. Based on Findings of Fact 6 through 9 and 12 through 17, the employer did not discriminate against Kenoyer and the union in violation of RCW 41.56.140(1) by terminating Kenoyer in reprisal for Kenoyer's union activities and the union's activities.

6. Based on Findings of Fact 10 through 12 and 14 through 16, the employer interfered with Kenoyer's employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of benefit made by Knezovich to Kenoyer in connection with Kenoyer's union activities.

7. The union failed to establish that the actions described in Findings of Fact 10 through 12 and 14 through 16 interfered with employee rights in violation of RCW 41.56.140(1) by threats of reprisal or force or promises of benefit made by Knezovich to all bargaining unit members and by Knezovich's actions toward Kenoyer in connection with the union's representation of Kenoyer.

ORDER

Spokane County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Making comments that could discourage employees from seeking union assistance in association with their union activity.

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

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

   a. Contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice posting. Post copies of the notice provided by the Compliance Officer 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.

b. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Board of Commissioners of Spokane County, 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.

c. Notify the complainant, in writing, no later than 20 days following the date this order becomes final 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.

d. Notify the Compliance Officer, in writing, no later than 20 days following the date this order becomes final as to what steps have been taken to comply with this order and, at the same time, provide her with a signed copy of the notice she provides.

ISSUED at Olympia, Washington, this 23rd day of April, 2015.

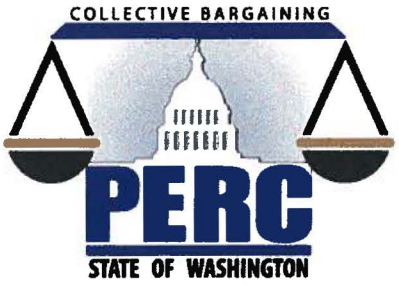
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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.

CASE 26263-U-14-6706
DECISION 12318 - PECB



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT *SPOKANE COUNTY* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY interfered with employee rights by making comments to an employee in the Spokane County Deputy Sheriff Association bargaining unit that could discourage employees from seeking union assistance.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL respect your right to engage in union activities.

WE WILL respect your right to seek union assistance during disciplinary investigations and file grievances.

WE WILL NOT make comments that could discourage you from seeking union assistance in association with disciplinary matters.

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 04/23/2015

The attached document identified as: DECISION 12318 - 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/ VANESSA SMITH

CASE NUMBER:	26263-U-14-06706	FILED:	01/31/2014	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	LAW ENFORCE				
DETAILS:	-				
COMMENTS:					

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