STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17,	)	
Complainant,	)	CASE 5382-U-84-977
vs.	)	DECISION 2045-B - PECB
PUBLIC UTILITY DISTRICT 1 OF CLARK COUNTY,	)	DECISION OF COMMISSION
Respondent.	)	

Richard D. Eadie, Attorney at Law, appeared on behalf of the complainant.

Davis, Wright and Jones, by Thomas A. Lemly, Attorney at Law, appeared on behalf of the respondent.

Examiner Kenneth J. Latsch issued his findings of fact, conclusions of law and order in the above-entitled matter on February 24, 1989.[1] This matter comes before the Commission on a petition for review filed by the employer and a cross-petition for review filed by the union.

PROCEDURAL BACKGROUND

On August 1, 1984, International Federation of Professional and Technical Engineers, Local 17, filed a complaint charging unfair labor practices with the Public Employment Relations Commission

[1] Public Utility District 1 of Clark County, Decision 2045-A (PECB, 1989).

alleging that Public Utility District 1 of Clark County had violated RCW 41.56.140(1) and (4), by bargaining in bad faith and by directly contacting bargaining unit members while negotiations were in progress.

On September 12, 1984, the Executive Director of the Public Employment Relations Commission issued a preliminary ruling pursuant to WAC 391-45-110, concluding that the Commission had jurisdiction over the employer pursuant to Chapter 41.56 RCW.[2] The union thereafter amended the complaint on three separate occasions.

On September 24, 1984, the union added an allegation that the employer had placed pre-conditions on further negotiations between the parties.

On October 24, 1984, the union added an allegation that the employer was using the threat of layoffs as a bargaining ploy.

On November 2, 1984, the union added an allegation that the employer had continued to use the threat of layoffs in the bargaining process, and that it had conditioned final agreement between the parties on the withdrawal of all pending legal actions filed by the union against the employer, including this unfair labor practice case.

Further proceedings in this case were held in abeyance while the employer sought a declaratory ruling as to the unfair labor practice jurisdiction of the Commission over these parties. The Commission ruled in Public Utility District 1 of Clark County, Decision 2125 (PECB, 1985), that the employer was within its jurisdiction under Chapter 41.56 RCW, and the employer petitioned for judicial review. In Public Utility District 1 of Clark County

---

[2] Public Utility District 1 of Clark County, Decision 2045 (PECB, 1984).

v. Public Employment Relations Commission, 110 Wn.2d 114 (1988), the Supreme Court affirmed that the Commission has jurisdiction over this employer pursuant to Chapter 41.56 RCW.

After the Supreme Court ruled, Examiner Kenneth J. Latsch conducted a hearing and the parties submitted post-hearing briefs. In his decision, the Examiner found that the employer had committed certain "interference" and "refusal to bargain" unfair labor practices. The Examiner refrained from ordering any extraordinary remedies, and modified the traditional bargaining order remedy to take account of interim actions by the union.

DISCUSSION - THE EMPLOYER'S PETITION FOR REVIEW

The employer challenges all but 5 of the Examiner's 16 findings of fact, and it challenges the substance of each of the Examiner's conclusions of law. Through such arguments, the employer contends that the Examiner erroneously determined that it engaged in unfair labor practices.

Claimed Omissions of Facts

The employer challenges paragraphs 4, 5, 8, 9, 10 and 13 of the Examiner's findings of fact on the basis of "omissions". With a minor exception relating to paragraph 9, the facts found by the Examiner are not disputed. Rather, the employer now contends that the Examiner "failed to make related material findings of fact", and should have included additional information which, the employer believes, would be favorable to the employer.

Paragraph 9 of the Examiner's findings of fact relates to a letter sent by the employer to the union on July 19, 1984. A letter sent by the employer to the union on July 17, 1984 was the subject of

paragraph 7 of the Examiner's findings of fact. The employer correctly points out that the July 17 letter had mentioned the potential for implementation on July 22, so that the Examiner erred by stating that the July 19 letter was the first time that the date for implementation was communicated to the union. The findings of fact will be amended accordingly. Looking at the course of events as a whole, however, a two-day shift of first notice of a potential implementation has minimal effect on the outcome of the case. We understand the primary thrust of finding of fact 9, and of its inclusion in the list supporting conclusion of law 2, is elsewhere. The employer does not challenge the portions of finding of fact 9 which detail the allegedly coercive language used by the employer in the July 19, 1984 letter and the employer's forwarding of copies of that letter directly to bargaining unit employees.

Paragraph 13 of the Examiner's findings of fact relates to a mediation session held by the parties in October of 1984 under the auspices of the Federal Mediation and Conciliation Service. The petition for review declared paragraph 13 to be erroneous on the same basis as others in this grouping, but no argument was advanced to support that claim. Accordingly, the finding will stand.

Paragraphs 4 and 5 of the Examiner's findings of fact relate to the onset of bargaining between the parties in 1984, and to their early proposals and positions in bargaining. Paragraph 8 relates to discussion of a date for further meetings, and to the union's cancellation of a meeting tentatively set for July 24, 1984. Paragraph 10 merely notes that the parties discussed mediation and mediation arrangements. The employer argues that additions which it would have included in the findings of fact would impact the conclusions to be drawn, but the Commission is not so persuaded. Past good relations between the parties in bargaining, the existence of economic rationale for some of the employer's positions early in the bargaining, the details of when bargaining did occur,

the details of when bargaining or implementation did not occur, the details of additional communications between the parties, the fact of the employer's agreement to meet in mediation, and the location for mediation sessions are all matters of record in this case and were, as such, considered by the Examiner in framing the ultimate facts having a bearing on the outcome of the case.

Further, among the findings of fact challenged in this grouping, only paragraphs 9 and 13 were among those listed as the basis for paragraph 2 of the Examiner's conclusion of law, where "interference" and "refusal to bargain" violations were found. As already noted, the "omission" challenge to paragraph 9 misses the primary thrust of the paragraph, and the challenge to paragraph 13 of the findings of fact is unsupported and without merit.

The "Interference" Violations

The case is before the Commission under RCW 41.56.140(1), which prohibits employer interference with the right of employees to organize and bargain collectively through representatives of their own choosing. Similarly, Section 8(a)(1) of the National Labor Relations Act (NLRA) prohibits employer interference with the right of employees to organize and bargain collectively through representatives of their own choosing.[3]

In opposing paragraphs 7 and 9 of the Examiner's findings of fact and paragraph 2 of the Examiner's conclusions of law, the employer argues that its July 17 and July 19, 1984 letters were both lawful communications. Specifically, it contends that its criticism of

---

[3] Citation of Section 8(a)1 of the NLRA is important here because RCW 54.04.170 authorizes employees of public utility districts to enter into collective bargaining with their employers with all rights and privileges incident thereto as are accorded to similar employees in private industry.

the union in those letters was justified, and that the language of the letters did not contain implied threats. The question before the Commission is whether bargaining unit employees could reasonably have perceived the employer's statements as a threat directed against their exercise of lawful union activity.

As noted in 1 Morris, The Developing Labor Law, 82 (2nd Edition, 1983), distinguishing between illegal threats and legitimate prophecies can be difficult. In NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969), the Supreme Court stated that in making this distinction, one must:

> [T]ake into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

With respect to plant closings, and similarly, layoffs, the Court stated that legitimate prophesies must be based on objective facts indicating circumstances (such as economic circumstances) beyond the employer's control.

Both the language of the letters and the context of their delivery defeat the employer's arguments here. The relevant portion of the final paragraph of the July 17 letter reads:

> We sincerely hope that you do not sacrifice these 28 [sic[4]] employees for reasons important only to the union as a whole. That could be a grave mistake.

---

[4] Both the Examiner's decision and the employer's brief in support of its petition for review (at page 3, citing exhibit 34) state that there were 23 employees in the bargaining unit.

We need not address the question of whether this was lawful bargaining table banter between seasoned professional negotiators, because the employer itself took the step of sending copies of its letter directly to bargaining unit employees. When so disseminated, the letter clearly had the potential of undermining the union's relationship with its members, by stating that the union was placing its goals or "reasons" above the welfare of the employees. An inference to be drawn from the letter was that the union was not considering the interests of the bargaining unit employees. Even more important, the letter reasonably could be read by the employees to mean that the union's conduct was jeopardizing the jobs of the employees. In light of prior layoffs of non-unit employees, unit employees could reasonably conclude that the phrase "sacrifice these . . . employees" meant sacrificing their jobs.

The July 19, 1984 letter addressed to union representative Kalibak but forwarded to all bargaining unit employees continued its attack on the union in the following terms:

> You and the union have let the employees in this bargaining unit down by not giving them adequate representation when they most need it.
>
> We made it very clear to you at the time that we were very skeptical that the union was willing or able to break out of the current deadlock.

Those statements preceded comments on the subject of a unilateral implementation of changed wages, hours and working conditions, as well as comment on the termination of the grievance procedure. Once again, in the context of bargaining on difficult issues, these statements must be interpreted as an unlawful attempt by the employer to drive a wedge between the union and its members.

We find that the cumulative effect of these letters was coercive, and in violation of RCW 41.56.140(1). We have considered the "totality of circumstances", but find these letters stand by themselves. Neither a past history of good relations between these parties, nor any subsequent conduct on the part of the union, has any bearing on the determination that the July 17 and July 19 letters interfered with, restrained and coerced employees in the exercise of their collective bargaining rights.

The Duty to Bargain - Impasse

The employer's brief contains a lengthy argument that the parties were at impasse by early July, 1984. It challenges the Examiner's determination, at paragraph 3 of his conclusions of law, that any impasse that existed was caused by or contributed to by the employer's unfair labor practice.[5]

In reviewing the record and the issues before us, we conclude that the question of when an impasse occurred has no legal significance in this dispute. The Examiner's determination regarding the cause of any impasse clearly refers to the employer's July 17 and July 19 letters. The existence of a lawful impasse is only important when a unilateral implementation of changed wages, hours or working conditions follows. The parties do not dispute the Examiner's observation that the employer had engaged in good faith bargaining up to the time period in dispute. The Examiner made no findings or conclusions regarding the legality of any subsequent "implementation" by the employer. This omission is not challenged by the

---

[5] It has long been the policy of this Commission that there can be no legally cognizable "impasse" in collective bargaining if a cause of the deadlock is the failure of one of the parties to bargain in good faith. Federal Way School District, Decision 232-A (EDUC, 1977), citing Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3rd Circuit, 1963).

union. Further, the existence of a lawful impasse does not abrogate the duty to bargain in good faith, and it certainly does not give the parties license to commit "interference" or "discrimination" unfair labor practices. The rules for bargaining behavior are much the same for parties at impasse as they are in normal collective bargaining. Pierce County, Decision 1710 (PECB, 1983); Spokane County, Decision 2167-A (PECB, 1985), affirmed, Thurston County Superior Court (1988). Because the dispute concerning the existence of an impasse is not an integral part of the issues before us on review, we will amend the Examiner's conclusions of law to strike his paragraph 3.

The Duty to Bargain - The Threatened Layoffs

At the outset of this course of events in March of 1984, the union represented a bargaining unit composed of approximately 23 professional (senior engineer, engineer) and technical (engineering aide, engineering aide trainee) employees. The last collective bargaining agreement between the parties expired on March 31, 1984. The "layoff" issue, which did not arise at the bargaining table until September of 1984, is covered in paragraphs 11 and 12 of the Examiner's findings of fact. Specifically, paragraph 11 recites the employer's announcement of a layoff of eight employees, while paragraph 12 recites the employer's modified announcement of a layoff of six employees. The Examiner relied upon those findings of fact in paragraph 2 of his conclusions of law, where "interference" and "refusal to bargain" violations were found.

The employer bases its challenges to paragraphs 11 and 12 of the Examiner's findings of fact on a past history of reductions in force, on a then-current study of manpower needs, on a claimed management right to lay off, and on basic economic motivation. The Commission acknowledges the importance of evaluating manpower needs, of being fiscally responsible, and the basic right of

management to determine the products or services to be provided to its customers/clientele. Federal Way School District, supra. The Commission also observes that, within the context of collective bargaining, management must be mindful of unlawful impacts of its otherwise lawful activities. Irrespective of whether the parties were at impasse when the proposal was made, an employer which chooses to propose layoffs during bargaining may be required to defend allegations that the proposed layoffs were reasonably taken by its employees to be threats against their exercise of lawful collective bargaining activity, or that the layoffs were proposed in bad faith, merely to impact the progress of negotiations. In this case the employer has been accused of using the threat of layoffs only as a bargaining tactic.

There was conflicting evidence on these issues, and differing inferences could reasonably be drawn from that evidence. The Examiner chose to accept the evidence, and the inferences therefrom, that were favorable to the union. We agree with the Examiner's interpretation of the facts. The employer recites at page 11 of its appeal brief that there had been layoffs of up to 46% of the employees in its other bargaining units between 1981 and 1984, but the record discloses that it apparently had not put the possibility of layoffs on the bargaining table in this bargaining unit. The employer states that a newly-promoted manager was given an initial assignment in August or September of 1984 to develop a manpower report for the functions handled by the members of this bargaining unit, but there is evidence that parties were at an advanced stage of bargaining by that time and were, by the employer's own claim, at "impasse" on the issues that had been brought to the bargaining table some six months previously. An extensive report developed within a period of a few weeks concluded that eight to ten bargaining unit members could be laid off and the department could still function satisfactorily. On September 17, 1984, the employer announced to the union that it was considering

the layoff of eight employees. Two days later, the employer actually sent layoff notices to six employees. That such actions would have sent shock waves throughout the bargaining unit is understandable.[6]

In spite of the employer's history of trimming its workforce and suggesting that this bargaining unit could be cut back, the employer's need for, and commitment to, a reduction in force was not evidenced by its subsequent actions. Within a month after announcing layoffs of a substantial portion of the bargaining unit, the employer engaged in discussions with the union to limit the number of layoffs to three. Then, in a letter dated October 15, 1984, the employer agreed there would be no layoffs. While employment within the bargaining unit has decreased in the intervening years, the reduction has been accomplished through attrition and the record does not indicate that any employees have been laid off.

The employer would have the Commission believe that the foregoing record shows "business as usual", with no intent to impact the collective bargaining process. The Commission simply does not believe that experienced management officials are so naive. We are not convinced that the threatened layoffs were advanced in good faith: They were not brought to the table in an orderly manner, but as a late change of position clouded by the July 17 and July 19 threats; they were not triggered by some outside circumstance or notable event, but by a hurried internal study commissioned after difficult bargaining; they were not a matter of economic necessity, but were instead a question of employee utilization; they were not followed through, but were modified and then dropped within a matter of weeks. The employer should have realized the

---

[6] In a bargaining unit of 23 employees, 8 employees would have been 34.8% of the unit. The 6 layoffs actually announced would have directly impacted 26.1% of the bargaining unit. Three would have impacted 13%.

impropriety of interjecting a new proposal for layoffs into already difficult and adversarial bargaining.

We find no merit in the employer's argument that provisions of the parties' last collective bargaining agreement gave it the right to lay off employees without further negotiation. That contract had expired prior to the time the employer raised the layoff issue in bargaining or gave notice to six employees. A "waiver" of bargaining rights in a contract expires with the contract. City of Bremerton, Decision 2733-A (PECB, 1987). Footnote 4 to the employer's appeal brief correctly recites its duty to bargain in the absence of a waiver by contract.

The Duty to Bargain - Withdrawal of Pending Litigation

The employer also challenges paragraph 14 of the Examiner's findings of facts, which states:

> The parties had subsequent discussions and, on October 25, 1984, the employer presented the union a document entitled "Addendum No. 1 to Final Offer". The new proposal specified that the employer would not lay off any bargaining unit employee, in return for the union's acceptance of the two-year wage freeze. The employer further conditioned the settlement upon the union's withdrawal of all pending litigation against the employer, including this unfair labor practice case. (emphasis supplied)

In opposition to that finding of fact, the employer asserts that Local 17 knew of the employer's intention to demand withdrawal of all pending litigation, and that withdrawal of litigation was more an agreement or understanding between the parties than a condition of settlement. The employer also seeks to rely on the fact that the union did not attempt to negotiate the removal of that language from the final offer, as well as the fact that the union did not

request deletion of the language from the final offer after it was accepted by the members of the bargaining unit.

The Commission is empowered by RCW 41.56.160 through RCW 41.56.190 to hear, determine and remedy unfair labor practices.[7] The unfair labor practice provisions of the statute, RCW 41.56.140 and RCW 41.56.150 regulate the process of collective bargaining, and are not themselves matters of wages, hours or working conditions of employees. We conclude, consistent with federal precedent, that the settlement of unfair labor practice charges is a permissive subject of bargaining, so that proposals can be made, but not insisted upon as a condition to a contract or concession. Butcher Boy Refrigerator Door Co., 127 NLRB 1360 (1960), enforced, 290 F.2d 22 (7th Circuit, 1961). We thus concur with the Examiner's conclusion that a party commits an unfair labor practice by insisting in collective bargaining upon the withdrawal of unfair labor practice charges as a pre-condition to settlement of the negotiations. The employer's position on review does not differ as to the legal principles applicable here.

The employer's argument that it did not commit an unfair labor practice is predicated upon its view of the facts. Indeed, as with other issues in this case, there is conflicting evidence. In particular, a witness for the employer testified that the union had orally agreed to drop the unfair labor practice charges in the final settlement. Witnesses for the union dispute this. In Asotin County Housing Authority, Decision 2471-A (PECB, 1987), we stated:

> We attach considerable weight to the factual finding and inferences therefrom made by our staff Examiners. They have had the opportunity to personally observe the demeanor of

---

[7] Chapter 54.04 RCW and the National Labor Relations Act do not "provide otherwise" in the absence of National Labor Relations Board jurisdiction over public entities such as this employer.

> the witnesses. The inflection of voice, the coloring of the face, and perhaps the sweating of the palms are circumstances that we, as Commission members, are barred from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every appeal, is even more appropriate on a "fact oriented" appeal. . . .

Such deference is appropriate on this issue. The Examiner found the evidence presented by the union more credible than the evidence presented by the employer. The Examiner's determination is supported by the facts concerning the manner in which the demand for withdrawal of litigation was presented to the union. This was not handled as an "agreement" being taken by the negotiators to the union membership for ratification. Rather, the demand for withdrawal of pending litigation was set forth in writing, in a document which the employer itself characterized as a ". . . Final Offer".

The timing and content of the employer's "final offer" also support the Examiner's factual determination on this issue. The employer's document exchanged a "no layoff" promise for wage concessions; it included "Addendum A", a promise by the union to drop these unfair labor practice charges; and it stated that the offer would be withdrawn if not accepted the very day it was received. The union received the employer's written "final offer" on October 25, 1984, and presented it to the bargaining unit employees on the same day. Thus, the Examiner reasonably concluded that the union had no meaningful opportunity to seek the withdrawal or modification of any term of that proposal.

Finally, there is nothing else in the record simply that convinces us that the demand for withdrawal of these unfair labor practice charges was merely an informal matter or a statement of understanding between these parties.

The Disclaimer

The employer challenges paragraph 3 of the Examiner's findings of fact, where Local 17 is described in the present tense as exclusive bargaining representative of the bargaining unit involved, and paragraph 16 of the findings of fact, where the Examiner recited that the union contradicted its October 26, 1984 "disclaimer" of the bargaining unit by its actions to pursue this case. Examiner Latsch ruled in paragraph 4 of his conclusions of law that the putative "disclaimer" was void, due to having been coerced by the employer's unlawful conduct.

The employer contends that the union clearly disclaimed the bargaining unit rather than pursuing other avenues of relief, such as attempting to get the "withdrawal of litigation" language set aside or signing the agreement and then attempting to continue pursuit of the litigation. In the alternative, the employer contends that the union disclaimed due to a mistaken understanding of the law, that it disclaimed due to its own frustration with the bargaining process and relationship between the parties, or that the disclaimer was a fraud perpetrated as part of a larger tactical plan. We are not persuaded by these arguments, although we observe that the union's "disclaimer" of the bargaining unit was a highly unorthodox tactic which presents a novel issue that is clearly one of the most difficult to be resolved in this case.

Given the July 17 and July 19 letters, the threatened layoff of a substantial portion of the bargaining unit, and the "impasse" characterization placed on the negotiations by the employer, the union could easily have concluded that it was being put in an untenable situation when called upon to give up its unfair labor practice charges or risk layoffs among the members of the bargaining unit.

We do not condone the taking of knowingly false positions in collective bargaining, and we accordingly reject the employer's suggested "sign and violate" procedure as being contrary to the principles of good faith that are required by both federal and state law. A major objective of the entire collective bargaining process is the signing of a written contract. The statutes and this Commission have recognized the sanctity of such contracts in a variety of contexts, including the "contract bar" to representation proceedings,[8] limitations on obtaining unit clarifications mid-term in a collective bargaining agreement,[9] and the endorsement of final and binding arbitration of disputes concerning the interpretation and application of such contracts.[10] We routinely defer to contractual dispute resolution procedures to resolve contract interpretation questions raised in unfair labor practice cases.[11] The union in fact believed that any attempt on its part to sign the agreement as offered by the employer, and then to continue with this litigation, would have been vigorously, and perhaps successfully, resisted by the employer. The employer's citation of Pierce County, Decision 1710 (PECB, 1983) is inapposite.[12]

Stated simply, the union was caught between a rock and a hard place. Had it refused to submit the employer's "final offer" to the employees, it could have faced a decertification effort and

---

8 RCW 41.56.070.

9 WAC 391-35-020; Toppenish School District, Decision 1143-A (PECB, 1981).

10 RCW 41.58.020(4); RCW 41.56.122(2); RCW 41.56.125.

11 Stevens County, Decision 2606 (PECB, 1987).

12 It was the complainant in that case that gave notice of its intent to pursue unfair labor practice charges after settlement of the underlying dispute. The employer did not make termination of the unfair labor practice proceedings a condition of settlement in the underlying negotiations.

even a lawsuit if layoffs had actually ensued. It recognized the need of the unit to vote on the offer, and the unit majority arguably accepted the offer in order to save their jobs. Thus, we concur with the Examiner's conclusion that the disclaimer was coerced by the employer's unlawful acts, and was a nullity.

The Examiner's decision on this issue can be affirmed for another reason. A union may lose its status as exclusive bargaining representative by its own conduct, as well as through formal decertification procedures. Federal precedent allows an employer to withdraw recognition of a union because of the union's conduct and loss of employee support. See, generally, 1 Morris, The Developing Labor Law, 244 et seq. (2nd Edition, 1983). In "withdrawal of recognition" cases, the status of the union is a question of fact, to be determined on a case-by-case basis, after considering all of the evidence. Relevant facts include the union's failure to take any overt act to represent the employees over an extended period of time, loss of employee support, or highly unusual conduct. E.g., Peoples Gas Co., 214 NLRB 944, reversed sub nom. Teamsters Local 769 v. NLRB, 532 F.2d 1385 (D.C. Circuit, 1976), reheard 238 NLRB 1008 (1978), enforced in part, 629 F.2d 35 (D.C. Circuit, 1980). In the case before us, the employer has refused to recognize the union in the five years since the "disclaimer", and urges us to do the same. Looking at the issue before us as essentially a "withdrawal of recognition" situation, we are unable to reach the result desired by the employer.

The employer argues that it has submitted evidence that the union no longer enjoys majority support among the employees. Assuming, arguendo, that this is true, there is no evidence that such a condition existed at or prior to the time of the union's disclaimer. One could easily conclude that any loss of support suffered by the union was occasioned, in large part, by the employer's unfair labor practices or by the employer's withdrawal

of recognition, which has been for a considerable duration. Clearly, an employer's withdrawal of recognition cannot be used to justify a subsequent loss of majority support. Nor will we recognize a loss of majority occasioned by employer unfair labor practices. Like the NLRB, we "block" decertification and other representation proceedings until any concurrent employer unfair labor practices are remedied. WAC 391-25-370.

In the case before us, the union's letter disclaiming the unit is the only fact supporting the employer's position. To accept the employer's position, we would have to conclude, as a matter of law, that this one fact relieves the union of its representation rights. We cannot do so. We must inquire into all of the facts -- including the reasons for the union's "highly unusual conduct". As we discussed above, the union was placed in a no-win situation. This does not justify its conduct, but it does help to explain it. We also consider the fact that the union's subsequent conduct has not been at all consistent with a finding that it intended to abandon the bargaining unit. The union has, in fact, vigorously represented the bargaining unit in these unfair labor practice proceedings and related "jurisdiction" litigation which included Supreme Court review. The monetary costs of the union's efforts no doubt have been significant. The union also submitted evidence that it has otherwise attempted to continue its representation of the bargaining unit, but has been thwarted by the employer, which has continually refused to recognize it or allow it on the employer's premises. We find all of these facts to be inconsistent with the union's ill-conceived "disclaimer", and they lead us to affirm the Examiner's decision on this issue.

This is an issue of first impression. The union and employees have paid a heavy price for their choice of tactics, including the loss of bargaining from the date of the putative disclaimer to the date of the Examiner's decision. For the future, it would be preferable

for a party faced with such a situation to refuse to sign the contract and file (or amend) unfair labor practice charges citing this precedent. We would be amenable to an expedited processing of unfair labor practice charges under such circumstances.

DISCUSSION - THE UNION'S CROSS-PETITION FOR REVIEW

The union's objections to the Examiner's decision relate entirely to the sufficiency of the remedies ordered. The union argues that the employer's actions, when taken as a whole, warrant the imposition of extraordinary remedies. Specifically, Local 17 seeks a posted apology, an award of back dues, an award of attorney fees, imposition of an interest arbitration procedure for bargaining of a new agreement between the parties, and an order preserving the status of the union as exclusive bargaining representative for a period of at least three years.

The Examiner ordered the employer to post the customary "Notice to Employees", informing bargaining unit members of the unfair labor practices committed and the remedies provided. We do not understand what different purpose would be served by a "posted apology".

Union dues are an undertaking of bargaining unit members, not an obligation of the employer. The Examiner dealt with the union's purported "disclaimer" of the bargaining unit by omitting the customary reinstatement of the status quo for the period up to the date of the Examiner's decision. This was done on the basis that the employer had some reason to believe, during the period from October 26, 1984 to the date of the Examiner's decision, that the union was no longer the exclusive bargaining representative. The union does not object to that provision of the Examiner's order, and we agree that it would have been much wiser for the union to amend its complaint and litigate its unfair labor practice allega-

tions without appearing to walk away from the bargaining unit. Although not specifically mentioned in the Examiner's decision, extension of the Examiner's logic on the bargaining order indicates rejection of the union's claim for "back dues".

We next consider whether an award of attorney fees is warranted in this case. Such a remedy is appropriate:

> a) when it is (1) necessary to make our order effective; and (2) the defense to the unfair labor practice charge is frivolous; or
>
> b) when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation.

Lewis County v. PERC, 31 Wn.App. 853 (Division II, 1982), rev. den., 97 Wn.2d 1034 (1982).

The fashioning of remedies is a discretionary action of this Commission. We regard an order for payment of attorney fees as an "extraordinary" remedy, and have used such remedies sparingly.

In the case at hand, we are unable to conclude that the employer's defenses to the unfair labor practice charges were frivolous. Its initial defense asserted a lack of Commission jurisdiction. This was a very debatable issue, and a Supreme Court decision was required to resolve it. The employer's other defenses were based primarily on its view of the facts. Although we disagree with the employer's view, there was some evidence in the record to support its position. Thus, the first Lewis County criterion is not satisfied.

As to the second criterion, we find that a close question is presented. There is evidence that suggests the employer's conduct was in "patent disregard of its good faith bargaining obligation".

While the precise nature of its good faith bargaining obligation was uncertain at that time, given the uncertainty as to our own jurisdiction, the employer ran the risk of being held accountable for its actions if it did not prevail on the issue concerning the Commission's jurisdiction. On the other hand, the situation has been clouded by the union's disclaimer of the bargaining unit, and by the fact that the employer's refusal to bargain after October 26, 1984 was not itself made the subject of an unfair labor practice charge. We are putting the parties back to the bargaining table, with direction that they proceed as required by Chapter 41.56 RCW. We have elected to withhold issuance of an extraordinary remedy at this time. See, Lewis County, Decision 556-A (PECB, 1979).

We imposed "interest arbitration" as an extraordinary remedy for repetitive unfair labor practices in METRO, Decision 2845-A (PECB, 1988), and the union seeks an "interest arbitration remedy" in this case. Although this dispute has extended over a long period of time, this case is the first to rule that the employer has engaged in any "refusal to bargain" unfair labor practice. Now that the question regarding our jurisdiction and the cloud of the disclaimer have been resolved, it would be premature for us to assume that the parties will have difficulty in their renewed bargaining relationship. Accordingly, we do not find it appropriate to impose an interest arbitration remedy at this time.

The union's request for protection from representation petitions amounts, in essence, to a "contract bar" for the maximum period of three years allowed by RCW 41.56.070 or to a "certification bar" for three times the maximum period provided by RCW 41.56.070. The union will be entitled to a reasonable period of good faith bargaining within which to reach a new contract with the employer. Lewis County, Decision 645 (PECB, 1979). We decline to impose a

three-year period upon the parties, leaving that matter for the negotiations which have been ordered.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact issued in the above-entitled matter by Examiner Kenneth J. Latsch are affirmed and adopted as the findings of fact of the Public Employment Relations Commission, except as follows:

   a. Paragraph 7 of the findings of fact is amended to read:

      7. On July 17, 1984, the parties met in further negotiations. At that meeting, the employer's attorney presented a letter to the union, expressing the employer's belief that the parties were at impasse, announcing implementation of changed wages, hours and working conditions effective July 22, 1984, and stating:

         > We sincerely hope that you do not sacrifice these 28 employees for reasons important only to the union as a whole. That could be a grave mistake.

      The employer sent a copy of its July 17, 1984, letter to each bargaining unit employee.

   b. Paragraph 9 of the findings of fact is amended to read:

      9. On July 19, 1984, the employer sent a letter to the union, expressing disappointment with the cancellation, expressing the employer's

belief that the union had "let the employees in this bargaining unit down by not giving them adequate representation when they most needed it", and reiterating that the employer's final offer would be implemented on July 22, 1984. The employer sent a copy of its July 19, 1984, letter to each bargaining unit employee.

2. The conclusions of law issued in the above-entitled matter by Examiner Kenneth J. Latsch are affirmed and adopted as the conclusions of law of the Commission, except that paragraph 3 is stricken and the following paragraphs are renumbered accordingly.

3. The following is substituted as the order of the Public Employment Relations Commission:

ORDER

Pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, it is ordered that Public Utility District No. 1 of Clark County, its officers and agents immediately:

1. Cease and desist from:

   a. Interfering, restraining and coercing employees in the bargaining unit of its engineering employees represented by International Federation of Professional and Technical Engineers, Local 17.

   b. Refusing to bargain in good faith with International Federation of Professional and Technical Engineers, Local 17, concerning wages, hours, and working conditions for its engineering employees.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes of RCW 54.04.170 and Chapter 41.56 RCW:

a. Upon request, bargain collectively in good faith with International Federation of Professional and Technical Engineers, Local 17, concerning wages, hours, and working conditions for the bargaining unit of engineering employees represented by Local 17 up to October 25, 1984. Such bargaining shall cover the time period beginning on February 24, 1989, and shall be based on the status quo marked by the wages, hours and working conditions in effect on that date.

b. Post, in conspicuous places on the employer's premises where notices to employees are customarily posted, copies of the notice attached to the Examiner's decision. Such notice shall, after being duly signed by an authorized representative of Public Utility District No. 1 of Clark County, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the employer to ensure that said notices are not removed, altered, defaced, or covered by other material.

c. Notify the complainant, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a signed copy of the notice required by this Order.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same

time, provide the Executive Director with a signed copy of the notice required by this Order.

DATED at Olympia, Washington, this 11th day of October, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson
JANE R. WILKINSON, Chairman

/s/ Mark C. Endresen *
MARK C. ENDRESEN, Commissioner

Joseph F. Quinn
JOSEPH F. QUINN, Commissioner

* Commissioner Mark C. Endresen participated, by telephone, in the conference where the terms of this decision were finalized and the decision was signed by the other members of the Commission. Commissioner Endresen authorized that indication of his concurrence be affixed, and that the decision be issued immediately.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION HAS HELD A HEARING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE. THE COMMISSION HAS FOUND THAT WE VIOLATED THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT (CHAPTER 41.56 RCW) AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their collective bargaining rights.

WE WILL NOT refuse to bargain with International Federation of Professional and Technical Engineers, Local 17, concerning wages, hours, and working conditions.

WE WILL, upon request, bargain collectively with International Federation of Professional and Technical Engineers, Local 17, concerning wages, hours, and working conditions.

PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY

By:_____
Authorized Representative

DATED_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.