STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CLINTON DEVOSS, Complainant, vs. KING COUNTY, Respondent.	CASE 17346-U-03-4478 DECISION 8630-A - PECB CASE 17676-U-03-4583 DECISION 8631-A - PECB
CLINTON DEVOSS, Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 587, Respondent.	CASE 17347-U-03-4479 DECISION 8632-A - PECB CASE 17675-U-03-4582 DECISION 8633-A - PECB DECISION OF COMMISSION

Clinton DeVoss appeared pro se.

Norm Maleng, Prosecuting Attorney, by *Susan N. Slonecker,* Deputy Prosecuting Attorney, for the employer.

Rosen Law Firm, by *Jon Howard Rosen,* Attorney at Law, for the union.

This case comes before the Commission on an appeal filed by Clinton DeVoss, seeking to overturn findings of fact, conclusions of law, and order issued by Examiner Karl Nagel.[1] We affirm the Examiner's dismissal of the complaints.

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[1] King County, Decision 8630-A (2004).

PROCEDURAL HISTORY

On March 28, 2003, DeVoss filed unfair labor practice complaints naming both King County (employer) and Amalgamated Transit Union, Local 587 (union) as respondents.[2] Those complaints alleged that the employer and union interfered with employee rights protected under Chapter 41.56 RCW, by negotiating rules regulating the conduct of employees in regard to an election of union officers. DeVoss filed additional complaints against the same respondents on July 14, 2003, alleging that a memorandum issued by Hal Poor further interfered with employees' protected rights by creating even more ambiguity in the election rules.[3]

The Unfair Labor Practice Manager reviewed the complaints under WAC 391-45-110. A deficiency notice was issued as to all cases on July 17, 2003, and DeVoss filed amended complaints on August 7, 2003. A preliminary ruling was issued on August 19, 2003, finding causes of action to exist. The employer and union filed answers on September 9 and 10, 2003, respectively.[4]

The Examiner conducted a consolidated hearing on December 1, 2003, concerning all four cases. The Examiner issued his decision on June 29, 2004, dismissing all four complaints, and DeVoss filed a timely notice of appeal on July 16, 2004.

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[2] Cases 17346-U-03-4478 and 17347-U-03-4479.

[3] Cases 17675-U-03-4582 and 17676-U-03-4582.

[4] The Commission takes this opportunity to remind all parties that while complainants and respondents may disagree with the legal arguments of the other, ad hominim attacks are not persuasive and parties would be better to limit their arguments to the law.

ISSUES

WAC 391-45-350(3) requires parties wishing to appeal a decision issued by an examiner to identify, in separately numbered paragraphs, the specific ruling, findings of fact, conclusions of law, or orders claimed to be in error. The Commission does not allow parties to bring forth new facts or claims on appeal that could have been considered in proceedings before examiners or the Executive Director. *See, e.g., Tacoma School District*, Decision 5465-E (EDUC, 1997). In this case:

- No challenge to the Examiner's findings of fact appears in the notice of appeal. The Commission accepts unchallenged findings of fact as verities on appeal. *Brinnon School District*, Decision 7210-A (PECB, 2001).

- The notice of appeal only specifically challenges Conclusion of Law 3, where the Examiner ruled that restrictions placed upon employees were a legitimate limitation on the use of [the] employer . . . premises. DeVoss claims that the Examiner erred by failing to find "that the promulgated rules applied a disparate content-based restriction on solicitation and distribution of information relating to the candidates for internal union election."

Therefore, in this appeal we need only examine if the Examiner has correctly applied the law to the unchallenged findings of fact.

Interference With Protected Employee Rights

Chapter 41.56 RCW prohibits interference with the exercise of collective bargaining rights. RCW 41.56.040 provides in part:

> [N]o 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.

RCW 41.56.140(1) enforces those statutory rights against employers, by establishing that an employer who interferes with, restrains, or coerces public employees in the exercise of their collective bargaining rights commits an unfair labor practice. RCW 41.56.150(1) is the concomitant enforcement of those statutory rights against unions.

An interference violation exists when an employee could reasonably perceive actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The employee is not required to show an intention or motivation to interfere on the part of the respondent to demonstrate an interference with collective bargaining rights. *See City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced or that the respondent had an anti-union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A. However, the complainant bears the burden of demonstrating that the employer's conduct results in harm to protected employee rights.

Incorrect Premise as to Right To Use Public Facilities

DeVoss seems to presume that he and other employees should have a right to use the employer's premises in connection with the campaign activities surrounding an internal union election. That is a dubious or false premise, however. Chapter 41.56 RCW does not give public employees a right to use public facilities for personal or union business. *City of Seattle*, Decision 1355 (PECB, 1982).

Employers may limit union activities and the posting of union-related materials to non-working locations within the employer's facilities and limit employees from participating in union-related activities during working hours. *City of Seattle*, Decision 7819 (PECB, 2002) (union activity may be limited to non-working locations); *City of Seattle*, Decision 5391-C (PECB, 1997) (union activity may be limited to non-working hours). Under National Labor Relations Board (NLRB) precedents, an employer that allows employees to post any materials may not discriminate against union-related notices or the employees that post them. *See, e.g., Honeywell, Inc.*, 262 NLRB 1402 (1982), *enforced* 722 F.2d 406 (8th Cir. 1983). Even then, however, it is well settled that "[r]ules prohibiting distribution of literature are presumed valid *unless* they extend to activities during non-work time and in non-working areas." *St. John's Hospital*, 222 NLRB 1150 (1976), *enforced in part* 557 F.2d 1368 (10th Cir. 1977) (emphasis added). The NLRB has also stated that an employer's prohibition against employee distribution in work areas at all times is presumptively valid. *Albert Einstein Medical Center*, 245 NLRB 140, 142 (1979).

Commission Examines Cases On An Individual Basis

DeVoss, basing his argument on decisions of the NLRB, essentially argues that the rules prohibit the distribution of literature of employees' own time and in non-working areas, as these do, because he is not allowed to campaign outside of the time frame established by the rules. *See Our Way, Inc.*, 268 NLRB 394 (1984). By DeVoss's logic, the posted rules in this case "place no limitations of their applicability, sweeping broadly to encompass individual employees and the individual activity." DeVoss further argues that the employer has failed to overcome its "presumption of invalidity" that the NLRB applies to cases such as this one. *See Ichikoh Mfg.*, 312 NLRB 1022 (1992) *enfd.* 41 F.3d 1507 (6th Cir. 1994).

The statutory mission of this agency is to promote the continued improvement of the relationship between public employers and their employees and to promote peace in labor relations. RCW 41.56.010; WAC 391-08-003. In *Whatcom County*, Decision 8512-A (PECB, 2005), this Commission held that it would not presume the invalidity of "parity" clauses contained in collective bargaining agreements, and noted that each case would be decided individually. *Whatcom County*, Decision 8512-A. That rationale continues to be sound, and we decline to adopt any rule that would deprive this Commission from deciding each case based upon the unique facts presented by the parties.

Election Rules Did Not Interfere With Employee Rights

We also disagree with DeVoss's analysis because his interpretation of the rules is so broad that it leads to unreasonable conclusions not supported by the record.

- The established rules are narrowly tailored to a single set of related events: the internal union elections to be held on May 8, 2003, and June 5, 2003.

- Because elections are held only once every three years, placing a time limitation is a valid exercise of the employer's right not to have union campaign activity constantly interfere with its work environment.

- The rules established by the employer and the union limited campaign activity to "off-duty hours" and to "employee lunchrooms, lounges, and non-work areas." The rules speak for themselves, and are clearly within the scope of rules that are presumptively valid.

- Although the May 22, 2003, memorandum issued by election committee chair Hal Poor may have created some ambiguity by use of the term "company time", the ordinary use of the term

"off-duty hours" as used within the original rule is sufficiently clear to place employees on proper notice.[5]

- The Examiner correctly found that the definition of the terms "rally," "demonstration," "good taste," and "suitable," while possibly being subject to two or more meanings, were used in such a context that the ordinary meaning of the words could be easily discerned. DeVoss failed to present any evidence as to how any of the words could be interpreted in any other manner.

This case also differs from previous Commission decisions regarding election or campaign activity. In *City of Seattle*, Decision 5391-C, the employer enacted a rule that prohibited all campaign activity, including individual employee solicitations and discussions, during the hours that the office was officially open for business. The Commission found that because the employer did not limit the application of the rule to working time, and it put forth no evidence to show that it conveyed an intent to permit solicitation or open discussion during employee's non-working time, the employer interfered with employee protected rights. In *City of Seattle*, Decision 7819, an examiner ruled that an employer who prevented an employee from distributing campaign leaflets in front of, but not on, the employer's property before the employee's shift began interfered with employee protected rights.

Here, the promulgated rules reasonably allow employees to conduct campaign activity during non-working hours and in specified areas. Unlike the situation in City of Seattle where employees' conduct was prohibited during employee breaks and lunch time, and were therefore unreasonable, no such clear prohibition exists either in

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[5] Furthermore, no evidence was presented that any party, including DeVoss, was negatively affected in any way based upon the promulgated rules or the "Hal Poor" memorandum.

the original rules or Hal Poor memorandum. Although the respondents could have (and should have) explicitly defined many of the terms used within their memorandum (such as "off-duty hours" and "company payroll"), these rules, as proffered by the respondents, fail to rise to a level where they interfered with protected employee rights.

NOW, THEREFORE, it is

ORDERED

The findings of fact, conclusion of law, and order issued by Examiner Karl Nagel dismissing the complaint are AFFIRMED and adopted as the findings of fact, conclusions of law, and order of the Commission.

Issued at Olympia, Washington, the 13th day of April, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

Commissioner Douglas G. Mooney did not take part in the consideration or decision of this case.