Washington State Department of Corrections, Decision 7870 (PSRA, 2002)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Complainant, vs. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent.	)	CASE 16573-U-02-4313 DECISION 7870 - PSRA PARTIAL DISMISSAL AND ORDER FOR FURTHER PROCEEDINGS
WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Complainant, vs. TEAMSTERS UNION, LOCAL 313, Respondent.	)	CASE 16574-U-02-4314 DECISION 7871 - PSRA ORDER OF DISMISSAL
WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Complainant, vs. TEAMSTERS UNION, LOCAL 117, Respondent.	)	CASE 16575-U-02-4315 DECISION 7872 - PSRA PARTIAL DISMISSAL AND ORDER FOR FURTHER PROCEEDINGS

On July 18, 2002, the Washington Public Employees Association (WPEA) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, naming the Washington State Department of Corrections (employer), Teamsters Union, Local 117,

and Teamsters Union, Local 313, as respondents. Consistent with the Commission's docketing procedures, three cases were docketed:

- Case 16573-U-02-4313 for the allegations against the employer;
- Case 16574-U-02-4314 for the allegations against Teamsters Local 313; and
- Case 16575-U-02-4315 for the allegations against Teamsters Local 117.

A letter filed by the WPEA on September 5, 2002, was taken as amendatory material.

The cases have been processed under WAC 391-45-110. At this stage of the proceedings, all of the facts alleged in a 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 Commission. A deficiency notice was issued on September 13, 2002, and the WPEA was given a period of time in which to file and serve an amended complaint.[1]

Based upon review of the amended complaint filed by the WPEA on September 27, 2002, the Director of Administration concludes that some allegations should be the subject of further proceedings under Chapter 391-45 WAC. The remaining allegations are DISMISSED as insufficient to state a cause of action.

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[1] Teamsters Local 117 filed a letter with the Commission on October 2, 2002, commenting on the situation. Under WAC 391-45-110, the preliminary ruling process is limited to a review of the materials filed by a complainant. Thus, the letter filed by Teamsters Local 117 was not considered in preparing this decision.

BACKGROUND

This controversy concerns the institutions bargaining unit at the state Department of Corrections. Teamsters Local 313 is the incumbent exclusive bargaining representative of that unit, under a certification issued by the Washington Personnel Resources Board (WPRB). A copy of a collective bargaining agreement between the employer and Local 313 (covering the period from January 22, 1999, through January 21, 2002) was attached to the complaint. The complaint alleges that agreement was extended by the parties on January 18, 2002, for an additional six months.

DISCUSSION

The deficiency notice in these matters identified three categories of allegations, as described under separate headings below.

Assignment of Representation Responsibilities

The WPEA complains that Teamsters Local 117 has purported to act in place of Teamsters Local 313, and that the employer has dealt with Teamsters Local 117 in that context. Thus:

- Case 16573-U-02-4313 alleges that the employer interfered with employee rights in violation of RCW 41.56.140(1), and dominated or assisted Teamsters Local 117 in violation of RCW 41.56.140(2);
- Case 16574-U-02-4314 alleges that Teamsters Local 313 interfered with employee rights in violation of RCW 41.56.150(1), and induced the employer to commit an unfair labor practice in violation of RCW 41.56.150(2); and

- Case 16575-U-02-4315 alleges that Teamsters Local 117 interfered with employee rights in violation of RCW 41.56.150(1), and induced the employer to commit an unfair labor practice in violation of RCW 41.56.150(2).

The deficiency notice indicated it was not possible to conclude that any of the respondents could be found to have committed an unfair labor practice concerning the alleged assignment of representation responsibilities.

The amended complaint fails to cure the defects noted in the deficiency notice, so that dismissal of the allegations concerning the assignment of representation responsibilities is now appropriate. Unions are entitled to select their own representatives for bargaining and contract administration, without influence or interference by an employer or any other party. While it is common to have union staff members conduct negotiations and contract administration, nothing in the statutes precludes a union from hiring an attorney or other outside representatives.[2]

The decision in *Vancouver School District*, Decision 2575-A (PECB, 1987) is of interest here. While unfair labor practice charges were dismissed after the union that had been acting as agent of another won certification for the bargaining unit, significance is to be drawn from the absence of any criticism of the earlier arrangement between the two unions. The dismissal of "refusal to bargain" claims filed by the former incumbent was triggered by its loss of "exclusive bargaining representative" status when the former service provider became the new incumbent.

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[2] By way of comparison, numerous independent police guilds in Washington contract with one of a handful of law firms to provide all of the bargaining and grievance services customarily provided by union staff members.

The deficiency notice pointed out the absence of any explicit statutory language or any case precedent that supported the complaint, and that research on both Commission precedents and an extensive body of National Labor Relations Board (NLRB) precedent failed to yield any support for the proposition that a union is precluded from appointing another union to act as its agent. Accordingly, no support was found for the proposition that an employer can (or must) refuse to bargain with the representatives designated by an incumbent exclusive bargaining representative. The amended complaint did not cure the lack of cited authority.

The WPEA has cited *Skagit Valley Hospital*, Decision 2509-A (PECB, 1987), *aff'd*, 55 Wn. App. 348 (1989), but that precedent is inapposite to the situation at hand. *Skagit* concerned an affiliation by which a union that was the incumbent exclusive bargaining representative of certain employees became a part of another union, and ceased to exist as a separate entity. The case at hand merely involves an incumbent union that has appointed another union to act as its agent in representing the employees. Nothing suggests that Teamsters Local 313 has become part of Teamsters Local 117.

The complaint and amended complaint do not allege any specific facts supporting a claim that Teamsters Local 313 somehow "transferred" its representational rights to Teamsters Local 117. Any suggestion to that effect is contradicted by other allegations in the complaint, which concern the efforts of Teamsters Local 117 to gain certification as exclusive bargaining representative.

Alleged Overly-Broad No-Solicitation Policy

Fact-based Allegations Concerning April 4, 2002 -
The WPEA complains that the employer prevented a WPEA supporter from soliciting authorization cards on April 4, 2002. Case 16573-

U-02-4313 thus alleges an additional count of employer interference in violation of RCW 41.56.140(1).

Commission precedent concerning no-solicitation policies includes *Clallam County Public Hospital District 1*, Decision 5445 (PECB, 1996), stating:

> A valid employer policy might prohibit union-related activities on employee work time and in work areas, but could not prohibit discussion of such issues by employees on their breaks, during lunch periods, or on their own time.

In *City of Seattle*, Decision 5391-C (PECB, 1997), the Commission ruled that no-solicitation policies must be restricted to employees' working time.

The deficiency notice pointed out that facts set forth in the original complaint with regard to a situation in April of 2002 did not support an "overly-broad policy" allegation. A statement that one employee was "soliciting authorization cards . . . inside the Washington Corrections Center" was too vague to constitute a basis for further proceedings, and an attachment filed with the complaint contained "during . . . work time, in front of the . . . offender dining hall" facts that contradicted any suggestion that the WPEA organizing activity was within the employee "breaks . . . lunch periods, or on . . . own time" precedents. No other facts were alleged that supported a claim that the employer's no-solicitation rule was overly-broad.

The amended complaint provides new factual allegations concerning the incident on April 4, 2002, and they provide basis for concern that the employer's policy is (or was at least applied) in contravention of the Commission precedents cited above:

- Employee Lisa Jordan was allegedly standing with other employees near a designated smoking area at about 6:30 a.m., taking a break while waiting for an inmate count. It is alleged to be common for employees to take a break during the inmate count, while inmates are locked down in living units.
- Jordan allegedly discussed union matters with another bargaining unit employee during this break, and asked the employee to sign an authorization card in support of WPEA.
- Jordan was called into a meeting with Captain Alan Kunz later in the morning on April 4, 2002. Kunz is alleged to have:
  - Told Jordan that she was not allowed to have any WPEA material, including authorization cards, within the prison grounds;
  - Ordered Jordan to take her WPEA material out of the institution and to place it in her car; and
  - Told Jordan that he did not want her to hand out any union material as he did not want a "shift war started" or an increase in tensions between unions.

Those specific facts are sufficient to warrant a hearing under Chapter 391-45 WAC, in Case 16573-U-02-4313, for interference with employee rights in violation of RCW 41.56.140(1). Further, the amended complaint raises the specter of discriminatory enforcement of the employer's no-solicitation policy and the employer showing a preference between competing unions, which state a cause of action against the employer.

Abstract Allegations of Overly-Broad No-Solicitation Policy - Apart from the allegations concerning the events of April 4, 2002, the WPEA seeks to launch a general attack on the employer's no-solicitation policy as being overly-broad. The WPEA's amended

complaint supplied some additional factual allegations concerning the employer's maintenance of an overly-broad no-solicitation policy at the Washington Corrections Center in Shelton, as follows:

- The Washington Corrections Center has three work shifts;
- Employees work "straight-eight" shifts and are subject to call at all times during their shift;
- Employees do not receive unpaid lunch or rest breaks, and take breaks "when and where they can" throughout the institution;
- While there are designated lunch and break rooms, employees may or may not have access or opportunity to use those rooms depending on their post and duties;
- Employees are prohibited from smoking in prison buildings and while performing their duties, but may gather to smoke in designated locations outside buildings within the prison when a break in their duties allows; and
- The employer's no-solicitation policy directing that employees may not engage in union solicitation during work times is ambiguous, as employees could reasonably conclude that such a ban applies while an employee is on shift, even during lunch and rest breaks.

However, the WPEA has not alleged any specific facts concerning: (1) employer rejection of any WPEA request for access to the employees; (2) employee efforts to solicit on behalf of the WPEA; or (3) employer actions to prevent or curtail employee efforts on behalf of the WPEA.

Applying NLRB precedents to the abstract claims advanced by the WPEA weighs against finding that a cause of action exists at this time. In *Jay Metals*, 308 NLRB 167 (1992), *enf'd*, 12 F.3d 213 (6th

Cir. 1993), the NLRB held that an employer rule prohibiting solicitation and distribution of literature during "working time" was lawful, even though employees took short breaks as their work schedule permitted and were paid for their lunch and breaktime. The NLRB stated:

> [T]o the extent . . . that the Respondent releases employees from their duties for lunch or other breaks, it would be inconsistent with *Our Way* [268 NLRB 394 (1983)] to infer that the Respondent's no solicitation/no distribution rule would apply to such periods--or that employees might reasonably think that it did--merely because employees are paid for such periods or because the breaks are informally scheduled and may not overlap with the breaks of other employees.

Jay Metals at 168.

In *Brockton Hospital*, 333 NLRB No. 165 (2001), the NLRB cited *Jay Metals* in ruling that employees would not reasonably believe that a policy prohibiting solicitation or distribution of literature during "working time" would apply to break periods, merely because the policy excluded "authorized lunch time" but did not mention "breaktimes." Solicitation or distribution during an employee's "non-working hours" is permitted by the policy at issue here.

The amended complaint alleges, generally, that the employer's no-solicitation policy is overly-broad with regard to locations where employees may engage in union-related speech. The WPEA characterizes the employer's policy as "limiting the distribution of authorization cards to break rooms and lunch areas" and it claims that such limitations "effectively preclud[e] employees without easy access to those areas from solicitation by their co-workers to support WPEA." The WPEA alleges that the employer's no-solicitation policy prohibits solicitation in smoking areas. However, the

no-solicitation policy set forth in the amended complaint allows solicitation or distribution of literature "in non-working locations at the institution, i.e. designated break rooms and staff eating areas." The term "i.e." is used in the employer's policy to explain, or give examples of, "non-working locations" where solicitation or distribution of literature is allowed, and is the focus of the amended complaint. *Black's Law Dictionary* (Revised Fourth Edition, 1968) defines that term as: "An abbreviation for '*id est*,' that is; that is to say." The word "is" infers a definitive result, as in "This is the menu for today." The WPEA theorizes that use of the term "i.e." may reasonably have led employees to believe that solicitation or distribution of literature under the employer's no-solicitation policy was restricted to "designated break rooms and staff eating areas." Such speculation is insufficient to state a cause of action against the employer or against Teamsters Local 117.

The amended complaint alleges that the employer's no-solicitation policy is overly-broad because it equates the solicitation of union membership and the signing of authorization cards with the distribution of union literature. The WPEA cites NLRB precedent for the proposition that solicitation to sign authorization cards is treated as oral solicitation and not distribution. The WPEA appears to concede that an employer may prohibit the distribution of literature in work areas, but it theorizes that an employer cannot prevent solicitation in those locations. The employer's no-solicitation policy reads as follows:

> [A]dministration has been made aware that some employees are soliciting other employees to sign petitions related to union activities, during work times. Be advised this is in violation of the [collective bargaining agreement] and Department Policy.
>
> . . . .

> Employees may distribute union authorization cards/petitions and other such literature during their non-working hours in non-working locations at the institution, i.e. designated break rooms and staff eating areas.

Thus, the employer's policy appears to draw a distinction, in accord with NLRB precedent, between oral solicitation and distribution of literature. In *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962), the NLRB stated, at page 621:

> [W]e believe that to effectuate organizational rights through the medium of oral solicitation, the right of employees to solicit on plant premises must be afforded subject only to the restriction that it be on nonworking time. However, because distribution of literature is a different technique and poses different problems both from the point of view of the employees and from the point of view of management, we believe organizational rights in that regard require only that employees have access to nonworking areas of the plant premises.

In a footnote, the NLRB gave the following examples of nonworking areas:

> [L]uncheon breaks, restroom periods, coffee breaks, timeclock punching, clothes changing, auto parking, and simple entry into and departure from the plant.

Thus, under *Stoddard-Quirk*, employer policies may restrict the distribution of literature to working time and to working areas of a plant, while the only restriction on oral solicitation is that it must be done on nonworking time. Thus, the amended complaint does not contain sufficient factual details to state a cause of action concerning equation of the solicitation of union membership and the

signing of authorization cards with the distribution of union literature under the employer's no-solicitation policy.

Discriminatory Enforcement of No-Solicitation Policy

The WPEA complains that the employer allowed Teamsters Local 117 special access to work sites and employees for the purposes of organizing. Thus:

- Case 16573-U-02-4313 alleges that the employer has interfered with employee rights in violation of RCW 41.56.140(1), and dominated or assisted Teamsters Local 117 in violation of RCW 41.56.140(2); and
- Case 16575-U-02-4315 alleges that Teamsters Local 117 has interfered with employee rights in violation of RCW 41.56.150(1), and induced the employer to commit an unfair labor practice in violation of RCW 41.56.150(2).

The deficiency notice indicated that these allegations stated a cause of action for further proceedings under Chapter 391-45 WAC, and would be assigned to an Examiner in due course.

Commission precedent draws a distinction between negotiations/ administration activities by a union and organizing activities by the same union. In *Enumclaw School District*, Decision 222 (EDUC, 1977), *aff'd*, WPERR CD-34 (King County Superior Court, 1977), a proposed "release time" arrangement was faulted because the potential use of employer-paid time for organizing activities would have provided unlawful assistance to the union. That concern was not allayed by the fact that use of employer-paid time under the same proposed language for negotiations/administration activities could have been entirely legitimate. *See also Washington State Patrol*, Decision 2900 (PECB, 1988).

The WPEA alleges that Teamsters Local 117 moved into an organizing mode during and after May of 2002, when it announced an effort to actually supplant Teamsters Local 313 as the exclusive bargaining representative of the Department of Corrections employees. The deficiency notice stated that it was arguable that the employer was obligated at that point to enforce the same restrictions on Teamsters Local 117 that it had earlier enforced on WPEA, and that Teamsters Local 117 obtained unfair advantage because of its presence on the employer's premises for a legitimate purpose.

NOW, THEREFORE, it is

ORDERED

1. [Case 16573-U-02-4313, Decision 7870 - PSRA] In regard to Washington State Department of Corrections:

   a. Assuming all of the facts alleged in the amended complaint to be true and provable, a cause of action is found to exist on allegations summarized as follows:

      i. Employer interference with employee rights in violation of RCW 41.56.140(1), by enforcement and/or discriminatory enforcement of a no-solicitation policy on April 4, 2002; and

      ii. Employer interference with employee rights in violation of RCW 41.56.140(1) and domination of or providing unlawful assistance to a union in violation of RCW 41.56.140(2), by discriminatory failure to enforce its no-solicitation policy against Teamsters Local 117 on and after the date that

organization commenced organizing activities among the employees of the employer.

Those allegations will be the subject of further proceedings under Chapter 391-45 WAC. Within 14 days following the date of this order, the employer shall file and serve its answer as required by WAC 391-45-190 and 391-45-210, or shall be subject to sanctions as prescribed in WAC 391-45-210.

b. All other claims against the employer are DISMISSED for failure to allege facts sufficient to constitute a claim for relief available through unfair labor practice proceedings before the Commission.

2. [Case 16574-U-02-4314, Decision 7871 - PSRA] In regard to Teamsters Union, Local 313, all allegations of the complaint and amended complaint are DISMISSED for failure to state a cause of action against that organization.

3. [Case 16575-U-02-4315, Decision 7872 - PSRA] In regard to Teamsters Union, Local 117:

a. Assuming all of the facts alleged in the amended complaint to be true and provable, a cause of action is found to exist on allegations summarized as follows:

Union interference with employee rights in violation of RCW 41.56.150(1) and inducing the employer to commit an unfair labor practice in violation of RCW 41.56.150(2), by its organizing activities among the employees of the employer.

Those allegations will be the subject of further proceedings under Chapter 391-45 WAC. Within 14 days following the date of this order, Teamsters Union, Local 117, shall file and serve its answer as required by WAC 391-45-190 and 391-45-210, or shall be subject to sanctions as prescribed in WAC 391-45-210.

b. All other claims against Teamsters Union, Local 117, are DISMISSED for failure to allege facts sufficient to constitute a claim for relief available through unfair labor practice proceedings before the Commission.

ISSUED at Olympia, Washington, this 10th day of October, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARK S. DOWNING, Director of Administration

Paragraphs 1.b, 2, and 3.b of this order will be the final order of the agency on the allegations found to be defective, unless a notice of appeal is filed with the Commission under WAC 391-45-350.