Seattle School District (IUOE, Local 609), Decision 9135 (PECB, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE SCHOOL DISTRICT Employer.	)	
LIESL ZAPPLER Complainant,	)	CASE 18736-U-04-4763
vs.	)	DECISION 9135 - PECB
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609 Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On August 2, 2004, Liesl Zappler filed an unfair labor practice complaint with the Public Employment Relations Commission alleging that the International Union of Operating Engineers, Local 609 (union), interfered with her collective bargaining rights under RCW 41.56.150(1).[1] The Commission issued a preliminary ruling on September 8, 2004, finding that a cause of action existed for "union interference with employee rights in violation of RCW 41.56.150(1), by attempts to discipline Liesl Zappler for statements concerning proposed budget cuts to the grounds department."

[1]The Seattle School District is not a party to this action.

Zappler filed a motion to amend her complaint on November 15, 2004, subsequent to the union's actual imposition of discipline. The motion was granted on December 15, 2004. The union timely answered both complaints. Examiner David I. Gedrose held a hearing on April 25, 2005, in Kirkland, Washington. Both parties filed post-hearing briefs.

The Examiner finds that the union interfered with Zappler's collective bargaining rights under Chapter 41.56 RCW by threatening to expel her from the union, fining her $1,200 (albeit suspended contingent on her future behavior), and after imposing discipline, sending a letter concerning Zappler to the employer. The union did not interfere with her rights under Chapter 41.56 RCW in bringing Zappler to trial under the union's constitution and by-laws, nor in the way in which the union conducted the trial. The union did not interfere with Zappler's rights under Chapter 41.56 RCW when it posted union newsletters referring to Zappler.

BACKGROUND

Zappler began employment as a gardener with the Seattle School District (employer) in November 2002. The union represents four bargaining units within the school district, including one representing custodians and gardeners and one representing cooks. In the summer months, cooks may work as seasonal grounds maintenance staff. They are included in the custodians' and gardeners' bargaining unit during that time.

In February and March 2003, Zappler had her initial conflict with the union. At that time, she urged the union to ask the employer for an alternative work shift for gardeners, allowing options to the then-current eight hour, five days a week schedule. She

initially attempted to gain support for her idea from fellow gardeners, but eventually communicated directly with union officers and the union's business agent. The business agent wrote her a letter stating that her efforts were counter to the union's intentions regarding work shifts. The union was committed to the eight hour, five days a week schedule. The letter stated she might be subject to discipline if she persisted in trying to change that practice. In April 2003, she attended a union meeting and presented her concerns. During meeting she felt union officers attempted to stifle her presentation. After the meeting, she met with the business agent to further explain her position, but believed he was uninterested in her concerns and treated her rudely.

In January 2004, Zappler heard that the school board was considering personnel cuts in its budget. She heard that the proposed cuts included the supervisor of Zappler's unit, the grounds supervisor. The grounds supervisor was not in any of the union's bargaining units. Zappler also heard that in conjunction with eliminating the grounds supervisor position, custodians would be appointed leads over the gardener staff.

On January 15, 2004, Zappler wrote an e-mail to school board members. She urged them not to cut the grounds supervisor position and objected to custodial leads. She believed the grounds supervisor provided a high level of professionalism needed by the gardeners. She did not believe that custodial leads could provide this. She was also committed to organic gardening, as was the grounds supervisor. She feared that the loss of the grounds supervisor would end organic gardening in the school district. She suggested that cuts to the seasonal staffing, as well as supplies, were preferable to cutting the grounds supervisor (the seasonal

staffing reference was to members of the cooks' bargaining unit). Zappler identified herself as a gardener within the employer's grounds crew. She sent a similar e-mail to the union's business agent. A school board member e-mailed Zappler thanking her for her views.

On February 3, she e-mailed a message similar to her January missive to both the school board and the union's officers. In this message, she added the suggestion of not filling positions when gardeners retired. On the same day, the union's president wrote Zappler a letter, stating that her advocacy to the school board of cuts to hourly staff (the cooks working on the summer grounds crew) undermined the livelihood of fellow union members and discredited the union. He stated that she was violating certain parts of the union's constitution and could be subject to union discipline. He invited her to explain her actions to the union's executive board and to send a written confirmation of her intent to do so. Zappler did not appear before the union board, but did send a written response to the union's letter.

On February 4, Zappler attended a school board meeting. She did not speak at the meeting, but informally presented her views to school board members. On February 9, she e-mailed the union's president with a response to his February 3 letter. She stated she did not intend to harm other union members. She urged the union to advocate for a 40-hour work week for the cooks. Zappler also suggested the cooks could go on unemployment in the summer. She asked the union to solicit the views of the grounds crew on the subject.

On February 5, 17, and 25, Zappler sent additional e-mails to the school board. She continued to urge the board not to eliminate the

grounds supervisor position and to consider alternatives. Among her suggestions were:

- losing hourly staff or one or two gardener positions was preferable to losing the grounds supervisor;
- using volunteers to fill the gaps;
- not filling gardener positions when gardeners retired.

Zappler urged school board members to contact her and gave them her phone number. She made further budgetary suggestions (at the invitation of a board member) and listed several reasons why the grounds supervisor position was essential. She did not claim to represent the union.

In fact, her views were the opposite of the union's. While the union did not suggest eliminating the grounds supervisor position, it did tell the school board it wanted to retain bargaining unit positions, that cutting the grounds supervisor was preferable to cutting union jobs, and that custodial leads could supervise the grounds crew.

In April, May, and June, 2004, Zappler continued writing the school board with essentially the same position as her earlier messages, although she expanded on some points:

- she expressed surprise that the cooks were used as summer help, again advocated eliminating the use of cooks as seasonal staff, and suggested hiring seasonal help from an applicant pool, for example, graduate students;

- she stated it was a conflict of interest for the union to represent gardeners, custodians, and cooks, and that the best interest of the union was not the best interest of the gardeners and grounds crew;
- she advocated not filling a vacant lead gardener position and objected to custodians serving as grounds crew leads, claiming they were not qualified to do so;
- she suggested to the school board that the union contracts be reexamined. (This resulted from her learning that the employer's collective bargaining agreements with the union precluded not filling vacant positions.)

On May 25, the union's newsletter informed its readers that a female union member who worked on the grounds crew was urging the school board to eliminate summer grounds work and cut the grounds leads. The newsletter added that the union's executive board was considering disciplinary action against the member. On June 14, a second newsletter reiterated the earlier claims, stating that the executive board had invited the still-unnamed person to come to its next meeting and explain her actions, and that discipline was possible.

On June 21, the union's president sent Zappler another letter inviting her to appear before the union's executive board on July 7 and to indicate in writing if she intended to come. The June 21 letter repeated the warning that discipline was possible. The letter went on to state that this could include fines, suspension, or expulsion from the union. Zappler replied to this letter via e-mail on July 2. She again urged the union to strive for a 40-hour

work week for the cooks, income supplements through unemployment, and suggested, among other ideas, that the cooks work in shared positions. Zappler opined that this was preferable to "seasonal work for a select few."

At this point, communication over budget cuts had occurred between: (1) the union and the school board; (2) Zappler and the school board; and (3) the union and Zappler.

On July 20, 2004, the union wrote Zappler informing her that its executive board had received complaints against her for violating the union's constitution and had voted to hold a trial before the union's membership on September 11, 2004. The letter stated the union's charges against her:

- repeatedly and publicly advocating for cutbacks in hourly staffing in grounds;
- publicly advocating that union members not be granted seasonal employment;
- publicly stating that it is a conflict of interest for the union to represent gardeners, custodians, and cooks;
- publicly stating that long term union members (grounds leads) are not qualified to lead grounds department members;
- falsely stating in June that there were only 3 grounds leads and that freezing leads at that number would not harm anyone;
- falsely stating that the union tried to get the grounds supervisor fired several years ago and that the grounds supervisor suggested that he be laid off "merely to get the union off his back."

On July 21, Zappler e-mailed the union's president, remarked that a grounds crew reorganization would not work, and suggested a shop meeting to discuss the issue, with the caveat that the union exclude its business agent from the meeting. On July 28, she informed the union that she could not attend the trial on September 11. She explained that she had to take her elderly mother to eastern Canada to a relative's memorial service.

On August 24, the union's president sent a letter to Zappler reiterating that her trial would take place on September 11. He recommended that she appear and defend herself from charges he summarized as "undercutting the interests of the union in its negotiations with the employer." Zappler responded the next day, reminding the union that she could not attend the September 11 trial for personal reasons. She requested a delay, and also requested a meeting between her, her attorney, and the union's executive board. On September 1, the union's president denied her requests for a meeting and continuance. He again recommended that she appear and defend herself against charges of "consciously and deliberately undercutting the interests of the union in its negotiations with the employer."

Zappler did not attend the trial, but the union allowed Zappler to retain a union-approved court reporter to record the proceeding. On September 14, 2004, the union informed Zappler by mail that it had found her guilty of the charges stated against her in its letter of July 20, 2004. The penalty was official censure and a $1,200 fine. The union suspended the fine contingent on her refraining from future communication with the school board on union issues.
On September 22, the union's business agent wrote to the employer, stating in pertinent part:

> This communication is in regards to recent actions taken in constitutional trial by the members of this organization and seeks to underscore several important points . . . .
> [I]n any and all matters (germane to the wages, hours and/or terms and conditions of employment) of collective bargaining, this union speaks through one voice. . . . As chief executive officer of the Local, that (one) voice is either mine or one of the other designated officers of the Local.
> This would exclude Ms. Liesl Zappler, who has been officially censured for attempting to circumvent the union's representational status by attempting to bargain directly with the school board and others within administration.
> The School Board . . . should be made aware that such circumvention is unlawful and may bring about further conflict between us.

Zappler filed her original complaint before the September 11 trial. The Commission's preliminary ruling referred only to the union's attempt to discipline her. Zappler filed her amended complaint after the trial in order to add factual allegations: (1) the trial took place and the union fined Zappler $1,200 (fine conditionally suspended); and (2) the content of the union's September 22 letter to the employer. At some point following the trial, but prior to the April 25, 2005, unfair labor practice hearing, Zappler resigned her union membership and became a fee payer. At the time of the hearing, she remained a school district employee.

The union asserts that the Commission lacks jurisdiction in this case because it involves internal union affairs. The union argues that the Commission has consistently declined to intervene in this area and has no authority to do so now. Although denying it violated Zappler's rights, the union points out that Zappler has recourse to the union appeal process and state courts.

Both parties request attorney fees; Zappler also requests the cost of the trial transcript.

ISSUE

Did the union interfere with Zappler's rights under Chapter 41.56 RCW?

LEGAL STANDARD

Both employers and unions can commit interference violations. The legal standard is the same: a violation occurs if employees can reasonably perceive an employer's or union's action as a threat of reprisal or force, or a promise of benefit related to the pursuit of rights protected by Chapter 41.56 RCW. A finding of intent is not necessary. *City of Seattle,* Decision 3199-B (PECB, 1991); *City of Port Townsend,* Decision 6433-B (PECB, 2000). The central question in the present case is whether Zappler could reasonably perceive that the union interfered with her protected collective bargaining rights.

The Commission has jurisdiction over internal union affairs where a nexus exists between those affairs and the Commission's legislative mandates. RCW 41.56.150(1) states: "It shall be an unfair labor practice for a bargaining representative to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter." RCW 41.56.160(1) states: "The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders . . . . This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law."

While the Commission has ruled on charges of union interference, there is no Commission case law relative to a claim of interference because of union imposed discipline. The Commission has repeatedly

stated it has limited authority regarding the internal affairs of unions. The Commission finds it has no jurisdiction where the dispute involves union by-laws, constitutions, and the resolution of internal union disputes. *Enumclaw School District*, Decision 5979 (PECB, 1997). This lack of jurisdiction extends to:

- grievance processing, *Community College District 19-Columbia Basin*, Decision 8295 (CCOL, 2003); and
- internal nominating and election procedures, *King County*, Decision 8630 (PECB, 2004).

The Commission will assert jurisdiction over internal union affairs where there are allegations that unions:

- violated employee rights under Chapter 41.56 RCW with threats of reprisal or force;
- worked in collusion with the employer against an employee; and
- discriminated in the application of the collective bargaining agreement.

North Beach School District, Decision 2487 (PECB, 1986); *King County*, Decision 8630.

In the absence of Commission precedent, as in the present case, the Commission will look for guidance to decisions of the Supreme Court of the United States, the Supreme Court of the State of Washington, and the National Labor Relations Board.

A decision by the Supreme Court of the United States provides the most substantive guidance, *Scofield v. National Labor Relations Board*, 394 U.S. 423, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1969). In *Scofield*, the Court ruled on whether a labor union could fine or

expel members for violating a union rule placing a ceiling on production for which union members would accept immediate piece-work pay. *Scofield*, at 424-25. In a footnote, the Court noted that the union security clause in the collective bargaining agreement gave employees the option of becoming union members or declining membership and paying a service fee. *Scofield*, at 424-25. The Court held that a union can "enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy which Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield*, at 430. *See Pattern Makers' League of North America, AFL-CIO v. National Labor Relations Board*, 473 U.S. 95, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985).

The Seattle School District is a public employer under RCW 41.56.030(1). Zappler is a public employee under RCW 41.56.030(2). The union is the exclusive bargaining representative under RCW 41.56.030(3). RCW 41.56.122 prohibits closed shops. Public employees in Washington may decline full union membership and pay a representation fee.

The Commission, pursuant to its legislative mandate, certified the union as the exclusive bargaining representative for employees in the custodian and gardener bargaining unit. The union, having sought and received Commission approval for its bargaining status, may not shield itself from Commission oversight in its dealings with public employees by claiming immunity under the umbrella of internal union affairs. Zappler did not claim that the union's constitution, by-laws, grievance procedures, or nominating and election procedures interfered with her bargaining rights under Chapter 41.56 RCW. She claimed the union's discipline interfered with those rights. The Commission has jurisdiction to adjudicate her claim.

ANALYSIS

This is a case of first impression. Just as the Commission has the authority to evaluate an *employer's* disciplinary actions, the Commission may evaluate a *union's* disciplinary actions. An employer could conceivably use its disciplinary decisions to unlawfully threaten or retaliate against employees for exercising their statutory rights. A union could conceivably do the same. Zappler claims that the union interfered with her rights when it attempted to discipline her, and ultimately did discipline her, over her communication with the school board regarding layoffs in the grounds crew, more specifically, the elimination of the grounds supervisor position.

She claims that the union's actions against her were:

- writing letters threatening to discipline her;
- imposing a conditionally suspended $1,200 fine;
- sending a letter concerning her to the employer implying further conflict between the union and the employer if the employer continued to communicate with Zappler on collective bargaining issues;
- writing indirect references to her in its newsletter; and
- refusing to reschedule the trial when it knew she could not attend.

Under the standard provided in *Scofield v. National Labor Relations Board,* the Commission must determine: (1) whether the union enforced properly adopted rules reflecting a legitimate union interest; (2) whether its actions impaired any policy the legislature imbedded in labor laws; (3) whether it reasonably enforced

its rules against Zappler; and (4) whether Zappler was free to leave the union and escape the rules. *Scofield,* at 424-30.

Zappler's communication with the school board

The issue here is whether the union legitimately challenged the content of Zappler's contact with the board. When Zappler communicated with the board, she identified herself as a gardener on the employer's grounds crew. She did not claim to represent the union, nor a faction of dissenting bargaining unit members. She did not engage in union activities sanctioned by the union. She did not champion her own collective bargaining rights, but advocated the retention of the grounds supervisor position.

Zappler made numerous presentations to the school board, both orally and in writing, urging the board to save the grounds supervisor position and to consider alternatives to cutting that position, including eliminating the use of summer hourly workers. This was in opposition to the union's position of retaining union jobs and, if necessary, laying off the grounds supervisor. The union never challenged Zappler's right to communicate with the board, but charged that as a union member she was undercutting the union's position and was subject to its discipline.

It should be obvious that there is no question here of a violation of Zappler's constitutional right of free speech. The union is not a government agency. The record shows that the school board never tried to silence her. Even if a constitutional question existed, the Commission, as an administrative agency, has no jurisdiction to enforce constitutional rights. *Whatcom County,* Decision 7643-A (PECB, 2003).

Zappler was aware that the employer and the union had rolled over the 2001-2004 collective bargaining agreement and that across-the

table negotiations for a successor agreement would not take place. She did not understand that the employer and the union were in fact negotiating over the proposed layoffs in the grounds department.

The union makes the point that it is constantly negotiating with the district over contractual issues and did so over the layoffs. The union argues that Zappler's public stance harmed the union by undermining its efforts as the exclusive bargaining representative. The union's position is based on RCW 41.56.080, which states in pertinent part:

> The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent, all the public employees within the unit without regard to membership in said bargaining representative. . . .

The union also cites Commission precedent in support of its position: "Individual union members have no statutory right to attain their own goals within the collective bargaining process and must submit to the will of the majority." *City of Seattle*, Decision 3470-A (PECB, 1990). The union's argument is persuasive. Zappler's communications with the school board were attempts to influence the board on collective bargaining issues directly related to wages, hours, and working conditions. She was aware that her views were in direct opposition to the union's. Legally, she could not collectively bargain with the school board because she was not the bargaining representative. However, when she identified herself as a school gardener, she knew, or should have known, that school board members would assume she was a union member. She knew, or should have known, that school board members could view this as evidence of disunity within the union.

Zappler's relationship with the union was a mixture of her refusing to be silenced by its admonitions to her and a reluctance to participate in union activities. Her reaction to the warning letters sent by the union's president was to continue her communication with the board, with written explanations to the union of her reasons for her position. On the other hand, although opposing the union's position on the layoffs, she did not run for union office or become otherwise active in the union. Based on the record, she attended only one union meeting, in the spring of 2003. She claimed she was treated rudely at that meeting and in subsequent private meetings by union officers and its business agent. However, these allegations are insufficient to establish an argument for futility. An argument for futility is fact specific and depends upon an entire course of conduct. *See City of Snohomish*, Decision 1661-A (PECB, 1984).

There is no evidence in the record that Zappler attended a union meeting in 2004 or attempted to influence internal union affairs. She did not profess an intention to run for union office or officially challenge, via Commission rules, the status of the union as an exclusive bargaining representative. Zappler offered no persuasive evidence that she had no recourse other than direct communication with the school board. In addition, her evidence shows that her communication with the board did not concern her own wages, hours, and working conditions, but those of the grounds supervisor. In sum, Zappler offered no legitimate reasons for her communications with the school board that come within the purview of Chapter 41.56 RCW. The record shows that Zappler incorrectly believed she and the union were on an equal footing in advocating their respective positions.

Zappler's lack of knowledge about the collective bargaining process, and the role played by the exclusive bargaining represen-

tative, does not shield her from accepting responsibility as a union member for actively seeking to supplant the majority position of the union. Once she entered the arena, she was responsible for knowing the rules. Zappler's communication with the board was not protected activity under Chapter 41.56 RCW.

The union's reaction

The union had a legitimate interest in retaining its position as the exclusive bargaining representative for the gardeners and custodians, as well as the cooks. *Scofield*, at 424-30. Since the layoff issue concerned the cooks' summer status, the union reasonably argued for retaining the cooks' status in its winter and spring 2004, negotiations with the school board.

The union asserted that Zappler violated Article XXIV(7)(e) of its constitution and Article XXII(1) and (3) of its by-laws. Article XXIV (7)(e) states, in pertinent part:

> Any officer or member of a Local Union . . . who destroys the interest and harmony of the Local Union . . . may be disciplined or, upon trial therefor and conviction thereof, be fined, suspended or expelled from his Local Union.

Article XXII (1) of the by-laws states:

> Any member working out of this Local Union who violates any part or section of these rules may be subject to trial by the union membership, and on conviction may be subject to a fine, suspension and or expulsion.

Article XXII (3) of the bylaws states:

> No member shall engage in conduct discreditable to this Local Union.

The union demonstrated that these were properly adopted union rules. *Scofield*, at 424-30.

Zappler's actions undermined the union's status as exclusive bargaining representative with the employer. However, Zappler's efforts failed. The grounds supervisor position was eliminated. Custodial leads were placed over the gardeners. Yet, after this occurred, the union proceeded with Zappler's trial, imposed the fine, and warned the employer not to communicate specifically with her on collective bargaining issues.

The union's attempts to stop Zappler's unauthorized bargaining with the employer did not violate RCW 41.56.150(1). However, its overall actions toward her lead to an analysis of whether the union impaired a legislative policy regarding interference and reasonably enforced its rules relative to interference. *Scofield*, at 424-30.

The union's violations

The union lawfully acted to stop Zappler's communication with the board on issues directly related to its status as the exclusive bargaining representative for the gardeners, custodians, and cooks. It was within its lawful authority to discipline Zappler as a union member, including putting her on notice of a trial and proceeding with the trial. The Commission does not assert jurisdiction over the internal trial process, nor over Zappler's procedural and due process rights. *Enumclaw School District*, Decision 5979; *Whatcom County*, Decision 7643-A.

However, the union's actions were unreasonable when it threatened Zappler with expulsion from the union, levied a conditionally suspended $1,200 fine, and sent the post-trial letter to the employer.

Zappler's interference claim results from these actions and is this: She reasonably feared that the union threatened her employment.

The union impaired a legislative policy regarding public employees. In 1967, the Washington legislature declared its purpose for enacting Chapter 41.56 RCW:

> The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

RCW 41.56.010.

The State of Washington further recognizes that public employees have a property interest in retaining employment. *Danielson v. City of Seattle,* 108 Wn2d. 188, 795-99, 742 P.2d 717 (Wash. 1987); *Hoflin v. City of Ocean Shores*, 121 Wn2d. 113, 127-29, 847 P.2d 428 (Wash. 1993).

Zappler's fundamental right under Chapter 41.56 RCW was the strengthening of her employment relationship with her employer through her membership in the union. Despite her mistakes in communicating with the school board, the union's lawful actions ended with its right to determine her union status, not threaten her employment.[2] The determinative question in this case is whether Zappler reasonably believed that the union threatened her employment relationship with her employer, regardless of the union's intentions.

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[2] This case is distinct from a scenario where a union validly enforces a union security clause. The union never charged Zappler with failure to pay union dues.

Zappler's reasonable belief

Zappler convincingly testified that she believed expulsion from the union would result in termination from employment. According to the record, her only reliable source of information on that question was the collective bargaining agreement then in effect. That agreement states in Article VII (C): "It is agreed that all employees under this Agreement will become members of the Union after thirty-one (31) days of employment and maintain membership as a condition of continued employment unless an RCW 41.56 exception applies." In view of Zappler's unfamiliarity with union contracts, union politics, and the collective bargaining process, her testimony was credible.

Zappler was always free to leave the union and escape its discipline. Following the trial, she did. Whether union officials were aware she could resign, or believed she knew of that option, is irrelevant in an interference claim. The union need not have intended to create Zappler's fear of termination from employment to commit interference. *City of Seattle*, Decision 3199-B; *City of Port Townsend*, Decision 6433-B.

This Examiner declines to find a duty of public employees, working under the type of union security clause noted above, to go the extra mile and research the legal status of such a provision. Employees who lack experience in and knowledge of collective bargaining would reasonably see this provision as meaning exactly what it says; exclusion from the union results in loss of employment. The record shows that Zappler belonged to this category of employees. Zappler's lack of knowledge of collective bargaining did not absolve her of responsibility when she *actively* competed with the union before the school board. However, it does protect her from the union's *active* violation of her rights. The union knew, or should have known, that the threat of expulsion from the

union would cause Zappler to fear that her employment status was in jeopardy. Again, the union's intent is not at issue. *City of Seattle,* Decision 3199-B; *City of Port Townsend,* Decision 6433-B.

Once the union continued to threaten her with possible expulsion, it stepped over the interference line. It could have explained that expulsion would not result in termination, or that Zappler could resign and pay a representation fee in lieu of discipline.[3]

In addition, the amount of the fine raises a question regarding the reasonableness of the union's discipline. The trial transcript, verified as accurate by both parties, reveals that the union viewed the $1,200 fine as a source of reimbursement for the income lost by cooks not used for summer grounds work. The union attributed their lost income "in part" to Zappler's communications with the school board. The union's business manager stated that he had initially wanted to purchase grocery store gift certificates for the non-used seasonal staff. He stated that he did not do so because, "frankly, at this point, we will need that money to pay for the legal fees needed for defending the Union against her [Zappler's] charges."[4]

A cursory examination of the gardeners' salary schedule in the collective bargaining agreement leads to an estimate of the fine as between at least one and two weeks take-home pay for Zappler in

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[3] As with an employee's duty to investigate security clauses, this Examiner declines to impose a *duty* on unions to explain to employees all of the ramifications of the unions' actions in disciplinary matters.

[4] Zappler did not allege a claim of retaliation for filing this unfair labor practice complaint. This evidence is used only as part of the evaluation of the reasonableness of the fine.

2004. The union's by-laws, Article XII(8), provide for a fine of not less than $200 for violation of strike or lockout rules. The gap between a $200 fine for jumping the union ship during a strike or lockout and a $1,200 fine for Zappler's intrusive, but ineffective, advocacy before the school board is too striking to ignore. An employer imposing a similar level of discipline would levy a five to ten day suspension, an exceptionally harsh punishment. The fine was suspended, but only on the condition of no further rules violations. The trial transcript makes clear that the union's purpose for imposing such a large fine was punitive, rather than remedial.

Any employee, under those circumstances, could reasonably consider a voluntary quit rather than face future substantial financial setbacks. Whether the union intended such a reaction by Zappler is, again, beside the point. Zappler's evidence shows she considered the amount of the fine a massive burden that jeopardized her employment.

The union, having demonstrated its power to Zappler, then wrote a letter to the employer warning it not to engage in collective bargaining with anyone other than the duly appointed representatives of the union. This was appropriate under the circumstances. However, naming Zappler was gratuitous. Naming her could only signal to Zappler that the union now identified her to the employer as a source of conflict between it and the union. This added to Zappler's apprehension over her employment status.

Zappler reasonably believed the union endangered her employment through threat of force, a belief the union did nothing to counter, but rather, encouraged. A threat of force need not imply violence. Force is, "[p]ower dynamically considered, that is, in motion or in action; constraining power, compulsion; strength

directed to an end." *Black's Law Dictionary*, Abridged 5th Edition (West 1983). The union distorted the legislative intent of Chapter 41.56 RCW when it placed Zappler in a position of fearing that her membership in the union would not enhance her employment relationship with her employer, but end it.

Newsletters

Zappler contends that two union newsletters, one issued on May 25, 2004, the other on June 14, 2004, were part of the union's violations. Although neither newsletter named her, they identified the actions of a female gardener and union member who had worked at the district for one and a half years. Zappler argues that this was sufficient to identify her. The union posted the newsletters in break rooms throughout the school district. Zappler asserts this subjected her to the hostility of other union members, particularly the cooks. The newsletters included a reference to possible discipline, but did not specify what that meant. Zappler believes the posting of the newsletters removes the matter from being an internal union issue.

Whether Zappler perceived hostility by other employees, and whether the newsletters were or were not public is not germane to the outcome of this case. The only question is whether the newsletters could, combined with the union's letters to her and the employer and the fine, add to Zappler's belief in a threat of force against her employment.

The newsletters are distinguishable from the union's letters to her and the employer and the fine. The newsletters postings do not constitute violations of Zappler's statutory rights under Chapter 41.56 RCW. First, the newsletters are addressed to other union-members. The newsletter issue is similar to the facts in *North Beach School District*, Decision 2487. In that case, Union

A sent a letter to co-workers of a Union A member who was supporting Union B in a representation election. The letter mentioned the Union A member by name and opposed his advocacy of the rival union. The Union A member filed an unfair labor practice complaint against Union A, claiming the letter constituted interference. The Commission found no violation by Union A for merely opposing the complainant in a letter addressed to other union members.

Second, the union's newsletters make no specific mention of fines and expulsion. Third, the newsletters do not name Zappler. Her contention that union members could easily deduce who she was, and did, is not supported by any evidence in the record other than her testimony. The union opposed Zappler's views through its newsletter, meant only for its members' eyes, not the employer's. The newsletter did not identify her by name nor specify the type of discipline that might occur. The reference to the unnamed union member was a small part of the content of the two newsletters in question. Zappler could not reasonably believe that the union's newsletters threatened her employment.

Interference is the only claim considered

In their closing briefs, both Zappler and the union included arguments regarding discrimination and reprisal for filing charges. However, Zappler's only claim is for interference. Zappler filed her unfair labor practice complaint using the standard Commission form. This form gives a complainant several options in charging alleged violations. For complaints solely against unions by employees, the options are: (1) union interference with employee rights; (2) union discrimination for filing charges; and (3) other unfair labor practice (the complainant is asked to explain and specify on an attached sheet of paper). Zappler indicated only that her claim was "union interference with

employee rights." The preliminary ruling found that a cause of action existed for interference. Zappler's amended complaint asked only to add factual allegations, not to amend the cause of action. At the hearing, Zappler did not move to amend her complaint to conform to the evidence.

The Commission will not consider evidence or argument that does not apply to the cause of action specified in the preliminary ruling. *King County,* Decision 6994-B (PECB, 2002). Amendments to complaints are allowed after the start of a hearing only when there is a motion to conform the pleadings to evidence received without objection. WAC 391-45-070(2)(c); *City of Seattle,* Decision 8313-B (PECB, 2004). Accordingly, this Examiner has considered evidence and argument related only to union interference with Zappler's collective bargaining rights under RCW 41.56.150(1).

Forum

The union argues that Zappler's remedy, if any, must come either through the union appeal process or the state courts, since this case involves a dispute over her rights under the union constitution. As noted above, the Commission will not assert jurisdiction where the dispute involves union constitutions and by-laws. *Enumclaw School District,* Decision 5979. This Examiner is not questioning the validity of the union's constitution or by-laws. The analysis of the union's actions extends only to whether its disciplinary process interfered with Zappler's rights under Chapter 41.56 RCW. Zappler could have elected to seek remedies through the union or state courts She chose to file a claim with the Commission. She was entitled to an unfair labor practice hearing.

Zappler's resignation

At some point after the trial, Zappler resigned her union membership. She is now a fee payer. At the time of the hearing she was employed as a gardener by the employer. The union interfered with her collective bargaining rights. As noted below, the union will publicly post and announce its violation. However, the application of a restrictive remedy particular to Zappler is moot. Admonishing the union not to interfere with the statutory rights of a non-member through its disciplinary process would be an empty gesture. Zappler resigned from the union precisely to remove herself from union discipline. *Scofield*, at 424-30.

Transcript and attorney fees

Zappler's trial transcript fee resulted from the union's lawful use of its disciplinary process. Whether Zappler should be responsible for the fee is a matter of interpretation of the union's constitution and by-laws, and as such is a matter for the union appeal process or the state courts. *Enumclaw School District*, Decision 5979.

Zappler's and the union's demands for attorney fees are subject to Commission precedent. The Commission usually has awarded attorney fees when the prevailing party has shown that the losing party engaged in a repetitive pattern of illegal conduct or committed egregious or willful bad acts. *Mansfield School District*, Decision 5238-A (EDUC, 1996); *City of Anacortes*, Decision 6863-B (PECB, 2001).

In the present case, the union's actions did not alter Zappler's terms and conditions of employment. She kept her job, and her status, wages, and hours were not adversely changed. The union's discipline amounted to a censure and a suspended fine. Zappler

never alleged that resigning her union membership was harmful to her and prevented her from exercising her statutory rights. Based on Commission precedent, Zappler did not show that the union engaged in a repetitive pattern of illegal behavior or committed egregious or bad acts sufficient to justify an extraordinary remedy.

Although Zappler failed to prove interference regarding the union's newsletter or trial process, her claim was neither frivolous nor meritless. She prevailed on three allegations.

Under the facts of this case, neither party merits attorney fees or costs.

FINDINGS OF FACT

1. The Seattle School District is a public employer within the meaning of RCW 41.56.030(1).

2. Liesl Zappler is a public employee within the meaning of RCW 41.56.030(2).

3. The 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 gardeners, custodians, and cooks, among others, in the Seattle School District.

4. Zappler had a reasonable belief that the union's actions could result in her termination from employment when the union threatened her with expulsion from the union.

5. Zappler had a reasonable belief that the union's actions could result in her termination from employment when the union issued her an excessive $1,200 fine, suspended contingent on her future actions.

6. Zappler had a reasonable belief that the union's actions could result in her termination from employment when the union named Zappler in the letter sent to the employer after the union's trial. This letter gratuitously named Zappler as a possible source of conflict between the employer and union.

7. Zappler's communication with the school board undermined the union's status as the exclusive bargaining representative for gardeners, custodians, and cooks.

8. The union was entitled to discipline Zappler for her communications with the school board.

9. The union proceeded with Zappler's trial under the provisions of its duly adopted constitution and by-laws.

10. Zappler did not have a reasonable belief that the union's actions could result in her termination when it referred to her in its newsletter.

11. Zappler resigned from the union after her trial, became a fee payer and, at the time of the unfair labor practice hearing, remained an employee of the Seattle School District.

12. Neither Zappler nor the union pursued claims or defenses that were frivolous or without merit, and neither party engaged in repeated illegal actions, bad acts or egregious behavior.

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. On the basis of Findings of Fact 4-6, the union interfered with Zappler's collective bargaining rights under RCW 41.56.150(1), when it threatened her with expulsion from the union, fined her $1,200, and sent a post-trial letter to the employer.

3. On the basis of Findings of Fact 4-6, the union's actions against Zappler constituted a threat of force which impaired the Washington legislature's intent under RCW 41.56.010.

4. On the basis of Findings of Fact 4-6, the union did not reasonably enforce its rules against Zappler, and thus violated RCW 41.56.150(1).

5. On the basis of Findings of Fact 3, 7, 8, and 9, the union did not, through its trial process, interfere with Zappler's collective bargaining rights under RCW 41.56.150(1).

6. On the basis of Finding of Fact 10, the union did not violate RCW 41.56.150(1) when it posted the newsletters of May 25 and June 14, 2004.

7. On the basis of Finding of Fact 11, Zappler is not subject to present or future union discipline.

8. On the basis of Finding of Fact 12, neither Zappler nor the union are entitled to attorney fees or costs.

ORDER

On the basis of Conclusion of Law 2, 3, and 4, the complaint charging an unfair labor practice by the International Union of Operating Engineers, Local 609, against Liesl Zappler, filed in case 18736-U-04-4763, is SUSTAINED in part, on the merits. On the basis of Conclusions of Law 5 and 6, the complaint is DENIED in part, on the merits.

The International Union of Operating Engineers, Local 609, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from: Interfering with, restraining or coercing its members 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 purposes and policies of Chapter 41.56 RCW:

   a. Post, in conspicuous places common to all postings of Local 609's notices of all kinds, copies of the notice attached hereto and marked "Notice."

   b. Such notice shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such

notices are not removed, altered, defaced, or covered by other material.

c. Read the notice attached and marked "Notice" aloud at the next Local 609 general meeting and append a copy thereof to the official minutes of said meeting.

d. Notify Liesl Zappler, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order.

e. 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 required by this order.

Issued at Olympia, Washington, on the 17th day of October, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

David I. Gedrose, 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 WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO OUR MEMBERS:

WE UNLAWFULLY interfered with the collective bargaining rights of Liesl Zappler by threatening her with expulsion from the union. Liesl Zappler reasonably believed that expulsion from the union would result in the termination of her employment with the Seattle School District.

WE UNLAWFULLY interfered with Liesl Zappler's collective bargaining rights when, after a union trial, we fined her $1,200, suspended on condition of her future behavior. This fine was excessive and also caused her to reasonably believe her employment was in danger.

WE UNLAWFULLY interfered with Liesl Zappler's collective bargaining rights when, after the trial, we sent a letter to the Seattle School District warning against further communication with Liesl Zappler over collective bargaining issues. The letter stated that further such communication might result in further conflict between Local 609 and the Seattle School District. Naming Liesl Zappler was unnecessary and caused her to reasonably believe her employment was threatened.

Zappler has resigned from Local 609, is now a fee payer, and is not subject to Local 609 discipline.

All members of Local 609 who are subject to discipline under the duly adopted rules of the Local may resign membership in the union and become fee payers, no longer subject to union discipline. Neither resignation nor expulsion from the union will, by themselves, result in termination of employment from the Seattle School District. Both full union members and fee payers remain subject to the union security provisions of the collective bargaining agreements between Local 609 and the Seattle School District.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL NOT, in the exercise of lawful union discipline, unrelated to union security, cause union members to fear the loss of their employment with the Seattle School District.

WE WILL NOT interfere with, restrain, or coerce members of Local 609 in the exercise of their collective bargaining rights under the laws of the state of Washington.

WE WILL read this notice into the record of the next general meeting of Local 609 and will permanently append a copy thereof to the official minutes of said meeting.

WE WILL notify Liesl Zappler, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order.

WE WILL 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 required by this order.

Dated:_____ INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609

By: _____

Authorized Representative

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

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions concerning this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC) at 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's website, www.perc.wa.gov.