STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PAUL GRASS,	)	
	)	
Complainant,	)	CASE 20933-U-07-5342
	)	
vs.	)	DECISION 10013-A - PECB
	)	
CITY OF BRIER,	)	
	)	
Respondent.	)	DECISION OF COMMISSION
	)	

Emmal Skalbania & Vinnedge, by *Alex J. Skalbania*, Attorney at Law, for the complainant.

Davis Grimm Payne & Marra, by *Eileen M. Lawrence*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by the City of Brier (employer) seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Karyl Elinski.[1] Complainant Paul Grass (Grass) supports the Examiner's decision.

ISSUE PRESENTED

Did the Examiner err in concluding that the employer discriminated against Grass by terminating his employment in reprisal for engaging in protected union activities?

For the reasons set forth below, we reverse the Examiner's decision that the employer violated RCW 41.56.040 and RCW 41.56.140(1) when

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[1] *City of Brier*, Decision 10013 (PECB, 2008).

it terminated Grass's employment. The record does not support a finding that union animus played a substantial motivating factor in the employer's decision. Furthermore, although the employer did not appeal the Examiner's findings and conclusion that it committed an independent interference violation by making certain statements to the complainant, we reverse that conclusion because the statements were made more than six months prior to Grass's complaint.[2]

STANDARD OF REVIEW

This Commission reviews conclusions and applications of law and interpretations of statutes de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings support the examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the matter. *Renton Technical College*, Decision 7441-A (CCOL, 2002). 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). If the examiner applied the correct legal standard to facts supported by substantial evidence, the decision should be upheld. *Clark County*, Decision 9127-A (PECB, 2007).

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[2] As a result of the dismissal of this case, it is unnecessary to address the issue raised by the employer concerning whether Grass's post-termination conduct impacts the Examiner's reinstatement order.

ANALYSIS

Applicable Legal Standards

An employer unlawfully discriminates against an employee when it takes action against the employee which is in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The employee maintains the burden of proof in employer discrimination cases. To prove discrimination, the employee must first set forth a prima facie case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. The employer deprived the employee of some ascertainable right, benefit, or status; and

3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). Where the employee establishes a prima facie case, the employee creates a rebuttable presumption of discrimination.

In response to an employee's prima facie case of discrimination, the employer need only articulate its non-discriminatory reasons acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A

(PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County*, Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

To prove discriminatory motivation, the employee must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. An examiner can infer knowledge when the employee has engaged in overt union activities and when the employer's operation is small in size. *Metropolitan Park District of Tacoma*, Decision 2272, *aff'd*, Decision 2272-A (PECB, 1986).

Application of Standards

The employer maintains a police force fluctuating in size from four to seven officers. The employer hired Grass as a full-time police officer effective October 1, 2005. Consistent with the collective bargaining agreement between the employer and the Brier Police Association (union), Grass worked subject to a twelve-month probationary period. During the probationary period, the employer could terminate Grass's employment without establishing "just cause." On August 31, 2006, prior to the end of the probationary period, the employer terminated Grass's employment. In the notice of termination, Chief of Police Don Lane stated:

> The City has decided to release you while on probation; this decision is related to your performance and attitude, specifically the City of Brier being a community friendly city and your continued condescending and

> arrogant attitude to citizens in Brier and other citizens traveling through. I have received ongoing complaints about this from members of the community and confirmed these concerns. I have also discussed our interest in remaining a community friendly policing agency with you and have seen no improvement in your performance or reduction in the number of complaints and concerns. Your performance and attitude does not meet with the City's objectives and our officer standards.

Employee's Prima Facie Case

The employer argues that the Examiner erred in determining that Grass established a prima facie case of discrimination. We disagree. No question exists that the employee met the first two elements in establishing a prima facie case. The employee participated in protected activity, including serving as vice-president of the union, and participating on the union's bargaining team. The employer knew of this protected activity when it terminated Grass's employment. The only question remains whether Grass established the required causal connection.

Examiner's Finding of Causal Connection

The Examiner found a causal connection between Grass's termination and the following:

- In December of 2005, Lane initiated a meeting with Grass. During that meeting, Grass advised Lane that he had been elected vice-president of the union. At that time, Lane warned Grass that "new hires in union positions get the short end of the stick." (Finding of Fact 7).

- Grass supported Murphy[3] in his union activities. (Finding of Fact 10).

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[3] Officer Pat Murphy served as union president during the time of Grass's employment.

- Grass helped prepare the union's initial bargaining proposal for contract negotiations in the summer of 2006. (Finding of Fact 11).

- Grass served on the union's bargaining team in the summer and fall of 2006, and was an active participant in contract negotiations during that time. (Finding of Fact 12).

- On August 30, 2006, Grass was "vocal" at a union meeting concerning contract negotiations. (Finding of Fact 16).

The employer argues that substantial evidence does not support a number of the Examiner's findings, including the above-referenced Findings of Fact 10, 11, 12 and 16, and that substantial evidence does not support a causal connection between those findings and Grass's termination from employment. We review each of the Examiner's five findings of fact that form the basis of her causal connection determination.

Lane's December 2005 Statement to Grass

Although the employer contested the December 2005 statement at hearing, the employer did not appeal this finding of fact. As a result, we treat it as a verity on appeal. *City of Redmond*, Decision 8863-A (PECB, 2006).

Grass Supported Murphy in his Union Activities

It is undisputed that Grass served as vice-president and Murphy served as president of the union. Both were members of the union's bargaining team. To the extent the Examiner intended this finding to capture something more than the above, the record does not support it.

The record clearly demonstrates conflict between Murphy and Lane as well as conflict between Murphy and other bargaining unit employees. For example, as the Examiner found, shortly after Mayor Bob Colinas took office in November 2005, Murphy aired some of his concerns regarding Lane with Colinas, as did Grass. During the December 2005 meeting between Grass and Lane when Lane made the "short end of the stick" comment, he also expressed concern that Grass was aligning himself with Murphy. Grass testified that he thought his relationship with Murphy played a role in his termination because "I definitely was vocal about supporting Pat [Murphy] in the union as well as in his -- in several of the claims against him. That's pretty much all."

The record does not support a conclusion that any of these conflicts or concerns with Murphy related to union matters. No evidence suggests that Murphy or Grass spoke with Colinas in their capacity as union officers. Grass testified that as union officers he and Murphy worked together on union matters. Other than working together to negotiate a new collective bargaining agreement, this record contains insufficient evidence to establish that the conflicts involving Murphy related to union matters or involved him or Grass as union representatives.

We do not disturb the finding that Grass supported Murphy in his union activities. We simply emphasize a narrow reading of the finding of fact.

Grass's Involvement with Union's Initial Bargaining Proposal

Although the record contains substantial evidence demonstrating how Grass helped prepare the union's initial bargaining proposal, the record is less clear on the employer's awareness of Grass's role. In a footnote in the decision, the Examiner states:

> Detective Lori Batiot, an apparent confidante of Lane, was aware that Grass participated in preparing the proposal. Given the small size of the department, it is not a stretch to assume that Chief Lane was also aware of that fact.

Officer Michael Javorsky, a probationary employee who also served on the union's bargaining team, testified that he thought it was just Murphy who prepared the proposal and that he was unaware of the fact Grass helped to prepare the proposal.

Although we are concerned by the Examiner's "stretch" to assume that the employer was aware of something that a union bargaining team member was not even aware of, we do not disturb this finding as it does not impact the outcome.

Grass's Service on the Bargaining Team

The employer minimizes Grass's role on the bargaining team stating that he did not play a central role and that at most he attended two sessions, the first of which established ground rules, the last of which was in June of 2006. Grass testified he attended two or three sessions and that he was an active participant. The parties agree that during a bargaining session Grass explained how twelve-hour shifts could work for overtime purposes.

Because his employment ended effective August 31, 2006, the Examiner erred in finding that Grass served on the bargaining team in the fall of 2006. We revise Finding of Fact 12 to delete reference to Grass bargaining in the fall of 2006. We find substantial evidence supports that Grass was an active participant on the bargaining team even if he only attended two sessions.

Grass "Vocal" at August 30, 2006 Union Meeting

Despite the small size of the employer's operation, the record does not support that the employer was aware a union meeting took place

on August 30, 2006, or who said what at the meeting. At hearing, Grass admitted that he had no information other than pure speculation that Lane was aware of what Grass said at the union meeting.

Furthermore, the record supports that the employer had already decided to terminate Grass's employment by August 30, 2006. The undisputed testimony shows that Lane informed Mayor Colinas one to two weeks prior to the termination meeting of his intention to terminate Grass's employment. As a result, substantial evidence does not support a finding that the employer knew Grass was vocal at an August 30, 2006, union meeting when it decided to terminate him. We amend Finding of Fact 16 accordingly.

Causal Connection

After removing from consideration those findings for which there is not substantial evidence, we consider whether Lane's December 2005 warning, coupled with Grass's support of Murphy in his union activities, including serving as vice-president, serving on the bargaining team, and helping to prepare the initial contract proposal in the summer of 2006, establish a causal connection to Grass's termination from employment. We find that the Examiner did not err in finding a causal connection between Grass's union activity and his termination. Accordingly, Grass established a prima facie case for discrimination.

The Employer's Non-Discriminatory Reasons

We agree with the Examiner that the employer met its burden of articulating legitimate, non-retaliatory reasons for its actions. During the eleven months of Grass's employment, the employer received a number of complaints and concerns about Grass's

performance.[4] The complaints came from members of the public as well as Grass's colleagues. Lane and two bargaining unit employees testified at hearing about the concerns with Grass's performance.[5]

Lane testified that Grass failed to understand the community policing concept and that Grass's approach to members of the community was inappropriately aggressive, condescending, and demeaning. Grass's demeanor toward co-workers, citizens and his supervisor also showed a consistent pattern of difficulty in accepting constructive criticism, following instructions, and interacting appropriately with others. In one instance, Lane warned Grass about potential insubordination if Grass did not cooperate with an investigation Grass himself initiated.

Lane testified that each complaint by itself was not necessarily a major issue but the pattern caused him concern. He testified that he spoke with Grass about the concerns as they arose and counseled him. Lane acknowledged that he neither disciplined Grass nor placed him on any type of improvement plan.

Employee's Ultimate Burden of Proof

The Examiner concluded that Grass met his ultimate burden, proving that union animus played a substantial motivating factor in his termination from employment. In reaching this conclusion the Examiner rejected consideration of the fact that Grass was not retained past his probationary period with two other law enforcement agencies, disputed the significance of the fact that the other

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[4] Lane estimated that he counseled Grass about seven to ten complaints. Grass testified that he specifically recalled Lane advising him of four complaints.

[5] Batiot, one of the bargaining unit employees who testified, served as union secretary "for years" and was serving as union president at the time of the hearing.

probationary employee on the union bargaining team suffered no adverse impact, and discredited the employer's reasons for terminating Grass's employment during his probationary period. While discrediting the employer's positions, the Examiner identified very limited evidence of union animus and failed to explain or provide a basis for resolving her credibility findings.

The Examiner pointed to the employer's bargaining proposal that would have excluded probationary employees from participating on the union bargaining team, the employer's frustration with the union's initial bargaining proposal, contentiousness at the bargaining table, and Lane's December 2005 statements.

Grass's Prior Employment Terminations

The record demonstrates that Grass had been employed by two other law enforcement agencies prior to working for this employer and that he did not continue with those agencies past his probationary periods. Grass was allowed to resign from King County prior to the conclusion of his probationary period. The Duvall-Carnation Police Department terminated his employment at the conclusion of his probationary period. Grass testified that in King County he had a problem with multi-tasking and was not a good fit. In Duvall, he was not given a reason for his firing, but Grass testified that he thought it was due to a car accident.

Lane talked with David Merryman, Police Chief of the Duvall-Carnation Police Department, prior to terminating Grass's employment. During that meeting he learned that Merryman's concerns with Grass's performance were similar to his own concerns, including Grass's inability to adapt and fit with the culture of Duvall, his difficulty getting along with others, and his questionable judgment.

The Examiner appeared skeptical about Lane contacting Merryman. Her decision stated: "Shortly after the union presented its initial bargaining proposal, Lane began to build his case against Grass. Lane met with Duvall's Chief of Police for the sole purpose of determining why Duvall did not retain Grass, despite the employer's thorough pre-hire investigation of Grass." The Examiner does not address the fact that two other agencies let Grass go at the end of probation or that the last agency had concerns with Grass's performance that were similar to the employer's concerns. The Examiner's negative inference from Lane's actions is not warranted or supported by the record. We amend Findings of Fact 20 and 21 accordingly.

No Adverse Action Against Other Probationary Employee

The Examiner did not find it compelling that another probationary employee, Javorsky, served on the union's bargaining team without suffering any adverse employment action. Testimony from multiple witnesses demonstrate that Javorsky had an adversarial approach toward the employer at the bargaining table and that he did not fully support the union's proposal. Javorsky testified:

> The whole contract was - I felt was garbage. And the city had ultimate power over the officers, it wasn't like a 50/50 thing. There were so many issues in there that they just had the power over us. And I brought it up, and one of the negotiators on the city side was saying, well, you know we spend all the time working on this, we spent weeks and we're very proud of it, etcetera, etcetera. I said I don't care, it's irrelevant, it's garbage. You spent two weeks on garbage. And you know, I - I was the one who was the most adversarial in the whole situation.

The fact that other employees who were involved in union activities, including another probationary employee, were not subject to any adverse employment action supports the employer's defense that

Grass's protected activities did not play a substantial role in its decision.

Employer Bargaining Proposal

One of the Examiner's findings of fact addresses the employer's bargaining proposal that would have barred a probationary employee from serving on the union bargaining team. The employer presented this proposal after terminating Grass. The employer readily withdrew the proposal in response to the union's objections.

The employer argues that this evidence is inadmissible post-termination evidence. We disagree. Case precedent specifically authorizes consideration of such evidence to prove motive. *Pasco Housing Authority*, Decision 6248-A (PECB, 1998). Although the evidence is admissible, the Examiner drew a negative inference from the evidence and did not appear to consider the employer's rationale for the proposal. After terminating Grass's employment, Lane and Colinas heard the allegation that Grass was fired because of his involvement with bargaining. The testimony and evidence demonstrate that Lane and Colinas were concerned that when a probationary employee participated in bargaining, the union would argue any adverse action taken against the employee was union-related. The fact that this proposal came after Grass's termination is important because it demonstrates that Lane and Colinas wished to avoid future situations similar to the one presented in this case. Substantial evidence does not exist in this record supporting the Examiner's negative inference that the employer's bargaining proposal represents union animus. Accordingly, that finding must be reversed.

Frustration with Union's Proposal, Contentious Bargaining

The record reflects that Lane and Colinas, the two members of the employer's bargaining team, were frustrated by the union's initial

bargaining proposal and that bargaining was contentious. The union's initial proposal constituted a significant re-write of a bargaining agreement that Lane and Colinas had participated in negotiating. The record contains no allegations of employer bad faith bargaining and no evidence of anti-union remarks stemming from the proposal or bargaining. Lane and Colinas' feelings of frustration during the bargaining process and contentiousness at the bargaining table do not constitute evidence of union animus.

Employer's Termination of Grass's Employment During Probation

The Examiner discredits the employer's reasons for terminating Grass's employment. Specifically, the Examiner noted that the employer took no disciplinary action against Grass, did not place him on an improvement plan, and did not advise him he needed to improve.

The employer terminated Grass's employment during his probationary period. Employers are not required to use progressive discipline with probationary employees or place those employees on plans for improvement to help correct performance deficiencies. Furthermore, unless collective bargaining agreements or employer policies provide otherwise, this Commission cannot mandate that employers implement progressive discipline for probationary employees through our interpretation of Chapter 41.56 RCW. Simply put, probationary employees serve as "at will" employees whose employment may be terminated without cause.[6] In this case, the parties' bargaining agreement did not require the employer to use progressive discipline, to develop plans for improvement, or to use a just cause disciplinary standard for probationary employees.

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[6] However, an employer may not discriminatorily terminate a probationary employee in violation of RCW 41.56.140(3), or in violation of other public policy against discrimination based upon race, religion, or gender.

The record contains limited documentation of the employer's concerns with Grass's performance. It may have been a better human resources practice for the employer to fully document the performance concerns, even for a probationary employee. The record, however, including the testimony of two bargaining unit employees, clearly establishes that the employer's concerns with Grass's performance were real and not pretextual.

We cannot agree that the Examiner's negative credibility findings are supported by this Commission's precedents or by the evidence. By discrediting the employer's non-discriminatory reasons based upon the employer's failure to have disciplined Grass or place him on an improvement plan, the Examiner essentially shifted the burden to the employer to prove that its motives were non-discriminatory. That is not the standard set forth in *Educational Service District 114*, Decision 4361-A, which clearly requires the complainant to carry the burden throughout the proceedings.

Summary

In the eight months following Lane's December 2005 statements to Grass, the record shows no other statements or actions that support a finding of union animus. The record contains no evidence that the employer targeted Grass for his union activities. Instead, the record demonstrates that the employer had legitimate concerns with Grass's performance and took action to terminate his employment during his probationary period. Substantial evidence does not support the Examiner's conclusion that Grass met his ultimate burden of proof.

CONCLUSION

We reverse the Examiner's conclusion that the employer discriminated against Grass when it terminated his employment. We conclude

that Grass's protected union activities were not a substantial motivating factor for the employer's decision and the employer's reasons for discharge were not pretextual.

DISMISSAL OF INTERFERENCE COMPLAINT

RCW 41.56.160(1) limits the Commission's ability to process unfair labor practices that occur more than six months before the filing of the complaint. The Examiner concluded that the employer interfered with Grass's rights when Lane advised Grass that probationary employees in union positions "get the short end of the stick" and warned Grass not to align himself with Murphy. This conclusion is based on a statement made in December of 2005. The employee filed his complaint on February 22, 2007, well past the six-month statute of limitations.

Although the employer did not raise the statute of limitations as a defense, this is a jurisdictional issue that the Commission may raise at any time. *City of Bellevue*, Decision 9343-A (PECB, 2007). As a result, we vacate Conclusion of Law 3.[7]

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

We adopt the Findings of Fact issued by Examiner Karyl Elinski as the Commission's Findings of Fact except: we strike paragraph 25

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[7] It is also appropriate to dismiss the interference complaint where, as here, we have dismissed the discrimination complaint. The Commission does not find independent interference violations based upon the same facts in a dismissed discrimination complaint. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

from the record, we renumber paragraph 26 as paragraph 25, we add a new paragraph 26, and we amend paragraphs 12, 16, 19, 20, 21, and 24 as follows:

12. Grass served on the union's bargaining team in the summer of 2006, and was an active participant in contract negotiations during that time.

16. On August 30, 2006, Grass was "vocal" at a union meeting concerning contract negotiations. Grass failed to establish that the employer was aware of the meeting or who said what.

19. Grass was the subject of several citizen complaints regarding his performance. None of these resulted in discipline or corrective action. The parties' collective bargaining agreement did not require the employer to take discipline or corrective action.

20. The employer conducted a thorough background investigation of Grass prior to extending him an offer of full-time employment. Grass did not make it past his probationary period with two other law enforcement agencies.

21. Before terminating Grass's employment, Lane contacted the City of Duvall to determine why Grass was not retained as a police officer and learned that the City of Duvall had similar concerns with Grass's performance.

24. A causal connection exists between Grass's union activities described in Findings of Fact 7 and 10 through 12, and the employer's termination of Grass's employment described in Finding of Fact 17.

26. Grass filed the complaint alleging employer interference on February 22, 2007; this was more than six months after the conduct described in Findings of Fact 7 and 8 which are the basis for the Examiner's interference conclusion.

AMENDED CONCLUSIONS OF LAW

We affirm and adopt Conclusions of Law 1 and 4 issued by Examiner Karyl Elinski. We strike from the record Conclusions of Law 2 and 3 and replace those conclusions of law with the following:

2. The employer did not discriminate against Paul Grass in violation of RCW 41.56.040 or 41.56.140(1) when it terminated his employment.

3. Grass did not file the complaint alleging interference based upon statements made in December of 2005 within the statute of limitations set forth in RCW 41.56.160(1).

AMENDED ORDER

The complaint filed by Paul Grass against the City of Brier alleging unfair labor practices is DISMISSED.

Issued at Olympia, Washington, the 18th day of May, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. MCLANE, Commissioner