STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| FORT VANCOUVER REGIONAL LIBRARY, Complainant, vs. WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Respondent. | ) | CASE 6051-U-85-1134<br>DECISION 2350-D - PECB<br>DECISION OF COMMISSION |

Mark S. Lyon, Attorney at Law, appeared on behalf of the Washington Public Employees Association.

Stoel, Rives, Boley, Fraser and Wyse, by Harry S. Chandler, Attorney at Law, appeared on behalf of the Fort Vancouver Regional Library.

Both sides to this appeal filed complaints and amended complaints raising numerous issues under Chapter 41.56 RCW, which, after a lengthy proceeding, were decided by Examiner Martha M. Nicoloff in a 133-page decision. Only one issue decided by the Examiner is presented to the Commission for review. In its petition for review dated November 22, 1988, the Washington Public Employees Association (WPEA or association) challenged conclusion of law 22, which stated:

> By seeking the removal of the designated bargainers from their bargaining responsibilities and/or their employment, as described in 10 and 13 of the findings of fact, the union failed and refused to bargain in good faith and violated RCW 41.56.150(4).

BACKGROUND

The facts pertinent to the issue on review are largely undisputed. As stated by the Examiner, the Fort Vancouver Regional Library District is headquartered in Vancouver, Washington, and provides library service to residents of several counties. The employer is governed by a board of seven trustees, who are appointed by the commissioners of the three counties and the Vancouver City Council.

The board of trustees appoints the library director. During the relevant time period, Ruth Watson held that position. Corinne Venturini held the position of associate director for central services, and Gordon Conable held the position of associate director for community services.

The employer has approximately 80 office/clerical employees. On December 27, 1984, the WPEA was certified as the exclusive bargaining representative of a bargaining unit consisting of employees at all the employer's library facilities and those working on its bookmobile. The employer and the WPEA first met for negotiations on January 9, 1985. The employer's representatives were Conable, who acted as the chief spokesperson, Venturini, and Frank Hurlburt, the employer's labor relations consultant.[1] The WPEA was represented by Executive Director Eugene L. St. John and Senior Staff Representative James Cameron. Several employees from the bargaining unit joined the WPEA bargaining team. Cameron was the union's chief spokesperson.

The parties met for the purposes of collective bargaining on a number of subsequent occasions and, between January and May,

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[1] The employer's bargaining team consisted of these same three people throughout the negotiations.

they parties reached agreement on a number of issues. They did not reach agreement on the entire contract, however, and the employer filed a mediation request with the Commission on June 26, 1985.

William A. Lang of the Commission staff was assigned as mediator. Several mediation sessions were held into January, 1986. The parties still did not reach a collective bargaining agreement.

The union conduct which formed the basis for the Examiner's unfair labor practice determination which is now before us consists primarily of two letters from the WPEA to the employer. The first letter, dated March 14, 1985, was addressed to Gordon Conable. It complained at the outset that the employer's proposal was a step backwards. It then stated:

> The [proposal] reflects poorly on the library board and the stewardship of the library director, Ruth Watson, as being grossly insensitive and irresponsible.
>
> WPEA is willing to discuss and negotiate the elements of this proposal, however, unless it is improved significantly and quickly, we intend to act against the Library Administration. We intend to poll our Members through a VOTE OF NO CONFIDENCE in Ruth Watson, as Library Director, based upon your "Employer Proposal". After our VOTE is completed, we intend to go public with the NO CONFIDENCE vote and begin a publicity campaign focusing the community on this administration under Director Watson and the Library Board. Should this administration refuse to offer responsible future proposals, WPEA intends to take more active steps to bring about a satisfactory contract settlement.

The second letter was sent by the WPEA to George Delvo, the chairman of the board of trustees, and to other members of the board of trustees, on June 20, 1985. That letter stated in pertinent part:

> On behalf of the 80 bargaining unit employees represented by WPEA and employed by the Fort Vancouver Regional Library, please accept this call for the resignation of Ruth Watson, Library Director, and her management team. WPEA urges and requests that she be immediately replaced along with those top administrators responsible for management, operations, and policies--including Associate Directors Gordon Conable and Corinne Ventruni [sic]. [emphasis supplied]
>
> The basis for this request is a NO CONFIDENCE vote among our bargaining unit employees which was completed on June 15th. Of approximately 80 ballots sent out, 60 were returned to WPEA -- with many of the remaining 20 fearing reprisal or threatened in their job status should they return the ballot.
>
> Of the 60 ballots returned, all 60 voted NO CONFIDENCE in Director Ruth Watson and her administration of the library system.
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> * * *
>
> WPEA urges you to respond to our request, and to immediately replace the incumbent administration with leaders and managers who can do just that: lead and manage people effectively. The library resource is too important to be unproductively wasted, with service delivery employees suffering low morale, wages and working conditions. We believe the operations can be managed more effectively with a new team.
>
> We urge you to respond immediately and if our request cannot be honored, WPEA requests to be placed on your next Board of Trustees Meeting Agenda so we can present

> our case. You should also know that while our members are not pleased with the status of collective bargaining negotiations, our appearance at the Board of Trustees Meeting will not be used to negotiate with the Board itself. We believe the NO CONFIDENCE issues go well beyond the bargaining process, and it's those issues we wish the Trustees to address, and not proposals for negotiating at the table.
>
> WPEA will look forward to your response.

In addition to those letters, the employer presented evidence that Delvo and other members of the board of trustees received several telephone calls from WPEA representatives. The gist of those telephone calls was that the WPEA did not believe the management staff was giving the trustees correct information about the collective bargaining negotiations, and that they desired to explain "the real situation" to the trustees.

Relying on the Commission's decision in Sultan School District, Decision 1930-A (PECB, 1984),[2] the Examiner did not find a "circumvention" violation of Chapter 41.56 RCW. She concluded that there was insufficient evidence to establish that the union spokesperson made specific bargaining proposals during the telephone calls with the trustees, or that they threatened to break off negotiation or refuse to meet with the representatives designated by the employer. The Examiner did, however, find a violation of Chapter 41.56 RCW, because of the union's efforts to have the employer's bargainers fired.

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2 In Sultan School District the Commission stated that union officials have the right, as public employees, to lobby public officials on public issues, but they would violate Chapter 41.56 RCW if they attempted to bargain with officials other than the designated bargaining representatives.

## POSITIONS OF THE PARTIES

### Union Arguments

1. The WPEA did not engage in coercive actions against the library as an employer. It is not an unfair labor practice for a union to request that one of the employer's bargaining representatives be replaced. Only if the union goes beyond the request, and attempts to enforce its request, does the union act illegally. The letters in question call for the resignation of the library director and her management team; they do not threaten any action if the management team does not resign. Nor did the union do anything to enforce its request through strikes, work stoppages, refusal to bargain, or the like.

2. The union's actions were an exercise of its protected constitutional rights to free speech and to petition government. As private citizens, the employees have the same right as any other citizen to petition the library board for a new administration.

### Employer Arguments

1. The WPEA interfered with the employer's selection of its bargaining representative. The employer characterizes the WPEA's argument as: "because we did not succeed, we should not be found guilty". Success is not the standard; attempts to coerce or restrain the employer in its selection of its representative is a violation of the union's obligation to bargain in good faith.

2. The union's attempt to coerce the employer, and to interfere with the employer's selection of its representa-

tive for bargaining, is not protected by the First Amendment. City of Madison Joint School District No. 8 vs. Wisconsin Employment Relations Commission, 429 U.S. 167 is distinguishable on the basis that it only addresses the question of participation at public open meetings. The state has a right to control some forms of speech in the collective bargaining setting, where there is a need to balance the employees' free speech rights against the regulation of collective bargaining.

## DISCUSSION

As the Examiner observed, Section 8(b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of its representatives for collective bargaining or the adjustment of grievances. Violations of that section are generally also found to be violations of the union's duty to bargain under that statute. Chapter 41.56 RCW does not contain language similar to Section 8(b)(1)(B), but RCW 41.56.150(4) makes it an unfair labor practice for a union to refuse to bargain in good faith with the employer of the employees in a bargaining unit it represents. The Examiner implicitly concluded that conduct which would violate Section 8(b)(1)(B) of the NLRA would constitute a refusal to bargain under RCW 41.56.150(4). We agree.

The facts of the case at hand present two underlying issues to be examined:

a) The scope of the prohibition against a union's attempt to influence or coerce management in the selection of its bargaining representative; and

b) The right of employees to make known their views to management regarding their supervisors.

There is an interplay between these two issues when, as here, the employer's chosen representatives for bargaining are also supervisory employees of the employer.

At the outset, we must examine the term "bargaining representative" as delineated by a recent Supreme Court decision on that issue. In NLRB v. Electric Workers Local 340, ___ U.S. ___, 107 S.Ct. 2002, 95 L.Ed.2d 557, 125 LRRM 2305 (1987), the Court reviewed the NLRB's "reservoir doctrine", which held that all union-member supervisors are protected from union discipline because they are potential employer representatives for the adjustment of grievances, and thus are potential management bargaining representatives. The Court found the scope of the NLRB's protection to be too broad, and held that, to violate Section 8(b)(1)(B), the coercion must be targeted at a supervisor who actually performs or has the potential of performing collective bargaining-related duties. Thus, we must distinguish earlier NLRB decisions, to the extent they are inconsistent with the Supreme Court's decision.

We next examine the right of employees to make known their views on their supervisors in the context of cases in which the targeted supervisor is not exercising any collective bargaining responsibilities. NLRB vs. Phoenix Mutual Life Insurance Company, 167 F.2d 983 (7th Cir. 1948), cert. den. 335 U.S. 845, 69 S.Ct. 68 (1948), involved salesmen who were discharged for requesting the appointment of a "competent" cashier. Their protest consisted simply of a letter to their superiors. It was deemed "moderate action" by the court, which stated:

> [C]onceding [the employees] had no authority to appoint [a supervisor] or even

> recommend anyone for the appointment, they have a legitimate interest in acting concertedly in making known their views to management without being discharged for that interest.

Phoenix, 167 F.2d 983, 988

In Silverbay Labor Union No. 962 (Alaska Lumber and Pulp Co., Inc.), 198 NLRB 751, 760 (1972) enforced in part, remanded on other grounds, 498 F.2d 26 (9th Cir. 1974), the Court stated:

> In Phoenix it was held that the Section 7 rights of employees to engage in concerted activities for the mutual aid or protection included the right of employees to endeavor by written document to influence management in the choice of their supervisor. . . .

See also, NLRB v. Guernsey-Muskingum Electric Co-op, Inc., 285 F.2d 8 (6th Cir 1960); and Cubit Systems Corp., 195 NLRB 622 (1971).

The union places great reliance on City of Dunedin and the International Association of Fire Fighters, Local 2327, (Florida PERC Order 87U-217, July 12, 1978),[3] where the union sought removal of a supervisor. The Florida PERC held that the union's action was a protected concerted activity[4] under Florida law, and did not constitute an unfair labor practice.

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[3] The case is digested at 1978-80 CCH Public Bargaining Cases, paragraph 4690.

[4] We note that Chapter 41.56 RCW does not contain language exactly comparable to Section 7 of the National Labor Relations Act, 29 USC Section 157, which gives employees the right to engage in "other concerted activity for the purposes of collective bargaining or other mutual aid or protection." The Florida law apparently contains such language. We do not, however, distinguish Dunedin or base our ruling in this case on the lack of such language.

We note, however, that the action at issue in Dunedin did not take place in the context of collective bargaining negotiations, and that there was no indication that the targeted supervisor exercised any bargaining responsibilities.

We now examine the prohibition against a union's attempt to influence or coerce management in the selection of its representatives for bargaining. As Examiner Nicoloff noted, the NLRB has many times found unions guilty of unfair labor practices for their attempts to force employers into selecting or replacing a particular individual as bargaining representative. E.g., Laborers' International Union of North America, Local 478, 204 NLRB 357 (1973), enf. 503 F.2d 192 (DC Cir., 1974); Operating Engineers, Local Union No. 3, 219 NLRB 531 (1975); Asbestos Workers Local Union No. 27, 269 NLRB 719 (1984); Local 259, United Automobile, Aerospace, and Agricultural Implement Workers of America, 225 NLRB 421 (1976).

It is true, as the union argues, that the NLRB has held that the restraint or coercion must be accompanied by an affirmative action or threat of illegal action before a violation of the NLRA will be found. Thus, in Southern California Pipe Trades, 120 NLRB 249 (1958), the union objected of the choice of bargaining representative, but took no "affirmative action or threat." Id. at 258 (Trial Examiner's decision). In that case, the union's objective was to exclude an outside labor consultant from a multi-employer arbitration board on the grounds that the collective bargaining agreement said that all members of the arbitration board must be signatory construction contractors. The NLRB found no violation, noting that a violation must be predicated upon active restraint or coercion. It should be observed, however, that the charge in that case was based only on Section 8(b)(1)(B) for coercion; presumably no "refusal to bargain" charge was advanced, because the

conduct did not take place in the context of actual collective bargaining negotiations.

The cases cited above do not address the tension that exists between an employer's right to an unfettered choice of its representative for bargaining and the right of employees to voice their views on their supervision where, as here, the supervisors with whom the union is unhappy also have collective bargaining responsibilities. Our concern in this case is with the effect union statements or action will have on the ability of the targeted supervisors to fully represent the interests of the management in collective bargaining negotiations. Supervisors, like other employees, have a paramount concern with their own job security. This is true even where, as here, they have collective bargaining duties. They may well prefer accommodation of union demands over being made the target of union criticism of their job performance.[5]

While we have not found any federal cases with exactly parallel fact patterns, we have found decisions which do, in fact, restrict the right of the employees to voice their opinions on their supervisors. In International Builders of Florida, Inc., 204 NLRB 357 (1973), a concerted attempt to influence the choice of super-vision was held to be an unfair labor practice, because it was accompanied by an illegal strike threat. Local 259, United Autoworkers, Aerospace and Agricultural Implement Workers (Atherton Cadillac, Inc.), 225 NLRB 421 (1976), enf. 95 LRRM 3011 (2nd Cir., 1977), dealt with an interesting situation where, during the course of collective bargaining, the union demanded the discharge of the employer's service manager and

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[5] This is of particular concern under Chapter 41.56 RCW as supervisors themselves have collective bargaining rights under Municipality of Metropolitan Seattle v. Department of Labor and Industries, 88 Wn.2d 925 (1977).

conditioned the grant of concessions on that dismissal. There was evidence that the individual in question was, indeed, a poor manager whose conduct towards customers was hurting the employer's business. The NLRB held that the question of whether an unfair labor practice occurred must be adjudged by the "totality of the union's conduct", and that the union committed an unfair labor practice by tying its demand for the service manager's dismissal to its action at the bargaining table.[6]

We conclude that restrictions should apply to the union's conduct at issue in this case. The WPEA did not merely object to the employer's choice of representative. It went further than that, and also objected to the employment of Conable and Venturini as supervisors, at least in part because of their actions at the bargaining table. Following the March 14, 1985 letter in which the union stated, "The [proposal made in bargaining] reflects poorly on . . . the stewardship of the library director, Ruth Watson . . .", the union's June 20, 1985 letter called specifically for the resignation of Watson "and her management team". After referring to the vote of "no confidence" in Watson, the letter proceeded to iterate items of concern that exist both at the bargaining table and away from it, and then stated:

> WPEA urges you to respond to our request, and to immediately replace the incumbent administration with leaders and managers who can do just that: lead and manage people effectively. ... We believe the operations can be managed effectively with a new team.

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6 The Board's remedy was unusual: The reinstatement of the service manager was ordered, and the union was ordered to reimburse that individual for lost pay.

The union requested permission to address the library trustees on issues that "go well beyond the bargaining process", although it specifically stated it did not wish to bring bargaining table issues to the trustees.

There is also evidence of actions and threats of actions tied to the demand for removal of the employer's bargainers. The March 14, 1985 letter contained a threat to take a "vote of no confidence" in the director, and this threat was carried out, as noted above. The union also threatened to "go public" with the vote and begin a publicity campaign "focusing the community of this administration under Director Watson and the library board".

We scarcely can conceive of a more coercive environment created for the employer's bargainers. Not only did the union seek their removal from the bargaining table, but it also sought their ouster from their jobs. The union expressed its beliefs not only in two letters, but also in telephone calls to the library trustees. Moreover, it threatened to air the dirty linen in public - not only the collective bargaining dispute, but the competency of the director and her "management team". We cannot condone such conduct as a means to an end in the collective bargaining setting. The potential for mischief is too great, particularly in the public sector, where public opinion sometimes - for better or worse - plays a role in the selection and retention of management employees. The union's conduct has an undue potential for intimidating and coercing the targeted individuals in the exercise of their collective bargaining responsibilities. Viewing the totality of the circumstances, we conclude that Examiner Nicoloff did not err in finding that the union's conduct constituted a breach of the union's duty to bargain in good faith, and so violated Chapter 41.56 RCW.

We also disagree with the union's contention that the Examiner's decision interferes with the constitutionally protected free speech rights of its members. Collective bargaining laws establish the "rules of the game" for labor/ management relations generally, and for negotiations in particular. These rules, by their nature, impose some restrictions upon the parties' conduct and speech. The courts have never held that such restrictions are unconstitutional. The constitutional issues that have been decided in this area have arisen in narrowly-defined circumstances. Thus, we are not persuaded that decisions like City of Madison, et al. v. WERC, supra, which held that a rule limiting participation at open public meetings unconstitutionally interfered with the employee's free speech rights, goes farther than their facts. As pointed out by the employer, the decisions generally recognize the right of the states to control some forms of speech in the collective bargaining setting.

We believe that the union went too far in seeking the ouster of the management officials in this case from their jobs, as well as from their bargaining duties. Our Supreme Court expressed concern in International Association of Fire Fighters v. City of Yakima, 91 Wn.2d 101 (1978) that the public trust be protected by officials having full loyalty to the interests of the employer. Accordingly, we do not believe that our holding in this case violates the constitutional rights of the employees.

## ORDER

The findings of fact, conclusions of law and order issued by Examiner Martha M. Nicoloff are AFFIRMED and adopted as the

findings of fact, conclusions of law and order of the Public Employment Relations Commission.[7]

Dated at Olympia, Washington, the 24th day of April, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANE R. WILKINSON, Chairman

MARK C. ENDRESEN, Commissioner

JOSEPH F. QUINN, Commissioner

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7 The customary order for notice of steps taken to comply is omitted in this case, as the union previously posted notice and notified the Executive Director, in compliance with the Examiner's order.