

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| UNITED ASSOCIATION OF JOURNEYMEN |) | |
| AND APPRENTICES OF THE PLUMBING |) | |
| AND PIPEFITTING INDUSTRY OF THE |) | |
| UNITED STATES AND CANADA, |) | |
| LOCAL 82, |) | |
| |) | |
| Complainant, |) | CASE 15638-U-01-3964 |
| |) | |
| vs. |) | DECISION 7390-A - PECB |
| |) | |
| TACOMA HOUSING AUTHORITY, |) | |
| |) | |
| Respondent. |) | DECISION ON MOTION |
| |) | |
| |) | |

This case is specifically before the Examiner for a ruling on a motion filed by the union after the close of the hearing. The proceeding is generally before the Examiner under Chapter 391-45 WAC, based on a complaint charging unfair labor practices filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 82 (union), on February 7, 2001.¹

The case was processed through normal Commission procedures and a hearing was held before the undersigned Examiner on August 29 and 30, September 24, and November 5 and 15, 2001.

¹ The underlying complaint alleges employer interference with employee rights in violation of RCW 41.56.140(1), employer domination of or assistance to the union in violation of RCW 41.56.140(2), employer discrimination for the filing of unfair labor practice charges in violation of RCW 41.56.140(3), and employer refusal to bargain by skimming or contracting out work previously performed by members of the union.

Although the hearing was declared closed and a schedule for simultaneous brief was established, on December 10, 2001, the union moved to reopen and supplement the record. Based upon the union's arguments and the pertinent section of the Washington Administrative Code, the Examiner granted the motion and scheduled the case for further hearing on January 17, 2002, for the limited purpose of allowing the union to present evidence that it could not have previously known was necessary to include in the record.²

The hearing was called to order on January 17, 2002. The union obtained admission in evidence of an original job description that had been proposed by the employer and rejected by the union in their negotiations. In response to that evidence, the employer called Warren E. Martin to testify. Martin is an attorney and a partner in the firm that is representing the employer in this matter. Martin had been the employer's spokesperson during the negotiations under question. The union did not object to his appearance as a witness and cross-examined him after direct examination. At the conclusion of Martin's testimony, the hearing was closed and a new briefing schedule was established.

Motion To Disqualify

On January 28, 2002, the union filed the motion for disqualification that is presently before the Examiner for a ruling. It alleged that, because Martin was called to testify in a matter in which another member of the same law firm was the counsel-of-record, that counsel, Lynn Ellsworth, should be disqualified from further participation as counsel-of-record for the employer in this matter. The union's specific focus was on the writing of the employer's closing brief in the matter. It cited the Washington State Bar Association's Rules of Professional Conduct, 3.7, as the basis for its motion.

² WAC 391-45-270(2).

Employer's Response to Motion -

The employer filed a response to the union's motion on January 29, 2002. The employer argued that the motion should be denied because Rules of Professional Conduct do not apply to administrative proceedings, because the union had not objected to the testimony presented by Martin, and because the union had proceeded with its own cross-examination of Martin.

Discussion -

The Rules of Professional Conduct promulgated by the state bar association contain the following rule which the union is seeking to enforce in this motion:

RULE 3.7 LAWYER AS WITNESS

A lawyer shall not act as advocate at a trial in which the lawyer or another lawyer in the same law firm is likely to be a necessary witness except where:

(a) The testimony relates to an issue that is either uncontested or a formality;

(b) The testimony relates to the nature and value of legal services rendered in the case; or

(c) The lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate; or

(d) The trial judge finds that disqualification of the lawyer would work a substantial hardship on the client and that the likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial.

The Rules of Professional Conduct are not statutory, or even adopted as part of the Washington Administrative Code (WAC).

The Public Employment Relations Commission is the state agency that has been created by Chapter 41.58 RCW, and has been delegated

authority to enforce certain state collective bargaining statutes.³ The Commission conducts adjudicative proceedings under the state Administrative Procedure Act,⁴ and generally uses the Model Rules of Procedure adopted by the Chief Administrative Law Judge.⁵ None of those statutes or rules empower the Commission to enforce the Rules of Professional Conduct cited by the union. The Supreme Court of the State of Washington set limits in *International Association of Fire Fighters, Local 2916 v. Public Employment Relations Commission*, 128 Wn.2d 375 (1995), when it wrote, "While the Supreme Court generally accords great deference to PERC's interpretation of the law it administers, PERC has no more authority than is granted to it by the Legislature."

Therefore, the Examiner cannot impose the sanction proposed by the union in this case. The union's motion to disqualify the employer's counsel is hereby DENIED.⁶

Issued at Olympia, Washington on the 13th day of February, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


WALTER M. STUTEVILLE, Examiner

³ These parties are subject to Chapter 41.56 RCW.

⁴ Chapter 34.05 RCW.

⁵ Chapter 10-08 WAC.

⁶ The March 15, 2002, deadline established for the filing of briefs may be revised, if requested by either party.