STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VANCOUVER POLICE GUILD, Complainant, vs. CITY OF VANCOUVER, Respondent.	CASE 14411-U-99-3569 DECISION 7013 - PECB
VANCOUVER POLICE GUILD, Complainant, vs. CITY OF VANCOUVER, Respondent.	CASE 14580-U-99-3645 DECISION 7014 - PECB RULING ON MOTION FOR SUMMARY JUDGMENT

David Snyder, Attorney at Law, appeared on behalf of the complainant.

Graham and Dunne, Attorneys at Law, by James M. Shore, Attorney, appeared on behalf of the respondent.

This case is before the Examiner for a ruling on a motion for summary judgment filed by the Vancouver Police Guild (union) on the basis of an answer filed by the City of Vancouver (employer). The motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

On February 23, 1999, the union filed the first of these unfair labor practice complaints against employer, alleging interference with employee rights in violation of RCW 41.56.140(1) in connection with an investigatory interview. Case 14411-U-99-3569. The

Executive Director issued a preliminary ruling on May 10, 1999, directing that the employer file an answer and further proceedings be held on a cause of action summarized as:

> Use by the employer of guidelines during internal investigation "witness" interviews, which resulted in the absence of the union's appointed attorney representative, and insistence by the employer on a "no-disclosure" rule for internal investigation interviews, creating an interference and chilling effect on the union's ability to represent members during grievances.

The undersigned was designated as Examiner to conduct further proceedings in the matter.

On May 17, 1999, the union filed the second of these unfair labor practice complaints against employer, again alleging interference with employee rights in violation of RCW 41.56.140(1) in connection with an internal affairs investigation. Case 14580-U-99-3645. The cases were consolidated for further proceedings.

Both complaints arise out of events taking place after an internal affairs investigation (99-01) was launched among the uniformed personnel of the Vancouver Police Department. The purpose of the investigation was to determine whether a particular police officer had been the victim of harassment or discrimination in violation of federal and/or state law.[1] The focus of investigation 99-01 was on

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[1] In an earlier internal investigation (98-31), a police officer apparently gave open and forthright answers to questions regarding an incident at a training session. As a result, two sergeants were disciplined. The rumor mill in the department soon indicated that officer was the subject of criticism, harassment, and ostracism in retaliation for his forthright answers to the questions in the internal investigation. The employer also had a concern that other employees were discriminating against the officer because of his national origin.

four sergeants who were members of the bargaining unit represented by the union: Anderson, Chapman, Creager, and Luse. Sergeant Nannette Kistler, who is a member of bargaining unit represented by the union, was asked to interview bargaining unit employees Horch, Rigali, Rickard, LeBlanc, Neal, and Reynolds.

The complaint alleges that the employer imposed restrictions on the attendance and participation of the union's attorney as the representative of the bargaining unit employees being interviewed. In its answer to the complaint filed on August 10, 1999, the employer admitted:

> [A]t the beginning of the interview, [the employer's agent] read Guild Attorney David A. Snyder a series of guidelines pertaining to the confidentiality of internal affairs investigations. ...

and

> City admits that Attorney Snyder refused to comply with the guidelines and was consequently asked to leave.

On September 27, 1999, the union filed its motion seeking entry of a summary judgment finding that the employer committed unfair labor practices by:

> (1) using guidelines during internal investigation witness interviews which purported to restrict the rights and actions of participating Guild representatives following the interviews,
>
> (2) excluding the Guild's designated representative from the interviews upon his refusal to agree to the guidelines,
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> (3) insisting on a gag order for internal investigation interviews that barred Guild members interviewed by the City from discussing their interview with their Guild representatives, and

> (4) insisting on a gag order for internal investigation interviews that barred Guild members serving as the representative of members interviewed by the City from discussing the interview with other Guild officials and representatives.

The union's claim that there is no issue of material fact was supported with affidavits/declarations from its attorney and from bargaining unit employees Anderson, Horch, LeBlane, Rickard, Rigali, and Rogers. The employer responded with a cross-motion for summary judgment, and briefing and affidavits/declarations in opposition to the union's motion.

DISCUSSION

Motions for summary judgment are processed under WAC 391-08-230, which states in pertinent part:

> A summary judgment may be issued if the pleadings and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that one of the parties is entitled to a judgment as a matter of law.

A summary judgment is only appropriate where the party responding to the motion cannot or does not deny any material fact alleged by the party making the motion. Monroe School District, Decision 5283 (PECB, 1985). A motion for summary judgment calls upon the Examiner to make final determinations on a number of critical issues, without the benefit of a full evidentiary hearing and record. The granting of such a motion cannot be taken lightly. Port of Seattle, Decision 7000 (PECB, 2000). However, entry of summary judgment "accelerates the decision-making process by dispensing with the hearing where none is needed". Renton School District, Decision 3121 (PECB, 1989).

The Right to Union Representation

In National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975), the Supreme Court of the United States ruled that an employer commits an "interference" unfair labor practice under the National Labor Relations Act if it denies an employee's request for union representation in connection with an investigatory interview. The principles enunciated in Weingarten have been embraced by the Commission in its administration of the fundamentally-similar provisions of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

Most recently, in Cowlitz County, Decision 6832 (PECB, 1999), an employer was found guilty of an unfair labor practice for denying the timely request of two employees for union representation in connection with a meeting the employer official characterized as a "counseling session", where the employees had advance knowledge that they were under investigation and the employer official actually questioned them about their conduct. The Examiner in that case agreed with the union that a "latent potential" for future discipline arising out of that session was sufficient to trigger the right to union representation. The fact that the two employees involved in the Cowlitz County case were not disciplined at or following the disputed meeting was not controlling. In City of Seattle, Decision 3593-A(PECB, 1991), the Commission found a violation where a senior employer official who was not present at the interview disciplined the employee based on reports of something the employee said at the interview. In the analysis of "right to union representation" issues, one must be mindful that the employee whose rights were enforced in Weingarten was disciplined for something she blurted out during the interview where she was denied union representation, rather than on the basis of the allegation for which the meeting was called.

Allegations Concerning Right to Union Representation

In this case, the union has made a compelling argument that its motion for summary judgment should be granted as to its allegations concerning denial of the employees' right to union representation.

The employer argues that the right to union representation is or should be inapplicable regarding the arranged interviews of these six employees, because they were being interviewed as "non-subject witnesses" rather than as persons under investigation. It supplied an affidavit from its interviewer, asserting that the employees were assured that they were not subjects of the investigation and that no discipline could result from their appearance. The interviewer also asserts that the employer wished no retaliation against union members. The employer's arguments are not persuasive.

The interviews at issue here, even when conducted by a bargaining unit member, are of the type which invoke the right to union representation under the Weingarten rule. As was stated in another recent decision involving the right to union representation:

> Avoidance of a violation would not have been difficult in this instance. [The union representative] was already present at the meeting, so that there was no issue about delay until a union representative could be present. All the employer would have had to do was to allow the union representative to remain in the meeting. Instead, [the employer official] made a call which was not his to make: **The right to representation is the employee's, not the employer's; if the reasonability of the employee's perceptions are to be decided at all, that is done by the Commission rather than by the employer.** Proof that [the person involved] or any other employer official reasonably had different perceptions of the situation is irrelevant. An employer official who refuses an employee's request for representation, ... assumes a substantial risk. ...

> City of Puyallup, Decision 6784 (PECB, 1999) [emphasis by **bold** supplied].

The employer took a risk by attempting to defuse the "objective considerations" with assurances that the "non-subject witness" employees were not subject to discipline. Nothing in this record justifies a result different from that reached in Cowlitz County, supra, where the employees were similarly assured they would not be disciplined.

In this case, the employer presented the union's attorney with a set of ground rules which he would predictably refuse to accept. Under those circumstances, the rejection of the limitations by the union's attorney does not relieve the employer of liability. One of the reasons for the participation of a union representative in an investigatory setting is to ferret out questions which, if answered by the employee, might lead to the discipline of that employee. Examples: Questions about information provided on the individual's original job application might be deployed by management to snare a wayward and vulnerable employee; questions asked one employee about the discrimination claims of another employee might elicit information about conduct of the employee being interviewed, in addition to information about the employee who claimed harassment or discrimination. Even if the employer has no intent or purpose to set traps or operate a dragnet, employees are entitled to union representation if they perceive a potential for discipline. Like the statement of the employee in Weingarten, statements by employees could come back to haunt them in an entirely different context.

Another view of the employer's action in this case is that it offered some sort of plea bargain for immunity: "You answer my questions and you will not be disciplined." The key word is "questions", where they were being posed to investigate

misconduct.[2] An employee is entitled to the assistance of a union representative to determine whether the questions being asked are (or become) "investigatory" with regard to the employee being interviewed, even if the employee was initially called in as what the employer terms a "non-subject witness".[3]

An exacerbating circumstance admitted by the employer here is that the bargaining unit employees personally observed their attorney depart from their interviews after being asked to do so by the employer. While things done and said between employer and union officials in pursuit of a bargaining relationship outside of the presence of bargaining unit employees may be evaluated by a different standard, things done in the presence of rank-and-file employees must be evaluated from the perspective of the reasonable perceptions of the employees. Because they were entitled to union representation under either Cowlitz County, supra, or City of Omak, Decision 5559 (PECB, 1997), the employer's display of power over the union was untoward, and provides basis for finding an independent "interference" violation under RCW 41.56.140(1).

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[2] Questions asked in an entirely different context do not invoke the Weingarten rule. For example, the right to union representation did not apply where an employee was invited to an interview for a promotion, and there was no indication whatever that misconduct was being investigated. Lewis County, Decision 6868 (PECB, 1999).

[3] The Examiner's use of the employer's terminology does not constitute acceptance or validation of it. A routine review of arbitration decisions filed as public records under WAC 391-65-130 has made the Examiner aware of an award issued in a grievance arbitration proceeding involving these parties. Arbitrator William A. Lang rejected the employer's characterization of the interviewed employees as "witnesses", and ruled that the employer violated the parties' collective bargaining agreement. While the arbitration award does not bind the Examiner under the deferral policy set forth by the Commission in City of Yakima, Decision 3564-A (PECB, 1991), it certainly conforms to the Examiner's reasoning.

There is no denial of the material facts as to the exclusion of the union representative from the investigatory interviews. A summary judgment is appropriate as to that part of the union's complaint.

Allegations Concerning a "No Disclosure" Order

The union's motion for a summary judgment is denied as to its allegations concerning a no-disclosure demand and Snyder's refusal to accept the limitations imposed by the employer.

The allegations in this case regarding a "gag" and limits on the participation of the union representative are reminiscent of City of Bellevue, Decision 4324 (PECB, 1993). The employer in that case decided to conduct an investigatory interview of a police officer in connection with an internal affairs investigation, the employee brought along his union representative, the employer imposed limitations on the participation of the union representative in the investigatory interview, another portion of the employer's policy sought to impose restrictions on disclosure of information by the employee being investigated and/or the union representative, and the Commission found the employer guilty of an unfair labor practice. In Bellevue, the language purporting to impose limits on the union representative was as follows:

> [The union] representative shall not disclose the nature or content of the interview to any person, [and] shall not participate in the interview except as an observer. ...

The Examiner in Bellevue ruled that the employer could not impose limitations on the role and participation of a union representative in a Weingarten situation. Although that Examiner relied on King County Decision 4299 (PECB, 1993), where a similar result was reached, neither of those decisions was based upon a *per se* rule (e.g., that all interviews where a union representative is barred or limited are illegal under RCW 41.56.140(1)).

Because the circumstances in the case now before the Examiner involve four bargaining unit employees who were to be interviewed separately, designation of another bargaining unit employee as the interviewer, and the absence of the union representative from the actual interviews, it would be inappropriate to elevate the Bellevue and King County precedents to the level of a *per se* rule by issuing a summary judgment in this case. Whether the imposition of no-discussion rules was illegal under Chapter 41.56 RCW, or was somehow defensible because of employer concerns about its liabilities under state and federal laws prohibiting discrimination and harassment, will be appropriate subjects for an evidentiary hearing in this case.

NOW, THEREFORE, it is

ORDERED

1. The complainant's motion for summary judgment is DENIED with respect to the allegations concerning imposition of a no-disclosure rule and imposition of limitations on the participation of the union representative. A hearing will be scheduled to take evidence on those subjects.

2. The union's motion for summary judgment is GRANTED with respect to the allegations concerning the right of employees to union representation, and those matters shall not be a subject of the hearing in this matter.

Issued at Olympia, Washington, on the 6th day of April, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner