STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

EAST VALLEY SCHOOL DISTRICT – SPOKANE, Employer.	
TERRY KERR, Complainant, vs. PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Respondent.	CASE 131045-U-18 DECISION 13114 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Melissa Kerr appeared on behalf of Terry Kerr.

Robert H. Lavitt, Attorney at Law, Barnard Iglitzin & Lavitt LLP, for Public School Employees of Washington.

On December 11, 2018, Terry Kerr filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission) against Public School Employees of Washington, an affiliate of the SEIU Local 1948 (union).[1] The East Valley School District – Spokane (employer) is not a party to this complaint. Kerr's complaint alleged that the union interfered with his rights by refusing to respond to Kerr's requests for information and representation during investigatory meetings and/or during the processing of a grievance. An unfair labor practice administrator reviewed Kerr's complaint under WAC 391-45-110 and issued a preliminary ruling on December 19, 2018. The case proceeded to hearing on June 18, 2019,

[1] Kerr initially filed a complaint against the employer on October 8, 2019, on which an unfair labor practice administrator issued a preliminary ruling. However, Kerr checked the box marked "employer" on the complaint form while also asserting facts against the union in the body of his complaint. The unfair labor practice administrator allowed Kerr to specify against whom he was filing his complaint and Kerr refiled *only* against the union on December 11, 2018.

before Examiner Daniel Comeau, after which the parties filed post-hearing briefs to complete the record.

ISSUES

As framed by the December 19, 2018, preliminary ruling, the issue is whether the union interfered with employee rights in violation of RCW 41.56.150(1), within six months of the date the complaint was filed, by breaching its duty of fair representation in refusing to respond to Kerr's requests for information and representation during investigatory meetings and/or during the process of a grievance.

During the hearing, the union made several objections to evidence offered by the complainant: arguing that certain evidence was outside of the scope of the preliminary ruling, protesting that certain evidence related to claims outside of the Commission's six-month jurisdictional window, and challenging that certain evidence was not specifically plead in the complaint. To clarify the rulings made during the hearing and to clarify the precise legal issues, I will address each objection in turn.

The Scope of the Unfair Labor Practice Proceedings

The preliminary ruling limits the causes of action before an examiner and the Commission. WAC 391-45-110(2)(b). Once an examiner is assigned to hold an evidentiary hearing, the examiner can only rule upon the issues framed by the preliminary ruling. *King County*, Decision 9075-A (PECB, 2007), *citing King County*, Decision 6994-B (PECB, 2002). As explained by the Commission in *King County*, Decision 9075-A, the purpose for such a limitation is to provide the responding party with sufficient notice of the facts and issues to be heard by the examiner. If a complainant believes that the preliminary ruling fails to address one or more of the causes of action it sought to advance, then it must—prior to issuance of a notice of hearing—seek clarification from the person who issued the preliminary ruling. WAC 391-45-110(2)(b); *Northshore Utility District (Washington State Council of County and City Employees)*, Decision 10304-A (PECB, 2009). Once clarified, the complainant would then have an opportunity to file additional information in a complaint. *Northshore Utility District*, Decision 10304-A.

There are two elements to the cause of action found within the December 19, 2018, preliminary ruling. Those elements pertain to Kerr's claim that the union failed to respond to Kerr's *request for information* and Kerr's *request for representation* during investigatory meetings and/or the processing of a grievance. Thus, any allegation in addition to those mentioned is outside of the scope of the preliminary ruling, and any evidence relating to such allegation is properly excluded. *See State – Corrections*, Decision 11571-A (PSRA, 2013) (affirming the examiner did not err in failing to address an issue that was not raised in the preliminary ruling).

On June 19, 2018, the union requested from the employer an agreement to hold one of Kerr's grievances in abeyance, which the employer denied. At hearing, the union challenged e-mails and testimony concerning its alleged failure to respond to (a) the employer's denial of the grievance abeyance request, and (b) any failure to communicate with Kerr about that abeyance denial. Specifically, the union objected to Kami Hoekema's testimony (the union representative handling Kerr's grievance) regarding any failure to follow up on the employer's denial of the grievance abeyance and Hoekema's lack of communication with Kerr. Kerr argued, in essence, that his claims were broad enough to include *any* ongoing failure of the union to communicate with him.

Hoekema's testimony and the e-mails regarding any follow-up to the grievance abeyance denial were properly excluded, as they relate to issues outside of the scope of the preliminary ruling. The allegations and assertions in the complaint deal mainly with Kerr's claim that the union continued to withhold information from him during the processing of a grievance and/or continued to provide substandard representation during investigatory meetings (i.e., *Weingarten* meetings). Kerr's allegations, and the preliminary ruling, did *not* include claims that the union failed to process any of his grievances or failed to communicate or update him on the status of his grievances.[2]

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[2] Kerr admitted during the hearing that he was not attempting to raise a failure to process his grievance as an allegation.

Nor did Kerr seek clarification from the unfair labor practice administrator prior to the issuance of the notice of hearing in this case. Kerr's failure to seek such a clarification forecloses any interpretation that would broaden the existing allegations to include communications regarding Kerr's grievance processing.

Evidence outside of the Commission's Six-Month Jurisdiction

An unfair labor practice complaint "shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." RCW 41.56.160(1). The Commission has uniformly held that the six-month period set forth in RCW 41.56.160(1) begins to run, or is triggered by, the date of notice or constructive notice of the complained-of action. *City of Pasco*, Decision 4197-A (PECB, 1994), *citing Port of Seattle*, Decision 2796 (PECB, 1987); *Community Transit*, Decision 12797-A (PECB, 2018).

Kerr filed his complaint on December 11, 2018, and the unfair labor practice administrator issued a preliminary ruling on December 19, 2018. The December 11, 2018, filing date gives the Commission the jurisdiction to remedy any violation that occurred on or after June 11, 2018. Any alleged violation occurring before June 11, 2018, would not fall within the Commission's jurisdiction to remedy and cannot form the basis of a violation. Therefore, the Commission is prohibited from issuing a remedy for any allegation that the union failed to provide adequate representation at an investigatory meeting before June 11, 2018, or that the union failed to allow Kerr to select another union representative prior to that date.

The union challenged the introduction of any evidence or testimony relating to the standard of representation provided by union president Jan Jenkins to Kerr at investigatory meetings prior to the six-month statute of limitations. In addition, the union also challenged the introduction of e-mail communications between Jenkins and Wayne Deist, the employer's custodial supervisor, from before the six-month statute of limitations.

However, facts or evidence that occurred prior to the six-month statute of limitations period can serve as relevant background information, even though those facts or evidence may not form the basis of a violation. *See City of Bellingham*, Decision 10907-A (PECB, 2012), *citing City of*

Seattle, Decision 5930 (PECB, 1997). In regard to Jenkins' March 2018 communications with Deist concerning Jenkins' willingness to share her notes, those communications are relevant background information relating to Kerr's information request claim. Moreover, Jenkins testified that she does not share her meeting notes, these communications serve as a relevant rebuttal to that assertion, as well as Hoekema's testimony admitting that she had provided her notes to Kerr. Therefore, this evidence was properly admitted.

Allegations Not Plead

WAC 391-45-050(2) requires that an unfair labor practice complaint contain, in separate numbered paragraphs, a clear and concise statement of the facts constituting the alleged unfair labor practices, including times, dates, places, and participants in the occurrences. *Bethel School District (Public School Employees of Washington)*, Decision 6847-A (PECB, 2000), *citing City of Seattle*, Decision 5852-C (PECB, 1998), *aff'd, Apostolis v. City of Seattle*, 101 Wn. App. 300 (Div. I 2000). A skeletal "charge" will not suffice and will not be fleshed out by agency personnel. *Bethel School District*, Decision 6847-A, *citing Jefferson Transit Authority*, Decision 5928 (PECB, 1997). The Commission is not empowered to make leaps of logic or fill in gaps in the complaint but is instead confined to adjudicating based on facts alleged within the four corners of the complaint. *Id.*; *Bellevue School District*, Decision 10868-A (PECB, 2011). The purpose of the notice pleading requirements of this rule is to place a respondent party on notice of the specific allegations to which that party must respond or defend. *Bethel School District*, Decision 6847-A.

At hearing, Kerr attempted to introduce evidence of a November 2018 information request that he made to the union for additional meeting notes, but the union objected to that evidence. Although this evidence would have been within the six-month jurisdictional window, and arguably within the information request element of the preliminary ruling, the union objected to the introduction of this evidence on the grounds that it was not plead in the complaint. Kerr did not dispute the fact that the November 2018 information request was not plead, but he argued that the union's failure to provide information was an ongoing concern.

Here, Kerr failed to assert in his complaint any information requests made in November 2018. The only information request asserted in his complaint was his June 9, 2018, e-mailed information

request to Jan Jenkins.[3] In that information request, Kerr requested from Jenkins her notes from an investigatory meeting on April 18, 2018; her meeting notes (all in 2018) from January 8, January 18, February 16, and February 26; and "any other correspondence [she had] with the district on [Kerr's] behalf since the beginning of the school year." Since Kerr did not specifically plead that he made an additional request in November 2018, let alone the union's failure to respond to it, that evidence was properly excluded.

Precise Issue Statements

Thus, the issues to be decided are more precisely stated as follows:

1. Did the union violate its duty to provide fair representation by refusing to respond to Kerr's June 9, 2018, information request and provide Jan Jenkins' notes from the April 18, 2018, investigatory meeting and from meetings in 2018 on January 8, January 18, February 16, and February 26?

2. Did the union violate its duty to provide fair representation by assigning bargaining unit member Chris Evola as the union representative to attend Kerr's *Weingarten* meeting on November 21, 2018?

Based on the record before the Examiner, the union violated its duty of fair representation to Kerr when it refused to provide the information he requested in his June 9, 2018, information request. The information Kerr requested was related to a grievance appeal of which the union was aware. The union had the information and could have provided it but failed to provide any substantial countervailing interest in refusing to provide it to Kerr. The union, however, did not violate its duty of representation to Kerr when it assigned Chris Evola to serve as union representative at Kerr's November 21, 2018, *Weingarten* meeting. The union did not act arbitrarily, discriminatorily, or in

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[3] There is a scrivener error in Kerr's complaint, which erroneously refers to this information request being made on June 19, 2018, though the e-mail itself shows that Kerr sent it on June 9, 2018.

bad faith in making the assignment, as Evola exhibited a sufficient level of competence in serving as representative.

BACKGROUND

Kerr's Information Requests

Kerr worked for the East Valley School District in Spokane, Washington, as a custodian. The custodian position is within a bargaining unit represented by Public School Employees of Washington, an affiliate of the SEIU Local 1948, which has a collective bargaining relationship with the employer. At all times relevant to this matter, the parties had a collective bargaining agreement (CBA) in place, which included language that expressed employees' rights to union representation. Article 14, Section 1 of the parties' CBA reflected the agreement that '[e]mployees shall have the right to have a representative present when being formally disciplined."

Kerr was also a member of the union. In early 2018, Kerr was called into several meetings by his supervisor, Wayne Deist. Based on the record, these meetings appear to have occurred on or about January 8, 2018; January 18, 2018; February 16, 2018; and February 26, 2018.[4] While the subject matter of these meetings is unclear from the record, it appears from a March 12, 2018, e-mail from the union representative, Kami Hoekema, that Kerr received discipline at the February 26, 2018, meeting.

On March 13, 2018, the day after Hoekema e-mailed Deist regarding Kerr's grievance of the February 26 discipline, Deist replied, requesting a meeting to discuss the grievance. They set the meeting for 10:30 a.m. on March 22, 2018, at East Farms Elementary School. Jenkins replied to that e-mail string indicating that she would be "happy" to attend that meeting, if needed, for "historical memory." On March 14, 2018, Jenkins wrote to Deist via e-mail, indicating that she

[4] There was no direct testimony from witnesses regarding the specific subject of these meetings, but these dates are supplied by Kerr's June 9, 2018, information request to Jan Jenkins.

had mistakenly thought the meeting was for the following day and that she would be out of town on March 22, 2018.

Deist replied to Jenkins indicating that Hoekema would be in attendance and she would be bringing a district director. Jenkins expressed to Deist her willingness to share her notes with him and wanted to know if he wanted her to scan and send them to him. Deist replied that he was "down stairs" and that if Jenkins printed the notes, he would pick them up. There was no direct testimony concerning the specific subject of these notes, and Jenkins testified that she did not know to what those notes pertained.

Jenkins had attended meetings as Kerr's representative earlier that year. According to Jenkins, each building has a designated building representative or representatives. For Kerr's building, however, they had been short a representative and the only other alternative representative would have been Kerr's wife, Melissa Kerr. To avoid having Ms. Kerr represent Mr. Kerr at these meetings, Jenkins stepped in to perform this function.

On or about April 17, 2018, Deist contacted Jenkins to attend a meeting with Kerr, which was scheduled for the following day at East Farms Elementary School. The purpose of the meeting was to discuss why Kerr was in his car before the end of his shift on April 17. Jenkins did not inform Kerr of the meeting's subject matter prior to the meeting, as she assumed that managers often discussed these issues with employees and, therefore, Kerr already knew what would be discussed. Furthermore, given that she understood the accusation was that Kerr left work early, Jenkins did not believe the issue was going to be severe.

On April 18, 2018, Jenkins arrived at the school building and checked in at the main office. She did not see Kerr there, and Jenkins waited in the lobby until she saw Deist. Deist asked Jenkins to follow him to the custodial office, during which time she saw Kerr enter the building and proceed to the kitchen to mop the floor. When Kerr was done in the kitchen, Deist indicated that he needed to speak with him. Prior to the meeting, Jenkins had no conversations with Kerr regarding the meeting or the subject matter of the meeting.

Jenkins described the meeting as being brief. She testified that Deist told Kerr that he (Deist) witnessed Kerr leaving prior to his shift, and Deist reminded Kerr that he was supposed to remain on shift or report to his supervisor about leaving early. Kerr received a written warning for the alleged infraction.

Jenkins testified that she normally took notes at these types of meetings to ensure that employees' rights were being followed in accordance with the CBA. However, she did not take notes at this meeting. Instead, she typed up notes of the meeting when she returned to her office later that same day.

The union entered Jenkins' notes into evidence. Jenkins' notes indicated that the meeting was, in fact, brief, in that she arrived at the building at 9:10 a.m. and the entire sequence of events (waiting for Kerr to arrive, finish mopping the kitchen, and conducting the meeting itself) concluded at 9:25 a.m. Her notes also described in a little more detail the subject of the discussions. Deist claimed that Kerr left work early and Kerr disputed this claim. Deist offered to show Kerr video evidence from the day in question, and Kerr refused. Deist also reminded Kerr of a previous directive and indicated that Kerr's directives were put in writing since Kerr had difficulty remembering. Jenkins' notes also indicated that, several times during the meeting, Kerr asked Jenkins why she was not saying anything, to which Jenkins replied that her role was to be there to "ensure that things were conducted appropriately, and to keep a record of the meeting." These notes were limited to describing the meeting; there was no mention of any other bargaining unit member or school district employee, or any of Jenkins' reflections upon the merits of Deist's allegations against Kerr.

Kerr did not take notes at the meeting. Upon learning from Hoekema that Jenkins had created notes of the meeting, on June 9, 2018, he sent Jenkins a request for those notes. Specifically, Kerr requested her notes from April 18, 2018, and her notes, if she had any, from January 8, 2018; January 18, 2018; February 16, 2018; and February 26, 2018. Kerr also requested copies of "any other correspondence [Jenkins had] with the district on [his] behalf since the beginning of the school year," if any. On June 11, 2018, Jenkins forwarded Kerr's request to Hoekema, without copying Kerr on the communication, and stated that she had "no plans to send [Kerr] any of [her]

notes. . . ." Although Jenkins did not copy Kerr on that e-mail, she testified at hearing that she spoke with Kerr regarding her denial of the information request.

Jenkins testified that she did not, as a practice, provide her meeting notes to bargaining unit members. She not only considered her notes to be her own, but the issue of providing her notes to bargaining unit members was something that she had discussed with union field representatives many times in the past. In this particular instance, she conferred with union representative Ted Raihl over providing her notes to Kerr. According to Jenkins, Raihl gave her the rules regarding the recording of meetings and told her that the union did not give notes to bargaining unit members. Jenkins was not specific about the rules for recording meetings or the criteria or rationale, if any, for not providing investigatory meeting notes to members.

On June 19, 2018, Hoekema requested from the employer an agreement to hold a grievance it had filed for Kerr in abeyance until September 28, 2018. The union had invalidated the grievance and Hoekema knew Kerr was appealing the union's decision to the union's state grievance panel on that date. Kerr had intended to use the information he was requesting from the union in his appeal, and the abeyance would allow him the opportunity to obtain the information and prepare for his presentation before the panel.

Kerr's November 21, 2018, Weingarten Meeting

In November 2018, Kerr was called into approximately three meetings for which he invoked his *Weingarten* right. While there were efforts to postpone those meetings so that Kerr could secure union representation, the union assigned Chris Evola, a new union steward at Kerr's building, to serve as a representative at an investigatory meeting on November 21, 2018. At the time, Evola had only been a custodial representative for about two weeks and had not undergone any steward training.

The November 21, 2018, meeting was held to investigate whether Kerr falsified timesheets for unauthorized overtime, whether Kerr was insubordinate (three counts of insubordination), and whether Kerr continued to arrive at work late and leave work early. Evola attended the meeting and took notes at that meeting. Following the meeting, Evola wrote up a report to the union local

regarding the meeting, the allegations, and his recommendation to the union local as to whether there were contract violations. He found partial merit in only one of the allegations against Kerr and recommended the other allegations against Kerr be null and void.

Evola testified that he represented Kerr to the best of his abilities at the meetings he attended, that he had no preconceived notions about Kerr, and that he did not intentionally provide a low level of representation at the meetings. Although he did not attend any steward trainings until after the meetings, Evola had prior experience in unions and with grievance handling. He testified that in previous union experiences he read CBAs, filed grievances on his own, and had also won grievances. There was no other evidence or testimony offered at hearing in regard to the substance of the meeting or how the meeting was conducted.

ANALYSIS

Applicable Legal Standards

Duty of Fair Representation

It is an unfair labor practice for a bargaining representative to interfere with, restrain, or coerce public employees in the exercise of their rights. RCW 41.56.150(1). An exclusive bargaining representative unlawfully interferes with, restrains, or coerces a public employee in the exercise of his or her rights when the bargaining representative when it violates its duty of fair representation. *City of Tacoma (Tacoma Police Management Association)*, Decision 12849-A (PECB, 2018). The duty of fair representation arises from the rights and privileges held by a union when it is certified or recognized as the exclusive bargaining representative under a collective bargaining statute. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002), *citing City of Seattle (International Federation of Professional and Technical Engineers, Local 17)*, Decision 3199-B (PECB, 1991).

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983), the Washington State Supreme Court adopted three standards by which to measure whether a union has breached its duty of fair representation:

1. The union must treat all factions and segments of its membership without hostility or discrimination.

2. The broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty.

3. The union must avoid arbitrary conduct.

Each requirement represents a distinct and separate obligation.

The employee claiming a breach of the duty of fair representation has the burden of proof. *City of Renton (Washington State Council of County and City Employees)*, Decision 1825 (PECB, 1984). An exclusive bargaining representative breaches its duty of fair representation when its conduct is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967); *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012). A union member's dissatisfaction with the level and skill of representation does not form the basis for a cause of action, unless the member can prove the union violated the rights guaranteed in statutes administered by the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004).

Bargaining Unit Member's Right to Union Representation

In *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975) (*Weingarten*), the United States Supreme Court affirmed a National Labor Relations Board (NLRB) decision holding that under the National Labor Relations Act (NLRA), employees have the right to be accompanied and assisted by their union representatives during meetings at which an employee reasonably believes may result in disciplinary action. This *Weingarten* right is applicable to employees who exercise their collective bargaining rights under chapter 41.56 RCW.

In *Omak School District*, Decision 10761-A (PECB, 2010),[5] the Commission held that:

> When an employee makes a valid request for union representation, an employer has three options: 1) Grant the request; 2) Discontinue the interview; 3) Offer the employee the choice of continuing the interview unrepresented, or having no interview at all, thereby foregoing any benefit that the interview might have conferred upon the employee. *Roadway Express*, 246 NLRB 1127 (1979). An employer may not continue the interview with an unrepresented employee who has asserted his or her *Weingarten* rights unless the employee voluntarily agrees to continue the interview unrepresented and the employer has made the employee aware of the choices just described. *U.S. Postal Service*, 241 NLRB 141 (1979).

Furthermore, "[w]hen two union officials are equally available to serve as a *Weingarten* representative . . . the decision as to who will serve is properly decided by the union officials, unless the employer can establish special circumstances." *City of Tacoma*, Decision 11064 (PECB, 2011), *aff'd*, Decision 11064-A (PECB, 2012) (quoting *Anheuser-Busch Incorporated v. National Labor Relations Board*, 338 F.3d 267 (2003)).

Application of Standards

Kerr's June 9, 2018, Information Request

The first issue is whether the union violated its duty of representation by refusing to respond to Kerr's June 9, 2018, information request and by refusing to provide Jenkins' notes recording the April 18, 2018, investigatory meeting. In general, the Commission takes a "hands off" approach to internal union affairs when a union is enforcing an internal union policy or rule, and such claims are generally dismissed at the preliminary ruling stage. *City of Moses Lake (Washington State Council of County and City Employees)*, Decision 12996 (PECB, 2019), *citing Lewis County (Washington State Council of County and City Employees, AFSCME AFL-CIO)*, Decision 464-A

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[5] It is understood that this case is no longer relied upon by the Commission, as the Thurston County Superior Court reversed the Commission's decision and remanded it to the Commission to dismiss the complaint. *See Omak School District*, Decision 10761-B. However, Kerr relies upon this case heavily in his complaint and argument. More relevant case law stems from examiner and Commission decisions in *City of Tacoma*, Decision 11064 (PECB, 2011), and *City of Tacoma*, Decision 11064-A (PECB, 2012), respectively.

(PECB, 1978); *Lake Washington School District (Lake Washington School District Bargaining Council)*, Decision 6891 (PECB, 1999).

However, the Commission's avoidance of involvement in internal union affairs is not without its limits. In *Western Washington University (Washington Public Employees Association, UFCW Local 365)*, Decision 8849-B (PSRA, 2006), the Commission held that when a union agrees to open the contract ratification vote to all bargaining unit employees (not just union members), the union violates its duty of fair representation when it then denies nonmember employees the right to that ratification vote. Additionally, in a separate case,[6] the Commission, adopted the legal standard set forth in *Scofield v. National Labor Relations Board*, 394 U.S. 423 (1969), when scrutinizing a union's decision to discipline its own member under an internal union rule. In that case, the Commission explained that it had no jurisdiction over complaints where union action (1) leads to disciplining one of its members in order to enforce a properly adopted rule that reflects a legitimate union interest, (2) impairs no policy that our legislature has imbedded in the labor laws, and (3) is reasonably enforced against union members who are free to leave the union and escape the rule. *Seattle School District (International Union of Operating Engineers, Local 609)*, Decision 9135-A. *See also King County (Washington State Nurses Association)*, Decision 10389-A (PECB, 2011) (applying the same standard to a union enforcing an internal rule prohibiting "dual-unionism" against a union member who filed a decertification petition to remove the union as the exclusive representative).

The Commission has not applied this standard outside of the internal union discipline context. Indeed, the Commission has not yet been presented with a case to decide whether a union violates its duty of fair representation under the *Allen v. Seattle Police Officers' Guild* standards by refusing to provide a union member with notes from an investigatory meeting involving that union member. In cases of first impression, it is well established that the Commission may look to case law interpreting the NLRA for guidance. *Seattle School District*, Decision 9135-A. Decisions construing the NLRA, while not controlling, are persuasive in interpreting state labor acts that are

[6] *Seattle School District (International Union of Operating Engineers, Local 609)*, Decision 9135-A (PECB, 2007).

similar to or based upon the NLRA. *Id., citing Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984); *See also Washington Public Employees Association v. Community College District No. 9*, 31 Wn. App. 203 (1982).

The NLRB has found that a union can violate its duty of fair representation if it fails to provide information to union members under certain circumstances. In *Letter Carriers Branch 529*, 319 NLRB 879 (1995), the NLRB affirmed the administrative law judge's decision that the union violated its duty of fair representation when it refused to provide a union member with copies of her grievance forms. While the NLRB, as well as the Commission, provided unions with "a wide range of reasonableness in serving the unit employees," the NLRB applied the following factors in finding that the union's conduct fell so far outside of the wide range of reasonableness as to be irrational:

1. The documents requested pertained to a grievance filed by the union member;
2. The union member had a legitimate general interest in obtaining the documents;
3. The legitimate interest in obtaining the documents was communicated to the union;
4. The union raised no substantial countervailing interest in refusing to provide the union member with the copies of the requested documents;
5. The ability of the union to provide copies of the documents; and
6. The relative ease with which the union could have complied with the request, taking into account the limited amount of documentation requested.

319 NLRB at 881-2; *see also Mail Handlers Local 307 (Postal Service)*, 339 NLRB 93 (2003); *Letter Carriers Branch 758 (Postal Service)*, 328 NLRB 952 (1999). In the *Letter Carriers 529* case, a member requested grievance forms that were in the union's possession, the documents related to a grievance the member had filed, and the legitimate general interest was communicated to the union. The NLRB found a violation because the union provided no substantial countervailing interest or reason not to provide the documents to the union member.

The NLRB was explicit in its rejection of the union's asserted defense to refusing to provide the documents. In its decision, the NLRB explained:

> We are unable to fit the Respondent's refusal to provide [the union member] with copies of the forms within even the wide range of reasonableness that must be allowed a statutory collective-bargaining representative. Even the respondent's arguably good-faith, nondiscriminatory reliance on NALC's asserted "policies" of not providing grievants with standard grievance forms and not giving out copies of grievance forms, and the Respondent's ignorance of the underlying reasons for [the union member]'s request cannot rescue its conduct from drifting beyond the borders of reasonableness, into arbitrariness. . . . [The union] relied simply on the wobbly footings of the "advice of our national business agent," and the assertion that [the union member's] grievance forms were the "property" of the Respondent.

319 NLRB at 882.

Applying these six factors to the present case leads to the conclusion that the union's refusal to provide Kerr with the requested investigatory interview notes fell so far outside of the wide range of reasonableness as to be irrational. First, the April 18, 2018, interview meeting notes that Kerr requested from Jenkins pertained to a meeting at which the reasons for Kerr's discipline were provided, and on which there had been a grievance, or grievances, filed. Second, the union invalidated the grievance on behalf of Kerr, and Kerr was planning to appeal that decision to the union's state grievance panel in September 2018. Thus, Kerr's legitimate general interest in the meeting notes was self-evident as they could have provided him with information he could submit to the panel. *See Letter Carriers Branch 529*, 319 NLRB at 881. Third, the union knew of Kerr's interest in the information, because Hoekema predicated her request for Kerr's grievance abeyance on Kerr's internal union appeal time frame. Factor four is discussed below. In regard to the fifth factor, Jenkins was in possession of the April 18, 2018, notes, which consisted of one and one-half pages of typewritten notes. Sixth, this one and one-half pages of notes could easily have been scanned and attached to an e-mail with little to no effort involved in responding to Kerr's June 9, 2018, information request.

In regard to factor four, and in a fashion nearly identical to the *Letter Carriers 529* case, the union provided no substantial countervailing interest in refusing to provide the notes to Kerr. Jenkins'

testimony was simply that the union had a practice of not sharing notes with members and that those notes were her own (i.e., property of the union). Even Jenkins' conversation with Raihl revealed no rationale or reasons as to *why* the union did not provide notes to members but, again, simply that union did not provide them. A review of Jenkins' notes from April 18, 2018, revealed no cues that any of the information contained therein needed to be protected from disclosure. There were no other union members referenced or mentioned in the notes, there were no mental impressions or credibility determinations regarding anyone who attended the meeting, and there were no other pieces of information that appeared to be privileged in any way. Thus, without an explanation, it seems arbitrary that a simple record of an investigatory meeting regarding Kerr could not be given *to* Kerr.

Furthermore, the evidence suggests that the nondisclosure rule was not consistently applied.[7] In March 2018, Jenkins expressed a clear willingness to share her notes with Deist to provide her "historical memory" as an alternative to appearing in person at Kerr's March 22, 2018, grievance meeting. If Jenkins was unwilling to share or disclose notes to bargaining unit members, by rule or practice, then her actions in this case become even more arbitrary. Her actions leave a strong impression that Jenkins was willing to assist Kerr's supervisor with notes that would allow him to prep for a March grievance meeting *against* Kerr, only to deny Kerr access to her notes she took *on his behalf* on April 18, 2018.

Jenkins testified that she could not recall the subject of the notes she was willing to share with Deist. The e-mail communications, in context, clearly demonstrate that they were Jenkins' notes and that they related to historical information regarding Kerr. The messages began with Hoekema's announcement that the union was filing a grievance on behalf of Kerr and the employer was setting up a March 22, 2018, meeting to discuss that grievance. Jenkins appeared to be fully aware of these circumstances on March 13, 2018, when she replied by e-mail and offered to be there "if needed for historical memory." Later, on March 14, 2018, when Jenkins' realized that she was unavailable to attend the March 22 meeting, she e-mailed Deist, and only Deist, that she

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[7] Hoekema testified that she provided Kerr with her notes from a meeting at which she had represented Kerr in January 2018. She testified that she was later told to stop sharing her notes with bargaining unit members.

could not make the meeting and offered to provide Deist, Kerr's supervisor, her notes in lieu of attending in person. Thus, Jenkins' failure to recall these notes at hearing is insufficient to overcome the weight of this evidence.

The union argues, and cites to cases and other precedent, that this is simply a case of poor communication between a union and a union member, and it is not a violation of the union's duty of fair representation to poorly communicate with its union members.[8] This case is distinguishable from a case where the union is poorly communicating the reasons or rationale to a member for not processing a grievance. *See City of Tacoma (Tacoma Police Management Association)*, Decision 12849-A (PECB, 2018). Instead, this is a case where a union member has requested specific documents from the union. The information sought was related to open grievance appeals. The union certainly could have provided the documents to Kerr without considerable hardship, if any, but the union failed to explain the reasons for its practice of nondisclosure other than that the information belonged to the union. The *Letter Carriers 529* case provides a rational standard under which to analyze a case such as this, because that case is consistent with the *Allen v. Seattle Police Officers' Guild* rule that unions must avoid arbitrary conduct. The union violated its duty of fair representation in this case.

The Assignment of Chris Evola to Represent Kerr at the November 21, 2018, Meeting

The second issue to be considered is regarding union representation. It is clear from Kerr's complaint, arguments at hearing, and closing brief, that he believed Jenkins was not serving in his best interests and that he did not want Jenkins to represent him at any current or future investigatory meetings. Kerr further relies upon *Omak School District*, Decision 10761-A, for the proposition that he, himself, has the right to choose whichever union representative he desires. Thus, Kerr

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[8] The union also, correctly, asserts that the Commission has not previously held that a union has an affirmative duty to disclose or provide to bargaining unit members meeting notes union representatives take on behalf of its members. While correct, it is because the Commission has not been presented a case on precisely this issue. In any event, this decision does not create an affirmative duty upon unions to disclose or provide notes, nor does it create an absolute right, in all cases, for union members to obtain such notes.

argues that the union violated his rights by not assigning the union representative that he wanted at his investigatory meetings.

However, as explained above, Kerr's claim that Jenkins' representation on April 18, 2018, violated his rights is outside of the six-month jurisdictional window. Therefore, the issue remaining is whether the union's assignment of Chris Evola to attend an investigatory meeting with Kerr on November 21, 2018, violated its duty of fair representation. Based on the evidence presented at hearing, the union did not violate its duty of fair representation in this instance.

It is important to note that this case is not against the employer, so any cited authority, whether *Omak School District* or otherwise, that analyzes an *employer's* conduct under the *Weingarten* standard is inapposite here. This is a case where the union is claimed to have violated a bargaining unit member's *Weingarten* right, and the standard under which a union must act is still to avoid arbitrary, discriminatory, or bad faith conduct. Furthermore, when two or more union officials are available to serve as a *Weingarten* representative, the decision as to who will serve is properly decided *by the union officials*, unless special circumstances are established. *City of Tacoma*, Decision 11064. Therefore, the union, and not the union member, can properly decide who to send to represent a bargaining unit member, so long as that decision is not arbitrary, discriminatory, or in bad faith.

There is no evidence to suggest that Evola was assigned arbitrarily, discriminatorily, or in bad faith. He was new to the position, he testified that he had no prior experience with Kerr, and that he harbored no preconceived notions regarding Kerr. Though Evola admitted that he had not received any steward training prior to attending Kerr's November 2018 meetings, Evola also testified that he had previously been a union member, had read and interpreted CBAs, filed grievances, and even "won them."

This level of experience is demonstrated in his November 21, 2018, meeting report to Jenkins and Hoekema, in which he appears to aptly review and interpret the parties' CBA in order to distinguish between meritorious and demeritorious employer violations. Evola even recommended that certain disciplinary actions taken against Kerr be nullified. It is difficult to imagine, and Kerr did

not argue or assert, how this level of representation violated any of his employee rights, or that this level of representation fell arbitrarily or discriminatorily below any level of representation he could have received from any other union representative. There simply was no other evidence presented at hearing to demonstrate that Evola failed to represent Kerr fairly at those meetings.

CONCLUSION

Based on the record presented and the reasoning set forth above, the union violated its duty of fair representation in this case by refusing to provide Jenkins' notes from investigatory meetings to Kerr. This case is decided on the facts presented to the Examiner, and, as is typical in cases before the Commission, each future case must be decided upon its own facts. Thus, this decision does not create absolute rights or absolute duties on unions on behalf of bargaining unit members.

Furthermore, based on the record presented and the reasoning set forth above the union did not violate its duty of fair representation when it assigned Chris Evola to serve as union representative at Kerr's *Weingarten* meeting. To the contrary, the evidence strongly suggests that Evola represented Kerr fairly at that meeting, in spite of Evola's relatively short tenure in the union steward position with the union.

FINDINGS OF FACT

1. East Valley School District – Spokane (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. Terry Kerr, a public employee within the meaning of RCW 41.56.030(11), was employed by the employer as a custodian.

3. The Public School Employees of Washington, an affiliate of SEIU Local 1948 (union), is a bargaining representative within the meaning of RCW 41.56.030(2), and it is the exclusive bargaining representative of an appropriate unit of employees working for the employer, which includes Kerr's custodial position.

4. At all times relevant to this matter, the employer and the union had a collective bargaining agreement (CBA) in place, which included language that expressed employees' rights to union representation. Kerr was a member of the union.

5. At all times relevant to the complaint, Jan Jenkins was the president of the union and Kami Hoekema was a union representative, employed by the union. Chris Evola served as union steward beginning in November 2018.

6. In early 2018, Kerr was called into several meetings by his supervisor, Wayne Deist. These meetings occurred on or about January 8, 2018; January 18, 2018; February 16, 2018; and February 26, 2018. Kerr received discipline at the February 26, 2018, meeting.

7. On March 13, 2018, the day after Hoekema e-mailed Deist regarding Kerr's grievance of the February 26 discipline, Deist replied, requesting a meeting to discuss the grievance. They set the meeting for 10:30 a.m. on March 22, 2018, at East Farms Elementary School.

8. Jenkins replied to that e-mail string indicating that she would be "happy" to attend that meeting, if needed, for "historical memory." On March 14, 2018, Jenkins wrote to Deist via e-mail, indicating that she had mistakenly thought the meeting was for the following day and that she would be out of town on March 22, 2018.

9. Jenkins expressed to Deist her willingness to share her notes with him and wanted to know if he wanted her to scan and send them to him. Deist replied that he was "down stairs" and that if Jenkins printed the notes, he would pick them up. Given the subject matter of the e-mails, these notes pertained to Kerr, were notes Jenkins had taken in previous meetings about Kerr, and would serve as "historical memory" for Deist at the March 22, 2018, meeting.

10. On or about April 17, 2018, Deist contacted Jenkins to attend a meeting with Kerr to discuss why Kerr was in his car before the end of his shift on April 17. On April 18, 2018, Jenkins arrived at the school building and checked in at the main office. Prior to the meeting,

Jenkins had no conversations with Kerr regarding the meeting or the subject matter of the meeting.

11. Jenkins normally took notes at these types of meetings to ensure that employees' rights were being followed in accordance with the CBA. However, she did not take notes at the April 18 meeting. Instead, she typed up notes of the meeting when she returned to her office later that same day.

12. Jenkins' notes were limited to describing the meeting; there was no mention of any other bargaining unit member or school district employee, or any of Jenkins' reflections upon the merits of Deist's allegations against Kerr. Jenkins' notes indicated that the meeting was brief and that the meeting concluded at 9:25 a.m. Her notes also described the subject of the discussions in relevant detail, including Deist's claim that Kerr left work early, that Deist offered to show Kerr video evidence from the day in question, and that Kerr refused the offer. Her notes further indicated that Deist reminded Kerr of a previous directive and revealed that Kerr's directives were put in writing since Kerr had difficulty remembering. Jenkins' notes documented that Kerr disputed Deist's claim, and that, several times during the meeting, Kerr asked Jenkins why she was not saying anything. Jenkins indicated in her notes that she replied by saying her role was to be there to "ensure that things were conducted appropriately, and to keep a record of the meeting."

13. Kerr did not take notes at the meeting. Upon learning from Hoekema that Jenkins had created notes of the meeting, on June 9, 2018, he sent Jenkins a request for those notes. Specifically, Kerr requested her notes from April 18, 2018, and her notes, if she had any, from January 8, 2018; January 18, 2018; February 16, 2018; and February 26, 2018. Kerr also requested copies of "any other correspondence [Jenkins had] with the district on [his] behalf since the beginning of the school year," if any.

14. On June 11, 2018, Jenkins forwarded Kerr's request to Hoekema, without copying Kerr on the communication, and stated that she had "no plans to send [Kerr] any of [her] notes. . . ."

15. Jenkins considered her notes to be her own, and she had discussed this issue with union field representatives many times in the past. In this particular instance, she conferred with union representative Ted Raihl over providing her notes to Kerr. Raihl gave her the rules regarding the recording of meetings and told her that the union did not give notes to bargaining unit members. Jenkins was not specific about the rules for recording meetings or the criteria or rationale for not providing investigatory meeting notes to members.

16. The union invalidated a grievance it had filed on behalf of Kerr, and Kerr appealed the union's decision to invalidate the grievance to the union's state grievance panel, which was set to meet in September 2018. Kerr intended to use the information he was requesting from Jenkins at that September 2018 meeting.

17. On June 19, 2018, Hoekema requested from the district an agreement to hold the Kerr grievance in abeyance until Kerr had the opportunity to exhaust his internal appeal process. She requested an abeyance until September 28, 2018.

18. In November 2018, Kerr was called into approximately three meetings for which he invoked his *Weingarten* right. The union assigned Chris Evola, a new union steward at Kerr's building, to serve as a representative at an investigatory meeting on November 21, 2018. At the time, Evola had only been a custodial representative for about two weeks and had not undergone any steward training.

19. Evola had prior experience in unions and with grievance handling. In previous union experiences, Evola read CBAs, filed grievances on his own, and had also won grievances.

20. For Kerr's assigned school building, the union had been short a representative and the only alternative representative would have been Kerr's wife, Melissa Kerr.

21. Evola represented Kerr to the best of his abilities at the meetings he attended, he had no preconceived notions about Kerr, and he did not intentionally provide a low level of representation at the meetings.

22. Following the meeting, Evola wrote up a report to the union local regarding the meeting, the allegations, and his recommendation to the union local as to whether there were contract violations. He found partial merit in only one of the allegations against Kerr and recommended the other allegations against Kerr be null and void.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.56 RCW and 391-45 WAC.

2. By refusing to provide information to Kerr as described in findings of fact 4 through 17, the union breached its duty of fair representation to Kerr and violated RCW 41.56.150(1).

3. As described in findings of fact 18 through 22, the union did not breach its duty of fair representation to Kerr by assigning Evola to represent him at the November 21, 2018, investigatory meeting.

ORDER

The Public School Employees of Washington, SEIU Local 1948, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

    a. Failing or refusing to represent Terry Kerr by refusing to provide investigatory meeting notes to him, without a reasonable explanation for refusing to do so.

    b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under 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. Provide Terry Kerr with the information he requested in his June 9, 2018, e-mailed information request.

   b. Contact a compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

   c. Read the notice provided by the compliance officer into the record at a regular meeting of the governing body or board of the Public School Employees of Washington, SEIU Local 1948, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

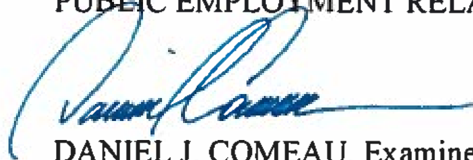
   d. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the compliance officer.

   e. Notify the compliance officer, 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 compliance officer with a signed copy of the notice provided by the compliance officer.

ISSUED at Olympia, Washington, this 19th day of December, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DANIEL J. COMEAU, Examiner

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

RECORD OF SERVICE

ISSUED ON 12/19/2019

DECISION 13114 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 131045-U-18

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