King County, Decision 6000 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JAMIE NEWMAN,	)	
	)	
Complainant,	)	CASE 13202-U-97-3211
	)	
vs.	)	DECISION 6000 - PECB
	)	
KING COUNTY,	)	
	)	
Respondent.	)	ORDER OF DISMISSAL
	)	
	)	

The complaint charging unfair labor practices filed in the above-captioned matter on June 2, 1997, was the subject of a deficiency notice issued pursuant to WAC 391-45-110 on July 7, 1997.[1] The complainant was given a 14 day period in which to file and serve an amended complaint which stated a cause of action, or face dismissal of the case. An amended complaint filed on July 21, 1997, is now before the Executive Director for a preliminary ruling under WAC 391-45-110.

The Complainant's Legal Standing

The original complaint identified Jamie Newman as an employee in the public transit operations of King County, and as a "shop steward" for Amalgamated Transit Union, Local 581. Under a heading of "employer interference with employee rights", Newman described

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[1] At that stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations commission.

a refusal by the employer to permit him to speak on behalf of another employee at a "reread" hearing concerning another employee.[2] The deficiency notice questioned whether Newman was filing the complaint as an authorized agent of the exclusive bargaining representative or as an employee directly affected by the complained of actions, and indicated that Newman otherwise lacked standing to initiate a complaint. In the amended complaint, Newman acknowledged that he had not filed the complaint as an agent of the union, and he conceded that he did not have the right to file a complaint to assert rights on behalf of the fellow employee whose accident was being reviewed.

The complainant contends, in his amended complaint, that the mere existence of the reread policy violates the rights of each employee in the bargaining unit, and that he filed the complaint on his own behalf. However, he cites no authority for the proposition that standing should be implied in the absence of any current case or controversy affecting his rights. Addressing the first issue raised by the complainant in the amended complaint, the following is noted. Allowing that there could be published policies or regulations, the mere existence of which are so destructive of rights guaranteed by statute that any employee may have standing to file a complaint without regard to a showing that they have been applied to his detriment, or without requiring that the right be asserted by the exclusive bargaining representative, the "reread" procedure involved here cannot be regarded as falling within that ambit. Its mere existence does not, on its face, interfere with

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[2] The "reread" is described as a procedure by which an employee who disagrees with the judgment of the employer's safety officer about an accident can have the question of "preventability" reviewed by a committee consisting of a senior instructor, a union representative, and a safety officer.

rights guaranteed by statute. It is only in its application that any conceivable statutory right might be assailed. Thus, the only parties who may bring such an action are an employee who has had the policy applied to him or his exclusive representative.

Interference with Right to Representation

A second thrust of the amended complaint is premised on the proposition that the "reread" policy falls within the ambit of the right of bargaining unit employees to union representation under National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975). The amended complaint asserts no additional facts, but merely cites authority for the complainant's theory of the case. In this regard, the complainant relies exclusively upon the decision in American Federation of Government Employees, Local 1941 v. Federal Labor Relations Authority, 837 F.2d 495 (D.C. Cir, 1988)[hereinafter, "AFGE"]. The complainant argues that the actual situation and the decision of the court in that case should be applied to the instant complaint.

While federal precedent is helpful in interpreting similar state laws, under Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1984), consideration of the merits of this contention requires analysis of both the legal situation and factual situation which underlie the AFGE decision. Several distinctions are, in fact, noted here:

- AFGE involved a complaint filed by a union with the Federal Labor Relations Authority (FLRA), under the Federal Service Labor Management Relations Act. That statute specifically provides for the exclusive bargaining representative to be given the opportunity to be represented at any examination by the employer of a bargaining unit employee in connection with

an investigation, if the employee reasonably believes the examination may result in disciplinary action and the employee requests representation. The case now before the Executive Director arises under Chapter 41.56 RCW, which has no specific provision codifying the Weingarten precedent.

- In the AFGE case, the dispute concerned an appearance before a "credentials committee" existing under U.S. Army regulations covering medical professionals.[3] The committee consists of management officials who have authority to make recommendations to the base commander, who has final authority to act subject to review by the office of the Surgeon General. The credentials committee is authorized to conduct investigations or appoint an officer to do so. The credentials committee reviews the information obtained, and may either make recommendations at that point or convene a hearing to review the data prior to making a recommendation. When a hearing is convened, the regulations require the physician to be notified and advised he is entitled to attend, but **the employee is not required to attend.** If the employee elects to attend, he or she may call witnesses and cross-examine witnesses, present evidence, and consult with counsel, but counsel may not actively participate. If the employee appears, he is subject to examination. Based on the investigation and the material presented before the hearing committee the credentials committee makes its recommendations. The process may result in termination of employment. In contrast, Commission precedent has only applied the principles enunciated in Weingarten to situations which are: (1) "investigatory

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[3] The employer involved was an ophthalmologist employed by a government hospital.

interviews", and (2) where the employee's attendance is required by the employer.

- In the AFGE case, the employee proceeded to attend and fully participate in a hearing before a credentials committee after employer denied the request that a union representative be permitted to attend the hearing. The committee recommended that certain of the employee's clinical privileges be withdrawn and the base commander adopted those recommendations, but the employee did not exercise his appeal rights.[4] In contrast, there has been neither a demand by the employer that Newman attend an investigatory conference nor any action against him.

- A divided appeals court reversed an FLRA decision that employer acting pursuant to an Army regulation in denying the request of a bargaining unit employee to have a union representative present when he appeared before the credentials committee.[5] Citing the Federal statute, the majority reasoned that, as a practical matter, the employee was compelled to appear in order to defend against the charges, or risk termination of employment with no defense presented and without recourse to an impartial tribunal. While recognizing that compulsory attendance at a meeting was a factor relied upon by the Supreme Court in deciding Weingarten under the National Labor Relations Act, the majority held that the collective bargaining statute administered by the FLRA did not make this a requirement in order to have the right of union representation. In contrast, no such specific statute is

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[4] Certain adverse findings of the investigator were reversed by the credentials committee.

[5] The FLRA was also divided on this case.

operative in the case now before the Executive Director. The dissenting opinion in AFGE, which opined that the statute in question was designed to give federal employees only those rights provided in the Weingarten, and only applies to informed, confrontational, and involuntary interviews (and not structured formal proceedings wherein attendance and participation by the employee is voluntary),[6] is the more persuasive here.

Thus, the facts are distinguishable, however, and the laws clearly differ.

Additional distinctions are available from examination of the settings in which the cases arose:

- The dissent in AFGE aptly noted that purpose of the hearing at issue there was not to obtain facts upon which to base a determination about discipline, but to review findings previously made during an investigation. The dissent saw Weingarten protections as analogous to custodial interrogation in the criminal justice system. In the case at hand, the majority of the members conducting the reread is composed of bargaining unit members, and the determination of the reread committee is final and binding on the employer.

- In AFGE, the process was initiated by others; in the case at hand, the reread process is initiated by the employee to

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[6] The Court of Appeals for the ninth circuit, which includes the state of Washington, has likewise held that Weingarten protections only flow from interviews where the employer mandates participation by the employee to determine the parts upon which to premise a disciplinary decision. Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403 (9th Cir. 1978).

review the evidence gathered and to consider any additional facts which the employee may choose to present.

- In AFGE, there was no appeal of the results of the committee process outside of the employer's management hierarchy. In the case before the Commission, there is resort to the grievance procedure culminating in binding arbitration.

The situation described in this complaint is the very antithesis of the type of situation described in Weingarten.

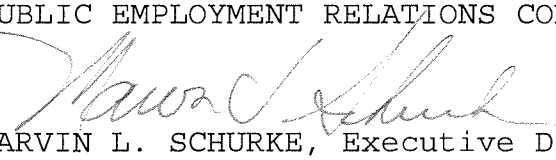
NOW, THEREFORE, it is

ORDERED

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

DATED at Olympia, Washington, this 13th day of August, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.