STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF PASCO, Employer	)	
CHARLES WICKLANDER, Complainant,	)	CASE 11297-U-94-2645
vs.	)	DECISION 5028 - PECB
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 280, Respondent.	)	
CHARLES WICKLANDER, Complainant,	)	CASE 11626-U-94-2727
vs.	)	DECISION 5029 - PECB
CITY OF PASCO, Respondent.	)	ORDER OF DISMISSAL

The above-captioned cases are before the Executive Director for the purpose of making preliminary rulings pursuant to WAC 391-45-110. At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

BACKGROUND

Charles Wicklander is employed by the City of Pasco, within a bargaining unit represented by International Union of Operating Engineers, Local 280. In a previous case, the union contended that

the employer committed a "discrimination" unfair labor practice by means of a disciplinary notice issued to Wicklander following an altercation with a supervisor during the processing of a grievance.

In City of Pasco, Decision 3804 (PECB, 1991), issued on June 13, 1991, Examiner William A. Lang found that Wicklander's comments and actions at the grievance meeting exceeded the bounds of protected activity under Chapter 41.56 RCW. The Examiner wrote:

> The definition of "collective bargaining", RCW 41.56.030(4), makes grievance processing a part of the collective bargaining process. RCW 41.56.122(1) permits, and RCW 41.58.020(4) encourages, the peaceful resolution of disputes concerning the interpretation or application of collective bargaining agreements. At the same time, a grievance meeting is not an "audience", benevolently granted by a master to a servant. It is a meeting of equals who can be expected to vigorously advocate their respective positions. The processing of grievances is but another aspect of collective bargaining; there is no difference in the roles of the parties' representatives, whether they are negotiating an agreement or administering one. Controversy, questioning of authority and even some profanity may characterize many a collective bargaining session between managements and unions.
>
> At the same time, it is difficult to extend the protections of the statute to statements by either party which suggest removing issues from the discussion and debate of the collective bargaining process, by substituting physical combat. An employee who files a grievance could reasonably feel that they were "interfered with, restrained or coerced" by a supervisor who responds to the grievance by suggesting that the parties "step outside" to settle the matter with fists. It follows that a unfair labor practice violation could be found against an employer under RCW 41.56.140(4) for such conduct by a supervisor. Similarly, **an employee who invites a supervisor to "step outside" to settle a grievance has taken the dispute outside of the collective bargaining process and the protections that accompany that process.**

> The union's "provocation" arguments do not suffice here. Wicklander appeared quick to annoyance, and other witnesses confirmed Wicklander's volatile behavior. The Examiner thus credits the supervisor's version of the grievance meeting, and particularly that **it was Wicklander who first verbalized the idea of physical combat to resolve the grievance.** In doing so, he crossed the line between protected and unprotected activity, and subjected himself to a warning from the employer as to that particular conduct. See, Pierce County Fire District 9, Decision 3334 (PECB, 1989), where a union official exceeded the bounds of appropriate conduct in a setting where his right to be present was at least questionable.

Decision 3804 at pages 10-11 [emphasis by **bold** supplied].

The Examiner found the employer violated the law in that case only by dredging up prior incidents as a basis for the warning letter, thus making it appear that Wicklander was being disciplined for his grievance processing efforts rather than for unprotected actions.

On an appeal filed by the employer, the Commission affirmed the Examiner's decision in City of Pasco, Decision 3804-A (PECB, 1992). The Commission wrote:

> The fact that grievance processing constitutes protected activity does not mean that employees or union officials can act with impunity during the grievance process. If behavior becomes too disruptive or confrontational, it loses the protection of the act. Pierce County Fire District No. 9, Decision 3334 (PECB, 1989) [footnote omitted]. Thus, the Examiner correctly applied Commission precedent in finding that the act of inviting a supervisor to fight did not constitute protected activity, even in the context of a grievance meeting. As the Examiner noted, a warning letter limited to that behavior would have been lawful, and such a letter is allowed by the Examiner's remedial order.

The Commission ordered the employer to comply with the remedial order issued by the Examiner, including removal of the disputed

warning letter from Wicklander's personnel file. The employer removed the offensive warning letter, and substituted one which was limited to Wicklander's unprotected behavior. A dispute ensued concerning the sufficiency of the employer's tendered compliance.

On December 9, 1993, Wicklander filed unfair labor practice charges against both the employer and union.

The Commission accepted the employer's tender of compliance on the first unfair labor practice case on March 21, 1994. Wicklander's ongoing objections to having any warning on his file were rejected by the Commission.

On August 29, 1994, Wicklander filed the above-captioned unfair labor practice charges against both the employer and union. The two complaint forms shared a single statement of facts, which took issue with actions by both the employer and union.[1] In particular, Wicklander alleged that the union's concurrence with the tender of compliance made by the employer in the earlier case was a reversal of position, alleged that the union failed to represent him by failing to call a particular witness in the earlier case, alleged that the union's action on the compliance issue was in retaliation for his intervening unfair labor practice charges against the union, and that the employer had retaliated by putting reference to his union activities in his job evaluation. A preliminary ruling letter issued on September 30, 1994 concluded that these complaints lacked sufficient facts to state a cause of action. Wicklander was given 14 days in which to file and serve an amended complaint, or face dismissal of these complaints.

---

[1] The existence of two separate complaints was not discerned immediately, and only one case number was assigned. That error has been corrected. Case 11297-U-94-2645 applies to the charges against the union; Case 11626-U-94-2727 applies to the charges against the employer.

On September 30, 1994, the complaint charging unfair labor practices which Wicklander had filed against the employer on December 9, 1993 was dismissed for failure to state a cause of action, except for a single allegation of employer interference in the internal affairs of the union. City of Pasco, Decision 4860 (PECB, 1994).[2] The complaint filed on December 9, 1993 against the union was dismissed in its entirety. City of Pasco, Decision 4859 (PECB, 1994).[3]

On October 19, 1994, Wicklander filed additional copies of the two complaint forms and the statement of facts which he filed to initiate the above-captioned matters on August 29, 1994. No added details were provided at that time. There is no record of either a request or approval of any continuance of the 14-day deadline established in the preliminary ruling letter issued on September 30, 1994.

---

[2] A preliminary ruling letter noted that: An allegation about a written reprimand failed to state a cause of action, absent any facts tying the warning to Wicklander's having engaged in protected activity; allegations about a change of the union's methodology for selecting its negotiators and about a failure of the union to represent Wicklander contained no material which would state a cause of action against the employer; allegations that grievants and stewards were forced to attend grievance hearings on their own time, and that the employer and the union acted in collusion to prevent the filing of grievances, were insufficiently detailed to state a cause of action; and allegations that the employer would not pay for Wicklander to attend certain training, and that the employer and union were unable to determine what training might be appropriate, were not sufficiently detailed to conclude those parties had engaged in collusion against Wicklander.

[3] A preliminary ruling letter had noted that an allegation about interrogation of employees concerning Wicklander's status as a union steward may have contained some hint of collusion between the employer and the union, but that the preliminary ruling process does not permit the Executive Director to make inferences in the absence of specific factual allegations. Wicklander had been given a 14-day period in which to file an amended complaint containing detailed factual allegations, but he had not done so.

On February 24, 1994, Wicklander filed documents designated as an "amendment" to the complaints filed on August 29 and October 19, 1994. The allegations in that package relate to alleged reprisals taken against Wicklander beginning in August and September of 1994, first in relation to his testimony before the Department of Labor and Industries, then in relation to his filing and processing of the above-captioned complaints, and finally in relation to various grievances.

DISCUSSION

In paragraph 1 of the statement of facts filed on August 29, 1994, and refiled on October 19, 1994, Wicklander asserts that a letter written by employer official Greg Rubstello indicated that the union believed the employer was in compliance with the Commission's order in the case filed in 1990. The mere fact of passing along information received in the normal course of business would not be a basis for finding an unfair labor practice.

In paragraph 2 of the same statement of facts, Wicklander took issue with the union's processing of the earlier case, stating:

> The union failed to represent me in that case by failing to call as a witness [H] who has consistently testified that I only asked [the supervisor] a question because of [the supervisor's] violent background. That [the supervisor] has even had union grievances filed against him because of his violence against other city employees.

The proceedings in the earlier case are long-since closed, and the decision reached in that case is not subject to collateral attack in the above-captioned cases. If a party fails to produce evidence which it has available, it must rise or fall based on the evidence which is presented. A motion to reopen a hearing will be denied

unless the moving party is seeking to produce newly discovered evidence which it could not have discovered by reasonable diligence prior to the hearing. Even if viewed as a charge against the union alone, this allegation relates to events which took place far more than six months prior to the filing of these complaints, and so is untimely under RCW 41.56.160.

In paragraphs 2 and 3 of the August 29, 1994 statement of facts, Wicklander asserts that the union's action was a complete reversal on its part, and was taken in retaliation for his having filed an unfair labor practice complaint against the union in Case 10825-U-93-2514. This allegation is unfounded in the face of the earlier case, where the Examiner and Commission decisions concluded that Wicklander was subject to discipline for his unprotected activity and the Commission accepted the employer's tendered compliance over Wicklander's objections.

In paragraph 4 of the August 29, 1994 statement of facts, Wicklander went on to allege that the actions on the part of the union had:

> [E]ncouraged the City of Pasco to retaliate repeatedly against me over union activities and the city has now, this year, began [sic] to put my union activities in my job evaluation.

The preliminary ruling letter noted that making union activity a part of an employee's job evaluation is a type of conduct for which a violation of the statute could be found, but that this allegation was so lacking in detail that it could not be found to state a cause of action. Wicklander did not file a timely response containing the dates, times, places, and participants in occurrences, as are required by WAC 391-45-050(3).

For all of the reasons indicated above, the above-captioned unfair labor practice complaints must be dismissed. Close examination of

the purported "amendment" filed on February 24, 1995 discloses that the matters at issue are not germane to the incidents described above. Accordingly, the materials filed on February 24, 1995 have been docketed, and will be processed, as separate cases.[4]

NOW, THEREFORE, it is

ORDERED

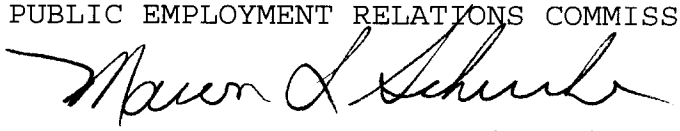
1. The motion to amend filed in the above-captioned matters on February 24, 1995 is DENIED, on the basis that the new material is not germane to the original allegations filed in these matters.

2. The complaint charging unfair labor practices filed against International Union of Operating Engineers, Local 280, in Case 11297-U-94-2645 is DISMISSED.

3. The complaint charging unfair labor practices filed against the City of Pasco in Case 11626-U-94-2727 is DISMISSED.

Issued at Olympia, Washington, on the 16th day of March, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

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

---

[4] The case numbers assigned to the February 24, 1995 filings are: Case 11627-U-95-2728 applies to the charges against Local 280; Case 11628-U-95-2729 applies to the charges against the City of Pasco.