STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LWANDA OKELLO, Complainant, vs. PORT OF TACOMA, Respondent.	CASE NO. 3071-U-80-434
LWANDA OKELLO, Complainant, vs. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 28, Respondent.	CASE NO. 3073-U-80-435 DECISION NO. 1396 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Lwanda Okello, appeared pro se.

James J. Mason, Attorney at Law, appeared on behalf of the Port of Tacoma.

Pozzi, Wilson, Atchison, Kahn & O'Leary, by Daniel C. Dziuba, Attorney at Law, appeared on behalf of International Longshoremen's and Warehousemen's Union, Local 28.

The above-named complainant filed complaints with the Public Employment Relations Commission on October 2, 1980 wherein he alleged that the above-named respondents had committed unfair labor practices within the meaning of RCW 41.56.140. Following filing of an amended complaint, the Executive Director notified the parties on March 17, 1981, that Examiner Rex L. Lacy was being assigned to the cases, which were consolidated at that time, to determine (1) whether the complainant requested and was denied union representation to which he was entitled; and (2) whether the union breached a duty of fair representation by failing or refusing to represent the complainant. The parties were informed that the Commission does not adjudicate contractual grievances in unfair labor practice cases and that no ruling would be made on other issues. Pursuant to notice issued by the Examiner, hearing on the complaint was held on May 14, 1981 at Tacoma, Washington.

POSITIONS OF PARTIES:

The complainant contends that he requested, and was denied, union representation by both respondents. The specific occasions identified are on August 26, 1980 when he filed grievances against the employer, and on October 8, 1980, when he filed a grievance against the union and the employer. Further, the complainant contends that he was discharged for falsely stated reasons and that the union breached its duty of fair representation by refusing to arbitrate the complainant's grievance solely on the basis of racial discrimination (Okello is black).

The employer contends that the complainant, a casual employee, never had a collective bargaining grievance, because no adverse action was taken against him; that Okello's complaints were generally concerned with the processing of a grievance filed under the Port of Tacoma Affirmative Action Plan; that Okello was not proficient in his work performance; that Okello never responded directly to specific requests for the reasons for his complaints; and that the complainant was terminated for failing to take a work-related proficiency test conducted on October 16, 1981.

The union contends that the complainant did not request the union to file and process any grievance on his behalf before October 8, 1980; that the union has never refused to represent the complainant in the filing and processing of a grievance; and that the complainant's grievance against the union and the employer on October 8, 1980 was accepted, investigated, and processed by the union to the end that it was determined that Okello had been properly paid.

HEARING PROCEDURE

On March 31, 1981, the Examiner mailed out notices setting this matter for hearing on May 14 and 15, 1981. The respondents were notified to file an answer to the complaints by April 7, 1981.[1/] On April 6, 1981, the employer filed an answer to Okello's complaint. The union did not file an answer on or before April 10, 1981.

On April 9, 1981, Okello requested summary judgment against the union for failure to answer the complaint. On April 10, 1981, Okello filed a request for summary judgment against the employer, claiming that the answer filed was insufficient. On April 16, 1981, Okello filed a motion seeking a default judgment against ILWU, Local 28, for failing to answer the complaint of unfair labor practices.

1/ Since the notice of hearing was served by mail, the respondents were entitled by WAC 391-08-103 to add three (3) days to the period allowed. Filings received up to the close of business on April 10, 1981 would have been timely.

On April 21, 1981, the Examiner received a letter from John Burt, President of ILWU, Local 28, requesting that the union be allowed to respond to the charges. Burt set forth his reasons for failing to answer on time, relating to a turnover of officers of the union in mid-term and not having picked up the notice of hearing at the union's post office box until April 15, 1981. On August 29, 1981, counsel for ILWU Local 28, filed an answer to the complaint in Case No. 3073-U-80-435, accompanied by further explanation of the delay, and a request that the answer be accepted.

On April 29, 1981, (but prior to receipt of the proposed answer from the union) the Examiner directed a letter to the union permitting the union to file an answer to the complaint on or before May 5, 1981. The complainant was also granted the opportunity to present objections to the Examiner's ruling at the time of the hearing.

On April 30, 1981, Okello filed lengthy objections to the Examiner's ruling permitting the respondent union an extension of the time for filing an answer to the amended complaint. On May 2, 1981, Okello filed additional comments objecting to the union being permitted to answer the complaint. On May 7, 1981, Okello filed additional objections to the extension for filing an answer to the complaint.

At the outset of the hearing on May 14, 1982, the complainant renewed his motions for a default judgment against the union, based on a failure to timely file an answer, and for a summary judgment against the Port of Tacoma. The Examiner reserved ruling on those motions.

When offered the opportunity to present evidence, the complainant indicated that he did not intend to call any witnesses. Both respondents then moved to dismiss. At that point, forty-five (45) exhibits, consisting mostly of documents previously filed with the Commission, were marked for identification and the respondents were afforded an opportunity to indicate objections to the admission of those exhibits in evidence. The Examiner reserved final ruling on the exhibits other than Exhibit 38, which was rejected as an entirely self-serving summation of events written by the complainant for his own file. The remaining exhibits were received, noting the objections stated to some of them by one or both of the respondents.

Following the numbering and initial rulings on the exhibits, Okello made a statement for the record. The employer and the union each made opening statements in which they renewed their motions that the complaint be dismissed for failure to state a cause of action. Okello was then again offered an opportunity to call witnesses and he declined to do so, indicating that he was relying entirely on the documents theretofore submitted. The employer declined to call any witnesses. The union called Okello as a witness with the expressed purpose of furthering the defense of the union,

and to identify the exhibits. The union then called two other witnesses to testify in defense of the union.

POST-HEARING PROCEDURE

At the close of the hearing on this matter on May 14, 1981, it was determined that the parties would submit simultaneous post-hearing briefs to the Commission on July 10, 1981. On July 6, 1981 the employer filed its post-hearing brief and the complainant filed his post-hearing brief. On July 10, 1981, the union filed its post-hearing brief. No provision was made for reply briefs but, on July 17, 1981, Okello filed a rebuttal brief regarding comments contained in the employer and union's post-hearing briefs. At the same time, Okello filed a motion for re-hearing on this matter.

On July 20, 1981, Okello furnished a copy of a letter to Lynn Schafer, Washington State Human Rights Commission, regarding a case filed with that agency. On October 23, 1981, Okello filed a motion to admit evidence after the hearing in this matter had been closed. Enclosed with the motion was the investigation and recommendation made by the staff of the Washington State Human Rights Commission.

On December 1, 1981, the Examiner granted the respondents 10 days to reply to the motions to reopen the hearing and admit additional evidence from another agency. On December 7, 1981, the employer responded to the motions to reopen and admit other evidence. On December 11, 1981, the union responded to the complaint's motions.

On January 4, 1981, Okello furnished the Commission with a copy of another letter written by Okello to the Washington State Human Rights Commission.

THE FACTS

Based on the foregoing description of the unusual circumstances by which the record has been developed, the Examiner has developed the following synopsis of the facts:

Lwanda Okello was hired by the Port of Tacoma in March, 1979 as a "casual" security officer. The employer acknowledged in argument at the hearing that the union security provisions of the Port's collective bargaining agreement with the union had been applied to Okello, necessitating the inference that he was in the bargaining unit and represented by the union despite his "casual" designation.

On July 4, 1980, Okello, working as security officer for the Port, required assistance from the Tacoma Police Department to deal with a group of people who had entered Port property for purposes of a holiday celebration. On July 10, 1980, the Port of Tacoma's Chief of Security informed Okello that a complaint had been lodged against him concerning his handling of the July 4 incident. An exchange of correspondence ensued between Okello, the Tacoma Police Department and the Port of Tacoma, but no formal complaint was ever filed.

On August 15, 1980, a Port of Tacoma official, Bruce MacKenzie, held a meeting with Okello to review complaints which had been made by Okello's co-workers, Patrolmen Johnson, Hirst and Nash, concerning Okello's work performance. All three patrolmen and Port of Tacoma official Betty Winestone were present at the meeting. At the conclusion of the meeting, Okello was given 60 days to familiarize himself with the Port's facilities, physical layout and emergency procedures. Okello responded that if he was unable to do so he should be discharged. The Port thereupon scheduled a proficiency examination to be held October 16, 1980. All of the Port's casual security employees were required to take the proficiency examination.

On August 26, 1980, Okello filed a complaint under the employer's affirmative action plan grievance procedure, charging the employer with harassment. The complaint contained all the documentation Okello deemed pertinent to the grievance. Copies of the grievance were provided to management officials Reed Jones, Betty Winestone, and Ralph Teller, and to Jack Nash, Shop Steward for Local 28. On August 29, 1980, a meeting was held between Okello and representatives of the Port, under authority of Step 2 of the Affirmative Action Plan.

On September 11, 1980, Okello wrote to MacKenzie regarding a meeting held in response to his grievance of August 26, 1980. He inquired as to why he had not received a written reply to the grievance in the three day time period required by Step 2 of the Affirmative Action Plan.

On September 16, 1980, Winestone replied to Okello's September 11, 1980 letter. She informed him that the employer considered his grievance to be without merit, and denied the grievance at that time.

On September 20, 1980, Okello wrote to the Port's Equal Opportunity Officer regarding his August 26, 1980 grievance. He gave a detailed history of the events that had transpired at the Step 2 meeting. Okello requested to pursue his grievance at Step 6 of the Affirmative Action Plan grievance procedure. He requested that 13 witnesses be present at the Step 6 hearing (four of whom were to be named at a later date) and requested copies of the Port Security Officer Duty Roster and the collective bargaining agreement between Local 28 and the Port. Copies of Okello's request were mailed to the National Labor Relations Board, Equal Employment Opportunity Commission and U.S. Senator

Henry Jackson. About this time Okello filed a complaint with the NLRB. He was informed that the NLRB did not have jurisdiction over public sector employers, such as the Port of Tacoma, and the complaint was withdrawn or dismissed.

On September 24, 1980, Hershal Pass, President of ILWU, Local 28, wrote to Okello regarding the complaint Okello filed with the National Labor Relations Board. Additionally, Pass indicated that the union was mailing a copy of the collective bargaining agreement to Okello and that efforts were being made to investigate the situation.

On September 25, 1980, Okello wrote to Reed Jones raising questions regarding the processing of his grievance under the Port's Affirmative Action Plan. On the same date, Jones wrote to Okello denying Okello's grievance on the basis that no detrimental action had been taken against Okello. The record is unclear as to whether the latter was in response to the former.

On September 27, 1980, Okello answered Pass' letter of September 24, 1980. He explained the basis of his grievance in broad terms, suggested that Pass contact Nash for further details, intimated that Nash had refused to represent Okello because of Okello's race and that Nash did not fully understand his role as shop steward, and that Okello intended to pursue all avenues available to him to correct the Port's action.

On September 30, 1980, Pass answered Okello's letter of September 27, 1980 explaining that the union's preliminary investigation disclosed no adverse disciplinary action against Okello, that the union requested complete details of Okello's grievance and other harassment allegations, and that the union was sending Okello a copy of the contract.

On October 2, 1980, Okello filed unfair labor practices allegations against the Port of Tacoma which were docketed as Case No. 3071-U-80-434, and against International Longshoremen's & Warehousemen's Union, Local 28 docketed as Case No. 3073-U-80-434. Both unfair labor practice allegations referred to Okello's grievance package dated August 26, 1980.

On October 8, 1980, Okello answered Pass' September 30, 1980 letter indicating that Nash had been kept informed of the circumstances of Okello's complaint and suggested that Pass contact Nash for further details. Additionally, Okello informed Pass that he would provide the union a copy of the material for $80.00.

On October 8, 1980, Okello filed documents with the union purporting to be a grievance against both the employer and union for alleged violations of the pay provisions of the collective bargaining agreement on March 3, 1980 and July 20, 1980; for alleged refusal of the union to represent the grievant

with regard to his August 25, 1980 grievance; and for alleged refusal of the union to provide the grievant with a copy of the collective bargaining agreement. Okello requested the grievance be remedied by purging his personnel record of all reference to the foregoing incidents involving Okello's work performance, that Okello be compensated a total of 320 hours pay for the alleged harassment and preparation costs of the grievance materials, that Okello be reimbursed for counseling fees and other expenditures attendant to his grievance, and additionally that the union compensate Okello $2,500 for the union's violations which caused Okello severe mental anguish.

On October 9, 1980, Winestone informed Okello that the copy of the Port of Tacoma Disaster Plan which was made available to Okello on August 19, 1980 was still unclaimed in the personnel office. Additionally, Winestone indicated that Okello would be required to prove his familiarity with the Disaster Plan, or be discharged, on October 16, 1980.

On October 13, 1980, Okello replied to Winestone's letter of October 9, 1980 regarding the method of delivery of the Port of Tacoma Disaster Plan. Okello indicated his displeasure at having to pick up the disaster plan at the employer's premises, and requested that it be mailed to his home or be made available to him at a "meeting" scheduled for October 16, 1980.

On October 14, 1980, Pass wrote to Okello concerning the unfair labor practice complaint filed against Local 28. Pass requested a copy of the August 26 grievance which was not attached to the complaint.

On October 16, 1980, Okello refused to take the scheduled familiarity test, delivered a letter from his "personal representative", and departed from the employer's premises prior to the arrival of the union representative who observed the testing. The test was given to all part-time casual security patrolmen, including at least one other black employee.

On October 17, 1980, Okello wrote to Richard Smith, Executive Director, requesting that his grievance be referred to Step 7 of the Affirmative Action Plan.

On October 18, 1980, Pass wrote Okello requesting additional information regarding Okello's grievance. Pass raised questions concerning the alleged violation of the collective bargaining agreement, the unpaid training time of 3 hours, the date Okello filed a grievance under the terms of the collective bargaining agreement, and the date when Nash was first notified of Okello's grievance. Pass also indicated that the union had requested additional time from the employer to investigate and process Okello's grievance.

On October 23, 1980, MacKenzie wrote Okello the following communication:

> "On 16 October you were requested to demonstrate your proficiency as a Casual Security Patrolman. At that time you advised Port management that you were unwilling to do so and, in fact, did not.
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> The Port is very serious regarding its responsibility to the general public to protect their safety and property. Since this burden of responsibility falls heavily on the individual Security patrolmen, the Port must make all reasonable efforts to insure that these patrolmen are proficient in their duties and responsibilities. Since you were unwilling to demonstrate your proficiency, the Port can no longer use your services as a Casual Security Patrolman.
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> Please return the Port-owned equipment (consisting of weapon, badge, commission card and uniforms) on or before 5 November 1980. This may be done at your convenience Monday through Friday between the hours of 0800 and 1600 at the Security office located at Pier 2, Port of Tacoma. Mr. Sadler, Chief of Security, or his representative on duty, will accept the equipment on behalf of the Port."

On October 27, 1980, Okello wrote Pass indicating the sections of the collective bargaining agreement that Okello considered violated by the employer. Okello informed Pass that Nash had been supplied with the details of Okello's grievance, that Pass could obtain the information from Nash, or that Okello would supply a copy of the material for $80.00.

On November 5, 1980, Okello returned all the Port of Tacoma's equipment, including the weapon issued to him.

On November 7, 1980, Okello wrote to the Washington State Human Rights Commission, Public Employment Relations Commission and to Hershal Pass, with copies to various employer officials concerning reporting pay for the October 16, 1980 test.

DISCUSSION:

The complainant has filed several motions upon which the Examiner makes the following rulings:

Motion for Summary Judgment Against ILWU, Local 28

Local 28 filed a request seeking an extension of the answer date set forth in the notice of hearing. The request contained an appropriate explanation for the extension request, and was made well in advance of the established hearing date. Okello was notified of the Examiner's ruling well in advance of the hearing. WAC 391-45-210 permits the Examiner to extend the date for

answer, for good cause shown.[2/] The Examiner considers that the reasons for the union failing to answer cited in their letter of August 21, 1980, were, and continue to be, sufficient good cause shown to allow the Examiner to extend the date for the union to file an answer in this matter.

The motion is denied.

Motion for Re-hearing

The hearing in this matter was conducted in accordance with Chapter 41.56 RCW and WAC 391-45. When an agency, such as PERC, conducts hearings it must insure that the hearings are "adequate and fair".[3/] The Public Employment Relations Commission is an "administrative agency" created by Chapter 41.58 RCW and governed by RCW 34.04 with respect to the conduct of contested case hearings. The Commission has the discretion to consider a re-hearing in matters under WAC 391-45.[4/] The Courts have stated that:

> "Unless specifically prohibited by statute and subject to judicial review as to reasonableness, administrative agencies are free to exercise discretion and judgment."[5/]

The key concept articulated by the Court is judgment. The Commission, in a unit determination case, set forth standards for re-hearing as follows:

> "This matter was remanded for further hearing because the employer claimed that a significant change of circumstances had occurred since the case was originally heard. Unit determination orders of the Commission are final administrative orders, under RCW 34.04, to which res judicata principles apply; and it follows that 'changed circumstances' are an important element of proof for a party seeking to overcome a previous determination by the Commission. However, the motions on which remand was granted in this case were made prior to the entry of a final order by the Commission. While the Commission was critical of the procedure followed by the employer, and cautioned against reliance on similiar procedure in the future, its ultimate order was for the taking of additional evidence in the same proceeding." City of Seattle, Decision 689-C (PECB, 1981). (Emphasis supplied)

2/ WAC 391-45-210 ANSWER--CONTENTS AND EFFECT OF FAILURE TO ANSWER. An answer filed by a respondent shall specifically admit, deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. The failure of a respondent to file an answer or the failure to specifically deny or explain in the answer a fact alleged in the complaint shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of the respondent of a hearing as to the facts so admitted.

3/ Hood vs. Washington State Personnel Board, 82 WA.2d 396, affirmed 6 Wash app 872 (1972).

4/ Alaska S.S. Co., vs. Federal Maritime Commission, 356 Fed.2d 59 (1966).

5/ Savage vs. State, 75 WA.2d 618 (1969)

The complainant's request for re-hearing is based solely on the Examiner's decision to allow the union to answer the complaint. The complainant does not contend that there has been a significant change of circumstances since the hearing was conducted, and does not allege that the hearing was inadequate, or that the hearing was unfair. Absent the element of a change of circumstance there is no need to reopen the hearing.

The motion is denied.

Motion to Admit Additional Evidence

The complainant has submitted an investigative report of the Washington State Human Rights Commission, and seeks to have it included as evidence in this matter. The document was not available on the date of the hearing in this matter. The preliminary investigation report by the WSHRC establishes that a hearing is needed to determine whether a violation has occurred. Consistent with the Examiner's acceptance of written correspondence at the hearing that involves parties to these cases, the document is accepted for what it is and for what it is worth, recognizing that it is a preliminary determination rather than a final determination of the claim involved.

Duty of Fair Representation

The duty of fair representation was established in a series of cases arising under the Railway Labor Act. In Steele v. Louisville, wherein the Supreme Court stated:

> "The union's duty is to exercise fairly the power conferred upon it, in behalf of those for whom it acts, without hostile discrimination against them."6/

In Miranda Fuel Co., 140 NLRB 181 (1962), the NLRB held that the privileges of acting as an exclusive bargaining representative under Section 9 of the NLRA requires the union to assume responsibility to act as the representative of all the employees in the bargaining unit and, in a subsequent case, found a union guilty of a "refusal to bargain" violation of the NLRA for negotiating racially discriminatory work assignment provisions in its collective bargaining agreement with the employer.7/

The Supreme Court later stated in Vaca v. Sipes, supra:

> "A breach of the statutory duty occurs...when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."8/

6/ Steele v. Louisville & N.R.R., 323 U. S. 192 (1941).

7/ Local 1367, International Longshoremen's Assn. (Galveston Maritime Assn.), 149 NLRB 897 (1964) enf. 368 F.2d 1010 (5th Circuit, 1966).

In Vaca, the United States Supreme Court ruled that a cause of action exists in state and federal courts under Section 301 of the Labor-Management Relations Act of 1947 (Taft-Hartley Act) for grievants who can establish that their union has breached its duty of fair representation in connection with the processing of a contractual grievance, thus giving the grievant access to a remedy against the employer for breach of the collective bargaining agreement. The availability of judicial relief for a union's breach of the duty of fair representation is discussed in Vaca as follows:

> "There are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representaiton will in many cases be a critical issue in a suit under L.M.R.A. Section 301 charging an employer with a breach of contract." 64 LRRM 2369 at 2374.
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> * * *
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> "...it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many Section 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of the employer and the union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong - slight deterrence, indeed, to future union misconduct - or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the (National Labor Relations) Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without remedy for the union's wrong." 64 LRRM 2369 at 2375.

The Public Employment Relations Commission does not assert jurisdiction through the unfair labor practice provisions of RCW 41.56 to remedy violations of collective bargaining agreements. City of Walla Walla, Decision 104 (PECB, 1976). Violations of collective bargaining agreements, like other causes of action arising from contracts, are remedied through civil litigation in the Courts. The Public Employment Relations Commission has processed only three "fair representation" cases. Elma School District, against a non-member, a type of conduct which could clearly have been in Decision 1349 (EDUC, 1982) involved allegations of union discrimination

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8/ Vaca v. Sipes, 386 U. S. 207 (1967).

violation of statute under RCW 41.59.090. In City of Redmond, (Redmond Employees Association), Decision 866 (PECB, 1980), the union refused to process a grievance without a valid reason for refusing to do so, and a breach of duty of fair representation violation was found, but it was impossible for the Examiner to place himself in the role of the Courts in enforcement of the contract itself. The third PERC case was decided subsequent to the hearing in this case. Mukilteo School District, (Public School Employees), Decision 1381 (PECB, 1982), arose from an allegation involving differing interpretations of the collective bargaining agreement. In dismissing the complaint in Mukilteo the Executive Director stated:

> "Assuming all the facts alleged to be true and provable, it is nevertheless the conclusion of the undersigned that the Public Employment Relations Commission lacks jurisdiction to remedy a breach of the duty of fair representation arising exclusively from the processing of claims arising from an existing collective bargaining agreement."

The Mukilteo case casts serious doubt on the jurisdiction of the Examiner in this case. The complaint against the union arises exclusively from the processing of the grievances filed by the complainant.

When considered on the merits, it also appears that Okello's claims must fail. The Port of Tacoma's Affirmative Action Plan and its self-contained grievance procedure are separate and apart from the grievance procedure contained in the collective bargaining agreement. Okello initially chose the Affirmative Action Plan as the forum in which to pursue his complaint against the employer. From early July, 1980 through mid-September, 1980, the complainant elected to represent himself when dealing with the employer.[9/] The affirmative action plan permits employees to represent themselves. RCW 41.56.080 states:

> "41.56.080 Certification of bargaining representative--Scope of representation. The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent, all the public employees within the unit without regard to membership in said bargaining representative: Provided, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the exclusivebargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance." (Emphasis supplied)

9/ The union's shop steward was furnished a copy of the grievance package developed by the complainant, on August 26, 1980. The record does not establish that Okello requested the union, or its shop steward, to be present, or to represent the complainant, at the August 26, 1980, or August 29, 1980 meetings conducted by the employer.

The complainant was attempting to move the grievance filed under the affirmative action plan from Step 2 to Step 6 of the procedure when the final events leading to his termination occurred. No grievance was ever filed under the collective bargaining grievance procedure regarding the same allegations.[10/] Neither remedial process had been exhausted when these actions were filed on October 2, 1980.

The burden of proof in unfair labor practice proceedings rests on the complaining party. The Courts of Washington explain the burden thusly:

> "Generally, the 'burden of proof', in sense of duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case, he fails."[11/]

The Courts have also stated:

> "Litigants must prevail on the strength of their own case and not on the weakness of their adversaries."[12/]

The complainant can fulfill its burden of proof by offering direct evidence, e.g., a witness to the action, or by offering circumstantial evidence which requires a weighing of probabilities as to matters other than the truthful-ness ness of a witness.[13/] The evidence must be persuasive enough to convince a reasonable person that the action actually occurred. The complainant has not met his burden of proof in this matter. Okello called no witnesses to substantiate the exhibits he offered in support of his complaints, and he did not prove that he requested, and was denied, union representation from the employer, or the union. The complainant's evidence is generally circum-stantial, and unsubstantiated. Because the complainant has failed to prove his case, these matters will be dismissed.

FINDINGS OF FACT

1. The Port of Tacoma is a "port district" within the meaning of RCW 53.18.010 and is a "public employer" within the meaning of RCW 41.56.030(1).

10/ The complainant filed a grievance, against the union and the employer, with the union on October 8, 1980, that alleged that Okello had not been properly paid on three occasions. The union investigated the allegations on October 16, 1980, and found the allegations to have no merit.

11/ Gillingham v. Phelps, 11 Wa.2d 492 (1942).

12/ McFarland v. Commercial Boiler Works, 10 Wa.2d 81 (1941).

13/ McCormick on Evidence, pg. 789.

2. International Longshoremen's and Warehousemen's Union, Local 28, is an "employee organization" within the meaning of RCW 51.18.010 and is a "bargaining representative" within the meaning of RCW 41.56.030(3). ILWU, Local 28, is the exclusive representative of the Port of Tacoma security personnel.

3. Lwanda Okello is an "employee" within the meaning of RCW 53.18.010 and is a "public employee" within the meaning of RCW 41.56.030(2). At all times material herein, Okello was a casual security officer for the Port of Tacoma.

4. Between July 10, 1980 and August 15, 1980, the complainant was involved in a number of correspondences with the Port and the Tacoma Police Department regarding incidents involving Okello's work performance. At least two meetings were held between the complainant and the employer wherein the complainant's work performance was discussed. The complainant did not request the employer to delay the meetings so that he could obtain the presence of a union representative, nor did he request a union representative to be present, either orally or in writing.

5. On August 26, 1980, the complainant filed a grievance under the provisions of the Port of Tacoma's Affirmative Action Plan alleging he was harassed by the Port's representatives and employees. Although a copy of the grievance was sent to John Nash, Shop Steward for ILWU, Local 28, the complainant did not seek that the union be allowed to represent him from the Port, nor did he request the union to represent him, orally or in writing.

6. On October 2, 1980, the complainant filed unfair labor practice complaints with the Public Employment Relations Commission, alleging that the union had breached its duty of fair representation for failing to represent the complainant and alleging that the employer had refused to allow the complainant union representation in grievances filed against the employer on August 26, 1980. Additionally, the complainant alleged that the reason for the breach of the union's duty of fair representation was based solely on racial discrimination because the complainant is black.

7. On October 8, 1980, the complainant filed a grievance with the union, against the union and the employer, regarding alleged pay violations on December 27, 1979, March 3, 1980, and July 20, 1980; the union's failure to represent the complainant with regard to the August 26, 1980 matter; and the union's failure to furnish Okello with a copy of the collective bargaining agreement between the union and the employer.

8. On October 16, 1980, the complainant refused to take a proficiency examination conducted by the employer, claiming that the test was discriminatory. On the same date of the examination, the union investigated the complainant's October 8, 1980 grievance and found it to be without merit. Thereafter, the employer discharged the complainant on October 23, 1980 for his refusal to take the examination.

9. This record, except for self-serving statements to the complainant's personal file, does not contain any proof that the complainant requested the employer to delay meetings involving his work performance in order for the complainant to seek, and obtain, union representation. The record also does not establish that the complainant requested the union to represent him, orally or in writing, before the allegations in these matters were filed with the Commission.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.160.

2. The Port of Tacoma has not violated Chapter 41.56 RCW by its actions in regard to the processing of a grievance filed by Lwanda Okello under the Port of Tacoma Affirmative Action Plan.

3. International Longshoremen's and Warehousemen's Union, Local 28, has not violated Chapter 41.56 RCW by its actions in regard to the processing of a grievance under the Port of Tacoma Affirmative Action Plan or by refusing to pursue grievances on behalf of the complainant.

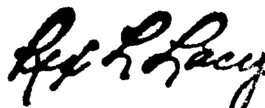
Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following:

ORDER

The complaints are dismissed.

DATED at Olympia, Washington this 3rd day of September, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



REX L. LACY, Examiner