STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 587, Complainant,	)	CASE 14993-U-00-3787
vs.	)	DECISION 7819 - PECB
KING COUNTY, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Frank Rosen Freed Roberts, LLP, by *Jon Rosen*, Attorney at Law, for the union.

Prosecuting Attorney Norm Melang, by *Susan Sloneker*, Senior Deputy Prosecuting Attorney, for the employer.

On January 25, 2000, Amalgamated Transit Union, Local 587 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming King County (employer) as the respondent. A preliminary ruling was issued on April 6, 2000, finding a cause of action to exist on allegations concerning:

> Employer interference with employee rights, in violation of RCW 41.56.140(1), by actions of employer agent Willie Clanton on August 4, 1999, prohibiting bargaining unit employee Linda Averill from distributing to her co-workers written materials pertaining to the ratification of an offer made by the employer in contract negotiations.

A hearing was held before Examiner Paul T. Schwendiman. Both parties filed briefs.

The Examiner rules that the employer interfered with employee rights protected by RCW 41.56.040, in violation of RCW 41.56.140(1). A remedial order is issued.

BACKGROUND

Among other services, the employer provides public passenger transportation services through its METRO division. The union is the exclusive bargaining representative of employees working in the public passenger transportation operation. Linda Averill is a part-time transit operator employed within the bargaining unit represented by the union.

The parties' bargaining relationship is subject to interest arbitration, under RCW 41.56.492. In July of 1999, after a year of negotiations, the employer and union reached a tentative agreement on the terms of a successor collective bargaining agreement. The tentative agreement was subject to ratification by the union membership.

On August 4, 1999, Averill distributed a leaflet to bargaining unit employees at the employer's Atlantic Central Base in Seattle, in which she opposed union ratification of that tentative agreement. That leaflet began: "**Safety, Part-time Issues, and a Cola Giveaway are three reasons to Reject Metro's Contract Offer**". It continued:

> A dangerous lack of new safety measures, an absence of job security for part-time drivers, and the underhanded removal of our Cost of Living Adjustment (COLA) provide ample cause to send the proposal back to the drawing board - despite the lure of getting a long overdue, retroactive raise. At a time when ridership is up and Metro is crying for driv-

ers, ATU 587 can do better than sign an agreement that ignores our most pressing concerns.

Say No! To Management's stalling on safety issues

Eight months after the murder of Mark McClaughlin, we are still putting our lives on the line. A passenger is stabbed on the #54; a trolley operator is severely beaten for his transfers. Death threats, assaults, harassment and road rage aimed at drivers continue unabated. Yet management is still doing almost nothing about safety and this contract offers no solutions or even promises of improvement.

Let's not wait for another operator to die before we demand that Metro formulate a comprehensive security plan that includes improved road support and response systems, training and public education. A $.65 an hour raise is poor compensation for the stress, strain and even injury we incur as a result of an increasingly unsafe workplace.

Say No! To second-class status for part-timers

A contract that gives management the right to keep almost half of all drivers part-time with a starvation guarantee of two hours, 20 minutes a day is unacceptably. Combine that with the carryover language that directs Metro to layoff part-timers first, regardless of years or hours worked, and it is clear that part-timers have little or no job protection. Even the promise of full medical benefits for drivers working more than 20 hours is an illusion, since there is nothing to stop Metro from chopping up work to keep people from qualifying.

Things may seem fine now, but what happens if Initiative 695 passes and Metro loses the tens of millions it gets from auto license tabs? Bus service could be curtailed. Part-timers with years of service could lose their hours and/or jobs while newly promoted (and lower paid) rookie full-timers keep driving. We need contract language that better protects all drivers from layoff, and which follows the

principle of seniority based on total hours worked, regardless of part-time or full-time status.

Say No! To the UNCOLA contract

To get our yes vote Metro's negotiators are trying to hoodwink us into giving up our COLA for fixed 3% raises that won't even keep up with inflation and barely give back what we have lost in an artic premium and rising medical co-payments. Management is betting inflation ***will*** be greater than 3%; that's why it wants to suspend COLAs - at our expense, not our benefit. Booms and busts in the U.S. economy are as predictable as rain in Seattle. Do you really want to bet your economic security on the assumption that inflation will stay below 3% a year past 2001? When oil prices are up 49% in the last 6 months, mortgage interest rates are climbing again, and Federal Reserve Chairman Greenspan is sounding the inflation alarm?

True, our 90% COLAs haven't kept pace with rising prices, but the solution is to strengthen them, not give them up. Most City of Seattle unions receive 100% COLAs with a 3% minimum and a 7% ceiling. Why not follow their lead? Metro is testing the waters. If we aren't willing to insist on our COLA in good times, we can kiss it goodby when times get tough. It's time we got a COLA with a guaranteed 3% raise.

Say Yes! To fighting for a just contract

We work hard for our money, and we deserve better. Let's hold out for a truly Fair Contract by voting no on August 5th.

Once this contract is rejected, the union rank and file need to mobilize and demand more say in negotiations when bargaining resumes. We must bring to the table our demands for better safety, more even-handed job protection, higher part-time guarantees, and a COLA with a 3% minimum raise.

We need an aggressive Fair Contract campaign this next time around. One that includes mass informational picketing and

> rallies, extensive outreach to our riders and labor unions, and full use of the media to publicize our concerns. Like the successful UPS strikers, we will find broad public support for the problems of part-time workers, pay equity, and job safety.

Exhibit 2 (emphasis in original).

The leaflet concluded with the names of 49 persons, including Averill and other employees.

Averill began distributing her leaflet to other employees shortly after 5:00 a.m., which was prior to the start of her work shift. About 6:00 a.m., still before Averill was due to report to work, the employer official told Averill she would have to leave because her leafleting was against employer policy. Averill complied with Clanton's request, and she was neither disciplined nor treated differently after the incident.

Clanton was aware that Averill's leaflet concerned the union, but he testified of his understanding of METRO policy that employees "could not hand out leaflets for any purpose." He testified that he "went out and informed her that . . . what she was doing was against Metro policy, and I was asking her not to do that" and that he "was referring to practice as we did it back in those days. It was just as far as I've always known -- I don't know if I ever read it anywhere, but it was always a policy that you could not petition or solicit on Metro property." Transcript 27-28.

Clanton's distribution of the leaflet occurred in a non-work area in front of the main building at the employer's facility. The record discloses no disruption of the employer's business, no littering, and no other negative impacts on the employer.

Averill filed a grievance on August 19, 2000, protesting Clanton's request that she stop leafleting. As a remedy, she sought to "Allow employees to circulate petitions or distribute leaflets in non-work areas on non-work time, and that METRO post notices informing employees of their rights." Exhibit 4.

The employer denied Averill's grievance based on Article III, Section 5(b) of the parties' collective bargaining agreement, which provided:

> Solicitations for fund or other purposes and the circulation on non-METRO business related lists, petitions or endorsements or other documents shall not be conducted on METRO property or among Employees on duty, except with the written consent of METRO.

Exhibit 5.

Notwithstanding its denial of the grievance filed by Averill, the employer stipulated in this proceeding that:

> [D]espite the language in Article III, Section 5(b), employees occasionally solicit for funds or other purposes (i.e., ask other employees to buy candy to support their own or their children's non-METRO activities) on Metro property while employees are on duty without obtaining written consent from management. Further, METRO acknowledges that some employees have circulated non-business related lists, petitions, endorsements or other documents, including union related materials while employees are on duty without obtaining written consent from management. METRO further acknowledges that, consistent with the contract provision, supervisors have on some occasions told individuals they may not solicit on or pass out leaflets on METRO property, while on other occasions supervisors have allowed such activity to occur on Metro property.

Exhibit 3.

In her letter denying the grievance, Employee and Labor Relations Representative Beth Dolliver, noted:

> I do not find any contract violation has occurred and this grievance is denied. However, I do understand and agree with the union and Ms. Averill that certain protected union activities are permitted by law in the workplace and there does need to be a policy that addresses this. To that end, METRO Transit is issuing the enclosed policy from General Manager Rick Walsh which addresses both the employee's legal rights to engage in protected activity while, at the same time, insures that such activity will not interfere with METRO's normal business operations. This memo is being sent to all transit work locations for posting. It is my hope that this will address the underlying concern raised by Ms. Averill's grievance.

Exhibit 5.

The memo attached to Dolliver's letter revised the employer's policy concerning solicitations, as follows:

> TO: All Transit Division Employees
>
> FROM: Rick Walsh, General Manager Transit Division
>
> SUBJECT: RULES AND REGULATIONS ON THE DISTRIBUTION OF INFORMATION BY UNION REPRESENTED MEMBERS
>
> King County Metro Transit ("Metro") acknowledges that employees covered by collective bargaining agreements have the right to discuss, comment upon, leaflet and otherwise give expression to their views on collective bargaining issues to their co-workers. At the same time, Metro and its work force have a right to a work place that is free of unreasonable disruption, harassment, and hostility. Therefore, in accordance with these important interests, Metro has promulgated the following rules and regulations.

1. Employees covered by a collective bargaining relationship may, on their own time, distribute materials regarding the collective bargaining relationship, including materials speaking for or against any proposed changes in the collective bargaining agreement, provided they comply with the following guidelines:

   (a) At operating bases materials may be distributed in non-work areas, including parking lots, employee lunch rooms, lounges and "bullpens". Areas at operations bases where materials may not be distributed include the bus yard, the vehicle maintenance shop floor, training offices, classrooms when a class is in session, and the area immediately surrounding the operator sign-in area.

   (b) At work locations other than operations bases, employees may distribute materials only in non-work areas approved by Metro management.

2. Any exercise of the rights described above shall not disrupt work force operations and shall at all times respect the views of others not to engage in conversation and/or debate and to refuse to accept materials being distributed. Metro reserves the right to direct individuals who fail to comply with these requirements to immediately cease such conduct and leave the area.

3. Employees will not use County in-house mail, fax machines, or e-mail to distribute material to the extent not allowed other employees.

4. Materials may not be posted on any County property, including Metro Park & Ride lots or comfort stations or bulletin boards to the extent not allowed other employees, unless an appropriate supervisor has designated an area for such material.

5. Any material subject to distribution must be in good taste and suitable for viewing

by members of the visiting public and co-workers.

6. Employees entering Metro property for any of the purposes enumerated above shall notify the appropriate work area supervisor or designated person in charge before commencing such activities. As long as the guidelines are complied with, access will not be denied.

If an employee has a question regarding these rules and regulations, the employee can contact his or her union representative or Beth Dolliver at Metro management . . .

Cc: Amalgamated Transit Union, Local 587

International Brotherhood of Electrical Workers, Local 77

International Federation of Professional and Technical Engineers, Local 17

Exhibit 5.

The employer distributed copies of that memo to Averill and other employees.

DISCUSSION

Applicable Legal Standards

Chapter 41.56 RCW prohibits employers from interfering with or discriminating against public employees who exercise the collective bargaining rights secured by the statute:

> 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 collec-

> tive bargaining, or in the free exercise of any other right under this chapter.

Enforcement of those statutory rights is through the unfair labor practice provisions of Chapter 41.56 RCW:

> 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.

The burden of proof in any unfair labor practice proceeding is on the party that files the complaint. WAC 391-45-270(1)(a).

Interference Claims -

An interference violation will be found under RCW 41.56.140(1) when employees could reasonably perceive an employer's actions to be a threat of reprisal or force or promise of benefit associated with their own union activity or that of other employees. *City of Seattle*, Decision 3066 (PECB, 1988), *aff.* Decision 3066-A (PECB, 1989); *City of Seattle*, Decision 3566-A (PECB, 1991); *City of Pasco*, Decision 3804-A (PECB, 1992); *Port of Tacoma*, Decision 4626-A (PECB, 1995); *King County*, Decision 4893-A (PECB, 1995); *Mansfield School District*, Decision 5238-A (EDUC, 1996); and *Kennewick School District*, Decision 5632-A (PECB, 1996). It is not necessary to show that the employer acted with intent or motivation to interfere, nor is it necessary to show that the employee(s)

involved actually felt threatened or coerced. *Kennewick School District, supra,* and cases cited therein. The determination is based on whether a typical employee in the same circumstances could reasonably see the employer's actions as discouraging his or her union activities. An employer's innocent, or even laudatory, intentions when taking in disputed actions are legally irrelevant. *City of Seattle, supra.* Thus, although claims of unlawful interference with the exercise of rights protected by Chapter 41.56 RCW must be established by a preponderance of the evidence, the standard is not particularly high. *See City of Mill Creek,* Decision 5699 (PECB, 1996), and cases cited therein.

Prior restraint on union-related activities by employees was discussed in *Clallam County Public Hospital,* Decision 5445 (PECB, 1996), as follows:

> Employers get in trouble for putting unwarranted restrictions on the exercise of employee rights under a collective bargaining statute such as RCW 41.56.040, not for remaining silent on such matters.
>
> . . . A valid employer policy might prohibit union-related activities on employee work time and in work areas, but could not prohibit discussion of such issues by employees on their breaks, during lunch periods, or on their own time. *Our Way Inc.*, 268 NLRB 394 (1983).[6] See, also, *King County,* Decision 2553-A (PECB, 1987); and *City of Tukwila,* Decision 2434-A (PECB, 1987).
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> 6. A valid no-solicitation rule would also have to uniformly ban other solicitations, such as selling raffle tickets or admissions for charities or charitable events.

RCW 41.56.040 and 41.56.140(1) also protect the free exercise by public employees of their right to dissent from union actions. By

ensuring that any representation ballot contain "a choice for any public employee to designate that he does not desire to be represented by any bargaining agent" in addition to the name(s) of any organization seeking certification, RCW 41.56.070 implements the right of employees to refrain from or to oppose union activity. *See Port of Seattle,* Decision 3064 (PECB, 1988).

In addition to securing the wages, hours and working conditions of bargaining unit employees and the relationship between the employer and union, the signing of a collective bargaining agreement limits the exercise of statutory rights by the employees covered. In particular, RCW 41.56.070 suspends the exercise of employee free choice for the term of a valid collective bargaining agreement:

> Where there is a valid collective bargaining agreement in effect, no question of representation may be raised except during the period not more than ninety nor less than sixty days prior to the expiration date of the agreement. . . .

Given that a contract can bar a "decertification" petition for up to three years, debates about the propriety of ratifying a collective bargaining agreement must be no less free than the debate about choosing an exclusive bargaining representative.

Precedents developed under the National Labor Relations Act are persuasive in the interpretation of similar provisions found in Chapter 41.56 RCW. *Nucleonics Alliance, et al. v. Washington Public Power Supply System,* 101 Wn.2d 24 (1984). Like RCW 41.56.040, Section 7 of the NLRA, 29 USC Section 157, grants employees the rights to organize, to choose a bargaining representative, to bargain collectively with their employer, and to refrain from union activities. The National Labor Relations Board (NLRB)

has ruled that the federal law protects the distribution of union literature:

- The NLRB considers employer rules prohibiting solicitation or distribution on an employer's premises to be overly-broad on their face, if they are not restricted to working time. The NLRB holds that a rule without such restrictions is presumptively unlawful. An employer can avoid the finding of a violation only by a showing that its rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work. *Our Way, Inc.*, 268 NLRB 394 (1983). See also, *United Aircraft Corp.*, 139 NLRB 39 (1962), *enfd.* 324 F.2d 128 (2d Cir. 1963), *cert. denied* 376 U.S. 951 (1964) *United Pacific Insurance*, 270 NLRB 981 (1984); and *Ichikoh Manufacturing*, Inc., 312 NLRB 1022 (1993).

- Except where justified by compelling business reasons, a rule which denies off-duty employees entry into parking lots, gates, and other outside non-working areas will be found invalid. *Tri-County Medical Center*, 222 NLRB 1089 (1976). The appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rule is likely to have a chilling effect on Section 7 rights, the Board may conclude that its maintenance is an unfair labor practice, even absent evidence of enforcement. *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

- Where a rule is ambiguous and may be read as prohibiting protected activity, it is reasonable that employees will construe the rule as prohibiting such activity. The risk of ambiguity must be borne by the promulgator of the rule. *T.R.W. Bearings*, 257 NLRB 442 (1981).

Application of Standards

The Examiner has no hesitation about ruling that the content of the leaflet circulated by Averill constituted protected activity under Chapter 41.56 RCW. In that leaflet, Averill opposed the ratification of a tentative agreement that had been reached between the employer and union in collective bargaining under Chapter 41.56 RCW. Implicitly, she also argued for: (1) pursuit of a better contract through the mediation and interest arbitration processes established by statute for the bargaining unit in which she was employed; and/or (2) continuing the employees' statutory freedom of choice about their union representation, unimpeded by the contract bar that would have been imposed by RCW 41.56.070 upon the ratification of a valid collective bargaining agreement.

The Examiner also rules that Averill's distribution of the leaflet was protected by Chapter 41.56 RCW. It clearly occurred in a non-work area, before the start of her work shift, and without any proven negative impact on the employer's operations. Employer interference with that right could thus constitute an unfair labor practice of RCW 41.56.140(1).

Employer official Willie Clanton told Averill she would have to leave because her leafleting was prohibited by an employer policy. Regardless of whether an employer policy actually existed or was properly interpreted by Clanton, the no-distribution policy actually asserted by Clanton in his encounter with Averill was a blanket prohibition that included literature protected by Chapter 41.56 RCW, and was thus overly-broad and presumptively invalid when applied to prohibit distribution on non-working time in non-work areas. The employer has not provided the type of compelling business justification that would be needed for it to justify such

a blanket no-distribution rule. A typical employee in the same circumstances as Averill would reasonably see the employer's actions as discouraging his or her protected union activities.[1]

Compounding the interference with Averill's statutory rights, Clanton's interaction with Averill occurred in an area frequented by other employees. Thus, other employees could reasonably have perceived Clanton's directive as a threat of reprisal or force associated with their own pursuit of rights protected by Chapter 41.56 RCW. As the exclusive bargaining representative of the bargaining unit which included Averill and other employees who frequented the area, the union clearly had a right to pursue this unfair labor practice proceeding on their behalf.

Contractual Defense -

The employer's reliance upon Article III, Section 5(b) of the collective bargaining agreement that was in effect is misplaced.

The rights guaranteed by RCW 41.56.040 belong to each and every individual employee at all times. Those rights operate regardless of whether there is a collective bargaining agreement in effect, and even without regard to whether the employees have organized for the purpose of collective bargaining.[2] The freedom from interference, restraint, coercion, or discrimination has a broad reach, extending to employers and any ". . . other person . . ."

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[1] Even if an "actual effect" component existed in the test for interference violations (which, again, it does not), it is clear from the evidence in this case that Averill ceased her protected activity (*i.e.*, distribution of her leaflet) in response to the employer's directive.

[2] Consistent with this, the rights of non-employee union organizers are less extensive than the rights of employees. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992).

regardless of whether the prohibited acts are "direct or indirect." That includes unions and others who may enter into agreements with employers interfering with individual employee rights. An employer and union (or other entity) cannot avoid liability for an "interference" violation by joining together in an agreement that interferes with employee rights in a manner that would be unlawful for either of them acting alone.

Article III, section 5(b) contains a blanket prohibition against distribution "on METRO property . . . except with the written consent of METRO". [Exhibit 5.] As such, it runs afoul of the NLRB precedents prohibiting prior restraint on the distribution of protected materials. Rather than constituting a defense in this case, by operating to bar the distribution of literature protected by RCW 41.56.040 during an employee's non-work time and in non-work areas without compelling proof of any negative impact on the employer's business operations, the collective bargaining agreement cited by the employer instead constitutes evidence of a violation of RCW 41.56.140(1).[3]

Denial of the Grievance -

The employer did not help itself by the acknowledgment of employee rights made in connection with its denial of the grievance filed by Averill. That acknowledgment of rights conferred by Chapter 41.56 RCW came after the fact, and in a context of denying the "freedom to communicate" relief sought by the grievance. Additionally, the employer relied upon the overly-broad provision of the collective bargaining agreement to justify Clanton's interference with Averill's rights. Averill and other employees could reasonably

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[3] The Examiner notes that the collective bargaining agreement predated Clanton's directive that Averill cease distribution of the protected literature. In its answer to this complaint, the employer indicated that Clanton relied on the collective bargaining agreement.

have believed that the collective bargaining agreement restricted the rights conferred upon them by Chapter 41.56 RCW.

Inconsistent Enforcement -

Even where a valid no-solicitation rule exists, disparate enforcement of a lawful rule violates Section 8(a)(1) of the NLRA. *See Harrah's Marina Hotel & Casino*, 296 NLRB 1116 (1989). In this case, neither the "policy" relied upon by Clanton nor the prohibition contained in the collective bargaining agreement was uniformly applied in actual practice. The employer stipulated:

> [D]espite the language in Article III, Section 5(b), employees occasionally solicit for funds or other purposes (i.e., ask other employees to buy candy to support their own or their children's non-Metro activities) on Metro property while employees are on duty without obtaining written from management. Further, Metro acknowledges that some employees have circulated non-business related lists, petitions, endorsements or other documents, including union related materials while employees are on duty without obtaining written consent from management. Metro further acknowledges that, consistent with the contract provision, supervisors have on some occasions told individuals they may not solicit on or pass out leaflets on Metro property, while on other occasions supervisors have allowed such activity to occur on Metro property.

Exhibit 3.

There is no reason to deviate from the NLRB precedents on this subject area in enforcing the similar rights conferred by RCW 41.56.040. The disparate enforcement admitted by the employer in this case is found to have violated RCW 41.56.140(1).

Requirement for Employer Approval -

The NLRB has held that rules which require employees to get prior approval from the employer for solicitations are overly restrictive of employee rights, and are unlawful. *Opryland Hotel*, 323 NLRB 723, 728 (1997); *Baldor Electric Co.*, 245 NLRB 614 (1979). In this case, Article III, Section 5(b), of the collective bargaining agreement clearly required prior employer approval for distribution, and therefore interfered with protected employee rights in violation of RCW 41.56.140(1).

Remedy

RCW 41.56.160 grants the Commission authority to issue appropriate orders to remedy unfair labor practices. Describing that authority in *Municipality of Metropolitan Seattle v. PERC*, 118 Wn.2d 621, 633 (1992), the Supreme Court of the State of Washington stated:

> [W]e interpret the statutory phrase "appropriate remedial orders" to be those necessary to effectuate the purposes of the collective bargaining statute and to make PERC's lawful orders effective.

The general purpose of remedial orders issued under RCW 41.56.160 is to return the employees (and their union, where appropriate) to the same situation that lawfully existed prior to the unfair labor practice being committed. That may or may not be fulfilled in a case such as this, where substantial time passed even before the hearing was held and the parties took related actions (including ratification of the collective bargaining agreement which Averill had opposed) in the normal course of events.

The customary remedial order in an "interference" case includes requiring the employer to cease and desist from its unlawful conduct and requiring the employer to post and read notices to

communicate that it has disavowed the unlawful actions. Inasmuch as neither Averill nor any other employee suffered any loss of pay or benefits, there is no occasion for inclusion of a "reinstatement" or "back pay" component in the remedial order to be issued in this case.

The Employer's Revised Policy Does Not Remedy the Violation - The employer's issuance of a revised policy did not excuse the violation of the law that occurred when Clanton directed Averill to cease her protected activity. If the employer has committed a violation of the statute, the union is entitled to an order that requires the employer to cease and desist from such conduct in the future. *King County*, Decision 6734-A (PECB, 2000).

The Commission does not accept a "mootness" defense in unfair labor practice proceedings. Because unfair labor practices are limitations on employer, employee and union conduct imposed by the legislature on all participants in the collective bargaining process, even the resolution of a situation between the parties does not make the statutory violation moot. *Shelton School District*, Decision 579-B (EDUC, 1984); *City of Seattle*, Decision 3329-B (PECB, 1990); *Bates Technical College*, Decision 5140-A (PECB, 1996).

The revised policy is not directly before the Examiner in this proceeding. The preliminary ruling issued on April 6, 2000, found a cause of action to exist only with respect to allegations concerning:

> [A]ctions of employer agent Willie Clanton on August 4, 1999, prohibiting bargaining unit employee Linda Averill from distributing to her co-workers written materials pertaining to

> the ratification of an offer made by the employer in contract negotiations.

The absence of an amendment taking issue with the employer's revised policy confirms that it is beyond the scope of the case now before the Examiner.[4]

The memo containing the revised policy was dated May 18, 2000, and was first supplied to employees and the union after that date. Unlike the errant policy asserted by Clanton and the errant

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[4] Prior to August 1, 2000, WAC 391-45-070 read: "A complaint may be amended upon motion made by the complainant to the executive director or the examiner prior to the transfer of the case to the commission." In *Battle Ground School District*, Decision 2449-A (PECB 1986), the commission noted that its "... policy serves the preference for disposition of cases on their merits, as opposed to decisions based upon the technicalities of [pleading] rules" and also analogized its rules to "Superior Court Civil Rules 15(a) and (b) [that] allow amendments of pleadings to conform to the evidence where issues not raised by the original pleadings are tried by express or implied consent of the parties." In *Harding v. Will*, 81 Wn.2d 132 at 136 (1972), the Supreme Court pointed out that CR 15(b) was "designed to avoid the tyranny of formalism". In *Walla Walla County*, Decision 2932-A (PECB, 1988), the Commission noted that, as an administrative agency, "our process for initial handling of unfair labor practice complaints does not involve the degree of formality that one would expect in court proceedings." Under the rule in effect when this case was filed, the Examiner would be inclined to rule that the parties had litigated the propriety of the memo issued on May 18, 2000. In amending its rule effective August 1, 2000, however, the Commission changed its policy. As amended, WAC 391-45-070 is clearly more restrictive than CR 15(b), stating: "After the opening of an evidentiary hearing, amendment may only be allowed to conform the pleadings to evidence received without objection, upon motion made prior to the close of the evidentiary hearing." No such motion was made in the present case.

contract language cited in the grievance response, the revised employer policy was not (and could not have been) any part of the employer's decision to curtail Averill's distribution of protected literature on August 4, 1999. The fact that the revised policy may have been an attempt to supply Averill with some part of the remedy she requested in her grievance does not change the situation.

The revised policy is intimately connected with the violation of RCW 41.56.140(1), however. The memo effectively kept the erroneous contract language in effect, including the requirement for the written consent of the employer, and could continue to chill and impede the exercise of the statutory right of individual employees to distribute protected materials:

- The revised policy appears to be overly-broad. Like Article III, Section 5(b) of the collective bargaining agreement erroneously relied upon by the employer, the memo dated May 18, 2000, does not make any distinction concerning or allowance for distribution of literature that is protected by Chapter 41.56 RCW. It could thus impermissibly chill employee exercise of rights protected by Chapter 41.56 RCW.

- The revised policy could reasonably be read as imposing prior restraint and as requiring management approval of protected distributions. Specifically, paragraph 4 states,

> Materials may not be posted on any County property, including Metro Park & Ride lots or comfort stations or bulletin boards to the extent not allowed other employees, unless an appropriate supervisor has designated an area for such material.

In the context of the entire memo, that language could be read to imply that "other" employees are permitted to post materials without authorization, but "Union represented members" are

required pre-authorization of distributions including postings in some non-work areas.[5] Prohibiting employee access to union or other bulletin boards may in some cases raise a question of discrimination.[6] Any such limitation would be contrary to the precedents cited above.

- The revised policy could reasonably be read by employees to prohibit distribution of protected literature in non-work areas. Specifically,

  - Paragraphs 1(a) and (b) state,

> (a) At operating bases materials may be distributed in non-work areas, including parking lots, employee lunch rooms, lounges and 'bullpens'. Areas at operations bases where materials may not be distributed include the bus yard, the vehicle maintenance shop floor, training offices, classrooms when a class is in session, and the area immediately surrounding the operator sign-in area.
>
> (b) At work locations other than operations bases, employees may distribute materials only in non-work areas approved by Metro management.

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[5] The Examiner accepts that paragraph 4 could have been an attempt by the employer to give assurances that it will not discriminate against distribution of material protected by Chapter 41.56 RCW, but the words actually used sufficiently disguise such an intent to leave room for employees to read paragraph 4 otherwise.

[6] A union may negotiate access to bulletin boards for its use, and union use of bulletin boards is a mandatory subject of bargaining. *NLRB v. Proof Co.*, 242 F.2d 560 (CA 7, 1957), but bulletin boards are not automatically available for distribution of other protected literature. In this case, Article 1, Section 6 of the collective bargaining agreement provides only, "METRO agrees to provide space at work locations, as determined by METRO and the UNION, for UNION bulletin boards..." Exhibit 1.

Acceptance of the employer's revised policy would thus presuppose that the areas not pre-approved by management contain no non-work areas, or that there are compelling business reasons for excluding all such areas.[7] The Examiner does not accept that presupposition.

- Paragraph 6 requires that,

> Employees entering Metro property for any of the purposes enumerated above shall notify the appropriate work area supervisor or designated person in charge *before commencing such activities*. As long as the guidelines are complied with, access will not be denied. (Emphasis supplied.)

Employees could reasonably perceive the memo as a prior restraint on distributing protected literature in non-work areas and on non-working time.

Any such limitation would be contrary to the precedents cited above.

- The revised policy could reasonably be read as suggesting that individual employees have different sets of rights depending on their representational status or union membership status. Specifically, the title of the memo, "Re: RULES AND REGULATIONS ON THE DISTRIBUTION OF INFORMATION *BY UNION REPRESENTED MEMBERS*" (emphasis provided) could cause employees to infer that some employees are afforded different treatment based on union membership status or representational status. Further misleading language in the body of the document includes:

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[7] Neither the fact that the non-specified areas contain no non-work areas nor any compelling business reason for denying the right of distribution in any non-work area can be inferred from the record in this case.

- "Employees covered by a collective bargaining relationship may . . ." in the preamble paragraph, and "[E]mployees covered by collective bargaining agreements have the right . . ." in numbered paragraph 1, either of which could be read as implying a special rule or benefit applicable only to union-represented employees;

- "[T]he employee can contact his or her union representative or Beth Dolliver at Metro management" in the concluding paragraph, both suggests some special treatment afforded to union-represented employees and may mis-direct employees by limiting their sources of information about statutory rights to union and management officials.[8] Apart from the general potential for such language to chill the exercise of employee rights, concern is particularly apt in this case where the employee was expressing dissatisfaction with a tentative agreement reached by the employer and union.

Any such inference would be inconsistent with Chapter 41.56 RCW because, as noted above, the rights of individual employees concerning distribution of protected information are independent of either representational status or union membership status.

- The revised policy could be read as constituting surveillance. An employer commits an "interference" violation if it even *creates the impression* that it is engaged in surveillance of employees engaged in protected activities, even if there was no actual surveillance. *City of Longview*, Decision 4702 (PECB, 1994), *City of Vancouver*, Decision 6732-A (PECB,

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[8] Employers need to be cautious about free advice given to employees, and certainly must not mis-direct employees. *City of Seattle*, Decision 2773 (PECB, 1987).

1999).[9] Given that the memo restricts content in paragraph 5, paragraph 6 is reasonably read as requiring that the content of a protected distribution be scrutinized by the management. To the extent that the content of a protected distribution is not intended for employer eyes,[10] the requirement for employer scrutiny could constitute unlawful surveillance of protected union activity.

- The restriction on content set forth in the revised policy is so unclear as to allow the employer to prohibit distributions based on the employer's judgment of what is ". . . in good taste and suitable for viewing by members of the visiting public and co-workers." Ambiguous terms such as "good taste" and "suitable" could reasonably be viewed by employees in ways that differ from the intentions and interpretations of employer officials, yet employees could be subjected to discipline or other adverse consequence for violating the revised policy. The chilling effect of such prior restraint based on its content is obvious.

  The NLRB and the federal courts have rejected content restrictions in a collective bargaining context. The "primary source of protection for union freedom of speech under the NLRA . . . is the guarantee of § 7 of the Act. . . . [T]hat federal

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[9] The problem with employer surveillance lies in creating feelings of anxiety among the employees, by conveying a message of, "You're being watched in your lawful union activity". *Skagit County*, Decision 6348 (PECB, 1998). The NLRB has held that, by highlighting employee anxiety concerning union activities, the employer inhibits the future union activities of the employees. *CBS Records Div.*, 223 NLRB 709 (1976).

[10] In this case, the protected distribution contained the names of 49 employees who allegedly joined in opposing the tentative agreement reached by the employer and union.

law gives . . . license to intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective way to make its point." *See Letter Carriers v. Austin*, 418 U.S. 264 (1974), where the Court also observed, "Expression of such an opinion, even in the most pejorative terms is protected under federal law." *Id* at 283. *In Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), the Supreme Court stated regarding NLRA preemption of state defamation actions:

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. . . . Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language. [383 US at 58]

In *Linn*, the Supreme Court found the NLRA protected content analogous to federal constitutional protection of speech:

> [C]ases involving speech are to be considered "against the background of a profound . . . commitment to the principle of debate . . . should be uninhibited, robust, and wide open, and . . . it might well include vehement, caustic, and sometimes unpleasant sharp attacks." *New York Times v. Sullivan,* 376 U.S. 254, 270. Such considerations likewise weigh heavily here [by virtue of Section 7 of the NLRA]; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. [383 U.S. at 62-63.]

RCW 41.56.040 is comparable to Section 7 of the NLRA, and Chapter 41.56 RCW has been interpreted as prevailing over other statutes. *Rose v. Erickson*, 106 Wn.2d 420 (1986).

The Examiner thus concludes that the employer's issuance of the revised policy neither remedied the "interference" violation that is specifically before the Examiner nor constitutes a base which can co-exist with an appropriate remedial order in this case.[11] To leave the revised policy in place could leave employees to infer that it is a correct statement of their rights under Chapter 41.56 RCW while the memo may, in fact, be inconsistent with the employee's protected rights. Thus, the remedial order issued in this case requires that the revised policy be revoked.

While little or no precedent exists in Commission decisions, the NLRB has developed an extensive body of precedent on remedies for overly-broad no-distribution rules. A typical NLRB remedy is an order to cease and desist from promulgating, maintaining, or enforcing an overly-broad rule prohibiting protected distribution by employees, and to rescind the overly-broad rule. *See UCSF Stanford Health Care*, 335 NLRB No. 42, 32-CA-16965 and 32-CA-17092 (2001); *Dunes Hotel*, 284 NLRB 871 (1987); *Ameron Automotive Center*, 265 NLRB 511 (1982). The Examiner adopts that pattern here, to

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[11] The Examiner notes that "vagueness" can also be a basis for a challenge on constitutional grounds:

> An ordinance or statute is "void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *O'Day v. King Cy.*, 109 Wn.2d 796, 810 . . . (1988). The vagueness doctrine serves two important purposes: to provide fair notice to citizens as to what conduct is proscribed and to protect against arbitrary enforcement of the laws. *State v. Richmond*, 102 Wn.2d 242, 243-44, 683 P.2d 1093 (1984); *State v. Hilt*, 99 Wn.2d 452, 453-54, 662 P.2d 52 (1983).

Seattle v. Eze, 111 Wn.2d 22 (1988).

The revised policy here could be subject to challenge as vague, due to the use of "good taste" and "suitable".

require recision of: (1) whatever employer policy was cited by Clanton in his directive that Averill cease her distribution of protected materials; (2) Article III, Section 5(b) of the collective bargaining agreement that was in effect between the employer and union when Clanton made his directive to Averill, and any successor contract containing similar language; and (3) the revised policy promulgated in response to the grievance filed on behalf of Averill. While the remedial order includes a requirement for the employer to bargain with the union concerning replacement of any contract provisions struck down by this order, the employer and union may not enter into any agreement (or insist upon) any contractual provision that interferes with the rights of individual employees protected by Chapter 41.56 RCW,[12] including the right to distribute information as protected by that chapter.[13]

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[12] Illegal subjects of bargaining are matters which neither the employer nor the union have the authority to negotiate, because their implementation of an agreement on the subject matter would contravene applicable statutes or court decisions. *City of Seattle*, Decisions 4687-B and 4688-B (PECB, 1997). An illegal subject bargaining that interferes with individual employee rights guaranteed by Chapter 41.56 RCW, possibly may not be proposed or discussed at all. *King County Fire District 11*, Decision 4538 (PECB, 1994). However, a compelling business justification may also justify limitations distributions that otherwise would violate RCW 41.56.140(1). A union and an employer might also negotiate greater rights of distribution than the statutory minimum right. Accordingly, discussion is appropriate here in determining whether a proposal may be justified or exceed statutory minimums.

[13] RCW 41.56.492 affords interest arbitration to resolve impasses that occur in collective bargaining to employees of public passenger transportation systems, including employees of the employer here. Inclusion of an overly-broad no-distribution policy in a collective bargaining agreement is impermissible, whether such agreement interfering with employee rights is achieved by negotiations or interest arbitration.

FINDINGS OF FACT

1. King County is a "public employer" within the meaning of RCW 41.56.030(1).

2. Amalgamated Transit Union, Local 587, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of King County employees working in a public passenger transportation system known as "METRO".

3. Linda Averill, a "public employee" within the meaning of RCW 41.56.030(2), was employed by King County within the bargaining unit represented by Local 587.

4. Prior to August 4, 1999, King County and Local 587 reached a tentative agreement in negotiations on a successor collective bargaining agreement. That agreement was to be submitted for ratification or rejection by vote of the union membership.

5. On August 4, 1999, Averill distributed a leaflet opposing ratification of the tentative agreement. Her actions took place in a non-work area outside the employer's Atlantic Central Base in Seattle, before her work shift. The evidence does not establish that any disruption of the employer's business, littering, or other negative impacts on the employer's operations resulted from Averill's actions.

6. Averill's leaflet addressed safety concerns, the hours and status of part-time employees, and the wages of bargaining unit employees under the tentative agreement. The leaflet contained the names of 49 persons identified as sharing the

concerns addressed in the leaflet, including Averill and other employees in the bargaining unit.

7. On August 4, 1999, in the presence of other employees, employer official Willie Clanton directed Averill to cease her distribution of the leaflet described in paragraph 6 of these Findings of Fact. Averill complied with Clanton's request.

8. In making the directive described in paragraph 7 of these Findings of Fact, Clanton was aware that the leaflet concerned the collective bargaining relationship between the employer and union.

9. In making the directive described in paragraph 7 of these Findings of Fact, Clanton asserted that employer policy prohibited employees from petitioning or soliciting on METRO property for any reason.

10. A grievance was filed under the collective bargaining agreement between the employer and union, protesting Clanton's directive that Averill cease her distribution of the leaflet described in paragraph 6 of these Findings of Fact.

11. The employer denied the grievance described in paragraph 10 of these Findings of Fact, citing Article III, Section 5(b) of a collective bargaining agreement between the employer and union. That provision included:

> Solicitations for funds or other purposes and the circulation on non-METRO business related lists, petitions or endorsements or other documents shall not be conducted on METRO property or among Employees on

duty, except with the written consent of METRO.

12. Notwithstanding any employer policy asserted by Clanton and the language of the collective bargaining agreement, employees had sometimes been allowed to solicit on METRO property for various purposes, including fund-raising activities on behalf of charitable or social organizations, without obtaining written consent from management.

13. Notwithstanding any employer policy asserted by Clanton and the language of the collective bargaining agreement, employees had sometimes been allowed to circulate lists, petitions, endorsements or other documents not related to METRO business, as well as union-related materials, without obtaining written consent from management.

14. In connection with its denial of the grievance described in paragraph 10 of these Findings of Fact, the employer promulgated a revised policy on May 18, 2000, concerning solicitations and distributions. That revised policy was subject to scrutiny as being overly-broad, as imposing prior restraint on activities protected by Chapter 41.56 RCW, as requiring management approval for activities protected by Chapter 41.56 RCW, as prohibiting distribution of protected materials on non-work time and in non-work areas, as suggesting some difference of rights of individual employees based on representational status or union membership, as constituting surveillance, or as being vague. The employer distributed the revised policy to the union and to Averill, and the employer posted the revised policy where it could be read by other employees.

15. Averill and other employees could reasonably perceive the directive issued by Clanton as a threat of reprisal or force associated with their exercise of rights under RCW 41.56.040.

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. The actions of Linda Averill, as described in paragraphs 5 and 6 of the foregoing Findings of Fact, were protected activities under RCW 41.56.040.

3. By the actions set forth in paragraphs 7 through 13 and 15 of the foregoing Findings of Fact, King County interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Chapter 41.56 RCW, and committed unfair labor practices in violation of RCW 41.56.140(1).

ORDER

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, and pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, it is ordered that King County, its officers and agents, shall immediately:

1. Cease and desist from:

   (a) Promulgating, maintaining, or enforcing any overly-broad rule or policy prohibiting distribution of union-related literature protected by Chapter 41.56 RCW in non-work areas and on non-work time, in the absence of compelling

circumstances required to maintain an orderly work environment.

(b) Agreeing with Amalgamated Transit Union, Local 587, on collective bargaining agreement provisions promulgating, maintaining, or enforcing any overly-broad rule or policy prohibiting distribution of union-related literature protected by Chapter 41.56 RCW in non-work areas and on non-work time, in the absence of compelling circumstances required to maintain an orderly work environment.

(c) In any other manner, interfering with, restraining or coercing public employees in the free exercise of their rights guaranteed by Chapter 41.56 RCW.

2. Take the following affirmative actions to remedy the unfair labor practices and to effectuate the policies of the Act:

(a) Rescind any and all policies relied upon or asserted by Willie Clanton in making his directive to Linda Averill on August 4, 1999, as well as the revised policy issued on May 18, 2000, and include provisions in any replacement policy that will protect the rights of individual employees under Chapter 41.56 RCW.

(b) Rescind Article III, Section 5(b) of the collective bargaining agreement which was relied upon on August 4, 1999, or similar language relating to solicitation and circulation of protected materials that is contained in a collective bargaining agreement with Amalgamated Transit Union, Local 597, and bargain in good faith with the union concerning replacement provisions which do not

infringe on the rights of individual employees under Chapter 41.56 RCW.

(c) Enforce any policies and/or contract provisions concerning solicitation and distribution of materials in a consistent manner, without regard to representational status or union membership of the employees involved.

(d) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall, after being duly signed by an authorized representative of King County, be and remain posted for sixty (60) days. Reasonable steps shall be taken by King County to ensure that said notices are not removed, altered, defaced or covered by other material.

(e) Read the notice attached hereto and marked "Appendix" into the record at the next public meeting of the King County Council, and permanently append a copy of said notice to the official minutes of that meeting.

(f) Notify Amalgamated Transit Union, Local 587, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the union with a signed copy of the notice required by this order.

(g) Notify the Executive Director of the Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive

Director with a signed copy of the notice required by this order.

Dated at Olympia, Washington, this 28th day of August, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Paul T. Schwendiman

PAUL T. SCHWENDIMAN, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT promulgate, maintain or enforce any overly-broad policy, rule, or regulation prohibiting distribution of union-related literature protected by statute during non-work time in non-work areas, without compelling circumstances required to maintain an orderly work environment.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

WE WILL rescind any employer policy relied upon in directing bargaining unit employee Linda Averill to cease distribution of union-related literature on August 4, 1999, as well as the revised policy issued on May 18, 2000, and will include provisions in any replacement policy that will protect the rights of individual employees under Chapter 41.56 RCW.

WE WILL bargain in good faith with Amalgamated Transit Union, Local 587, to replace Article III, Section 5(b) of the collective bargaining agreement which was relied upon on August 4, 1999, or similar language relating to solicitation and circulation of protected materials that is contained in a successor collective bargaining agreement, with language that does not infringe on the rights of individual employees under Chapter 41.56 RCW.

WE WILL enforce any policies and/or contract provisions concerning solicitation and distribution of materials in a consistent manner, without regard to representational status or union membership of the employees involved.

DATED: _____ KING COUNTY

BY: _____

Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300.