STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS GUILD, Complainant, vs. CITY OF SEATTLE, Respondent.	CASE 20235-U-06-5159 DECISION 9945-A - PECB DECISION OF COMMISSION

Aitchison & Vick, by *Hillary McClure*, Attorney at Law, for the union.

Thomas A. Carr, Seattle City Attorney, by *Fritz E. Wollett,* Assistant City Attorney, for the employer.

This case comes before the Commission on a timely appeal filed by the Seattle Police Officers Guild (union) seeking review and reversal of certain Findings of Facts, Conclusions of Law, and Order dismissing the union's complaint issued by Examiner Sally B. Carpenter.[1] The City of Seattle (employer) supports the Examiner's decision.

ISSUE PRESENTED

Did the employer interfere with protected employee rights in violation of RCW 41.56.140(1) when it subpoenaed, as part of its defense against former union Vice-President Stuart Colman's federal civil rights lawsuit, certain internal union documents and records concerning Colman's union activities?

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1 *City of Seattle*, Decision 9945 (PECB, 2007).

For the reasons set forth below, we affirm the Examiner's decision that the employer did not commit an unfair labor practice. The subpoena was not issued as part of the collective bargaining process or for purposes of administering the parties' collective bargaining agreement; rather, it was issued to assist the employer in its defense of a federal civil rights lawsuit. Accordingly, because the subpoena occurred outside of the collective bargaining process and under the jurisdiction of the federal courts, the employer's action was not an unfair labor practice.

DISCUSSION

In order to provide the proper context to our decision, a brief statement of the facts is in order. Former union Vice-President Stuart Colman filed a federal lawsuit alleging that the employer had violated his civil rights. Colman's suit claimed that the employer took retaliatory action against him for his union activity in violation of Chapter 41.56 RCW and RCW 49.32.020.[2]

In preparing for its defense, the employer issued a subpoena under the Federal Rules of Evidence requesting several internal union documents relating to Colman's union activities.[3] The union informed the employer that the information it was seeking was protected union information and that the union intended to file an unfair labor practice complaint to preclude the disclosure of internal union information. Although the union provided the employer with certain documents that the union viewed as containing non-privileged information, the union declined to provide the employer with any information that it viewed as privileged. The employer did not seek enforcement of its subpoena, but the union did file the instant complaint.

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2 A review of the Commission's docket demonstrates that Colman did not seek redress for alleged violations of Chapter 41.56 RCW with this agency.

3 The employer also interviewed former union President Mike Edwards about Colman's activities. As part of the instant complaint, the union alleged that the employer's line of questioning interfered with protected employee rights in violation of Chapter 41.56 RCW. The Examiner dismissed that part of the union's complaint, and the union did not appeal the dismissal of that particular allegation.

Applicable Legal Standard

Chapter 41.56 RCW prohibits employer interference with, or discrimination against, the exercise of collective bargaining rights. RCW 41.56.040 provides:

> No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

RCW 41.56.140(1) enforces those statutory rights, by establishing that an employer who interferes with, restrains, or coerces public employees in the exercise of their collective bargaining rights commits an unfair labor practice.

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party or individual. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or 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 the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *See 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 a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Application of Standard

The Examiner held that the employer had a legitimate reason for issuing a subpoena for the information, and there was no evidence demonstrating that the employer created an impression of surveillance of employees engaged in protected activities. The union asserts that this conclusion was in error, and argues that under *Public Employment Relations Commission v. City of Vancouver*, 107 Wn. App. 594 (2001)(*City of Vancouver*), only in certain limited circumstances may an employer inquire about internal union affairs, such as situations where

investigation concerns non-protected activity. Otherwise, any interrogation by an employer becomes illegal if that interrogation could reasonably be perceived by bargaining unit employees as discouraging the free exercise of their collective bargaining rights. According to the union, the facts of this case do not present a situation where the employer is allowed access to internal union documents through a federal subpoena because the request for information was specifically about Colman's activities as union vice-president.[4] Thus, the union asserts the employer clearly violated the standard set forth in *City of Vancouver* and committed an unfair labor practice. We disagree.

Federal Subpoenas Cannot be Challenged in Unfair Labor Practice Proceedings

The union's reliance on *City of Vancouver* is misplaced because the factual situations of this case and *City of Vancouver* differ. In *City of Vancouver*, the employer's investigation concerned an allegation made by a bargaining unit employee that co-workers made harassing and discriminatory statements at a union meeting about possibly retaliating against the complainant for cooperating with an employer misconduct investigation against a fellow bargaining unit member. Although the employer provided assurances to employees that the scope of its question would be limited to allegations that threatening statements were made, and not about any internal union policies, procedures, or labor strategies, the employer informed employees that they could be disciplined if they did not cooperate with the investigation. The union objected to the employer's attempts to interview bargaining unit employees, and filed an unfair labor practice complaint with this agency alleging that the mere act of interviewing bargaining unit employees about statements made during a union meeting tended to interfere with protected employee rights in violation of Chapter 41.56.RCW.

The key difference between the *City of Vancouver* case and the instant proceedings is how each case arrived before this agency. In *City of Vancouver*, the employer's action (interviewing bargaining unit employees and potentially disciplining those employees who did not cooperate)

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[4] The information subpoenaed by the employer included a request for all notes taken by Edwards regarding Colman's employment, any documents created by Colman related to his resignation as the vice-president of the union, any documents created by Colman demonstrating any dissatisfaction he may have had with the union, and all timekeeping documents maintained by the union indicating the number of hours Colman spent as a union representative in his capacity as vice-president.

related directly to the parties' collective bargaining relationship and the administration of the collective bargaining agreement. Thus, if the subject matter of the employer's line of questioning sought disclosure of union policies, practices and bargaining strategies, the union's first option was to file an unfair labor practice complaint directly with this agency and seek the appropriate remedy.[5]

In the case before us, the employer's action (subpoenaing internal union documents) did not relate to collective bargaining or the administration of the parties' collective bargaining agreement. Rather, the action stemmed from the employer's defense of a civil rights lawsuit filed in federal court. The employer was not in a position to exert pressure over the union or any bargaining unit employee through any type of employment action to force compliance with the subpoena. Thus, this situation is factually distinct from the *City of Vancouver* case, where employees potentially faced discipline if they did not cooperate with the investigation.

Furthermore, because the Federal judge presided over Colman's lawsuit and had jurisdiction over any subpoena issued in relation to that suit, if the union wanted protection from the subject matter of the employer's subpoena based upon the holding in *City of Vancouver*, the union should have sought protection from the Court judge. Where a subpoena is filed as part of a lawsuit in a state or federal court, it is the Court, not this Commission, which has the authority to rule upon the scope of the subpoena and determine what information and statements are protected under the *City of Vancouver* case.

Finally, even if a federal or state court, applying the reasoning enunciated in the *City of Vancouver* decision, were to issue a protective order, quash a subpoena requesting the disclosure of internal union documents, or prevent bargaining employees from testifying about internal union matters, the court's protective order by itself would not constitute evidence that the subject matter of the subpoena interfered with protected rights.

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[5] In fact, the union in City of Vancouver not only filed an unfair labor practice complaint, but also asked the Commission to seek injunctive relief through the courts to preclude the employer from asking questions concerning internal union matter. The Commission did in fact obtain an injunction for the union. *City of Vancouver*, 107 Wn. App. at 701.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Sally B. Carpenter are AFFIRMED and Adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 6th day of October, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner