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-A PECB DECISION OF COMMISSION

Pamela G. Cipolla, Attorney at Law, appeared on behalf of the complainant.

Burks and Bell, by James G. Bell, Attorney at Law, appeared on behalf of the respondent.

The allegations of the complaint charging unfair labor practices filed on August 20, 1982 involve subcontracting of bargaining unit work and the subsequent loss of employment for one employee. The employer filed a motion to dismiss stating three separate grounds, one of which was that the complaint fails to state a cause of action. In his preliminary ruling made pursuant to WAC 391-45-110, the Executive Director read the complaint as indicating that the bargaining unit had become a one-person unit. The Executive Director thus concluded that there was no duty to bargain, and he dismissed the complaint as failing to state a cause of action. The complainant has petitioned for review. Both parties have filed briefs, and the complainant has requested an opportunity to make oral argument to contradict certain factual assertions made by the employer in its brief to the Commission. For reasons indicated below, we find that oral argument is not necessary in this case.

We agree with the Executive Director that the employer's motion to dismiss based on laches and its motion to dismiss based on prior settlement through the grievance procedure are not well taken. We reverse the order of dismissal based on the conclusion that the complaint fails to state a cause of action, and substitute an opportunity for the complainant to amend its complaint.

The Executive Director correctly observed that a one-person unit is inappropriate for collective bargaining. In the instant case, the complaint

alleges that the unit had varied in size up to ten employees. In August, 1981, the unit consisted either of two employees or of a supervisor and one non-supervisory employee. A mixed unit of supervisors and non-supervisory employees would be considered inappropriate either under the National Labor Relations Act, Sonoma-Marin Publishing Co., 172 NLRB 625, 626, or under RCW 53.18.060(3), Port of Ilwaco, Decision 388 (PORT, 1978); and such a mixed unit may be inappropriate under RCW 41.56.060 even though supervisors are public employees within the meaning of RCW 41.56.030(2). Municipality of Metropolitan Seattle v. Department of Labor and Industries, 88 Wn.2d 925 (1977), City of Richland, Decision 279-A (PECB, 1978) aff. 29 Wa. App. 599 (Division III, 1981), cert. den., 96 Wa.2d 1004 (1981).

A temporary reduction in force of a small unit to a single employee does not, however, relieve an employer of its bargaining obligation. Crispo Cake Cone Co., 195 NLRB 352, 354, enfc'd, CA-8, sub. nom. NLRB v. Crispo Cake Cone Co., 464 F 2d 233. In affirming the NLRB the Eighth Circuit said:

> The record does not compel a finding that the staff of three clerical employers would within a month be permanently reduced to one employee. p. 235

In footnote 2 the court added:

> If the Company can in fact establish that its clerical unit consisted of only one employee since the August 1970 hearing and that the unit has been permanently reduced to one employee, it would appear that only a waste of time and effort for all concerned would result from an attempt to seek compliance with the bargaining order with respect to clerical employees ... P. 236.

When the appropriateness of the unit was re-examined in the course of compliance proceedings, the employer in Crispo Cake met its burden of proving that the unit reduction had been permanent, 201 NLRB 309. In this case, the complainant is entitled to an opportunity to amend its complaint to clarify its claims as to the size and composition of the bargaining unit.

On either a motion to dismiss or a preliminary ruling under WAC 391-45-110, we must take as provable the complainant's allegations, and we must resolve all doubts about the facts in favor of the complainant. That analysis is ordinarily made within the four corners of the complaint, but cannot ignore admissions made in answers or otherwise. In this case, we cannot assume that the decision of the Port of Bellingham to contract out the pile driving work was made only after Mr. Johnson's quitting, thereby reducing the unit from two to one, or that Mr. Johnson's quitting instantly, and ipso facto, relieved the Port of its obligation to bargain about subcontracting the work. In its letter of September 13, 1982, the Port says:

> The Port had for a considerable time prior to August, 1981, been considering how to deal with pile driving work around the waterfront, whether to contract the work out...
>
> The decision of the Port Commission to liquidate its pile driving work was made at approximately the same time as Mr. Costello's supervisor quit (August, 1981). (emphasis ours).

In the light of this near-admission and the absence of evidence as to when the reduction in force became permanent, the complainant will be entitled to a hearing on its subcontracting claim if it sufficiently amends its complaint to allege an appropriate bargaining unit.

NOW, THEREFORE, it is

ORDERED

1. The order of dismissal is vacated, and the matter is remanded to the Executive Director for further processing consistent with this decision.

2. The complainant is allowed a period of fourteen (14) days following the date of this Order to file an amended complaint, which shall then be processed under WAC 391-45-110.

ISSUED at Olympia, Washington, this 8th day of April, 1983.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, Chairman

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Mary Ellen Krug

MARY ELLEN KRUG, Commissioner