City of Port Angeles, Decision 10445-A (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 997, Complainant, vs. CITY OF PORT ANGELES, Respondent.	CASE 22470-U-09-5738 DECISION 10445-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Summit Law Group, PLLC, by *Bruce L. Schroeder*, Attorney at Law, for the employer.

Richard Hixson, Vice President and shop steward, for the union.

On May 13, 2009, the International Brotherhood of Electrical Workers Local 997 (union) filed an unfair labor practice complaint against the City of Port Angeles (employer). On May 19, 2009, the Commission's Unfair Labor Practice Manager issued a deficiency notice. The union did not provide any additional information in response. On June 17, 2009, the Unfair Labor Practice Manager issued a preliminary ruling and partial dismissal order, finding causes of action for an employer interference violation, but dismissing a discrimination allegation. Examiner J. Martin Smith conducted a hearing on November 20, 2009. The parties filed briefs and memoranda of legal authority to complete the record.

ISSUES PRESENTED

Did the employer engage in interference by threats of force or reprisal or promises of benefit, by its actions involving Richard Hixson in November 2008, and involving George Drake and Bruce Rowley in April of 2009, concerning the filing of grievances by the union?

The Examiner rules that the employer did not engage in interference in violation of RCW 41.56.140 (1).

APPLICABLE LAW

The union and employer involved here negotiate under Chapter 41.56 RCW. RCW 41.56.040 prohibits employers from interfering with or discriminating against a public employee who exercises collective bargaining rights secured by the statute. RCW 41.56.160 gives the Commission jurisdiction to determine and remedy unfair labor practice claims. RCW 41.56.140(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce public employees in the exercise of their statutory rights.

Employees have a statutory right to file and pursue unfair labor practice charges before the Commission, and the insistence of a party on withdrawal of unfair labor practice charges is itself an unfair labor practice. *Public Utility District 1 of Clark County*, Decision 2045-A (PECB, 1989). Related to this, it is an unfair labor practice for an employer to interfere with or discriminate against employees in the exercise of their statutory right to file and pursue grievances. Employer actions to specifically "derail" or inhibit the filing of particular grievances under an existing collective bargaining agreement are usually viewed as violations. *Valley General Hospital*, Decision 1195-A (PECB, 1981); *City of Pasco*, Decision 3804-A (PECB, 1992).

The burden of proving an allegation of unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, and must be established by a preponderance of the evidence. To establish an "interference" violation under RCW 41.56.140(1), a complainant must establish that an employer engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. *City of Seattle*, Decision 3066 (PECB, 1989), *aff'd*, Decision 3066-A (PECB, 1989). See, also, *City of Pasco*, Decision 3804-A, and cases cited therein. A showing that the employer acted with intent or motivation to interfere is not required. Nor is it necessary to show that the employees concerned were *actually* interfered with or coerced. *City of Seattle,* Decision 2773 (PECB, 1987). Washington's appellate courts agree that

it is not necessary to show anti-union animus for an interference charge to prevail. *Clallam County v. Public Employment Relations Commission,* 43 Wn. App. 589 (1986).

In certain situations, an employee or group of employees could reasonably believe they were being singled out for discipline or retaliation based on some comment they had made or action they had taken related to bargaining or to prosecution of a grievance. In one situation, an employee is asked to talk to a supervisor or manager about a particular issue. Depending upon the context, such a conversation could have the effect of intimidation. A conversation between an employer official and a small group of employees might also lead to a situation in which employees could interpret questions as being meant to stifle union activity. Characterization of a union activist as "iconoclastic" or "argumentative" could be reasonably perceived as a threat of reprisal associated with union activity. *Port of Tacoma*, Decision 4626-A (1995).

ANALYSIS

Background – The City of Port Angeles, in Washington's Clallam County, provides electrical power service to residences and businesses in its metropolitan area. For many years, the employer has negotiated a collective bargaining agreement with International Brotherhood of Electrical Workers Local 997. Presently the parties have an agreement covering the period from January 2008 through December 2010. There are 18 different classifications covered by the agreement, but all of the bargaining unit employees work for the City Light Operations Division, managed by Jim Klarr. For 20 years, the labor agreement has included language requiring the employer to notify the union in writing of any changes to work rules or regulations, and to meet and discuss those changes if requested by the union. When disputes arise in the work place for bargaining unit employees, the union and employer utilize the grievance procedure at Article VII of the contract.

Allegation involving Richard Hixson – City officials became aware in late 2007 that a new OSHA-WISHA requirement for safer (and more expensive) work boots for electrical system linemen[1] and related workers would require the employer to acquire and provide boots for their

[1] The parties use the term "linemen" in their collective bargaining agreement.

line crews. The 2008-2010 collective bargaining agreement provided for a $100 boot allowance for each employee, payable in January of each contract year. The style of the work boot was subject to the approval of the Light Operations Manager.[2]

Deputy director of public works Mike Puntenney testified that both department director Glenn Cutler and light operations director Klarr determined in late 2007 that a "hazard analysis" should be made with regard to footwear and the protective properties of the boots referenced in the contract. Cutler and Puntenney insisted that the entire Public Works department participate in the hazard analysis. A subcommittee of the Public Works Safety Committee began to analyze the boots soon thereafter, and appears to have met 5-6 times over the next eleven months. That subcommittee was made up of employer and union representatives, including IBEW and AFSCME. The subcommittee began to prepare a draft of a new policy sometime in November of 2008.

At a regular meeting of the two line crews on November 13, 2008, light operations manager Klarr addressed the employees, and said he wanted to give them a "heads-up" that employees in the two line crews should probably refrain from buying boots in 2009 under the labor contract provision. The reason was that a new policy was being developed whereby the City would probably provide new footwear.

Richard Hixson, a lineman and shop steward for IBEW, remembered that Klarr told crew members that "the City had a policy . . . it was a done deal and we were going to get this policy and that we needed to start looking for boots." Hixson also remembers that a lineman named Greg McCabe asked "where the written policy was" and why the union could not see it.[3] Klarr responded that the policy was "OSHA law" and after January 1 [2009] they could start buying safety toe work boots.

Hixson, in his role as shop steward, filed a grievance on November 14, 2008, the day after the crew meetings. The testimony of both Hixson and local union president Terry Manning reflects

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2 This record does not reveal whether the boot allowance article was discussed during bargaining for the 2008 – 2010 agreement, or whether the language simply continued without change from prior years.

3 McCabe was not called as a witness.

that the grievance stated that the employer had violated the contract terms by drafting and proposing to implement a safety boot policy without giving the union 14 days notice of the "implementation" of the policy. The written grievance was not made a part of the record.[4] Hixson indicated that he personally delivered the grievance to Klarr's desk the morning of November 14. Klarr testified he took the grievance and told Hixson, "Okay, we'll move this along." Klarr testified that he also told Hixson "I don't know how this (grievance) applies . . . I don't have a policy to give you."

Later in the day on November 14, Klarr decided to phone Manning. Manning testified that Klarr said he thought the grievance was premature, and that Klarr recommended that the union withdraw the grievance to save embarrassment. Manning preferred to just push the grievance to the next step and deal with it there.

Puntenney testified that Hixson came into his office the day the grievance was filed, and that Puntenney told Hixson, "we'd certainly accept the grievance, and there was no issue with that." But he told Hixson that he agreed with Klarr that the grievance was premature, because there wasn't a policy as yet. Puntenney was the official who drafted such policies.

Later the same day, Klarr walked over to the serviceman's desk, where Hixson was filling out paperwork. Klarr remembers saying to Hixson that he had talked to Manning, and that Manning was recommending that the grievance be withdrawn.[5] Hixson disagreed with that assessment, and asked Klarr to respond to the grievance. Klarr remembers a conversation with Hixson a half hour later as they walked to their parking lot, wherein Klarr indicated his intent to respond to the grievance, but that there was no policy and therefore the 14-day notice period made no sense.

Klarr followed through and responded to the grievance. Although the grievance was denied at that step, Hixson took the matter up with public works director Puntenney in late November.

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4 Since Manning testified that "all grievances are filed through me for approval and signature," it would have been logical to offer this as an exhibit through him.

5 The Examiner credits Manning's version of his discussion with Klarr: since Manning was responsible for filing grievances for all his bargaining unit members, including Port Angeles, it's likely that the filing by Hixson came as a surprise to Manning when he was told about it. Klarr misunderstood Manning's response, which was to move the grievance "on to the next step."

Hixson characterized the meeting as "a really good conversation." On the same day, Klarr called Hixson and offered an apology for "misspeaking" at the employee meetings two weeks earlier. Hixson suggested that Klarr might do well to apologize to the crews, which Klarr did on December 1. Puntenney's comments to Hixson, and Hixson's conversation with Klarr clearly lead to a resolution of the grievance.

The grievance was withdrawn at that time. On November 26, human resources director Bob Coons sent out a "proposed foot protection policy" as recommended by the Department Safety Committee. Coons and Puntenney proposed a meeting with IBEW and related parties on December 16. The policy proposed steel toe safety boots for utility and linemen personnel. On February 8, 2009, Manning signed off on a letter of understanding for the IBEW bargaining unit, allowing for a new boot purchase in 2009 and agreeing to amend the contract.

Did Employer Response Act as an Interference for Filing Grievances? – The Examiner agrees with the employer here that "parties should be encouraged to discuss their positions in grievances so that disputes can be resolved at the lowest possible level in the dispute resolution process." Those discussions are not barred simply because a grievance has been filed under the contract.

What happened here was that, despite all of the conversations about the viability of the grievance, a new draft policy for boots and who pays for them was in fact adopted by February 8, 2009. The union and employer sat down and negotiated a new contract provision on how to provide for safer boots without employee expense. The Examiner cannot find any anti-employee animus, or interference violation, out of Klarr's "heads up" comment of November 13. Klarr credibly testified that he promised to Hixson that he would "move along" the grievance. There was no interference or discrimination in Klarr's phone conversation with Manning. No effort by Klarr or a city officer sought to have the grievance "pulled."

The gist of the claim here is that the employer – mostly through Klarr – attempted to disparage or head off the grievance by making political attacks on the grievance itself, through discouraging or disparaging remarks. That was the case in *Snohomish County*, Decision 9834-B (PECB, 2008) and *Grant County Hospital Dist. No. 1*, Decision 8378-A (PECB, 2004), but is not the case here. That was the case in *Valley General Hospital*, Decision 1195-A; it is not the case

here. Klarr and Puntenney were clearly willing to proceed through the steps of the safety boots grievance. [6]

In summary, the Examiner sees: (1) Klarr's statements to Hixson and Manning were not in tone coercive; (2) the employer's statements were substantially factual and stated to get a better understanding of the timeliness of the grievance; (3) the employer made no threats of reprisal or promises of benefits to any employee; and (4) the statements did not disparage, discredit, or undermine the union's attention to what was happening in the workplace, or demean the status of IBEW as representative.[7] In this case, the employer representative actually apologized to the membership for misstating the employer's position on the boot policy. The Examiner concludes that the reaction of the employer here stayed within the legal bounds of the *Wenatchee* criteria. *See City of Wenatchee*, Decision 8802-A (PECB, 2006)

Allegation involving George Drake and Bruce Rowley – The Light Operations Division also reviewed new WISHA/OSHA requirements set out for line "covers" to be used during repair of high voltage lines. These concerns surfaced sometime in 2007, at about the same time as the safety boots controversy. Essentially, the new equipment safety requirements concerned a piece of equipment called "cover," a large tube-like plastic sleeve which is fitted over high voltage wires, to prevent their contact with persons working in close proximity to them.[8] It would not be uncommon for as many as three covers to be used in a line repair. The state rules for WISHA and Federal OSHA rules led to development of an "Operations Accident Prevention Plan" which was being implemented by the employer.[9]

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[6] And the testimony implied that AFSCME and IBEW employees were on the Safety Committees who first discussed the new OSHA requirement after November 2007. Union representatives had every opportunity to know the outcome of the policy during the meetings of 2008. When union official Manning was asked if he knew that a subcommittee of employees was studying the boot safety issue, Mr. Hixson entered a relevance objection. Once overruled, Manning's answer was he didn't know about those committees. But it's a fair assumption that Mr. Hixson DID know about those committees.

[7] Klarr's caution to IBEW that the union ought "to have all of its ducks in a row" was a benign suggestion that the procedures of a grievance, as well as the facts, were critical to an understanding and resolution of the problem.

[8] Much of this evidence was demonstrated with actual equipment at the hearing, over objection by the union. The evidence includes a photograph which shows the proper placement of cover on a "hot" line of electricity.

[9] WAC 296-45-305 *et seq.*

On April 1, 2009, a safety meeting was held, and the issue of the cleaning and application of cover protection devices was discussed. This meeting was conducted by ESCI, a professional training company which provides training to the light operations division. The foremen of the light crews – George Drake and Bruce Rowley – were in attendance.

Klarr was responsible for field inspections of most installation and repair activities, and performed such an inspection on Thursday, April 2, 2009. In observing both line crews working on that day, he noted insufficient cover and other anomalies. Klarr testified that Brian Wahto's crew along Marine Drive was using insufficient cover protection while grounding a transmission line. He made a note of it in his notebook to talk to the foreman. He later observed Rowley's crew working along Spruce Street. He saw that cover was inadequate, and since they were just starting the job, talked to Rowley about the issue. Rowley and the crew made the corrections suggested, and finished the repair.

Klarr decided to discuss his observations with Rowley and Drake soon thereafter. Drake testified that Klarr came into the foremen's office the next day, April 3. Klarr wanted to talk about the new cover policy, and sharply stated that he had observed inadequate cover only a day after the training meeting. Drake remembered that Klarr promised "harsh disciplinary action" unless the policy was followed, and acknowledged that he and Rowley decided to inform their crews to "watch out." Both foremen remembered Klarr saying that his "hands were tied" and that discipline would result unless there was new vigilance on this safety issue. The foremen told the union on April 3 that Klarr wanted all crews "to cover system neutrals and grounded guys [wires] when working in the area."[10]

The union makes the case that it had filed a grievance soon after the April 1 safety meeting, contending that the policy on live line tools and electrical protective devices procedures was being changed, and that this violated the contract. On April 2, Klarr reviewed the grievance and wrote a denial of it at Step 1. Neither Rowley nor Drake was aware of these events, and therefore it would be highly unlikely that they were dissuaded or intimidated as a result. The union filed a second grievance, signed by Hixson and Manning, on April 2, protesting a new

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[10] Rowley and Drake made "affidavit"-type statements to the union, but those were not produced at the hearing. The Examiner relies on their credible testimony.

policy where supervisors inspected crewmen's trucks on Fridays. On June 22, 2009, the human resources director and City Manager denied the grievances at Step Three. On the date of hearing in this case, those grievances were moving forward. There is no evidence that the union was pressured to withdraw the grievances, or evidence that the two foremen were punished in any way as a result. The Examiner does not see the comments from Klarr to Rowley and Drake to be "threatening" in terms of what the union had to watch for. The Examiner agrees that *City of Seattle*, Decision 3566-A (PECB, 1991) and related cases allow employer representatives to communicate directly with employees "on the shop floor" and that normal direction of the workforce is not necessarily intimidating and coercive under RCW 41.56.140 (1).

FINDINGS OF FACT

1. The City of Port Angeles is a public employer within the meaning of RCW 41.56.030(1).

2. International Brotherhood of Electrical Workers Local 997, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative for all linemen, meter readers, and facilities and maintenance crewpersons working in the Light Operations Division of Port Angeles Public Works Department.

3. In late 2007, a new federal safety requirement for safer footwear and work boots was established. The employer was obligated by Federal and State law to provide safety work boots. Joint labor-management safety committees were apprised of the potential need for more expensive work boots because of the new regulations, and began a "hazard analysis" of work boots soon thereafter.

4. In bargaining for the 2008-2010 collective bargaining agreement, the parties agreed to continue a $100/year boot allowance to defray employee costs for footwear for the line crews. The potential for change in both the type and cost of work boots due to the new regulations was not discussed in negotiations.

5. A meeting of the two line crews took place November 13, 2008. Klarr told employees at this meeting that he wanted to give them a "heads-up" that employees in the two line

crews should refrain from buying boots in 2009 under the collective bargaining agreement provision because a new policy was going to require a different approach.

6. On November 14, 2008, union shop steward Richard Hixson filed a grievance, claiming that a change in the contract terms had occurred in violation of the agreement. Klarr reviewed the grievance. He commented unofficially that when a grievance was filed a union ought to have "all their ducks in a row," and this particular grievance seemed premature and untimely. Klarr did not ask Hixson to withdraw the grievance.

7. Klarr also discussed the "boots" grievance with union president Terry Manning and told him that continuing the grievance might prove embarrassing, since there was no policy on which to base the grievance. Klarr's superior, Mike Puntenney, also discussed the grievance with Hixson, and indicated that he would accept the grievance and respond to it.

8. Klarr apologized to Hixson for his remarks of November 13, 2008, and followed up on Hixson's suggestion to apologize to the full line crew a few weeks later, on the grounds that Klarr's comments had been misleading.

9. In December 2008, after discussions with City officials Puntenney, Klarr, and Coons, the "boots" grievance was withdrawn. In early 2009, the union and employer negotiated a memorandum of understanding covering new safety boots for 2009 and 2010.

10. Klarr's comments to Hixson, Manning, and employees were not coercive in nature, and did not threaten punishment or negative treatment.

11. Klarr directed work crews to use electrical power line covers more routinely and consistently than what he had observed in the field. Besides regular safety meetings, Klarr insisted on them at a training of April 1, 2009. On the next day, Klarr observed line crews improperly using "covers" in situations that he thought dangerous.

12. Klarr advised lead employees Drake and Rowley that discipline might result if covers were not used. The union filed two grievances on April 2, 2009, alleging that the policies on power line covers and Friday safety meetings were improper because they were not negotiated. Those grievances are ongoing.

13. Neither Drake nor Rowley were threatened or pressured to drop or otherwise curtail the prosecution of the grievances.

CONCLUSIONS OF LAW

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

2. In its actions and comments concerning a grievance filed by union shop steward Richard Hixson, the employer did not engage in interference in violation of RCW 41.56.140 (1).

3. In discussing safety issues and new policies regarding safety equipment with foremen Rowley and Drake, the employer did not engage in interference in violation of RCW 41.56.140 (1).

ORDER

The complaint charging unfair labor practices is hereby DISMISSED.

Issued at Olympia, Washington this 11th day of May, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

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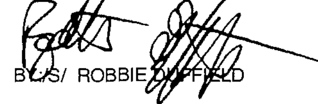

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER: 22470-U-09-05738 FILED: 05/13/2009 FILED BY: PARTY 2

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