STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609,	)	
Complainant,	)	CASE 20973-U-07-5351
vs.	)	DECISION 9982 - PECB
SEATTLE SCHOOL DISTRICT,	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW, AND ORDER

Schwerin Campbell Barnard, LLP, by *Kathleen Phair Barnard,* Attorney at Law, for the union.

John M. Cerqui, Senior Assistant General Counsel, for the employer.

On March 13, 2007, the International Union of Operating Engineers, Local 609 (union), filed an unfair labor practice complaint with the Public Employment Relations Commission alleging that the Seattle School District (employer) interfered with and dominated the union in violation of RCW 41.56.140(1) and (2). The Commission issued a preliminary ruling finding a cause of action existed and hearings were held before Examiner Robin A. Romeo on July 11, 2007, July 16, 2007, September 19, 2007, and September 28, 2007. The parties submitted post-hearing briefs.

ISSUES

1. Did the employer interfere with and/or dominate the union when management officials conducted an investigation in response to a complaint filed by an employee?

2. Did the employer interfere with and/or dominate the union when management officials issued a report in response to a complaint filed by an employee?

Based upon the record presented, the Examiner finds that the employer did not commit violations of RCW 41.56.140 when management officials conducted an investigation of an employee complaint and issued a report in response to the investigation.

APPLICABLE LEGAL STANDARDS

This unfair labor practice complaint was filed by the union on March 13, 2007. It alleged interference and domination by actions of management officials in conducting an investigation and issuing a report in response to Zappler's complaint including:

1. The employer's use of union internal affairs information;

2. The employer's discouraging of an employee's right to union representation in connection with investigatory interviews; and

3. The employer's surveillance of union officials in relation to provision of representation in interviews.

Applicable provisions of Chapter 41.56 provide:

> RCW 41.56.140 Unfair Labor Practices for public employer enumerated. It shall be an unfair labor practice for an employer:
>
> (1) To intefere 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. . . .

INTERFERENCE

An interference violation will be found when an employee could reasonably perceive the employer's actions as a threat of reprisal or force of benefit or as a promise of benefit associated with the union activity of that employee or other employees. The burden of proof rests with the complaining party who must demonstrate that the employer's conduct resulted in harm to protected employee rights. *Community College District 13 (Lower Columbia),* Decision 9171-A (PSRA, 2007); *King County,* Decision 8630-A (PECB, 2005). Substantial evidence as shown by the totality of the circumstances must demonstrate that the perception is reasonable. *PERC v. City of Vancouver,* 107 Wn. App. 694 (2001), *review denied* 145 Wn.2d 1021 (2002).

DOMINATION

An employer controls, dominates, or interferes with a union when it involves itself in the internal affairs or finances of the union or attempts to create, fund, or control a "company union." *City of Yakima,* Decision 9451-A (PECB, 2006), *rev'd on other grounds; City of Yakima,* Decision 9451-B (PECB, 2007). A domination violation requires proof of intent. *Snohomish County,* Decision 9834 (PECB, 2007). In *City of Yakima,* Decision 9451-A (PECB, 2007), an employer's statements indicated anti-union animus but did not rise to the level of attempting to dominate the union because the union's independence of action was not threatened.

APPLICATION OF STANDARDS

In February 2006, employee Liesl Zappler filed a complaint with the employer's Office of Equity and Compliance. She alleged gender

discrimination and retaliation by certain actions taken by union officials which she believed were in retaliation for her filing of an unfair labor practice complaint against the union.

In response to Zappler's complaint, the employer hired an outside investigator, attorney Elizabeth Reeve, to conduct an investigation. In conducting the investigation, Reeve interviewed employees and union officials and then issued a report of her findings and conclusions. Her report was forwarded to Mark Green, the employer's chief operating officer. Green returned the report to Reeve and asked her to remove her conclusions from the report. After she deleted her conclusions, she resent her report to Green who then forwarded a copy of her report to Zappler and to union officials.

In Green's cover letter to the union's business agent, David Westberg, he stated that, based upon Reeve's report, he found Westberg made an inappropriate statement to an employee on the employer's property and asked him to comply with the employer's Anti-Harassment Policy. In Green's cover letter to the union's shop steward, Jeff Wasson, Green stated that based upon Reeve's report he did not find Wasson guilty of any inappropriate conduct, but he stated that the employees would benefit from training on the employer's Anti-Harassment Policy.

Green's finding that Westberg made an inappropriate statement refers to a statement made during a meeting that occurred between union officials and Fred Stephens, Director of Facilities, to discuss dissatisfaction with a supervisor's performance. During the meeting, Westberg alluded to a possible sexual relationship between the supervisor and Zappler. Green said that that comment was inappropriate.

Issue 1 - The Investigation

Evidence and argument were offered by the union alleging that the methods used by the independent investigator violated RCW 41.56-.140(1) and (2) when she conducted her investigation of the complaint filed by an employee. The employer particularly raises the issue of the timeliness of the complaint and that will be determined first.

The statute of limitations for filing an unfair labor practice complaint under the Public Employees' Collective Bargaining law (PECB) is six months from the date of occurrence:

> RCW 41.56.160(1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders; PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more that six months before the filing of the complaint with the commission.

The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *City of Bremerton,* Decision 7739-A (PECB, 2003). The only exception to the strict enforcement of the six-month statute of limitations is where the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Pasco,* Decision 4197-A (PECB, 1994).

The evidence reveals that Reeve's investigation into this matter occurred more than six months prior to the time that the union filed its complaint. Reeve conducted an investigation from May 2006 until July 19, 2006, when she conducted the final interview.

The complaint was filed on March 13, 2007, approximately eight months after the time that the investigation process was concluded.

Thus, the time period for filing an allegation concerning that process expired two months prior to the time that the petition was filed. There has been no argument that the union was not aware of the events in question, so no exception applies. Therefore, the allegations concerning the investigation are untimely and are dismissed.

Issue 2 - Issuance of the Report

The union argues, meticulously, that many parts of Reeve's investigatory report interfere with and dominate the union. The employer defended by asserting that the investigator was acting independently when she issued the report and not as its agent.

An employer is bound by the acts of individuals reasonably perceived to be its agent. *Seattle School District,* Decision 7349-A (PECB, 2001). The Commission, citing common law principles, recently examined the definition of an agent where an interference violation was alleged:

> An agent's authority to bind his principle may be of two types, either actual or apparent. *Deers, Inc. v. DeRuyter,* 9 Wn. App. 240, 242 (1973) (citing 3 Am.Jur.2d Agency sec. 71 (1962). With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person or party. . . Washington courts have held that the "authority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the essential services." *Walker v. Pacific Mobile Homes, Inc.* 68 Wn.2d 357, 351 (1966).

Community College District 13 (Lower Columbia), Decision 8117-B (PECB, 2005).

The investigator testified that she was given broad latitude to conduct the employer's investigation. She was given information and documents by the employer and she determined the course of the investigation. She determined who to interview and when the interviews would occur. She determined what questions to ask during the interview.

Therefore, the statements in the report are Reeve's alone and cannot be imputed to the employer. The employer did not author, control, or direct the contents of report. Although the employer directed Reeve to delete certain conclusions, she was not an agent of the employer when she issued the report. The report itself cannot form the basis of a violation of RCW 41.56.140.

THE EMPLOYER'S RESPONSE

Green's letters to Westberg and Wasson do not interfere with any employee's right to union representation. There has been no threat of reprisal or force of benefit or promise of benefit associated with the union activity of Zappler or any other employee. In fact, the employer did not send copies of the letters to any other members of the union's bargaining unit. There has been no harm shown. There has been no showing that the totality of the circumstances would lead to a reasonable employee perceiving interference.

Although the employer sent a copy of its internal report responding to an employee's complaint directly to the union, and commented on the union's conduct, there was no allegation that Green's statement interfered with any employee's right to representation. The union did not allege that Green's statement resulted in harm. While he

was commenting on a union employee's conduct, the conduct occurred on the employer's property with both union and non-union employees.

Nor do Green's letters dominate or control the union. He did not interfere with or comment on the internal affairs of the union. There was no evidence presented that he intended to dominate the union. The independence of the union has not been compromised.

More specifically, Green's statement to Westberg did not serve to dominate the union. While he commented on the appropriateness of the statement made by a union representative, his comment itself does not concern any union business nor was there evidence presented that the employer circulated the letter to any member of the bargaining unit. Prohibiting that type of statement does not direct the union how to conduct its business and there has been no proof presented that Green intended to dominate or control the union.

CONCLUSION

The union's allegation that the investigation of a complaint was improper is dismissed as untimely.

The union's allegation that the investigator's report was improper is dismissed as the investigator was not acting as an agent of the employer.

The union's allegation that the employer interfered with or dominated the union is not supported by substantial evidence and, therefore, it is also dismissed.

FINDINGS OF FACT

1. Seattle School District is a public employer within the meaning of RCW 41.56.030(1).

2. International Union of Operating Engineers, Local 609, is a bargaining representative within the meaning of RCW 41.56.030(3).

3. In February 2006, employee Liesl Zappler filed an internal complaint alleging gender discrimination and retaliation. The employer hired an outside consultant to conduct an investigation of the complaint.

4. The investigation started in April 2006 and continued until July 2006. A report of the findings was issued in November 2006.

5. The employer forwarded a copy of the investigator's report to the union with a cover letter finding that the union business agent had made an inappropriate statement in reference to Zappler in a meeting with employer officials. The investigator's report was also forwarded to the complaining employee and another employee who is the union's shop steward. The employer did not forward the report or its comments on the report to any other members of the bargaining unit.

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 employer did not interfere with and/or dominate the union in violation of RCW 41.56.140(1) and (2) when it conducted an investigation in response to a complaint filed by an employee.

3. The employer did not interfere with and/or dominate the union in violation of RCW 41.56.140(1) and (2) when it issued a report in response to a complaint filed by an employee.

ORDER

The complaint charging unfair labor practices is hereby DISMISSED in its entirety.

Issued at Olympia, Washington, this 19th day of February, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

ROBIN A. ROMEO, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the agency under WAC 391-45-350.