STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RENTON SCHOOL DISTRICT, Employer.	)	
CHET MUNRO, Complainant, vs. UNITED CLASSIFIED WORKERS UNION, LOCAL 1, Respondent.	)	CASE 13717-U-98-3358 DECISION 6300-A - PECB
CHET MUNRO, Complainant, vs. RENTON SCHOOL DISTRICT, Respondent.	)	CASE 13718-U-98-3359 DECISION 6301-A - PECB DECISION OF COMMISSION

Tyler M. Johnson, Attorney at Law, appeared on behalf of the complainant.

Merrilee J. Miron, President, appeared for United Classified Workers Union, Local 1.

Sebris Busto, P.S., by Michele A. Gammer and Elizabeth K. Maurer, Attorneys at Law, appeared for the Renton School District.

This case comes before the Commission on a petition for review filed by Chet Munro, seeking to overturn a decision issued by Executive Director Marvin L. Schurke.[1]

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[1] Renton School District, Decision 6300 (PECB, 1998).

BACKGROUND

On February 13, 1998, Chet Munro filed a complaint charging unfair labor practices with the Public Employment Relations Commission. Allegations against the union and employer were divided for the purposes of processing the complaint and separate cases were docketed for each respondent.[2] After the issuance of deficiency notices stating that the allegations did not state a cause of action, the complainant amended his complaint. The complaint as amended contained allegations involving the application of RCW 28A.400.304, which states as follows:

> (1) By June 30, 1997, **school districts**, educational service districts, and their contractors **shall require that all employees who have regularly scheduled unsupervised access to children** and were hired before June 11, 1992, **undergo a record check** through the Washington state patrol criminal identification system under RCW 43.43.830 through 43.43.838, 10.97.030 and 10.97.050 and through the federal bureau of investigation. **The record check shall include a fingerprint check** using a complete Washington state criminal identification fingerprint card. The superintendent of public instruction shall provide a copy of the record report to the employee. Once an employee has a record check as required under this section, additional record checks shall not be required of the employee unless required by other provisions of law.
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> (2) Employees, school districts, and educational service districts shall not be required by the state patrol or superintendent of public instruction to pay for the record check required in subsection (1) of this section.

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[2] The complaint against the union was processed as Case 13717-U-98-3358. The complaint against the employer was processed as Case 13718-U-98-3359.

> (3) The record checks required in this section shall be in process no later than June 30, 1997.
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> (4) This section expires March 31, 1998.

[Emphasis by **bold** supplied.]

The complainant alleged that: he contested a termination and the employer reinstated him to his position; the employer and union thereafter discontinued the grievance process guaranteed by the collective bargaining agreement, and colluded and agreed that the employer would commence a lawsuit against the complainant; the agreement between the employer and union was coercive, and constituted breach of the union's duty to represent the complainant; the lawsuit sought to require the complainant to submit to fingerprinting and a background check, and that those "conditions of employment" are mandatory subjects of collective bargaining; and the union failed to assist him in objecting to the lawsuit, and that its refusal to represent and defend him constitute an unfair labor practice under RCW 41.56.150.

On May 20, 1998, Executive Director Marvin L. Schurke dismissed the complaint on the basis that it failed to state a cause of action. The Executive Director stated that: (1) an individual employee lacks legal standing to pursue a "refusal to bargain" claim, as the duty to bargain exists only between a public employer and an exclusive bargaining representative; (2) the Legislature may have precluded collective bargaining on the subject of background checks on school personnel, as the statute contains no indication of any local discretion in the matter; (3) Title 28A RCW is not among the statutes administered by the Commission, and even if the Commission had authority to interpret RCW 28A.400.304, the "priority of action" rule would deprive the Commission of any authority to act; (4) silence on the issues of fingerprint and record checks in a collective bargaining agreement is not inherently unlawful, and the

union's failure to bargain the subjects is not inherently unlawful even if they are a mandatory subject of bargaining; (5) an agreement between the employer and union concerning the declaratory judgment action does not deprive the complainant of any right under Chapter 41.56 RCW; (6) it is not within the Commission's authority to enforce a duty of fair representation in this situation and require that the union represent the complainant in the declaratory judgment action; (7) the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute; (8) the Commission does not assert jurisdiction to enforce the agreement to arbitrate, the procedures for arbitration, or the awards issued by arbitrators on grievance disputes; and (9) the Commission lacks the authority to rule on an alleged "coercive" nature of the employer's declaratory judgment action as RCW 41.56.140 only prohibits employers from coercing public employees in the exercise of collective bargaining rights.

POSITIONS OF THE PARTIES

The complainant argues that: (1) he has standing to assert an unfair labor practice complaint that the employer and union refused to bargain a mandatory subject of bargaining when such failure to negotiate results in a civil complaint against him alone; (2) RCW 28A.400.304 does not preempt collective bargaining; (3) the employer and union undermined the collective bargaining process by abandoning their own dispute resolution process when the employer filed the declaratory judgment action with the approval of the union, and (4) the priority of action rule favors the Commission's jurisdiction over the subject matter and does not preclude the filing of the complaint. The complainant requests the opportunity

to brief the issue of whether RCW 28A.400.304 preempts collective bargaining.

The union argues that it bargained the issue of fingerprinting in 1996, that the bargaining unit ratified the contract and members were subsequently fingerprinted without incident, and that the unit voted to eliminate fingerprinting from its proposed reopeners in the spring of 1997. The union argues that it met its obligation in all areas of contract negotiations and contract enforcement, and urges the Commission to uphold the Executive Director's ruling.

The employer argues that the complainant lacks standing to assert a refusal to bargain unfair labor practice claim under RCW 41.56.140(4) and WAC 391-45-010, and that the superior court has the authority to interpret RCW 28A.400.304. The employer urges the Commission to affirm the Executive Director's ruling.

DISCUSSION

The Duty to Bargain

The duty to bargain under the Public Employees' Collective Bargaining Act is defined in RCW 41.56.030(4) as follows:

> "Collective bargaining" means **the performance of the mutual obligations of the public employer and the exclusive bargaining representative** to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit ...

[Emphasis by **bold** supplied.]

In addition, RCW 41.56.100 describes the authority and duty of a public employer to engage in collective bargaining.

The definition of collective bargaining in RCW 41.56.030(4) is patterned after the National Labor Relations Act (NLRA). The Supreme Court of the State of Washington has ruled that decisions construing the NLRA are persuasive in interpreting state laws which are similar to or based on the federal law. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1981).

The Commission has followed National Labor Relations Board (NLRB) and federal court precedents which distinguish between "mandatory", "permissive" and "illegal" subjects of bargaining. Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg Warner, 356 U.S. 342 (1958).[3]

- **Mandatory subjects of bargaining** are matters affecting the wages, hours, and working conditions of bargaining unit employees;
- **Permissive subjects of bargaining** are matters considered remote from "terms and conditions of employment", or those which are regarded as prerogatives of employers or of unions;
- **Illegal subjects of bargaining** are matters which neither the employer nor the union have the authority to negotiate, because their implementation of an agreement on the subject matter would contravene applicable statutes or court decisions.[4]

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[3] See, also, City of Pasco, Decision 4694-A and 4695-A (PECB, 1994); and City of Centralia, Decision 5282-A (PECB, 1996).

[4] Illegal subjects may not be proposed or bargained at any time. See, King County Fire District, Decision 4538-A

The duty to bargain only exists as to matters over which the employer may lawfully exercise discretion. Zylstra v. Piva, 85 Wn.2d 743 (1975). Any bargaining must be done within the bounds of substantive authority granted elsewhere. RCW 28A.400.304 appears to be clear on its face, so there was ample basis for the Executive Director's suggestion that an agreement between the union and employer on the subject of fingerprinting and background checks might contravene the statute, and thus they would be illegal subjects of bargaining.

Standing to Assert a Refusal to Bargain Claim -
The complainant is asking the Commission to direct the employer and union through collective bargaining to interpret and apply RCW 28A.400.304 to the work place as the parties agree. The complainant urges the Commission to decide whether fingerprinting and background checks are a mandatory subject of bargaining, and if it is, the complainant argues, then the employer and the union have an obligation to determine how the law is going to be implemented.

A duty to bargain under RCW 41.56.030(4) and RCW 41.56.100 exists only between a covered employer and the organization holding status as the incumbent exclusive bargaining representative of the employees. Individual employees within a bargaining unit are third-party beneficiaries to, but not parties to, such a bargaining relationship. Thus, only the employer and union that are parties to a particular bargaining relationship have legal standing to file or pursue "refusal to bargain" claims. See, Mukilteo School District, Decision 3964-A (PECB, 1992) and Tacoma School District,

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(PECB, 1994). See, also, City of Richland, Decision 2486-A (PECB, 1986).

Decision 5465-E, (EDUC, 1997).[5] The complainant cites Tacoma School District, Decision 5086-A (PECB, 1995), in support of his position that he has standing. He fails to acknowledge, however, that Tacoma School District did not involve refusal to bargain allegations. In addition, Vaca v. Sipes, 386 U.S. 171 (1967), also cited by the complainant, did not involve a refusal to bargain claim. The complainant has provided no other case citations that support his position that he has standing to bring a refusal to bargain claim. Thus, this complainant has no standing to bring claims that fingerprinting and background checks are a condition of employment and should be a mandatory subject of collective bargaining.

Jurisdiction of the Commission

The complainant seeks to have the Commission interpret and apply RCW 28A.400.304. The Commission has no authority to decide which specific job classifications or employees fall under the "regularly scheduled unsupervised access to children" requirements of RCW 28A.400.304. As the Executive Director stated, the Commission only has jurisdiction over the laws that have been assigned to its administration by statute, and Title 28A RCW is not among the statutes administered by the Commission.

Abandonment of the Grievance

The complainant asserts that both the employer and union abandoned his grievance, which he had filed to contest his allegedly wrongful

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[5] See, also, Grant County, Decision 2703 (PECB, 1987); Port of Seattle, Decision 4106 (PECB, 1992); Port of Seattle, Decision 4107 (PECB, 1992); City of Tacoma, Decision 4233 (PECB, 1992); Spokane Transit Authority, Decision 5742 (PECB, 1996); and Seattle School District, Decision 5774 (EDUC, 1996).

termination for failing to submit to the fingerprinting and background checks. The Commission has held in a long line of cases that we do not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976). Nor does the Commission assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances. Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982).

NOW, THEREFORE, it is

ORDERED

The Executive Director's order of dismissal issued on May 20, 1998, in the above-entitled matter is AFFIRMED.

Issued at Olympia, Washington, on the 29th day of September, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner