Port of Anacortes, Decision 12155 (PORT, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 25, Complainant, vs. PORT OF ANACORTES, Respondent.	CASE 26006-U-13-6657 DECISION 12155 - PORT CASE 26011-U-13-6658 DECISION 12156 - PORT FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Schwerin Campbell Barnard Iglitzen & Lavitt, LLP, by *Dmitri Iglitzen* and *Laura Ewan,* Attorneys at Law, for the union.

Chmelik, Sitkin & Davis, P.S., by *Richard A. Davis,* Attorney at Law, for the employer.

These consolidated complaints allege that the employer interfered with employee union activity when the employer's executive director called meetings to instruct employees to remove their union buttons during a union organization campaign. The union argues that this action unlawfully interfered with those employees' union activities. The employer asserts that it was enforcing an evenly-applied dress code policy when instructing employees to remove their buttons and that special circumstances justify its restriction on wearing union buttons.

As explained below, based on the record as a whole, I conclude that the employer interfered with protected employee rights and order the employer to remedy the violation.

PROCEDURAL HISTORY

The union filed the unfair labor practice complaint in Case 26006-U-13-6657 on October 14, 2013, and its complaint in Case 26011-U-13-6658 on October 17, 2013. Unfair Labor Practice Manager David Gedrose issued preliminary rulings finding that the complaints adequately alleged unfair labor practices. In the preliminary ruling issued in Case 26011-U-13-6658, the complaints were consolidated for further proceedings. The Commission assigned the consolidated complaints to me to serve as Examiner.

On November 4, 2013, the employer filed its answers and affirmative defenses and a hearing was scheduled for April 14, 2014. On February 27, 2014, the union filed motions for summary judgment arguing that no genuine issues of material fact remained regarding the complaints. The employer filed responsive arguments opposing summary judgment. On April 1, 2014, I issued a decision denying summary judgment, concluding that genuine issues of material fact remained regarding facts cited by the employer.

The hearing was held as scheduled on April 14, 2014. Both parties were afforded the opportunity to call witnesses and present evidence in support of their positions. The parties filed post-hearing written arguments by June 5, 2014, thereby closing the record.

ISSUES

As framed by the preliminary rulings issued in these cases, the issues presented by the complaints are as follows:

> Did the employer interfere with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made by employer official Robert Hyde on October 11, 2013 to Michael Wray and Ole Knudson, and on October 14, 2013 to David Bost and Michael Wray, in connection those employees' union activities?

I find that the employer interfered with the rights of employees Michael Wray, Ole Knudson, and David Bost when its executive director, Robert Hyde, called meetings to instruct the employees to remove their union buttons within one week of the union filing a representation petition. The employees could reasonably perceive such action as a threat of reprisal or force for engaging in union activity. The employer's dress code policy and its interest in maintaining a certain employee image do not alter the employees' reasonable perception of the employer's actions.

BACKGROUND

On October 7, 2013, the union filed a representation petition with the Public Employment Relations Commission seeking to be certified as the bargaining representative of a group of then-unrepresented employees, including Michael Wray, Ole Knudson, and David Bost.[1] Wray, Knudson, and Bost were aware that the union was seeking to represent them for collective bargaining with the employer.

Wray, Knudson, and Bost wear employer-provided uniforms that include identifying information such as the employee's name and the employer's logo. In early October 2013, Wray, Knudson, and Bost began wearing union buttons in support of the union's petition. The buttons were circular in shape and approximately two and one-half inches in diameter. The center of the button contained the union's "ILWU" acronym over a small map of North America and Hawaii. Surrounding the logo and map was the text "An Injury to One Is an Injury to All." The buttons were worn in a way that did not obscure the identifying information on the employer-provided uniforms.

On October 11, 2013, Wray and Knudson were called into a meeting with Hyde. During the meeting, Hyde instructed Wray and Knudson to remove their union buttons. On October 14, 2013, Bost was called into a meeting with Hyde. At Bost's request, Wray accompanied him to the meeting. During the meeting, Hyde instructed Bost to remove his union button. During the

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1 On December 3, 2013, following an election, the union was certified by the Commission as the bargaining representative for the bargaining unit. *Port of Anacortes*, Decision 11942 (PORT, 2013).

meetings, Hyde cited compliance with the employer's policies as the reason for asking the employees to remove the buttons.

The employer's policies do not specifically prohibit wearing buttons or pins. Other than the actions taken in this case, the employer has not enforced any prohibition on wearing buttons or pins.

APPLICABLE LEGAL STANDARDS

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. RCW 41.56.140(1).

To prove interference, the complainant must prove, by a preponderance of the evidence, the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd*, 98 Wn. App. 809 (2000) (remedy affirmed). An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd*, 98 Wn. App. 809 (2000)(remedy affirmed).

The complainant is not required to demonstrate that the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *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,* Decision 6793-A.

The Commission recently reaffirmed the foregoing standard, commonly referred to as the "reasonable perception" standard. *City of Mountlake Terrace*, Decision 11831-A and 11832-A (PECB, 2014). In *City of Mountlake Terrace*, the Commission further clarified two points regarding the standard. First, "[t]here is no requirement that an employee be engaged in protected activity, or have communicated an intent to do so, for an employer interference violation to exist," and second, that the seven criteria test identified in *Lake Washington School District*, Decision 2483 (EDUC, 1986) will "no longer be used to analyze interference claims."

ANALYSIS

As stated above, the Commission applies a "reasonable perception" standard when analyzing interference claims under the state's collective bargaining statutes. *City of Mountlake Terrace*, Decision 11831-A and 11832-A. In this case, the union must prove that Wray, Knudson, and Bost could reasonably perceive the employer's calling of a meeting to instruct them to remove their union buttons as a threat of reprisal or force associated with their union activity.

The reasonable perception standard is an objective standard taken from the viewpoint of the employees at issue. Therefore, it is key to distinguish the employee's reasonable perception from the the employer's intentions or motivations in taking the actions and making the statements.

Three facts, when viewed from the reasonable perception of the employees at issue in this case, lead me to conclude that employees could reasonably perceive the employer's action as a threat of reprisal or force for wearing union buttons.

First, the meetings occurred within one week of when the union filed its representation petition. Wray, Knudson, and Bost were all aware of the union's organization campaign and were wearing the union buttons in support of the campaign.

Second, the meetings were headed by Hyde, the employer's executive director and head of the management team. It was Hyde who instructed Wray, Knudson, and Bost to remove their union buttons. At least one of the meetings was also attended by Chris Johnson, the employer's deputy

executive director who is involved in making personnel decisions. The employees' direct supervisors were not in attendance.

Third, other than small talk, the sole topic raised in the meeting was the wearing of union buttons.

Taking these facts from the employee perspective, Wray, Knudson, and Bost could reasonably perceive that a meeting called by top management officials for the purpose of instructing them to remove their union buttons within a week of the union filing a representation petition carried a threat of reprisal or force in the form of discipline if the instruction was not followed. Indeed, Bost testified that he complied with Hyde's instruction to remove the button because he feared "some ramification" if he did not comply.

Commission precedent indicates that wearing union buttons is union activity. *See, e.g., Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A (PECB, 2009); *Leavenworth School District*, Decision 533 (EDUC, 1978). Undisputed evidence supports a finding that Wray, Knudson, and Bost were wearing union buttons to support the union's effort to represent them as their bargaining representative. All three employees testified that they wore the union buttons. I therefore conclude that Wray, Knudson, and Bost engaged in union activity by wearing union buttons to support the union's effort to be certified as their bargaining representative.

The undisputed evidence also supports a finding that the employer called the meetings with Wray, Knudson, and Bost for the purpose of instructing them to remove their union buttons. Therefore, I conclude that the meetings and instruction to remove the buttons were employer actions and statements associated with Wray, Knudson, and Bost's union activity.

These facts lead to a conclusion that the employer interfered with employee rights in violation of RCW 41.56.140(1).

The employer argues that Wray, Knudson, and Bost were violating the employer's policies regarding employee appearance while wearing the union buttons. The policies were developed to

promote the employer's "legitimate interest in projecting a uniform, identifiable, professional image to its customers and general public." It therefore contends that calling the meetings to instruct the employees to remove their union buttons was justified because it was enforcing those policies.[2]

Under the reasonable perception standard, the employer's intent or motivation for taking an action that is alleged to interfere with employee rights is not determinative. However, the policies are relevant considerations under the reasonable perception standard to the extent that they alter an employee's reasonable perception of the employer's actions.

For two reasons, I conclude that the policies do not alter the reasonable perception of the employees regarding the employer's action and statements in calling the meetings to instruct them to remove their union buttons. First, the employer's policies do not specifically prohibit the wearing of buttons. Second, the employer did not enforce the policies in a way that would alter the employees' reasonable perception regarding the meetings and instruction to remove the union buttons.

On their face, the policies in question do not mention the wearing of buttons or pins. The Personal Appearance & Dress Code policy provides its purpose, in relevant part, as:

> All employees are ambassadors of the Port and, therefore, dress and appearance should:
>
> 1. Present a professional and/or identifiable appearance for customers, suppliers and the public;
> 2. Create a sense of trust and confidence in doing business with the Port;
> 3. Promote a positive working environment;
> 4. Limit distractions caused by inappropriate dress attire;
> 5. Ensure safety while working.

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[2] The employer cites these facts to argue a "special circumstances" affirmative defense. In support of the affirmative defense, the employer relies solely on federal precedent under the National Labor Relations Act. My review of Commission precedent does not reveal any case where such a defense has been recognized by the Commission under facts similar to this case. While the relevant facts are considered as part of the reasonable perception analysis, I decline to extend such an affirmative defense in this case.

Another section of the Personal Appearance & Dress Code policy provides similar general guidance to employees required to wear uniforms:

> Where uniforms are required, they must be worn during working hours. The uniforms should be neat and clean when the employee arrives for work.

The Port Provided Clothing policy is also general in nature and provides, in part:

> Employees who have frequent and direct customer contact, as a primary job function, will be provided Port logo clothing or other non-logo uniforms to ensure the Port exhibits a professional and clean image.

An employee could reasonably perceive that the policies do not prohibit the wearing of buttons because they do not mention buttons or pins. This is true even though the policies do specifically prohibit other attire such as denim, and clothing that contains offensive language. Therefore, the existence of these policies, by themselves, does not alter my conclusion regarding the employees' reasonable perception of the employer's statements and actions relating to the wearing of buttons. This is particularly true because the employees did not wear the buttons in a way that obscured their uniform's identifying information or would confuse the general public.

The employer argues that it has consistently applied the policies to prohibit the wearing of any button or pin, particularly subsequent to the policies being revised on January 1, 2013. However, the revised policies, like the previous version, do not mention buttons or pins. Further, other than the actions at issue here, the employer had not taken any action to enforce its button prohibition under either version of the policies.

Significantly, under the reasonable perception standard, no evidence was presented that the employees at issue here knew of the strict prohibition against wearing buttons under the revised policies. Two of the employees – Wray and Bost – testified that they had seen other employees wearing pins or buttons for various organizations and causes. Dale Fowler, a member of the employer's management team, testified that he wore pins or buttons on his uniform for Rotary and to support school levy and fundraising efforts.

With this background, when the employees were called into meetings by Hyde and instructed to remove their buttons, they could reasonably perceive that the actions and statements were associated with their union activity, not by the existence of policies or the employer's enforcement of those policies.

CONCLUSION

The employer interfered with employee rights when it called meetings with Wray, Knudson, and Bost within a week of the union filing a representation petition to instruct them to remove the union buttons they were wearing in support of the union's organization efforts. Employees could reasonably perceive such actions and statements as a threat of reprisal or force associated with their union activity.

FINDINGS OF FACT

1. The Port of Anacortes is a port district within the meaning of RCW 53.18.010 and therefore a public employer within the meaning of RCW 41.56.030(12). Robert Hyde serves as the employer's executive director.

2. The International Longshore and Warehouse Union, Local 25 is an employee organization within the meaning of RCW 53.18.010 and therefore a bargaining representative within the meaning of RCW 41.56.030(2).

3. On October 7, 2013, the union filed a petition with the Public Employment Relations Commission seeking to be certified as collective bargaining representative of a group of then-unrepresented employees, including employees Michael Wray, Ole Knudson, and David Bost. Wray, Knudson, and Bost were aware that the union was seeking to represent them for collective bargaining with the employer.

4. In early October 2013, Wray, Knudson, and Bost began wearing union buttons in support of the union's petition.

5. Wray, Knudson, and Bost wear employer-provided uniforms that include identifying marks, such as the employee's name and the employer's logo. Wray, Knudson, and Bost wore the buttons in a way that did not obscure the identifying information on the employer-provided uniforms.

6. On October 11, 2013, Wray and Knudson were called into a meeting with the employer's executive director, Robert Hyde. During the meeting, Hyde instructed Wray and Knudson to remove their union buttons.

7. On October 14, 2013, Bost was called into a meeting with Hyde. At Bost's request, Wray accompanied him to the meeting. During the meeting, Hyde instructed Bost to remove his union button.

8. Wray, Knudson, and Bost were engaged in union activity while wearing union buttons in support of the union's petition to represent employees.

9. Employees could reasonably perceive that the employer's actions referenced in Findings of Fact 6 and 7 were a threat of reprisal or force associated with the union activity.

10. The employer did not meet its burden in proving its affirmative defenses. The employer's policies do not specifically prohibit wearing buttons or pins. Other than the actions taken in this case, the employer has not enforced any prohibition on wearing pins or buttons.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW.

2. Based on the Findings of Fact above, the employer interfered with employee rights in violation of RCW 41.56.140(1) by instructing Wray, Knudson, and Bost to remove the union buttons they were wearing in support of the union's representation petition.

ORDER

The Port of Anacortes, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Prohibiting employees from wearing union buttons in support of a union representation campaign.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

   b. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Port Commission of the Port of Anacortes, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

   c. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time

provide the complainant with a signed copy of the notice provided by the Compliance Officer.

c. Notify the Compliance Officer, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 2nd day of September, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

E. MATTHEW GREER, 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.

CASE 26006-U-13-6657, DECISION 12155 – PORT
CASE 26011-U-13-6658, DECISION 12156 – PORT

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT *THE PORT OF ANACORTES* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY interfered with employee rights by instructing employees to remove their union buttons.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL respect your right to engage in union activities.

WE WILL respect your right to show support for a union by wearing union buttons.

WE WILL NOT prohibit employees from wearing union buttons in support of a union representation campaign.

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.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
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OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 09/02/2014

The attached document identified as: DECISION 12156 - PORT has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	26011-U-13-06658	FILED:	10/14/2013	FILED BY:	PARTY 2
DISPUTE:	ER INTERFERENCE				
BAR UNIT:	OPER/MAINT				
DETAILS:	David Bost				
COMMENTS:					

EMPLOYER: PORT OF ANACORTES
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REP BY: RICHARD A DAVIS III
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Ph1: 360-671-1796

PARTY 2: ILWU LOCAL 25
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814 6TH STREET
ANACORTES, WA 98221
Verified 2/14 Staggs President per ILWU website
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REP BY: DMITRI IGLITZIN
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	26006-U-13-06657	FILED:	10/11/2013	FILED BY:	PARTY 2
DISPUTE:	ER INTERFERENCE				
BAR UNIT:	OPER/MAINT				
DETAILS:	-				
COMMENTS:					

EMPLOYER: PORT OF ANACORTES
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