

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE	)	
EMPLOYEES,	)	
	)	
Complainant,	)	CASE 21261-U-07-5424
	)	
vs.	)	DECISION 9955 - PECB
	)	
WASHINGTON STATE - OFFICE OF	)	FINDINGS OF FACT,
FINANCIAL MANAGEMENT,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
Respondent.	)	
_____	)	

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Attorney at Law, for the union.

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Assistant Attorney General, for the employer.

The Washington State Legislature granted adult family home providers the right to organize and engage in collective bargaining effective July 22, 2007. RCW 41.56.029 indicates that solely for the purposes of collective bargaining, the Governor is the public employer of adult family home providers. On July 23, 2007, the Washington Federation of State Employees (Federation) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission which was docketed as case 21176-E-07-3286. The Federation seeks to represent a bargaining unit of all adult family home providers. The Washington State Residential Care Council (Care Council) filed a motion to intervene which was granted. Commission staff conducted an election with employees choosing between the Federation, the Care Council, or no representation. When the vote was counted on September 7, 2007, none of the three choices received a majority of the vote, leading to a run-off election between the Federation and

the Care Council, the two ballot choices which received the most votes.

The Federation filed an unfair labor practice complaint on September 21, 2007, and an amended complaint on September 24, 2007. The complaint alleges that the Washington State Office of Financial Management (employer) as the representative of the Governor and through the Washington State Department of Social and Health Services (DSHS), interfered with employee rights and dominated or assisted the Care Council by providing a list of insurance companies to bargaining unit employees during the pendency of the representation proceedings. The complaint alleges that some of the insurance companies showed a preference for the Care Council, required membership in the Care Council, or discouraged membership in the Federation. Pursuant to WAC 391-25-370, the representation proceedings were suspended, including the run-off election, pending the outcome of this unfair labor practice case.

I conducted a hearing on October 29, 2007. The parties filed post-hearing briefs to complete the record.

#### ISSUE PRESENTED

Did the employer interfere with employee rights or dominate or assist the Care Council by providing bargaining unit employees a list of insurance companies during a representation campaign when some of the insurance companies showed a preference for the Care Council, required membership in the Care Council, or discouraged membership in the Federation?

Based on the evidence presented, I find that the employer did not unlawfully interfere with employee rights or dominate or assist the Care Council. I dismiss the complaint.

APPLICABLE LEGAL PRINCIPLESEmployer Domination or Assistance

An employer commits an unfair labor practice when it controls, dominates or interferes with a bargaining representative. RCW 41.56.140(2). The Commission finds domination or assistance when an employer involves itself in the internal affairs or finances of the union, shows a preference between two unions or groups that are competing for the same bargaining unit, or attempts to create, fund or control a "company union." *State - Labor and Industries, Decision 9348 (PSRA, 2006)*. The complainant maintains the burden of proving the allegations of its complaint by a preponderance of the evidence. WAC 391-45-270(1)(a). In unfair labor practice complaints alleging domination or assistance violations, the complainant must prove the employer intended to assist one union to the detriment of another. *Community College District 13 - Lower Columbia, Decision 8117-B (PSRA, 2005)*.

Employer neutrality is required during representation proceedings. In *Whatcom County, Decision 8245-A (PECB, 2004)*, the Commission held that: "[O]nce a valid [representation] petition has been filed with the Commission, an employer must remain strictly neutral in rival union organizing situations."

Employer Interference

RCW 41.56.040 states that employers commit unfair labor practices when they:

directly or indirectly interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

An interference violation is found under 41.56.140(1) where an employer interferes with, restrains, or coerces public employees in the exercise of their rights guaranteed by Chapter 41.56 RCW. As with allegations of employer domination or assistance, the complainant bears the burden of proving interference. WAC 391-45-270(1)(a).

To prove an interference charge, the complainant must establish that the employer engaged in conduct which a typical employee could reasonably perceive as a threat of reprisal or force, or promise of benefit, associated with the employee's protected union activities. *City of Tacoma*, Decision 6793-A (PECB, 2000). Unlike allegations of domination, the complainant is not required to establish that the employer intended to interfere with employee rights. Additionally, the complainant is not required to prove that employees were actually coerced. The complainant does, however, bear the burden of proving that the employer's conduct resulted in harm to protected employee rights. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

#### FACTUAL BACKGROUND

The allegations in this case focus on communication concerning required liability insurance. The communication at issue took place between adult family home providers (employees) and George Zimmerman, program manager of Aging and Disability Services Administration (ADSA), a division within DSHS; and employees and insurance companies.<sup>1</sup> The following background information provides context for, and a summary of, that communication.

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<sup>1</sup> For purposes of this decision, I will use "insurance companies" to refer to insurance brokers, insurance agents, and risk retention groups.

Liability Insurance Requirement

Effective August 1, 2004, DSHS required all contractors, not just employees who serve Medicaid clients, to carry liability insurance. Due to insurance market factors and the lack of affordable insurance, DSHS suspended the requirement for several years.

As market factors changed, DSHS reinstated a requirement that contractors, including employees who serve Medicaid clients, carry liability insurance, effective July 1, 2007. In preparing for this requirement, the employer worked with insurance companies, the Adult Family Home Advisory Committee,<sup>2</sup> and two adult family home associations to communicate information about the requirements. One association was the Adult Family Home Association of Washington (AFH Association). The AFH Association is primarily focused on the promotion of adult family home providers, their education, and their community connections. Another association was the Care Council. At some point, the Federation became affiliated with the AFH Association, and the Care Council became a collective bargaining representative under Chapter 41.56 RCW.

Zimmerman testified that he communicated to the insurance companies that the best way for them to market their liability insurance plans to employees was through the two state associations, the AFH Association and the Care Council. He was aware that some of the insurance companies took that approach, including the Personal Care and Assisted Living Insurance Center (PCALIC Insurance), a long-term care risk retention group.

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<sup>2</sup> The Committee was established by statute in an effort to ensure a cooperative process among DSHS, employee representatives, and resident and family representatives on matters pertaining to the adult family home program. The Committee is comprised of eight members representing various adult family home interest groups.

Communication Between Employer and Employees

By letter dated July 18, 2006, the employer provided notice of the insurance requirement to employees who serve Medicaid clients. The employer also created and updated a list of insurance companies who contacted the employer, indicating they would sell policies that met the employer's requirements. By letters dated March 30 and September 28, 2007, the employer provided the list to employees. The employer also provided the list to employees who inquired about insurance companies. In the March 30, 2007 letter to employees who serve Medicaid clients, the employer stated: "Enclosed for your convenience is a listing of the insurance brokers who have informed DSHS they are actively selling liability insurance to adult family homes. There may be other brokers in the state who are also selling AFH liability insurance."

Zimmerman testified that the employer's goal was to provide as many adult family homes as possible for Medicaid clients and to get as many adult family homes as possible to meet the insurance requirement. Because different insurance companies offered different rates and covered different types of clientele, when employees called Zimmerman with questions about liability insurance, he provided names and contact information for the three cheapest options which he believed offered the coverage the employee was seeking. Zimmerman testified that employees wanted to purchase the lowest cost insurance.

Communication Between Employees and Insurance Companies

Two employees testified about their communications with insurance companies, the names of whom they acquired from the employer's list. In June or July of 2007, employee Mariebel Yancey contacted Rice Insurance, whose agent advised her that if she joined the Care Council she would receive a discount of about \$600 to \$800. Yancey, who was already a member of the AFH Association, felt that

the insurance agent encouraged her to be a member of both the Care Council and the AFH Association, if she could afford it. She joined Care Council but did not receive a discount.

In April of 2007, employee Debra Zacher contacted PCALIC Insurance about liability insurance. PCALIC Insurance sent her its "frequently asked questions" which stated "[W]e have worked closely with DSHS to assure that limits of liability provided under the AFH Liability Program meets those required by DSHS. In addition, DSHS has approved PCH Mutual and PCALIC to write this insurance." Another version of PCALIC Insurance's "frequently asked questions" which was admitted into evidence stated: "Membership with a State Association is a requirement. For Adult Family Homes in Washington, the PCH Mutual program has received the full support of the Washington State Residential Care Council . . . as well as the Adult Family Home Association of Washington . . . ."

Zacher completed the PCALIC Insurance application which indicated she needed to submit a copy of a state association membership certificate. The application included the Care Council's website address but made no reference to the AFH Association. Zacher received a memo from PCALIC Insurance dated April 24, 2007, which instructed her to submit evidence of membership in a state association. The document included: "To obtain membership visit [www.WSRCC.org](http://www.WSRCC.org) [Care Council] or call Craig Frederickson 253-630-2026." At that time, Craig Frederickson was affiliated with the AFH Association.

Zacher testified that the PCALIC Insurance representative only talked about one association, the Care Council. Zacher asked the representative who was requiring association membership; the representative responded that it was the insurance company's requirement.

PCALIC Insurance sent Zacher a follow-up letter dated October 16, 2007, indicating that she had not yet submitted proof of membership in a state association. The letter stated, in part: "There are a number of State Associations you may join. If you are a member of the Union, this will also qualify, please send proof of your Union membership." PCALIC Insurance sent a similar letter to another employee dated September 18, 2007. PCALIC Insurance accepted Zacher's membership in the AFH Association as meeting its requirements.

The two employees who testified stated that the PCALIC Insurance and Rice Insurance representatives did not indicate that they were speaking for DSHS.

Two union organizing directors testified about communication they had with employees and insurance companies. Carolyn Klinglesmith, AFSCME [the Federation's parent organization] Organizing Director, and Megan Parke, Federation Organizing Director, testified that they went on home visits in September of 2007, after the election conducted by the Commission. They heard employees express concerns about the cost of liability insurance as well as questions about why they had to join the Care Council to get reduced insurance rates. As a result of those conversations, Klinglesmith and Parke took the list of insurance companies provided by the employer and made telephone inquiries.

Parke testified that she contacted Rice Insurance. The agent quoted her one price but told her that if she joined the Care Council, Rice Insurance would give her a reduced price. Parke asked if she could be a member of the union. Rice's representative stated membership in the union would satisfy the company's requirements but that he did not recommend it. Parke testified that the Rice Insurance representative "had a whole speech about



union dues and was clearly anti-union and was discouraging me from having union membership be the choice for getting the discount."

Klinglesmith testified that she contacted two insurance companies, including Valley Insurance. She said that they referred her to PCALIC Insurance. During the conversation with Valley Insurance, the representative also referred her to Zimmerman at DSHS for further questions. Klinglesmith called Zimmerman asking why association membership is required for reduced rates. She testified that Zimmerman explained to her that insurance companies create a risk management pool and they feel that if you belong to the association, you're a higher quality provider because of the training and monitoring the association provides. During their conversation, Zimmerman recommended to Klinglesmith three insurance companies, PCALIC, Rice, and Nicholson.

#### ANALYSIS

##### Domination or Assistance

The Federation alleges that the employer engaged in unlawful domination or assistance by showing a preference for the Care Council. The Federation presented no evidence that the employer intended to assist one union to the detriment of the other. Instead, the evidence established that the employer's unequivocal intent was to help employees find an affordable way to meet DSHS's liability insurance requirement. The employer demonstrated that the neutrality the law requires of public employers during representation proceedings.

Additionally, the employer is not responsible for the actions of the insurance companies. Applying basic agency principles to this situation, the employer gave the insurance companies neither actual nor apparent authority to act on its behalf. *City of Brier,*

Decision 5089-A (PECB, 1995). The Federation did not present evidence that any employee believed that the insurance companies were speaking for the employer.

### Interference

The Federation did not prove that the employer interfered with employee rights in violation of RCW 41.56.140(1). The Federation did not establish that the employer engaged in conduct which a typical employee could reasonably perceive as a threat of reprisal or force, or promise of benefit, nor did it establish that the employer's conduct resulted in harm to protected employee rights.

The employer's actions included: (1) developing, updating, and distributing a list of insurance companies to employees; and (2) giving the names of three lower cost insurance companies to employees who requested it. The employer's communication was not coercive or misleading. The employer made no disparaging remarks about the Federation; the employer did not act to undermine the Federation.

The evidence established that Rice Insurance encouraged one employee to join the Care Council after talking about a reduced rate and tried to discourage a Federation organizer (who did not disclose that she was a union organizer) from joining the Federation. The evidence established that PCALIC Insurance, at most, was not clear with one employee about the option of joining the AFH Association. In addition, in April of 2007, PCALIC Insurance's application referenced the Care Council and the Care Council website and did not reference the AFH Association. The Federation did not introduce evidence of what was on the Care Council website in April of 2007. In August of 2007, the Care Council website featured campaign information concerning the representation election, including what purported to be negative information on the Federation.

The Federation did not introduce evidence that the insurance companies stated or implied that they were speaking on behalf of the employer, or that the employer encouraged the insurance companies to direct employees to the Care Council. The Federation did not introduce evidence that any employee believed the insurance companies were speaking on behalf of the employer, or that a typical employee could reasonably perceive that the employer was interfering with protected employee rights.

The insurance companies acted independently; their statements and conduct are not attributable to the employer. Applying basic agency principles to this situation, the employer gave the insurance companies neither actual nor apparent authority to act on its behalf.

#### CONCLUSION

I find that the Federation failed to prove that the employer interfered with employee rights or dominated or assisted the Care Council and I dismiss the Federation's complaint.

#### FINDINGS OF FACT

1. Under RCW 41.56.029, the Governor of the State of Washington is the public employer of adult family home providers, solely for the purposes of collective bargaining. The Washington State Office of Financial Management is the representative of the Governor under RCW 41.56.029. The Aging and Disability Services Administration, a division within the Washington State Department of Social and Health Services (DSHS), has responsibilities associated with adult family home providers.
2. Adult family home providers are public employees solely for the purposes of collective bargaining under RCW 41.56.029.

3. The Washington Federation of State Employees (Federation) is a bargaining representative within the meaning of RCW 41.56.030(3).
4. The Washington State Residential Care Council (Care Council) began as an adult family home association. At some point in time, the Care Council became a bargaining representative within the meaning of RCW 41.56.030(3).
5. The Adult Family Home Association of Washington (AFH Association) is an association of adult family home providers primarily focused on the promotion of providers, their education, and their community connections. At some point in time, the Federation became affiliated with the AFH Association.
6. In 2006, DSHS reinstated a requirement that adult family home providers serving Medicaid clients obtain liability insurance by July 1, 2007.
7. DSHS created, maintained, and distributed a list of insurance companies who had informed the employer that they would offer policies meeting the liability insurance requirements. The list included PCALIC Insurance and Rice Insurance.
8. When an employee requested information from the employer about insurance companies who sold the required insurance, George Zimmerman, program manager of DSHS's Aging and Disability Services Administration division, provided the names and contact information of the three cheapest options offering the coverage the employee was seeking.
9. In April of 2007, employee Debra Zacher contacted PCALIC Insurance about liability insurance after finding the name and

contact information on the employer's list. The PCALIC Insurance application she completed indicated she needed to submit a copy of a state association membership certificate. The application included the Care Council's website but did not reference the AFH Association.

10. PCALIC Insurance sent Zacher a memo dated April 24, 2007, which instructed her to submit evidence of membership in a state association. The memo included: "To obtain membership visit [www.WSRCC.org](http://www.WSRCC.org) or call Craig Frederickson 253-630-2026." At that time, Craig Frederickson was affiliated with the AFH Association. PCALIC Insurance accepted Zacher's membership in the AFH Association as meeting its requirements.
11. In June or July of 2007, employee Mariebel Yancey contacted Rice Insurance about liability insurance. The Rice Insurance representative advised her that if she joined the Care Council, she would receive a discount. Yancey joined the Care Council although she was already a member of the AFH Association. She did not receive a discount.
12. In September of 2007, Federation organizer Megan Parke contacted a representative of Rice Insurance; the representative acknowledged that membership in the Federation would satisfy the company's requirements but the representative discouraged such membership.
13. The employer did not advocate for employees to join the Care Council or the Federation; the employer did not advocate for any of the insurance companies to encourage employees to join the Care Council or the Federation.
14. The PCALIC Insurance and Rice Insurance representatives did not indicate that they were speaking for the employer.

15. There was no evidence that any employee believed that the PCALIC Insurance or Rice Insurance representatives were speaking for the employer.
16. The employer did not delegate any authority to PCALIC Insurance or Rice Insurance to speak or act on the employer's behalf.
17. The employer did not intend to support or show a preference for the Care Council by creating, maintaining, and distributing a list of insurance companies to employees, or by providing employees the names of the three cheapest insurance options.
18. A typical employee could not reasonably perceive the employer's actions, as described in Findings of Fact 7 and 8, as a threat of reprisal or force, or promise of benefit, associated with the employee's protected union activities.
19. The employer's action in creating, maintaining, and distributing a list of insurance companies to employees, and providing the names of the three cheapest insurance options to employees, did not result in harm to protected employee rights.

#### 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. By the actions described in Findings of Fact 7 and 8, the State of Washington did not demonstrate a preference for or provide unlawful assistance to the Washington State Residential Care Council and did not violate RCW 41.56.140(2).

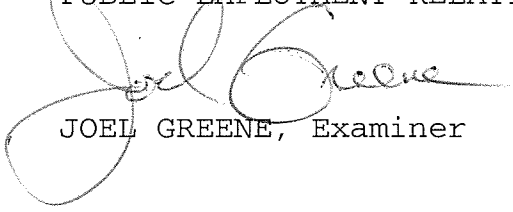
3. By the actions described in Findings of Fact 7 and 8, the State of Washington did not interfere with employee rights and did not violate RCW 41.56.140(1).

ORDER

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

ISSUED at Olympia, Washington, this 16<sup>th</sup> day of January, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JOEL GREENE, 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.