STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. MOSES LAKE SCHOOL DISTRICT, Respondent.	CASE 18557-U-04-4723 DECISION 8770-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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On May 25, 2004, Public School Employees of Washington (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, which named Moses Lake School District (employer) as respondent. The employer operates a Migrant Services Office and the union is the exclusive bargaining representative of the employees who work in that office.

There are two controversies in this case, based on different sets of facts. First, the union claims that through the demeaning conduct of Trish Tracy, Sylvia Pérez's supervisor, as well as through several adverse personnel actions that Tracy took, the employer interfered with Pérez's exercise of rights protected under Chapter 41.56 RCW. The union also alleges that the employer took adverse actions against Pérez when Tracy gave Pérez a poor performance rating, when the employer transferred Pérez, and when

the employer discontinued Pérez's migrant records clerk position. The union further alleges that the employer took these actions to discriminate against Pérez for filing a grievance through the union.

Agency staff reviewed the complaint under WAC 391-45-110 and issued a preliminary ruling, finding that a cause of action existed under RCW 41.56.140(1). Examiner Carlos R. Carrión-Crespo held a hearing on the case on September 28, 2004. The parties submitted post-hearing briefs.

ISSUES PRESENTED

1. Did the employer interfere with Pérez's rights protected by Chapter 41.56 RCW?

2. Did the employer discriminate against Sylvia Pérez for engaging in protected activity?

On the basis of the record presented as a whole, the Examiner holds that the union did not meet the burden of proof necessary to establish that the employer violated RCW 41.56.140(1), nor that it infringed upon Pérez's rights guaranteed by RCW 41.56.040. The union did not prove that the employer interfered with Pérez's rights under the statute, nor that the employer discriminated against Pérez when it evaluated Pérez's performance or when it transferred Pérez to North Elementary School.

ANALYSIS

ISSUE 1: Did the employer interfere with Pérez's protected rights?

The Public Employees' Collective Bargaining Act, in RCW 41.56.040, grants public employees the right to organize and designate

representatives of their own choosing without interference, restraint, coercion or discrimination from their employer. RCW 41.56.140(1) protects these rights when it declares that it is an unfair labor practice for employers to interfere with employees when they exercise such rights.

The Commission has found that an employer interferes with an employee's rights:

> [W]henever 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. 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.

King County, Decision 6994-B (PECB, 2002) (citations omitted).

The Commission has not defined "threat of reprisal." In a footnote in *Kennewick School District*, Decision 5632-A (PECB, 1996), the Commission listed specific situations it had considered as such:

> The Commission has found interference where employees could reasonably perceive a lay-off of a union activist as a threat of reprisal associated with union activity (*City of Federal Way*, Decision 5183-A (PECB, 1996)); where an employee's prior behavior was characterized as misconduct and he was warned about it only after the processing of his grievance (*City of Pasco*, [Decision 3804-A (PECB, 1992)]); where the employer allowed an employee to have a union representative present during investigatory interview, but refused to allow the representative to actively participate in meeting (*King County*, Decision 4299 (PECB, 1993)); where the employer refused requests for a union representative at an "investigatory" meeting where the employee had a reasonable belief the interview could lead to disciplinary action against him (*City of Seattle*, Decision 3593-A (PECB, 1991)); and where employees could have perceived

> interview questions as directed toward stifling union activity, and characterization of a union activist as "iconoclastic" or "argumentative" could be reasonably perceived as a threat of reprisal associated with union activity. (*Port of Tacoma*, Decision 4626-A (1995)). The Commission found no interference violation in *Seattle School District*, Decision 5237-B (EDUC, 1996), where union activity was limited to a group grievance filed after the employer began working with the employee to improve performance, and the record was devoid of anti-union animus.

The protected activity

Filing and pursuing a grievance through a contractual procedure is a clearly protected activity. *Renton Technical College,* Decision 7441-A (CCOL, 2002). In a similar case, the Commission has found that an employee engaged in a protected activity through "efforts to obtain satisfactory break time arrangements through contacts with her union and the procedures of the collective bargaining agreement." *Valley General Hospital*, Decision 1195-A (PECB, 1981).

In the case at hand, the union alleges that Pérez engaged in an activity protected under Chapter 41.56 RCW when she sought the union's assistance between March and June 2003,[1] after Tracy notified her that the employer would reduce Pérez's work day from eight hours to five in September 2003. Pérez testified to that effect; she also declared that the union spoke to the employer on her behalf. The employer did not contradict Pérez's testimony during the hearing, and admits in its post-hearing brief that Pérez filed a grievance, which the employer rejected and which Pérez did not pursue further. Although the union could have provided more tangible evidence than it did, Pérez's declarations and the employer's admission allow the Examiner to find that Pérez engaged

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[1] The testimony was not clear on the date, but referred to the spring of 2003.

in protected activity when she sought the union's assistance in relation to a change in her hours of work.

Tracy's conduct during the 2003-04 school year

Tracy is the Federal Programs Director at Moses Lake School District. In that capacity, Tracy supervises the Migrant Services Office.

The union claims that the employer interfered with Pérez's rights when Tracy criticized Pérez harshly and in front of coworkers and when Tracy treated Pérez differently than other workers. The union claims that Pérez felt that Tracy's conduct threatened Pérez for filing the grievance on the change in work hours and constituted unlawful interference with Pérez's exercise of protected rights. Pérez indicated in her testimony that her relationship with Tracy was good before the employer changed Pérez's hours of work. Pérez described several events that indicated to her that Tracy's attitude towards her had changed after she sought assistance from the union. Although Pérez's testimony does not contain specific dates, the Examiner infers that all the events Pérez narrated occurred during the 2003-04 school year. The following will summarize Pérez's declarations and comment regarding each point.

Tracy's treatment of Pérez

Pérez described an incident in which Tracy criticized the way Pérez crafted a student roster. Tracy attempted to correct the problem personally and later asked Pérez's coworkers how long it would take them to do it. Pérez interpreted Tracy's intervention as an unfair measurement of her performance. Pérez also narrated two incidents where Tracy confronted her in the presence of a coworker and with an unfriendly tone of voice: in October 2003, asking to discuss her job performance; and later, asking her to be more efficient and to get used to change. On both occasions, Pérez said, she felt

embarrassed and humiliated, and felt that Tracy was moved by Pérez's complaint about the change in work hours.

On another occasion, Pérez overheard Tracy complain about discrepancies in Pérez's work on a new computer system, although she did not mention Pérez's name. In June 2004, Tracy rated Pérez's performance as poor. Pérez interpreted such evaluation as unfair and inaccurate, but did not file a grievance over it because she feared that Tracy would retaliate against her.

In its amended complaint, the union claimed that previous evaluations did not justify Tracy's criticism. Although Tracy's comments about Pérez's performance made Pérez feel uncomfortable and led to a poor performance evaluation, they could not be reasonably perceived as threats of reprisal for requesting union representation. However tactlessly delivered, they are more aptly described as warnings that Pérez's supervisor did not find her performance satisfactory. Without these comments, Pérez would not have had an opportunity to prevent the poor performance rating.

Since the complaint relates only to Tracy's conduct during the 2003-04 school year, previous evaluations are relevant only to establish two facts: first, that evaluations constituted a routine element in the relationship between Tracy and Pérez, not an isolated mechanism to punish Pérez; and second, that the problems did not exist in previous school years. The fear of retaliation that Pérez described does not meet the standard that the Commission has established for interference charges, since it did not keep her from exercising the right to reply to the evaluation, which the parties' collective bargaining agreement provided her.

Pérez testified that Tracy didn't treat her as well as she treated a coworker when both announced they were taking a longer lunch break, and that she had not experienced the poor way Tracy had

treated her in her 10-year experience in a school setting. Pérez filed a grievance on this last issue, but withdrew it to tackle the situation in a different way. Monte Redal, Assistant Superintendent for Business and Operations, who supervises the employer's Human Resources Director and participates both in bargaining and resolving grievances with the union, testified that he knew about a grievance that Pérez had filed alleging "favoritism . . . and discourteous treatment, harassment, intimidation . . ." but not retaliation for having sought assistance from the union. On cross-examination, Redal said that he had only interviewed one of Pérez's two coworkers before he concluded that Tracy had not treated Pérez in a discourteous or demeaning manner.

The aforementioned incidents constitute day-to-day workplace frictions that might reveal poor management skills, but do not rise to the level of threats of reprisal. The evidence does not show that a typical employee in the same circumstances could reasonably see the employer's actions as connected with her union activities. *City of Seattle*, Decision 3066-A (PECB, 1989). Therefore, the Examiner finds that the employer did not interfere with Pérez's rights through Tracy's conduct. The incidents that Pérez described in the hearing did not rise to the level of such interference.

Adverse actions taken by Tracy

Pérez declared that Tracy refused to allow a union representative in the meeting that Tracy called to discuss Pérez's performance. The union did not allege an independent violation of her right to have a union representative in the meeting. Therefore, the Examiner will address this fact as background information in support of the interference allegation. Further, this was not an investigative interview intended to result in disciplinary action, so Pérez did not have a right to have a union representative. *See Cowlitz County*, Decision 6832-A (PECB, 2000).

Pérez also testified that Tracy did not authorize Pérez's request to work overtime or at home to complete a job. However, the collective bargaining agreement does not require the employer to authorize overtime.

Pérez testified, in addition, that Tracy refused to authorize Pérez's pay for one of the days she had attended a conference. Redal testified that union and employer representatives discussed with Pérez how to compensate Pérez's attendance at the aforementioned conference, as well as the expectations that the employer had of Pérez's work performance. The employer decided to compensate Pérez for attending the conference each day.

Pérez narrated that Tracy reprimanded Pérez in writing on February 3, 2004, for sending out notices for a meeting one day late. The employer withdrew the reprimand from her personnel records after she filed a grievance. In doing so, the employer took prompt action to restore Pérez's rights and cannot be said to have taken adverse action. There was no threat involved, either, and thus no interference with the exercise of protected rights.

In conclusion, Tracy's actions did not amount to interference with Pérez's rights, since all of Pérez's claims were heard and most of them were granted.

Issue 2: Did the employer discriminate against Pérez for engaging in protected activities?

Commission precedent regarding RCW 41.56.040 and 41.56.140(1) indicates that in order to prevail in a complaint charging discrimination, the union must meet a "substantial motivating factor" standard. *Educational Service District 114*, Decision 4331-A (1994). The first step to do this is to establish a prima facie case. This means that a union must show three basic facts to

establish that the employer discriminated against an employee for engaging in protected activities. They are:

- That the employee exercised a right protected by the collective bargaining statute, or communicated an intent to do so;
- That the employee was deprived of some ascertainable right, benefit or status; and
- That there was a causal connection between the exercise of the legal right and the deprivation.

Port of Tacoma, Decision 4626-A.

A union may establish this causal connection by showing that the adverse action followed the employee's known exercise of a protected right under circumstances from which the trier of facts can reasonably infer causality. *Port of Tacoma*, Decision 4626-A; *City of Tacoma*, Decision 8031-B (PECB, 2004). The Commission has declared that "[t]he timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between the protected activity and the adverse action." *Mansfield School District*, Decision 5238-A (EDUC, 1996).

Once the union has established a prima facie case, it creates a rebuttable presumption in favor of the complainant. The employer has an opportunity to articulate legitimate, non-discriminatory reasons for its actions. It does not have to prove them: it is a burden of production. *Educational Service District 114*, Decision 4361-A. If the employer is able to articulate such reasons, the union must show, by a preponderance of the evidence, that these reasons are mere pretexts or that the protected activity substantially motivated the employer's actions. *City of Tacoma*, Decision 8031-B. This may be established by showing that:

- the stated reasons for the disputed actions were pretexts; and/or
- anti-union animus was nevertheless a substantial motivating factor behind the action.

Educational Service District 114, Decision 4361-A.

The poor performance evaluation

In the performance evaluations Tracy issued on January 4, and September 29, 2000; May 15, 2001; May 15, 2002; and June 16, 2003; Tracy declared that Pérez's performance met all expectations. On June 10, 2004, Tracy issued a performance evaluation in which she declared that Pérez did not meet expectations in three areas: quantity of work, adaptability, and initiative. The following will summarize Tracy's testimony regarding each aspect.

Quantity of work

Tracy testified that Pérez's duties were reduced, together with her work day, as follows:

- The program budget had been cut back from $193,000 in the 2002-03 school year to $189,000 in the 2003-04 school year. It increased by $2,000 in the 2004-05 school year, but district-funded labor costs increased by two percent. This reduced the money available for other items. To offset the shortfall, the employer reduced the supplies that the migrant program sent to the schools, as well as the hours that the program coordinator and the educational assistant spent in the schools. In support of Tracy's testimony, the employer submitted financial information that reflected reduced allocations for the migrant programs for school years 2002-03, 2003-04, and 2004-05.

- The migrant program had three employees. In 2000, the school district began to develop a computerized management system; in 2002, the system began to process much of the information that Pérez fed into the computer. The duties of the position had been reduced to the extent that the employer decided to reduce the migrant student program's records clerk to five hours of work a day.

Factors in the poor performance evaluation

Based on the reduced duties of the position, Tracy explained each factor in the poor performance evaluation for the 2003-04 school year, as follows:

- Quantity: Tracy gave Pérez additional responsibilities as a result of an update in the computer programming, but the work load was reduced by fifty or sixty percent. However, on several occasions Pérez did not complete the work in a timely manner. On cross-examination, Tracy admitted that she had not asked Pérez whether she had been otherwise engaged during a month that Tracy had been on bereavement leave, but insisted the amount of work Pérez produced during that time was not adequate, and that Tracy had repeatedly spoken to Pérez on the issue.

- Adaptability: Pérez resorted to old and inefficient ways of performing her work on several occasions. Pérez alleged that such ways were better or rejected the instructions the software trainer gave her.

- Initiative: Pérez did not seem motivated to meet the work expectations in terms of quantity of work or deadlines. On several instances, Tracy asked Pérez to perform the work differently or faster.

The union claims that the employer, through Tracy, discriminated against Pérez for requesting the union's assistance when Tracy issued such an evaluation of her performance. The union presented Pérez's testimony to prove its claim. The first time she testified, Pérez described that she had not been trained adequately to perform the new duties. Pérez testified on a second occasion that she had performed other work that kept her from completing one of her tasks and that Tracy discussed her concerns with her throughout the year in what she felt was a hostile manner.

The collective bargaining agreement allows the employer to place the June 2004 performance evaluation in her personnel file for seven years, and to refer to it when making decisions regarding Pérez's employment in the future. Thus, the performance evaluation affects Pérez's rights, benefits or status. The incidents the Examiner summarized in analyzing the interference claim happened after Pérez's actions and they suggest that either the change or the complaint -- or both -- had created friction between Tracy and Pérez. Further, Tracy indicated in the performance evaluation form that Pérez did not meet expectations in three areas related directly to how Pérez handled the change. Therefore, the Examiner can infer that the performance evaluation may have had a causal relationship with Pérez's union activity.

However, the employer articulated, through Tracy's testimony, nondiscriminatory reasons to rate Pérez's job performance as poor in some areas. The testimony detailed Tracy's concerns about the way Pérez performed under the changed circumstances. Thus, the union had to prove that Tracy did not rate Pérez as a poor performer because it was below standard or that it was motivated by her union activity. The record does not show that the employer had shown anti-union animus in the past. Neither does it establish that the employer was concerned about the fact that Pérez sought

union representation when Tracy commented on Pérez's performance. There is no evidence that Tracy was concerned with issues other than Pérez's productivity. Although Tracy may have had a different attitude towards Pérez after she engaged in protected activity, it is also true that the employer acquiesced to several of Pérez's complaints.

The union did not demonstrate by a preponderance of the evidence that the employer used the diminished output as a pretext to retaliate against Pérez for seeking union representation on the issue of her reduced workday. Even if the Examiner infers that Tracy did not investigate fully what caused the underproduction she perceived, this does not lead to the conclusion, in and of itself, that it was a pretext.

The transfer to the North Elementary School

On May 12, 2004, the employer notified Pérez that it would transfer Pérez to North Elementary School, which made Pérez feel under-utilized because she would assist only that school's parents and not those of the school district's students. The employer also reduced her yearly days of work from 201 to 180, and her wages were reduced accordingly. Pérez also lost the certainty of working in the migrant program's summer school. The employer instead offered her the opportunity to apply for a summer school secretary position. In addition, the school district will reduce her pay rate for the 2005-06 school year.

The employer explained the transfer through Tracy's and Redal's testimonies. Tracy testified that at the end of the 2003-04 school year, Tracy recommended to Redal that the school district reduce the migrant program's office to two employees and transfer Pérez out of the office. They made this decision to offset the added

labor costs and because Pérez was the least senior of its employees. The transfer meant that Pérez could work during the summer if she competed for it successfully, instead of being automatically assigned to do it. By increasing Pérez's work day to six hours, the school district paid her approximately as much as before the transfer.

Redal corroborated Tracy's testimony and declared that he had concurred with Tracy's recommendation because Pérez was the least senior employee in the program, and because the funding had been, in fact, reduced. On cross-examination, Redal testified that he also understands that the building secretaries enter the students' data into the computer program, so the migrant program does not need to duplicate the work.

The union states that the employer transferred Pérez in retaliation for engaging in protected activity. The transfer deprived her of pay for twenty-one work days a year, which is an ascertainable benefit. Since Pérez was transferred at the end of the school year following the protected activity, the Examiner can infer a causal relationship between the actions taken by Pérez and the employer. However, the employer articulated in the hearing nondiscriminatory reasons to transfer Pérez, explaining that it responded to the budgetary needs of the employer. The union had to prove that the employer did not transfer her because of budgetary concerns or that it did so because she engaged in protected activity.

The record does not show that the employer has shown anti-union animus in the past. Neither does it establish that the employer expressed concern about the fact that Pérez sought union representation when the employer reduced her work hours. There is no evidence that Tracy was concerned with issues other than the automation of the programs or the reduction of the Migrant Program's budget.

The union did not demonstrate by a preponderance of the evidence that the employer used the reduced budget as a pretext to retaliate against Pérez for seeking union representation on the issue of her reduced workday. Thus, the union did not meet its burden of proof.

Conclusions

The evidence in this case does not demonstrate that the employer discriminated against Pérez for seeking union representation when Pérez's supervisor issued a poor performance evaluation of Pérez's job performance in the 2003-04 school year, nor when it transferred Pérez from the migrant services program to the North Elementary School.

Any facts or arguments presented at the hearing that are not cited within this decision are immaterial or not persuasive.

FINDINGS OF FACT

1. Moses Lake School District is a "public employer" within the meaning of RCW 41.56.030(1).

2. Public School Employees of Washington is a "bargaining representative" within the meaning of RCW 41.56.030(3), and is the exclusive bargaining representative of an appropriate bargaining unit of custodial, maintenance, warehouse, transportation, bus driver/assistant, nutritional service, secretarial/clerical, paraeducator, technology, data processing, and security enforcement employees of the employer.

3. At all times material herein, there was in existence a collective bargaining agreement between Moses Lake School

District and Public School Employees of Washington covering terms and conditions of employment of classified employees.

4. At all times material herein, Sylvia Pérez worked as migrant records clerk at Moses Lake School District's Migrant Services Office or as program assistant at Moses Lake School District's North Elementary School.

5. At all times material herein, Trish Tracy worked as Federal Programs Director of Moses Lake School District, and as part of her job duties managed the Migrant Services Office, with authority over the position of records clerk at Moses Lake School District's Migrant Services Office. As such, Tracy was Pérez's supervisor and an agent of the employer.

6. Beginning in 2000, Moses Lake School District began developing computer programs that would automate some of the work that it carried out. In 2002, it began to develop such programs for the Migrant Services Office, which resulted in the automation of part of the duties of the position of records clerk at Moses Lake School District's Migrant Services Office.

7. In Fall 2003, Moses Lake School District reduced Pérez's work day from eight to five hours, to offset the effect of reduced operating budget. Pérez requested that Public School Employees intervene before Moses Lake School District.

8. During the 2003-04 school year, Tracy communicated to Pérez on several occasions her concern that Pérez was not performing her job according to expectations. In June 2004, Tracy issued an evaluation of Pérez's performance in which she indicated that the amount of work, adaptability and initiative did not meet expectations.

9. In the fall of 2004, Moses Lake School District transferred Pérez to North Elementary School. The decision was based on increased labor costs, the reduced work load caused by automation and the fact that Pérez was the least senior employee in the office.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Moses Lake School District did not interfere with Sylvia Pérez's exercise of rights protected under Chapter 41.56 RCW through Trish Tracy's acts as a supervisor.

3. Moses Lake School District did not discriminate against Sylvia Pérez by issuing a poor performance evaluation or by transferring Pérez to the North Elementary School, and did not commit an unfair labor practice in violation of RCW 41.56.140(1).

ORDER

The unfair labor practice complaint is DISMISSED.

Issued in Olympia, Washington, on the 30th day of June, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CARLOS R. CARRIÓN-CRESPO, 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.