STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 17, AFL-CIO, | ) | |
| Complainant | ) | Case No. 1020-U-77-136 |
| vs | ) | DECISION NO. 809-A PECB |
| CITY OF SEATTLE, | ) | DECISION OF COMMISSION |
| Respondent | ) | |

Michael T. Waske, Business Manager, appeared on behalf of the complainant.

Douglas N. Jewett, City Attorney, by P. Stephen DiJulio, Assistant City Attorney, appeared on behalf of the respondent.

This dispute has festered for five years. It arises out of a collective bargaining agreement which expired on August 31, 1975. The specific conduct complained of occurred in June 1977, as the question before us for review involves only the right of the complainant to represent its members at that time in reclassification proceedings before the Seattle Civil Service Commission. That commission was abolished in January 1979. On its way here, the dispute, or aspects of it, have been to arbitration, to the now-defunct civil service commission, to the Superior Court for King County and to Division 1 of the Court of Appeals. The hearings before our examiner were continued at one point at the request of the parties for a period in excess of five months pending their (unsuccessful) settlement negotiations.

The controversy was begun by the union's filing of a grievance on behalf of fifteen employees, alleging that they were being required to work out of classification without being properly compensated. Article VI of the collective bargaining agreement established a four-step grievance procedure, after defining grievances as follows:

> "Section 1. Any dispute between the City and any employees covered by this Agreement concerning the interpretation, application, claim of breach or violation of the terms of this Agreement shall be deemed a grievance."

Article VIII of the collective bargaining agreement provided for classifications and rates of pay. Section 2 provided:

> "Section 2. Promotions and reclassifications of employees covered by this agreement shall be accomplished by the Departments in accordance with Civil Service Rules and any appeals thereof shall be decided by the Civil Service Commission."

Article IX of the agreement provided for work outside of classification, and it was that article the union accused the city of violating. The grievance was not settled, and the union demanded arbitration.

At the arbitration, the city contended that the union was really seeking a reclassification of the grievants instead of proper compensation for their work out of classification and that, therefore, the grievance was not arbitrable. The city was willing, however, to arbitrate the arbitrability of the filed grievance. The union agreed, and the parties entered into three stipulations, two of which are pertinent here:

> "1. It was stipulated by the Parties that arbitration is not a proper avenue for reclassification questions.
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> 3. It was agreed to by the Parties that if the dispute was arbitrable and the City had violated the Agreement and employees were to receive back pay, that the specific amount of back pay would be determined by the Parties at a later time.

The issue contained in the original demand for arbitration dated January 23, 1976, was:

> "The City of Seattle has violated Article IX (work outside of classification) Sections 1 & 2 by assigning employees that are included in the Professional and Technical Units to perform the duties of employees at higher paid classifications without proper compensation".

The parties finally agreed to state the issue before the arbitrator as:

> "Is the demand for Arbitration as presented by the Union on January 23, 1976, arbitrable under the Collective Bargaining Agreement between the City of Seattle and Local 17, IFPTE and associated exhibits?".

Thus, while it appeared that the parties were submitting the issue of arbitrability, that question necessarily carried the general issue. The arbitrator ruled in the context of two contract articles, but failed to hear the merits of the union's arguments on either one.

The arbitrator proceeded to hold that the grievance was not arbitrable. The examiner deferred to that arbitration award, relying on Spielberg Mfg. Co., 112 NLRB 1080 (1955); but nevertheless found an interference violation. The city would go further than the examiner and would have us completely exclude the dispute from the coverage of RCW 41.56. For the reasons indicated below, we find the examiner's application of Spielberg, supra, to be in error in this case, and we reverse in that respect.

The deferral of reclassification questions to civil service procedures under Article VIII, Section 2 of the collective bargaining agreement was a bargained waiver of bargaining under state law, Chapter 41.56 RCW, rather than a delegation by ordinance, resolution or charter of the City of Seattle.

In its brief, the City stretches our decision in City of Seattle, Decision 489-A (PECB, 1978) far beyond its intent or any reasonable interpretation thereof. In that earlier case, an individual sought redress for alleged discrimination against him in reprisal for his efforts as an individual and outside the context of any organizational or collective bargaining activity, to assist other employees with the processing of grievances under procedures unilaterally adopted by management. This case arises out of the efforts of a previously recognized exclusive bargaining representative to represent employees within its bargaining unit in processing of claims under contractually recognized procedures.

The federal "right to representation" cases cited by the City are similarly inapposite. Those cases involve the rights of employees outside of the context of contractually recognized dispute resolution procedures. Nobody even remotely questions the right of bargaining unit employees to have their union represent them in contractually recognized dispute resolution procedures. See: RCW 41.56.080.

Deferral to arbitration awards is a matter of policy, not a matter of law. Agreements between parties cannot restrict the jurisdiction of the Public Employment Relations Commission. See: NLRB vs Walt Disney Productions, 146 f.2d 44 (C.A.9), cert denied 324 U.S. 877. To be worthy of deferral under the principles enunciated in Spielberg, the arbitration proceedings must appear to have been fair and regular, all parties must have agreed to be bound, and the decision of the arbitration panel must not be clearly repugnant to the purposes and policies of the collective bargaining act. The difficulty with the arbitration award in this case is that it appears from the face of the award that the union never had a chance to present its case in full while the arbitrator engaged in questionable procedure by calling members of the civil service commission in as witnesses before him. At page 2 of the award filed with the American Arbitration Association on August 16, 1976, the arbitrator states:

> "Toward the end of the first day of the Hearings it became evident to the Arbitrator that testimony from members of the City of Seattle's Civil Service Commission was necessary. Therefore, a second day of the Hearings was scheduled for July 19 to receive input on the City's civil service system." (emphasis ours)

At page 11 of the award, the arbitrator states:

> "Before proceeding to the award, the Arbitrator would like to make a few comments. The Arbitrator chose not to hear the full merits of the case before rendering a decision on arbitrability on the basis of 1) the similarity of the present dispute to the Chuang Grievance and 2) the testimony of the union regarding the intermittent, rather than continuous, nature of the higher paid duties. The arbitrator's questions regarding arbitrability had been answered by the evidence and testimony presented at the Hearings.' (emphasis ours)

The record before us does not disclose precisely what "input" was received at the arbitrator's request or what "evidence and testimony" was presented at the arbitration hearings; but in the context of a case where the arbitrability issue necessarily merges with the merits of the grievance, we find the arbitrator's injection of himself into the presentation of the case and then his limitation of the evidence on the merits sufficient to deprive the proceedings of the fairness and regularity required for our deferral. We have no jurisdiction to vacate the arbitrator's award; but we decline to give the arbitration award any weight in our disposition on this matter.

The City is not guilty of trying to dominate the union contrary to law. The grievance may have become partially or entirely moot with the passage of time. However, the procedures followed by the parties in this dispute have become so jumbled, and the postures and actions of the parties have been so affected by the confusion, that it is nearly impossible to sort out the situation. What is clear is that the union has viewed the dispute in a collective bargaining context while the City has viewed the dispute in a civil service context. A question of contract interpretation is involved to determine which of them is correct in their view of the case. Because the award of the arbitrator recites that the union's case was not fully heard on the merits, we cannot defer to that arbitration award as being dispositive of that contract interpretation question. The union has the right to present its grievance under Article IX on the merits, and to represent its constituents in so doing. We could make that contract interpretation; but in the anomalous situation which has developed in this case we prefer to reserve jurisdiction in order to give the parties an opportunity to agree on procedures and a tribunal for final resolution of the grievance under Article IX. If the grievance is resolved within ninety (90) days following the date of this order, the complaint will be dismissed. If it has not been so resolved, we will entertain a motion by either party to proceed with the matter.

## AMENDED FINDINGS OF FACT

1. The City of Seattle is a municipal corporation located in King County and a "public employer" within the meaning of RCW 41.56.030(1).

2. The International Federation of Professional and Technical Engineers, Local 17 is a labor organization and a bargaining representative within the meaning of RCW 41.56.030(3); the union is exclusive bargaining representative for a bargaining unit including employees working as engineers in the City of Seattle Engineering Department.

3. The city and the union entered into a collective bargaining agreement effective from September 1, 1974 through August 31, 1975. The contract delegated reclassification questions to the City of Seattle Civil Service Commission.

4. On August 29, 1975, the union filed a "working out of classification" grievance on behalf of 15 bargaining unit employees classified as assistant engineers in the City of Seattle Engineering Department. The grievances were submitted to binding arbitration. During the pendency of the arbitration proceedings, bargaining unit employees Phillip Fraser, Harpal Sidhu, Gene Leonard and Wayne McPhillips sought review of their reclassification claims by the Civil Service Commission.

5. On August 13, 1976, the arbitration award was issued by Arbitrator Richard B. Peterson. The Arbitrator held that the Civil Service Commission had exclusive jurisdiction to decide reclassification questions; but that award was based on an incomplete record and irregular procedure.

6. At a meeting conducted on June 22, 1977, the Civil Service Commission refused to permit the union's business representative to present reclassification grievances on behalf of bargaining unit employees Fraser and Sidhu.

7. The union's business manager was permitted to present the reclassification grievances raised by bargaining unit employees Leonard and McPhillips before the Civil Service Commission on October 4, 1978.

## AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.

2. The collective bargaining agreement between the parties, in Article VIII, constitutes a clear and unmistakeable waiver of bargaining as to reclassification matters, but does not constitute a waiver of the right of bargaining unit employees to have union representation in the processing of grievances under Article IX of that agreement.

3. The union has had no opportunity to present its grievance under Article IX of the collective bargaining agreement, and must be afforded that opportunity.

AMENDED ORDER

IT IS ORDERED that:

1. The City of Seattle, its officers and agents, shall immediately commence negotiations with International Federation of Professional and Technical Engineers, Local 17, AFL-CIO, concerning procedures and the designation of a tribunal for final resolution of the grievance advanced by that organization under Article IX of the collective bargaining agreement, and if agreement is reached pursue these procedures in a timely manner.

2. Both parties are directed to notify the Executive Director of the Commission of the procedures agreed to, if any, and the outcome of any such proceedings.

3. In the event that the grievances of Fraser and Sidhu are not resolved within ninety (90) days following the date of this Amended Order, the Commission will entertain a motion from either party to proceed with determination of the matter.

DATED this 17th day of June, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mary Ellen Krug
MARY ELLEN KRUG, Chairman

Robert J. Williams
ROBERT J. WILLIAMS, Commissioner

JOHN H. LEINEN, Commissioner