Okanogan-Douglas County Hospital, Decision 5830 (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

| | | |
|---|---|---|
| UNITED STAFF NURSES UNION, LOCAL 141, | ) | |
| | ) | CASE 12356-U-96-2927 |
| Complainant, | ) | |
| | ) | DECISION 5830 - PECB |
| vs. | ) | |
| | ) | |
| OKANOGAN-DOUGLAS COUNTY HOSPITAL DISTRICT, | ) | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| Respondent. | ) | |

James G. McGuinness, Attorney at Law, appeared on behalf of the union.

William W. Treverton, Labor Relations Consultant, appeared on behalf of the employer.

On February 26, 1996, United Staff Nurses Union, Local 141, filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging the Okanogan-Douglas County Hospital District committed unfair labor practices in violation of RCW 41.56.140(1) and (2), by assisting the filing of a decertification petition. A hearing was held before Examiner Jack T. Cowan at Brewster, Washington, on August 30, 1996. The parties filed post-hearing briefs.

## BACKGROUND

Okanogan-Douglas County Hospital District 1 (employer) is a municipal corporation operated by a board of elected commissioners.

The employer's day-to-day operations are under the direction of Hospital Administrator Howard Gamble, while departmental operations are the responsibility of several administrators and supervisors who report directly to Gamble.

United Staff Nurses Union, Local 141 (union), is the exclusive bargaining representative of a bargaining unit consisting of approximately 28 nurses, described in a certification issued on September 8, 1994 as:

> All full-time, part-time, and per diem registered (staff) nurses employed by the employer, excluding supervisors, administrative and managerial employees and all other employees.

Okanogan-Douglas County Hospital, Decision 4832 (PECB, 1994)

The employer and union commenced negotiations for their initial collective bargaining agreement after that certification was issued, but they had not ratified or signed a contract prior to January 29, 1996.

On January 29, 1996, Raine Bo Beeson filed a petition for investigation of a question concerning representation with the Commission under Chapter 391-25 WAC, seeking to decertify the union from its status as exclusive bargaining representative of the bargaining unit described above.[1] That petition was accompanied by a document headed as follows:

> WE, THE UNDERSIGNED, WOULD LIKE TO ASK FOR A REVOTE OF OUR BARGAINING UNIT BEING REPRESENTED BY UNITED STAFF NURSES UNION, LOCAL 141:

---

[1] The representation case was docketed as Case 12298-E-96-2048. Processing of that case has been "blocked" under WAC 391-25-370, pending the outcome of this proceeding.

Even though she was clearly not required to serve any "showing of interest" materials on other parties, Beeson may have provided the union a copy of a document she filed as a showing of interest in support of her decertification petition.[2]

Tamara Brown is a registered nurse who works in the employer's emergency room. She was an eligible voter in the representation election conducted in 1994. Brown's signature appeared, along with the signatures of other employees, on a document which came into the union's possession during or about January of 1996.[3]

Responding to a request from the Commission, the employer submitted a proposed eligibility list on February 16, 1996, listing a "Tami Brown" as a supervisor.[4]

The list of eligible voters stipulated by the parties to the representation case during an investigation conference held on March 5, 1996, did not include a "Tamara Brown" or "Tami Brown".[5]

---

[2] A multi-signature document of the type described here would not have been sufficient to constitute a showing of interest under WAC 391-25-110, so Beeson's representation petition would only have been processed upon submission of individual documents bearing the signatures of employees who supported the decertification effort.

[3] The Commission's file for Case 12298-E-96-2048 cannot be used to confirm or deny Brown's support for the decertification petition, or even whether the document relied upon by the union in this case was actually filed with the Commission in the representation case. A showing of interest filed under WAC 391-25-110 in support of a representation petition is kept confidential under WAC 391-25-210.

[4] The document is in evidence as Exhibit 5 in this case.

[5] The document is in evidence as Exhibit 1 in this case.

POSITION OF THE PARTIES

The union contends that the employer directly or indirectly interfered with the statutory rights of bargaining unit members to designate a bargaining representative of their choosing under RCW 41.56.040, by assisting the solicitation of signatures in support of the decertification petition, and the filing of that petition. The union contends that Tamara Brown is a "supervisor" excluded from the bargaining unit set forth in the certification, and that a majority of the individuals who signed cards supporting the decertification petition were recently hired by the employer.

Notwithstanding the positions it took in the representation proceeding, the employer now contends that Tamara Brown is not a supervisor as defined by the Public Employment Relations Commission and the National Labor Relations Board. Even if Brown was a supervisor, the employer urges the sole act of signing a document in support of a decertification petition does not constitute interference with the employees' rights to select a bargaining representative of their choosing.

DISCUSSION

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, secures the right of covered employees to select a bargaining representative of their own choosing:

> RCW 41.56.040 **Right of employees to organize and designate representatives without interference.** No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public

> employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.
>
> [1967 ex.s. c 108 § 4.]

Enforcement of RCW 41.56.040 is through the unfair labor practices enumerated in RCW 41.56.140, as follows:

> RCW 41.56.140 **Unfair labor practices for public employer enumerated.** It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
>
> (4) To refuse to engage in collective bargaining.
>
> [1969 ex.s. c 215 § 1.]

In this case, the union advances an "interference" claim under RCW 41.56.140(1) and an "assistance/domination" claim under RCW 41.56-.140(2).[6] It is well-established that the burden of proving any unfair labor practice claim rests with the complaining party, and must be established by a preponderance of the evidence.[7]

---

[6] An amended complaint filed on July 5, 1996 contained an allegation of "discrimination" against a union leader, but that was abandoned by the union prior to the hearing.

[7] WAC 391-45-270 includes: "The complainant shall prosecute its own complaint and shall have the burden of proof". See, also, Lyle School District, Decision 2736 (PECB, 1987); Bellingham Housing Authority, Decision 2335 (PECB, 1985).

The Policy Against Unlawful Assistance

The history and purpose of RCW 41.56.140(2) are traced back to a "prohibit company unions" theme that was a key element in the debate leading to adoption of the National Labor Relations Act (the Wagner Act) in 1935. See, Washington State Patrol, Decision 2900 (PECB, 1988). The prohibition against employer involvement in internal union affairs was so well understood that it has only been necessary to decide a few cases under such provisions since 1935.

Charges of "unlawful assistance" were dealt with in Renton School District, Decision 1501-A (PECB, 1982), and a technical violation of the law was found in that case. During the pendency of a representation proceeding, that employer notified the incumbent exclusive bargaining representative that it was holding dues checkoff money in escrow pending the results of an election, thus implying a possibility that the funds could be turned over to the petitioning organization if it were to be successful in its effort to replace the incumbent. The Examiner ruled that the employer created, albeit unintentionally, an appearance of favoring one union over the other. In light of the pendency of the representation case, and the fact that the unfair labor practice case had operated as a "blocking charge" under WAC 391-25-370, the Examiner ordered the employer to post notices to "clear the air".

The only other "unlawful assistance" case cited by the parties is Pierce County, Decision 1786 (PECB, 1982), where another "technical" violation of the law was found to exist. In that case, a newly-formed independent guild had used the employer's facilities while preparing for a representation campaign, including holding meetings on the employer's premises, using the employer's telephones, using the employer's offices and work time for guild

purposes, and posting notices on the employer's bulletin boards. Although these improper uses of county property were unknown to the employer and were stopped reasonably promptly upon discovery, the totality of the evidence showed that employees could have believed that Pierce County had assisted, supported or showed a preference for the guild over the incumbent union. Even though the evidence was insufficient to prove an intentional violation, the employer was required to post a "clear the air" notice informing bargaining unit members of its neutrality.

In a more recent case dealing with this type of allegation, the Commission stated:

> Consistent with Renton and Pierce County, we hold that an "assistance" violation requires proof of employer intent to assist one union (bargaining representative within the meaning of RCW 41.56.030(3)) to the detriment of others. Since the union did not prove such an intent, and since there was no union receiving assistance, that charge is dismissed.

King County, Decision 2553-A(PECB, 1987).

In the absence of any labor organization created by Beeson and her associates, the employer cannot have dominated or provided unlawful assistance to a labor organization. Thus, no violation of RCW 41.56.140(2) is possible in this case.

The sole question left to be answered in this matter, is whether the totality of this record demonstrates the employer has interfered with employee rights in violation of RCW 41.56.140(1). For purposes of this analysis, it is important to note that intent need not be shown. The essence of an interference violation is employer conduct "which makes impossible the free exercise of employees' rights". NLRB v. Monroe Tube Co., Inc., 545 F.2d 1320, 1325 (2d

Cir., 1976). The propriety of the employer's conduct must be assessed in light of all of the facts to ascertain whether it was coercive. Ibid, at 1327. An employer may commit an interference violation unintentionally, if the circumstances indicate that employees could reasonably have perceived the employer's conduct as interfering with their protected rights under the collective bargaining statute.

## Application of the Standard

The document which Beeson provided to the union is credible evidence that Brown supported the decertification effort. Called as a witness by the employer in this proceeding, Brown acknowledged that she signed a document in support of Beeson's petition.

The union's claim that Tamara Brown is a "supervisor" raises a unit determination question, which is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060 provides:

> **RCW 41.56.060 DETERMINATION OF BARGAINING UNIT -- BARGAINING REPRESENTATIVE.** The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining unit, the commission shall consider the **duties, skills, and working conditions** of the public employees; the **history of collective bargaining** by the public employees and their bargaining representatives; the **extent of organization** among the public employees; and the **desire of the public employees.** ...

[Emphasis by **bold** supplied.]

The statute, the rules adopted by the Commission to implement that statute, and Commission precedent all reflect concern for the stability of bargaining relationships, as well as concern that the Commission's processes not be abused. City of Fife, Decision 3397 (PECB, 1990).

Early in its history, the Commission held "supervisors" are public employees within the meaning and coverage of Chapter 41.56 RCW. City of Tacoma, Decision 95-A (PECB, 1977). The Supreme Court of the State of Washington agreed, in Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). The Commission recognized, however, that a potential for conflicts of interest is inherent in having both supervisors and their subordinates in the same bargaining unit. Both Tacoma and METRO arose out of separate units of supervisors, and the Commission thereafter enunciated unit determination policies which generally require the exclusion of supervisors from the bargaining units which include their subordinates. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

The definition of "supervisor" set forth in Section 2(11) of the National Labor Relations Act has sometimes been used as a guide to identify the types of authority which give rise to the unwanted potential for conflicts of interest. That definition provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them or to adjust grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not merely of a routine or

> clerical nature, but requires the use of independent judgement.

Port of Ilwaco, Decision 388 (PECB, 1978).

In assessing the potential for conflicts of interest, the Commission has also referred to the definition of "supervisor" in the Educational Employment Relations Act, Chapter 41.59 RCW:

> RCW 41.59.020 DEFINITIONS.
>
> ...
>
> (4)
> ... (d) Unless included within a bargaining unit pursuant to RCW 41.59.080, any supervisor, which means any employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment, and shall not include any persons solely by reason of their membership on a faculty tenure or other governance committee or body. The term "supervisor" shall include only those employees who perform a preponderance of the above-specified acts of authority.

Thus, the determination of "supervisor" status is tied to the specific authority of the individual over subordinates, not to the title applied by the employer on its table of organization.

The union provided no evidence in support of its assertion that the employer maintained, throughout bargaining, that Brown should be excluded from the bargaining unit as a supervisor.

The union points to the eligibility list provided by the employer on February 16, 1996, and to the stipulated eligibility list agreed to in the pending representation case. The union asserts that the employer has changed horses in the middle of the stream, by denying here that Tamara Brown is a supervisor after asserting that she is not an eligible voter in the pending representation case.

The problem here is that the union offered minimal evidence to support its allegations. It clearly could have done so, but the union did not call any witnesses to testify concerning the validity of its allegations. Therefore, the Examiner must rely on a very limited record to evaluate the "supervisor" allegation.

Brown testified that she works full-time as a registered nurse in the emergency room of the hospital. Brown has held the same position since she was hired seven years ago. She is supervised by Jan May, who is responsible for the emergency room operation. Brown performs hands-on nursing functions normally associated with emergency room processes.

Brown has been assigned responsibility for keeping track of the emergency medical services trauma cases handled by the hospital, but that administrative record-keeping task does not involve exercise of authority over subordinate employees. In particular, Brown does not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, to adjust the grievances of other employees, or to effectively recommend such action. As reflected in this record, Brown's only action involving other employees was to leave a memorandum to her co-workers in the emergency room, reminding them of tasks that needed to be accomplished. The fact that Brown is a self-described "bossy person" is not evidence that the employer has conferred upon her the types of authority which are of concern to

the Commission in determining bargaining units. Thus, the Examiner concludes that the record does not establish that Brown possesses sufficient authority to warrant her exclusion from the bargaining unit as a supervisor. The apparent stipulation of the employer and union to exclude Brown from the list of eligible voters is not binding on the Commission. City of Richland, supra.

Even if Brown was an initial supporter of the decertification effort, the record contains no evidence of her involvement after the one signature relied upon by the union. Beeson was notified that the representation petition had a procedural defect, as filed. It can be inferred from the further processing of the representation petition that the procedural defect was corrected by the submission of individual authorization documents, but any such "showing of interest" is not (and cannot be) made part of the record in this proceeding. There is no evidence of Brown making any statements to employees or otherwise engaging in support for the decertification petition while holding herself out as a supervisor or otherwise as a representative of the employer. The union has not sustained its burden of proof to establish that bargaining unit members could reasonably have believed that the employer had sponsored or assisted the decertification effort, given only the facts proven here.

## FINDINGS OF FACT

1. Okanogan-Douglas County Hospital District is a "public employer" within the meaning of RCW 41.56.030(1).

2. United Staff Nurses Union, Local 141, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of full-

time, part-time, and per diem registered nurses employed by Okanogan-Douglas County Hospital District.

3. The employer and union were engaged in negotiations for their initial collective bargaining agreement in January of 1996.

4. On January 29, 1996, Raine Bo Beeson, a full-time registered nurse employed within the bargaining unit, filed a petition for investigation of a question concerning representation with the Commission, seeking decertification of the union as exclusive bargaining representative of the above-mentioned bargaining unit.

5. Tamara Brown performs direct patient care in the emergency room facility of the hospital. She was an eligible voter in the representation election which led to certification of the union in 1994. Additionally, Brown is responsible for tracking emergency medical service trauma cases.

6. The record does not contain evidence which supports either the union's allegations that the employer sought exclusion of Brown from the bargaining unit during the parties' contract negotiations or the employer's request for her exclusion as part of the processing of the petition filed by Beeson. Brown does not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, to adjust their grievances, or to effectively recommend such actions.

## CONCLUSIONS OF LAW

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

2. Tamara Brown is a "public employee" within the meaning of RCW 41.56.030(2).

3. The union has failed to sustain its burden of proof to establish that the employer has improperly involved itself in the internal affairs of any labor organization or that the employer has provided financial or other assistance to any labor organization, so that no violation of RCW 41.56.140(2) is established in this case.

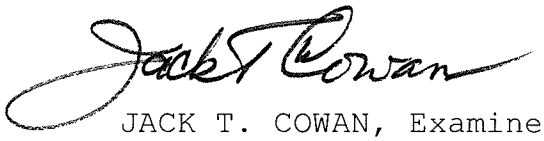
4. The union has failed to sustain its burden of proof to establish that bargaining unit employees could reasonably have perceived actions by Tamara Brown as indicating employer support for decertification of the union, so that no violation of RCW 41.56.140(1) is established in this case.

## ORDER

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

Dated at Olympia, Washington, this 7th day of February, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JACK T. COWAN, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.