Seattle School District (International Union of Operating Engineers, Local 609), Decision 9135-B (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE SCHOOL DISTRICT, Employer.	)	
LIESL ZAPPLER, Complainant, vs. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Respondent.	)	CASE 18736-U-04-4763 DECISION 9135-B - PECB CORRECTED DECISION OF COMMISSION

Abraham A. Arditi, Attorney at Law, for Liesl Zappler.

Schwerin Campbell Barnard LLP, by *Kathleen Phair Barnard,* attorney at law, for the union.

This case comes before the Commission on a timely appeal filed by the International Union of Operating Engineers, Local 609 (union), and a timely cross-appeal filed by Liesl Zappler, each seeking to overturn findings of fact, conclusions of law, and the remedial order issued by Examiner David Gedrose.[1]

ISSUES PRESENTED

1. Was the union's discipline against bargaining unit member Zappler an unfair labor practice?

---

[1] *Seattle School District*, Decision 9135 (PECB, 2005).

2. Did the union's actions, statements and imposition of discipline against Zappler interfere with her protected rights under Chapter 41.56 RCW ?

We find that the union's imposition of internal discipline was the enforcement of a properly adopted rule reflecting a legitimate union interest that impaired no policy the Legislature imbedded in the labor laws. We also find the rule was reasonably enforced against Zappler, who was free to leave the union and not be subject to its rule. However, we disagree with the Examiner that the union's protection from this agency's purview ended when the union's imposed discipline reasonably suggested to Zappler that her employment status was threatened. This Commission lacks the statutory authority to assert jurisdiction over employee claims asserting that their union breached its duty of fair representation by failing to inform them of their union security rights. Those claims must be adjudicated in the courts.

Accordingly, we affirm the Examiner's findings and conclusions that the union's imposition of discipline for violation of a properly adopted rule did not interfere with Zappler's protected rights. We reverse the Examiner's findings and conclusions that the fine imposed by the union was unreasonable, and we reverse the Examiner's decision that the union interfered with Zappler's protected rights when Zappler reasonably perceived that the union's imposed discipline threatened her employment status.

APPLICABLE LEGAL STANDARDS

Standard of Review

This Commission does not conduct a de novo review of examiner decisions in unfair labor practice proceedings under Chapter 391-45

WAC. Rather, we review the findings of fact to determine whether they are supported by substantial evidence and, if so, whether those findings of fact support the conclusions of law and order. *Cowlitz County*, Decision 7007-A (PECB, 2000). Substantial evidence exists if the record contains competent, relevant and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings. *Ballinger v. Department of Social and Health Services*, 104 Wn.2d 323 (1985).

Background

Because this is a case of first impression, we briefly outline the factual situation. Zappler, a gardener and bargaining unit member, advocated alternative schedules for the gardeners within the bargaining unit. The union informed Zappler that it was committed to the current work schedule, and stated that if she continued to advocate for an alternative schedule, she may be subject to internal union discipline.

During this time, Zappler also learned that the employer was considering eliminating the grounds supervisor and appointing the custodians as supervisors of the gardening staff. Over the next several months Zappler communicated her opposition to this plan directly with the school board and offered alternative plans, including advocating staffing cuts in other departments represented by the union. The union informed Zappler that her efforts potentially undermined the livelihood of fellow bargaining unit members, and undermined the authority of the union, and that her actions violated certain parts of the union's constitution, and that she could be subject to union discipline. He invited her to explain her actions to the union's executive board and to send a written confirmation of her intent to do so. Zappler failed to

appear before the union's inquiry board, but did provide a written response to the union's letter.

Despite the union's warnings, Zappler continued her advocacy over the next several months, mostly communicating informally with the employer by e-mail. The union distributed a newsletter informing bargaining unit members that a female union member was urging the employer to take action contrary to the union's position, and that the employee may be subject to future union discipline. The union subsequently sent a letter to Zappler informing her that bargaining unit employees had filed complaints against her, and a union trial would be held to address those complaints. Zappler informed the union that she would not be able to attend the trial for personal reasons, and asked for the trial to be rescheduled. The union informed Zappler that the trial would take place as scheduled. Zappler did not attend the trial.

The union informed Zappler it had found her guilty of circumventing the union's bargaining authority by attempting to directly negotiate with the employer. The union imposed a $1200 fine and issued an official censure of Zappler. However, the union suspended the fine contingent on her refraining from future communication with the employer on union issues. The union also sent a letter to the employer outlining its imposed discipline.

Union Interference in Context of Union Discipline

This Commission has never before considered an appeal of a case involving a union's discipline of its members as grounds for an unfair labor practice violation of union interference. Before we answer the question of whether any of the complained-of conduct constituted union interference with protected employee rights, we must first answer the question of whether or not this Commission

has jurisdiction over complaints arising out of factual scenarios such as the one presented here.

It is well established that when the Commission lacks precedent, such as in cases of first impression, it may look to case law interpreting the National Labor Relation Act (NLRA) for guidance. Decisions construing the NLRA, while not controlling, are persuasive in interpreting state labor acts which are similar or based upon the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1981); *see also Washington Public Emp. Ass'n v. Community College Dist. 9*, 31 Wn. App. 203 (1982).

Under the United State Supreme Court cases interpreting the NLRA, the Court found that the National Labor Relation Board's ability is limited when finding interference unfair labor practice complaints regarding matters of union discipline. Section 8(b)(1) of the NLRA is similar to RCW 41.56.150(1) and states the rights of employees under Section 7, and then Section 8(b)(1)(A), and makes it an unfair labor practice for a bargaining representative to restrain or coerce employees in the exercise of their rights under Section 7:

> Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

RCW 41.56.150(1) also provides that it shall be an unfair labor practice for a bargaining representative to "interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter." While the text of our statute differs from the federal statute, we have exercised a similar approach in interpreting the narrowness of our jurisdiction. As

the Executive Director said in *Enumclaw School District*, Decision 5979 (PECB, 1997):

> the Commission has very limited authority regarding the internal affairs of unions, that the bylaws and constitutions of unions are the contracts among the members for how the organization is to be operated, and that internal affairs disputes must be resolved through internal procedures or the courts.

Similarly, in *King County*, Decision 8630 (PECB, 2004), *aff'd*, Decision 8630-A (PECB-2005), an examiner discussed the narrowness of our authority over internal union matters:

> The Commission's intrusion into internal union matters is limited to the prevention of conduct that is reasonably perceived by employees as a threat of reprisal of force associated with their exercise of rights protected by the collective bargaining statute, and to the enforcement of the duty of fair representation.

In that decision, the union's action related to election rules and the posting of campaign materials in the workplace. The examiner, in rejecting the union's argument that the rules were internal union activities beyond the Commission's jurisdiction, noted that if the employer had not signed the election rules, the question of jurisdiction might have been different.

The United States Supreme Court distinguished between internal and external enforcement of union rules in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967), where the Court said that Congress did not intend for Section 8(b)(1) of the National Labor Relations Act to limit internal union affairs, provided that the enforcement of the rule did not affect a member's employment status. The Supreme Court refined that ruling in *Scofield v. NLRB*, 394 U.S. 423 (1969). The internal union rule at issue in *Scofield* fined its

members who broke the union's rule which limited the amount of piecework for which each union member was allowed to accept immediate payment. This rule placed a limitation on the amount of money each employee could be paid each day, and was intended to keep the employer from lowering the price paid for each piece of work.

In upholding the imposition of fines against the employees, the *Scofield* Court determined that no violation could be found because Section 8(b)(1) "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield v. NLRB*, 394 U.S. at 430. The *Scofield* Court also found that such a limited jurisdiction was most appropriate because a union and its individual members have a contractual relationship, so state courts with jurisdiction over the contractual relationship would be the appropriate forum for disputes which did not fall within the limits of Section 8(b)(1).

Since the *Scofield* decision held that a rule must be "reasonably enforced" against union members, the *Scofield* decision suggests that 8(b)(1) would protect an employee from an unreasonably large fine. However, in *NLRB v. Boeing*, 412 U.S. 67 (1973), the Supreme Court ruled otherwise, and held that the NLRA did not protect employees from unreasonably large fines. In *Boeing*, the court decided that an unreasonable fine was not union interference because 8(b)(1)(A) was "not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act." The Court explained that in both the *Allis-Chalmers* and *Scofield* decisions the reasonableness of the fine was assumed, and so the

Scofield decision should not be interpreted to suggest that an unreasonably large fine was prohibited.

Applying *Scofield* and *Boeing*, it readily appears that only the reasonableness of the enforcement of the rule should be examined in the context of union discipline interfering with protected employee rights, and not the amount of punishment. Support for this conclusion exists in *Rasmussen v. NLRB*, 875 F.2d 1390 (9th Cir. 1989), where the Ninth Circuit found that an internal union rule might not have been reasonably enforced where a supervisor who was also a union member was fined for each day that he crossed a picket line. The Court found that a union's rule prohibiting bargaining unit members from crossing a picket line to perform bargaining unit work may be reasonably enforced, but the Court remanded the case back to the NLRB to ensure that the fine was calculated to only include the days that the supervisor violated the union rule and not days where the supervisor crossed the picket line to perform non-bargaining unit work.

Based upon *Scofield* and its progeny, we have no jurisdiction over complaints where the union has disciplined one of its members in order to enforce a properly adopted rule that reflects a legitimate union interest, impairs no policy that our state Legislature has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. Our ability to find an unfair labor practice based on reasonableness of an imposed fine is also limited, provided there is no showing that the discipline is based upon invidious motives. Like the NLRB, this Commission is not a court of general jurisdiction, but rather an administrative forum limited to issues arising under the labor laws that we are charged with administering, and this Commission is not empowered to adjudicate other contractual

conflicts between union members and a union or unions. *See City of Walla Walla*, Decision 104 (PECB, 1976).

Union's Rule Was Reasonably Adopted

Here, the Examiner found that Zappler's communications to the employer were not a protected collective bargaining activity[2] because the union was certified as the exclusive bargaining representative and Zappler was contradicting the union's efforts. We agree. At the time of Zappler's advocacy, she was a full member of the union, not an agency fee payer. As a full member of the union, Zappler had a contractual relationship with the union and made herself subject to the union's properly adopted rules. In accordance with those rules, the union determined that Zappler violated the union's bylaws which prohibit union members from destroying "the interest and harmony" of the union and engaging in "conduct discreditable" to the union.

We find that those rules reflect not only the purpose of Chapter 41.56 RCW, namely the ability for employees to freely select an exclusive bargaining representative to bargain on their behalf, but also demonstrate a legitimate union interest of presenting to the employer a unified membership. Collective bargaining laws do not require an exclusive bargaining representative to strengthen every relationship that each individual employee has with the employer at all times. Such an expectation is not only unreasonable, it is not possible to achieve. Employees who have chosen to exercise their rights to organize collectively gain the power of collective action, and as such the individual loses the power to directly deal

---

[2] Zappler's constitutional right to petition the school board is not relevant as this is an unfair labor practice proceeding. Besides which, her conflict is with the union, and not a government entity.

with the employer and bargain individually for wages, hours, and working conditions.

Were the Union's Rules Reasonably Enforced?

Although the Examiner found that the union's rules prohibiting union members from destroying "the interest and harmony" of the union and engaging in "conduct discreditable" to the union were reasonably adopted, he ruled that those rules, as enforced against Zappler, interfered with her protected rights. We examine each instance where the Examiner found the union's actions unreasonable.

Amount of Fine

The union fined Zappler $1200 for her conduct, but suspended the fine provided she committed no future violations. The Examiner found that regardless of the suspension, the evidence demonstrates that the purpose of the fine was punitive, not remedial, and that any employee in the same situation would consider such a fine a massive burden that could jeopardize her employment. We disagree that the union's imposed fine interfered with Zappler's protected rights.

As previously noted, while the *Scofield* decision stated that a rule must be "reasonably enforced" against union members, the *Boeing* decision states that *Scofield* did not protect an employee from an unreasonably large fine. Furthermore, the *Boeing* Court noted that the NLRB was not "empowered by Congress . . . to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee." *Boeing v. NLRB*, 412 U.S. at 74-5 (*quoting Local 283, UAW*, 145 NLRB 1097, 1104 (1964)). Here, the union levied a large fine against Zappler. The question before us is the reasonableness of the fine. We fail to find evidence supporting the Examiner's finding that the imposed

fine threatened Zappler's employment, particularly in light of the fact that the union suspended the fine provided Zappler committed no future misconduct. In sum, we cannot agree that a suspended fine is unreasonable or threatening, particularly in light of the precedent discussed above.

Communications that Specifically Targeted Zappler

Zappler alleged that the union interfered with her rights when it referred to Zappler, albeit not by name, in two union newsletters is not contested. That fact does not lead to a conclusion that such a reference negatively impacted Zappler's employment relationship, nor did it interfere with her protected rights.

Fundamental to the collective bargaining process is the ability of unions and employers to have full and frank discussions regarding their bargaining relationship. The union and employer must be able to speak openly about their conflicts and if the union is not urging or suggesting that the employer should take any actions regarding Zappler, reporting the incident to the employer should not be an unfair labor practice. To do otherwise would put unions and employers in a position where they would be encouraged to talk in code to avoid talking directly about conflicts in their relationships. Finally, we do not find it more objectionable that the Zappler was named by letter rather than in face-to-face conversation. We decline to encourage different standards for types of communications, and find it illogical for a union to be able to freely name a disciplined member verbally, but to commit an unfair labor practice if it includes her name or likeness in written communication to bargaining unit members.

Fair Representation

As the exclusive bargaining representative, the union owes a duty to provide fair representation to all bargaining unit employees,

including Zappler. Under *Vaca v. Sipes,* 375 U.S. 335 (1964), a union is obligated to "serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *See also Allen v. Seattle Police Officer Guild*, 100 Wn. 2d 361 (1983).

The NLRB has found a union to have violated an employee's right to fair representation when it ridiculed the employee because of his filing of grievances and pursuing an unfair labor practice regarding safe working conditions. *Auto Workers Local 235 (General Motors Corp.)*, 313 NLRB 36 (1993). In that case, a union official who had not supported expending union resources on the grievance and unfair labor practice, addressed the employee during a union meeting by saying "if you want to talk about expenses, let's talk about expenses." The union official then told the members that the employee had cost the union over $1,000 in trial expenses because of charges filed with the NLRB and that "a whole lot more would be incurred." When the employee attempted to explain that he testified under subpoena and had not filed the charges, the official ruled that he was out of order and told him to sit down and shut up.

While Zappler's censure by the union was also public, we do not see a violation of the duty of fair representation as was present in *Auto Workers*. Unlike the union member in that case, the actions taken against Zappler were not in retaliation for the lawful exercise of collective bargaining rights. Rather, she was being disciplined for violating the union's internal rules. Furthermore, the union's decision to discipline Zappler was not arbitrary; it was done to promote union unity. Although the possibility of a union trial and being mentioned in a union newsletters might have

made Zappler uncomfortable, these are legitimate and appropriate actions for a union to take to regulate communications with its membership and with the employer. Therefore, Zappler's situation is not equivalent to that of the employee who had been publicly ridiculed at a union meeting for his involvement in NLRB proceedings.

Union's Duty to Inform Zappler of Her Proper Status

Although the Examiner found that the union reasonably adopted its rules, he nevertheless found that by threatening Zappler with expulsion from the union, the union threatened her employment status and therefore interfered with her protected rights. The Examiner declined to require public employees working under a union security obligation to research the legal status of that obligation and the ramification that obligation may have on their employment status. The Examiner premised his ruling on the assumption that employees who lack experience in labor relations matters would see the union security provision as meaning exactly what it says -- exclusion from the union results in loss of employment. The Examiner went on to conclude that the union stepped over the line when it continued to pursue discipline that caused Zappler to reasonably believe her employment status was threatened. Finally, the Examiner stated that once the union threatened her with expulsion, it could have explained to her that expulsion would not result in termination, or that Zappler could have resigned and paid a representation fee in lieu of discipline.

In *Local 2916, IAFF v. Public Employment Relations Commission*, 128 Wn.2d 375, 382 (1996), the Supreme Court of Washington held that this Commission's jurisdiction is limited to those rights protected by statute, and issues involving the use of agency fees is a topic for the superior courts. Therefore, this Commission lacks

jurisdiction to adjudicate employee challenges to an agency fee provision on First Amendment grounds. Similarly, in *In Re: WAC 391-95-010*, Decision 9079 (2004), this Commission declined to adopt an administrative rule that would permit all employees subject to a union security provision the opportunity to vote on ratification of the collective bargaining agreement. The Commission found that adopting such a rule requiring exclusive bargaining representatives to permit all employees subject to a union security provision the right to ratify the collective bargaining agreement would not only impermissibly infringe upon internal union matters, but it would also impermissibly attempt to regulate union security provisions.[3]

We disagree with the Examiner's conclusion that the union should have explained to Zappler that expulsion from the union would not result in her termination, and in that respect we must reverse the Examiner's conclusion that the union interfered with Zappler's rights. In *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, the United States Supreme Court held that, aside from requiring exclusive bargaining representatives to inform employees of their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988)[4], an exclusive bargaining representative does not violate its duty of fair representation by failing to explain every legal intricacy of

---

[3] *But Cf. Community College District 7 (Shoreline)*, Decision 9094-A (PSRA, 2005), holding that if a union agrees through collective bargaining that all bargaining unit employees shall have an opportunity to ratify a negotiated collective bargaining agreement, the union must ensure that all bargaining unit employees are in fact afforded a reasonable opportunity to do so, although they are not members of the union.

[4] In Beck, the United States Supreme Court held that under section 8(a)(3) of the National Labor Relations Act, an employee is only obligated to pay the fees and dues necessary to support the union's activity as the employees' exclusive bargaining representative.

a negotiated union security obligation contained within a negotiated collective bargaining agreement.

With these legal principles in mind, we agree with the Examiner that the union could have notified Zappler that her employment status would not be threatened by the union's impending discipline if the union desired to do so. However, we do not agree that the union was under any legal obligation to inform Zappler that she could resign from the union to avoid union discipline. To impose such a requirement on a union could lead to this Commission being the arbiter of claims asserting that a union has failed to explain the legal intricacies of each and every action of an exclusive bargaining representative that potentially impacts a represented employee.

Furthermore, the rights of employees with respect to any union security clause in a negotiated collective bargaining agreement derive from decisions of the U.S. Supreme Court, and not this agency. *Local 2916 v. Public Employment Relations Commission*, 128 Wn.2d at 382. The *Local 2916* decision precludes this Commission from exercising jurisdiction over union security claims, aside from determining an employee's right of nonassociation under RCW 41.56.122(1).

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

1. Seattle School District is a public employer within the meaning of RCW 41.56.030(1).

2. Liesl Zappler is a public employee within the meaning of RCW 41.56.030(2).

3. The International Union of Operating Engineers, Local 609, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of gardeners, custodians, and cooks, among others, in the Seattle School District.

4. The union was entitled to discipline Zappler for her communications to the school board which undermined the union's status as the exclusive bargaining representative.

5. This discipline included warning Zappler in a letter, discussing her actions in a union newsletter, trying and convicting her for violating union rules, levying a large suspended fine, and naming her in a letter to the employer.

6. Zappler had been free to resign her union membership before engaging in the conduct for which she was disciplined.

7. The union's discipline was reasonably enforced, reflected a legitimate union interest, and impaired no policy the Legislature imbedded in the labor laws.

8. By its actions taken in the course of this discipline, the union did not align itself against the interest of Zappler for improper or invidious purposes and the union's conduct was not arbitrary.

AMENDED CONCLUSIONS OF LAW

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

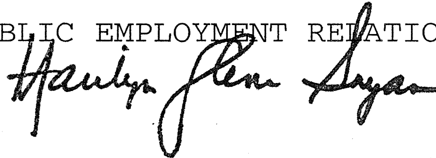
2. On the basis of the Findings of Fact 4 through 8, International Union of Operating Engineers, Local 609, did not interfere with the collective bargaining rights of Liesl Zappler in violation of RCW 41.56.150(1).

AMENDED ORDER

The complaint filed by Liesl Zappler in the above-entitled matter is DISMISSED on its merits.

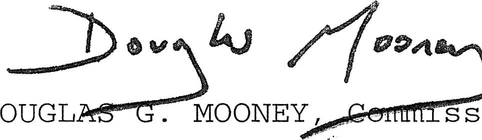
Issued at Olympia, Washington, the 28th day of December, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner



DOUGLAS G. MOONEY, Commissioner