STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17,	)	CASE 8640-U-90-1883
Complainant,	)	DECISION 3815-A - PECB
vs.	)	
PUBLIC UTILITY DISTRICT 1 OF CLARK COUNTY,	)	DECISION OF COMMISSION
Respondent.	)	

Richard D. Eadie, Attorney at Law, appeared on behalf of the union.

Davis Wright Tremaine, by Stephen M. Rummage, Attorney at Law, appeared on behalf of the employer.

This matter comes before the Commission on a timely petition for review filed by the employer, seeking to overturn a decision issued by Examiner Mark S. Downing on July 22, 1991.[1]

PROCEDURAL BACKGROUND

The parties' collective bargaining relationship dates back to a voluntary recognition of International Federation of Professional and Technical Engineers, Local 17, AFL-CIO (union), as exclusive bargaining representative of certain "engineering" employees of Public Utility District 1 of Clark County (employer). The instant unfair labor practice case must be viewed in the context of a lengthy history of litigation between these parties since they opened negotiations for a successor contract in March of 1984.

[1] Decision 3815 (PECB, 1991).

The union filed an unfair labor practice complaint on August 1, 1984 which, together with amendments filed on September 24, October 24 and November 2, 1984, alleged that the employer had committed unfair labor practices in violation of RCW 41.56.140(1) and (4).

The employer petitioned the Commission for a declaratory ruling as to its jurisdiction. The Commission ruled in Public Utility District 1 of Clark County, Decision 2125 (PECB, 1985), that the employer was within its jurisdiction, and the employer petitioned for judicial review. The jurisdictional question was finally resolved by the Supreme Court of the State of Washington in Public Utility District 1 of Clark County v. Public Employment Relations Commission, 110 Wn.2d 114 (March 3, 1988), holding that this employer is subject to Chapter 41.56 RCW.

In October of 1988, Examiner Kenneth J. Latsch conducted a hearing on the unfair labor practice allegations filed in 1984.[2] In a decision issued on February 24, 1989, Public Utility District 1 of Clark County, Decision 2045-A (PECB, 1989), Examiner Latsch found that the employer had committed certain "interference" and "refusal to bargain" unfair labor practices during the course of the negotiations in 1984. The employer's misconduct included: (1) direct contacts with bargaining unit employees while negotiations were in progress, (2) threat of a layoff of bargaining unit employees to influence the negotiations, and (3) conditioning a contract settlement on the union's withdrawal of all pending litigation filed against the employer (including the unfair labor practice allegations filed with the Commission in 1984). The Examiner found that a purported disclaimer of the bargaining unit by the union in October of 1984 had been coerced by the employer's unlawful conduct, and was void, so that the union continued to be the exclusive bargaining representative of the employer's engineer-

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[2] Proceedings on the unfair labor practice case had been held in abeyance while the jurisdictional question was being processed before the Commission and courts.

ing employees.[3] The employer was ordered to bargain collectively with the union, upon request, concerning the wages, hours and working conditions of the bargaining unit historically represented by the union. Because of the purported disclaimer, the Examiner excused the employer from bargaining retroactively, and ordered bargaining to commence from the status quo in effect on the date of his order.

On October 11, 1989, the Commission, with certain exceptions not pertinent to this proceeding, affirmed the Examiner's decision. Public Utility District 1 of Clark County, Decision 2045-B (PECB, 1989).[4] In addressing objections to the Examiner's decision that had been raised by the union, the Commission denied a request for extraordinary remedies. Denial of an "attorney fees" remedy was based, in part, on conclusions that the employer's defenses as to the Commission's jurisdiction and the employer's view of the facts were not frivolous. Noting that there was evidence suggesting a "patent disregard of [the employer's] bargaining obligation", the Commission said, however:

> While the precise nature of its good faith bargaining obligation was uncertain at that time, given the uncertainty as to our own jurisdiction, **the employer ran the risk of being held accountable for its actions if it did not prevail** on the issue concerning the

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[3] Paragraph 4 of the Examiner's conclusions of law dealt specifically with this issue:

> Under the circumstances presented in this case, the disclaimer made by International Federation of Professional and Technical Engineers, Local 17, was coerced by the employer's conduct in violation of RCW 41.56.140 and was void, so that the complainant did not waive its right to litigate the instant unfair labor practice matter.

[4] The Commission specifically affirmed and adopted all of the Examiner's conclusions of law.

> Commissions's jurisdiction. On the other hand, the situation has been clouded by the union's disclaimer ..., and by the fact that the employer's refusal to bargain after October 26, 1984 was not itself made the subject of an unfair labor practice charge. **We are putting the parties back to the bargaining table, with direction that they proceed as required by Chapter 41.56 RCW.** We have elected to withhold issuance of an extraordinary remedy **at this time.** See, Lewis County, Decision 556-A (PECB, 1979).

Decision 2045-B at 22 [emphasis by **bold** supplied].[5]

Thus, the Commission followed the criteria for extraordinary "attorney fees" remedies used by the Court of Appeals in Lewis County v. PERC, 31 Wn.App. 853 (Division II, 1982), review denied, 97 Wn.2d 1034 (1982), and previously implemented by the Commission in selected cases.

On November 9, 1989, the employer filed a petition for review in the Superior Court for Clark County. The employer did not serve the Commission, however, until November 15, 1989. By the latter date, the time to perfect an appeal under the applicable Administrative Procedures Act, Chapter 34.04 RCW, had passed.

On January 12, 1990, the Superior Court for Clark County dismissed the employer's petition for judicial review as untimely, because it was not served on the Commission until two days after the statutory deadline. No stay of the Commission's decision was granted by the court.

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[5] In Lewis County, Decision 556-A (PECB, 1979), the Commission had stated that it was not awarding attorney's fees **"at this time in the hope and with the expectation that respondent will enter into negotiations in good faith promptly".** The Commission awarded attorney fees in a subsequent case, Lewis County, Decision 644 (PECB, 1979).

On March 23, 1990, union representative Kalibak wrote to employer official Bosch, as follows:

> As a result of the Public Employment Relations Commission upholding of the Unfair Labor Practices committed by the Clark County Public Utility District and Local 17's representational status, please accept this letter as a request by the union to commence collective bargaining negotiations. To expedite this process, please have someone from your staff contact me to schedule mutual bargaining dates.
>
> Additionally, the union would request a list of salary adjustments given to all classifications under Local 17's jurisdiction since August 1984.

After receiving no reply from the employer, Kalibak sent a follow-up letter to Bosch on April 20, 1990. On April 24, 1990, Bosch responded by letter to Kalibak, as follows:

> As indicated in previous correspondence, the matter referred to in your letter of April 20, 1990, is still in litigation. For that reason, all correspondence should be directed to our legal counsel, Wayne W. Nelson of our office and Thomas A. Lemly of Davis, Wright, Tremaine in Seattle. By copy of this letter, I am forwarding copies of your letter to them.

Kalibak wrote to Nelson and Lemly on May 7, 1990, enclosing copies of the union's March 23 and April 20 letters, and requesting a reply to the union's bargaining demands.

On May 25, 1990, Lemly responded on behalf of the employer in a letter to Kalibak, as follows:

> We've received copies of your letters of April 20 and May 7, 1990, concerning collective bargaining between Local 17 and Clark Public Utilities. As I think you know, Clark Public

> **Utilities is not comfortable with the Commission's decision** in this case, and is not prepared to commence collective bargaining at this time. Local 17 has disavowed interest in the bargaining unit of engineers at the Utility, and the employer will not recognize Local 17 as a representative of these employees without proof that the employees actually desire your representation. [Emphasis by **bold** supplied.]

The union's unfair labor practice complaint in the instant proceeding was filed shortly thereafter, on June 15, 1990. The factual bases recited in the complaint were: (1) the Commission's October 11, 1989 decision; (2) the union's requests, by letters of March 23, April 20 and May 7, 1990, that the employer commence collective bargaining negotiations and furnish information concerning salary adjustments given to bargaining unit employees; and (3) the May 25, 1990 letter from the employer's attorney. The union alleged that the employer had violated RCW 41.56.140(4) by its refusal to bargain in 1990, and requested remedies including a bargaining order and payment of the union's attorney fees.

On August 3, 1990, the Court Commissioner for the Washington Court of Appeals affirmed the superior court's decision dismissing the employer's petition for review in the earlier case. After the Court of Appeals denied a motion to modify the Commissioner's ruling, the employer appealed that case to the Supreme Court of the State of Washington. No stay of the Commission's October 1, 1989 decision was requested by the employer at any time during the progress of the case through the appellate courts, and none was granted by any court.

On August 10, 1990, the union amended its complaint in this case, adding an allegation of additional interference violations against the employees and union under RCW 41.56.140(1) and (2), because of the following statement contained in the May 25, 1990 letter from the employer's attorney:

> ... The employer will not recognize Local 17 as a representative of these employees...

The amendment requested additional remedies, in the form of an order continuing the union's status as exclusive bargaining representative and an order imposing interest arbitration.

The employer filed an answer to the complaint on September 18, 1990, denying that its conduct violated Chapter 41.56 RCW and asserting several affirmative defenses, including: (1) that the union had disclaimed any interest in representing the employees,[6] and therefore lacked standing to seek an order "requiring the imposition of a bargaining relationship"; and (2) that the union's request for relief is barred by its failure to seek enforcement of the Commission's October 11, 1989 bargaining order, on which its current claim for relief is premised.

On March 7, 1991, the Supreme Court of the State of Washington affirmed dismissal of the employer's untimely petition for review in the earlier case. Clark County Public Utility v. PERC and International Federation of Professional and Technical Engineers, Local 17, 116 Wn.2d 1015 (1991).

On July 22, 1991, Examiner Downing ruled that "a violation of RCW 41.56.140(4) could be found ... on the basis of the employer's clear refusal to commence negotiations communicated in [its] May 25, 1990 letter",[7] as well as on the basis of the employer's refusal to furnish the requested wage information. In finding a violation, the Examiner held that he, as well as the employer, were bound by the Commission's ruling in Decision 2045-B, supra:

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[6] The employer had raised this defense in the earlier proceeding, and had received an adverse ruling.

[7] Decision 3815, at page 11.

> ... that the purported "disclaimer" was null and void by reason of it having been coerced by the employer, and that the union remains the exclusive bargaining representative of the engineering personnel of ... [the employer].

Decision 3815, at page 19.

The Examiner granted the union's request for attorney fees, but refused to impose interest arbitration as a remedy in this case. Finally, the Examiner refused to find an independent interference violation, because there was no evidence that the employees were made aware of the May 25, 1990 letter.

On August 9, 1991, the employer filed (and served) a timely petition for review of the Examiner's decision, thus bringing the case before the full Commission.

POSITIONS OF THE PARTIES

The employer argues that this proceeding is, in effect, an "enforcement proceeding" relating to the order issued by the Commission in 1989. The employer contends that the statute governing Commission orders provides that such orders can only be enforced by judicial, not administrative, proceedings; and that an employer can suffer no penalty for declining to comply with a remedial order until a court has enforced that order. For this reason, the employer objects to the Examiner's finding that the union was the exclusive bargaining representative of some of the employer's employees, contending that was "in reality a conclusion of law which has no support in the record or in any of the Examiner's other findings of fact, but was based solely on findings made in the earlier administrative proceeding, which findings have never been the subject of a petition for enforcement." The employer also argues that the Examiner erred in awarding attorney fees to the union.

The union's brief in response to the employer's petition for review is in substantial agreement with the Examiner's decision. The union contends that the employer's characterization of this as an "enforcement" action is in error. It urges that a final order of the Commission is effective unless stayed by a court, so that the Examiner's reliance on Decision 2045-B was proper.

DISCUSSION

Nature of This Proceeding

RCW 41.56.160 authorizes the Public Employment Relations Commission to issue appropriate orders to remedy unfair labor practices, so long as the violation occurred less than six months before the filing of the complaint with the Commission. As noted by the Examiner in this proceeding,

> ... the operative factual allegations of the complaint concern only the actions of the employer during March, April and May of 1990.

Decision 3815, at page 24.

While the union's complaint made reference to the employer's obligations under the Commission's 1989 decision, the complaint in this case does not request that we enforce Decision 2045-B. The union is not seeking compliance with the notice posting requirements of that order, nor is it seeking bargaining retroactive to the date of the Examiner's decision in the earlier case.[8] Rather, we are only asked to make determinations here as to whether the employer violated the statute by its refusals, in 1990, to commence negotiations and furnish requested wage data.

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[8] If Decision 2045-B were being enforced in these proceedings, the employer's bargaining obligation would extend back to the status quo as of February 24, 1989.

The employer seems to have several misconceptions about the nature of enforcement proceedings, as well as the consequences if judicial enforcement is not sought. The earlier unfair labor practice case arose while Chapter 34.04 RCW governed administrative procedure, and that statute provided for the finality of orders issued by administrative agencies.[9] RCW 41.56.190, which authorizes the Commission to seek enforcement of its orders, does not suspend the duty of a party to comply with Commission orders until they are enforced by a court; nor does it affect the viability of Commission orders if enforcement is not sought. Enforcement is discretionary; the statute places no obligation on the Commission or a party to seek enforcement.[10] As a matter of fact, in many cases enforcement may not even be appropriate.

Rather than "enforcing" its prior order in this proceeding, the Commission is merely relying on a conclusion of law that was made in the prior proceedings and was never successfully challenged. That reliance is for the sole purpose of determining whether there was a bargaining relationship between these parties in 1990, when the union made the demand for bargaining and request for information that are at issue in this case. It is not necessary to include a finding that neither the union nor the Commission sought enforcement of the 1989 decision under RCW 41.56.190. Accordingly, paragraph 6 of the Examiner's findings of fact was not erroneous by omitting reference to such omission.

Regardless of how the union may have characterized this proceeding, or its purpose in filing the complaint, we are constrained to deal with this case as an unfair labor practice proceeding under Chapter 41.56 RCW and the Commission's implementing rules, Chapter 391-45

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[9] RCW 34.04.130 spoke of "final orders" issued by administrative agencies. RCW 34.04.130(3) indicated that there was no automatic stay of agency orders pending appeal.

[10] The Commission or a party may elect not to seek enforcement, because of budgetary considerations.

WAC. Accordingly, paragraphs 11 and 12 of the Examiner's findings of fact were not erroneous by omitting reference to the union's purpose in filing the complaint.

Res Judicata Effect of Prior Decisions

Other than its objections to paragraphs 6, 11 and 12 of the Examiner's findings of fact, as discussed above, the employer's petition for review does not raise any factual issues. Rather, the primary question before us is the legal effect to be given to the decision issued by the Commission in an earlier case involving the same parties.

The Commission's decision in Public Utility District 1 of Clark County, Decision 2045-B (PECB, 1989), was the final order of the agency under RCW 41.56.160 and Chapter 391-45 WAC. It was also a "final decision in a contested case" under RCW 34.04.130. The employer had a right to judicial review of that decision, but failed to perfect an appeal.

Decision 2045-B, supra, voided the union's disclaimer of its representational status, based on employer coercion found by the Commission to be unfair labor practices. The employer sought to re-raise the "disclaimer" issue in this proceeding. The Examiner in the instant case found that Decision 2045-B was res judicata on the issues litigated therein, and is not subject to collateral attack in this or any other subsequent proceeding. He therefore refused to re-examine the Commission's rulings in 1989 that: (1) the disclaimer was null and void by reason of the employer's unlawful coercion; and (2) the union was (as was undeniably the case prior to the disclaimer), and remained, the exclusive bargaining representative of the employees in the bargaining unit. We agree.

Commission Precedent on Res Judicata -
The Commission first applied res judicata principles in Lewis County, Decision 644 (PECB, 1979). The Commission had certified a bargaining unit in a prior case. After failing to appeal the certification, the employer refused to bargain. Without characterizing its action as such, the Commission clearly applied res judicata principles to the prior certification, and found an unfair labor practice violation. The Commission's analysis was sustained by the court of appeals, which held that the certification was a "final" decision under RCW 34.04.130(1):

> The time for the County to have challenged the [certification] was when the certification order issued and the bargaining relationship was finalized. The County did not do so here. It is now estopped from attacking the certification.

Lewis County v. PERC, 31 Wn.App. 853, 863 (Division II, 1982).[11]

The employer sought review by the Supreme Court of the State of Washington, but that petition was denied. Lewis County v. PERC, 97 Wn.2d 1034 (1982).

The principle that Commission orders are final in the absence of an appeal has been followed in later cases. See, Shelton School District, Decision 2084 (PECB, 1984), where the Executive Director rejected the attempt of an incumbent union to make a collateral attack on the certification under which it held status as exclusive bargaining representative of some, but not all, of the employees it then desired to represent. In Quillayute School District, Decision 2809-A (PECB, 1988), the Commission applied res judicata principles

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[11] Noting that the Commission is subject to the state administrative procedures act, the court refused to apply the practice followed under the National Labor Relations Act (NLRA), which allows a charged party to attack the certification as a defense to the unfair labor practice.

to a staff decision which had not been appealed to the Commission in a timely manner.

There is a difference between finding a bargaining obligation that **arises out of** an earlier decision (as was the case in Lewis County, Decision 644-A, supra) and **enforcing** a bargaining order contained in an earlier decision (as was the case in Walla Walla County, Decision 2932-B (PECB, 1990). See, also, Mason County, Decision 3116-A (PECB, 1989), where another employer confused past and future bargaining obligations. In that case, the employer relied upon a superior court finding that a collective bargaining agreement for 1985-86 was null and void, because it was entered into in violation of provisions of the Open Public Meetings Act, Chapter 42.30 RCW, that were in effect at that time. The court returned the parties to the position they were in prior to entering into the voided agreement, but the employer refused to meet with the union in 1987 to negotiate a 1985-86 agreement. The union filed a second unfair labor practice charge, based on the 1987 refusal to bargain, and immediately appealed the superior court's decision. As a defense in the second unfair labor practice proceeding, the employer argued that the Commission was relieved of jurisdiction when the superior court ruled that the 1985-86 agreement was null and void, that the court's order made the 1985-86 period a nullity for purposes of collective bargaining, that the union was barred by the doctrine of res judicata and/or collateral estoppel from asserting its claim, and that the union surrendered its right to insist on further negotiations for 1985-86 when it elected to pursue an appeal of the superior court decision.[12] The Commission rejected those arguments, however. In addressing the employer's res judicata defense, the Examiner in that case correctly noted that the complaint under consideration was filed in 1987, based on events that occurred in June and July of 1987, and

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[12] The superior court decision was eventually affirmed in Mason County v. PERC, 54 Wn.App. 36 (Division II, 1989), review denied, 113 Wn.2d 1013 (1989).

that those events were not previously litigated. The Commission determined that, while the courts had entirely relieved the employer of the "original" agreement for 1985-86, they did not relieve the employer of its statutory duty to bargain in good faith for the 1985-86 time period. Thus, a violation was found based on the union request for bargaining made in 1987.

Effect of Availability of "Enforcement" -
The employer correctly points out that Lewis County and the other cases relied upon by the Examiner did not involve unfair labor practice orders that were subject to judicial enforcement under RCW 41.56.190. However, federal courts have applied res judicata or collateral estoppel principles in reviewing National Labor Relations Board (NLRB) orders that were subject to both judicial review and enforcement, even when exceptions were not filed to the order of an NLRB trial examiner (administrative law judge).

The principle that findings by an administrative agency are entitled to res judicata effect was followed by the Supreme Court of the United States in United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966), where the Court stated:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

384 U.S. at page 422.

Federal courts have followed Utah Construction in cases involving Section 303 of the federal Labor-Management Relations Act,[13] which allows persons injured in their business or property by a secondary boycott to bring an action in federal district court for money

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[13] 29 U.S.C. Section 187(a).

damages against the labor organization which caused the unlawful boycott.[14] Thus, federal courts have held that prior NLRB unfair labor practice determinations are controlling on both the facts and the law in subsequent Section 303(b) damage actions. See, International Wire v. Local 38, IBEW, 475 F.2d 1078 (6th Circuit, 1973), cert. denied, 414 U.S. 867 (1973) [res judicata against charging party]; Texaco, Inc. v. Operative Plasterers & Cement Masons, 472 F.2d 594 (5th Circuit, 1973), cert. denied, 414 U.S. 1091 (1973) [res judicata against charged party]; Painters District Council 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Circuit, 1969) [res judicata against charged party; no petition for review filed with court of appeals]; Eazor Express, Inc. v. General Teamsters Local 326, 388 F.Supp. 1264, 1266-67 (D.Del., 1975) [res judicata against charged party]. In Consolidated Express v. N.Y. Shipping Assn., 602 F.2d 494, 100 LRRM 3170 (3rd Circuit, 1979), the court applied res judicata against the respondent union in the NLRB proceeding, and cited all of the above-cited cases with approval. The court of appeals approved the district court's holding that the NLRB's finding of a secondary boycott violation "made in a proceeding to which both [the union] and the plaintiffs were parties collaterally estops [the union] from litigating its liability for damages."

In Paramount Transport Systems v. Teamsters, etc., 436 F.2d 1064, 76 LRRM 2427 (9th Circuit, 1971), the district court had granted a summary judgment in favor of the plaintiff on the issue of the union's liability for unlawful secondary boycott activity, based on an NLRB trial examiner's findings that the union was not certified as the majority representative of the plaintiff's employees, that the union picketed, and that such picketing was an unlawful secondary boycott.[15] Applying the general principles of collateral

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[14] Secondary boycotts are defined as an unfair labor practice under Section 8(b)(4) of the NLRA, 29 U.S.C. Section 158(b)(4).

[15] No exceptions to the trial examiner's recommended order were filed, so it became a final NLRB decision.

estoppel, the district court was of the opinion that the trial examiner's unfair labor practice determination was binding on it as the trier of facts. The union filed an interlocutory appeal, but the Ninth Circuit agreed with the district court, concluding:

> We believe that the district court correctly applied United States v. Utah Construction & Mining Co., supra, to foreclose the union from litigating in this action those material issues of fact decided adversely to it in the proceedings culminating in a final order by the National Labor Relations Board.

436 F.2d at pages 1065-1066.

In further discussion of Utah Construction in its Paramount Transport decision, the Ninth Circuit stated:

> But we do not construe Utah Construction to require that the doctrine of collateral estoppel be applied across the board to all determinations of such issues by administrative agencies. Reading Utah Construction with United States v. Carlo Bianchi & Co., 373 U.S. 709, 83 S.Ct. 1409, 10 L.ed.2d 652 (1963), we conclude that **collateral estoppel effect should be given only to those administrative determinations that have been made in a proceeding fully complying with the standards of procedural and substantive due process** that attend a valid judgment by a court, and further, that such effect should be accorded only to those findings upon material issues that are supported by substantial evidence on the administrative record as a whole.

436 F.2d at 1066 [Emphasis by **bold** supplied]

On remand, a jury trial was held in Paramount Transport on the issue of damages. The district court received in evidence (and submitted to the jury as conclusive) the NLRB trial examiner's opinion which included a finding that a customer had informed the plaintiff it could no longer use the plaintiff's services, because of its inability to deliver the customer's goods from its factory

to a warehouse or make other pickup and deliveries of the customer's products or goods. On appeal, the Ninth Circuit held that the district court did not err in receiving the NLRB finding into evidence and submitting it to the jury. Paramount Transport Systems v. Teamsters, 529 F.2d 1284, (9th Circuit, 1976), cert. denied, 426 U.S. 908 (1976). Noting that the union had insisted that such findings were not "findings upon material issues" before the trial examiner in the unfair labor practice proceeding, and therefore not entitled to collateral estoppel effect under the court's language in its decision on the interlocutory appeal, as quoted above, the Ninth Circuit stated that it did not subscribe "to such a narrow construction of the 'collateral estoppel effect' of the specific findings" involved in the second appellate proceedings. The Ninth Circuit then concluded:

> We are convinced that the quoted caveat as to application of the doctrine to across the board determinations by administrative agencies places no restrictions or limitations upon the direct explicit holding in this case that the Unions are foreclosed "from litigating in this action those material issues of fact decided adversely to it in the proceedings culminating in a final order by the ... Board."

529 F.2d at page 1286.

Thus, federal substantive labor law applies res judicata principles to final agency determinations. As demonstrated in all of the federal cases cited above, the NLRB ruling given res judicata effect by the courts was made in an unfair labor practice decision that was subject to "enforcement" under Section 10(e) of the NLRA, as well as to "judicial review" under Section 10(f) of the NLRA. None of those federal court decisions indicate that entry of a judicial "enforcement" order in the underlying unfair labor practice case was a pre-condition to use of the NLRB decision for res judicata purposes in the subsequent proceedings.

Conclusions Regarding "Res Judicata" -
The Commission has considered the language of Chapter 41.56 RCW, and finds nothing to suggest that the Legislature intended that final orders of the Commission were not to have res judicata effect. That conclusion is especially reinforced when Chapter 41.56 RCW is read in conjunction with the state Administrative Procedures Act.

The Commission and the Washington courts have looked to federal precedent, where consistent with Chapter 41.56 RCW, in the administration of our statute. Nucleonics Alliance, Local 1-369 v. WPPSS, 101 Wn.2d 24 (1984). We conclude that the principles followed by the federal courts in regard to the res judicata effect of NLRB unfair labor practice decisions (which are subject to judicial enforcement proceedings, as well as to judicial review) should be applicable as well to final decisions of the Public Employment Relations Commission.

Application of Res Judicata Principles

In its answer to the complaint in the instant case, the employer pleaded "lack of standing and abandonment of interest" as an affirmative defense, and it specifically alleged that the union had disclaimed any interest in representing the employer's employees. While a copy of Decision 2045-B was received in evidence, without objection, the employer introduced no other evidence in support of its affirmative defense.[16]

The question of abandonment and disclaimer was fully litigated in the earlier proceeding. The issue was decided adversely to the

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[16] The employer has offered no other defense to its "refusal to bargain" in 1990, including both its refusal to meet with the union and its refusal to respond to union requests for information concerning the wages paid to bargaining unit employees.

employer in Decision 2045-B, and a timely petition for review was not filed. Applying the principles of res judicata and collateral estoppel, the employer is foreclosed from litigating in this proceeding those issues decided adversely to it in prior proceedings culminating in a final order of the Commission. Lewis County v. PERC, supra.

The employer complains that the Examiner's decision would accomplish an "end run" around PERC v. Kennewick, 99 Wn.2d 832 (1983). The employer theorizes that the union would be obtaining a bargaining order in this case, without substantive judicial review of the underlying decision, as required by Kennewick. The employer thus argues that any order here that depends on the Commission's 1989 order cannot be enforced (or presumably appealed) "without examining the propriety of the underlying decision."

The decision of the Supreme Court in PERC v. Kennewick, supra, has no application here. The question in that case involved the scope of review by the courts in what was unquestionably an "enforcement" proceeding filed under RCW 41.56.190. The instant case is not in court, and it is not an action to enforce the remedial order issued by the Commission in its 1989 decision. Rather, this is a proceeding to determine whether the employer committed "refusal to bargain" unfair labor practices in 1990.

We have no argument with the holding in Kennewick that "limited" review may occur in an enforcement proceeding. On the other hand, nothing in Kennewick precludes application of well-established res judicata and collateral estoppel principles in connection with administrative proceedings dealing with a **subsequent bargaining demand.** The Court in Kennewick said that it was following established federal substantive labor law in ruling that limited review is required in an enforcement proceeding. As noted earlier, we are following federal substantive labor law in determining that res judicata principles are applicable to final decisions of the

Public Employment Relations Commission. The employer's arguments miss the point of res judicata and collateral estoppel principles, and of how those principles are applied. As was pointed out by the court in Lewis County, supra, it is clearly improper to extend an appeal record to include consideration of the merits of a prior decision relied upon, if that prior decision was a "final decision" under RCW 34.04.130(1). Similarly, the court in the second Paramount Transport decision, supra, foreclosed the defendant union from relitigating issues that were previously adjudicated in a final administrative decision.

In the instant case, the Examiner looked to the conclusions of law affirmed by the Commission in Decision 2045-B solely for the purpose of disposing of a defense raised by the employer in this proceeding, i.e., that a disclaimer had terminated the duty to bargain. That defense was fully adjudicated in the prior proceeding. Applying the principles enunciated by the Court of Appeals in Lewis County, supra, the conclusion of law made on the "disclaimer" issue in Decision 2045-B stands as the final decision in that case, in the absence of a timely appeal. The employer is now estopped from attacking the Commission's decision that the employer's unlawful coercive conduct nullified the union's disclaimer, so that the union continued to enjoy status as exclusive bargaining representative. We thus affirm all of the Examiner's findings of fact and conclusions of law in the instant case.

The "Attorney's Fees" Remedy

The standard used by the Commission for determining whether to award attorney fees to a successful complainant was correctly stated by the Examiner. It originated in the appellate proceedings concerning Lewis County, Decision 644-A (PECB, 1979). In Lewis County v. PERC, 31 Wn.App. 853 (Division II, 1982), review denied, 97 Wn.2d 1034 (1982), the Court of Appeals affirmed the Commission's award of attorney fees.

Two years earlier, in State ex. rel. Washington Federation of State Employees v. Board of Trustees, 93 Wn.2d 60 (1980), our Supreme Court had held that RCW 41.56.160 is broad enough to permit a remedial order containing an award of attorney's fees "when that is necessary to make the order effective". The Supreme Court went on to say, however:

> Such an allowance is not automatic, but should be reserved for cases in which a defense to the unfair labor practice charge can be characterized as frivolous or meritless. The term "meritless" has been defined as meaning groundless or without foundation.

93 Wn.2d at page 69.

In discussing the union's request for attorney fees in Lewis County, supra, the Court of Appeals noted that:

> ... A **pattern of bad faith** bargaining may preclude a "debatable" defense and allow PERC to award attorney fees if appropriate. The novelty or "debatability" of a party's legal defense to an unfair labor practice should not shield the charged party from imposition of the obligation to pay the charging party's attorney fees when it is clear that the **history of underlying conduct evidenced a patent disregard for the statutory mandate to engage in good faith negotiations.** RCW 41.56.030(4) & .100.
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> ...
>
> Disregarding whatever legal merit the defense might actually bear, the course of conduct from which it arose was not faithful to the statutory duty to bargain in good faith. ... The fee award was imposed only after prior attempts to reconcile Lewis County to its bargaining duty had proved futile. **The remedy was proper to curtail** Lewis County's **dilatory tactics and prevent their recurrence,** [citation omitted] **and was necessary to make the cease and desist order effective.** ...

Lewis County v. PERC, supra, at pages 866-867 [Emphasis by **bold** supplied].

Four years later, in Green River Community College v. HEPB, 107 Wn.2d 427 (1986), the Supreme Court affirmed an award of attorney fees, saying:

> The remedy is proper **to curtail** the college's **arbitrary behavior and to prevent its reoccurrence**, and is necessary to make the order to negotiate in good faith at reasonable times effective.

Green River Community College v. PECB, at page 442. [Emphasis by **bold** supplied]

The broad authority of this Commission to issue appropriate orders that it, in its expertise, believes are consistent with the purposes of the act, was most recently affirmed in Municipality of Metropolitan Seattle v. PERC, ___ Wn.2d ____ (No. 57935, March 12, 1992). In that unanimous decision, the Supreme Court affirmed issuance of an extraordinary remedy by the Commission where "necessary to make its order effective".

This is not the first time that a request for an extraordinary remedy has been considered in the context of litigation between these parties. In Decision 2045-B, supra, the Commission refused to conclude that the employer's defenses to that unfair labor practice complaint were frivolous,[17] but indicated that a "close question" was presented as to whether the employer had engaged in a pattern of conduct showing a "patent disregard of its good faith bargaining obligation". After noting that this employer "risked being held accountable for its actions" if it did not prevail on its legal arguments, the Commission offered an admonition similar to that used by the Commission in the case which had preceded Lewis County v. PERC, supra:

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[17] Specifically cited was that the employer's jurisdictional defense was a "very debatable" issue, and that a Supreme Court decision was required to resolve it.

> We are putting the parties back to the bargaining table, with direction that they proceed as required by Chapter 41.56 RCW. We have elected to withhold issuance of an extraordinary remedy at this time. See, Lewis County, Decision 556-A (PECB, 1979).

Decision 2045-B, at page 22.

In the case at hand, the Examiner's decision cited the use of the "attorney fees" remedy in cases involving repetitive patterns of illegal conduct or willful acts by the respondent. The Examiner then noted the ongoing resistance of this employer to bargaining with the union, and he based his award of attorney fees upon a conclusion, under Lewis County v. PERC, supra, that an extraordinary remedy was necessary to make an order effective.

It is clear that this employer has not heeded the Commission's forbearance in the earlier case, when it said it was:

> **... putting the parties back to the bargaining table, with direction that they proceed as required by Chapter 41.56 RCW.**

The employer waited more than two months before making any substantive reply to the union's March 23, 1990 letter. By May 25, 1990, when the letter from its attorney confirmed the "refusal to bargain" at issue in this case, the superior court had already dismissed the employer's petition for judicial review of the Commission's decision in the earlier case. The employer knew or should have known that it was at **"risk of being held accountable for its actions if it did not prevail"** on its appeal concerning the timeliness of its petition for judicial review. Nevertheless, this employer continued to resist its bargaining obligations at that time, saying that it was "not comfortable" with the Commission's decision. The bargaining obligations imposed by Chapter 41.56 RCW are not conditioned upon whether an employer is "comfortable" with them.

This employer never obtained a stay of the decision issued by the Commission in the earlier case. It nevertheless continued to assert its "disclaimer" defense before the Examiner, even after the court of appeals had affirmed the dismissal of its petition for review as untimely.

This employer has even continued to resist the "disclaimer was void" ruling made in Decision 2045-B in its petition for Commission review in this case, filed long after the Supreme Court disposed of the untimely petition for judicial review by a pro forma order signed by the Chief Justice on March 7, 1991.[18]

Under the state Administrative Procedures Act and the Supreme Court's decision, Decision 2045-B was a final determination on the "disclaimer" issue. Even if one was to read the holding in Kennewick as creating some doubt regarding application of res judicata principles, we find that the employer has engaged in a pattern of behavior which precludes a "debatable" defense, under Lewis County, supra. It has sought to evade its bargaining duty by a course of conduct that is not faithful to the duty to bargain.

The courts in Lewis County, supra, Green River Community College, supra, and METRO, supra, have outlined the authority (and obligation) of this Commission to curtail dilatory tactics and prevent recurrences. We see no reason for further forbearance to the benefit of this employer, and believe that an award of attorney fees to the union is necessary to make an order effective in this case.

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[18] Consistent with its disposition of the untimely petition for review filed by this employer, the Supreme Court entered a unanimous decision dismissing a similarly defective petition for review in City of Seattle v. PERC, 116 Wn.2d 923 (May 16, 1991).

NOW, THEREFORE, it is

ORDERED

1. The findings of fact, conclusions of law and order issued in the above-entitled matter by Examiner Mark S. Downing are hereby affirmed and adopted as the findings of fact, conclusions of law and order of the Public Employment Relations Commission.

2. Public Utility District 1 of Clark County, its officers and agents, shall immediately:

   a. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached to the Examiner's decision in this matter. 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.

   b. Notify the above-named complainant, in writing, within 30 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 complainant with a signed copy of the notice required by the preceding paragraph.

   c. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time

provide the Executive Director with a signed copy of the notice required by this order.

Entered at Olympia, Washington, the 26th day of March, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner