STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

UNITED STAFF NURSES UNION, UNITED FOOD AND COMMERCIAL WORKERS LOCAL 141,	)	CASE 16444-U-02-4221
Complainant,	)	DECISION 8378 - PECB
vs.	)	
GRANT COUNTY PUBLIC HOSPITAL DISTRICT 1, d/b/a SAMARITAN HOSPITAL,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Kirk S. Bond, Attorney at Law, for the union.

Garvey, Schubert & Barer, by *Bruce E. Heller*, Attorney at Law, for the employer.

On June 14, 2002, the United Staff Nurses Union (USNU), United Food and Commercial Workers Local 141, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, naming Grant County Public Hospital District 1 (employer) as respondent. A preliminary ruling was issued on July 3, 2002, finding a cause of action to exist on allegations summarized as:

> Employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), and employer refusal to bargain in violation of RCW 41.56.140(4), by breach of its good faith bargaining obligations in reneging on a promise to present December 2001 mediator proposal to board of commissioners for vote, and by rejecting April 2002 tentative agreement between parties because union subpoenaed several commissioners to testify

at unfair labor practice hearing, in reprisal for union activities protected by Chapter 41.56 RCW.

The employer filed an answer to the complaint. A hearing was held on May 7, 2003, before Examiner J. Martin Smith. The parties filed post-hearing briefs.

Based on the entire record, the Examiner rules that the employer has committed "interference" and "refusal to bargain" unfair labor practices in violation of RCW 41.56.140(1) and (4).

BACKGROUND

The employer operates Samaritan Hospital, a primary care facility located at Moses Lake, Washington, and offering emergency medicine, surgical, medical, and pediatrics services. Keith Baldwin is the chief administrator; Randy Bibe is an assistant administrator.

The union has had represented registered nurses working at the hospital for several years. Other employees of the hospital, including licensed practical nurses, are represented in other bargaining units.

This dispute concerns contentious negotiations between the parties in 2001 and 2002, to replace a collective bargaining agreement which expired on June 30, 2001. There was little testimony regarding the issues in dispute, but it is clear that not much was accomplished in bilateral negotiations that began in January 2001. A mediator from the Commission staff held mediation sessions in October 2001, when the employer was represented by its attorney, Bruce Heller, and the union was represented by its business representative, John Aslakson. During negotiations in November

2001, the employer indicated it was planning to make a "last, best and final offer" and then implement that offer if it was rejected by the union.

On December 10, 2001, the union filed an unfair labor practice complaint alleging that the employer had refused to bargain by a letter in which the employer declared an impasse (even though the mediator had not declared an impasse) and announced its intention to implement its offer effective December 9, 2001, while inviting the Union to "meet and negotiate further if [the Union believes] that such negotiations could produce a settlement" of the dispute.[1]

The mediator apparently decided to recommend a settlement, and told the parties they should accept or reject her proposal as soon as practicable. Although the mediator's proposal was not made a part of the record in this proceeding, other evidence indicates it was submitted to the parties on December 18, 2001.

On January 2, 2002, Heller sent a letter to Aslakson, stating as follows:

> This is to advise you that the Board of Commissioners for Samaritan Healthcare has *considered and rejected the proposal* made by PERC mediator Sharrel Ables on December 18, 2001. Feel free to call if you have any questions. . . .

Exhibit 1 (emphasis added). A copy of that letter was sent to the union by telefacsimile (fax) transmission.

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[1] Notice is taken of the Commission's docket records for Case 16139-U-01-4125. A hearing was held on that case, but a decision is still pending on that record.

The bargaining unit employees met in January 2002, and voted to approve the settlement proposal advanced by the mediator. Although there was debate about the precise date of that meeting, Aslakson testified that he received Heller's January 2 letter on the next day after the union's meeting.

After additional mediation, the mediator made another attempt to put a compromise solution before the parties in April 2002.

A hearing on Case 16139-U-01-4125 was scheduled for May 8 and 9, 2002. An issue was framed in that case about whether the employer's board had actually taken the action described in Heller's January 2 letter, and the union served subpoenas on several employer officials on or about May 6, 2002.[2] Among those, Tom Frick recalled that he received his subpoena just prior to a meeting of the employer's board held on May 6, 2002, and Jay Ballinger recalled that his subpoena was served upon him by a bargaining unit employee he had known for a number of years.

The employer's board held a public meeting on May 6, 2002, and considered the revised mediator proposal in an executive session held that day. It rejected the mediator's recommendation.

Bargaining unit employee Sandra Martin testified that she was present at the May 6 meeting of the employer's board, and that Baldwin made an unsolicited comment to her at the conclusion of that meeting, to the effect that the service of the subpoenas had an adverse effect on the board members and caused them to reject

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[2] Tom Frick is clearly identified in this record as the chairperson of the employer's board, and was one of those served with a subpoena. Others named were Shawn Needham, Michael Bolander, Veronica Caballero-Roylance and Jay Ballinger.

the settlement proposal. While Martin testified that employer official Bibe was standing nearby and nodded assent with Baldwin's comment, Bibe testified that he interpreted the situation as Baldwin voicing frustration that the mediator's proposal had failed. Bibe testified that he thought it was a fair proposal which would have ended the negotiation on amicable terms.

Bibe also had a conversation with bargaining unit employee Marsha Briggs, in which he said that the service of the subpoenas was ill-timed from a standpoint of building trust between the parties, and avoiding an "adversarial relationship before one was needed."

Bibe made similar comments to an assembled group of bargaining unit employees at a staff meeting later in May 2002.

POSITIONS OF THE PARTIES

The union notes that the mediator advanced a recommended settlement to both parties after several mediation sessions, and it alleges that both parties agreed to submit the proposal to their respective principals. The union claims that the employer's board failed to actually vote on the mediator's proposals in both December 2001 and April of 2002, but told the union the proposals were unacceptable, so that bad faith should be found. The union also urges finding both interference and discrimination violations based on the adverse reaction of employer officials to the lawful subpoenas requiring them to testify in another hearing before the Commission.

The employer argues that its board was within its rights when it rejected the mediator's proposal in December 2001, regardless of whether the board held a formal meeting or took a formal vote on the matter. It also argues that there was no interference with

employee rights or discrimination as a result of the employer officials being served with subpoenas concerning the earlier unfair labor practice case.

DISCUSSION

The collective bargaining relationship between these parties is regulated by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Within that chapter, RCW 41.56.040 secures the right of employees to organize and bargain without discrimination, RCW 41.56.140(1) prohibits employer interference with the employee rights conferred by the statute, RCW 41.56.140(4) prohibits employer refusals to bargain by reference to a definition of collective bargaining in RCW 41.56.030(4) which includes a duty to bargain in good faith, and RCW 41.56.160 authorizes unfair labor practice proceedings before the Commission. Separately, the state Administrative Procedure Act, Chapter 34.05 RCW, authorizes the issuance of subpoenas to compel attendance and testimony in adjudicative proceedings which include unfair labor practice proceedings before the Commission.[3]

The "Interference" Allegation

The preliminary ruling frames an issue as to whether certain comments made by employer officials to bargaining unit employees violated RCW 41.56.040(1). The Examiner finds a violation.

The Applicable Legal Standard -
An employer commits an "interference" violation if its actions or the statements of its officials are reasonably perceived by

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[3] RCW 34.05.446.

employees as a threat of reprisal or force or promise of benefit associated with the exercise of rights protected by Chapter 41.56 RCW. *Skagit County*, Decision 6348 (PECB, 1998); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997); *City of Tukwila*, Decision 4968 (PECB, 1995); *King County*, Decision 4893-A (PECB, 1995). It is not necessary to show that the employer (or its agent) acted with intent or motivation to interfere, nor is it necessary to show that the employee(s) involved actually felt threatened or coerced. *Kennewick School District*, Decision 5632-A (PECB, 1996). The determination is based on whether a typical employee in the same circumstances could reasonably view the employer's actions as discouraging his or her union activities. An employer's innocent, or even laudatory, intentions when taking disputed actions are legally irrelevant. *City of Seattle*, Decision 3566-A (PECB, 1991). Thus, although claims of unlawful interference with the exercise of rights protected by Chapter 41.56 RCW must be established by a preponderance of the evidence, the standard is not particularly high. *See City of Mill Creek*, Decision 5699 (PECB, 1996).

Numerous "interference" cases have involved comments by employer officials suggesting that matters would go more smoothly if the employees rely on the managers, and less smoothly if they rely on the union representation to which they are entitled by the statute. The Commission has found violations where the reasonable apprehension created by the employer action could cause employees to believe they will be treated with suspicion if they voice support for their exclusive bargaining representative or for unions in general. *See City of Renton*, Decision 7476-A (PECB, 2002); *City of Bremerton*, Decision 3843-A(PECB, 1992).

When employer statements are directed at union officials, such employees should be accustomed to — and should not intimidated or

threatened by – harsh words, criticism or general negative comments regarding a union's political behavior. When employer statements are directed to rank-and-file employees, however, the employer takes a risk that comments that might be ignored by a union official could be interpreted as threatening. *See Premier Rubber Co.*, 272 NLRB 466 (1984).

Application of Standard -

Although examiners and the Commission itself have applied the "reasonable apprehension" test with some limitations,[4] a "thin skin" analysis does not help the employer under the circumstances presented in this record:

First, it is clear beyond any doubt that the union had a statutory right to subpoena the employer officials, and that the employer officials had no right whatever to take any adverse action because they had been compelled to testify in an unfair labor practice proceeding before the Commission.

Second, the employees who heard and overheard the comments made by the employer officials about the adverse effect of the lawful subpoenas were rank-and-file bargaining unit members. The first employee to hear the employer comments appears to have been lawfully attending a public meeting of the employer's board; the other employees heard the negative comments in individual and group meetings where they had a right (or even an obligation) to be present. To such individuals, the negative comments about the subpoenas could reasonably have been perceived as threats (or explanations) of reprisal or as criticism of their union.

A rank-and-file public employee can be expected to know the meaning of a subpoena: *A person served with a subpoena is required by*

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[4] As in *City of Renton*, Decision 7476-A (PECB, 2002), and *King County*, Decision 7506-A (PECB, 2003).

force of law to appear and give testimony, even if they would rather not do so. The employees involved in this case would have had reason and opportunity to know that the upcoming hearing was related to the long-delayed negotiations on the collective bargaining agreement covering their employment. To suggest that service of subpoenas a few days before a scheduled hearing was ill-timed is to ignore the realities of the *hearing* process. The Commission has vigorously protected its own processes. See, for example, *Mansfield School District*, Decision 5238-A (EDUC, 1996). Thus, the inescapable conclusion is that the comments made by the employer officials constituted "interference" in violation of RCW 41.56.140(1). A remedial order is warranted.

The Discrimination Allegation

The preliminary ruling frames an issue as to whether the employer's rejection of the mediator proposal in May 2002 constituted discrimination in violation of RCW 41.56.040 and .140(1). The Examiner finds there was no violation.

The Applicable Standard -

A "discrimination" violation occurs when: (1) one or more employees exercise a right protected by the collective bargaining statute, or communicate to the employer an intent to do so; (2) the employee(s) is/are deprived of some ascertainable right, status, or benefit; and (3) there is a causal connection between the exercise of the legal right and the discriminatory action. *See Educational Service District 114*, Decision 4361-A (PECB, 1994); *Mansfield School District*, Decision 5238-A. A complainant has the burden to establish a prima facie case of discrimination, after which the respondent is afforded an opportunity to articulate legitimate, non-retaliatory reasons for its actions. The burden of proof

ultimately remains on the complainant, to prove by a preponderance of the evidence that the disputed action was in retaliation for the exercise of statutory rights. That ultimate burden may be satisfied by showing: (1) that the reasons articulated were pretextual; and/or (2) that union animus was nevertheless a substantial motivating factor behind the action. *Educational Service District 114* (citing *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v Seattle Housing Authority*, 118 Wn.2d 79 (1991)).

Application of Standard -

There can be no doubt that the employees in the bargaining unit involved here were engaged in protected activity, in negotiating through their union for a successor collective bargaining agreement. Similarly, the employer's participation in the negotiations and mediation leaves no room to doubt the employer's awareness of the employees' protected activities.

In this case, the prima facie case fails largely because the union does not make a compelling case that any employee was deprived of any *ascertainable* right, status, or benefit. Bargaining is a process of give and take, so that specific outcomes are seldom ascertainable until an agreement is finalized. There is no evidence here of any specific concession or consideration given up by the union which could have created an offer-and-acceptance expectancy of the type described in *Naches Valley School District*, Decision 2516-A (EDUC, 1987). There was a proposal on the table, but it was not even of the parties' own creation. The mediator's proposal certainly did not rise to the level of a tentative agreement, by which the parties' negotiators actually or impliedly created some expectation that it would be accepted.

Because there was no ascertainable deprivation, it is impossible to assess the existence of a causal connection. Similarly, there is

no need to consider the articulated reasons, pretext, or motivation subjects usually addressed in a "discrimination" case.

Failure to Bargain in Good Faith

The preliminary ruling frames an issue as to whether the employer's rejection of the mediator's proposals in December 2001 and May 2002 constituted a failure or refusal to bargain in good faith in violation of RCW 41.56.140(4). Although no violation is found as to the rejection of the mediator's proposal in December, the employer's conduct in May was not above reproach.

The Applicable Standard -

The duty to bargain is defined in RCW 41.56.030(4) to include a good faith component. Numerous Commission decisions have defined the mandatory subjects of collective bargaining, and have evaluated the bargaining tactics of both unions and employers.

One bargaining tactic that was touched upon in this case, but not actually invoked, is the prospect of unilateral change. In general, the duty to bargain includes a duty to maintain the *status quo* as to employee wages, hours, and working conditions until and unless changes are either: (1) negotiated by the employer with the union representing the affected employees; or (2) an impasse is reached after good faith bargaining. *See Federal Way School District*, Decision 232-A (EDUC, 1977); *Pierce County*, Decision 1710 (PECB, 1985). Additionally, RCW 41.56.123 imposes a freeze of contract terms for one year following the expiration of a collective bargaining agreement.

An aspect of the bargaining process that is directly involved in this case is the ratification of proposals advanced in bargaining. While ratification processes are customarily used on both sides of

the bargaining table, they are not specifically recognized or required by the collective bargaining statute. *Naches Valley School District*, Decision 2516-A. An exclusive bargaining representative is neither: (1) in a position to dictate or control the method by which an employer ratifies a collective bargaining agreement; nor (2) compelled to follow any specific procedure to accept a proposal or ratify an agreement reached by its negotiators. Similarly, an employer cannot dictate how a union accepts or ratifies a proposal. The overarching question about the behavior of both employers and unions throughout the bargaining process is whether they have acted in good faith.

Application of Standards -

It is clear that these parties were having difficulties in their negotiations long before the December 2001 and May 2002 ratification processes specifically at issue here. After a period of negotiation much longer than the 60-day norm anticipated by Section 8(d) of the National Labor Relations Act, the parties entered mediation more than two months after their previous contract had expired.[5] The employer made a false start at a unilateral change that would arguably have been unlawful under RCW 41.56.123, but it did not follow through with that tactic. By the time the mediator made the first of her settlement proposals, the negotiations had continued for nearly six months beyond expiration of the previous contract.

It is clear that the employer had financial concerns about the settlement recommended by the mediator in December 2001. Just as the duty to bargain does not include a duty to agree, a mediator

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[5] Notice is taken of the Commission's docket records for Case 15980-M-01-5569. The mediation case was filed on September 4, 2001.

has no power of compulsion. Neither the union nor the mediator was in a position to dictate how the mediator's proposal would be presented to or acted upon by the employer's board.[6] It suffices to say that the letter sent to the union by the employer's attorney in January 2002 communicated the employer's rejection of the mediator's recommendation. The union has not established a violation of RCW 41.56.140(4) as to the December transaction.

The admitted statements of employer officials about the adverse effect of the subpoenas on the employer's board constitute substantial admissions-against-interest in evaluating the employer's good faith at the meeting on May 6. In particular, the Examiner credits testimony the employer officials used words to the effect that, "You could have had it all . . . ." Based on those statements, the Examiner infers that the employer's rejection of the May proposal was motivated largely, if not entirely, by the pique of employer officials with the entirely lawful tangential event of the union having served subpoenas for an unfair labor practice hearing before this agency. The employer is thus found to have violated RCW 41.56.140(4) and (1) by breach of its good faith obligation in the May 6 meeting.

FINDINGS OF FACT

1. Grant County Public Hospital District 1, d/b/a Samaritan Hospital, is an employer within the meaning of RCW 41.56.030.

2. United Staff Nurses Union, UFCW Local 141, a bargaining representative within the meaning of RCW 41.56.030(3), is the

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[6] This is not the proper forum to evaluate whether the employer violated some provision of the Open Public Meetings Act or some other state law regulating its operations.

exclusive bargaining representative of registered nurses employed at Samaritan Hospital.

3. The employer and union were parties to a collective bargaining agreement which was to expire on June 30, 2001.

4. The parties commenced negotiations for a successor contract during or about January 2001, but did not reach an agreement. Beginning in or about September 2001, the parties were assisted by a mediator from the Commission staff.

5. In November 2001, the mediator advanced a recommended settlement to both parties. By a letter dated January 2, 2002, the employer communicated its rejection of the mediator's proposal to the union. The union membership accepted the mediator's proposal in January 2002, apparently without knowledge that the employer had already rejected that proposal.

6. The union filed a complaint charging unfair labor practices with the Commission, alleging that the employer had breached its good faith obligation in connection with its rejection of the mediator's proposal. A preliminary ruling was issued finding a cause of action to exist on that complaint, and a hearing was set to begin on May 7, 2002.

7. The mediator continued to work with the parties, and made a second settlement proposal in April 2002. That proposal was accepted by the union.

8. Prior to a meeting of the employer's board held on May 6, 2002, the union served subpoenas on various employer officials to compel their attendance and testimony at the hearing on the

unfair labor practice complaint described in paragraph 6 of these findings of fact.

9. During its meeting on May 6, 2002, the employer's board went into executive session and then announced rejection of the mediator's proposal.

10. On several occasions after the meeting of the employer's board on May 6, 2002, employer officials made statements to bargaining unit employees by which they disparaged the union for ill-timed service of the subpoenas upon employer officials, and indicated that the service of those subpoenas had created a negative reaction on the part of the employer's board which resulted in rejection of the contract proposal.

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. By the statements of employer officials to bargaining unit employees in which they disparaged the union, its officials, and/or its supporters for the issuance of lawful subpoenas, as described in paragraph 10 of the foregoing findings of fact, the employer has interfered with, restrained, and coerced public employees in the exercise of their rights under Chapter 41.56 RCW and has committed unfair labor practices in violation of RCW 41.56.140(1).

3. The union has failed to make out a prima facie case that any employee has been deprived of any ascertainable right, status, or benefit, so that no discrimination violation has been established under RCW 41.56.040 and RCW 41.56.140(1).

4. Based upon the admissions-against-interest by its officials as described in paragraph 10 of the foregoing findings of fact, the employer's rejection of the mediator's proposal in May 2002 was lacking in the good faith required by RCW 41.56.030(4), so that the employer committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

ORDER

Public Hospital District 1 of Grant County, d/b/a Samaritan Hospital, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST FROM:

   A. Disparaging the union, its officials, or employees who support and act on behalf of the union, for their exercise of rights protected by Chapter 41.56 RCW, including the right to file and process unfair labor practice proceedings before the Public Employment Relations Commission.

   B. Failing and refusing to bargain in good faith, by rejecting a contract proposal on the grounds other than its merits, including but not limited to in response to being served with subpoenas to testify at an unfair labor practice hearing before the Public Employment Relations Commission.

   C. In any other manner interfering, 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 purpose and policies of Chapter 41.56 RCW:

A. Present, and in good faith consider, the proposal that was rejected by the employer's board on May 6, 2002, without prejudice to or limitation by any collective bargaining agreement that may now be in existence between parties, and promptly communicate its decision to the union.

B. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized representative of the respondent, and 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.

C. Read the notice attached to this order into the record at a regular public meeting of the employer's 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.

D. 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.

E. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days follow-

ing 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 2nd day of February, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, 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

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 bargain in good faith with USNU Local 141 concerning the wages, hours and working condition of employees represented by that union.

WE WILL reconsider in good faith, the proposal made by the mediator on or about April 2, 2002.

WE WILL NOT interfere with, restrain or coerce employees or their bargaining representative with respect to the issuance of subpoenas or pursuit of complaints before the Public Employment Relations Commission.

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.

DATED: _____

GRANT COUNTY PUBLIC HOSPITAL DISTRICT 1
d/b/a Samaritan Hospital

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 711 Capitol Way S, Suite 603, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300.