University of Washington, Decision 9550 (PSRA, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL NERVIK Complainant, vs. UNIVERSITY OF WASHINGTON Respondent.	)	CASE 20214-U-06-5152 DECISION 9550 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Attorney General Rob McKenna, by *Jeffrey W. Davis*, Assistant Attorney General, for the employer.

Michael Nervik, an employee, appeared on his own behalf.

On February 24, 2006, Michael Nervik filed an unfair labor practice charge against the University of Washington (employer). Nervik charged that the employer interfered with employee rights when the director of public safety retaliated against him for signing a letter complaining about unsafe working conditions at Harborview Medical Center (HMC). The Washington Federation of State Employees (union) represents approximately 36 security officers, including Nervik, at the University of Washington's HMC for purposes of collective bargaining. The union is not a party to this action. The union and the employer are parties to a collective bargaining agreement.

The Public Employment Relations Commission issued a preliminary ruling on April 11, 2006, which forwarded Nervik's charges for further proceedings under Chapter 391-45 WAC. The employer filed a summary judgment motion on July 25, 2006. Examiner Karyl Elinski denied the motion and held a hearing on September 25, 2006. The employer filed a post-hearing brief on November 13, 2006; Nervik did not.

ISSUES

1. Did Nervik engage in protected union activity?

2. If so, did the employer violate the statute and interfere with employee rights when the Director of Public Safety told some employees that they could leave if they did not like their jobs, and that they could be replaced?

On the basis of the record presented, the Examiner finds that Nervik did not engage in protected union activity, a threshold issue for an interference violation under RCW 41.80.110(1)(a). Given the failure to meet this threshold requirement, the employer cannot be, and is not, found to have interfered with Nervik's rights. Even if Nervik engaged in protected activity, he failed to prove the elements of an interference claim. Nervik's complaint is therefore dismissed.

APPLICABLE LEGAL STANDARDS

The law governing state employees' collective bargaining rights is contained in the Personnel System Reform Act (PSRA), Chapter 41.80 RCW. Specifically, RCW 41.80.050 provides: "[e]mployees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion . . . " It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in RCW 41.80.050. RCW 41.80.110(a).

An "interference" violation under 41.80.110 is similar to one under RCW 41.56.140(1) of the Public Employees Collective Bargaining Act

(PECBA), Chapter 41.56 RCW. Thus, Commission decisions concerning interference violations under Chapter 41.56 RCW are applicable to interference violations under Chapter 41.80 RCW. *Community College District 19 (Columbia Basin) (Washington Public Employees Association))*, Decision 9210 (PSRA, 2006) and RCW 41.58.005(1). In order to prevail on an interference claim, the complainant must prove that he engaged in a protected activity. *Seattle School District*, Decision 5237-B (EDUC, 1996).

Under Washington law, "concerted activities for . . . mutual aid or protection" are not protected under the collective bargaining statutes. *City of Seattle*, Decision 489-A (PECB, 1978), aff'd 489-B (PECB, 1979). Although both the PSRA and the PECB protect employees engaged in union activities, neither protects "concerted activity." The Commission has specifically declined to grant protection for concerted activity.[1] *City of Tacoma*, Decision 4444 (PECB 1993); *City of Bellevue*, Decision 4242 (PECB, 1992).

ANALYSIS

Issue 1 - Protected Union Activity

Nervik is employed as a campus security officer at HMC. The security officers, including Nervik, are members of the union. Emmet Stormo is HMC Director of Public Safety.

Sometime during the summer of 2005, several campus security officers, including Nervik, signed and sent a letter concerning workplace safety issues directly to the employer's president Mark Emmert, bypassing Stormo. There is no indication in the record that

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[1] RCW 49.32.020, which applies to private entity employees in the State of Washington, defines concerted activity as follows: "activities undertaken by employees in unison with one another for the purpose of improving their working conditions."

the union sanctioned, or even encouraged, the letter to Emmert. On or about October 18, 2005, Stormo and campus security officers Lisa Wilcox, Jill Burr, Thomas Coonradt, Michael Lynne, and Neal Reinig engaged in a discussion about workplace issues. At some point, Nervik entered the discussion. Stormo indicated he was angry about the letter to Emmert. Stormo told the security officers present that if they were not happy working at HMC, they could look for a job elsewhere, and that the officers could be replaced.

At meetings on November 14, 2005, and January 11, 2006, at the urging of union representative David Claiborne, Stormo apologized for his comments. Nervik was not present at either of the meetings.

The exercise of a protected activity is a required element for a finding of interference. The Commission has long held that individual activity in the presentation of grievances to an employer constitutes protected activity under state law and Commission precedent *only* when it takes place in a collective bargaining context. *See Seattle School District*, Decision 5237-B (EDUC, 1996) and cases cited therein. *See, also, City of Bellevue*, Decision 4242 (PECB, 1992) (complaints dismissed at preliminary ruling stage where individuals who claimed retaliation for concerted activities were not engaged in protected union activities). Although Stormo's comments undoubtedly upset the employees present during the meeting, there is no indication that the officers engaged in protected union activity when they signed the letter to Emmert.

The evidence shows that Nervik and other security officers wrote a letter concerning working conditions to Emmert. Nothing in the record indicates that they raised these issues in a collective bargaining context. Nothing in the record indicates that the

employer was on notice of the exercise of any collective bargaining rights. There was no evidence that the union participated in any way with the letter. At best, the evidence indicates that Nervik discussed the letter with the union only after Stormo made the objectionable comments. Nervik did not express an intent to file, nor did he file, a grievance concerning the safety issues addressed in the letter to Emmert. Moreover, Nervik presented no evidence of personal involvement in union activity.

The bare fact that an employee, with or without co-employees, addressed an issue with his or her employer is insufficient to bring the topic into the "protected activities" arena. Because Nervik was not involved in any protected activities, his claim of interference must be dismissed.

Issue 2: Interference Claim

The burden of proving unlawful interference rests with the complaining party. WAC 391-45-270(a). The Commission has found an interference violation when a typical 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 other employees. *Community College District 19 (Columbia Basin) (Washington Public Employees Association)*, Decision 9210 (PSRA, 2006). The complainant need not prove that the employer acted with intent or motivation to interfere, nor prove the employee involved actually felt threatened or coerced. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004); *City of Seattle*, Decision 3566-A (PECB, 1991).

Even if Nervik could prove that he was engaged in union activity, his claim fails to establish another necessary element of interference: reasonableness. The unrefuted testimony demonstrates that Stormo acknowledged that his comments were inappropriate and

apologized twice at union meetings. The union posted minutes of both meetings and Stormo's apologies, making them available to all union members. In that context, a typical employee would not reasonably perceive Stormo's actions to be a threat of reprisal or force in connection with union activity. The apologies, in and of themselves, are enough to refute Nervik's interference claim.

FINDINGS OF FACT

1. University of Washington is an institution of higher education within the meaning of RCW 41.80.005(10).

2. Michael Nervik is an employee of the University of Washington, Harborview Medical Center (HMC) within the meaning of RCW 41.80.005(6).

3. The Washington Federation of State Employees is an employee organization within the meaning of RCW 41.80.005(7) and was, at all times relevant to this case, the exclusive bargaining representative for the bargaining unit of which Nervik was a member.

4. Nervik and co-workers wrote a letter concerning working conditions to University of Washington President Mark Emmert during the summer of 2005. On or about October 18, 2005, Emmet Stormo, the director of public safety at HMC, told Nervik and some co-workers that they could be replaced, and that if they did not like working at their jobs, they could look for work elsewhere.

5. Nervik was not involved in the exercise of any protected activity in signing the letter to Emmert, or in his October 18, 2005, discussion with Stormo.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.80 RCW.

2. The University of Washington did not interfere with Nervik's protected rights when Stormo told Nervik and some co-workers that they could be replaced, and that if they did not like working at their jobs, they could look for work elsewhere.

ORDER

The complaint charging unfair labor practices file in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 12th day of January, 2007.

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.