Snohomish County, Decision 9570 (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY CORRECTIONS GUILD, Complainant,	)	CASE 20155-U-06-5135
vs.	)	DECISION 9570 - PECB
SNOHOMISH COUNTY, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Cline and Associates, by *Aaron D. Jeide*, Attorney at Law, for the union.

Prosecuting Attorney Janice E. Ellis, by *Linda Scoccia*, Deputy Prosecuting Attorney, for the employer.

The Snohomish County Corrections Guild (union) filed an unfair labor practice complaint against Snohomish County (employer) on February 2, 2006. The complaint alleged the employer committed unfair labor practices when it changed the amount charged to the union for copies of documents requested in anticipation of an unfair labor practice hearing. The union alleged the employer's actions interfered, restrained or coerced public employees in the exercise of their rights; controlled or dominated an employee organization; retaliated for the filing of an unfair labor practice complaint, and constituted a refusal to engage in collective bargaining. The Commission issued a preliminary ruling on March 28, 2006.

Examiner Karl Nagel held a hearing on November 8 and 9, 2006, in Everett, Washington. The parties filed post-hearing briefs on January 26, 2007.

ISSUES

1. Did the employer refuse to engage in collective bargaining by unilaterally changing the amount charged for copies?

2. Did the employer interfere, restrain or coerce public employees?

3. Did the employer control, dominate or interfere with a bargaining representative?

4. Did the employer discriminate against the union for filing an unfair labor practice?

On the basis of the record, I find the employer committed no unfair labor practices as alleged.

ISSUE 1: Did the employer refuse to engage in collective bargaining by unilaterally changing the amount charged for copies?

Legal Standard

RCW 41.56.030(4) defines "collective bargaining" as the duty "to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions . . . "

The duty to bargain is enforced on employers through RCW 41.56.140(4), and unfair labor practice proceedings under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice

is alleged, the complainant is responsible for the presentation of its case and has the burden of proof. The complainant must demonstrate that the facts occurred as alleged and that those facts constituted an unfair labor practice. WAC 391-45-270(1)(a).

The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991); *City of Edmonds*, Decision 8798-A (PECB, 2005). The duty to bargain requires a party proposing a change involving a mandatory subject of collective bargaining to: (1) give notice to the other party; (2) provide an opportunity for bargaining on the subject; and (3) bargain in good faith, if requested, to reach an agreement or impasse before implementing the change. *See South Kitsap School District*, Decision 472 (PECB, 1978) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *City of Vancouver*, Decision 808 (PECB, 1980).

The duty to provide relevant information to an opposite party for the proper performance of that party's collective bargaining responsibilities is included under both federal and state law. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, 119 Wn.2d 373 (1992); *City of Wenatchee*, Decision 8898-A (PECB, 2006). The obligation extends not only to information that is useful and relevant to the collective bargaining process, but also encompasses information

necessary to the administration of the collective bargaining agreement. *King County*, Decision 6772-A (PECB, 1999).

The Commission has held that information sought for the processing of a grievance is covered under the continuing duty to provide collective bargaining-related information, as a grievance is part of that continuing relationship. *Port of Seattle*, Decision 7000-A (PECB, 2000); *City of Pullman*, Decision 7126 (PECB, 2000); *Pasco School District*, Decision 5384-A (PECB, 1996); *Pullman School District*, Decision 2632 (PECB, 1987). The Commission has held that interest arbitration is also covered by the duty to supply information as that process is part of collective bargaining. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, 119 Wn.2d 373 (1992).

The Commission, however, has determined that the duty does not apply to requests related to discovery in civil litigation between parties to a collective bargaining relationship. In *Highland School District*, Decision 2684 (PECB, 1987), a union took a termination dispute to civil court after exhausting the dispute resolution mechanisms available under the contract.[1] The examiner determined the parties had moved the dispute beyond the collective bargaining process regulated by the Commission under Chapter 41.56 RCW. The decision concluded that the union's right of access to information was controlled by the rules and decisions of the civil court to which the dispute had been taken. The examiner cited *City of Tacoma*, Decision 6793 (PECB, 1978), where the Commission held that: "negotiations for the settlement of civil litigation were

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[1] The Commission cited *Highland School District* with approval in *City of Redmond*, Decision 8863-A (PECB, 2006).

controlled by the rules of civil courts and could not give rise to an unfair labor practice, even though the underlying dispute originated as a collective bargaining dispute."

The National Labor Relations Board (NLRB) has come to a similar conclusion: the duty to provide information does not apply where a party has taken the issue outside of the bargaining process. NLRB precedents apply that reasoning as well to requests made for information in the context of an unfair labor practice proceeding. *Huck Mfg. Co.*, 254 NLRB 739, 755 (1981); *General Electric Co.*, 163 NLRB 198, 210 (1967), *enf'd*, 400 F.2d 713 (5th Cir. 1968); *American Oil Co.*, 171 NLRB 1180 (1968). As observed in *National Ass'n of Government Employees*, 327 NLRB 676 (1999), the Board stated:

> [T]he Union chose to prosecute these matters through the Board's procedures rather than to bargain with Respondent, and its request was akin to a discovery device pertinent to its pursuit of the charge rather than to its duties as a collective-bargaining representative. *WXON TV*, 289 NLRB 615, 617-618 (1988).

Both the NLRB and the Commission do not provide discovery procedures within their respective unfair labor practice processes. *Emhardt Industries v. NLRB*, 907 F.2d 372,378 (2nd Cir. 1990); WAC 391-08-300. The Commission provides the power to subpoena testimony of witnesses and the production of documents and other tangible evidence. WAC 391-08-300.

The Commission does not appear to have squarely faced the issue of the duty to provide information applying to requests made in an unfair labor practice litigation. An examiner did previously find an employer violated the duty by its refusal to comply with a union

request that was relevant to both pending grievances and pending unfair labor practice charges. *Washington State Patrol*, Decision 8785 (PSRA, 2004).

Analysis

The union represents correctional officers in the employer's correctional operation. On December 10, 2004, the Commission certified the union as exclusive bargaining representative after an election in which the union decertified Teamsters, Local 763. Following the certification the employer and union engaged in collective bargaining but were unable to reach agreement. At the time of the hearing, the parties were awaiting interest arbitration to resolve the contractual dispute.

The union has filed over 200 grievances since its certification. The union has also filed a number of unfair labor practice complaints against the employer. On June 13, 2005, the union filed a complaint against the employer which the Commission docketed as Case 19549-U-05-4959. An examiner set hearing dates in December 2005 and February 2006.

On November 3, 2005, union attorney Aaron Jeide made the union's first request for information from the employer in connection with ULP 2. The five-page request asked for 38 different categories of documents and stated that the request was made under both state collective bargaining laws and the state Public Disclosure Act (PDA).

On November 28, 2005, the employer made available to the union thousands of pages of documents for inspection. Jeide and union attorney Chris Casillas examined the documents and marked pages for

copying. On the same day, Deputy Prosecuting Attorney Steven Bladek and the two union attorneys spoke regarding the cost per page for the copying. Bladek informed the union attorneys that the employer intended to charge the union $.25 per page for the copies. The union attorneys objected to the charge but continued to ask for the copies. There were several exchanges of requests from the union and productions from the employer throughout November and December 2005, and January 2006. The employer made the documents available to the union, but kept a running tally of the copying costs incurred.

On December 20, 2005, Jeide sent a letter to Bladek concerning the copying costs. Jeide asserted that the employer's existing practice was to charge no copying costs for information requested by its unions and proposed that the employer continue that practice. Additionally, Jeide offered a compromise of $.05 per page. That reduced price would have brought the costs down from the employer's approximate $748 to $176.54.

In a response dated January 10, 2006, Bladek re-asserted the employer's position that it had the right to charge for copies at $.25 a page. Bladek denied the existence of a past practice and noted that Jeide's requests were made under both the collective bargaining laws and the PDA. On January 31, 2006, Bladek responded by letter to union requests for more documents. Bladek indicated that the documents and copies of two taped interviews were "available for production," and listed the new total owing as $764.74. He stated the material would be furnished to Jeide "immediately upon payment of your outstanding balance." Although Bladek's January 31 letter said that production would not occur until the union paid the balance, the employer gave the items to

the union at a hearing date on ULP 2 in February 2006.[2] All-in-all, the employer made copies of more than 2700 pages of material requested in connection with the ULP 2 hearing.

Application of the duty to provide information

The union did not make its requests for information here within the collective bargaining process. The parties were clearly in litigation mode at the time of the requests and the union was conducting discovery. The union did not seek facts and figures to use in bargaining or to gain an understanding of the employer's proposals in negotiations, but rather made a request for production of documents similar to the practice in civil litigation.

The Commission itself has not ruled on whether the duty to provide information carries over into the litigation of unfair labor practice complaints. I believe that the rationale of previous examiner decisions concerning the application of the duty to civil litigation should be applied to unfair labor practice litigation. I decline to follow the lead of the examiner in *Washington State Patrol*, Decision 8785 (PSRA, 2004), as that decision involved a mixed information request and did not address *Huck Mfg. Co.*, and the line of NLRB authority considered above. I concur with the NLRB's reasoning and determine that the union's requests here do not fall within the duty to provide information pursuant to a collective bargaining relationship.

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[2] The examiner in that case denied a motion to compel production of the material, as discovery processes are not available per RCW 34.05.446(2). *Snohomish County*, Decision 9291 (PECB, 2006). The examiner noted that the parties agreed the employer would provide the documents and that the pending unfair labor practice in Case 20155-U-06-5135 (this case) would resolve the issue of payment.

The union's complaint in this case does not charge the employer with violating the duty to provide information. Perhaps it did not so allege because the union actually received the thousands of pages it wanted. Instead, the union alleges the employer refused to bargain by unilaterally changing the previous practice on the payment for copies produced.

Analysis of a unilateral change allegation must begin with a determination of whether the underlying issue is a mandatory subject of bargaining. Consequently, are copying charges imposed on information requests in an unfair labor practice case a mandatory subject of bargaining? If I believe that the requests are part of a process that is separate from collective bargaining, then I logically cannot determine that factors affecting those requests are mandatory subjects of collective bargaining.[3] If there is no mandatory subject involved, there is no duty to bargain a change. Based upon the previous discussion, I can find no violation of RCW 41.56.140(4).

ISSUE 2: Did the employer interfere, restrain or coerce public employees?

Legal Standard

RCW 41.56.040 provides: "No public employer . . . shall . . . interfere with . . . any public employee . . . in the free exercise

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[3] I want to make it clear that this involves only the information requests made here in an unfair labor practice case. If the issue were a unilateral change in the form and manner of responding to requests that came under the duty to provide information, my determination would differ greatly.

of . . . any other right under this chapter." The enforcement clause for these rights is in RCW 41.56.140. *King County*, Decision 8630-A (PECB, 2005). RCW 41.56.140(1) states it is an unfair labor practice for a public employer to, "interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter . . . "

The test for interference is whether a typical employee could, in the same circumstances, reasonably perceive the employer's action as discouraging his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). A complainant is not required to show intent or motive for interference, or that the employee involved was actually coerced, or that the respondent had a union animus. *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct resulted in harm to protected employee rights. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

An employer violates RCW 41.56.140(1) and interferes with public employees in the exercise of their rights when it engages in conduct that an employee could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998), citing *City of Seattle*, Decision 3066-A (PECB, 1989). The legal determination of interference is based not upon the reaction of the particular employee involved, but rather on whether a typical employee in a similar circumstance could reasonably perceive the actions as an attempt to discourage protected activity. *City of Tacoma*, Decision 6793-A (PECB, 2000).

The burden of proving unlawful interference rests with the complaining party and must be established by a preponderance of the

evidence. WAC 391-45-270. The timing of adverse actions in relation to protected union activity can support an inference of an interference violation. *City of Omak*, Decision 5579-B (PECB, 1998); *Kennewick School District*, Decision 5632-A (PECB, 1996).

Analysis

Did the employer's charging for copies of documents produced in response to requests for documents concerning a pending unfair labor practice case interfere, restrain or coerce a public employee? There are other employee organizations beside the union representing employees in the employer's correctional operation; Teamsters, Local 763 (Teamsters) represents control room operators, and the Washington State Council of City and County Employees, Council 2 AFSCME (WSCCCE) represents other support personnel. The employer has other union employees, such as its deputy sheriffs, represented by the Snohomish County Deputy Sheriffs' Association (SCDSA), and employees of the county clerk's office, represented by the Snohomish County Clerks Association (Clerks Association).

The history of the employer in charging for copies provided to other unions is mixed. Deputy Prosecuting Attorney Bladek testified that he charged an attorney for the Teamsters $.15 a page for copies of documents requested in the context of an unfair labor practice case in December 2004. Bladek stated that he charged that amount because the Public Disclosure Act (PDA) sets that rate as the reasonable charge if a governmental agency has not calculated its actual cost per page. RCW 42.56.070(8). Bladek was unaware that the employer had actually set $.25 a page as the PDA rate on November 1, 2004. He became aware of the rate establishment before Jeide's request on behalf of the union in this case. The employer charged the union in this case $.25 per page because that is the rate the employer now charges any member of the public for copies

requested under the PDA. The employer established that rate after calculating the actual cost of copying per page.

Teamsters shop steward Ronald Neff testified the Teamsters had not been charged copying costs for requested documents to his knowledge. Neff indicated that the Teamsters had to reimburse the employer for copies the Teamsters made on employer-owned machines to communicate with its members. Neff stated that inmates are charged $.05 per page for copies made by staff.

Undersheriff Steven O'Conner testified that the employer did not charge the SCDSA for copies prior to 2004. In March and June of 2004, the employer charged the SCDSA $.15 a page for copies of documents produced after the SCDSA made a request for a large number of documents during negotiations. He said, as of January 2006, the Sheriff's Office established an $.88 a page copying rate after the employer's administrative services chief and performance auditor determined the actual cost for making copies in the Sheriff's Office. O'Conner testified the employer did not negotiate those rates with the SCDSA.

WSCCCE has not been charged for documents produced under the collective bargaining duty to provide information. According to the employer's senior labor relations analyst, Dave Ellgen, that was because WSCCCE has not made extensive requests for information. Ellgen testified that, before a couple of years ago, the employer did not charge any union for copies. He said it has only been in the last two years that the employer has seen requests from unions that required the production of large numbers of copies. Ellgen cited the SCDSA's large request in 2004 as an example, as well as one made by the Clerks Association. He stated that the size of the request did matter; small requests might be produced without

charges but a union would be charged for large requests. He stated that he would determine what was small and what was large in his professional discretion.

The employer charged the Clerks Association $.25 a page for copies. The Clerks Association has an unfair labor practice complaint pending in which copying charges are an issue.

Conclusion

One of the rights protected by RCW 41.56.040 is the right of employees to organize and designate representatives of their own choosing for the purposes of collective bargaining. An employer can interfere with that right through conduct that may otherwise be legal, but which gives the perception of discouraging or retaliating against the exercise of protected rights.

The employer's labor relations analyst testified that he used his professional judgment on when to charge for copies and when not to charge for copies. He further said that he had no "bright line" to determine whether a request met either the free or the charged criteria. He said part of the reason he would charge depended on the size of the request. If the request sought release of many pages, the requestor would be charged. If the union was only looking at a few pages, the copies were free. It does not take any imagination to perceive that a union, if it behaves itself and asks only for what the employer thinks it should, then it is provided the copies for free; while a union that asks for too much is charged because of the size of its request. That type of arbitrary determination could result in the perception that an employer is attempting to discourage the union's exercise of its right to request relevant collective bargaining information. The charges at issue here, however, are those in the context of requests made in

an unfair labor practice case, not in response to a request for collective bargaining information.

The timing of the evolution of the copying charges may lend credibility to the union's allegation of interference. The employer charged no union for copies prior to 2004. The Commission certified this union as the representative of the bargaining unit in 2004. The first time that the employer charged the union $.25 a page for copies and precipitated a showdown over the issue, was after the union filed an unfair labor practice complaint. This timing may support an inference of employer interference. Evidence submitted by the employer, however, rebuts that inference. The employer established the $.25 a page rate in late 2004 for public disclosure requests and Bladek testified that he applied the rate to the copies of documents he produced in all litigation as soon as he knew of the rate. The employer charged the union the same amount it charged other litigants and members of the public.

I do not find an interference violation here. Ellgen's testimony about what requests are charged copying costs and which ones are not is troubling to me. However, Bladek applied the rate, not Ellgen. As a deputy prosecutor, Bladek was involved because the union brought a legal action against the employer. The requests for information, the copies and the amount charged for those copies, were all in the context of litigation, not bargaining.

The union had the burden of proof here and based on the record, I cannot determine that the employer's actions interfered, restrained or coerced a public employee in violation of RCW 41.56.140(1).

ISSUE 3: Did the employer control, dominate or interfere with a bargaining representative?

Applicable Authorities

RCW 41.56.140(2) provides that: "It shall be an unfair labor practice for a public employer: To control, dominate or interfere with a bargaining representative . . . "

An employer violates RCW 41.56.140(2) when it controls, dominates or interferes with a bargaining representative by involving itself in the internal affairs or finances of the union, or attempts to create, fund, or control a "company union." *State - Patrol*, Decision 2900 (PECB, 1988); *City of Anacortes*, Decision 6863 (PECB, 1999). A domination violation requires proof of employer intent. *King County*, Decision 2553-A (PECB, 1987); *Community College District 13 - Lower Columbia*, Decision 8117-B (PSRA, 2005).

Analysis

There is no evidence in the record suggesting that the employer engaged in conduct interfering with or involving itself in the internal affairs or finances of the union. To the degree that charging for copies affected the financial resources of the union, it does not arise to the level of control or domination envisioned by RCW 41.56.140(2).

The union suggested that the employer is demonstrating a preference between unions by not charging costs or charging less costs to other unions, while charging this union more. The union also appeared to frame an argument that the employer favored WSCCCE or the Teamsters by its conduct. The record does not support such findings and I find no violation of RCW 41.56.140(2).

ISSUE 4: Did the employer discriminate against a union for filing an unfair labor practice?

Applicable Authorities

RCW 41.56.040 provides: "No public employer . . . shall . . . discriminate against any public employee . . . in the free exercise of any other right under this chapter." One of those rights is the filing of an unfair labor practice complaint under RCW 41.56.140, 41.56.150, and 41.56.160. RCW 41.56.140(3) directly states, "It shall be an unfair labor practice for a public employer . . . to discriminate against a public employee who has filed an unfair labor practice charge."

The same legal standards and framework for a discrimination case apply to the question of discrimination for filing an unfair labor practice complaint. A prima facie case of discrimination is established when:

- The employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;
- The employee was deprived of some ascertainable right, status or benefit; and
- A causal connection exists between the protected union activity and the action claimed to be discriminatory.

If the complainant makes out a prima facie case, then the employer must set forth lawful reasons for its actions. If lawful reasons are cited, the complainant must show that the reasons given were pretexts and/or that the protected activity was a substantial motivating factor for the underlying action(s). *Educational Service District 114*, Decision 4361-A (PECB, 1994), and *Mansfield School District*, Decision 5238-A (EDUC, 1996).

Analysis

The employer here applied the charge of $.25 cents a page to copies the union requested as part of its pursuant of an unfair labor practice case. The union is the exclusive representative of the employees and the officers of the union are also public employees under the protection of Chapter 41.56 RCW. The union's exercise of the right to file an unfair labor practice complaint clearly meets the first step of the discrimination test.

It is difficult to conclude, however, that being charged for copies deprived the union or its officers and members of a right, status or benefit. The union made no factual or legal showing that it had a right to free copies, or even copies at a rate of less than $.25 a page. There is no showing of discrimination and I find no violation of RCW 41.56.140(3).

FINDINGS OF FACT

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

2. Snohomish County Corrections Guild, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive representative of a bargaining unit of correctional employees of the employer.

3. On June 13, 2005, the union filed an unfair labor practice complaint (Case 19549-U-05-4959) against the employer. An examiner set hearing dates in December 2005 and February 2006.

4. On November 3, 2005, union attorney Aaron Jeide submitted a request to the employer for information related to the pending

unfair labor practice complaint. The request was made under both the state collective bargaining laws and the state Public Disclosure Act.

5. On November 28, 2005, the employer's attorneys made thousands of pages of documents available for inspection by the union attorneys. Deputy Prosecuting Attorney Steven Bladek informed union attorneys Jeide and Chris Casillas that the employer intended to charge $.25 a page for any copies requested by the union. The union attorneys objected to the charges.

6. Throughout November and December 2005 and January 2006, the union attorneys submitted requests and Bladek produced information, keeping a running total of the copying charges.

7. On January 31, 2006, Bladek sent a letter to Jeide stating that more documents were "available for production," but that the material would be furnished "immediately upon payment of your outstanding balance" which had risen to $764.74.

8. The union filed this unfair labor practice complaint on February 2, 2006.

9. During a hearing in Case 19549-U-05-4959 in February 2006, the employer provided the requested information to the union.

10. Other unions representing bargaining units within the employer's operations include: Teamsters, Local 763; the Washington State Council of City and County Employees, Council 2; the Snohomish County Deputy Sheriffs' Association and the Snohomish County Clerks Association.

11. The employer has charged unions various rates for copies or has not charged at all. Bladek charged an attorney for the Teamsters $.15 a page for documents produced relevant to an unfair labor practice case in December 2004, but that was before Bladek became aware that the employer had set the rate for copies under the Public Disclosure Act in November 2004 at $.25 a page.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Information requests made in an unfair labor practice case are not included within the duty to provide collective bargaining information under the requirement to bargain in good faith contained in RCW 41.56.100.

3. As copying charges imposed on information requests made as discovery in an unfair labor practice case are not a mandatory subject of bargaining, the employer did not refuse to bargain and did not violate RCW 41.56.140(4).

4. The union did not demonstrate that the employer's actions interfered, restrained or coerced public employees in violation of RCW 41.56.140(1).

5. The union did not demonstrate that the employer's actions controlled, dominated or interfered with a bargaining representative in violation of RCW 41.56.140(2).

6. The union did not demonstrate that the employer's actions discriminated against a union for filing an unfair labor practice complaint in violation of RCW 41.56.140(3).

ORDER

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

ISSUED at Olympia, Washington, this 31st day of January, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

KARL NAGEL, 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.