Pierce County, Decision 12195 (PECB, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PIERCE COUNTY DEPUTY SHERIFF'S INDEPENDENT GUILD, Complainant, vs. PIERCE COUNTY, Respondent.	CASE 25731-U-13-6590 DECISION 12195 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Lombino Martino, P.S., by *Leann K. Paluck*, Attorney at Law, for the union.

Prosecuting Attorney Mark Lindquist, by *Andrew F. Scott*, Prosecutor/Civil, for the employer.

On May 30, 2013, the Pierce County Deputy Sheriff's Independent Guild (union) filed an unfair labor practice complaint against Pierce County (employer). Agency staff issued a preliminary ruling on June 5, 2013, finding a cause of action for employer interference with employee rights and employer discrimination by its actions toward employee Gavin Foster.

On May 16, 2014, the employer filed a motion to dismiss the complaint for untimeliness. The union filed a response to the motion on May 28, 2014. On May 29, 2014, the Examiner denied the motion to dismiss, and invited the parties to present additional evidence to support their respective timeliness arguments at the hearing, pursuant to the Commission's ruling in *State – Corrections*, Decision 11025-A (PSRA, 2011).

Examiner Lisa A. Hartrich conducted a hearing on June 3 and 4, 2014.[1] The parties submitted post-hearing briefs to complete the record.

[1] The parties requested continuances three times prior to the scheduling of these hearing dates.

ISSUES PRESENTED

1. Were the interference (*Weingarten* rights) allegations of the complaint timely filed? If so, did the employer deny Gavin Foster's right to union representation in connection with an investigatory interview?

2. Did the employer discriminate against Foster in reprisal for his protected union activities?

Based on the arguments, testimony, and evidence presented by the parties, the Examiner finds that the employer did not commit an unfair labor practice. The interference allegations of the complaint were not timely filed, and the union did not make a *prima facie* case for the discrimination claim.

APPLICABLE LEGAL STANDARDS

Statute of Limitations

"[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." RCW 41.56.160(1). A cause of action accrues, and the statute of limitations begins to run, at the earliest point in time that the complaint concerning the alleged wrong could be filed. *Municipality of Metropolitan Seattle*, Decision 1356-A (PECB, 1982), *citing Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616 (1945). The start of the six-month period, also called the triggering event, occurs when "a potential complainant has actual or constructive notice of the complained-of action." *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990); *Lake Washington School District*, Decision 11913-A (PECB, 2014).

Weingarten Rights Interference

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); *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014).

In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court of the United States ruled that an employer commits an interference violation under Section 8(a)(1) of the National Labor Relations Act (NLRA) if it refuses an employee's request for union representation at an investigatory interview. The Commission has long held that the rights announced in *Weingarten* are applicable to employees who exercise collective bargaining rights under Chapter 41.56 RCW. *See Okanogan County*, Decision 2252-A (PECB, 1986). *Weingarten*'s language clearly indicates that the protected right is an individual employee right, not a union right. See *Methow Valley School District*, Decision 8400-A (PECB, 2004).

Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in employer discrimination cases. To prove discrimination, the complainant must first make 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.

City of Vancouver, Decision 10621-B (PECB, 2012), *aff'd*, 180 Wn. App. 333 (2014).

Ordinarily, a complainant may use circumstantial evidence to establish the *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). To prove discriminatory motivation, the complainant 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 facts sought to be proved. *See Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

In response to a *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 complainant to prove either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A; *City of Vancouver*, Decision 10621-B.

BACKGROUND

The union is the exclusive bargaining representative for all fully commissioned employees, including deputies, sergeants, lieutenants, and detectives employed by the Pierce County Sheriff's Department. The union and employer were parties to a collective bargaining agreement (CBA) effective January 1, 2010, through December 31, 2011. The parties mutually agreed to extend the CBA through December 31, 2012.

Sergeant Gavin Foster was an employee of the Pierce County Sheriff's Department. He was hired as a deputy by the employer in 1999, and promoted to sergeant in 2009. Foster became the supervisor of the community support team (CST) in January 2012, and supervisor of the air operations unit in April 2012. Lieutenant Cynthia Fajardo was responsible for the CST, and was Foster's direct supervisor. Fajardo was also the president of the union. Fajardo and Foster were friends.

On Friday, August 3, 2012, Foster was flying the employer's airplane when he had a propeller strike accident ("prop strike") at the Olympia, Washington airport and damaged the airplane. On Monday, August 6, 2012, Fajardo, learned about the accident from Lieutenant Jim Kelley, who was in charge of the air operations unit. Fajardo testified that when she heard about Foster's accident, she was annoyed because she thought Foster should have been doing CST work, not flying the county airplane. Additionally, Foster had gone outside of his assigned area without notifying Fajardo. Fajardo did not know that Foster was spending work time flying the county's plane in order to get his private pilot's license. Fajardo thought that he was using a friend's plane for that purpose.

After hearing about the accident, Fajardo e-mailed Foster and requested that he meet her in her office the next day, August 7, 2012. The e-mail stated, "Gavin, Please plan on meeting with me tomorrow at 2pm at my office. This is in reference to the event that occurred on Friday. At this point, this meeting is only an inquiry." Foster wrote back, "The plane?" and Fajardo replied, "Yes." Foster then phoned Fajardo to discuss the e-mail she sent. Fajardo told Foster that she wanted to meet with him face-to-face.

Fajardo testified that she intended the August 7 meeting with Foster to be short. Fajardo had another commitment at 2:30 P.M. She did not intend for the meeting to be investigatory. Fajardo wanted to find out from Foster why he was not where he was supposed to be, and why he did not let her know what he was doing. She did not intend to write up any paperwork. Fajardo testified that she was only concerned with the time he was spending flying the plane instead of doing his work with the CST. She was not concerned about looking into the damage of the plane because she was not in charge of the air operations unit.

Foster was concerned because he heard rumors that there might be a criminal investigation into his use of the county plane. He also believed that he might be disciplined. Prior to meeting with Fajardo on August 7, Foster asked Sergeant David Perry to attend the meeting with him as his union representative. Sergeant Perry was the financial secretary of the union.

Foster arrived at Fajardo's office around 2:00 P.M. on August 7. He informed Fajardo that he intended to bring a union representative to the meeting. Fajardo told Foster that if he wanted a union representative present, the meeting would have to be postponed so that she could "draw a number" and tape record the meeting. "Drawing a number" means filling out an incident performance report (IPR), which could involve an inquiry, criticism, or commendation. She advised Foster that as his supervisor, she had the right to inquire into what he was doing with his time. When Perry arrived at Fajardo's office to represent Foster, Fajardo asked Perry to step out of her office. Perry stepped out of the office. Perry testified that he did not hear any of the conversation that took place between Foster and Fajardo after he stepped out, but at some point Foster indicated to Perry that it was alright for him to leave. Perry returned to his desk down the hall.

Fajardo assured Foster that their conversation would not be about the prop strike, but about how he was using and reporting his time. Fajardo asked Foster why he was adjusting his work time to take an evening flight school class, and asked about the amount of work time he used to fly the county airplane. Foster told Fajardo that Chief Rick Adamson had given him permission. According to Fajardo, Foster believed he was providing a benefit to the employer by spending his own money to earn his pilot's license. In return, he thought he could use the county plane for his required flight time and use county time to go to flight school. Foster testified that Fajardo was angry, and that he also got angry during the course of the conversation. At the conclusion of the meeting, Fajardo asked Foster to provide his flight logbooks to her, and the dates and times Foster spent engaged in pilot training on county time.

Fajardo testified that she thought Foster did not understand her expectations. She felt Foster had a sense of entitlement. She was not convinced that Foster believed he had erred in any way. Prior to the August 7 meeting, she had suspicions he was taking advantage of their friendship. She suspected that Foster was not leaving his home in the morning when he was logged in to service. She also noticed that he was infrequently present at the substation where the CST was located.

Fajardo spoke to Chief Adamson about her conversation with Foster some time after August 20, 2012. Adamson was Fajardo's direct supervisor. After Fajardo's discussion with Adamson, it was determined that a GPS tracking device would be installed on Foster's county-owned patrol vehicle. Undersheriff Eileen Bisson gave final authorization to put the tracker on Foster's vehicle, and it was installed on September 5, 2012, without Foster's knowledge. Based on the information provided by the tracker, Fajardo was ordered to conduct an investigation into possible policy violations by Foster.

On October 17, 2012, Fajardo sent a letter to Foster via e-mail and interdepartmental mail, notifying him that he would be investigated for possible policy manual violations. Foster was ordered to report to the investigatory interview at 1:00 P.M. on October 18, 2012. Detective Brian Lund was present at the interview as Foster's union representative. Fajardo and Lieutenant Scott Mielcarek with internal affairs were also present. The interview was tape recorded and lasted approximately four hours. At the conclusion of the interview, Foster was re-assigned to court security and removed from his supervisory duties.

Following the interview, Fajardo issued a 42-page investigative narrative detailing her findings, including 13 potential policy violations. However, she did not make any recommendations as to whether the charges against Foster were substantiated. The investigative narrative was sent to Foster, union representative Lund, and the union's attorney on December 9, 2012.

Fajardo's findings were reviewed by Lieutenant Jerry Lawrence. Lawrence met with Foster, Lund, and the union's attorney on January 16, 2013. At that meeting, Foster provided Lawrence with a written response to Fajardo's investigation. In that response, Foster asserted that his *Weingarten* rights were violated during the August 7, 2012 meeting with Fajardo. Foster also raised the allegation of a *Weingarten* violation with Lawrence during the January 16 meeting.

On March 10, 2013, Lawrence issued the results of his review of Foster's case. Lawrence sustained 12 violations, and recommended that Foster be terminated from employment. Foster's case was next reviewed by Bureau Chief Robert Masko, who met with Foster on March 29, 2013. Masko also recommended termination. The union asked Masko to determine whether a

Weingarten violation had occurred at the August 7, 2012 meeting between Fajardo and Foster. Masko recommended that there was no *Weingarten* violation.

The review of Foster's case continued up the chain of command. On June 5, 2013, Undersheriff Bisson met with Foster. Bisson recommended that the policy manual violations be sustained, and concurred with the recommendation that Foster be terminated from employment. On July 10, 2013, Foster met with Sheriff Paul Pastor. Foster declined to have union representation at the meeting with Pastor. On July 31, 2013, Sheriff Pastor issued an order of formal discipline for Foster's termination.

ANALYSIS

Were the interference (*Weingarten* rights) allegations of the complaint timely filed?

The employer argues that Foster knew or should have known on either August 7, 2012, or at least by October 2012, whether he believed a *Weingarten* violation had occurred at the August 7 meeting. The complaint was filed by the union on May 30, 2013, which means the "triggering event" would have had to occur on or after November 30, 2012.

In its complaint, the union pled that Foster did not realize the significance of the alleged *Weingarten* violation on August 7, 2012, until he received Fajardo's investigative narrative in December 2012. The union argues that, but for the August 7, 2012 meeting without a union representative, the GPS tracker would not have been put on Foster's county vehicle, and the information gained from the tracker which ultimately led to a disciplinary investigation would not have existed. The union considers the information gathered from the "unlawful meeting" between Foster and Fajardo to be unusable as the basis for disciplining Foster.

The union further argues that the complaint was filed by the union itself, not Foster. The union contends that it did not find out about the alleged *Weingarten* violation until December 2012, when the union's attorney received Fajardo's investigative narrative. The union argues that Foster did not discuss the disciplinary process with the union until December, and therefore the complaint is timely because notice to the union occurred within the six-month window.

The union's argument overlooks well-established law that *Weingarten* rights attach to the individual employee, not the union. Even if one were to agree that Foster did not know there was a potential *Weingarten* violation, or was coerced by union president Fajardo that he did not need union representation, still Sergeant Perry, an elected union officer, was well aware on August 7, 2012, that Foster asked for a union representative.

The focus is on the date when a potential complainant had actual or constructive notice of the complained-of action. The union and Foster had notice of a possible *Weingarten* violation on August 7, 2012, not four months later in December. Therefore, the interference allegation is dismissed as untimely.

Did the employer discriminate against Foster in reprisal for his protected union activities?

The union argues that Foster was singled out and targeted for discipline because he requested a union representative at the August 7, 2012 meeting with Fajardo. The union contends that Foster was treated differently than other employees who were investigated for similar behavior without the use of a tracker. The union asserts that Fajardo should have addressed her concerns directly with Foster rather than "set a trap" for him.

The union has the burden of proof to make a *prima facie* case for employer discrimination. First, the union must establish that Foster participated in protected union activity. Requesting a union representative to attend a meeting with a supervisor qualifies as protected union activity.[2] Next, the union must prove that Foster was deprived of some ascertainable right, benefit, or status. Foster was deprived of an ascertainable right, benefit, or status when he was eventually terminated from employment.

While the union met its burden to prove the first two elements of a *prima facie* case for discrimination, the union did not prove the third element, which is to show a causal connection between Foster's request for a union representative and his termination. The union did not present any evidence, circumstantial or otherwise, to prove a discriminatory motivation for the

[2] Because the *Weingarten* allegation was dismissed based on timeliness, the decision of whether or not there was an actual interference violation is not reached.

employer's actions. Foster was terminated because he violated a number of the employer's policies, not because he requested a union representative.

CONCLUSION

The interference (*Weingarten* rights) allegations of the union's complaint are dismissed because the complaint was not filed within the six-month statute of limitations. The union failed to make a *prima facie* case of discrimination. The unfair labor practice complaint is dismissed.

FINDINGS OF FACT

1. Pierce County (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. Pierce County Deputy Sheriff's Independent Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The union is the exclusive bargaining representative for all fully commissioned employees, including deputies, sergeants, lieutenants, and detectives employed by the Pierce County Sheriff's Department.

4. The union and employer were parties to a collective bargaining agreement (CBA) effective January 1, 2010, through December 31, 2011. The parties mutually agreed to extend the CBA through December 31, 2012.

5. Sergeant Gavin Foster was employed by the employer's Sheriff's Department in a position within the bargaining unit represented by the union.

6. Lieutenant Cynthia Fajardo was employed by the employer's Sheriff's Department in a position within the bargaining unit represented by the union. Fajardo was Foster's direct supervisor. She was also the president of the union.

7. On August 3, 2012, Foster was flying the employer's airplane when he had an accident and damaged the airplane.

8. After hearing about the accident, Fajardo requested that Foster meet her in her office on August 7, 2012.

9. Foster believed he might be disciplined for his use of the employer's plane, so he asked Sergeant David Perry to attend the meeting with Fajardo as his union representative. Perry was the financial secretary of the union.

10. When Foster arrived at Fajardo's office on August 7, 2012, he informed Fajardo that he intended to bring a union representative to the meeting. Fajardo told Foster that if he wanted a union representative, the meeting would have to be postponed.

11. When Perry arrived at Fajardo's office to represent Foster, Fajardo asked Perry to step out of her office. Perry stepped out of the office.

12. Foster indicated to Perry that it was alright for Perry to leave. Foster and Fajardo continued to meet without Perry present.

13. After the August 7, 2012 meeting, Fajardo began conducting an investigation into possible policy violations by Foster. Foster was eventually terminated for violating the employer's policies.

14. The union filed an unfair labor practice complaint on May 30, 2013, alleging the employer denied Foster his *Weingarten* rights when Fajardo did not allow Foster to have a union representative at the August 7, 2012 meeting.

15. May 30, 2013, is more than six months after the meeting on August 7, 2012.

16. A causal connection does not exist between Foster's request for a union representative on August 7, 2012, and Foster's termination from employment.

CONCLUSIONS OF LAW

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

2. The interference (*Weingarten* rights) allegations of the complaint were not timely filed under RCW 41.56.160(1). The employer did not interfere with employee rights or violate RCW 41.56.140(1).

3. As described in Findings of Fact 10 through 13 and Finding of Fact 16, the union failed to sustain its burden of proof to establish that the employer discriminated against Gavin Foster or violated RCW 41.56.140(1).

ORDER

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

ISSUED at Olympia, Washington, this 7th day of November, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

LISA A. HARTRICH, 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.