STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| TEAMSTERS UNION, LOCAL 313,<br><br>Complainant,<br><br>vs.<br><br>PIERCE COUNTY,<br><br>Respondent. | CASE NO. 6359-U-86-1240<br><br>DECISION 2693 - PECB<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

Hafer, Price, Rinehart and Schwerin, by M. Lee Price, attorney at law, appeared on behalf of the complainant.

William H. Griffies, Prosecuting Attorney, by Richard H. Wooster, Deputy Prosecuting Attorney, appeared on behalf of the respondent.

On April 21, 1986, Teamsters Union, Local 313 filed a complaint charging unfair labor practices against Pierce County. The complaint alleged that the county violated RCW 41.56.140(1) and (4) when it refused to submit a grievance to binding arbitration. A hearing was conducted September 12, 1986 in Tacoma, Washington, before Katrina I. Boedecker. The parties submitted post-hearing briefs.

## BACKGROUND

Pierce County and Teamsters Union, Local 313 had a collective bargaining agreement effective for the period January 1, 1983 through December 31, 1984. The agreement contained the following provisions:

### ARTICLE 16 - GRIEVANCE AND ARBITRATION PROCEDURE

16.1 - Definition. A grievance shall be defined as any dispute arising from the application of this Agreement. Grievances arising from the application of this Agreement relating to any suspension of more than twenty (20) working days, reduction in rank or pay or dismissal for disciplinary reasons shall be subject to the sole jurisdiction of the County's Personnel Review Board.

16.2 - Procedure. If a decision is not returned to the employee within the time limits specified in each step below, the employee may, after the time limit has passed, present the grievance to the County representative specified in the next step of the grievance procedure. Grievances must be filed in a timely fashion to be considered. If not timely filed, they will be deemed waived.

Step 1. The grievance shall be discussed by the employee or shop steward with his/her immediate supervisor within five (5) working days of the occurrence which gave rise to the grievance or when the employee should have reasonably had first knowledge of the grievance. The immediate supervisor shall notify the employee of his/her decision on the grievance within one (1) working day after the discussion with the employee, or the grievance shall be deemed denied.

Step 2. If there is no timely response or satisfaction at Step 1, then the employee or Union must file a written grievance, which shall set forth the specific acts that constitute the basis for the grievance, specific contract provisions alleged to have been violated and remedy sought, within five (5) working days after the receipt of the response or expiration of the time for response to the next level of supervision (department director or designee), who shall respond within five (5) working days in writing or the grievance shall be deemed denied.

Step 3. If there is no timely response or satisfaction at Step 2, then the employee or Union shall file the written grievance with the County Executive or his/her labor relations designee within ten (10) working days. The County Executive, or his/her labor relations designee shall meet with the employee or his/her representative within ten (10) working days from the receipt of the grievance at Step 3. The County Executive or his/her labor relations designee shall make a written response within ten (10) working days of the meeting.

Step 4. In the event that any matter submitted to the County Executive or his or her labor relations designee cannot be settled, the matter shall thereupon be submitted within twenty (20) calendar days to an impartial arbitrator mutually agreeable to both parties. The decision of the arbitrator shall be rendered as expeditiously as possible and shall be within the scope of this Agreement and shall not add to or subtract from any of the terms of the Agreement. The arbitrator shall confine himself/herself to the precise issue submitted for arbitration and shall have no authority to determine other issues not so submitted. In the event no agreement has been reached on the selection of an arbitrator within five (5) working days from the receipt of the request for arbitration, the Federal Mediation and Conciliation Service shall be requested to submit a list of eleven (11) qualified and approved arbitrators from which list the arbitrator shall be selected by alternately striking one (1) name from the list until only one (1) name shall remain.

16.3 The cost and expense of the employment of the impartial arbitrator mentioned above shall be borne equally by the parties hereto.

> The time limits set forth above may be extended by mutual agreement of the Employer and the Union.
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> 16.4 The grievance and arbitration procedures provided for herein shall constitute the sole and exclusive method of adjusting all complaints or disputes which the Union or employee may have and which relate to or concern the employees and the Employer.

Raymond Wainright is a member of the bargaining unit represented by Teamsters Union, Local 313. On August 26, 1985, Dennis March, Assistant Personnel Director for Pierce County, notified Wainright that he was to be placed on layoff status because he did not possess a valid Washington State Driver's License as required for his classification as a maintenance technician I. Wainright requested and was granted a 30-day medical leave of absence.

On September 26, 1985, Wainright attempted to return to work without possessing a valid driver's license. Will Kinne, Central Supervisor of the Public Works Department, refused to allow Wainright to return to work and instead placed him on layoff status for up to one year. That same day, Wainright filed a grievance through the union. Also that day, Dennis Durham, Business Representative for the union, wrote to George Tyler, Maintenance Manager, regarding Wainright. Durham's letter did not make reference to the collective bargaining agreement or a grievance. It stated that Wainright returned to work from a leave of absence and was denied the right to work which was "not consistent with Pierce County policies." On October 4, 1985, Tyler denied the grievance due to the fact that Wainright did not have a valid driver's license.

On October 11, 1985, John Doucett, Business Representative for the union, proceeded to "Step 3" of the grievance procedure filing Wainright's grievance with Kaye Adkins, Personnel Director for Pierce County. Marsh wrote Doucett on October 16, 1985 that Wainright's grievance was moot since Wainright had obtained a driver's license and was returned to work by the employer. Doucett answered on October 31, 1985 that the union was proceeding with the grievance because Wainright was not allowed to assume non-diving duties for the period of time he was without a driver's incense. The union claimed that Wainright was due eight hours of back pay for each day he would have otherwise worked if the county had not violated its past practice and the seniority

provisions of the collective bargaining agreement. On November 14, 1985, Doucett filed Wainright's grievance at "Step 3" with Joseph Stortini, County Executive.

November 25, 1985, Adkins responded to Doucett as follows:

> This letter is in response to your Step Three grievance on behalf of Ray Wainright.
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> Following our meeting of November 20, I have considered the facts in the case. Our basic premise is and has been that Maintenance Technicians must have a valid driver's license. This only makes good sense. We have tried to be very consistent in administering this policy.
>
> In Mr. Wainright's particular case, we made every effort to accommodate his special needs. In addition, we returned him to work immediately upon his obtaining a valid license. I do not feel that Mr. Wainright's request is either reasonable or merited given the circumstances.
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> Your grievance is denied at Step Three.

On December 4, 1985, Doucett requested, in writing, that the grievance be sent to arbitration. The next day Adkins denied the request, citing that the collective bargaining agreement had been expired since January 1, 1985 and "although many of the terms and conditions of the prior agreement continue, our position has consistently been that arbitrability is not one of them."

The union presented evidence of other grievances which the employer processed through certain steps of the grievance procedure during the contract hiatus. In February and March, 1985, the county processed grievances regarding the transfers and assignments of Fred Hedberg and Steve Hamblin through Step 3. The county denied the grievance but did not argue that they were not arbitrable. In September, 1985, the union filed a grievance on behalf of David Brewer requesting an adjustment to his longevity pay. The employer again denied the grievance, but did not claim it

could not be arbitrated. The county handled the grievance of the termination of Michael Wallace in a similar manner in November, 1985.

In August, 1985, the union took the following position regarding employees' wages for certain pieces of road equipment:

> Since we have not concluded our negotiations pertaining to our contract, these pieces of equipment have not been negotiated into our agreement at this time. Therefore, they must be treated the same as any other piece of equipment which has had no new negotiated rate and must continue at the contract rate currently in effect.

On December 3, 1985, James Montgomerie, the County Deputy Executive, wrote the union concerning the overall contract negotiations. In his letter he wrote:

> During this time of negotiation, the terms and conditions of the prior contract except for union security and arbitrability continued according to current law resulting in a hiatus beginning January 1, 1985.

On April 28, 1986, the parties executed a new collective bargaining agreement for the term January 1, 1986 through December 31, 1988.

POSITION OF THE PARTIES

The union argues that grievance arbitration provisions are mandatory subjects of bargaining and that, as such, they cannot be unilaterally changed prior to impasse. The union contends that the Wainright grievance should be arbitrated because the arbitration procedure was not negated by express language or clear implication. The union advances that its argument on unilateral action prior to impasse is made more compelling by the parties' reliance on the terms of the old contract throughout the hiatus period and, in particular, their use of the grievance procedure during that time.

The county asserts that it is not bound to arbitrate the Wainright matter because the grievance did not arise under the contract, but rather arose after the contract had expired. The county argues

that its policy has consistently been that when the collective bargaining agreement expires, the employer does not give effect to the union security provision or the arbitration provision of the contract. The county admits that it followed the first three steps of the grievance procedure as outlined in the collective bargaining agreement, but points out that those steps are identical to the procedural steps that are followed pursuant to the Pierce County Personnel Guidelines, which apply to all employees. The county defends that it refused to arbitrate because the contract had expired and the Pierce County Personnel Guidelines do not provide for arbitration.

DISCUSSION

On the whole, the facts of this case are undisputed. The decision does not turn on the credibility of witnesses. Rather, the case involves a simple issue: Do provisions for final and binding arbitration of grievances survive the normal expiration of a collective bargaining agreement?

A grievance procedure is a mandatory subject of bargaining, specifically referenced in the definition of "collective bargaining" in the Public Employees' Collective Bargaining Act.

> "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 of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

RCW 41.56.030(4)(Emphasis added.)

Additionally, grievance arbitration is expressly authorized by the Act:

> A collective bargaining agreement may:

* * *

> (2) Provide for binding arbitration of a labor dispute arising from the application or the interpretation of the matters contained in a collective bargaining agreement.
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> RCW 41.56.122

Although a grievance procedure is a mandatory subject of bargaining, it is a different type of mandatory subject than are wages, hours or working conditions. The litany of "wages, hours and working conditions" denotes the areas of concern between bargaining unit members and employers. These mandatory subjects of bargaining must be maintained at status quo upon the expiration of the collective bargaining agreement and can be altered only by one the following circumstances:

1. Negotiated agreement between the parties;
2. Unilateral implementation after notice of the proposed change to the effected party, the opportunity to bargain regarding the proposed change and a waiver of bargaining rights by the effected party; or
3. Unilateral implementation by the employer after impasse has been reached subsequent to good faith bargaining on the proposed change.

There are, however, certain other mandatory subjects which are frequently bargained between employers and unions, and incorporated in collective bargaining agreements, which expire when the collective bargaining agreement ends. These are clauses which establish the manner and the means whereby the employer will satisfy its statutory obligation to deal with the union as the exclusive bargaining representative during the life of the agreement and the way in which the union may enjoy its statutory privilege of representing the employees. Union security is one example. Pierce County, Decision 1840-A (PECB, 1985).[1] The provision for binding grievance

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1 A union security provision does not survive the expiration of the contract because it is a condition of employment established between the union and the employer.

arbitration is another such clause which is a mandatory subject of bargaining but which addresses the relationship between the union and the employer as opposed to the employee and the employer. The union "owns" the grievance procedure. A union grievance committee can elect not to proceed to arbitration with a unit member's grievance. Such an internal decision is final. Barring allegations of unlawful discrimination, the unit member has no statutory avenue of redress.[2]

Other sections of the Public Employees' Collective Bargaining Act also acknowledge this union-employer relationship. The statute recognizes the connection between the concepts of the "exclusivity" of a bargaining representative and the adjustments of alleged contract violations through the grievance procedure.

> 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: Provided, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the

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If the union's contract with the employer ends, so does that condition of employment.

2 It is interesting to note that while grievance arbitration is a mandatory subject of bargaining which expires with the collective bargaining agreement, interest arbitration is treated differently. In City of Tukwila, Decision 1975 (PECB, 1984), interest arbitration was found to be a means to an end, rather than a benefit or condition; therefore it is not a mandatory subject. As a methodology which parties may agree to use, absent a negotiated settlement, in determining what the working conditions will be, an interest arbitration clause is merely a permissive subject of bargaining.

> intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance.

RCW 41.56.080.

Thus the statute does not permit for grievance adjustments without allowing the union the opportunity to be present to insure that the adjustment is consistent with the collective bargaining agreement which the union must guard.

The parties in the instant case had bargained a "no strike clause" in their collective bargaining agreement.

> Article 17 17.1 There shall be no work stoppage, slow down, boycott, sympathy strike, refusal to cross a picket line, or lockout for any reason regardless of whether the action of either party may be reasonably concluded as a violation of this Agreement or any law, policy or regulation during the life of this Agreement.
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> 17.2 Employees who refuse to cross a legal, primary picket line as recognized by the Union through its Secretary-Treasurer, which is directed at other than County facilities shall not constitute a violation of this Agreement and shall not be cause for discharge or disciplinary action; provided, however, that such decision shall be made freely by such employees without coercion by either the Employer or the Union. Nothing in this paragraph, 17.2 shall be construed to preclude the employer from continuing to maintain and operate County functions with or without replacement personnel. Employees will be required to work and cross a primary picket lime as described in this paragraph 17.2 when deemed necessary by the County to assure public health and safety.

A no-strike agreement is a pledge by the union regarding how it will handle certain concerted activity movements.[3] A no-strike agreement has been labeled the quid pro quo for a binding arbitration provision. Godall-Sanford, Inc. v. Textile Workers (UE), 353 U.S. 550 (1957). The paralleling of these two clauses emphasizes that they both run to the union as the party of interest instead of the individual unit member.

The union supports its contention by citing to a series of cases developed under the federal law. The Supreme Court has found a strong federal policy favoring arbitration as a method to resolve labor disputes. United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Additionally, in John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), the Supreme Court determined that the parties' obligations under their arbitration clause survived the contract termination when the dispute was over an obligation (severance pay) arguably created by the expired agreement.

The union argues that the landmark case which should control the present situation is Nolde Bros, v. Bakery Workers, 430 U.S. 243 (1977). Therein the Court required Nolde to arbitrate a dispute over severance pay caused by a plant closing, even though the closing occurred four days after the collective bargaining agreement had expired. Writing that "… where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication", the Court reached its decision on three grounds:

1) the parties had agreed to resolve all their disputes by resorting to the mandatory grievance arbitration machinery in their collective bargaining agreement;
2) the union submitted its grievance within days of the expiration of the collective bargaining agreement; and

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3 A union might argue that a no-strike agreement should not be pivotal in a decision regarding the public sector since the right to strike is denied public employees in RCW 41.56.120. However, a search of the Commission's records shows that this bargaining unit did strike this employer for 23 days in March, 1980.

3) the strong presumption favoring arbitrability.

The Court wrote:

> However, even though the parties could have so provided, there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract but which is based on events that occur after its termination. The contract's silence, of course, does not establish the parties' intent to resolve post-termination grievance by arbitration. But in the absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract. Any other holding would permit the employer to cut off all arbitration of severance pay claims by terminating an existing contract simultaneously with closing business operations.

430 U.S. 243 (Emphasis added.)

In effect, the Nolde Court ruled that if the subject matter of a particular grievance is arbitrable, the fact that it arises after the contract has expired does not necessarily abrogate the duty to arbitrate. But it does not guarantee it either. The Court expressly did not rule on the arbitrability of post-termination contractual claims which were not asserted within a reasonable time after the contract's expiration. In a significant passage, the Court acknowledged the potential importance of the time factor when it expressly reserved judgment on "the arbitrability of post-termination contractual claims which, unlike the [claim in Nolde] are not asserted within a reasonable time after the contract's expiration". 430 U.S. at 255 n.8.

The facts of the present unfair labor practice case show that the parties had agreed to exclude some disputes from the provision for grievance arbitration. However, a limited arbitration clause did not dissuade a "post-Nolde" court from sending a dispute over the accumulation of pension rights while employees were laid off when the dispute arose after the contract's expiration. Federated Metals Corp. v. Steelworkers, 648 F.2d 856 (CA 3, 1981); 454 U.S. 1031 (1981) den cert. Writing that the parties still express a clear preference for arbitration when they draft a

narrow arbitration clause, the court criticized as a "somewhat esoteric determination" that the Nolde presumption applies only when employees have accrued certain rights during the life of the contract and realized them after expiration. That court focused on whether the dispute arguably related to a particular type of grievance rather than whether the dispute related to the collective bargaining agreement.

What is more determinative in the instant case is that the grievance arose months after the contract expired. Thus, this case more accurately squares with Teamsters Local 703 v. Kennicott Bros., 771 F.2d 300 (CA 7, 1985). In Kennicott a discharge of an employee and a grant of retroactive pay increases occurred more than six months after the agreement had expired. The court wrote:

> Although it may be reasonable to presume that parties intend to arbitrate grievance arising shortly after the expiration of a contract, the presumption weakens as the time between expiration and grievance events increases. A contrary holding would mean that parties to a collective bargaining agreement would be presumed to intend that any dispute rising between them years or even decades after the expiration of the agreement would be arbitrable. We do not read the Nolde presumption of arbitrability to persist indefinitely after expiration. Indeed the Nolde court itself … expressly reserved judgment on [the arbitrability of claims] not asserted within a reasonable time after the contract's expiration".

771 F.2d at 303 quoting 430 U.S. at 255 n. 8.

The Kennicott court acknowledged that since there was no language in the agreement expressly ending the right to arbitrate with the contract's expiration, that some post-contract grievances would be arbitrable. However, the significantly longer period in Kennicott over Nolde between the expiration of the agreement and the events which triggered the grievances eviscerated the Nolde presumption of arbitrability.

In the public sector, the continuation of bargaining agreements for an indefinite period of time is discouraged.

> … Any agreement which contains a provision for automatic renewal or extension of the agreement shall not be a valid agreement; nor shall any agreement be valid if it provides for a term of existence for more than three years. RCW 41.56.070

A finding that an agreement to arbitrate would continue for months after the contract has expired would violate the intent of RCW 41.56.070. Although in Seattle School District, Decision 2079-A (PECB, 1985), 2079-C (PECB, 1986) the Commission held that the parties continued their collective bargaining agreement for more than three years by their actions, which indicated their clear assent. In the instant case, the union is not persuasive in its position that by processing this, and other grievances which arose during the hiatus, through the preliminary steps of the grievance procedure, the employer is now bound to go on to arbitration. A plain reading of the documents in evidence shows that the union spent some time skirting the issue of whether Wainright's claim was a grievance under the collective bargaining agreement or a claim to be processed through the county personnel policies. The employer in the case at hand, gave the union distinct notice of its position that the union security and the arbitration provisions ended when the contract expired. Grievance arbitration -- calling for the interpretation of whether there has been a violation of the contract -- is, by its very nature, dependent upon the existence of a valid contract to be "interpreted".

The Commission has consistently held that it has no violation of contract jurisdiction through its unfair labor practice authority. Clallam County, Decision 607-A, (PECB, 1979); Seattle Housing Authority, Decision 1215 (PECB, 1981); Pasco School District, Decision 2546 (PECB, 1986). On the balance, a public policy favoring the resolution of labor disputes through arbitration is not damaged by a finding that the provision for binding arbitration is a right which runs to the union, not to the individual employee. Thus, operating like a union security clause, binding arbitration expires when a collective bargaining agreement naturally terminates. There is no evidence in the record that the employer was trying to prolong reaching agreement for a replacement collective bargaining agreement in order to avoid arbitration. Such tampering with the collective bargaining

process would cast a different light on the allegations. Nor is there evidence that the employer went to binding arbitration with any of the other grievances which the union entered into the record as being processed during the contract hiatus.[4] On the facts presented, the employer did not commit a refusal to bargain violation when it unilaterally ceased giving effect to the binding arbitration provision upon the expiration of the collective bargaining agreement.

## FINDINGS OF FACT

1. Pierce County is a "public employer" within the meaning of RCW 41.56.030(1).
2. Teamsters Union, Local 313, is a "bargaining representative" within the meaning of RCW 41.56.030(3) which represents certain employees of Pierce County.
3. Pierce County and Teamsters Union, Local 313 had a collective bargaining agreement effective for the period January 1, 1983 through December 31, 1984. That agreement contained a provision for binding arbitration. On April 28, 1986, the parties executed a replacement collective bargaining agreement for the term January 1, 1986 through December 31, 1988.
4. On September 26, 1985, Teamsters Union, Local 313 submitted a grievance on behalf of Raymond Wainright involving an incident which had occurred on that date.
5. The employer processed the grievance under the first three steps of the grievance procedure as outlined in the collective bargaining agreement. The county refused to submit the matter to binding arbitration.

## CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. The complainant has not met its burden of proof to show that the employer refused to bargain in good faith under Chapter 41.56.030(4) RCW.

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4 This decision does not rule on the consequences on the grievance arbitration provision when a collective bargaining agreement is made effective retroactively.

3. By its actions described in Findings of Fact 5 above, the employer has not violated RCW 41.56.140(4) or (1).

Based on sworn testimony given at the hearing, the exhibits received into evidence and the record as a whole, it is

ORDERED

The complaint charging unfair labor practices against Pierce County is dismissed.

DATED at Olympia, Washington, this 29th day of May, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

[SIGNED]

KATRINA I. BOEDECKER, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.