STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 839, Complainant, vs. PASCO HOUSING AUTHORITY, Respondent.	CASE 12735-U-96-3055 DECISION 5927-A - PECB DECISION OF COMMISSION

Davies, Roberts & Reid, by David W. Ballew, Attorney at Law, represented the union.

Menke, Jackson, Beyer & Elofson, by G. Scott Beyer, Attorney at Law, represented the employer.

This case comes before the Commission on a petition for review filed by the Pasco Housing Authority, seeking to overturn a decision issued by Examiner William A. Lang.[1] The Commission granted the employer's request for oral argument, based upon a claim that its due process rights were violated, and the parties presented oral argument before the Commission on September 16, 1997.

BACKGROUND

The facts of this case are fully set forth in the Examiner's decision, and only the facts crucial to our conclusions are summarized here.

The Pasco Housing Authority (employer) and Teamsters Union, Local 839 (union) are parties to a collective bargaining relationship

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[1] Pasco Housing Authority, Decision 5927 (PECB, 1997).

that began when the union was certified as exclusive bargaining representative on August 25, 1995.[2] In September of 1995, the union initiated efforts to negotiate a collective bargaining agreement. Business Representative Ted Duffy represented the union at the outset of the negotiations; Secretary-Treasurer Robert Hawks replaced Duffy as the union representative in May of 1996. Attorney Rocky L. Jackson represented the employer throughout the negotiations.

At a bargaining session held on August 19, 1996,[3] Hawks suggested the employer had laid off union adherents in order to destroy the union. In an exchange that followed, Jackson asked if the union was saying it did not represent a majority of employees. Hawks jokingly responded that he was surprised he had not received notice of a decertification effort. Whether Hawks also stated that the union lacked majority status is disputed.

After the August 19 meeting, the employer's executive director informed the employer's board that the union had "instructed us that he no longer represented the majority of the members", and that Jackson had "suggested the year's time frame was up".[4] The board was also advised that the employer could petition for decertification of the union, based on the union's admission that it lacked majority representation.

On September 10, 1996, the employer canceled a bargaining session that had been scheduled for September 25, 1996. That action was attributed to the employer's board, although that body had not been an active participant in the negotiations up to that time.

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[2] Pasco Housing Authority, Decision 5234 (PECB, 1995).

[3] Between September of 1995 and August of 1996, the parties met few times, partially due to debates on scheduling.

[4] Transcript, page 63.

On September 11, 1996, the employer published a memo under the title of "Representation Facts", as follows:

> It has been over a year since negotiations began between the Teamsters and the Authority. At the last negotiation meeting, the Teamster Representative reported to the Authority that he did not believe the Teamsters represents the majority of the employees at this time.
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> ...
>
> The Authority's history has proven to provide wage increases yearly for their employees, wage increases authorized by the Board without the involvement of union representation amounted to 4.0% in 1992 and 5.5% in 1993. Up until the budget deficits, employee's medical benefit was paid 100% without the need for union representation. The Authority wages are at or above what is required by HUD and comparable to wages within this industry and surrounding public agencies.
>
> In proposals to date:
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> - The Teamsters have not addressed any wage increase in their proposed contract.
> - The Teamsters have proposed a closed shop, which means every employee must pay Union dues. Employees who do not wish to join the Union or pay Union dues cannot retain their employment with the Authority.
> - Union dues will amount to approximately $20 per month or $240 per year per employee.
> - For the negotiation sessions alone, the Authority has paid $13,000 for representation costs. This amount would be equivalent to:
>   - a 3.0% raise for every employee which amounts to $10,000/year; plus
>   - Authority paying 100% of medical insurance coverage. Current employee out-of-pocket deductions represent $3,000/year.
> - The Board recognizes the employee's [sic] desire to be involved in decision affecting their employment and suggest [sic] the employees consider an employee committee

who can meet with the Management and Board to provide employee input on issues.

- Authority employees are now eligible to vote for decertification of union representation. The Board urges you to consider the benefits of union representation and exercise your right to vote for continued representation or decertification.

The memo was produced in the employer's office, based upon ideas from the employer's board and advice from Jackson's law firm. Copies were distributed to all employees represented by the union.

On September 30, 1996, the union filed the complaint charging unfair labor practices to initiate this proceeding. It alleged that the employer interfered with employee rights in violation of RCW 41.56.140(1), and committed a domination or assistance violation under RCW 41.56.140(2), by: (1) canceling a negotiation session, (2) making inaccurate statements in the September 11 memo, and (3) urging employees to decertify the union and form their own employee committee. The union requested that the Commission order the employer to:

1. Cease and desist from soliciting decertification from Teamsters Local Union No. 839 and encouraging employees to form their own "employee committee."
2. Cease and desist from providing inaccurate misrepresentations about the bargaining process to employees.
3. Comply with its obligation to bargain in good faith with the exclusive bargaining representative of the employees.

Examiner William A. Lang held a hearing on February 26, 1997, and issued his decision on May 28, 1997. The Examiner found the employer: (1) remained obligated to bargain with the union in good faith at all pertinent times; (2) acted in pursuit of a decertification strategy by its September 10, 1996 action to cancel a

bargaining session, and thereby interfered with employee rights in violation of RCW 41.56.140(1); and (3) interfered with employee rights in violation of RCW 41.56.140(1), by issuing the September 11, 1996 memorandum. The Examiner found that imposition of an extraordinary remedy was warranted, because the employer committed flagrant and repetitive violations of RCW 41.56.140 and demonstrated little likelihood of reaching an agreement, and because the defenses asserted by the employer were frivolous. The Examiner thus ordered the employer to pay the union's reasonable attorney fees, to bargain collectively with the union upon request, to participate in mediation if no agreement is reached within 60 days, and to submit any remaining issues to interest arbitration.

POSITIONS OF THE PARTIES

The employer argues that the Examiner erred in viewing the case in a "refusal to bargain" context, and in assigning a burden of proof to the employer. It asserts that its cancellation of a bargaining session involved no strategy to decertify. The employer claims the statements in its September 11, 1996 memo were factual, and that those statements did not illegally promise benefits, undermine the union, or express a tone of coercion. The employer cites error in the Examiner's ruling that the employer's violations were flagrant and repetitive, and takes issue with the Examiner's conclusion that the employer's defenses were frivolous. The employer thus argues that attorney fees and interest arbitration are inappropriate.[5]

[5] The employer asserts error in the Examiner's statement, at page 4 of his decision, that the employer offered excerpts from a transcript of another hearing as evidence at the hearing in this matter, and that they were admitted as an exhibit. The excerpts were discussed at the hearing in this case, but not admitted in evidence. Correction of this minor error does not affect the ultimate conclusions in this case.

The union urges the Commission to defer to the Examiner's factual findings and inferences. The union contends that the employer improperly encouraged a decertification effort. The union argues that statements in the employer's September 11, 1996 memo constituted material misrepresentations, that it contained promises of benefit, that it undermined the union, and that it evidenced a tone of coercion. The union argues that the Examiner properly considered the employer's defenses to be frivolous, and properly imposed extraordinary remedies in the form of attorney fees and interest arbitration.

DISCUSSION

The Legal Standards

Chapter 41.56 RCW prohibits employers from interfering with or discriminating against public employees who exercise the collective bargaining rights secured by the statute:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. 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.

[Emphasis by **bold** supplied.]

Enforcement of those statutory rights is through the unfair labor practice provisions of Chapter 41.56 RCW:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:

> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
> (2) **To control, dominate or interfere with a bargaining representative;**
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

RCW 41.56.160 authorizes the Commission to determine and remedy unfair labor practices.

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, and must be established by a preponderance of the evidence,[6] but the standard is not particularly high. An interference violation will be found when *employees could reasonably perceive* the employer's actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees.[7]

An employer's communication to employees could be an "interference" unfair labor practice under any one, any combination, or all, of the following criteria:

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[6] See, City of Mill Creek, Decision 5699 (PECB), and cases cited therein.

[7] See, City of Seattle, Decision 3066-A (PECB, 1988); City of Seattle, Decision 3566-A (PECB, 1991); City of Pasco, Decision 3804-A (PECB, 1992); Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995); King County, Decision 4893-A (PECB, 1995); Mansfield School District, Decision 5238-A (EDUC, 1996); Kennewick School District, Decision 5632-A (PECB, 1996); and Mukilteo School District, Decision 5899-A (PECB, 1997).

1. Is the communication, in tone, coercive as a whole?

2. Are the employer's comments substantially factual or materially misleading?

3. Has the employer offered new "benefits" to employees outside of the bargaining process?

4. Are there direct dealings or attempts to bargain with the employees?

5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?

6. Did the union object to such communications during prior negotiations?

7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

City of Seattle, Decision 3566 (PECB, 1990).

See, also, Lake Washington School District, Decision 2483 (PECB, 1986).

Application of Legal Standards

The Commission affirms the Examiner's conclusion that the employees in the bargaining unit represented by Teamsters Local 839 could reasonably have perceived the employer's September 11 memo as a threat of reprisal or force or promise of benefit associated with their union activity. Taken in the context of the prolonged negotiations process, and also standing alone, the employer's memo is coercive in tone. It is also materially misleading and substantially untrue, it demonstrates a desire on the part of the employer to deal directly with bargaining unit employees, it impliedly offers benefits outside of the collective bargaining process, and it discredits and undermines the union. As the Examiner stated:

> [T]he memo was written in a style used in representation election campaigns, but this was not a pre-election campaign where employees were about to make a ballot choice.

Examiner's decision, page 16.

We arrive at our conclusions for the reasons delineated in the following detailed analysis of the September 11 memo:

1. THE FIRST SENTENCE and the LAST PARAGRAPH of the memo read as follows:

> It has been over a year since negotiations began between the Teamsters and the Authority.
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> ...
>
> Authority employees are now eligible to vote for decertification of union representation. The Board urges you to consider the benefits of union representation and exercise your right to vote for continued representation or decertification.

With the first sentence, the employer pointed out the expiration of the certification bar year under RCW 41.56.070 and WAC 391-25-030(2)(a). The last paragraph of the memo clearly solicited employees to decertify the union, without giving the employees a full explanation of their statutory rights.[8] In an environment

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[8] The advice could reasonably be taken by employees as limiting the rights or options available to them under Chapter 41.56 RCW, including selection of a different union. See, City of Seattle, Decision 2773 (PECB, 1987), where an "interference" violation was found when the employer advised an employee of rights under a civil service appeals procedure without making reference to parallel rights under a collectively bargained grievance procedure. See, also, City of Seattle, Decision 3066-A (PECB, 1989), where a violation was found when the employer notified employees of their right to appeal performance evaluations without advising them of their parallel right to challenge standards used in the evaluation through the collective bargaining agreement.

where no decertification petition had been filed, these statements were coercive, and employees could reasonably have perceived them as an attempt to undermine the union.

2. THE BALANCE OF THE FIRST PARAGRAPH reads as follows:

> At the last negotiation meeting, the Teamster Representative reported to the Authority that he did not believe the Teamsters represents the majority of the employees at this time.

The employer cites error in the Examiner's conclusion that it did not sustain its burden of proof that this statement was true. While the complainant always has the overall burden of proof in an unfair labor practice case, a respondent always has the burden of proof on any affirmative defenses that it asserts. In this case, the employer did not deny making the statement, but rather asserted an affirmative defense that the statement was true. We thus find the employer's "burden of proof" argument to be without merit.

We have also thoroughly reviewed the record, and find no error in the Examiner's conclusions on this issue. As the Commission has previously noted:

> We attach considerable weight to the factual findings and inferences therefrom made by our Examiners. They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commission members are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every appeal, is even more appropriate of a "fact oriented" appeal ...

City of Pasco, Decision 3307-A (PECB, 1990), citing Asotin County Housing Authority, Decision 2471-A (PECB, 1987); Educational Service District 114, Decision 4361-A (PECB, 1994); Seattle School District, Decision 5237-B (PECB, 1996).

Even if we were to credit the employer's witnesses, and were to find that the union's representative made the remark attributed to him, the testimony indicates: (1) That any such statement was made in conjunction with the statement expressing surprise that the employer had not petitioned for decertification; and (2) that the union official made the statement about an employer petition in jest. The employer dispensed with those important contextual facts, however, when it used the strong "reported" terminology in its memo to the employees. Accordingly, employees could reasonably have perceived the employer's phraseology as indicating that the union made a formal, oral report that it lacked majority status. The memo was therefore materially misleading, and evidenced an attempt to undermine the union.

The employer also takes issue with the Examiner's observation that the employer did not follow-up on the union's alleged remarks in a manner that would have been consistent with the collective bargaining statute. We find no error. WAC 391-25-090 provides for employer-filed representation petitions where an employer has a good faith belief that a majority of its employees in an existing bargaining unit no longer desire to be represented by their incumbent exclusive bargaining representative. This employer did not file such a petition. While the language of the rule does not place an affirmative duty on the employer to file a petition, it would be an unfair labor practice under RCW 41.56.140(1), (2) and (4) for an employer to continue bargaining with an organization that it knows or believes lacks majority status. Thus, the employer's filing of a representation petition would clearly have been consistent with its contention that this statement in its September 11 memo was true. WAC 391-25-090 is properly used to point out the inconsistency between the employer's September 11 memo and Jackson's October 4, 1996 letter offering to resume negotiations with the union, and that inconsistency provides further support for a conclusion that the employer was attempting to coerce employees into believing incorrect facts.

3. THE SECOND PARAGRAPH containing violations reads as follows:

> The Authority's history has proven to provide wage increases yearly for their employees, [sic] wage increases authorized by the Board without the involvement of union representation amounted to 4.0% in 1992 and 5.5% in 1993. Up until the budget deficits, employee's medical benefit was paid 100% without the need for union representation. The Authority wages are at or above what is required by HUD and comparable to wages within this industry and surrounding public agencies.

By stating how well employees had been treated before they obtained union representation, the employer made an implied promise of benefit to those employees (i.e., wage increases and benefits similar to those provided prior to their selection of an exclusive bargaining representative and/or similar to those provided by other employers), if they would again forego exercise of their rights under the Public Employees' Collective Bargaining Act. Additionally, this paragraph contributes to the coercive tone of the memo as a whole.

4. THE THIRD PARAGRAPH containing violations reads as follows:

> [In proposals to date:] The Teamsters have not addressed any wage increase in their proposed contract.

The employer again dispensed with important contextual facts, so that employees could reasonably have perceived this statement as discrediting and undermining both the union and the collective bargaining process. The employer's memo did not mention either the tentative agreements which had been reached by the employer and union up to that time, nor did it make adjustment for the severe limitations that the employer had imposed on the frequency and duration of bargaining sessions.

5. THE FOURTH PARAGRAPH containing violations states as follows:

> The Teamsters have proposed a closed shop, which means every employee must pay Union dues. Employees who do not wish to join the Union or pay Union dues cannot retain their employment with the Authority.

The Examiner found this statement invoked obsolete and controversial "closed shop" terminology, and thus inherently suggested that the union was proposing a form of union security outlawed by RCW 41.56.122.[9] We agree. The union was not proposing a closed shop.

The employer sought to defend its statement on the basis that use of the "closed shop" terminology is common in labor negotiations, and that employees were not materially misled by the statement, but that is not the test. Any employee who knew or sought out the true definition of "closed shop" could reasonably have perceived the employer's statement to indicate a serious violation of the law by the union. As such, the statement was materially misleading. Any reference to "closed shop" was uncalled for, and indicates a patent disregard for proper use of labor law terminology. We thus affirm the Examiner's conclusion that the employer's statement provides basis for finding a violation of RCW 41.56.140(1).

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[9] The "closed shop" was outlawed by the Labor-Management Relations Act of 1947 (the Taft-Hartley Act). Roberts' *Dictionary of Industrial Relations*, BNA Books (1966) contains the following definition of the term:

> A union-security arrangement where the employer is required to hire only employees who are members of the union. Membership in the union is also a condition of continued employment. The closed shop is illegal under federal labor statutes.

The authorization of union security arrangements under Chapter 41.56 RCW is found in RCW 41.56.122, as follows:

> A collective bargaining agreement may:
> (1) Contain union security provisions: PROVIDED, That nothing in this section shall authorize a closed shop provision ...

5. THE FIFTH PARAGRAPH containing violations states as follows:

> Union dues will amount to approximately $20 per month or $240 per year per employee.

The employer argues that the Examiner erred in inferring wrongful conduct by the employer in this statement, that it was substantially true, and that the amount of dues and fees was not a subject of discussion in the bargaining. The statement must be analyzed from the employee's point of view, however.

The specification of a dues amount was clearly not meant to be a report on the status of negotiations. Its likely effect was to show the hardships that employees would endure if they continued to exercise their collective bargaining rights. It is easily detected that the employer was essentially attempting to scare employees into rejecting the union, so that this statement is part of the coercive tone of the memo as a whole. Finally, we agree with the Examiner that the statement misrepresents the actual facts.[10]

6. THE SIXTH PARAGRAPH containing violations reads as follows:

> For the negotiation sessions alone, the Authority has paid $13,000 for representation costs. This amount would be equivalent to:
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> - a 3.0% raise for every employee which amounts to $10,000/year; plus
> - Authority paying 100% of medical insurance coverage. Current employee out-of-pocket deductions represent $3,000/year.

As the Examiner found, these statements could have been reasonably perceived by employees as promises of benefit (*i.e.*, a 3% wage increase and employer-paid benefits out of savings the employer

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[10] The record shows that union dues would actually be between $24.00 and $30.00 a month.

would incur if it did not have to bargain with a union), if the employees would again forego exercise of their rights under the Public Employees' Collective Bargaining Act, and therefore constituted interference with employee rights under RCW 41.56.040, in violation of RCW 41.56.140(1).

The employer's defense that the information is a matter of public record, and that the employees were entitled to know the cost of representation borne by the employer, does not hold up when considering the memo as a whole. The Legislature has set down the process for employees to exercise their collective bargaining rights, but the employer's statements express a tone of dissatisfaction with the collective bargaining process imposed by state law.

Employees could reasonably perceive the statements contained in this paragraph to indicate the employer is spending too much money on attorney fees, and as making an implied request for the employees to consider the employer's costs in deciding whether to exercise their rights under the collective bargaining statute. We find the statements to be coercive in tone, and an interference violation under RCW 41.56.140(1).

7. THE SEVENTH PARAGRAPH containing violations states:

> The Board recognizes the employee's [sic] desire to be involved in decisions affecting their employment and **suggest** [sic] **the employees consider an employee committee** who can meet with the Management and Board to provide employee input on issues.

[Emphasis by **bold** supplied.]

In its briefing and at oral argument in this case, the employer has sought to characterize the September 11, 1996 memo as "free

speech".[11] However, that concept merely invokes the test for determining "interference" claims, and is not a license for an employer to commit other unfair labor practices. During oral argument on September 16, 1997, counsel for the employer was asked about the paragraph which suggests an employee committee, "If that's not an offer of direct dealing, what is it?" The response was that the statement was meant to inform employees of the option of a committee. A review of federal and Commission precedent persuades us that the employer would have opened itself up to unfair labor practice charges and potential violations of RCW 41.56.140(2), had its idea of an employee committee been pursued, which supports finding an interference violation, and discredits the employer's defense.

The National Labor Relations Act (NLRA) has long been interpreted to prohibit employer-dominated "company unions". In his March 1, 1934 speech upon introduction of the bill that eventually became the NLRA, Senator Wagner said:

> **The greatest obstacles to collective bargaining are employer-dominated unions**, which have multiplied with amazing rapidity since the enactment of the [National Industrial R]ecovery [Act] law. ... **Under the employer-dominated union, the worker, who cannot select an outside representative to bargain for him, suffers** two fatal handicaps. In the first place, he has only slight knowledge of the labor market, or of general business condi-

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[11] The so-called "free speech proviso" of the National Labor Relations Act is found among the unfair labor practice provisions in Section 8 of that statute, as follows:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

> tions. ... If forbidden to hire an expert in industrial relationships, he is entirely ineffectual in his attempts to take advantage of legitimate opportunities.

Legislative History of National Labor Relations Act, 1935, Volume I, pages 15 - 17. [Emphasis by **bold** supplied.]

Thus, the "company union" was the very first evil to be addressed by the prime sponsor of the NLRA. Soon thereafter, Senator Wagner wrote that his new bill:

> ... forbids any employer to influence any organization which deals with problems such as wages, grievances and hours.

"Company Unions: A Vast Industrial Issue", New York Times, March 11, 1934.

Section 8(a)(2) of the NLRA makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it". RCW 41.56.140(2) is a close paraphrase of the federal law, making it unlawful for a public employer in this state: "To control, dominate or interfere with a bargaining representative."

The first unfair labor practice case decided by the National Labor Relations Board (NLRB) dealt with an employee committee promoted by an employer. In Pennsylvania Greyhound Lines, 1 NLRB 1 (1935), aff'd 303 U.S. 261 (1938), the NLRB and the Supreme Court of the United States shared the view that an employer usurped the right of employees to a bargaining representative of their own choosing when it set up and accorded recognition to a "committee".

In NLRB v. Cabot Carbon Company, 360 U.S. 203 (1959), the Supreme Court ruled that employee committees established and supported by employers to discuss grievances and conditions of work are labor

organizations within the meaning of the NLRA, even if they do not bargain with employers in the usual concept of collective bargaining.[12] Since Cabot Carbon, the NLRB has found unlawful employer domination where, similar to the case at hand, committees were "tacitly held out to employees as an employer-approved alternative to representation by an organization of the employees' own choice".[13]

This area of the law has been reviewed in recent years, in the context of the decisions of the NLRB and court in Electromation, Inc., 309 NLRB 990 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994), where the NLRB wrote:

> [T]he Board's cases following Cabot Carbon reflect the view that when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment.

Electromation, 309 NLRB at p. 996.

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[12] The Court made a statutory interpretation that Congress, in defining "labor representative", differentiated the term "dealing with" from "bargaining with". While RCW 41.56.030(3) defines "bargaining representative" as "any lawful organization which has as one of its primary purposes *the representation of employees* in their employment relations with employees" [emphasis by *italics* supplied], the Commission interpreted the statute broadly in King County, Decision 5910-A (PECB, 1997), and we have no legislative history indicating our Legislature intended anything different from the federal law.

[13] Salt Lake Division, Waste Management of Utah, Inc., 310 NLRB 883 (1993); See, also, Uarco, Inc., 286 NLRB 55 (1987); and Ryder Distribution Resources, Inc., 311 NLRB 814 (1993).

Thus, employee committees continue to be clearly illegal under federal law, where an employer creates an organization, determines its structure, dominates its administration and determines its continued existence.

The Commission has had few cases involving employer domination of or assistance to labor organizations, but has dealt with those situations firmly:

- In Quillayute Valley School District, Decision 2809-A (PECB, 1988) the Commission set aside an election because of an employer letter suggesting that employees consider an employer-established process as a legitimate alternative to collective bargaining on matters pertaining to their wages, hours, and working conditions. The letter implied, and could reasonably have led the employees to believe, that the choice was between union representation and the employer-established process, when the employees were in fact choosing between the union and "no representation".

- In Pierce County, Decision 1786 (PECB, 1983), an "interference" violation was found upon facts giving rise to a mere suggestion of unlawful assistance, even though the employer in that case clearly did not intend to control, dominate or provide assistance to an employee group. That employer was required to post a notice to clear the air.[14]

This is not an election objection case, nor an unlawful assistance case, but employees could reasonably have been led to believe that the employee committee was a viable alternative to union representation. The employer's effort to promote dealing with work issues

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[14] See, also, Enumclaw School District, Decision 222 (EDUC, 1977); Renton School District, Decision 1501-A (PECB, 1982); and State of Washington (Washington State Patrol), Decision 2900 (PECB, 1988).

through an employee committee thus constituted interference with, restraint, and coercion of its employees in the exercise of their collective bargaining rights, in violation of RCW 41.56.140(1). The statement also contributed to the coercive nature of the entire memorandum, implied benefits outside of the collective bargaining process, and attempted to undermine the union, so that it constituted a violation under the criteria set forth in Lake Washington School District, supra.[15]

Our conclusion here comports with the approach taken by the NLRB in similar cases. In Greenleaf Motor Express, 285 NLRB 844 (1987), the mere suggestion of the formation of a committee to deal directly with the employees on complaints, apart from their union representative, was found to be a violation of Section 8(a)(1) which, like RCW 41.56.140, makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their statutory collective bargaining rights. The Administrative Law Judge in that case wrote:

> What it really meant, and surely it was what [the employer] desired throughout, was dealing with the employees entirely apart from the Union which had a statutory right to be exclusive representative!

On its face, this employer's September 11, 1996 memo shows that the employer contemplated a similar situation.

Finally, we note that the employer would have violated RCW 41.56.140(4) if it bargained with an employee committee that did not have the majority status necessary to be recognized as an exclusive bargaining representative under RCW 41.56.080.

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[15] In contrast to a finding of employer unlawful assistance or domination, where a finding of intent is required, no showing of intent is necessary to find an interference violation. Pierce County, Decision 1786 (1983).

Remedy

The fashioning of remedies is a discretionary action of the Commission. In creating the Commission, the Legislature expressed its intention to achieve:

> [E]fficient and expert administration of public labor relations administration and to thereby ensure the public of quality public services.

RCW 41.58.005.

RCW 41.56.160(2) states:

> If the commission determines that any person has engaged in or is engaging in an unfair labor practices, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, **and to take such affirmative action as will effectuate the purposes and policy of this chapter**, such as the payment of damages and the reinstatement of employees.

[Emphasis by **bold** supplied.]

In Municipality of Metropolitan Seattle v. PERC, 118 Wn.2d 621 (1992), the Supreme Court of the State of Washington approved a liberal construction of the remedial authority conferred by RCW 41.56.160, in order to accomplish the purposes of the Public Employees' Collective Bargaining Act.

Attorney Fees -
The authority granted to the Commission has been interpreted as broad enough to authorize an award of attorney fees, when such an award "is necessary to make the order effective and if the defense to the unfair labor practice is frivolous or meritless". METRO, supra. The term "meritless" has been defined as meaning groundless

or without foundation. See, State ex. rel. Washington Federation of State Employees v. Board of Trustees, 93 Wn.2d 60 (1980).[16]

The circumstances when an award of attorney fees is appropriate have also been outlined as follows:

> a) when it is (1) necessary to make our order effective; and (2) the defense to the unfair labor practice charge is frivolous; or
> b) when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation.
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> Lewis County v. PERC, 31 Wn.App. 853 (Division II, 1982), rev. den., 97 Wn.2d 1034 (1982). See, also, Clark County, Decision 2045-B (PECB, 1989).

The Commission has used the "extraordinary" remedy of attorney fees sparingly. Clark County, supra.

The employer's defenses are meritless or frivolous. It engaged in a pattern of conduct showing a patent disregard of its collective bargaining obligations, and an extraordinary remedy is necessary to make an order effective in this case. Specifically:

- The employer's repeated arguments that it did not have the burden of proof are completely without merit. The burden of proof always falls on complainants, but respondents are always under an obligation to defend the allegations and, as noted above, to sustain the burden of proof on affirmative defenses.

- The employer's assertion that the Examiner improperly engaged in a "refusal to bargain" analysis is completely without

[16] See, also, Lewis County v. PERC, 31 Wn.App. 853 (1982), review denied, 97 Wn.2d 1034 (1982); King County, Decision 3178-B (PECB, 1990); and Public Utility District 1 of Clark County, Decision 3815-A (PECB, 1992).

merit. The complaint in this case alleged "interference" (and two of the three remedies requested were directed to the "soliciting decertification", "employee committee" and "misrepresentation" claims), but the complaint also alleged the union was attempting to negotiate a labor agreement and that the employer had canceled a negotiation session. The union's third remedy request asked that the employer be ordered to comply with its obligation to bargain in good faith. It was the employer that offered a large volume of documentary evidence detailing the bargaining that had gone on prior to September 10, 1996. The parties' activities during negotiations were thus both an integral part of the record established by the parties and constituted the context out of which the September 11, 1996 memo occurred. Kennewick School District, Decision 5632-A (PECB, 1996), stands for the proposition that a case may be analyzed on the evidence actually presented, even though the complaint may not contain the specific charge established by that evidence, if both parties acted as if the additional charge was alleged. We cannot allow the employer to now take back the evidence that it presented in this case.

- Even if the cancellation of a bargaining session and all evidence concerning the negotiations were to be excluded from consideration, that would not change the result. A careful reading of the record persuades us that the same "interference" violations found by the Examiner would have been found on the basis of the September 11 memo, which showed a patent disregard of the employer's obligations under this state's collective bargaining statute.

- The employer's continued attempts to defend its misrepresentations in the September 11 memo constitute a blatant disregard of the facts evidenced by the record in this case.

- The employer demonstrated a patent disregard for the clear language of Chapter 41.56 RCW, and engaged in a misuse of controversial labor law terminology, in regard to the "closed shop" subject. Its defenses on that issue are thus found to have been frivolous.

- The employer demonstrated a patent disregard for both federal and state labor policy in regard to the "employee committee" subject, so that its defenses on that issue are found to have been frivolous.

- The employer's general "free speech" defense was meritless. The right of an employer to communicate with employees who are represented for the purposes of collective bargaining is constrained by statute and case law. The principle that charges of interference, restraint and coercion are to be evaluated from a "reasonably perceived by employees" perspective is so well established as to be beyond serious debate.

- The employer is unable to provide essential support for its defenses in issuing the September 11, 1996 memo. Many of its assertions about the Examiner's decision in its brief on petition for review and at oral argument were minor claims which do not detract from the illegalities of the memo itself. They do not change the inescapable conclusion that the memo was blatantly coercive in nature, the representations it made were not substantially factual and were materially misleading, it implied promises of benefit, there was an attempt to bargain directly with the employees, and it constituted a strong effort to discredit and undermine the union.

- The employer admits no wrongdoing, so that an extraordinary remedy in addition to the customary posting of notice is needed to make an order effective in this case.

We thus agree with the Examiner's imposition of attorney fees as a remedy in this case.

The employer would distinguish Mansfield School District, Decision 5238-A (EDUC, 1996), which was cited by the Examiner. The Commission awarded attorney fees in that case, after finding a causal connection between an employee's testimony in an unfair labor practice hearing and subsequent actions taken by the employer against both her and her husband. The employer's actions in that case were found to have been willful and retaliatory, the employer's defenses were lacking in merit, and an extraordinary remedy was deemed necessary to establish that retaliation against testimony before the Commission will not be tolerated. Contrary to the employer's contentions here, we find similarities in regard to the patent disregard of the rights and obligations imposed by the collective bargaining statute, and we find many of the employer's defenses in this case meritless or frivolous.

The employer takes issue with the Examiner's use of an 18 year old case to show a repetitive and flagrant pattern of conduct.[17] We concur that the one old case would not, by itself, indicate a repetitive or flagrant pattern of conduct. We base our award of attorney fees here on the September 11, 1996 memo and the surrounding circumstances, which we find to be sufficiently flagrant to warrant the extraordinary remedy.

Interest Arbitration -
Interest arbitration is routinely used under Chapter 41.56 RCW for "uniformed personnel",[18] at a point in contract negotiations where

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[17] The Examiner cited Pasco Housing Authority, Decision 702 (PECB, 1979), where this employer was found guilty of discriminatorily discharging an employee in reprisal for that employee's union activity.

[18] See, RCW 41.56.030(7).

an impasse has been reached. Unresolved issues are then submitted to an impartial arbitrator, who decides the terms of the future collective bargaining agreement. Interest arbitration can also be ordered as an extraordinary remedy in unfair labor practice cases, under METRO, supra.

The employer takes issue with the Examiner's finding that this case presented an appropriate situation for imposition of the interest arbitration remedy, and that such an order was necessary to assure that the parties would attain an initial collective bargaining agreement. We note that the Supreme Court envisioned a limited usage of the interest arbitration remedy in its METRO decision, stating:

> In the very limited circumstances presented by the facts of this case, such an order is not contrary to collective bargaining principles. Instead, it serves as an impetus to successfully negotiate an agreement.

The METRO case involved an unfair labor practice complaint alleging the employer had refused to bargain, and an employer that had refused to recognize the union as exclusive bargaining representative even after Commission and lower court orders that it do so. The Supreme Court specifically admonished that the remedy of interest arbitration "should rarely be used as an enforcement tool", stating:

> PERC does have the authority, in limited and extraordinary circumstances, to order interest arbitration as part of an unfair labor practice remedy. Such a remedy must be cautiously and sparingly used, however, and used **only in those cases where there is a clear history of bad faith refusal to bargain** and where there is a very strong likelihood that such refusal will continue despite PERC's order to bargain in good faith.

[Emphasis by **bold** supplied.]

Inasmuch as the case now before us primarily concerns "interference" violations arising out of the September 11 memo, and only tangentially concerns the collective bargaining negotiations between the parties, we find insufficient basis to support imposition of the interest arbitration remedy, and so reverse the Examiner's remedial order on that point.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact and Conclusions of Law of the Examiner's decision issued in the above captioned matter on May 28, 1997, are AFFIRMED.

2. The Pasco Housing Authority, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

    a. CEASE AND DESIST from:

        1. Interfering and discriminating against, restraining or coercing employees in the exercise of their collective bargaining rights under the laws of the State of Washington, by soliciting decertification of Teamsters Local 839, by limiting or canceling bargaining sessions, by misrepresentations, by promises of benefits, by denigrating the union, by an overall tone of coercion of employees, and/or by suggesting substitution of an employee committee in place of collective bargaining.

        2. In any other manner interfering with, discriminating against, restraining or coercing the employees in the

exercise of their collective bargaining rights secured by the laws of Washington.

b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

1. Reimburse Teamsters Union, Local 839, AFL-CIO, for its costs and reasonable attorney fees associated with this matter, upon presentation of a sworn statement of such costs and fees.

2. Upon request, bargain collectively in good faith with Teamsters Union, Local 839, with respect to all subjects of bargaining as described in Chapter 41.56 RCW for the employees in the bargaining unit established by the Commission.

3. If no agreement is reached through bilateral negotiations within sixty (60) days after Local 839 has requested to bargain under this order, either party may request the Public Employment Relations Commission to provide the services of a mediator to assist the parties.

4. Post, in conspicuous places on the employer's premises where notices to employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall, after being duly signed by an authorized representative of the Pasco Housing Authority, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Pasco Housing Authority to ensure that said notices are not removed, altered, defaced, or covered by other material.

5. Notify the complainant, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply herewith, and at

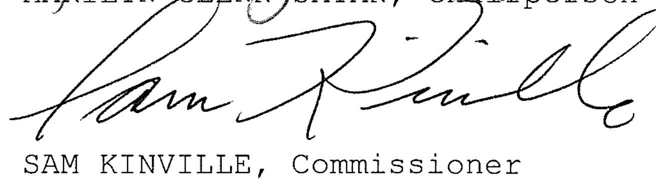
the same time provide the complainant with a signed copy of the notice required by the preceding paragraph (2)(f).

6. Notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) days of the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph (2)(f).

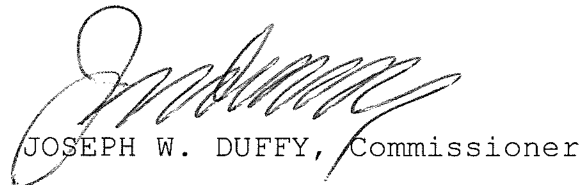
Issued at Olympia, Washington, on the 19th day of November, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

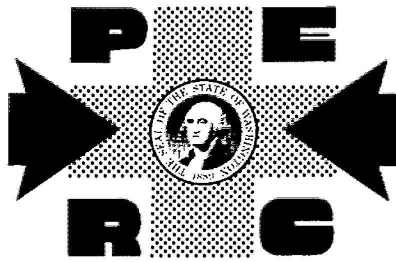


SAM KINVILLE, Commissioner



JOSEPH W. DUFFY, Commissioner

Appendix



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 NOT solicit the creation of an employee committee in place of collective bargaining.

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.

WE WILL, upon request, bargain collectively in good faith with Teamsters Union, Local 839, AFL-CIO, with respect to all subjects of bargaining as described in Chapter 41.56 RCW for the employees in the bargaining unit established by the Public Employment Relations Commission.

WE WILL pay Teamsters Union, Local 839, AFL-CIO, reasonable costs and attorney fees in this matter.

DATED: ___________________

PASCO HOUSING AUTHORITY

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, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.