STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GORDON E. HAMILTON, Complainant,	)	CASE 7940-U-89-1717
vs.	)	DECISION 3593 - PECB
CITY OF SEATTLE, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hafer, Price, Rinehart and Schwerin, by Richard H. Robblee, Attorney at Law, appeared on behalf of the complainant.

Mark H. Sidran, City Attorney, by Leigh Ann Tift, Assistant City Attorney, appeared on behalf of the respondent.

On April 25, 1989, Gordon E. Hamilton filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Seattle had violated RCW 41.56.140(1) and (2), as a result of certain personnel actions taken concerning him. A hearing was held on February 28, 1990, 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 area residents.

International Brotherhood of Electrical Workers, Local 77, is the exclusive bargaining representative of the employees who operate

and maintain Seattle City Light's power distribution system. The collective bargaining relationship between the employer and the union predates the events involved in this case, and they are parties to a collective bargaining agreement that expires on January 22, 1991.

Gordon E. Hamilton has been employed by Seattle City Light for approximately 20 years. At all times relevant to this proceeding, Hamilton has been employed as a cable splicer assigned to the Network Division of the City Light Department.[1] The position of cable splicer is included in the bargaining unit represented by Local 77. Hamilton is dispatched for work out of the employer's north service center, and he has worked on the installation and maintenance of the underground electrical distribution system in Seattle's downtown and university districts.

The "crew chief" classification is considered the first echelon supervisor of rank-and-file employees, although the position is included in the Local 77 bargaining unit. At some unspecified time in the past, Hamilton took a test conducted by the employer,[2] and he was determined to be qualified to serve as a relief crew chief. Hamilton estimated that he has been assigned as a relief crew chief on approximately 70 occasions. According to Hamilton, his training for work as a relief crew chief consisted of observing crew chiefs, review of management rules and memoranda, and three days of human relations training which he was provided in about 1985.

Crew meetings are held at the beginning of each work shift, and last for approximately 15 minutes. Approximately 12 employees normally attend, and they are dispatched to new work assignments at

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[1] A cable splicer is the underground equivalent to a lineman.

[2] The record does not reflect the nature or scope of the test.

the crew meetings. Hamilton testified that crew chiefs have broad discretion to allow discussion of a wide range of topics at crew meetings, including the activities of the previous day, collective bargaining, grievances, and safety. Employees routinely interpose their opinions regarding various matters.

Hamilton was assigned to fill the position of relief crew chief for a two week period expiring on Friday, September 23, 1988. While conducting a crew meeting on September 23, 1988, Hamilton read from the minutes of a recent safety meeting,[3] where reference was made to the fact that discipline imposed on Bill E. Kuhlmeyer had been overturned by the Seattle Civil Service Commission.

According to Hamilton, a crew member asked him to elaborate on the Kuhlmeyer matter. Hamilton then commented that he was glad that the discipline had been rescinded, that he considered the discipline to be an adverse precedent, and that he had talked with Kuhlmeyer. Hamilton went on to relate Kuhlmeyer's explanation of a conversation in which Crew Chief Patty Eng had told Kuhlmeyer that she did not like "indians" and was out to get him. Hamilton implied that the reasons given for Kuhlmeyer's discipline had been pretextual, and that the discipline imposed by Eng was racially motivated.[4] Hamilton testified that it was his desire to discuss the matter further, to explain that his observations were his personal opinion, and to affirmatively speak up against any form of discrimination. He testified that he was unable to do so, however,

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[3] Separate from crew meetings, safety meetings are conducted once a month for the specific purpose of discussing safety-related matters. The "minutes" referred to were not introduced in evidence, and the record contains no other information regarding the safety meeting or those minutes. It is inferred that the meeting had been held between September 9 and 23.

[4] The record does not reflect Kuhlmeyer's race or national origin, but the Examiner infers from Hamilton's remarks that Kuhlmeyer may be a Native American.

because he was interrupted by a number of questions from the crew members. Hamilton was asked whether he had his facts straight on the matter,[5] and whether he thought that Eng did not like Native Americans. Hamilton responded affirmatively to the latter question, after which the crews were dispatched to their job sites without further comment regarding the matter.

Later that day, Eng contacted Hamilton and asked to meet with him to discuss the allegations he had made about her that morning. Eng and Hamilton met that afternoon. Eng told Hamilton that she had heard of his statement about her during the morning crew meeting. Eng testified that Hamilton admitted making such a statement. The substance of their discussion is disputed as to whether Hamilton agreed to make a public apology to Eng for his remarks. Hamilton acknowledged that he agreed, because of Eng's desire to do so, that Eng could sit in at the next crew meeting.

Prior to the crew meeting on the following Monday morning, September 25, 1988, Hamilton notified Eng that he wanted to discuss the matter first with the crew, without her being present, and he asked that she delay her arrival. Contrary to Hamilton's desire, Eng was

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[5] The Civil Service Commission decision regarding Kuhlmeyer issued on September 9, 1988 is in evidence. The stated reasons for the discipline imposed on Kuhlmeyer related to several accidents with the employer's vehicles. The hearing examiner's decision stated:

> I conclude that the discipline given to Appellant Kuhlmeyer was inappropriately harsh in comparison, and that a more appropriate discipline would be to suspend him for two weeks, and restrict him to a non-driving position similar to the one he is presently performing in the lab.

Hamilton's remark at the crew meeting, to the effect that Kuhlmeyer was "reinstated to his former position", appears to be inconsistent with the civil service decision. Either the minutes of the safety meeting were incorrect, Hamilton's reading of those minutes was incorrect, or the record in this case is incomplete.

present at the crew meeting from its outset. Hamilton raised the matter of the remarks that he had made at the previous crew meeting about Eng, and claimed that they were his personal opinion based on what he had been told by Kuhlmeyer and other employees, as well as on his interpretation of the Civil Service Commission ruling. Hamilton then defended his comment on the basis that he was entitled to state his opinion without fear of reprisal. Notwithstanding Hamilton's explanation, several employees interposed their opinion regarding the matter. A number of derogatory remarks were made, and the meeting became caustic. Eng testified that the crew meeting degenerated into a yelling match, became totally out of hand, and that she then left.

Later that day, Hamilton contacted his normal supervisor and crew chief, John Gustafson,[6] for the purpose of advising Gustafson of the problem that had developed as a result of his remark about Eng. Hamilton explained what had transpired between himself and Eng on the preceding Friday and earlier that day. Hamilton told Gustafson that he felt that Eng was upset by the matter, and that he expected that she would take the matter further.

Gustafson contacted Hamilton on Tuesday, September, 27, 1988, and asked Hamilton to meet with him and Gerd Jerochim, the manager of the Underground, Operating, and Street-lighting Division, to further discuss the events which had transpired during the preceding days. Hamilton testified that he agreed to meet, provided that he could be accompanied by a union shop steward if the meeting was to be an official inquiry. Gustafson responded that it was his impression that the meeting was not to be an official inquiry, but rather a briefing session.

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[6] Gustafson had been temporarily re-assigned to the next echelon position of relief supervisor, and the record reflects that he had not yet returned to his regular position. The record reflects that the crew chief in charge that morning was "Darrell".

Hamilton continued to be concerned that there was a possibility of his being disciplined, and he asked Jim Meyers, the union shop steward, to be present in the vicinity of the office where the meeting was to be held. Hamilton and Meyers pre-arranged that if Hamilton determined that he didn't need Meyers in attendance at the meeting, he would signal Meyers to leave the area.

At the appointed time, Jerochim, Gustafson and Hamilton assembled outside the office where the meeting was to be held. There are a number of differences in the testimony about what transpired.

Jerochim recalled seeing the shop steward in the area. Hamilton testified that he asked Jerochim for permission to be accompanied by a union shop steward, and that Jerochim responded that Hamilton did not need a shop steward. Hamilton quotes Jerochim as saying that the meeting was intended to be off-the-record, that it was not to be a fact-finding inquiry, and that the purpose of the meeting was to inform Jerochim about what had transpired between Hamilton and Eng, so that Jerochim could intelligently answer questions on the matter. Hamilton testified that Jerochim further commented that if there was to be disciplinary action taken against Hamilton, there would be another meeting so that the union shop steward could be present. Gustafson drafted a memorandum dated January 24, 1989, which supports Hamilton's testimony:

> On September 27, 1988, Gordon Hamilton was requested by Gerd Jerochim to discuss a crew meeting incident involving communications between Hamilton acting as relief crew chief, and crew 65.
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> Those attending that meeting were: Gerd Jerochim, John Gustafson and Gordon Hamilton.
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> Prior to the meeting, Hamilton requested a shop steward to be present. Gerd assured Gordon there would be no discipline generated from this meeting, and if discipline would be following, a meeting would be held including a shop steward.

Jerochim did not recall Hamilton making reference to the attendance of a shop steward at the meeting. It is clear that Hamilton signaled Meyers to leave the area, and that he did so.

Hamilton testified that the meeting lasted for 45 minutes to one hour. Jerochim testified that the meeting lasted for approximately 15 to 30 minutes. Gustafson testified that the meeting lasted for approximately 45 minutes.

According to Hamilton, Jerochim started taking notes at the outset of the meeting, but discontinued doing so after Hamilton commented that he wanted the shop steward present if Jerochim was going to take notes. Jerochim denied taking any notes. Gustafson was not asked about the note-taking issue.

In the course of the meeting, Hamilton explained what had transpired the preceding Friday and Monday regarding Eng, and answered questions raised by Jerochim and Gustafson about the matter. Jerochim suggested that they discuss the matter directly with Eng. Hamilton testified that he was opposed to that idea, because he had already met with Eng on the matter and felt that she was hostile toward him. Jerochim persisted in his request, and Hamilton subsequently agreed to meet later that week with Jerochim, Gustafson, Eng and Eng's supervisor, Ben Cohn. Jerochim scheduled the follow-up meeting for the afternoon of Thursday, September 28, 1988.

Hamilton testified that Jerochim told him that the meeting was "off" after Hamilton notified Jerochim that he wanted to be accompanied by a union representative. Jerochim did not testify as to that transaction.[7]

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[7] The record reflects that the meeting with Eng was held as scheduled, without Hamilton being present.

Hamilton's remarks regarding Eng were subsequently brought to the attention of Deputy Superintendent Malcom MacDonald. It was MacDonald's testimony that he was advised that the employer's Equal Employment Opportunity (EEO) office had received a complaint from Eng regarding Hamilton's comments,[8] and that the EEO office felt that Hamilton's comments were grounds for disciplinary action. MacDonald advised management at the north service center that Hamilton should be disciplined. MacDonald testified that he based his decision on the EEO office report, information that witnesses had provided statements corroborating Eng's claims, information obtained in a series of meetings regarding the matter which supported Eng's claim, and because of Hamilton's admission that he had made the comments regarding Eng.[9]

On October 25, 1988, Jerochim issued a formal written reprimand to Hamilton, stating:

> This memo is an official reprimand for your inappropriate comments made about another employee on September 23, 1988 while you were acting Crew Chief in Unit 526.
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> In discussing this matter with you and other witnesses, it is clear that you, in fact, publicly made a disparaging remark about a crew chief from another unit. Your remark was particularly troublesome since it was based upon a hearsay statement allegedly made against a particular ethnic group.

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[8] Eng testified in the instant proceeding that she had not filed such a complaint.

[9] Hamilton passionately objected to the admission, as evidence of the truth of the matters asserted, of copies of statements allegedly made by employees present when Hamilton made his remarks regarding Eng, claiming they were "hearsay", were not reliable, and deprived Hamilton of fundamental "due process" rights of cross-examination. The Examiner has not relied on those documents in reaching his decision in this case. Hamilton admitted making the remark about Eng, so there is no issue before the Examiner as to whether such a remark was made.

> As a journey level worker and relief Crew Chief, you have a responsibility in accordance with the management principles to set a good example, exercise your authority professionally, and to help build a team. It is my hope that you will take this responsibility seriously and refrain from future activity of this nature.
>
> Similar remarks or behavior that have the effect of humiliating or insulting other individuals may subject you to further disciplinary action including, but not limited to time off without pay.
>
> A copy of this reprimand shall be placed in your personnel file.

On November 21, 1988, Hamilton submitted three grievances to the union for processing on his behalf. Those grievances regarding the reprimand remain unresolved.[10]

Hamilton testified that he is not well acquainted with Eng, and that he has not witnessed her engage in any form of discrimination or heard her express an opinion that he felt was derogatory or discriminatory.

POSITION OF THE PARTIES

Gordon Hamilton claims that the employer engaged in unlawful interference, restraint and coercion, by denying his request for union representation at the meeting with the management on September 27, 1988. Hamilton also claims that the written reprimand issued to him on October 25, 1988 was based on information that he provided at the September 27 meeting, notwithstanding the employ-

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[10] Hamilton's grievances do not dispute the employer's charge that he had made inappropriate comments about Eng, but rather claimed that Hamilton was improperly denied union representation and that Hamilton had the right to make the comments.

er's assurance to him that any information that he divulged would not be held against him. Hamilton contends that the reprimand should be expunged from his employment records, because it was based on unlawfully obtained information and because the employer has failed to demonstrate just cause for imposing the discipline.

The employer denies that any of its personnel actions involving Hamilton violated Chapter 41.56 RCW. The employer maintains that the disputed meeting was convened for the purpose of developing a strategy of alternative dispute resolution, so that Hamilton and Eng could informally resolve the differences between them, and it denies that the meeting was for the purpose of gathering information that could lead to the imposition of discipline. The employer maintains, further, that Hamilton had the option to terminate the meeting but that he voluntarily remained in attendance. The employer contends that its decision to reprimand Hamilton was based on information that Hamilton voluntarily provided through the contacts he initiated with the management and from other sources of information independent of the disputed meeting. The employer points out that Hamilton has not denied making the remark attributed to him about Eng. It regards that remark as divisive and as a cause of dissension among its employees, so the employer regards the reprimand as warranted under the circumstances. Even if a "technical" violation of Chapter 41.56 RCW were to be found regarding Hamilton's right to union representation, the employer contends that the reprimand should still stand.

DISCUSSION

Deferral to Arbitration

The employer claims Hamilton is attempting to use both unfair labor practice and grievance proceedings to achieve his desired remedy, and that this dispute should be deferred to arbitration.

Hamilton contends that it would be inappropriate to defer the instant case to arbitration, because it concerns a deprivation of Hamilton's statutory right to union representation. Hamilton also points out that the union is not a party to this proceeding, and that the collective bargaining agreement does not provide for the arbitration of disciplinary matters.

The Public Employment Relations Commission does not "defer" all types of unfair labor practice cases. The deferral policies set forth in Stevens County, Decision 2602 (PECB, 1987) are limited to "unilateral change" cases where the employer's conduct is arguably protected or prohibited by an existing collective bargaining agreement. Deferral of a complaint involving union representation was specifically rejected in Seattle-King County Health Department, Decision 1458 (PECB, 1982), and deferral must be rejected here.

Additionally, the collective bargaining agreement between the union and the employer does not provide for final and binding arbitration of grievances concerning disciplinary matters. While the union has had discussions with the employer regarding the possibility of submitting Hamilton's grievances to final and binding arbitration on an ad hoc basis, no such arrangements have been finalized. The conditions proposed by the employer for an ad hoc arbitration procedure were not acceptable to Hamilton. Deferral implements the legislative preference of RCW 41.58.020(4) for "final" adjustment of grievances by a method agreed upon by the parties, and is not ordered where there is no agreement in advance to accept the results of the arbitration process as final and binding. This matter is properly before the Examiner for determination.

The Legal Standards to be Applied

The first substantive determination to be made in this case pertains to Hamilton's assertion of a right to have union representation at the meeting with his supervisors on September 27, 1988.

Employees subject to the National Labor Relations Act engage in protected activity when they insist upon union representation at an investigatory interview called by the employer, where the employee reasonably believes that discipline could result. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

The Commission and the Washington courts give consideration to federal precedent where it is consistent with Chapter 41.56 RCW,[11] and the Commission has adopted standards similar to Weingarten and its progeny in interpreting Chapter 41.56 RCW. City of Seattle, Decision 3198 (PECB, 1989); Okanogan County, Decision 2252-A (PECB, 1986). An employer which denies employees their rights in this regard commits an "interference" in violation of RCW 41.56.140(1).

The Weingarten right must be asserted by the employee. City of Montesano, Decision 1101 (PECB, 1981). Once asserted, however, the right to union representation is a matter of law, not to be negotiated or agreed upon by the employer.[12]

Application of the Legal Standard

Discipline Reasonably Suspected -

It is undisputed that Hamilton feared that there could be repercussions as a result of what transpired at the crew meeting on Friday, September 23, as a result of his meeting with Eng, and as a result of what transpired at the crew meeting on Monday, September 26.

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[11] 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).

[12] Unlawful motivation is not an essential element in finding an interference violation. Such a violation will be found where employees reasonably perceive employer conduct to have interfered with, restrained or coerced them in the exercise of their rights under Chapter 41.56 RCW. City of Mercer Island, Decision 1589 (PECB, 1983).

Hamilton's distress is further evidenced by his arranging in advance to have the shop steward station himself in the vicinity of the office where the September 27, 1988 meeting with Gustafson and Jerochim was to be held. Subsequent events, and the employer's arguments in this case, bear out that the employer in fact took the matter seriously. It is concluded that Hamilton reasonably perceived that he was faced with the possibility of discipline for his actions and remarks about Eng. He thus satisfied one of the conditions precedent to a valid request that he be accompanied by a union representative while meeting with the management officials.

Union Representation Requested -
There is a dispute in the testimony as to whether Hamilton actually requested union representation at the September 27 meeting, but the record supports a conclusion that such a request was made.

Hamilton's first request for union representation appears to have been made to Gustafson, when the meeting between Hamilton, Gustafson and Jerochim was first arranged. Hamilton further testified of Gustafson's response, to the effect that it was his understanding that the meeting was to be a briefing session for Jerochim's benefit, so that no union representative was necessary. Hamilton's recollection was not disputed by Gustafson. Jerochim was not a participant in that initial conversation, and therefore had no firsthand knowledge of what was said. There is no reason to doubt Hamilton's recollection.

In the context that Hamilton proceeded to make arrangements to have the union steward in the vicinity where the meeting was to be held, Hamilton testified that he made a request for union representation immediately prior his meeting with Gustafson and Jerochim. The response was, according to Hamilton, that there was no reason for him to have a steward present. The meeting was described as "informal", and assurances were given that no discipline would come out of the meeting. Jerochim denied recalling a request for union

representation by Hamilton, but he did recall seeing the shop steward in the area where the meeting was to be held. This lends credence to Hamilton's testimony in this regard. Although it was written somewhat later, Gustafson's memorandum regarding the incident further supports Hamilton's testimony in this regard. There is no reason to doubt that Hamilton requested union representation at the outset of the September 27 meeting.

Hamilton claims to have made a third request for union representation when Jerochim began taking notes during the September 27 meeting. According to Hamilton, Jerochim stopped taking notes, but left the request for union representation go unheeded. Jerochim denied that Hamilton requested union representation and also denied taking notes but, in direct contradiction to Jerochim's testimony, the employer argued in its brief that Jerochim's closing of his notebook was a "signal" to Hamilton that he was free to leave.[13] Gustafson did not dispute Hamilton's recollection, and there is no reason to doubt his testimony.

The Examiner finds that the record supports a conclusion that Gordon Hamilton invoked his right to union representation under Weingarten and its progeny, and that the employer either ignored his requests, refused his requests, or induced him to participate in the meeting by giving assurances that the meeting would not result in discipline.

Defenses Asserted by the Employer

Meeting was not Investigatory -
The employer maintains that the September 27 meeting was merely an informal briefing session, so that there was no unlawful denial of union representation. The argument is without merit.

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[13] There is no basis in the evidence for such an argument. If there was an intention by Jerochim to make such a signal, it was not recognized or understood by Hamilton.

Gustafson initiated the meeting at Jerochim's request, so that they could further discuss the Eng matter with Hamilton. Gustafson and Jerochim controlled the meeting, determining what would be discussed, the depth of inquiry, and the disposition of the information obtained. Jerochim acknowledged that he chided and admonished Hamilton that his remarks regarding Eng were inappropriate and could be construed as sex harassment or racial discrimination. The employer's naive intentions are not a defense to an "interference" violation. Hamilton was falsely given assurance by the employer that the meeting was to be informal and that disclosures made at the meeting would not be used against him. The record fairly reflects that, regardless of what the employer's intentions may have been at the outset, the character of the meeting was investigatory. Gustafson's and Jerochim's initial assurances to Hamilton that there would be no discipline resulting from the meeting are then contradicted by the fact of discipline having actually been imposed.

Attendance was not Required -
The employer maintains that Hamilton was not compelled to attend the September 27 meeting, and that he voluntarily attended, so that there was no unlawful denial of union representation. Again, the argument is without merit.

Nothing in the record reflects that the conditions of Hamilton's attendance at the September 27 meeting were ever discussed, let alone that the employer notified Hamilton that his attendance at the meeting was voluntary. Because the employer was opposed to Hamilton having union representation at the meeting, it was incumbent upon it to clearly advise Hamilton that it was his option to either leave the meeting or alternatively that he could remain voluntarily without a union representative present. The employer instead induced Hamilton to remain by describing the meeting as something it was not.

Jerochim sought to characterize his attendance at the meeting as that of a passive guest, but both he and Gustafson acknowledged that they elicited information from Hamilton regarding what had transpired at the crew meetings and at Hamilton's meeting with Eng. Although Gustafson and Jerochim maintain that there was no intention that discipline would come out of the meeting, they nevertheless represented the employer's interests. They were required to exercise precautions against violation of Hamilton's Weingarten rights.

Conclusions

This case contains all of the elements of a Weingarten violation. Hamilton reasonably perceived the possibility of disciplinary repercussions for his remarks regarding Eng. The employer initiated a meeting between Hamilton and his supervisors. Hamilton asserted his right to union representation, and even arranged to have a union steward present for that purpose. The employer rejected Hamilton's request for union representation. The employer then actually turned the meeting into an investigatory interview, while disregarding Hamilton's renewed request for union representation. The evidence establishes that the employer unlawfully interfered with Hamilton's right to union representation, in violation of RCW 41.56.140(1).

REMEDY

The Seattle City Light Department is no stranger to proceedings before the Public Employment Relations Commission in cases regarding the right of employees to union representation. Such employee rights were the focus in City of Seattle, Decision 2134 (PECB, 1984), where the employer was found to have unlawfully interfered with employee rights by a supervisor's remarks when the employee asserted Weingarten rights. The superintendent of the

department addressed the matter of employee representation in a memorandum directed to the department's, directors, managers, and supervisors on June 10, 1985, stating in relevant part:

> Any union employee who is part of a formal investigation conducted by City Light may request union representation during any interview which is part of that investigation. I expect you to accommodate any reasonable request for representation, including changing the schedule of a meeting when necessary to facilitate the requested representation.
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> ...
> If you are unclear about the appropriateness of representation in a particular case, I would rather err on the side of caution.

In City of Seattle, Decision 2773 (PECB, 1987),[14] the employer was found to have committed an unfair labor practice by providing employees with incomplete and ambiguous advice concerning their representation rights.[15]

The circumstance of a repetitive pattern of Weingarten violations indicates consideration of an extraordinary remedy in this case, in order to make the Commission's remedial order effective. The assurances that management officials made to Hamilton, i.e., that his right to union representation would be recognized, were shallow, at best. Hamilton requested union representation on three different occasions in conjunction with the September 27 meeting, all of which were disregarded by the management officials involved, notwithstanding previous internal admonitions from the department

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[14] This decision resulted from consolidated proceedings on three separate cases involving separate facts but a common theme of "right to union representation".

[15] In City of Seattle, Decision 3198 (PECB, 1989), the employer was not required to grant the employee's request for union representation, since its only purpose was to inform the employee of a decision regarding discipline.

head regarding the right of employees to union representation. More important, previous unfair labor practice decisions and remedial orders of the Commission have gone unheeded.

The Commission has awarded attorney fees in selected cases, to make its orders effective and to respond to frivolous defenses. Lewis County, Decision 644 (PECB, 1979), affirmed 31 Wn.App. 853 (Division II, 1982), review denied 97 Wn.2d 1034 (1982); Municipality of Metropolitan Seattle, Decision 2845 (PECB, 1988). The case at hand appears to be an example of repetitive and intentional disregard by City of Seattle officials of their obligations under Chapter 41.56 RCW. The employer's argument that it sought to resolve the conflict between Hamilton and Eng by alternate dispute resolution methods does not nullify the employee's fundamental right to union representation, or grant the employer a waiver of the employee's rights, or allow the employer to completely disregard such employee rights with impunity. The employer is ordered to pay reasonable attorney's fees incurred by Hamilton for the processing of this case before the Commission.

Finally, a second substantive determination is necessary where a Weingarten violation has occurred. The unfair labor practice remedy may be only a "cease and desist" order where discipline does not result, or is not based on unlawfully obtained information. On the other hand, reversal of disciplinary action and a make-whole order may be appropriate where an employer relies upon information obtained at a meeting held in violation of the principles espoused in Weingarten. The Commission provided direction for determining such remedy questions in Okanogan County, supra,[16] where it stated:

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[16] The Superior Court for Thurston County has reversed the Commission's application of its test in Okanogan County. The case is to be remanded to the Commission for reconsideration of that portion of its order which excused the employer from a make-whole remedy in that case.

> Make-whole relief is avoided only upon a showing of independent grounds for the employer's action, unrelated to and unaffected by events which occurred (or which did not occur) at the unlawful interview. Thus, we will impose make-whole relief for Weingarten violations unless there is a showing that the affected employee was clearly discharged or disciplined for cause and not for attempting to assert Weingarten rights. In making the just cause determination we will not consider any information or inferences adverse to the employee obtained by the employer at the unlawful interview.

If the employer is to avoid "make whole" relief in this case, it must demonstrate that the reprimand issued to Hamilton on October 25, 1988 was unrelated to, and unaffected by, any admissions made by Hamilton to Gustafson and Jerochim at the September 27 meeting.[17]

Employer officials McDonald and Jerochim both testified that the decision to reprimand Hamilton was based, at least in part, on the admissions Hamilton made when he met with Jerochim and Gustafson on September 27. The information that the employer obtained from Hamilton at the unlawful interview was thus inextricably intertwined with the disciplinary decision, notwithstanding that Hamilton may have volunteered some information to Gustafson on the previous day. There is also an inference to be drawn from the evidence that the decision to impose the disciplinary warning

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[17] This is not a "just cause" determination in the sense that the term is applied in grievance arbitration. The employer's instructions to its employees to refrain from making any remark that may indicate a racial bias are taken as a given, and are not subject to review here for their reasonability. Similarly, the severity of the discipline imposed in relation to that imposed for other offenses is not an issue before the Examiner here. Conversely, there is no basis for the Examiner to consider Hamilton's extensive arguments that the reprimand infringed on his first amendment freedom of speech, because they affected a matter of public policy.

flowed from Hamilton's refusal to cooperate with Jerochim's suggested course of action, which was in turn related to Hamilton's repeated request for union representation. The employer has the burden of proof on this issue, and it has failed to demonstrate that it relied on grounds independent of the unlawful interview. The appropriate remedy in this case is an order requiring the City of Seattle to make Gordon Hamilton "whole", by expunging the disputed reprimand from his employment record.

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 utility, known as Seattle City Light.

2. Gordon E. Hamilton, a "public employee" within the meaning of RCW 41.56.030(2), was employed by Seattle City Light at all times relevant to this proceeding as a cable splicer.

3. International Brotherhood of Electrical Workers, Local 77, AFL-CIO, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a unit of operations and maintenance employees employed by Seattle City Light, including Gordon Hamilton.

4. The collective bargaining agreement between the employer and IBEW Local 77 does not provide for final and binding arbitration of disciplinary matters.

5. For a two week period ending on Friday, September 23, 1988, Hamilton served as a relief crew chief. In that capacity, he conducted crew meetings each morning at the beginning of the work shifts.

6. While conducting a crew meeting on September 23, 1988, Hamilton commented on a report that discipline of another bargaining unit employee had been overturned by the Seattle Civil Service Commission. Hamilton made further comment on allegations that another crew chief, Patty Eng, had made statements indicating a racial bias against Native Americans.

7. Later on September 23, 1988, Hamilton and Eng discussed the situation. Hamilton agreed to allow Eng to attend the next meeting of the crew involved, at which time Hamilton would make additional comment regarding the matter.

8. At a crew meeting held on September 26, 1988 with Eng present, Hamilton stated that his remarks about Eng were his personal opinion and did not reflect a formal determination by the employer. The crew meeting became disorderly, and Eng left.

9. Later on September 26, 1988, Hamilton informed his supervisor, John Gustafson, of the incidents described in paragraphs 6, 7 and 8 of these findings of fact. Hamilton was concerned that there could be repercussions against him due to what had transpired on the preceding Friday and earlier that day.

10. Gustafson subsequently requested that Hamilton meet with Gustafson and Gerd Jerochim, the manager of the Seattle City Light division in which Hamilton is employed. Hamilton reasonably believed that he could be subjected to discipline, and he requested permission to be accompanied by a union representative. Gustafson responded that it was his impression that the meeting was not to be an official inquiry, but rather a briefing session.

11. Hamilton thereafter arranged to have a union official present at the place where the meeting between Hamilton, Gustafson and Jerochim was to be held.

12. On September 27, 1988, at the convening of the meeting with Gustafson and Jerochim, Hamilton again requested that he be accompanied by a union representative. Hamilton's request was not granted. Gustafson and/or Jerochim advised Hamilton that he did not need a union representative, because the meeting was intended to be off-the-record, because the meeting was not to be a factfinding inquiry, and because no discipline was to come out of it. Hamilton thereupon signaled the union steward that his participation would not be necessary.

13. During the course of the September 27 meeting, Jerochim commenced to take notes. Hamilton thereupon reiterated his request that for a union representative. Jerochim discontinued taking notes, but Hamilton's request for a union representative was disregarded.

14. Jerochim scheduled a meeting between Hamilton, Eng and management officials for Thursday, September 28, 1988.

15. Hamilton requested that he be permitted union representation at the September 28 meeting. Jerochim thereupon told Hamilton that the meeting was "off". The meeting was then held as scheduled, without Hamilton in attendance.

16. The situation between Hamilton and Eng subsequently came to the attention of Deputy Superintendent Malcom MacDonald. Based at least in part on his understanding that other management officials had personally talked to Hamilton about the matter, MacDonald directed that Hamilton be disciplined for his remarks regarding Eng.

17. By memorandum dated October 25, 1988, Jerochim issued a formal written reprimand to Hamilton for the comments he had made about Eng.

CONCLUSIONS OF LAW

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

2. The complaint in this matter was timely pursuant to RCW 41.56.160, as the complained of actions occurred within six months prior to the filing of the complaint.

3. The meeting held with Gordon Hamilton on September 27, 1988 by John Gustafson and Gerd Jerochim was "investigatory" in nature, giving Hamilton a right to union representation under RCW 41.56.040, upon his reasonable belief that the interview could lead to disciplinary action against him.

4. By its rejection, disregard and/or refusal of Gordon Hamilton's requests for union representation at the September 27 meeting, the City of Seattle has interfered with, restrained and coerced a public employee in the exercise of his rights conferred by RCW 41.56.040, and has committed unfair labor practices within the meaning of RCW 41.56.140(1).

5. The City of Seattle, and particularly the Seattle City Light Department, have repeatedly been found guilty of unfair labor practices for interference with the right of public employees to union representation in investigatory interviews where the employee reasonably perceives the possibility of discipline, so that an extraordinary remedy is necessary to make a remedial order under RCW 41.56.160 effective in this case.

6. The City of Seattle has failed to sustain its burden of proof that the reprimand issued to Gordon Hamilton on October 25, 1988 was unrelated to and unaffected by Hamilton's admissions made to Gustafson and Jerochim at the interview conducted on September 27, 1988 in violation of RCW 41.56.140(1).

ORDER

The City of Seattle, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Interfering with, restraining or coercing its employees in their exercise of their right to union representation in investigatory interviews where the employee reasonably perceives a possibility of disciplinary action.

   b. In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

   a. Reimburse Gordon Hamilton for his reasonable attorney fees and other costs associated with the prosecution of this unfair labor practice case, upon presentation of a sworn and itemized statement of such costs and fees.

   b. Expunge the written reprimand issued on October 25, 1988 from the employment record of Gordon Hamilton, and make no reference to that reprimand in any future transaction or dispute resolution procedure concerning Hamilton's employment with the City of Seattle.

   c. 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 be duly signed by an authorized

representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, this 10th day of October, 1990.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

Frederick J. Rosenberry

FREDERICK J. ROSENBERRY
Examiner

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

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL reimburse Gordon Hamilton for his reasonable attorney fees and other costs associated with the prosecution of this unfair labor practice case.

WE WILL expunge the written reprimand issued on October 25, 1988 from the employment record of Gordon Hamilton.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to have union representation at an investigatory interview where the employee reasonably believes that the interview may lead to disciplinary action.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

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 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza FJ-61, Olympia, Washington 98504. Telephone: (206) 753-3444.