STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2024, Complainant, vs. KING COUNTY FIRE PROTECTION DISTRICT NO. 39, Respondent.	)	CASE NO. 5610-U-84-1021 Decision 2160-C PECB PRELIMINARY RULING

This matter comes before the Executive Director for a preliminary ruling, pursuant to WAC 391-45-110, on a second amended complaint.

The original complaint charging unfair labor practices was filed on December 21, 1984. In a preliminary ruling issued on February 28, 1985,[1] problems were noted both as to the propriety of the bargaining unit and as to the existence of a cause of action for "refusal to bargain" allegations concerning a change of pre-hire minimum qualifications for employment in bargaining unit positions. The complainant was afforded an opportunity to amend the complaint.

In a preliminary ruling issued on April 10, 1985,[2] dismissal of an amended complaint filed by the union in this case was based exclusively on the absence of a "refusal to bargain" cause of

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1 King County Fire District No. 39, Decision 2160 (PECB, 1985).

2 King County Fire District No. 39, Decision 2160-A (PECB, 1985).

action with respect to pre-hire minimum qualifications for employment in bargaining unit positions. The propriety of the bargaining unit was not mentioned. The union filed a petition for review.

In an order issued on December 3, 1985,[3] the Commission noted that allegations made by the union concerning a safety hazard to its members were conclusionary, but that the union had made a good faith effort to respond to the initial preliminary ruling. The Commission remanded the matter to the Executive Director, with leave to the union to file and serve an amended complaint setting forth facts sufficient to support its "safety" theory. No reference was made to the propriety of the bargaining unit.

On January 15, 1986, the complainant filed a second-amended complaint wherein it again alleged that the respondent has refused to engage in collective bargaining by its unilateral action to limit the pool of applicants from which bargaining unit members are selected. The complainant alleges that a safety hazard for bargaining unit employees is created by the limitation of the applicant pool. The new materials in the second amended complaint include:

> ... [the limited pool of applicants] was composed almost entirely of volunteer fire fighters with two years of experience with the District and resident fire fighters hired on a part-time basis by the District; resident fire fighters are students at vocational fire fighting training school who reside in the District's fire stations and respond to night calls.

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3 King County Fire District No. 39, Decision 2160-B (PECB, 1985).

. . .

> ... [the applicant pool under earlier standards] included not only District volunteers and resident fire fighters but also professional fire fighters with experience and training with other fire departments. It also included volunteer fire fighters from other fire districts, many of whom possessed substantial experience and training in fire protection.

. . .

> By limiting the pool of applicants the District not only diminished the quantity of the applicants but also the quality of applicants from previous pools as many of those individuals deleted from the pool were better qualified than District volunteer and resident fire fighters. The limitation in the quantity and quality of applicants was a lowering of the hiring standards, resulting in a reduction in the quality of new hires. Any lessening of the quality of new hires creates a greater safety hazard to Unit employees, who must work alongside new hires and rely upon the skilled performance of their jobs in often dangerous fire-fighting situations.

Thus, the allegations are still based exclusively on the theoretical impact of the change of the minimum qualifications, with no reference to actual experience with employees hired from the smaller pool of applicants.

The Commission's ruling in this matter only granted the complainant leave to file a second amended complaint. It did not require disregard of other circumstances, rules and precedents in the processing of the case. A number of related developments bear on the disposition of this case.

On October 24, 1985, while the instant case was pending before the Commission, the employer filed a "Petition for Clarification of an Existing Bargaining Unit" under Chapter 391-35 WAC, questioning the propriety of the mixed unit of uniformed and non-uniformed personnel in which the union claims to be exclusive bargaining representative. A hearing has been held on that case subsequent to the remand of the instant case by the Commission, and the existence of a "mixed" unit has been established.[4]

In King County Fire District No. 39, Decision 2328 (PECB, 1985), decided on November 8, 1985 while this case was pending before the Commission, a number of other unfair labor practice cases filed by these parties against one another on "scope of bargaining" issues were dismissed. It was noted therein that the authority of the parties to proceed to interest arbitration had been withdrawn, and that an underlying collective bargaining dispute had been remanded for further mediation. The docket records of the Commission disclose that the parties subsequently reached an agreement in mediation, obviating the need for re-activation of the interest arbitration case. None of the unfair labor practice cases so dismissed were refiled, but the instant case was not withdrawn.

On May 10, 1985, a month after the second preliminary ruling was issued in this case and while this case was pending before the Commission, the union filed a request with the Commission for the appointment of an arbitrator, pursuant to RCW 41.56.125

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[4] The docket records of the Commission disclose that the examiner in Case No. 5650-U-85-1035, another unfair labor practice case involving these parties, has held those proceedings in abeyance pending the outcome of the unit clarification proceedings.

and Chapter 391-65 WAC, to hear and determine a grievance. William A. Lang, a member of the Commission staff, served as the impartial chairman of an arbitration panel in Case No. 5816-A-85-457. A hearing was held on August 27, 1985. The parties stipulated that the issues to be determined by the arbitration panel in that proceeding were:

> 1. Does [the] arbitrator have jurisdiction over the Union's grievance regarding the District's decision to limit eligible candidates for firefighter to those persons with prior experience as volunteer firefighters with the District? If not, there is no need for a hearing as to whether or not there has been a violation of Article V of the now expired labor agreement. If so, the arbitration panel needs to hear the respective cases of the parties regarding the grievance.
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> 2. If the grievance is arbitrable, then did the District violate the (now expired) collective bargaining agreement, Article V - Non-discrimination, by its decision to require participation as a volunteer firefighter or part-paid firefighter in order to be eligible to compete for the position of firefighter? If so, what is the proper remedy?

The union urged that the grievance was arbitrable and that the contractual prohibition against discrimination extended to applicants for employment "because any restriction on the number of applicants affects the quality of the workforce and, thereby, the safety of the employees". The employer argued that the grievance was not arbitrable, that the non-discrimination clause operated only as to current employees, and that "the safety of employees has not been affected by its hiring practices".

The Public Employment Relations Commission does not assert jurisdiction through the unfair labor practice provisions of Chapter 41.56 RCW to remedy violations of collective bargaining agreements. City of Walla Walla, Decision 104 (PECB, 1976). RCW 41.58.020(4) endorses grievance arbitration as the legislatively preferred method for resolution of disputes concerning interpretation or application of a collective bargaining agreement. Accordingly, the processing of "unilateral change" unfair labor practice allegations filed with the Commission is normally "deferred" where the employer's conduct is "arguably protected or prohibited" by an existing collective bargaining agreement between the parties and grievance arbitration procedures are available to the parties to obtain determination of the contract dispute. Nothing in the original complaint or in the first amended complaint suggested, however, that the unilateral change disputed in this unfair labor practice case was covered by the contract.[5] Accordingly, no inquiries were made previously concerning the propriety of deferral of this case to arbitration.

On January 31, 1986, the arbitration panel chaired by Arbitrator William A. Lang formally issued its arbitration award on the union's grievance concerning the change of pre-hire minimum qualifications.[6] Rejecting the employer's arguments on arbitrability, the arbitration panel held:

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[5] Although filed long after the grievance arbitration case, the second amended complaint filed on January 15, 1986 similarly makes no reference to a contractually based claim.

[6] The arbitration award had been submitted to the partisan arbitrators in October, 1985. It was reviewed and signed by the members of the arbitration panel on November 6, 1985, subject to correction of typographical errors.

> ... [This] is a class action filing under Article 15 on behalf of the employees covered by contract. It is not a claim made on behalf of applicants. To the contrary, if the grievance is successful their rights would be adversely affected because it would greatly enlarge the competition to fill the two vacancies.
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> The union has filed a grievance on behalf of employees covered by the contract. The fact that they seek an interpretation of an article which the district views as erroneous does not diminish its right to seek such an interpretation. We hold the grievance, therefore, to be properly before us.

Turning to the merits of the grievance, the panel rejected the employer's analysis based on the status of applicants for employment, stating:

> ... This logic fails when applied to the controversy at issue. The union is not seeking to protect either current employees or job applicants against coercive interference with rights. The union objective is to enlarge the pool of applicants because of safety concerns. (emphasis supplied)

Rejecting a union argument, however, the arbitration panel noted a "presumption of intent" in connection with bargaining history which disclosed that earlier "employees or applicants" coverage of the contract article relied upon by the union had been changed in the intervening period by the deletion of "or applicants". The arbitration panel then dealt with the union's "safety" concerns, as follows:

> "Finally we find that the argument of diminished safety to be speculative. While a limited pool of applicants could have

> safety implications, the record does not show that safety has been adversely affected. Two-thirds of the current workforce were, in fact, recruited from the volunteer firefighters. Moreover, there has not been any union complaints of inferior performance or evidence of adverse safety effects."

Accordingly, with the union-appointed panel member dissenting, the arbitration panel denied the grievance.

The National Labor Relations Board has engaged in post-arbitral deferral in unfair labor practice cases since Spielberg Manufacturing Co., 112 NLRB 1080 (1955). As supplemented in Raytheon Co., 140 NLRB 883 (1963) and subsequent cases, the NLRB applies four inquiries in considering post-arbitral deferrals: (1) that the proceedings be fair and regular; (2) that all parties agree to be bound; (3) that the decision not be repugnant to the purpose and policies of the Act; and (4) that the issue involved in the unfair labor practice case must have been presented to and considered by the arbitrator.

The Public Employment Relations Commission has also established policy on deferral to arbitration awards. See, City of Seattle Library Board, Decision 1199 (PECB, 1981); Clark County Fire District No.5, Decision 1343 (PECB, 1982); Seattle School District, Decision 2079-B, 2079-C (PECB, 1986); City of Seattle, Decision 2134 (PECB, 1985); Hoquiam School District, Decision 2489 (PECB, 1986); City of Spokane, Decision 2398 (PECB, 1986).

At least to this point, no party has contended (and nothing in the record suggests) that the arbitration proceedings were other than fair and regular, or that they have reached a result repugnant to the purpose and policies of Chapter 41.56 RCW.

The union itself initiated the claim that the "safety" matter was covered by the contract, and it initiated the arbitration proceedings with the Commission. The arbitration panel agreed with the union that the grievance was arbitrable. The collective bargaining agreement provided at Article 15, Step 4, that the findings of the arbitration tribunal were to be final and binding upon the parties.

It is self-evident from the arbitration award that the issues raised in the unfair labor practice case (i.e., whether the employer met its duty to bargain and whether there was a "safety" impact on bargaining unit employees) were considered by the arbitrators. The union's grievance was denied on both grounds. The arbitrators held that there had been bargaining on the matter, specifically relying on bargaining history which demonstrated first inclusion and then deletion of the "or applicants" language in the contract provision concerning discrimination. Having heard the union's evidence on the "safety" claim, the arbitrators ruled that the union had failed to show any adverse effect on existing employees flowing from the employer's action in limiting its pool of applicants and they dismissed the union's "safety" argument as speculative.

The resources available to the Public Employment Relations Commission are limited and the disputes to be resolved are many. Setting aside (again) the "propriety of bargaining unit" issue that is pending in a parallel proceeding before the Commission and lurks in the background in this case, the fact remains that the union appears to have had its "day in court" in the arbitration proceedings on its "safety" claims. There is no evident reason to withhold application of "deferral" principles here. Accordingly, it does not appear that the union's complaint should be processed through the unfair labor practice provisions of Chapter 41.56 RCW.

NOW, THEREFORE, it is

ORDERED

Unless good cause is shown on or before

November 13, 1986

why such action should not be taken, the complaint charging unfair labor practices filed in the above entitled matter will be dismissed in deference to the arbitration award issued on January 31, 1986.

DATED at Olympia, Washington, this 29th day of October, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director