STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GORDON E. HAMILTON,	)	
	)	
Complainant,	)	CASE 7940-U-89-1717
	)	
vs.	)	DECISION 3593-A - PECB
	)	
CITY OF SEATTLE,	)	
	)	
Respondent.	)	DECISION OF COMMISSION
	)	

Hafer, Price, Rinehart and Schwerin, by Richard H. Robblee, Attorney at Law, appeared on behalf of the complainant.

Mark H. Sidran, City Attorney, by Leigh Ann Tift, Assistant City Attorney, appeared on behalf of the respondent.

This case comes before the Commission on a timely petition for review filed by the City of Seattle. The employer seeks to overturn a decision issued on October 10, 1990 by Examiner Frederick J. Rosenberry.

BACKGROUND

A thorough review of the record in this case is detailed in the Examiner's decision. The background information given here relates specifically to those issues brought up in the petition for review.

Gordon Hamilton is a City of Seattle employee who is represented for the purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 77. The sequence of events leading to this particular dispute began while Hamilton was working as a "relief crew chief" for the City Light Department.

Hamilton conducted a crew meeting on Friday, September 23, 1988. During that meeting, Hamilton implied that the discipline of another City Light employee had been racially motivated, and he stated his opinion that the crew chief who imposed that discipline did not like indians.[1]

The crew chief referred to by Hamilton subsequently met with Hamilton to discuss the situation. Their meeting did not resolve the situation, and the crew chief attended a subsequent crew meeting to discuss the situation. The second crew meeting made the situation worse.

Hamilton then advised his supervisor, Gustafson, of the situation. In doing so, Hamilton indicated a belief that the crew chief might file a complaint on the matter. Gustafson passed the information along to his superior, Jerochim, who requested that a meeting be set up between Hamilton, Gustafson and Jerochim.

Hamilton asked Gustafson whether he could be accompanied at the meeting by a union shop steward. Gustafson replied that there was no reason for a shop steward, because the meeting was just a briefing session. Hamilton nevertheless contacted a shop steward and arranged for him to stand by in case he was needed.

Before his meeting with Gustafson and Jerochim started on September 27, 1988, Hamilton asked Jerochim about bringing the shop steward into the meeting. Jerochim replied that there would be no reason for a shop steward, because the purpose of the meeting was for factfinding.

The September 27 meeting lasted for between 30 and 60 minutes, and ended with a general agreement that Hamilton would meet with Gustafson, Jerochim, the crew chief who had been the subject of

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[1] The reference was to persons of native American ancestry.

Hamilton's remarks, and her supervisor. Hamilton subsequently decided to not attend the follow-up meeting,[2] but the other scheduled participants went ahead with that meeting in Hamilton's absence.

The situation subsequently came to the attention of certain high-level managers in the City Light Department. Management officials Malcolm MacDonald and John Saven met with Lily Egular, who was then serving as Equal Employment Opportunity Officer, and Egular recommended disciplinary action against Hamilton. MacDonald checked with another level of management, and then caused Jerochim to issue a reprimand to Hamilton. The reprimand contains the phrase: "In discussing this matter with you and other witnesses, it is clear that you, in fact, publicly made a disparaging remark about a crew chief from another unit."

On April 25, 1989, Hamilton filed a complaint charging unfair labor practices with the Commission, alleging that the City of Seattle had violated RCW 41.56.140(1) and (2), in regard to the disciplinary action taken against him after denial of his right to union representation. The City of Seattle denied that it committed any unfair labor practice. Following a hearing and submission of briefs, Examiner Rosenberry found that the employer had committed an unfair labor practice violation, by imposing discipline after conducting an investigatory interview at which Hamilton did not have union representation. The Examiner specifically rejected employer defenses that the meeting was "not investigatory" and that "attendance was not required".

Based on the several previous cases in which the City of Seattle was involved with the Weingarten precedent, and describing the employer's conduct as "an example of repetitive and intentional

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[2] Hamilton maintains that his refusal to attend was because he was not permitted to bring a shop steward.

disregard ... of [the employer's] obligations under Chapter 41.56 RCW", the Examiner ordered an extraordinary remedy requiring the employer to pay Hamilton's attorney fees.

POSITIONS OF THE PARTIES

The City of Seattle continues to assert that the September 27, 1988 meeting was voluntary, so that the employee's right to union representation did not apply. It challenges the Examiner's statement that the City of Seattle and its City Light Department have been repeatedly found guilty of unfair labor practices for interference with the right of public employees to union representation, and it contends that the Examiner should not have awarded attorney fees to the complainant. The employer also asserts that the Examiner did not consider that, independent of the September 27 meeting, the employer obtained information that constituted the basis for the discipline.

The complainant requests that the Commission affirm the Examiner's decision. In the alternative, if the Commission does not adopt the Examiner's grounds for "make whole" relief, the complainant requests that the case be remanded to the Examiner to consider Hamilton's arguments under the First Amendment to the United States Constitution and other "just cause" arguments.

Briefs amicus curiae were filed in this matter by International Federation of Professional and Technical Engineers, Local 17, AFL-CIO, and by the Committee for Equal Rights at City Light (CERCL).[3]

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[3] Local 17 represents City Light employees in bargaining units other than that in which Hamilton is employed. The CERCL identifies itself as an employee advocacy group which has existed since 1983. When offered the opportunity to do so, neither party indicated any objection to the consideration of an amicus brief by the Commission.

The arguments advanced therein generally support the position of the complainant.

DISCUSSION

The "Weingarten" Violation

The City of Seattle has collective bargaining relationships with a number of labor organizations under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. That statute is patterned generally after the federal National Labor Relations Act (NLRA) as amended by the Labor Management Relations Act of 1947. Similar to the rights of private sector employees under Section 7 of the NLRA, RCW 41.56.040 establishes a right of public employees to be represented by organizations of their own choosing. Similar to Section 8(a)1 of the NLRA, RCW 41.56.140(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their representation rights.

In 1975, the Supreme Court of the United States interpreted Sections 7 and 8(a)(1) of the NLRA as guaranteeing private sector employees a right to union representation, upon request, at an investigatory interview called for by the employer, where the employee reasonably believes that discipline could result. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

The principles enunciated in Weingarten were found to be applicable under Chapter 41.56 RCW by an Examiner in City of Montesano, Decision 1101 (PECB, 1981), and by the full Commission in Okanogan County, Decision 2252-A (PECB, 1986). That interpretation was affirmed by the Thurston County Superior Court on appeal in the Okanogan case. Thus, the law in such matters is clear: A public employee has a right to union representation, upon request, at an "investigatory" interview where the facts are to be examined.

The previous cases involving the City of Seattle demonstrate an awareness of the Weingarten precedent by this employer, even if some of those cases did not arise directly out of a refusal of union representation at an investigatory meeting. In City of Seattle, Decision 2134 (PECB, 1985), an Examiner found an unfair labor practice violation on the basis of a supervisor's remarks that the only reason an employee received discipline was because she had requested that a union shop steward be present at a meeting.[4] In City of Seattle, Decision 2773 (PECB, 1987), the Executive Director had consolidated three unfair labor practice charges which all concerned "the extent of employee rights to union representation", and the Examiner found unfair labor practice violations on two of the three complaints, based on the "advice" given by the employer to its employees.[5] In City of Seattle, Decision 3079, 3079-A (PECB, 1989), where this employer had strongly contended that the Weingarten precedents did not apply to internal EEO procedures,[6] the right of employees to union representation was discussed as follows:

> In NLRB v. Weingarten, 420 U.S. 251 (1975), the Supreme Court agreed with the National Labor Relations Board that an employee was entitled to union representation at an "investigatory" interview where the employee reasonably believes that the session might result in disciplinary action against him. The same principles have been adopted under Chapter 41.56 RCW. Okanogan County, Decision 2252-A (PECB, 1986); City of Seattle, Decision 2773 (PECB, 1987).

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[4] The case arose out of the City Light Department of the City of Seattle. The Weingarten case was cited no less than six times in the decision.

[5] All three cases arose out of the City Light Department. No violation was found in the third case, where the employer had refrained from giving employees any advice about their rights.

[6] The case arose out of the City Light Department.

The Commission found an unfair labor practice violation in that case, based on the right of the union to represent bargaining unit employees in securing their wages, hours and working conditions, including the "EEO" procedures at issue there. In City of Seattle, Decision 3198 (PECB, 1989), the Examiner dismissed a complaint on a finding that the decision on discipline had been made prior to the meeting with the employee, but the clear implication of that decision is that the right to union representation does apply to meetings held in advance of the decision to discipline.

In addition to the aforementioned administrative proceedings, an internal City Light Department memorandum from department-head Randall W. Hardy, dated June 10, 1985, told managers that requests from represented employees for union representation should be honored for meetings where discipline might result. Hardy directed his subordinate managers to "err on the side of caution".

The Commission believes that the facts contained in the record are determinative in this case. The evidence clearly establishes that the meeting held by Gustafson and Jerochim on September 27, 1988 was "investigatory" in nature. The behavior of City Light management when Hamilton sought union representation is confounding. Hamilton had alerted management that a complaint might be made against him, and had told Gustafson some of the story. Hamilton saw the potential for discipline, whether warranted or not.

Jerochim should have followed the excellent advice in Hardy's 1985 memo by allowing Hamilton to have union representation or refraining from holding the meeting. It is difficult to believe that Jerochim (or any management official) did not realize Hamilton might be subject to discipline for his actions, when all the facts were known. Instead, Jerochim seems to have acted in complete disregard for, or in a conscious attempt to circumvent, the employer's legal obligations.

Was the Meeting Voluntary?

The Commission agrees with the Examiner's analysis and conclusions concerning the employer's claim that the September 27 meeting was "voluntary and non-investigatory". The collective bargaining statute and the Weingarten precedents make no distinction between "voluntary" meetings and other types of meetings; the employee is entitled to union representation, upon request, if the possibility of discipline is reasonably perceived by the employee.

The employer called the meeting at issue. Hamilton reasonably perceived that discipline might result, and was induced to attend the meeting by representations to the contrary. This employer defense is entirely without merit.

REMEDY

Having concluded that the employer violated RCW 41.56.140(1) by denying Hamilton's request for union representation at the September 27, 1988 meeting, the analysis shifts to formulating an appropriate remedy.

The Validity of the Warning Notice

The employer contends that the discipline imposed on Hamilton should have been left to stand, because it had developed a basis for disciplining Hamilton that was independent of the information learned at the September 27 meeting. The Examiner dealt with the employer's argument, but was not persuaded by it. Neither is the Commission.

The Commission is mindful that a finding of a Weingarten violation does not necessarily justify vacating the discipline imposed on the employee. The Examiner properly placed the burden on the employer,

to persuade that its unlawful conduct at the September 27 meeting did not contribute to the disciplinary decision. The fact is that the letter of reprimand was neither decided upon nor issued until after the unfair labor practice was committed. Information learned at the unlawful meeting was part of the basis for the discipline.[7] The link is very clear and very direct, and was a basis for the Examiner's conclusion that discipline was reasonably perceived.

In this case, we are not persuaded that the same discipline would have resulted without the meeting held in violation of the employee's right to union representation. That meeting contaminated the entire process. The violation is more serious, given Hamilton's repeated requests for a shop steward to accompany him. Accordingly, we find an appropriate remedy for the employer's Weingarten violation requires rescission of the reprimand issued to Hamilton.

The Extraordinary Remedy

The Examiner awarded attorney fees to the complainant in this case, based on a conclusion that the City of Seattle, and its City Light Department, are repeat offenders in unfair labor practices under the Weingarten precedent. We share the Examiner's frustration with an employer that has continuously attempted in this case to defend the actions of managers that were not only in clear violation of the statute, but also in violation of the employer's own internal directive.

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[7] During the hearing before the Examiner in this unfair labor practice proceeding, management official MacDonald acknowledged that it was the employer's general policy to hear from the accused, as well as from the accusers of its employees. In this case, Jerochim's September 27 meeting with Hamilton apparently was treated by the management as meeting the intent of that policy.

Weingarten principles did not lead directly to findings of unfair labor practice violations in all of the cases cited above.[8] Yet all of those administrative proceedings put the employer on notice of a need for sensitivity regarding the representation rights of its employees at meetings that might potentially lead to discipline. The City of Seattle has had plenty of time to train its managers as to those rights. Its intransigence in asserting meritless defenses in this case suggests that an extraordinary remedy is required, to insure that the employer will, without need for repeated administrative procedures, comply with the clear Weingarten precedents.

Given the documented familiarity of the City of Seattle with Weingarten principles and the employer's own top-management memorandum directing managers to "err on the side of caution" in considering employee requests for union representation, the Commission concurs with the Examiner's conclusion that it is necessary to impose an extraordinary remedy, in order to get the City of Seattle and its City Light Department to acknowledge the right of employees to union representation where the potential for discipline exists. The award of attorney fees will stand.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact issued by Examiner Frederick J. Rosenberry in the above-entitled matter are hereby AFFIRMED and

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[8] The employer correctly points out that the Examiner's finding of a "continuing pattern of Weingarten violations" overstates the record. The Examiner's decision will be modified to alter the characterization of the history.

adopted as the findings of fact of the Public Employment Relations Commission.

2. The conclusions of law issued in the above-entitled matter by Examiner Frederick J. Rosenberry are AFFIRMED and hereby adopted as the findings of fact of the Commission except for paragraph 5, which is amended to read as follows:

> 5. The City of Seattle, and Seattle City Light, committed the unfair labor practice in this case notwithstanding repeated involvement in litigation concerning the right of public employees to have union representation in investigatory interviews where the employee reasonably perceives the possibility of discipline; this history calls for an extraordinary remedy to make a remedial order under RCW 41.56.160 effective in this case.

3. The order issued in the above-entitled matter by Examiner Frederick J. Rosenberry is hereby AFFIRMED and adopted as the order of the Commission.

4. The City of Seattle, its officers and agents, shall:

   a. Notify the above-named complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the Examiner's order.

   b. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been

taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by the Examiner's order.

Dated at Olympia, Washington, on the 16th day of July, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Janet L. Gaunt

JANET L. GAUNT, Chairperson

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Dustin C. McCreary

DUSTIN C. McCREARY, Commissioner