STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON,	)	
Complainant,	)	CASE 15994-U-01-4074
vs.	)	DECISION 8400-A - PECB
METHOW VALLEY SCHOOL DISTRICT,	)	DECISION OF COMMISSION
Respondent.	)	

Eric T. Nordlof, General Counsel, for the union.

Stevens Clay Mannix, by *Paul E. Clay*, for the employer.

This case comes before the Commission on an appeal filed by Public School Employees of Washington (PSE or union) seeking to overturn an order by Examiner Frederick J. Rosenberry dismissing its unfair labor practices complaint.[1] The Methow Valley School District (employer) supports the Examiner's decision. For the reasons explained below, the Commission affirms the Examiner's dismissal of the complaint.

BACKGROUND

The union represents the classified employees of the Methow Valley School District. Rank-and-file members of the bargaining unit handle administration duties of the local chapter. The local

[1] Decision 8400 (PECB, 2004).

chapter receives additional support from the union's full-time professional staff who are assigned to geographic areas.

In July 2001, a female employee filed a complaint with Superintendent Louis Gates alleging harassment, intimidation and other inappropriate behavior in the maintenance-custodial department. Gates advised union officials of the allegations and informed them that an independent investigator, Lloyd Olsen, would conduct the investigation.

Olsen initiated his investigation by conducting separate interviews with three female employees on July 30, 2001. The union field representative assigned to the bargaining unit, Karen Luton, attended these interviews. Olsen also conducted separate interviews with three male employees. Rose Jones, the local chapter vice-president, attended the interviews with the three male employees. Following those interviews, Olsen scheduled an August 23, 2001, interview with Greg Stanovich, who also serves as the local chapter secretary-treasurer.

On August 9, 2001, Stanovich sent a letter to Gates stating that he would like four people present at his interview. These included: Rose Jones; the local chapter president, Dan Corrigan; a PSE field representative from another geographic area, Don Contreras; and his personal attorney. Stanovich also asked for conformation if "everyone on the list is acceptable by [Gates] to attend?"

On August 15, 2001, Gates responded in writing to Stanovich by informing him that he may bring one representative and asked Stanovich to "inform the District as to [his] choice for representation." Stanovich did not respond to Gates's August 15, 2001 letter.

On August 23, 2001, Stanovich arrived at the interview with three of the four individuals previously named (Jones, Corrigan, and Contreras). Gates informed Stanovich that he was allowed only one representative of his choosing. After a short caucus, Stanovich designated Contreras as his representative and Olsen conducted the interview.

The union filed an unfair labor practice complaint alleging the employer violated the union's rights by not allowing the union a representative at Stanovich's interview. The Examiner issued his written decision on February 17, 2004, dismissing the complaint. The union filed a timely appeal.

ANALYSIS

On appeal, the PSE asks this Commission to recognize a right of a local labor organization to have its own representative at an investigatory interview to the protect local chapter's interests. This representative would be in addition to any representative brought by the individual employee. The union asserts that the second representative is necessary to ensure that employees are asked similar questions so the investigation is fair.

The employer argues that it satisfied its duty owed to Stanovich by allowing him to have one representative of Stanovich's choosing present at the interview.

Applicable Legal Standards

Standard of Review -
This Commission reviews the findings of fact to determine if they are supported by substantial evidence, and if so whether the

findings in turn support the Examiner's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002); *World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991). The Commission attaches considerable weight to the factual findings and inferences made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

The Right of Union Representation -

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court of the United States affirmed a National Labor Relations Board decision that Section 7 of the National Labor Relations Act (NLRA) provides employees the right to be accompanied and assisted by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action.

The U.S. Supreme Court explained that a lone employee may be too fearful or may not be articulate enough to present his side of the story during an investigatory interview. *Weingarten*, 420 U.S. at 263. An employee-representative's presence at an investigatory interview protects the individual employee from being overpowered or out maneuvered by the employer. *Weingarten*, 420 U.S. at 265 n. 10. *Weingarten's* language clearly indicates that the protected right is an individual employee right, not a union right. *Weingarten*, 420 U.S. at 256-257; *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), *enforced*, 338 F.3d 267 (4th Cir. 2003). Once an employee requests union representation, the employer must either grant the request or end the interview.[2]

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[2] The representative present at a *Weingarten* interview is not limited to being a passive or silent observer, but

This Commission and Washington Courts interpret issues arising under Chapter 41.56 RCW by examining federal decisions construing the NLRA, as amended by the Labor Management Act of 1947 (Taft-Hartley Act), when the language between the two statutes is similar. *State ex rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wn.2d 60, 67-8 (1980). Although the language of Section 7 of the Act and RCW 41.56.040(1)[3] are not identical, the Commission has previously held that the rights granted in Section 7 may be inferred in RCW 41.56.040. *Okanogan County*, Decision 2252-A (PECB, 1986).

Application of Standards

Weingarten Grants No Rights to the Union -

To support its contention that a local chapter of a labor organization should be allowed its own representative at a *Weingarten* hearing, PSE argues recent caselaw expands the rights afforded to individuals at investigatory interviews. Specifically, they cite *Epilepsy Foundation of Northwest Ohio v. NLRB,* 331 NLRB 676 (2000), *enforced,* 268 F.3d 1095 (DC Cir. 2001), to support their contention.

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the representative does not speak in place of or for the employee who is being interviewed. *City of Bellevue*, Decision 4324-A (PECB, 1994).

[3] RCW 41.56.040(1) states: No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

In *Epilepsy,* the Board held that because a non-union employee seeks representation for mutual aid and protection at an investigatory interview just as a unionized employee would, Section 7 applies to non-unionized employees and therefore non-unionized employees have the same *Weingarten* rights as unionized employees. *Epilepsy*, 268 F.3d at 1099. However, on June 9, 2004, the NLRB reversed its position for the fourth time in the past 22 years, announcing "that the Weingarten right does not extend to a workplace where . . . the employees are not represented by a union." *IBM Corporation*, 341 NLRB No. 148 (June 9, 2004). The Board found that the right of an employee to a co-worker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough and confidential workplace investigations.[4] Any reliance the union may have had on the Board's interpretation of Section 7 of the Act in *Epilepsy* is now misplaced.

Refusal to Expand Employees Weingarten Rights to Unions - PSE's request for this Commission to expand the rights granted under *Weingarten* as necessary for the protection of its bargaining rights is misplaced. PSE argues that allowing the local chapter to have its own representative present at such an investigatory meeting constitutes a necessary "investigation of the investigation" for the protection of the local chapter, particularly when a union official is targeted. This argument fails to persuade the Commission.

Weingarten rights afforded to the employee under Section 7 of the Act provide that the employees may select a representative of their

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[4] The *Epilepsy* decision specifically noted that Congress gave the Board the freedom to interpret Section 7 of the NLRA as it sees so long as the rationale underlying the decision is clear and reasonable. *Epilepsy*, 268 F.3d at 1102.

choosing. In the case at bar, the employer's refusal to allow multiple representatives at the hearing did not preclude Stanovich from choosing a representative that could both represent Stanovich and observe for the union at the same time. Stanovich could have selected Rose Jones, who was intimately familiar with the details of the examination and familiar with the line of questioning in the previous interviews.

Challenged Finding of Fact and Conclusion of Law Well Supported - PSE assigns error to the Examiner's finding that Stanovich requested multiple representatives for his August 23, 2001, interview and that when he appeared at his interview he was accompanied by three of the four individuals he requested to attend through his August 9, 2001, letter. The union argues that it simply requested Rose Jones' presence at Stanovich's August 23, 2001, interview. The union asserts that it requested Jones' presence at the interview to observe as a non-participatory representative of the union.[5]

Substantial evidence exists within the record as a whole to support the Examiner's findings of fact and conclusions of law. The record clearly indicates that on August 9, 2001, Stanovich wrote a letter to the employer asking to have four representatives present at his August 23, 2001, interview. Additionally, the record clearly indicates that the employer responded by informing Stanovich that he was allowed only one representative of his choosing. The evidence presented through exhibits and at hearing demonstrate that aside from limiting Stanovich to one employee representative, the employer placed no other limitations on Stanovich's selection.

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[5] The union's "non-participatory representative" concept is a distinction without a difference.

As to PSE's claim that it requested Gates allow them a non-particpatory representative for the local chapter at Stanovich's interview, the Examiner noted that as a matter of fact, the record contains conflicting testimony regarding any request. However, the Examiner explained that the conflicting testimony had no impact on deciding the merits of the case because denying PSE a representative for the local chapter or access to the interview in no way infringed on the existing rights afforded to the employee or union at investigatory interviews.

Applying the standards set forth in *Weingarten*, the Examiner correctly concluded that unions have no independent right to representation at investigatory or pre-disciplinary hearings. Employees initiate their rights of representation under *Weingarten*, not unions. By allowing Stanovich one representative of his choosing, the employer committed no violation RCW 41.56.140. The employer afforded Stanovich the rights allowed to him through Chapter 41.56 RCW, Weingarten and its progeny, and the decisions of this Commission.[6] The findings of fact support the Examiner's conclusion that the employer committed no unfair labor practices.

Having found that the employer committed no unfair labor practices, the union's complaint is DISMISSED.

NOW, THEREFORE, it is

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[6] *See for example, City of Bellevue*, Decision 4324-A (PECB, 1994); *City of Tacoma*, Decision 3346-A (PECB, 1990); *City of Mercer Island*, Decision 1460-A (PECB, 1982).

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued in the above-captioned matter by Examiner Frederick J. Rosenberry are affirmed and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 29th day of October, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner

PAMELA G. BRADBURN, Commissioner