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-A PECB DECISION OF COMMISSION

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 complainant was employed as a casual security officer by the Port of Tacoma. After he had been criticized for his handling of an incident with Tacoma policemen on Port property on July 4, 1980, complainant believed that he had been harassed by the Port because of his race, which is black. He filed a grievance with the Port, not under the collective bargaining agreement with ILWU, but under the Port's Affirmative Action Plan. He asked Port officials if he was entitled to union representation in presenting his "grievance" and they told him orally on August 29, 1980, and in a letter dated September 25, 1980, that he was not. The letter stated in part:

> "You should understand that as a casual, non-union worker you are not a regular Port employee. Your status is strictly that of an extra man who is on temporary status when part-time help is required. This is important for you to realize in view of your apparent belief that you are a member of the union and entitled to various rights accorded regular Port employees."

The grievance procedures in Article X of the Affirmative Action Plan include this sentence:

> "Grievances of union employees shall be handled in accordance with the grievance procedure outlined in their respective union contract and RCW 49.60."

RCW 49.60 is the state statute prohibiting discrimination in employment.

The union contract then in effect covered "...the employees classified herein, now or hereafter being members of the union:

> "a. Security Patrol personnel employed by the Port of Tacoma..." p.1

Under the subheading, Classes of Security Personnel, the contract provided in part:

> "There shall be two classes of Security personnel: regular and casual. ... They casual employees shall have fulfilled the probationary requirements as stipulated by the Port of Appendix A." pp. 7-8.

Appendix A provides an hourly wage rate for casual security officers and a probationary period of 90 days. The claimant had been employed by the Port for more than 90 days before the events leading up to this case occurred.

It is agreed by all parties that the claimant had been paying union dues. Whether or not he had been formally initiated is immaterial. RCW 41.56.080. The Port's own memorandum of its meeting with the claimant on August 29, 1980, recites in part:

> "[Claimant] was advised that though he paid Union dues, he was not represented by the Union since he was not a member."

At the hearing before the Examiner in the instant proceeding, the Port conceded that the claimant was a member of the bargaining unit and was represented by the union. Few matters are better settled in the law of labor relations than that membership in the bargaining unit is what entitles an

employee to union representation, regardless of membership in the union. Local Union No. 2088, IBEW, 218 NLRB 396, 402.

Accordingly, the erroneous advice given to the claimant by the Port at the August 29, 1980 meeting and in its letter to claimant of September 25, 1980, was a technical unfair labor practice under RCW 41.56.140(1), which provides that it shall be an unfair labor practice for a public employer:

> "(1) To interfere with, restrain or coerce public employees in the exercise of their rights guaranteed by this chapter."

The claimant has alleged that the union failed to represent him when he requested such representation with respect to his grievance. There is no proof that the claimant ever requested such representation. There are letters in the record by the claimant in which he implies or claims that he had made such a request; but no such specific request appears in the record. The claimant's letter of October 8, 1980, informed the union of three derelictions claimant charged against the Port, but discrimination on account of race is not among them. He charged the union with (1) failure to represent him on August 25, 1980, after what he calls "notice", not a request that the union actually represent him, and (2) delay in sending him a copy of the collective bargaining agreement. The claimaint called no witnesses at the hearing and did not even testify in his own behalf. The record shows that the union investigated the three derelictions alleged on the part of the Port and the union's handling of those matters is not in issue here.

In his petition for review the claimant states that on August 17, 1980, he orally asked Mr. Nash, his shop steward, for union representation and he described a purported conversation with Mr. Nash on that date in his memorandum to his own file dated August 25, 1980. This memorandum does not appear to have been communicated to anyone prior to the hearing. Mr. Nash did not testify and the claimant did not testify to any such conversation at the hearing where he could have been cross-examined. Therefore, the memorandum is hearsay and self-serving, and no fault on the part of the union is proved by it. In his petition for review claimant states that on August 26, 1980, he requested in writing that the union represent him. No such written request appears in the record.

In order to prove a breach of the duty of fair representation the employee must demonstrate the union's actual refusal to process the grievance or take other desired action. The Developing Labor Law, Cum. Supp. 1971-1975, p. 385. Here no such refusal has been demonstrated.

In any event, the claimant sustained no detriment by reason of the Port's unfair labor practice or his lack of union representation. Claimant's grievance did not complain of any disciplinary action or threatened disciplinary action against him by the Port or of any economic detriment. He was not dismissed, suspended, deprived of work opportunities or pay.

On October 16, 1980, the claimant refused to take a test required of all casual security personnel to demonstrate their familiarity with the Port's facilties, physical layout and emergency procedures. He had been warned on August 15th that he would have to pass it or be discharged. He refused to take it and was discharged by letter dated October 23, 1980. The discharge had nothing to do with his grievance. Accordingly, the complainant sustained no damage or loss of pay by reason of the unfair labor practice committed by the Port or the unfair labor practice alleged, but not proved, to have been committed by the union.

The dismissal of the charge against the union is affirmed. The dismissal of the charge against the Port is reversed and the Port will be required to post an appropriate notice.

AMENDED 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).

2. International Longshoremen's and Warehousemen's Union, Local 28, is an "employee organization" within the meaning of RCW 53.18.010 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, Okello was a casual security officer employed by the Port of Tacoma within the bargaining unit for which ILWU, Local 28, is recognized as exclusive representative.

4. Between July 10, 1980 and September 25, 1980, the complainant corresponded with the Port of Tacoma and with the Police Department of the City of Tacoma regarding incidents involving his work performance. At least two meetings were held between the complainant and representatives of the employer at which the complainant's work

performance was discussed. The complainant asked Port of Tacoma officials if he was entitled to union representation, and they told him orally on August 29, 1980 and in a letter dated September 25, 1980, that he was not. The complainant did not request the employer to delay the meetings so that he could obtain the presence of a union representative.

5. On August 26, 1980, the complainant filed a grievance under the provisions of the Port of Tacoma's Affirmative Action Plan, alleging that 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, there is no evidence of record that the complainant requested, orally or in writing, for the union to represent him.

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 by 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. The complainant alleged that the reason for the breach of the union's duty of fair representation was 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, 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, orally or in writing, to represent him before the complaints in these cases were filed with the Commission.

AMENDED 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, by its notice to Lwanda Okello that he was not entitled to union representation, has interfered with the rights of a public employee conferred by RCW 41.56.040 and has thereby violated RCW 41.56.140(1).

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.

AMENDED ORDER

1. The complaint charging unfair labor practices filed in Case No. 3073-U-80-435 against International Longshoremen's and Warehousemen's Union, Local 28, is dismissed.

2. The Port of Tacoma, its officers and agents, shall immediately:

   a. Cease and desist from interfering with, restraining or coercing public employees in the exercise of their rights secured by RCW 41.56.040, including the right to have representation by the union recognized as exclusive bargaining representative of the bargaining unit in which the employee is employed in connection with the processing of grievances.

   b. Take the following affirmative action which the Commission finds will effectuate the purposes and policies of Chapter 41.56 RCW:

      i. 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 A". Such notices shall, after being duly signed by an authorized representative of the Port of Tacoma, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Port of Tacoma to ensure that said notices are not removed, altered, defaced or covered by other material.

ii. Notify the Executive Director of the Commission, in writing, within thirty (30) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceeding paragraph.

Issued at Olympia, Washington, this 18th day of January, 1983.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANE R. WILKINSON, Chairman

MARK C. ENDRESEN, Commissioner

MARY ELLEN KRUG, Commissioner

"Appendix A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce employees employed in a bargaining unit for which an employee organization has been recognized as exclusive representative in connection with the exercise of their right to have representation by their exclusive representative in connection with the filing and processing of grievances.

DATED:_____

PORT OF TACOMA

BY:_____
AUTHORIZED REPRESENTATIVE

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. Any questions concerning this notice or compliance with its provisions may be directed to the PUBLIC EMPLOYMENT RELATIONS COMMISSION, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone; (206) 753-3444.