

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE PATROL  
TROOPERS ASSOCIATION,

Complainant,

vs.

WASHINGTON STATE PATROL,

Respondent.

CASE 24232-U-11-6208

DECISION 11863-A - PECB

DECISION OF COMMISSION

Vick, Julius, McClure, P.S., by *Jeffrey Julius*, Attorney at Law, for the union.

Attorney General Robert W. Ferguson, by *Stewart Johnston*, Senior Counsel, and *Kristi D. Kelly*, Assistant Attorney General, for the employer.

When the Washington State Patrol (employer) investigates allegations of non-criminal employee misconduct, the employer adheres to detailed procedures. Those procedures include a directive to employees not to discuss the investigation with individuals other than their union or legal representative. When an employee chooses to be represented by the Washington State Patrol Troopers Association (union), the union, at times, conducts its own investigation into the incident. The union's investigation is generally conducted concurrently with the employer's investigation. This case stems from an employer investigation into non-criminal employee misconduct, the union's concurrent investigation, and an employer directive to the union representative not to conduct a concurrent investigation.

This case presents the issue of whether the employer interfered with employee rights when the employer directed the union not to interview witnesses to an alleged incident of non-criminal employee misconduct until after the employer completed its internal investigation.

The employer interfered with employee rights when it directed the union representative not to interview witnesses until after the employer completed its investigation. An employer interferes with an employee's statutory collective bargaining rights when an employer's communication or action could reasonably be perceived as a threat of reprisal or force, or a promise of benefit. The union representative was exercising his statutorily protected right to represent employees when he investigated allegations of employee misconduct before the employer concluded its investigation and disciplined the employee. The employer's directive for the union representative not to investigate the matter until the employer's internal investigation concluded interfered with employee rights and caused the union representative to stop engaging in statutorily protected rights.

## ANALYSIS

### 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 an interference violation, 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.

### Application of Legal Standards

This case arises from an internal investigation into non-criminal employee misconduct and the employer's direction to the union representative about conducting a concurrent investigation. First, we will discuss the employer's investigatory process. Second, we will discuss the union's investigatory process. Third, we will discuss the facts of this case. Fourth, we will determine whether a statutorily protected right was threatened. Finally, we will determine whether the employer's directive to the union representative not to conduct concurrent investigations interfered with statutorily protected employee rights.

#### *The employer investigates allegations of employee misconduct.*

The Office of Professional Standards (OPS) is the division of the employer responsible for investigations of non-criminal employee misconduct. Investigations of non-criminal employee misconduct are governed by the Administrative Investigation Manual (AIM). In addition to the AIM, the parties' collective bargaining agreement contains provisions for employee rights during investigations.

Upon receiving a complaint that an employee may have violated a department policy, the employer completes an Internal Incident Report (IIR) and serves the employee.<sup>1</sup> When the employer serves the employee with the IIR, the employee is given an administrative investigation advance notice form. That form includes a directive that the employee "have no further communication regarding [the] matter, either on-duty or off-duty, with any person who is a potential witness or may be materially involved with the administrative investigation." The directive prohibits communication by fax, telephone, mail, electronic messaging, in-person, person to person relay, or any other form of communication.<sup>2</sup> The directive does not prohibit the

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<sup>1</sup> An administrative investigation may be placed on hold when the employee's action or omission may constitute criminal misconduct.

<sup>2</sup> Person to person relay means using an intermediary to gather and relay information back to the employee under investigation.

employee under investigation from discussing the investigation with his or her union representative and legal advisor. Failure to follow the directive is considered a violation of the employer's policy and can result in discipline.

Following the employer's investigation, the employer issues the employee under investigation an "administrative insight." The administrative insight is the employer's assessment of the evidence and a finding. After the employer issues the administrative insight, the directive not to discuss the matter is lifted.

*The union investigates allegations of employee misconduct during OPS investigations.*

The union trains union executive board members to represent employees. The training includes guidance that the union representative does not act as defense counsel for accused employees. Rather, the union's goal is provide the employee the best possible representation, ascertain the facts of the case, and ensure neither the collective bargaining agreement nor the employee's rights are violated.

To effectively represent employees, the union might investigate an allegation of non-criminal employee misconduct. During an investigation of non-criminal employee misconduct, a union representative might interview potential bargaining unit employee witnesses. The union representative does not contact private citizens. The union seeks basic details from witnesses. The union uses the information its representative obtains, in part, to test the veracity of the employee it is representing. The union also uses the information obtained from those interviews to facilitate resolution of the complaint.

*Investigation in this case.*

The employer served an employee with an IIR. The employee contacted Trooper Spike Unruh, a member of the union executive board, and requested Unruh serve as his union representative.

Unruh called three bargaining unit employees, who were potential witnesses in the OPS investigation.<sup>3</sup> He told the employees he was representing the employee in an OPS investigation and asked what they had observed.

Unruh spoke with Captain Karen DeWitt multiple times. During the initial discussion, DeWitt and Unruh discussed the complaint. In a subsequent conversation, Unruh told DeWitt he had spoken with witnesses.

After speaking with Unruh, DeWitt called OPS. DeWitt told OPS Lieutenant Rob Huss that Unruh had contacted witnesses. After her conversation with Huss, DeWitt told Unruh he was not to contact witnesses. After receiving the directive from DeWitt not to speak to witnesses, Unruh ceased his investigation. Unruh was afraid, if he continued the investigation, he would be disciplined.

Unruh notified union president Tommie Pillow and union vice president Mark Soper that the employer had instructed him not to contact witnesses. Soper spoke with Captain Michael DePalma, the OPS division commander. DePalma told Soper union representatives were not to conduct concurrent investigations. In a follow-up e-mail DePalma wrote, "The appropriate timing for a representative of any association to interview or contact witnesses is after the initial determination is provided to the affected employee." The employer maintained that OPS was responsible for interviewing witnesses. The employer's direction caused the union to stop its investigation.

*Was the union's investigation protected by the statute?*

The issue before the Commission is whether the employer's direction to the union representative not to interview witnesses until after the employer completed its investigation interferes with employee rights. The employer agrees that union representatives have a protected right to investigate and process grievances and potential grievances. However, the employer argues that, under the facts of this case, the union representative's right to investigate was not triggered in this case. The employer asserts that the union representative's investigation was not protected activity.

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<sup>3</sup> There is no dispute about whether Unruh used employer resources or time to conduct the investigation.

It is not necessary for a union to prove an employee was engaged in protected activity to establish an interference allegation. *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). However, in this case, the parties dispute whether the union representative's investigation was protected by the statute. To determine whether the employer interfered with employee rights it is necessary to determine whether the union representative's investigation was statutorily protected.

When determining whether activity is protected, we first look at whether the activity was taken on behalf of the union. *University of Washington*, Decision 11199-A (PSRA, 2013). If the activity appears to be union activity on its face, a "reasonableness" standard is applied. *Vancouver School District v. SEIU Local 92*, 79 Wn. App. 905 (Div. II 1995); *PERC v. City of Vancouver*, 107 Wn. App. 694 (Div. II 2001). "Employee protected activity loses its protection when it is unreasonable – but reasonableness is gauged by what a reasonable person would do in the midst of industrial strife, and not by what a reasonable person would do in the more ordinary affairs of life." *Vancouver School District v. PERC*, 79 Wn. App. at 922; see also *Vancouver School District*, Decision 3779 (PECB, 1991), *rev'd*, *Vancouver School District*, PECB 3779-A (PECB, 1992). "Conduct may fall outside of the protections of labor statutes if the conduct is irresponsible and abusive." *City of Vancouver*, 107 Wn. App. at 711 (even when it was claimed the actions were taken as part of union duties, actions that amounted to a conspiracy to retaliate against a fellow employee were unprotected). If behavior becomes too disruptive or confrontational, it loses the protection of the Act. *Pierce County Fire District No. 9*, Decision 3334 (PECB, 1989).

Engaging in an investigation of issues related to potential disciplinary actions of a represented employee is union business protected by the statute. See *City of Pullman*, Decision 11148 (PECB, 2011), *aff'd*, Decision 11148-A (PECB, 2012). When a union investigation may be helpful in resolving matters before discipline even issues, that conduct is protected.<sup>4</sup> In this case, the union representative's pre-disciplinary investigation into non-criminal employee misconduct was taken on behalf of the union. The union representative initiated the investigation after an employee contacted him and requested representation at the employer's investigatory interview.

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<sup>4</sup> In fact, here the collective bargaining agreement at Section 20.2 encourages negotiated settlements before the employer determines discipline.

The purpose of the union's investigation was to effectively represent the employee during the investigatory process and facilitate settlement. The union representative investigated the non-criminal employee misconduct in his role as a union representative, not as an employee. On the facts of this case, the union representative's pre-disciplinary investigation into non-criminal employee misconduct was statutorily protected.

Having found that the investigation in this case was protected by the statute, the next step is to determine whether the union representative's investigation was reasonable.

A union investigation into an employee disciplinary matter loses its protection when the representative's conduct is unreasonable. *Vancouver School District v. SEIU Local 92*, 79 Wn. App. 905. In *Vancouver School District*, the employer investigated an incident that occurred on a school bus. The employee under investigation sought union representation. The union requested that the employer interview more witnesses, and the employer complied. After the employer completed its interviews, the union informed the employer that the union would conduct its own investigation. The union representative spoke to an employer official about the union's planned investigation. The employer denied the union representative's request to ride the school bus. The union conducted an investigation by going to the school bus stop. At the bus stop, the union representative approached children and asked them where they lived and if their parents were home. While the court noted that investigating a grievance is protected activity, the court found the union stepped out of the protections of the law in its handling of the investigation.

Unlike the investigation in *Vancouver School District*, the investigation in this case was reasonable. The union representative investigated non-criminal employee misconduct that may have violated employer policies. The employer's investigation was initiated after a complaint from a supervisor, not a member of the public. The union confined its investigation to interviewing three bargaining unit employees. The union representative asked the bargaining unit employee witnesses general questions, did not share that information with the employee under investigation, did not investigate criminal matters, and did not contact civilian witnesses. After being instructed to no longer contact witnesses, the union official immediately ceased his

investigation. There is no evidence that the union representative conducted the investigation in a manner that would cause it to fall outside of the protections of the statute.

*The employer's direction that the union representative could not investigate interfered with employee rights.*

A reasonable employee could perceive the employer's direction not to investigate allegations of non-criminal employee misconduct concurrently as a threat of reprisal or force associated with union activity. The employer's directive caused the union representative to stop investigating an allegation of employee misconduct. Unruh's fear that he would be disciplined if he continued to engage in the investigation, in this case protected by statute, was reasonable. On the facts of this case, the employer's direction to the union representative not to investigate employee misconduct until after the employer concluded its investigation interfered with employee rights. We affirm the Examiner.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Jamie L. Siegel are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 28<sup>th</sup> day of May, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
MARILYN GLENN SAYAN, Chairperson

  
THOMAS W. McLANE, Commissioner

  
MARK E. BRENNAN, Commissioner





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CASE NUMBER: 24232-U-11-06208 FILED: 09/08/2011 FILED BY: PARTY 2  
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