State - Corrections, Decision 12002-A (PSRA, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117, Complainant, vs. STATE - CORRECTIONS, Respondent.	CASE 25011-U-12-6397 DECISION 12002-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.

Teamsters Local 117 (union) filed an unfair labor practice complaint alleging that the Department of Corrections (employer) interfered with employee rights by statements made to Jimmy Fletcher and Dave Roberts and discriminated against Fletcher by denying him a promotional opportunity and placing him under investigation in reprisal for engaging in protected activity. Examiner Robin Romeo conducted a hearing. After Examiner Romeo became unavailable to decide the case, the case was reassigned to Examiner Emily K. Whitney to make a decision on the record. Examiner Whitney concluded that the employer did not commit an unfair labor practice.[1] The union appealed.

The issues in this case are whether (1) the employer interfered with employee rights by statements made by Lieutenant Richard Samp to Correctional Sergeant Jimmy Fletcher and Correctional Officer Dave Roberts; (2) the employer discriminated against Fletcher when it

[1] *State – Corrections*, Decision 12002 (PSRA, 2014).

placed Fletcher under investigation; and (3) the employer discriminated against Fletcher when Samp denied Fletcher a letter of recommendation that was required for an application for a promotional opportunity.

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *C-Tran*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

We have reviewed the record and fully considered the arguments in this matter. The Examiner correctly stated the legal standards for interference and discrimination. Substantial evidence supports the Examiner's findings of fact. The findings of fact support the Examiner's conclusions of law that the employer did not interfere with employee rights by statements Samp made to Fletcher and Roberts and did not discriminate by placing Fletcher under investigation. We affirm the Examiner's decision that the employer did not interfere with employee rights by statements Samp made to Fletcher and Roberts. We affirm the Examiner's decision that the employer did not discriminate against Fletcher when it placed him under investigation.

The only issue remaining on appeal is whether the employer discriminated against Fletcher when Samp denied Fletcher a letter of recommendation that was required for an application for a promotional opportunity. We reverse the Examiner. We conclude that the union has proved by a preponderance of the evidence that Samp's reason for denying Fletcher a letter of recommendation was pretextual.

ANALYSIS

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 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 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.

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).

Application of Standards

In 2011, the union filed case 24001-U-11-6138, in which it alleged multiple unfair labor practice violations. One of the violations was whether the employer interfered with employee rights by statements Lieutenant Richard Samp made to Sergeant Jimmy Fletcher on February 27, 2011. On February 6, 7, and 8, 2012, an Examiner presided over a hearing concerning the relevant allegations. Fletcher testified on February 6, 2012, and Samp testified on February 8, 2012.

In *State – Corrections*, Decision 11571 (PSRA, 2012),[2] which issued on December 10, 2012, Fletcher testified that Samp told him that the employer thought he had too much clout with the officers, that it was dangerous for a sergeant to have that much power, and that Fletcher should take that into consideration if he wanted to promote. The Examiner concluded that Samp's statements to Fletcher were interference. *State – Corrections*, Decision 11571 (PSRA, 2012), *affirmed*, Decision 11571-A (PSRA, 2013).[3]

On November 14, 2011, then Monroe Correctional Complex Superintendent Scott Frakes issued letters to employees, including Fletcher, outlining a timeline for improving completion rates of performance evaluations (PDPs) at the facility. By January 2, 2012, the facility was to be at 85 percent compliance. By February 1, 2012, the facility was to be at 90 percent compliance. By March 1, 2012, the facility was to be at 95 percent compliance.

The letter informed Fletcher that he had not met the employer's requirement for completing the PDPs of the employees he supervised. According to the letter, Fletcher had completed 56 percent of the PDPs he was responsible for. The letter informed Fletcher that by December 1, 2011, Fletcher was to have completed 75 percent of the PDPs he was responsible for.

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[2] The Examiner excerpted portions of the testimony and answer to the complaint in her decision.

[3] The employer did not appeal the examiner's conclusion.

On December 19, 2011, Samp sent an e-mail to Edwin Fritch about Fletcher's PDP completion rate. Samp identified an evaluation that had been completed in August, but Samp had not received the PDP to sign it and human resources had not processed the PDP. Samp told Fritch that, with the PDP completed, Fletcher would have completed more than 80 percent of the PDPs Fletcher was responsible for completing.

On December 21, 2011, Frakes sent Fletcher a second letter. The letter informed Fletcher that he had not met the target PDP completion rate by the first deadline. Fletcher was given until January to complete performance evaluations, and, impliedly meet the 85 percent completion rate by January 2, 2012. The letter did not identify the consequences of not meeting the employer's PDP completion rate. After receiving the letter, Fletcher took steps to improve his completion rate.

On February 15, 2012, the employer posted an announcement that it was establishing a list for acting lieutenant positions. To be on the list, employees had to submit an application. As part of the application, the employer required a letter of recommendation from an applicant's current supervisor. On February 20, 2012, Fletcher sent an e-mail to Samp requesting a letter of recommendation for an acting lieutenant position.

On February 21, 2012, Samp sent an e-mail to Frakes. Samp asked for a copy of the report on Fletcher's PDP completion rate. Samp wanted the letter because Fletcher had requested a letter of recommendation for the acting lieutenant position. Samp wrote that he was "not willing to write [a letter of recommendation] for a sergeant that is not at 95% complete on their evaluations. The more information I have when I turn him down for a letter o[f] recommendation would be helpful."

On February 23, 2012, Samp held a documented supervisory conference with Fletcher and Dave Roberts, Fletcher's union representative. At that time, Samp had not yet responded to Fletcher's request for a letter of recommendation. Samp told Fletcher he would not provide a letter of recommendation because Fletcher had not completed 100 percent of the PDPs he was required to

complete. Roberts asked Samp if the 100 percent completion rate applied only to Fletcher. Samp said it did.

Under Monroe Correctional Complex Superintendent Scott Frakes' November 14, 2011 letter, Fletcher was not required to be at the 95 percent completion rate until March 1, 2012. At no time had Frakes expressed a 100 percent completion rate requirement.

The Examiner concluded the union proved a prima facie case of discrimination. We agree. The burden of production shifted to the employer to articulate a non-discriminatory reason for Samp denying Fletcher a letter of recommendation. The employer articulated a non-discriminatory reason for Samp denying Fletcher a letter of recommendation: Fletcher did not have a 100 percent completion rate for PDPs.

In discrimination cases, the burden of proof rests at all times with the complainant. The union had to prove that the employer's reason for not giving Fletcher a letter of recommendation was either pretextual or substantially motivated by union animus. The Examiner concluded that the union did not meet its burden of proof. We disagree.

The union argued the employer's standard of a 100 percent completion rate for Fletcher was unreasonable, pretextual, and substantially motivated by union animus because it only applied to Fletcher. The union further argued that Samp's communication with Frakes demonstrated that Samp was looking for a reason to deny Fletcher an opportunity to promote and suggested pretext and union animus. The employer argued its reason for not extending a letter of recommendation was not pretextual, that Samp's e-mail to Frakes was not seeking additional information to deny the letter of recommendation, and the Examiner's decision was supported by substantial evidence.

The employer, through Samp, denied a letter of recommendation to Fletcher because Fletcher had not completed 100 percent of his performance evaluations. This requirement to have completed 100 percent of employees' PDPs to obtain a letter of recommendation was Samp's

personal requirement that he had not previously communicated to Fletcher or apparently anyone else.

Furthermore, Samp was not consistent in identifying the completion rate required to obtain a letter of recommendation from him. In his February 21, 2012 e-mail to Frakes, Samp said he was unwilling to write a letter of recommendation for an employee who had not completed 95 percent of the PDPs. However, in his conversation with Fletcher and Roberts, Samp communicated the standard as 100 percent which was higher than Superintendent Frakes had established for the facility. This inconsistent requirement contributes to the finding that the reason was pretextual. While the record does not contain evidence of Fletcher's actual completion rate, it is clear that the completion rate Samp held Fletcher to was inconsistent with what the employer actually required of employees.

We agree with the union that Samp's communication to Frakes indicates that he was looking for reasons to support a decision not to give Fletcher a letter of recommendation. When asked whether he had made a decision whether or not to write a letter of recommendation for Fletcher when he wrote to Frakes, Samp responded, "I had intentions. I wanted to make sure that the facts I had were accurate so that if I did issue or not issue, that the facts would back up what I was doing." Based upon the e-mail and Samp's testimony, we infer that Samp had decided to deny Fletcher a letter of recommendation and was gathering facts to support a decision he had already made.

When questioned about whether the completion rate was the only criteria for receiving a letter of recommendation, Samp testified there were other factors. However, other than discussion about PDP completions, the record is devoid of evidence regarding any other factors he may have considered. This leads to the conclusion that there were no other factors and supports finding Samp's reason for denying Fletcher a letter of recommendation was pretextual.

Finally, Samp's decision to deny Fletcher a necessary letter of recommendation cannot be evaluated in a vacuum. In February 2011, Samp and Fletcher discussed Fletcher's goal to promote. Samp cautioned Fletcher to take into consideration his union activities. On February

6, 2012, Fletcher testified in case 24001-U-11-6138 while Samp testified just two days later. On February 23, 2012, Samp denied Fletcher's request for a letter of recommendation. The timing of Fletcher's testimony in relation to Samp's denial leads to a conclusion that Samp's decision was based on union animus. By denying Fletcher a letter of recommendation, Samp's caution to Fletcher to consider his union activity when he wanted to promote proved true.

The union has met its burden of proving that the employer's reason for denying Fletcher a letter of recommendation required for a promotion to be pretextual. The employer discriminated when it denied Fletcher a letter of recommendation to apply for an acting lieutenant position.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact and Conclusions of Law issued by Emily K. Whitney are AFFIRMED and adopted as the Findings of Fact, except the following Findings of Fact are added:

13. The requirement to have completed 100 percent of employees' PDPs was Samp's personal requirement. The requirement applied only to Fletcher.

14. In the November 14, 2011 letter, Frakes notified Fletcher that by February 1, 2012 "we will be at 90% compliance" and "[b]y March 1, 2012 we will be at no less than 95 % compliance." At the time Fletcher requested the letter of recommendation, Samp was holding Fletcher to a higher standard than the employer had established for the facility. Samp's requirement that Fletcher have completed 100 percent of his PDPs was not consistent with what the employer required as the completion rate.

15. Samp never communicated the requirement that an employee must complete 100 percent of his PDPs in order to obtain a letter of recommendation.

16. When questioned about whether the completion rate was the only criteria for receiving a letter of recommendation, Samp testified there were other factors. However, other than discussion about PDP completions, the record is devoid of evidence regarding any other factors he may have considered.

The Conclusions of Law issued by Examiner Emily K. Whitney are affirmed, except Conclusion of Law 3 is modified:

4. Based upon Findings of Fact 4 and 9 through 17, the employer discriminated in violation of RCW 41.80.110(1)(c) and (a) by denying Jimmy Fletcher a letter of recommendation required to apply for a promotional opportunity.

ORDER

The Washington State Department of Corrections, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Discriminating against and interfering with employee rights by not providing Jimmy Fletcher a letter of recommendation because he engaged in activity protected by Chapter 41.80 RCW.

   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 41.80 RCW:

a. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission 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. Notify the complainant, in writing, within 20 days following the date of this order, 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.

c. Notify the Compliance Officer, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide him with a signed copy of the notice he provides.

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner