STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION LOCAL 597,	)	
Complainant,	)	CASE 15733-U-01-3989
vs.	)	DECISION 7506 - PECB
KING COUNTY,	)	ORDER DENYING MOTION FOR DISMISSAL
Respondent.	)	

Frank Rosen Freed Roberts LLP, by *Jon Howard Rosen*, Attorney at Law, for the complainant.

Norm Maleng, King County Prosecuting Attorney, by *Peter Rufatto*, Senior Deputy Prosecuting Attorney and *Susan Slonecker*, Senior Deputy Prosecuting Attorney, for the respondent.

This case is before the Examiner for a ruling on a motion for dismissal filed by the employer, seeking deferral to an arbitration award previously issued on a related grievance. The motion is DENIED.

BACKGROUND

On March 22, 2001, Amalgamated Transit Union, Local 587 (union) filed a complaint charging unfair labor practices with the Commission under Chapter 391-45 WAC, alleging that King County (employer) had interfered with employee rights and discriminated against Mike Rochon, an employee within a bargaining unit represented by the union whose employment had been terminated in

September of 2000 for alleged misuse of employer-owned computers. A preliminary ruling was issued under WAC 391-45-110, finding a cause of action to exist on allegations summarized as:

> Employer interference with employee rights and discrimination in violation RCW 41.56.140(1) by its termination of Mike Rochon in reprisal of his union activities protected by Chapter 41.56 RCW.

The employer filed a timely answer to the complaint, and the matter was assigned to Examiner J. Martin Smith for further proceedings under Chapter 391-45 WAC.

Separately, the union filed and pursued a grievance under the parties' collective bargaining agreement. That grievance was eventually submitted to final and binding arbitration. The resulting arbitration award reinstated Rochon, on the basis that the termination of his employment violated the "just cause" standard set forth in the parties' collective bargaining agreement. The arbitration award was issued on May 29, 2001.

On August 7, 2001, the employer filed a motion with the Examiner, seeking dismissal of the unfair labor practice case on the basis that the arbitration award was *res judicata* on the matter. The union opposed that motion in a brief filed on August 24, 2001. The employer filed a reply brief on August 30, 2001.

DISCUSSION

Although couched as a "motion for dismissal" and citing a common law principle, the employer essentially asks the Examiner to defer to the arbitration award which resulted from the grievance arbitration process conducted under the parties' collective

bargaining agreement. Far from being novel or unusual, deferral to arbitration is controlled by a long line of Commission precedents recently codified in a Washington Administrative Code (WAC) rule. Those authorities require rejection of the employer's motion in this case.

Early in its history, the Commission ruled that deferral to arbitration is a matter of policy (rather than a matter of law), and that agreements between parties cannot restrict the jurisdiction of the Commission. *City of Seattle*, Decision 809-A (PECB, 1980). The Commission reviewed and restated its policies on deferral to arbitration in *City of Yakima*, Decision 3564-A (PECB, 1991), where the type of case appropriate for deferral was narrowly defined:

> This Commission has taken a conservative approach, limiting "deferral" to situations where an employer's conduct at issue in a "*unilateral change*" case is arguably protected or prohibited by an existing collective bargaining agreement. . . . The goal of "deferral" in such cases is to obtain an arbitrator's interpretation of the labor agreement, to assist this Commission in evaluating a "waiver by contract" defense which has been or may be asserted in the unfair labor practice case.

(emphasis added).

Thus, deferral is only appropriate in "unilateral change" unfair labor practice cases, where the legislative policy favoring arbitration set forth in RCW 41.58.020(4) can be implemented by leaving interpretation of the contract to an arbitrator.[1]

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[1] The Commission outlined the following further pre-conditions for "deferral" in *City of Yakima*: (1) The existence of a contract; (2) an agreement to accept an arbitration award as "final and binding"; and (3) no dispute between the parties concerning arbitrability.

In *City of Yakima*, the Commission stated that deferral is not a method by which respondents can avoid determinations as to whether they committed an unfair labor practice. As a discretionary (rather than mandatory) policy, deferral is ordered only where it can be anticipated that the delay in processing of an unfair labor practice case will yield an answer to the question that is of interest to the Commission in resolving the unfair labor practice case. In addition, the Commission has the authority to refuse to defer to arbitration any unfair labor practice case, and may interpret any collective bargaining agreement to the extent necessary to decide a pending unfair labor practice case. *See City of Wenatchee,* Decision 6517-A (PECB, 1999).

After the deferral policy set forth in *City of Yakima* stood without change for several years, and was cited in numerous cases, the Commission codified that policy in WAC 391-45-110, as follows:

> WAC 391-45-110 DEFICIENCY NOTICE--PRELIMINARY RULING--DEFERRAL TO ARBITRATION. The executive director or a designated staff member shall determine whether the facts alleged in the complaint may constitute an unfair labor practice within the meaning of the applicable statute.
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> . . .
>
> (3) The agency may defer the processing of allegations which state a cause of action . . . pending the outcome of related contractual dispute resolution procedures, but shall retain jurisdiction over those allegations.
>
> (a) Deferral to arbitration *may be ordered where:*
>
> *(i) Employer conduct alleged to constitute an unlawful unilateral change* of employee wages, hours or working conditions is arguably protected or prohibited by a collective bargaining agreement in effect

> between the parties at the time of the alleged unilateral change; . . .
>
> (emphasis added.)

Allegations concerning interference with the statutory rights of employees or concerning discrimination for union activities are not deferrable. It follows that an arbitration award addressing such issues cannot displace unfair labor practice proceedings on a complaint alleging that an employer has acted in a retaliatory manner. An arbitrator's authority is exclusively drawn from the terms of a collective bargaining agreement; an arbitrator does not have any authority, either express or implied, to interpret or enforce the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

In the present case, the arbitrators reviewed some 80 pages of briefs filed by the parties after a four-day hearing. The termination of Rochon was reduced to a suspension under the "just cause" standard, but the arbitration award also addressed statutory claims advanced by the union, saying:

> The union concedes it bears the burden of proof on this allegation of what would be unlawful Employer conduct. In the end, however, I cannot find that the Union met its burden.

It is self-evident that the arbitration proceedings did not involve an alleged unilateral change of employee wages, hours or working conditions; the arbitration award did not resolve whether the employer's actions were substantially based on an anti-union animus;[2]

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[2] Rather than the "just cause" test applied by arbitrators under collective bargaining agreements, the Commission applies a "substantial motivating factor" test adapted from *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991), *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991), when evaluating "discrimination" claims.

the arbitration award did not authoritatively interpret or enforce RCW 41.56.140(1).[3]

NOW, THEREFORE, it is

ORDERED

The motion for dismissal filed by King County in the above-captioned matter is DENIED.

Issued at Olympia, Washington, on the 18th day of September, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner

[3] RCW 41.56.160(1) vests the Commission with authority to determine and remedy unfair labor practices.