King County, Decision 6772-A (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 174, Complainant,	CASE 14420-U-99-3572
vs.	DECISION 6772-A - PECB
KING COUNTY, Respondent.	DECISION OF COMMISSION

This case comes before the Commission on an appeal filed by Teamsters Union, Local 174, seeking to overturn an order of dismissal issued by Executive Director Marvin L. Schurke.[1] We affirm.

BACKGROUND

On March 1, 1999, Teamsters Union, Local 174 (union), filed a complaint charging unfair labor practices against King County (employer), alleging a refusal to bargain in violation of RCW 41.56.140(4). The controversy concerns an alleged failure to make crucial witnesses available for a grievance hearing, and thus refusing to process the grievance.

Executive Director Marvin L. Schurke issued a deficiency notice on May 27, 1999. The union's attempt to resort to the Commission's processes to compel testimony or otherwise enforce the grievance procedure in the parties' collective bargaining agreement was

[1] King County, Decision 6772 (PECB, 1999).

viewed as misdirected, and the Executive Director cited precedents holding that the Commission does not assert jurisdiction to enforce arbitration procedures or arbitration awards.

The union filed an amended complaint on June 17, 1999, together with a letter briefing the issues. The union alleged that: an employee grieved his transfer; the employer denied the grievance, the union moved the grievance to Step 3, and a hearing was scheduled; the union learned that the employer would not be calling any witnesses at the hearing; the union requested managers be available for questioning at the hearing; and that the employer failed to make crucial witnesses available. The employer's actions were described as a reaction to the grievant's pending complaint in civil court, and as denying him the opportunity to pursue his contractual rights because of his independent pursuit of state and federal discrimination claims. The union alleged that the employer engaged in bad faith bargaining by (1) failing to provide access to witnesses and information in the witnesses' possession; (2) refusing to negotiate to resolve differences with the union regarding providing witnesses and information; (3) conditioning access to witnesses and information on agreement to a permissive and illegal subject of bargaining; and (4) undermining the union's representational status by conditioning access to witnesses and information on an employee's pursuit of statutory rights. The union sought an order requiring the employer to fully participate the employee's grievance hearing, including making witnesses available for testifying, and attorney fees and costs.

The Executive Director dismissed the complaint on July 30, 1999, based on long-established precedent of the Commission that states the Commission does 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). In addition, the Executive Director stated that 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. Thurston County Communications Board, Decision 103 (PECB, 1976). The complaint allegations thus did not state a cause of action.

On August 19, 1999, the union filed an appeal, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

The union argues that the employer failed to bargain in good faith by failing to provide witnesses for hearing, conditioning bargaining on a permissive subject of bargaining, and by undermining the union's representational status. It asserts that the employer has a duty to provide information, including witnesses at hearings, relevant to the union's role as the employees' exclusive bargaining representative, and that failure to provide requested witnesses is an unlawful refusal to bargain under RCW 41.56.140. The union claims the employer may not assert concerns now that were not expressed at the time of its failure to provide the witnesses. It contends that the employer may not refuse to provide relevant information to the union on the grounds that the claims are being pursued through the grievance process and in state court. The union requests the Commission to reverse the order of dismissal, and to direct the employer to answer the amended complaint.

The employer requests the Commission to strike the union's appeal brief because of untimely service on the employer. In the

alternative, the employer requests the Commission to reject the appeal brief, and affirm dismissal of the case. The employer argues that the duty to share information does not encompass compelling witness testimony at a contractual grievance hearing and that it did not violate its duty when it declined to compel managerial witnesses to testify and to submit to cross-examination in such a hearing. It argues that the dispute involves a contractual procedure outside the Commission's jurisdiction, and contends that it did not condition bargaining on a non-mandatory subject.

DISCUSSION

Service of the Union's Appeal Brief

WAC 391-08-120 requires a party which files or submits papers to the Commission to serve a copy of the papers upon all counsel and representatives of record. WAC 391-08-120(3) states, "Service shall be completed no later than the day of filing," and lists several methods by which service may be effected, and when service would be regarded complete. WAC 391-08-120(3)(a) states, "Service may be made personally, and shall be regarded as completed when delivered in the manner provided in RCW 4.28.080."

The employer argues that it did not receive a copy of the union's appeal brief on September 16, 1999, the date of the filing of the brief with the Commission. An assistant with the union's attorney is alleged to have told the employer that a messenger slipped the brief under the locked door 12 minutes after the employer's office closed for the day at 4:30 p.m. The employer claims its attorney did not see a brief until one was faxed on September 28, 1999, 12 days after the original due date.

WAC 391-08-003 requires a liberal construction of the rules to "effectuate the purposes and provisions of the statutes administered by the agency," considering the policy of the state "being primarily to promote peace in labor relations. The rule allows the Commission to waive any requirement of the rules when such a waiver effectuates the purposes and provisions of the applicable collective bargaining statute. Mason County, Decision 3108 (PECB, 1991). Waiver is not appropriate when a party shows it would be prejudiced by such a waiver.

The Commission has been more stringent with the time requirements to file complaints and appeals than it has briefs. See, e.g., Spokane School District, Decision 5647-B (PECB, 1996); Valley Communications Center, Decision 6097-A (PECB, 1998); City of Richland, Decision 6120-C (PECB, 1998); Puget Sound Educational Service District, Decision 5126-A (PECB, 1996); City of Tacoma, Decision 5634-B (PECB, 1996); King County, Decision 5720-A (PECB, 1997). Timeliness of complaints is intricately bound to the violation itself under RCW 41.56.160. If the Commission were to accept late filings or late service of either complaints or appeals, other parties would normally be prejudiced.

The statutory requirement on the service of briefs, however, is different. The Administrative Procedure Act, specifically RCW 34.05.437, requires only that a party filing a brief with an agency serve a copy on all other parties. While the rules and procedures are set forth for a reason and are not to be disregarded, the Commission has yet to consider the postponement of the service of a brief to be cause for dismissal of the case. In this case, service would have been complete if the messenger had merely dropped the package in the U.S. Mail on the day of filing, even if that occurred after 4:30 p.m. The employer has not indicated that

it suffered any prejudice, and we find waiver of the service requirements to be appropriate.

The Jurisdiction of the Commission

The Commission's unfair labor practice jurisdiction is defined by Chapter 41.56 RCW, which establishes the Commission as the forum for implementing the legislative goal of peaceful labor-management relations in public employment. City of Yakima v. International Association of Fire Fighters, Local 469, 117 Wn.2d 655 (1991). Under this chapter, aggrieved parties may bring complaints to the Commission if they believe their rights have been violated. Public Employment Relations Commission v. City of Kennewick, 99 Wn.2d 832 (1983). Because Chapter 41.56 RCW is remedial in nature, its provisions are to be liberally construed to effect its purpose. Public Utility District No. 1 of Clark County v. Public Employment Relations Commission, 110 Wn.2d 114 (1988). Additionally, the courts of this state give great deference to Commission decisions, and to the Commission's interpretation of the collective bargaining statutes. Kennewick, supra; City of Bellevue, Decision 3085-A (PECB, 1989), affirmed, 119 Wn.2d 373 (1992).

The name "Public Employment Relations Commission" is sometimes interpreted as implying a broader scope of authority than is actually conferred upon the agency by statute. The Commission's jurisdiction is limited to the resolution of collective bargaining disputes between employers, employees, and unions. The agency does not have authority to resolve each and every dispute that might arise in public employment. The Commission has jurisdiction in this case to determine and rule on whether the union's allegation that the employer has violated its statutory duty to bargain under Chapter 41.56 RCW states a cause of action.

The Duty to Provide Information

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

> Collective bargaining" means ... 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.]

That definition is patterned after the National Labor Relations Act (NLRA). Decisions construing the National Labor Relations Act are persuasive in interpreting similar provisions of RCW 41.56. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1981).

Under both federal and state law, the duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432 (1967); City of Bellevue, Decision 3085-A (PECB, 1989), affirmed, 119 Wn.2d 373 (1992). In Acme, the Court strongly endorsed requiring the employer to supply information to the union which would aid the union in "sifting out unmeritorious claims" in the grievance process.[2]

The courts and the NLRB use a discovery-type standard to determine relevancy of the requested information:

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[2] See, Pasco School District, Decision 5384-A (PECB, 1996).

> [T]he goal of the process of exchanging information is to encourage resolution of disputes, short of arbitration hearings, briefs, and decision so that the arbitration system is not "woefully overburdened".

Pennsylvania Power and Light Company, 301 NLRB 1104 (1991) at p. 1105, citing NLRB v. Acme Industrial Co., supra, at 438.

The obligation extends not only to information that is useful and relevant for the purpose of contract negotiations, but also encompasses information necessary to the administration of the collective bargaining agreement. Requested information necessary for arguing grievances under a collective bargaining agreement, including that necessary to decide whether to proceed with a grievance or arbitration, must be provided by an employer. Albertson's, Inc., 310 NLRB 1176 (1993).[3]

The requesting party must demonstrate more than an abstract, potential relevance of the requested information, and must show that the information is actually relevant.[4] Thus, the National Labor Relations Board (NLRB) has held that an employer is not obligated to comply with a union's request for information when the only justification is "in order ... to fulfill its responsibilities as collective bargaining representative".[5] The duty turns upon the circumstances of the particular case, but a union's bare assertion that it needs information to process a grievance does not automati-

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3 In describing the employer's duty to furnish information, the United States Court of Appeals for the Fifth Circuit has said that the duty "continues ... so far as it is necessary to enable the parties to administer the contract and resolve grievances **or disputes**". Sinclair Refining Company v. NLRB, 306 F.2d 569 (5th Cir., 1962).

4 San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 94 LRRM 2923 (CA 9, 1977).

5 Tyson Foods, 311 NLRB 552 (1993).

cally oblige the employer to supply all the information in the manner requested.[6]

Application of the Legal Standards

Persuasive NLRB Precedent -
The issue of supplying witnesses at grievance hearings has not directly come before the Commission. The National Labor Relations Board, however, has decided cases with closely similar facts:

- In Anheuser-Busch, Inc., 237 NLRB 982 (1978), the NLRB affirmed its adherence to the principles of NLRB v. Acme Industrial Co., supra, that an employer has a "general obligation" to furnish a union, upon request, information relevant and necessary to the proper performance of its duties as bargaining representative. The NLRB dismissed the complaint, however, finding that witness statements were fundamentally different from the types of information contemplated in Acme. The NLRB stated that disclosure of witness statements involves critical considerations which do not apply to requests for other types of information, and declined to require an employer to provide a union with statements obtained during the course of an employer's investigation of employee misconduct. In doing so, the NLRB stated, "Requiring prearbitration disclosure of witness statements would not advance the grievance and arbitration process." The NLRB stated, "[R]equiring either party to a collective bargaining

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[6] Detroit Edison Co. v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979). On the other hand, where the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out, an employer may be obligated to furnish the requested information. Beverly California Corporation, 310 NLRB 222 (1993).

relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the grievance and arbitration process."

- In Whirlpool Corp., 281 NLRB 17, 23 (1986), the NLRB affirmed an administrative law judge's determination that found a parallel between handing over a written statement, as in Anheuser-Busch, and handing over an employee to make a written or oral statement. The Board agreed that the employer's failure to produce a witness at hearings did not violate its duty to furnish information.

The union argues that Whirlpool Corp. did not involve similar factual circumstances or legal issues found in the case at hand. The union distinguishes that case, claiming the NLRB relied on a past practice issue, not present in this case. The past practice issue in Whirlpool, however, appears to have little to do with the issue of the duty to provide information, and more with the unilateral change issue that was present in that case. In addition, the past practice issue was simply one matter that the NLRB dealt with in that case and the NLRB's decision was not dependent upon the issue.

The union also argues that the decision in Whirlpool depended upon the union's request for witnesses prior to the contractual time for their appearance at hearing, and argues that in the case at hand, it requested the presence of witnesses at the contractually mandated time for witnesses to appear. The union's argument is unpersuasive. Both Whirlpool and the case before us involve prearbitration procedures. The administrative law judge and the NLRB do not appear to have based their decisions purely on the request for access to witnesses being made prior to the

contractually mandated hearing. The NLRB case outcome was more dependent upon the inherent parallel between handing over a written statement (the facts found in Anheuser-Busch, Inc.) and handing over an employee to make a written or oral statement (the facts in Whirlpool and the case at hand). In Whirlpool, the NLRB essentially extended the "written statement" exception to the information obligation. The union thus misses the point. Whirlpool Corp. stands for the proposition that the employer's failure to produce a witness did not violate the duty to furnish information.

The obligation of the employer to provide information to the union arises from a determination that the union needs information to represent members of the bargaining unit. Under Acme Industrial, supra, the union only needs to show that the information is probably relevant to the union's need to represent its members. In this case, a requirement to provide witnesses would not provide the necessary opportunity for the union to show that the specific information to be procured is probably relevant prior to the information being provided.

Persuasive Commission Precedent -

As interpreted by the Commission, the duty to provide information has never encompassed the type of circumstances that would be inherent in a duty to supply witnesses at grievance hearings. Supplying witnesses at hearings would be qualitatively and substantially different from providing other information. An order for the employer to supply witnesses would involve those witnesses' availability for cross-examination and involve the witnesses in a dispute. The duty to provide information has never involved a requirement that the party, in addition to providing the information, justify it, explain it, or respond to extensive questions about the content, and the like.

In Seattle School District, Decision 5542-C (PECB, 1997), the employer might have been excused for its failure or refusal to supply witness statements and student complaints. A violation was found, mainly because of the employer's blanket refusal to provide the union with any of the requested information, and its failure to share and negotiate about concerns that constituted the unfair labor practice. In that case, the witness statements had already been procured and documents were in existence. The requested information was inferred to be probably relevant to the union's need to represent its members. The requested information would have been helpful to the union to potentially "sift out unmeritorious claims" before a grievance was filed, or to otherwise work with the employer on related issues to attempt to resolve disputes. In addition, the union received no response to early requests for information.

The NLRB has also found an employer was obligated to furnish requested names and addresses of witnesses. See, Transport of New Jersey, 233 NLRB 101 (1977). Those cases are inapposite, however. The case at hand involves witness testimony.

Allegations of Placement of Impermissible Conditions -
The union alleges the employer has conditioned bargaining on a permissive subject of bargaining and conditioned the resolution of the union's grievance on the grievant's decision to pursue an individual lawsuit. That the claims were being pursued through the grievance process and in state court, however, has no bearing on our decision in this case. The facts as alleged simply do not show that the employer has conditioned access to witnesses and information on agreement to a permissive, and illegal subject of bargaining, or that the employer has undermined the union's representational status conditioning access to witnesses and information on

an individual employee's decision concerning his statutory rights. As the Executive Director stated in the order of dismissal, the union retains the right to control the processing of the grievance.

Contract Violations Not Subject to Commission's Jurisdiction

The union's argument itself clearly identifies the issue in this case. In contrasting Whirlpool Corp., supra, with the case at hand, it states, "The agreement here provides for an actual hearing before a panel of decision-makers, which in many instances may be the final adjudication of the grievance." Union's brief, p. 6. It thus clearly refers to a separate legal matter, enforcement of the collective bargaining agreement, rather than to a duty to bargain or a duty to provide information.

The essence of the union's complaint involves a dispute concerning the application of the steps of the grievance procedure contained within the collective bargaining agreement, Article 12, Section 7. The union asks the Commission to require the employer to fully participate in the hearing on the grievance, including making the requested witnesses available to testify. We note that Article 12, Section 7 (C) of the parties' collective bargaining agreement makes reference to the organization of the hearing panel to which the allegations in this case refer, the panel's jurisdiction and its duty toward witnesses. That provision states in part:

> The Panel shall have, except as otherwise provided, jurisdiction for the duration of the grievance.... The County shall, when requested by the Panel and when practicable, make employees available as witnesses without loss of pay.

Thus, the union is asking the Commission to enforce the contract. As the Executive Director stated in the order of dismissal, the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, supra. Enforcement of contracts are matters properly subject to the jurisdiction of the courts. Thurston County Communications Board, supra. The allegations do not state a cause of action before the Commission.

NOW, THEREFORE, it is

ORDERED

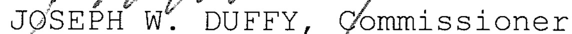
The order of dismissal issued in the above-captioned matter is AFFIRMED.

Issued at Olympia, Washington, on the 14th day of December, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner



JOSEPH W. DUFFY, Commissioner

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RECORD OF SERVICE

THE ATTACHED DOCUMENT, IDENTIFIED AS: DECISION 6772-A - PECB HAS BEEN SERVED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION BY DEPOSIT IN THE UNITED STATES MAIL, ON THE DATE ISSUED INDICATED BELOW, POSTAGE PREPAID, ADDRESSED TO THE PARTIES AND THEIR REPRESENTATIVES LISTED IN THE DOCKET RECORDS OF THE COMMISSION AS INDICATED BELOW:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ BETTY PASSMORE

CASE NUMBER: 14420-U-99-03572 FILED: 03/01/1999 ISSUED: 12/14/1999

FILED BY: PARTY 2 DISPUTE: ER GOOD FAITH DETAILS: Er. refuses to provide witnesses for arb. hrg.

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