Broadway Center for the Performing Arts, Decision 7488-B (PECB, 2003)

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-B - PECB
BROADWAY CENTER FOR THE PERFORMING ARTS,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	)	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE PROJECTIONISTS, LOCAL 15,	)	
Complainant,	)	CASE 16248-U-02-4157
vs.	)	DECISION 8169 - PECB
CITY OF TACOMA,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	)	

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

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

Summit Law Group, by *Bruce L. Schoeder*, Attorney at Law, for the City of Tacoma.

On July 16, 2001, Local 15 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and

Allied Crafts of the United States, its Territories and Canada (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Broadway Center For the Performing Arts (BCPA) as respondent. Case 15911-U-01-4048. On February 20, 2002, the union filed a second complaint naming the City of Tacoma (Tacoma) as respondent. Case 16248-U-02-4157. On an appeal from a dismissal of the complaint filed against the BCPA, the Commission remanded the case for a hearing. The Executive Director thereupon consolidated the two cases, and Examiner Walter M. Stuteville conducted further proceedings under Chapter 391-45 WAC. Following discussions with the parties, a hearing held on March 18, 2003, was limited to the issues concerning the jurisdiction of the Commission. The parties filed post hearing briefs to complete the record.

The Examiner concludes that the complaint against the BCPA must be dismissed because (1) the union has not established that the BCPA is a public employer, so that the BCPA is not directly subject to the Commission's jurisdiction under RCW 41.56.020; (2) the BCPA does not "act on behalf of" the City of Tacoma, so the union cannot invoke the Commission's jurisdiction indirectly by means of RCW 41.56.030(1); and (3) notwithstanding evidence that the BCPA executive director is a Tacoma employee and another Tacoma employee holds an ex-officio position on the BCPA board, there was no evidence that the BCPA board is controlled by Tacoma officials, that the executive director acts on behalf of Tacoma, or that the labor relations of the BCPA are controlled or influenced by Tacoma in any way. The complaint against the City of Tacoma must also be dismissed because, although Tacoma is clearly a public employer subject to the jurisdiction of the Commission, the union has failed to prove that Tacoma is a joint employer of the BCPA employees represented by the union.

BACKGROUND

Tacoma owns the Pantages Theater, the Rialto Theater and the Theater on the Square, all located in the downtown area of the city.

The BCPA is a private, nonprofit corporation, which contracts to operate the theater facilities owned by Tacoma. The BCPA and Tacoma are signatories to an operating agreement which spells out their landlord/tenant, contractual relationship in detail.

The union represents certain BCPA employees for the purposes of collective bargaining. That bargaining relationship has existed for a substantial period of time, but there is no record of the union being certified by the Commission to represent the BCPA employees.[1] Uncontroverted testimony indicates all bargaining has been between the BCPA and the union, with no involvement by Tacoma. At the time of the hearing in this matter, the collective bargaining agreement covering those employees was being renegotiated.

PROCEDURAL BACKGROUND

The union's initial complaint alleged that the BCPA had violated RCW 41.56.140(4) and (1), by skimming work previously performed by the production stage manager position, without providing an opportunity for bargaining. Based upon an allegation that the BCPA was "acting on behalf of" Tacoma (and was thus a public employer within the Commission's jurisdiction) the case was initially docketed as a complaint against Tacoma.

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[1] A search of the Commission's computerized docket records dating back to the onset of agency operations (in 1976) fails to disclose any case involving the BCPA prior to these cases.

In a letter filed with the Commission on August 6, 2001, the BCPA objected to the docketing of that complaint. Based upon the assertions of counsel for the BCPA, the Commission staff issued a record of appearance on August 10, 2001, changing the docket record for the case to list the BCPA as the employer and respondent.

The complaint was reviewed under WAC 391-45-110,[2] and a deficiency notice issued on August 10, 2001, found the complaint insufficient to state a cause of action based on a lack of jurisdiction. The union filed an amended complaint on August 20, 2001. After review, the amended complaint was dismissed for lack of jurisdiction. *Broadway Center for the Performing Arts*, Decision 7488 (PECB, 2001). The union appealed on September 4, 2001.

The union filed its second complaint on February 20, 2002, while the appeal concerning the first complaint was pending before the Commission. The second complaint alleged that Tacoma was engaged in a joint venture with the BCPA, and repeated the earlier "skimming" allegations regarding the production stage manager.

On August 16, 2002, the Commission vacated the dismissal and remanded the first case for further proceedings. *Broadway Center for the Performing Arts*, Decision 7488-A (PECB, 2002).

POSITIONS OF THE PARTIES

The union argues that the Commission has jurisdiction over the BCPA because the BCPA acts "on behalf of" Tacoma. It cites the roles of

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[2] At that stage of the proceedings, all of the facts alleged in a 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.

two Tacoma employees in the BCPA, and what it terms as "the close and intertwined relationship" between the BCPA and Tacoma. It also asserts that the BCPA and Tacoma are joint employers of the employees represented by the union, and that Tacoma is thus liable for the actions of the BCPA.

The BCPA contends it is an independent, non-profit corporation. While acknowledging that it receives some financial support from Tacoma, and that its board and staff includes Tacoma employees, it asserts that its executive director does not report or consult with any Tacoma departments or the Tacoma administration in regard to development and administration of the BCPA budget; direction of BCPA programs; hiring or firing or directing of the BCPA staff; or labor relations between the BCPA and the union. Rather, it characterizes the fact of the executive director being a Tacoma employee as part of the financial support that Tacoma provides for the on-going operation of its three theaters.

Tacoma argues that it and the BCPA are separate and distinct employers, and that the management of city-owned properties by the BCPA does not provide a basis for finding that the Commission has jurisdiction over the labor relations of the BCPA or that the BCPA and Tacoma are dual or joint employers. Tacoma asserts that the "acting on behalf of" concept is inapplicable here, and that an assertion of jurisdiction by the Commission would lead to preemption issues with the National Labor Relations Board.

DISCUSSION

Statutory Definitions

It is clear that the BCPA is not a public employer within the conventional types listed in the statute, 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 . . . .

No evidence was provided that the BCPA is some form of municipal corporation or a political subdivision.

In contrast, Tacoma is a municipal corporation, and is clearly within the coverage of RCW 41.56.020, but the union's primary argument concerning the BCPA is based on its reading of the definition of "public employer" in the next paragraph of the statute:

> 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. . . .

(emphasis added). Tacoma's defense to this argument is that the "on behalf of" language has only been used to hold public employers liable for the acts of supervisory employees in relation to the employees they supervise (as in *Grays Harbor County*, Decision 7239-A (PECB, 2002)), and that there is no Commission precedent wherein this language was used to assert jurisdiction over a separate, otherwise private, employer.

The Operations Agreement -

The relationship between Tacoma and the BCPA is detailed in a written contract signed by those parties.[3] The second and third paragraphs of that agreement generally describe the relationship

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[3] The BCPA board is characterized as a "board of directors" in some documents and as a "board of trustees" in other documents. The Examiner concludes those characterizations have no bearing on the outcome of these cases.

between Tacoma and the BCPA (sometimes, "the Corporation"), as follows:

> WHEREAS the Corporation has been organized as a non-profit corporation for the purpose of creating and operating a center for the advancement of the arts and cultivating, promoting, bolstering, sponsoring, and developing in the community an appreciation and understanding of the arts, all pursuant to the authority of the Corporation as provided by its Articles of Incorporation, and
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> WHEREAS both parties desire that the Broadway Center for the Performing Arts facilities be managed and operated as a place for public entertainment and cultural events in accordance with the provisions, terms, and conditions of this agreement, to the end that the Broadway Center for the Performing Arts facilities will serve as an economic and cultural stimulant for the community and the people of the City and its environs, and will relieve the City partially of the financial burden and expense of operating the Theaters, . . .

Sections 3.14 and 4.3 of that agreement then reiterate that the relationship between those parties is of a contractual nature:

> 3.14 Independent Contractor. The Corporation shall be considered as an independent contractor in the operation of the Theaters, and this agreement shall not be construed as creating any form of partnership between the City and the Corporation.
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> . . . .
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> 4.3 Access to City Services. The City shall make available to the Corporation the use of City services, including but not limited to telephone, financial, word processing, purchasing, central stores, etc., and other record-keeping and business purposes connected with Broadway Center for the Performing Arts management and operation *on a direct cost reimbursable basis. No City services or supplies shall be rendered except at the written request therefor by the Corporation.*

(emphasis added).

The BCPA executive director, Eli Ashley, is a Tacoma employee "on loan" to the BCPA as spelled out in the operating agreement:

> 4.5 Executive Director. The *City shall be responsible for hiring and paying the Executive Director* for the Broadway Center for the Performing Arts. The selection of the executive Director shall be the responsibility of a joint City/Corporation selections committee, with the *final selection by the City Manager* or assignee. The Executive Director shall be liaison between the City and the Corporation with regard to the performance of this agreement. The Executive Director will be an employee of the City and be located in the Tacoma Economic Development Department for administrative purposes and *report directly to the City Manager and will serve as the City's agent in the conduct of business related to the Broadway Center for the Performing Arts* and in the conduct of terms with the theater users and licensees.

(emphasis added). The evidence indicates that Ashley communicates with the city manager once or twice a month concerning both finances and program. Although there is evidence of input from the BCPA, the direct reporting relationship and ultimate reservation of appointment authority take on some significance in this case, in light of recent media attention to the pervasive powers vested in the city manager position in Tacoma.

The appearance of a close connection between the BCPA and Tacoma is furthered by another provision in the operating agreement:

> 3.2 Executive Committee. The Corporation shall perform numerous functions, including fund raising, relating to the operations of the Broadway Center for the Performing Arts. It is agreed that the Corporation shall establish an Executive Committee which shall be selected from the Corporation's Board of Directors. The Executive Committee shall function on behalf of the Board. *The City shall appoint a representative who shall serve as an ex-officio*

> *member of the Board and Executive Committee, with rights to participate in all Board and executive Committee meetings, without a vote.*

(emphasis added). Leslie Rowen, who is employed by Tacoma, serves as the non-voting, ex-officio member of the BCPA Board referred to above.

The agreement goes on to detail that the general operation of the BCPA is the responsibility of the BCPA officers and board, including choosing and scheduling performances and setting ticket prices. In actual fact, Ashley reports on a frequent and ongoing basis to the BCPA President, to the BCPA Executive Committee, and to the BCPA board concerning daily operations and the implementation of the priorities and goals of the BCPA. He testified that he sets the general budget goals in consultation with the board and gets their final approval.

Of particular interest in these cases, Ashley testified that he implements employment policies established by the board, and that he manages the personnel relations for the BCPA staff that includes 20 regular unrepresented employees, a number of part-time unrepresented employees, and the employees represented by the union. Ashley testified that he and his Deputy Executive Director/Finance Director, who is a BCPA employee, together establish employee salaries and benefits, bonuses, job descriptions, and employment policies. Moreover, Ashley specifically testified that none of those personnel decisions are made in consultation or with direction from Tacoma. Neither represented or unrepresented BCPA employees are covered by any medical or retirement plans offered by Tacoma. Ashley also stated that no Tacoma employee other than himself is involved in the evaluation or discipline of BCPA employees.

Ashley's administrative responsibilities include negotiating with the union and administering the collective bargaining agreement covering the represented BCPA employees. Ashley specifically testified that this is done without involvement or representation by Tacoma. Even when requested by union officials, Tacoma has not injected itself into the collective bargaining relationship between the BCPA and the union. Evidence was presented that the union had requested mediation directly through the Federal Mediation and Conciliation Service (FMCS), as would be routine for a bargaining relationship governed by the federal Labor-Management Relations Act of 1947 (the Taft-Hartley Act). Evidence was also presented that the union filed unfair labor practice charges with the National Labor Relations Board (NLRB) in approximately 2002, as would be appropriate for an employer covered by the Taft-Hartley Act.[4]

The evidence does establish the existence of an ongoing financial arrangement between the BCPA and Tacoma. In addition to the wages and benefits paid to Ashley and Rowen, Tacoma pays a fee to the BCPA for managing the three theaters. Further, Tacoma recently gave the BCPA $1,000,000 to be spent on capital improvements for the theaters.

Although there are some facts that superficially support the union's claim of a close connection, the Examiner concludes from the foregoing that the preponderance of evidence establishes that the BCPA operates independent of the City of Tacoma. In particular, it is clear that the BCPA develops its own budget based on revenues from ticket sales, revenues from rentals, and revenues from private donations, in addition to the funding provided by

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[4] On March 27, 2002, the NLRB deferred the charge to arbitration. On September 20, 2002, the NLRB refused to issue a complaint in the matter on the assumption that the union had no further interest in pursuing the matter.

Tacoma. Apart from the involvement of Ashley, that budget is not reviewed or approved by any Tacoma official or body.

Absence of Legal Basis for Claim -

The union has not provided either Commission precedents or evidence of legislative history to support its argument that the "acting on behalf of" language in RCW 41.56.030(1) was intended to be used (or has ever been used) to extend the jurisdiction of the Commission to a private lessee of a public employer. Indeed, the few Commission precedents that touch on this subject clearly define the elements that must be proven to establish that an employer falls under the Commission's jurisdiction, and application of those precedents requires rejection of the inference or presumption that the union would have made in this case.

In *Tacoma School District*, Decision 3314-A (PECB, 1990), the Commission analyzed a contract for school bus services that had been signed by a private employer with a public employer covered by Chapter 41.56 RCW. The Commission wrote:

> Since cases of this type are extremely fact-intensive, we find it important to discuss the burden of proof. In this case, the nominal and presumptive employer of the petitioned-for employees would be Mayflower, and this Commission lacks jurisdiction over that private entity. The reverse situation arises in cases before the National Labor Relations Board (NLRB). There, private sector employers over which the NLRB would normally have jurisdiction sometimes seek to escape NLRB jurisdiction based on their ties to a public entity exempt from the federal statute. That is not the case here. Instead, the union seeks to have us assert jurisdiction based on the ties of a public entity to the presumptive employer.
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> Where individuals in a proposed bargaining unit are employed in the traditional sense by an entity over which we lack jurisdiction, the burden is properly placed on the petitioner to prove that a public entity should actually be viewed as the employer for the purposes of Chapter 41.56 RCW, and that jurisdiction should be

asserted over that entity. The union therefore bears the burden of proving facts sufficient to make the [public entity], over which we do have jurisdiction, an "employer" of the individuals at issue here.

The "Right to Control" Test

The Commission examined a situation involving a school district contracting with a private company for bus services in *North Mason School District*, Decision 2428-A (PECB, 1986). In that case, we essentially followed the "right to control" analysis used by the NLRB in several of its decisions. See, e.g., *National Transportation Services*, 240 NLRB 565 (1979); *Res-Care, Inc.*, 280 NLRB 670 (1986); and *Long Stretch Youth Home, Inc.*, 280 NLRB 678 (1986). The Executive Director noted that, when determining the actual employer(s) of particular employees, the Commission and Washington courts have applied principles similar to the "right of control" test set forth by the National Labor Relations Board in *National Transportation Service*, 240 NLRB 565 (1979).

As the Executive Director correctly noted, the issue before the Commission in this case is whether those reservations of authority made by the [public entity] are in keeping with its role as a purchaser of services, or are an exercise of "control" as an employer of the employees rendering the services. In applying the "right of control" test, however, the Executive Director seems to have adopted the idea that contract specifications restricting the private firm's total control, or having a severe impact on such control, should cause the Commission to invoke its jurisdiction. Such a rule, carried to its logical conclusion, would make the public entity an employer in every "independent contractor" situation in which the contract specifications contained any significant restrictions.

The lodestar of our analysis in *North Mason* was the concept of "the final say" over core subjects of bargaining. We did not hold that mere impacts on bargaining of restrictions reserved to the public entity in contract specifications, however dire would be the key factor. It is only such retained control as would be equal to a veto power, or a final say, that would trigger sufficient control to explode the private contractor's independent status and target the public entity as the true employer. As we noted in *North Mason*, the facts in a particular case may show that the public and private entities share control over basic bargaining subjects ("joint" employers), that they divide control with each entity control-

> ling allocated areas of the employment relationship ("dual" employers), or that one entity or the other maintains virtually total control of the basic bargaining subjects.
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> Application of the "Right to Control" Test
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> Applying the *North Mason* rule to these facts, we conclude that the [public entity] is not the employer, because it does not have final say with regard to most subjects of bargaining, particularly wages and benefits. Surely there are impacts on wages, hours and working conditions by reason of the contract specifications. Such would be the case in most typical "independent contractor" situations, where there might be a broad spectrum or variety of impacts in a number of bargaining subject areas. The "right to control" or "final say" test, however, requires more than just an impact on bargaining. In this case, we find the "purchaser of services" characterization applies.

In the analysis that followed, the Commission was not persuaded by (1) a contractual preference for hiring the employees of a previous contractor, where the new contractor retained the right to select its own employees thereafter; (2) the public entity retaining a right to restrict reassignments and to require reassignments under certain circumstances, where they were related to student discipline and safety and did not preclude the private employer from negotiating a seniority system for other changes of assignment; (3) the public entity reserving rights associated with the well-being of its students, where final control over discipline decisions rested with the private firm;[5] and (4) the public entity setting some minimums, where final control over wage and benefit levels was found to remain with the private firm.[6] The Commission then concluded:

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[5] The Commission cited *Rustman Bus Co.*, 282 NLRB 152 (1986).

[6] The Commission cited *ARA Services*, 283 NLRB 602, 603-604 (1987).

> The case before us falls in the category of Mayflower having sufficient control to engage in meaningful collective bargaining. This case is distinguishable from cases . . . where the . . . entity [exempt from the coverage of the NLRA] retained the right to approve or actually set specific wage and benefit levels. See, also, *Board of Trustees of Memorial Hospital v. NLRB*, 624 F.2d 177 (10th Cir. 1980); *Lutheran Welfare Services v. NLRB*, 607 F.2d 777 (7th Cir. 1979). We agree with the [public employer] that the wage and benefit specifications in this case neither grant [it] final say nor preclude meaningful collective bargaining between Mayflower and its employees.

Thus, the private firm, not the public entity, was found to be the party that could effectively bargain over the terms and employment conditions of the employees and the public entity did not retain sufficient control to be labeled either a dual or joint employer.

Union Factual Arguments

The union's citations of certain troublesome facts are dealt with separately:

BCPA Executive Director -

It is undisputed that the chief executive officer of the BCPA, Eli Ashley, is a Tacoma employee. The union argues that he acts "on behalf" of Tacoma in that position, and it cites both the job description for Ashley's position and language in the operating agreement which refers to the position as an "agent" of Tacoma and as reporting to the Tacoma city manager.

The union reasons that, because Tacoma has the authority to fire or discipline Ashley (or to hire his successor), it would be expected that Ashley would act in the interest of Tacoma. One evident defect with that line of reasoning is that it assumes the interests of the BCPA and Tacoma are now (or would be in the future) in

conflict. Such an assumption is not borne out by any testimony in this record.

More important than speculating about a potential for divergence of BCPA and Tacoma interests in the future, the evidence in this record clearly establishes that, as previously discussed, Ashley's primary interactions are with the BCPA board. While there is evidence that Ashley does keep the city manager informed as to what is going on, the union has not produced substantial evidence that Ashley receives or follows directions from the city manager concerning the internal management of the BCPA. Exhibits consisting of letters indicating copies were sent to the city manager were consistent with a "for information" purpose, rather than a "seek/take direction" purpose. The union has not provided any other evidence to establish that Tacoma utilizes Ashley to exercise a meaningful "right of control" over the wages, hours and working conditions of BCPA employees, or over bargaining between the BCPA and the union.

BCPA Board Member -

It was also undisputed that a Tacoma employee, Leslie Rowen, sits on the BCPA's Board, Finance Committee and Executive Committee. Rowen is the director of General Services for Tacoma. The union argues that Rowen's dual roles give Tacoma "enormous leverage" with the BCPA.

The union's claim was not borne out by the evidence. Rowen merely serves as an ex-officio member of the BCPA board and committees. As such, she has no voting rights on either the BCPA board or its committees. Moreover, she has no role in the day-to-day management of the BCPA organization or in the BCPA' negotiations with the union representing its employees.

Testimony of Ray Corpuz -

The former city manager testified in this proceeding that the BCPA "manages the facility on *behalf of the City*" (emphasis added). The union would have that turn of phrase interpreted as a concession that the BCPA acts as an agent of Tacoma, and as an admission-against-interest that the BCPA is a public employer.

This argument strains credulity. The fact that Corpuz happened to use a statutory phrase does not "make" the union's case: First, there is no evidence that Corpuz was aware that he was using a statutory term, or that he intended to express an opinion on the issue to be decided by the Commission; second, it is evidence of actual control and management of employees and labor relations that was needed to establish the union's burden of proof under the Commission precedents cited above, and that burden cannot be met by conclusionary statements.

The evidence and arguments support a conclusion that, as both a landlord and financial contributor, Tacoma has a vested interest in keeping abreast of the financial health of the BCPA. It is thus no surprise that senior Tacoma officials would continue to be interested in and receive reports from the BCPA. The union has not connected that awareness to any actual influence on the BCPA's employee relations or its collective bargaining obligations.

BCPA's Articles of Incorporation -

The union points to the BCPA's Articles of Incorporation, which include among the stated purposes of the organization to "assist, counsel, and advise the . . . City of Tacoma and the city officials, officers, agents and employees thereof, . . ." and to "promote and encourage the physical restoration, as a historic building, of the said Pantages Theater building, so long as the same remains the property of the City of Tacoma." From those

phrases, the union would have the Examiner extrapolate that the BCPA must be acting "on behalf of" the City.

The problem with this analysis is that it goes far beyond the issue of whether the BCPA is a public employer. Maintaining and/or restoring a public building has little to do with control over collective bargaining or employee relations. The union takes the phrase "on behalf of" out of its statutory context and stretches its meaning far beyond plausibility. The BCPA articles of incorporation are fairly read as reinforcing the landlord/tenant relationship that most visibly exists between Tacoma and the BCPA, and do not provide compelling evidence that the BCPA is a public employer, or even that it is directed or influenced by Tacoma in such a way as to infer control by Tacoma over BCPA employees.

"Other Evidence" -

Under an "other evidence" heading in its brief, the union lists circumstantial facts that are claimed to "reveal" an entity that acts "on behalf of" Tacoma. The Examiner is not persuaded:

- The BCPA is listed in the blue pages of a telephone directory where public entities are listed. Apart from whether Tacoma and the BCPA could be bound by the actions of a third party (the telephone directory publisher(s)), and apart from whether there would be some basis for a telephone service provider to object to the arrangement, the Examiner infers that the sharing of a telephone system was intended to obtain some overall cost savings.

- The inclusion of "a direct benefit to the City" in the BCPA operating agreement is not conclusive. Such general verbiage is aptly compared to introductory statements commonly found in statutes and collective bargaining agreements, yet seldom the source of any specific rights or benefits to the parties.

- The fact that a BCPA organizational chart contains a box to one side for Tacoma is not conclusive. The Examiner explicitly rejects the union's characterization of that document as showing the BCPA "subsumed" under the City of Tacoma.

Taken separately or as a whole, these scattered circumstantial facts merely confirm the admitted fact that the BCPA and Tacoma have an ongoing business relationship, but do not satisfy the union's burden of proof to establish that Tacoma exercises a "right of control" sufficient to make the BCPA a public employer.

Liberal Construction of Statute -

The union cites *METRO v. Amalgamated Transit Union*, 118 Wn. 2d 639, 644 (1992), for the proposition that the Commission should interpret Chapter 41.56 RCW liberally in the accomplishment of its mission, but the requested interpretation making the BCPA a public employer would have to be based upon evidence. In the absence of coverage under Chapter 41.56 RCW, the BCPA and its employees will presumably be covered by the Taft-Hartley Act and any labor-management disputes will presumably be resolved by the federal agencies whose jurisdiction the union has already invoked.

Conclusion

Tacoma owns the buildings operated by the BCPA, provides financial support to the BCPA including funding the executive director position, maintains an ex-officio presence on the BCPA board, and makes some services and facilities available to the BCPA, but the union did not prove the elements of the "right to control" test or the "final say over core elements of collective bargaining" test enunciated by the Commission in *Tacoma School District*. The union did not provide evidence that proves that the BCPA and the City share control in any manner which could lead to a "dual employer"

analysis and conclusion. Indeed, none of the control aspects which were at issue in *Tacoma School District* (hiring, transfer, discipline or discharge of employees; setting wage or benefit levels) were ever at issue in the instant case. The unfair labor practice charges against the BCPA must be dismissed.

The Charge Against the City

Having found that the BCPA has neither been acting as a surrogate for nor acting as a dual employer with Tacoma, the unfair labor practice charges against Tacoma must also be dismissed. Tacoma is clearly not the employer of the represented BCPA employees; it has no decision-making authority or input concerning the wages, benefits, or working conditions of those employees. Any decisions made by the BCPA concerning its employees thus cannot be attributed to the public employer or form the basis of a cause of action against it.

FINDINGS OF FACT

1. The City of Tacoma is a municipal corporation of the state of Washington within the meaning of RCW 41.56.020, and is a public employer within the meaning of RCW 41.56.030(1). Ray Corpuz was the city manager during the time relevant to these proceedings. Tacoma owns certain theater facilities located in its downtown district.

2. The Broadway Center for the Performing Arts is incorporated under the laws of the state of Washington as a private, non-profit corporation. The BCPA articles of incorporation include provision for a board, a management staff, and employees, to engage in the operation of theater facilities under a contractual relationship with the City of Tacoma.

3. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 15, a bargaining representative within the meaning of RCW 41.56. 030(3), is the exclusive bargaining representative of a bargaining unit of approximately seven stage employees employed by the Broadway Center For the Performing Arts.

4. Under an operating agreement between the BCPA and Tacoma, Tacoma provides some financial support to the BCPA, including funding of the executive director position at the BCPA, and the BCPA is entitled to use some Tacoma resources on a cost-reimbursement basis. A Tacoma employee also sits on the BCPA board and certain BCPA committees, but without voting rights.

5. The executive director of the BCPA communicates regularly with the Tacoma city manager, but reports directly to the BCPA board and officers concerning daily operations and implementations of the priorities and goals of the BCPA. The BCPA independently determines facility rentals by organizations and community groups, along with its own artist bookings and ticket prices. The BCPA independently establishes its budget, without consultation or control by Tacoma officials.

6. Employment policies at the BCPA are established by the BCPA officers, board and staff, without consultation or control by Tacoma officials.

7. Collective bargaining between the BCPA and Local 15 is conducted by the BCPA, without consultation or control by Tacoma officials. The union has, from time to time, asserted rights under the federal Taft-Hartley Act, and has invoked the jurisdiction of federal agencies for the resolution of

disputes arising in collective bargaining between the union and the BCPA.

8. On and after July 16, 2001, the union has filed unfair labor practice charges with the Public Employment Relations Commission under Chapter 41.56 RCW, and has alleged that the BCPA is "acting on behalf of" the City of Tacoma in regard to a dispute concerning skimming of work from the responsibilities of a production stage manager within the bargaining unit represented by the union.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. [Case 15911-U-01-4048; Decision 7488-B] The Broadway Center for the Performing Arts is not a public employer within the meaning of RCW 41.56.020.

3. [Case 16248-U-02-4157; Decision 8169] On the record made in these proceedings, the union has not satisfied its burden of proof to establish that the Broadway Center for the Performing Arts acts on behalf of the City of Tacoma so as to warrant an assertion of jurisdiction by the Commission under RCW 41.56.030(1), or that the City of Tacoma is either a dual employer or joint employer of the persons employed by the BCPA in the operation of the theaters.

ORDER

1. The complaint of unfair labor practices docketed as Case 15911-U-01-4048 is hereby DISMISSED for lack of jurisdiction.

2. The complaint of unfair labor practices docketed as Case 16248-U-02-4157 is hereby DISMISSED for lack of a cause of action.

Issued at Olympia, Washington, this 25th day of August, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.