STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE PROJECTIONISTS LOCAL 15,	)	
Complainant,	)	CASE 15911-U-01-4048
vs.	)	DECISION 7488-A - PECB
BROADWAY CENTER FOR THE PERFORMING ARTS,	)	DECISION OF COMMISSION
Respondent.	)	

Schwerin, Campbell, Barnard LLP, by *Dmitri Iglitzin*, Attorney at Law, for the union.

Mc Gavick Graves, by *Edward Lindstrom*, Attorney at Law, for the Broadway Center for the Performing Arts.

Robins Jenkinson, City Attorney, by *Cathy Parker*, Assistant City Attorney, for the City of Tacoma.

This case comes before the Commission on a notice of appeal filed by International Alliance of Theatrical Stage Employees and Motion Picture Projectionists, Local 15, seeking to overturn an order of dismissal issued by Director of Administration Mark S. Downing under WAC 391-45-110.[1] The City of Tacoma filed a letter requesting that it be removed from the docket records for case. We vacate the dismissal and remand the case for further proceedings under Chapter 391-45 WAC.

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[1] *Broadway Center for the Performing Arts,* Decision 7488 (PRIV, 2001).

BACKGROUND

On July 16, 2001, International Alliance of Theatrical Stage Employees and Motion Picture Projectionists, Local 15 (union), filed a complaint charging unfair labor practices under Chapter 391-45 WAC, naming the Broadway Center for the Performing Arts (BCPA) as the respondent. In the statement of facts, Local 15 alleged that BCPA is "a public employer as defined by RCW 41.56.030 (1) . . . acting on behalf of the City of Tacoma."[2] The substance of the controversy concerns interference with employee rights and refusal to bargain, allegedly in violation of RCW 41.56.140(1) and (4), by skimming work previously performed by a production stage manager without providing an opportunity for bargaining.

The complaint was reviewed under WAC 391-45-110, and a deficiency notice was issued on August 10, 2001. Although the "acting on behalf of" allegation was acknowledged, it was noted that: (a) the collective bargaining agreement filed with the complaint listed only the BCPA as the employer and made no mention of the City of Tacoma; (b) the letter from counsel claimed that the BCPA is a non-profit, private corporation; and (c) the Commission generally lacks jurisdiction over private entities. The union was given an

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[2] The complaint form named only the executive director of the BCPA as a contact person for the employer. The case was initially docketed with the City of Tacoma listed as the employer and the executive director of the BCPA listed as a contact person for the employer. A "notice of case filing" was issued, inviting parties to submit any corrections to the names and addresses of parties and representatives listed on the docket record. In a letter filed on August 6, 2001, counsel for the BCPA asserted that the BCPA was the employer and that the City of Tacoma was listed in error. A "record of appearances" was then issued on August 10, 2001, listing the BCPA as the employer.

opportunity to provide documentation that the BCPA is subject to the jurisdiction of the Commission.

The union filed an amended complaint on August 20, 2001. Apart from reiterating its "acting on behalf of" allegation, the union added a new paragraph to the statement of facts, stating:

> 3. Evidence that the BCPA is a "body acting on behalf of [a] public body," as required for the exercise of jurisdiction by PERC pursuant to RCW 41.56.030(1), includes, but is not limited to, the following:
>
> (a) the position of BCPA Executive Director, . . . is a regular full-time City of Tacoma job, see Exhibit A [City of Tacoma job descriptions . . .];
>
> (b) according to his own admission, current BCPA Executive Director Eli D. Ashley is a full-time City of Tacoma employee employed by the City of Tacoma to fill the role of BCPA Executive Director; and
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> (c) among the purposes of the BCPA, according to its Articles of Incorporation, is to "assist, counsel and advise the City Council of the City of Tacoma and the city officials, officers, agents and employees thereof," with respect to the Pantages Theatre building, but "only so long as, said building remains the property of the City of Tacoma," see Exhibit B [BCPA Nonprofit Corporation Annual Report, Articles of Incorporation, certificate of Amendment, Articles of Amendment, and Application for Status as a Public Benefit Nonprofit Corporation], fourth page.

The Director of Administration thereafter dismissed the complaint on the basis that the Commission did not have jurisdiction over the

private, non-profit corporation.[3] The union filed a timely notice of appeal, on September 4, 2001.

POSITIONS OF PARTIES

The union filed an appeal brief on September 19, 2001, and it filed supplemental information on April 8, 2002. It claims the BCPA is a public employer under RCW 41.56.030(1). Based on Eli Ashley being a full-time City of Tacoma employee working as executive director of the BCPA, it argues that Ashley must be working on behalf of the City of Tacoma. The union also points to the avowed purpose of the BCPA to "assist, counsel and advise the . . . City of Tacoma . . . ." The union also points to the fact that the relationship between the BCPA and the City of Tacoma is to continue "so long as the Pantages Theatre building remains the property of the City of Tacoma." Thus, the union argues that the Commission has jurisdiction over its unfair labor practice complaint.

The BCPA filed a brief on October 4, 2001. From the outset, it has argued that it is a private entity excluded from the jurisdiction of the Commission. It acknowledges that its executive director is a City of Tacoma employee, but claims that position is provided by the City of Tacoma as part of a package of contributions that includes use and maintenance of the buildings and cash.[4] The BCPA disputes the union's claim that Ashley acts on behalf of the City of Tacoma, and urges that Ashley works under the direction of the

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[3] Under Chapter 49.08 RCW, the Commission can provide assistance to private sector parties who consent to the jurisdiction of the Commission. However, the parties did not consent to use of that statute in this situation.

[4] BCPA receives contributions from private individuals and corporations including cash and other "in-kind" services.

BCPA's board of trustees. It also asserts (but did not offer any details or documentation) that the BCPA board is independent from the City of Tacoma (even though city officials are among the members of that board). The BCPA contends the union has misinterpreted the relationship between the BCPA and the City of Tacoma, and that its "suggestions . . . with regard to suggested maintenance and capital improvements on the Pantages Theatre" are of secondary importance. Finally, the BCPA cites collective bargaining agreement provisions calling for arbitration through the Federal Mediation and Conciliation Service as evidence that the union never thought of the BCPA as a public employer, and contends the parties would have utilized "reduced cost PERC arbitration" if the BCPA had been considered to be a public employer.

The City of Tacoma received the notice of case filing and the later record of appearances for this case emanating from the Commission's computerized case docketing system. In a letter filed following the notice of appeal, counsel for the City of Tacoma asserts that several discussions among the parties resulted in an agreement that the City of Tacoma is not a party in this matter, and requested confirmation from the Commission that the City of Tacoma is no longer viewed as a party in this matter.

DISCUSSION

Standard of Review

Because we are reviewing an order of dismissal issued at the preliminary ruling stage of case processing under WAC 391-45-110, we are confined to the assumptions uniformly applied in that process: All of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether the

complaint states a claim for relief available through unfair labor practice proceedings before the Commission.

Applicable Legal Principles

Statutory Provisions -

Under RCW 41.56.160, this Commission has jurisdiction to hear, determine, and remedy unfair labor practice claims under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The coverage of that statute is described as follows:

> RCW 41.56.020 Application of Chapter. This chapter shall apply to any county or municipal corporation, or any political subdivision of the state of Washington . . .
>
> . . .
>
> RCW 41.56.030 Definitions. As used in this chapter:
>
> (1) "Public employer" means any officer, board, commission, council, or other person or body acting on behalf of any public body governed by this chapter, or any subdivision of such public body.

There is no doubt that the City of Tacoma is a public body within the coverage of Chapter 41.56 RCW. The question before the Commission in this case is whether the BCPA is within the class of agents of a public employer to which Chapter 41.56 RCW applies.

Controlling Precedents -

In determining the actual employer(s) of particular employees, the Commission and the Washington courts have applied principles similar to the "right of control" test initially set forth by the National Labor Relations Board (NLRB) in *National Transportation Service*, 240 NLRB 565 (1979) and later refined in *Res-Care, Inc.*, 280 NLRB 670, (1986). That test examines both the allocation of

control over the essential terms and conditions of employment, and the scope and degree of control exercised by a particular entity over the matters critical to labor-management relations.

Apart from the fact that they are few in number, the two Commission decisions applying that right of control test are subject to criticism as being substantively inconsistent with one another in their application of the "right of control" test:

- In *North Mason School District*, Decision 2428-A (PECB, 1986), a union had filed a representation petition seeking certification as the exclusive bargaining representative of a unit of school bus drivers. The public employer responded with a claim that the individuals involved were employees of a private entity that contracted with the school district. The "acting on behalf of" language found in RCW 41.56.030(1) was acknowledged, but was not directly applied because the private entity was not named as a party in that case. The Commission determined that the school district maintained the right of control for core subjects of bargaining, so that no "joint" employer relationship existed.[5] Ultimately, the Commission ruled it had jurisdiction over the bus drivers notwithstanding the involvement of the private entity.

- *Tacoma School District*, Decision 3314-A (PECB, 1990), also involved a union petition seeking certification as exclusive bargaining representative of a unit of school bus drivers, and

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[5] The Commission's decision (and the credibility of the employer's arguments) was likely affected by the fact that the superintendent of the school district had previously supplied an affidavit that was filed by the private entity with the NLRB in opposition to a representation petition. That affidavit provided basis for the NLRB to dismiss its case based on a finding that the public employer "dominated" the private entity.

a claim that the individuals involved were employees of a private entity that contracted with the school district. The private entity was not named as a party in that case, and the "acting on behalf of" language found in RCW 41.56.030(1) was not mentioned or interpreted in the decision. The analysis applied was to determine who had the "final say" on core subjects of bargaining. The Commission placed particular importance on who controlled the employees' wages and benefits, and concluded that the "final say" test requires more than just an impact on bargaining via bid specifications. The Commission ruled that it lacked jurisdiction over the employees, and dismissed the petition in that case.

In *Management Training Corp.*, 317 NLRB 1355 (1995), the NLRB overturned its *Res-Care* decision stating that the "emphasis in *Res-Care* on control of economic terms and conditions was an oversimplification of the bargaining process." The NLRB thereafter asserted jurisdiction over nonprofit employers with close ties to an exempt governmental agency, if the private entity met the definition of employer under Section 2(2) of the National Labor Relations Act and meets the applicable monetary standard for asserting jurisdiction.

Application of Standards

In this case, it is undisputed that the BCPA is a private nonprofit corporation. However, the alleged (and controverted) facts concerning the executive director call the relationship between the two entities into question and frame an issue as to whether the BCPA is sufficiently "acting on behalf of" the City of Tacoma to invoke our jurisdiction under Chapter 41.56 RCW. The Commission decisions cited above are not helpful, because neither of them directly interpreted or applied RCW 41.56.030(1). The possibility that the NLRB might now assert jurisdiction over the BCPA is not

helpful, because the union is entitled to a ruling on its claim of a right to bargain with the City of Tacoma and (potentially) to the simplicity of bargaining under one law.

From the briefs and exhibits supplied by the parties, we discern that there are factual issues affecting whether this Commission has jurisdiction over all or any part of the bargaining relationships.[6] We lack an evidentiary record to decide those issues at this time, because we cannot consider documents or factual arguments supplied by the employer and union in support of their positions on this appeal.[7] Instead, we must decide this appeal under the "assuming all of the facts alleged to be true and provable" standard that is

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[6] For example: If the executive director acts on behalf of the City of Tacoma, that could support a finding that the BCPA "acts on behalf" of the City of Tacoma within the meaning of RCW 41.56.030(1). Even if the executive director is controlled by the BCPA board, there is still a question because of the composition of that board: If the body is composed of or controlled by city officials, the executive director could be acting on behalf of Tacoma; if the facts are otherwise, the public funding of the executive director position could be of lesser or no importance. Similarly, more facts are needed to resolve the debate about the meaning and implementation of the language concerning the relationship between the BCPA and the City of Tacoma.

[7] For example: The complaint makes reference to the articles of incorporation of the BCPA, but documents that have accumulated in the file include documents dated December 28, 1978, and July 10, 1991. The complaint refers to an operations agreement, and the file contains a document dated September 8, 1999. There is reference to a job description for the executive director, but a document on file that dates from March 11, 1981, as revised in 1988 and 1994, uses a different title. The complaint makes reference to a collective bargaining agreement between BCPA and Local 15, but the document on file was only effective from July 1, 1999 through June 30, 2002, and there is no indication of whether a successor contract has been negotiated.

properly applied in the preliminary ruling process under WAC 391-45-110. A remand for further proceedings is thus necessary, to obtain the evidence needed to decide this case.

NOW, THEREFORE, it is

ORDERED

The order of dismissal issued in the above-captioned matter is VACATED, and the matter is remanded for further proceedings under Chapter 391-45 WAC.

Issued at Olympia, Washington, on the 16th day of August, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner