

NO. 48881-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SEIU 775,
Appellant/Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, and THE EVERGREEN FREEDOM
FOUNDATION d/b/a FREEDOM FOUNDATION,
Appellees/Defendants,

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. **Disclosing The Times And Locations Of Contracting Appointments And Safety And Orientation Trainings Would Constitute An Unfair Labor Practice Under The Public Employment Collective Bargaining Act, RCW 41.56, *et seq.***

Respondent Freedom Foundation (“Foundation”) relies upon several inaccurate legal conclusions to support its contention that Respondent State of Washington Department of Social and Health Services (“DSHS”) would not commit an unfair labor practice (“ULP”) under the Public Employment Collective Bargaining Act, RCW 41.56, *et seq.* (“PECBA”) by facilitating, through disclosure of certain information pursuant to the Foundation’s Public Records Act (“PRA”) request, the Foundation’s anti-union propagandizing at contracting appointments and safety and orientation trainings that public employees working as Individual Providers (“IPs”) represented by Appellant SEIU 775 must attend.

Whether a ULP occurs turns on the perceptions of a reasonable employee. As Division II of the Washington State Court of Appeals explained in *Pub. Employees Rel. Comm’n v. City of Vancouver*, 107 Wn. App. 694, 705, 33 P.3d 74 (2001):

an employer unlawfully interferes with union activity if the evidence is sufficient to show that an employer’s actions would tend to coerce a reasonable employee. The evidence does not need to show that an employer actually

intimidated or coerced employees by its conduct. In other words, the evidence must demonstrate that, taken from the point of view of the employees, the reasonable tendency of an employer's conduct or statements is coercive in effect.

Id. at 705 (internal citations omitted); *see also Carole A. Jordan v. Comm. College Dist. 13*, Dec. 9171-A, 2007 WL 2461945 at *3 (PECB 2007) (“An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees.”); *Utd. Staff Nurses Union, UFCW Local 141 v. Grant Cty. Pub. Hosp.*, Dec. 8378, 2004 WL 725935 at *4 (PECB 2004) (“The Commission has found violations where the reasonable apprehension created by the employer action could cause employees to believe they will be treated with suspicion if they voice support for their exclusive bargaining representative or for unions in general.”).

The Foundation first claims that no IP could perceive the State as interfering with protected union rights where the State's action is limited to disclosing the times and locations of the meetings. *See* Foundation Resp. Brf. at 27. However, as explained above, whether a ULP occurs turns on the perceptions of a reasonable employee. IPs must attend contracting appointments and safety and orientation trainings as part of their employment. CP 45. The collective bargaining agreement (“CBA”)

between SEIU 775 and the State of Washington provides SEIU 775 with access to bargaining unit members at these two types of appointments. *Id.* These appointments generally take place at various DSHS facilities around the state, though DSHS representatives do not attend the portion of the appointments at which SEIU 775 speaks to the IPs. *Id.* The contracting appointments and safety and orientation trainings are not events open to the public, but are internal matters for the State and the IPs that are part of the operation of the homecare program. *Id.* A reasonable employee who attended these appointments and trainings and was confronted with the Foundation's opt-out efforts facilitated by DSHS's having told the Foundation where and when the appointments were occurring could assume that DSHS caused, invited, or allowed the Foundation to attend the meeting for the purpose of discouraging employees from affiliating with SEIU 775. As such, the Foundation's presence at such a meeting would tend to coerce and intimidate employees from engaging in protected rights.

The Foundation's next argument fails for the same reason. The Foundation claims that the fact that the disclosure of meeting times is purportedly required by law would preclude a reasonable IP from perceiving a threat. *See* Foundation Resp. Brf. at 29. But what matters is what an IP would reasonably believe based on the facts known to them.

The IPs in attendance at these meetings will not know how or why the Foundation is there encouraging them to opt out of, or to decline participation in, their union. Even if they did, they are unlikely to be aware of PRA provisions or case law construing the PRA that prohibits the State from inquiring as to a requester's intended purpose.

Similarly, the Foundation misunderstands the nature of a "surveillance" ULP when it asserts that no surveillance could have occurred where the State already possesses the records at issue in this PRA suit. *See* Foundation Resp. Brf. at 28. A surveillance violation occurs when the employer creates the *appearance* that it is acquiring information about employees' union sympathies. *See City of Tacoma*, Decision 6793, 1999 WL 739680, at *7 (PECB 1999) ("even the appearance of employer surveillance of union meetings constitutes unlawful interference."); *Longview Police Guild v. City of Longview*, Dec. 4702, 1994 WL 900095 at *2 (PECB 1994) (finding a violation of RCW 41.56.140 where employer's agent surveilled union meeting and interrogated union president about what transpired in the meeting; "Any such surveillance necessarily has a 'chilling effect' on future participation by employees in union meetings."). Here, the Foundation's presence and aggressive anti-union proselytizing would cause employees to reasonably believe that the Foundation was there at the State's behest and that employees' support for

the Foundation or for SEIU 775 could be something their employer would learn.

Next, the Foundation relies on the inaccurate presumption that because the IPs have already organized into a union, there can be no interference violation. *See* Foundation Resp. Brf. at 31. In fact, PERC routinely finds interference violations even in the context of established collective bargaining relationships, and organized employees continue to enjoy the right to exercise their rights to support (or decline to support) their union free from employer interference. *See Pasco Hous. Auth.*, Decision 5927-A (PECB 1997), *aff'd*, 98 Wn. App. 809, 811, 991 P.2d 1177 (2000).

B. The State Would Commit A ULP By Facilitating Actions Of The Foundation, As A Third Party, To Interfere With, Restrain Or Coerce IPs In The Exercise Of Their Rights To Support Their Union, SEIU 775.

The Foundation misstates the law in asserting that a ULP can only occur where an employer communicates with or engages in action directed at bargaining unit members. *See* Foundation Resp. Brf. at 26. It is well-established that a third party's interactions with employees can give rise to ULP liability on behalf of the employer. Indeed, RCW 41.56.040 itself provides that no employer or "other person" shall interfere with employees' protected rights. A third party's actions give rise to a ULP

wherever the employer has sufficient control over the third party. *Fabric Services Inc.*, 190 NLRB 540, 542 (1971). See also *Altman Camera Co., Inc. v. NLRB*, 511 F.2d 319, 321 (7th Cir. 1975) (“In absence of any specific repudiation by company of supervisors’ conduct in subjecting employees to threats or inducements, the company was responsible for these acts of its agents); *Public, Professional and Office-Clerical Employees and Drivers, Local 763 v. Town of Granite Falls*, Dec. 2692, 1987 WL 383191 at *6 (PECB 1987) (interference violations may be effected by a third party).

In *Fabric Services*, the Administrative Law Judge found not only that Fabric Services violated the Act when one of its managers ordered a Southern Bell employee to remove union insignia, but also that Southern Bell had violated the Act when it “acquiesced” in Fabric Services’ unlawful rule. *Id.* at 542. Southern Bell’s actions had the “practical and legal effect” of interfering with its employee’s rights while on Fabric Services’ premises. *Id.* The fact that Fabric Services was the mouthpiece from which the anti-union statements were uttered did not prevent Southern Bell from committing a ULP by acquiescing to a third party interfering with its employee’s rights. *Id.*

Similarly, here, the State’s disclosure of the requested “times and locations” information to the Foundation knowing that the Foundation will

use it to attempt to dissuade bargaining unit members from participating in and supporting their union pursuant to the Foundation's PRA request will have the practical and legal effect of interfering with the providers' rights under RCW 41.56.

This case presents a factual scenario quite similar to that in *In re Huron*, Case No. 7-CA-44761, 2003 WL 1831897 (2003). In that case, the ALJ found that the employer committed an interference ULP by allowing an employee who was a known member of an anti-union organization to accompany a regularly-scheduled government safety inspection of the facility. The judge reasoned that by allowing the anti-union organization to perform a function normally reserved for Union or Employer members of the Joint Health and Safety Committee, the Employer gave standing on par with the union to the anti-union organization. *Id.* The employer's encouragement of the organization, and therefore its anti-union activity, undercut the Union as the exclusive bargaining representative for its employees, and it was therefore a violation of the Act.

So too, here, would DSHS's disclosure of the requested information constitute a ULP. By facilitating and allowing the Foundation to attend the contracting appointments and safety and orientation meetings - a function normally reserved for the Union alone - the State would

legitimize the Foundation and its anti-union message, undercutting SEIU 775's role as the providers' exclusive bargaining representative.

C. The PECBA Explicitly Prohibits Committing ULPs And Is Therefore Encompassed In The PRA's "Other Statute" Exemption To The Extent That Disclosure Of Requested Records Would Necessarily Effect A ULP.

RCW 42.56.070(1) incorporates into the Public Records Act other laws that exempt or prohibit from disclosure specific information or records. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994) ("*PAWS II*"). Here, the PECBA expressly forbids state agencies from committing unfair labor practices. RCW 41.56.040 does not merely *imply* a restriction on the State's ability to take certain action – it expressly forbids it. Therefore, if this Court agrees that disclosing the requested records would amount to a ULP by facilitating and effectively inviting the Foundation to interfere with employees' protected rights, it must find that RCW 41.56.040 is an "other statute" that exempts or prohibits disclosure.

The case presented here is nothing like other cases where the "other statute" in question contained a mere "implied" basis for nondisclosure. In *Wash. State Patrol*, the Court found that a statute containing permissive language, allowing an agency "upon request" to release sex offender records to any victim, witness, or community member

was not an “other statute” within the meaning of RCW 42.56.070(1). *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 374–75, 374 P.3d 63 (2016). Significantly, the statute in question in that case, RCW 4.24.550 contained *only* language *permitting* disclosure. The Court refused to read that pro-disclosure statute as “the exclusive mechanism for producing sex offender records” “by implication.” *Id.* Unlike the PECBA’s express prohibition against committing ULPs, the statute in that case contained no hint that the Legislature intended to restrict the State’s actions; the most that could be said about it was that it permitted disclosure. It is hardly surprising that the Court in that case declined to find the statute prohibited disclosure of records under the PRA. Unlike the statute in *Wash. State Patrol*, there is no need to rely on “implication” to find that the PECBA bars disclosure of the records at issue in this case.

Further, the legislative intent behind the PECBA supports the conclusion that the statute expressly prohibits state agencies from disclosing information in response to a PRA request where doing so would constitute a ULP. In determining when an “other statute” operates to exempt or prohibit disclosure, Courts scrutinize whether the legislative intent underlying the “other statute” was aimed at protecting “a particular interest or value.” *See Wash. State Patrol*, 185 Wn.2d 363 at 378. Here, the Legislature was clear and direct in its intent to prohibit certain actions:

“No public employer...shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining...” RCW 41.56.040. This intent to protect the right of public employees to express and act on union sympathies in a free and unrestrained manner is further illuminated by RCW 41.56.010, which provides:

The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

The legislature could not have been more clear in its intent to prohibit state agencies from committing unfair labor practices.

Finally, the Foundation attempts to play a “trump” card by way of RCW 42.56.030, which provides that, “[i]n the event of conflict between the provisions of [the PRA] and any other act, the provisions of [the PRA] shall govern.” Foundation Resp. Brf. at 30. The Foundation claims that SEIU 775’s argument would require the State to choose between violating the PRA or violating the PECBA. *See* Foundation Resp. Brf. at 30. But where the PECBA would be violated, the PRA does not require disclosure.

The “other statute” provision forecloses such a conflict by eliminating from the world of records that must be disclosed records whose disclosure is barred by a statute external to the PRA. Indeed, the very same prohibitions on disclosure established by the PECBA’s ULP provisions are incorporated into the PRA itself by operation of RCW 41.56.070(1). *Planned Parenthood of Great Nw. v. Bloedow*, 187 Wn. App. 606, 619, 350 P.3d 660 (2015) (“The ‘other statute’ exemption avoids any inconsistency and allows other state statutes and federal regulations to supplement the PRA’s exemptions.”). This Court should reject the Foundation’s invitation to make a “Hobson’s Choice” that does not exist, and if made, would render the PECBA’s protections against unfair labor practices illusory.

Additionally, while it is true that PRA exemptions are to be construed narrowly, so too are exceptions to the rights set forth in the PECBA. *City of Yakima v. Int’l Ass’n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass’n*, 117 Wn. 2d 655, 671, 818 P.2d 1076 (1991) (“The exceptions to that right are to be narrowly construed.”). The PRA may not be construed in a way that would diminish the protections for workers set forth in RCW 41.56.

D. Disclosure Would Not Be In The Public Interest Where It Would Violate Another Statute.

To determine that disclosure would not be in the public interest, this court need look no further than the Legislature's stated intent in enacting the PECBA: to

promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

RCW 41.56.010. The Washington Supreme Court has observed that the "purpose of the Act is to recognize and implement the right of public employees to be represented by labor organizations and to participate in collective bargaining with respect to matters concerning their employment relations." *City of Yakima*, 117 Wn.2d at 671.

Should this Court conclude that DSHS facilitating the Foundation's attendance at the contracting appointments and safety and orientation trainings would be an unfair labor practice, there can be no doubt that disclosing information that allows that ULP to be committed is contrary to the public interest. Protecting workers from interference with their rights under RCW 41.56 is undeniably in the public interest.

SEIU 775 will also be injured through the loss of members and revenues if the Foundation obtains the requested information and

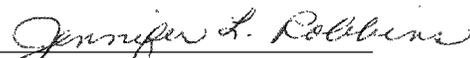
successfully persuades IPs to withdraw membership in and financial support of SEIU 775.

For the foregoing reasons, disclosure of the requested records would not be in the public interest, and disclosure would substantially or irreparably harm SEIU 775.

II. CONCLUSION

This Court should reverse the trial court's denial of preliminary and permanent injunctive relief enjoining DSHS from disclosing the requested information to the Foundation. It is clear that the State would commit a ULP by disclosing records to the Foundation because doing so would invite the Foundation to show up at contracting appointments and safety and orientation trainings for the express purpose of interfering with IPs' statutorily-protected rights to support a union. The PECBA, RCW 41.56 *et seq.*, is explicit in its prohibition against committing unfair labor practices. Because that law contains prohibitory language applicable to the disclosure of records in this case, it is an "other statute" that prohibits disclosure of the records requested by the Foundation.

RESPECTFULLY SUBMITTED this 6th day of October, 2016.

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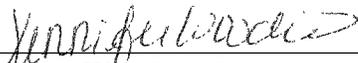
DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the State of Washington that on October 6, 2016, I caused the foregoing Appellant's Reply Brief to be filed with the Court of Appeals, Division II, and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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