University of Washington, Decision 9633 (PSRA, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL NERVIK,	)	
	)	
Complainant,	)	CASE 20230-U-06-5157
	)	
vs.	)	DECISION 9633 - PSRA
	)	
UNIVERSITY OF WASHINGTON,	)	
	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW
	)	AND ORDER
	)	

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

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

On February 28, 2006, Michael Nervik filed an unfair labor practice complaint against the University of Washington (employer). The complaint alleges that the employer interfered with Nervik's employee rights in violation of RCW 41.80.110(1)(a). Examiner David I. Gedrose held a hearing on October 24, 2006. The employer filed a closing brief; Nervik did not.

ISSUE

Did the employer unlawfully interfere with Michael Nervik's collective bargaining rights when it issued a memorandum to him following Nervik's union-related activities in a grievance meeting?

The Examiner rules that the employer's memorandum did not interfere with Nervik's collective bargaining rights. The complaint is dismissed.

ANALYSIS

Legal Standards

RCW 41.80.110(1)(a) proscribes employer interference with employee collective bargaining rights guaranteed in Chapter 41.80 RCW. In numerous cases the Commission has set forth its legal standard for interference violations:

- interference is proven when an employee/complainant establishes that the employer engaged in conduct an employee could reasonably perceive as a threat of reprisal or force, or promise of benefit, associated with the employee's protected union activity;
- the reasonable perceptions of the employee are critical when evaluating interference claims;
- a finding of interference is not based on the reaction of the particular employee, but rather whether a typical employee in a similar circumstance could reasonably perceive the employer's action as an attempt to discourage protected activity;
- the employer's intent or motivation is not required to show interference;
- it is not necessary to show anti-union animus to prove interference;
- a showing of actual coercion is not necessary to prove interference; and
- the complainant bears the burden of proving, by a preponderance of the evidence, that the employer's

> action resulted in harm to the employee's protected collective bargaining rights.

City of Wenatchee, Decision 8802-A (PECB, 2006); *King County,* Decision 6994-B (PECB, 2002); *City of Omak,* Decision 5579-B (PECB, 1998).

This case arises from a grievance meeting held on February 21, 2006. Michael Nervik is a security officer and serves as a shop steward for a bargaining unit that includes security officers at Harborview Medical Center. The unit is represented for the purpose of collective bargaining by the Washington Federation of State Employees. There are three daily security shifts at Harborview, each with an officer-in-charge (OIC) designate. Emmet Stormo is Director of the Department of Public Safety at Harborview. Stormo assigned an officer from the second shift as OIC of the third shift. Security officers Wilcox and Johnson, serving on the third shift, grieved the decision. Nervik represented them in his capacity as shop steward. The meeting was the first step in the grievance process, during which Nervik and the two other employees discussed the matter with Stormo. During the meeting, Stormo stated that he would not alter his decision. Stormo's rejection of the officers' protest was not the employer's final word on the matter. Nervik could have filed a written grievance on the employees' behalf. The record does not indicate whether he did so. The grievance meeting lasted about ten minutes. The next day, Stormo wrote Nervik the following memorandum:

> After careful thought and reflection on the grievance meeting that we had regarding Officers Johnson and Wilcox I have decided to write this memo which will be placed in your personnel file.
>
> I can appreciate your willingness to represent other officers and the passion that you demonstrate in this regard, however, there are limits. Without Officers Wilcox or Johnson being given the opportunity to talk,

> you immediately started interrogating me. You totally disregarded the explanation that I gave for the appointment and targeted past practice as an arguing point.
>
> After 7 or 8 minutes of attempting not to argue which I knew would be counter productive, I told you that I wasn't going to argue with you. At that point, you replied "yes you will" and I immediately ended the conversation. That comment in and of itself was disrespectful. If you want to maintain a good working relationship with this department's administration as a union shop steward, you will conduct yourself in a more respectful manner in the future. This type of behavior is unacceptable.

Stormo placed the memorandum in a supervisory documentation file to be used in Nervik's evaluation. The memorandum was not placed in Nervik's official personnel file.

Nervik does not dispute the facts set forth in the memorandum. Nervik did not call Wilcox, Johnson, or any other witnesses at the hearing. Nervik only provided a brief statement for his case-in-chief, which basically reiterated the complaint. He entered the memorandum as his only supporting evidence. Nervik's apparent position is that the memorandum is *per se* evidence of interference. Nervik cross-examined Stormo about Stormo's perception of their relationship when Nervik acts as a shop steward. Nervik believes that when he represents employees as shop steward, he is not subordinate to Stormo and is under no obligation to be courteous. Stormo believes that a shop steward remains a subordinate, even while acting in a union capacity. The employer argues that Nervik has a duty to remain civil to superior officers, whether acting as a security officer or as a shop steward.

The issue here is thus more narrowly defined as: What latitude does an employee have, when acting on behalf of the union, for statements made to a supervisor? On at least two occasions, Commission examiners have dealt with this question.

An examiner ruled in a 1989 case that an employer did not interfere with an employee's collective bargaining rights when the employer warned that the employee's words and actions bordered on insubordination. *Pierce County Fire District 9,* Decision 3334 (PECB, 1989). In that case, the employee was acting as a union agent for another employee in a disciplinary meeting with a supervisor.

During the meeting the union agent:

- questioned the supervisor in a progressively louder tone of voice, became confrontational, used profanity, acted in an agitated manner, and pointed his finger at the supervisor;
- told the supervisor that the matter was "bullshit," and when the supervisor asked him to calm down replied, "goddamit, don't tell me to calm down, I'm acting as a union officer."

The supervisor told the union agent that he had no right to be disrespectful to a supervisor while on duty and that his conduct bordered on insubordination. The employer took no further action against the union agent. *Pierce County Fire District 9,* Decision 3334.

The union filed an unfair labor practice complaint alleging interference. The union asserted that by mentioning insubordination, the employer threatened the union agent. The union argued that the union agent was, in that capacity, not subject to the employer's rules and was free to conduct himself as he saw fit. The employer maintained that even union agents may not disregard accepted standards of behavior and become insubordinate.

In ruling against the union, the Examiner cited a case from the National Labor Relations Board (NLRB) that addressed the issue of disruptive employee conduct. There, the NLRB ruled that a line exists beyond which employees may not go with impunity while engaged in protected activities. Employees exceeding the line lose their protection. *Pierce County Fire District 9*, citing *Prescott Industrial Products Co.*, 205 NLRB 51 (1973).

The Examiner ruled that:

- a mutual duty exists between parties in a collective bargaining setting to treat their adversaries in a business-like manner;
- the union agent had no protected right to disregard normally acceptable standards of behavior or behave with impunity, in union activities involving his superiors; and
- the union agent's actions were not protected union activity.

Pierce County Fire District 9.

In 1991, another Examiner found that an employee, representing himself in a grievance meeting with a supervisor, crossed the line of acceptable behavior when he challenged the supervisor to a fight. *City of Pasco*, Decision 3804 (PECB, 1991), *aff'd*, Decision 3804-A (PECB, 1992).

In *City of Pasco*, the employee filed a grievance over vacation issues and presented the grievance to his supervisor. The meeting lasted about fifteen minutes. The supervisor denied the grievance as untimely. The employee then suggested to the supervisor that they "step outside" to settle the matter. The supervisor ulti-

mately issued a written warning, referring not only to the employee's actions at the grievance meeting, but to previous, unrelated actions. The Examiner found, based on the warning and its reliance on past behavior, that the employee could have interpreted the warning letter as retaliation for filing the grievance, not merely as a warning for his comments at the grievance meeting.

However, the Examiner ruled that the employee's invitation to settle the matter by physical combat was not protected activity. The employee argued that this invitation was in response to the supervisor's sarcasm and hostility. The Examiner did not credit this argument, but instead, based on witness testimony, found that the employee was volatile while the supervisor was adverse to confrontation.

The Examiner cited two NLRB cases as relevant to the issue. The NLRB found in one case that a shop steward's threat, obscene language, and discourteous behavior toward a supervisor did not negate protected activity. *Acme-Arsena Co. v. NLRB,* 276 NLRB 1291 (1985). The shop steward consistently and zealously protested perceived work jurisdiction and safety violations by the employer. While stopping short of unlawful or violent behavior, the shop steward on one occasion told a supervisor to "go fuck yourself," and on another occasion, "you can put that up your ass and smoke it." The employer ultimately fired the shop steward. The shop steward's union objected. The NLRB ruled in the union's favor and ordered the shop steward reinstated. The NLRB found that in protesting safety violations the shop steward had acted within the limits of protected activity, despite his offensive language. *Acme-Arsena,* 276 NLRB 1291, at 1294-96.

In the second case, the NLRB found protected activity when an employee, during a grievance meeting, replied "bullshit" to a

supervisor's denial of a record request. The employer suspended the employee, with a warning that further violations would result in termination. The employee protested. The NLRB ruled for the employee and reversed the employer's actions, finding that the suspension was an overreaction to the employee's profane epithet. *Illinois Bell Telephone Co.*, 259 NLRB 1240(1982).

The Examiner in *City of Pasco* noted:

- a grievance meeting is not an "audience" benevolently granted by a master to a servant;
- a grievance meeting is one between equals who can be expected to vigorously advocate their respective positions; and
- a grievance meeting is but another aspect of collective bargaining, which may include acceptable levels of controversy, questioning of authority, and even some profanity.

City of Pasco, Decision 3804. The Commission, in affirming this decision, concluded that if behavior becomes too disruptive or confrontational, it loses its protection under the collective bargaining statute.

Under Commission precedents, union representatives are not passive observers when meeting with employer representatives. The Commission has consistently affirmed this principle in cases involving disciplinary investigations (*Weingarten* cases). *King County*, Decision 4299-A (PECB, 1993); *City of Bellevue*, Decision 4324-A (PECB, 1994)("union representatives cannot be completely silenced"). Commission and NLRB precedent involving grievance meetings recognize the same rule. *Pierce County Fire District 9*, Decision 3334; *City of Pasco*, Decision 3804-A.

Closely related to the right of union agents to speak is the principle that while engaged in collective bargaining activities employer and union agents are on an equal footing, regardless of whether the union agent is a subordinate employee in relation to the employer's representative. *City of Pasco,* Decision 3804-A.

No bright line exists, however, in deciding when statements by employee/union agents are protected, and when an employer interferes with employee rights by taking action in response to those statements. It is the context of both the statements and the response that determines whether the employer interfered with employee rights.

I have considered the following criteria in analyzing Nervik's claim:

- the nature of the dispute;
- the actions and words of the parties during the grievance meeting; and
- the employer's response.

The nature of the dispute can range from a meeting over termination or suspension, to one involving contractual issues such as work hours or assignments. The words and actions of the employer and union representatives are critical to the analysis. Did either the employer or union agents, through words or body-language, provoke the other party's outburst or exacerbate the tension surrounding the meeting? Did either party use profanity, sarcasm, slurs or threats? If so, what words were used? Finally, how did the employer respond to the union agent/employee's words? Was its response reasonable or an overreaction? For example, did the employer terminate the employee for the outburst, or was there a similar verbal response from the employer's agent?

Application of Standards

A significant point of disagreement between the parties is whether Stormo and Nervik were on equal footing during the grievance meeting. Stormo asserts that Nervik remains his subordinate even when acting as a union agent. This is incorrect. On the other hand, Nervik believes that his status as a union agent absolves him of restrictions on courteous behavior. This is also incorrect.

The facts in this dispute are uncontested. The meeting was a first level grievance meeting over a contractual dispute. Stormo did not attempt to silence Nervik in the meeting, but let him speak freely. Stormo explained his position and remained calm. Stormo attempted to disengage from a confrontation. Nervik raised the level of emotion by challenging Stormo's attempt to leave. Stormo's reaction was to send a memorandum to Nervik concerning his behavior. That Stormo was offended by Nervik's words is obvious. However, Stormo chose a low-level response to the matter, recognizing Nervik's right to passionately represent union members.

This case would be different had Stormo, during or after the meeting, engaged in the following conduct:

- instructed Nervik to remain silent;
- admonished him for speaking at all;
- placed Nervik on a progressive discipline path with a written warning or more; or
- continued to plague Nervik over this incident.

The record reveals none of this. On the contrary, the evidence is that Stormo believed Nervik was disrespectful, and that his rudeness had nothing to do with the merits of the grievance. The memorandum ended the matter as far as Stormo was concerned.

Nervik did not carry his burden of proof on any level of the complaint. In analyzing Nervik's interference claim, the pertinent questions are: (1) did Nervik engage in protected union activity? (2) would a reasonable employee perceive the employer's action as a threat of reprisal or force, or promise of benefit, for the protected activity? and (3) was Nervik harmed by the employer's response?

First, while his actions in representing the other two employees in the grievance meeting were protected, no evidence supports protection for Nervik's final exclamatory statement to Stormo. It is not clear why Nervik issued the challenge. Was it to incite Stormo and provoke a response? Did Nervik expect Stormo to meekly acquiesce to Nervik's command? Nervik offered no explanation for his words, other than the implication that as a union agent he can say anything he wants to at any time.

Second, based upon Stormo's memorandum, a reasonable employee would not see Stormo's reaction as a threat of reprisal or force for union activity. Stormo did not admonish Nervik for being a shop steward, for being at the meeting, or for speaking. Had Nervik allowed Stormo to disengage without further comment, this case probably would not have arisen. In fact, it is more likely that had Stormo intended to retaliate against Nervik for the meeting, or for Nervik's actions as shop steward, he would have chosen another seemingly unrelated reason for doing so. Stormo was upset at Nervik's parting shot, not the grievance meeting. The evidence shows that Stormo admonished Nervik over his final words to Stormo, not his actions as the union agent.

Third, Nervik offered no evidence of harm. The record does not reveal the memorandum's effect upon Nervik. Did Nervik immediately resign as shop steward? Did he thereafter decline to speak in grievance meetings? Did his most recent performance evaluation

suffer in comparison to earlier ones, based on this incident? The record is silent on these questions.

Nervik presented only a brief case-in-chief. He did not call any supporting witnesses. The Examiner concludes from Nervik's minimal participation in this case that he believes the employer's memorandum is sufficient proof of interference. It is not. The complaint fails.

FINDINGS OF FACT

1. The University of Washington is a public employer under RCW 41.80.005(8).

2. Michael Nervik is an employee of the University of Washington under RCW 41.80.005(6).

3. On February 21, 2006, Nervik acted as a union agent in representing two employees in a grievance meeting with an employer representative. The meeting was the first step in the grievance process. The employer representative attempted to conclude the meeting by stating that he would not argue with Nervik. Nervik replied, "yes you will." The employer representative exited the meeting.

4. On February 22, 2006, the employer representative sent Nervik a memorandum concerning Nervik's final words at the meeting. The memorandum was placed in a supervisory documentation file for use in Nervik's evaluation. The employer took no further action against Nervik.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-45 WAC.

2. By sending a memorandum to Michael Nervik, as described in Findings of Fact 3 and 4, the University of Washington did not interfere with employee rights or violate RCW 41.80.110(1)(a).

ORDER

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

Issued at Olympia, Washington, this 5th day of April, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, Unfair Labor Practice Manager[1]

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.

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[1] I was promoted to the position of Unfair Labor Practice Manager on February 19, 2007.