

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ROBERT SCHAUER,	)	
	)	
Complainant,	)	CASE 20434-U-06-5206
	)	
vs.	)	DECISION 9749 - PSRA
	)	
WASHINGTON STATE DEPARTMENT	)	
OF REVENUE,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	

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Richmond Law Group, by *James P. Richmond*, Attorney at Law, for the employee.

Attorney General Rob McKenna, by *Franklin Plaistowe*, Assistant Attorney General, for the employer.

On June 1, 2006, Robert Schauer filed an unfair labor practice complaint with the Public Employment Relations Commission against the Washington State Department of Revenue (employer), charging employer interference with employee rights in violation of RCW 41.80.110(1)(a) and domination or assistance of a union in violation of RCW 41.80.110(1)(b). A preliminary ruling was issued on July 13, 2006, finding a cause of action. The hearing in this matter was held on December 18, 2006, and post hearing briefs were filed.

Based on the evidence provided, the Examiner finds that the employer did not interfere with employee rights, nor dominate nor assist the union by requiring Schauer to submit a form which described his outside activity. The complaint is therefore dismissed.

ISSUES PRESENTED

1. Should the complaint be dismissed since Schauer is no longer an employee of the employer?
2. Did the employer interfere with Schauer's protected rights by requiring him to submit a form concerning his involvement with the Fair Washington Labor Association (FWLA)?
3. Did the employer dominate or assist the Washington Public Employees Association by requiring Schauer to submit a form concerning his involvement with the Fair Washington Labor Association (FWLA)?

Issue 1: Should the complaint be dismissed?

Upon commencement of the hearing on December 18, 2006, the employer moved for dismissal of this case on the basis that Schauer is no longer an employee of the employer. The Examiner deferred her ruling to be addressed in this decision and does so briefly below.

Schauer was employed by the employer at the time of the alleged complaint. Although he no longer is employed with the employer, the allegations, which state a cause of action, occurred during his employment. Regardless of his employment status with the employer at the time of hearing, under RCW 41.80.120(1) Schauer timely filed his complaint with the Commission and therefore, the employer's motion is dismissed.

Issue 2: Did the employer interfere with Schauer's protected rights by requiring him to submit a form concerning his involvement with the Fair Washington Labor Association (FWLA)?

Interference Standard

It is an unfair labor practice for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by [the Personnel System Reform Act (PSRA), Chapter 41.80 RCW]." RCW 41.80.110(1)(a). The PSRA provides employees with the right to "form, join, or assist employee organizations . . . free from interference, restraint, or coercion." RCW 41.80.050. The Commission has determined that an interference violation is committed where one or more employees could reasonably perceive an employer action as a threat of reprisal or force or promise of benefit associated with the pursuit of rights under Chapter 41.56 RCW. It is not necessary for a complainant to show that the employer intended to interfere, or even that the employees involved actually felt threatened. *City of Omak*, Decision 5579-B (PECB, 1997); *City of Tacoma*, Decision 8031-A (PECB, 2004). The Commission noted in its decision in *King County*, Decision 6994-B and 6995-B (PECB, 2002), that "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." See also *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004).

The complainant has the burden of proof in unfair labor practice claims. WAC 395-45-270(1)(a). A complainant is not required to show intent or motive for interference or that the employee involved was actually coerced, or that the respondent acted with union animus. *King County*, Decision 8630-A (PECB, 2005). However, the complainant bears the burden of demonstrating that the employer's conduct resulted in harm to protected employee rights. See *City of Wenatchee*, Decision 8802-A (PECB, 2006).

No discouragement of protected activities

On December 15, 2006, Schauer and a co-worker formed the Fair Washington Labor Association (FWLA) and filed articles of incorporation with the Secretary of State. The purpose of the FWLA is:

to fairly represent the interests of current and former Washington State Employees; to organize; recruit; coordinate, advocate for; provide a public voice for; negotiate on behalf of and defend the rights of current and former Washington State Employees.

At some point after filing the articles of incorporation, Schauer's co-worker submitted an outside paid and volunteer employment record form to the employer and attached FWLA's articles of incorporation.

The outside paid and volunteer employment form is to be filled out by all employees engaged in activities outside their usual employment. The employer uses this form to obtain information concerning employees' outside activities that could pose a conflict of interest with their employment with the employer. Although the form itself may not prevent a conflict of interest from arising, it alerts the employer to potential conflicts. For this reason, the employer requests all employees engaged in outside employment or volunteer activity to fill out the form.

After Schauer's co-worker submitted his form, the employer reviewed it and the attached articles of incorporation. At this point, the employer noticed Schauer was named as vice president of operations and treasurer of the FWLA, but had not submitted an outside paid and volunteer employment form on his own behalf. Although the employer acknowledged that the form is not submitted by employees 100 percent of the time, when the employer does become knowledgeable about someone's outside activity they routinely ask for an outside paid and volunteer employment form to be completed. Therefore, the employer requested that Schauer submit the form reporting his outside activity.

The impetus for having Schauer submit the form was based on the fact that Schauer's co-worker submitted to the employer FWLA's articles of incorporation and Schauer was mentioned as a corporate officer. For that reason, in February 2006 Schauer's supervisor, Sandra Hurley, verbally requested the form from him. During the course of the conversation between Schauer and Hurley, the issue of decertification was discussed. Schauer testified that Hurley told him during the course of their conversation that the basis for requesting the form was due to his decertification activities. However, Hurley testified that she did not believe she was the one who brought up the issue of decertification. She further testified that she told him her supervisor had asked her to request the form from Schauer because he was involved in an outside activity and they did not know the type of activity in which he was involved, therefore, the form needed to be submitted.

After Hurley initially requested the form from Schauer, he refused to provide it, stating that he had the right to be involved in union activity without permission from his employer. Subsequently Schauer talked with the program manager, and the assistant director of the audit division concerning the issue of submitting the form. During the course of these discussions Schauer was told that the reason for the request was to be consistent in having the form submitted by people engaged in outside activities and to make sure conflicts of interest do not exist. Schauer responded that he believed there was no conflict of interest and that the employer's request for the form interfered with his rights under RCW 41.80. However, the employer stated that it was requesting the form because it knew that Schauer was involved in an outside organization or activity.

There was no evidence to show that the employer was, in fact, interested in type of organization or activity in which Schauer was

involved, but rather testimony showed that it was attempting to assess whether a conflict of interest existed between his duties and involvement as a corporate officer of the FWLA and his job duties with the employer. Through out the course of discussion between Schauer and the employer, it was made clear that the purpose for requesting the form was to assess whether or not a conflict of interest was present and to have the form on file in the event a question of conflict arose in the future. From these on-going conversations and the fact that the form is routinely expected to be submitted when an employee is involved in an outside activity, a typical employee would not view the employer's request for the form as an attempt to discourage protected activity.

#### No harm

Schauer continued to argue that the employer's insistence on him submitting the form interfered with his rights by requesting to approve his involvement in the FWLA. In April 2006, after much communication with the employer, Schauer eventually did submit the form, but under protest. The employer reviewed his form and approved his report of his outside activity.

Schauer failed to prove that there was any actual harm to his protected right to form an employee organization. Therefore, the employer did not interfere with Schauer engaging in protected activity.

#### No threat of reprisal

Although Schauer testified that he felt he might be terminated for "fail[ing] to fill out a policy or conform to a policy," there is no indication that a typical employee would perceive any threat of reprisal for involvement in protected activity of forming a labor organization. During the course of correspondence with the employer as mentioned above, Schauer asked his supervisor "what can

I expect from the [employer] if I do not file the form?" The employer responded by saying that if Schauer decided that he would not fill out the form then it would need to look into what the potential consequence would be, if any, for not filling out the form since that had not occurred before. After this conversation, the employer continued to have on-going conversations with him about submitting the form. In his testimony, Schauer did not explain that there was any reason for him to believe that he would be disciplined for engaging in protected activities and the employer never threatened to discipline him during their conversations. Schauer failed to prove that an employee could reasonably perceive the employer's action of requesting the form as a threat of reprisal or force or promise of benefit associated with the right to organize. Although Schauer may have personally believed that he would be disciplined for insubordination if he did not submit the form, there is no indication that a typical employee would perceive that there would be potential discipline for engaging in the protected activity of organizing a union.

Schauer failed to prove that an employee could perceive the employer's actions as a threat of reprisal or a discouragement to engage in protected activity. The outside paid and volunteer employment form is a routine form that is requested by all employees when engaged in outside activity. Schauer was engaged in outside activity as a corporate officer of a corporation, the FWLA, and therefore on a routine basis the employer requested the form. Additionally, there was no proof of actual harm or threat of reprisal to Schauer's protected right to organize. For these reasons, the interference complaint is dismissed.

ISSUE 3: Did the employer violate RCW 41.80.110(1)(b) by dominating or assisting the Washington Public Employees Association when it requested Schauer to submit a form concerning his involvement with the FWLA?

It is an unfair labor practice "[t]o dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it . . ." The legislature has forbidden employers from involving themselves in the internal affairs of unions, from showing a preference among two or more unions competing for the same group of employees, or from providing financial or other support to a union, any of which could compromise the independence of the union as the exclusive bargaining representative of the employees. *Tacoma school District*, Decision 5446-D (EDUC, 1997). In *Pierce County*, Decision 1786 (PECB, 1983), the Commission found that the finding of a violation requires proof of employer intent to assist one union to the detriment of others.

Schauer provided no evidence of the employer showing a preference to the Washington Public Employees Association over the FWLA or that it was providing any support to the Washington Public Employees Association. Schauer believes that the employer alluded that Washington Public Employees Association instigated the request for him to submit the form because the employer stated to him in a conversation that it had "contractual obligations with other organizations." The program manager testified that in his conversation with Schauer he was explaining that the contract between the Washington Public Employees Association and the employer requires that all policies be applied "uniformly and consistently." This however, does not connect the Washington Public Employees Association to the request of the form from Schauer, nor does it show the employer was assisting or had intent to assist the Washington Public Employees Association. Schauer did not provide any evidence of intentional employer action to assist the Washington Public Employees Association to the detriment of the FWLA. Therefore, the domination and assistance complaint is dismissed.



FINDINGS OF FACT

1. The State of Washington is an employer, within the meaning of RCW 41.80.005(8), of employees working at the Washington State Department of Revenue, which is a general government agency within the meaning of RCW 41.80.005(1).
2. The Washington Public Employees Association is an employee organization within the meaning of RCW 41.80.005(7), and is the exclusive bargaining representative of bargaining unit members at the Department of Revenue, which at all times relevant to this case, included employee Robert Schauer.
3. Robert Schauer and a co-worker formed the Fair Washington Labor Association and filed articles of incorporation with the Secretary of State on December 15, 2005.
4. Upon a review of the outside paid and volunteer employment record form submitted by a co-worker, the employer noticed Schauer was listed on the Fair Washington Labor Association's articles of incorporation as a corporate officer.
5. The employer routinely requested that Schauer submit an outside paid and volunteer employment record form to document his outside activity.
6. The employer engaged in multiple conversations with Schauer explaining the reason for requesting the form was to assess whether or not a conflict of interest existed between his employment with the employer and his outside activity.
7. In April 2006, Schauer submitted the outside paid and volunteer employment record form under protest. The employer approved Schauer's outside activity as stated on the form.

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. The employer did not interfere with employee rights in violation of RCW 41.80.110(1)(a) when it requested that Schauer submit an outside paid and volunteer employment record form as described in Finding of Fact 5 above.
3. There was no evidence presented that the employer dominated or assisted the Washington Public Employees Association in violation of 41.80.110(1)(b) through the action of requiring Schauer to submit an outside paid and volunteer employment form as described in Finding of Fact five above.

ORDER

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

ISSUED at Olympia, Washington, this 20th day of June, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CHRISTY YOSHITOMI, 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

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
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