STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17,	)	
Complainant,	)	CASE 14042-U-98-3471 DECISION 6994-D - PECB
vs.	)	CASE 14454-U-99-3581 DECISION 6995-D - PECB
KING COUNTY,	)	
Respondent.	)	DECISION OF COMMISSION

Ray Goforth, Business Representative, for the union.

Robert Railton, Labor Negotiator, and Prosecuting Attorney Norm Maleng, by *Diane Hess Taylor*, Assistant Prosecuting Attorney, for the employer.

This case comes before the Commission on a notice of appeal filed by International Federation of Professional and Technical Engineers, Local 17 (union), seeking to overturn an order of dismissal issued by Examiner J. Martin Smith.[1] The Commission affirms that no unfair labor practices were committed.

BACKGROUND

On July 21, 1998, the union filed an unfair labor practice complaint with the Commission under Chapter 391-45 WAC, naming King County (employer) as the respondent. Case 14042-U-98-3471. That

[1] *King County*, Decision 6994-C (PECB, 2002).

case involved employee Sherilyn McKee. On August 14, 1998, a preliminary ruling was issued finding causes of action to exist regarding three allegations. On March 16, 1999, the union filed another unfair labor practice complaint against the employer. Case 14454-U-99-3581. The second complaint involved McKee, as well as an additional King County employee, Terry Hammond. On June 18, 1999, a preliminary ruling was issued finding a cause of action to exist for discriminatory administration of the federal Family Medical Leave Act (FMLA). On July 2, 1999, these two cases were consolidated before Examiner Smith.

The Examiner conducted a hearing on October 7, 1999, March 30 and 31, 2000, and May 5, 2000. The Examiner issued a decision on January 10, 2001, dismissing the union's complaints.[2] Based on an appeal filed by the union, the Commission remanded the case on May 14, 2002, directing the Examiner to review the law and to apply the facts to the causes of action specified in the preliminary rulings.[3]

On November 27, 2002, the Examiner issued a revised decision, again dismissing the union's complaints.[4] The union appealed again, and it is that second appeal we consider in this decision.

POSITIONS OF THE PARTIES

The union argues that the Examiner should have granted its motion for summary judgment, and that the Examiner did not apply the

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[2] *King County*, Decision 6994-A (PECB, 2001).

[3] *King County*, Decision 6994-B (PECB, 2002).

[4] *King County*, Decision 6994-C (PECB, 2002).

correct scope of review to his decision on remand. The union also assigns error to numerous findings of fact, conclusions of law, and the order. It asserts that the employer failed or refused to supply information requested by the union; interfered with employee rights by a July 9, 1998 letter; failed or refused to respond to telephone messages left by the union and/or the union's requests for meetings; and engaged in discriminatory administration of the FMLA.

The employer asserts that the issues in this appeal are largely factual disputes within the Examiner's findings, and it did not file an exhaustive response to the latest appeal. The employer argues that the Examiner was in the best position to assess the credibility of witnesses and to decide how credibility related to the documentary evidence. The employer claims the union's appeal brief includes much information that is not at-issue, and disputes many factual assertions that were dealt with exhaustively in the post-hearing briefs. The employer argues that the Examiner's decision on remand adequately addressed the concerns raised in the Commission's earlier decision in this matter. Finally, the employer argues that the Examiner applied the correct legal standard with regard to the interference charge discussed by the Examiner, and claims that the union simply disagrees with the result of that analysis.

DISCUSSION

Summary Judgment Motion

The union again assigns error to the Examiner's failure to address a summary judgment motion the union made early in the proceedings.

Repeating our previous holding on this issue, we again hold that the Examiner was not obligated to consider the union's motion. A full evidentiary record has been made. We will not now consider a motion that could only have avoided the need for an evidentiary hearing. *See King County*, Decision 6994-B and Decision 6994-A.

Scope of Review

The union argues that the summary of procedural history in the Examiner's decision on remand is in error, inasmuch as "the . . . examiner erroneously asserts that the Commission remanded the case with instructions to consider three narrow issues only." The union also argues that the Examiner "erred in not reviewing the entire record and in artificially constraining his review to narrower questions than had been tasked to him by [the] preliminary rulings and the Commission's direction on remand."

We hold that the Examiner addressed the correct issues on remand, in that he addressed all four causes of action presented in the preliminary rulings.[5] It is also clear that he reviewed the entire record when considering the issues presented in this case.

The Findings of Fact

The union has assigned error to a number of the Examiner's findings of fact and conclusions of law, and to the order issued by the Examiner on remand. When reviewing the findings of fact issued by

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[5] Our listing in *King County*, Decision 6994-B, of the legal issues the Examiner should have addressed in his initial decision was not exhaustive. It was appropriate for the Examiner to address the factual issue of whether the employer responded in a timely fashion to requests for meetings and/or returned telephone messages.

staff members, the Commission applies a "substantial evidence" test.

Finding of Fact 6 -

The union claims error in the Examiner's finding that illegal response deadlines imposed upon Shop Steward McKee and Shop Steward Hammond "were merely due to unfamiliarity with the proper procedures." The Examiner wrote:

> The erroneous periods allowed for response in the letters described in . . . these findings of fact was due to the unfamiliarity of employer officials with FMLA procedures.

Employer official Frawley testified that the employer had only been requesting FMLA certifications since February 1998, and had implemented the FMLA from 1993 up to that time without using forms supplied by the federal government. McKee and Hammond were the first employees subjected to the federal deadline, but that is not conclusive proof of union animus or discrimination. Frawley testified that the imposition of the deadline was on a "learn-as-you-go" basis, that he did not know of the 15-day rule in June and July of 1998, that he chose the deadline specified in a letter based on the idea that "a couple weeks' time" seemed reasonable, and that he did not base the deadline on the applicable federal statute. Graves testified that the employer did not become aware of the 15-day rule until August 1998. Thus, we hold there is substantial evidence in the record to support this finding.

Findings of Fact 7, 9, 10 and 11 -

The union claims error in regard to all of these paragraphs, which deal with allegations that the letters sent to McKee in June 1998 were disciplinary. Because of their similarities, we take these three paragraphs together. The Examiner wrote:

7. Although the letter sent to McKee in June of 1998 was definite in tone and purported to set a deadline for reply, it neither expressly threatened nor actually constituted a disciplinary action as defined in the collective bargaining agreement between the employer and Local 17.

. . .

9. In a letter sent to McKee on June 30, 1998, the employer again requested documentation in support of her FMLA leave. Although this letter was also definite in tone and purported to set a deadline for reply, it neither expressly threatened nor actually constituted a disciplinary action as defined in the collective bargaining agreement between the employer and Local 17. A reference in that letter to a previous letter as having been issued on "July 11, 1998" was clearly erroneous, and there is no reasonable basis for concluding it had any impact upon subsequent events.

10. Employer officials neither discussed nor implemented any form of disciplinary action against McKee or Hammond.

11. Although perhaps inconvenienced by the errors and/or inaccurate deadlines imposed by the employer, as described in these findings of fact, neither McKee nor Hammond were adversely affected by the employer. McKee continued to hold status as a King County employee on leave under the FMLA.

Having reviewed the record, we note an absence of any evidence whatever that the employer actually took any steps to discuss or implement any discipline, and it is clear that no discipline was ever imposed upon McKee.

The Examiner's discussion includes that employer witnesses credibly testified that their focus was on eliciting a response from McKee, who seemed to be "out of touch" after she was injured in a motor vehicle accident. Employer officials who spoke with McKee in early July 1998 testified that she did not indicate she was afraid she was about to be fired or disciplined. Derrick testified that he

assured Goforth that the employer had not initiated discipline against McKee, and that the employer was not intending to initiate discipline. We defer to the Examiner's credibility determinations, and conclude there is substantial evidence which supports these findings of fact.[6]

Finding of Fact 8

This paragraph is claimed to be in error by reason of stating that McKee did not receive the June 11 letter because of her disability. The union claims it has no knowledge of, and that no testimony was given about, any specific information employer officials may have gleaned about McKee by means of interrogating her co-workers. The Examiner wrote:

> McKee did not promptly receive the letter described in paragraph 6 of these findings of fact, due to disabilities which prevented her from accessing her U.S. Mail. Employer officials received information concerning McKee from a variety of employees, as well as through the union.

As to the first sentence of that paragraph, the union claims that a failure of the employer to mail the letter dated June 11 accounts for the failure of McKee to receive that letter.

There is substantial evidence that supports the Examiner's finding of fact. McKee testified that: (1) she did not have an approved mailbox; and (2) she could not install an approved mailbox because

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[6] We do acknowledge that the Examiner's reference to "as defined in the collective bargaining agreement" in paragraph 6 likely overstates an inference he made from the parties' contract. No explicit definition of the term "disciplinary action" is found in either the parties' 1995-1997 or their 1998-2000 contract. Even if the statement is in error, it has no effect on the outcome of the cases.

of her injuries. Pamela Paul testified that McKee did not have an approved mailbox as of early June 1998. Lynnette Baugh testified that McKee was in and out of a hospital during this time period.

As to the second sentence in this paragraph, the union asserts that the Examiner erroneously asserted a "context" for a letter dated July 9, 1998, that is not apparent on its face and goes against the weight of evidence.[7] Again, however, there is substantial evidence in the record to support this portion of the finding of fact. The Examiner explained that the context for a comment about "third parties" in the letter signed by Baugh derived from an understanding that (in addition to dealing with the employer through Goforth) McKee had been using multiple fellow employees to convey messages to the employer. Employer officials testified of receiving information about McKee from various employees, apart from efforts to communicate with McKee directly or through the union.

Finding of Fact 12 -

The union claims this paragraph is erroneous in its entirety, except for a statement that union representative Goforth made repeated information requests to various levels of the employer's management "in a desperate effort" to get the needed information before the employer's deadline passed. The Examiner wrote:

> In an effort to point out the incorrect date in the letter described in paragraph 9 of these findings of fact and/or to point out the employer's alleged contravention of the FMLA, Goforth sent letters, e-mail messages and faxes to a number of employer officials. Goforth should have known that most of the individuals addressed were without authority to act in the matter, inasmuch as Lynette Baugh, Michael Frawley, Pamela Paul and Robert Derrick had all deferred to the employer's senior labor negotiator, Robert Railton, and Railton had instructed

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[7] Also see the discussion of finding of fact 13, below.

> Goforth to contact him in the event he and the union needed more information regarding grievances or bargaining matters.

Frawley testified that he deferred to Railton, because of Railton's senior position with the employer.[8] In turn, Railton testified that, on June 22, 1998, he asked Goforth to direct information requests to him in writing, so there is substantial evidence in the record to support the Examiner's finding about the direction given by Railton to Goforth.[9] Moreover, an employer is entitled to designate its representatives for purposes of labor-management relations.

Finding of Fact 13 -

The union claims the "Examiner strays from the facts and characterizes the letter and the intent of the issuer." The Examiner wrote:

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[8] Unless stipulated by the parties, declarations such as those signed by Baugh and Paul on this issue, have little probative value.

[9] That testimony confirmed a declaration signed by Railton, stating as follows:

> 4. In about June 1998 I informed Mr. Goforth that all requests for information were to be made in writing. A short time later, I also clarified that I wanted such requests to be directed at me. Mr. Goforth did not make his requests for information related to Sheri McKee to me or in writing.
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> 5. The reason I requested that all union requests for information go to me and be in written form was because I have overall responsibility for administering the labor agreement and I need to ensure the county does not commit an unfair labor practice by not providing documents in accordance with the law and we had not yet developed a working relationship on how information requests could be otherwise handled.

> On July 9, 1998, Baugh sent a letter to McKee in which she made reference to third parties, but that was not tied directly or indirectly to the union or to the ongoing conversations between employer officials and Goforth acting on her behalf.

The record contains sworn testimony as follows:

- Baugh testified that Derrick wanted the language about "third parties" included in the letter Baugh sent to McKee, and that she (Baugh) did not know what Derrick meant to communicate by the added language.[10]

- Derrick testified that McKee's co-workers were making inaccurate statements in the workplace regarding employer actions involving McKee, and that McKee's co-workers were communicating with the employer about McKee.[11] Derrick also testified

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[10] Baugh's testimony on this point is consistent with a declaration she signed, in which she stated:

> I signed a letter to Ms. McKee on July 9, 1999, at which time I still had not received any response from her. Director Robert Derrick requested that information be included in the letter regarding third parties.

[11] Derrick also signed an declaration stating:

> I instructed . . . to include in the draft for the July 9, 1998 letter to Mr. Goforth, a reference to "third party communications." I was not referring to the union when I mentioned "third parties." I was referring to difficulties we had experienced in receiving inconsistent information through Ms. McKee's co-workers because Ms. McKee was not communicating directly with the Department. In addition, rumors by third-party employees that were inaccurate were being spread throughout the workplace. My inclusion of the reference to "third parties" was an effort to encourage Ms. McKee to communicate directly with the Department.

> that he and Baugh preferred communicating with union officials, rather than through other employees.

As noted above in regard to paragraph 8 of the findings of fact, employer officials had received information concerning McKee from other employees, above and beyond their efforts to communicate with McKee directly or their communications with her through the union. We thus hold there is substantial evidence in the record to support the Examiner's finding of fact.

Finding of Fact 14 -

The union claims error by omission of "the fact that the employer did not provide all the requested information, refused to timely respond because manager Baugh took offense at union representative Goforth's 'tone', and characterizes the employer's responses as prompt." The Examiner wrote:

> On various dates, McKee and/or Goforth requested that Goforth be provided with documents regarding McKee's FMLA leave. Within three days after Goforth's request, the employer provided Goforth with a copy of the letter issued to McKee on June 30, 1998, and it promptly provided Goforth with any other documents requested.

Our first response to this assignment of error is that testimony was given that supports this finding. Our second response is that we agree with the Examiner that the letter of June 30, the telephone call of July 6, and the letter of July 9 were all part of the same transaction between the union and the employer. The union did engage in "numerous conversations and meetings" with Derrick concerning McKee's return to work. The employer did respond to the alleged refusal to provide the union with the letters and other documents regarding McKee's FMLA leave. It is apparent from the record that McKee became confused after receiving the June 30 letter, and that she thought by July 9 that she was being disci-

plined, but the union has not shown that (under the circumstances of this particular case) the information it sought was not conveyed in a timely manner. Examiners need not respond to facts or arguments they find to be immaterial or unpersuasive.[12]

Finding of Fact 15 -

The union claims this paragraph to be erroneous in its entirety, as "going against the law and the weight of the evidence." The Examiner wrote:

> The union has failed to establish any causal connection between McKee's status as a union steward and the events described in these findings of fact.

Baugh and Frawley testified they were not aware that McKee was a shop steward. Frawley was the employer official responsible for administration of the FMLA. Thus, we hold there is substantial evidence in the record to support this finding.

Finding of Fact 16 -

The union also claims error in its entirety, as "going against the law and the weight of the evidence." The Examiner wrote:

> The union has failed to establish that the employer's actions were reasonably perceived as an interference with the rights of McKee under Chapter 41.56 RCW.

As with the discussion above concerning paragraphs 7 through 11 and 13 of the findings of fact, we hold there is substantial evidence in the record to support this finding of fact.

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[12] The Examiner's discussions explain his rationale. *King County*, Decision 6994-A and 6994-C.

Finding of Fact 17 -

This is another paragraph claimed to be in error in its entirety, as "going against the law and the weight of the evidence." The Examiner wrote:

> The employer responded in a timely fashion to requests for meetings and/or return telephonic messages.

As already noted, the union engaged in "numerous conversations and meetings" with Derrick concerning McKee's return to work and work-place accommodations to be made available. The fact that the union would have preferred to deal with some other employer official does not negate the responses that were given. Thus, we hold there is substantial evidence in the record to support this finding.

The Examiner's Conclusions of Law

We hold that the Examiner applied the correct legal standard to the "discrimination" claim in this case. *See Educational Service District 114*, Decision 4631-A (PECB, 1994), citing *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991).

Likewise, we hold that the Examiner applied the correct legal standard to the "duty to provide information" claim in this case. *See Port of Seattle*, Decision 7000-A (PECB, 2000).

We reject the union's claim that the Examiner did not apply the correct legal standard to the "interference" claim in this case. This case presents a typical question of whether the employee reasonably perceived a threat of reprisal or force or promise of benefit associated with the exercise of collective bargaining rights protected by Chapter 41.56 RCW. *See Reardan-Edwall School*

District, Decision 6205-A (PECB, 1998). In that context, the Examiner correctly considered and decided this case.[13]

Conclusion of Law 2 -

This is claimed to be entirely erroneous, as "going against the law and the weight of the evidence." The Examiner wrote:

> International Federation of Professional and Technical Engineers, Local 17, has failed to establish that King County discriminated against Terry Hammond or Sherilyn McKee in reprisal for their exercise of rights under RCW 41.56.040, so that no unfair labor practice has been established under RCW 41.56.140(1).

Based on the findings of fact that the employer officials who were responsible for drafting the disputed letters to McKee (namely, Frawley, Baugh, and Graves) did not know of McKee's union activities, a conclusion of "no discrimination" was virtually inescapable. As to McKee, the findings of fact support a conclusion that the union did not connect the employer's fumbling attempts to implement the federal law with McKee's inclusion in the bargaining unit represented by the union, with her support for or membership in the union, with her with her previous filing of grievances under the collective bargaining agreement, with her role as a shop steward, or even with her request for union assistance following her injury accident. As to Hammond, the findings of fact that there was no direct evidence that the employer officials who wrote the disputed letters knew of Hammond's union activities, together with the finding that the short time periods for Hammond to respond

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[13] To clarify our previous decision in these cases, the narrow test for interference applied in *Okanogan County*, Decision 2252-A (1986), should not be applied in cases such as these (which do not involve a denial of union representation at an investigatory interview in contravention of precedents dating back to *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975)).

to requests for medical information also resulted from a lack of familiarity by employer officials with the federal law, supports a conclusion that "discrimination" was not established under Chapter 41.56 RCW. We thus affirm the Examiner's conclusion of law.

Conclusion of Law 3 -

This paragraph is also claimed to be in error in its entirety, once more as "going against the law and the weight of the evidence." The Examiner wrote:

> International Federation of Professional and Technical Engineers, Local 17, has failed to establish that King County failed or refused its duty to provide any information to which the union was entitled, so that no unfair labor practice has been established under RCW 41.56.140(4).

Given that paragraphs 12 and 14 of the finding of fact are supported by substantial evidence, as noted above, we affirm the Examiner's conclusion of law supported by those findings of fact.

Conclusion of Law 4 -

This is also claimed to be entirely erroneous as "going against the law and the weight of the evidence." The Examiner wrote:

> International Federation of Professional and Technical Engineers, Local 17, has failed to establish that McKee or any other employee represented by Local 17 reasonably perceived the employer actions described in the foregoing findings of fact as threats of reprisal or force or promises of benefit associated with their exercise of rights under Chapter 41.56 RCW, so that no unfair labor practice has been established under RCW 41.56.140(1).

In light of paragraphs 7 through 11 and 13 of the findings of fact, we are unable to conclude that Baugh's mention of third parties was reasonably perceived by McKee as a threat of reprisal or force

or promise of benefit associated with union activity. Thus, we affirm this conclusion of law supported by those findings of fact.

The Examiner's Order

The union argues that the order is in error in its entirety, one more time as "going against the law and the weight of the evidence." The Examiner dismissed both complaints on their merits. For the reasons discussed above, the Examiner's findings of fact and conclusions of law support that order. We affirm.

NOW, THEREFORE, it is

ORDERED

The findings of fact, conclusions of law and order issued by Examiner J. Martin Smith in the above-captioned matters are AFFIRMED and adopted as the findings of fact, conclusions of law and order of the Commission.

Issued at Olympia, Washington, on the 30th day of December, 2003.

PUBLIC EMPLOYMENT RELATIONS Commission

MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner

DISSENTING OPINION - Decision 6994-D - PECB

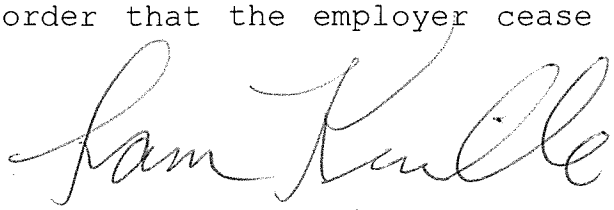
I strongly disagree with the tone and the result of the Examiner's two decisions, and particularly the first decision of January 10, 2001. I therefore respectfully dissent from the majority's decision that upholds the Examiner's final decision.

Employer and employee representatives in this case used some harsh language. I presume their rationale is that they are advocates. The unbiased trier-of-facts, the Examiner, also used harsh language. Page 9 Decision 6994-A. I question what could have been his rationale.

> The Examiner feels obliged to comment on Goforth's opening statement at the hearing, where he stated:
>
> > Well, the charges that bring us here today stem from a bunker mentality and a dysfunctional management culture at the [DDES]. This management culture approaches all problems with the assumption that DDES can do no wrong, and then seeks to martial facts to support this assumption. . . .
>
> TR 20-21.
>
> None of this had anything to do with RCW 41.56.140, with McKee's employment, or, for that matter, with collective bargaining. The very existence of a "management culture" may be questionable in the public sector, because the management is a part of (not separate from) the civic culture. Additionally, management or administrative styles are not themselves the business of unions, who are only empowered to negotiate the "wages, hours, and working conditions" of employees, as per RCW 41.56.030-(3). If the polemic of the quoted statement was designed to inflame, distort, and editorialize, none of those are tactics which the public expects the Commission to indulge. Finally, if the quoted statement was a prediction of this union's future approach to representing its members, it is a change from the prior (successful) approach and may be headed for disaster.

The crux of this case is that letters sent to two union shop stewards were more limited and more strict than letters that were sent to a number of rank-and-file union members before and after the letters to the two union shop stewards. The unbiased trier-of-facts, the Examiner, called this merely "fumbling" by the employer. I call it discrimination. See Decision 6994-C, at page 16.

I would find that a "discrimination" unfair labor practice did occur, and I would issue an order that the employer cease and desist.



SAM KINVILLE, Commissioner