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-A - PECB
JANICE PANKNIN, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2916, Respondent.	CASE 8381-U-89-1819 DECISION 3774-A - PECB DECISION OF COMMISSION

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.

This case comes before the Commission on a timely petition for review filed by International Association of Fire Fighters, Local 2916, and a cross-petition for review filed by the complainants, all of which seek to overturn a decision issued by Examiner Mark S. Downing.[1]

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[1] Decisions 3773 and 3774 (PECB, 1991).

BACKGROUND

Spokane County Fire District 9 (employer) serves a population of approximately 35,000 in the northern portion of Spokane County. The employer's services are provided from seven fire stations, staffed by 12 full-time firefighters and approximately 100 volunteer firefighters.

International Association of Fire Fighters, Local 2916 (union), 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.

James H. Panknin and Janice Panknin are each employed by Spokane County Fire District 9, within the bargaining unit represented by the union. Prior to the events at issue in these proceedings, both James Panknin and Janice Panknin were members of the union.

The employer and union were parties to a collective bargaining agreement which was effective for the period from January 1, 1986 through December 31, 1988. That contract contained union security provisions which required bargaining unit employees to join the union or pay a monthly service fee to the union that was equivalent to the amount of dues paid by union members.

There are a number of disputes in this case, all relating either to the Panknins' obligations to make payments to the union or to the union's right to take action against the Panknins if certain payments were not made. The first dispute arose when the union levied a special assessment against members of the bargaining unit; the Panknins refused to pay that assessment, and resigned their membership in the union. Next, the union attempted to enforce union security obligations on the Panknins during a time period when the 1986-88 collective bargaining agreement had expired and a new agreement was not yet negotiated. When the union advised the

Panknins that they could no longer use any of the "house benefits" services provided by union dues, it did not accompany that notice with any reduction of the monthly service fee that the Panknins were called upon to pay. When the Panknins subsequently requested a review of the union's financial records, the union gave them some financial information, but refused them access to its financial records for years prior to 1988 and for the second half of 1989. The Panknins requested that amounts they had paid as special assessments be returned to them; the union's officials responded that the funds would be returned, but at the same time indicated that the union would request the termination of the Panknins' employment for non-payment of dues.

On December 29, 1989, James Panknin and Janice Panknin filed unfair labor practice complaints against the union, alleging that the union had violated RCW 41.56.150(1) and (2) by its assessment of inappropriate costs to non-members of the union. The Executive Director issued a preliminary ruling under WAC 391-45-110, finding the complaints stated a cause of action. Examiner Downing was then assigned to conduct further proceedings under Chapter 391-45 WAC.

On September 9, 1990, the 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 it to file and serve its answer was September 25, 1990. The notice of hearing also quoted the provisions of WAC 391-45-210 concerning the consequences of a failure to answer.

The union's answer was not filed within the time specified in the notice of hearing, but an answer was submitted on the day before the scheduled hearing. At the start of the hearing on October 5, 1990, the attorney for the complainants indicated that he had just received the union's answer at the hearing.

The complainants filed a written motion for summary judgment at the hearing, and the union was provided an opportunity at the hearing 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 under the deadline specified. 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 Examiner concluded that the reasons advanced by the union 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 complaints was admitted as true. Post-hearing briefs were filed by both parties.

In a decision issued on May 6, 1991, Examiner Downing found that the union had committed unfair labor practices. He fashioned a remedy which included partial refunds of dues and assessments paid by the Panknins, but he did not call for the union to pay the fees of the Panknins' attorney. The union filed a timely petition for review, and the Panknins filed a timely cross-petition for review, bringing these cases before the Commission.

POSITIONS OF THE PARTIES

The union takes issue with the Examiner's ruling on its late answer, with certain of the Examiner's findings of fact, and with the Commission's jurisdiction in the matter. The union argues that "the only exception" to its ability to enforce its collectively bargained union security provisions is "if and when, these complainants were able to satisfactorily supply sufficient evidence to indicate a religious belief and their membership in a recognized

religious organization which prohibits the payment of union dues". The union thus states that exemptions may only be required pursuant to RCW 41.56.122 and 41.59.100.

The Panknins argue that they should be awarded attorney's fees, based on the conduct of the union in response to their request for lesser dues and assessments, and based on the union's response to their request for a look at the union's financial records.

DISCUSSION

The Failure to Answer

The Commission's rules clearly specify, at WAC 391-45-210, the effects of a failure to answer. Enforcement of that rule dates back to at least City of Benton City, Decision 436 (PECB, 1978) [Examiner's decision]; affirmed, Decision 436-A (PECB, 1978) [Commission decision]; affirmed, WPERR CD-343 (Benton County Superior Court, 1979). RCW 41.56.170 formerly required filing of an answer within 5 business days after issuance of a notice of hearing; our rules now prescribe filing of an answer not less than 10 days before the hearing. The notice of hearing was issued in this case 25 days prior to the scheduled hearing. If the answer was prepared on October 1, 1990, as claimed by the union at the hearing, the union was nevertheless lax in failing to serve it until the outset of the hearing on October 5. The Commission finds no error in the Examiner's rulings.

The Commission's Jurisdiction

RCW 41.56.122(1) authorizes the inclusion of union security arrangements **within collective bargaining agreements** negotiated under the Public Employees' Collective Bargaining Act. Employees have an unfair labor practice cause of action before the Commission

where they are subjected to unlawful enforcement of state union security obligations. Mukilteo School District, Decision 1122-A (EDUC, 1981).

The union does not appear to contest the Examiner's finding that dues and assessments were demanded by the union for a period when there was no contract in effect.[2] The decisions in Pierce County, Decision 1840-A (PECB, 1985) and City of Seattle, Decision 3169-A (PECB, March 26, 1990) are very clear on this point. We note that a collective bargaining agreement, and therefore the union security clause, were not in effect during the period from December 31, 1988 to May 1, 1990.

RCW 41.56.122(1) does, indeed, provide for payments to charity, in the alternative to paying union dues, for employees who object to union membership on the basis of "religious tenets or teachings of a church or religious body of which such public employee is a member".[3] The union is correct that there is no religious-based claim in this case. That does not mean that there are no other exceptions to a union's ability to enforce union security obligations upon bargaining unit employees.

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2 The Examiner decided that the union committed unfair labor practices when it excluded the Panknins from the "house benefits" on the basis of their withdrawal from union membership, when it obtained payments from the Panknins under threat of discharge pursuant to a union security obligation, and when it threatened the Panknins that it would seek their discharge if they accepted refund of the payments made on June 30, 1989.

3 The provision was interpreted by the Supreme Court of the State of Washington in Grant v. Spellman, 99 Wn.2d 815 (1983) [Grant II], to include personal religious beliefs, as well as beliefs founded on the teachings of an organized church or body. RCW 41.59.100, cited by the union, is a provision of the Educational Employment Relations Act, Chapter 41.59 RCW, which has no application to this employer or union, or to these employees.

The union's arguments fail to consider Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986). In Abood, the Supreme Court of the United States held that union members and non-members alike can be held liable for union expenses directly related to contract negotiations and member representation, but that non-members may not be required to pay for union activities that are not directly related to the union's role as bargaining representative. Hudson set forth procedural requirements relating to determining the dues amounts that non-members could be required to pay under Abood. By attempting to focus on the "religious beliefs" provisions of the state law, the union ignores these significant federal court decisions, and the many state decisions based upon them.

Both Abood and Hudson are based on the rights of employees under the United States Constitution, and our state law must be interpreted and applied in conformity with those decisions. The existence of an unfair labor practice cause of action concerning enforcement of union security in contravention of the federal constitution was discussed in Brewster School District, Decision 2779 (EDUC, 1987), and applied in Snohomish County, Decision 3705 (PECB, January 30, 1991), both of which were cited by the Examiner in his decision in this case. We thus affirm the Examiner's conclusion that the union would commit unfair labor practices by failing to provide the procedures required by Hudson.

The Challenged Findings of Fact

In paragraph 6 of his findings of fact, the Examiner described the collective bargaining agreement and union security provision, and then went on to state:

> 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.

The union argues that there is no evidence in the record to support the Examiner's finding.

As indicated above, Abood and Hudson impose obligations on unions that seek to enforce union security obligations on employees. If a procedure for the apportionment of dues existed, the union bore the burden of proving that fact as an affirmative defense to the unfair labor practice complaint against it. Absent any evidence in the affirmative, the Examiner was justified in inferring that no such procedure was in effect.

Attorney's Fees

The standard used by the Commission for determining whether to award attorney fees to a successful complainant originated in the decision in State ex. rel. Washington Federation of State Employees v. Board of Trustees, 93 Wn.2d 60 (1980). Our Supreme Court held there 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 69 [emphasis by **bold** supplied]

In discussing a union's request for attorney fees two years later, in Lewis County v. PERC, 31 Wn.App. 853 (Division II, 1982), the court of appeals noted that:

> ... 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 the 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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> ...
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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.
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> ...
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> ... 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, quoted from WPERR at CD 252-255 [emphasis by **bold** supplied].[4]

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 recurrence**, and is necessary to make the order to negotiate in good faith at reasonable times effective.

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,

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4 The Supreme Court denied the employer's petition for review in that case. 97 Wn.2d 1034 (1982).

1992). In that unanimous decision, the Supreme Court affirmed issuance of an extraordinary remedy by the Commission where "necessary to make its order effective".

More issues were involved before the Examiner than here, and the Examiner noted that case law was still evolving as to some of those issues. We thus find no abuse of discretion in the Examiner's decision that an award of attorney fees was not then justified.

The union then pressed this appeal, however, as to issues that were clearly resolved by the Examiner in accordance with established precedent. In doing so, the union was not diligent in researching the applicable legal precedents, or in addressing the points raised by the Examiner's decision. The defenses advanced in support of the union's petition for review thus fall to the level of being frivolous or meritless, and appear calculated to simply prolong the process and put the complainants to discouraging expense.

The courts in Lewis County, supra, Green River, supra, and METRO, supra, have outlined the authority (and obligation) of this Commission to curtail dilatory tactics and prevent recurrences of unfair labor practices. Beyond the conclusion that the union's petition for review in this case is "frivolous" and "meritless", the Commission believes that an extraordinary remedy is necessary to prevent recurrence of dilatory tactics and repetitive misconduct.

The request of the complainants for attorney fees is granted for the "review" portion of this proceeding only.

NOW, THEREFORE, it is

ORDER

1. The findings of fact and conclusions of law issued in the above-captioned matter by Examiner Mark S. Downing are

AFFIRMED and adopted as the findings of fact and conclusions of law of the Commission.

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

a. CEASE AND DESIST from:

(1) 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.

(2) 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.

(3) 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.

(4) 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.

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

(1) 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.

(2) 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.

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

(4) 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.

(5) Reimburse James Panknin and Janice Panknin for their attorney fees and costs associated with the proceedings for review of the Examiner's decision in this case by the Commission, upon presentation of a sworn and itemized statement of such fees and costs.

(6) 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.

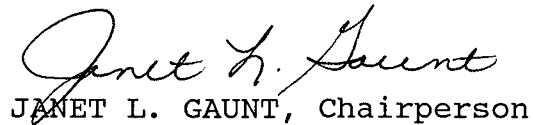
(7) Notify the above-named complainants, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainants with a signed copy of the notice required by the preceding paragraph.

(8) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20

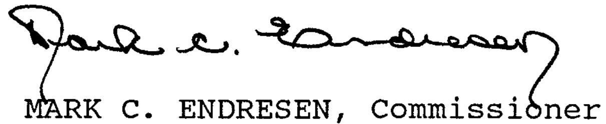
days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

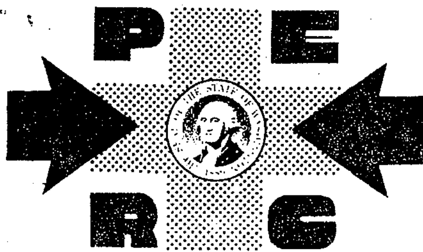


JANET L. GAUNT, Chairperson



MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner



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 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 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, upon presentation of a sworn and itemized statement, reimburse James Panknin and Janice Panknin for their attorney fees and costs associated with the proceedings for appeal of the Examiner's decision to the full Commission.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce 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 Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.