STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
KING COUNTY PROSECUTING ATTORNEYS ASSOCIATION	)	CASE 9879-E-92-1626
	)	DECISION 4253 - PECB
Involving certain employees of:	)	
	)	ORDER ON MOTION FOR
KING COUNTY	)	SUMMARY JUDGMENT
	)	
	)	

Aitchison, Hoag, Vick and Tarantino, by James M. Cline, Attorney at Law, appeared for the petitioner.

Norm Maleng, Prosecuting Attorney, by Richard Holmquist, Chief Civil Deputy, appeared for the employer.

Pamela G. Bradburn, General Counsel, appeared for the incumbent intervenor, Washington State Council of County and City Employees.

On July 7, 1992, the King County Prosecuting Attorneys Association (KCPAA) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking to represent certain attorneys employed in the office of the King County Prosecuting Attorney. The Washington State Council of County and City Employees (WSCCCE) was granted intervention in the proceedings, on the basis of its status as the incumbent exclusive bargaining representative of the petitioned-for employees. A pre-hearing conference was conducted by a member of the Commission staff, by telephone conference call, on September 3, 1992. A statement of results of the pre-hearing conference issued on September 4, 1992 indicates that the WSCCCE sought to raise issues concerning the timeliness of the petition and the qualification of the petitioner for certification as an exclusive bargaining representative under the statute. There were no objections or proposed corrections to the pre-hearing statement, but counsel for the KCPAA objected to the issues raised by the WSCCCE in a letter to the

Executive Director filed on September 8, 1992. Counsel for the WSCCCE responded in a letter dated September 11, 1992, asserting that the issues were factual in nature, and that a hearing was necessary. On September 25, 1992, the KCPAA filed a motion for summary judgment, together with supporting affidavits. Written arguments were filed by both parties, and the case has been transferred to the Executive Director for a ruling on that motion.

DISCUSSION

The Purported "Contract Bar" Claim

RCW 41.56.070 precludes the processing of a petition for investigation of a question concerning representation while there is a valid collective bargaining agreement in effect, except where a petition is filed during the "window" period not more than 90 nor less than 60 days prior to the expiration date of the contract. It is undisputed here that the last full collective bargaining agreement between the employer and the WSCCCE expired on December 31, 1991, and that those parties were engaged in contract negotiations up to the filing of the representation petition in this matter.

The WSCCCE argued at the pre-hearing conference that the contract which ended December 31, 1991 was extended by the parties, and remained in effect on July 7, 1992, when the petition in this case was filed. Although the WSCCCE has not provided the Commission with a copy of the extension agreement on which its claim at the pre-hearing conference was based, counsel for the KCPAA has made reference to earlier correspondence in which the employer and WSCCCE acknowledged that the employer would continue to abide by the terms of the expired contract. No party has suggested that there was an extension agreement for a specific term. The WSCCCE provided no additional factual claims or legal arguments on this issue in response to the motion for summary judgment.

Upon close examination, the "contract bar" claim advanced by the WSCCCE is found to be insufficient to warrant a hearing or further consideration in this case. In the absence of specific reliance on a written contract having a fixed term more than 90 days after its execution, any contract extension that may have been signed by the employer and WSCCCE pending completion of their contract negotiations could not be sufficient to constitute a "contract bar" under RCW 41.56.070 and Commission precedent interpreting that provision.

The National Labor Relations Board (NLRB) established the "contract bar" doctrine by decisional precedents. In order to stabilize employer-union relationships, the general right of employees to choose their bargaining representatives is limited to a specific "window" of time in the contract cycle. To bar a petition, however, a contract must be in writing, must be executed by both parties, must be clearly identifiable as a controlling document, and must contain substantial terms and conditions of employment. The contract must also have a definite duration if it is to serve as a bar to an election under NLRB precedent.[1] Our Legislature paraphrased the NLRB's precedents in incorporating the "contract bar" doctrine into RCW 41.56.070. The Commission and courts have had occasion to develop the policy in subsequent cases.

The Supreme Court of the State of Washington has effectively engrafted a "written contract" requirement onto the RCW 41.56.070 "contract bar" provision. In State ex. rel. Bain v. Clallam County, 77 Wn.2d 542 (1970), the Supreme Court held that **all** collective bargaining agreements signed under Chapter 41.56 RCW must be in written form, in order to preserve an accurate record of the public's business.

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[1] This requirement dates back to at least Pacific Coast Association of Pulp & Paper Mfrs., 121 NLRB 990 (1958), which is among multiple "contract bar" cases decided by the NLRB at that time. This requirement was restated at least as recently as Cind-R-Lite Co., 239 NLRB 1255 (1979).

The petitioner aptly cites West Valley School District, Decision 2913-B (PECB, 1988), and Mabton School District, Decision 2419 (PECB, 1986) as Commission precedent applicable here. The parties in Mabton decided to extend a two-year agreement by signing a two-year "extension". The Commission held that a petition filed during what would have been the "window period" of the original contract was timely, notwithstanding the extension agreed to by the parties. The theory was that when an employer and union sign a contract, statutory rights are created on behalf of **third parties** (e.g., employees who might seek to decertify the union, and rival labor organizations who might seek to represent the bargaining unit). The West Valley decision extended the analysis to exclude operation of the "contract bar" doctrine in situations where the contracting parties foreshorten or eliminate the "window" period by failing to set the contract's expiration date more than 90 days after the contract is signed.

The WSCCCE was not forthcoming with details of its "contract bar" claim during the telephonic pre-hearing conference held in this case, and it has never asserted that its "contract bar" claim is supported by a contract for a fixed term. A contract extension signed for the period "until a new contract is finalized" (or words to similar effect) may be entirely lawful, and may be valuable to its parties. Certainly, it will keep contract provisions in effect between the parties to the original contract. It will not, however, operate as a "contract bar" under RCW 41.56.070.

Status as a Labor Organization Under RCW 41.56.030(3)

An "exclusive bargaining representative" gains a special status under RCW 41.56.080, as follows:

> RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION. The bargaining representative which has been determined to represent a **majority of the**

> **employees in a bargaining unit** shall be certified by the commission as the exclusive bargaining representative of, and shall be **required to represent, all the public employees within the unit without regard to membership in said bargaining representative ...** [Emphasis by **bold** supplied.]

The statute makes reference to "labor organizations", but RCW 41.56.030(3) defines "bargaining representative" broadly, as follows:

> As used in this chapter:
>
> ...
>
> (3) "Bargaining representative" means **any lawful organization** which has as **one of its primary purposes** the representation of employees in their employment relations with employers. [Emphasis by **bold** supplied.]

That provision of state law is not a precise quotation of the counterpart provision of the federal law, but a review of the history of both the federal and state provisions is instructive in making a determination on the issues raised in this case.

As enacted in 1935, the National Labor Relations Act (NLRA or "Wagner Act") defined "labor organization" broadly, as follows:

> Sec. 2. When used in this Act -
>
> ...
>
> (5) The term "labor organization" means **any organization** of any kind, or any agency or employee representation committee or plan, in which **employees participate** and which exists for the **purpose, in whole or in part, of dealing with employers** concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. [Emphasis by **bold** supplied.]

Some 230 major legislative changes were proposed to the NLRA in the next 12 years, including stricter controls over unions and tighten-

ing of union legal obligations and responsibilities. No major alterations were adopted, however. During that period, union membership grew from 3 million to 15 million employees.[2]

The Labor Management Relations Act of 1947 (LMRA or "Taft-Hartley Act") was enacted over the objections of organized labor.[3] While the definition of "labor organization" was not changed, the LMRA added Sections 9(f), (g) and (h) to the NLRA,[4] clearly moving the federal government into the arena of regulating internal union affairs:

Section 9(f) required unions to file information with the Secretary of Labor, including copies of their constitutions and bylaws, identification of principal places of business, salaries of officers, election methods, dues structure, and initiation fees. Detailed financial accounting was required.

Section 9(g) prohibited certification of unions to represent employees and processing of their unfair labor practice charges, if their reporting under Section 9(f) was incomplete.

Section 9(h) excluded unions from the benefits of the NLRA unless their officers filed non-Communist affidavits once a year.

The involvement of the federal government in internal union affairs was further increased by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or "Landrum-Griffin Act").[5] That

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[2] Morris, The Developing Labor Law, BNA Books, Second Edition, page 35.

[3] Indeed, President Truman vetoed the bill on June 20, 1947. Congress overrode the veto by votes of 68 to 25 in the Senate and 331 to 83 in the House.

[4] Sections 9(f), (g) and (h) were repealed by the Landrum-Griffin Act in 1959. See, infra.

[5] Corruption within organized labor had been disclosed by hearings held in 1957 before the Senate Committee on Improper Activities in Labor-Management Relations, chaired by Senator McClellan.

statute covered an even broader range of labor organizations than the LMRA, and defined "labor organization" as follows:

> Sec. 3. For the purposes of Titles I, II, III, IV, V (except section 505), and VI of this Act --
> ...
> (i) "Labor organization" means *a labor organization engaged in an industry affecting commerce and includes* any organization of any kind, any agency, or employee representation committee, *group, association*, or plan *so engaged* in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, *and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.*

[*Italics* denote major additions to NLRA definition.]

Title I of the LMRDA sets forth a "bill of rights" for union members, including giving all union members equal rights in the internal political affairs of the union, freedom of speech and assembly, member involvement in setting of union dues and fees, protection of the right of employees to sue, safeguards on union disciplinary actions, entitlement of employees to copies of collective bargaining agreements covering their employment, and a right of members to information about the Landrum-Griffin Act. Replacing the limited federal scrutiny of union affairs which had been contained in Sections 9(f), (g) and (h) of the Taft-Hartley Act, Title II of the LMRDA required filing of union constitutions and bylaws with the Secretary of Labor, together with reports on union offices, fees, officers, and financial affairs. Title II imposed an obligation on employers to report payments made to union officials, as well as expenses incurred to oppose organizational activities. Title III regulated union trusteeships, while Title IV regulated the terms and election of union officers. Title V

imposed fiduciary obligations on union officials, required that they be bonded, prohibited Communists and felons from holding union office, and outlawed payments between employers and union officials in a variety of situations. Title VI dealt with administration of the law and other miscellaneous provisions. Title VII of the LMRDA then went on to make a number of amendments to the NLRA, none of which is relevant here.

The enactment of Chapter 41.56 RCW came in 1967, against the background of 30+ years of developments in the federal law. The use of a broad definition in RCW 41.56.030(3) parallels the Wagner Act, while the absence of any provisions regulating internal union affairs strongly distinguishes the state law from both the Taft-Hartley Act and the Landrum-Griffin Act. Chapter 41.56 RCW has been amended on a number of subsequent occasions, but the definition of "bargaining representative" remains as originally enacted in 1967, and no "reporting and disclosure" provisions have ever been added to the statute.

Chapter 41.56 RCW was administered by the Department of Labor and Industries (L&I) from the time of its enactment until December 31, 1975.[6] During that time, L&I saw fit to adopt an administrative rule purporting to regulate at least some internal union affairs:

> WAC 296-132-065 LABOR ORGANIZATION, LAWFUL ORGANIZATION. In order to qualify as Labor Organization as referred to in RCW 41.56.010, or Lawful Organization as referred to in RCW 41.56.030, any organization:
>
> (1) Upon request by the authorized agent, or any party of interest, must produce authentic records of how, when, and by whom the organization was formed.
>
> (2) Must have a constitution and/or bylaws which plainly show the purpose of the organization is consistent with the require-

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[6] The transfer of jurisdiction to the Public Employment Relations Commission took effect on January 1, 1976.

> ments of the Act and is available to all members.
>
> (3) The constitution and/or by-laws must provide:
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> (a) An approved method of nomination and election of officers in accordance with parliamentary procedure, for terms not to exceed four years.
>
> (b) An approved method of financial record-keeping and a financial audit at least once a year, which is made available to all members.
>
> (c) That at least four regular meetings must be held each year with adequate notice of same to all members.
>
> (d) That a specific minimum number of members must be present to form a quorum before any organization business may be transacted.

Some of the history behind that rule was recited in Franklin Pierce School District, Decision 78 (PECB, 1976).[7] The requirements of the L&I rule paralleled some, but certainly not all, of the requirements imposed on unions by the Landrum-Griffin Act. There was no citation of any basis for those requirements within the state statute, however.

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[7] That decision states:

> The "Declaration of Purpose" of the Act (RCW 41.56.010 states its intent to implement "... the right of public employees to join labor organizations of their own choosing and to be represented by such organizations..." The first occasion on which a question was raised as to whether or not an organization was a "labor organization" under the Act, was in 1967. A final decision by Mr. Harold J. Petrie, then Director of the Department of Labor and Industries, ruled that Public School Employees of Washington did not qualify because of the contents of their Constitution and Bylaws. [Citation omitted.] Emergency rules were put into effect shortly thereafter and were made permanent on April 10, 1970.

Upon assuming responsibility for the administration of Chapter 41.56 RCW in January of 1976, the Public Employment Relations Commission adopted all of the L&I rules for 90 days on an "emergency" basis, as Chapter 391-20 WAC. WAC 296-132-065 became WAC 391-20-065. A blanket re-adoption of the L&I rules was made in April of 1976, also on an "emergency" basis. When those rules came up for re-adoption in June of 1976, however, the Commission made changes which reflected its own understanding of the law. In particular, WAC 391-20-065 was not re-adopted, and thus expired in July of 1976, at the end of its second "emergency" adoption.

The one Commission case in which WAC 391-20-065 is known to have had some involvement arose when an independent organization sought a severance of office-clerical employees from a larger bargaining unit in the Franklin Pierce School District. That petition was dismissed by an authorized agent of the Commission in May of 1976, citing WAC 391-20-065. Franklin Pierce School District, Decision 78, supra. On appeal, the Commission remanded the case for hearing. Franklin Pierce School District, Decision 78-A (PECB, 1976). The decision resulting from that hearing noted that the statute only required a petitioning organization to be a "prospective" bargaining representative, and so avoided any deficiency that may have existed in the independent organization's documentation at the time the original petition was filed. Franklin Pierce School District, Decision 78-B (PECB, 1977). The Commission affirmed in Franklin Pierce School District, Decision 78-D (PECB, 1977). The practical effect of the "prospective" interpretation is that an organization has until the close of the hearing on its representation petition to establish that it is qualified for certification as an exclusive bargaining representative under the statute.[8]

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[8] A stipulation or ruling on the "qualified for certification" issue is a condition precedent to determining any question concerning representation by election or cross-check. The hearing is the last opportunity to produce evidence in a representation case.

In subsequent cases, the Commission has taken only a very limited role in scrutinizing the internal affairs of labor organizations. Southwest Washington Health District, Decision 1304 (PECB, 1981) implemented the "prospective" interpretation made earlier, and permitted an organization to qualify for certification based on relatively minimal documents amended after the petition was already on file. Kitsap County, Decision 2116 (PECB, 1984) reiterated that there is no requirement in Chapter 41.56 RCW or in the Commission's rules that a labor organization have a constitution, bylaws, or any particular level of formality. Quillayute Valley School District, Decision 2809 (PECB, 1987) stands out as a case in which the evidence failed to disclose that an "organization" had ever been formed, as distinguished from the actions of individuals.[9]

The refusal of the WSCCCE to stipulate that the KCPAA is an organization qualified for certification as exclusive bargaining representative would normally be a basis to send this case to hearing. At such a hearing, the KCPAA would be put to its proof as to its existence as a lawful organization and its primary purposes, and it would have an opportunity to demonstrate that it had cured any defects concerning its compliance with the statutory definition of "bargaining representative". Against the background of the foregoing statutory, rule and case precedents, three determinations are called for in response to the parties' arguments on the motion for summary judgment in this case.

Status as "Lawful Organization" -

Arguments about frivolous claims and delay tend to obscure the fact that there has been an absence of detailed arguments forthcoming from the WSCCCE in this case. The Statement of Results of Pre-Hearing Conference reflects that the KCPAA accused the WSCCCE of

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[9] The one aspect of WAC 296-132-065 and WAC 391-20-065 which appears to have had some statutory basis was the requirement that the organization be able to prove "how, when and by whom it was formed".

designed delay during that procedure, and that allegation was reiterated in the letter written by counsel for the KCPAA on the following day. That letter went on, however:

> As to the "labor organization" objection, **[the WSCCCE's] lawyer refused to indicate any facts in support of her contention** that the KCPAA was not a labor organization. I pointed out at the conference that the association was a duly incorporate [sic] entity.

Copies of the KCPAA's certificate of incorporation and articles of incorporation were supplied with that letter.[10]

The WSCCCE asserted that the issues were "factual, not just legal" in its letter dated September 11, 1992, but still no specifics were indicated. Apart from taking exception to the allegation of delay, the WSCCCE acknowledged that it already had a copy of the KCPAA's articles of incorporation.

The motion for summary judgment filed on September 25, 1992 led to the setting of a 14-day period for a response from the WSCCCE. When the WSCCCE requested an extension, the KCPAA returned to its "frivolous/delay" allegations in a formal response and affidavit filed on October 12, 1992. Of importance here, the KCPAA again alleged that the WSCCCE had refused to provide any facts in support of its contention that the KCPAA was not a labor organization.

Having been challenged on at least three occasions to detail its factual claims, the WSCCCE's response to the motion for summary judgment did not contest that the KCPAA has filed articles of incorporation, or that the Secretary of State has issued a certificate of incorporation. Leaving administration of the laws

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[10] The existence of the rule governing summary judgment was noted, at that time, but that rule was not specifically invoked by the petitioner.

on corporations to the Secretary of State, there is no room for debate before the Commission as to whether the KCPAA is within "any lawful organization" as that term is used in RCW 41.56.030(3). The WSCCCE's claim is thus insufficient to warrant a hearing.

Regulation of Internal Union Affairs -
The WSCCCE contends that the standards used by the Commission in Southwest Washington Health District, supra, are insufficient to protect employee rights, as a matter of law, and it seeks to raise several factual issues related to that contention. While the WSCCCE contends that past "unconcern for organizational structure and financial controls should no longer be acceptable", it does not cite any provision of existing statute on which the Commission could, or should, base deeper scrutiny into internal union affairs.

Our Legislature has paraphrased many of the provisions of the Wagner Act and the Taft-Hartley Act in Chapter 41.56 RCW, but it has never enacted any provisions which even remotely resemble the "internal affairs" provisions which were found in Sections 9(f), (g) or (h) of the Taft-Hartley Act, or the provisions which are found today in the Landrum-Griffin Act. The Commission rejected the L&I rule on the subject, evidencing its conclusion that it has no role in the regulation of union "reporting and disclosure".[11] Some regulation of internal union affairs may or may not be appropriate, but that is a matter for the Legislature to decide. It is concluded that, as a matter of law, the "reporting and disclosure" requirements which the WSCCCE would have imposed in this case are not currently available in representation proceedings

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[11] By way of comparison, the NLRB has never been involved in the types of "internal affairs" regulation which were the subject of the L&I rule and which are sought by the WSCCCE here. The "reporting and disclosure" requirements of both the LMRA and LMRDA have provided for administration by U.S. Department of Labor, rather than by the agency making impartial determinations on representation and unfair labor practice disputes (e.g., the NLRB and the Commission).

before the Commission. It follows that the purported "factual" issues which the WSCCCE seeks to litigate in this case are not material to the determination of the case, and that a hearing is not warranted on those claims.

Organizational Purpose -

Status as a "lawful organization" is not sufficient, by itself, to meet the requirements of RCW 41.56.030(3). The organization must also have, "as one of its primary purposes, the representation of employees in their employment relations with employers". The articles of incorporation tendered by the KCPAA in this case have been reviewed for the purpose of ascertaining whether they meet the second of the fundamental requirements of the statute. The only provision material to this question is as follows:

> ARTICLE III.
>
> OBJECTS AND PURPOSES:
> The objects and purposes of the Corporation shall be all lawful pursuits guaranteed under the laws of the State of Washington including, but not limited to, the following:
>
> A. Engaging in collective bargaining for the purpose of improving the wages, hours and working conditions of **King County Prosecuting Attorneys Association members;**
>
> B. The general preservation and improvement of the quality of health, well-being, and life of **employees of the King County Prosecuting Attorneys Association.**
>
> C. Such other purposes as may be defined by the general membership or Executive Board of the King County Prosecuting Attorneys Association.
>
> D. But, not for profit.
>
> [Emphasis by **bold** supplied.]

Two concerns emanate from those provisions: First, nothing indicates that representation of employees is or will continue to be a "primary purpose" of the organization; and Second, the

statutory obligations of an "exclusive bargaining representative" would appear to be ultra vires to the stated purposes of the KCPAA. The first of those is arguably a matter of interpretation or merely a potential future issue which might be overlooked at this juncture. The WSCCCE has raised concerns about the "duty of fair representation" in this case, however, and the second of these concerns is fatal to the motion for summary judgment.

The notions of "exclusive bargaining representative" and "collective bargaining" are tightly intertwined in Chapter 41.56 RCW, just as they are in the NLRA and LMRA. The duty to bargain exists **only** between an employer and the "exclusive bargaining representative" of its employees. RCW 41.56.080. Further, the duty to bargain exists **only** in a bargaining unit that is an appropriate unit for collective bargaining under RCW 41.56.060. South Kitsap School District, Decision 1541 (PECB, 1983). The statute does not provide for "members only" bargaining units, and such units are not found appropriate under RCW 41.56.060. To act as "exclusive bargaining representative" under Chapter 41.56 RCW, the KCPAA would need to fairly **"represent, all the public employees within the unit without regard to membership in said bargaining representative ....** RCW 41.56.080. Although the Commission does not intercede in "duty of fair representation" cases arising exclusively out of disputes concerning contract grievances,[12] the Commission does police its certifications. The Commission has ruled on "duty of fair representation" claims in which the right of an organization to the benefits of certification is called into question by allegations that a union has discriminated against, or otherwise aligned itself in interest against, employees it is certified to represent. City of Redmond (Redmond Employees' Association), Decision 886 (PECB, 1980); Elma School District (Elma Teachers' Organization), Decision 1349 (EDUC, 1982).

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[12] Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982).

The articles of incorporation tendered by the KCPAA in this case appear to conflict with the statutory obligation which it seeks to undertake as "exclusive bargaining representative". It does not matter whether that is inadvertent or intentional,[13] as it casts cloud over the ability of the KCPAA to comply with RCW 41.56.080. While the KCPAA can be regarded as a "prospective" bargaining representative under Franklin Pierce, supra, and may be able to clear up the problems at a hearing in this proceeding, it is not entitled to a summary judgment.

NOW, THEREFORE, it is

ORDERED

1. The motion of the King County Prosecuting Attorneys Association for summary judgment in this matter is DENIED.

2. The matter is remanded for assignment of a Hearing Officer to conduct a hearing in this matter under Chapter 391-25 WAC and this order.

Entered at Olympia, Washington, on the 15th day of December, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

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[13] The same "members only" approach was used by counsel for the KCPAA in the memorandum filed in support of the motion for summary judgment.