Seattle School District, Decision 11779-A (PECB, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE/KING COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 25668-U-13-6576 DECISION 11779-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Robblee Detwiler & Black, PLLP, by *Daniel Hutzenbiler*, Attorney at Law, for the union.

Preg O'Donnell & Gillett, PLLC, by *Curtis M. Leonard*, Attorney at Law, for the employer.

On April 29, 2013, the Seattle King County Building and Construction Trades Council (union) filed an unfair labor practice complaint against the Seattle School District (employer). The union alleged employer discrimination in violation of RCW 41.56.140(1), by demoting Tighe Peterson after laying off Tyrone Van Brocklin and Mike Winters, in reprisal for union activities. The union also alleged employer domination or assistance of a union in violation of RCW 41.56.140(2) by the aforementioned acts. On May 6, 2013, the Unfair Labor Practice Manager issued a partial deficiency order indicating that it was not possible to conclude that a cause of action existed regarding the allegation concerning domination or assistance of a union. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the defective allegations. The union did not file any further information. On June 6, 2013, the Unfair Labor Practice Manager dismissed the defective claims and issued a preliminary ruling stating a cause of action existed regarding the discrimination claim. Examiner Robin A. Romeo held a hearing on October 16, 2013. The parties filed post-hearing briefs to complete the

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

ISSUE

Did the employer discriminate in violation of RCW 41.56.140(1) by demoting Tighe Peterson after laying off Tyrone Van Brocklin and Mike Winters, in reprisal for union activities?

Based on the record as a whole, the employer did not discriminate in violation of RCW 41.56.140(1) when it demoted Peterson after laying off Van Brocklin and Winters. The union established a *prima facie* case of discrimination by proving the employees participated in protected activity, the employer deprived the employees of a right, and a causal connection existed between the two. The employer responded by presenting a legitimate, non-discriminatory reason for its actions. Specifically, the layoffs and demotion were related to the lack of work and funding. The union failed to produce evidence showing that the employer's stated reason was pretextual or that Peterson's union activity was a substantial motivating factor in the employer's actions. Accordingly, the employer did not discriminate when Peterson was demoted after Van Brocklin and Winters were laid off. Because the employer did not discriminate, there is no derivative interference violation.

BACKGROUND

The union represents various employees including those in the employer's sheet metal shop and those that work in the Major Preventative Maintenance Department (MPM). Peterson worked as a foreperson for the employer in the sheet metal shop at the time of the alleged unfair labor practice. Van Brocklin and Winters worked under Peterson in the sheet metal shop and worked within the MPM.

In the spring of 2013, the MPM department had funding and lack of work issues. On March 27, 2013, at 11:00 A.M. Frank Griffen, Manager of MPM, had a meeting with two budget analysts and the Director of Facilities. During the meeting, Griffen discussed his plan to transfer $800,000 capital dollars into the MPM budget to solve the funding issue. This transfer of money

would allow the MPM department to accept more projects in turn creating work for the department. Griffen was told during the meeting that he did not have authority to move the money and would need approval from the superintendent, which would take time. In this meeting, Griffen decided that the only way to solve the funding issues was to lay off employees until the $800,000 transfer was approved by the superintendent, and the money was made available. Griffen spoke about the necessary layoffs with forepersons from three different groups: painters, laborers, and sheet metal workers. Prior to the layoff conversation with Griffen, the painters and laborers forepersons received notice of new projects for the employees in their groups. Because the painters and laborers had full-time projects for the employees in their groups, no layoffs were necessary. The only group that did not have full-time work for its employees was the sheet metal shop. Due to the lack of work in the sheet metal shop and the lack of funding in the MPM, Griffin determined the layoffs were necessary within the sheet metal shop.

On March 27, 2013, at 1:00 P.M. the employer held its regularly scheduled leadership meeting. During these regularly scheduled leadership meetings, all the general forepersons and area representatives for the union, including Peterson, and the employer representatives, including Griffen, gather to openly discuss maintenance issues, open projects, air concerns, and arrive at consensus. During the March 27 meeting, as in previous leadership meetings, Peterson expressed a concern about fewer work orders in the sheet metal shop and the skimming of department work leading to fewer work orders.

On March 28, 2013, Van Brocklin and Winters received layoff notices due to a decreased workload effective April 5, 2013. The layoffs actually took place on April 9, 2013. Because the layoffs occurred, there were no longer four or more employees working in Peterson's group. Peterson needed four employees in his group to remain a foreperson in accordance with the collective bargaining agreement. The collective bargaining agreement stated in pertinent part, "The District shall appoint a foreperson for each craft when the craft has four (4) or more employees.... The foreperson shall receive a premium of $2.00/hr worked." On April 26, 2013, Peterson was notified that, in accordance with the contract, effective May 1, 2013, he would no longer receive the foreperson's rate of pay.

On May 17, 2013, Griffen was informed that the request for the transfer of the $800,000 was in the superintendent's office. Around the same time, the sheet metal workload increased. On May 31, 2013, the employer recalled Van Brocklin and Winters effective June 10, 2013, to complete the new sheet metal work. Once the two employees returned to work, Peterson's foreperson's pay was reinstated.

APPLICABLE LEGAL STANDARD

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.56.140(1). In *State - Corrections*, Decision 11571-A (PSRA, 2013), the Commission reiterated the legal principals applicable to prove employer discrimination under RCW 41.56.140(1). The Commission stated that an employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of protected rights. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in discrimination cases. To prove discrimination, the complainant must first set forth a *prima facie* case establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;
2. The employer deprived the employee of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

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

In response to a complainant's *prima facie* case of discrimination, the respondent need only articulate its non-discriminatory reasons for acting in such a manner. The respondent does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant to prove either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

When the Commission finds a discrimination violation under RCW 41.56.140(1) it carries with it a derivative interference violation. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998). If there is no finding of a discrimination violation, then no derivative interference violation will be found. *Reardon-Edwall School District*, Decision 6205-A.

ANALYSIS

The union alleges the employer discriminated against Peterson when, after expressing his concern about possible skimming of bargaining unit work during a regularly scheduled leadership meeting, Van Brocklin and Winters were laid off and Peterson was demoted from his foreperson position.

The first part of the analysis is to determine whether the union has established the three part test of a *prima facie* case. First, the expression of a concern for the skimming of work is protected by the collective bargaining statute. During the March 27, 2013, leadership meeting, where the employer was present, Peterson expressed his concern that bargaining unit work was being skimmed by the employer and given to members of another union. Second, the employer deprived Peterson of his status and pay. On March 28, 2013, one day after Peterson expressed his concern in the meeting, Van Brocklin and Winters were laid off and Peterson was subsequently demoted from the foreperson position. Third, the timing of the events creates circumstantial evidence of a causal connection between Peterson's expressed concern about the skimming of the bargaining unit's work and his demotion from his foreperson position. The union established a *prima facie* case of discrimination.

In response, the employer argues it had four non-discriminatory reasons for demoting Peterson from his foreperson position. First, the employer points to the parties' collective bargaining agreement language, which was in effect between 2010 and 2013. The collective bargaining agreement contained language regarding foreperson pay status. It stated in pertinent part, "The District shall appoint a foreperson for each craft when the craft has four (4) or more employees. . . . The foreperson shall receive a premium of $2.00/hr worked." When there were no longer four employees working in Peterson's group, according to the collective bargaining agreement, Peterson could no longer receive pay as a foreperson.

Second, the employer points to the fact that it had already decided to lay off employees. Prior to the 1:00 P.M. March 27, 2013, leadership meeting, the employer had already determined that it would need to lay off employees in the MPM group because they would not be able to transfer the $800,000 necessary to cover the salary and pay for the work that would be assigned to those employees.

Third, the employer argues that the temporary layoff was due to the ebb and flow of the work. The employer proved layoffs had happened in the same months the previous year. The employer provided evidence that Winters had been laid off due to workload and scheduling issues on March 20, 2012, and was later recalled when the workload increased. Peterson testified there was an ebb and flow with the amount of work available. As in previous years, when there was a reduction in work, the employer reduced its staff starting with the paid staff. Van Brocklin and Winters were both paid staff employees.

Fourth, the employer argued that the concern of skimming work had been brought up for many years, thus the layoffs and demotion was not retaliatory in nature. Peterson testified that he had expressed concern about skimming issues on different instances in the past. He stated that the concern about skimming had begun approximately ten years prior to the comments made during the March 27, 2013 meeting.

The union's argument that the employer's reasons were pretextual is not compelling for three reasons. First, the notice to Van Brocklin and Winters stated that the layoff was due to lack of

work. The employer provided evidence that there was not enough work to fund these two full-time positions. When the transfer of funds did not occur, there was no additional money to pay these two employees to complete the department's projects. Thus the employer had to lay off the employees in order not to deplete all of its money. Second, while the remaining employees were required to complete work that would have been assigned to paid staff, the amount of work was not the equivalent of two full-time positions. The union testified that after Van Brocklin and Winters were laid off, the remaining employees in the group completed 255.75 hours of work that would have been assigned to Van Brocklin and Winters. 255.75 hours is not the equivalent of one full-time employee for the two month period Van Brocklin and Winters were laid off. Third, once the money and work became available, Van Brocklin and Winters were rehired and Peterson was reinstated into the foreperson position.

The employer produced evidence that Peterson's removal from his foreperson position was prompted by an unrelated monetary and workload issue. The union was unable to establish that the employer's non-discriminatory reason for demoting Peterson from his foreperson position was pretextual or that union animus was a substantial motivating factor in the employer's decision to temporarily demote Peterson from his position. The complaint is dismissed.

FINDINGS OF FACT

1. Seattle School District (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The Seattle/King County Building and Construction Trades Council (union) is a bargaining representative within the meaning of RCW 41.56.030(2), and is the exclusive bargaining representative of employees in the employer's sheet metal shop and in the Major Preventative Maintenance Department (MPM).

3. Tighe Peterson worked as a foreperson for the employer in the sheet metal shop at the time of the alleged unfair labor practice. Tyrone Van Brocklin and Mike Winters worked under Peterson in the sheet metal shop and worked within the MPM.

4. On March 27, 2013, at 11:00 A.M. Frank Griffen, Manager of MPM, had a meeting with two budget analysts and the Director of Facilities to discuss the MPM department's funding issues. During the meeting, Griffen discussed his plan to transfer $800,000 of capital dollars into the MPM budget to solve the funding issue. Griffen was told during the meeting that he did not have authority to move the money and would need approval from the superintendent, which would take time. In this meeting, Griffen decided layoffs were necessary to solve the funding issues until the money was made available.

5. Griffen spoke about the necessary layoffs with forepersons from three different groups: painters, laborers, and sheet metal workers. Prior to this conversation, the painters and laborers forepersons received notice of new projects for the employees in their groups. Because the painters and laborers had full-time projects for the employees in their groups, no layoffs were necessary. The only group that did not have full-time work for its employees was the sheet metal shop. Due to the lack of work and funding, Griffin determined the layoffs were necessary within the sheet metal shop.

6. On March 27, 2013, at 1:00 P.M. the employer held its regularly scheduled leadership meeting. During the March 27 meeting, as in previous leadership meetings, Peterson expressed a concern about fewer work orders in the sheet metal shop and the skimming of department work leading to fewer work orders.

7. On March 28, 2013, Van Brocklin and Winters received layoff notices due to a decreased workload effective April 5, 2013. The layoffs actually took place on April 9, 2013.

8. Because the layoffs occurred, there were no longer four or more employees working in Peterson's group. Peterson needed four employees in his group to remain a foreperson in accordance with the collective bargaining agreement. The collective bargaining agreement stated in pertinent part, "The District shall appoint a foreperson for each craft when the craft has four (4) or more employees.... The foreperson shall receive a premium of $2.00/hr worked."

9. On April 26, 2013, Peterson was notified that, in accordance with the contract, effective May 1, 2013, he would no longer receive the foreperson's rate of pay.

10. On May 17, 2013, Griffen was informed that his request for the transfer of the $800,000 was in the superintendent's office. Around the same time, the sheet metal work load increased.

11. On May 31, 2013, the employer recalled Van Brocklin and Winters effective June 10, 2013, to complete the new sheet metal work. Once the two employees returned to work, Peterson's forepersons pay was reinstated.

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 upon Findings of Fact 3 through 11, the employer did not discriminate in violation of RCW 41.56.140(1) by demoting Tighe Peterson after laying off Tyrone Van Brocklin and Mike Winters, in reprisal for union activities.

ORDER

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

ISSUED at Olympia, Washington, this 6th day of February, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ DIANE THOVSEN

CASE NUMBER:	25668-U-13-06576	FILED:	04/29/2013	FILED BY:	PARTY 2
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BAR UNIT:	OPER/MAINT				
DETAILS:	-				
COMMENTS:					

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