STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17,	)	CASE 9225-U-91-2045
Complainant,	)	DECISION 4563 - PECB
vs.	)	
PUBLIC UTILITY DISTRICT 1 OF CLARK COUNTY,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Richard D. Eadie, Attorney at Law, appeared on behalf of the union.

Davis Wright Tremaine, by Stephen M. Rummage, Attorney at Law, appeared on behalf of the employer.

On June 24, 1991, International Federation of Professional and Technical Engineers, Local 17 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Public Utility District 1 of Clark County (employer) had violated RCW 41.56.140(4), by refusing to bargain with the union. An amended complaint filed on April 30, 1992 alleged a second count of the same nature, based on a subsequent refusal to bargain. A hearing was held on September 23, 1992, in Kirkland, Washington, before Examiner Walter M. Stuteville. Both parties filed post-hearing briefs.

BACKGROUND

This proceeding is the latest in a lengthy history of litigation between these parties. Some information set forth under this heading is derived from the earlier decisions:

CLARK PUD I refers to Public Utility District 1 of Clark County, Decision 2125 (PECB, 1985); affirmed 110 Wn.2d 114 (1988).

CLARK PUD II refers to Public Utility District 1 of Clark County, Decisions 2045-A, 2045-B (PECB, 1989); review denied, 116 Wn.2d 1015 (1991).

CLARK PUD III refers to Public Utility District 1 of Clark County, Decisions 3815, 3815-A (PECB, 1992); stay denied, Decision 3815-B (PECB, 1992); stay denied, Clark County Superior Court (1992).

The CLARK PUD IV designation is used herein to refer to the instant case.

The Parties

Public Utility District 1 of Clark County provides electric service to residents in and around Vancouver, Washington. During the course of these proceedings, W. Bruce Bosch has been the general manager and chief executive officer of the utility; Thomas Lemly of the Davis Wright Tremaine law firm has represented the employer in labor relations matters.

International Federation of Professional and Technical Engineers, Local 17, was recognized prior to 1983 as the exclusive bargaining representative of certain engineering employees of this employer. Throughout the recent events, Bill Kalibak has been the Local 17 business agent, and Richard Eadie has been the attorney, representing this bargaining unit.

The parties had a one-year collective bargaining agreement that was effective from April 1, 1983 through March 31, 1984. During that year, the bargaining unit consisted of approximately 23 employees. The parties commenced negotiations on a successor contract, but did not reach an agreement. On August 1, 1984, the union filed an

unfair labor practice complaint in which it accused the employer of bargaining in bad faith during their contract negotiations.

CLARK PUD I - The "Jurisdiction" Issue

The Executive Director of the Public Employment Relations Commission made a preliminary ruling on the union's unfair labor practice complaint under WAC 391-45-110, finding a cause of action to exist for proceedings before the Commission under Chapter 41.56 RCW and Chapter 391-45 WAC.[1] The Executive Director cited Public Utility District 1 of Clark County, Decision 1884 (PECB, 1984) and Public Utility District 1 of Clark County, Decision 1991 (PECB, 1984), each of which involved this employer's relations with another union and bargaining unit.[2] The unfair labor practice case was held in abeyance, however, while the Commission and courts addressed the "jurisdiction" issue in a related proceeding.

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[1] Public Utility District 1 of Clark County, Decision 2045 (PECB, 1984). This was the first decision in what became the CLARK PUD II case. As described below, the "jurisdiction" case discussed there was brought to a conclusion in the CLARK PUD I litigation.

[2] The first of those decisions was the preliminary ruling on two unfair labor practice complaints filed by that union. Reliance was placed on Roza Irrigation District v. State, 80 Wn.2d 633 (1972), and Nucleonics Alliance v. Washington Public Power Supply System, 101 Wn.2d 84 (1984). It was noted that concern about the need for an administrative agency to implement collective bargaining rights was particularly apt where one of those disputes would properly have been the subject of a unit clarification proceeding.

The second of those decisions incorporated the first decision, in toto, and found a cause of action to exist on "discrimination" allegations filed by 10 individual employees against this employer and their union. It was noted that the employees found themselves "without a friend or a forum within the bargaining relationship between the employer and the union".

Neither of those cases became the subject of a decision on-the-merits.

The employer filed a declaratory ruling petition with the Commission in 1984, in which it questioned whether the Commission had jurisdiction under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, as to public utility districts organized under Chapter 54.04 RCW.

In 1985, the Commission ruled that it has jurisdiction over the employer, pursuant to Chapter 41.56 RCW.[3] That ruling was affirmed by the Supreme Court of the State of Washington, on March 3, 1988.[4]

CLARK PUD II - The First Unfair Labor Practice Case

After the Supreme Court conclusively established the Commission's jurisdiction, a hearing on the unfair labor practice charges filed by the union in 1984 was conducted by Examiner Kenneth J. Latsch in October of 1988. In a decision issued in February of 1989,[5] the Examiner ruled that the employer had violated RCW 41.56.140(1) and (4), by:

1. Circumventing the union, by directly contacting bargaining unit members concerning bargainable subjects;

2. Threatening the layoff of bargaining unit employees, to influence the collective bargaining negotiations; and

3. Conditioning settlement of the contract negotiations on the union's withdrawal of all pending litigation against the employer, including that unfair labor practice complaint.

Examiner Latsch concluded that a purported disclaimer of the bargaining unit by the union had been coerced by the employer's unlawful conduct, and was therefore void, so that a bargaining relationship continued to exist between the parties. The employer

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[3] CLARK PUD I, Decision 2125, supra.

[4] CLARK PUD I, 110 Wn.2d 114, supra.

[5] CLARK PUD II, Decision 2045-A, supra.

was ordered to bargain collectively with the union concerning the wages, hours and working conditions of the employees in the bargaining unit, but that bargaining obligation was made effective only from the date of the Examiner's decision.[6] Of particular interest in the instant case, the Examiner rejected the union's requests for extraordinary remedies, including attorney fees and interest arbitration.

Both parties petitioned for Commission review of the Examiner's decision in CLARK PUD II. On October 11, 1989, the Commission affirmed the Examiner's decision.[7] While it indicated that it considered the issue to be "a close question", the Commission also refused to order the extraordinary remedies requested by the union. Instead, it stated its intent to put the parties "back to the bargaining table", and admonished them to "proceed as required by Chapter 41.56 RCW" now that questions regarding the Commission's jurisdiction and the continued existence of a bargaining relationship had been cleared.

The employer attempted to initiate judicial review proceedings on the Commission's CLARK PUD II decision, but it failed to serve its petition for review on the Commission until two days after the deadline for doing so. On January 12, 1990, the Superior Court for Clark County dismissed the employer's petition for judicial review, holding it was untimely under the applicable Administrative Procedure Act, and that the court lacked jurisdiction to review the Commission's decision. The employer appealed the superior court's dismissal of its petition for judicial review to the court of

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6 The Examiner reasoned that the union's very unusual "disclaimer" action had provided the employer with some basis to refuse to bargain with the union up to the date of the Examiner's decision holding that the disclaimer was null and void, and so excused the employer from any retroactive bargaining obligation.

7 CLARK PUD II, Decision 2045-B, supra.

appeals, but did not obtain a stay of the Commission's CLARK PUD II order.

CLARK PUD III - The Second Unfair Labor Practice Case

On March 23, 1990, Kalibak sent a letter to Bosch which stated:

> As a result of the Public Employment Relations Commission upholding of the Unfair Labor Practices committed by the Clark County Public Utility District and Local 17's representational status, please accept this letter as a request by the union to commence collective bargaining negotiations. To expedite this process, please have someone from your staff contact me to schedule mutual bargaining dates.
>
> Additionally, the union would request a list of salary adjustments given to all classifications under Local 17's jurisdiction since August 1984.

After receiving no reply from the employer, Kalibak sent a follow-up letter to Bosch on April 20, 1990.

Bosch responded in an April 24, 1990 letter to Kalibak, wherein he referred the matter to two attorneys that were representing the employer: Thomas Lemly in Seattle, and Wayne Nelson in Vancouver.

Kalibak wrote to Lemly and Nelson on May 7, 1990, enclosing copies of the union's March 23 and April 20 letters, and requesting a reply to the union's bargaining demands.

Lemly responded in a letter to Kalibak on May 25, 1990, as follows:

> We've received copies of your letters of April 20 and May 7, 1990, concerning collective bargaining between Local 17 and Clark Public Utilities. As I think you know, **Clark Public Utilities is not comfortable with the Commission's decision in this case, and is not pre-**

> **pared to commence collective bargaining at this time.** Local 17 has disavowed interest in the bargaining unit of engineers at the Utility, and the employer will not recognize Local 17 as a representative of these employees without proof that the employees actually desire your representation.
>
> [Emphasis by **bold** supplied.]

The union then filed another unfair labor practice complaint on June 15, 1990, initiating the CLARK PUD III litigation. That complaint alleged that the employer had violated RCW 41.56.140(4), by the "not comfortable" statement in Lemly's May 25, 1990 letter. The remedies requested by the union included a bargaining order and payment of the union's attorney fees. Amendments to the CLARK PUD III complaint filed by the union on August 10, 1990, did not assert any new factual allegations, but alleged additional violations from the original facts, including "interference" violations against both employees and the union. The union requested additional remedies, in the form of an order continuing the union's status as exclusive bargaining representative and an order imposing interest arbitration.

The answer filed by the employer on September 18, 1990 denied that it had violated Chapter 41.56 RCW, and asserted several affirmative defenses. A hearing was held in CLARK PUD III on October 11, 1990, before Examiner Mark S. Downing.

By March 7, 1991, the Supreme Court had denied the employer's appeal from dismissal of its petition for judicial review of the Commission's CLARK PUD II decision.[8] The employer made no attempt at further appeal in that case.

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[8] CLARK PUD II, 116 Wn.2d 1015, supra. The employer's appeal had previously been denied by the court of appeals.

Local 17 sent a letter to the employer on March 12, 1991, again demanding to commence collective bargaining:

> As a result of the Supreme Court's denial of the Clark County Public Utility District's request for review in the matter of Clark County Public Utility vs. Public Employment Relations Commission and International Federation of Professional and Technical Engineers, Local 17, it appears to the Union that the employer has exhausted all its appeal avenues in this matter.
>
> Based on the Court's refusal to review this matter, please accept this letter as a request by the Union to commence collective bargaining negotiations.
>
> To expedite this process, please have someone from your staff contact me to schedule mutually acceptable bargaining dates.
>
> Additionally, the Union would request a list of salary and benefit adjustments given to all classifications under the Union's jurisdiction since August, 1984.

The employer replied through Attorney Stephen Rummage of the Davis Wright Tremaine law firm on March 21, 1991, as follows:

> Clark Public Utilities has recently received the attached letter from Local 17's business representative, requesting commencement of collective bargaining negotiations. Because this matter remains in litigation, the Utility has asked me to respond to this request.
>
> The Utility's position vis-a-vis Local 17's bargaining rights has been discussed at length in the pleadings and papers filed in connection with the agency and judicial proceedings between the parties. I will not repeat that position here. Suffice it to say that, **in the Utility's view, Local 17 does not represent its employees**. As explained in the papers we filed last fall in [CLARK PUD III] the Utility will adhere to its position until a court has an opportunity to review PERC's ruling. If the Union wishes to expedite a decision on this matter, it should file an enforcement

> proceeding pursuant to RCW 41.56.190, as the Utility has suggested on numerous occasions. We can only speculate as to the Union's motives in avoiding judicial review.
>
> In any event, we believe, the Utility's position is clear and correct under the law.
> ...

[Emphasis by **bold** supplied.]

The union replied through its attorney on March 29, 1991:

> Reference is made to your letter of March 21, 1991. I do not know what you are referring to when you state that this matter remains in litigation. PERC's jurisdiction over the PUD has been conclusively established. The unfair labor charges brought by Local 17 have been conclusively established as reflected by the Supreme Court denial of your petition for review. Local 17 is surprised and disappointed in the PUD's continued refusal to recognize it as exclusive bargaining representative and to engage in collective bargaining as ordered by PERC.
>
> Your client had its opportunity to have judicial review of the unfair labor practice decision of PERC. Your client's failure to file its appeal in a timely manner is not the fault of Local 17. The PUD joins a number of other parties (usually employees) who have been denied substantive review of their case due to failure to file or serve in a timely manner. That rule has been clear for many years, as reflected by the numerous cases we both have cited and argued in our recent but now completed litigation.
>
> You continue to cast aspersions on the Union's motives. I call on you to speak frankly and directly and to the issues involved and to avoid personality. The Union's motives are now and always have been to negotiate a collective bargaining agreement free from coercion or influence by unlawful acts (unfair labor practices) of the employer.
>
> Your client charts a dangerous course by its continued refusal to recognize Local 17 and commence collective bargaining. Each such

> refusal is still another unfair labor practice, and each such occurrence calls for more severe penalties.
>
> We look for your positive response. However, be advised that in the face of the PUD's continued refusal to adhere to the law and to flaunt final decisions of PERC, Local 17 will seek its remedies available under the law.

Rummage responded on April 4, 1991, as follows:

> I am writing to clear up a couple of misunderstandings reflected in your letter of March 29. First, this matter remains in litigation because of pending unfair labor practice charges brought by Local 17 against the PUD. As you know, the PUD has taken a position in that proceeding that the Union's enforcement remedy lies in the courts, pursuant to RCW 41.56.190. The PUD's position is fully supported by a long line of precedent, a portion of which is cited in our responsive brief.
>
> Second, I did not intend "to cast aspersions on the Union's motives." I simply do not understand those motives. If the Union had really wanted a prompt resolution, it could have commenced an enforcement proceeding pursuant to RCW 41.56.190, which would likely have been completed by now if it had acted promptly. It mystifies me that the Union has never filed an enforcement petition.
>
> In any event, contrary to the implication in your letter, I have always spoken courteously, frankly and directly to you and have avoided personality throughout this dispute. I will continue to adhere to that course, and I trust that your will do the same.

On June 24, 1991, while the CLARK PUD III case remained pending before Examiner Downing, the union filed the complaint charging unfair labor practices in the instant case. Additional details concerning this complaint are set forth below, under the CLARK PUD IV heading.

In a decision issued on July 22, 1991,[9] Examiner Downing ruled in CLARK PUD III that the employer had violated RCW 41.56.140(1) and (4). The Examiner found:

1. That a final decision by the Commission is not automatically stayed upon the filing of a petition for judicial review, and that a court must affirmatively grant a stay to suspend a remedial order; and

2. That the employer's refusal to provide information on salary adjustments given to bargaining unit employees was a violation of its duty to engage in collective bargaining under RCW 41.56.140(4); and

3. That the employer was required to bargain, upon request, with Local 17 as the exclusive bargaining representative of its employees.

Examiner Downing ordered the employer to pay the union's attorney fees and costs for processing the CLARK PUD III case, but he denied the union's request that interest arbitration be imposed on the employer. Of particular interest in the instant case, the Examiner made the following statement concerning the union's request for an interest arbitration remedy:

> The Examiner is not imposing interest arbitration at this time. **If the employer fails to adhere to the remedies imposed by this decision**, its continued recalcitrance will bring this case exceedingly close to the facts found significant by the Examiner and Commission in METRO, supra. Thus, **the Commission may have an opportunity to consider these questions again at a later time, depending on the employer's response to this decision.**

CLARK PUD III, Decision 3815, supra. [Emphasis by **bold** supplied].

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[9] CLARK PUD III, Decision 3815, supra.

The employer petitioned for Commission review of the Examiner's decision in CLARK PUD III, but the union did not cross-petition for review. In its decision issued on March 16, 1992,[10] the Commission affirmed Examiner Downing's findings and conclusions on all points. It rejected the "enforcement" theory advanced by the employer, and held that the Commission's CLARK PUD II decision was res judicata on the "disclaimer" issue which the employer sought to renew in that proceeding. In affirming the Examiner's award of attorney fees, the Commission wrote, "We find that the employer has engaged in a pattern of behavior which precludes a 'debatable' defense" and "We see no reason for further forbearance to the benefit of this employer, and believe that an award of attorney fees to the union is necessary to make an order effective in this case."[11]

CLARK PUD IV - The Third (current) Unfair Labor Practice Case

The original "refusal to bargain" allegations in this case are based upon Rummage's March 21, 1991 letter, in which he renewed the "disclaimer" argument as a basis for refusing to bargain. The union's original complaint requested the following remedies:

1. An order prohibiting the employer from further refusal to recognize the union, and requiring it to commence bargaining;
2. An order directing the parties to submit their differences to interest arbitration, should they be unable to reach agreement on a contract within a reasonable amount of time; and
3. An award of attorney fees and costs to the union.

In a letter dated September 6, 1991, the Commission advised the parties that CLARK PUD IV would be held in abeyance, until the status of Local 17 as the exclusive bargaining representative of

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10 CLARK PUD III, Decision 3815-A, supra.

11 The full Commission was not called upon to consider the "interest arbitration" remedy in CLARK PUD III.

employees of this employer was decided by the Commission in the appeal of the Examiner's decision in CLARK PUD III.

On April 7, 1992, less than a month after receiving the Commission's CLARK PUD III decision, Kalibak sent yet another letter to the employer, requesting a resumption of collective bargaining between the parties.

The employer replied on April 20, 1992, through its general counsel, Wayne W. Nelson:

> Thank you for your letter of April 7, 1992, concerning the recent decision of the Public Employment Relations Commission.
>
> The Utility believes that the Commission's decision in this matter is erroneous. Accordingly, we have instructed the utility's attorneys to petition for a review of the Commission's order in Clark County Superior Court.
>
> The Utility believes it would be inappropriate to engage in negotiations while this matter is still in litigation, especially given the Utility's fundamental disagreement with the Commission's finding that Local 17 is the exclusive representative of some of the Utility's employees. It will be up to the courts to decide whether that finding is correct.

On April 30, 1992, the union filed an amendment to its complaint in CLARK PUD IV, adding the employer's April 20, 1992 response as an additional count of unfair labor practices.

The CLARK PUD IV case came before the Commission on May 18, 1992, in connection with a report on CLARK PUD III as part of the Commission's "compliance" docket. By that time, the employer had filed a petition for judicial review in CLARK PUD III, and it asked the Commission to hold the CLARK PUD IV proceedings in abeyance pending the outcome of that judicial review proceeding. The Commission treated the employer's request as a motion for a stay of

the Commission's order in CLARK PUD III, and it subsequently denied the requested stay in a written order.[12]

At the hearing held in this matter in September of 1992, the employer again argued that it is inappropriate to engage in bargaining with the union before the Superior Court for Clark County issues a decision on the employer's petition for judicial review of the CLARK PUD III decision.

The employer requested a stay of the Commission's CLARK PUD III decision from the court, but that request was denied.[13]

The employer's answer admits its refusals to bargain, as embodied in the letters authored by Rummage in March of 1991 and by Nelson in April of 1992.

POSITIONS OF THE PARTIES

The union argues that the employer's obligation to bargain with the union has been repeatedly affirmed: By the Supreme Court's CLARK PUD I decision in 1988, upholding the application of Chapter 41.56 RCW to public utility districts; by the Commission's CLARK PUD II decision in 1989, holding that the employer had committed unfair labor practices during the parties' contract negotiations in 1984; and by the Commission's CLARK PUD III decision in 1992, holding that the employer had committed another unfair labor practice by

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12 CLARK PUD III, Decision 3815-B (PECB, 1992).

13 This decision was delayed for a time, based on information that a decision on the merits of the employer's appeal in CLARK PUD III would be forthcoming from the superior court, based on a summary judgment motion by the employer. No such decision has been issued as of this time, however, and the Examiner has not been informed of any effort on the part of the employer to further pursue the CLARK PUD III matter in the court.

refusing to bargain or to supply the information requested by the union in 1990. The union asserts that the Commission's decisions were valid and effective upon issuance, absent the granting of a stay by a court, and that an employer cannot simply ignore those decisions on the grounds that the union has not filed an enforcement action in superior court. The union emphasizes that the employer never requested a stay of the Commission's CLARK PUD II order, and that the employer's petition for review in that case had been dismissed by the court prior to the union's demand for bargaining which became the subject of CLARK PUD III. The union reasons that its filing of new unfair labor practice complaints was the appropriate method to challenge the employer's more recent actions, and to demonstrate the employer's steadfast refusal to accept Commission jurisdiction over its affairs or to bargain with the union. The union asserts that enforcement of the previous Commission order would have been inadequate, because that order did not contain all of the relief that is finally necessary to remedy the employer's repeated unfair labor practice violations. The union maintains that the employer's continuing illegal conduct warrants the imposition of extraordinary remedies, namely attorney fees and interest arbitration.

The employer advances three separate lines of argument here:

First, the employer argues that the union is, in effect, asking the Commission to enforce its CLARK PUD II order without following the statutory enforcement procedures provided by Chapter 41.56 RCW. It argues that the courts, and not the Commission, have jurisdiction to "enforce" Commission orders, and that it has no obligation to bargain with the union until the Commission's previous bargaining orders are enforced by a court. The employer contends that the Commission's orders remained interlocutory in nature, and therefore unenforceable, so long as the employer's appeal from dismissal of its petition for review in CLARK PUD II was pending. The employer justifies its refusal to bargain with the union on the basis that it disagrees with the Commission's

decision, that Commission orders are not self-enforcing, and that it intends to obtain judicial review of that order.

Second, it asserts that no factual basis exists for the imposition of extraordinary remedies. It insists that nothing in its past conduct suggests that it will fail to live up to its lawful obligations once the pending judicial processes result in an order to bargain. It further argues that an award of attorney fees would be unnecessary and redundant.

Third, it maintains that the union's request for the imposition of interest arbitration is not allowed by statute. It argues that, unlike other public employers, public utility districts are subject to the federal labor relations laws applicable in the private sector, even though administered by the Commission. In its view, interest arbitration is not available as a remedy in "refusal to bargain" cases under the National Labor Relations Act, and thus is not available to the union as a remedy in this case.

DISCUSSION

The Employer's Bargaining Obligations

The facts described above constitute a repetition, by further correspondence between the parties, of issues that were fully litigated and decided in CLARK PUD III. Therefore, much of the analysis concerning the existence of a violation is derived (or borrowed in toto) from the CLARK PUD III decisions.

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, guarantees the right of public employees to organize and bargain collectively with their employers, as follows:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, inter-

> fere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

The authorization of public employers to bargain collectively, as well as the obligation of public employers to engage in collective bargaining negotiations with the representatives of their employees, is further established by provisions of RCW 41.56.100:

> RCW 41.56.100 AUTHORITY AND DUTY OF EMPLOYER TO ENGAGE IN COLLECTIVE BARGAINING -- LIMITATIONS -- MEDIATION, GRIEVANCE PROCEDURES UPON FAILURE TO AGREE. A public employer shall have the authority to engage in collective bargaining with the exclusive bargaining representative and **no public employer shall refuse to engage in collective bargaining with the exclusive bargaining representative**: ...
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> [Emphasis by **bold** supplied.]

The Legislature has defined certain types of conduct by public employers to be unfair labor practices, as follows:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
>
> (4) **To refuse to engage in collective bargaining.**
>
> [Emphasis by **bold** supplied.]

The question of whether this employer is subject to the jurisdiction of the Commission under Chapter 41.56 RCW was resolved by the Supreme Court in CLARK PUD I, and is not open to debate here.

Employers and unions subject to the provisions of Chapter 41.56 RCW are required to bargain, upon request, unless a collective bargaining agreement is in effect between the parties. Mason County, Decision 3116-A (PECB, 1989). The parties' last collective bargaining agreement expired on March 31, 1984, so that no "waiver by contract" defense is available to the employer in this case.

The violations found in Clark PUD II included that the employer tampered with the administration of the collective bargaining statute, by conditioning agreement on the union withdrawing pending unfair labor practice charges. This led, in turn, to the conclusion in that case that the "disclaimer" action taken by the union at that time was null and void, so that the bargaining obligation continued to exist between the employer and Local 17. The Commission found in CLARK PUD III that the findings made in CLARK PUD II concerning the "disclaimer" and the existence of a duty to bargain were res judicata, and were not subject to collateral attack in the subsequent proceeding. As reiterated in CLARK PUD III, the bargaining obligations of Public Utility District 1 of Clark County have been clearly stated on several occasions in the past. The employer sought a stay of the CLARK PUD III bargaining order, but was refused by both the Commission and the court.

The Latest Refusal to Bargain

The union renewed its request for collective bargaining in March of 1991, after the Supreme Court affirmed dismissal of the employer's petition for judicial review of CLARK PUD II. The employer does not contest that it refused to bargain at that time.

And again in April of 1992, the union once more renewed its request for collective bargaining. This was after the Commission issued its CLARK PUD III decision containing an extraordinary remedy based on the employer's course of conduct. Again, the employer refused to bargain.

Thus the factual basis clearly exists for finding another "refusal to bargain" unfair labor practice violation in this case.

The Employer's "Enforcement" Defense

The employer would shift the blame for this protracted litigation to the union and/or to the Commission, based upon the absence of a petition for "enforcement" in CLARK PUD II. It was the employer, however, that failed to effect a valid filing of a petition for judicial review of the Commission's CLARK PUD II decision. Its efforts to avoid that reality have been rejected by the courts at every level up to and including the state Supreme Court, and were rejected by the Commission in Clark PUD III. For the reasons set forth below, the Examiner finds no basis to sympathize with the argument made by the employer and its counsel.

As an administrative agency of the state of Washington, the Public Employment Relations Commission is subject to the state statutes governing administrative procedure. The CLARK PUD II proceedings were governed by Chapter 34.04 RCW,[14] and the Commission's decision in that case was subject to judicial review, as follows:

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[14] The CLARK PUD II proceedings were commenced before the July 1, 1989 effective date of the current Administrative Procedure Act, which is codified as Chapter 34.05 RCW. Under RCW 34.05.902, agency proceedings begun before July 1, 1989 were to be completed under the applicable provisions of the previous Administrative Procedure Act, Chapter 34.04 RCW.

> RCW 34.04.130 CONTESTED CASES--JUDICIAL REVIEW. (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof ... and **such person may not use any other procedure to obtain judicial review of a final decision**, even though another procedure is provided elsewhere by a special statute or a statute of general application. ...
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> (2) Proceedings for review under this chapter shall be instituted by filing a petition in the superior court ... **The petition shall be served and filed within thirty days after the service of the final decision of the agency. Copies of the petition shall be served upon the agency** and all parties of record. ...
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> [Emphasis by **bold** supplied.]

The dismissal of the employer's appeal at each level of the court system was consistent with both Commission precedent and court precedent concerning the timeliness of petitions for review. The Commission has ruled that both the filing and service of a petition for Commission review are jurisdictional requirements. Federal Way Water and Sewer District, Decision 3228-A (PECB, 1990). Shortly after it rejected this employer's appeal in CLARK PUD II, the Supreme Court ruled in another Commission case that a superior court does not obtain jurisdiction over an appeal from an agency decision, unless the appealing party serves all of the other parties in a timely fashion. City of Seattle v. PERC, 116 Wn.2d 923 (May 16, 1991).

In the absence of a petition for judicial review, the final decision of an administrative agency becomes res judicata on the matters involved, and is not subject to collateral attack in a subsequent proceeding. Clark PUD III, supra.[15]

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[15] Res judicata is the legal rule that final judgments by a court (or administrative agency) of competent jurisdiction is conclusive of the rights of parties in all later suits on matters determined in the former case. Black's

The employer continues to maintain here that the Commission's orders are not self-executing, and that it can ignore such rulings until they are enforced by a court through an "enforcement" proceeding initiated by either the Commission or another party to the Commission proceedings. The employer thus defends its continued refusal to bargain with the union on the grounds that the remedial orders issued by the Commission in CLARK PUD II and CLARK PUD III are interlocutory and unenforceable until reviewed by a court. These are the same arguments advanced by the employer in CLARK PUD III.

In Decision 3815-PECB, Examiner Downing traced the history of the employer's "enforcement" argument, and was not persuaded by it. Indeed, the Examiner found that the employer's position was not supported by either federal or state precedent. Contrary to the employer's arguments, a specific state statute authorizes the Commission to issue remedial orders in unfair labor practice proceedings:

> RCW 41.56.160 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS. The commission is empowered and directed to prevent any unfair labor practice and to **issue appropriate remedial orders**: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.
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> [Emphasis by **bold** supplied.]

The decision issued by an examiner can become the "final order" of the agency, unless the case is brought before the Commission in a timely manner under the following provision:

Law Dictionary, Revised Fourth Edition (1974).

> WAC 391-45-350 PETITION FOR REVIEW OF EXAMINER DECISION. The examiner's findings of fact, conclusions of law and **order** shall be subject to review by the commission on its own motion, or at the request of any party made within twenty days following the date of the **order** issued by the examiner. ... In the event no timely petition for review is filed, and no action is taken by the commission on its own motion within thirty days following the examiner's **final order**, the findings of fact, conclusions of law and **order** of the examiner shall automatically become the findings of fact, conclusions of law and **order** of the commission and shall have the same force and effect as if issued by the commission.

[Emphasis by **bold** supplied.]

When a case is considered by the Commission, the order issued by the Commission under WAC 391-45-390 is certainly the "final order" of the administrative agency, as that term is used in both the Administrative Procedure Act applicable to this case and in the former statute governing judicial review.

The employer correctly notes that specific statutory provisions give the Commission and other parties the **option** to petition for enforcement of a remedial order issued by the Commission:

> RCW 41.56.190 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS--PROCEDURE--PETITION TO COURT FOR ENFORCEMENT OF ORDER OR OTHER RELIEF--TRANSCRIPT FILED--NOTICE--COURT DECREE. The commission, or any party to the commission proceedings, thirty days after the commission has entered its findings of fact, shall have power to petition the superior court of the state ... for the enforcement of such order and for appropriate temporary relief or restraining order ... Upon such filing, the court ... shall have jurisdiction of the proceeding and of the question determined therein, and shall have power ... to make ... a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the commission.

In CLARK PUD III, the employer attempted to revive its failed effort to obtain judicial review of the CLARK PUD II decision, by seeking to attach the label of an "enforcement" action to a new unfair labor practice complaint which was limited to conduct which post-dated the Commission's CLARK PUD II decision.[16] That characterization of the CLARK PUD III proceedings was rejected by the Examiner and Commission in the CLARK PUD III decisions.

In the instant case, the employer again contends that the union is seeking to achieve an "enforcement" of the CLARK PUD II decision (as well as the CLARK PUD III decision) by means of a new unfair labor practice case. The employer's argument on this issue is quite similar to the theory that was considered and rejected in Mason County, Decision 3116 (PECB, 1989). In that situation, the union's first unfair labor practice complaint, filed in 1985, alleged that the employer had violated RCW 41.56.140(1) and (4), by repudiating its previous ratification of a collective bargaining agreement. The Examiner's decision upheld the union's allegations, and the Commission affirmed.[17] The employer petitioned for judicial review, thus preserving the potential for a final holding in the first case that no contract had been reached. While the appeal from the first case was pending in the court in 1987, the union requested bargaining for the 1985-86 time period involved in the first case, but the employer refused to bargain. Shortly thereafter, the Superior Court of Mason County overruled the Commission's decision, thus putting the parties back to a "no contract" posture. The union appealed the first case to the court of appeals, but requested bargaining while that appeal was pending.

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[16] Citing PERC v. Kennewick, 99 Wn.2d 832 (1983), the employer argued to the Commission in Clark PUD III that enforcement cannot lawfully be granted without a court reviewing the propriety of the underlying unfair labor practice findings.

[17] See, Mason County, Decision 2307 (PECB, 1985), and Mason County, Decision 2307-A (PECB, 1986).

The employer took the position that it had no obligation to bargain for the 1985-86 period, and the union filed a second unfair labor practice complaint alleging that the employer had refused to engage in collective bargaining. The employer argued in the second case that the union was barred by the doctrine of res judicata from attempting to re-raise issues that had been disposed of in its first unfair labor practice case. The Examiner and Commission in the second case both rejected the employer's position, however, holding that the second case was based on events that took place in 1987, and thus was based on conduct different than was at issue in the union's 1985 unfair labor practice complaint.[18]

Given the six-month "statute of limitations" set forth in RCW 41.56.160, and the employer's protracted delay in coming to the bargaining table, the union cannot be faulted for doing what is necessary to preserve its rights. It has merely moved to re-assert its demand for bargaining on appropriate occasions, and has then filed timely unfair labor practice complaints in response to the employer's more recent refusals to bargain.

Thus, the employer offers nothing new here. Applying the foregoing principles to the case at hand, the undersigned Examiner is bound by the Commission's CLARK PUD II and CLARK PUD III rulings, which held that the employer committed unfair labor practices during the 1984 negotiations; that a collective bargaining relationship continues to exist between the parties; and that the employer has subsequently refused to bargain with the union. While the union's complaint in this case makes reference to the employer's obligations under the Commission's CLARK PUD III decision, the operative factual allegations of the complaint now before the Examiner concern only the actions of the employer during 1991 (after the hearing on CLARK PUD III) and 1992 (after the Commission's decision in CLARK PUD III. This Examiner can only repeat Examiner Downing's

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[18] See, Mason County, supra.

conclusion: The employer has engaged in a continuing pattern of refusing to bargain, in direct violation of the statute.

Effect of Appeal on Commission Orders

The Administrative Procedure Act applicable to CLARK PUD II clearly stated the effect of an appeal on the agency order:

> RCW 34.04.130 CONTESTED CASES -- JUDICIAL REVIEW. (1) Any person aggrieved by a final decision in a contested case, ... is entitled to judicial review thereof ...
>
> ...
>
> (3) **The filing of the petition shall not stay enforcement of the agency decision.** ...
>
> [Emphasis by **bold** supplied.]

The Administrative Procedure Act applicable to CLARK PUD III clearly does not make a stay automatic in any case. RCW 34.05.550 only **permits** the agency or a court to grant a stay of an agency decision, upon a motion of one of the parties to the case. The employer nevertheless defends its refusal in its March 21, 1991 letter, to bargain on the basis that "... this matter remains in litigation".

The employer's argument here is even weaker than it was in CLARK PUD III, where Examiner Downing wrote:

> ... [E]ven if the employer had some colorable claim of a valid judicial review pending (and therefore the possibility of moving for a stay of the Commission's decision), a defense built on that premise ceased to exist on January 12, 1990, when the Superior Court dismissed the employer's petition for judicial review based on the defect in its service. Thereafter, the employer was no more than attempting to rehabilitate its defective attempt to use the only avenue of appeal allowed to it by the applicable Administrative Procedure Act, and it

> lacked a forum in which to even move for a stay of the Commission's decision.

The union's March 12, 1991 request for bargaining was made immediately following the Supreme Court's rejection of the employer's petition for review in CLARK PUD II. The employer had a petition for judicial review of the Commission's CLARK PUD III decision pending when Nelson wrote his April 20, 1992 letter, but both the Commission and the reviewing court specifically rejected the employer's requests for a stay of the Commission's CLARK PUD III order.

A party's obligations under a Commission decision are **not altered by collateral litigation between the parties.** This principle was initially established in Lewis County, Decision 556 (PECB, 1978),[19] and was reaffirmed by the Commission in CLARK PUD III, as follows:

> ... federal courts have applied res judicata or collateral estoppel principles in reviewing National Labor Relations Board (NLRB) orders that were subject to both judicial review and enforcement, even when exceptions were not filed to the order of an NLRB ... examiner... United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966).
>
> Decision 3815-A, supra.

The Commission's rulings on this principle are consistent with the holdings of the National Labor Relations Board. See, Hamilton Electronics Company, 203 NLRB 206 (1973).

It is clear that the Commission's CLARK PUD II and CLARK PUD III decisions were not automatically stayed upon the filing of a petition for judicial review, and that neither of them has been stayed by the Commission or any court. The issues resolved by the

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[19] This ruling was affirmed in Lewis County, Decision 556-A (PECB, 1979).

Commission in those decisions should not be relitigated in the instant matter. The employer had an obligation to bargain with the union as of the Commission's CLARK PUD II order of October 11, 1989, and it remains a final and effective order of the Commission.

Extraordinary Remedies

As the employer's defenses to the CLARK PUD IV complaint have not been substantiated, the Examiner turns to the question of how to remedy the employer's unfair labor practices. It goes without saying that the customary "cease and desist", "post notice" and "bargaining" orders are warranted.

Attorney's Fees -

The standard utilized by the Commission for determining whether attorney's fees should be awarded in CLARK PUD III originated in Lewis County, Decision 644-A (PECB, 1979); affirmed 31 Wn.App. 853 (1982); review denied 97 Wn.2d 1034 (1982). In turn, the Lewis County decision had cited State ex. rel. Washington Federation of State Employees v. Board of Trustees, 93 Wn.2d 60 (1980), where the Supreme Court held that RCW 41.56.160 is broad enough to permit a remedial order containing an award of attorney fees. The court noted that allowance of attorney fees should be reserved for cases in which a defense to the unfair labor practice charge can be characterized as frivolous or without merit. As delineated by the court in Lewis County v. PERC, an award of attorney fees is appropriate when:

1. Such an award is necessary to make the Commission's order effective; and

2. The defense to the unfair labor practice charge is frivolous;

or

3. There is a pattern of conduct evidencing a patent disregard for the duty to bargain in good faith.

The Commission's infrequent orders awarding attorney fees have generally been based on a repetitive pattern of illegal conduct, or on willful acts by the respondent. See, King County, Decision 3178-B (PECB, 1990); City of Seattle, Decision 3593 (PECB, 1990).

The Commission found in CLARK PUD III that an award of attorney fees was necessary to make its order effective. The employer has done nothing to redeem itself since that time. Indeed, this employer has a long history of resisting its bargaining obligations under Chapter 41.56 RCW. Subsequent to the Supreme Court's ruling that the Commission has jurisdiction over public utility districts, two Examiners have held, and the Commission has twice affirmed, that this employer has committed "refusal to bargain" unfair labor practices. The employer has repeatedly been ordered to commence collective bargaining negotiations with Local 17, but it continues to refuse to bargain with that union. The CLARK PUD II bargaining order has been effective since October 11, 1989, and the employer's attempt to obtain judicial review of that ruling were rejected by three levels of courts, including the state Supreme Court. The employer's attempts to obtain a stay of the CLARK PUD III order were rejected by both the Commission and the court. The employer has now ignored the Commission's rulings for more than four years, yet it asserted no new defenses here. This conduct evidences a repetitive pattern clearly indicating its unwillingness to adhere to state collective bargaining laws. An award of attorney fees here fully complies with the third circumstance outlined in Lewis County, above.

Interest Arbitration -

Whether further extraordinary remedies should be imposed on this employer was called a "close question" in CLARK PUD II. The Examiner and Commission denied the union's request for an "interest arbitration" remedy in 1989, indicating some doubt "... as to whether the employer had engaged in a pattern of conduct showing a

patent disregard of its good faith bargaining obligation".[20] The Examiner in CLARK PUD III denied the union's request for an "interest arbitration" remedy, but cautioned that the matter would be reconsidered if the employer's recalcitrance persisted. Given the employer's continuing violations of state collective bargaining laws over the intervening period of time, additional remedies must again be considered here.

The Commission has ordered "interest arbitration" as a remedy for unfair labor practices, "[w]hen faced with a situation [where] there is little that a union can legally do to enforce the collective bargaining rights of its members". Municipality of Metropolitan Seattle (METRO), Decision 2845, 2845-A (PECB, 1988). That case involved a long history of litigation, and repeated attempts by the employer to avoid bargaining obligations.[21] The Examiner in METRO described the employer's arguments as frivolous, noting that the employer had evaded its bargaining obligations for

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20 CLARK PUD II, Decision 2045-B, supra.

21 In 1984, METRO and the City of Seattle entered into an intergovernmental agreement which transferred certain "commuter pool" employees to METRO and called for METRO to become the successor employer under a collective bargaining agreement with Local 17. After the transfer, METRO refused to recognize Local 17 as the exclusive bargaining representative, and sought to have the unit declared inappropriate in a unit clarification proceeding before the Commission. Local 17 filed suit in superior court to enforce the intergovernmental agreement, and filed unfair labor practice charges with the Commission. In 1986, the Commission ruled that Local 17 continued to be the exclusive bargaining representative of the commuter pool employees. METRO, Decision 2358-A (PECB, 1986). A hearing was held on the union's unfair labor practice charges while METRO appealed the Commission's decision to court. In 1987, a superior court affirmed the Commission's unit clarification decision, held that the employer had acted in bad faith, ordered METRO to recognize Local 17 as exclusive bargaining representative, and awarded attorney fees to the union. METRO nevertheless filed new representation and unit clarification petitions challenging the union's status.

a period of six years, and that not even an extraordinary "attorney fees" remedy ordered by the King County Superior Court had been sufficient to cause the employer to comply with the law. The Examiner concluded that the broad remedial authority granted to the Commission by RCW 41.56.160 included the power to impose interest arbitration, and he ordered that either party could invoke interest arbitration if no agreement was reached through bilateral negotiations within 60 days after Local 17 requested bargaining under the remedial order. He further concluded that the imposition of interest arbitration would be truly remedial, given the history and the indicated willingness of the employer to continue its pursuit of tactics designed to frustrate the bargaining process, and would assure that the parties would achieve an initial collective bargaining agreement. The Commission affirmed the Examiner's ruling in METRO, holding that the "interest arbitration" remedy was proper in that matter, because of the employer's repeated efforts to subvert the collective bargaining process. The Commission noted that imposition of interest arbitration was appropriate only in cases where there is a showing of recalcitrance on the part of the unfair labor practice violator.

The METRO case remained in judicial review proceedings throughout the time that CLARK PUD II was being processed before the agency, and even through the proceedings before the Examiner in CLARK PUD III. The "interest arbitration" aspect of the Commission's METRO order was affirmed by the Superior Court for King County, but was then reversed by the court of appeals on January 14, 1991.[22] A petition for review of was granted by the Supreme Court in METRO, but the "interest arbitration" issue dropped out of the CLARK PUD III case before it reached the Commission.

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[22] METRO v. PERC, 60 Wn.App. 232 (Division I, 1991). The court held that the Commission had no implied power under RCW 41.56.160 to order such a remedy.

In the instant case, however, the law and facts concerning interest arbitration have come into confluence:

First, any doubt about the overall viability of the "interest arbitration" remedy has been resolved in favor of that extraordinary remedy. On March 12, 1992, the Supreme Court issued its unanimous decision in Municipality of Metropolitan Seattle v. Public Employment Relations Commission, et al., 118 Wn.2d 621 (1992), holding:

> [The Commission] has authority to issue appropriate orders that it, in its expertise, believes are consistent with the purposes of the act and that are necessary to make its orders effective unless such orders are otherwise unlawful. [Footnotes omitted.]

and:

> In this case PERC specifically found that the remedy of interest arbitration, upon impasse, was necessary to make its order to bargain effective. In the very limited circumstances presented by the facts of this case, **such an order is not contrary to collective bargaining principles. Instead, it serves as an impetus to successfully negotiate an agreement.** [Footnotes omitted.]

[Emphasis by **bold** supplied.]

The Supreme Court thus overruled the Court of Appeals, and reinstated the "interest arbitration" remedy ordered by the Commission in METRO.

Second, any doubts about the recalcitrance of this employer are resolved on the basis of the employer's recent conduct. The employer has now evaded its duty to bargain for more than four years since CLARK PUD II was issued, and has evidenced an arrogant attitude towards the whole system of collective bargaining, towards the Commission, towards the statutes governing Washington administrative procedure, and even towards the courts up to and including

the Supreme Court of this state. The foremost example of this attitude is the employer's failure to even recognize the union as the employee's exclusive bargaining representative. Thus, there is a basis in fact to expect that, regardless of its arguments to the contrary, the employer would continue with the course of resistance it has historically set unless additional remedies are fashioned to change that direction.

The employer resists the imposition of an "interest arbitration" remedy, on the basis that public utility districts are subject to federal substantive labor law. The employer's arguments are founded upon the following statutory provisions:

> RCW 41.56.020 APPLICATION OF CHAPTER. This chapter shall apply to any county or municipal corporation, or any political subdivision of the state of Washington **except as otherwise provided by RCW** 41.56.170, **54.04-.170, 54.04.180**, and chapters 41.59, 47.64, and 53.18 RCW. The Washington State Patrol shall be considered a public employer of state patrol officers appointed under RCW 43.34.020.
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> ...
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> RCW 54.04.170 Collective bargaining authorized for employees. Employees of public utility districts are hereby authorized and entitled to **enter into collective bargaining relations with their employers with all the rights and privileges incident thereto as are accorded to similar employees in private industry.**
>
> RCW 54.04.180 Collective bargaining authorized for districts. Any public utility district may **enter into collective bargaining relations with its employees in the same manner that a private employer might do** and may agree to be bound by the result of such collective bargaining.
>
> [Emphasis by **bold** supplied.]

The employer argues in this case that the authority to impose interest arbitration does **not** exist in the private sector under the

National Labor Relations Act, as amended. It likewise contends that such authority does not exist for employees of public utility districts. It must be noted, however, that this employer's expansive interpretations of RCW 54.04.170 and 54.04.180 have been considered and rejected in the past.

The Commission's analysis of the provisions in Chapter 54.04 RCW is found in CLARK PUD I, where it held that the Commission has jurisdiction over public utility districts:

> So what does RCW 41.56.020 mean? The language says RCW 41.56 applies to municipal corporations, of which PUD No. 1 of Clark County is one, except as provided by RCW 54.04.170 and 54.04.180. **These sections relate solely to collective bargaining.** They confer on employees of public utility districts the right to bargain collectively and give these public employees all the rights and privileges incidental thereto as are accorded to similar employees in private industry, without regard to the source of such rights in federal or state law, including by implication the right to strike over bargaining issues. These rights need no administrative agency to enforce them, collective bargaining being far older than any federal or state legislation on the subject. **With the enactment of Chapter 41.56 RCW, the administrative machinery governing public employee collective bargaining, including employees of public utility districts, was put in place.**

Decision 2125-PECB. [Emphasis by **bold** supplied.]

In affirming the Commission's CLARK PUD I decision, the Supreme Court held that Chapter 41.56 RCW applies to public utility districts, except where that statute **conflicts** with the statutes expressly referred to in RCW 41.56.020, such as RCW 54.04.170 and .180. The Court described Chapter 41.56 RCW as follows:

> ... the Act, "being remedial in nature, is entitled to a liberal construction to effect its purpose." Roza Irrig. Dist. v. State, 80

> Wn.2d 633, 641, 497 P.2d 166 (1972). The Districts proposed construction does just the reverse; it strictly construes the Act. It would deny Local 17 **access to PERC's expertise and ability to decide and enforce the rights** which Local 17 has under RCW 54.04.170 -.180. Local 17 would be left without access to PERC. Thus, neither PERC nor any other agency would be available to decide questions concerning representation, the holding of elections, the certification of bargaining representatives or to hear unfair labor practice complaints such as the one Local 17 has filed in this case.
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> As Justice Utter succinctly expressed it in Nucleonics Alliance, Local 1-369 v. WPPSS, 101 Wn.2d 24, 35-36, 677 P.2d 108 (1984) (Utter, J., Dissenting):
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> > **PERC jurisdiction is essential for enforcement of the labor laws, since neither the NLRB nor any other agency has jurisdiction over PUD's.** While some labor law provisions are enforceable, others are essentially administrative tasks, such as supervising union elections and selecting bargaining units. Some administrative agency must have discretion to administer the applicable law.
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> ...
> In sum, based on a thorough consideration of all aspects of the matter, **we conclude that the Legislature intended to place jurisdiction in PERC to regulate labor relations between public utility districts and their employees** "except as otherwise provided by" public utility district law. Suggestions and dicta to the contrary notwithstanding, PERC correctly held that it has jurisdiction over labor disputes between public utility districts and their employees under RCW 41.56.020.

[Emphasis by **bold** supplied.]

The Examiners' decisions in CLARK PUD II and CLARK PUD III each discussed the effect of the Supreme Court's ruling on the Commission's handling of cases involving public utility districts. The Commission normally considers decisions of the National Labor Relations Board (NLRB) as influential on its interpretations of

state law,[23] but the Examiners in those cases concluded that RCW 54.04.170 and 54.04.180 require a **closer** adherence to NLRB decisions on substantive questions in cases involving public utility districts.

A similar conclusion was voiced by a Washington appellate court in Electrical Workers v. Grays Harbor PUD, 40 Wn.App. 61, 63 (1985), as follows:

> Because PUD employees have the same collective bargaining rights as do similar employees in private industry, RCW 54.04.170, the arbitrability of this dispute is determined by reference to the **substantive principles of federal labor law.**
>
> [Emphasis by **bold** supplied]

A question remains, however, as to whether the interest arbitration remedy sought by the union here is controlled by "substantive" principles under NLRA precedent, or by "procedural" principles under Chapter 41.56 RCW.

The lead NLRB case on the issue of the imposing substantive terms as a remedy for proven unfair labor practices is H.K. Porter Co., v. National Labor Relations Board, 397 U.S. 99 (1970). In that case, the NLRB and the federal Court of Appeals (D.C. Circuit) both held that an employer's bad faith over an eight-year period warranted an NLRB order imposing the "dues checkoff" language that had been sought by the union in the parties' unsuccessful contract

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[23] RCW 41.59.110(2) expressly states:

> The rules, precedents, and practices of the national labor relations board, provided they are consistent with this chapter, shall be considered by the commission in its interpretation of this chapter ...

The propriety of using NLRB precedent in interpreting Chapter 41.56 RCW was affirmed by the Supreme Court in Nucleonics, supra.

negotiations. The Supreme Court of the United States reversed, holding that the NLRB's remedial powers are not so broad as to include authority to impose a contract clause. While affirming that the employer had repeatedly violated the NLRA by refusing to bargain in good faith on the "dues checkoff" issue, the Supreme Court concluded that the remedy issue was controlled by Section 8(d) of the federal law, which defines the parties' bargaining obligation with the caveat that "such obligation does not compel either party to agree to a proposal or require the making of a concession".

In H.K. Porter, supra, the Supreme Court recognized that it was balancing two fundamental principles of labor law: (1) Encouragement of private bargaining under governmental supervision of the procedure alone (i.e., without official compulsion over the actual terms of the contract), and (2) securing workers' rights to the process and product of collective bargaining.[24] Writing for the majority, Justice Black focused on the former principle, stating:

> The object of this act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, argument, and struggles of prior years would be channeled into constructive, open discussions leading hopefully to mutual agreement. But it was recognized from the beginning that agreement might be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.
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> . . .

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[24] The Court of Appeals had focused on the latter principle when it approved the Board's imposition of the contract clause. H.K. Porter v. NLRB, 414 F.2d 1123 (1969).

> It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process.

The Supreme Court thus held that the NLRB's remedial powers were limited by the "no duty to agree" proviso.[25] In line with the Porter holding, the court in East Bay Chevrolet v. NLRB, 659 F.2d 1006, 1009 (9th Cir., 1981), stated that the NLRB: "...may not prescribe the substantive terms of a collective bargaining agreement, either directly or indirectly...".

The remedial powers granted to the Commission in RCW 41.56.160 are part of a system of dispute resolution procedures which effectuate the stated purposes of the statute applicable to these parties:

> RCW 41.56.010 DECLARATION OF PURPOSE. The intent and propose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

The purpose of the state labor relations legislation was further defined in the Supreme Court's METRO, supra, decision:

> The purpose of the Act "is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right." Yakima v.

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[25] For further discussion of this case, see: The Developing Labor Law, 1983 edition, Volume II at pp. 1674-1675.

> International Association of Fire Fighters, Local 469, 117 Wn.2d 655, 670, 818, P.2d 1076 (1991).
>
> With that purpose in mind, we interpret the statutory phrase "appropriate remedial orders" to be those necessary to effectuate the purposes of the collective bargaining statute and to make PERC's lawful orders effective.
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> ...
>
> Agencies enjoy substantial freedom in developing remedies. This court in In re Case E-386, 65 Wn.2d 22, 29, 395 P.2d 503 (1984) (quoting 2 Am.Jur.2d Administrative Law 672 (1962)) held:
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> > Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, especially where a statute expressly authorizes the agency to require that such action be taken as will effectuate the purposes of the act being administered. The relation of remedy to policy is particularly one for the administrative agency and its special competence, at least the agency has the primary function in this regard. ...
>
> PERC thus has authority to issue appropriate orders that it, in its expertise, believes are consistent with the purposes of the act, and that are necessary to make its orders effective unless such orders are otherwise unlawful.

This case presents an example of an employer attempting to thwart the basic purposes of a statute originally designed to provide a forum for resolution of legitimate issues, by using the arguments propounded in H.K. Porter several years after the legislation was enacted. Our Legislature created the existing system of state labor law, in 1967 with Chapter 41.56, and in 1963 with Chapter 54.04. H.K. Porter was decided in 1970.

As an extraordinary remedy, interest arbitration must be distinguished from situations where it is utilized to avoid a strike.[26] The stated purpose of the Legislature in adopting "interest arbitration" as a strike-substitute for certain classes of public employees was to resolve impasses resulting where positions taken by parties lawfully and in good faith during conventional collective bargaining prevent them from reaching an agreement. When used as an extraordinary remedy for unfair labor practices, interest arbitration is imposed to enforce the basic purpose of the state statute, similar to the supervision of elections and the determination of unfair labor practice allegations cited by Justice Utter in Nucleonics, supra.

The remedy requested by the union here is also distinguished procedurally from the order described in Porter, supra. The order issued in METRO first required the parties to engage in conventional collective bargaining, thus giving them the opportunity normally available under the statute to resolve their differences. The parties were only required to enter into mediation if they failed to reach agreement within a stated period, but mediation still gave them the opportunity to resolve their differences voluntarily. They were required to submit their differences to interest arbitration only upon the failure of mediation, but then were to have a hand in the selection of the impartial arbitrator. The outcome of the interest arbitration process was to be based on the substantive evidence and arguments put forth by the parties at an evidentiary hearing before the impartial arbitrator. Thus, the entire process outlined in the "interest arbitration" remedial order in METRO was designed to keep the parties' focus on the substantive issues separating them in collective bargaining, and

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[26] Our Legislature has, in fact, decided that it is necessary to impose substantive terms of contracts **under certain circumstances**. See, RCW 41.56.440, et seq., RCW 41.56.475 and RCW 41.56.492. This is different from the policy of the NLRA, as described by Justice Black's opinion in Porter.

gave them ample opportunity to reach a result through (or at least consistent with) the normal collective bargaining process. There was a minimum of the "governmental review" abhorred by Justice Black, and nothing which equates to the NLRB's stepping in to "impose its own views of a desirable settlement" rejected by the Supreme Court in Porter, supra.

The Examiner concludes that the remedial authority affirmed in METRO, supra, is more closely related to the basic functions of the labor relations regulatory agency, as discussed in Nucleonics and CLARK PUD I, than to whatever "substantive" rights might flow from the provisions of Chapter 54.04 RCW. As noted by the Commission in CLARK PUD I, RCW 54.04.170 and .180 relate solely to the right to bargain collectively. The overlay of Chapter 41.56 RCW provides the administrative enforcement of those rights. Such enforcement is exactly what this case is about - the administration of the statutory duty to recognize the exclusive bargaining representative and to bargain. This employer has had ample opportunity to comply with the Commission's orders in the earlier cases, and it has clearly refused to do so. The Commission's admonitions in CLARK PUD II, the Examiner's cautionary language in CLARK PUD III, and the extraordinary "attorney fees" remedy in CLARK PUD III have not prompted any affirmative response from the employer. Continued toleration of such a flaunting of the state law undermines and demeans the collective bargaining process. Under these circumstances, taking the remedies to the next level by an order for interest arbitration is consistent with the Supreme Court's discussion in METRO, supra, and is necessary to effectuate the order to bargain.

FINDINGS OF FACT

1. Public Utility District 1 of Clark County is a municipal corporation or political subdivision of the state of Washing-

ton, and is a public employer within the meaning of RCW 41.56.030(1).

2. International Federation of Professional and Technical Engineers, Local 17, AFL-CIO, a "bargaining representative" with the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of an appropriate bargaining unit of engineering employees of the employer.

3. The employer and union were signatories to a collective bargaining agreement covering the period of April 1, 1983 through March 31, 1984. They were not successful in reaching an agreement in negotiations for a successor contract, and the union filed an unfair labor practice complaint alleging that the employer had refused to bargain. That proceeding was held in abeyance until a question concerning the jurisdiction of the Commission was resolved by the Supreme Court of the State of Washington, by a decision issued in 1988.

4. On February 24, 1989, an Examiner ruled that the employer had violated RCW 41.56.140(1) and (4) by its conduct during contract negotiations with the union in 1984. The Examiner held that a purported "disclaimer" by the union was null and void, by reason of it having been coerced by the employer, and that the union remained the exclusive bargaining representative of the engineering employees.

5. On October 11, 1989, the Examiner's ruling was affirmed by the Commission.

6. The employer failed to file a timely petition for judicial review of the Commission's decision. The court dismissed the petition on January 12, 1990, holding that the employer failed to serve its petition on the Commission within 30 days after the Commission's decision, as required by RCW 34.04.130(2).

The employer did not obtain a stay of the order issued by the Commission on October 11, 1989.

7. On March 23, 1990, the union made a written demand on the employer to commence collective bargaining. The employer refused to bargain in a letter sent by its attorney on May 25, 1990, and the union filed a new unfair labor practice complaint based on that refusal to bargain.

8. The employer's appeal from dismissal of its untimely petition for judicial was dismissed by the Court Commissioner for the Washington Court of Appeals on August 3, 1990, by the Court of Appeals on October 25, 1990, and by the Supreme Court of the State of Washington on March 7, 1991.

9. On March 12, 1991, the union made a written demand on the employer to commence collective bargaining. The employer refused to bargain in letters from its attorney on March 21 and April 4, 1991, and the union filed a new unfair labor practice complaint based on that refusal to bargain.

10. The unfair labor practice case filed in 1990 was processed by the Commission under Chapter 41.56 RCW and Chapter 391-45 WAC. On July 22, 1991, an Examiner ruled in that proceeding that the employer had violated RCW 41.56.140(4), by its refusal to commence negotiations with the union in 1990, and by its refusal to furnish wage information requested by the union in 1990. On March 26, 1992, the Commission affirmed the Examiner's decision, including an award of attorney fees as an extraordinary remedy based on the employer's conduct and defenses.

11. On April 7, 1992, the union made a written demand on the employer to commence collective bargaining. The employer refused to bargain in a letter from its attorney on April 20,

1992, and the union filed an amendment to the unfair labor practice complaint which it had filed in 1991, based on that refusal to bargain.

12. The Commission subsequently considered a request by the employer to hold the instant proceedings in abeyance, treating that as a motion for a stay of the order issued by the Commission on March 26, 1992. The Commission denied the requested stay of its order, by means of a written order issued on June 17, 1992.

13. The employer requested the Superior Court for Clark County to stay the order issued by the Commission on March 26, 1992. The court denied the requested stay.

14. The defenses asserted by the employer in this proceeding are essentially the same as were considered and rejected by the Commission in its decision issued on March 26, 1992.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC, including the administration of collective bargaining rights secured for the parties by provisions in Chapter 54.04 RCW.

2. Public Utility District 1 of Clark County has committed unfair labor practices within the meaning of RCW 41.56.140(4), by refusing to recognize and bargain collectively with International Federation of Professional and Technical Engineers, Local 17, AFL-CIO.

3. The defenses asserted by Public Utility District 1 of Clark County were frivolous and without merit, in view of their having been essentially unchanged from defenses that were

considered and rejected as dilatory and without merit in previous proceedings before the Commission, so that imposition of an extraordinary remedy is appropriate, requiring the employer to pay the attorney fees incurred by International Federation of Professional and Technical Engineers, Local 17, AFL-CIO, in connection with the processing of this case.

4. Public Utility District 1 of Clark County has evidenced an arrogant attitude towards the whole system of collective bargaining, towards the Commission, towards the statutes governing Washington administrative procedure, towards the courts up to and including the Supreme Court of this state, in connection with its recalcitrant refusal to bargain collectively with International Federation of Professional and Technical Engineers, Local 17, AFL-CIO, so that imposition of an extraordinary remedy requiring the employer to submit unresolved issues to interest arbitration is appropriate in this case under RCW 41.56.160.

ORDER

Public Utility District 1 of Clark County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to bargain collectively in good faith with International Federation of Professional and Technical Engineers, Local 17, concerning the wages, hours and working conditions for its engineering employees.

   b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collec-

tive bargaining rights secured by the laws of the State of Washington.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes and policies of Chapter 41.56 RCW and RCW 54.04.170:

a. Reimburse International Federation of Professional and Technical Engineers, Local 17, for its reasonable attorney's fees and other costs associated with the prosecution of this unfair labor practice case, upon presentation of a sworn and itemized statement of such costs and fees.

b. Upon request, bargain collectively in good faith with International Federation of Professional and Technical Engineers, Local 17, concerning the wages, hours and working conditions for its engineering employees, subject to the following additional requirements and procedures applicable to the negotiation of the parties' first collective bargaining agreement under this order:

(1) If no agreement is reached through bilateral negotiations within sixty (60) days after Local 17 has requested to bargain, either party may request the Public Employment Relations Commission to provide the services a mediator to assist the parties.

(2) If no agreement is reached by using the mediation process, and the Executive Director, on the request of either of the parties and the recommendation of the assigned mediator, concludes that the parties are at impasse following a reasonable period of negotiation and mediation, the parties shall submit the remaining issues to interest arbitration using the procedures of RCW 41.56.450, et seq. The

decision of the neutral arbitration panel shall be final and binding upon both the parties.

c. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

ENTERED at Olympia, Washington, on the 22nd day of December, 1993.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL, upon request, bargain collectively in good faith with International Federation of Professional and Technical Engineers, Local 17, concerning the wages, hours and working conditions for our engineering employees represented by the union.

WE WILL reimburse International Federation of Professional and Technical Engineers, Local 17, for its reasonable attorney's fees and other costs associated with the prosecution of this unfair labor practice case, upon presentation of a sworn and itemized statement of such costs and fees.

WE WILL NOT refuse to bargain collectively in good faith with the International Federation of Professional and Technical Engineers, Local 17, concerning the wages, hours and working conditions for our engineering employees represented by the union.

WE WILL submit to interest arbitration any issues remaining unresolved after a reasonable period of negotiations and mediation, as determined by the Public Employment Relations Commission.

WE WILL NOT in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

PUBLIC UTILITY DISTRICT 1 OF CLARK COUNTY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.