Lynden School District, Decision 6391 (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 120,	)	
Complainant,	)	CASE 13387-U-97-3267
vs.	)	DECISION 6391 - PECB
LYNDEN SCHOOL DISTRICT,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW
Respondent.	)	AND ORDER

Schwerin, Burns, Campbell and French, by Kathleen Phair Barnard, Attorney at Law, appeared on behalf of the complainant.

Perkins Coie, by Thomas E. Platt, Attorney at Law, appeared on behalf of the respondent.

On September 8, 1997, Service Employees International Union, Local 120, filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Lynden School District violated RCW 41.56.140(1), by unilaterally offering improved holiday and vacation benefits to certain of its employees during a union organizing campaign. A preliminary ruling was issued under WAC 391-45-110, and Examiner Jack T. Cowan was designated to conduct further proceedings under Chapter 391-45 WAC. A hearing was held at Kirkland, Washington, on February 6, 1998, before the Examiner. The parties filed post-hearing briefs to complete the record.

BACKGROUND

The Lynden School District (employer) is located in Whatcom County. It operates common school programs for approximately 2,385 students in kindergarten through the 12th grade, through one high school, one middle school, one intermediate school, and two elementary schools.[1] Howard Heppner is the superintendent. Charles Foster has been its labor relations consultant and spokesperson for the past 18 years.

Service Employees International Union, Local 120, (union) represents three separate bargaining units within this employer's workforce: (1) A unit of custodial, maintenance and grounds employees; (2) a unit of food service employees; and (3) a unit of secretaries and librarians. David Warren has been the union's business representative and primary spokesperson at the Lynden School District for several years.

Warren recalls telling the employer, on many different occasions, that the union desired to expand its involvement at the Lynden School District, and that he intended to organize all of the employer's unrepresented classified employees.[2] Warren testified of having made such comments over an extended period, perhaps as

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[1] Information from the 1997-1998 edition of the Washington Education Directory, compiled and produced by Barbara Krohn and Associates, Seattle, Washington.

[2] The employer has bargaining relationships with two other unions. The employer's certificated employees are represented by a local affiliate of the Washington Education Association; the employer's school bus drivers are represented by Public School Employees of Washington.

many as five or six years, both directly to the superintendent and to Foster.

In about February of 1997, the union initiated an organizing campaign among the employer's educational assistants, who were not represented for the purposes of collective bargaining. Most, if not all, of them work part-time, and only during the school year. Warren recalled a couple of meetings with the educational assistants at a cafe, as well as a meeting at an employee's residence. He felt the employees were primarily interested in holidays and paid vacations, although he also mentioned their interest in working conditions such as seniority and a grievance procedure, as well as longevity pay and call-back premium pay. Foster recalled Warren's comment that he was attempting to organize the educational assistants in 1997, although he was not sure of the date.

Contemporaneous with Warren's 1997 organizing effort among the educational assistants, he and Foster were negotiating an initial collective bargaining agreement for the food service bargaining unit. According to Warren, a major goal of the union in those negotiations was paid holidays and paid vacations for part-time food service employees who had not qualified for such paid leaves in the past. As a result of the negotiations, the employer agreed to provide paid holidays on a pro-rata basis to all of the members of the bargaining unit,[3] and the employer also agreed to provide paid vacation leave to all of the part-time members of the food service bargaining unit in accordance with a formula based on hours worked and length of service. Those negotiations were concluded on

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[3] The parties' contract calls for six paid holidays in 1996-97, seven in 1997-98, and eight in 1998-99.

May 21, 1997, and the final agreement signed in July of 1997 was to be effective from September 1, 1996 to December 31, 1999.

Also contemporaneous with Warren's 1997 organizing campaign among the educational assistants, Local 120 acquired status as exclusive bargaining representative of the bargaining unit of the employer's office-clerical employees and librarians.[4] The parties commenced negotiations for an initial agreement, where paid holidays and vacations for part-time employees were also at issue.

According to Foster, and acknowledged by Warren, the employer considered the cost of extending new benefits to its unrepresented employees when it evaluated the union's proposals for holiday and vacation benefits for the part-time employees in the food service and office/library bargaining units.

The employer's board of directors announced personnel policy changes that were favorable to the interests of its unrepresented employees by means of two memoranda distributed to those employees in August of 1997.[5] One memorandum announced holiday and paid vacation benefits for unrepresented part-time employees, stating:

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[4] Notice is taken of Commission's docket records for Case 12927-E-97-2164. The union was certified as exclusive bargaining representative of:

> All full-time and regular part-time secretaries, librarians, and library aides in the Lynden School District, excluding supervisors, certificated employees, and all other employees.

Lynden School District, Decision 5855 (PECB, March 4, 1997).

[5] The memos were dated June 19, 1997, but apparently were not distributed at that time.

The Lynden School Board of Directors approves Vacation and Holidays for non-represented, part-time classified personnel effective 9-1-96 based on the following schedule:

Vacations

Non Represented classified employees shall be entitled to earned vacation pay pro-rated as to hours worked on the following basis:

1996-97	
1-10 year of service	3 earned days
11 or more years of service	4 earned days
1997-98	
1-10 years of service	6 earned days
11 or more years of service	8 earned days
1998-99	
1-10 years of service	8 earned days
11 or more years of service	12 earned days

Earned vacation pay will be paid in the subsequent year over a 12 month period. Effective September 1, 1999, vacation pay will be calculated based on the following formula:

1-10 years of service	1 day per 22.5 days worked (8)
11 or more years of service	1 day per 15 days worked (12)

Holidays

Non-represented classified employees shall be paid for the following holidays which fall within their working period, pro-rated as to hours worked.

1996-97	Veterans Day, Thanksgiving Day, Christmas Day, New Years Day, Martin Luther King Jr.'s Birthday and Memorial Day
1997-98	Add Labor Day to the list above
1998-99	Add President's Day and Friday of Spring Break Week to the list.

If an employee is required to work on any of the above named holidays he/she shall be paid at the rate of double time.

The second memorandum was directed to the non-represented full-time employees, and was the same with two exceptions: First, the opening section of the memo specifically identified the full-time employees to be affected; second, it permitted full-time employees to carry over up to six days of vacation into the subsequent year.

According to Warren, the educational assistants' interest in union representation ceased after the employer distributed the memoranda. Warren then terminated his organizing campaign, in about August of 1997, without ever filing a representation petition.

POSITIONS OF THE PARTIES

The union maintains that the employer's extension to its unrepresented employees of the same favorable vacation and holiday benefits that the union acquired for the food service workers in collective bargaining constituted an unlawful interference with the union's organizing campaign among the educational assistants. It is the union's contention that the employer was very well aware of the union's active organizing campaign, and sought to thwart it by the personnel action. The union maintains that the employer should be prohibited from unilaterally implementing such changes in the wages, hours and working conditions of the educational assistants, because such change deter employees from organizing.

The employer defends its personnel actions by pointing out that it has a long-standing practice of maintaining parity and internal equity among its employees. It has previously extended collectively bargained wage and benefit enhancements to its non-represented employees. The employer stresses that there was no question

concerning representation pending when it extended the vacation and holidays changes agreed upon in bargaining for the food service employees to the unrepresented educational assistants. The employer denies that the unilateral change was an unlawful interference and requests that the complaint be dismissed.

DISCUSSION

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, assures public employees of the right freely to organize and designate representatives of their own choosing. It includes:

> 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.

Enforcement of those rights are through the unfair labor practice provisions of the statute:

> 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.

The state statute is patterned after the National Labor Relations Act, and both the Public Employment Relations Commission and the National Labor Relations Board (NLRB) have interpreted their respective statutes in a generally similar manner.[6]

The Standards to be Applied

An interference violation occurs under RCW 41.56.140(1), where employees could reasonably believe that the employer has intruded into their free exercise of their right to organize and bargain collectively through an organization of their own choosing. In American Freightway Co. Inc., 124 NLRB 146 (1959), the NLRB held:

> It is well settled that the test of interference, restraint, and coercion under section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

In City of Seattle, Decision 2773 (PECB, 1987), the standard for evaluation of interference claims was set forth as follows:

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

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[6] Nucleonics Alliance, Local Union 1-369, Oil, Chemical and Atomic Workers v. WPPSS, 101 Wn.2d 24 (1984).

Thus, an interference violation occurs where the employer's conduct *could reasonably be perceived* by employees as a threat of reprisal or force, or a promise of benefit, deterring them from lawful union activity. City of Seattle, Decision 3066-A, (PECB, 1989); City of Mercer Island, Decision 1580 (PECB, 1983); City of Seattle, Decision 2134 (PECB, 1985); King County, Decision 2955 (PECB, 1988).

Unilateral changes of the wages, hours or working conditions of union-represented employees have been found unlawful (as refusals to bargain and, derivatively, as unlawful interferences) in numerous Commission precedents since Federal Way School District, Decision 232-A (EDUC, 1977).[7] Similarly, promises of benefit to encourage decertification of an incumbent exclusive bargaining representative are unlawful interference. Pasco Housing Authority, Decision 5927-A (PECB, 1997). Those are not the facts here, however, as the changes at issue were made in advance of the filing of any representation petition.

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[7] An exception for changes that maintain the "dynamic status quo" insures that representation questions do not block the occurrence of routine, non-discretionary changes to employees' working conditions:

> [There] is an exception to the status quo rule which recognizes occasional circumstances when the status quo may not be static. Where an employer's salary schedule includes step increases for which employees qualify by length of service, a refusal to grant those step increases during bargaining was unlawful because payment of earned step increases was the status quo. Snohomish County, Decision 1868 (PECB, 1984).

Clark County, Decision 5373 (PECB, 1995)

Promising or granting benefits during the processing of a representation petition clearly constitute objectionable conduct and/or an unlawful interference. Mason County, Decision 1699 (PECB, 1983); City of Tukwila, Decision 2434-A (PECB, 1987). Again, however, the changes disputed in this case were made in advance of the filing of a representation petition.

The NLRB found conduct in advance of the filing of a representation petition to be unlawful interference in The Trading Port Inc., 219 NLRB 298 (1975), where the employer embarked on a clear course of unlawful conduct which undermined the union's majority status and subverted the election process. Generally, however, pre-petition conduct is not considered for purposes of election objections,[8] and objections have been dismissed with explanation that the pre-petition period is not within the scope of "objections" proceedings under Chapter 391-25 WAC. Bremerton Housing Authority, Decision 2834 (PECB, 1988). Absent evidence of the type presented in Trading Port, there is no legal impediment to the imposition of unilateral personnel actions by an employer regarding its unrepresented employees. Snohomish County, Decision 2234 (PECB, 1985).

It is the nature of unit determinations made under RCW 41.56.060, and of bargaining units themselves, that each unit stands on its own. See, City of Wenatchee, Decision 2216 (PECB, 1985); City of Pasco, Decision 3368-A (PECB, 1990), affirmed 119 Wn.2d 504 (1992). An interference allegation was recently dismissed in Douglas County, Decision 6129 (PECB, 1997), where a union sought to rely on a historical practice of granting the same wage increases to all employees of a Sheriff's Department (regardless of whether they

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[8] Ideal Elec. and Mfg. Co., 134 NLRB 1275 (1961).

were represented for the purposes of collective bargaining), as a basis for protesting a greater wage increase given to unrepresented employees than was negotiated for bargaining unit members. See, also, Benton County, Decision 6035 (PECB, 1997), which restates the proposition that one union is not in a position to rely upon or object to the wages and benefits negotiated by another union for a different bargaining unit. Conversely, a union has no duty of fair representation toward employees outside of the bargaining unit it represents, and such employees have no cause of action against a union that is successful in negotiating conditions of employment greater than an employer grants its non-represented employees. City of Chelan, Decision 6266 (PECB, 1998).

Commission precedent requires employers and incumbent unions to shut down bargaining for successor contracts in bargaining units that are subject to pending questions concerning representation. Yelm School District, Decision 704-A (PECB, 1980). But that line of precedent does not require employers and unions representing unaffected bargaining units to cease their labor relations activities pending resolution of representation case(s) in other unit(s) that may exist within the employer's workforce. Such a policy would, in fact, impose an unrealistic burden on non-parties, given the delays that can occur in representation proceeding.

As with any other unfair labor practice allegations under RCW 41.56.140, the burden of proving an "interference" violation rests with the complaining party. WAC 391-45-270. To satisfy that burden, a complainant must produce a preponderance of the evidence supporting its claims. Bellingham Housing Authority, Decision 2335 (PECB, 1985); Lyle School District, Decision 2736 (PECB, 1987).

Application of the Standard

The Past Practice -

The union would seemingly have the disputed changes treated as a one-time response to its announced representation campaign, but the evidence supports the employer's contention that it has sometimes extended the benefits agreed upon in collective bargaining to its similarly-situated unrepresented employees. As examples, the employer pointed out:

- In the mid 1980's, it increased the amount of paid vacation and holidays for similarly situated employees after negotiating similar benefits to its union-represented custodial employees;

- In 1995, the employer adopted Dr. Martin Luther King Jr. Day as a paid holiday for its non-represented full-time mechanics, maintenance, accounts payable, and payroll personnel, after it agreed to recognize that holiday in negotiations for the custodial bargaining unit.

The record thus reflects that the personnel actions at issue in this case are consistent with past practice, rather than a departure from it.

Credibility of the Assertion -

The employer acknowledges that the union representative announced his intention to organize the educational assistants, but the evidence also supports a conclusion that the employer was in a position to question the credibility of the remark. The union had been making similar assertions for years. Apart from Warren's

statements, there is no evidence that the employer had any independent knowledge of the educational assistants having any interest in organizing. It would be unrealistic to impose a general prohibition on employer action, simply because a union sporadically makes an assertion that it is planning, or engaged in, a representation campaign. At the same time, it would be unfair to employees (and an infringement on their statutory right to refrain from organizational activity if they so desire) to require the maintenance of the status quo ante or to prohibit routine changes in terms and conditions of employment simply because a union announces or begins an organizing campaign.[9] That is not the intent of the law.

The union maintains that the employer's personnel action casts doubt on the question of whether a majority of the educational assistants would have authorized the union to represent them, were it not for the employer's extension of the more favorable vacation and holiday benefits to them. However, that assumes facts not in evidence. This record does not establish the degree of employee fervor and support for the union's organizing campaign. No witnesses were called, and no documentary evidence was provided, regarding the degree of interest. The Examiner is left with the possibility that this may well have been a one-sided campaign marked by a great deal of union "institutional" interest in expanding its influence in the Lynden School District, but little or no interest by the members of the prospective bargaining unit. All that is clear is that the union never even filed a representation petition with the minimal 30% showing of interest required by

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[9] Indeed, selecting an exclusive bargaining representative would become the only means by which improvements in terms and conditions of employment could be implemented.

the statute and rules. In the absence of any evidence of union animus, threats of reprisal or force, or references conditioning or relating the new benefits to the organizing campaign, the Examiner finds no basis to rule that the employer's personnel actions regarding its unrepresented employees constituted unlawful interference with the union's alleged organizing campaign.

The Timing of Events -

Finally, the timing of events weighs against the union here. The union's organizing campaign was supposedly initiated "early" in 1997, which is interpreted as some time in the January to April time frame. Authorization cards submitted to satisfy the "showing of interest" requirement in a representation case must be less than 90 days old, under WAC 391-425-110, so an inference is available that any cards obtained by the union "early" in 1997 would have become stale by the end of July 1997. The complained-of personnel action was not announced to the employees until August 1997. No representation petition had been filed by the union, and there is no record of the union having made a demand for voluntary recognition during this period. The record does not reflect how many educational assistants are employed by this employer, and certainly does not suggest that the union ever had the 70% support necessary to warrant direction of a cross-check or even the simple majority needed to win a representation election. The union had more than six months to obtain sufficient interest to initiate representation proceedings if it had sufficient interest. It did not do so, and an inference is available that the union never even obtained the 30% showing of interest necessary to petition for an election.

The union has failed to demonstrate, by a preponderance of the evidence, that the employer's grant of holiday and vacation

benefits to its unrepresented employees was reasonably perceived by those employees as a threat of reprisal or force of promise of benefit associated with their pursuit of lawful union activities protected by Chapter 41.56 RCW.

Refusal to Bargain Regarding Secretaries/Librarians Unit

The union's post-hearing brief raises a different claim that, while it relates to the same holiday and vacation benefits, is not within the scope of this proceeding. It contends that the employer has failed or refused to bargain in good faith in the collective bargaining for the parties' first contract covering the newly-certified secretaries/librarian bargaining unit. In particular, the union alleges that the employer unlawfully declined to extend the same holiday and paid vacation benefits to those employed in the secretaries-librarian bargaining unit.

The complaint that initiated this proceeding was limited to allegations of unlawful personnel action affecting the union's organizing campaign for educational assistants. While some information regarding the secretaries/librarians bargaining unit has limited value as background information on that claim, and has been taken into consideration on that basis, there was no independent claim of refusal to bargain in the secretaries/librarians unit. Accordingly, no such claim was subjected to the preliminary ruling process under WAC 391-45-110 or forwarded to the Examiner for further proceedings in this case. No amendment to the complaint was filed. The additional issue(s) are not properly before the Examiner in this proceeding.

FINDING OF FACT

1. The Lynden School District is operated pursuant to Title 28A RCW, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Service Employees International Union, Local 120, is a "bargaining representative" within the meaning of RCW 41.56.030(3).

3. Local 120 represents three bargaining units of employees of the Lynden School District: (1) A unit of custodial, maintenance and groundskeeper employees; (2) food service employees; and (3) secretaries/librarians.

4. Over an extended period of time, perhaps as long as five years, the union's representative has advised employer representatives of the union's intention to organize and represent the employer's unrepresented classified employees.

5. The union initiated an organizing campaign during or about February of 1997, seeking to represent the employer's educational assistants. Neither the number nor fervor of employee interest is established in this record.

6. During the first half of 1997, the union and employer were engaged in negotiations for an initial collective bargaining agreement covering the food service bargaining unit. In the course of those negotiations, the employer agreed to provide new holiday and paid vacation benefits to part-time employees.

7. By a memorandum distributed to the affected employees in August of 1997, the employer notified its unrepresented part-time classified employees, including the educational assistants, that it would provide them with holiday and paid vacation benefits, effective September 1, 1996. The announced benefits were the same as those negotiated by the employer and union for the food service bargaining unit.

8. The union representative perceived a lack of interest among the educational assistants in the union's organizing drive, after the employer announced the holiday and vacation benefits for its unrepresented part-time employees. The union thereupon abandoned its organizing campaign without ever filing a petition for investigation of a question concerning representation petition with the Commission.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.46 RCW and Chapter 391-45 WAC.

2. The decision of the Lynden School District to extend paid vacation and holidays to its unrepresented educational assistants was a managerial prerogative, in the absence of any collective bargaining relationship established under RCW 41.56.080.

3. By the actions described in the foregoing findings of fact, the union has failed to sustain its burden of proof to establish that the actions of the Lynden School District to

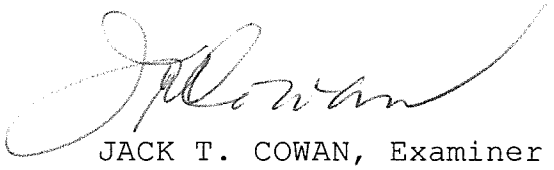
extend holiday and vacation benefits to its educational assistants were reasonably perceived by those employees as an interference with their rights under Chapter 41.56 RCW, so that no unfair labor practice has been established under RCW 41.56.140(1).

ORDER

The complaint charging unfair labor practices filed in this matter is DISMISSED on its merits.

Issued at Olympia, Washington, on the 19th day of August, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JACK T. COWAN, Examiner

This will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.