

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF
STATE EMPLOYEES,

Complainant,

vs.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY,

Respondent.

CASE 130988-U-18

DECISION 13119 - PSRA

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Edward Earl Younglove III, Attorney at Law, Younglove & Coker, P.L.L.C., for
the Washington Federation of State Employees.

Elizabeth Delay Brown, Assistant Attorney General, Attorney General Robert W.
Ferguson, for the Washington State Department of Ecology.

On September 28, 2018, the Washington Federation of State Employees (union) filed an unfair labor practice complaint against the Washington State Department of Ecology (employer) with the Public Employment Relations Commission (PERC). A preliminary ruling was issued on November 28, 2018, finding that the complaint stated a cause of action in violation of RCW 41.80.110 (1)(a) for employer interference.

I held a hearing on July 26, 2019. Both the union and the employer filed post-hearing briefs.

ISSUES

1. Did the employer interfere with employee collective bargaining rights when a manager gave the impression of using a bargaining unit member to spy on the union activities of other employees?

Yes, the manager interfered with collective bargaining rights when he created an impression of surveillance.

2. What is the appropriate remedy?

The union has requested nonstandard remedies. Standard remedies are more appropriate.

BACKGROUND

The employer's former section manager, Gary Maciejewski, created the impression of surveillance by using a nonsupervisory bargaining unit member, Sara Fennessy, in a way that appeared to be surveillance of the protected activities of bargaining unit members in the Business Technology Service Center of the employer's Information Technology Services Office. This service center functions as a help desk.

In 2018, the working relationships in the service center had become highly contentious and polarized. Conflicts had arisen over management's decision to terminate an employee and to curtail telecommuting and flexible schedules. Over the spring and summer of 2018, the tension in the service center continued to worsen. The conflicts culminated in nine out of ten of the bargaining unit employees at the service center being involved in filing a grievance. This grievance was filed on June 5 by shop steward Alan Bogner. It was about action taken by the Information Technology Service Office appointing authority and chief information officer Baird Miller, Maciejewski (who was the service center's manager), and Kelson Smith (who was the service center's first line supervisor). The one service center employee not involved in the grievance was Fennessy. As this grievance was filed, the union reached out to the employer to have a conversation about its concerns. That conversation led to an investigation.

On August 6, 2018, an investigation report was issued and was highly critical of the supervisory employees. The report focused on the allegations against Smith and Maciejewski, as Miller no longer worked for the employer. Maciejewski retired as disciplinary proceedings were pending against him. Smith's employment also ended. In light of these developments, the union withdrew its grievance.

The investigation report referred to Maciejewski as having likely encouraged Fennessy to inform him of her coworkers' union activities. The report stated, "there is a preponderance of evidence that Mr. Maciejewski encouraged Ms. Fennessy to inform him of her coworkers' union activities and created at least the appearance of giving her preferential treatment." This conclusion was included in the pre-disciplinary letter issued to Maciejewski:

The investigator did find a preponderance of evidence that your actions encouraged an employee to inform you of their coworkers' union activities and created at least the appearance of giving preferential treatment towards this employee. Altogether witness statements show that you failed to stop the employee from reporting union activities to you, which more likely than not encouraged them to do so and contributed to their isolation from their peers who broadly perceive [sic] them to be receiving preferential treatment.

In this polarized workplace, Fennessy had been closely aligned with Maciejewski and was frustrated with the union. She did not believe that it was working for her as a represented employee. She felt isolated from her peers and, by the summer of 2018, the only people with whom she really talked were Maciejewski and Smith. Smith was her supervisor in the late spring of 2018. At the start of 2018, her supervisor had been Mark King. In April of the same year, King had voluntarily demoted from that supervisory position to a bargaining unit position.

Even though Maciejewski was not Fennessy's direct supervisor, she spent significant time working with him. When King was Fennessy's supervisor, King felt directed by Maciejewski on key decisions regarding Fennessy. Maciejewski mentored Fennessy and had her work full time on a special project even though King considered this project unnecessary. The bargaining unit members perceived this project as easier than regular service center work. While working on this special project, she was able to move to a more desirable cubicle near a window, instead of in the aisle with the other service center bargaining unit members. She was doing technical writing and found working near her service center peers too distracting because of the noise of their frequent phone calls. However, bargaining unit members perceived this more desirable cubical assignment to be a special privilege.

The surveillance behavior with which Fennessy was connected involved shop steward Bogner's visits to the service center. While almost all of the bargaining unit members in the service center had reached out to Bogner for assistance, Fennessy had not, and she was not involved in the grievance. In May through August 2018, Bogner frequently visited the service center on his work breaks to chat with bargaining unit employees and to check on morale. During about six of these visits, Fennessy made a "beeline" to Maciejewski's office.

The most significant of Bogner's visits to the service center bargaining unit members occurred on a Friday afternoon in February or March 2018, when King was still Fennessy's supervisor. Bogner visited the center and was chatting with employees when Fennessy left for a smoke break. When she returned, he was still there. In the interim, Fennessy went to Maciejewski's office to alert him of Bogner's chat with bargaining unit members. She interrupted a meeting between Maciejewski and King. Maciejewski sent King out to check on what was happening. King determined it was a benign conversation, just chitchat, and returned to Maciejewski's office to resume their meeting. King told Maciejewski that he was concerned that Fennessy was going to "paint herself in a corner away from the rest of her peers." Maciejewski indicated that he was okay with that, as Fennessy could be utilized to see what was going on with the union.

In the summer of 2018, when Maciejewski was still the manager, Fennessy frequently requested permission to telecommute because of personal matters. Permission was granted, even though the personal matters were minor. This ability to frequently telecommute was perceived as another example of preferential treatment by the bargaining unit members who worked at the service center.

ANALYSIS

Applicable Legal Standards

It is an unfair labor practice for an employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by chapter 41.80 RCW. RCW 41.80.110(1)(a); *State – Corrections*, Decision 11571-A (PSRA, 2013). 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), *remedy aff'd, Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn. App. 809 (2000). 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 other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

To prove an interference violation, the complainant must prove by a preponderance of the evidence that the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A. To meet its burden of proving interference, a complainant need not establish that an employee was engaged in protected activity. *State – Washington State Patrol*, Decision 11775-A (PSRA, 2014); *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). The complainant is not required to demonstrate that the employer intended to interfere or that it was motivated to interfere with an employee's protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee was actually coerced by the employer or that the employer had union animus. *Id.*

An employer commits an interference violation if it creates the impression that it is engaged in surveillance of employees involved in protected activities, even if there is no actual surveillance. *State – Corrections*, Decision 12644 (PSRA, 2016); *City of Longview*, Decision 4702 (PECB, 1994). Even seemingly innocent actions may create the impression that the employer is engaged in surveillance of employees involved in protected activities and therefore constitute an interference violation. *Town of Granite Falls*, Decision 2692 (PECB, 1987).

Application of Standards

Maciejewski created, at a minimum, the impression of surveillance, which amounted to the unfair labor practice of interference. A key moment in creating this impression occurred during that Friday afternoon incident in February or March when Fennessy interrupted King's meeting with Maciejewski to report Bogner's presence in the service center. After this interruption, King warned Maciejewski that he was isolating Fennessy from the other bargaining unit members.

Maciejewski responded that Fennessy was a source of information. According to King, Maciejewski responded, "Well, that's okay because we can utilize her to see what's going on with the union" or "what the union's doing." Even if Maciejewski never explicitly asked Fennessy to surveil the bargaining unit, and Fennessy never saw herself engaging in surveillance on the bargaining unit, Maciejewski's comment creates the impression of surveillance.

Maciejewski did not testify at hearing, however, an exhibit was provided that included his account of the incident. It was an August 31, 2018, letter that he wrote to the employer to provide information in a response to the employer's intent to discipline him. Due to the context of this letter, and the fact that it was not subject to cross-examination, I find this letter to have limited evidentiary value.

In his letter, Maciejewski stated that his response to Fennessy barging into his meeting with King was to tell Fennessy that reporting Bogner's visit to the service center was "not her job" and that she should "allow supervisors to handle" Bogner's visits. Fennessy's testimony at hearing, and as included in the investigation report, does not mention Maciejewski discouraging her. I found King to be a credible witness, and I do not view Maciejewski's letter as credible evidence that he discouraged Fennessy.

I also find that King's testimony was supported by the testimony of Josh Jackson, another former supervisory employee who also became a service center bargaining unit member in early 2018. Jackson testified that when he had been a supervisory employee, Maciejewski had described Fennessy as an asset and that she was keeping an eye on the union.

Subsequent to that February or March incident, the impression of surveillance was further created during some of Bogner's later visits to the service centers. When Bogner visited the service center, Maciejewski allowed a situation where Fennessy's beelines to his office created an appearance of surveillance.

Fennessy testified that Maciejewski did not ask her to report on Bogner's visits or union activities. She does not consider herself to have been as spy, and the union has conceded her involvement in

surveillance could have been inadvertent. However, in light of Maciejewski's comments about using her as a source of information and his creation of an environment where Bogner's visit coincided with beelines by Fennessy to his office, there was an impression of surveillance—even if Fennessy did not intentionally provide Maciejewski with information about union activities.

Bogner's morale check chitchats were not formal union meetings, but they were related to protected activities. These morale checks were occurring at an especially tense time in the service center. The morale check chitchats were not about any specific collective bargaining matters, but they occurred in the context of a toxic working environment that led to the grievance and investigation. The union's concerns were significant enough to eventually end the employment of three supervisory employees, including Maciejewski. In light of these circumstances, monitoring Bogner's morale checks in the service center was related to protected activity, even though the chitchats were not formal meetings or discussions of union matters.

Apparent surveillance can still be an unfair labor practice even if it does not actually impair protected activity because it can have a chilling effect. Fennessy's apparent monitoring of Bogner's presence in the service center did not hamper the morale checks, the grievance, or the investigation, but a chilling effect on bargaining activities occurred as Maciejewski gave Fennessy preferential treatment and he characterized her as useful way to gain information about the union. He mentored her and, to the perception of the bargaining unit members, appeared to give her a preferential work assignment. This work assignment also led to her having a better, more desirable, cubicle. I am not convinced that Fennessy's work and cubicle assignment alone are a clear indication of preferential treatment. Having a quieter place to work on technical writing is reasonable. The service center was highly polarized, and whether or not Fennessy's work assignment was a good use of resources could possibly have been a difference of opinion between King and Maciejewski. However, the better cubicle and work assignment are part of the overall context of preferential treatment that also included Fennessy being permitted to telecommute frequently.

Along with the work assignment and better cubicle, it was Fennessy's frequent ability to telecommute that, in total, amounted to preferential treatment. This preferential treatment was

reasonably seen as a benefit for being a source of information to the union activity of the other service center employees. “Telecommuting restrictions” was a topic of dispute between bargaining unit members and Maciejewski. Fennessy was frequently granted permission to telecommute even though her personal reasons were minor. In the context of the dispute between Maciejewski and the other bargaining unit members over the ability to telecommute, this was reasonably perceived as preferential treatment associated with her usefulness to Maciejewski for information regarding union activities.

Maciejewski’s comment to King and Jackson about using Fennessy as a source of information, paired with Fennessy making beelines to Maciejewski’s office during Bogner’s visits during late spring and early summer 2018, created the impression of surveillance. The preferential treatment that she received through permission to telecommute was reasonably perceived by bargaining unit members as a benefit given, as she was seen by Maciejewski as being a source of information about union activities. Taken as a whole, Maciejewski’s actions regarding Fennessy created an appearance of surveillance that amounted to interference.

REMEDY

The union has requested the nonstandard remedies of attorney’s fees and mandatory training. Neither is warranted. Extraordinary remedies are used sparingly and ordered only when a defense is frivolous or when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation. *University of Washington*, Decision 11499-A (PSRA, 2013); *State – Corrections*, Decision 11060-A (PSRA, 2012).

The employer’s defense was not frivolous. The impression of surveillance exists—in the context of Maciejewski’s comments to Jackson and King, in the beelines during Bogner’s visits, and in the preferential treatment—but this is not a case where actual surveillance was done in a particularly productive manner. The union has conceded that Fennessy’s involvement could have been done unwittingly. Fennessy would leave her work station and go to Maciejewski’s office when Bogner was at the service center, rather than stay and listen in on Bogner’s entire conversation with the other bargaining unit employees. Furthermore, Fennessy was able to work

in a more quiet location and was able to frequently telecommute. Both actions removed her from the proximity of the bargaining unit and so her use as a surveillance tool was notably minimal.

This is also not a case where the employer has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation. In fact, the employer in this case has already taken direct actions to address Maciejewski's behavior. The employer's own investigation report and disciplinary process highlighted the issue of surveillance. Maciejewski's actions that created the unfair labor practice were also already part of the disciplinary process he faced when he chose to retire.

In light of the limited impression of surveillance and the actions the employer had already taken to address Maciejewski's actions, the standard remedies are appropriate.

FINDINGS OF FACT

1. The Washington State Department of Ecology (employer) is a public employer within the meaning of RCW 41.80.005(8).
2. The Washington Federation of State Employees (union) is a bargaining representative within the meaning of RCW 41.80.005(7).
3. The union represents a bargaining unit of employees including nonsupervisory employees employed at the Business Technology Service Center of the employer's Information Technology Services Office. This service center functions as a help desk.
4. In 2018, the working relationships in the service center had become highly contentious and polarized. Conflicts had arisen over management's decision to terminate an employee and to curtail telecommuting and flexible schedules. Over the spring and summer of 2018, the tension in the service center continued to worsen. The conflicts culminated in nine out of ten of the bargaining unit employees at the service center being involved in filing a grievance. This grievance was filed on June 5 by shop steward Alan Bogner. It was about

action taken by the Information Technology Service Office appointing authority and chief information officer Baird Miller, Gary Maciejewski (who was the service center's manager), and Kelson Smith (who was the service center's first line supervisor). The one service center employee not involved in the grievance was Sara Fennessy. As this grievance was filed, the union reached out to the employer to have a conversation about its concerns. That conversation led to an investigation.

5. On August 6, 2018, an investigation report was issued and was highly critical of the supervisory employees. The report focused on the allegations against Smith and Maciejewski, as Miller no longer worked for the employer. Maciejewski retired as disciplinary proceedings were pending against him. Smith's employment also ended. In light of these developments, the union withdrew its grievance.
6. The investigation report referred to Maciejewski as having likely encouraged Fennessy to inform him of her coworkers' union activities. The report stated, "there is a preponderance of evidence that Mr. Maciejewski encouraged Ms. Fennessy to inform him of her coworkers' union activities and created at least the appearance of giving her preferential treatment." This conclusion was included in the pre-disciplinary letter issued to Maciejewski:

The investigator did find a preponderance of evidence that your actions encouraged an employee to inform you of their coworkers' union activities and created at least the appearance of giving preferential treatment towards this employee. Altogether witness statements show that you failed to stop the employee from reporting union activities to you, which more likely than not encouraged them to do so and contributed to their isolation from their peers who broadly perceive [sic] them to be receiving preferential treatment.

7. In this polarized workplace, Fennessy had been closely aligned with Maciejewski and was frustrated with the union. She did not believe that it was working for her as a represented employee. She felt isolated from her peers and, by the summer of 2018, the only people with whom she really talked were Maciejewski and Smith. Smith was her supervisor in the late spring of 2018. At the start of 2018, her supervisor had been Mark King. In April

of the same year, King had voluntarily demoted from that supervisory position to a bargaining unit position.

8. Even though Maciejewski was not Fennessy's direct supervisor, she spent significant time working with him. When King was Fennessy's supervisor, King felt directed by Maciejewski on key decisions regarding Fennessy. Maciejewski mentored Fennessy and had her work full time on a special project even though King considered this project unnecessary. The bargaining unit members perceived this project as easier than regular service center work. While working on this special project, she was able to move to a more desirable cubicle near a window, instead of in the aisle with the other service center bargaining unit members. She was doing technical writing and found working near her service center peers too distracting because of the noise of their frequent phone calls. However, bargaining unit members perceived this more desirable cubical assignment to be a special privilege.
9. The surveillance behavior with which Fennessy was connected involved shop steward Bogner's visits to the service center. While almost all of the bargaining unit members in the service center had reached out to Bogner for assistance, Fennessy had not, and she was not involved in the grievance. In May through August 2018, Bogner frequently visited the service center on his work breaks to chat with bargaining unit employees and to check on morale. During about six of these visits, Fennessy made a "beeline" to Maciejewski's office.
10. In February or March 2018, when King was still Fennessy's supervisor, Bogner visited the center and was chatting with employees when Fennessy left for a smoke break. When she returned, he was still there. In the interim, Fennessy went to Maciejewski's office to alert him of Bogner's chat with bargaining unit members. She interrupted a meeting between Maciejewski and King. Maciejewski sent King out to check on what was happening. King determined it was a benign conversation, just chitchat, and returned to Maciejewski's office to resume their meeting. King told Maciejewski that he was concerned that Fennessy was going to "paint herself in a corner away from the rest of her peers." Maciejewski indicated

that he was okay with that, as Fennessy could be utilized to see what was going on with the union. According to King, Maciejewski responded, "Well, that's okay because we can utilize her to see what's going on with the union" or "what the union's doing."

11. Maciejewski did not testify at hearing, however, an exhibit was provided that included his account of the incident. It was an August 31, 2018, letter that he wrote to the employer to provide information in a response to the employer's intent to discipline him. In his letter, Maciejewski stated that his response to Fennessy barging into his meeting with King was to tell Fennessy that reporting Bogner's visit to the service center was "not her job" and that she should "allow supervisors to handle" Bogner's visits. Fennessy's testimony at hearing, and as included in the investigation report, does not mention Maciejewski discouraging her.
12. Josh Jackson, a former supervisory employee who became a service center bargaining unit member in early 2018, testified that when he had been a supervisory employee, Maciejewski had described Fennessy as an asset and that she was keeping an eye on the union.
13. In the summer of 2018, when Maciejewski was still the manager, Fennessy frequently requested permission to telecommute because of personal matters. Permission was granted, even though the personal matters were minor. This ability to frequently telecommute was perceived as another example of preferential treatment by the bargaining unit members who worked at the service center. "Telecommuting restrictions" was a topic of dispute between bargaining unit members and Maciejewski.
14. Fennessy testified that Maciejewski did not ask her to report on Bogner's visits or union activities. She did not consider herself to have been a spy, and her involvement in surveillance could have been inadvertent.
15. Maciejewski's comment to King and Jackson about using Fennessy as a source of information, paired with Fennessy making beelines to Maciejewski's office during

Bogner's visits during late spring and early summer 2018, created the impression of surveillance. The preferential treatment that she received through permission to telecommute was reasonably perceived by bargaining unit members as a benefit given, as she was seen by Maciejewski as being a source of information about union activities.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.80 RCW and chapter 391-45 WAC.
2. Based upon findings of fact 1 through 15, the employer interfered with protected employee rights in violation of RCW 41.80.110(1)(a).

ORDER

The WASHINGTON STATE DEPARTMENT OF ECOLOGY its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:
 - a. Unlawfully interfering with employee rights by engaging in activities that create an impression of surveillance of protected activities.
 - 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 41.80 RCW:
 - a. Contact the compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice

provided by the compliance officer 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. 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 the compliance officer with a signed copy of the notice provided by the compliance officer.

ISSUED at Olympia, Washington, this 3rd day of January, 2020.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



Emily H. Martin, 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.



RECORD OF SERVICE

ISSUED ON 01/03/2020

DECISION 13119 - PSRA has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 130988-U-18

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