STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 120, Complainant,	NO. 2072-U-79-290
vs.	DECISION NO. 844-B PECB
PORT OF EDMONDS, Respondent.	DECISION OF COMMISSION

Michael McGrorey, Research Director, Northwestern States Council 14, SEIU, appeared on behalf of the union.

Richard Cole, attorney at law, appeared on behalf of the employer. Perkins, Coie, Stone, Olsen & Williams, attorneys at law, by Lawrence B. Hannah and Thomas E. Platt associated in filing the brief in support of the petition for review.

Examiner Alan R. Krebs issued his findings of fact, conclusions of law and order in the captioned matter on April 7, 1980 (Decision 844 PECB) and an amended order on April 14, 1980 (Decision 844-A PECB). The Examiner found that the Port of Edmonds committed unfair labor practices by not giving an opportunity to negotiate the port's decision, and its effects, to contract out certain port operations. The Port of Edmonds timely filed a petition for review of the Examiner's decision by the Commission.

The relevant facts, for the most part undisputed, are set forth in the first section of the Examiner's decision. The issues raised in the port's petition are: (1) Does the Commission have jurisdiction over port district unfair labor practices; (2) if so, does the port have a statutory obligation to bargain with the union; (3) did the port fulfill any obligation it had to bargain; (4) did the union waive its right to bargain over the contracting out of port operations; (5) was the port excused from bargaining because a decertification petition had been filed; and (6) is the Commission estopped from penalizing the port for acting upon the advice of a Commission staff member?

In its argument on jurisdiction, the port asks us to overrule Port of Seattle, Decision 599-A (PECB, 1979), which held that both RCW 41.56 and RCW 53.18 are applicable to port districts.

The Commission there stated:

> While it administered both RCW 41.56 and RCW 53.18, the Department of Labor and Industries chose to interpret those statutes as mutually exclusive systems of rights and obligations respecting labor relations. We see no statutory basis for such interpretation. RCW 53.18 was enacted as Chapter 101, Laws of 1967, and contains certain definitions, rights and limitations. RCW 41.56 was first enacted after RCW 53.18, as Chapter 108, Laws of 1967, 1st extraordinary session, and has been amended substantively since that time. RCW 41.56 contains a broader range of rights and obligations than RCW 53.18. Specifically, RCW 41.56 provides for the definition and prevention of unfair labor practices. There is nothing in RCW 53.18 which provides "otherwise".

Were there an inconsistency between RCW 41.56 and RCW 53.18, the latter would prevail. But there is none. We believe this ruling was correct and, since there have been no subsequent judicial or legislative events suggesting that it was erroneous, we decline to alter or overrule it.

The port's second argument is that Ch. 53.18 RCW makes all bargaining subjects discretionary; i.e., permissive, and is inconsistent with, and therefore controls RCW 41.56.030, which sets forth mandatory bargaining subjects.[1/] We disagree.

The disputed language in RCW 53.18.020 states that (emphasis added):

> "[p]ort districts <u>may</u> enter into labor agreeements or contracts with employee organizations."

See also RCW 53.18.050. The issue is whether the word "may" makes collective bargaining permissive only, or is simply an authorization to engage in labor negotiations.

Implicit in <u>Port of Seattle</u>, <u>supra</u>, is the proposition that RCW 41.56 and 53.18 are complimentary in nature and should be so construed with that notion in mind. Therefore, troublesome language differences between the two statutes should be reconciled when reasonably possible. Contrary to the port's assertions, there is no settled rule that the word "may" always denotes permissive action, while "shall" necessarily means the action is mandatory. See, e.g., <u>In re Elliot</u>, 74 Wn.2d 600, (1968) ("shall" is not mandatory); and <u>Local 1724B, Am. Fed. of State, County & Munic. Employees v. Bd. of County Commissioners, Lane County</u>, 5 Or. App. 891 (1971) ("may" is mandatory). See, generally, 1A Sutherland, Statutory Construction, Sec. 25. The counterpart to RCW 53.18.020 is found in the first clause of RCW 41.56.100, which states:

<u>1/</u> In <u>City of Kennewick</u>, Decision 482-B (PECB, 1980) we held, consistent with <u>Fibreboard Paper Products v. NLRB</u>, 379 U.S. 203 (1964) and its progeny, that the decision to contract out work previously performed by bargaining unit employees is, under RCW 41.56.030(4), a mandatory bargaining subject. The port apparently does not dispute this.

> "A public employer shall have the authority to engage in collective bargaining with the exclusive bargaining representive...."

There is neither a counterpart to RCW 41.56.030(4) nor a contrary provision in RCW 53.18. We find that a reasonable conciliatory construction of RCW 41.56.030 and 53.18.020 is that the latter provides authorization for port management to bargain, while the former describes the substantive obligations of port management (along with all other public employers) to engage in collective bargaining.

The port's third contention is that, even if it had a duty to negotiate its decision to lease out its operations, it fulfilled that duty during its July, 1977 to July, 1978 negotiations with the union by emphasizing the reservation of a right to lease out.

The 1977-78 negotiations involved abstract discussion of contracting situations which might arise in the future.

The record is clear that the union was not given notice of, or an opportunity to bargain about the port's firm and final decision to contract out its marina operations to a specific operator. The opportunity to bargain must be meaningful, and that cannot be the case when the subject is discussed in the abstract unless finalized in a manner so as to indicate application of the agreement reached to specific situations as they arise. Evidence of a waiver of bargaining rights must be clear. NLRB v. R.L. Sweet Lumber Co., 515 F.2d 785 (10th Cir., 1975), cert. den., 423 U.S. 985 (1975); and City of Kennewick, supra, note 1. The employer has failed to demonstrate the existence of a waiver arising from the discussions which took place between these parties.

The union's acquiescence to the management rights clause is, the port next contends, an enforceable waiver of the union's right to negotiate the port's decision to contract out. We disagree.

Under Kennewick, supra, the employer does not possess an inherent right to unilaterally contract out. On the contrary, this employer appears to have been bargaining hard to obtain the right to make unilateral contracting out decisions. Had the tentative agreement between the parties been ratified and embodied in a written and signed collective bargaining agreement, as is required by State ex. re. Bain v. Clallam County, 77 Wn.2d 541 (1970), the language discussed in the negotiations might well have been deemed a waiver of bargaining rights in the actual situation presented in this case. But those are not the facts. We agree with the Examiner that, since the contract was never consummated, and since the port failed to provide the union with the 60-day notice of leasing out which was required by the tentative agreement, the evidence does not support a finding of a waiver by the union.

The port's fifth argument is that the filing of a decertification petition by a port employee excused the port from continuing negotiations with the union. The port argues vigorously that the NLRB, beginning with Telautograph Corp, 199 NLRB 892 (1972) has consistently held that the filing of a decertification petition supported by the requisite showing of interest, by itself, justifies the employer's withdrawal of recognition of and refusal to bargain with an incumbent union.

As suggested in the Examiner's decision, however, the case law in the private sector has been less than clear and consistent regarding the proper response of an employer, with respect to negotiations, to a timely filed decertification petition. We have not had the opportunity to squarely face this issue. Perhaps the best support for the port's position is NLRB v. National Cash Register Co., 494 F.2d 189 (8th Cir., 1974), which contains somewhat equivocal language supporting the "per se" rule that the port espouses. There is a contrary line of cases illustrated by NLRB v. Grede Plastics, ___F.2d___, 104 LRRM 2646 (D.C. Cir., 1980), which held that a decertification petition supported by the required 30% showing of interest does not, by itself, justify automatically a refusal to bargain. The Court, at footnote 1, observed that the NLRB majority has rejected a "per se" rule, "requiring (instead) some objective evidence of loss of majority status in addition to the mere filing of a decertification petition. That rule has been endorsed by this court and two other courts of appeals". See: Allied Industrial Workers v. NLRB, 476 F.2d 686 (D.C. Cir. 1973); Retired Persons Pharmacy v. NLRB, 519 F.2d 486 (2d Cir. 1975); Rogers Manufacturing Co. v. NLRB, 486 F.2d 644 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974).

The questions of whether or not the decertification petition was valid and whether or not the union retained majority status were not the province of the employer to decide unilaterally. There existed, then as now, proper legal channels for the determination of any question concerning representation. A key fact overlooked by the employer in its "withdrawal of recognition" arguments is that the negotiations did not involve a future contract or even a modification of an existing contract, but rather unilateral change of working conditions of the bargaining unit. This was done by the employer at its peril. The existence of either a certified exclusive bargaining representative or a pending question concerning representation should have deterred this employer from making such a unilateral change. It appears to this Commission that the port, by its unilateral decision to change the working conditions, defied the orderly settlement procedure for such controversies under the statutes of the State of Washington, as well as well established principles guiding labor relations conduct.

Finally, the port contends we should be estopped from ruling against it because a PERC employee informally told a port negotiator that "normally" it is appropriate to cease negotiations with the union in the face of a decertification petition. There is no evidence that the port's inquiry involved more than a hypothetical question or that the PERC representative's response included more than sought by the question. Without discussing or deciding the circumstances under which PERC, as a government entity, might be estopped, we do not think the facts suggest justifiable reliance, or the type of injustice that would give rise to a serious estoppel case. See generally, Beggs v. City of Pasco, 93 Wn.2d 682 (1980) and cases cited therein.

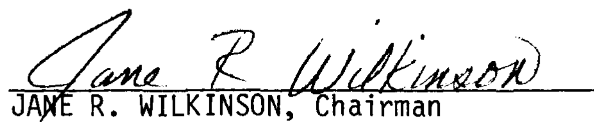
We find no error in the examiner's findings of fact and conclusions of law; accordingly, that decision is affirmed.

ORDER

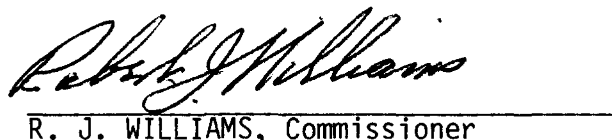
The Port of Edmonds, its officers and agents, shall notify the Executive Director of the Commission, in writing, within ten (10) days following the date of this Order, as to what steps have been taken to comply with the Amended Order issued by Examiner Alan R. Krebs on April 14, 1980; and shall, at the same time, provide the Executive Director with a signed copy of the notice posted in conformity with that order.

DATED at Olympia, Washington, this 12th day of December, 1980.

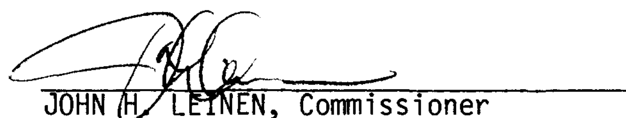
PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANE R. WILKINSON, Chairman



R. J. WILLIAMS, Commissioner



JOHN H. LEINEN, Commissioner