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Inside This Issue

Union Activities at Work – What's Allowed and What's Not

A recent PERC Hearing Officer's decision casts new light on an old subject: which union activities are permissible in the work place? For example, is there a problem allowing the union local to hold their monthly meetings in your (taxpayer-financed) public building? What about allowing paid firefighters who are on duty to attend the meeting while on the payroll? Is that permissible?

In many instances we are aware of, collective bargaining agreements actually include express language allowing some of these activities to occur. It is not unusual, for example, to negotiate a clause allowing use of an office, use of a bulletin board, and even to allow limited paid time off for certain union members to attend meetings or other activities related to "policing the contract" such as accompanying members to Loudermill or Weingarten conferences.

The recent decision involves Kitsap County and their Deputy Sheriffs Guild. Hearing Examiner Katrina Boedecker held a hearing in October and November 2004 on a ULP in which the county was charged with interference with employee rights, employer domination or assistance of the union, and refusal to bargain. The Commission dismissed the "domination or assistance" charge but the interference and refusal to bargain claims proceeded to hearing. Ultimately, Examiner Boedecker held that no ULP was committed and dismissed the ULP claims on their merits. It was her reasoning, however, that is worthy of commentary and analysis. The Commissioners of PERC will get the case next, as we understand it has been appealed. PERC Hearing Examiner decisions are considered precedential, unless and until reversed or modified by the Commission. But before we discuss the binding nature of the decision, or whether fire departments should try to change current practices and procedures, let us discuss the details of the case.

The Sheriff's Guild witnesses testified that, prior to autumn 2002 at least, the employer routinely granted "release time" for employees engaged in (1) grievance or interest arbitrations, specifically as witnesses or union representatives, (2) attending executive board and general membership meetings on employer property, (3) preparing for bargaining (i.e. negotiations), (4) consulting with legal counsel over union activities and

(5) attending PAC committee meetings. For purposes of the case and our discussion "release time" means being considered on duty and in regular pay status, not on leave. During contract negotiations in 2002, the employer allegedly proposed restricting release time and then unilaterally implemented some changes. The Guild alleged that now the employer would only allow release time for joint contract negotiation sessions and labor/management meetings called by the employer.

Additionally, the Guild alleged that by past practice, sergeants controlled the granting of release time, but under the new policy, a lieutenant or higher rank must approve it.

Guild witnesses testified that in the 1990's it was routine for guild members to attend E-board and general meetings while on duty, and the employer knew it. They said the former sheriff allowed them to go to meetings while driving their patrol vehicles. Their testimony was that officers and members attended arbitrations, consulted with attorneys, and prepared for negotiations, as well as attending PAC meetings, all on release time and with the knowledge of their supervisors. The position of sergeant is in the bargaining unit.

The employer countered with evidence that in the 1990s and prior to 2002 there had only been one grievance arbitration and two interest arbitrations. A current administrator and former guild officer testified that as a guild officer in the late 1990's he never took release time for E-board or general meetings but adjusted his work schedule to attend such meetings. The record showed some sergeants approved release time for union activities and some denied it.

The Examiner ruled that the evidence was insufficient to establish a past practice about release time to attend arbitrations, as the number of instances was insufficient to establish a pattern. Besides, the Examiner said, there was no evidence that the employer even knew their pay status while attending. A past practice requires knowledge by both parties that it is occurring.

The Examiner found that for the first time the employer established a policy on release time when a new labor relations manager was appointed in 2002. The key features of the new policy were (1) release time was to be approved at lieutenant grade or above, (2) release time plainly prohibited by law would not be approved, and (3) any release time must be "vitally connected to the employer's business".

The decision also discusses the payment of overtime pay during guild activities, but the Examiner essentially held that the evidence of past

practice was insufficient. For purposes of our analysis here, that section of the decision is not necessary to the discussion. The interesting and perhaps ground-breaking aspect of this decision is the consideration of the following issues. The Examiner asked whether any activities involving release time or overtime violated Washington law. The Examiner cited two prior decisions (one from PERC and the other from the Department of Labor and Industries) for the concept that an employer may deny use of public facilities and release time for union activities.

The Examiner noted that it is an unfair labor practice and a violation of RCW 41.56.140 for an employer to assist or dominate a union. PERC has found in the past that unrestricted funding of union activities by an employer violates that statute. While discussing "illegal activities", the Examiner made it clear that she was using that term not in a criminal sense, but only because the Washington Constitution in at least two sections prohibits use of public funds and property for gifts or providing additional compensation without consideration. PERC has no jurisdiction to adjudicate constitutional issues; only the courts can do that. Ironically, the Examiner noted, the ULP alleging employer domination or assistance had been dismissed. However, she also noted, the employer's *defense* could still raise these issues.

Basically, the employer was arguing that providing guild members with release time for union activities would be illegal funding, or would violate either Article 8, Section 7 of the State Constitution or Article 2, Section 25. For those not familiar with those constitutional provisions, the first prohibits government agencies in Washington with providing any gift or loan of credit to any person, except the "poor and infirm". The latter provision prohibits "additional compensation" to any officer or employee, above and beyond their agreed-upon salary or wages. In other words, wages should be for services rendered to the *public* that the public employee serves, not services to their union. The Examiner's point was that not only would such use of property or funding be illegal, it would also be unlawful "assistance" under RCW 41.56.140, so ironically the union member would be essentially leading the employer into a ULP (that they could then allege!).

In the case, apparently the guild admitted that funding of attendance at WACOPS (the PAC) would be illegal. The guild's position seemed to be that, other than activities related *solely* to guild business (such as union fund raisers) all of the other meetings are related to the employer's business.

The Examiner ultimately found that a public entity allowing free use of public property or release time for public employees violates the statute (meaning the RCW on ULPs, specifically "assistance"). She stressed that an exception would be any explicit agreements in the collective bargaining agreement for negotiation sessions and joint labor/management meetings. Also, she had no problem with release time and use of property for guild members serving as union reps in *Weingarten* and *Loudermill* proceedings. (For those not familiar with those terms, those refer, respectively, to meetings for discipline and for pre-disciplinary conferences or hearings, at which union representation is required by case law.) Finally, participation at a grievance arbitration hearing may be during release time.

The Examiner held, however, that the uses of release time at issue in this case would violate the statute and therefore the Guild had no valid ULP case. She made it quite clear that, at least for this PERC Examiner, it is illegal assistance for the employer to use free public property (meeting room, for example) and/or release time for: (1) E-board and general membership meetings, (2) attendance at PAC or other political action conventions, (3) negotiation planning meetings or consultations with legal counsel or union business agents over labor matters, and (4) participation in mediations, arbitrations, and other union activities as guild representatives or witnesses ***not*** involving formal disciplinary investigations or hearings (as mentioned above in the *Weingarten/Loudermill* context). The same principles apply to overtime pay for such activities, she said.

The Examiner responded to the union's closing brief by stating: "Common logic and experience dictates that an employer who provides a free meeting place for unions, and pays union members to conduct union business, is assisting and dominating the union."

This decision may have grave implications for many agencies in Washington, subject to PERC's jurisdiction, that allow use of meeting rooms, offices, and bulletin boards, as well as pay release time, for many of these same activities, either by express agreement or past practice. First, let me address the question whether this is a binding precedent, or only advisory, pending appeal to the full PERC Commission. Historically, final decisions after a ULP hearing are considered to be just as binding and precedential as the decisions of the appointed commissioners. Many significant PERC precedents are decisions of Examiners and not the full board. Of course, once the three appointed commissioners make a final ruling, that will be the final word, unless the matter is appealed to the Superior (or higher) Court. So, you might ask, could this "rule" change in the near future? The answer is that it might well be modified or clarified by the PERC Commission after the appeal.

Those agencies with explicit contract language or with an admittedly established past practice inconsistent with the dictates of this decision might consider waiting to change their policies, practices, or contract language, until the full PERC Commission makes a ruling. After all, such practices have already existed in some places for many years. Changing such practices now, as a practical matter, may generate many more ULP complaints, alleging that the employer has unilaterally changed working conditions without first giving the union notice and an opportunity to bargain. Of course, the countervailing argument would be that the practice or contract provision, being entirely illegal, is null and void, so a ULP to try to compel a constitutional violation would be dismissed. On balance, we feel that it is impractical and may be downright expensive to change established practices, as opposed to waiting until PERC finally decides.

Agencies that are still in a quandary or confused, after reading this article, should contact me or another labor/management attorney for guidance.

(NOTE: The author was appointed by Governor Booth Gardner and served from 1986 to 1990 as a PERC Commissioner.)

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The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Joseph F. Quinn and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.