Thurston County (Washington State Council of County and City Employees), Decision 13393 (PECB, 2021)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

THURSTON COUNTY, Employer.	
GREGORY BURNES, Complainant, vs. WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, Respondent.	CASE 133253-U-20 DECISION 13393 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Sydney Phillips, Attorney at Law, Freedom Foundation, for Gregory Burnes.

Ed Stemler, General Counsel, for the Washington State Council of County and City Employees.

On December 22, 2020, Gregory Burnes filed an unfair labor practice complaint against the Washington State Council of County and City Employees (union) with the Public Employment Relations Commission. A preliminary ruling was issued on January 7, 2021, which found that the complaint had stated a cause of action in violation of RCW 41.56.150(1) for union restraint or coercion by threats made to Burnes after he requested to cease the deduction of dues from his wages.

On February 22, 2021, I held a prehearing/scheduling conference call conducted by videoconference. The parties notified me that they each intended to file a motion for summary judgment and agreed on the briefing schedule for the motion and cross-motion. The final brief was submitted on May 21, 2021.

ISSUES

1. Are there genuine issues of material fact in dispute preventing judgment?

   There are no genuine issues of material fact in dispute; summary judgment is appropriate.

2. Has the union committed an unfair labor practice violation?

   No; it has not. A typical employee in similar circumstances could not reasonably perceive the union's conduct as a threat of reprisal or force, or a promise of benefit, related to pursuing a right protected by the collective bargaining laws.

The unfair labor practice complaint is dismissed.

BACKGROUND

Gregory Burnes is an information technology consultant who is employed by Thurston County in a bargaining unit represented by the union. Burnes had been a union member until July 2020. He notified the union that he wanted to stop having union dues deducted from his wages. In response, the union sent him a letter acknowledging receipt of his request to be a nonmember and encouraging him to reconsider. The letter included the following sentence in boldface type: "It should also be noted that the Union may institute charges for non-members who ask for union representation under the collective bargaining agreement."

The key context for Burnes's request and the union's response is that these events occurred after the landmark U.S. Supreme Court case about agency fees and the First Amendment, *Janus vs. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Prior to the *Janus* decision, bargaining unit members could have been required by a collective bargaining agreement's union security provision to be union members or pay agency fees. In *Janus*, the Supreme Court ruled that such a requirement was unconstitutional, as it was violation of the First Amendment rights of nonunion members.

I take judicial notice of the fact that the *Janus* decision was a major event in the history of public sector labor law and that there was much discussion about this case among those interested in unions and collective bargaining, as well as in the national media.

ANALYSIS

Summary Judgment—Applicable Legal Standard

Motions for summary judgment are considered under WAC 10-08-135. An Examiner may grant a motion for summary judgment if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue as to a material fact. A material fact is one upon which the outcome of the litigation depends. *State – General Administration*, Decision 8087-B (PSRA, 2004) (citing *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243 (1993)). Pleadings and briefs can be sufficient to determine if there is a genuine issue of material fact. *Pierce County*, Decision 7018-A (PECB, 2001) (citing *City of Seattle*, Decision 4687-A (PECB, 1996)). Because a motion for summary judgment calls upon the Examiner to make a final determination without the benefit of a full evidentiary hearing and record, the granting of such a motion should not be taken lightly. *Port of Seattle*, Decision 7000 (PECB, 2000). Summary judgment is only appropriate where the party responding to the motion cannot or does not deny any material fact alleged by the moving party.

Summary Judgment—Application of Standard

This case is simply about the one disputed sentence in the letter that the union wrote Burnes, and whether that sentence amounted to an unfair labor practice. Two years after the Supreme Court's *Janus* decision, Burnes notified the union that he no longer wanted to pay union dues. The union sent him a letter acknowledging his request and asking him to reconsider. This letter stated that it may institute charges for nonmembers who ask for union representation.

The parties are in agreement that no material issues of fact exist. I agree. The facts presented in the complaint, answer, and motions for summary judgment do not raise a question of material fact. Therefore, summary judgment is appropriate. *Whatcom County*, Decision 13082-A (PECB, 2020).

Union Interference—Applicable Legal Standard

RCW 41.56.150(1) states, "It shall be an unfair labor practice for a bargaining representative: (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter." To prove an interference violation, the complainant must prove, by a preponderance of the evidence, that a typical employee in similar circumstances could reasonably perceive the conduct as a threat of reprisal or force, or a promise of benefit, related to pursuing a right protected by the collective bargaining laws. *City of Port Townsend (Teamsters Union, Local 589)*, Decision 6433-B (PECB, 2000). A finding of intent is not necessary. *Id.* (citing *City of Mercer Island*, Decision 1580 (PECB, 1983).

Union interference and coercion findings under RCW 41.56.150(1) are limited to union tactics involving violence, intimidation, and reprisals—a more narrow standard than employer interference under RCW 46.56.140(1). *Community College District 13 (Lower Columbia College)*, Decision 8117-B (PSRA, 2005).

In considering union interference cases, the Commission has long-standing case precedent of avoiding involvement in internal union affairs. *Lewis County (Washington State Council of County and City Employees, AFSCME, AFL-CIO)*, Decision 464-A (PECB, 1978); *Lake Washington School District (Lake Washington School District Bargaining Council)*, Decision 6891 (PECB, 1999). When asked to regulate the internal workings of unions, the Commission has taken a 'hands-off' approach except where complainants have asserted that union conduct affected the wages, hours, or working conditions of individual employees. *Pierce Transit (Amalgamated Transit Union)*, Decision 4094 (PECB, 1992). *See also King County (King County Corrections Guild)*, Decision 12943-A (PECB, 2020), *aff'd*, Decision 12943-B (PECB, 2020) (pending appeal in court); *King County (King County Corrections Guild)*, Decision 13178 (PECB, 2020), *aff'd*, Decision 13178-A (PECB, 2020) (pending appeal in court).

Where an unfair labor practice is alleged, the complainant bears the burden of proof and must prove by a preponderance of the evidence that the complained-of allegation occurred. WAC 391-45-270(1)(a); *Cowlitz County*, Decision 7007-A (PECB, 2000).

Union Interference—Application of Standard

This union interference allegation is centered on the letter that the union wrote to Burnes in receipt of his communication that he no longer wanted to pay union dues. And so, this letter was a communication between a union and a member who was leaving the union. The union asked him to reconsider his choice. This letter did not involve the member's relationship with the employer or the employees' wages, hours, or working conditions. It is a violation of the Commission's hands-off approach to internal union matters to exercise jurisdiction over this communication between the union and this departing member.

Even if it were to be found not to be an internal union matter, the union's actions did not constitute an unfair labor practice because a typical employee in similar circumstances could not reasonably perceive the letter as a threat of reprisal or force, or a promise of benefit, related to pursuing a right protected by the collective bargaining laws.

Burnes argues that the union's letter was essentially a threat to institute an agency fee in retaliation for his decision to stop paying union dues. Burnes also argues that the union cannot charge or threaten to charge its bargaining unit members for representation services because, as the exclusive bargaining representative for the bargaining unit, the union owes a duty of fair representation to all bargaining unit members. Thus threatening a fee for a nonmember who requests representation would be a threat to Burnes's right to fair representation.

The union did not institute a fee. The dispute in these proceedings is not about whether actually charging a nonmember a fee would be an unfair labor practice. This case is solely about whether the union's letter was an unlawful threat when it said it "may institute charges for non-members who ask for union representation under the collective bargaining agreement."

A typical employee would not assume that the union was threatening to institute an agency fee. The mention of a potential charge was mentioned as a possibility only for those "who ask for union representation." This sentence only mentions the possibility of a fee triggered by a request for assistance from a nonmember. The potential fee is not an agency fee levied on nonmembers regardless of whether they ask for or seek union assistance.

The union's letter did not precisely state that it was alluding to the possibility of a fee for a nonmember requesting the union's help in a contractual grievance over discipline. However, asking the union to pursue a grievance to overturn discipline is a clear example of when a nonmember might request assistance from the union. The possibility of a fee in this type of circumstance was an explicit rationale used by the U.S. Supreme Court in *Janus*. In justifying its overruling of long-standing precedent on agency fees, the Court stated: "Individual nonmembers could be required to pay for that service or could be denied union representation altogether." *Janus*, at 2468–69. The union's letter to Burnes essentially paraphrases this section of the *Janus* decision. In comparison to mandatory agency fees, the Court suggested this type of fee as a less restrictive option to deal with the problem of nonmembers benefiting from the union's work without bearing a fair share for the expenses.

The Court said:

> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. [*Harris v. Quinn*, 573 U.S. 616 (2014) at 30], (internal quotation marks omitted). Individual nonmembers could be required to pay for that service or could be denied union representation altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

Id.

In footnote six of *Janus*, the Court further said:

> There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.*, Cal. Govt. Code Ann. §3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, §315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

This solution to free ridership might not ever be pursued in Washington State. It might not be deemed permissible under Washington collective bargaining statutes. However, a reasonable employee would not view the union's mention of a potential charge for a nonmember who asks the union for assistance as a threat, since the potential for such a charge was a part of the *Janus* decision—the landmark decision that was at the center of much discussion and publicity.

CONCLUSION

There are no material issues of fact in dispute. Summary judgment is appropriate in this case.

This case is about a sentence in a letter from a union to a departing member. As such, it is an internal union matter and so falls within the Commission's policy of taking a hands-off approach in exercising jurisdiction over internal union matters.

Even if jurisdiction would have been appropriate, the disputed sentence in this letter is not interference. The union's reference to the potential for a charge for a nonmember who requests union services is not reasonably seen as a threat, as it is restating a possibility that is part of the *Janus* decision. Burnes's request to stop paying dues and the union's response are both done in light of *Janus*. In that context, the letter is not interference.

Burnes's motion for summary judgment is denied. The union's motion for summary judgment is granted. The unfair labor practice complaint is dismissed.

FINDINGS OF FACT

1. Thurston County (employer) is a public employer within the meaning of RCW 41.56.030(13).

2. Washington State Council of County and City Employees (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The union represents a bargaining unit that includes information technology consultants employed by the employer. The union and the employer have been parties to a series of collective bargaining agreements.

4. Gregory Burnes is an information technology consultant who is employed by Thurston County in a bargaining unit represented by the union.

5. Burnes had been a union member until July 2020. He notified the union that he wanted to stop having union dues deducted from his wages. In response, the union sent him a letter acknowledging receipt of his request to be a nonmember and encouraging him to reconsider.

6. The letter included the following sentence in boldface type: "It should also be noted that the Union may institute charges for non-members who ask for union representation under the collective bargaining agreement."

7. The key context for Burnes's request and the union's response is that these events occurred after the landmark U.S. Supreme Court case about agency fees and the First Amendment, *Janus vs. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Prior to the *Janus* decision, bargaining unit members could have been required by a collective bargaining agreement's union security provision to be union members or pay agency fees. In *Janus*, the Supreme Court ruled that such a requirement was unconstitutional, as it was violation of the First Amendment rights of nonunion members.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.56 RCW and chapter 391-45 WAC.

2. According to findings of fact 5–7, no genuine issue of material fact exists under WAC 10-08-135, and the union is entitled to judgment as a matter of law.

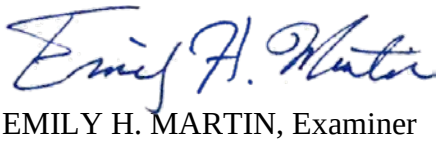
3. By its actions described in findings of fact 5–7, the union did not interfere with employee rights in violation of RCW 41.56.150(1) with its letter to Burnes.

ORDER

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

ISSUED at Olympia, Washington, this 17th day of August 2021.

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 08/17/2021

DECISION 13393 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 133253-U-20

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