City of Centralia, Decision 11687 (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 252, Complainant, vs. CITY OF CENTRALIA, Respondent.	CASE 24935-U-12-6376 DECISION 11687 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Reid Pedersen McCarthy & Ballew, by *David Ballew,* Attorney at Law, for the union.

Summit Law Group, by *Rodney Younker,* Attorney at Law, for the employer.

On June 6, 2012, Teamsters Local 252 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission. The union alleged that the City of Centralia (employer or city) discriminated against Phillip Reynolds by terminating Reynolds' employment in reprisal for union activities. The Unfair Labor Practice Manager reviewed the complaint under WAC 391-45-110 and issued a preliminary ruling on June 26, 2012, finding a cause of action to exist. The Commission assigned this case to Examiner Erin Slone-Gomez who held a hearing on October 24, 2012. The parties filed post-hearing briefs December 21, 2012.

ISSUE

Did the employer engage in discrimination in violation of RCW 41.56.140(1), by terminating Phillip Reynolds in reprisal for union activities?

The union was unable to prove that the employer discriminated against Reynolds for his union activity. The charge of discrimination is dismissed.

BACKGROUND

Philip Reynolds was employed by the City of Centralia as a police officer from April 2006 to March 2012, when he was terminated. During his tenure with the employer, Reynolds received a significant number of reprimands and discipline, from verbal counseling to a two-week suspension for misconduct. On July 12, 2011, Reynolds was issued a letter from Chief Robert Berg warning Reynolds that:

> This is truly the final opportunity for you to make some fundamental changes in your approach regarding your relationships with supervisory staff in this department and to abide by the policies and procedures adopted by this agency. Future violations of departmental policy will be dealt with in the most severe terms and may result in your dismissal from employment.

On January 1, 2012, Reynolds was on duty. During his shift several calls came through the police dispatch that required officer response. It is a work expectation that officers will "back up" other officers during the course of their duties. All Centralia officers, including Reynolds, have the discretion to determine whether back up is necessary in any given instance. Reynolds had previously been counseled about providing adequate back up both verbally and in writing.

During the aforementioned calls, Reynolds did not provide back up to fellow officers as he had been directed in the past. At least one officer complained to Reynolds' supervisor, Carl Buster about Reynolds' lack of assistance during the shift. Later that day, Buster questioned Reynolds about why he had not backed up any of the calls that day. Reynolds asked Buster if the answers to his questions could lead to discipline. While testimony differs on Buster's exact response, "possibly," "yes," or "I don't know," it was clear that Buster indicated his questions could lead to discipline. Reynolds informed Buster that he would like his union representative present. Buster continued to question Reynolds and Reynolds continued to respond by requesting union representation. At the end of the conversation Buster contacted his superior officer, Commander David Ross about Reynolds' lack of back up response and their subsequent conversation. Ross contacted Chief Berg who directed that Reynolds be sent home on administrative leave.

On January 5, 2012, Buster filed a complaint, where he alleged that Reynolds had committed serious rule violations of insubordination, neglect of duty, and false reports. Included in the

complaint were memoranda written by Buster and Sergeant Brian Warren, Buster's co-sergeant. In the complaint, they outlined what they believed to be Reynolds' history of deficient work performance. The complaint went into considerable detail about the events on January 1, 2012, including a discussion of the dispatch calls from the day, Reynolds' lack of back up and Reynolds request for union representation. Commander James Rich was assigned by Berg to investigate the merits of Buster's complaint against Reynolds. This investigation included a review of Reynolds' "activities while on-duty on January 1, 2012 and [Reynolds'] subsequent refusal to answer [Buster's] questions." Rich continued that, "[Buster] alleged that you have displayed a pattern of avoiding calls and failing to back up your fellow officers. Additionally, he alleges that your responses to him at Mellen Street [the location of the conversation between Buster and Reynolds] regarding these concerns constituted insubordination."

Rich completed a thorough investigation, which included creating a timeline of the events from January 1, 2012, and interviewing several members of the police department including Reynolds, who was accompanied by a union representative. At the conclusion of his investigation, Rich then provided his report to Ross who reviewed the investigation and wrote a recommendation to the chief. Chief Berg reviewed the recommendation and decided to terminate Reynolds' employment effective March 22, 2012.

APPLICABLE LEGAL STANDARDS

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. *Seattle School District*, Decision 10732-A (PECB, 2012), *citing Educational Service District 114,* Decision 4361-A (PECB, 1994); *Community College District 13 (Lower Columbia),* Decision 9171-A (PSRA, 2007). The employee maintains the burden of proof in such 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 a *prima facie* case of discrimination because parties do not typically announce a discriminatory motive for their actions. *Clark County,* Decision 9127-A (PECB, 2007).

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. Circumstantial evidence consists of proof of facts or circumstances which, according to the common experience, gives rise to a reasonable inference of the truth of the fact sought to be proved. *City of Yakima,* Decision 10270-A (PECB, 2011).

In response to an employee's *prima facie* case of discrimination, the employer need only articulate its non-discriminatory reasons for 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 nonetheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

ANALYSIS

It is important to state that the Commission is not tasked with determining whether the city met a just cause burden of proof when terminating Reynolds, which is to be addressed through the parties' grievance and arbitration procedure. The sole question before the Commission is whether the city discriminated against Reynolds for union activity.

Establishment of a *prima facie* case

The union argues Reynolds' engaged in union activity when he requested union representation at his meeting with Buster on January 1, 2012, and was terminated for that reason. The city argues that the conversation between Buster and Reynolds was not an investigatory interview as Buster had no authority to discipline Reynolds. The city also stated that the conversation was a typical

"shop floor" exchange and that by restricting this conversation, the city's police functions would be greatly inhibited.

The Commission has recognized an employee's right to union representation during an investigatory meeting, commonly called *Weingarten* rights, in *Seattle School District*, Decision 10732-A (PECB, 2012).

> 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).

An investigatory interview is one which the employer elicits a response(s) from the employee which could enable the employer to build a case against the employee resulting in discipline at some future time. *Lennox Industries*, Inc., 637 F.2d 340 (1981). Thus, a meeting in which information is gathered from an employee that could eventually lead to discipline, comes under the purview of the *Weingarten* doctrine. *Lewis Public Transportation Benefit Area*, Decision 9275 (PECB, 2006).

The meeting between Reynolds and Buster on January 1, 2012, was an investigatory interview and merited *Weingarten* protection. Buster is Reynolds' supervisor and on-duty sergeant. Buster is responsible for outlining expectations to his staff and taking affirmative action to make sure those expectations are met. Problems with Reynolds' performance are observed by Buster who reports performance issues through his chain of command. The questions Buster asked Reynolds' on January 1, 2012, were designed to elicit information about his performance related to a particular incident that day. It is apparent that, had he answered the questions, his answers would have been reported to Buster's supervisors for potential disciplinary action, since he was disciplined for his performance on January 1, 2012.

Additionally, Reynolds had every reason to fear future discipline as he had been warned in the past about his lack of backing up other officers and had an extensive disciplinary record. The result of his previous performance was the impetus for Reynolds' receipt of a last chance letter from Berg warning that any future infraction could result in termination.

The meeting between Reynolds and Buster was an investigatory meeting and there was reasonable belief that Reynolds' responses could lead to discipline. Therefore, Reynolds was engaged in protected activity when he requested a union representative in his meeting with Buster on January 1, 2012.

The union successfully met the second prong of the test and proved Reynolds suffered harm when he was sent home on administrative leave and eventually terminated. The union also met the third requirement for proving a *prima facie* case by showing a causal connection between Reynolds' protected activity and the harm he suffered. In multiple instances, the employer communicated verbally and in writing to Reynolds that his unresponsiveness to back up calls on January 1, 2012, and his "refusal" to answer Buster's questions, accompanied by his request for union representation, were the reasons he was placed on administrative leave and investigated. Thus, the union successfully established a prima facie case.

Employer's stated non-discriminatory reason for discipline

The city points to Berg's termination letter as evidence of the reason for Reynolds' termination. Here Berg outlined three previous instances of significant misconduct by Reynolds that resulted in a two-day suspension, a written reprimand and a two-week suspension. Berg further states:

> The many policy violations detailed above, coming after repeated counseling and serious discipline for many other performance failures, proves to me that you are either incapable or unwilling to correct your behavior and conduct your duties in a manner that comports with Department policies and meets reasonable performance expectations. In addition, these latest performance failures reveal that you have not only failed to improve your interactions with your supervisors, you have also undermined the trust and confidence that they and your peer officers must have in you for you to function effectively within the Department.

The city offered substantial evidence to support this reasoning, through testimony of fellow officers, records of Reynolds' performance, and a review of the well-documented standards of conduct and performance required of all officers.

Showing of pre-text or substantial union animus

In *City of Vancouver*, Decision 10621-B (PECB, 2012), the Commission held, "that under Chapter 41.56 RCW, a decision maker may be found to have committed a discriminatory act if the decision maker makes a decision that was influenced by the animus of his subordinate." For this reason, it is important to review the conduct of the two commanders, Rich and Ross, who conducted the investigation and made recommendations to Berg about Reynolds' employment.

An example of union animus can be found in Rich's February 9, 2011 investigation summary memorandum to Ross. Here Rich wrote:

> Officer Reynolds could not articulate a reason for refusing to answer Sgt Buster's questions. After discussing the CPD Policies and Ofc Reynolds' previous exposure to the disciplinary process, it is my opinion that Officer Reynolds simply requested union representative [sic] to hamper Sgt. Buster's ability to effectively supervise him and to avoid being held accountable for his actions.

A second expression of union animus appears in Ross' recommendation to Berg. He states:

> Commander Rich makes valid points as to Officer Reynolds misunderstanding when it comes to his union rights. I believe Officer Reynolds fails to understand the difference between actual investigations versus his immediate supervisor asking performance questions or giving orders to make sure his crew is safely accomplishing the department's mission. I believe that without this clear distinction, supervisors would not be able to ask any of their subordinates any questions for fear of possible discipline without first having their union representative present.

While both of the department's commanders gave recommendations to Berg about potential discipline for Reynolds, Berg is the sole and final decision maker. On several occasions, prior to and at the hearing, Berg stated that he did not consider Reynolds' exercise of *Weingarten* rights when imposing discipline.

On March 5, 2012, Berg wrote to Reynolds:

> While I am troubled by the descriptions of your interaction with Sergeant Buster during your January 1, 2012 shift, I do not find that your exercise of union rights during that interaction constituted insubordination. I do find that you have refused to comply (directly or constructively) with established rules, policies, or standard operating procedures regarding backing up officers and filling in your day with productive tasks.

At the hearing, when questioned by the employer's attorney, Berg again stated that he did not consider Reynolds' exercise of *Weingarten* rights when deciding to terminate Reynolds.

> Q. Okay. Does your final determination vary at all from Commander Rich's conclusion of Commander Ross' recommendation?
>
> A. It does.
>
> Q. In what place?
>
> A. Specifically, in the place of the insubordination. Looking at the letter that I authored, towards the bottom, it says under the last bullet on the first page, 'standards of conduct, chapter six, insubordination'. I write, 'while I am troubled by the descriptions of your interaction with Sergeant Buster during your January 1, 2012 shift, I do not find that your exercise of union rights during that interaction constituted insubordination.'

Later, during the same examination:

> Q. Okay. Did you consider his exercise of union rights to be – to constitute insubordination?
>
> A. I did not.

In the above examples, Berg stated that he did not consider Reynolds' exercise of Weingarten rights when determining to terminate Reynolds. I find his testimony to be credible and consistent with his communication with Reynolds about the reason for his termination. I have no reason to doubt that Berg relied on other factors to make his determination. I credit Chief Berg's testimony that the extent and severity of Reynolds' prior discipline and his continued refusal to provide back up to other officers despite extensive coaching and warnings were the actual reasons for Reynolds' termination.

Conclusion

The union established a *prima facie* case for discrimination based on Reynolds' protected activity, however the union could not overcome the final hurdle of showing the employer's reasons were pretextual or union animus was a substantial motivating factor. The union failed to show by a preponderance of the evidence that Reynolds was terminated in retaliation for his union activity.

FINDINGS OF FACT

1. The City of Centralia is a public employer within the meaning of RCW 41.56.030(12).

2. Teamsters Local 252 is a bargaining representative within the meaning of RCW 41.56.030(2) and represents police officers and sergeants working for the city of Centralia.

3. Phillip Reynolds worked as a police officer at the city of Centralia from 2006 to 2012. On July 12, 2011, Reynolds received a letter from Chief Robert Berg stating that "future violations of departmental policy will be dealt with in the most severe terms and may result in your dismissal from employment."

4. On January 1, 2012, Reynolds did not provide back up to other officers as he had been directed in the past.

5. On January 1, 2012, Reynolds' supervisor, Sergeant Carl Buster, met with Reynolds and asked him about his failure to provide back up as previously directed. Reynolds did not answer Buster's questions. Reynolds engaged in protected activity when he requested union representation at this meeting that could lead to discipline.

6. On January 5, 2012, Buster filed a complaint about Reynolds' lack of response to calls and Reynolds' refusal to answer questions on January 1, 2012.

7. Commander James Rich was assigned to conduct a thorough investigation about the events of January 1, 2012, based on Buster's complaint. Rich provided his investigation report to his co-commander, Commander David Ross.

8. Commander Ross provided a written recommendation to Chief Berg where he stated Reynolds had engaged in insubordination when he asked Buster for union representation on January 1, 2012.

9. On March 5, 2012, Berg terminated Reynolds effective March 22, 2012. In the termination letter Berg stated, "while I am troubled by the descriptions of your interaction with Sergeant Buster during your January 1, 2012 shift, I do not find that your exercise of union rights during that interaction constituted insubordination." Berg stated that Reynolds failure to follow supervisor directives to back up other officers, coupled with his previous discipline, was the reason Reynolds was being terminated.

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. By its actions described in Finding of Fact 9, the employer did not engage in discrimination when it terminated Reynolds.

ORDER

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

ISSUED at Olympia, Washington, this 22nd day of March, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Erin J. Slone-Gomez

ERIN J. SLONE-GOMEZ, 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:	24935-U-12-06376	FILED:	06/26/2012	FILED BY:	PARTY 2
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BAR UNIT:	LAW ENFORCE				
DETAILS:	Phil Reynolds 25101-S-12-0312				
COMMENTS:					

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