Seattle School District, Decision 10410 (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 609,	)	
Complainant,	)	CASE 21876-U-08-5571
vs.	)	DECISION 10410 - PECB
SEATTLE SCHOOL DISTRICT,	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW, AND ORDER

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

Freimund, Jackson & Tardif, LLP by *Gregory E. Jackson*, for the employer.

On July 18, 2008, the International Union of Operating Engineers, Local 609 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission naming the Seattle School District (employer) as respondent. The union alleges that the employer interfered with employee rights and refused to bargain in good faith when it failed to respond to a request for information concerning the termination of a bargaining unit member. A preliminary ruling was issued that the union's complaint stated a cause of action under RCW 41.56.140(1) and (4). The employer filed an answer and Examiner Robin A. Romeo conducted hearings in the matter on November 17, 2008, and December 11, 2008. The parties filed post-hearing briefs.

ISSUE PRESENTED

1. Did the employer interfere with employee rights and refuse to bargain in violation of RCW 41.56.140(1) and (4) when it

failed to provide information requested by the union during an investigation into allegations of misconduct and in processing the grievance following the termination of a bargaining unit member?

2. If the above violations are found, is an award of attorney fees to the union appropriate?

Based upon the record as a whole, the Examiner finds that the employer violated RCW 41.56.140(1) and (4) when it failed to provide information requested by the union during the investigation of allegations of misconduct and in processing the grievance concerning the termination of a bargaining unit member. The failure to provide information is found to be a continuing course of conduct by the employer and therefore, an award of attorney's fees is appropriate.

ANALYSIS

The Failure to Provide Information

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, governs the bargaining relationship between the union and the employer. RCW 41.56.030(4) defines "collective bargaining" and requires the parties to "to meet at reasonable times, to confer and negotiate in good faith."

Information Request Standards

The Commission has repeatedly held that the parties' duty to bargain in good faith:

> includes a duty to provide relevant, necessary information requested by the opposite party to a collective

> bargaining relationship for the proper performance of its duties in the collective bargaining process. . . . The duty to provide information turns on the circumstances of a particular case.

King County, Decision 6994-B (PECB, 2002) (numerous citations omitted).

The Commission has also held that the good faith bargaining obligation requires each party to negotiate and attempt to find a resolution when disagreements arise over the production of information:

> The party receiving an information request has a duty to explain any confusion about, or objection to, the request and then negotiate with the other party toward a resolution satisfactory to both. . . . This is consistent with viewing the duty to provide information as part of an ongoing and continuous obligation to bargain.

King County, Decision 6994-B.

In other words, an employer can't simply deny or refuse to provide the requested information but must request clarification and negotiate over it's objection to produce documents. *City of Bremerton*, Decision 5079 (PECB, 1995); *City of Tacoma*, Decision 5284 (PECB, 1995).

Good Faith Standards

In analyzing a claim that a party committed an unfair labor practice, "[t]he Examiner's task . . . is to determine whether the employer's conduct fell below the standard of 'good faith' that is imposed on both sides of the bargaining table. The Commission looks to the 'totality of the circumstances' in determining whether a party has engaged in unlawful bargaining tactics." *City of*

Wenatchee, Decision 8028 (PECB, 2003) (citing *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988)).

Interference Standards

Interference violations will be found when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or as a promise of benefit associated with the union activity of that employee or other employees. *City of Seattle*, Decision 3066-A (PECB, 1989). A "derivative" or automatic interference violation will be found where an employer has been found guilty of an unfair labor practice by domineering or assisting a union, discriminating against an employee for engaging in union activity or where an employer fails to bargain. *Washington State Patrol*, Decision 4757-A, (PECB, 1995).

The complaining party carries the burden of proof by a preponderance of the evidence that an unfair labor practice was committed. *Whatcom County*, Decision 7244-B (PECB, 2004); *City of Tacoma*, Decision 6793-A (PECB, 2000); WAC 391-45-270(1)(a).

ANALYSIS

In applying the legal standard to the facts here, a chronology of the union's information requests is relevant:

In April 2008, Mike McBee, the union's Recording and Correspondence Secretary, represented an employee, Vercell Jones, during an investigatory interview concerning allegations of misconduct of theft through the improper use of an employer gas card.

A second investigatory meeting occurred on May 20, 2008 wherein McBee requested copies of the policy that Jones was accused of violating. Three days later, McBee sent an e-mail to Gary Ikeda, the employer's Chief Legal Officer and Acting Human Resource Director, requesting the names of all employees accused of theft in the previous ten years.

On May 30, 2008, Mary Lou Webster, the employer's Labor Relations Analyst, responded to McBee's request by providing a list of names of individuals who had been investigated for theft or fraud and the disposition of those investigations. McBee responded to the information by stating that the list was incomplete and that he knew of other individuals who had been investigated for theft or fraud who were not on the list provided, including Tracey Lott, and reiterated his original request.

On June 5, 2008, Webster responded by providing McBee with an expanded list of names. Again, McBee's response was that the list was incomplete. He informed her that the list did not contain the names of teachers who were investigated for misuse of sick leave, thus expanding the request somewhat. On June 13, 2008, McBee repeated his request in an e-mail to Ikeda, included copies of previous requests and added the name of another employee, Bob Griffin, about whom no information had been provided.

On June 18, 2008, the employer terminated Jones. On that same day, McBee expanded his information request to include any and all data used by the employer in making the decision to terminate Jones, including handwritten notes taken at the investigatory interviews. This request was made to Jeanette Bliss, the employer's Human Resource Manager.

On June 27, 2008, the informal grievance meeting occurred. During that meeting Dave Westberg, the union's Business Manager, reiterated the request for the gas card policy which had been originally requested, but still had not been received by the union. McBee also reiterated his request for data concerning teachers accused of misuse of sick leave. The employer responded to McBee that no such documents existed. The request was reiterated in a subsequent e-mail sent by the union.

On July 2, 2008, the employer provided the union with a copy of a draft gas card policy.

On July 9, 2008, the union grieved the Jones termination and two days later, on July 11, Westberg e-mailed Ikeda reiterating the union's request for information.

On July 18, 2008, the instant complaint was filed. Subsequently, in August 2008, the employer provided the union with data concerning the teachers alleged misuse of sick leave, the drafts and final version of the gas card policy, and the information relating to sick leave on Tracey Lott.

CONCLUSION

The employer has committed an unfair labor practice. It failed to provide information to the union that it had requested during the course of the investigation and the subsequent processing of the grievance concerning the termination of Jones. Between the period of May 23, 2008, to July 18, 2009, the union, by two of its representatives, requested in writing and orally, information concerning the policy alleged to have been violated as well as information concerning treatment of other employees, namely teachers, a total of six times with limited responses from the

employer. That was a long enough of a period of time, to determine that no reasonable response was received. Silence is not an acceptable method to respond to an information request.

The argument by the employer that it eventually provided the information and that the delay was reasonable is not persuasive. The employer was under a duty to notify the union that it had questions about the information request or that it was in the process of complying with the request. A delay may have been justified if the employer had updated the union. Instead, the employer did not respond at all to the multiple requests to numerous individuals for a period of over five weeks.

The employer's additional argument was that the union possessed an Internal Control Audit from 2003, that proved that the information requested was not relevant, is also without merit. Testimony at the hearing reinforced the fact that the union was unaware of the results of the 2003 audit. The employer never communicated this position to the union and thus never gave the union the opportunity to respond. Again, the employer had a duty to communicate with the union and inform them if its position was that the information was not relevant and allow the union a chance to reply.

The employer's failure to respond was a violation of the employer's duty to bargain in good faith. The failure to bargain automatically results in a finding that there has been unlawful interference by the employer. *Skagit County,* Decision 8746-A (PECB, 2006).

Attorney's Fees

The union has requested that it be awarded attorney's fees. Attorney's fees are appropriate when there is a continuing course of conduct that shows an intentional disregard of the union's

collective bargaining rights. *Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982), *review denied*, 97 Wn.2d 1034 (1982).

From a search of the Commission's records it is apparent that the instant case is the fourth in a series of complaints filed by this union concerning the employers' failure to provide information and that has resulted in the employer having been found to have committed unfair labor practices.

The first complaint resulted in *Seattle School District*, Decision 5542-C, (PECB, 1997) wherein the Commission found that the employer had unlawfully failed to provide information requested by the union concerning allegations of misconduct against two bargaining unit members.

The second complaint resulted in *Seattle School District*, Decision 8976, (PECB, 2005) wherein the employer was found to have failed to provide the union with documents requested concerning allegations of misconduct against a bargaining unit member. Attorney's fees were awarded in that case based on previous decisions where the Commission had found that the employer had committed a failure to bargain.

The third complaint resulted in *Seattle School District*, Decision 9628-A, (PECB, 2008) wherein the Commission again found that the employer had failed and refused to provide the requested information.

Those prior cases are evidence of this employer's continuing course of conduct of failing to provide the union with requested information necessary to process grievances. The employer was clearly on

notice of the legal requirement to provide information to the union upon request but disregarded that requirement. The extraordinary remedy of attorney's fees is therefore appropriate.

FINDINGS OF FACT

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

2. The International Union of Operating Engineers, Local 609, is a bargaining representative within the meaning of RCW 41.56(3)(3) and represents a bargaining unit of classified employees at the Seattle School District.

3. In April 2008 Mike McBee, the union's Recording and Correspondence Secretary, represented an employee, Vercell Jones, during an investigatory interview concerning allegations of misconduct of improper use of a gas card.

4. A second investigatory meeting occurred on May 20, 2008, wherein McBee requested copies of the policy and procedures that the employee was accused of violating.

5. Three days later, McBee sent an e-mail to Gary Ikeda, the Chief Legal Officer and Acting Human Resource Director, requesting the names of all employees accused of theft in the previous ten years.

6. One week later, on May 30, 2008, Mary Lou Webster, Labor Relations Analyst, responded to McBee's request for names by providing him a list of names of individuals who had been investigated for theft or fraud and the disposition.

7. McBee responded to the request by stating that he knew of other individuals who had been investigated for theft or fraud who were not on the list provided and reiterated his request.

8. On June 5, 2008, Webster responded by providing McBee with an expanded list of names. Again, McBee's response was that the list was incomplete. He informed her that the list did not contain the names of teachers who were investigated for misuse of sick leave.

9. On June 13, 2008, McBee repeated his request in an e-mail to Ikeda, included copies of previous requests and added the name of another employee about whom no information had been provided.

10. On June 18, 2008, the employer terminated Vercell Jones. On that same day, McBee expanded his information request to include any and all data used by the employer in making the decision to terminate, including handwritten notes taken at the investigatory interviews. The request was made to Jeanette Bliss, Human Resource Manager.

11. On June 27, 2008, the informal grievance meeting occurred. During that meeting, Dave Westberg, the union's Business Manager, reiterated the request for the gas card policy which still had not been received by the union. McBee also reiterated his request for data concerning teachers accused of misuse of sick leave. The employer responded to McBee that no such documents existed. The request was reiterated in a subsequent e-mail.

12. On July 2, 2008, the employer provided the union with a copy of a draft gas card policy.

13. On July 9, 2008, the union grieved the termination and two days later, On July 11, Westberg e-mailed Ikeda reiterating the union's request for information. On July 18, 2008, the instant complaint was filed.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By failing and refusing to provide the union with information requested concerning the investigation and processing of the grievance of Vercell Jones, Seattle School District committed unfair labor practices in violation of RCW 41.56.140(1) and (4).

3. By the actions described in the foregoing Findings of Fact, the Seattle School District acted in a manner warranting an award of attorney fees consistent with the Commission's remedial authority granted by RCW 41.56.160.

ORDER

Seattle School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to provide the International Union of Operating Engineers, Local 609, information requested to process the grievance of Vercell Jones.

b. In any other way manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Reimburse the International Union of Operating Engineers, Local 609, for all attorney fees and expenses related to this complaint.

b. Respond to future requests for information from the union in a timely manner.

c. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Seattle School Board, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have

been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

f. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice attached to this order.

ISSUED Olympia, Washington, on the 14th day of May, 2009.

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 Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE
TO EMPLOYEES

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE *SEATTLE SCHOOL DISTRICT* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS:

WE UNLAWFULLY refused to provide the International Union of Operating Engineers, Local 609, information requested to process the grievance of Vercell Jones.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL respond to future requests for information from the union in a timely manner.

WE WILL reimburse the International Union of Operating Engineers, Local 609, for all attorney fees and expenses related to this complaint.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.