STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS' GUILD, Complainant,	)	CASE 16410-U-02-4213
vs.	)	DECISION 7913 - PECB
CITY OF SEATTLE, Respondent.	)	RULING ON EMPLOYER'S MOTION TO DISMISS

Aitchison & Vick, by *Christopher K. Vick*, Attorney at Law, for the union.

Thomas Carr, Seattle City Attorney, by *Paul A. Olsen*, Assistant City Attorney, for the employer.

This case is before the undersigned Examiner for a ruling on a motion for dismissal filed by the employer. The Examiner denies the motion.

BACKGROUND

In a nutshell, the operative facts extracted from documents attached to the employer's motion are as follows:

- Prior to 2002, the employer's Public Safety Civil Service Commission exercised authority under Seattle Municipal Code 4.04 and 4.08 to provide a system of examination, hiring and promotion for law enforcement officers.
- Effective January 1, 2002, Ordinance 120658 moved some or all duties of the Public Safety Civil Service Commission to the employer's personnel director.

- On January 24, 2002, the union filed a lawsuit in the Superior Court for King County, seeking injunctive and other relief based on alleged violations of Chapter 41.12 RCW via the above-enumerated actions. King County Cause 02-2-03156-1SEA. Judge Shaffer denied the union's request for a temporary restraining order.

- On May 17, 2002, Judge Shaffer held a hearing on and denied the employer's motion for dismissal of the lawsuit filed by the union in King County Cause 02-2-03156-1SEA.[1]

- On May 28, 2002, the union filed a complaint charging unfair labor practices to initiate this proceeding before the Commission, alleging violations of Chapter 41.56 RCW. The union named the City of Seattle as respondent, and it alleged that the employer unlawfully implemented unilateral changes of employee working conditions by transferring certain functions from its Public Safety Civil Service Commission to its Personnel Director, without providing the opportunity for bargaining.

- On June 25, 2002, the Commission's Director of Administration issued a preliminary ruling under WAC 391-45-110, finding the complaint to state a cause of action for further proceedings, and directing the employer to answer the complaint.

- The employer filed its answer to the unfair labor practice complaint on June 16, 2002, denying the material allegations of the complaint, and denying that it had engaged in any violation of Chapter 41.56 RCW.

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[1] The employer's documents filed with the Commission do not include its answer to the lawsuit or any of the papers associated with the motion made in court in May of 2002. Thus, the Examiner has only limited information about the context and substance of that employer motion.

- A trial has been set in King County Cause 02-2-03156-1SEA for July of 2003.
- On July 22, 2002, the employer moved for dismissal of the unfair labor practice complaint, asserting a "priority of action" theory.

Thus, no hearing has been held on the merits of either the lawsuit pending in court or the unfair labor practice complaint pending before the Examiner, and the only question now before the Examiner concerns the appropriate forum in which to determine the merits of the unfair labor practice complaint.

DISCUSSION

Settled law is that both the court and the Commission have power to determine unfair labor practice charges. In *City of Yakima v. IAFF et al*, 117 Wn.2d 655 (1991) (affirming *City of Yakima*, Decision 3503-A (PECB, 1990)), the Supreme Court of the State of Washington announced application of a "priority of action" concept to situations where labor and management prefer opposite forums for the resolution of unfair labor practice allegations.

The employer contends that the complaint filed with the Commission should be dismissed, because the lawsuit in court was filed first and because it could have included the interpretation and application of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

The union replies that their Superior Court lawsuit seeking injunctive relief involves different parties, different issues and legal standards, and different requests for relief than those

before the Commission. In particular, the union contends that the allegations of unfair labor practices under Chapter 41.56 RCW are not within the pleadings filed in the Superior Court.

Review of the King County Cause 02-2-03156-1SEA supplied by the employer in support of its motion supports the union's contention about the scope of its lawsuit in the courts. Nothing in those documents indicates that the union invoked the jurisdiction of the Superior Court for King County to interpret or apply Chapter 41.56 RCW. Moreover, nothing in the documents supplied by the employer establishes (or even remotely suggests) that the employer made a motion in the court proceedings for an order requiring the union to include potential unfair labor practice charges in the lawsuit.[2]

Review of the specific facts underlying the unanimous decision of the Supreme Court in *City of Yakima* is instructive here. In that controversy, two court proceedings were initiated as requests for declaratory judgments. The second of those proceedings was initiated shortly after the superior court rejected the first of them on priority of action principles, and was cast so as to encompass matters that were arguably outside of the jurisdiction of the Public Employment Relations Commission. In denying a motion for dismissal of the second declaratory judgment case, the superior court saw a distinction based on the expiration of the previous collective bargaining agreement between those parties. Reversing the superior court, the Supreme Court wrote:

> PERC unquestionably has authority to rule on unfair labor practice complaints. Indeed,

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[2] The Examiner infers that there may be pleadings in King County Cause 02-2-03156-1SEA that have not been supplied to the Commission. The Examiner's ruling is necessarily based on the pleadings that have been supplied.

PERC is recognized both by statute, and case law as possessing expertise in the labor relations area. However, this expertise and authority do not divest the superior courts of jurisdiction in all cases to resolve unfair labor practice complaints which involve interpretation of public employee collective bargaining statutes. Both PERC and the court thus had the authority to resolve the question posed in this case.

The trial court ruled that the "priority of action rule" compelled it to decline jurisdiction in the 1989 action but allowed it to retain jurisdiction in the 1990 action. This rule is that the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved. The reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process.

The priority of action rule applies to administrative agencies and the courts. It generally *applies only if the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief. The identity must be such that a decision of the controversy by one tribunal would, as res judicata, bar further proceedings in the other tribunal.*

In this case, . . . [the first case sought] relief identical to that which it requested in the PERC proceeding. We hold that the trial court properly dismissed the [first] declaratory judgment action based on the priority of action rule.

The trial court refused to decline jurisdiction in the [second] case, however, finding that the subject matters were not identical with the [first] complaints . . . .

The issue in controversy in both cases was whether the City had a duty to bargain with the union with respect to matters delegated to the Civil Service Commission. The subject matter of the actions thus was identical. The distinction drawn between the two actions by the trial court was not, in our

> view, sufficient to support the Superior Court's acceptance of jurisdiction in view of the identity of legal issues and the parties involved, the identity of the remedies requested as well as the fact that the action was filed just 1 day after the City's first effort to have the court resolve the same conflict had failed. Under the priority of action rule, we conclude that the trial court erred in not recognizing that the cause was pending before PERC and it should have declined to accept jurisdiction of the 1990 declaratory judgment action.

The "priority of action" is thus applied on objective considerations from actual facts, not on theoretical possibilities.

Identity of Subject Matter? -

The unfair labor practice complaint filed by the union concerns alleged unilateral changes of employee wages, hours, or working conditions without bargaining with the union. The duty to bargain imposed by RCW 41.56.030(4) and RCW 41.56.040 includes a duty to provide notice and an opportunity for bargaining prior to implementation of changes of the wages, hours or working conditions of union-represented employees. That duty is enforced by unfair labor practice proceedings under RCW 41.56.140(4) and RCW 41.56.160, and the Commission has adopted Chapter 391-45 WAC to regulate the processing of unfair labor practice cases before it. The City of Seattle has been involved in numerous unfair labor practice cases under those statutes and rules. On several occasions, this employer has been found guilty of unlawfully implementing unilateral changes of employee wages, hours and working conditions.[3]

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[3] Examples include, but are not necessarily limited to: *City of Seattle*, Decision 1667-A (PECB, 1984) [unilateral change of standby procedures]; *City of Seattle*, Decision 3051-A (PECB, 1989) [unilateral adoption of a no-smoking policy]; *City of Seattle*, Decision 4163, 4163-A (PECB, 1993) [unilateral skimming of bargaining unit work].

The lawsuit filed by the union in the superior court seeks a declaration that the new ordinance is void by reason of failing to accomplish the purposes of Chapter 41.12 RCW, that it is against the public policy, and that it is contrary to the Seattle City Charter. None of those theories appear to state claims for relief available through unfair labor practice proceedings before the Commission under Chapter 41.56 RCW and/or Chapter 391-45 WAC. Had the union sought to advance such claims before the Commission, they would have been subject to a deficiency notice and dismissal under WAC 391-45-110.[4]

The Examiner concludes that the subject matters of the two proceedings differ. It may be understandable that the employer prefers to litigate all related issues in one forum and proceeding, but it was not the moving party in either of these proceedings. Even if the union *could have* put its unfair labor practice claims before the court, it did not actually do so.

Identity of Parties? -

The parties to the unfair labor practice case are the union and the employer, who are the parties to the collective bargaining relationship and obligations at issue under Chapter 41.56 RCW. While public employers must necessarily act through their officials, the Commission has consistently treated employer officials as agents of the respondent employer, rather than as individual respondents.[5]

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[4] In *City of Bellingham*, Decision 6950 (PECB, 2000), the Executive Director declined to assert jurisdiction over a "violation of city charter" claim in an unfair labor practice case, stating, "A court would need to rule on the claimed violation of the city charter . . . ."

[5] See *Snohomish County*, Decision 4995 (PECB, 1995); *King County*, Decision 1403 (PECB, 1982).

The union is also the sole plaintiff in the lawsuit filed in the court, but the defendants named in that lawsuit include individual city officials, as well as the City of Seattle as an entity.

The Examiner concludes that the difference of parties could be significant. While it may be safe to say that the entity alone is before the Commission, it will be up to the court to decide (and is beyond the authority of the undersigned Examiner to decide) whether any of the named individual defendants in the lawsuit have any liability separate and apart from the entity as a whole.

Identity of Relief Sought? -

The relief requested in the unfair labor practice complaint includes some fairly conventional remedies: An order restoring the *status quo ante*, and posting of notices to employees. While the union asks for a special finding that the employer acted in willful disregard of settled law regarding its duty to bargain over mandatory subjects, that is interpreted as a stepping stone underlying the union's request for an award of attorneys' fees and costs as an extraordinary remedy.[6] The fact that the union has requested an order prohibiting the employer from implementing the new ordinance until it has discharged its duty to bargain and for other (unspecified) relief does not assure that those requests are within the "remedial" orbit or will be granted even if an unfair labor practice violation is found.

The union's lawsuit seeks injunctive relief that is clearly not available directly from the Commission.

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[6] The Commission awards attorney fees in cases where the respondent has asserted frivolous defenses or has engaged in repetitive misconduct. *Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982), *review denied*, 97 Wn.2d 1034 (1982).

The Examiner concludes that the difference of the relief sought (and of the relief available) could be significant. Just as the party asserting a res judicata defense has the burden of proving that the claim was decided in the prior adjudication, the burden of proof is on the party asserting "priority of action" as the basis for the withholding of action and/or dismissal of a proceeding. The employer has failed to sustain that burden in this case, where the union appears to have a timely and properly filed unfair labor practice complaint before the Commission, there is no indication that the court has been asked to rule on the matter, and the trial in the court is many months away.

NOW, THEREFORE, it is

ORDERED

The motion of the City of Seattle based upon the existence of the proceedings in King County Cause 02-2-03156-1SEA is DENIED.

Issued at Olympia, Washington, on the 18th day of November, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARTHA M. NICOLOFF, Examiner