STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 280,	)	CASE 8723-U-90-1904
Complainant,	)	DECISION 3804-A - PECB
vs.	)	
CITY OF PASCO,	)	DECISION OF COMMISSION
Respondent.	)	

Lester C. Meyers, Business Representative, appeared on behalf of the complainant.

Greg A. Rubstello, City Attorney, appeared on behalf of the respondent.

This case comes before the Commission on a timely petition for review filed by the City of Pasco, seeking to overturn a decision issued by Examiner William A. Lang.

BACKGROUND

International Union of Operating Engineers, Local 280 (union), is the exclusive bargaining representative of City of Pasco employees within the maintenance and operations divisions of the Public Works Department and within certain divisions of the Parks and Recreation Department. At the time this case arose, the union and employer were parties to a collective bargaining agreement effective through December 31, 1990.

Charles Wicklander has been an employee of the City of Pasco since June 6, 1985. At the time this case arose, he was employed as a heavy equipment operator, within the bargaining unit represented by

the union. Wicklander's personnel file contained several commendations, and no disciplinary complaints.

On April 25, 1990, Wicklander filed a written grievance with his supervisor, alleging violation of vacation provisions of Article XIX of the collective bargaining agreement between the parties.

On May 4, 1990, Wicklander's supervisor, Superintendent Marvin C. Ricard,[1] met with Wicklander and union Shop Steward Enrique Curiel pursuant to Step 1 of the contractual grievance procedure. At that meeting, Ricard handed Wicklander a written response which had been prepared in advance of the meeting. The response denied the grievance as untimely. During the ensuing discussion of Ricard's response to the vacation grievance, both men became angry. At one point, Wicklander suggested that the matter could be settled by their stepping outside. Ricard declined to take up that invitation, suggesting instead that the matter needed to be resolved more sensibly. Wicklander ultimately concurred, and the meeting ended shortly thereafter.

On May 7, 1990, Ricard issued a written warning to Wicklander concerning the May 4 grievance meeting, as follows:

> On Friday, May 4, 1990 at 1315 hours, you were presented with the written answer to your grievance which you filed on April 25, 1990. During this meeting you expressed the desire to enter into a verbal confrontation which was negative to the intent of this meeting.
>
> You interrupted my answer to a statement you made, stating "this could be settled out in back of the warehouse." I interpreted this intimidating remark to imply you were wishing to enter into physical combat.
>
> **In the past you have <u>exhibited</u> these same intimidating actions and verbal abuse of**

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[1] Ricard's title is "water distribution / street maintenance superintendent".

> **personnel in charge, even to the point of strong profanity towards your foreman. These actions have been reported to management people, but have not been documented or action taken in the past. They have been overlooked because of your work ability and with the hope you would overcome this problem. On one occasion, you apologized, saying it wouldn't happen again, however, this last incident which happened in the presence of your foreman / union steward indicates to me there has been no progress or improvement with this problem.**
>
> I therefore feel I have no choice but to issue a written warning for this disrespectful action. I want it understood, your foreman, your superintendent, or any other personnel placed in temporary charge, will not tolerate any verbal abuse, profanity directed at them, or intimidating gestures such as shoving or pushing.
>
> This warning is written with the objective of correcting the problem. I am suggesting you hold this matter in confidence and look at it as a step in the right direction for the betterment of yourself and the Public Works organization. [Emphasis by **bold** supplied.]

The warning letter, a form of progressive discipline, did not indicate that a copy was to be placed in Wicklander's personnel file, nor was Wicklander told that it would be placed in his file. Ricard testified, however, that it was his intent to have the warning placed in the personnel file, even though that was not indicated.

On May 16, 1990, Wicklander filed a grievance concerning Ricard's May 7, 1990 memorandum, characterizing it as "undocumented, arbitrary, untrue and written in reprisal" for the filing of the earlier vacation grievance. Wicklander claimed a violation of Article 7.3 of the collective bargaining agreement, which prohibits retaliation for filing grievances.

Ricard denied Wicklander's May 16, 1990 grievance on May 18, 1990, stating that the warning was warranted.

Wicklander appealed Ricard's denial of his May 16 grievance to Director of Public Works James S. Ajax, who was the next level of the grievance procedure. Ajax sent a letter to Wicklander dated June 6, 1990, advising that he had conducted an in-depth investigation because of the seriousness of Wicklander's allegations of retaliation and dishonesty. Ajax concluded that there was a clear history of Wicklander being disrespectful and engaging in verbal abuse and physical intimidation toward supervisors. Ajax recounted a number of instances of misconduct by Wicklander, two of which had been confirmed by witnesses. Ajax denied the grievance, and advised Wicklander that a copy of Ajax's letter would be placed in Wicklander's personnel file, together with a copy of the grievance.

Wicklander appealed Ajax's denial of his May 16, 1990 grievance to City Manager Gary Crutchfield, who was the next step in the grievance procedure. Crutchfield denied the grievance in a letter to Wicklander dated July 16, 1990. According to the contractual grievance procedure, Wicklander then had the right to request review by an independent Fact Finder.[2] He did not do so.

On August 13, 1990, the union filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The complaint alleged that the employer had interfered with the rights of public employees, by retaliating against an employee for filing a grievance, in violation of RCW 41.56.140(1).

Following a hearing and the submission of post-hearing briefs, Examiner William A. Lang found that Wicklander's invitation to engage in physical combat exceeded the bounds of protected activity, but that the employer had committed an unfair labor

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[2] The contract provides for independent factfinding but the city manager makes the final decision whether to accept, reject or amend any factfinding opinion. The contract does not contain provision for a final and binding decision by an impartial arbitrator.

practice by referring in the May 7, 1990 warning letter to past incidents for which Wicklander had not previously been warned or counselled.

The employer petitioned for review of the Examiner's decision, thus bringing the matter before the full Commission.

POSITION OF THE PARTIES

The employer argues that the filing and processing of grievances through contractual grievance procedures is not an activity protected by Chapter 41.56 RCW, so that the Commission lacks jurisdiction to find unlawful retaliation. The employer asserts the Commission also lacks jurisdiction because the contractual grievance procedure provides a method for final and binding resolution of retaliation claims. The employer argues that the Examiner made various factual errors, and that he erred in concluding that Wicklander could "reasonably" have perceived the warning letter's references to prior conduct as retaliatory. The employer contends there is no evidence of anti-union animus, nor any evidence that Ricard was motivated by any desire to retaliate against Wicklander for filing a grievance.

The union agrees with the Examiner's decision, and asks that it be affirmed by the Commission.

DISCUSSION

Commission Jurisdiction

The employer asserts two different reasons why the Commission lacks jurisdiction to decide the instant unfair labor practice case. We reject both assertions.

Grievance Processing is Protected Activity -
The employer first argues that grievance processing is not part of the collective bargaining process and, therefore, not within the scope of activities protected by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. In support of its position, the employer notes differences between provisions of the National Labor Relations Act and the definition of collective bargaining found in RCW 41.56.030(4). We have considered the differences relied upon by the employer, but do not consider them indicative of a legislative intent to exclude grievance processing from the scope of protected collective bargaining activity in Washington state.

The employer views the collective bargaining process as ceasing once a contract is signed. We do not. The nature of collective bargaining is such that ambiguities inevitably creep into a negotiated labor contract. In addition, circumstances change during the term of a contract. The duty of employers to bargain under Chapter 41.56 RCW concerning changes of wages, hours and working conditions made during the life of a contract has been affirmed on many occasions, most recently by City of Yakima v. International Association of Fire Fighters, 117 Wn.2d 655 (1991). As contractual provisions are applied to situations foreseen during bargaining and sometimes unforeseen, a collective bargaining agreement is an evolving document; one whose negotiated intent is often subject to further discussion and clarification. It makes little sense to hold that the process of negotiating contract provisions is protected activity, and then not accord the same status to a contractual grievance process which the parties establish to resolve questions concerning the interpretation and enforcement of negotiated rights.

The definition of "collective bargaining" contained in RCW 41.56.030(4) includes specific mention of "grievance procedures" as a mandatory subject of bargaining. RCW 41.56.040 specifically prohibits a public employer from interfering with or discriminating

against a public employee in the exercise of their rights under the Public Employees' Collective Bargaining Act. The Commission and the Washington courts have long held that the processing of grievances pursuant to a collective bargaining agreement is an activity protected by Chapter 41.56 RCW. Clallam County, Decision 1405-A (PECB, 1984), affirmed ___ Wn.App. ___, WPERR CD-319 (Division II, 1986); Valley General Hospital, Decision 1195-A (PECB, 1981). We see no persuasive reason to overturn that precedent here.

Contractual Provisions Do Not Waive Commission Jurisdiction - Starting from a premise that the parties' contract prohibits retaliation and provides a procedure for "final and binding" resolution of complaints, the employer next argues that the union's remedy was either to pursue the negotiated grievance procedure or to go to court to enforce the contract. We do not agree.

The hearing and determination of unfair labor practice complaints is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.160 through .190. RCW 41.56.160 expressly states that the Commission's authority "... shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that may have been or may hereafter be established by law."

The Commission "defers" the processing of unfair labor practice cases where an employer's alleged "unilateral change" action is "arguably protected or prohibited" by an existing collective bargaining agreement between the parties. See, Stevens County, Decision 2602 (PECB, 1987).[3] A deferral is not available, however,

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[3] Such a "deferral" is not indicative of an absence, loss or surrender of jurisdiction over the unfair labor practice allegations, but rather is an exercise of discretion in harmony with the legislative preference for final and binding grievance arbitration stated in RCW 41.58.020(4). City of Yakima, Decision 3564-A (PECB, 1991).

where (as here) the contract does not contain any provision for final and binding resolution of the grievance by an impartial arbitration forum. Furthermore, the Commission does not defer "interference" or "discrimination" charges to arbitrators.[4]

Alleged Factual Errors

The employer takes issue with the Examiner's findings that: (1) Wicklander had not been previously counseled or disciplined for the additional incidents cited in the warning letter; (2) those prior incidents had not been documented; and (3) Wicklander was not given an opportunity to refute the allegations. We find the record supports all three conclusions.

Without being specific, the May 7 warning letter clearly referenced prior behavior, regarding which the supervisor conceded he had not previously warned Wicklander or documented the matters, in writing, for the employee's personnel file. Because Wicklander had not been confronted at the time of the alleged incidents, the Examiner correctly concluded that "Wicklander was not given an opportunity to confront his accusers, or to give his side of the incidents, **in a timely manner.**" City of Pasco, Decision 3804, p.13 (PECB, 1991) [emphasis by **bold** supplied].

The Scope of Protected Activity

The burden of proving an allegation of unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, and must be established by a preponderance of the evidence. Lyle School District, Decision 2736 (PECB, 1987); Bellingham Housing Authority, Decision 2335 (PECB, 1985). We find that burden was met in this case.

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[4] City of Yakima, Decision 3564-A (PECB, 1991); Kitsap County Fire Protection, Decision 3105 (PECB, 1989).

The fact that grievance processing constitutes protected activity does not mean that employees or union officials can act with impunity during the grievance process. If behavior becomes too disruptive or confrontational, it loses the protection of the act. Pierce County Fire District No. 9, Decision 3334 (PECB, 1989).[5] Thus, the Examiner correctly applied Commission precedent in finding that the act of inviting a supervisor to fight did not constitute protected activity, even in the context of a grievance meeting. As the Examiner noted, a warning letter limited to that behavior would have been lawful, and such a letter is allowed by the Examiner's remedial order.

In this case, however, the employer issued a warning letter that also brought up intimidating behavior and verbal abuse that had allegedly occurred in the past. By his own account, Ricard had tolerated the alleged misconduct by Wicklander for the preceding two or three years. Ricard had never discussed the prior behavior with Wicklander, never voiced any objection to it, nor written the behavior up for Wicklander's personnel file. Under those circumstances, we concur with the Examiner that the act of dredging up undocumented incidents from the past and including them in a warning regarding abusive behavior in a grievance meeting could reasonably have been perceived as retaliatory action.

Ricard's actual motivation is not the controlling consideration. He may well have referenced the earlier behavior without any retaliatory intent or anti-union animus. However, the applicable standard for the evaluation of claims of unlawful interference does not turn on an employer's actual motive, or on whether the coercion succeeded or failed. Rather, the applicable standard was described in City of Seattle, Decision 2773 (PECB, 1987), as follows:

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[5] In that case, an employee's role as a union representative did not allow him to disregard normally acceptable standards of behavior in dealings with his superiors.

> The test for judgment on "interference" allegations has been determined by both the National Labor Relations Board and the Public Employment Relations Commission. A showing of intent or motivation is not required Nor is it necessary to show that the employees concerned were actually interfered with or coerced.

An interference violation occurs under RCW 41.56.140(1) when an employee could reasonably perceive an employer's actions to be threatening in nature. King County, Decision 3318 (PECB, 1989).

In the present case, Wicklander raised an issue regarding his vacation and found himself reprimanded, not just for misbehavior during the grievance procedure but also for prior conduct never before characterized as misbehavior. Wicklander alleged that the allegations regarding his past conduct were untrue and written in retaliation for the filing of his grievance.

The record indicates that Wicklander occasionally engaged in behavior that could reasonably be labelled as disrespectful, or as verbal abuse. That same record, though, establishes that Wicklander's prior behavior was never characterized as misconduct until the processing of his grievance. Given that fact, Wicklander could reasonably perceive the raising of Ricard's stale allegations as retaliatory in nature. Because the warning of May 7, 1990 was premised in part on prior incidents for which Wicklander had not previously been warned, we find unlawful interference in this case.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact, conclusions of law and order issued in this matter by Examiner William A. Lang are affirmed and

adopted as the findings of fact, conclusions of law and order of the Public Employment Relations Commission.

2. The City of Pasco, its officers and agents, shall immediately:

a. Notify the above-named complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with the order issued by the Examiner in this matter, and at the same time provide the above-named complainant with a signed copy of the notice required by the Examiner's order.

b. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with the order issued by the Examiner in this matter, and at the same time provide the Executive Director with a signed copy of the notice required by the Examiner's order.

Issued at Olympia, Washington, the 13th day of February, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL remove the written warning issued to Charles Wicklander on May 7, 1990, from all personnel files and employment records of Charles Wicklander.

WE WILL vacate any discipline subsequently imposed upon Charles Wicklander on the basis of the written warning issued to him on May 7, 1990.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington, including the right to file and process grievances under the collective bargaining agreement between International Union of Operating Engineers, Local 280, and the City of Pasco.

NOTE: The Commission found that an invitation by an employee to resolve a grievance by physical violence is not an activity protected by the laws of the State of Washington, and it has acknowledged the right of the City of Pasco to warn its employee, Charles Wicklander, against recurrence of such conduct.

DATED: _____

CITY OF PASCO

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza FJ-61, Olympia, Washington 98504. Telephone: (206) 753-3444.