STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DONALD J. WAKENIGHT, Complainant, vs. CITY OF SEATTLE, Respondent.	)	CASES 7780-U-89-1648 7816-U-89-1665 7843-U-89-1676 7844-U-89-1677 7867-U-89-1681 DECISION 3429 - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Donald J. Wakenight, appeared pro se.

Debra L. Hillary, Labor Negotiator, appeared on behalf of the employer.

Between January 25 and March 27, 1989, Donald J. Wakenight filed five separate complaints charging unfair labor practices with the Public Employment Relations Commission, each alleging that the City of Seattle had violated RCW 41.56.140(1) and/or (3) as a result of certain personnel actions taken concerning him. The complaints were consolidated for processing, and a hearing was held on August 28, 1989, before Examiner Frederick J. Rosenberry. The parties submitted post-hearing briefs.

BACKGROUND

Among other municipal services, the City of Seattle operates a city-owned electric utility, known as Seattle City Light, that generates and distributes electric power to Seattle residents.

International Federation of Professional and Technical Engineers, Local 17, is recognized as exclusive bargaining representative of

several bargaining units of City of Seattle employees, including clerical and related employees at Seattle City Light. The collective bargaining relationship between the employer and the union predates the events involved in this case, and they had a collective bargaining agreement for the period from September 1, 1986 through August 31, 1989.

Donald J. Wakenight is employed as an assistant credit supervisor in the Credit and Collections Section of the Seattle City Light Department. He fills one of three such positions, all of which are included in the bargaining unit represented by Local 17.

By a memorandum dated December 1, 1988, Wakenight's immediate supervisor, Credit and Collections Section Supervisor John Dion, reconfirmed an announcement that had been made in July, 1988, to the effect that the work schedules of the three assistant credit supervisors were to be changed, effective January 1, 1989. Wakenight was opposed to the change of his work schedule and, on December 2, 1988, he submitted a grievance regarding the matter to Customer Services Division Director Betty Blair.[1]

Wakenight specifically requested that the union not be involved in the processing of his work schedule change grievance, indicating that he desired to pursue the matter as an individual.

A meeting held on December 19, 1988, to discuss the merits of Wakenight's work schedule change grievance, was attended by Wake-

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[1] Wakenight submitted his grievance on the printed form that is used by Local 17 to submit grievances to the employer. That form identifies the grievant, contains instructions for describing the nature of the grievance, and has a section for office/administrative use.

night, Blair and Karen Altschul.[2] The results of that meeting were inconclusive, and Wakenight's grievance was rejected by the employer in a letter dated December 28, 1988. That letter made note of the fact that Wakenight had represented himself in the processing of the grievance, and had requested that Local 17 not be involved.

Wakenight thereafter requested union assistance in pursuing his work schedule change grievance. By letter dated January 17, 1989, the union invoked the third step of the grievance procedure contained in the collective bargaining agreement, and commenced to represent Wakenight regarding the matter.[3]

Separately, Wakenight made a request on January 17, 1989, for permission to take one hour of vacation per day during the period from January 17 to January 31, 1989. Although the record does not specifically reflect when the hour would be taken, it is inferred

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[2] The record reflects that Altschul is employed by the City Light Department, but does not indicate her position or title.

[3] The collective bargaining agreement between Local 17 and the employer contains a four step grievance procedure. The first step calls for presentation of the grievance by the aggrieved employee or union steward to the immediate supervisor. The second step calls for the aggrieved employee or the union business manager (or designee) to submit the grievance, in writing, to the division head, with a copy to the employer's director of labor relations. The third step calls for the aggrieved employee or union business manager / designee to submit the grievance, in writing, to the employer's director of labor relations, with a copy to the head of the department where the aggrieved employee works. The fourth step authorizes either the employer or union to submit the grievance to final and binding arbitration. The contract permits the aggrieved employee or the union to advance a grievance to the next step in the event that the employer fails to reply to the grievance within a specified period of time, but also provides that failure by the aggrieved employee or union to comply with specified time limits constitutes withdrawal of the grievance.

that the time off would be the last normally scheduled hour of Wakenight's work day, from 4 p.m. to 5 p.m. Dion denied Wakenight's request on the basis that the employer would not allow the use of vacation time to alter a work schedule on a daily basis. Wakenight filed a grievance that same day regarding the matter,[4] stating:

> On January 17, 1989, I requested 1 hour of vacation a day for 1-17-89 to 1-31-89. This was denied by John Dion/Mary Meier as not approving request "to alter a staff members works schedule on a daily basis" (sic).
>
> I allege a violation of Article 12, Section 13 of the Local 17 contract.

By memorandum dated January 19, 1989, Wakenight notified Blair that he would be handling the "vacation denial" grievance that he filed with her on January 17, 1989.

Facts Giving Rise to Case 7780-U-89-1648

On January 20, 1989, Wakenight became displeased over a situation involving rest breaks that had transpired earlier that day, and he confronted Dion. In the course of their conversation, Wakenight mentioned that he had prepared a draft of a memorandum that outlined his aggravation over rest breaks. Dion asked to see the draft, and Wakenight produced it. It stated:

> I am furious. Today @ 10:02 a.m. I was ready to leave for my scheduled break. I was advised by Jeannie that Tony had just left on his break. Tony's break is scheduled for 9:45 a.m. Marty Bos told me to go to break as she was here.

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[4] Wakenight again used the printed grievance form that is used by Local 17 to submit grievances to the employer.

> Tony wanted 10:00 a.m. as his break time when we switched hours effective 1-2-89. He was assigned the 9:30 a.m. break due to his early start time (6:30 a.m.). As we are beening (sic) so schedule aware as to not let vacation adjust schedule why are break times not being followed?
>
> I also have a problem with Tony's scheduled lunch of 12:30 to 1:30. Federal law states that employee lunch should be scheduled as close to the middle of the shift as practical this would mean the lunch on the early should be 10:30 a.m. to 11:30 a.m. or 11:00 a.m. to 12:00 p.m. I see no practical reason for the later lunch so I intend to file a complaint with the government over it, if it remains as is.
>
> I also will not allow the department to be as strict with my schedule and not enforce others.

While the rest breaks matter was not pursued as a grievance, Wakenight and Dion gave conflicting testimony about whether Wakenight's other grievances came up during their conversation(s) on January 20.

According to Wakenight, Dion became upset and commented that he felt that Wakenight's problems were harassment, that he was going to investigate to determine whether the problems raised by Wakenight represented an abuse of the employer's time, and that Wakenight liked to play hardball, he could too.[5]

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[5] Supporting Wakenight's testimony is a personal memo he prepared following his meeting with Dion, stating:

> 1-20-89 10:50 a.m. John advised me he felt memo's were harassment and he was going to investigate if it represented misuse of company time. Further said had promoted me twice and let things slide in the past, and that I like to play hard ball and he could to. (sic)

Dion maintains that Wakenight was very agitated, and acknowledged that he and Wakenight discussed rest breaks on January 20, 1989, that they had a heated discussion, and that Wakenight showed him the draft memorandum. Dion testified of his belief that he had a second conversation with Wakenight that day, after he had investigated Wakenight's complaint about the rest breaks and concluded that there had been no interference with Wakenight's break time. Dion was aware that Wakenight had two grievances pending at that time, but denied that either grievance came up in their conversations that day. Although he did not specifically recall making the alleged "hardball" remark, Dion testified that "hardball" is an expression used by Wakenight, and he acknowledged that he may also have used that term.[6] According to Dion, Wakenight had

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[6] Dion's version of the conversation is supported by a memorandum that he sent to his supervisor, Mary Meier, that day, stating:

> As I told you earlier, Don Wakenight came to me upset that Tony had taken a break at 10: (sic) a.m. when 9:30 a.m. was his break time. Don felt Tony had used his (Don's) break time. I looked into it and it turns out Tony's break time is 9:45 and he left at 9:55, as he had a customer on the phone. He had alerted Mary, who takes a break at 10:30, and she was here.
>
> Around 11:00 a.m. Don showed me a draft of a memo to me (I asked to see it) and he had written this incident up, etc. and expected my response. I explained what I found out (above). I told him I felt he was getting a little carried away and that I doubted if he would have even complained if it had been someone other that Tony. He said "maybe not." (sic) I also pointed out I had answered a number of memos in the last few months and I was beginning to consider it needless harassment, because, as he said before, "wants to keep the heat on," and I might check into that.
>
> Later on he told me "as a courtesy" that I would not be hearing any more and he told Betty Blair I had threatened him. I asked in what way and he mentioned my comment about harassment. I told him that was no threat and that

developed a practice, over a period of several months, of submitting written inquiries or statements of position to Dion or to Dion's supervisor regarding various work-related matters. Dion maintained, further, that Wakenight told him on one occasion that he was going to "keep the heat on", due to unhappiness about his work schedule change.[7] Dion maintained that he admonished Wakenight about getting carried away with writing memos about everything,[8] and that he was going to look into whether Wakenight's actions could be considered harassment against Dion.

On January 25, 1989, Wakenight filed the first in this series of unfair labor practice charges against the employer, alleging:

> On January 20, 1989 at approximately 11:50 A.M. I had a discussion with John Dion (my direct Supervisor) regarding a memo I had drafted relating to a grievance I have filed.

> it sure seemed to be boardering (sic) on harassment.
>
> That was the end of the conversation and I just wanted you to be aware.

[7] The record does not reflect when or under what circumstances such a remark was made, but it is inferred from the reference to a "work schedule change" that the incident was in the recent past. Wakenight did not deny having made such a remark.

[8] The record reflects that Wakenight's performance evaluation during the summer of 1988 had noted that Wakenight had missed a deadline concerning submission of a report. The employer maintains that Wakenight then started writing repetitious memoranda on the employer's time. Wakenight submitted a memo to Dion on September 27, 1988, regarding report deadlines. He submitted two memos on September 29, one regarding city ordinance requirements and the other regarding report deadlines. He submitted another memo on December 2, 1988, regarding city ordinance requirements. In addition to his grievances on the subjects, Wakenight submitted two memos on January 17, 1989, regarding vacation policy and an amended work schedule.

> Mr. Dion advised me that I was harassing him and he was going to investigate if my activities represented misuse of city time. He further advised me "You like to play hardball, I can play to". (sic)

The Executive Director's preliminary ruling characterized the cause of action in terms of threats made in connection with employee pursuit of rights under a grievance procedure.

Facts Giving Rise to Case 7816-U-89-1665

A grievance meeting was held on January 27, 1989, regarding Wakenight's vacation denial grievance. The meeting was held at the office of David Orcutt, the light department's labor relations manager. Wakenight had previously notified the employer that he would be handling that grievance himself, but that the union was being provided with a copy. Wakenight in fact represented himself at the meeting.[9] The record does not reflect which members of management were present at that meeting. Wakenight's grievance was not resolved at this meeting.

Wakenight was unhappy with the manner in which the January 27 meeting was conducted, and he directed an inquiry to Orcutt on that subject, on February 7, 1989, as follows:

> After approximately 10 minutes of discussion you asked me to leave the room so management could caucus on the grievance. While cooling my heels for approximately 30 minutes outside the office I heard laughter coming from the closed office on more than one occasion. Would you please advise me what City Light management found so humorous about my griev-

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[9] Tangentially, while Wakenight was processing his vacation denial grievance as an individual, the union was processing his work schedule change grievance and a meeting was scheduled for the union and employer to discuss that matter on February 6, 1989.

> ance? Also was it reasonable to keep me out of the meeting that long and then come out and say the meeting was over?

Orcutt responded with a memorandum dated February 10, 1989, stating:

> I am in receipt of your memo dated February 7, 1989. Any questions concerning the grievance process should be directed to your certified bargaining representative, Local 17. If, after doing so, there are still unresolved issues, please have your Local 17 representative contact me to discuss them.

By a memorandum dated February 14, 1989, Wakenight notified Orcutt that he was advancing his "vacation denial" grievance to the third step, since he had not received the employer's response.

By letter dated February 14, 1989, Carole V. Coe-Hauskins, the light department's director of administrative services, notified Joseph L. McGee, a Local 17 business representative, that the employer was denying Wakenight's "vacation scheduling" grievance. Coe-Hauskins enclosed a copy of Wakenight's February 14, 1989 memorandum notifying Orcutt that he was advancing that grievance to the third step of the grievance procedure. The employer did not send a copy of that letter to Wakenight.

On February 16, 1989, Wakenight filed the second of these unfair labor practice charges, alleging:

> On January 19, 1989, I filed a step two grievance with the director of the Customer Services Division of Seattle City Light.
>
> On January 27, 1989, a grievance meeting was held.
>
> On February 7, 1989, I questioned certain aspects of the handling of the grievance meeting.

> The City (by memo dated February 10, 1989) has directed me to direct any questions on my grievance to Local 17.
>
> On February 14, 1989, the city responded to Local 17 on my grievance without providing me with a copy.
>
> This is my grievance brought without the intervention of Local 17.

The Executive Director's preliminary ruling characterized the cause of action in terms of an interference with the right of an employee to represent himself in the presentation of a grievance.

Facts Giving Rise to Case 7843-U-89-1676

Wakenight maintains that he was notified on March 1, 1989, by union representative McGee, that the employer had contacted the union for the purpose of scheduling a grievance meeting to discuss Wakenight's vacation denial grievance. According to Wakenight, McGee told him of having advised the employer that the union had not filed the grievance, but that the union would agree to schedule a meeting to discuss the matter.

McGee did not recall this conversation with Wakenight, although he did not deny having had such a conversation with the employer. The record does not identify the employer representative who contacted McGee about scheduling the meeting. It would appear from testimony concerning the normal procedures in the employer's offices that Rosemary Bautista, an administrative specialist - secretary assigned to the employer's Labor Relations Department, may have been the intermediary. In any case, Debra Hillary, a labor negotiator for the employer, sent a letter to McGee under date of March 3, 1989, confirming that a meeting regarding Wakenight's vacation denial grievance was scheduled to take place on March 23, 1989. Hillary sent a copy of that letter to Wakenight, and he received it.

Wakenight filed the third of these unfair labor practice charges on March 9, 1989, alleging:

> On March 1, 1989, I received a telephone call from Joe McGee, Business Representative, Local 17 I.F.P.T.E. He advised me the City had contacted him to arrange a step three grievance meeting on my grievance. He advised the city that Local 17 had not filed the grievance. He arranged a meeting. To date I have not been contacted or notified of any meeting by the City of Seattle.

The Executive Director's preliminary ruling again stated the cause of action in terms of an interference with the right of an employee to represent himself in the presentation of a grievance.

Facts Giving Rise to Case 7844-U-89-1677

Wakenight continued to be unhappy about the manner in which the January 27, 1989 meeting on his vacation denial grievance had been conducted. There had been an exchange of correspondence on that subject during the month of February, as set forth above.[10] On March 6, 1989, Wakenight sent a memorandum to Orcutt, as follows:

> Subject: My February 7, 1989 Memo.
>
> I am still waiting for a response to my February 7, 1989 memo. If the city is not willing to justify it's actions I will have no choice but to assue (sic) you will not do so as such actions violate 41.56.140.

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[10] Concurrently, Wakenight sent a memorandum on February 17, 1989, to Director of Labor Relations William Hauskins, notifying the employer that he was advancing a grievance to the third step. Wakenight's handwritten memorandum has a subject heading stating "grievance", but the specific nature or identity of the grievance was not indicated. It can be inferred from the sequence of events that this referred to the vacation denial grievance, because the union had previously advanced his work schedule grievance to the third step.

> If I do not receive a response I will be forced to file a fourth U.L.P. (sic)

Altschul responded for Orcutt on March 7, 1989, as follows:

> Subject: Your memo to me dated March 6, 1989 (copy attached)
>
> In the referenced memo you stated you were still awaiting a response to a February 7, 1989 memo. A response was sent to you by memo dated February 10, 1989 (copy attached).

Wakenight filed the fourth in this series of unfair labor practice cases on March 9, 1989, alleging:

> On March 6, 1989 I sent a memo to the City of Seattle about my treatment at a January grievance meeting. My memo . . . questions if the City violated RCW 41.56.140, it further states if I did not receive justification I would file a U.L.P. I was again referred to the union who did not attend the meeting or bring the grievance.

The Executive Director's preliminary ruling again framed the cause of action in terms of an interference with the right of an employee to represent himself in the presentation of a grievance.

Facts Giving Rise to Case 7867-U-89-1681

McGee contacted Wakenight on March 22, 1989, suggesting that they meet before the meeting with the employer that had been scheduled for March 23, 1989. McGee was asked to advise the employer that Wakenight would not be attending, because he had not been personally contacted by the employer regarding scheduling the meeting and did not feel that he was invited to attend.

The third step meeting regarding Wakenight's vacation denial grievance took place on March 23, 1989, as previously scheduled.

Altschul and Hillary represented the employer. Wakenight did not attend. McGee attended on behalf of the union and took the position that the employer's denial of Wakenight's vacation request violated the parties' collective bargaining agreement. Wakenight's grievance remained unresolved.

Wakenight filed his fifth unfair labor practice complaint on March 27, 1989, alleging:

> On March 23, 1989 at 2:00 p.m. the City of Seattle and Local 17 I.F.P.T.E. held a grievance meeting on vacation schedule. This meeting was the result of a grievance I filed. Notice of my attendant (sic) at a meeting was not provided to me by anyone with the City of Seattle.

Again, the Executive Director's preliminary ruling framed the cause of action in terms of an interference with the right of an employee to represent himself in the presentation of a grievance.

Subsequent Events

On March 27, 1989, Hillary sent a letter to Wakenight, offering to reconvene the third step meeting on the vacation denial grievance, if Wakenight so desired. Wakenight responded affirmatively, and the third step grievance meeting was reconvened on April 12, 1989. Both Wakenight and McGee were in attendance on that occasion, while the employer was represented by Hillary.

On April 26, 1989, Coe-Hauskins notified Wakenight, by letter, that the employer continued to deny his vacation scheduling grievance. The record does not reflect the ultimate disposition of that dispute.

POSITIONS OF THE PARTIES

Donald Wakenight alleges that the City of Seattle engaged in unlawful interference, restraint and coercion, and discriminated against him in violation of RCW 41.56.140, by threatening retaliation against him for processing grievances, by notifying the union rather than him that it was rejecting his vacation denial grievance, by scheduling a meeting on the vacation denial grievance with the union rather than with him, by failing to respond to his inquiry regarding the conduct of employer officials at the January 27, 1989 grievance meeting, and by meeting with the union in his absence to discuss his grievance. Wakenight claims that, notwithstanding his desire to process his vacation denial grievance without the intervention of the union, the employer declined to cooperate, repeatedly referred him to the union and sought the union's intervention.

The employer denies that any of its personnel actions involving Wakenight violated Chapter 41.56 RCW. The employer argues that Wakenight purposefully initiated frivolous actions against the employer, in an attempt to harass and intimidate the employer into changing his work schedule. While acknowledging that Dion expressed concern to Wakenight regarding a recent proliferation of non-grievance memoranda, the employer denies that Dion's statements constituted a threat of reprisal in connection with Wakenight's pursuit of grievances. The employer maintains that its written response rejecting Wakenight's vacation denial grievance was properly directed to the union, in accordance with the collective bargaining agreement and past practice. The employer further claims that it scheduled a grievance meeting with the union pursuant to Wakenight's request, that a copy of the confirming letter was sent to Wakenight, and that the meeting was scheduled during Wakenight's regularly scheduled work day, in accordance with the terms of the collective bargaining agreement. The employer denies that it had any obligation to respond to Wakenight's

inquiries regarding the nature of discussions or amount of time that transpired in the employer's private caucus to discuss his grievance. The employer further maintains that Wakenight was adequately notified of the grievance meeting held on March 23, 1989, consistent with past practice, and that it was his personal choice to not appear. The employer denies that it interfered with Wakenight's right to present his grievance without the intervention of the union. Further, the employer claims that, because of the number of grievances initiated by Wakenight and the lack of clear identification among them, it was difficult to distinguish between the vacation denial grievance that Wakenight was processing as an individual and the work schedule grievance which the union was processing for him. Moreover, the employer maintains that it had no knowledge of the degree of intervention Wakenight sought from the union, because the union appeared to be acting as Wakenight's representative at past grievance meetings regarding the vacation denial grievance.

DISCUSSION

The Legal Standards to be Applied

Normally, it is an unfair labor practice for an employer to deal directly with a union-represented employee, rather than with the exclusive bargaining representative, on matters of wages, hours or other terms and conditions of employment. RCW 41.56.140(4); City of Wenatchee, Decision 2216 (PECB, 1985); Seattle - King County Health Department, Decision 1458 (PECB, 1982). The statute provides, however:

> **RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION.** 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: PROVIDED, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance. (emphasis supplied)

Like Section 9(a) of the National Labor Relations Act (NLRA),[11] the Public Employees' Collective Bargaining Act thus contains an exception to the principle of "exclusive" representation that permits the employer to accept, hear and adjust grievances submitted by individual employees who desire to proceed without representation from the union. Because of both the general rule and limitations expressly stated in RCW 41.56.080, an employer must proceed with caution when dealing directly with employees on such occasions.

The exclusive bargaining representative cannot be deprived of its ability to perform its statutory representation function. City of Bellevue, Decision 3129 (PECB, 1989). It is clear from RCW 41.56.080 that the exercise of an employee's right to process a grievance as an individual does not allow either the employee or the employer to limit or deny the exclusive bargaining representative access to the proceedings.

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[11] The Commission and the state's courts give consideration to federal precedent where it is consistent with Chapter 41.56 RCW. Nucleonics Alliance, Local 1-369 v. WPPSS, 101 Wn.2d 24 (1984); Public Employees v. Highline Community College, 31 Wn.App. 203 (Division II, 1982); Clallam County, Decision 1405-A (PECB, 1982), aff. 43 Wn.App. 589 (Division I, 1986).

It is also clear from RCW 41.56.080 that any grievance adjustment arranged by the employer with an individual employee must be consistent with the terms of any collective bargaining agreement then in effect. Accordingly, the exclusive bargaining representative has the right to make its views known, and to object to a grievance settlement that it believes to be at odds with the terms of the contract.

RCW 41.56.080 and its counterpart provisions in Section 9 of the NLRA and RCW 41.59.090 do not provide any particular procedural rights to an employee who seeks to process a grievance as an individual. The employer has no statutory obligation to respond to such a grievance, or to accept progressive appeals to higher levels within the management.

Certainly, the employee acting as an individual is not authorized to pursue a grievance to arbitration. METRO, Decision 2147 (PECB, 1985); Tacoma Public Library, Decision 1679-A, 1680-A (PECB, 1983); Pomeroy School District (Washington Education Association/ Uniserv), Decision 1610 (EDUC, 1983); City of Seattle, Decision 1226 (PECB, 1981).[12]

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[12] The latter case filed by Wakenight alleged that the employer and union had unlawfully entered into a contract that deprived him of access to arbitration independent of the union. The dismissal order noted that arbitration is permitted only in the context of a relationship between an employer and an exclusive bargaining representative, and that it is not necessary for such parties to open the arbitration process to individual employees.

Wakenight is no stranger to unfair labor practice proceedings before the Public Employment Relations Commission. Other unfair labor practice charges that he filed in 1981 were closed by City of Seattle, Decision 1290-A (PECB, 1982). In City of Seattle, Decision 1355 (PECB, 1982) the Executive Director dismissed Wakenight's unfair labor practice charge alleging that the employer engaged in unlawful interference when it instructed him to refrain from using the employer's stationery, typewriters and copying machines in his processing of labor relations matters. In 1983, Wakenight filed unfair labor

All of these limitations on the rights of an employee who chooses to proceed as an individual are consistent with the proviso to RCW 41.56.080 being a minor exception to the general principle of "exclusive" representation by the union chosen by majority vote among the employees in a bargaining unit. The bargaining relationship is between the employer and the union. Individual members of the bargaining unit lack standing to file or process unit clarification proceedings seeking to re-define the scope of the relationship. King County, Decision 298 (PECB, 1977). Similarly, while bargaining unit members stand as third-party beneficiaries to the bargaining relationship, they do not have standing to file or process "refusal to bargain" unfair labor practice charges. Grant County, Decision 2703 (PECB, 1989).

It is unlawful for a public employer to engage in any form of reprisal against its employees because they exercise their right, under Chapter 41.56 RCW, to pursue grievances. Valley General Hospital, Decision 1195-A (PECB, 1981); RCW 41.56.040; RCW 41.56.1-40. An employer commits an "interference" violation if it engages in conduct such that an employee could reasonably believe that the employer has intruded into the free exercise of the right to present grievances. In City of Seattle, Decision 2773 (PECB, 1987), standards for the evaluation of claims of unlawful interference were set forth as follows:

> The test for judgment on "interference" allegations has been determined by both the

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practice charges against the employer and union, alleging that the union had failed to adequately represent him. Wakenight subsequently withdrew the charges against his employer, and the complaint against the union was dismissed for failing to state a cause of action. City of Seattle, Decision 1902 (PECB, 1984). In 1985, Wakenight filed an unfair labor practice charge against the employer alleging discrimination on account of his previous filing of unfair labor practice charges. That complaint was dismissed for failing to state a cause of action. City of Seattle, Decision 2192 (PECB, 1985).

> National Labor Relations Board and the Public Employment Relations Commission. A showing of intent or motivation is not required. Nor is it necessary to show that the employees concerned were actually interfered with or coerced.

A discrimination occurs under RCW 41.56.040 where it is demonstrated that an employer has actually deprived an employee of some ascertainable right, or has unfairly or unequally applied policy, or differs in its treatment of employees, in reprisal for the pursuit of lawful activities protected by Chapter 41.56 RCW. Essential to a finding of discrimination is a showing that the employer intended to discriminate against the employee. City of Seattle, Decision 3066 (PECB, 1989). The burden of proving a discrimination violation of the Act, established by a preponderance of the evidence, rests with the complaining party. Bellingham Housing Authority, Decision 2335 (PECB, 1985); Lyle School District, Decision 2736 (PECB, 1987).

Finally, while the unfair labor practice provisions of the statute protect the right of employees to file and pursue contract "grievances" addressing the possibility of a breach of the terms of a collective bargaining agreement, the Public Employment Relations Commission does not assert jurisdiction to enforce collective bargaining agreements through the unfair labor practice provisions of Chapter 41.56. Walla Walla, Decision 104 (PECB, 1976). If there has, in fact, been a violation of the contract, the remedy would have to come through the grievance and arbitration machinery of the contract itself.

Application of the Legal Standards in Case 7780-U-89-1648

Wakenight maintains in the first of these complaints that the employer violated RCW 41.56.140(1) on January 20, 1989, by threatening him with retaliation for pursuing grievances. The employer

characterizes Dion's comments as a legitimate expression of concern that the problems raised by Wakenight were motivated by a desire to harass the employer into acquiescing to Wakenight's demand for reinstatement of his former work schedule. Therefore, Dion's remarks that he was going to investigate to determine whether the problems raised by Wakenight represented an abuse of the employer's time were warranted, according to the employer, and were not an unlawful threat against Wakenight.

Although there were no actions to convert any threat into actual discrimination,[13] it is apparent that there were harsh words between Dion and Wakenight. Dion commented to Wakenight that he felt that Wakenight might be engaging in harassment, and that he planned to investigate whether there had been an abuse of "company" time. It also appears that Dion made the comment attributed to him regarding "hardball".[14] At issue is whether Dion's comments to

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[13] Where anti-union discrimination is alleged, the Commission has adopted the causation test set forth by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083 (1980), which prescribed a test for balancing the rights of employees with those of the employer. In Port of Seattle, Decision 1624 (PECB, 1983), the principles set forth in Wright Line were applied in evaluating claims of adverse action against an employee based on discriminatory motivation:

> Where an employer responds to discrimination allegations with claim of business reasons for its actions, a shifting of burdens occurs during the course of litigation. . . . The complainant is required initially to make a prima facie showing sufficient to support an inference that protected activity was "a motivating factor" in the employer's decision. Once that is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

[14] Dion could not specifically recall making such a remark, but admitted that he may have done so. There is no reason to doubt Wakenight's recollection in this regard.

Wakenight were reasonably understood by Wakenight as a threat of reprisal for his continued pursuit of the grievances he had filed regarding his work schedule change and denied vacation.

Dion explained his impression that Wakenight had submitted a series of unnecessary, written inquiries or statements to the employer since his work hours had been changed. The record reflects that Wakenight submitted seven memoranda to Dion during a period of approximately four months from September 27, 1988 to January 20, 1989. Four of those addressed operational matters, while three addressed personnel matters. The number of memoranda initiated by Wakenight over a four-month period does not seem, on its face, to be inordinate. The record does not reflect whether Wakenight's use of written communications with his supervisors was inconsistent with the accepted practice for intra-departmental communications. Moreover, only two of the seven memoranda were submitted after Wakenight filed his work schedule change grievance, thus eroding the argument that Wakenight was attempting to coerce the employer into restoration of his former work schedule.[15]

Notwithstanding the merits of his potential grievance on rest breaks, Wakenight appears to have been acting in good faith in raising the issue, and he was entitled as a matter of law to submit it to the employer without fear of reprisal. By its nature, the term "play hardball" has the connotation of a systematic program of adopting unyielding and/or repressive positions in the employment relationship. The term "hardball" may have become "shop parlance" in the work area involved here, but its use must still be evaluated in the context of the circumstances at hand. It is apparent that Dion's use of the term implied some potential reprisal for Wakenight's submission of grievances. Apart from the

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[15] This is not to say that an employer is required to endure protracted harassment designed to frustrate the employer and force acquiescence to an employee's demands.

immediate subject of rest breaks, there was an oblique reference in the draft memo to Wakenight's pending work schedule and vacation denial grievances.

In summary, the circumstances and context of Dion's remarks to Wakenight regarding an investigation to determine if there has been harassment and an intent to play "hardball", are such as to indicate that an interference violation must be found.

Application of the Legal Standards in Case 7816-U-89-1665

Wakenight's February 7, 1989 communication with the employer regarding the January 27, 1989 grievance meeting states his assumption that his grievance was the basis for laughter in the employer's caucus, and implies that the employer's 30 minute caucus was inordinately long. Wakenight maintains in the second of these complaints, that the employer violated RCW 41.56.140(1), and possibly 41.56.140(3),[16] by interfering with his right to represent himself in the presentation of grievances.

In the first of the two issues raised in this complaint, Wakenight maintains that the employer unlawfully directed him to the union, rather than responding directly to his request for information regarding what transpired in the employer's caucus. As noted above, Chapter 41.56 RCW does not mandate any specific procedure for processing individually filed grievances, and contains no requirement that the employer meet with the grievant or respond to a grievance presented by an individual. Thus the act of referring Wakenight to the union for an answer to his "process" question did not impinge on any right secured for Wakenight by the statute.

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[16] Wakenight presented no evidence supporting of actual employer discrimination because he filed unfair labor practice charges, and such allegation was not included in the preliminary ruling setting the matter for hearing.

In the second issue raised in the complaint, Wakenight maintains that the employer unlawfully directed its formal written rejection of his vacation denial grievance to the union, rather than to him. It would seem to be a breach of common courtesy for the employer to make itself available to individual grievants and then neglect to provide its response to such a grievance, but no provision of the statute guaranteed Wakenight a direct written response. On the other hand, the employer was required by the statute to keep the union apprised of what was transpiring in the course of processing Wakenight's individually filed grievance. To the contrary, absent such notification, the union would be unable to exercise its right under the statute to monitor any adjustment arrived at between the employer and the individual for conformity with the terms of the collective bargaining agreement. Moreover, such notice to the union did not prejudice Wakenight's ability to continue processing his vacation denial grievance as an individual, and it is apparent that he understood this when he invoked the third step of the grievance procedure on February 17, 1989. The complaint must be dismissed.

Application of the Legal Standards in Case 7843-U-89-1676

Wakenight maintains in his third complaint, that the employer violated RCW 41.56.140(1), and possibly 41.56.140(3),[17] when it contacted the union for the purpose of scheduling a meeting to discuss his vacation denial grievance.

Neither the individual grievant nor an employer can deny the exclusive bargaining representative access to a grievance meeting. The employer's communication with the union did not impede or

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[17] Wakenight has presented no evidence to support an allegation of actual discrimination in reprisal for filing unfair labor practice charges against his employer and such allegation was not included in the preliminary ruling setting the matter for hearing.

compromise Wakenight's ability to continue processing his vacation denial grievance as an individual. While common courtesy would again have indicated that the employer notify Wakenight directly, rather than by a copy of correspondence addressed to the union, that it desired to schedule a conference on Wakenight's grievance, notice to the union did not prejudice Wakenight's claim. Wakenight was free to attend the meeting on the employer's time, but elected to not attend.

There was no statutory obligation on the employer to call such a meeting in the first place. The employer could have summarily dismissed the grievance, if it so desired. The employer's actions do not rise to the level of an unfair labor practice, and the complaint must be dismissed.

Application of the Legal Standards in Case 7844-U-89-1677

Wakenight maintains in his fourth complaint that the employer violated RCW 41.56.140 when it declined to explain the laughter in the employer's caucus and the duration of the employer's caucus during the January 27, 1989 grievance meeting.[18]

Although Wakenight may have been annoyed by the manner in which the employer's representatives conducted themselves at the January 27, 1989 grievance meeting, the evidence fails to support finding any violation of the statute. There was no statutory obligation for the employer to meet with Wakenight regarding his grievance. Wakenight suffered no loss of income, as the meeting took place on the employer's time. The statutory duty to bargain in good faith obligates an employer to provide the exclusive bargaining representative of its employees with requested information reasonably necessary for the union to perform its representation functions.

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[18] This complaint evolved from the same meeting as the second of these unfair labor practice cases.

City of Bellevue, Decision 3085-A (PECB, 1989). No such obligation extends towards individual members of a bargaining unit. Thus, the employer had no statutory obligation to respond to Wakenight's inquiry, or to divulge the substance of what was said in a private caucus. This complaint must also be dismissed.

Application of the Legal Standards in Case 7867-U-89-1681

Wakenight's fifth complaint condemns the employer for meeting with the union on March 23, 1989, notwithstanding Wakenight's refusal to attend the meeting out of protest for the employer's failure to personally contact him to schedule the meeting. Again, Wakenight claims that the employer violated RCW 41.56.140(1), and possibly 41.56.140(3).[19] This complaint is an extension of Wakenight's third unfair labor practice charge which addressed the manner in which the meeting was scheduled.

As is the case in evaluating the merits of the second, third and fourth of these unfair labor practice complaints, the employer had no statutory obligation to met with Wakenight or to discuss the grievance that he sought to pursue as an individual. The employer did have an obligation to give the exclusive bargaining representative access to the grievance meeting, and Local 17 had a right to attend and make its views known.

The employer communicated with the union by letter and provided a copy of that correspondence to Wakenight, but did not thereby compromise Wakenight's ability to continue processing his grievance as an individual. There is no indication that Wakenight sought a

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[19] Again, Wakenight has presented no evidence to support an allegation of discrimination by his employer in reprisal for filing unfair labor practice charges, and such allegation was not included in the preliminary ruling setting the matter for hearing.

different result than the union sought in the resolution of this grievance, and the grievance in fact remained unresolved.

Although common courtesy, business etiquette and perhaps even the collective bargaining agreement would have indicated it preferable for the employer to have contacted Wakenight personally to schedule the grievance meeting, it is clear that there was no violation of the statute. The meeting was scheduled to take place on the employer's time, so that Wakenight would have suffered no loss of pay or personal time for time spent at the meeting. The employer's decision to carry through with the March 23, 1989 meeting with the union did not rise to the level of an unfair labor practice and the complaint must be dismissed.

FINDINGS OF FACT

1. The City of Seattle is a municipality of the State of Washington and is a public employer within the meaning of RCW 41.56.030(1). It operates a city-owned electric utility, known as Seattle City Light.

2. International Federation of Professional and Technical Engineers, Local 17, a bargaining representative within the meaning of RCW 41.56.030(3), is recognized as the exclusive bargaining representative of several bargaining units of City of Seattle employees, including clerical and related employees at Seattle City Light.

3. Donald J. Wakenight, a "public employee" within the meaning of RCW 41.56.030(2), was employed, at all time relevant to this proceeding, as an assistant credit supervisor in the Credit and Collections Section of Seattle City Light. Such employment was within the "clerical and related" bargaining unit represented by Local 17.

4. The collective bargaining agreement between the employer and the union contains provisions for the filing and processing of grievances by individuals who do not desire to be represented by the union.

5. By memorandum dated December 1, 1989, Wakenight's immediate supervisor, John Dion, reaffirmed an earlier announcement that the work schedules of assistant credit supervisors would be changed, effective January 1, 1989. Wakenight was opposed to such a work schedule change and, on December 2, 1988, he submitted a grievance regarding the matter to Customer Services Director Betty Blair. Wakenight initially indicated that he desired to process that grievance without the intervention of the union.

6. Wakenight met with management representatives on December 19, 1988, to discuss the merits of his work schedule change grievance. The record does not indicate that the union was given notice of that meeting and an opportunity to be present, as is required by RCW 41.56.080. The union was not represented at this meeting. The grievance was not resolved.

7. At Wakenight's request, Local 17 commenced to represent Wakenight with regard to his work schedule change grievance after the December 19, 1988 meeting. On January 17, 1989, the union invoked the third step of the grievance procedure set forth in the collective bargaining agreement between the employer and the union.

8. On January 17, 1989, Wakenight requested permission from Dion to take one hour of vacation per day, for the period from January 17, 1989 through January 31, 1989. Dion denied Wakenight's request. Wakenight filed a grievance that same day regarding the matter.

9. On January 20, 1989, Wakenight became displeased over a situation involving rest breaks. In a discussion regarding the matter on the same day, Wakenight presented Dion with a draft of a memorandum addressing his aggravation over the matter. That memorandum included a reference to his pending vacation denial grievance. Dion was aware of Wakenight's pending work schedule change and vacation denial grievances. In the course of their conversation, Dion stated that he planned to investigate to determine whether a number of problems raised by Wakenight constituted an abuse of the employer's time, and that he could "play hardball" on the matter. Wakenight could reasonably have interpreted Dion's remarks to be a threat of reprisal for his continued pursuit of grievances under the collective bargaining agreement.

10. Wakenight met with management representatives on January 27, 1989, to discuss the merits of his vacation denial grievance. The record does not indicate that the union was given notice of that meeting and an opportunity to be present, as is required by RCW 41.56.080. The union was not represented at this meeting. The grievance was not resolved.

11. Wakenight was unhappy with the manner in which the employer representatives conducted themselves at the January 27, 1989 grievance meeting. By letter to the employer dated February 7, 1989, Wakenight implied that a 30 minute caucus held by the employer representatives was unduly long, that the employer representatives who were present at the meeting laughed at his grievance, and that he was inappropriately summarily dismissed at the conclusion of the employer's caucus. Wakenight requested an explanation from the employer for its actions.

12. By memorandum dated February 10, 1989, the employer acknowledged receipt of Wakenight's February 7 inquiry and directed

him to the union for any questions that he may have regarding the grievance process.

13. By letter dated February 14, 1989, Director of Administrative Services Carole V. Coe-Hauskins notified union representative Joseph L. McGee that the employer was denying Wakenight's "vacation denial" grievance.

14. By letter dated February 14, 1989, Wakenight notified Manager of Labor Relations David Orcutt that he was advancing his vacation denial grievance to step three of the grievance procedure of the collective bargaining agreement.

15. On or before March 1, 1989, the employer contacted McGee for the purpose of scheduling a meeting to discuss Wakenight's vacation denial grievance. McGee advised the employer that the union had not filed the grievance, but that the union was willing to schedule a meeting to discuss the matter.

16. On March 1, 1989, McGee informed Wakenight of his conversation with the employer concerning the scheduling of a meeting on Wakenight's vacation denial grievance.

17. By letter dated March 3, 1989, Labor Negotiator Debra Hillary notified McGee that a meeting was being scheduled for March 23, 1989, to discuss Wakenight's grievance. A copy of the letter was sent to Wakenight, and he received it.

18. McGee contacted Wakenight on March 22, 1989, to prepare for the March 23 grievance meeting. McGee was then advised that Wakenight would not attend the meeting, because Wakenight felt that he had not been personally contacted by the employer.

19. On March 23, 1989, a meeting was held to discuss Wakenight's vacation denial grievance, as scheduled. Wakenight did not

attend. The union supported Wakenight's claim that the employer's denial of his vacation request violated the terms of the collective bargaining agreement.

20. By letter dated March 27, 1989, Hillary notified Wakenight that the employer was willing to reconvene a meeting to discuss his vacation denial grievance, if he so desired. Wakenight responded affirmatively to that notification, and a meeting was held on April 12, 1989 with both Wakenight and McGee attending.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.

2. The complainants in the above-entitled matters were timely pursuant to RCW 41.56.160, to the extent that the complained-of actions occurred within six months prior to the filing of the complaint.

3. By the hostile and confrontive remarks made by its supervisory employee, John Dion, on January 20, 1989, the City of Seattle has interfered with, restrained, and coerced Donald Wakenight in the exercise of his rights guaranteed by RCW 41.56.040, and has engaged in unfair labor practices within the meaning of RCW 41.56.140(1).

4. Donald Wakenight has failed to establish that the employer has violated his rights under Chapter 41.56 RCW in connection with its processing of grievances that he filed as an individual employee, so that there has been no violation of RCW 41.56.140 as to such matters.

ORDER

1. The complaints charging unfair labor practices filed against the City of Seattle in:

   Case 7816-U-89-1665
   Case 7843-U-89-1676
   Case 7844-U-89-1677
   Case 7867-U-89-1681

   are DISMISSED on their merits.

2. IT IS ORDERED that the City of Seattle, its officers, and agents, shall immediately take the following actions to remedy the effects of its conduct found unlawful in Case 7780-U-89-1648:

   a. Cease and desist from interfering with, restraining or coercing public employees in the exercise of their rights secured by RCW 41.56.040.

   b. Take the following affirmative action which the Commission finds will effectuate the purposes and policies of Chapter 41.56 RCW:

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

ii) Notify Donald J. Wakenight, 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.

iii) Notify the Executive Director of the Commission, 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 Executive Director with a signed copy of the notice required by the preceding paragraph.

DATED at Olympia, Washington, this 28th day of February, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Frederick J. Rosenberry

FREDERICK J. ROSENBERRY

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A HEARING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT interfere with, restrain, or coerce employees for engaging in activities protected by Chapter 41.56 RCW, including the pursuit of grievances under the collective bargaining agreement between the City of Seattle and International Federation of Professional and Technical Engineers, Local 17.

DATED: _____

THE CITY OF SEATTLE

BY: _____
Authorized Representative

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

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.