STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SPOKANE COUNTY FIRE DISTRICT 9, Employer.	
JAMES H. PANKNIN, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2916, Respondent.	CASE 8342-U-89-1812 DECISION 3773 - PECB
JANICE PANKNIN, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2916, Respondent.	CASE 8381-U-89-1819 DECISION 3774 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Underwood, Campbell, Brock & Cerutti, P.S., by Stephen R. Matthews, Attorney at Law, appeared on behalf of the complainants. Michelle K. Wolkey, Attorney at Law, assisted on the brief.

Barry E. Ryan, Attorney at Law, appeared on behalf of the union.

On December 29, 1989, James H. Panknin and Janice Panknin filed a complaint charging unfair labor practices against International Association of Fire Fighters, Local 2916 (union).[1] The complainants alleged that they are employees of Spokane County Fire

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[1] Two separate cases were docketed, consistent with the Commission's docketing procedures in such situations.

District 9, that the union is their exclusive bargaining representative, and that the union had violated RCW 41.56.150(1) and (2) by its assessment of inappropriate costs to non-members of the union. A hearing was held before Examiner Mark S. Downing in Spokane, Washington, on October 5, 1990. Post-hearing briefs were filed by both parties.

BACKGROUND

Spokane County Fire District 9 serves a population of approximately 35,000 in the northern portion of Spokane County, Washington.[2] The employer's services are provided from seven fire stations, staffed by 12 full-time firefighters and a volunteer force of approximately 100 firefighters. Robert Anderson is chief of the fire district.

International Association of Fire Fighters, Local 2916, is the exclusive bargaining representative of the nonsupervisory full-time firefighting employees of Spokane County Fire District 9. Charles Oliver is president of the local union.

On September 9, 1990, the undersigned Examiner issued a Notice of Consolidated Hearing, informing the parties that a hearing would be held on the above-captioned matters on October 5, 1990. That notice informed the union that the deadline for filing its answer to the complaint was September 25, 1990. That notice additionally informed the union of the consequences of a failure to file an answer, quoting the provisions of WAC 391-45-210 as follows:

> The failure of a respondent to file an answer ... shall, except for good cause shown, be deemed to be an admission that the fact is

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[2] The general background information in this paragraph is derived from Spokane County Fire District 9, Decision 3021-A, 3482-84 (PECB, 1990), and Spokane County Fire District 9, Decision 3661 (PECB, 1990).

> true as alleged in the complaint, and as a waiver of the respondent of a hearing as to the facts so admitted.

That notice also informed the union that it was to serve a copy of its answer on counsel for the complainants.

The union's answer was filed with the Commission on October 4, 1990, nine days after the deadline established in the Notice of Consolidated Hearing.

At the start of the hearing on October 5, 1990, the complainants filed a written motion for summary judgment, seeking a ruling from the Examiner that the facts as alleged in the complaint should be admitted as true. The attorney for the complainants indicated that he had just received the union's answer at the hearing.

The union was provided an opportunity to show "good cause" for its late answer under the provisions of WAC 391-45-210. The union's attorney indicated that union President Oliver had been out of town, and did not return in sufficient time to prepare an answer and meet the deadline. The union's attorney stated that the answer had been prepared and dated on October 1, 1990, but did not contest that the answer was not served on the complainants until the outset of the hearing.

The undersigned Examiner concluded that the union's reasons did not constitute "good cause" for its failure to file and serve its answer in a timely manner. Therefore, in accordance with WAC 391-45-210, the Examiner ruled that the "Statement of Facts" attached to the complaint was admitted as true. That "Statement of Facts" is set forth, in full:

> 1. Complainants James H. Panknin and Janice Panknin are fire fighters employed by Spokane County Fire District No. 9 in Spokane County, Washington. They are in the bargain-

ing unit represented by Local 2916 of the International Association of Fire Fighters. However, they are not members of the International Association of Fire Fighters.

2. In September 1988 Local 2916 levied a special assessment against members of the bargaining unit. Because they believed this assessment was improperly levied, the Complainants refused to pay it and filed an appeal. On December 27, 1988, Local 2916 advised them that their membership had been suspended effective December 19, 1988, for failure to pay the disputed special assessment. On January 30, 1989, Local 2916 President Charles Oliver sent a letter to the Complainants reinstating their membership and advising that a re-vote would be taken on the special assessment. The Complainants decided at this time that they no longer supported Local 2916 and they resigned their membership immediately. Neither James Panknin nor Janice Panknin has been a member of the IAFF since February 14, 1989.

3. The Collective Bargaining Agreement between the ... [employer] and ... [union], states in Article 3: "Any employee who is not a member of the Union, shall, as a condition of employment, pay the Union a monthly service charge <u>equal to the monthly Union dues</u> as a contribution towards the administration of this agreement. Employees who fail to meet this requirement shall be discharged". (Emphasis supplied.) This Union security provision is part of the contract in effect from January 1, 1986, through December 31, 1988. As of the date of this Complaint, the ... [employer] and ... [union] have not completed negotiations and agreed upon a new contract for 1989 or beyond. Therefore, for the time period covered by the actions complained of herein, there was no current Collective Bargaining Agreement in effect in Fire Protection District No. 9. [emphasis in original]

4. Local 2916 provides its members with the use of a television set, video cassette recorder, coffee, condiments and other services. Bargaining unit members pay for these as part of their monthly Union dues. At the time that James Panknin and Janice Panknin were

suspended from Local 2916, they were advised that they could no longer use any of these services. However, their monthly service charge was not reduced accordingly. In order to determine the proportion of their monthly service fee that was going towards these benefits, the Panknins requested a review of the Association's financial records. On July 25, 1989, President Charles Oliver and Secretary/Treasurer Jack Moon met with James Panknin and his representative to review the Association's financial records. Although Mr. Oliver and Mr. Moon refused to allow Mr. Panknin access to written records, they did provide a verbal summary of income and expenses for 1988 and year-to-date 1989. From that verbal summary it appears that Local 2916 spent $837.51 on coffee, television, and other miscellaneous expenses not related to grievance handling, collective bargaining or contract administration in 1988. Through July 25, 1989, it appears that Local 2916 spent approximately $424.69 on similar expenses that would not benefit non-members.

5. At the July 25, 1989 meeting, President Oliver indicated that he did not have the information necessary for Mr. Panknin to review records for years prior to 1988. At this time he agreed to either send Mr. Panknin and his representative copies of audited financial reports for prior years or set up a time to meet and review these financial records. Although the Panknins have requested this review both verbally and in writing on several occasions, the Association has refused to allow them access to the records for years prior to 1988 and for the second half of 1989. Because of the Association's refusal to provide access to their financial records, the Complainants are unable to determine the exact amount of their monthly service fee that is being applied to expenses not related to collective bargaining, grievance handling or contract administration.

6. In the spring of 1989, Local 2916 again conducted a vote on the special assessment mentioned in Paragraph 2 above. This assessment was passed and made effective in June of 1989. On June 2, 1989, the Complainants were advised that they each must pay an

administrative fee in the amount of $54.00 in addition to the standard monthly service charge (which at that time was $35.00) by June 30, 1989. They were advised that Local 2916 considered this one time special assessment to be "Union dues" and, therefore, if the Complainants refused to pay the assessment, the Local would invoke Article 3 of the Collective Bargaining Agreement and request the termination of their employment. In order to protect their jobs, James Panknin and Janice Panknin paid the special assessment on June 30, 1989. This payment of $108.00 was made under protest. The Panknins requested that Local 2916 hold the funds in trust until a determination could be made of whether this assessment was an appropriate expense to be levied against non-members of the Association.

7. The purpose of the assessment paid by the Panknins on June 30, 1989, was to establish a "bargaining unit member assistance program." This program was to provide assistance to employees who had lost income due to discipline by the District and for employees suffering "a wide range of problems." Attached as Exhibit "A" is a true copy of the letter of June 18, 1989, from Charles R. Oliver, President of Local 2916 discussing this assessment. In the discussion of the Union financial records of July 25, 1989, President Oliver stated that the special assessment had been used at that time to reimburse one employee for income loss while he was suspended from his duties and to provide a loan to another employee who missed work due to an injury.

8. After the Local's refusal to provide access to additional Union financial records, the Panknins requested, in a letter of December 1, 1989, that the amount paid for the special assessment be reimbursed because the money was not used for costs related to grievance handling, contract administration or collective bargaining. On December 13, 1989, President Charles Oliver advised the Panknins' attorney that he would return the funds but that the Local considered this assessment to be Union dues and, therefore, the Local would attempt to invoke Article 3 of the Collective Bargaining Agreement and would request the

> termination of the Complainants for failure to pay dues. In order not to jeopardize their employment, the Panknins decided not to accept the reimbursement until a formal determination could be made by the Public Employment Relations Commission concerning these funds.

Attached as "Exhibit A" to the "Statement of Facts" was a letter dated June 18, 1989, from union President Oliver to James Panknin, stating in relevant part:

> I have received your letter concerning your increase in administrative fees for the month June 1989.
>
> In response to your inquiries mentioned within your letter which was undated but bore a postmark of June, 15, 1989, [sic] the Union offers this.
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> Earlier this year, Local 2916 IAFF unanamously [sic] passed a resolution providing for a bargaining unit member assistance program. This program, contrary to your letter, is not only for assistance in disciplinary matters that are unjust but also for members suffering a wide range of problems. These could include assistance for injuries or illness, layoffs of any type and other devastating situations. ...

The complaint sought the following remedies from the Commission for the union's actions:

1. Access to the union's financial records so complainants can determine what percentage of their monthly service fees did not relate to collective bargaining, contract administration or grievance handling expenses;

2. Reimbursement by the union of all service fees or special assessments that did not relate to collective bargaining, contract administration or grievance handling expenses, along with interest to the date of payment;

3. An order prohibiting the union from using threats to seek complainants' termination for refusal to pay a special assessment when no collective bargaining agreement was in effect.

4. Attorney's fees and costs.

After the "Statement of Facts" was admitted as true, the union presented evidence at the hearing concerning several affirmative defenses to the complaint.

POSITIONS OF THE PARTIES

The complainants argue that the union violated Commission precedent by seeking their termination, during a contract hiatus, for failure to pay a special assessment. The complainants allege that this one-time special assessment was not related to expenses of the union for collective bargaining, contract administration or grievance handling, although it was characterized by the union as "union dues". The complainants also object to being charged for certain "house benefits", such as coffee, condiments, and use of a television set and video cassette recorder, as part of their monthly service fees after the union prohibited them from using or enjoying those benefits. The complainants additionally urge that those "house benefits" are not related to the union's duties in conjunction with collective bargaining, contract administration or grievance handling.

The union's brief renewed its objection, made at hearing, to the Examiner's ruling concerning the absence of "good cause" for its late answer. The union contends that its attorney had difficulty getting in touch with the union president in order to prepare an answer. Several affirmative defenses were also presented by the union: (1) The union argues that the complainants have not alleged that their right of nonassociation for union membership is based on bona fide religious beliefs under RCW 41.56.122; (2) The union

argues that a ruling on the complaint is prohibited by the lack of evidence in the record as to whether any successor collective bargaining agreement between the parties contained union security provisions similar to those in the expired agreement, and whether those provisions were retroactive to January 1, 1989.

DISCUSSION

Respondent's Failure to File a Timely Answer

The Commission has adopted procedural rules, codified in Chapter 391-45 WAC, to assure that unfair labor practice complaints will be answered in a timely fashion. Those rules state:

> **WAC 391-45-170 NOTICE OF RIGHT TO ANSWER.** The examiner shall issue and cause to be served on the parties a notice of hearing at a time and place specified therein. ... The notice of hearing shall specify the date for the filing of an answer, which shall be not less than ten days prior to the date set for hearing. ...
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> **WAC 391-45-190 ANSWER -- FILING AND SERVICE.** The respondent(s) shall, on or before the date specified therefor in the notice of hearing, file with the examiner the original and three copies of its answer to the complaint, and shall serve a copy on the complainant.
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> **WAC 391-45-210 ANSWER -- CONTENTS AND EFFECT OF FAILURE TO ANSWER.** An answer filed by a respondent shall specifically admit, deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. The failure of a respondent to file an answer or the failure to specifically deny or explain in the answer a fact alleged in the complaint shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a

> waiver of the respondent of a hearing as to the facts so admitted.
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> **WAC 391-45-230 AMENDMENT OF ANSWER.** The respondent may amend its answer at any time prior to the hearing. ...

The requirement that the respondent provide its answer at least 10 days prior to the hearing allows the complainant a reasonable period of time to prepare its case for hearing. A complainant need not present testimony at a hearing concerning facts that have been admitted as true by a respondent in its answer. When no answer has been filed, a complainant can assume under WAC 391-45-210 that the facts in the complaint are admitted as true, and that it need not present evidence at the hearing on those matters.

Previous Commission rulings have emphasized the importance of timely answers by respondents. In City of Benton City, Decision 436 (PECB, 1978), a representative of the respondent employer called the Examiner at the time and place scheduled for a hearing, and stated that, as a result of its misunderstanding, the respondent could not be present. The Examiner continued the hearing in that case until 1:30 p.m. on the same day, and the employer's mayor appeared at that time. When asked why no answer had been filed, the mayor replied:

> I would say its my fault why it wasn't answered. It wasn't that I just wanted to ignore it, but there was so many things going on that I overlooked it.

City of Benton City, at page 2.

The Examiner held in that case that the respondent's "overlooking" of its obligation to provide an answer did not meet the "good cause" standard of the Commission's rules. The facts alleged in the complaint were deemed admitted as true. This ruling was affirmed by the Commission, in City of Benton City, Decision 436-A

(PECB, 1978), and court, in City of Benton City, No. 78-1322, WPERR CD-343 (Benton County Superior Court, 1979).

In Battle Ground School District, Decision 2449-A (PECB, 1986), the Commission noted that default judgments have been entered against respondents in a variety of circumstances:

> City of Vancouver, Decision 808 at note 2 (PECB, 1980), [city, without good cause, failed to file a timely answer]; Pasco School District, Decision 1053 (EDUC, 1980) [employer failed, without good cause, to file timely answer and then, after tendering answer at outset of hearing, absented itself from the hearing] and Seattle Public Health Hospital (American Federation of Government Employees), Decision 1781 (PECB, 1983) [union claimed unfamiliarity with PERC procedures and press of other business].

Battle Ground School District, at page 9.

More recently, in Toutle Lake School District, Decision 2659 (PECB, 1987) and Southwest Snohomish County Public Safety Communications Agency, Decision 3289-B (PECB, 1990), default judgments were entered against respondents who failed to file timely answers.

Although the union's attorney asserted that he had difficulty in contacting his client, neither the Examiner nor the complainants' attorney was notified that counsel was encountering such difficulties, or that the answer would be delayed.

The union's answer was signed and dated four days prior to hearing. It was not filed with the Commission, however, until one day prior to the hearing. Of perhaps even greater importance, the answer was not served on the complainants or their attorney until the day of hearing. Although both the respondent's attorney and the complainants' attorney have offices in the same city, there was no explanation of the failure to serve the answer on the complainants' attorney until the day of hearing.

The respondent's conduct is wholly unacceptable. Its conduct left the complainants and their attorney completely in the dark as to how to prepare for the hearing. Lacking any notice from the respondent that an answer was or would be forthcoming, the complainants were entitled to assume that the union was admitting the facts as contained in the complaint. Under these circumstances, the union has failed to establish "good cause" for its tardy answer.

Legislative History of Union Security Provisions

As initially adopted in 1967, the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, provided for negotiation of "checkoff" of union dues by employers as part of a collective bargaining agreement. Under this arrangement, employers were required to deduct and transmit dues to the exclusive bargaining representative for employees who had given written authorization for such deductions. This statutory provision was as follows:

> **41.56.110 Dues - Deduction from pay**. A collective bargaining agreement may provide that upon the written authorization of any public employee within the bargaining unit, the public employer shall deduct from the pay of such public employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and shall transmit the same to the treasurer of the exclusive bargaining representative.
>
> (1967 1st ex. sess. ch. 108 Section 11.)

Under this two-step provision: (1) employers only deducted union dues pursuant to a collective bargaining agreement; and (2) employers only deducted union dues for employees who had given authorization. There was no provision for enforcing a "union security" obligation on employees who preferred not to be members of the union.

In 1969, the Legislature created a joint legislative/clientele committee to study the state's collective bargaining laws. The committee, which became known as the Public Employees Collective Bargaining Committee, issued its report on January 11, 1971.[3] That report contained a "working draft" document, in addition to proposed amendments to Chapter 41.56 RCW. The purpose of the "working draft" was to "provide the opportunity for comment from labor, public management and the public",[4] regarding changes to Chapter 41.56 RCW. It contained the following suggestions:

> Sec. 3. Section 11, chapter 108, Laws of 1967 ex. sess. and RCW 41.56.110 are each amended to read as follows:
>
> ((~~A collective bargaining agreement may provide that~~)) Upon the written authorization of any public employee within the bargaining unit and after the certification or recognition of such bargaining representative, the public employer shall deduct from the pay of such public employee the monthly amount of dues, initiation fee, and assessments as certified by the secretary of the exclusive bargaining representative and shall transmit the same to the treasurer of the exclusive bargaining representative.
>
> NEW SECTION. Sec. 4. There is added to chapter 41.56 RCW a new section to read as follows:
>
> A collective bargaining agreement may:
>
> (1) Contain union security provisions including all-union or agency provisions: PROVIDED, That agreements involving union security provisions including an all-union or agency 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. Such public employee must pay an amount of money equivalent to

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3 The First Biennial Report Submitted to the 42nd Session of the Washington State Legislature, (Revised Second Edition), July, 1971.

4 First Biennial Report, at page 60.

> regular union dues, initiation fees, and assessments, if any, to a nonreligious charity or to another charitable organization mutually agreed upon by the public employee affected and the bargaining representative to which such public employee would otherwise pay the dues, initiation fee, and assessments. ...

First Biennial Report, at page 60C.

In contrast to the "working draft", the Committee's proposed amendments to Chapter 41.56 RCW did not address RCW 41.56.110. The substance of the working draft's suggestion of a "union security" provision was included as a proposed amendment in the committee report, as follows:

> NEW SECTION. Sec. 4. A collective bargaining agreement may provide that all public employees within a unit shall become members of the bargaining representative as a condition of their employment with the public employer and shall share as a member of such bargaining representative in the expenses incurred in bargaining for fringe benefits and salaries: PROVIDED, That agreements involving union security ... must safeguard the rights of nonassociation of employees, based on a bona fide religious tenets ...

First Biennial Report, at page 65.

The Committee thus embraced the concept that non-members should share in the exclusive bargaining representative's collective bargaining expenses.

The first legislative action on any of the Committee's recommendations came on January 16, 1973, when House Bill 175 was introduced at the Committee's request. Section 1 of the bill incorporated the changes to RCW 41.56.110 suggested in the Committee's working draft, except for the suggestions concerning initiation fees and assessments. House Bill 175 adopted the working draft language on "union security", with the changes indicated here by underlining:

> NEW SECTION. ... There is added to chapter 41.56 RCW a new section to read as follows:
>
> A collective bargaining agreement may:
>
> (1) Contain union security provisions ~~including all-union or agency provisions:~~ PROVIDED, That nothing in this section shall authorize a closed shop provision: PROVIDED FURTHER, That agreements involving union security provisions ~~including an all-union or agency 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. Such public employee ~~must~~ shall pay an amount of money equivalent to regular union dues~~,~~ and initiation fees~~, and assessments, if any,~~ to a nonreligious charity or to another charitable organization mutually agreed upon by the public employee affected and the bargaining representative to which such public employee would otherwise pay the dues~~,~~ and initiation fee~~, and assessments~~.
>
> ...

House Bill 175 was passed by both houses of the Legislature, without amendment.[5] The provisions of RCW 41.56.110 were thus amended to provide the incumbent exclusive bargaining representative with a statutory right to "checkoff" of union dues, upon authorization of bargaining unit employees.[6] That provision has remained unchanged to this date. The new section that authorized collective bargaining agreements to contain "union security" provisions was codified as RCW 41.56.122, and that language has remained intact except for the substitution, in 1975, of the Public Employment Relations Commission as the agency responsible for administration of the statute.[7]

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[5] Chapter 59, Laws of 1973.

[6] Making checkoff a statutory right of the incumbent exclusive bargaining representative, independent of the existence of a contract, is a substantial deviation from federal law on this subject.

[7] Chapter 296, Laws of 1975.

In 1975, the Legislature passed the Educational Employment Relations Act to regulate the collective bargaining activities of certificated employees of school districts. That statute contained the following provisions regarding "checkoff" and "union security":

> **41.59.100 Union security provisions - Scope - Agency shop provision, collection of dues or fees.** A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues. All union security provisions must safeguard the right of nonassociation of employees based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular dues and fees to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the bargaining representative to which such employee would otherwise pay the dues and fees. ... [emphasis supplied]

This marked the first reference to the term "agency shop" in a Washington collective bargaining statute.

In City of Seattle, Decision 3169-A - 3175-A (PECB, 1990), the Commission looked to the Committee's report for guidance as to the definition of various terms used by the Legislature in House Bill 175 and subsequent collective bargaining laws. Definitions were contained in a "Glossary of Commonly Used Terms in Labor Relations" included in an appendix to the Public Employees Collective Bargaining Committee's 1971 report, as follows:

> Agency Shop - A provision in a collective bargaining agreement which requires all employees who do not join the union to pay a

> fixed monthly sum, usually the equivalent of union dues and fees, as a condition of employment, to help defray the union's expenses in acting as bargaining agent for the group. Some arrangements provide that payments be allocated to the union's welfare fund or a charity, rather than to the union's treasury.
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> Closed Shop - A labor contract provision stipulating that the employer may hire and retain only union members. In 1947 the Taft-Hartley Act banned this practice in industries and businesses engaged in interstate commerce.
>
> Maintenance of Membership - An arrangement providing that those who are members of the employee organization at the time the agreement is negotiated, or who voluntarily join it subsequently, must maintain their membership for the duration of the agreement as a condition of employment.
>
> Open Shop - A labor contract provision that the employee does not have to be a union member in order to secure to retain employment. Also used for establishments where no union exists.
>
> Union Security - Protection of union status by provisions in a collective bargaining agreement establishing closed shop, union shop, agency shop or maintenance-of-membership.
>
> Union Shop - A labor contract clause that the employer may hire anyone he wants, but that all workers must join the union within a specified period of being hired and must retain membership, as a condition of continuing employment.
>
> Under a modified union shop, current members must remain so, all new hires are obliged to join, but current nonmember employees do not have to join.

First Biennial Report, at pages 70-74.

In concluding that those definitions should be accepted as forming the basis for the Legislature's intent in using those terms, the Commission stated:

> The study committee report had used "union security", "closed shop", "union shop", "main-

> tenance 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.

City of Seattle, at pages 12-13.

Non-members, such as the complainants here, who elect to pay a service or agency fee to the union in lieu of joining the union, have become known as "agency fee payers".

The Respondent's Affirmative Defenses

Lack of Assertion of Religious Beliefs for Nonassociation -
The union argues that the complainants do not qualify for any right of nonassociation from union membership, because they failed to allege that their right of nonassociation was based on religious beliefs under RCW 41.56.122. That statute only refers to a right of nonassociation for employees with objections of a "religious" nature, and proceedings before the Commission under Chapter 391-95 WAC have been restricted to circumstances where public employees have alleged a right of nonassociation based on religious beliefs,[8] but the existence of that statutory exception does not preclude the existence of other exceptions to union security obligations. The complainants' cause of action here is based on constitutional principles, as detailed below.

Existence of a Contract Hiatus -
Paragraph 3 of the complaint filed to initiate these cases alleged that the collective bargaining agreement between the employer and

[8] See, Grant v. Spellman (Grant II), 99 Wn.2d 815 (1983); Vancouver School District, Decision 224 (EDUC, 1977); City of Seattle, Decision 3344-A (PECB, 1990); Snohomish County, Decision 3579 (PECB, 1990).

union expired on December 31, 1988. The same paragraph went on to allege:

> ... [F]or the time period covered by the actions complained of herein, there was no current Collective Bargaining Agreement in effect in Fire Protection District No. 9.

Those alleged facts were not controverted by the union in its untimely answer.

Apart from the fact of a contract hiatus having been deemed admitted upon the respondent's failure to answer, notice is taken of the docket records of the Commission, which indicate that a request for mediation assistance was filed on January 13, 1989.[9] That file was closed on May 1, 1990, on the basis of "Agreement Reached", after a successor agreement was negotiated between the employer and union.

The terms of any successor agreement are irrelevant here. The statutory right to "check-off" of union dues upon the voluntary authorization of employees remained in effect, pursuant to RCW 41.56.110, even in the absence of a collective bargaining agreement. Snohomish County, Decision 2944 (PECB, 1988).[10] Union security provisions do not survive the expiration of the collective bargaining agreement in which they are contained, however. Pierce County, Decision 1840-A (PECB, 1985). In like manner, union security provisions which have once expired with a collective bargaining agreement cannot be revived "retroactively" by the contracting parties entering into a successor agreement. City of

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[9] Case 7768-M-89-3069.

[10] The statutory "check-off" language only requires deduction of dues (as opposed to initiation fees), and only mandates monthly deductions by an employer (as opposed to semi-monthly deductions). Emergency Dispatch Center, Decision 3255-B and 3522 (PECB, 1990).

Seattle, supra. The Examiner concludes from the foregoing that there is a basis in the record to conclude that there was a hiatus between contracts during the period relevant to this case.

Efforts to Terminate Employment During Contract Hiatus

The union advised the complainants on June 2, 1989, during the contract hiatus, that the union would request termination of their employment under Article 3 of the expired agreement, unless a special assessment of $54.00 per employee was paid by June 30, 1989. Complainants, on June 30, 1989, paid the special assessments under protest.

The union's right to enforce union security obligations on bargaining unit employees expired on December 31, 1988. The union's threat to seek termination of the complainants' employment during a contract hiatus thus constituted an "interference" in violation of RCW 41.56.150(1).[11]

A second count of the same nature occurred in December of 1989. On December 1, the complainants requested that the union return the special assessments paid in June, because such monies were not used for "costs related to grievance handling, contract administration or collective bargaining". On December 13, the union advised the complainants that it would return the special assessment monies, but it accompanied that with a claim that the assessments were "union dues" and a renewed threat to seek the termination of the

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[11] Had the union actually carried out its threat, by asking the employer to discharge the complainants, it would have also been violating RCW 41.56.150(2). The Examiner makes no finding under RCW 41.56.150(2) in this case, due to the absence of any "take action" allegation among the admitted allegations of the complaint. Similarly, the Examiner does not rule on whether RCW 41.56.122 would have permitted the union to enforce collection of "assessments" through the union security provisions of the statute.

complainants' employment under Article 3 of the expired agreement. Based on those conditions, the complainants decided not to jeopardize their employment by accepting reimbursement from the union. A second violation of RCW 41.56.150(1) thus occurred.

Constitutional Principles

The Supreme Court of the State of Washington has indicated its willingness to interpret the union security provisions of our state collective bargaining laws in accordance with federal constitutional principles. In Capitol Powerhouse Engineers v. State, 89 Wn.2d 177 (1977), the Supreme Court held, referring to Abood v. Detroit Board of Education, 431 U.S. 209 (1977), that the union security provisions of RCW 41.06.150 were valid under the First Amendment to the United States Constitution. In Grant v. Spellman, supra, the Supreme Court gave the "religious nonassociation" provisions of RCW 41.56.122 an interpretation that would preserve the constitutionality of that statute as against the "establishment of religion" clause of the United States Constitution.

In Abood, supra, the Supreme Court of the United States held, under the First Amendment to the United States Constitution, that non-members of a union could be required to pay the costs of collective bargaining, contract administration and grievance adjustment, but could not be forced to pay fees for the support of ideological causes not germane to the union's duties as exclusive bargaining representative. The restriction on the use of service fees from non-members was also stated as prohibiting the use of such fees to contribute to political candidates, or to express political views unrelated to the union's duties as collective bargaining agent.[12]

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[12] The statute at issue in Capital Powerhouse Engineers permits state employees to pay a service fee to the union, instead of union dues. The union in that case had a readily accessible procedure for refund of monies which would otherwise be used for political purposes to which an employee objected.

In Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), the Supreme Court of the United States set forth certain procedures that unions must follow to protect the substantive distinction drawn in Abood. The collective bargaining agreement at issue in Hudson authorized the union to specify the amount of the non-member fee, so long as it did not exceed dues paid by union members. The union had established the amount for the 1982-83 school year at 95% of the dues paid by union members, calculated on the basis of union financial records for the fiscal year ending June 30, 1982. Non-members could object to the fee after it was deducted from their pay, by writing to the union president and instituting a three-stage procedure: (1) Consideration by the union executive committee, with notice to the objector within 30 days of the decision; (2) appeal within 30 days to the union's executive board, which would consider the objection; and (3) appeal to an arbitrator paid by the union and selected by the union's president from a list maintained by the Illinois Board of Education. If an objection was sustained at any stage, the remedy was a rebate of amounts overpaid in the past and a reduction in future deductions.

The unanimous Hudson court held that the union procedure contained three constitutional defects: First, it failed to minimize the risk that employees' contributions might be temporarily used for impermissible purposes. Second, it failed to provide non-members with adequate information about the basis for the fee demanded. Third, it failed to provide for a reasonably prompt impartial decision. The Court emphasized its previous holding from Abood, stating as follows:

> [T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.

Hudson, at page 302, quoting Abood, from page 237.

Accordingly, the Supreme Court required creation of procedural safeguards in all three of the problem areas identified, as a condition precedent to enforcement of union security obligations on public employees.

Commission Decisions Adopting Federal Precedents

The principles of Abood and Hudson have been cited, with approval, in several Commission decisions.

In Brewster School District, Decision 2779 - 2882 (EDUC, 1987), four public school teachers filed unfair labor practice charges accusing the employer and union of violating Chapter 41.59 RCW, by enforcing an unlawful union security agreement against employees who were not union members. The collective bargaining agreement contained union security language requiring non-members to pay a representation fee to the union in an amount to be determined by the union. The union had determined that the representation fee was equal to the full dues amount paid by members for the Brewster Education Association, Washington Education Association and National Education Association. In his preliminary ruling, the Executive Director indicated that the union security provisions of RCW 41.59.100 are subject to having the affirmative obligations set forth in Hudson engrafted onto them, in the following manner:

> 1) Adequate explanation of the basis of the fee. The union must provide adequate information explaining the basis for the agency shop fee to the employee. This includes identifying the expenditures for collective bargaining, contract administration and grievance adjustment that were provided for the benefit of nonmembers as well as members, not just the money that had been expended for purposes that did not benefit non-members. [footnote omitted] The Union need not provide non-members with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as

> well as verification by an independent auditor. The employee has the burden of raising an objection, but the union bears the burden of proving the proportion of political to total union expenditures.
>
> 2) <u>Reasonably prompt opportunity to challenge the amount of fee before an impartial decisionmaker</u>. The non-member's objections must be addressed in an expeditious, fair and objective manner. The procedure cannot be controlled by the union. Special judicial procedures are not necessary, nor is a full administrative hearing with evidentiary safeguards (as had been mandated by the Seventh Circuit in the <u>Hudson</u> case). An expeditious arbitration might satisfy the requirement so long as the arbitrator's selection did not represent the union's unrestricted choice.
>
> 3) <u>Escrow for amounts reasonably in dispute while challenges are pending</u>. The risk that non-member contributions might be temporarily used for impermissible purposes must be minimized. A rebate after the fact was held not sufficient. On the other hand, escrow of 100% of the dues amount was not required. If information initially provided to the employee by the union includes a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories. If the union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.

<u>Brewster School District</u>, Decision 2779 - 2882, at pages 8-9.

The Executive Director also issued a preliminary ruling on an additional complaint filed concerning agency shop fee procedures for the 1987-88 school year. That ruling stated:

> As before, there is no allegation here that Jones has notified the union of her objection,

> that the union has refused to supply information, that the union has failed to respond to an objection in the manner described in Hudson, or that the union has declined to escrow disputed dues amounts.

Brewster School District, Decision 2779-A, 2971 (EDUC, 1988), at pages 8-9.

While the Brewster cases were eventually dismissed for lack of prosecution, so that there were no decisions "on the merits",[13] the legal analysis set forth by the Executive Director remains valid.

The principles of Hudson were also followed in Snohomish County, Decision 3705 (PECB, 1991). The complainant in that case alleged that the union refused to comply with her request for a "reduction of dues obligation to equal only the pro rata costs of collective bargaining" with the employer. The union moved to dismiss the complaint, noting that it had adopted Hudson procedures and had additionally refunded the full amount of complainant's escrowed dues, with interest. An unfair labor practice violation was found, however, for the time period that had elapsed before the union's publication of its Hudson procedure. The Examiner noted that, on its face, the union's procedure did not appear to be defective.

Refinement of Hudson Principles by the Courts

In Crawford v. Air Line Pilots Assn., 870 F.2d 155 (4th Cir. 1989), monthly payments of non-members were reduced in advance by 150 per cent of the union's estimated rebate obligation. The union based its estimate on the previous years' experience, along with budget projections and other available information. Non-members' fees were deposited in an interest-bearing escrow account. The actual ratio of germane and nongermane expenses was calculated by May 31 of the following year, at which time the non-members received a

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13 See, e.g., Brewster School District, Decision 2971-A (EDUC, 1988).

lump sum rebate, with interest. The plaintiffs in that case challenged the escrow-and-rebate approach, arguing that Hudson required an advance reduction of agency fees used for political and ideological expenditures. The court, in approving the plan, stated:

> This procedure, we believe, fully satisfies Hudson's concerns that a union not exact an involuntary loan from a nonmember for nongermane expenditures.

Crawford, at page 161.

In Dashiell v. Montgomery County, 731 F.Supp. 1251 (D.Md. 1990), the plaintiffs focused their protest on the role of the independent auditor in determining the reduced agency fee. They argued that Hudson required the auditor to determine which of the union's expenditures related to chargeable activities and which concerned nonchargeable matters. The court disagreed, ruling that the constitutional minimum is satisfied when the auditor accepts the union's allocation of fully-audited expenditures to either the chargeable or nonchargeable category and, based upon the union's allocation, determines the appropriate reduced fee. The auditor's "verification" is simply that expenditures were actually made by the union for the claimed expenses. If an employee challenges the union's calculation of the proportion of chargeable activities, an arbitrator will determine at a later point in time whether certain expenses are, in fact, chargeable to agency fee payers. On appeal, the U.S. Court of Appeals for the Fourth Circuit stated:

> The test of adequacy of the initial explanation to be provided by the union is not whether the information supplied is sufficient to enable the employee to determine in any final sense whether the union's proposed fee is a correct one, but only whether the information is sufficient to enable the employee to decide whether to object. If the employee objects, **then** the union will be called upon to demonstrate more completely its justification for

> the fee, because "[t]he burden of proof in establishing the charges validly chargeable ... rests on defendant unions." Beck v. Communications Workers of America, 776 F.2d 1187, 1209 ... (4th Cir. 1985) ... aff'd on rehearing en banc, 800 F.2d 1280 ... (1986), aff'd, 487 U.S. 735 ... (1988). [emphasis in original]
>
> Thus, in its initial explanation to nonunion employees the union must break its expenses into major descriptive categories and disclose those categories or portions thereof which it is including in the fee to be charged. Hudson also requires that the financial data be verified by an independent auditor. The verification requirement compels the union to have an independent auditor determine whether the amounts claimed by the union for chargeable activities are true.

Dashiell v. Montgomery County, __ F.2d __, 136 LRRM 2550 (4th Cir. 1991), at LRRM pages 2554-55.

The Court of Appeals thus affirmed the ruling of the district court.

A "fair share fee" provision of a collective bargaining agreement between a teachers union and a local school board was at issue in Lowary v. Lexington Board of Education, 903 F.2d 422 (6th Cir. 1990). The union's agency fee plan contained a "local union presumption" which called for an arbitrator to presume that the percentage of chargeable expenditures for the local and district associations was the same as the percentage found to be appropriate for the state-wide Ohio Education Association organization. The union plan reasoned that, since the local and district associations spent a significantly larger percentage of their budgets on chargeable expenditures, the presumption meant that objectors would be charged less than they lawfully could be charged. The court voided this part of the union's plan, holding that such a presumption impermissibly shifted the burden of persuasion in arbitration. The court reminded that, after a nonmember makes his or her objec-

tion, the union bears the burden of proving the proportion of germane expenditures to total union expenditures. The court rejected an argument by the plaintiffs there that they should be entitled to full restitution for all agency fees paid under the tainted plan. In concluding that relief should be limited to the nonchargeable portion of the unconstitutionally collected fees, the court was concerned that awarding total restitution to the plaintiffs would undermine the policy concerns of Abood. The court noted that one objective of Abood was "to require every employee to contribute to the cost of collective-bargaining activities."[14]

In Tierney v. City of Toledo, 917 F.2d 927 (6th Cir. 1990), a challenge was made to a union's compliance with the Hudson requirement regarding financial disclosure. The plaintiffs argued there that the union failed to adequately disclose financial data which would enable them to "gauge the propriety of the union's fee". The union had disclosed the amount that it had sent to its parent union, but failed to disclose how those funds were utilized. The court ruled that adequate financial disclosure must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations. If the parent union cannot disclose or does not see fit to disclose to the local union how these funds are spent, then the local union may not include payments to the parent union in its chargeable costs. The court stated:

> Non-members are constitutionally entitled to disclosure of these payments prior to objecting so that they may evaluate the basis for an objection and consequently protect their First Amendment rights. Further, objecting non-members have a right to an advance rebate of those fees which are attributable to clearly non-chargeable expenditures. [emphasis in original]

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[14] Abood, at page 237.

Tierney v. City of Toledo, at page 937.

The Tierney plaintiffs also argued that the union had failed to adequately disclose the methodology used to calculate the agency fee. When the union totaled its chargeable expenditures and divided that figure by the total dues collected, the percentage was 102.4% of the dues collected. The union acknowledged that it could not charge dissenting non-members more than regular dues paid by its members, and it set the agency fee at 100% of regular dues. The union asserted that its political and nonchargeable activities were entirely funded by outside profit-making businesses. Under these circumstances, the court held that the union must disclose its revenues and the assumptions to support such a conclusion.

A union's procedure for collecting agency fees was challenged in Grunwald v. San Bernardino City School Dist., 917 F.2d 1223 (9th Cir. 1990). The agency fee was equal to 100% of the dues paid by union members, and no notice was given before deductions occurred. All agency fees collected were placed in an independently managed interest-bearing escrow account. A notice was sent to all agency fee payers, advising them of their right to receive a rebate for the portion of the fee that was not attributable to collective bargaining expenses. The union's procedure was held to be constitutionally defective, as it failed to provide for advance reductions. In order for the union's procedure to minimize infringement on nonunion employees' First Amendment rights, the union was entitled to deduct only a reasonable estimate of the percentage of fees related to its collective bargaining expenses. The court also held that notice of and adequate information concerning the agency fee had to be given to all non-members before any fees could be collected by the union.

Following the decision in Hudson, supra, the Chicago Teachers Union adopted a revised agency fee procedure that was found to be constitutionally adequate in Hudson v. Chicago Teachers Union, __

F.2d __, 136 LRRM 2153 (7th Cir. 1991) [Hudson II]. In concluding that the plaintiffs' complaints in Hudson II had more to do with the way the union calculated the fair share fee than with the constitutional adequacy of the union's notice, the court stated:

> ... Hudson [I] did not contemplate that federal courts would be required, on the basis of the notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected. ...
>
> The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. ...
>
> The singular role of the federal courts in reviewing the adequacy of a fair share notice is to determine whether the notice gives the nonunion members enough information to challenge the basis for the fee.

Hudson II, at LRRM page 2160.

The union's fair share notice in Hudson II contained 39 pages and identified two categories: Chargeable expenses and non-chargeable expenses. Each category was defined and further broken down to specific items of expenditures. Quoting Gilpin v. AFSCME, 875 F.2d 1310, 1316 (7th Cir. 1989), cert. denied, __ U.S. __, 110 S. Ct. 278 (1989), the Hudson II court concluded that the notice provided sufficient information to enable the plaintiffs "to decide whether there is any reason to mount a challenge."

Dean v. Trans World Airlines, 924 F.2d 805 (9th Cir. 1991), concerned an airline pilot that had resigned his union membership in 1973. In 1975, the employer and union negotiated an agency shop clause in their collective bargaining agreement, requiring non-members to pay fees to the union in an amount equal to the dues paid

by union members. Dean immediately protested the assessment, contending that he was being forced to subsidize the union's ideological activities. The court held that the principles of Hudson, decided in 1986, should be applied on a retroactive basis. The court ruled that, without Hudson procedures in place, a union had no right to enforce an agency shop agreement to collect fees for use in any union activity beyond collective bargaining.

Application of Hudson Principles

In the case now before the Examiner, the complainants first objected to payment of monies to the union in September, 1988, when the union levied a special assessment. While the nature of their objection was not specified by the complaint, the dispute which ensued at that time apparently led the complainants to resign their union memberships, effective February 14, 1989.

After becoming non-members, the complainants objected to the union's use of their monthly service fees to purchase "house benefits", and requested a review of the union's financial records. On July 25, 1989, union officers explained the union's income and expenses for 1988 and year-to-date 1989, but refused the complainants' request for access to written records.

The complainants claim that they are unable to determine what proportion of their monthly service fee is being applied to expenses not related to collective bargaining, grievance handling or contract administration. Their focus on access to written union financial records at an early stage of the Hudson process is somewhat misplaced, but is not fatal to their overall case.

Under Hudson, the union should have given the complainants notice of the dollar amount they were to pay as "agency fee" payers,[15] and the union should have had a Hudson procedure in place for resolving any disputes. The union did not meet either of those requirements in this case.

The responsibility of the union to provide details about how its monies are expended arises under Hudson only after an employee objects to supporting activities that are not germane to collective bargaining. Then, the nonmember has the opportunity to challenge the amount of the agency fee before an impartial decisionmaker, and the union has the burden of proof before the arbitrator to establish that the expenses were, in fact, chargeable to non-members. While the complainants' request for written records would have been premature under an adequate Hudson procedure, the absence of such a procedure is the proper focus here, and is the basis for finding a violation. Absent a valid Hudson procedure, the union was without authority to collect agency fees for activities other than collective bargaining.

Court Decisions Interpreting Abood

The Abood court struggled with the question of where to draw the line between a union's collective bargaining activities and its ideological activities unrelated to collective bargaining. The court stated as follows:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining [sic] agreement and representing the interests of employees in settling disputes and processing grievances

[15] This notice is to establish the dollar amount to be paid by agency fee payers, explaining the proportion of union expenses that are chargeable to non-members.

> are continuing and difficult ones. They often entail expenditure of much time and money.

Abood, 431 U.S. at page 221.

In recognizing the difficult role that a union faces in making decisions, the Court stated:

> The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.

Abood, 431 U.S. at pages 222-23, quoting International Association of Machinists v. Street, 367 U.S. 740, 778 (1960).

The Court also noted that, in the public sector, the line as to chargeable activities may be somewhat hazier than in the private sector, stating:

> The process of establishing a written collective-bargaining [sic] agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.

Abood, at page 236.

In reviewing a case arising under the Railway Labor Act in Ellis v. Railway Clerks, 466 U.S. 435 (1984), the Court adopted the following test to delineate between chargeable and non-chargeable expenditures:

> [W]hether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in deal-

> ing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining [sic] contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Ellis, 466 U.S. at page 448.

The Ellis Court addressed five particular union expenditures:

First, a challenge was asserted to the union's national convention, held every four years, where members elected officers, established bargaining goals and priorities, and formulated overall union policy. The Court held that maintenance of the union's corporate or associational existence was essential to the union's discharge of its duties as a bargaining agent.

Second, a challenge was made to expenditures for the purchase of refreshments for union business meetings and occasional social activities. These activities were formally open to nonmember employees. The Court quoted the ruling from the lower court in the same case, as follows:

> [T]hese small expenditures are important to the union's members because they bring about harmonious working relationships, promote closer ties among employees, and create a more pleasant environment for union meetings.

Ellis, at pages 449-50, quoting Ellis, 685 F.2d 1065, 1074 (9th Cir. 1982).

The Supreme Court agreed that these activities were sufficiently related to collective bargaining to be charged to all employees.

Third, the petitioners objected to paying for the union's monthly magazine. In holding that this was "an accepted and basic union activity", the Court limited charges for this publication to articles related to collective bargaining activities. The Court

reasoned that, if the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing about that activity.

Fourth, the union's organizing expenditures were at issue. The Court held that such expenses were not chargeable to non-members.

Fifth, expenses of litigation were challenged. The Court concluded that such expenses having a direct connection with the bargaining unit were chargeable to agency fee payers.

The principles of Ellis were extended to cases arising under the National Labor Relations Act in Communications Workers v. Beck, 487 U.S. 735 (1988). The Court concluded that Section 8(a)(3) of the NLRA authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues".

In Crawford v. Air Line Pilots Assn., supra, non-members objected to the union's use of agency fees in support of strikes at two airlines and in preparation for a possible strike at another airline. The objectors claimed that such expenses should not be charged to agency fee payers who were not employees of those airlines. Non-members also challenged the use of their agency fees for the creation and maintenance of a strike reserve fund. The parties stipulated that the union involved was a "unitary national labor organization" without local unions. Bargaining policies were established by its national officers, and all negotiations and agreements had to be approved by them. With respect to the nature of collective bargaining in the airline industry, the Court quoted the district court's findings of fact as follows:

> [C]ollective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines. Each airline strives to keep its labor costs no higher than those of its competitors. Thus, when one airline obtains some

> cost-cutting concession from [the Association], other airlines generally seek to obtain the same or an equivalent concession. On the other hand, when [the Association] succeeds in negotiating a wage or benefit increase with one airline, that enhances its ability to negotiate a similar increase with other airlines.

Crawford, at page 157.

The objecting pilots asserted that the reference in Ellis to "employees in the bargaining unit" limited the expenses assignable to non-members to costs incurred only by his or her own bargaining unit. The Court rejected that argument, holding as follows:

> Ellis does not support the restrictive reading that the objecting pilots assign to it. In Ellis the Court analyzed which types of expenditures could be charged against nonmembers' fees. It did not decide how a national union must allocate the expenditures that are germane to bargaining among the bargaining units it represents.

Crawford, at page 158.

The Fourth Circuit had issued the opinion that was before the Supreme Court in Beck,[16] and it referred back to its Beck ruling, emphasizing that:

> [A] union could not charge agency fee-payers for its political and lobbying expenses, community service and charitable donations, and expenditures in support of strikes by other unions in other industries.

Crawford, at page 159.

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16 Beck v. Communication Workers, 776 F.2d 1187, 1210-12 (4th Cir. 1985), reh'g en banc, 800 F.2d 1280 (4th Cir. 1986), aff'd, 487 U.S. 735 (1988).

The Court concluded that the challenged strike-related expenses satisfied the Ellis test, and were chargeable to non-members.

The question of where to draw the line concerning expenses germane to collective bargaining activities was also addressed in Lehnert v. Ferris Faculty Assn., 881 F.2d 1388 (6th Cir. 1989). The plaintiffs in that case were faculty members at Ferris State College, a four-year public institution of higher learning in Michigan. They chose not to belong to the union, an affiliate of the Michigan Education Association and National Education Association. Under the unified dues structure of the union, membership in the Faculty Association constituted membership in the state and national organizations as well. The Court of Appeals dealt with several challenges to union expenditures:

First, the non-members objected to union expenditures for delegates to attend conventions of the state and national organizations, and to participate in the 13E Coordinating Council. The council developed bargaining strategies and representational policies for bargaining units, including Ferris State College. Plaintiffs attempted to distinguish Ellis, arguing that the conventions of the Michigan Education Association and the National Education Association were those of affiliated parent unions, rather than conventions of their actual bargaining representative. The Court rejected those arguments, relying in part on a holding of the Michigan Employment Relations Commission that a dissenting employee may be charged for the cost of state and national conventions under Ellis because the "union as affiliated is the exclusive representative".

Second, the non-members challenged union expenditures for legislative lobbying, for "millage" campaigns and other ballot issues. The major lobbying expense was the Preserve Public Education program of the Ferris Faculty Association. This program was directed at securing funding for public education in Michigan through "millage" and ballot campaigns. In rejecting this argument, the Court stated:

> While it is clear ... that dissenting employees in the private sector may not be charged for political or ideological union activities, we believe that the lobbying and other "political" activities of the union in this case were, as required by Ellis, "reasonably employed to implement or effectuate the duties" of the Ferris Faculty Association as the exclusive representative of the public employees at Ferris State College. [emphasis in original]

Lehnert, at page 1391.

The Court noted fundamental differences between collective bargaining in the public and private sectors, stating:

> To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other "political" arenas.

Lehnert, at page 1392.

The Court agreed with the holding of Robinson v. State of New Jersey, 741 F.2d 598, 609 (3rd Cir. 1984), that lobbying and similar "political" activities by a public employee union that are "pertinent to the duties of the union as a bargaining representative" may be constitutionally charged to dissenting employees. The court also rejected the plaintiffs' objection to being charged for articles related to lobbying and other political activities of the union that were published in the Teacher's Voice.[17] The court relied on the holding of Ellis that agency fee payers could be charged for the costs of union publications, insofar as they report on activities for which dissenters could be charged.

Third, the plaintiffs argued that certain expenditures of the state and national organizations for union services provided to

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[17] A publication of the Michigan Education Association.

employees in other bargaining units, rather than for employees at Ferris State College, should not be chargeable. The Court rejected that argument, relying on Ellis:

> The Ellis court concluded that dissenting employees could be charged for the expenses of the union's national convention, even though employees in other bargaining units participated in and benefited [sic] from such conventions. Moreover, the Court held that dissenters could be charged for the costs of a union publication insofar as the publication reported on activities chargeable to dissenters, even if the chargeable activities reported on were unrelated to the specific bargaining unit of the dissenting employees. [emphasis in original]

Lehnert, at page 1393.

The Court noted, with approval, the Crawford holding that dissenting employees could be charged for expenditures outside of the immediate bargaining unit, so long as those expenses were "germane" to the union's obligation as bargaining representative.

The objectors' fourth challenge involved union expenditures made in publicizing, preparing for and threatening a strike that was illegal under Michigan law. Because the union did not actually engage in an illegal strike, the district court found these expenditures chargeable. The Court of Appeals upheld that ruling, reasoning that negotiation tactics and public relations activities designed to put pressure on the employer were within the range of reasonable bargaining tools available to a public sector union during contract negotiations.

In their final objection, the plaintiffs asserted that they were improperly charged for other miscellaneous union expenditures, including expenses for professional activities and for general public relations activities. The Court stated:

> Public relations expenditures designed to enhance the reputation of the teaching profes-

> sion and professional/educational expenditures intended to improve the profession generally and the skills of teachers specifically are, in our opinion, sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters.

Lehnert, at page 1394.

Accordingly, the Lehnert court also rejected that challenge.[18]

In summary, under Abood and its progeny, a union may only use agency fees for activities germane to its role as the employees' exclusive bargaining representative. Unions are frequently formed by employees with a view toward improving their working environment. In order for a union's activities to be germane to the employees it represents, those activities undertaken must be related to goals to enhance the employees' conditions of employment. Those goals must concern improvement of the working relationship between the employees and the employer.

Application of Abood Principles

In this case, the complainants objected to the union's use of their agency fee monies to purchase "house benefits" such as coffee, condiments, a television set and a video cassette recorder. If these benefits had been afforded to non-members in the same manner that they were made available to union members (as were the refreshments at union meetings in Ellis), a question would arise as to whether they are chargeable expenses.[19] That question need not

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[18] Certiorari was granted by the Supreme Court on June 11, 1990, 110 S. Ct. 2616.

[19] The question would be: "Do expenditures by a union for refreshments and provision of entertainment equipment for employees' use during normal working time fall into a different category?" These expenses appear to have been incurred by the union in order to provide a more pleasant

be answered here, however, as the complainants were prohibited from utilizing these benefits once they resigned their union membership. They clearly cannot be charged for such expenses.

The complainants also objected to paying a one-time special assessment to establish what the union described as a "bargaining unit member assistance program". The union explained the purpose of its program, as follows:

> This program ... is not only for assistance in disciplinary matters that are unjust but also for members suffering a wide range of problems. These could include assistance for injuries or illness, layoffs of any type and other devastating situations.

The evidence establishes that the union had actually used funds from the program to reimburse one employee for income lost while he was suspended from his duties, and to provide a loan to another employee who missed work due to an injury. While the Examiner is troubled by the breadth of the fund's stated goals, the actual utilization of the fund has been limited to assisting bargaining unit members with employment-related matters. The expenses were incurred to replace employer funds that were not received by employees for various reasons. Under these circumstances, these were reasonable activities of the union in order to implement its duties as exclusive bargaining representative. Replacement of those funds by union-collected monies can be viewed as a method of improving the conditions of employment for those employees who suffered the losses. So long as such assistance is offered to non-

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working atmosphere for bargaining unit members at their work location. These expenses could thus be viewed as enhancing or improving the work environment, and thus as chargeable to agency fee payers. A similar situation was noted, but not decided, in Pateros School District, Decision 3745 (EDUC, 1991) at footnote 23.

members on the same basis as to union members, it is a chargeable expense to agency fee payers.

Remedy

The union is guilty of some unfair labor practices, and some remedial order is necessary. Only actions occurring within six months prior to the filing of a complaint can be remedied by the Commission under RCW 41.56.160. Thus, the requested remedy in this case will be confined to the time period commencing six months prior to the filing of the instant complaint.

While the normal remedy for unlawful enforcement of union security obligations during a contract hiatus would be a complete refund of all union dues paid by the complainants during that contract hiatus,[20] some adjustment of that remedy is warranted here. The record indicates that these complainants apparently volunteered payment of some "service fee" to the union even after they resigned their union memberships during the contract hiatus. The complainants did object to paying the special assessments demanded during the contract hiatus, however.

The complainants did demand a reduction of their volunteered service fees to reflect amounts that were not used by the union for collective bargaining, contract administration or grievance handling expenses. The Examiner notes a division of authorities on the appropriate remedies in such cases. In Snohomish County, supra, the Examiner ordered the union to refund all monies collected from the agency fee payer under the union security provision for periods when the union did not have a Hudson procedure in effect. On the other hand, restitution of the full amount of agency fees was rejected in Lowary v. Lexington Board of Education, supra, based upon the Abood principle that every

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[20] See, City of Seattle, Decision 3169-A, supra.

employee could be required to contribute to the cost of collective bargaining activities.[21] The first approach makes it an unfair labor practice for the union to ask for union security payments in the absence of a Hudson procedure, while the second approach only makes it an unfair labor practice for the union to attempt enforcement of the union security obligation (e.g., by seeking the discharge of the employee) in the absence of a Hudson procedure. Under the facts of this case, where the complainants have volunteered payment of a service fee, the Examiner adopts the latter approach.

The complainants also seek an award of attorney fees, arguing that the union admitted the facts but stubbornly refused to correct the situation with no explanation whatsoever. Attorney fees have been awarded where defenses to an unfair labor practice complaint are frivolous or meritless. See, Lewis County v. PERC, 31 Wn.App. 853 (1982). The term "meritless" was defined as meaning "groundless or without foundation" in State ex rel. Washington Federation of State Employees v. Board of Trustees of Central Washington University, 93 Wn.2d 60 (1980). Although the union failed to file a timely answer in this matter, it is instructive to review the contents of the union's tardy answer for the purpose of determining whether its defenses to the complaint were frivolous. The union's answer denied that the "house benefits" were paid for through union dues, claiming instead that "non-union dues sources" were used to purchase those benefits. The union admitted that it refused to allow the complainants access to its financial records for years prior to 1988 and for the second half of 1989 but, as noted above, the complainants' request for that information was premature. As also noted above, the law in this area is still developing. The union's defenses to the complaint were not entirely frivolous or

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[21] Complete restitution was also denied in Price v. Automobile Workers, __ F. Supp. __, 136 LRRM 2641 (D. Conn. 1990), where the court ordered only a refund of the nonchargeable amounts, with interest.

meritless. The imposition of a extraordinary remedy is not warranted.

FINDINGS OF FACT

1. Spokane County Fire District 9 is a public employer within the meaning of RCW 41.56.030(1).

2. International Association of Fire Fighters, Local 2916, a bargaining representative within the meaning of RCW 41.56-.030(3), is the exclusive bargaining representative of an appropriate bargaining unit of nonsupervisory employees of Spokane County Fire District 9.

3. James H. Panknin was, at all times pertinent hereto, an employee of Spokane County Fire District 9, within the bargaining unit represented by International Association of Fire Fighters, Local 2916.

4. Janice Panknin was, at all times pertinent hereto, an employee of Spokane County Fire District 9, within the bargaining unit represented by International Association of Fire Fighters, Local 2916.

5. Local 2916 provides certain "house benefits" for employees in the fire station, including coffee and condiments, and use of a television set and video cassette recorder.

6. The employer and union were signatories to a collective bargaining agreement covering the period of January 1, 1986 through December 31, 1988. Union security provisions of that agreement required any employee who was not a member of the union to pay a monthly service fee to the union that was equivalent to the amount of dues paid by union members. At no

time has the union had in effect a procedure for the apportionment of dues between the expenses chargeable and non-chargeable to objecting non-members, in conformity with constitutional principles laid down by the Supreme Court of the United States.

7. No successor collective bargaining agreement had been signed by the employer and union by the December 29, 1989 filing date of the unfair labor practice complaint in these cases.

8. On February 14, 1989, during a hiatus between contracts, James H. Panknin and Janice Panknin resigned their union memberships. They volunteered payment thereafter of a monthly service charge to the union.

9. On an unspecified date during or about late 1988 or early 1989, James H. Panknin and Janice Panknin were advised by the union that they could no longer partake of the "house benefits" provided by the union, if they were not union members. Their monthly service charges paid to the union were not reduced on account of their exclusion from such "house benefits".

10. On June 2, 1989, during a hiatus between contracts, the union advised James H. Panknin and Janice Panknin that they must each pay a special assessment in the amount of $54.00. The purpose of this assessment was to establish a "bargaining unit member assistance program". Funds from that program were used to reimburse one employee for income lost while he was suspended from his duties, and to provide a loan to another employee who missed work due to an injury. The complainants were advised by the union that refusal to pay the special assessment would result in the union invoking Article 3 of the collective bargaining agreement to request termination of their employment.

11. On June 30, 1989, at a time when there was no collective bargaining agreement in effect between the employer and union, the complainants made payment, under threat of termination of their employment, of the special assessments referred to in the foregoing paragraph.

12. The complainants requested a review of union financial records. At a meeting held on July 25, 1989, union officials Charles Oliver and Jack Moon explained the expenses of the union for 1988 and year-to-date 1989. The union officials refused to provide the complainants with access to written financial records of the union.

13. On December 1, 1989, the complainants requested that the union return the special assessments referred to in paragraphs 10 and 11 of these findings of fact.

14. On December 13, 1989, during a hiatus between contracts, the union responded to the complainants' December 1, 1989 request by indicating that it would return the monies, but that it regarded the assessments as "union dues", and that it would request the termination of the complainants' employment under Article 3 of the expired collective bargaining agreement.

15. Based on the union statements described in the foregoing paragraph, the complainants decided not to jeopardize their employment by accepting reimbursement from the union.

16. A Notice of Consolidated Hearing issued on September 9, 1990, informed the parties that a hearing would be held in these matters on October 5, 1990, and that the deadline for filing of the union's answer was September 25, 1990.

17. The union did not file an answer within the time specified in the Notice of Consolidated Hearing. An answer prepared and

dated October 1, 1990, was filed with the Commission on October 4, 1990, but was not served on the complainants until the start of the hearing on October 5, 1990.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. International Association of Fire Fighters, Local 2916, failed to show "good cause" for its tardy filing and service of its answer to the complaint charging unfair labor practices in this proceeding, and therefore, in accordance with WAC 391-45-210, the facts of the complaint are admitted as true.

3. Public employees have a right, under the United States Constitution, to limit their payments under an otherwise lawful union security clause to amounts reflecting the portion of the union's total expenses that are related to collective bargaining, contract administration and grievance adjustment. Unions representing public employees are required to establish and maintain procedures to protect the constitutional rights of public employees who are compelled to make payments to the union under otherwise lawful union security provisions, so as to collect from objecting employees only that portion of the union dues and initiation fees used for activities normally or reasonably related to implementing or effectuating the union's duties as the exclusive bargaining representative of employees in the bargaining unit. An attempt by a union to enforce union security obligations without conformance to those constitutional requirements is an activity not protected by RCW 41.56.122.

4. Establishment by International Association of Fire Fighters, Local 2916, of a "bargaining unit member assistance program", payment of funds to reimburse one employee for income lost while he was suspended from his duties, and the making of a loan to another employee who missed work due to an injury, were directly related to the employment relationship and were activities and expenditures normally or reasonably undertaken by the union to implement or effectuate its duty as the exclusive bargaining representative of employees in the bargaining unit, so that such expenses would be chargeable to agency fee payers under an otherwise lawful union security agreement.

5. By excluding James H. Panknin and Janice Panknin from the "house benefits", including coffee, condiments, and use of a television set and video cassette recorder provided by the union on and after June 29, 1989, on the basis of their withdrawal from union membership, International Association of Fire Fighters, Local 2916, interfered with, restrained, coerced, and discriminated against those public employees in the exercise of their rights under RCW 41.56.040, and so committed an unfair labor practice in violation of RCW 41.56.150(1).

6. International Association of Fire Fighters, Local 2916, committed an unfair labor practice in violation of RCW 41.56.150(1) on June 30, 1989, when it received payments from James H. Panknin and Janice Panknin under its previous threat to obtain their discharge under the provisions of a union security agreement, for the multiple reasons that: (a) There was no collective bargaining agreement in effect at that time containing a union security obligation; and (b) the union did not have a procedure in effect at that time to protect the rights of non-member objectors under the United States Constitution.

7. International Association of Fire Fighters, Local 2916, committed an unfair labor practice in violation of RCW 41.56.150(1) on December 13, 1989, when it threatened James H. Panknin and Janice Panknin that it would seek to obtain their discharge under the provisions of a union security agreement in the event that they accepted refund of the payments made on June 30, 1989, for the multiple reasons that: (a) There was no collective bargaining agreement in effect at that time containing a union security obligation; and (b) the union did not have a procedure in effect at that time to protect the rights of non-member objectors under the United States Constitution.

8. The right of nonassociation based on religious beliefs which is provided by RCW 41.56.122 stands separate and apart from the rights of public employees secured by the United States Constitution, and has no bearing on these cases.

ORDER

International Association of Fire Fighters, Local 2916, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Threatening employees to seek their discharge for failure to pay union dues when no collective bargaining agreement is in effect containing a union security obligation.

   b. Enforcing union security obligations on employees for any period during which the union does not have in effect a procedure to protect the constitutional rights of employees, by collecting from objecting employees only

that portion of the union dues and initiation fees used for activities normally or reasonably related to implementing or effectuating the union's duties as the exclusive bargaining representative of employees in the bargaining unit.

c. Excluding employees from utilizing "house benefits" provided by the union, including coffee, condiments, and use of a television set and video cassette recorder, on the basis of their having or not having union membership.

d. In any other manner interfering with, restraining or coercing its members in exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. Take the following affirmative action to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. As a condition precedent to enforcing or threatening enforcement of an otherwise lawful union security obligation on employees, establish and maintain procedures to protect the constitutional rights of public employees who are compelled to make payments to the union, so as to collect from objecting employees only that portion of the union dues and initiation fees used for activities normally or reasonably related to implementing or effectuating the union's duties as the exclusive bargaining representative of employees in the bargaining unit. Such procedure shall provide objecting employees with a reasonably prompt opportunity to challenge the amount of the service fee before an impartial decisionmaker.

b. Refund to James H. Panknin and Janice Panknin, with interest, a proportional amount of the union's expenses to purchase "house benefits", including coffee, condiments, and use of a television set and video cassette recorder, during the time period on or after June 29, 1989, for which they were not allowed to utilize those benefits.

c. Refund to James H. Panknin and Janice Panknin, with interest, the special assessment monies paid under protest on June 30, 1989.

d. For the period on or after June 29, 1989, provide James H. Panknin and Janice Panknin with a notice reflecting the portion of the union's total expenses that are related to collective bargaining, contract administration and grievance adjustment, and provide a refund, with interest, of any "service fee" monies collected that were not expended for activities normally or reasonably related to implementing or effectuating the union's duties as the exclusive bargaining representative of employees in the bargaining unit.

e. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

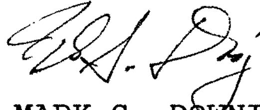
f. Notify the above-named complainants, in writing, within 20 days following the date of this order, as to what

steps have been taken to comply with this order, and at the same time provide the above-named complainants with a signed copy of the notice required by the preceding paragraph.

g. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

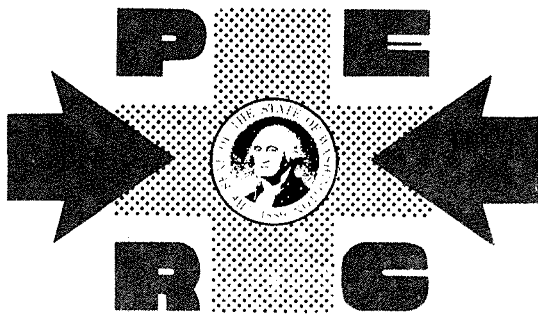
Dated at Olympia, Washington on the 6th day of May, 1991.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION



MARK S. DOWNING
Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING ON A COMPLAINT CHARGING UNFAIR LABOR PRACTICES. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE WILL NOT threaten employees with discharge or seek the discharge of employees for failing to pay union dues when there is no collective bargaining agreement in effect containing a lawful union security obligation.

WE WILL NOT enforce or threaten enforcement of union security obligations on employees for any period during which International Association of Fire Fighters, Local 2916, does not have in effect a procedure to protect the constitutional rights of employees, by collecting from objecting employees only that portion of the union dues and initiation fees used for activities normally or reasonably related to implementing or effectuating the union's duties as the exclusive bargaining representative of employees in the bargaining unit.

WE WILL NOT exclude employees from utilizing "house benefits" provided by the union, including coffee, condiments, and use of a television set and video cassette recorder, on the basis of their having or not having union membership.

WE WILL establish and maintain procedures to protect the constitutional rights of public employees who are compelled to make payments to the union under an otherwise lawful union security provision, including provision for a reasonably prompt opportunity to challenge the amount of the service fee before an impartial decisionmaker.

WE WILL refund to James Panknin and Janice Panknin, with interest, a proportional amount of the union's expenses to purchase "house benefits", including coffee, condiments, and use of a television set and video cassette recorder, during the time period on or after June 29, 1989, for which they were not allowed to utilize those benefits.

WE WILL refund to James Panknin and Janice Panknin, with interest, the special assessment monies they paid under protest on June 30, 1989.

WE WILL provide James Panknin and Janice Panknin with a notice reflecting the proportion of the union's total expenses on and after June 29, 1989 that were related to collective bargaining, contract administration and grievance adjustment, and will provide a refund, with interest, of any "service fee" monies collected that were not expended for activities normally or reasonably related to implementing or effectuating the union's duties as the exclusive bargaining representative of employees in the bargaining unit.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: ______________________

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 2916

BY: ____________________________
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza FJ-61, Olympia, Washington 98504. Telephone: (206) 753-3444.