STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CARPENTERS LOCAL 756 / PILE DRIVERS LOCAL 1824, Complainant, vs. PORT OF BELLINGHAM, Respondent.	CASE NO. 4190-U-82-669 DECISION NO. 1570 - PECB ORDER OF DISMISSAL

The complaint charging unfair labor practices was filed in the above-entitled matter on August 20, 1982. The factual allegations are:

> "1. Pile Drivers Union Local 1824 was certified June 27, 1972, as the bargaining representative of the employees in the bargaining unit described in the complaint (L and I Case No. 0-1180), pursuant to an agreement for a cross-check signed May 19, 1972, by James H. Freeman for the union and Tom J. Glenn for the employer.
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> 2. Over the years, the unit has varied in size from 10 to 2 employees. Tripo Costello has been its shop steward the last few years.
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> 3. The members of the bargaining unit have done pile driving, construction work and maintenance work on Port facilities such as docks, wharves, piers, etc.
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> 4. The Port has always paid bargaining unit members the wages and fringe benefits set by the Western and Central Washington Area Agreement between the United Brotherhood of Carpenters and Joiners of America and the Seattle and Tacoma chapters of the Associated General Contractors of America, Inc.
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> 5. Periodically, the union and the Port would discuss entering into a specific Maintenance Agreement covering the bargaining unit that was designed to lower the cost to the Port when the members were doing maintenance work as distinguished from construction and pile driving work. Neither party was sufficiently concerned about the situation over a long enough period, so an agreement was never reached.
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> 6. The Port has used the union hiring hall to hire members of the bargaining unit over the years.
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> 7. Tripo Costello has been a regular member of the bargaining unit for the past 7 years: For the 2 years before that he worked as an extra man on the crew.

8. The Port has treated Tripo Costello as an employee: His pay stubs bear an employee number; he participated in the city/county/port credit union; he and his wife were invited to the Port's regular Christmas and summer parties for its employees; he and the rest of the crew were told not to come in when there was no work but were always called back when there was pile-driving, construction, or maintenance work to do.

9. In the summer of 1981, Tripo Costello and foreman Mel Johnson were the only full time members of the bargaining unit. The Port was planning a substantial expansion of its boat harbor that would require the two pile-drivers and additional workers. At this time, the maintenance agreement proposal was discussed again. Because Mel Johnson, who had not favored the proposal, would be retiring soon, Jim Freeman and the Port's representative agreed to postpone its implementation until after Mr. Johnson retired.

10. On August 21, 1981, Don Ellis, the Port's resident engineer, told Mel Johnson and Tripo Costello that he would have to let them go for a couple of weeks because there was nothing for them to do. Mel Johnson became angry and quit on the spot.

11. After Mel Johnson quit, Tripo Costello locked up the area and went home. He spent the next two weeks as a delegate at the International union's convention, about which he had given Don Ellis several months' advance notice.

12. When he returned to Bellingham, Tripo Costello called Don Ellis who told him that he wasn't wanted and that the Port was not sure how it was going to accomplish its pile-driving and maintenance work.

13. The Port has paid Tripo Costello for his full shift on August 21, 1981, and for a half shift on November 17, 1981, when he came in to pick up his tools.

14. By letter dated March 25, 1982, the Port finally explained that it was no longer employing Tripo Costello because it was contracting for the work it had previously done itself.

15. Although the Port has had maintenance work of the type Tripo Costello performed, and James Freeman has attempted to persuade the Port to reemploy Mr. Costello, the Port has refused to do so. Tom Glenn, Don Ellis, and Claude Geiger, assistant engineer, have all said they do not want Mr. Costello back, several times referring to the fact that he went to the union after he was terminated.

16. While Mel Johnson and Tripo Costello were working for the Port, Don Ellis would frequently comment that they were being paid too much."

The employer is alleged to have violated RCW 41.56.140(1) and (4).

On September 16, 1982, the employer filed a motion to dismiss, advancing three lines of reasoning in support of its position: (1) That the complaint

is stale and barred by the doctrine of laches: (2) That the grievance was previously settled through a grievance procedure; and (3) That the complaint fails to state a claim on which relief can be granted. By letter dated October 28, 1982, the parties were invited to supply information concerning any applicable contract and grievance, and to comment on the propriety of deferral of the case to contractual dispute resolution mechanisms. The parties each responded in writing. Those responses disclose that there has never been a collective bargaining agreement between the employer and the union(s), and that there has been no contractual disposition of the issues raised by the complaint.

The first and second grounds advanced by the employer in support of its motion to dismiss are without merit. The "subcontracting" allegations relate to a time period after August 21, 1981. The "interference/discrimination" allegations relate to an even more recent time period. The conduct complained of is thus well within the two-year statute of limitations on civil actions which has been enforced by the Commission. See: Municipality of Metropolitan Seattle (METRO), Decision 1356-A (PECB, 1982). The employer itself has backed away from its "res judicata" claim in the correspondence filed in response to the request for information concerning the possibility of deferral to arbitration.

WAC 391-45-110 requires the Executive Drector to make a preliminary ruling in each unfair labor practice case, and a determination would be made under that rule even in the absence of a specific motion by the respondent. Upon examination of the complaint, it is concluded that the complaint fails to state a cause of action.

Assuming for purposes of this preliminary ruling that all of the facts relating to the certification of the union and the bargaining relationship between the parties to be true and provable, it is nevertheless concluded that the employer's obligation to bargain with the union ceased on August 21, 1981 when Johnson terminated his employment for reasons which are not in dispute. At that time, the bargaining unit had only one employee, and was no longer an appropriate unit for the purposes of collective bargaining. See: Town of Fircrest, Decision 248-A (PECB, 1977). There is no allegation that the decision to contract out work was made prior to August 21, 1981, or that the decision to lay off Johnson and Costello resulted from a previous decision to subcontract.

RCW 41.56.040 omits the "concerted activity" clause found in Section 7 of the National Labor Relations Act. That difference between State and federal law has been a subject of discussion in a number of decisions of the Public Employment Relations Commission. See: Spokane School District, Decision 310-B (EDUC, 1978); City of Seattle, Decision 489 (PECB, 1978); Valley General Hospital, Decision 1195, 1195-A (PECB, 1981) and Clallam County,

Decision 1405, 1405-A (PECB, 1982). The allegations of discriminatory refusal to reinstate relate to the period of time after the bargaining unit had become a "one man unit". Absent either a collective bargaining relationship or a collective bargaining agreement as elements of the environment in which the reinstatement grievance was being processed, the complaint fails to state facts on which relief can be granted under RCW 41.56.140(1).

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above entitled matter is dismissed for failure to state a cause of action.

Dated at Olympia, Washington, this 20th day of January, 1983.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director