STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

FORT VANCOUVER REGIONAL LIBRARY, Complainant, vs. WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Respondent.	)	CASE NO. 6051-U-85-1134 DECISION NO. 2350-A - PECB PRELIMINARY RULING ON AMENDED COMPLAINT

The complaint charging unfair labor practices was filed with the Public Employment Relations Commission in the above-entitled matter on October 24, 1985. The complaint was reviewed by the Executive Director for a preliminary ruling pursuant to WAC 391-45-110, and a letter was issued on November 25, 1985 sending certain of the allegations to an Examiner for a consolidated hearing together with unfair labor practice charges by the Washington Public Employees Association against the complainant herein. A formal preliminary ruling was issued on December 9, 1985, confirming the assignment of selected paragraphs to an Examiner and setting forth the reasons for dismissal of remaining allegations as failing to state a cause of action. Fort Vancouver Regional Library, Decision 2350 (PECB, 1985).

On December 11, 1985, the complainant herein filed a motion to amend and a proposed amended complaint dated December 9, 1985. The proposed amended complaint was in the form of a complete new document, and substantive differences were noted in a number of the allegations. It also appeared that two of the paragraphs of the original complaint had been combined, with the result that the amended complaint was self-contradictory. In light of the circumstance of the documents having crossed in the mail and the evident

typographical error, an inquiry was directed to counsel for the complainant, who advised that the error would be corrected and requested that a preliminary ruling be made on the amended complaint.

On December 24, 1985, the complainant filed a petition for review of the order of dismissal issued as regards certain allegations of the supplanted original complaint.

On December 30, 1985, the complainant filed a letter setting forth corrected language for paragraphs 6(h) of the amended complaint.

Amendments to unfair labor practice complaints are freely granted, particularly at the pre-hearing stage of the proceedings, and the motion to amend made in this case is similarly granted. The amended complaint filed on December 11, 1985 is, particularly when viewed in the context of the December 13 and December 30 communications, deemed to be a complete replacement for the original complaint. Since the complaint on which Decision 2350 was based has been supplanted, the order itself must be vacated and this new preliminary ruling substituted.[1]

As with the original complaint, paragraphs 1, 2, 3, 4 and 5 of the amended complaint identify the parties and their representatives in collective bargaining. While not often contested issues of fact, those items will need to be admitted or proven.

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[1] The alternative would be a needlessly complicated procedure. If the earlier preliminary ruling were deemed to be viable, then the petition for review filed by the employer would transfer the case to the Commission and preclude the Executive Director from making a preliminary ruling on the amended complaint. Any result ordered by the Commission on the petition for review on the original complaint would be rendered a nullity to the extent that the employer has voluntarily altered its allegations. In the meantime, the previously consolidated cross-complaints would have to be severed, and the union's pending unfair labor practice charges against the employer would have to be heard and decided separately.

Paragraph 6 of the amended complaint opens with an allegation that the union has engaged in a course of conduct of failing or refusing to bargain in good faith. Standing alone, without supporting factual allegations, this is merely conclusionary. To the extent that the complaint contains factual allegations of misconduct falling within the jurisdiction of the Commission, the complainant will be entitled to show a course of conduct involving those facts.

The last phrase of paragraph 6 of the amended complaint alleges that the union attempted to have members of the employer's bargaining team removed. Although conclusionary here, such conduct could constitute an unfair labor practice if based on factual allegations elsewhere in the complaint.

An unnumbered paragraph inserted between paragraph 6 and paragraph 6(a) again recites a conclusionary allegation that the union has engaged in an unlawful course of conduct, ending with an "including but not limited to" introduction to more specific allegations in the numbered paragraphs which follow. It has not been the practice of the Public Employment Relations Commission to send "inter alia's", "not limited to's" or "among other things'" to hearing. A respondent is entitled to notice of the charges against it.

Paragraph 6(a) of the amended complaint contains an allegation that the employer's bargaining team asked at the outset of negotiations that the union refrain from contacting library trustees. A similar allegation found in paragraph 6 of the original complaint was rejected as failing to state a cause of action, even when coupled with an allegation that the union has repeatedly violated that request.[2] Negotiations ground rules are, themselves, not mandatory subjects of bargaining. Even if they were, the Commission is not the proper forum for enforcement of contractual rights as

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2 Oregon has prohibited such contacts by statute. See: ORS 243.267(1)(i). Washington has not. See: Sultan School District, Decision 1930 (PECB, 1984). To the contrary, the Commission has recognized a right of free speech, which includes lobbying of public officials and communication of the political ramifications of their action or inaction. See: Sultan School District, Decision 1930-A (PECB, 1984).

between the parties. There is no basis to preclude a union from communicating its proposals to the public officials behind the management bargaining team, so long as it first communicates with the management bargainers.

Paragraph 6(b) of the amended complaint is virtually identical to paragraph 6(a) of the original complaint, except that the alleged threat is limited to the "Library Director", whereas it was directed in the original complaint and in the letter itself against the "employer team". Literal application of the amended complaint would delete the one viable allegation previously contained in the paragraph, but the mis-characterization of the letter will not be given that effect. The allegation will be referred to the Examiner for hearing based on the threats against members of the employer bargaining team.

Paragraph 6(c) of the amended complaint is essentially the same as paragraph 6(b) of the original complaint, and suffers the same deficiency. These allegations involve a "no confidence" vote directed against the library director, who is not a member of the employer's bargaining team. Careful review of the letter itself indicates, however, that all of the action threatened therein is in the nature of an exercise of free speech, seeking to sway public opinion about the employer and its administration.

Paragraph 6(d) of the amended complaint is similar to paragraph 6(c) of the original complaint, which was sent to hearing to the extent that the threats contained in the underlying letter made specific reference to employer bargaining team members Conable and Venturini. The same conclusion pertains here.

Paragraph 6(e) of the amended complaint is similar to paragraph 6(d) of the original complaint. The allegations deal with a letter addressed to the mediator concerning non-delivery of an expected proposal from the employer. Discussion of the possibility of filing unfair labor practice charges is not, of itself, an unfair labor practice.

Paragraph 6(f) of the amended complaint is similar to paragraph 6(e) of the original complaint. These allegations deal with a letter addressed to unspecified "local government elected officials", the nature of which is to solicit public opinion and support. This employer is a public entity and its management should not expect to be protected from public scrutiny and political pressure which the union might bring to bear by its exercise of free speech.

Paragraph 6(g) of the amended complaint is similar to paragraph 6(f) of the original complaint, dealing with a letter directed to members of the board of trustees of the employer. The content of the letter was, in substance, similar to the information contained in the letter discussed in paragraph 6.f., above. Nothing is identified as a new proposal which was being put forth in circumvention of the established employer bargaining team. The letter disclaims any desire to bargain with the trustees and it makes specific reference to the proposals being exchanged through the designated negotiators. While the employer argues in connection with its petition for review that it should be able to question whether such statements were sincere, it does not allege that they were otherwise.

Paragraph 6(h) of the amended complaint, as further amended by the letter filed on December 30, 1985, is similar to paragraph 6(g) of the original complaint, which was found to state a claim on which relief could be granted. This is one of two allegations in which a letter which, on its face, would merely be a free speech communication of a proposal previously or simultaneously made to the employer's bargaining team became, in fact, a circumvention of the bargaining team by reason of its delivery to the trustees a week prior to its delivery to the named addressee. This allegation is again referred to the Examiner for hearing.

Paragraph 6(i) as set forth in the letter filed on December 30, 1985, is similar to paragraph 6(h) of the original complaint. The underlying letter invites the employer to a hearing before union officials on a question of whether the employer should be placed on an "unfair to labor" list and

subjected to political sanctions. The maintenance of "unfair" lists is a free speech activity of unions.

Due to the previously mentioned confusion of two paragraphs in the amended complaint, and the division of that material into two separate paragraphs by the letter filed on December 30, 1985, we are left with yet another paragraph 6(i) in the amended complaint. The paragraph is essentially the same as the first sentence of paragraph 6(i) of the original complaint, dealing with calls placed to public officials responsible for the appointment of library trustees. But the amended complaint does not go on to address a letter which had been detailed in the original complaint. Without more, the conduct appears to be an exercise of free speech, as to which there is no basis to find an unfair labor practice violation.

Paragraph 6(j) of the amended complaint is similar to paragraph 6(j) of the original complaint. This is a second incident of the type described in amended paragraph 6(h) of the amended complaint. Assuming all of the facts alleged to be true and provable, it appears that an unfair labor practice violation could be found against the union for making proposals to the trustees prior to their delivery to the designated employer negotiators.

Paragraph 6(k) of the amended complaint is similar to paragraph 6(k) of the original complaint, which was sent to the Examiner because of reference to a specific incident of an attempt by the union to have the library "administration" removed. The allegation will again be sent to the Examiner for hearing.

Paragraph 6(l) of both the original and amended complaints involve a telephone call placed by a union official to the library director, but the amended complaint eliminates the details on which a cause of action was previously found to exist (i.e., the allegations were previously found to state a cause of action to the extent that the threat of a "no confidence" vote made against the library director was specifically tied to a refusal to

circumvent the designated management negotiators). The mere fact of a conversation is not sufficient to state a cause of action.

Paragraphs 6(m) of both the original and amended complaints deal with comments made by union officials at public meetings of the library board. As previously noted, the right of citizens to address public officials at a public meeting is a constitutional right which cannot be infringed by a collective bargaining statute. Sultan School District, supra, citing Madison School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976). Accordingly, no unfair labor practice violation could be found.

Paragraph 7 of the amended complaint has an introductory paragraph, three numbered sub-paragraphs and then a concluding paragraph. The introductory paragraph and the first two sub-paragraphs are similar to allegations found in paragraph 8 of the original complaint, which had been rejected as failing to state a claim for relief through unfair labor practice proceedings before the Commission. Nothing is cited or found which suggests that union free speech activities such as unfair lists or informational picketing could be either a per se unfair labor practice or indicative of failure to bargain in good faith.

Paragraph 7(c) of the amended complaint alleges generally that the union has "threatened and has sought the dismissal of Gordon Conable", who is one of the employer's negotiators. The allegation was dismissed in the preliminary ruling on the earlier complaint as a part of several involving "secondary" activities. On reconsideration at this juncture, it is noted that actions taken by the union to effect the removal of the management bargainer could, in theory, be unlawful, but there are insufficient facts here to warrant a hearing on the allegation. This allegation may be only redundant to more specific factual allegations set forth above, but it is impossible to know in the absence of information as to the persons who made and received the alleged threats. The respondent will not be called upon to answer and defend on this vague allegation.

It is noted that the amended complaint omits an allegation contained in the original complaint concerning picketing of the library director's home.

The unnumbered concluding sub-paragraph of paragraph 7 of the amended complaint relates to "secondary" activities directed against library trustees as individuals, including their personal business activities. Paragraphs 8, and 9 of the amended complaint are similar to paragraphs 9 and 10 of the original complaint. All of these allegations deal with "secondary" activities engaged in by the union, including a union effort to harass the employer's operation, and a threat of picketing against another (unnamed) organization because of its relationships with the complainant employer. The Public Employees Collective Bargaining Act, Chapter 41.56 RCW, exists in the context of common law precedent which holds that strikes by public employees are unlawful and enjoinable. Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wn.2d 317 (1958). Chapter 41.56 RCW omits the "concerted activity" clause found among the rights of employees in Section 7 of the National Labor Relations Act. RCW 41.56.120 expressly indicates that the Act does not confer or protect a right to strike. Although it must be noted that none of what is alleged is in the nature of a strike, it is also clear that the statute does not contain restrictions on union "secondary" activities similar to those found in Section 8(b) of the National Labor Relations Act. The legislature may have deemed such sophistication to be unnecessary in the absence of a right to engage in "primary" concerted activity. Even if the conduct alleged is beyond the protections of the applicable collective bargaining statute, that does not give the Commission jurisdiction to regulate the conduct or to provide relief to an offended party. The employer's remedies, if any, are in the courts under common law. The Public Employment Relations Commission has previously declined to regulate strikes or related activities through the unfair labor practice provisions of the statutes. See: Spokane School District, Decision 310-B (PECB, 1978).

In summary, those matters identified above in paragraphs 6, 6(b), 6(d), 6(h), 6(j) and 6(k), standing alone or as part of a course of conduct, state a

cause of action and they will be the subject of a consolidated hearing with the union charges against the employer. The remaining allegations fail to constitute conduct as to which relief could be granted through the unfair labor practice provisions of Chapter 41.56 RCW.

NOW, THEREFORE, it is

ORDERED

Except for the matters identified above as having been referred to an Examiner for hearing, the complaint charging unfair labor practices filed in the above-entitled matter is dismissed as failing to state a cause of action.

DATED at Olympia, Washington, this 15th day of January, 1986.

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 391-95-270.