Seattle School District, Decision 9982-A (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 20973-U-07-5351 DECISION 9982-A - PECB DECISION OF COMMISSION

Schwerin Campbell Barnard LLP, by *Kathleen Phair Barnard*, Attorney at Law, for the union.

John M. Cerqui, Senior Assistant General Counsel, for the employer.

This case comes before the Commission on a timely appeal filed by the International Union of Operating Engineers, Local 609 (union) seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Robin Romeo.[1] The Seattle School District (employer) supports the Examiner's decision.

ISSUE PRESENTED

Did the employer interfere with protected employee rights in violation of Chapter 41.56 RCW when it investigated an allegation that union officers were harassing a bargaining unit employee in violation of employer policies and by issuing a report summarizing the findings of that investigation?

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[1] *Seattle School District*, Decision 9982 (PECB, 2008).

We affirm the Examiner's conclusion that the employer did not interfere with protected employee rights through its investigation of claims of workplace harassment and by issuing a report summarizing its investigation.

BACKGROUND

The union represents a bargaining unit of mixed classes, including gardeners, groundskeepers, custodians, food service, and security employees. In 2006, Liesl Zappler, a bargaining unit employee, filed a hostile work environment complaint with the employer alleging that certain bargaining unit members retaliated against her for filing an unfair labor practice complaint with this agency.[2] The employer initially assigned the investigation to Rick Takeuchi, and then to Eddie Hill. Interim Human Resource Manager Penny Peters eventually took over the investigation and began a preliminary investigation of Zappler's allegations by interviewing several employees. When Peters determined that Zappler's complaint was against bargaining unit officials, including David Westberg, the union's business manager, and Jeffery Wasson, a Seattle School District employee, the employer then hired Betsy Reeves, an outside investigator, to continue the investigation. During the course of her investigation between April 2006 and September 2006, Reeves interviewed several other bargaining unit employees about statements they made to Zappler as well as their interactions with her. Reeves also interviewed Westberg about statements he may have made to Zappler.

Once Reeves completed her investigation, she turned her report over to Chief Operating Officer Mark Green. Green reviewed Reeves' preliminary findings and conclusions, and returned the report to Reeves with instructions to remove certain conclusions from her report. On November 22, 2006, Green released the report and issued three letters in relation to it. The first letter went to Zappler and informed her that her harassment allegations had been investigated and that the employer determined that Westberg made one inappropriate comment to her, that certain employees would receive anti-harassment training, and that the rest of her allegations were unsubstantiated. The second letter was sent to Westberg and informed him that he acted

2 For a detailed summation of Zappler's complaint against the union, *see Seattle School District*, Decision 9135-B (PECB, 2007).

inappropriately when he made comments suggesting that Zappler had a sexual relationship with her previous supervisor. The letter also reminded Westberg that while he was on the employer's premises he was obligated to comply with the employer's policies. The final letter was sent to Wasson and cleared him of any wrongdoing, but also informed him that the entire grounds department would benefit from anti-harassment training.

On March 13, 2007, the union filed its complaint alleging that the investigation and report interfered with protected employee rights. The Examiner dismissed the union's complaint, finding that many of the union's claims were time barred by the six-month statute of limitations, that Reeves was not an agent of the employer and therefore her report could not be imputed to the employer, and that the letters issued to Westberg and Wasson did not interfere with their protected rights.[3]

DISCUSSION

Two threshold issues must be addressed before a proper analysis of the union's interference allegations can be made. The first is whether the statute of limitations precludes certain union claims; the second is whether Reeves is an agent of the employer. We examine each in turn.

Statute of Limitations - Certain Union Claims are Not Time Barred

The statute of limitations for filing an unfair labor complaint under the Public Employees' Collective Bargaining Act (PECB) is six months from the date of occurrence. RCW 41.56.160(1); *City of Bellevue*, Decision 9343-A (PECB, 2007). The six-month statute of limitations begins to run when the complainant knows, or should know, of the violation. *City of Bremerton*, Decision 7739-A (PECB, 2003). This Commission has previously held that the only exception to the strict enforcement of the six-month statute of limitations is where the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Pasco*, Decision 4197-A (PECB, 1994). A complaint may be dismissed by an

[3] Although the Examiner found that the letter issued to Westberg did not interfere with his protected rights, we note that Westberg is not a public employee within the meaning of Chapter 41.56 RCW.

examiner as untimely even where the employer has not raised timeliness as a defense. *City of Bellevue*, Decision 9343-A.

The Examiner found that Reeves conducted her investigation between May 2006 and July 19, 2006, and because the union filed its complaint on March 13, 2007, the only allegations that could be considered were those occurring less than six months before filing of the complaint (or September 13, 2006). We do not disagree with the Examiner that procedural violations that may have occurred before September 13, 2006 are time barred, but certain other events, including the issuance of the Reeves report or any potential violations contained within the report, are within the statute of limitations.

When an employer conducts an investigation into a violation of its policies or procedures by employees represented for the purposes of collective bargaining, it needs to comply with certain requirements outlined by case law interpreting Chapter 41.56 RCW. For example, a bargaining unit employee has the right to be accompanied and assisted by their union representative at investigatory meetings that the employee reasonably believes may result in disciplinary action. *Methow Valley School District*, Decision 8400-A (PECB, 2004). Where a union believes that these procedural rights have been violated, a complaint must be filed within six months of the time when the union knows, or should have known, the violation occurred.

However, there are a variety of violations that may occur at different times during an investigation, such as a procedural violation, any actual discharge or discipline of employees, or other employer act associated with the investigation that interferes with protected rights often occur at different times. Those events often occur at different times, and therefore different dates that trigger the statute of limitations. Accordingly, where a complainant asserts procedural and substantive violations in association with an employer-conducted investigation, it is important to carefully analyze the timeline of pertinent events and determine when the alleged violations actually occurred, and apply the statute of limitations accordingly.

The union filed its complaint on March 13, 2007. This record demonstrates that the union was well aware the employer was conducting an investigation into Zappler's complaint. This record

also demonstrates that, although most of Reeves' interviews occurred before September 13, 2006, and are outside of the statute of limitations, several events, including the union's allegations that Reeves' report may have interfered with protected rights, are well within the statute of limitations. Accordingly, we must now determine if those events that occurred within the statute of limitations did in fact interfere with protected employee rights.

Agency - Reeves is an Agent of the Employer

This Commission applies the common law principals of agency when determining whether acts of an individual not employed by an employer can be imputed to that employer. *See Lower Columbia Community College (Community College District 13)*, Decision 8117-B (PSRA, 2005). An agent's authority to bind his principal may be either actual or apparent. *Deers, Inc. v. DeRuyter*, 9 Wn. App. 240, 242 (1973)(citing 3 Am.Jur.2d Agency sec. 71 (1962)) cited in *Lower Columbia Community College (Community College District 13)*, Decision 8117-B. With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person or party. *Smith v. Hansen, Hansen, Johnson, Inc.*, 63 Wn. App. 355, 363 (1991), *review denied*, 118 Wn.2d 1023 (1992). Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. Washington courts have held that the "authority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services." *Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 351 (1966).

The Examiner found that Reeves was not an agent of the employer, and therefore, neither her investigation nor her report can be imputed to the employer. On this record, we disagree.

This record demonstrates that although the employer hired Reeves to independently investigate Zappler's allegations, the employer still retained certain control of the investigation. For example, even though Reeves drafted the investigation report, Green returned the report to Reeves to delete certain conclusions to which Green objected. Furthermore, Green made sure that Reeves complied with certain procedural safeguards, such as providing employees with

Weingarten rights. Therefore, we cannot say that Reeves had total independence to act outside of the employer's control.

Furthermore, even if Green had not controlled the investigation in the manner in which he did, Reeves' conduct during the investigation still could have been imputed to the employer had she violated any procedural safeguards guaranteed by Chapter 41.56 RCW. A public employer cannot circumvent its obligations under Chapter 41.56 RCW by hiring an independent contractor to conduct an investigation. To allow otherwise would impermissibly circumvent the Act.

When the Examiner concluded that Reeves was not an agent of the employer, she found it unnecessary to analyze the Reeves report or any other part of her investigation to determine if that process interfered with protected employee rights. Additionally, the Examiner made no factual findings about the substance of the investigation or report. Because we are reversing the conclusion that Reeves was not an agent of the employer, we must make a de novo review of the record to determine whether the investigation and report did in fact interfere with protected employee rights. Furthermore, because we are making a de novo review of facts contained within the record, we must apply a preponderance of the evidence standard, as opposed to the substantial evidence standard that we normally apply when reviewing findings of fact on appeal. *See Skagit County*, Decision 8746-A (PECB, 2006).

Employer Interference – Applicable Legal Standard

RCW 41.56.040 grants public employees the right to organize and designate representatives of their own choosing without interference, restraint, coercion or discrimination from their employer. RCW 41.56.140(1) enforces the rights granted by RCW 41.56.040, by making it an unfair labor practice for employers to interfere with the exercise of employee rights. An employer unlawfully interferes with union activity if the evidence shows that an employer's actions would tend to coerce a reasonable employee from exercising collective bargaining rights. It is not necessary to show that the employer acted with intent or motivation to interfere, nor is it necessary to show that the employee involved actually felt threatened or coerced. *Grant County Public Hospital Dist. 1*, Decision 8378-A (PECB, 2004).

The union argues that any sort of investigation into harassment claims that may have occurred at an internal union meeting creates an impression that an employer is engaged in surveillance against the union and is therefore an unfair labor practice. We disagree.

In *PERC v. City of Vancouver*, 107 Wn. App. 694 (Div. II, 2001)(*City of Vancouver*), the Washington State Court of Appeals held that "an employer with a legitimate reason to inquire may interrogate employees on matters that relate to their collective bargaining rights without incurring liability under the [National Labor Relations Act (NLRA)]." *City of Vancouver*, 107 Wn. App. at 706 citing *NLRB v. Ambox, Inc.*, 357 F.2d 138 (5th Cir. 1966). Thus, an employer's investigation into an employee's union activities is not per se unlawful. *City of Vancouver*, 107 Wn. App. at 705. The interrogation becomes illegal when the words themselves or the context in which they are used suggests an element of coercion or interference with protected union-related activities. *City of Vancouver*, 104 Wn. App. at 706 citing *NLRB v. Ambox, Inc.,* 357 F.2d at 141.

The *City of Vancouver* court also adopted the NLRA test to determine whether an employer's interrogation of employees with respect to their union activity constitutes interference.[4] That test examines the totality of the circumstances and states:

> (1) the history of the employer's attitude toward its employees; (2) the type of information sought; (3) the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer had a valid purpose for obtaining the information; (7) if so, whether the employer communicated it to the employee; and (8) whether the employer assured the employee that no reprisals would be forthcoming should he or she support the union.

City of Vancouver, 107 Wn. App. at 706 citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). Even where all eight factors weigh in the employer's favor, a violation may still be found if,

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[4] This Commission and the 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. *Methow Valley School District*, Decision 8400-A citing *State ex. rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wn.2d 60, 67-8 (1980). The Commission has previously held that Section 7 of the NLRA and RCW 41.56.040, the statutes that guarantee employees the right to organize, select bargaining representatives, and collectively bargain with their employer free from interference, are substantially similar. *See Methow Valley School District*, Decision 8400-A; *Okanogan County*, Decision 2252-A (PECB, 1986).

under the totality of the circumstances, the interrogation tends to restrain, coerce, or interfere with protected employee rights. *City of Vancouver*, 107 Wn. App. at 706-7 citing *V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270 (6th Cir. 1999).[5]

Application of Standard – Employer Investigation

From the outset, we once again note that the employer's investigation concerned allegations that bargaining unit employees had violated the employer's anti-harassment policies in both the workplace setting and through statements made at a union meeting. Thus, the question that must be answered is whether the totality of the employer's conduct reasonably tended to restrain or interfere with employee rights.

Eight Factor Test

Examining the eight factor test outlined in *City of Vancouver* demonstrates that:

1. The union presented no evidence that the employer had a pattern of questioning union members about statements made at union meetings.

2. Reeves limited her questions to obtaining information about Zappler's allegations of misconduct. In fact, Reeves made it patently clear to those employees she interviewed that she was only seeking information about the allegations, and that employees should not volunteer information that was not directly related to the investigator's line of questioning.

3. Reeves was not a regular employee of the employer. Nevertheless, the employer did hire her to conduct the investigation, and she reported directly to Green, a high ranking employer official. This fact alone does not demonstrate intent on the part of the employer to intimidate or harass the bargaining unit employees.

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[5] The union's brief cites Commission precedent holding that any investigation into statements made at a union meeting tends to chill the free exercise of protected employee rights. The cited precedents pre-date the *City of Vancouver* case. When the Court of Appeals issued its decision in *City of Vancouver*, it effectively overturned all preexisting Commission precedent on this subject. Accordingly, the union's reliance on the cited cases is misplaced.

4. The interviews of bargaining unit employees occurred in a formal setting on the employer's premises. The interview of Westberg occurred at his attorney's office. However, at all of the interviews, the employer made sure that the procedural rights guaranteed by Chapter 41.56 RCW were maintained.

5. The investigator asked that employees respond to her question truthfully.

6. The employer had a legitimate interest in ensuring that its anti-harassment policies were enforced.

7. Reeves communicated the purpose of her investigation to all interviewees and took the necessary steps to instruct the interviewees to limit their answers to Zappler's allegations of harassment.

8. There is no evidence in this record demonstrating employees were informed that they would not suffer retaliation for failing to participate in the investigation as a sign of support for the union.[6] However, this fact by itself does not demonstrate that the employer committed an unfair labor practice.

Taken as a whole, nothing in the interview process leads to a conclusion that a reasonable employee would view that process as an employer attempt to interfere with or restrain protected employee rights. As the employer points out, the investigation concerned allegations of a hostile work environment and was not an investigation into union strategy or politics. Furthermore, the investigation conducted by this employer is similar to the type of investigation the *City of Vancouver* court found permissible. Accordingly, we find no violation.

<u>Application of Standard – The Reeves Report</u>

With respect to the Reeves Report, our analysis is simpler. In its brief, the union points to several individual lines within the report, and in reading those lines in isolation, objects to how the union is portrayed within the report. The union asserts that the report is biased, factually

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6 On appeal, the employer pointed out that Reeves informed employees that they would not be retaliated against for *participating in the investigation*. This is not the protection that employers need to provide to employees under the *City of Vancouver* case.

unsupported and demonstrates hostility towards the parties' statutory collective bargaining obligations. For example, the union points to a passage that claims the union controls training and paid training to reward supporters of union officers. Additionally, the union claims that statements in the report indicate that the union favors dues paying members over agency fee payers.

The bulk of the report relates to Reeves' findings and conclusions about Zappler's allegations of harassment or gender discrimination. The activities outlined in the report do not concern protected employee activity. Rather, they concern allegations that the bargaining agent violated the employer's anti-harassment policies. Therefore, any statement that does not concern union activity falls outside the protection of the labor statutes, and cannot form the basis for an interference violation, even when that statement is placed in writing. *See Vancouver School District v. SEIU, Local 92*, 79 Wn. App. 905, 906 (1995).

Furthermore, when the report is read in its entirety, a clearer context is gained for many of the statements that the union asserts constitute employer interference, and while none of the statements are flattering, they nevertheless represent statements given to Reeves during the course of her investigation. Obviously, the union objects to the overall tone of the report. That objection, however, does not equate to an interference violation. Because the report concerns unprotected activity, the union needed to present facts demonstrating that the employer intentionally misrepresented facts or manipulated statements contained within the report in an effort to discredit the union. That evidence simply does not exist in this record. Accordingly, an interference violation cannot be found and the complaint must be dismissed.

NOW, THEREFORE, it is

ORDERED

I. The Findings of Fact issued by Examiner Robin Romeo are AMENDED to read as follows:

1. Seattle School District is a public employer within the meaning of RCW 41.56.030(1).

2. International Union of Operating Engineers, Local 609, is a bargaining representative within the meaning of RCW 41.56.030(3).

3. In February 2006, employee Liesl Zappler filed an internal complaint alleging gender discrimination and retaliation. Rick Takeuchi initially conducted the investigation. The employer then assigned Eddie Hill to conduct the investigation. Interim Human Resource Manager Penny Peters eventually took over the investigation and began a preliminary investigation by interviewing several employees.

4. Peters determined that Zappler's complaint was against bargaining unit officials, including David Westberg, the union's business manager, and Jeffery Wasson, who was a Seattle School District employee. The employer hired Betsy Reeves, an outside consultant, to conduct an investigation of the complaint.

5. Reeves conducted her investigation between May 2006 and September 2006. She issued a preliminary report of her findings to Chief Operating Officer Mark Green. Green reviewed Reeves preliminary findings and conclusions, and returned the report to Reeves with instructions to remove certain conclusions from her report.

6. On November 22, 2006, Green then released the Reeves report and it was also forwarded to Zappler and the union's shop steward. The employer did not forward the report or its comments on the report to any other members of the bargaining unit.

7. On November 22, 2006, Green sent a letter to Zappler informing her that the employer conducted an investigation and concluded that David Westberg, the union business agent, made one inappropriate comment to her, that certain

employees would receive anti-harassment training, and that the rest of her allegations were unsubstantiated.

8. On November 28, 2006, the employer sent a letter to Westberg informing him that he acted inappropriately when he made comments suggesting that Zappler had a sexual relationship with her previous supervisor. The letter reminded Westberg that while he was on the employer's premises he was obligated to comply with the employer's policies.

9. On January 2, 2007, the employer sent a letter to Jeffrey Wasson, the union shop steward, clearing him of any wrongdoing. The letter also informed him that the entire grounds department would benefit from anti-harassment training

II. The Conclusions of Law and Order issued by Examiner Robin Romeo are AFFIMED and adopted as the Conclusions of Law and Order of the Commission.

ISSUED at Olympia, Washington, this 20th day of November, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner