STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JOHN ZAFIROPOULOS, Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 587, Respondent.	)	CASE 6929-U-87-1406 DECISION 2746-B - PECB
MUNICIPALITY OF METROPOLITAN SEATTLE, Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 587, Respondent.	)	CASE 6988-U-87-1421 DECISION 3151-A - PECB DECISION OF COMMISSION

John Zafiropoulos, appeared pro se.

Julie L. Kebler, Attorney at Law, and David Regnier, Attorney at Law, appeared on behalf of the Municipality of Metropolitan Seattle.

Frank and Rosen, by Jon H. Rosen, Attorney at Law, appeared on behalf of Amalgamated Transit Union, Local 587.

Examiner Katrina I. Boedecker issued findings of fact, conclusions and order in the above-entitled matters on March 6, 1989, ruling that the Amalgamated Transit Union, Local 587 (ATU) had committed unfair labor practices in violation of RCW 41.56.150(4) and (1). Local 587 filed timely petitions for review, thereby bringing the matters before the Commission.

PROCEDURAL BACKGROUND

The Complaints and Pre-Hearing Procedures

On July 6, 1987, John Zafiropoulos filed a complaint charging unfair labor practices with the Public Employment Relations Commission.[1] In essence, Zafiropoulos alleged that the ATU violated RCW 41.56.150(1) and (2), by unilaterally denying him the right to bid for certain route assignments offered by the Municipality of Metropolitan Seattle (METRO).[2]

On August 21, 1987, METRO filed a complaint charging unfair labor practices, alleging that the ATU violated RCW 41.56.150(1) and (4), by the same conduct at issue in the case filed by Zafiropoulos.[3]

The complaints were reviewed pursuant to WAC 391-45-110, and it was determined that it was at least arguable that the ATU had committed a violation of RCW 41.56.150. The Executive Director's letter stated, in part:

> [T]he situation appears to be one of first impression before the Public Employment Relations Commission. Although the precise legal theory for finding a violation is somewhat unclear, it appears that the disposition of the dispute would be benefited by having a full evidentiary record and fully developed legal arguments from the parties.

The letter went on to assign Examiner Boedecker to conduct further proceedings in the matters.

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1 Case 6929-U-87-1406.

2 Zafiropoulos is identified in the record as a part-time bus driver employed by METRO, and as a member in good standing of Amalgamated Transit Union, Local 587.

3 Case 6988-U-87-1421.

Notices were issued on February 8, 1988, consolidating the cases and specifying that the union was to serve its answer on each of the complainants on or before March 7, 1988.

The ATU did not file or serve an answer by March 7, 1988. On March 16, 1988, METRO moved for sanctions against the ATU for its failure to answer.

The ATU filed and served answers to both complaints on March 18, 1988, citing out-of-state travel commitments of the ATU's counsel as the reason for the late filing.

On March 28, 1988, METRO moved to amend its complaint, to include an allegation that the ATU also violated RCW 41.56.150(2), by engaging in the conduct described in the earlier unfair labor practice complaint.

The Motions and Rulings at the Hearing

At the outset of the hearing on March 29, 1988, the Examiner dealt with a number of proposed stipulations and motions:

METRO first proposed to withdraw its motion for sanctions if the ATU would not object to METRO's motion to amend its complaint. The ATU declined, and the proposal was dropped.

METRO next argued that the late-filed answer prompted it to make further investigation, and that its motion to amend was prompted by evidence disclosed by that additional inquiry. The Examiner thereupon denied the motion for sanctions, and granted the motion to amend the complaint.

The ATU then moved to amend its answer, to admit all of the facts alleged by Zafiropoulos, as well as paragraphs one through nine of METRO's statement of facts. The Examiner ruled that the remaining

paragraphs of METRO's statement of facts were legal conclusions, so that the ATU had admitted all of the facts alleged in both complaints. The Examiner then recessed the hearing, on the basis that there were no facts in dispute to be the subject of an evidentiary hearing. In so doing, the Examiner overruled METRO's objection. The parties were given a period of time to file written closing arguments on legal issues.

The Post-Hearing Motions and Rulings

Zafiropoulos filed a motion for re-opening of the hearing on April 4, 1988. METRO filed a similar motion on April 12, 1988. The Examiner denied both of those motions on May 23, 1988, reiterating that there were no facts in dispute.

On May 31, 1988, METRO made a Motion to Amend/Supplement Complaint that was reviewed by the Executive Director under WAC 391-45-110. The Executive Director denied that motion on June 30, 1988, noting that it related to conduct beyond the six-month statute of limitations imposed by RCW 41.56.160.

The Examiner then proceeded with deciding the case on the basis of the complaints and the admissions contained in the amended answer.

POSITIONS ON PETITION FOR REVIEW

The ATU requests review of paragraphs 6 and 7 of the Examiner's findings of fact, paragraphs 2 and 3 of the Examiner's conclusions of law, and the Examiner's remedial order.

Zafiropoulos did not file a brief on the petition for review.

METRO agrees with the Examiner's decision, and takes exception to each point made in the ATU's Petition for Review.

DISCUSSION

Issues Concerning Finding of Fact 6

Paragraph 6 of the Examiner's findings of fact states:

> During the summer of 1987 bid process the union president deleted any assignment that ended after 8:00 p.m. from the part-time bid sheets. The employer received no notice that such action was being contemplated.

The ATU claims that the last sentence of that paragraph is not supported by the record.

We might agree that the record is silent as to whether the employer received formal or actual notice of the union's contemplated action. The ATU misplaces the burden of proof, however.

The complainant initially has the burden of proof in unfair labor practice cases. WAC 391-45-270. Where a refusal to bargain unfair labor practice is alleged in connection with a "unilateral change" of a mandatory subject of bargaining, the complainant must establish both the existence of a status quo and a change of wages, hours or working conditions.

A respondent is entitled to assert affirmative defenses in unfair labor practice proceedings, but has the burden of proof to establish the facts asserted. The law requires that a party who would change existing wages, hours or working conditions give notice to the opposite party and provide an opportunity for collective bargaining prior to implementing the change. Whether there was prior notice of that change thus becomes an affirmative defense to be established by the party that claims it has fulfilled its bargaining obligations under the statute. Tacoma School District, Decision 2756 (PECB, 1987).

In these cases, METRO alleged that the union is responsible for ensuring that the employment opportunities that it offered to part-time employees were selected by those employees according to seniority. Both complaints alleged that METRO made certain employment available to part-time employees. Both complaints then alleged that ATU officials changed the situation, preventing Zafiropoulos and others from accepting those employment opportunities. These and all other factual allegations of both complaints must be deemed as established, having been admitted by the union in its amended answer. Absent evidence of prior notice, the union's action in unilaterally crossing off the disputed assignments was a per se violation of RCW 41.56.150(1) and (4).

The ATU had the opportunity to advance affirmative defenses in these cases. If the ATU had given notice of its objections and contemplated action to METRO, it was required to come forward with proof of such notice. The complainants were not obligated to prove a negative (i.e., a lack of notice). In fact, the union never asserted that notice was given, or that an opportunity for bargaining was provided, prior to its taking of unilateral action. The Examiner's inference from the admitted facts is plausible, although it goes beyond what is necessary to decide the case. We amend the finding of fact to more precisely assign the burden of proof.

Our amendment of paragraph 6 of the Findings of Fact does not change the outcome of the case. Good faith and a discrimination-free motive are not valid defenses in "unilateral change" situations. Unilateral action prevents the collective bargaining process from having a chance to work. Consistent with the union's assertion that the disputed scheduling was prohibited by the labor agreement, the ATU had the obligation to provide METRO with an opportunity to respond to the union's position through the grievance procedure. If the disputed scheduling was a change from past practice, the union still had an obligation to provide METRO with an opportunity to respond through the bargaining process.

Issues Concerning Finding of Fact 7

Paragraph 7 of the Examiner's findings of fact states, in part:

> With his seniority ranking, there was a good chance [Zafiropoulos] would have received the assignment.

The union claims that there is insufficient evidence to make such a finding.

The union correctly points out that any pecuniary loss by Zafiropoulos cannot be determined from this record. That does not preclude the finding of a violation however. Zafiropoulos had alleged that his seniority (77th on the seniority list) would have permitted him to pick one or more of the disputed assignments, but for the union's action to cross them off. The complaints also allege that the work opportunities were ultimately given to employees with less seniority than Zafiropoulos. These allegations were admitted, and the entitlement of Zafiropoulos to any assignment can be readily determined from them. Zafiropoulos has a viable claim with respect to any of the stricken routes that were taken by drivers with less seniority than himself.

Issues Concerning Conclusion of Law 2

Paragraph 2 of the Examiner's conclusions of law states, in its entirety:

> The complainant, Zafiropoulos, has met his burden of proof to show that the ATU, by its actions described in Findings of Fact 6 and 8 above, has interfered with, restrained or coerced the complainant's rights guaranteed by the Act. Such action constitutes an unfair labor practice as delineated in RCW 41.56.150 (1).

The ATU states that there has been no "allegation nor evidence" that Zafiropoulos suffered any loss as a result of the union's actions.

The existence of an unfair labor practice violation is not dependent on a calculation of loss. Here, the union appears to be confusing a ruling that its acts constituted an unfair labor practice with a determination as to the remedy available to Zafiropoulos as a result of those unlawful actions. The right to select established routes by seniority was protected by the applicable collective bargaining agreement. The denial of that right, clearly alleged by Zafiropoulos and admitted by the union, forms the basis for finding of the violation.

The calculation of the pecuniary loss, if any, for purposes of a remedy is a separate matter. Zafiropoulos is entitled to the difference between the hours he actually worked after the May, 1987 shakeup and the hours he would have worked if he had driven one of the assignments at issue. If the parties are unable to make that calculation, a hearing on compliance can be conducted at a later time.[4]

Issues Concerning Conclusion of Law 3

Paragraph 3 of the Examiner's conclusions of law states:

> The complainant, METRO, has met its burden of proof to show that the ATU unilaterally changed a mandatory subject of bargaining without

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[4] Although we do not regard the making of such a statement as a condition precedent to our ordering or holding a hearing on "compliance" issues, we note that the Examiner made a statement on the record in this case, reserving the right to reconvene the hearing on the issue of remedy. The parties thus had notice that the issues of liability and remedy would be handled separately, and that the question of liability could be decided first.

> notice to the employer and without bargaining in good faith. Such action constitutes an unfair labor practice of refusal to bargain as delineated in RCW 41.56.150(4).

The ATU's claim that there is no evidence that it failed to give notice has been addressed and rejected, above. It was incumbent on the union to offer proof that it provided the employer with notice and an opportunity to bargain prior to unilateral action.

Issues Concerning the Remedial Order

The Examiner ordered the union to cease and desist from taking unilateral action to cross out assignments, to cease and desist from refusing to bargain in good faith with the employer, to cease and desist from preventing Zafiropoulos and others similarly situated from performing assignments offered by the employer, and to cease and desist from otherwise interfering with employee rights. The Examiner further ordered the union to make Zafiropoulos whole for his losses, and to post notice to employees. We have reviewed that remedial order and find no error. In response to arguments made by the ATU on review, we note that the remedy is not dependent on the factual allegations made by either claimant.

ORDER

1. Paragraph 6 of the Examiner's findings of fact is amended to state:

> 6. During the summer of 1987 bid process the union president unilaterally deleted any assignment that ended after 8:00 p.m. from the part-time bid sheets. The record does not establish that the union gave the employer notice or an opportunity to bargain the matter prior to making that change.

2. As amended by paragraph 1 of this order, the findings of fact issued by Examiner Katrina I. Boedecker are AFFIRMED and adopted as the findings of fact of the Public Employment Relations Commission.

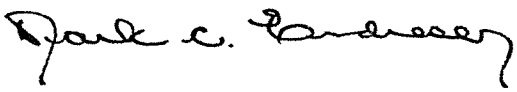
3. The conclusions of law and order issued by Examiner Katrina I. Boedecker are AFFIRMED and adopted as the conclusions of law and order of the Public Employment Relations Commission.

4. Amalgamated Transit Union, Local 587, shall, within 30 days following the date of this order, notify the Executive Director of the steps it has taken to comply with the remedial order issued by the Examiner in this matter.

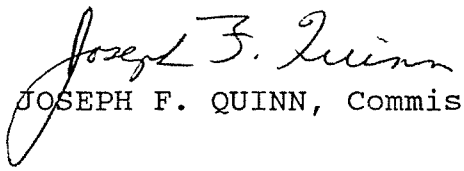
Issued at Olympia, Washington, this 30th day of January, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson



MARK C. ENDRESEN, Commissioner



JOSEPH F. QUINN, Commissioner