STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. STATE – ECOLOGY, Respondent.	CASE 128133-U-16 DECISION 12732-A - PSRA DECISION OF COMMISSION

Edward Earl Younglove III, Attorney at Law, Younglove & Coker, P.L.L.C., for the Washington Federation of State Employees.

Charlynn R. Hull, Assistant Attorney General, Attorney General Robert W. Ferguson, for the Washington State Department of Ecology.

The Washington Federation of State Employees (union) represents a bargaining unit at the Washington State Department of Ecology (employer). On April 19, 2016, the union filed an unfair labor practice complaint alleging that the employer interfered with employee rights in violation of RCW 41.80.110(1)(a). The Commission's unfair labor practice manager issued a preliminary ruling. On January 11, 2017, the union amended its complaint. Examiner Erin J. Slone-Gomez conducted a hearing. At the hearing, the Examiner granted the union's motion to amend its complaint, adding a fifth cause of action for interference. The Examiner issued a decision dismissing the union's complaint. *State – Ecology*, Decision 12732 (PSRA, 2017). The union appealed.

The issues before the Commission are whether the employer interfered with employee rights

1. by investigating an allegation that Tryg Hoff abused his schedule in October 2015;
2. by placing a performance review in Hoff's personnel file that claimed Hoff did not meet performance expectations;
3. by investigating whether Hoff misused agency time in January and investigating a business Hoff owned in the 1990s;

4. by giving Hoff a reprimand dated March 15, 2016; and
5. by investigating an allegation that Hoff engaged in inappropriate behavior and failed to follow his supervisor's directions.

Based on the union's appeal, we do not conclude that the union asserted that the Examiner's findings of fact were not supported by substantial evidence. Rather, the union assigned error "to the failure of Findings of Fact 7 through 25 to 'link' the specific interfering conduct" to Hoff's exercise of protected activity. After reviewing the record, we find that substantial evidence supports the Examiner's findings of fact, which in turn support the conclusions of law. While our analysis differs from that of the Examiner, we affirm.

BACKGROUND

Polly Zehm was the Deputy Director and oversaw the employer's environmental programs, including the Water Resources Program. Tom Loranger was the Water Resources Program Manager. Hoff worked as an Economic Analyst 3 in the Water Resources Program. Hoff reported to Dave Christensen, who supervised the Program Development & Operations Support Division.

Since 2012, the union has filed 13 grievances on Hoff's behalf, including six during the time period relevant to this case. Since 2014, the employer has investigated Hoff three times. The unfair labor practice complaint concerned actions that took place from October 19, 2015, through 2016.

Christensen and Hoff met weekly in one-on-one meetings to discuss Hoff's workload. In September 2015, Hoff and Christensen began meeting to create Hoff's performance and development plan (PDP) for the October 1, 2014, through September 30, 2015, review period.

On November 5, 2015, Christensen approached Hoff about his personal cell phone use. On November 23, 2015, the union filed a grievance alleging that Christensen's comments were part of a pattern of behavior that created a hostile work environment.

In November 2015, the employer initiated an investigation into Hoff's use of work time, including his use of state resources.[1] On December 2, 2015, the employer notified Hoff of the investigation. The employer conducted a fact-finding interview with Hoff on December 7, 2015.

On December 23, 2015, Hoff and Christensen met to finalize Hoff's PDP. Hoff disagreed with the evaluation, but on January 4, 2016, Hoff signed the PDP, acknowledging receipt. On January 7, 2016, the union filed a grievance alleging that Christensen's evaluation of Hoff did not comply with the collective bargaining agreement and continued a pattern of harassment and inappropriate behavior. The grievance also alleged the PDP was inaccurate. On January 13, 2016, the union grieved Christensen's conduct during the December 2015 PDP meeting.

On February 2, 2016, the employer e-mailed Hoff a meeting request for a follow-up fact-finding meeting scheduled for February 4, 2016. Hoff believed the employer was initiating a new investigation. However, contrary to Hoff's belief that the February 4 meeting was a new investigation, the meeting was a continuation of the investigation the employer began in November 2015. The notice stated that the purpose of the meeting was to follow up on comments Hoff made during the December 7, 2015, meeting as well as to gather facts about Hoff's performance and allegations that he misused state time and resources.

As a result of the investigation that began in November 2015, on March 22, 2016, the employer issued Hoff a written reprimand dated March 15, 2016. The employer reprimanded Hoff for failure to meet performance expectations, for failure to follow supervisory directives, and for misusing state resources. On April 8, 2016, the union grieved the written reprimand.

In an e-mail on October 18, 2016, Christensen asked Hoff to think about how he would tell the story of the impact of a Supreme Court decision and to bring a plan to their next check-in meeting. In response to Christensen's e-mail, Hoff wrote,

---

[1] The Examiner identified the investigation as beginning in December 2015; however, Employer Exhibit 10 stated that the employer initiated the investigation in November 2015.

> Dave you continue to overload me with work.
>
> I have people trying to explain to me their cash flow needs regarding their agreements. Is this gonna be another project that you pull the rug out from under me? This has made our outside customers very mad and this continues to show you don't have a high regard for actually completing work that has a purpose.

Christensen responded, prioritizing the work assignments. Hoff responded and included Zehm on the e-mail. Hoff replied,

> Dave, nobody believes you act in good faith.
>
> You are constantly trying to inundate me with make work and then cancel it once I've engaged all the customers. It's totally inappropriate and has made a wide variety of customers outside the agency, and within, angry with us. My work with OCR and agreements was clearly laid out a month ago to you. You just continue to try to sink my ship.
>
> I'm getting 6 agreements a day that I'm working through but obviously can't get all the details per day for them so it's going to take a lot of time. You already knew this. Dave, this is going to take months not days.
>
> I will suggest if you want an evaluation of the impacts of HIRST, you should contract with an economics firm. We already know you don't listen to me or have any reasonable perspective on scope of projects.

Based on the content of the e-mail, Zehm decided an investigation was appropriate. She delayed the investigation because the employer and union mediated a grievance on October 19, 2016, and were working toward a mediated settlement. During the mediation, Hoff overheard an allegation that he was insubordinate. On October 31 and November 7, 2016, Hoff e-mailed Loranger and asked about insubordination. Hoff's October 31 and November 7 e-mails demonstrate Hoff was concerned about the potential for employer action.

On November 28, 2016, shop steward Patricia Bailey submitted a letter under Article 31.6 of the collective bargaining agreement. Bailey requested that the employer remove the March 2016 written reprimand from Hoff's file.

On December 5, 2016, the employer notified Hoff that he was under investigation. On December 8, 2016, the employer conducted a fact-finding interview. The investigation was ongoing at the time of the hearing.

ANALYSIS

Applicable Legal Standards

Standard of Review

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission also reviews 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 (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). The Commission reviews factual findings for substantial evidence in light of the entire record. 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. *Public Employment Relations Commission v. City of Vancouver*, 107 Wn. App. 694, 703 (2001); *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference, while not slavishly observed on every appeal, is highly appropriate in fact-oriented appeals. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

Statute of Limitations

"[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." RCW 41.80.120(1). A cause of action accrues, and the statute of limitations begins to run at the earliest point in time that a complaint concerning the alleged wrong could be filed. *Municipality of Metropolitan Seattle*, Decision 1356-A (PECB, 1982), *citing Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616 (1945).

Interference

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. RCW 41.80.110(1)(a). An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *remedy aff'd*, 98 Wn. App. 809 (2000).

To prove an interference violation, the complainant must prove, by a preponderance of the evidence, that the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A. An employer interferes with employee rights 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).

To meet its burden of proving interference, a complainant need not establish that an employee was engaged in protected activity. *State – Washington State Patrol*, Decision 11775-A (PSRA, 2014); *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). 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. *Id.*

Application of Standards

The statute of limitations in an unfair labor practice case begins six months before the filing date of the complaint. RCW 41.80.120(1). In this case, the Examiner admitted both union and employer testimony and exhibits relating to events that occurred outside of the statute of limitations. The evidence was intended as background to show the existence of animus on the employer's part, but instead it distracted from the issues in the case. As a result, counsel for both parties devoted time and energy to discussing those facts and making arguments about issues that were outside of the statute of limitations. In turn, the Examiner devoted a portion of her decision

to addressing facts that were outside of the statute of limitations. While evidence of events occurring outside of the six-month statute of limitations can be relevant and is admissible to establish background leading to the complained-of conduct, we encourage parties to focus on events that occurred within the statute of limitations. Evidence not relevant to the proceeding, especially outside the statute of limitations, should properly be excluded.

A preliminary ruling frames the issues to be heard by an examiner. *King County*, Decision 9075-A (PECB, 2007). In this case, the preliminary ruling framed five issues, which were narrowly written, for hearing. While painting a complete picture of the circumstances in the case, the union offered evidence and testimony about comments that were made during grievance meetings and in e-mails. The Examiner addressed these facts in her decision, but they were not subject to the preliminary ruling. Therefore, we cannot rule as to whether the employer interfered with employee rights based on this evidence.

The issues before us are whether the employer interfered with employee rights by giving Hoff a PDP that stated he did not meet performance expectations for the October 1, 2014, through September 30, 2015, review period; by investigating Hoff beginning in November 2015 which culminated in the employer issuing a written reprimand on March 22, 2016; and by investigating Hoff beginning in October 2016.[2]

Arguments on Appeal

The union made three arguments that must be addressed: First, the Examiner erred by characterizing Hoff as an experienced shop steward. Second, the Examiner made factual assumptions that were not based on the record. Third, the Examiner erred by not considering employer witness testimony that the basis for the October 2016 investigation was Hoff's protected activity. We address the third allegation below.

The sophisticated representative or "thick-skin" standard applies to statements rather than actions. Decisions applying a heightened standard to union officials have involved statements made between executives of both the employer and the union. *State – Office of Financial Management*,

---

[2] Employer Exhibit 10 identified the start date as October 2016.

Decision 11084-A (PSRA, 2012). The union assigned error to the Examiner characterizing Hoff as a "sophisticated" shop steward. The union did not characterize Hoff as an experienced shop steward. The union listed Hoff as a shop steward for approximately eight years. Hoff has met with bargaining unit employees but has never represented an employee in a grievance. Hoff served as treasurer of the bargaining unit for one year. Based on the record, we do not find Hoff to be at the level of a union official to which a heightened interference standard should apply.

We agree with the union that the Examiner's decision included factual assumptions and opinions that were not supported by the record. Of particular concern are the Examiner's statements on page 15 of her decision:

> [E]mployers do not regularly begin investigations immediately after an allegation of misconduct. Frontline supervisors, such as Christensen, regularly discuss allegations of wrongdoing with their managers prior to initiating an investigation. Additionally, as human resources is involved in investigations, it must be consulted, which results in delay. Additionally, coordinating time for several staff members to be available for a meeting, especially around the holidays, can be difficult.

The record did not contain evidence as to why the investigation the employer began in November 2015 lasted until the employer issued the written reprimand on March 22, 2016, what conversations managers and human resources had, or what steps were necessary for the employer to coordinate the investigation. The employer explained why it delayed the October 2016 investigation, not the investigation that began in November 2015. It appears the Examiner relied upon her opinion on how investigations are conducted and those factual assumptions were not supported by the evidence. Examiners are to rely on the evidence in the record.

In support of its appeal, the union argued that each time Hoff filed a grievance or sought union assistance, the employer took action against Hoff, thus creating a reasonable perception of interference. The union asserted the Examiner did not consider the employer's pattern of behavior but rather analyzed the allegations in the preliminary ruling in a vacuum. In response, the employer argued that given the history of the parties, the temporal proximity of the grievances to the employer's investigations did not support a finding of interference. The employer asserted that it could not interfere with employee rights if it did not know an employee was engaging in protected

activity. This assertion is not consistent with Commission precedent. Employer actions can chill employee rights without an employee engaging in protected activity.

Timing of Employer Actions Related to Union Activity

The timing of adverse action in relation to protected union activity can support a finding of an interference violation under RCW 41.80.110(1)(a). *King County*, Decision 7104-A (PECB, 2001); *Kennewick School District*, Decision 5632-A. However, timing is not dispositive of an interference violation in every case.

The employer's concerns about how Hoff used work time arose before Hoff filed the November 23, 2015, grievance.[3] Christensen addressed Hoff's use of work time on November 5, 2015. Between the time the union filed the November 23 grievance and the employer issuing Hoff a written reprimand on March 22, 2016, the employer continued its investigation of Hoff and the union continued to file grievances on January 7, January 13, and February 25, 2016. Both parties, acting within their statutory obligation, met to process those grievances on January 19, February 2, February 11, February 16, and March 25, 2016. The fact that some of the employer's actions during its investigation were in temporal proximity to some of Hoff's union activities is not dispositive evidence, without more than timing, that the employer interfered with employee rights.

The timing of the PDP does not persuade us that the employer interfered with employee rights. Hoff and Christensen began working on the PDP in September 2015.[4] While Hoff received the PDP about one month after he filed the grievance, the process was underway before Hoff engaged in the temporally related protected activity. Hoff should have been aware of the potential outcome of the PDP because he and Christensen had begun the process in September—before Hoff filed the grievance—and they participated in regular check-in meetings. The finalization of the PDP, which Hoff found unfavorable, after Hoff filed a grievance is not dispositive evidence that the employer interfered with employee rights.

---

[3] Employer Exhibit 10 documented that the employer began the investigation in November 2015, after Christensen observed and addressed Hoff's use of work time but before Hoff filed the grievance.

[4] The evidence that Christensen and Hoff began discussing Hoff's PDP in September 2015 is outside the statute of limitations. However, this is the type of evidence that, while outside the statute of limitations, is relevant to the case.

When determining the limits of protected activity, the Commission must be mindful that although Chapter 41.80 RCW protects an employee's right to form, join, or assist a union, employers still have the right to manage their operations and direct employees in their day-to-day activities. *Seattle School District*, Decision 11045-A (PECB, 2011). In this case, the evidence revealed that the employer took steps to manage Hoff before, during, and after he engaged in protected activity. Thus, the timing of the employer's actions do not support a conclusion that the employer interfered with employee rights.

A reasonable employee could not find the employer's actions to be interference.
The reasonable perception of employees is a critical factor in the evaluation of an interference allegation. *King County*, Decision 6994-B (PECB, 2002), *citing City of Seattle*, Decision 3066 (PECB, 1988), *aff'd*, Decision 3066-A (PECB, 1989). The legal determination of interference is based not upon the reaction of the particular employee involved but rather on whether a typical employee under similar circumstances could reasonably perceive the actions at issue as attempts to discourage protected activity. *King County*, Decision 6994-B; *University of Washington*, Decision 11091-A (PSRA, 2012).

To support its case, the union presented evidence about discussions during grievance meetings and in e-mails. That testimony provided context but not a basis for finding interference because the complained-of actions were the investigations and issuance of the PDP and letter of reprimand. We confine our ruling to deciding whether an employee could reasonably perceive certain employer actions as interference.

Chapter 41.80 RCW does not shield employees from consequences for performance deficiencies or inappropriate behavior. An employer has the right to manage its workforce, which includes the authority to enforce behavioral expectations about how employees use their work time. The employer investigated how Hoff used his work time and an e-mail Hoff sent to his supervisors.

A typical employee could not reasonably perceive an investigation into his or her workplace behavior—specifically how the employee used his or her work time—to be interference after sending an e-mail to the employee's supervisors challenging employer directives, stating

unequivocally that the employee's direct supervisor was not acting in good faith, and suggesting that the employer contract out work rather than expect the employee to perform the work. When an employee asserts that he or she is overloaded with work, a reasonable expectation would be for the employer to inquire about how the employee uses his or her work time.

The union assigned error that, in reaching her conclusion, the Examiner did not consider Corrina McElfish's and Zehm's testimony that the October 2016 investigation was based on Hoff's union activities. In her decision, the Examiner expressed concern with portions of employer witnesses' testimony that part of the reason for the October 2016 investigation was Hoff's union activity.[5]

Zehm explained that she decided to request an investigation after receiving the October 18, 2016, e-mail. Hoff's e-mail concerned Zehm to the point that she decided the employer would investigate whether he was able to perform his duties, including how he managed his work time. The employer's investigation also considered how Hoff's protected activities might impact his work performance. Zehm could not identify any union activities that would have been encompassed in the investigation.

Employees are not granted unfettered rights to conduct union activities during work time. The employer investigated whether Hoff was using his work time appropriately, including whether he was engaging in union activities during work time. An employee could not reasonably perceive the October 2016 investigation as interference, because allegations that an employee is overloaded with work might reasonably result in the employer examining the employee's use of work time.

A reasonable employee could not perceive the investigation that began in November 2015 as interference with employee rights after the employee had been counseled for personal cell phone use and visiting websites unrelated to work purposes. In the absence of evidence that the employer did not investigate similar use of work time in other circumstances, we cannot conclude that a reasonable employee could find the investigation to have interfered with employee rights. A

---

[5] The Examiner accurately quoted portions of the transcript but did not include all of the relevant testimony on this point.

typical employee could not find a PDP that was reflective of his or her work performance to be interference with employee rights because the PDP was finalized after Hoff filed a grievance.

CONCLUSION

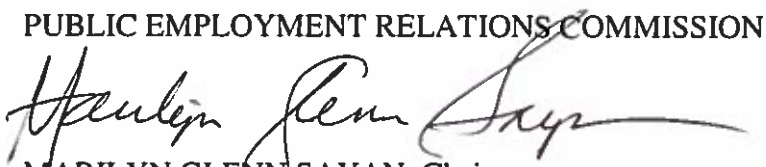
The union failed to prove the employer interfered with employee rights. Given the frequency of Hoff's activities during the time period in question, the employer could not have managed Hoff without having its actions occur in close proximity to Hoff's union activity. For this reason, timing alone is not enough to prove interference. Further, Hoff was aware of the employer's concerns about his performance and use of work time before the employer commenced the investigation in 2015, issued his PDP, continued the investigation, disciplined him, and commenced the investigation in 2016. An employee could not reasonably perceive the employer's actions as interference.

ORDER

The findings of fact, conclusions of law, and order issued by Examiner Erin J. Slone-Gomez are AFFIRMED and adopted as the findings of fact, conclusions of law, and order of the Commission.

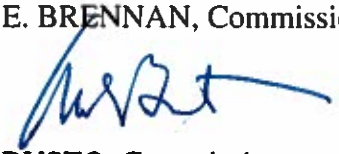
ISSUED at Olympia, Washington, this 14th day of November, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner



MARK BUSTO, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 11/14/2017

DECISION 12732-A - PSRA has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 128133-U-16

EMPLOYER: STATE - ECOLOGY

REP BY:
CHARLYNN R. HULL
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA, WA 98504-0145
charlynnh@atg.wa.gov
(360) 664-4167

FRANKLIN PLAISTOWE
OFFICE OF FINANCIAL MANAGEMENT
LABOR RELATIONS SECTION
128 10TH AVE SW
PO BOX 47500
OLYMPIA, WA 98504
labor.relations@ofm.wa.gov
(360) 407-4140

PARTY 2: WASHINGTON FEDERATION OF STATE EMPLOYEES

REP BY:
EDWARD EARL YOUNGLOVE III
YOUNGLOVE & COKER, P.L.L.C.
1800 COOPER PT RD SW, BLDG 16
PO BOX 7846
OLYMPIA, WA 98507-7846
edy@ylclaw.com
(360) 357-7791

HERB HARRIS
WASHINGTON FEDERATION OF STATE EMPLOYEES
1212 JEFFERSON ST SE STE 300
OLYMPIA, WA 98501-2332
herbh@wfse.org
(360) 352-7603