STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| PUBLIC SCHOOL EMPLOYEES OF TUMWATER,<br><br>Complainant.<br><br>vs<br><br>TUMWATER SCHOOL DISTRICT NO. 33,<br><br>Respondent. | CASE NO. 2046-U-79-283<br><br>DECISION NO. 936-PECB<br><br>ORDER OF DISMISSAL |

G. P. Sessions, attorney at law, appeared on behalf of the complainant.

Ditlevson, Rodgers & Hanson, by Craig W. Hanson, attorney at law, appeared on behalf of the respondent.

The complaint charging unfair labor practices was filed in this matter on April 10, 1979. A hearing was held on April 23, 1980, before Willard G. Olson, Examiner. On May 16, 1980, the examiner directed the parties to supplement the record with information concerning the current status of grievance and arbitration proceedings on a number of grievances introduced in evidence during the course of the hearing. A stipulation was filed on May 29, 1980.

## POSITIONS OF THE PARTIES

Based on stipulations that the complainant is and was the exclusive bargaining representative of bus drivers employed by the respondent; that during the month of January, 1979, certain bus drivers employed by the respondent within the bargaining unit were not permitted to work due to closure of roads by county and city authorities; that the complainant requested that the respondent enter into negotiations as requested; the complainant rested its case and asserts that the employer has violated RCW 41.56.140(4).

The employer responded at the hearing with the contention that the subject matter was not a mandatory subject of bargaining within the meaning of RCW 41.56.030(4); that the employer had no duty to bargain on this subject matter during the term of a then-existing collective bargaining agreement; and that the topic the union sought to negotiate was fully covered by the collective bargaining agreement and was the subject of grievances filed by affected employees and placed in evidence in these proceedings.

The stipulation filed by the parties on May 29, 1980, went beyond the current status of grievance and arbitration proceedings, as follows:

"I. The grievances embraced by the documents admitted as Exhibit No. 6 in these proceedings are not presently pending arbitration, nor were said grievances processed through the contractual grievance procedure as to enable timely submission to arbitration.

II. The grievances embraced by the documents admitted as Exhibit No. 6 in these proceedings did not embrace the issue of refusal to bargain which these proceedings are concerned.

III. This case does not present circumstances which the Commission should defer to the arbitration process."

DISCUSSION

The collective bargaining agreement between the parties was placed in evidence as Exhibit No. 7. The management rights clause of that contract provides:

"ARTICLE III

RIGHTS OF THE EMPLOYER

Section 2.1. It is agreed that the customary and usual rights, powers, functions, and authority of management are vested in the Board and management officials of the District. Included but not limited to these rights, in accordance with and subject to applicable laws, regulations and provisions of this Agreement, are to direct the work force, the right to hire, promote, retain, transfer and assign employees in positions; the right to suspend, discharge, demote, or take other disciplinary action against employees, and the right to release employees from duties because of lack of work or for other legitimate reasons. The District shall retain the right to maintain efficiency of the District operation by determining the methods, the means and the personnel by which operations undertaken by the employees in the unit are to be conducted." (emphasis added by examiner)

The broad generalities of the first sentence of that clause would not tend to constitute a waiver of the union's bargaining rights, City of Kennewick, Decision 482-B (PECB, 1980); but the more detailed language of the second sentence, particularly including the underlined portion thereof, could well constitute a waiver by contract. Borg-Warner, 245 NLRB No. 73 (1979).

RCW 41.58.020(4) states the legislative preference for having disputes concerning the interpretation or application of a collective bargaining agreement resolved through contractual grievance and arbitration machinery. Deferral to arbitration procedures of this agency and of the National Labor Relations Board are policy determinations rather than jurisdictional limitations, (See: City of Seattle, Decision 809-A (PECB, 1980) aimed at implementing the legislative preference for contract interpretation by arbitrators. Deferrals are never dependent on the agreement of both parties to have the matter deferred, and complainants are often opposed to deferral. Nevertheless, deferral policies have been adopted and implemented by this agency, (See: City of Richland, Decision 246 (PECB, 1977); and City of Kennewick, Decision 334 (PECB, 1977)).

It is an axiom so well established that no citation of authority is necessary that one should not reach a constitutional issue for determination if the case can be decided on statutory grounds. Similarly, this examiner should not address the "scope of bargaining" defense asserted by the employer unless "waiver by contract" defenses have been disposed of without determining the outcome of the case. The employer's arguments at the hearing made note of the pending grievances and of a claimed contractual right to take the action which is under attack in this proceeding. If the employer is right on that aspect of the case, there would be no need or occasion for this examiner to delve into the question of mandatory or permissive bargaining. Contract provisions on permissive subjects of bargaining are nevertheless enforceable as contract terms. There is no reason to believe that the underlying contract interpretation dispute cannot be resolved through arbitration, and the tests for deferral are clearly met in this case.

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-entitled matter is dismissed without prejudice to a later refiling upon a proper showing that either:

(1) The dispute has not, with reasonable promptness after the issuance of this decision and the reasonable diligence of the parties to obtain such determination, been resolved by amicable settlement or by grievance arbitration; or

(2) Grievance arbitration proceedings resulting in the final resolution of the dispute have not been fair or regular or have reached a result which is repugnant to the Act.

DATED at Olympia, Washington, this 17th day of July, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Willard G. Olson
WILLARD G OLSON, Examiner

cc: G. P. Sessions
Richard Randall
Craig Hanson
Jim Pill