STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, DISTRICT 925	)	CASE 13356-D-97-119
	)	
for a declaratory order concerning application of Chapter 41.56 RCW to:	)	DECISION 6046-A - PECB
	)	
	)	ORDER ON
UNIVERSITY OF WASHINGTON	)	RECONSIDERATION
	)	
	)	

Theiler, Douglas, Drachler & McKee, by Martha Barron, Attorney at Law, appeared on behalf of the union.

Christine O. Gregoire, Attorney General, by Diana E. Moller, Assistant Attorney General, appeared on behalf of the employer.

This matter came before the Commission on a motion filed by the University of Washington on October 6, 1997, requesting reconsideration of a declaratory order issued by the Commission on September 16, 1997.[1] Counsel for the parties argued the motion before the Commission at an open, public meeting held on October 21, 1997. This order is issued pursuant to RCW 34.05.240(5).

BACKGROUND

In 1993, the Legislature provided an "option" for state institutions of higher education and unions representing their classified employees to transfer their relationship from the state civil service law(s) to the Public Employees' Collective Bargaining Act,

[1] University of Washington, Decision 6046 (PECB, 1997).

Chapter 41.56 RCW, administered by the Public Employment Relations Commission. RCW 41.56.201. The implementing procedures set forth initially in University of Washington, Decisions 4668 and 4668-A (PECB, 1994), in response to a petition for declaratory order filed by an affected employee, were later codified by the Commission in WAC 391-25-011, effective April 20, 1996.

The University of Washington (employer) and the Classified Staff Association, SEIU District 925 (union) have invoked the RCW 41.56.201 option as to six bargaining units for which they signed collective bargaining agreements under Chapter 41.56 RCW.[2] In all, it appears that more than 3000 employees were originally included in bargaining units which have been transferred from civil service to the Commission's jurisdiction under Chapter 41.56 RCW.

On October 14, 1996, the union filed three inter-related cases with the Commission:

- Case 12760-U-96-3065 was an unfair labor practice case filed under Chapter 391-45 WAC for the "clerical" unit. The union alleged that the employer had refused to bargain in good faith, by unilaterally removing positions and work from the bargaining unit.

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[2] Notice is taken of the Commission's docket records for: Case 10652-E-93-1757 [notice for "clerical" unit filed August 26, 1993, finalized May 10, 1994]; Case 11114-E-93-1831 [notice for "technical" unit filed August 26, 1993, finalized June 27, 1994]; Case 11115-E-93-1832 [notice for "miscellaneous" unit filed August 26, 1993, finalized May 10, 1994]; Case 11116-E-93-1833 [notice for "supervisors" unit filed August 26, 1993, finalized June 27, 1994]; Case 12789-E-96-2139 [notice for "supervisors" unit filed October 29, 1996, finalized October 31, 1996]; Case 12790-E-93-2140 [notice for "miscellaneous" unit filed October 29, 1996, finalized October 31, 1996].

- Case 12761-U-96-3066 concerned the "supervisors" bargaining unit, but otherwise advanced unfair labor practice claims similar to those advanced in Case 12760-U-96-3065.

- Case 12762-C-96-797 was initiated by a petition for clarification of an existing bargaining unit filed under Chapter 391-35 WAC. The union sought rulings on the bargaining unit status of approximately 23 positions the employer had sought to remove from the "clerical" and "supervisors" bargaining units.

The Commission has endorsed the sequential processing of related unit clarification and unfair labor practice cases,[3] and the Executive Director asked the parties to comment on the appropriate order for processing of the cases filed by the union on October 14, 1996. The employer responded on December 4, 1996, stating:

> The process to resolve a unit clarification petition can be extensive and time-consuming. The subject matter for the unit clarification petition is not time-sensitive and will not impact the outcome of the unfair labor practice complaints. In contrast, the union's unfair labor practice complaints are both time-sensitive and allege that the University of Washington has violated the law. The University takes violations of the law seriously and wants any alleged violations resolved as quickly as possible. It would be more expeditious, more reasonable, and more just to the parties involved to resolve the ULP complaints prior to the unit clarification petition. ...

The union stated a preference for holding the unfair labor practice cases in abeyance until the unit clarification petition was

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[3] See, Thurston County Fire District 3, Decision 3859-A (PECB, 1992).

decided, and the Executive Director initially honored its request as the moving party.

The sequence issue was revisited in March of 1997, after a pre-hearing conference in the unit clarification case disclosed that the number of disputed positions had grown substantially, the union amended its unfair labor practice complaints to allege that the employer had engaged in unlawful "skimming" of bargaining unit work,[4] and the employer asserted that it has authority under Chapter 41.06 RCW to remove employees and positions from the bargaining units.[5] The Executive Director then held the unit clarification case in abeyance and issued a preliminary ruling on the unfair labor practice complaints under WAC 391-45-110, finding a cause of action to exist for "The employer's unilateral removal of positions and work from the bargaining unit". An Examiner was assigned, and the employer filed its answer to the unfair labor practice complaints.

On August 25, 1997, the union filed a petition for declaratory order with the Commission under RCW 34.05.240, seeking a ruling as to the applicability of Chapter 41.56 RCW to employees the employer has sought to remove from bargaining units transferred under RCW

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[4] In South Kitsap School District, Decision 472 (PECB, 1978) and numerous subsequent cases, the Commission has ruled that an employer has a duty to bargain with a union that represents its employees prior to transferring work historically performed by bargaining unit employees to employees of an outside contractor (termed "contracting") or to its own employees outside of the bargaining unit (termed "skimming").

[5] Chapter 41.06 RCW, the state civil service law, was made applicable to this employer and other state institutions of higher education in 1993, when Chapter 28B.16 RCW was repealed and the Higher Education Personnel Board was abolished.

41.56.201. The matter came before the Commission at an open, public meeting on September 16, 1997, where the union urged the Commission to issue a declaratory order and the employer opposed use of the declaratory order process. The Commission took the case under advisement at the conclusion of the parties' presentations, and issued a declaratory order later the same day.

THE MOTION FOR RECONSIDERATION

The employer's motion for reconsideration asserts both procedural defects and a substantive defect with the order issued by the Commission, and asks that the order be vacated.

Amount of Notice Received in Advance of September 16

The notice of the Commission's September 16, 1997 meeting made specific reference to this case, and was mailed to the parties on September 8, 1997. The employer objects that it first learned of the September 16 proceedings in a telephone conversation between its counsel and the Commission's Executive Director on September 9, 1997, and that it did not *receive* written notice of the meeting until September 11, 1997, but we find no merit in those arguments. Both Chapter 34.05 RCW and WAC 391-08-120 clearly distinguish "filing" from "service". Our rule, which is consistent with WAC 10-08-110 adopted by the Chief Administrative Law Judge of the State of Washington, clearly makes service complete upon deposit in the U.S. Mail. The Legislature has prescribed a 30-day period for agencies to respond to petitions under RCW 34.05.240(5), so anybody involved with a declaratory order petition should anticipate that periods of notice will necessarily be brief. We find no defect with the timing of the notice of the Commission's September 16, 1997 meeting, which was *served* eight days in advance of the meeting.

Notice Misleading as to Scope of Inquiry

The employer asserts it was misled by the conversation between its counsel and the Executive Director and/or by the notice of the September 16, 1997, so that it did not go into the merits of the case during its presentation on September 16. RCW 34.05.240(5) calls upon an agency to choose among four alternatives as its response to a petition for a declaratory order, as follows:

> Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:
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> (a) **Enter an order** declaring the applicability of the statute, rule, or order in question to the specified circumstances;
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> (b) **Set the matter for specified proceedings** to be held no more than ninety days after receipt of the petition;
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> (c) **Set a specified time** no more than ninety days after receipt of the petition by which it will enter a declaratory order; or
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> (d) **Decline to issue a declaratory order,** stating the reasons for its action.

[Emphasis by **bold** supplied.]

RCW 34.05.240(5) was not expressly cited in the notice of the September 16 meeting, however. The relevant portion read:

> SEIU Local 925 has filed a petition for declaratory order concerning the implementation of RCW 41.56.201. The question before the Commission is whether to accept and process the case in the declaratory order format.

While the alternatives posed by RCW 34.05.240(5) are not all procedural, we acknowledge that the notice actually issued could reasonably have been interpreted by the employer as excluding the merits of the case from the proceedings to be held on September 16, 1997. The employer clearly refrained from addressing the merits of

this controversy on September 16. Accordingly, we vacate the order issued that day, and would await a full presentation of the case before issuing a declaratory order.[6]

The "Consent" and "Prejudice" Issues

During the proceedings on September 16, 1997, the employer clearly opposed the issuance of a declaratory order in this case, citing RCW 34.05.240(7) which reads:

> (7) An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

The employer did not address the "prejudice" component of that subsection on September 16, other than by a blanket assertion that prejudice would exist. In the order being vacated, the Commission expressly stated it was "unable to find any showing of substantial prejudice in the arguments advanced by the employer" at that time.

In support of its motion for reconsideration, the employer advanced numerous factual claims as a basis for asserting prejudice. It is now clear that a full evidentiary hearing and briefing would be necessary in this case under RCW 34.05.240(5)(b), and that neither an immediate declaratory order under RCW 34.05.240(5)(a) nor an order under RCW 34.05.240(5)(c) would be appropriate.

The employer's position is now less clear than it was on September 16, however, with respect to its willingness to consent to having

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[6] The order was expressly confined to a reiteration of the terms of RCW 41.56.201, and did not rely on any other factual or legal arguments.

issues resolved in the declaratory order format. The employer offered alternative courses of action at page 6 of its motion for reconsideration, including: "[E]stablish a process that will allow all parties the opportunity to address the substantive issues raised by the petition." When asked at the October 21 meeting about whether the employer would consent to a full hearing/briefing process in this case, counsel for the employer indicated a need to consult with her client before providing a response. We frame our order accordingly.

Availability of Other Administrative Remedies

The union's unit clarification petition remains pending before the Commission. The union expressed a preference for that forum from the outset. During argument on the motion for reconsideration, counsel for the employer also expressed a preference for that forum (at least as compared to the declaratory order procedure). We reject the employer's contention that the Commission is without jurisdiction to determine issues concerning exclusions from the bargaining units transferred under RCW 41.56.201. The unit clarification case provides a vehicle to reach and determine the rights and status of employees holding the disputed positions, so the union would not be left without an administrative remedy if its declaratory order petition were to be dismissed.

The issues could also be addressed in the union's unfair labor practice complaints, which remained pending until the Executive Director acted upon requests for withdrawal which the union had included in a letter covering transmittal of its petition for a declaratory order.[7] When asked at the October 21 meeting about whether the union would desire reinstatement of the unfair labor

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[7] Orders closing the unfair labor practice cases were issued on September 19, 1997.

practice cases if the declaratory order were refused, counsel for the union indicated a need to consult with her client before providing a response. Having previously urged processing of the unfair labor practice cases in preference to the unit clarification case, counsel for the employer nevertheless sought to hold the union to its "independent choice to withdraw" those complaints. We frame our order accordingly.

NOW, THEREFORE, it is

ORDERED

1. The order issued in this proceeding as University of Washington, Decision 6046 (PECB, 1997) is VACATED.

2. Within 21 days following the date of this Order, the Classified Staff Association, SEIU District 925, shall file and serve a statement indicating whether it would prefer to proceed in the event of a denial of a declaratory order by:

   a. Reopening of the unfair labor practice cases which it previously filed and withdrew; or

   b. Processing of the unit clarification petition which remains pending before the Commission.

3. Within 21 days following the date of this Order, the University of Washington shall file and serve a statement indicating:

   a. Whether it will consent under RCW 34.05.240(7) to the issuance of a declaratory order in this proceeding on the

basis of a full evidentiary hearing and the filing of briefs; and

b. Whether it will consent, as a condition of dismissal of the union's petition for a declaratory order, to reopening and processing of the unfair labor practice cases filed by the union as described above.

Issued at Olympia, Washington, on the 27th day of October, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

Commissioner Joseph W. Duffy
did not take part in the
consideration or decision
of this case.