City of Seattle, Decision 9526 (PECB, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, Local 2898,	)	
Complainant,	)	CASE 19522-U-05-4955
vs.	)	DECISION 9526 - PECB
CITY OF SEATTLE,	)	
Respondent.	)	ORDER OF DISMISSAL

Webster, Mrak, Blumberg, by *James Webster*, Attorney at Law, for the union.

City Attorney Thomas Carr, by *Fritz Wollett*, Assistant City Attorney, for the employer.

On June 1, 2005, the International Association of Firefighters, Local 2898 (union) filed an unfair labor practice complaint against the City of Seattle (employer) charging employer interference with employee rights and refusal to bargain. A preliminary ruling issued July 5, 2005, and a timely answer was received July 26, 2005. A hearing was held before Examiner Christy Yoshitomi on May 9, 2006.

ISSUES PRESENTED

1. Did the employer interfere with employee rights by interviewing bargaining unit members in preparation for a grievance arbitration proceeding?

2. Did the employer refuse to bargain with the union by not providing requested information from the contested interviews to the union?

Based on the arguments and evidence submitted by the parties, the Examiner rules that the employer did not interfere with employee rights or refuse to bargain in violation of RCW 41.56.140(1)&(4).

ISSUE 1: Did the employer unlawfully interview bargaining unit members in preparation for an arbitration proceeding?

Interference: Legal standards

To establish an interference violation under RCW 41.56.140(1), a complainant must establish that a party has engaged in conduct which employees could reasonably perceive as a threat of reprisal or promise of benefit associated with the pursuit of rights under Chapter 41.56 RCW. *City of Pasco*, Decision 3804-A (1992). The Commission noted in its decision in *King County*, Decision 6994-B and 6995-B (PECB, 2002), that "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 reasonably could perceive the actions as attempts to discourage protected activity."

The complainant bears the burden of demonstrating that another employee, in the same circumstances, could reasonably perceive the employer's action as discouraging his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004).

ANALYSIS

In October, 2004, the union filed a grievance on behalf of a bargaining unit member who was an employee of the employer. The grievance asserted that the employer imposed discipline without just cause. The parties agreed to skip the first three steps of the grievance procedure and proceed directly to arbitration. In preparation for arbitration, the employer retained attorney Reba Weiss for its representation. Weiss subsequently interviewed three other bargaining unit members about their knowledge of the facts regarding the case. The information gathered from the interviewees was to be used for witness examination and to prepare the employer's defense in preparation for arbitration.

The union alleges that the above act of interviewing employees, who are members of the same bargaining unit, in preparation for a grievance arbitration is interfering with statutory rights under RCW 41.56. However, the union presented no facts showing that the bargaining unit members were engaging in any protected activity or pursuing their rights under RCW 41.56. The only protected activity claimed by the union was that the employees were members of a bargaining unit.

The union claims that *City of Omak,* Decision 5579-A (PECB, 1997) protects employees who associate with and support a grievant in the grievance procedure. However, *City of Omak* had very distinguishing facts from those here. In *Omak*, the employees who supported the grievant were told that they would be disciplined if they filed a grievance. Filing a grievance is a right that employees are provided and protection by 41.56 RCW. As shown through *City of Omak*, disciplining or threatening to discipline employees for engaging in that right is a clear violation of the statute. In

this case, the employer did not threaten to discipline the employees for engaging in any protected activity. Therefore, *City of Omak*, Decision 5579-A (PECB, 1997) does not apply.

The union also cites *Seattle School District*, Decision 7349-A (PECB, 2001), as relevant to this case. Again, the facts there are drastically different. In *Seattle School District*, the employer prevented union witnesses from appearing at a hearing. In this case, the employer did not interfere with the union presenting its case at arbitration nor was it shown that the employer prevented the union from interviewing employees in preparation for arbitration.

Board Precedent

As there are no Commission cases directly relevant to this case, the union cites *PERC v. City of Vancouver*, 107 Wn. App. 694, 33 P.3d 74 (2001), which discusses the National Labor Relations Board's adoption of *Johnnie's Poultry*, 146 NLRB 770, (1965). The union argues that under the *Johnnie's Poultry* standard, the employer in the present case unlawfully interviewed employees in preparation for an arbitration. However, there are many distinguishing factors which prevent the *Johnnie's Poultry* standards from being adopted here.

In *Johnnie's Poultry*, the employer did not believe that the union held a majority status and therefore would not recognize the union. To determine if the union held a majority status, the employer interviewed employees as to their union adherence and activities. After learning of this action, the union filed a charge with the National Labor Relations Board (NLRB) alleging employer interference, discrimination and refusal to bargain. The Board found "that by interrogating the employees concerning their union adherence and

activities Respondent engaged in interference, restraint, and coercion . . ." The type of questioning in *Johnnie's Poultry*, in content and in a representation context, was held to be in violation of the National Labor Relations Act. For this reason, the NLRB continues to hold that when an employer interviews an employee in preparation for hearing, it must communicate:

- The purpose of the questioning must be communicated to the employee.
- An assurance of no reprisal must be given to the employee.
- Participation is on a voluntary basis.

Johnnie's Poultry, 146 NLRB 770, (1965). Additionally, the decision states that:

> The questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature, and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

In the present case, the union did not allege the employer's questions interfered with employee rights, but rather that the act of the interviewing without the first three safeguards of *Johnnie's Poultry* was interference. In *Johnnie's Poultry*, statutory rights were being violated by the questions asked. In the present, case, no statutory rights were violated by the interviews.

The union claims that *Cook Paint*, 246 NLRB 646 (1979), established a per se rule that an employer may never use a threat of discipline to compel employees to respond to questions relating to a grievance

proceeding that has been scheduled for arbitration. However, on review, the District of Columbia Circuit Court overturned the Board's ruling. *See Cook Paint v. NLRB*, 648 F.2d 712 (1981). Therefore, even if the interviewees in this case were ordered to submit to an interview by the employer, this demand in and of itself, is not coercive. As stated in *Johnnie's Poultry*, 146 NLRB 770 (1965), an investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of a case is legitimate.

Potential for Interference

Under the following headings, there could be a potential for the employer to interfere with employees' statutory rights. However, even under these further analysis, no interference violation is found here.

The Interviewees

In *Cook Paint*, 648 F.2d 712 (1981), it was further noted that fundamental differences may arise between the interview of an employee and a union steward. The Circuit Court then remanded *Cook Paint*, for further proceedings on that issue. In its supplemental decision, *Cook Paint*, 258 NLRB No. 166 (1981), held that because of the union steward's representational status, the scope of respondent's questioning, and the impingement on protected union activities, the interview did violate employee rights under the National labor Relations Act.

There could be a potential of interference if the employees interviewed in this case were helping to represent the grievant at arbitration. However, in the present case, there was no such indication, testimony or evidence that the interviewed employees had

a rank in the union or were involved in any union business so that the interview might infringe on protected activity.

Content of the interview

In *Johnnie's Poultry*, 146 NLRB 770 (1965), the employer did not believe that the union held a majority status and therefore would not recognize the union. To determine if the union held a majority status, the employer interviewed employees as to their union adherence and activities. This type of questioning is drastically different from the case at hand and obviously in violation of the National Labor Relations Act.

Here, the employer interviewed employees about their knowledge of facts in an arbitration case to prepare for witnesses and the employer's defense. As stated above, this arbitration involved an individual's discipline and how the discipline was imposed upon that individual. The arbitration did not touch on factors related to the employee's statutory rights under 41.56 RCW, which clearly was the violation in *Johnnie's Poultry*. In this case, the union did not allege that the questions asked by the employer in the interview interfered with the employee's statutory rights.

Conclusion

The union did not prove that any statutory rights were exercised by the interviewees. There was no showing that the questions asked interfered with statutory rights nor was there any indication that the interviewees represented the grievant, as a steward or union president, for the arbitration. The employer, as well as the union, has the right to interview potential witnesses for examination and cross-examination in preparation of an arbitration. Membership in a union alone does not preclude members from being interviewed by the employer when the interview is performed in preparation for

arbitration and where the interviewees are not a representative of the union. The mere fact that the arbitration involves a bargaining unit member does not show an exercise of statutory rights. This membership does not immunize employees from being questioned in preparation of the employer's defense without *"Johnnie's Poultry"* safeguards. The interviewees did not exercise rights solely by being a member of the same bargaining unit as a grievant in an arbitration matter. Therefore, no violation of exercised rights under 41.56.140(1) occurred and the complaint is dismissed.

ISSUE 2: Did the employer refuse to bargain in violation of RCW 41.56.140(4) by not providing the union with information about the interviews upon request by the union?

Duty to Bargain

It is an unfair labor practice for a public employer to refuse to engage in collective bargaining. RCW 41.56.140(4). The Commission has stated that the duty to bargain includes a duty to provide relevant, necessary information requested by the opposite party for the proper performance of its duties in the collective bargaining process. *Port of Seattle*, Decision 7000-A (PECB, 2000). This duty extends to requests for information required for the processing of grievances and the sifting out of unmeritorious claims. *Port of Seattle*, Decision 7000-A (PECB, 2000). The duty to provide information turns on the circumstances of a particular case. *Pasco School District*, Decision 5384-A (PECB, 1996). The union must have a genuine need for the requested information. *City of Bremerton*, Decision 6006-A (PECB, 1998). The party receiving an information request has a duty to explain any confusion about, or objection to, the request and then negotiate with the other party toward a resolution satisfactory to both. *Port of Seattle*, 7000-A (PECB, 2000; *Seattle School District*, Decision 5542-B (PECB, 1997).

Request for information

After the union had learned employees were being interviewed about the pending arbitration, it requested in an e-mail to the employer "full disclosure of all interviewees, questions asked and information provided, and copies of all notes and statements." The complaint filed by the union on June 1, 2005, alleged the employer refused to:

> Share with the union the substance of the information obtained as a result of the interviews that may be relevant to the strength or weakness of the city's position with respect to issues in the arbitration proceeding.

The employer responded by asserting privilege exists and therefore refused to share information gathered in the pre-arbitration interviews with the union.

Privilege

A privilege exists to documents prepared by attorneys, when they are prepared in anticipation of litigation. The work product doctrine directs that a party may not obtain documents or other tangible items prepared in anticipation of litigation by or for another party by or for that other party's representative (including the other party's attorney, consultant, surety, insurer, or agent), unless it proves that it has substantial need of the materials in the preparation of its case and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. The work product doctrine also directs that those documents reflecting the mental impressions, opinions, or strategy of an attorney enjoy absolute immunity from discovery. *Hickman v. Taylor*, 329 US 495, 510-511 (1947). Thus, all documents prepared in anticipation of litigation are protected by, at the very least, a qulaified privilege under discovery rules and need to be produced

only upon a substantial showing of need. *See Snohomish County*, Decision 9291 (PECB, 2006).

In the situation here, the employer's attorney gathered information and took notes in the interviews when preparing for a grievance arbitration. This is clearly distinct from *City of Bellevue*, Decision 3085-A (PECB, 1989), which was argued by the union. In *Bellevue*, the employer was ordered to disclose its list of comparable employers to the union in preparation for interest arbitration where the employer argued it was privileged information. In *Bellevue*, the Commission found that the list of employers considered for comparables in wages, hours and conditions is not the "the mental impressions, conclusion, opinions, and legal theories of the employer's attorneys," but rather data which is basic evidence in interest arbitration. Therefore, the list of comparable employers used by the employer in the arbitration was not privileged information. On the other hand, the information obtained in the present case was gathered specifically for the employer in preparing its case for arbitration and is the mental impressions, conclusions, and opinions of the employer in preparing its case. Therefore, this information is protected under attorney-work product privilege.

Additionally, the union in this case had other means to obtain the information it requested. The union knew who was interviewed by the employer and had full opportunity to interview those employees in preparation for the arbitration. By seeking the specific information gathered by the employer in its interviews with the employees, the union is seeking to learn the employer's presentation for hearing. The union's request went far beyond a need for the information to properly perform its duties in the grievance process. The employer was not obligated to provided the information to the union and thus, the complaint is dismissed.

FINDINGS OF FACT

1. The City of Seattle is a public employer within the meaning of 41.56 RCW.

2. The Seattle Fire Chiefs Association Local 2898, International Association of Firefighters, a bargaining representative within the meaning of 41.56 RCW, is the exclusive bargaining representative of all supervisory uniformed personnel employed by the Seattle Fire Department.

3. The employer and union were parties to a collective bargaining agreement in effect through December 31, 2004, and have continued in this relationship.

4. In October, 2004, the union filed a grievance on behalf of a bargaining unit member. The grievance asserted the employer imposed discipline without just cause. The grievance proceeded to arbitration.

5. In preparation for the grievance arbitration, the employer's attorney interviewed three members of the same bargaining unit about the facts of the case.

6. In May 2005, the union requested the employer to provide the substance of information obtained from the interviews. The employer denied the request for information on grounds of privilege and refused to provide information obtained in the interviews to the union.

7. The union had the ability to obtain equivalent information to that requested from the employer.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in the matter pursuant to Chapter 41.56 RCW.

2. The employer did not interfere with employee rights in violation of RCW 41.56.140(1) by interviewing employees bargaining unit members in preparation for a grievance arbitration.

3. The employer did not refuse to bargain in violation of 41.56.140(4) by refusing to provide privileged information that the union had the ability to obtain through other sources.

ORDER

The complaints charging unfair labor practices filed in the above-captioned matter are dismissed.

Issued at Olympia, Washington, on the 29th day of December, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CHRISTY L. YOSHITOMI, Hearing 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.