STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117, Complainant, vs. STATE – CORRECTIONS, Respondent.	CASE 24001-U-11-6138 DECISION 11571-A - PSRA DECISION OF COMMISSION

Spencer Nathan Thal, General Counsel, for the union.

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

On May 23, 2011, Teamsters Local 117 (union) filed an unfair labor practice complaint against the Washington State Department of Corrections (employer) alleging the employer interfered with employee rights and discriminated against employees. The Unfair Labor Practice Manager reviewed the complaint pursuant to WAC 391-45-110 and issued a preliminary ruling with 13 causes of action for interference and four causes of action for discrimination.

Examiner Jessica J. Bradley conducted a hearing spanning eight days in four locations. Examiner Bradley issued a decision in which she found the employer interfered with employee rights under six of the allegations and dismissed the other allegations of interference and discrimination.[1] On December 28, 2012, the union appealed some of the dismissed allegations.

ISSUES

1. Did statements made by Lieutenant Larry Miller to Correctional Officer Susan Reid interfere with employee rights?

[1] *State – Corrections*, 11571 (PSRA, 2012).

2. Did the Examiner err when she failed to determine whether the employer discriminated against Jared Crum when the employer removed him from his seniority bid position on March 8, 2011?
3. Did the employer interfere with employee rights when a correctional officer removed Sergeant Jimmy Fletcher from the Governor's press conference at the Monroe Correctional Complex on March 21, 2012?
4. Did the employer discriminate against Sergeant James Palmer when it removed Palmer from his bid position?
5. Did the employer interfere with employee rights when the employer held a meeting with sergeants, including Correctional Officer Brad Waddell, about sergeants' performance?

Statements made by Miller to Reid interfered with employee rights. The Examiner did not err when she did not address an issue that was not framed by the preliminary ruling. The employer did not interfere with employee rights when a uniformed guard removed Fletcher from the Governor's press conference. The employer did not discriminate against Palmer when it removed him from his bid position during an investigation into a visitor complaint. The employer did not interfere with employee rights when Waddell was instructed to attend a meeting with other sergeants on the night of an informational picket.

APPLICABLE LEGAL STANDARDS

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.

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 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. *Cl rk 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.

ISSUE 1: Did statements made by Lieutenant Larry Miller to Correctional Officer Susan Reid interfere with employee rights?

Correctional Officer Susan Reid (Reid) worked for the employer for ten years and had worked at Larch Corrections Center since February 2011. Reid worked in the visiting room.

Leave requests at Larch were submitted electronically. Reid submitted a paper leave request for a "CBA day". Initially, her request for a CBA day was denied. Reid spoke with union shop steward Sid Clark (Clark). Clark told Reid he could help her. Clark later informed Reid her leave request was approved.

On May 1, 2011, an incident occurred in the visiting room. Sergeant Barbara Olson (Olson) received an incident report filed by the officer working with Reid. Olson took the report to Lieutenant Larry Miller (Miller) for advice on how to proceed.

On May 2, 2011, Reid was called to a meeting with Miller and Olson to discuss an incident in the visiting room. Miller questioned Reid on visiting room procedures, and Reid did not give him "a straight answer." Miller explained the importance of visitors being able to leave when ready. Reid alleged that Miller told her she could be investigated and be taken away in handcuffs. Miller admitted he made a statement about handcuffs to get Reid's attention. Miller wanted Reid to understand that he did not want the sheriff's office holding someone accountable because visitors were unable to leave. Olson did not recall Miller mentioning handcuffs.

Miller, who had been contacted by Mr. Caldwell in administration about Reid's leave request, questioned Reid about her leave request. Miller explained the appropriate process for requesting leave. Reid testified that Miller told her she "should know better than to go to Sid Clark. And that if I - - if I was smart that it wouldn't happen again." Miller did not recall mentioning Clark. Olson did not recall Miller mentioning Clark or the union.

In Finding of Fact 9 the Examiner specifically found that "Lieutenant Miller told Reid that she should have known better than to go to shop steward Sid Clark." The Examiner reasoned that the statement was made during a discussion about Reid's leave request and the statement could

reasonably be interpreted to mean that Reid did not need seek the union's assistance to appeal a decision that had not yet been made. The Examiner concluded that Miller's statement did not interfere with employee rights. Upon reviewing the totality of the circumstances, the Examiner concluded Miller's statement was not interference. The union appealed the Examiner's conclusion that Miller's statement did not constitute interference.

The Commission attaches considerable weight to the credibility determinations of our examiners, and we will not disturb a credibility finding unless it is not supported by the evidence. The Examiner made limited credibility determinations in this case. The Examiner gave Olson's testimony "very little weight." The Examiner concluded "that Reid was under a lot of stress" at the time of the meeting with Miller and Olson; however, the Examiner did not find Reid to be less credible because of the level of stress she may have been experiencing. Because the Examiner found that Miller made the statement about Reid going to the shop steward, the Examiner impliedly found Reid to be more credible than Miller or Olson.

Substantial evidence supports the Examiner's finding that Miller made the statement while explaining procedure for requesting leave. However, we disagree with the Examiner's conclusion that Miller's statement did not co stitute interference. In order to determine whether the alleged statement is interference, a typical employee must be able to reasonably perceive the statement as a threat of reprisal or force or a promise of benefit associated with the exercise of rights protected by Chapter 41.80 RCW.

Miller attempted to communicate the importance of allowing visitors to leave when they wanted to. Miller segued into discussing Reid's leave request. Miller was an employer official questioning Reid about submitting a leave slip. It would not have been interference for Miller to instruct Reid in the appropriate mechanism for submitting leave. However, that is not what happened in this case. Miller made an extraneous comment about Reid seeking assistance from the union.

After Reid sought assistance from the union, Miller cautioned Reid about seeking such assistance in the future. Miller was a supervisor acting in his official capacity when he made the statement. An employee could reasonably perceive Miller's statement as discouraging Reid from engaging

in protected activity or seeking further assistance from the union. Through Miller's statement, the employer interfered with employee rights.

ISSUE 2: Did the Examiner err when she failed to determine whether the employer discriminated against Jared Crum when the employer removed him from his seniority bid position on March 8, 2011?

In paragraphs 8.11 through 8.14 of the complaint, the union alleged that Jared Crum (Crum) was removed from his bid position after contacting the union. The union presented evidence about the allegations at the hearing. On March 1, 2011, Correctional Officer Crum contacted the union about an assault on another correctional officer. On March 8, 2011, Crum was removed from his seniority bid position and investigated for failure to properly monitor an inmate who was alleged to be collecting debts. The union grieved the removal. After the grievance meeting, Crum withdrew the grievance. The employer returned Crum to his bid position.

In paragraphs 8.15 through 8.19 of the complaint, the union alleged that on April 28, 2011, Crum was removed from his bid position, assigned to the mail room, and subsequently assigned to home, while Crum was being investigated for use of force. The union presented evidence about the allegations at the hearing.

The Examiner concluded that the employer did not discriminate against Crum when it removed Crum from his bid position on April 28, 2011, and, ultimately, placed him on home assignment. The union does not appeal this conclusion. The union argues that the Examiner failed to address the issue of whether the employer discriminated against Crum when it removed Crum from his bid position on March 8, 2011.

The preliminary ruling framed the issues for hearing. *King County*, Decision 9075-A (PECB, 2007). The preliminary ruling identified a cause of action for employer discrimination by removing Crum "from his seniority bid position and placing him on home assignment in reprisal for union activities." While the preliminary ruling does not specify the date of the incident in question, from the phrase "and placing him on home assignment" it is clear that the cause of

action relates to the allegations contained in paragraphs 8.15 through 8.19 of the union's complaint.

The preliminary ruling did not identify a cause of action for employer discrimination by removing Crum from his seniority bid position on March 8, 2011, and subsequently returning Crum to his bid position after he withdrew his grievance. The union pled this allegation in paragraphs 8.11 through 8.14 of its complaint. However, no cause of action was found to exist for these allegations. A deficiency notice was not issued for these allegations. The union did not seek to have the preliminary ruling clarified to include a cause of action. WAC 391-45-110(2)(b).

The Examiner addressed the issues identified in the preliminary ruling. The Examiner did not err when she did not address an issue that was pled in the complaint, but for which no cause of action was found to exist.

ISSUE 3: Did the employer interfere with employee rights when a correctional officer removed Sergeant Jimmy Fletcher from the Governor's press conference at the Monroe Correctional Complex on March 21, 2012?

Sergeant Jimmy Fletcher (Fletcher) worked at Monroe Correctional Complex. Fletcher served as a union shop steward since January 2011. Fletcher spoke publicly, including at the Washington State Legislature, about safety and participated in union organized informational pickets to raise awareness of safety concerns. Fletcher worked closely with and was a friend of Correctional Officer Jayme Biendl, who was slain while on duty. Fletcher spoke at Biendl's memorial service.

On March 21, 2011, Governor Christine Gregoire scheduled a press conference to release the results of a study conducted after Biendl's murder. The press conference was scheduled on short notice. The Governor's security team was in charge of security for the event.

Attendance at the press conference was limited. The Governor, her security detail, Secretary of Corrections Eldon Vail, Deputy Director Dan Pacholke, Director of Prisons Bernie Warner,

Communications Director Chad Lewis, and the Superintendent of the Monroe Correctional Complex Scott Frakes (Frakes) attended the press conference. The emergency response team was present. At the last minute, a few on-duty, preferably uniformed, staff were granted permission to attend the press conference. Some on-duty non-uniformed staff attended the press conference.

Prior to the press conference, limited information was communicated to the employees about the press conference. Fletcher learned about the press conference through an e-mail from a co-worker.

On March 21, 2011, Fletcher was not on-duty. Having heard about the press conference, Fletcher went to the Monroe Correctional Complex to attend the press conference. Displaying his identification, he entered the facility and attended the press conference. A few minutes after entering the press conference, a uniformed correctional officer directed Fletcher to leave the event. Fletcher was informed that he was unable to attend because the event was not open to the public.

After the press conference, Fletcher encountered Frakes. Fletcher explained to Frakes that Fletcher did not appreciate being escorted out of the press conference. Frakes took responsibility for any confusion over attendance at the event saying, "you can blame me." While Frakes took responsibility for Fletcher's removal, the evidence does not suggest that Frakes directed the correctional officer to remove Fletcher from the press conference.

The Governor's security team limited attendance at the Governor's press conference to on-duty, preferably uniformed, personnel. Fletcher was neither on-duty nor in uniform when he entered the press conference. An employee could not reasonably perceive Fletcher's removal from the press conference as interfering with employee rights because the press conference was not open to all employees.

The correctional officers who informed Fletcher he could not attend the press conference informed him that the direction about who could attend was given at a management briefing earlier in the day. Fletcher's removal from the press conference was consistent with the direction

from the Governor's security detail that only a limited number of on-duty, preferably uniformed, employees be permitted to attend. It would not be reasonable for an employee to perceive Fletcher being asked to leave the press conference as interference.

The union placed emphasis on the fact that the correctional officers were armed when Fletcher was asked to leave. However, the fact that the correctional officers were armed to perform their duties in conjunction with the press conference does not make the employer's enforcement of the security requirements for the press conference more prone to interference. Additionally, the union's reliance on the fact that other non-uniformed personnel attended the press conference was misplaced. The record indicates that the personnel who attended were on-duty. The employer did not interfere when Fletcher was removed from the press conference.

ISSUE 4: Did the employer discriminate against Sergeant James Palmer when it removed Palmer from his bid position?

Sergeant James Palmer (Palmer) worked in the visiting room at the Monroe Correctional Complex. Palmer served as a union shop steward beginning in January 2011. Palmer represented bargaining unit members and participated in informational pickets.

In March 2011, Palmer participated in the taping of a television special about prison staff safety. Palmer participated in the panel discussion with union counsel and other bargaining unit employees. The television special was filmed on March 9, 2011 and aired on March 17, 2011.

On March 14, 2011, a prison visitor complained that Palmer made inappropriate statements during a conversation with other visiting room staff on March 13, 2011. On March 16, 2011, Frakes designated James McGinnis to investigate the complaint. On March 17, 2011, Palmer received notification that he would be temporarily removed from his bid post effective March 18, 2011.

The Examiner found that the union established a *prima facie* case of discrimination, the employer presented a non-discriminatory reason for its actions, and the union failed to establish that the employer's reason was pretextual or substantially motivated by union animus. We agree.

Palmer engaged in protected activity as a shop steward representing bargaining unit employees. The employer deprived Palmer of a right, benefit, or status when it removed Palmer from his bid position. Sufficient evidence existed to find a *prima facie* case of discrimination existed.

The employer articulated a non-discriminatory reason for removing Palmer from his bid position: the complaint about Palmer's conduct in the visiting room. The employer investigated the complaint, which had been received before the television special had been aired.

Palmer engaged in protected activity after becoming a shop steward in the time leading up to the employer removing him from his bid position. The employer had an interest in investigating the complaint. The union was unable to prove that the employer's reason for removing Palmer from his bid position was either pretextual or substantially motivated by union animus.

ISSUE 5: Did the employer interfere with employee rights when the employer held a meeting with sergeants, including Sergeant Brad Waddell, about sergeants' performance?

Sergeant Brad Waddell (Waddell) has worked at the Monroe Correctional Complex since 1991. Waddell helped organize informational pickets at Monroe Correctional Complex on November 17, 2010 and March 2, 2011. Waddell participated in both pickets, including providing interviews to the media.

On March 2, 2011, Waddell attended the informational picket and then worked his shift. That night, Waddell was instructed to attend a meeting with Lieutenant Jack Warner (Warner). Waddell testified that most of the other graveyard shift sergeants were in attendance. Warner informed the sergeants that they were not performing at the level the employer wanted them to. Warner informed the sergeants of ratings provided by subordinate employees.

An employee could not reasonably perceive the employer conducting a meeting with sergeants, including Waddell, as interfering with employee rights. The employer conducted meetings with the sergeants at the Monroe Correctional Complex. The employer wanted to encourage the sergeants to engage in their supervisory responsibilities. The employer did not interfere with

employee rights through statements made to Waddell at a meeting of sergeants on March 2, 2011.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact issued by Examiner Jessica J. Bradley are AFFIRMED and adopted as the Findings of Fact of the Commission.

2. The Conclusions of Law issued by Examiner Jessica J. Bradley are AFFIRMED and adopted as the Conclusions of Law of the Commission, except that Conclusion of Law 3 is modified to read as follows:

    3. As described in Findings of Fact 8 and 9, the employer interfered with employee rights in violation of RCW 41.80.110(1)(a).

3. The Order issued by Examiner Jessica J. Bradley is AFFIRMED and adopted as the Order of the Commission.

ISSUED at Olympia, Washington, this 12th day of November, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

Commissioner Brennan did not participate in the consideration of or the decision in this case.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	24001-U-11-06138	FILED:	05/23/2011	FILED BY:	PARTY 2
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DETAILS:	-				
COMMENTS:					

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