

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KENNETH G. SULLIVAN,)	
)	
Complainant,)	CASE NO. 4389-U-82-703
)	
vs.)	DECISION NO. 1781-A - PECB
)	
AMERICAN FEDERATION OF GOVERNMENT)	FINDINGS OF FACT,
EMPLOYEES, LOCAL 1170,)	CONCLUSIONS OF LAW,
)	AND ORDER
Respondent.)	
)	
)	

Kenneth G. Sullivan, complainant, appeared Pro Se.

Stan Standifer, National Representative, appeared for the respondent.

On December 14, 1982, Kenneth G. Sullivan (complainant) filed a complaint charging unfair labor practices against Seattle Public Health Hospital, alleging that the hospital violated RCW 41.56.140(1) and (2) by a series of actions set forth in a statement of facts attached to the complaint. The matter was docketed as Case Number 4386-U-82-701. On December 16, 1982, complainant filed the above-captioned unfair labor practice complaint, alleging that American Federation of Government Employees violated RCW 41.56.150(1) by interfering with complainant's right to be properly represented in the processing of a grievance through a contractual grievance procedure.

The cases were assigned to Rex L. Lacy, Examiner, and were consolidated for further action. A notice of hearing was issued on May 25, 1983, setting hearing dates for July 19 and 20, 1983, and establishing June 2, 1983, as the date of which answers to the unfair labor practice complaints had to be filed. The union failed to answer in a timely fashion.

Complainant filed a motion for summary judgment on June 9, 1983. On June 16, 1983, the Examiner advised the union, in writing, that an answer was not on file, and reiterated that failure to answer could lead to summary judgment. The union responded by letter filed June 20, 1983 by Stan Standifer, national representative, wherein several reasons for the delay were set forth. In pertinent part, the letter detailed the union's unfamiliarity with Commission procedures and time constraints due to other business the union had to deal with. However, the letter did not specifically answer any of the allegations contained in the complaint.

The hearing was rescheduled for August 15, 16, and 17, 1983, and pre-hearing conference was scheduled for August 8, 1983. At the pre-hearing conference, the union appeared, but again failed, to answer the allegations in the unfair labor practice complaint filed against it.

At the outset of the hearing on August 15, 1983, the two unfair labor practice cases were separated for further proceedings. On October 20, 1983, the Examiner issued an order granting default judgment against AFGE, Local 1170. The union was afforded the opportunity to present affirmative defenses at a hearing conducted on January 4, 1984, at Seattle, Washington. The parties called no witnesses to testify at the hearing. The parties filed post-hearing briefs on February 3, 1984.

BACKGROUND

Public Health Hospital Preservation and Developmental Authority, d/b/a Seattle Public Health Hospital, Seattle, Washington, hereinafter "the authority" is a public entity chartered by the City of Seattle. Seattle Public Health Hospital has a governing council composed of citizens of the community. It provides medical care to patients in the greater Seattle area. The hospital was formerly operated as the United States Public Health Service Hospital, Seattle, Washington. The federal government ceased to operate the hospital on November 24, 1981. The authority commenced operating the hospital simultaneously with the end of federal government involvement with the facility. Dr. Richard Topkins is director of the hospital.

American Federation of Government Employees, Local 1170 (AFGE), represented employees of the United States Public Health Service Hospital, Seattle, Washington, from 1968 until its demise as a federal facility. Upon the commencement of operation of the hospital by the authority, AFGE, Local 1170, filed a petition with the Public Employment Relations Commission (PERC) raising a question concerning representation for certain employees of the Seattle Public Health Hospital. The union's petition sought representation rights for the same bargaining unit it had represented while the hospital was a federal facility. On April 8, 1982, PERC conducted a secret ballot representation election in an appropriate bargaining unit described as:

INCLUDED: All professional and non-professional employees employed by the employer.

EXCLUDED: Management officials, supervisory employees, employees engaged in personnel work in other than a purely clerical capacity, and all employees of any independent group practice that may contract with the employer.

AFGE was certified as the exclusive bargaining representative for the bargaining unit on April 16, 1982, Public Health Hospital Preservation and Developmental Authority, Decision 1435 (PECB, 1982). Beth Koster was president of AFGE, Local 1170, at the commencement of this proceeding. Koster resigned during the course of the proceedings. She was replaced by Hadley Butcher.

AFGE, Local 1170 and the United States Public Health Service Hospital had entered into a series of collective bargaining agreements between 1968 and 1981. The agreement in effect at the time of the transition from federal ownership was observed until a new agreement could be reached between the new employer and the union. AFGE and the authority ratified and implemented their first collective bargaining agreement on March 25, 1983. The contract was effective from March 25, 1983 until March 25, 1986.

On June 8, 1981, Kenneth G. Sullivan was hired as a file clerk within the AFGE bargaining unit. Sullivan worked in that capacity until March 28, 1983.

Between January, 1982 and August, 1982, Sullivan actively campaigned for the office of president of Local 1170. Sullivan was handily defeated by Koster in an election held in August, 1982.

On July 26, 1982, Patricia Hayes was hired as file unit supervisor. In mid-August of 1982, Hayes implemented new work rules for sick leave, emergency leave and annual leave. Shortly thereafter, Sullivan requested five days annual leave commencing August 23, 1982. Hayes denied Sullivan's leave request. On August 23, 1982, Sullivan notified Hayes, by telephone, that he was ill. Sullivan also missed the following two days. On August 26, 1982, Hayes directed Sullivan to provide a medical certificate for his absences on the preceding three days. Sullivan was allowed 48 hours to obtain the medical certificate.

On his lunch hour on Friday, August 27, 1982, Sullivan visited the Veterans' Administration Hospital in Seattle to obtain the required medical certificate. Sullivan returned to work 2½ hours late. Hayes informed Sullivan that he would be marked absent without leave (AWOL) for the 2½ hours. Sullivan's pay was docked 2½ hours for the AWOL incident. Sullivan filed a grievance seeking to overturn the pay reduction for the 2½ hours he was marked AWOL. Sullivan represented himself during the processing of the grievance. The grievance was denied at the highest step of the grievance procedure. Thereafter, Sullivan initiated a lawsuit on the matter in Superior Court.

In January, 1983, Hayes warned Sullivan against excessive use of the department's telephone for personal business. The file room has only one

telephone line. All employees had been restricted to one personal call daily. Emergency calls were also allowed. Hayes gave similar warnings to other employees.

On February 25, 1983, Hayes reprimanded Sullivan, in writing, for conducting union business during work hours and making excessive use of the telephone for personal business. The reprimand reads:

As I indicated to you during our conversation on February 17, 1983, I have decided to reprimand you for your violations of the policy restricting the conduct of personal and/or internal union business during work-time. Specifically, you engaged in five (5) personal telephone conversations during work-time in my presence on February 16, 1983.

On November 18, 1982, I discussed the file room policy with you and your fellow employees. I then followed-up with a written policy statement which was distributed to file room workers in the first week of December, 1982. Among other issues, the policy clearly restricts work-time personal telephone calls to one per day of short duration, and prohibits the conduct of internal union matters during work-time. The policy does not restrict any such activity during non-work time such as breaks and meals.

I orally admonished you on January 7, 1983, for violating the policy. This did not correct your behavior; in fact, I have noted eleven (11) separate instances of your violation of this policy. This behavior will not be tolerated further.

I am issuing this Letter of Reprimand to you in the hope you will correct your behavior and adhere to the policy of confining your non-work activities to non-work time. Further violations may result in more severe discipline.

A copy of this letter will be placed in your personnel folder for a period of one (1) year from the date of receipt. You have one week from the date of receipt to request reconsideration of this action. Such request, if any, should be made to Susan Helbig, Chief, Health Data Services. If the action is upheld, you have the right to initiate a formal grievance in accordance with Article XIX of the Collective Bargaining Agreement. If you have any questions, please call Rus Ritter, Employee/Labor Relations Officer, at extension 4111.

On Friday, March 11, 1983, Hayes delivered letters to each employee who had applied for a position upgrade, notifying them of their selection, or non-selection, for a position. Sullivan did not receive a promotion. After receiving that notice, Sullivan reported to the hospital's walk-in clinic. Sullivan was sent home with possible flu symptoms. On Monday, March 14, 1983, Sullivan did not report for work. He testified that he was ill from the same malady he had when he was sent home on the preceding Friday. On March 15, 1983, Sullivan was still unable to return to work. Hayes informed

Sullivan by telephone that she required a medical certificate for his absences of March 13 and 14, 1983. On March 16, 1983, Sullivan reported that he was unable to return to work due to a new medical affliction, a paper cut on his finger. Hayes informed Sullivan, by telephone, that she required a medical certificate for the new medical problem. Additionally, Hayes directed Sullivan to report to work on light-duty status. Sullivan did not report to work on March 17, 1983. On March 18, 1983, Sullivan notified Hayes he was unable to report to work due to his finger injury, and reactions to medicine prescribed by the V.A. Hayes reiterated that Sullivan was required to have a medical certificate attesting to his incapacitation to work. On March 21, 1983, Sullivan presented Hayes with a progress report on his finger injury. The progress report was all he was able to obtain from the V.A. hospital. He did not present any medical certificate for March 14 or 15, 1983. Additionally, Sullivan did not have a medical certificate for March 18, 1983. Hayes marked Sullivan AWOL on March 14, 15, and 18, 1983, and had his pay withheld for those three days.

On March 21, 1983, Hayes, Sullivan, and Reid Eaton, shop steward, met with Martin Ritter regarding the March, 1983 AWOL incident. During the meeting, Hayes informed Sullivan she was taking disciplinary action for the three AWOL days, and that she was going to follow up that action with even more severe disciplinary action. Hayes mentioned that she was considering suspension as the form of more severe discipline.

Sullivan had filed several legal actions in the courts, and one of those actions was scheduled for the morning of March 25, 1983. On March 24, 1983, Sullivan requested that he be allowed time off to attend court. Hayes initially denied Sullivan's request. After consulting Ritter and her supervisors, Hayes permitted Sullivan to use annual leave for the time he needed to attend court. Hayes instructed Sullivan to return to work after he was finished at the court, or by noon, whichever applied. On March 25, 1983, Sullivan attended the court hearing. Sullivan's legal action was rejected by the court. Sullivan did not return to work after the conclusion of the court proceedings.

On March 28, 1983, Sullivan called Hayes to report that he was ill. During the conversation, Hayes informed Sullivan that he was terminated because he did not report to work on March 25, 1983 upon the conclusion of the court hearing.

At the pre-hearing conference held on August 8, 1983, AFGE, Local 1170 offered to arbitrate Sullivan's discharge. The employer also agreed to arbitrate the discharge, and, additionally to waive the time limits of the grievance procedure in order to facilitate the processing of the grievance. Sullivan refused the union's offer to arbitrate his discharge.

POSITION OF THE PARTIES

The complainant contends that the respondent has refused to process the complainant's grievance, and has aligned itself in interest with hospital management against him in connection with the processing of his grievances, in clear reprisal for his exercise of union activity rights protected by Chapter 41.56 RCW.

The respondent contends that its default for failing to answer the unfair labor practice allegations has no bearing on the outcome of Sullivan's grievance; that it has not aligned itself in interest with the employer against the complainant in reprisal for his exercise of union activity rights protected by Chapter 41.56 RCW; that Sullivan chose to represent himself in his grievances against the employer; that the decision of the union not to arbitrate Sullivan's August, 1982 AWOL grievance was made on the merits of the case; and that when the union offered to arbitrate Sullivan's March, 1983 discharge, Sullivan refused the union's offer.

DISCUSSION

The ingredients of an unfair labor practice complaint are set forth in WAC 391-45-050, which reads:

WAC 391-45-050 CONTENTS OF COMPLAINT CHARGING UNFAIR LABOR PRACTICES. Each complaint shall contain, in separate numbered paragraphs:

(1) The name and address of the party filing the complaint, hereinafter referred to as the complainant, and the name address and telephone number of its principal representative.

(2) The name(s) and address(es) of the person(s) charged with engaging in, or having engaged in, unfair labor practices, hereinafter referred to as the respondent(s), and, if known, the names, addresses and telephone numbers of the principal representatives of the respondent(s).

(3) Clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.

(4) A listing of the sections of the Revised Code of Washington (RCW) alleged to have been violated.

(5) A statement of the relief sought by the complainant.

(6) The signature and, if any, the title of the person filing the complaint.

The complainant filed such a complaint against the union.

The initial processing of the complaint by the Executive Director is set forth in WAC 391-45-110 as follows:

WAC 391-45-110 INITIAL PROCESSING BY EXECUTIVE DIRECTOR. The executive director shall determine whether the facts as alleged may constitute an unfair labor practice within the meaning of the applicable statute. If it is determined that the facts as alleged do not, as a matter of law, constitute a violation, the executive director shall issue and cause to be served on all parties an order of dismissal containing the reasons therefore; otherwise, the executive director shall cause the contents of the charge to be issued and served as a complaint of unfair labor practices, shall assign the matter to an examiner and shall notify the parties of such assignment. An order of dismissal issued pursuant to this section shall be subject to a petition for review as provided in WAC 391-45-350.

The Executive Director made such a preliminary ruling on April 15, 1983, and a copy was directed to Koster as president of the union.

The notice of hearing procedure is covered in WAC 391-45-170 as follows:

WAC 391-45-170 NOTICE OF HEARING. The examiner shall issue and cause to be served on the parties a notice of hearing at a time and place specified therein. Attached to the notice of hearing shall be a copy of the complaint as approved by the executive director under WAC 391-45-110. The notice of hearing shall specify the date for the filing of an answer, which shall be not less than ten days prior to the date set for hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing.

The requirements for filing and service of an answer are contained in WAC 391-45-190 set forth below:

WAC 391-45-190 ANSWER--FILING AND SERVICE. The respondent(s) shall, on or before the date specified therefor in the notice of hearing, file with the examiner and original and three copies of its answer to the complaint, and shall serve a copy on the complainant.

The consequences of failing to answer are set out in WAC 391-45-210 as follows:

WAC 391-45-210 ANSWER--CONTENTS AND EFFECT OF FAILURE TO ANSWER. An answer filed by a respondent shall specifically admit, deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. The failure of a respondent to file an answer or the failure to specifically deny or explain in the answer a fact alleged in the complaint shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of the respondent of a hearing as to the facts so admitted.

The essence of WAC 391-45-210 is repeated in the notice of hearing issued by the undersigned Examiner on May 25, 1983. The Examiner established June 2, 1983, as the date on which answers to the unfair labor practices complaint had to be filed.

The union did not file a timely answer to the issue outlined by the Executive Director. The union does not contest the summary judgment issued by the Examiner on October 20, 1983. The primary reason offered in explanation of the failure to answer is the union's lack of familiarity with the procedures of the Public Employment Relations Commission, and that explanation is found to be completely lacking in merit. Irrespective of its history as a labor organization representing only federal government employees, and of the previous federal ownership of the Seattle Public Health Hospital, AFGE Local 1170, is now representing public employees, as defined under the laws of the State of Washington in RCW 41.56.030(2), and is now subject to the laws and regulations of the State of Washington and its administrative agencies. The union affirmatively sought the assistance of the Commission when it invoked the representation procedures of Chapter 391-25 WAC to obtain certification as exclusive bargaining representative of the bargaining unit in which complainant Sullivan was employed. The union cannot have it both ways. The procedural requirements of Chapter 391-45 are properly adopted administrative regulations of the State of Washington. The regulations themselves are clear and complete. Additionally, they are similar to well-accepted labor law procedures applied by the National Labor Relations Board and the Federal Labor Relations Authority.

RCW 41.56.080 obligates the organization certified as exclusive bargaining representative of a bargaining unit to represent all employees in the bargaining unit, without regard to membership in the organization. RCW 41.56.150(1) prohibits labor organizations from interfering with the rights guaranteed to public employees by Chapter 41.56 RCW, and RCW 41.56.040 assures public employees free exercise of the right to organize and designate representatives of their choosing for the purposes of collective bargaining.

The union here, by failing to comply with WAC 391-45-120, has admitted allegations that it aligned itself in interest against a represented employee because of his assertion of political rights within the union. The Washington State Supreme Court has held that public employee unions have a duty to fairly represent the interests of all their members without discrimination. The duty covers a broad range of activities, and an allegation of discriminatory breach of this duty will be closely scrutinized by the courts. Allen v. Seattle Police Guild, 100 Wn.2d 361 (1963).

The summary judgment order issued by the Examiner afforded the union the opportunity to present affirmative defenses to the default. The affirmative defense hearing was conducted on January 4, 1984. The respondent did not call any witnesses. The parties relied upon the record developed in Case No. 4386-U-82-701, opening and closing statements, communications to the Commission and Examiner, and post-hearing briefs to support their respective positions on the issues of this case.

THE REMEDY

The Public Employment Relations Commission does not remedy violations of collective bargaining agreements through the unfair labor practice provisions of Chapter 41.56 RCW. City of Walla Walla, Decision 104 (PECB, 1976). Collective bargaining agreements, like other contracts, are subject to enforcement in the courts of this state. Accordingly, the Public Employment Relations Commission has also declined to assert jurisdiction over "duty of fair representation" allegations arising solely in connection with the filing and processing of grievances. Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982). The complainant recognizes this divergence of jurisdiction. In his brief filed in the captioned matter on February 3, 1984, he indicates that the respondent's breach of its duty of fair representation (in connection with the processing of his contractual grievances) is appropriately before the United States District Court at Seattle. He goes on to assert that the breach of the duty of fair representation is also properly before the Commission, and asks for an order requiring the respondent to cease and desist from restraining employees in the exercise of their rights guaranteed by Chapter 41.56 RCW, by refusing to represent them in a fair and impartial manner. The complainant is entitled to such an order.

FINDINGS OF FACT

1. The Public Health Preservation and Developmental Authority d/b/a Seattle Public Health Hospital, Seattle, Washington, is a public authority chartered by the City of Seattle pursuant to Seattle Municipal Code 3.110, and is a public employer within the meaning of RCW 41.56.030(1).
2. American Federation of Government Employees, Local 1170, is a bargaining representative within the meaning of RCW 41.56.030(3). The union represents employees of the employer in an appropriate bargaining unit defined as:

INCLUDED: All professional and non-professional employees employed by the employer.

EXCLUDED: Management officials, supervisory employees, employees engaged in personnel work in other than a purely clerical capacity, and all employees of any independent group practice that may contract with the employer.

3. American Federation of Government Employees, Local 1170, and the Seattle Public Health Hospital are parties to a series of collective bargaining agreements containing a grievance procedure for processing employees' complaints.
4. On June 8, 1981, Kenneth G. Sullivan was hired as a file clerk.
5. During the Summer of 1982, Sullivan became involved in a dispute with officers of AFGE, Local 1170, concerning an election of union officers, resulting in a rescheduling of the election. Sullivan became a candidate for union office. Sullivan's campaign for election to union office was not successful.
6. In August, 1982, Sullivan was reported AWOL for 2½ hours for returning late from his lunch period. Sullivan grieved the 2½ hours pay reduction through the steps of the grievance procedure. Sullivan handled the processing of the grievance himself. The union was requested to attend the proceedings, and a shop steward was present throughout the meetings. The grievance was denied. AFGE, Local 1170, refused to arbitrate the grievance. Sullivan filed suit on the matter in court.
7. On December 14, 1983, Sullivan filed an unfair labor practice complaint against the employer, alleging discrimination and reprisal against the complainant for his engaging in protected union activities under Chapter 41.56 RCW.
8. On December 16, 1983, Sullivan filed an unfair labor practice complaint against AFGE, Local 1170, alleging that the union had aligned itself with the employer against the employee in connection with the processing of his grievances in reprisal for his exercising protected union activity rights under Chapter 41.56 RCW.
9. On April 15, 1983, the Executive Director of the Public Employment Relations Commission issued a preliminary ruling under WAC 391-45-110 establishing the following issue as the matter to be heard in this case:

Whether the union has refused to process complainant Sullivan's grievance, or aligned itself in interest against complainant Sullivan in connection with the processing of his grievances, in reprisal for his exercise of union activity rights protected by Chapter 41.56?

10. On May 25, 1983, the Examiner issued notice of hearing in this matter, setting hearing dates and establishing June 2, 1983 as the date for filing answers to the unfair labor practice complaints. The union failed to answer the complaints in a timely fashion.
11. On June 9, 1983, complainant filed a motion for summary judgment. The union was given the opportunity to comment upon the motion for summary judgment.
12. On June 20, 1983, the union responded by letter to the motion for summary judgment setting forth reasons for the delay in failing to timely file an answer. The letter did not specifically answer any of the allegations in the complaint.
13. A pre-hearing conference was scheduled for August 8, 1983. At the pre-hearing conference, the union did specifically answer the complaints of unfair labor practice allegations. During the course of the conference the union requested that this matter be severed from the proceedings involving the employer.
14. On August 15, 1983, the Examiner severed the two cases. Hearing on the unfair labor practice allegations against the employer was held separately.
15. On October 20, 1983, summary judgment against AFGE, Local 1170, was issued. Seattle Public Health Hospital, Decision 1781 (PECB, 1983).
16. On January 4, 1984, a hearing was held in this matter to afford AFGE Local 1170 an opportunity to present affirmative defense. The parties called no witnesses. The record in Case No. 4316-U-82-701 was made a part of the record in this matter.

CONCLUSIONS OF LAW

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

2. American Federation of Government Employees, Local 1170, has violated RCW 41.56.150(1) by refusing to process members grievances; or aligning itself in interest against members in connection with the processing of grievances in reprisal for their exercise of union activity rights protected by Chapter 41.56 RCW.

ORDER

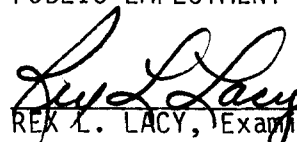
American Federation of Government Employees, Local 1170, its elected officials, business representatives, and agents shall immediately.

1. CEASE AND DESIST from:
 - a. Refusing to process members grievances, or aligning itself in interest against members in connection with the processing of members' grievances, in reprisal for their exercise of union activity rights protected by Chapter 41.56 RCW.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION which the Examiner finds will effectuate the policies of the Public Employee Collective Bargaining Act, Chapter 41.56 RCW:
 - a. 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 agent of American Federation of Government Employees, Local 1170, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the union to ensure that said notices are not removed, altered, defaced or covered by other materials.
 - b. Notify the Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide a signed copy of the notice required by the preceding paragraph.

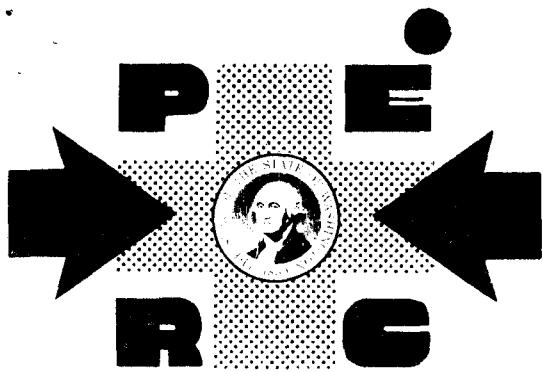
DATED at Olympia, Washington this 12th day of July, 1984.

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION



REX L. LACY, Examiner



APPENDIX
PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to process members' grievances, or align ourselves in interest against members in connection with the processing of members' grievances in reprisal for their exercise of union activity rights protected by Chapter 41.56 RCW.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1170

By: _____
President

By: _____
Vice-President

By: _____
Secretary-Treasurer

DATED _____

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 any 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.