Seattle School District, Decision 7349 (PECB, 2001)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	)	CASE 13603-U-97-3328 DECISION 7349 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Schwerin Campbell Barnard LLP, by *Kathleen Phair Barnard*, Attorney at Law, represented the complainant.

Perkins Coie LLP, by *Philip A. Thompson*, Attorney at Law, represented the respondent.

On December 10, 1997, International Union of Operating Engineers, Local 609, filed a complaint with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Seattle School District had committed unfair labor practices in violation of RCW 41.56.140. The Executive Director issued a preliminary ruling under WAC 391-45-110, framing the cause of action as:

> Employer interference with employee rights and refusal to bargain, by:
>
> 1. The employer's Assistant General Counsel advising a subpoenaed witness that he did not need to attend an arbitration hearing before Arbitrator Michael de Grasse on October 7 through October 9, 1997; and
> 2. The employer's berating of a grievant on October 9, 1997, for involving the subpoenaed witness in the arbitration hearing.

After being rescheduled three times, a hearing was held on November 24, 1999, before Examiner Paul T. Schwendiman. The parties filed post-hearing briefs in March 2000.

Based on the evidence, arguments, and precedents, the Examiner rules the employer has violated RCW 41.56.140(1).

BACKGROUND

Ray Jenkins (the grievant) was an employee of the Seattle School District, working within a bargaining unit represented by International Union of Operating Engineers, Local 609 (union). Brenda Little was an employee of the Seattle School District during the period relevant to this proceeding, working under an "assistant general counsel" title.

For as much as 20 years prior to events involved in this proceeding, the grievant and his brother, Terry Jenkins, had a relationship with Brenda Little's family. Terry Jenkins lived with the Little family for seven or eight years. That relationship was described in this record as follows:

> Q. (By Mr. Thompson) How long have you known Ray Jenkins?
>
> A. (By Brenda Little) Well, I know Ray's brother Terry innately (*sic*) because he lived with my parents for seven, eight - six, seven years. I know Ray through conversations with my dad, and I met Ray. And I know of Ray's mother because of my mom and dad's interest in Terry. And to put it simply, my dad loved the Jenkins boys. So he helped them whenever he could and did whatever he could for them including Terry and Ray.

Transcript 77.

Brenda Little's brother, Gregory (Greg) Little, was also a part of that social/familial relationship.

On an unspecified date prior to March 19, 1997, the grievant became aware that he was or might become the subject of an investigation. The grievant contacted Brenda Little, who told him she had not heard anything about an investigation, and that she had heard he was doing pretty good.

The Seattle School District (employer) discharged the grievant on March 19, 1997, on allegations of misconduct. The grievant contacted the union, and a grievance was filed to protest his discharge. The grievant told the union that Greg Little had some useful information about the grievance, and the union contacted Greg Little about his potential testimony.

After contacting Greg Little and learning the extent of his knowledge, a union representative told Greg Little that he would probably be contacted by a union attorney later in the process. During that initial contact, in April of 1997, Greg Little gave no indication he was unwilling to testify.

The discharge grievance was processed to arbitration, and a hearing before Arbitrator Michael de Grasse was scheduled for October 9, 1997. Several days before the scheduled arbitration hearing, a union attorney telephoned Greg Little about testifying. After discussing the gist of the testimony, the attorney and Greg Little discussed where he preferred to be served with a subpoena. Again, Greg Little gave every indication that he was willing to testify. The union mailed a subpoena to Greg Little on October 3, 1997.

Between October 3 and 8, 1997, Greg Little telephoned Brenda Little while she was at work. Testifying in this unfair labor practice

proceeding, Brenda stated that Greg explained he had been subpoenaed for an arbitration hearing, and wanted to know whether he had to obey. After researching the issue, Brenda telephoned Greg and advised him it was up to him to decide whether to attend the arbitration hearing, because the subpoena was an invitation to appear lacking the force of a superior court subpoena.

When contacted by a union representative on October 8, 1997, Greg Little stated: (1) that he would not attend the hearing; (2) that he had been advised by "his attorney" that he did not have to attend; and (3) that he had been advised by "his attorney" that his testimony would not help the union anyway. The union had a second subpoena personally served on Greg Little.

On an unspecified date prior to October 9, 1997, an employer official telephoned John Little, the father of Brenda Little and Greg Little. The employer official was acting on mistaken information as to the identity of the witness who was being subpoenaed in the arbitration proceeding. John was gravely ill at that time. Brenda mistakenly believed the contact had been made by the union, and became upset when she learned of the contact.

The arbitration hearing was convened on October 9, 1997, in the employer's headquarters building. The union was represented by Kathleen Phair Barnard; the employer was represented by Esther Ervin, who had the "assistant general counsel" title.[1] When Greg Little did not appear, Barnard explained the situation to Arbitrator de Grasse and to Ervin.

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[1] Ervin was new to the employer's staff, and the grievant's case was her first such proceeding.

During the lunch hour on October 9, 1997, Ervin discussed the arbitration proceedings and subpoena with Brenda Little. Brenda apologized to Ervin for making her job harder.[2]

During a recess of the arbitration hearing in the afternoon of October 9, 1997, Brenda Little approached the grievant and the union attorney in a hallway. Testifying in this unfair labor practice proceeding, Brenda admitted that she spoke loudly; that she told the grievant her family had done enough for his family; and that she said she couldn't understand why the grievant was involving her father in the grievance process, because he was very ill. She testified that she told the union attorney that "Greg was my brother, and he had called me for legal advice. And, bar anything, I was going to, you know, accommodate him and give him legal advice."[3] Brenda expressed frustration with the involvement of her family "behind [her] back",[4] after she had taken care to distance herself from the grievance.[5] She also testified she felt it "was dirty pool to intrude on my family like that."[6] Brenda stated that she had advised Greg he did not have to obey the subpoena, and she asked how the union attorney understood the law. When the union attorney replied that the subpoena had to be obeyed, Brenda "just did not believe that her legal advice to me was persuasive . . . ."[7]

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2 Transcript 99.

3 Transcript 95.

4 Transcript 94.

5 Brenda Little had responsibility for student rights and discipline, and for the employer's special education and bilingual departments.

6 Transcript 95.

7 Transcript 95.

When the arbitration hearing reconvened, the union attorney made an on-the-record statement concerning the conversation that had just occurred in the hallway. At that point, Ervin acknowledged her discussion with Brenda Little during the lunch break, and acknowledged that Brenda had informed her of the advice given to Greg Little. Arbitrator de Grasse held the arbitration record open for 14 days, to give the union an opportunity to depose Greg Little.

Testifying in this proceeding, Brenda Little admitted that she had further discussion of the arbitration matter with Greg Little after the arbitration hearing, and that she offered to find (and pay for) some other attorney to represent Greg during the deposition.

The union scheduled a deposition of Greg Little, but he did not appear. This unfair labor practice complaint followed.

POSITIONS OF THE PARTIES

The union contends the employer interfered with employee rights when its agent: (1) Told Greg Little the arbitration subpoena was not enforceable; (2) told Greg that his testimony would not help the union; and (3) berated the grievant for his handling of the grievance. The union asks the Commission to rely on National Labor Relations Board (NLRB) decisions involving similar facts.[8]

The employer argues that it committed no unfair labor practice, because the subpoenas were not legally valid. In addition, the employer asserts that Brenda Little acted as her brother's personal attorney throughout the events involved, and that Commission

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[8] The union did not pursue (and is deemed to have abandoned) a "refusal to bargain" theory.

precedent establishes that an employer does not owe any duty to make witnesses available to a union.[9]

DISCUSSION

Admission of Declaration Reversed

Upon further reflection and research, the Examiner concludes that a declaration of Greg Little which was offered in evidence as Exhibit 6 at the hearing in this proceeding, and later offered in redacted form as Exhibit 9, should not have been admitted over the union's objection. The earlier ruling on those exhibits is vacated, and the motions for their admission are now denied.

As a state administrative agency, the Commission is governed by the state Administrative Procedure Act, Chapter 34.05 RCW. That statute states, at RCW 34.05.452(1), that "[e]vidence, including hearsay evidence, is admissible if in the judgement of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely on in the conduct of their affairs." However, RCW 34.05.449 requires a presiding officer to "afford to all parties the opportunity . . . *to conduct cross-examination* . . . [t]o the extent necessary for full disclosure of all relevant facts and issues . . . ." (emphasis added).

The union aptly protested a lack of opportunity to cross-examine Greg Little in this case. The maker of a declaration offered in

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[9] The employer did not pursue (and is deemed to have abandoned) affirmative defenses stated in its answer that the complaint was barred by: The "culpability" of the grievant and the union's attorney in the hallway discussion; and by the doctrines of waiver and estoppel.

place of live testimony is, by definition, not available for cross-examination. Any number of unanswered questions may bear upon the reliability of a declaration. Without benefit of cross-examination, the Examiner cannot: Measure the existence or reliability of the declarant's sense perceptions; determine whether the declarant was biased; discern whether the declarant personally observed the incident or was repeating hearsay; or determine whether the person who signed the declaration is actually the author of the words it contains.[10] Thus, an Examiner cannot ascertain whether a declaration meets the standard of evidence on which reasonably prudent people would rely.

The evidentiary ruling was made at the hearing, on the basis of colloquy which occupied less than one page of the transcript. Affidavits and declarations are highly unusual in proceedings before the Public Employment Relations Commission.[11] This case does not provide any basis for a deviation from established practices.

The Commission has Jurisdiction

Legal Standard -

It is an unfair labor practice for a public employer to "interfere with, restrain, or coerce public employees in the exercise of their

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[10] In this case, it is clear that the declaration was prepared in the office of the employer's attorney.

[11] Apart from temporary relief motions under WAC 391-45-430, where affidavits/declarations have a limited purpose unrelated to the merits of the case, the Commission has only accepted such documents in limited circumstances: *Toutle Lake School District*, Decision 2659 (PECB, 1987) [by stipulation of the parties]; *Bates Technical College*, Decision 5575-B (CCOL, 1996) and *Bellingham Technical College*, Decision 4521 (CCOL, 1993)[in support of a motion for dismissal or summary judgment]; *King County*, Decision 6291 (PECB, 1998)[as proof of service].

rights guaranteed by" the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. RCW 41.56.140(1). The Public Employment Relations Commission has jurisdiction to hear and determine unfair labor practice complaints, and to issue remedial orders where violations are found. RCW 41.56.160. A violation is found under RCW 41.56.140(1), when "a complainant . . . establish[es] that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force, or promise of benefit associated with their union activity." No evidence of anti-union animus is required to prove an interference violation. *City of Omak*, Decision 5579-B (PECB, 1998), at pages 18-19. Whether the employees' reasonable perception is accurate is legally irrelevant to the issue of whether an interference violation exists. The Commission has held that, "[t]o establish an 'interference' violation under RCW 41.56.140(1), a complainant need only establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity." *City of Vancouver*, Decision 6732-A (PECB, 1999), at page 9.

Union Has Stated Cause of Action -

The issue here is whether the actions of an employer agent (Brenda Little) interfered with the exercise of employee rights protected by Chapter 41.56 RCW. The employer argues that the union has not stated a viable claim, and that the union is trying to enforce the contractual grievance and arbitration clauses through its unfair labor practice complaint, but the Examiner rejects those assertions. The merits of the grievance are not at issue here.[12]

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[12] The Commission does not assert jurisdiction to remedy contract violations through the unfair labor practice provisions of the statute. *City of Walla Walla*, Decision 104 (PECB, 1976), has been cited in at least 270 other decisions issued by the agency.

The employer relies upon *King County*, Decision 6772-A (PECB, 1999), where the Commission affirmed dismissal of a union complaint alleging that an employer refused to bargain and violated its duty to provide information when it did not require its officials to attend and speak in a pre-arbitration procedure,[13] but *King County* is inapposite to this case. This union neither alleges any contractual violation, nor seeks any contractual remedy. The happenstance that Greg Little was subpoenaed for an arbitration hearing conducted under the parties' collective bargaining agreement does not transform the union's claim into one for enforcement of the underlying contract. The employer's focus is too narrow, and fails to consider the overall context of the disputed behavior and this union's actual allegations.

De Grasse Award Irrelevant -

The employer offered the arbitration award issued by Arbitrator de Grasse as evidence in this case, and its brief hints that the arbitrator's opinion should persuade the Commission. The arbitrator denied the grievance, but that is not helpful in this case.

The Commission, not an arbitrator, has jurisdiction to decide whether state law has been violated. *Mason County*, Decision 3108 (PECB,1989). The reasons behind the failure of Greg Little to respond to the arbitration subpoena were no more than a side matter in the arbitration proceeding, but are directly at issue before the Commission. Unlike the arbitrator, the Examiner has heard witnesses testify, under oath, concerning what transpired between Brenda Little and Greg Little, as well as on what transpired in the hallway during the break in the arbitration hearing.

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[13] That union asked for an order directing the employer to fully participate in the grievance process and make witnesses available.

The Commission's "deferral to arbitration" policy is inapposite. It only applies to "waiver by contract" defenses, where the employer conduct at issue in an unfair labor practice complaint is arguably protected or prohibited by a collective bargaining agreement in effect between the parties at the time of the alleged unilateral change. WAC 391-45-110(3)(a)(i). The arbitration award issued by Arbitrator de Grasse is not relevant to the question of whether the employer interfered with a potential witness,[14] and has no probative value in this proceeding under the statute.

Participation in Protected Activity -

Chapter 41.56 RCW protects employee rights, and the legislature has directed that the chapter be liberally construed as "intended to be additional to other remedies. . . ." RCW 41.56.905. In addition to specific mention of grievance procedures in defining the mutual obligations of employers and unions to bargain collectively (in RCW 41.56.030(4)), the favorable view of the legislature toward grievance arbitration is evidenced in a stated preference for that process (in RCW 41.58.020(4)), in its specific authorization of grievance arbitration (in RCW 41.56.122(2)), in making agency staff members available to arbitrate grievances at state expense (in RCW 41.56.125), and in its requiring that a grievance arbitration procedure be deemed part of any arrangement implemented by an employer following an impasse in negotiations (in RCW 41.56.100). The Commission has consistently held that filing and processing grievances are activities protected by Chapter 41.56 RCW from

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[14] Arbitrator de Grasse volunteered a statement in his decision, indicating there was no showing that Greg Little's failure to testify was the result of any plan other than the union's decision not to pursue him further. That statement is disregarded as *dicta*, since the arbitrator received no evidence, and heard only argument, on the subject.

employer interference. In *Valley General Hospital*, Decision 1195 *aff'd* Decision 1195-A (PECB, 1981), the Examiner wrote:

> If the state legislature has decided to allow public employees to designate representatives for collective bargaining without interference and has embraced grievance procedures in its definition of collective bargaining, then the integrity of the statute would demand that represented employees have a protected right under the Act to pursue grievances through a grievance procedure in their contract.

These protections extend to other employees in a bargaining unit. In *City of Omak*, Decision 5579-A (PECB, 1997), the Examiner found an interference violation, writing at page 10:

> [T]he complainants have sustained their burden of proof to show that the employees reasonably perceived that their association with and support of [a grievant] in the grievance procedure led to threatened disciplinary actions and increased managerial scrutiny.

The Commission has also decided that constraints on a union's access to the grievance procedure, or on its ability to effectively represent grievants in that process, necessarily interferes with protected rights of the represented employees.

> [T]he Commission must be suspect of theories which would allow the right of access to the grievance procedure [to] be waived or bargained away by the exclusive bargaining representative. Such proposals diminish the statutory rights of the public employees in the bargaining unit. . . . Thus, to protect the rights of represented employees, the rights of their duly certified exclusive bargaining representative must also be protected.

City of Bellevue, Decision 3129 (PECB, 1989) at page 8.

Just as testifying in Commission proceedings is a protected activity, under *Mansfield School District*, Decision 5238-A (EDUC, 1996), the Commission extended protections of the statute to a bargaining unit member where the employee went to court after his grievance was denied at the highest step of a grievance procedure which evidently lacked arbitration:

> Logically, the same protections [as those granted to employees filing charges or testifying before the agency] would devolve to employees for their efforts in the courts to enforce rights secured by the collective bargaining statute or a collective bargaining agreement

Seattle Public Health Hospital, Decision 1911 (PECB, 1984), at page 18.

The logic of the cited precedents supports invalidating employer interference with witnesses in an arbitration proceeding, and there is no apparent reason to treat employer interference with grievance arbitration differently from employer interference with witnesses in a Commission proceeding. In both situations, bargaining unit members are exercising protected rights in pursuing and participating in resolving collective bargaining disputes affecting them individually and/or as part of a group. As the Commission noted in *Seattle Public Health Hospital, supra*, the forum in which the protected rights are being exercised does not affect the outcome.

The fact that Greg Little was neither an employee of the employer nor a bargaining unit member does not affect the outcome of this case. The impact of the disputed employer conduct here was on the grievant and on other bargaining unit members, when the intervention of an employer official prevented their union from obtaining testimony from a witness.

Employer Responsible for Brenda Little's Actions

Legal Status of Arbitration Subpoena Irrelevant -
In asserting there was a legal defect with regard to the subpoenas served on Greg Little, the employer would have the Examiner disregard the fact that Greg Little learned of any potential legal defect from employer attorney Brenda Little. The Examiner finds any legal cloud concerning the subpoenas is irrelevant here.

Employee Viewpoint Determinative -
The employer has defended the actions of Brenda Little on the basis that she was giving legal advice to her own brother. In doing so, it adopts the viewpoint of Brenda Little. Neither a familial relationship nor a lack of intent to interfere with the exercise of protected rights is a defense, once the complainant establishes that employees could reasonably perceive the act as interference.

NLRB Precedent Persuasive -
Decisions issued by the NLRB and the federal courts provide persuasive precedent in situations where the federal and state labor relations statutes are similar or parallel in purpose. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1981). Although Chapter 41.56 RCW and the National Labor Relations Act vary as to details, both laws protect employees from interference under similar definitions of interference. Therefore, the Commission can consider NLRB precedent in this case.

The NLRB has decided a number of cases in which various employer agents told employees subpoenaed for Board hearings that it was their decision whether to attend or not, because Board subpoenas weren't valid (notwithstanding the subpoena authority conferred on the NLRB by Section 11(1) of the NLRA) or weren't self-enforcing. For example:

- In *Bobs Motors, Inc.*, 241 NLRB 1236 (1979), an employer agent told an employee that an NLRB subpoena was not enforceable. Reversing a decision which found the comment was not clearly erroneous and did not discourage the employee from attending and testifying, the Board reasoned that the statute and the Board's regulations required witnesses to obey the Board's subpoenas, and that the employer agent's words were "tantamount to advising [the subpoenaed employee] that he did not have to comply" with the subpeona. *Bobs Motors, supra,* at page 1236. Relying on its well-settled precedent, the Board then found the employer had unlawfully interfered with employee rights.

- In *New Life Bakery, Inc.*, 301 NLRB 421 (1991), an interference violation was found where the employer told subpoenaed employees that the subpoenas for a representation hearing were invalid, and that they could be permanently replaced if they obeyed the subpoenas.

- In *Newland Knitting Mills*, 165 NLRB 788, 793-4, the Board found the employer committed an interference unfair labor practice by telling 12 to 15 subpoenaed employees they couldn't all attend the representation hearing, that they should choose five witnesses among themselves, and that anyone outside that five would be fired for attending. The Board noted the employer hadn't told the Board or the union that the number of subpoenas would create any production problems, and held that "[c]onduct which conveys to employees the idea that they may be penalized for honoring Board subpenas [*sic*] interferes" with their rights. 165 NLRB at 795.

The NLRB has extended its reasoning to other scenarios. In *Reeves Brothers, Inc.*, 277 NLRB 1568 (1986), employees were asked in writing to appear for pretrial General Counsel interviews, and the

employer told the employees they didn't have to comply because the letter wasn't a subpoena. The NLRB found the behavior unlawful, because it communicated the employer's discouragement of employee participation in the General Counsel's case preparation. The NLRB even found it was unlawful for an employer to ask a former supervisor whether he had been subpoenaed by the NLRB. The NLRB saw both the question and employer silence about what steps it might take as implied threats against the former supervisor. *Epic Security Corp.*, 325 NLRB 772 (1998).

The reasoning used in these NLRB decisions is persuasive. Like the Commission, the NLRB protects employees from employer interference with their collective bargaining rights. Both agencies consider grievance processing to be a protected right.

Brenda Little Reasonably Perceived as Employer Agent -
The outcome of this case turns on whether Brenda Little interfered with protected employee rights when she advised Greg Little that the subpoena wasn't enforceable. Commission precedents have held employers responsible for the actions of their agents working under a variety of titles. *See Clover Park School District*, Decision 6072-A (EDUC, 1998) [school principals]; *City of Kent*, Decision 5417 (PECB, 1996) [human resources director]; *Grant County*, Decision 2233 (PECB, 1986) [judges action gave county commissioners apparent authority to negotiate on their behalf]; and *Toutle Lake School District*, Decision 2659 (PECB, 1987) [various supervisors]. Even where non-supervisory employees are clothed with authority, the employer is bound by their behavior if other employees could reasonably perceive them as employer agents. *See Port of Seattle*, Decision 1624 (PECB, 1983) [fire lieutenants and captains were reasonably perceived by employees as employer agents, because they attended special management meetings, relayed information from

management to bargaining unit members, and were treated by the employer as if they were supervisors].

When the grievance underlying this dispute was arbitrated, Brenda Little was a staff attorney for the employer, working under an "assistant general counsel" title. Attorneys act on behalf of their clients, and an in-house attorney is reasonably perceived as clothed with authority to act on behalf of his or her employer.

The employer claims Brenda Little was not acting as its lawyer when she responded to the request of Greg Little for legal advice, citing Brenda's testimony at the unfair labor practice hearing, a claimed lack of any employer policy prohibiting her behavior, and a claimed lack of any violation of the Rules of Professional Conduct that govern lawyer behavior. The employer's arguments are not persuasive.

- First, and fatal to the employer's approach for reasons explained above, is that Brenda's intent is legally irrelevant. This case must be decided from the perspective of bargaining unit employees. When Brenda gave legal advice to Greg concerning a case in which her employer was a party, Brenda was occupying the office provided to her by the employer, was on the employer's time, and was using the employer's telephone. Brenda was in the employer's facility as an employee during the confrontation in the hallway.

- Second, Brenda's testimony about employer policies was not supported by any other evidence in this record or any legal argument. If such a policy has ever existed, the policy document should have been made an exhibit in this proceeding.

- Third, the Public Employment Relations Commission is not the appropriate forum to enforce the Rules of Professional Conduct

which are imposed by the courts upon attorneys in regard to the practice of law.[15]

In this case, the position and title held by Brenda Little gave bargaining unit members reasonable grounds to conclude Brenda Little was acting as an employer agent.

Brenda Little's Advice Concerning Subpoena

Brenda Little acknowledged that she told Greg Little that the subpoena was only an invitation to appear, and that it was up to him to decide whether to attend the arbitration hearing. Even if

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[15] Rule of Professional Conduct 1.7 CONFLICT OF INTEREST; GENERAL RULE, includes:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
> (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> (2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
> (2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

that advice would have been valid coming from a non-aligned attorney, that advice constituted an unlawful obstruction of the grievance arbitration process (and an interference with the rights of bargaining unit employees under Chapter 41.56 RCW) when coming from an attorney for one of the parties to the grievance arbitration proceeding. The advice given by Brenda could clearly have affected the outcome of the grievance arbitration procedure. It is impossible to tell what the testimony of Greg would have been if he had not received the advice provided by Brenda.

Employees could reasonably interpret Brenda Little's comments about the subpoena as employer opposition to attending or giving testimony in future arbitration proceedings, leading to uncertainty and fear that employees who obey union subpoenas in the future could be disciplined or disadvantaged in some way.[16] Through the act of its agent, Brenda Little, the employer interfered with the right of employees to participate in the grievance process and violated RCW 41.56.140(1).

Brenda Little's Advice about Value of Testimony

When asked to explain why he was refusing to attend the arbitration hearing, Greg Little told union agents that he'd been advised his testimony wouldn't help the union. The record lacks any evidence that Greg discussed this matter with anyone but Brenda Little after

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[16] Brenda Little's actions could also be seen as in conflict with the policy agreed upon by the employer in Article XVII, Section B.1 of the parties' contract:

> All individuals who might possibly contribute to the acceptable judgment of a grievance are urged to provide any relevant information they may have to the grievant and/or the district administration with full assurance that no reprisal will follow by reason of their involvement in the grievance.

his initial interviews with the union agents. Greg's comment was mentioned before Brenda was called as a witness in this proceeding, but she was not asked about it. The Examiner concludes Brenda Little made the comment.

Brenda Little claimed to know nothing about the grievance; she described leaving rooms to avoid discussions of the grievance while it was being processed. Her legal career indicates no experience with, or knowledge about, labor law. Experience in the field would have taught her that one cannot be certain what a witness will say in an arbitration hearing until he or she testifies. The factors involved include the lack of discovery and the difference between a friendly interview and the formality of testifying under oath. Brenda Little had absolutely no business giving an opinion about the usefulness of potential testimony to the union. The union was entitled to form its own opinion about whether to call Greg Little as a witness; only the arbitrator could decide the ultimate value of the testimony actually given. Here, the union had determined in advance of the arbitration hearing that Greg's testimony was of sufficient value to warrant his re-interview and issuance of a subpoena to him. By Brenda Little's comment, the employer trespassed on rights of bargaining unit members.

The Confrontation in the Hallway

Brenda Little loudly chastised the grievant in a public hallway, and in the presence of the union's attorney, during a break in the arbitration hearing. The employer has not cited any legal basis for the actions of Brenda Little in this regard, and none exists.

A similar temper tantrum by an employer official was found unlawful in *City of Omak, supra*. Moreover, acceptance of Brenda Little's claim that she and her family were immune from involvement

in the processing of the grievance would constrain the right of bargaining unit members to file, process, and participate in the resolution of grievances. Such an undermining of statutory rights cannot be accepted. Brenda Little's efforts to shield her family members from involvement in a grievance process have caused the employer to interfere with employee rights in violation of RCW 41.56.140(1).

THE REMEDY

RCW 41.56.160 directs the Commission to formulate an appropriate remedy where an unfair labor practice violation is found. The Supreme Court of the State of Washington has given a broad interpretation to the Commission's authority. *Municipality of Metropolitan Seattle*, Decision 2845-A (PECB, 1988), *aff'd*, 118 Wn.2d 621 (1992). In a previous case involving this same employer, the Commission wrote, "[R]emedial orders in unfair labor practice proceedings are designed to put the injured party back in the same situation it would have enjoyed if no unfair labor practice had been committed." *Seattle School District*, Decision 5733-B (PECB, 1998), at page 21.

In this case, the actions of Brenda Little prejudiced and tainted the grievance arbitration proceedings before Arbitrator de Grasse in multiple ways:

- It is impossible to know what the unaffected testimony of Greg Little would have been;

- It is impossible to know the effect on Arbitrator de Grasse during the morning of October 9, 1997, when he was told about

the failure of Greg Little to appear in response to the union's subpoena;

- It is impossible to know the effect on Arbitrator de Grasse during the afternoon of October 9, 1997, when he was told about the confrontation that had occurred in the hallway;

- It is impossible to know the effect on Arbitrator de Grasse when the union did not submit a deposition of Greg Little following the arbitration hearing; and

- It is impossible to know what Arbitrator de Grasse would have concluded, if he had heard Greg Little's unaffected testimony.

The Examiner thus rules that the tainted proceeding must be set aside to put the grievant and union back in the position they would have enjoyed if no unfair labor practice had been committed.

The employer will be ordered to vacate and purge the arbitration award issued by Arbitrator de Grasse, to reimburse the union for all costs it incurred (including any administrative fees, the arbitrator's fees and expenses, and the union's attorney fees) for that arbitration proceeding, and to restore the grievance to the pre-arbitration step of the grievance procedure set forth in the parties' collective bargaining agreement.

If the employer and union resolve the Jenkins grievance without invoking the arbitration step of their contractual grievance procedure, that will put an end to the matter. If the union chooses to re-arbitrate the grievance, the employer and union shall select an arbitrator other than Michael de Grasse. Additionally, the employer shall not: (1) call Greg Little as a witness in the new arbitration proceeding, (2) make any reference to Greg Little

or this proceeding in the new arbitration proceeding, or (3) make any arguments in the new arbitration proceeding concerning the timeliness of the grievance or any limitation on the employer's liability for back pay if the grievance is sustained.

The Notice to Employees -
Where an unfair labor practice violation is found, the Commission routinely requires the posting of a notice to employees and requires the reading of the notice into the record and minutes of a public meeting of the employer, so that the news media and the general public can be apprised of the actions of their public officials. Here, the union asks that the employer be required to mail the notices to the residences of bargaining unit employees.

The remedy sought by the union would be unusual, if not extraordinary, under Commission precedent. There is NLRB precedent for such an order, but only in unusual circumstances. In *Manno Electric, Inc.*, 321 NLRB 278 (1996), the employer was ordered to mail notices to bargaining unit employees if it closed the location where they worked or went out of business.

The union's justification for its proposed remedy is rooted in an alleged failure of this employer to properly post and maintain the remedial notices in past cases. The Examiner is not persuaded. The Commission's procedures include a "compliance docket" where cases in which an unfair labor practice violation has been found are monitored by the agency staff until either: (1) satisfactory compliance is tendered and reported to the Commission, or (2) the Commission authorizes the Attorney General to commence enforcement proceedings under the authority delegated by the legislature in RCW 41.56.160(3). If this union failed to pursue the administrative procedures which were available to it in the past cases it now cites (e.g., by initiating or following through with a compliance

hearing), this case does not provide a vehicle to revive those proceedings.[17] The customary posting of notices will suffice.

In the unusual circumstances of this case, where the unfair labor practice was committed by an "assistant general counsel" who has since been promoted to "deputy general counsel" and can be presumed to have a direct or close relationship with the elected members of the Board of Directors of the Seattle School District, the Examiner concludes that a deviation from the customary post-read-attach remedy is necessary.[18] Brenda Little has so exceeded the bounds of the law, that it is appropriate to reassure employees that the employer at the highest level and Brenda Little both recognize their legal obligations, and intend to comply with the Commission's order. Thus, the Examiner requires that the notice to employees be signed personally by both the chairperson of the Board of Directors and by Brenda Little (if she is still employed by the Seattle School District).

Extraordinary Remedies -

The Commission has ordered respondents to pay the attorney fees of successful complainants, under certain circumstances. In *Seattle School District*, Decision 5733-B (PECB, 1998), the Commission explained it grants attorney fees as an extraordinary remedy: (1) when necessary to make the order effective and the defense was frivolous, groundless, and without foundation; or (2) to counter

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[17] Where a complainant fails to object to the tender of compliance submitted by a respondent, or withdraws its objections in reliance on a respondent's promises, there will be no record of any deficiencies regarding posting or maintenance of posted notices.

[18] Under the customary form of the post-read-attach remedy order, any authorized representative of the respondent can sign the notice.

a respondent's disregard for its statutory obligations.[19] In this case, which is clearly the first of its type before the Commission, the Examiner is unable to conclude that an award of attorney fees to the union for this proceeding is also required.

FINDINGS OF FACT

1. The Seattle School District is a public employer within the meaning of RCW 41.56.030(1). In October of 1997, Brenda Little was employed by the Seattle School District with the title of "assistant general counsel."

2. International Union of Operating Engineers, Local 609, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of an appropriate bargaining unit of school security specialists employed by the Seattle School District.

3. Ray Jenkins was employed by the Seattle School District, as a member of the bargaining unit represented by Local 609. Jenkins and his brother had close social ties with John Little and Greg Little who were, respectively, the father and brother of Brenda Little.

4. The employer discharged Jenkins on March 19, 1997, and the union filed a grievance protesting that discharge.

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[19] The Commission affirmed an award of attorney fees in that case because the employer had pursued a frivolous defense to great lengths, had disregarded and repeatedly mischaracterized long-standing Commission policy on deferral to arbitration, and its agents had flagrantly disregarded the employer's bargaining obligations.

5. Jenkins told the union that Greg Little had information relevant to the grievance, and a union representative contacted Greg Little in April of 1997. During that initial interview, Greg Little described his knowledge and gave no indication that he would resist giving testimony in grievance arbitration proceedings concerning the discharge of Jenkins. Specifically, Greg Little did not object when the union representative said that a union attorney would probably contact him later.

6. The grievance protesting the discharge of Jenkins was advanced through the grievance procedure of the applicable collective bargaining agreement to arbitration. Michael de Grasse was selected as the arbitrator, and a hearing was scheduled to be held in the employer's administration building on October 9, 1997.

7. One of the union's attorneys telephoned Greg Little several days before the arbitration hearing. Again, Greg Little described his knowledge and gave no indication that he would resist giving testimony in grievance arbitration proceedings concerning the discharge of Jenkins. The discussion included where Greg Little wanted to be served with a subpoena, and the union mailed a subpoena to Greg Little on October 3, 1997.

8. On an unspecified date between October 3, 1997, and October 8, 1997, Brenda Little accepted a telephone call from Greg Little while working at her office on the employer's premises. Greg Little told Brenda Little that he had been subpoenaed to testify as a witness in the arbitration proceeding.

9. After the telephone conversation described in paragraph 8 of these Findings of Fact, Brenda Little performed legal research, and then telephoned Greg Little from her office on the

employer's premises. Brenda Little told Greg Little that the subpoena was just an invitation to appear, that he did not have to obey the subpoena, and that his testimony would not help the union. There is no evidence that Greg Little had contact with or received any legal advice on the subpoena from any person other than Brenda Little.

10. When contacted by a union agent on October 8, 1997, Greg Little stated that he had been advised he did not have to attend, and that his testimony would not help the union. The union thereupon had a second subpoena personally served on Greg Little at his place of employment.

11. The arbitration hearing was convened on October 9, 1997, in the employer's headquarters building. The union was represented by Kathleen Phair Barnard; the employer was represented by Esther Ervin, who had the title of "assistant general counsel."

12. When Greg Little did not appear, the union attorney explained the situation to Arbitrator de Grasse and to Ervin.

13. Ervin discussed the arbitration proceedings and subpoena with Brenda Little during the lunch hour on October 9, 1997. Brenda Little apologized to Ervin for making her job harder.

14. During a recess of the arbitration hearing in the afternoon of October 9, 1997, Brenda Little confronted Jenkins and the union attorney in a hallway of the employer's administration building. Brenda Little spoke loudly, told the grievant her family had done enough for his family, expressed frustration with the involvement of her family "behind [her] back," identified Greg Little as her brother, and stated that she had advised Greg Little he did not have to obey the subpoena.

15. When the arbitration hearing reconvened, the union attorney made an on-the-record statement concerning the conversation that had just occurred in the hallway. At that point, Ervin disclosed, for the first time, her discussion with Brenda Little during the lunch break, and that Brenda Little had informed her of the advice given to Greg Little. The arbitrator held the arbitration record open for 14 days, to give the union opportunity to depose Greg Little.

16. Brenda Little had further discussion of the arbitration matter with Greg Little after the arbitration hearing, and she offered to find (and pay for) some other attorney to represent Greg Little during the deposition.

17. By reason of her employment as assistant general counsel of the employer, bargaining unit employees could reasonably perceive that Brenda Little was acting as an agent of the employer in regard to her actions described in paragraphs the behavior described in Paragraphs 8, 9, 14, and 16 of these Findings of Fact.

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. International Union of Operating Engineers, Local 609, has sustained its burden of proof that Brenda Little was an agent of the employer in regard to her actions described in paragraphs 8, 9, 14, 16, and 17 of the foregoing Findings of Fact.

3. By the actions described in paragraphs 8, 9, 14, 15, 16, and 17 of the foregoing Findings of Fact, the Seattle School District interfered with, restrained and coerced employees in

the bargaining unit represented by International Union of Operating Engineers, Local 609, and committed unfair labor practices in violation of RCW 41.56.140(1).

ORDER

The Seattle School District, its officers and agents, shall immediately:

1. CEASE and DESIST from:

   A. Providing legal opinion or advice to bargaining unit employees and/or non-aligned individuals who are or may be called as witnesses by International Union of Operating Engineers, Local 609, in grievance arbitration proceedings under the collective bargaining agreement(s) between the employer and that organization.

   B. In any other manner, interfering with, restraining, or coercing public employees in the exercise of their rights under Chapter 41.56 RCW.

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

   A. Notify International Union of Operating Engineers, Local 609, of the unqualified willingness of the Seattle School District to vacate the arbitration award issued by Arbitrator Michael de Grasse on the grievance concerning the discharge of Ray Jenkins.

B. Purge the personnel and labor relations files of the Seattle School District of all references to the arbitration award issued by Arbitrator Michael de Grasse on the grievance concerning the discharge of Ray Jenkins, and make no reference to the vacated arbitration award in any future legal proceeding or collective bargaining negotiations of any kind.

C. Reimburse International Union of Operating Engineers, Local 609, for all attorney fees and expenses, for all arbitrator fees and expenses, and for any other expenses incurred by that organization in connection with the arbitration proceedings conducted by Arbitrator Michael de Grasse on the grievance concerning the discharge of Ray Jenkins, with interest computed quarterly under the formula set forth in WAC 391-45-410(3).

D. Notify International Union of Operating Engineers, Local 609, of the unqualified agreement of the Seattle School District to re-arbitrate the grievance concerning the discharge of Ray Jenkins in an entirely new proceeding before an arbitrator other than Michael de Grasse.

E. If Local 609 chooses to re-arbitrate the grievance concerning the discharge of Ray Jenkins, the Seattle School District shall participate in the selection of another arbitrator and proceed to arbitration without making reference to the vacated arbitration proceeding or asserting any defenses relating to the timeliness of the grievance or the potential back pay liability which may have accumulated during the processing of this unfair labor practice proceeding.

F. If Local 609 chooses to re-arbitrate the grievance concerning the discharge of Ray Jenkins, the Seattle School District shall be barred from calling either Greg Little or Brenda Little as a witness in the proceeding, and shall be barred from making any reference in that proceeding to either Greg Little or Brenda Little, to the arbitration proceedings before Arbitrator Michael de Grasse, or to this unfair labor practice proceeding.

G. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, and in all places where members of the security specialist bargaining unit work, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by the chairperson of the Board of Directors of the Seattle School District and, if she is still employed by the Seattle School District, by Brenda Little. Such notices shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

H. Read the notice attached to this order into the record at a regular public meeting of the Board of Directors of the Seattle School District, 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.

I. Notify the International Union of Operating Engineers, Local 609, 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.

J. Notify the Executive Director 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 Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, on the 28th day of March, 2001.

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.

APPENDIX

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 provide legal opinion or advice to bargaining unit employees or non-aligned individuals who are or may be called as witnesses by International Union of Operating Engineers, Local 609, in grievance arbitration proceedings under the collective bargaining agreement(s) between the Seattle School District and that organization.

WE WILL NOT interfere with the processing of grievances by employees in the bargaining units represented by International Union of Operating Engineers, Local 609.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce employees in the exercise of their collective bargaining rights secured by the laws of the state.

WE WILL vacate the arbitration proceedings and award issued by