Washington State University, Decision 9046 (PSRA, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE FEDERATION OF STATE EMPLOYEES, Complainant, vs. WASHINGTON STATE UNIVERSITY, Respondent.	CASE 16502-U-02-4262 DECISION 9046 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Parr Younglove Lyman & Coker, by *Edward Earl Younglove III*, Attorney at Law, for the union.

Attorney General of Washington Rob McKenna, by *Donna Stambaugh*, for the employer.

On April 19, 2002, the Washington Federation of State Employees (union) filed a complaint charging unfair labor practices with the Washington Personnel Resources Board. The union is the exclusive bargaining representative for employees in bargaining unit 3 comprised primarily of classified construction, maintenance, and utility workers employed by Washington State University. The union's complaint named Washington State University (employer) as respondent.

The case was transferred to the Public Employment Relations Commission on June 13, 2002, pursuant to the terms of the Personnel System Reform Act of 2002, Chapter 41.06 RCW. Agency staff issued a deficiency notice on April 11, 2003, and the union filed an amended complaint on or about April 30, 2003. Agency staff issued a preliminary ruling on September 22, 2003, indicating that the

union's complaint stated a cause of action under RCW 41.56.140(1). The employer filed an answer. Examiner Karyl Elinski conducted a hearing on November 15 and 16, 2004. Each party filed a post-hearing brief.

The examiner determines that the employer interfered with employee rights when it conducted investigations of a union shop steward and admonished him to not "engage in any activities which may be perceived as interfering" with the employer's ability to elicit facts. The employer also interfered with employee rights by allowing the posting of an altered photograph depicting union employees in a disparaging light. The examiner determines that the employer did not discriminate against employees.

ISSUES

1. Did the employer interfere with employees in the exercise of a right or rights under RCW 41.56 as made applicable through RCW 41.06.340?

2. Did the employer discriminate against employees in the exercise of a right or rights under RCW 41.56 as made applicable through RCW 41.06.340?

ANALYSIS

Standards Applicable to All Issues

State civil service employees are covered by RCW 41.56.140 through RCW 41.06.340(2) which provides:

> (2) Each and every provision of RCW 41.56.140 through 41.56.160 shall be applicable to this chapter as it relates to state civil service employees.

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, gives the Commission jurisdiction over unfair labor practice complaints. RCW 41.56.140(1) states:

> It shall be an unfair labor practice for a public employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter.

ISSUE 1: Did the employer interfere with employees in the exercise of a right under RCW 41.56 as made applicable through RCW 41.06.340?

LEGAL STANDARD

The Commission thoroughly set forth the legal standard for an independent interference violation of RCW 41.56.140(1) in *King County*, Decision 6994-B (PECB, 2002):

> An independent violation of RCW 41.56.140(1) will be found whenever a complainant establishes that a party engaged in separate conduct that an employee could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. *Reardan-Edwall School District, supra* (citing *City of Seattle*, Decision 3066-A (PECB, 1989)). The burden of proving unlawful interference rests with the complaining party and must be established by a preponderance of the evidence, but the test for deciding such cases is relatively simple. WAC 391-45-270; *King County*, Decision 7104-A (PECB, 2001) (citing *City of Tacoma*, Decision 6793-A (PECB, 2000); *City of Omak*, Decision 5579-B (PECB, 1997)). Thus:
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> - The reasonable perceptions of employees are critical when evaluating independent interference alle-

gations under RCW 41.56.140(1). *City of Seattle*, Decision 3066 (PECB, 1989), *aff'd*, Decision 3066-A (PECB, 1989). *See also City of Tacoma, supra.* The legal determination of interference is based not upon the reaction of the particular employee involved, but rather on whether a typical employee in a similar circumstance reasonably could perceive the actions as attempts to discourage protected activity. *City of Tacoma, supra.*

- An intent or motivation to interfere is not required to show interference with collective bargaining rights. *City of Tacoma, supra; Cowlitz County, supra.* Nor is it necessary to show that the employee involved was actually coerced. *City of Tacoma, supra; Cowlitz County, supra.* It is not even necessary to show anti-union animus for an interference charge to prevail. *City of Tacoma, supra; Cowlitz County, supra.*
- The timing of adverse actions in relation to protected union activity can support an inference of an interference violation under RCW 41.56.140(1). *City of Omak, supra; Mansfield School District*, Decision 5238-A (EDUC, 1996); and *Kennewick School District*, Decision 5632-A (PECB, 1996).

(Citations in original).

Application of the Standard

The events alleged in the union's complaint arose amidst a backdrop of both external and internal union strife, which began in approximately 1999 and continued during all relevant periods. The union was the subject of a number of decertification petitions. The union successfully challenged the employer's decision to contract out work on a project referred to as "Tri-Gen." The union successfully pursued two arbitrations concerning the employer's conduct in investigations and searches. Tensions were undoubtedly high during the three to four years leading up to and including the filing of this unfair labor practice complaint. Management aptly described labor relations as "delicate."

Disciplinary Investigations of Chief Shop Steward Ralph Webb

Ralph Webb became the chief shop steward for bargaining unit 3 in 1995. Webb, who worked for the employer for seventeen years, had never been disciplined or investigated prior to assuming the role of chief shop steward.

The first investigation - In December 2001, motor pool manager Dennis Rovetto discovered two vehicle emergency kits missing. Rovetto telephoned Webb to discuss the union's position on fingerprinting and polygraphs. The record reflects that the discussion was heated, and Webb hung up on Rovetto. Webb complained about the matter at a January 2002 labor-management committee meeting. The employer offered to investigate.

In the course of investigating Webb's complaint, management initiated a separate disciplinary investigation into Webb's interactions with Rovetto.[1] The employer notified Webb of the investigation by letter on January 25, 2002, admonishing him "not to engage in any activities which may be perceived as interfering with [my] ability to elicit the facts from potential witnesses"(the admonishment).[2] The employer completed its investigation of Webb on February 28, 2002.[3] The employer determined that Webb engaged in the conversation with Rovetto in his capacity as chief shop

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[1] Webb was also the subject of two other investigations in 2001. Neither resulted in discipline. The 2001 investigations are not the subject of this case, but are discussed only as background leading to the facts alleged in this case.

[2] "My" refers to Executive Director, Facilities Operations, Lawrence E. (Ev) Davis.

[3] The employer completed its investigation of Rovetto on February 8, 2002, determining that the allegations against him were unfounded.

steward, and decided not to pursue disciplinary action. The employer did send a letter to the union, however, complaining of Webb's unprofessional and insubordinate conduct.

The second investigation - Webb became the subject of another disciplinary investigation on March 1, 2002, for "inappropriate conduct" and "verbally threatening, harassing and abusing employees and making false and/or malicious statements" against unidentified co-workers beginning January 1, 2001, and continuing "up to and including the present." Webb was not advised of the identity of his accusers. He was again admonished not to "engage in any activities which may be perceived as interfering with [my] ability to elicit the facts from potential witnesses"(the admonishment).[4] Five months after initiating the second investigation, on August 1, 2002, the employer advised Webb that it did not have reasonable cause to believe that Webb engaged in the behavior alleged by unidentified co-workers. Webb later discovered that the complaints against him were initiated by employees who were unhappy with his input on overtime issues during labor management committee meetings.

Webb's Resignation - Webb resigned his position as chief shop steward on April 4, 2002, citing, in part, the employer's continuing use of the internal investigation procedure as a retaliatory tool for his union activity. The union had a difficult time finding a replacement for the chief shop steward position.[5]

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[4] "My" refers to Heidi D. Hutchinson, Interim Director, Human Resources Services.

[5] Greg Streva replaced Webb as chief shop steward. He had never been the subject of an investigation or discipline prior to this time. Shortly after he assumed the chief shop steward position the employer initiated an investigation against Streva. The complaint was

Conclusion - The unfounded investigations of Webb occurred during a period of strained labor management relations and severe turmoil and internal strife within the union. Under these circumstances, the employer's vague and sweeping admonishments to Webb, and the protracted investigations, could have a two-fold chilling effect on both Webb's union activities and other employees' union activities. The frequency, duration and contents of the investigations all point to an interference violation. While shop stewards are not automatically immune from discipline merely due to their status, neither should they be subjected to increased scrutiny. Here, the employer investigated Webb no less than four times during a two-year period.[6]

The union established, by a preponderance of evidence, that the unfounded investigations of Ralph Webb could be reasonably perceived by a typical employee as the threat of reprisal associated with union activity.

The employer asserted that it had legitimate reasons for conducting the investigations. The employer can commit an interference claim even when it lacks intent, motive, or anti-union animus. Given all of the circumstances, a typical employee could perceive the investigations with the broad admonishments not to interfere with the investigation, as reprisal for union activity.

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subsequently found to be baseless. Streva later discovered that the complaints against him were also initiated by employees unhappy with the position he took on overtime issues at a labor management committee meeting.

[6] Although two of the investigations occurred prior to the statutory period for this unfair labor practice claim, they are relevant to demonstrate the employer's practice.

Posted Materials

The employer had a long-standing policy regulating the posting of materials in the office. The policy prohibited displays of union insignia, cartoons, bumper stickers, flyers or other papers on walls or doors. It further required an employee to receive management approval prior to posting items on bulletin boards, and that postings be limited to two weeks. The policy was inconsistently enforced.

The monkey picture - Dennis Bowker was the information systems manager. He did not supervise any members of any bargaining unit. He testified credibly that he took a photo of union steward Gerry Hord sitting in a workplace break-room. Bowker digitally altered the photo on his home computer to depict Hord sitting at a table with a group of monkeys. A caption on the photo: "Listen here you monkeys . . . ." Bowker brought two copies of the altered photo to work. He taped one to another manager's office door, and gave one to his assistant to give to Hord. Bowker's assistant gave the photo to Webb, who showed it to Hord. Bowker testified credibly that he thought the photo was funny, and he believed that Hord would also be amused. He was unaware that his photo could be perceived as offensive. Hord, however, was upset by it. Bowker immediately apologized to Hord after the incident. Bowker received a written reprimand for his actions.

Though the monkey picture was intended as a joke, and management took swift disciplinary action, a typical employee engaged in union activity could reasonably perceive the photo as an attempt to dissuade employees from engaging in protected activity. Hord, a shop steward, is depicted sitting at a table with monkeys where union members typically sit. A member of management prepared and

distributed the photograph. Given the climate of labor relations at the time, a union member could perceive this as offensive and demeaning, especially when coming from management. Though the evidence established that the employer did not intend to interfere with employee rights, it was clear from the testimony and the exhibit itself that a typical employee under similar circumstances could reasonably perceive the picture as an attempt to discourage protected activity.

The cartoon - A Warner Brothers-type cartoon depicting electricians as lazy, with the names of union members inserted over the cartoon characters, was posted for a "long time." The union presented only hearsay testimony concerning the cartoon, but it was uncontroverted that the employees named in the cartoon believed it was nothing but a good-natured jab.

The testimony at the hearing failed to establish that the cartoon was or could be perceived as a threat or reprisal for union activity. The employees mentioned considered it to be a good-natured jab. It does not appear to have resulted in complaints by any individual union member despite the length of time for which it was purportedly posted. The union also failed to connect the employees named in the cartoon with protected union activity. It is safe to assume that a reasonable employee would not perceive it as threatening.

The e-mail joke - The union produced a copy of an e-mail joke mocking state workers as inefficient and lazy. One of the characters in the joke shared the chief shop steward's name, "Ralph." There was no direct testimony regarding where or when or by whom the document was generated, or whether it was posted or distributed.

The union failed to establish that the joke was ever published or even seen by union members prior to the hearing. At best, the union offered only hearsay testimony to support its contention that the joke was removed by a union representative from a bulletin board. Thus, it failed to meet its burden of proof with respect to the joke.

Conclusion - The record supports the union's interference claim with respect to the investigation of Ralph Webb and the monkey picture. The union failed to prove, by a preponderance of its evidence, that the joke or e-mail constituted unlawful employer interference.

ISSUE 2: Did the employer discriminate against employee(s) in the exercise of a right under RCW 41.56 as made applicable through RCW 41.06.340?

The Legal Standard

An employer violates RCW 41.56.140(1)when it "takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW." *Grant County Public Hospital District 1,* Decision 6673-A (PECB, 1999). In order to demonstrate discrimination, the complainant must:

1. Establish a prima facie case of discrimination, showing:
   a. The exercise of rights protected by an applicable collective bargaining statute, or communicating an intent to do so;
   b. That one or more employees was/were deprived of some ascertainable right, status or benefit; and
   c. A causal connection between the exercise of protected rights and the discriminatory action.

2. If the complainant makes out a prima facie case, the respondent must set forth lawful reasons for its actions.

3. If the respondent does cite lawful reasons, the complainant must show that the reasons set forth were pretextual and/or that protected activity was nonetheless a substantial motivating factor underlying the disputed action(s).

City of Tacoma, Decision 8031-B (PECB, 2004), *Educational Service District 114*, Decision 4361-A (PECB, 1994) (citing *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991)).

APPLICATION OF THE STANDARD

Prima Facie Case of Discrimination

To establish a prima facie case of discrimination, the union must prove a causal connection between the employee's union activity and the disputed employer action. In this case, the union failed to demonstrate that the joke or cartoon were related to any specific employee's union activity. The union also failed to prove that the cartoon deprived anyone of some ascertainable right, status or benefit. The remaining claim, related to disciplinary investigations, requires further analysis.

a. The exercise of rights protected by an applicable collective bargaining statute, or communicating an intent to do so

The first investigation undoubtedly focused on activities Webb conducted as chief shop steward. After he complained about the Rovetto incident during a labor-management meeting, the employer initiated its investigation of Webb. Although there is no evidence that Webb asserted he would file a grievance or unfair labor

practice claim, the gist of his complaints related to the same material as recent arbitration awards (employee investigations). The arbitrator in those cases found that the employer violated the collective bargaining agreement by the manner in which it conducted workplace investigations. Webb was engaged in activity protected by Chapter 41.56 RCW in his representative capacity.

The employer initiated the second investigation after receiving complaints from other employees. After the investigation was completed, Webb discovered that it was initiated by employees who were unhappy with actions he took on behalf of the union during a labor management meeting.

The union failed to establish that the second investigation was initiated by the employer as the result of any protected activity. Rather, the employer investigated because fellow employees complained that Webb "harassed, threatened and abused" them. The employer took the complaint seriously, but ultimately determined that it was unfounded. It later turned out that the employee complainants may have filed their complaints against Webb in retaliation for his exercise of protected activity. The employer did not, however, initiate the complaint as the result of Webb's protected activity. The union failed to establish that the second investigation was the direct result of Webb's exercise of any protected right.

b. <u>That one or more employees were deprived of some ascertainable right, status or benefit</u>

During the pendency of the investigations, the employer prohibited Webb from engaging in a broad panoply of activities. The vague wording of the employer's admonishment left Webb in an untenable

position: forgo his duties as chief shop steward, or risk discipline for violating the admonishment. The second element of the prima facie case requires that the employee must be deprived of some ascertainable right, status or benefit. Despite the potential for interference with Webb's union activities, nothing supports the union's claim that he was deprived of a right, status, or benefit of the type required to sustain a discrimination claim.

Conclusion

However burdensome the employer's actions in this case, the union failed to meet the second element of its prima facie case. Thus, its discrimination claim fails, and no further analysis of the claim is required.

CONCLUSION

In light of all the evidence, and judged by the totality of the circumstances, the union's interference claim is DISMISSED in part and SUSTAINED in part. The discrimination claim is DISMISSED.

FINDINGS OF FACT

1. Washington State University is a public employer within the meaning of RCW 41.56.030(1).

2. The Washington Federation of State Employees is a bargaining representative within the meaning of RCW 41.56.030(3). The union represents classified construction, maintenance and utility workers employed by the Washington State University.

3. The union and the employer were parties to a collective bargaining agreement that covered all relevant time periods.

4. Ralph Webb became chief shop steward in 1995. Prior to that time, he was never the subject of discipline or a disciplinary investigation.

5. Beginning in at least 1999 and at all relevant periods, the union was the subject of a number of decertification petitions, and labor management relations at Washington State University were strained.

6. Webb was notified that he was the subject of two disciplinary investigations on January 25, 2002, and March 1, 2002.

7. Each of the disciplinary investigation notices given to Webb contained the following language, admonishing Webb: "not to engage in any activities which may be perceived as interfering with [my] ability to elicit the facts from potential witnesses."

8. The employer began the first investigation after Webb initiated a complaint during a labor management meeting.

9. The employer notified Webb that the first investigation was completed on February 28, 2002. The employer declined to discipline Webb, and acknowledged that Webb engaged in the complained of conduct in his capacity as chief shop steward.

10. The employer initiated the second investigation after co-workers complained about Webb's conduct.

11. The employer notified Webb that the second investigation was completed on August 1, 2002. Webb did not receive any discipline as the result of the investigation.

12. Webb resigned his position as chief shop steward on April 4, 2002, due, in part, to the investigations the employer initiated against him.

13. Webb suffered no loss of ascertainable right, status or benefit as the result of the employer's actions.

14. Information systems manager Dennis Bowker altered a photograph of shop steward Gerry Hord. The altered photo depicted Hord sitting with a group of monkeys. He taped one copy of the photo onto another manager's door. He gave one copy to his assistant to give to Hord. Bowker's assistant gave the copy to Webb, who showed it to Hord.

15. A Warner Brothers-type cartoon depicting electricians as lazy, with the names of union members inserted over the cartoon characters, was posted for a "long time." The employees named in the cartoon believed it was nothing but a good-natured jab.

16. The union produced a copy of an e-mail joke mocking state workers as inefficient and lazy. One of the characters in the joke shared the chief shop steward's name, "Ralph."

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this case pursuant to RCW 41.06.340, Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Washington State University did commit an unfair labor practice and did violate RCW 41.56.140(1) by interfering with employee rights.

3. Washington State University did not commit an unfair labor practice and did not discriminate in violation of RCW 41.56.140(1).

ORDER

I DISMISS in part, and AFFIRM in part the Washington Federation of Employee's complaint charging the Washington State University committed unfair labor practices in this case.

WASHINGTON STATE UNIVERSITY, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from: interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the state of Washington by:

   a. Interfering with public employees in the exercise of their bargaining rights by conducting investigations with the following admonishment (or a variation thereof) to a union employee who is the subject of an investigation: "not to engage in any activities which may be perceived as interfering with [my] ability to elicit the facts from potential witnesses."

   b. Interfering with public employees by posting or allowing to be posted altered photographs or other medium depicting union employees in an disparaging light.

c. In any other manner, interfering with, restraining, or coercing 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 41.56 RCW:

a. Initiate, distribute and enforce a strict policy and procedure prohibiting the posting or dissemination of, and requiring the removal of, any material depicting union employees in a disparaging light.

b. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice attached to this order into the record at a regular public meeting of the Board of Regents of Washington State University, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. 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 attached to this order.

e. Notify the Executive Director of the Public Employment Relations Commission, 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 Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, on the 28th day of July, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, 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

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

We UNLAWFULLY interfered with the rights of members of Washington State Federation of State Employees, bargaining unit 3, by conducting investigations in which we admonished union-represented employees to not engage in any activities which may be perceived as interfering with the employer's ability to elicit the facts from potential witnesses.

We UNLAWFULLY interfered with our employees by posting or allowing to be posted altered photographs or other media depicting union-represented employees in a disparaging light.

We UNLAWFULLY interfered with our employees in the exercise of their collective bargaining rights under state law.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL initiate, distribute and enforce a strict policy and procedure prohibiting the posting or dissemination of, and requiring the immediate removal of, any material depicting union employees in a disparaging light.

WE WILL NOT interfere with public employees in the exercise of their bargaining rights by conducting investigations in which we admonished union-represented employees to not engage in any activities which may be perceived as interfering with the employer's ability to elicit the facts from potential witnesses.

WE WILL NOT interfere with public employees by posting or allowing to be posted altered photographs or other medium depicting union employees in an unflattering light.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ WASHINGTON STATE UNIVERSITY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission,112 Henry Street N.E. PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's website: www.perc.wa.gov.