City of Tacoma, Decision 11064 (PECB, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA POLICE UNION LOCAL 6, Complainant, vs. CITY OF TACOMA, Respondent.	CASE 23180-U-10-05903 DECISION 11064 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Aitchison & Vick, by *Jeffrey Julius,* Attorney at Law, for the union.

Tacoma City Attorney Elizabeth Pauli, by *Michael J. Smith*, Deputy City Attorney, for the employer.

On April 22, 2010, the Tacoma Police Union Local 6 (union) filed an unfair labor practice complaint against the City of Tacoma (employer). A preliminary ruling was issued on April 28, 2010, finding a cause of action to exist for interference with employee rights under RCW 41.56.140(1) and employer domination or assistance of a union in violation of RCW 41.56.140(2) and, if so, derivative interference under RCW 41.56.140(1) concerning the employer's refusal to allow an employee's choice of union representative at an investigatory interview. The employer answered the complaint on May 20, 2010. Examiner Guy Otilio Coss held a hearing on October 18, 2010, and both the union and employer filed post-hearing briefs.

ISSUE

1. Did the employer commit an unfair labor practice violation by excluding Tacoma Police Officer Aaron Joseph's first choice of union representative at an investigatory interview?

The Examiner finds that the employer acted lawfully when it excluded the employee's first choice union representative due to "special" or "extenuating" circumstances concerning a conflict of interest. The employer properly advised the employee that he needed to select an available, alternate union representative, which he did. Therefore, the employer did not interfere with employee rights nor dominate or assist the union.

APPLICABLE LEGAL STANDARDS

Generally, the burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party or individual. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *See City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *City of Tacoma.*

An employer violates RCW 41.56.140(2) when it controls, dominates, or interferes with a bargaining representative by involving itself in the internal affairs or finances of the union, or attempts to create, fund, or control a "company union." *State - Patrol*, Decision 2900 (PECB, 1988); *City of Anacortes*, Decision 6863 (PECB, 1999). A domination violation requires proof of employer intent. *King County*, Decision 2553-A (PECB, 1987); *Snohomish County*, Decision 9834 (PECB, 2007).

In *NLRB v. Weingarten*, 420 U.S. 251 (1975) (*Weingarten*), the Supreme Court of the United States affirmed a National Labor Relations Board (NLRB) decision holding that under the National Labor Relations Act (NLRA), employees have the right to be accompanied and assisted by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action. In *Okanogan County*, Decision 2252-A (PECB, 1986), the Commission held that the rights announced in *Weingarten* are applicable to employees who

exercise collective bargaining rights under Chapter 41.56 RCW. *See also Methow Valley School District*, Decision 8400-A (PECB, 2004).

In *Omak School District*, Decision 10761-A (PECB, 2010) the Commission recently held that:

> When an employee makes a valid request for union representation, an employer has three options: 1) Grant the request; 2) Discontinue the interview; 3) Offer the employee the choice of continuing the interview unrepresented, or of having no interview at all, thereby foregoing any benefit that the interview might have conferred upon the employee. *Roadway Expr*ess, 246 NLRB 1127 (1979). An employer may not continue the interview with an unrepresented employee who has asserted his or her *Weingarten* rights unless the employee voluntarily agrees to continue the interview unrepresented and the employer has made the employee aware of the choices just described. *U.S. Postal Service*, 241 NLRB 141 (1979).

(emphasis added)

While there is no decision from the Public Employment Relations Commission that directly addresses this particular set of facts, decisions of the NLRB do recognize limitations,[1] holding that an employer may exclude an employee's choice of representative if they can show "special" or "extenuating" circumstances. "When two union officials are equally available to serve as a *Weingarten* representative . . . the decision as to who will serve is properly decided by the union officials, unless the employer can establish special circumstances." *Anheuser-Busch Incorporated v. National Labor Relations Board*, 338 F3d 267 (2003), citing *New Jersey Bell Telephone Company*, 308 NLRB 277 (1992). *See also Anheuser-Busch, Inc.*, 337 NLRB. No. 2 (2001) (upholding "extenuating circumstances" language) and *Barnard College*; 340 NLRB No. 106 (2003), *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981).

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[1] In the absence of existing Commission precedent, the Commission and Washington Courts interpret issues arising under Chapter 41.56 RCW by examining federal decisions construing the NLRA when the language of the two statutes is similar. *Compare IAFF Local 609 v. City of Yakima*, 91 Wn. 2d 101 (1978) (adopting the NLRA definition of "confidential" employee) *with Municipality of Metropolitan Seattle v. Department of Labor and Industries*, 88 Wn. 2d 925 (1977) (rejecting NLRA precedent denying collective bargaining rights to "supervisory" employees). Although the language of Section 7 of the Act and RCW 41.56.040(1)(3) are not identical, the Commission has previously held that the rights granted in Section 7 may be inferred in RCW 41.56.040. *Okanogan County*, Decision 2252-A (PECB, 1986).

Clearly an employee's right to the union representative of his/her choice is an important right and, absent special or extenuating circumstances, is properly the right of union officials, not employers, to decide. The right is not, however, absolute. The employer has the burden to prove the existence of special or extenuating circumstances and each case must be analyzed on its own set of facts.

Finding that the employer acted properly in excluding an employee's choice of union representative at an investigatory meeting does not end the analysis. In *Omak School District*, Decision 10761-A the employee chose a union representative that was unavailable for two weeks and the employer "lawfully informed" the employee that the investigatory meeting would not be postponed until the representative was available. The employer then "properly instructed" the employee that he needed to select a different available representative. The commission held that "[n]either of these statements by themselves constitutes an unfair labor practice." *Omak School District.* However, the Commission still found a violation, ruling that where an employer lawfully excludes a chosen *Weingarten* representative and the employee refuses to choose an alternative representative, the employer must advise the employee that he/she has the option of either naming a representative other than the one that was unavailable, attending the meeting unrepresented, or canceling the meeting and thereby losing any benefit that the meeting could have provided the employee. In *Omak School District,* it was the employer's failure to inform the employee of these options that interfered with his protected employee rights, not the employer's refusal to allow the employees' first (lawfully excluded) choice of representative. *Omak School District*, Decision 10761-A (PECB, 2010).

ANALYSIS

In August 2009, the City of Tacoma received information that Tacoma police officer Aaron Joseph (Joseph) had allegedly threatened to kill his wife, himself, and another City of Tacoma police officer, Steve Storwick (Storwick). On August 7, 2009, the Puyallup Police Department started an independent criminal investigation into the charges. On August 9, 2009, Joseph was formally notified of the Tacoma Police Department's internal affairs investigation and the Puyallup Police Department criminal investigation.

The criminal and internal affairs investigations revealed that on July 31, 2009, Joseph made a telephone call to Storwick who was on duty and riding in a patrol car with officer Chris Tracy (Tracy). During this call Joseph accused Storwick of having an affair with his wife and made a threat to kill him. Tracy spent the rest of shift in the patrol car with the threatened officer and they discussed the situation. Because Tracy was in the car during the July 31, 2009 telephone call, both the criminal investigation and the internal affairs investigation identified Tracy as a witness in their respective investigations. On August 18, 2009, the Puyallup Police Department interviewed Tracy concerning the conversation and the alleged threats made by Joseph. By September 2009, the employer had received a copy of the Puyallup Police Department's criminal investigation, which included a one-page summary of their investigatory interview of Tracy.

In relation to this incident, the employer notified Joseph to attend an investigatory interview on March 31, 2010. On that morning, Joseph advised the employer that he had selected Tracy as his union representative. Tracy was a member of the union's executive board but had never served as a *Weingarten* representative in the past. Joseph's criminal defense attorney was also present and attending the interview. As of March 31, 2010, the Puyallup Police Department's criminal investigation was still pending and Tracy remained a witness in that case. Tracy had also been identified as a material witness in the employer's internal affairs investigation and had not yet been interviewed by the employer's internal affairs department.

The employer expressed its concern with Tracy being both Joseph's union representative as well as a material witness in the investigation at issue. The employer's position was that Tracy's presence at Joseph's investigatory interview was counter to sound investigation techniques and posed a threat to interfere with the fair and impartial investigations of both the criminal and internal affairs investigations. They asserted that Tracy would be influenced by the testimony of Joseph, thereby tainting his testimony as a witness when Tracy would later be interviewed by internal affairs and/or at a potential criminal trial. Therefore, the employer asked Joseph to choose an alternate union representative but did not restrict or otherwise indicate who Joseph could, or should, choose. Joseph was allowed to contact and confer with his union vice president Terry Krause (Krause) who was present in the Tacoma Police Headquarters building where the meeting was to be conducted. After lengthy discussions between the union and employer,

Joseph chose to go forward with the investigatory interview with Krause as his union representative. The interview was conducted and the union does not allege any violations occurred concerning the employee's rights during the actual investigatory interview.

The investigatory interview of Joseph that was held on March 31, 2010, was one in which an employee could reasonably believe would lead to discipline. It was Joseph's prerogative as to who would be his union representative unless the employer proves that it had a special, or extenuating circumstance for excluding his first choice. The union, citing *Omak School District*, Decision 10761-A (PECB, 2010) asserts that "PERC subscribes to the principle that in a *Weingarten* setting, an employee has the absolute right to select the Union representative he/she wants..." However, the Commission specifically stated the opposite principle: "[a]lthough *Weingarten* and its progeny grant employees the right to have a representative at a meeting that could lead to discipline, that right is not without limitations." *Omak School District* (emphasis added) citing *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977). The Commission then cited one example of a limitation, stating that: "For example, an employer is not required to postpone a disciplinary interview because a particular union representative is unavailable for an unreasonable period of time for reasons not attributable to the employer provided another representative is available whose presence could have been requested by the employee in the absent representative's place." *Omak School District* (emphasis added)

In this case, the employer cites to the seriousness of the charges - alleged threats made by a sworn, armed police officer to kill his wife, himself, and another officer. The employer cites its duty to conduct a fair and impartial investigation of these serious allegations for the protection of the employee's and alleged victims' rights, as well as its duty to public safety and maintaining the public's confidence. The employer's internal affairs investigators credibly testified that it was counter to sound investigatory techniques and not conducive to maintaining a fair and impartial investigation to allow a material witness to also act as a representative to the subject of the very investigation in which he was a witness. I find that the employer's concerns were valid and, under the specific facts of this case, do present a special and/or extenuating circumstance so that the employer's exclusion of Tracy as Joseph's union representative from the investigatory meeting was proper.

In the present case, after being advised that Tracy was not acceptable, Joseph was provided the opportunity to contact his union. He was given time to discuss the matter in order to decide whether to continue to demand Tracy be allowed to be his representative, to choose an alternate representative, to attend the interview unrepresented or to not attend at all. In addition to demanding that the employer honor Joseph's choice of union representative, the union offered to postpone Joseph's interview so as to allow Tracy to be interviewed for the internal investigation first thereby removing the potential for Joseph to influence Tracy's testimony. The employer refused to reschedule Joseph's interview and advised that even if Tracy was interviewed first, he would remain a material witness who may need to be re-interviewed depending on what investigators may learn during other witness interviews and aspects of their investigation. The union also pointed out that the Puyallup Police Department's summary of Tracy's interview showed that Tracy had limited knowledge so that an internal affairs interview of Tracy was unnecessary. The employer's position was that the Puyallup report was a summary, that the Puyallup investigators may, or may not, have asked the questions that its own internal affairs sought answers to. The employer believed that it was their duty to fully and properly conduct their own interviews and investigation into the allegations.

After these consultations between Joseph, the union and the employer concerning how, or whether, to proceed with the investigatory interview, Joseph chose to proceed with the investigatory interview with an alternate, available union representative. He chose to proceed, and did proceed, with Krause as his union representative. Once Joseph chose to proceed with his choice of an alternate, available union representative, the employer had no continuing duty other than to properly conduct the investigatory interview, which it did.[2] Had the union believed that Joseph was being illegally compelled to proceed, Joseph could have refused to proceed with the investigatory meeting or chosen to proceed with the investigation without a representative.

Finally, the union did not prove that the employer intended to dominate the union by involving itself in the internal affairs of the union when it lawfully excluded Joseph's first choice of union

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[2] The employer, in its brief, appears to imply that because the investigatory interview was conducted properly, no violation should be found for excluding the employee's choice of union representative. To the extent that argument was made, it is incorrect. An employer who illegally excludes an employee's first choice of *Weingarten* representative does not "cure" the violation by conducting a proper investigatory interview with the employee's alternate representative.

representative. The union did not allege, and did not present facts to show, that the employer attempted to influence or otherwise indicate who Joseph should choose as an alternate union representative for the investigatory interview. *See State - Patrol*, Decision 2900 (PECB, 1988); *City of Anacortes*, Decision 6863 (PECB, 1999); *King County*, Decision 2553-A (PECB, 1987); *Snohomish County*, Decision 9834 (PECB, 2007).

CONCLUSION

The employer acted lawfully when it excluded Joseph's first choice of union representative due to a conflict of interest arising from the chosen representative's status as a material witness in the criminal and internal affairs investigation at issue. The employer subsequently acted properly and advised Joseph to select an alternate, available union representative. The employer did not attempt to involve itself in the internal affairs of the union by indicating who Joseph could, or should, choose as an alternate representative. Joseph chose Krause, the union vice president, as an alternate, available union representative and went forward with the investigatory interview. Once Joseph chose to proceed with his choice of an alternate, available union representative, the employer had no continuing duty other than to properly conduct the investigatory interview, which it did. Accordingly, the employer did not interfere with employee rights under RCW 41.56.140(1) or dominate or assist a union in violation of RCW 41.56.140(2) or derivative interference under RCW 41.56.140(1).

FINDINGS OF FACT

1. The City of Tacoma is a public employer within the meaning of RCW 41.56.030(13).

2. The Tacoma Police Union Local 6 is a bargaining representative within the meaning of RCW 41.56.030(2).

3. In August 2009, the City of Tacoma received information that Tacoma police officer Aaron Joseph had allegedly threatened to kill his wife, himself, and another City of Tacoma police officer, Steve Storwick.

4. On July 31, 2009, Joseph made a telephone call to Storwick who was on duty and riding in a patrol car with Tacoma police officer Chris Tracy (Tracy). During this call Joseph accused Storwick of having an affair with his wife and made a threat to kill Storwick.

5. On August 18, 2009, the Puyallup Police Department interviewed Tracy concerning the telephone conversation and the alleged threats made by Joseph.

6. By September 2009, the employer had received a copy of the Puyallup Police Department's criminal investigation file which included a one-page summary of their investigatory interview of Tracy on August 18, 2009.

7. On March 31, 2010, the employer notified Joseph to attend an investigatory interview concerning the alleged threats. It was reasonable to believe this investigatory meeting could lead to discipline.

8. On March 31, 2010, Joseph advised the employer that he had selected Tracy, a material witness to the on-going internal investigation, as his union representative for the investigatory meeting.

9. As of the date of the scheduled interview, March 31, 2010, the Puyallup Police Department's criminal investigation was still pending and Tracy remained a witness in that case. Tracy had also been identified as a material witness in the employer's internal affairs investigation and had not yet been interview by the employer's internal affairs department.

10. Citing the conflict of interest with Tracy being a material witness in the investigation, the employer excluded Tracy as Joseph's union representative and asked Joseph to choose an alternate union representative. The employer did not restrict or otherwise indicate who Joseph could, or should, choose.

11. On March 31, 2010, Joseph chose to go forward with the interview utilizing the union vice president as his representative. The interview was conducted with Joseph, the union vice president, and Joseph's personal attorney present.

CONCLUSIONS OF LAW

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

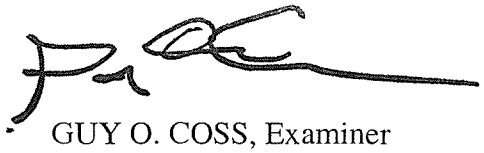
2. The employer did not interfere with employee rights under 41.56.140(1) or domination or assist a union in violation of RCW 41.56.140(2) when it excluded Joseph's first choice union representative due to a conflict of interest.

ORDER

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

ISSUED at Olympia, Washington, this 12th day of May, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



GUY O. COSS, 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

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	23180-U-10-05903	FILED:	04/22/2010	FILED BY:	PARTY 2
DISPUTE:	ER INTERFERENCE				
BAR UNIT:	LAW ENFORCE				
DETAILS:	AJ Internal Affairs Interview				
COMMENTS:					

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