STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| CITY OF SEATTLE,<br><br>Employer. | ) | |
| HOLLAN HILSTAD,<br>BRIAN HULBERT,<br>THOMAS GRIMM,<br>MARY MEREDITH,<br>BETO DE LEON,<br>THANH TRAN, and<br>REINO T. HEISKANEN,<br><br>Complainants,<br><br>vs.<br><br>INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 46,<br><br>Respondent. | ) | CASES 7234-U-88-1480<br>7371-U-88-1525<br>7372-U-88-1526<br>7373-U-88-1527<br>7374-U-88-1528<br>7375-U-88-1529<br>7376-U-88-1530<br><br>DECISIONS 3169-A - PECB<br>3170-A - PECB<br>3171-A - PECB<br>3172-A - PECB<br>3173-A - PECB<br>3174-A - PECB<br>3175-A - PECB<br><br>DECISION OF COMMISSION |

Graham & Dunn, by Clifford D. Sethness, Attorney at Law, appeared on behalf of the complainants.

Hafer, Price, Rinehart and Schwerin, by Cheryl A. French, Attorney at Law, appeared on behalf of the union.

Douglas N. Jewett, City Attorney, by Marilyn Sherron, Assistant City Attorney, appeared on behalf of the employer.

Lawrence C. Kenney, President, and Al Brisbois, Secretary-Treasurer, Washington State Labor Council, filed a brief amicus curiae, in support of the union.

This matter comes before the Commission on a timely petition of International Brotherhood of Electrical Workers, Local 46, for review of a decision issued by Examiner Katrina I. Boedecker.

PROCEDURAL BACKGROUND

On January 22, 1988, Hollan Hilstad filed a complaint charging unfair labor practices alleging that International Brotherhood of Electrical Workers (IBEW), Local 46, had violated RCW 41.56.150(1) and (2), and that the City of Seattle had violated RCW 41.56.140(1) and (2), when the union asked the employer to discharge him for failure to pay union dues for the period of a hiatus between collective bargaining agreements.

On April 25, 1988, the other complainants named above filed identical unfair labor practice charges.

The Executive Director's preliminary rulings made under WAC 391-45-110 concluded that the complaints stated a claim against the union under RCW 41.56.150, but did not state any claim against the employer. The cases were consolidated for hearing before Examiner Boedecker, who ruled that the union committed an unfair labor practice by seeking to enforce union security obligations retroactively. The Examiner ordered the union to cease and desist from its efforts in that regard.

FACTUAL BACKGROUND

The relevant facts, which were largely stipulated, are as follows:

The complainants are employed in the electrical shop of the employer's parks department. Hilstad is the electrician crew chief, and the supervisor of the other complainants.

The union is the exclusive bargaining representative of certain employees of the City of Seattle. As a member of the Joint Crafts Council, the union was party to a 1983-86 collective bargaining

agreement with the employer, which expired on August 31, 1986. That agreement contained a union security clause. As of the hearing date, all of the complainants had paid all union dues due and owing through the expiration date of the 1983-86 agreement.

The employer and union exchanged notices of "intent to modify the labor agreement" in May of 1986, and they began bargaining in July of that year. They did not reach a new collective bargaining agreement before the old one expired at the end of August, 1986. The complainants ceased paying union dues after the 1983-86 contract expired.

When the employer and union signed a new contract on November 4, 1987, they made it retroactive to September 1, 1986, and provided for retroactive pay increases and improved benefits. The new contract contains a union security provision which differs slightly, but not materially, from the union security provision of the previous contract. The "retroactive" effective date of the new agreement is the seed that germinated into this dispute.

In December of 1987, the union notified the complainants and the employer of claimed dues delinquencies, and of its intent to seek the discharges of the complainants to enforce the union security agreement. The dues at issue are those attributable to the 14-month period between September 1, 1986 and November 4, 1987.[1] Prior to hearing, all of the complainants except for Hilstad paid the dues claimed by the union for the hiatus period, and the union deposited those funds in a separate escrow account.

Although Hilstad did not learn of the transaction until the hearing held in these matters in August of 1988, the Joint Crafts Council,

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[1] As of the hearing in these matters, all of the complainants had paid all union dues that were due and owing since November 4, 1987.

IBEW Local 46 and the employer had agreed in May of 1988 to exclude Hilstad's position from the bargaining unit.

## POSITIONS OF THE PARTIES

The positions of the parties do not appear to have changed materially from those expressed in their brief filed with the Examiner.

The union contends that nothing in Chapter 41.56 RCW (which otherwise recognizes the validity of union security provisions and of retroactive contracts) prohibits retroactive application of union security provisions. The union argues that a union security clause is a "benefit" to bargaining unit employees, and therefore can be retroactively applied under RCW 41.56.950. The union urges us to ignore or distinguish National Labor Relations Board (NLRB) decisions in this subject area, because of statutory differences. The union also notes that a "rollover clause" may be used to continue a union security provision in effect during what would otherwise be a contract hiatus. The union argues that the complainants reaped the benefits of retroactivity, and should also share the costs of negotiating the contract. The union maintains that the statutory purpose behind such provisions would be furthered by such a rule. The union and the Washington State Labor Council, as amicus, point out that allowing bargaining unit members to have a "free ride" during a crucial negotiations period could undermine the financial stability of the union. Finally, with regard to complainant Hilstad, the union contends the controversy is moot, because it agrees that Hilstad is no longer a member of the bargaining unit.

The complainants ask that the Examiner's decision be affirmed on all issues. They point to a long line of NLRB decisions holding that a union may not require payments, or threaten discharge over

nonpayment, for dues accruing during a contract hiatus. The complainants argue that RCW 41.56.950 permits retroactivity only as to "benefits", and that a union security clause can hardly be regarded as a benefit to individual employees. They contend that the legislative history of RCW 41.56.950 supports their interpretation of the statute. They reject a contract "rollover" provision as inapplicable in the factual circumstances of this case.

## DISCUSSION

The precise question presented is whether a union security provision can be made retroactive, or otherwise survive, during a hiatus between collective bargaining agreements.

Although the precise issue is one of first impression for the Commission itself, Examiner Boedecker had previously held, in Pierce County, Decision 1848 (PECB, 1985), that union security provisions do not survive the expiration of the contract in which they are contained. We agree with the Examiner's rationale in that case. Union security is not a "working condition" operating between the employer and the employee, so as to be within the general "wages, hours and working conditions" topics on which bargaining is required under RCW 41.56.030(4). Rather, it is a special condition of employment, authorized by RCW 41.56.122(1) to be negotiated between an employer and a union as part of their collective bargaining agreement. Thus, if that contract expires, so does the "union security" obligation or condition attached to that contract.

As the Examiner noted in this case, the union recognized the Pierce County precedent during the hiatus between contracts, as it did not seek to enforce the union security provision during that time period. The union first raised the issue after the new contract

was entered into with a "retroactive" effective date, by calling upon employees to pay dues for the hiatus period or risk discharge.

This brings us to the key issue of law here: Can union security provisions which have expired with a contract be "revived" by the contracting parties entering into a retroactive contract under RCW 41.56.950? For reasons of policy and statutory interpretation, we hold that they cannot.

## NLRB Precedent

Commonly referred to as a "union shop", the maximum form of union security permitted by the federal National Labor Relations Act (NLRA) requires employees to be or become members of the union "on or after the thirtieth day beginning of such employment or the effective date of such agreement, whichever is the later . . ." Section 8(a)(3). In a long line of decisions, the NLRB has held that a union security clause only applies prospectively, from the date the contract is signed. See, e.g., Namm's Inc., 102 NLRB 466 (1953); Bethlehem Steel Company (Shipbuilding Division), 133 NLRB 1347 (1961). The NLRB deems retroactive back dues to be beyond the scope of the assessment of the "periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" that is allowed by Section 8(a)(3) of the NLRA.

As has often been stated by this Commission, and by the courts of this state, NLRB decisions interpreting the NLRA are often pertinent when construing our state collective bargaining laws, unless there is some statutory difference reflecting a policy distinction. Green River Community College v. Higher Education Personnel Board, 107 Wn.2d 427 (1986).

The union argues that the NLRB policy on this subject found its origin in the days of the 1935 Wagner Act, when unions could

enforce "closed shop" provisions outlawed by the Taft-Hartley amendments adopted by the Congress in 1947. We note, however, that the NLRB has "revisited" the issue many times since the "union shop" form of union security has been the most stringent allowed in collective bargaining agreements. Other Board policies have been modified with passage of time and changes of administration, but the Board has not seen fit to abandon its pre-1947 precedents on union security. See, Teamsters Local 25 (Tech Weld Corp.), 220 NLRB 76 (1975); Chestnut Hill Bus Corp., 270 NLRB 212 (1984).

## Claimed Distinctions in Washington Law

Although federal precedent has been consistent, an issue arises as to whether this Commission should adopt a different retroactivity rule because of statutory differences between the NLRA and the Washington Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

Authorization for "Retroactive" Agreements -
One of the differences relied upon by the union is the express statutory authorization for retroactive agreements. RCW 41.56.950 provides:

> **RCW 41.56.950 RETROACTIVE DATE IN COLLECTIVE BARGAINING AGREEMENTS ALLOWABLE, WHEN.** Whenever a collective bargaining agreement between a public employer and a bargaining representative is concluded after the termination date of the previous collective bargaining agreement between the same parties, the effective date of such collective bargaining agreement may be the day after the termination date of the previous collective bargaining agreement and all benefits included in the new collective bargaining agreement including wage increases may accrue beginning with such effective date as established by this section.

The union notes that such retroactive agreements were upheld in Barclay v. Spokane, 83 Wn.2d 698 (1974). We do not agree, however, that RCW 41.56.950 was intended to apply to union security provisions.

When construing statutory provisions, our overriding consideration must be the intent of the Legislature when enacting a statute. See, e.g., State v. Wright, 84 Wn.2d 645, 652 (1974); Tacoma v. Taxpayers, 108 Wn.2d 679, 693 (1987). In this case, the most evident legislative intent does not support the union's position.

RCW 41.56.950 was enacted in 1971, following the issuance of the report and recommendations of a Public Employees Collective Bargaining Committee. That committee, created by the Legislature in 1969, recommended, inter alia, that Chapter 41.56 RCW should be amended to authorize public agencies to make retroactive payments "of wages". The language ultimately adopted by the Legislature in RCW 41.56.950 was seemingly broader, specifying that "all benefits . . . including wage increases" may be retroactive. Thus, we must ascertain the intent of the Legislature in this use of the term "benefits".

The study committee saw a "benefit" in allowing union security provisions in the public sector:

> These devices enable the employee organization to play a more responsible role by obviating the temptation to pressure non-members, and giving the organization some direction in the discipline of members who violate the agreements and rules. It makes less urgent the incentive to pursue an aggressive policy in order to maintain membership by assuring a stable income, such as in "dues checkoff". It further removes the inequity of permitting the non-member the opportunity to refuse to pay for the benefits he (sic) enjoys as a result of the organization's bargaining efforts.

Public Employees Collective Bargaining Committee, "First Biennial Report (Revised 2d Edition)", January, 1971, page 3.

The union has a plausible argument, therefore, that the term "benefit" should be construed as including such clauses. We have considered this argument, but find other legislative history persuasive to the contrary.

RCW 41.56.950 was enacted in the context of the State Constitution and Supreme Court precedent. In years prior to the adoption of RCW 41.56.950, an issue had arisen as to whether retroactive wage and benefit increases would constitute an unconstitutional "gift" or "extra compensation".[2] The Washington Supreme Court addressed this issue in Christie v. Port of Olympia, 27 Wn.2d 534 (1947).

In Christie, a new higher rate of compensation decreed by a wartime arbitration authority was applied retroactively to the expiration date of the prior labor contract covering the employees of the port

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[2] Article II, Section 25 (as amended by Amendment 35 in 1958) provides:

> The legislature shall never grant any extra compensation to any public officer, agent, employee, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office. Nothing in this section shall be deemed to prevent increases in pensions after such pensions shall have been granted.

Article VIII, Section 7 of the Washington State Constitution provides:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

district. The Supreme Court found that the retroactive rate was not a "gift" under Article VIII, Section 7 or "extra compensation" for previously rendered services under Article II, Section 25, because the parties had made an express agreement at the expiration of the prior agreement that employees would continue to work, and that the new rate of pay would apply to work performed after the expiration of the prior contract.

In light of the Christie ruling, it seems reasonable to presume that the constitutional impediment of concern to the Legislature in 1971 would have been limited to the kind of retroactive wage and benefit increases that could fall within the "gift" and "extra compensation" terminology of the Constitution. It seems clear that the Legislature intended to permit bargaining of retroactive wages and fringe benefits traditionally discussed in collective bargaining, without putting the parties through the exercise of a separate agreement of the type condoned by Christie.

In concluding that the Legislature intended the term "benefits" to apply to the types of improvements that would otherwise be prohibited by the state constitution, we also adopt a plain and ordinary meaning of the word "benefit". A benefit is "something that promotes or enhances well-being". American Heritage Dictionary, Second College Edition (Houghton Mifflin Co., 1982). Black's Law Dictionary, 4th ed. (1968) defines the word as: "an advantage, profit, fruit or privilege" which "enhances the value of the property or rights of citizens as contradistinguished from what is injurious." Viewed from the perspective of individual bargaining unit employees, the pecuniary cost of dues payments and the possibility of discharge for nonpayment could be considered as injurious, rather than as a benefit to them. The individual employee may not appreciate the substantial, but rather esoteric, benefits to all bargaining unit members of having retroactive union security clauses, and could well see such a feature as primarily beneficial

to the union itself. We are thus not persuaded that the Legislature had any broader intention than "wages" and "fringe benefits" when it adopted RCW 41.56.950.

At the time RCW 41.56.950 was enacted in 1971, Chapter 41.56 RCW did not yet have a provision expressly validating the inclusion of union security provisions in collective bargaining agreements. The subsequent enactment of RCW 41.56.122(1) in 1973 reinforces our conclusion that there was no legislative intent in 1971 to provide for the retroactive application of union security provisions that would not be allowed until two years later.

We specifically decline the union's invitation to rewrite the statute, by interpreting the word "benefits" in RCW 41.56.950 to mean that all contract terms are made retroactive. If the Legislature had so intended, it could easily have drafted the statute that way. It did not and, like the courts of this state, we are constrained by a tradition of judicial conservatism. We do not write the laws; we merely interpret them. The interpretation that the union seeks is one calling for legislative, not quasi-judicial, attention.[3]

Definitional Differences -
The union contends that greater flexibility is allowed under the Washington statute than under the NLRA in defining the terms of a union security provision.

RCW 41.56.122(1), enacted in 1973, uses the term "union security provisions", as follows:

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[3] In so holding, we are not suggesting or implying that such a statutory change would be a wise policy choice. Such decisions are entirely for the Legislature.

> **RCW 41.56.122 COLLECTIVE BARGAINING AGREEMENTS-- AUTHORIZED PROVISIONS.** A collective bargaining agreement may:
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> (1) Contain union security provisions: PROVIDED, That nothing in this section shall authorize a closed shop provision: PROVIDED FURTHER, That agreements involving union security provisions must safeguard the right of nonassociation of public employees based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member. . . .

Chapter 41.56 RCW does not contain a detailed definition of the term "union security", but the law was not enacted in a vacuum. Roberts' Dictionary of Industrial Relations (BNA Books, 1966) defines "union security" with reference to numerous other publications, most or all of which relate to the practices and precedents applied under the NLRA. The Public Employees Collective Bargaining Committee report and recommendations issued in 1971 had opined:

> The P.E.C.B. Act should be amended to include a provision to permit the inclusion of union security clauses in agreements, if the parties agree, and further, to provide that where a labor agreement conflicts with a civil service rule or regulation, or other regulation, then the union security clause in the agreement will supercede.
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> **In the private sector** (except in those states having "right-to-work" laws), **the use of union security clauses is common.** Employers may or may not agree to a variety of union security clauses such as "union shop," "maintenance-of-membership," and "agency shop."

Public Employees Collective Bargaining Committee, "First Biennial Report (Revised Second Edition)", January, 1971, page 3. (underlining in original, emphasis by **bold** supplied)

The study committee report had used "union security", "closed shop", "union shop", "agency shop", "maintenance of membership" and related terms of art in a manner consistent with their established

and common meanings in the law and practice of labor relations under the federal statute governing the private sector. We find nothing in the Legislative history that indicates that the Legislature had any substantially different intent when it adopted RCW 41.56.122(1) in 1973.

Nothing within RCW 41.56.122(1) ties it to RCW 41.56.950 or otherwise indicates that "retroactive" application of union security provisions was intended or approved. Rather, there is every indication that the Legislature was attempting to embrace "union security" as a function of the collective bargaining agreement, consistent with the federal model. In distinct contrast, the Legislature deviated from the federal model with respect to "checkoff", which is made a statutory right of the incumbent exclusive bargaining representative by RCW 41.56.110, separate and apart from the existence of a contract. Renton School District, Decision 1501-A (PECB, 1982); Snohomish County, Decision 2944 (PECB, 1988).

The only state labor board decision in support of the union position is Berns v. Wisconsin Employment Relations Commission, 299 N.W.2d 248, 111 LRRM 3178 (1980). In doing so, the Wisconsin Court of Appeals applied a "fair-share" provision retroactively. In doing so, the Wisconsin court stressed:

> [T]he fair share agreement involved here does not compel union membership nor can it be invoked to affect the discharge of any employee.

299 N.W.2d at 256, n.6.

We agree with our Examiner, who pointed out that, unlike a fair-share provision under the Wisconsin law, a union security clause can be used under the Washington law to demand the discharge of an employee. It is the threatened discharge which is the proscribed "interference" by the union, violative of RCW 41.56.150(1).

## The Fiscal Impact on the Union

The union, and the State Labor Council as amicus, express concern about the fiscal impact of the Examiner's decision on the union. The Berns court also expressed concerns in this area. We do not believe that is a proper consideration for us, as the interpreter and enforcer of the statutes enacted by the Legislature. We must be reluctant to let our decisions turn on the perceived fiscal health of one of the parties to the collective bargaining process, just as we are loathe to inject ourselves into the internal affairs of unions.[4] If a detrimental fiscal impact does occur, that is an issue for the Legislature to consider.

## Effect of Rollover Clause

Many private sector collective bargaining agreements contain "rollover" clauses, which provide for continuation of the contract in effect beyond its stated expiration date, if neither party opens contract negotiations (usually within a prescribed period). RCW 41.56.070 states, inter alia, that: "Any agreement which contains a provision for automatic renewal or extension of the agreement shall not be a valid agreement . . .", but it may be entirely permissible for parties to arrange an extension of a collective bargaining agreement by an affirmative action taken by both parties at or near the stated expiration date of the contract.

In this case, of course, the parties did open negotiations before the contract expired, and the issues in bargaining did include the union security provision. The case relied upon by the union, Trico Products Corp., 238 NLRB 1306 (1978), is distinguishable. In

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[4] See Skagit Valley Hospital, Decision 2509-A (PECB, 1987), where we narrowly confined the intrusion of state law into the internal affairs of unions engaged in a merger transaction.

Trico, the contract was by its terms automatically renewed. The NLRB therefore held that the employer could continue dues check-off in accordance with the expired agreement, because the parties had agreed to extend the contract terms, and because the employees had not objected, and because the employees had not revoked their dues deduction authorizations.

The contract terms in the case at hand were not extended by operation of an automatic renewal clause, or even by extension agreements signed by the parties in 1986 and 1987 to avoid a contract hiatus. Rather, they were purportedly made effective "retroactive" to 1986 by a contract negotiated after more than a year-long hiatus. Employees did revoke their dues checkoff authorizations during the hiatus, and they have objected in this proceeding to the claims made by the union for the hiatus period.

## Mootness

Complainant Hollan Hilstad never paid anything to the union for the hiatus period. The union has since agreed to his exclusion from the bargaining unit, and it has abandoned any claim for dues (and presumably any demand to discharge) with regard to Hilstad. The Examiner nevertheless found that the union committed an unfair labor practice by making its demand for dues and its demand for his discharge because of his failure to pay dues for the hiatus period. The union asks us to reverse the Examiner's decision on this point, on the basis of mootness.

It is, indeed, difficult to see any present case or controversy with regard to Hilstad. Unlike the other six complainants, Hilstad has no funds in escrow, and so there is no money due and owing back to him. On the other hand, unfair labor practices do not become "moot" merely because the offending party ceases its unlawful conduct voluntarily or under threat of proceedings before this

Commission.[5] Hilstad is entitled to a declaration that the union's conduct was improper, and to an order preventing its recurrence. As a practical matter, a declaration that Hilstad's complaint was "moot" would make no difference here, as the other cases are not moot, and the issue may arise again in any event. Therefore, any mootness as to Hilstad's claim does not prevent us from ruling that the union committed an unfair labor practice by seeking to enforce the union security clause retroactively for the hiatus period. Because the union insisted on doing so, and collected the disputed dues money, it has violated RCW 41.56.150 and interfered with employees rights.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact, conclusions of law and order of the Examiner are affirmed and adopted as the findings of fact, conclusions of law and order of the Commission.

2. International Brotherhood of Electrical Workers, Local 46, shall immediately:

   a. Make whole each complainant (other than Hilstad) for the amount of dues each paid under protest along with interest in accordance with WAC 391-45-410;

   b. Post, in conspicuous places on the employer's premises where notices to its bargaining unit members are cus-

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[5] See our recent decision in Clark County PUD No. 1, Decision 2045-B (PECB, 1989), where a "refusal to bargain" cause of action was held to survive even a seemingly inconsistent "disclaimer" action by the union.

tomarily posted, copies of the notice attached to the Examiner's decision. Such notice shall, after being duly signed by an authorized representative of the respondent, be and remain posted for 60 days. Reasonable steps shall be taken by the respondent, and by the City of Seattle, to ensure that said notices are not removed, altered, defaced, or covered by other material.

c. Notify the complainants individually, in writing, within 30 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide them with a signed copy of the notice required by this Order.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 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 this Order.

ISSUED at Olympia, Washington, this 27th day of March, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Janet L. Gaunt

JANET L. GAUNT, Chairperson

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner