STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 77, Complainant,	)	CASE 15254-U-00-3852
vs.	)	DECISION 7277-A - PECB
LEWIS COUNTY PUBLIC UTILITY DISTRICT, Respondent.	)	ORDER FOR FURTHER PROCEEDINGS

Rinehart Robblee & Hannah, by *Richard Robblee*, for the union.

This case comes before the Commission on an appeal filed by International Brotherhood of Electrical Workers, Local 77 (union), seeking to overturn the order of dismissal issued by Director of Administration Mark S. Downing under WAC 391-45-110.[1] We vacate the dismissal and remand the case for further proceedings.

BACKGROUND

In March of 1999, the Commission certified the union as the exclusive bargaining representative of certain employees of the Lewis County Public Utility District (employer).[2] On June 16, 2000, the union filed a complaint charging unfair labor practices

---

[1] *Lewis County PUD*, Decision 7277 (PECB, 2001).

[2] *Lewis County PUD*, Decision 6622-A (PECB, 1999).

alleging that: (1) the employer budgeted in April of 1999 for a three percent, across the board cost-of-living wage increase for all of its employees (including those represented by the union) that was non-discretionary, automatic, and not based on merit; (2) the wage increase was scheduled to go into effect January 1, 2000; and (3) on January 1, 2000, all employees other than those represented by the union received the wage adjustment. The complaint further alleged that before, on, and after January 1, 2000, the parties were engaged in collective bargaining for terms and conditions of the bargaining unit employees.

The complaint was reviewed for purposes of making a preliminary ruling under WAC 391-45-110. A deficiency notice issued on September 27, 2000, acknowledged that the allegations of the complaint "concern[ed] employer interference and refusal to bargain in violation of RCW 41.56.140(1) and (4), by refusing to provide a previously-budgeted cost-of-living wage increase to employees," but indicated that it was not possible to conclude that a cause of action existed. Commission precedents were cited, holding that an employer has an obligation to maintain the status quo in regard to employee wages, hours, and working conditions, once a union becomes the exclusive bargaining representative of those employees. It was noted that a unilateral grant of the wage increase to the bargaining unit employees would have involved a change from the status quo that the employer was legally required to maintain.

On October 11, 2000, the union filed an amended statement of facts in which it alleged: "Prior to certification, the [e]mployer had a longstanding practice of granting regular annual wage increases to its employees at Cowlitz Falls Dam. This practice was an established term and condition of employment for the employees." The union also submitted a letter analyzing National Labor Relations Board (NLRB) decisions cited in support of its position.

In the order of dismissal issued on January 31, 2001, Director of Administration Downing placed significance on the allegation that the employer budgeted for the wage increase after, not before, the union was certified. He reasoned that, because an employer is required to maintain the status quo after certification of a union, granting the wage increase would have violated the status quo in place at the time of the certification.

POSITIONS OF THE PARTIES

Based on the fact that the employees involved here are employed by a public utility district, the union contends the Commission should give weight to NLRB precedent when deciding this case. It asserts that NLRB precedent unequivocally provides that an employer commits an unfair labor practice by discontinuing an established practice of granting regular wage increases without first bargaining with a newly certified union. Additionally, the union claims that by focusing on the date of the budgeted wage increase, the order of dismissal ignored the employer's long-established practice regarding regular annual wage increases.

The employer has not been called upon to file an answer to this complaint that was dismissed at the preliminary ruling stage of case processing, and it did not take a position on the issues to be determined in this appeal.

DISCUSSION

The facts of this case are novel to the Commission. The first issue to be addressed is whether the Commission should look to federal labor law when deciding disputes involving public utility

districts and their employees. We hold that the Commission must consider federal labor law when deciding cases involving public utility districts. The second issue before the Commission is whether the union has stated a cause of action as a matter of law. We hold that the union has stated a cause of action for employer interference and refusal to bargain in violation of RCW 41.56.140(1) and (4).

Standard of Review

Because we are reviewing an order of dismissal issued at the preliminary ruling stage, the materials on file are reviewed under WAC 391-45-110. At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

Commission Precedent

The Commission has consistently held that the wages of bargaining unit employees become a subject for collective bargaining, and an employer's status quo obligations commence, as soon as a union becomes the exclusive bargaining representative of the employees involved. *Centralia School District*, Decision 7423 (PECB, 2001); *City of Moses Lake*, Decision 6328 (PECB, 1998); *Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994). In *Snohomish County Fire District 3, supra*, the Commission held that an employer did not violate its status quo obligation by failing to grant a general cost of living wage increase. Although the employer had given wage increases annually, the Commission did not find that the employer's general wage increase practices predating recognition of the union were part of the status quo.

A "dynamic status quo" operates under Commission precedents, but only where actions are taken to follow through with changes that were set in motion prior to the filing of a representation petition. *King County*, Decision 6063-A (PECB, 1998); *King County*, Decision 5910 (PECB, 1997); *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990). If expected by the employees, changes that are part of a dynamic status quo do not disrupt a bargaining relationship. *King County*, Decision 6063-A, *supra* (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). Thus, where wage increases are previously scheduled they are part of the dynamic status quo, and it would be unlawful to withhold them just because a representation petition is filed. *King County*, Decision 6063-A, *supra*. In *Snohomish County*, Decision 1868 (PECB, 1984), the employer violated its status quo obligation by failing to grant step increases based on length of service under a wage scale.

Of specific interest in this case, the Commission has distinguished between step increases and cost of living wage increase. *Snohomish County Fire District 3, supra*. In awarding step increases, the employer typically has no element of discretion in granting increase amounts fixed ahead of time and to be paid when employees attain certain levels of longevity, so that the employees expect those increases. See *Centralia School District, supra; Snohomish County Fire District 3, supra*. On the other hand, general wage increases are usually far less concrete, do not follow an established or fixed formula, and allow the employer discretion as to whether to grant an increase at all. In the case at hand, the Director of Administration categorized the "cost-of-living" wage increase withheld by the employer as a general wage increase set in motion after the filing of the representation petition, and he dismissed the complaint *under Commission precedents*.

Public Utility Districts

The Supreme Court of the State of Washington has held that decisions construing the National Labor Relations Act (NLRA), while not controlling, are generally persuasive in interpreting state labor laws that are similar to or based upon the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1981). The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is substantially similar to the NLRA. Thus, the Commission may look to NLRB decisions, when ruling on disputes between most employers and employees under its jurisdiction.

The statutes concerning public utility districts arguably grant public utility districts and their employees rights different from those accorded other employees under Chapter 41.56 RCW:

> RCW 54.04.170 COLLECTIVE BARGAINING AUTHORIZED FOR EMPLOYEES. Employees of public utility districts are hereby authorized and entitled to *enter into collective bargaining relations with their employers with all the rights and privileges incident thereto as are accorded to similar employees in private industry.*
>
> RCW 54.04.180 COLLECTIVE BARGAINING AUTHORIZED FOR DISTRICTS. Any public utility district may *enter into collective bargaining relations with its employees in the same manner that a private employer might do* and may agree to be bound by the result of such collective bargaining.

(emphasis added).

In *Public Utility District v. Public Employment Relations Commission*, 110 Wn.2d 114 (1988), the Supreme Court of the State of Washington decided the interworkings between those statutes and RCW 41.56.020, which states:

> This chapter shall apply to any county or municipal corporation, or any political subdivision of the state of Washington, including district courts and superior courts, *except as otherwise provided by RCW 54.04.170, 54.04.180* . . . .

(emphasis added).

Thus, the Supreme Court held that the Commission has jurisdiction over labor disputes between public utility districts and their employees, except where Chapter 41.56 RCW conflicts with RCW 54.04.170 or .180. That ruling did not explicitly upset a state court of appeals ruling which stated that because public utility district employees have the same collective bargaining rights as do similar employees in private industry, disputes between those parties should be determined by reference to the substantive principles of federal labor law. *Electrical Workers v. PUD*, 40 Wn. App. 61 (1985). In a followup case, *Public Utility District 1 of Clark County*, Decision 2045-A (PECB, 1989), *aff'd*, Decision 2045-B (PECB, 1989), an Examiner stated that "closer adherence" to NLRB precedent is required in cases falling under RCW 54.04.170 and .180 than the general deference permitted by *Nucleonics, supra*.

In the case now before us, the order of dismissal did not cite or discuss any NLRB precedents. Because a public utility district and its employees are involved in this dispute, federal labor law should have been considered.

Federal Precedent

Both the Commission and NLRB cite *NLRB v. Katz, supra*, for the same general rule: That an employer commits an unfair labor practice by unilaterally changing the terms and conditions of employment of union-represented employees. In *Katz*, the Supreme Court of the

United States held that an employer negotiating with a newly certified bargaining agent was barred from unilaterally granting wage or merit increases unless they are "fixed and automatic" in nature. With the passage of time, the Commission and NLRB may now differ on what defines a "fixed and automatic" increase, with the Commission following a narrower interpretation. Among the federal cases that support the union's position are the following:

- In *Burrows Paper Corp.*, 332 NLRB No. 15 (2000), the NLRB ruled that the employer violated the duty to bargain by unilaterally withholding a customary across-the-board pay increase to employees after the union was certified. There was a 25-year established practice of the employer granting at least a three percent raise in or around July of each year. Thus, employees retained an expectancy that they would receive a raise of some amount at about the same time every year. The decision limited *Rural/Metro Medical Services*, 327 NLRB No. 18 (1998) (where an employer used a fixed criterion to determine whether an employee receives a raise) to situations in which each employee receives a merit raise based on an individual performance evaluation.

- In *Kurdziel Iron of Wauseon*, 327 NLRB No. 44 (1998), the employer had an established practice of granting cost-of-living increases on an annual basis. For the last two years, the increases were given in October for 3.75 percent and 2.75 percent. The NLRB ruled that the employer committed refusal to bargain and interference violations when it unilaterally changed this practice after the union was certified as exclusive bargaining representative and during the period of collective bargaining.

- In *Lamonts Apparel*, 317 NLRB No. 48 (1995), the employer had a long-established practice of annually surveying market data

and granting cost adjustment increases if the data supported the increase. Employees had received a cost adjustment increase for at least the last 13 years and had an expectation that they would continue to do so at least until the parties reached an initial collective bargaining agreement to establish wages. The NLRB found that the employer's past practice was sufficiently well-established to have become a term and condition of employment and that the employer committed refusal to bargain and interference violations when it discontinued this past practice without notice to the union or opportunity to bargain.

- In *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enf'd.* 73 F.3d 406 (D.C. Cir. 1996), the NLRB ruled that the employer committed refusal to bargain and interference violations by unilaterally withholding annual merit wage increases from employees during negotiations with the union for an initial contract. Here, the merit raises were fixed as to timing but discretionary as to amount. The merit review program was an established practice and a term and condition of employment regularly expected by employees. The NLRB wrote that it is the unilateral change in the terms and conditions of employment that results in the finding of a refusal to bargain violation and not the type of wage increase that is discontinued. See also *Bryant & Stratton*, 140 F.3d 169 (2nd Cir. 1998), *enf'g*, 321 NLRB 1007 (1996) (unfair labor practices found where employers unilaterally discontinued practice of providing employees discretionary merit increases on specific schedules, using fixed criteria).

- In *Acme Die Casting v. NLRB*, 309 NLRB 1085 (1992), an employer had granted across-the-board wage increases ranging from 15 cents to 30 cents an hour semi-annually for seven years. The

> NLRB ruled that the employer's failure to give such a wage increase after the union was certified constituted a refusal to bargain violation.

The recent NLRB precedents in this area have not been free of debate, and may still represent an unsettled area of the law. *Acme Die Casting, supra*, was appealed, and the Court of Appeals for the D.C. Circuit remanded the case to the NLRB in *Acme Die Casting v. NLRB*, 26 F.3d 162 (D.C. Cir. 1994), with instructions to set forth comprehensible rules as to when the frequency and quantity of wage increases constitute a settled practice that the employer must continue. After the NLRB merely reiterated its earlier conclusion in *Acme Die Casting*, 317 NLRB 1353 (1995), the D.C. Circuit expressed its exasperation with the NLRB in *Acme Die Casting v. NLRB*, 93 F.3d 854 (1996), and it only enforced findings that had already been affirmed. The court noted that the NLRB's perspective seems to shift from case to case.

Conclusion

Although the complaint in this case would properly be dismissed under Commission precedent, a public utility district and its employees are involved here. NLRB precedent must be considered, and this complaint is arguably sufficient under the recent NLRB precedents to warrant a full evidentiary hearing and a full briefing of the case which is not available to either the Director of Administration or the Commission in the preliminary ruling procedure under WAC 391-45-110. The case is thus remanded for further proceedings under Chapter 391-45 WAC, with the caution that the parties should be prepared to present evidence on and throughly brief the facts and arguments pertinent under federal labor law precedent.

NOW THEREFORE it is

ORDERED

1. The order of dismissal issued by Director of Administration Downing in the above-captioned matter on January 31, 2001, is VACATED.

2. The case is REMANDED for further proceedings under Chapter 391-45 WAC.

Issued at Olympia, Washington, on the 8th day of January, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH DUFFY, Commissioner