STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 11, AFL-CIO, Complainant, vs. PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY, WASHINGTON, Respondent.	CASE NO. 3756-U-81-574 CASE NO. 4270-U-82-681 DECISION NO. 1884 - PECB PRELIMINARY RULING AND ORDER DENYING MOTION TO DISMISS

On October 19, 1981, Office and Professional Employees International Union, Local 11, AFL-CIO (complainant) filed a complaint with the Public Employment Relations Commission (docketed as Case No. 3756-U-81-574) alleging that Public Utility District No. 1 of Clark County Washington (respondent) had committed unfair labor practices within the meaning of RCW 41.56.140(4). The material factual allegations of that complaint state:

3. Since March of 1981, the parties have met in collective bargaining sessions with the objective to enter into a labor contract as of the 1st day of April, 1981, through March 31, 1983.

4. As part of a negotiated contract, the PUD agreed to maintain health and medical benefits.

5. On or about September 17, 1981, the PUD made an improper payment of health and medical benefits covering union members for September, 1981, coverage.

6. Among other provisions, the labor contract ("Memorandum of Understanding") states that the PUD agrees to make full payment for medical plan coverage for each employee of Local 11. A copy of the "Memorandum of Understanding" is attached hereto as Exhibit "A".

7. The PUD of Clark County is a municipal corporation of the State of Washington who exercises its powers through an elected Board of Commissioners.

8. The action by the PUD in not making full or complete payments for medical coverage pursuant to the "Memorandum of Understanding" constitutes an unfair labor practice because the PUD has refused to effectuate an agreed-upon portion of the agreement and also constitutes a unilateral change in a contractual commitment and a refusal to bargain by subverting the terms of an agreement.

9. The PUD is under an obligation to bargain collectively with respect to unilateral changes in the complainant's health and medical coverage.

10. The obligation to bargain collectively and not to interfere with, restrain or coerce public employees in the exercise of their rights forbids unilateral action by the PUD affecting health and medical coverage during the existence of the labor contract between the PUD and complainant.

The statutory authority cited is RCW 41.56.140 and RCW 41.56.030(4). The exhibit attached is a copy of an undated two-page memorandum of understanding entered into by the parties "in addition to" another agreement referred to therein but not supplied with the unfair labor practice complaint. The exhibit does not contain provisions for or reference to the arbitration of grievances.

In a letter filed with the Commission on November 2, 1981, the respondent asserted that the Public Employment Relations Commission was without jurisdiction over it, and requested dismissal of the complaint. The undersigned Executive Director advised the parties, by letter dated January 21, 1982, that the matter would be held in abeyance pending the outcome of other litigation then pending concerning the jurisdiction of the Commission with respect to public utility districts.

On October 6, 1982, Office and Professional Employees International Union, Local 11, AFL-CIO, filed another complaint with the Public Employment Relations Commission (docketed as Case No. 4270-U-82-681) alleging that Public Utility District No. 1 of Clark County had committed unfair labor practices within the meaning of RCW 41.56.140(4). The material factual allegations of that complaint state:

1. On September 3, 1982, Byron Hanke, Director of Management Services for Clark County Public Utility District discussed with the Union Representative, Wayne Shelton, and the Union Negotiating Committee the District's intention to establish three (3) non-Union Executive Secretary positions. These positions are now held by bargaining unit employees, a Senior Clerk Stenographer-Engineering and two (2) Administrative Secretaries. The District also reported that they had created a new staff position of Records Coordinator.

2. The Union requested a copy of the proposed job descriptions and for the District to submit their intentions in writing on the positions of Executive Secretaries. In addition, the Union requested a copy of the job description for the Records Coordinator. The Union received this information, in writing, on September 20, 1982.

3. On September 24, 1982, the Union responded, in writing, to the District's objecting to the Executive Secretary positions and insisted that these three (3) positions remain in the bargaining unit. The Union also stated that the new District position of Records Coordinator should be a bargaining unit position.

4. On October 1, 1982, the District posted an announcement signed by W. Bruce Bosch, the General Manager, announcing the promotions of Janet I. Anderson and Bonnie J. Bruce Administrative Secretaries, and Patty K. Westby as Senior Clerk Stenographer-Engineering to Executive Secretaries for their respective Directors, (sic) the Directors of Operations and Engineering, and the Water Utility. At this time, the Union has not received a response on the Records Coordinator position.

5. On November 3, 1981, the District entered into a Labor agreement with the Union which is effective April , 1981 to March 31, 1983. A copy of this agreement is enclosed. Article I of this agreement states that the Union is the sole collective bargaining agent for all employees listed in Schedule "B". The Schedule "B" lists the positions of Senior Clerk Stenographer - Engineering and Administrative Secretaries.

6. Article XIII. of the agreement speaks to any positions not covered by Schedules "A" and "B". Therefore, the Union contends that the District should not have implemented the Records Coordinator as a staff position but have bargained with the Union on this matter.

7. The District has stated that they do not intend to fill the vacancies left by the promotion of the present Union Secretaries. It is the Union's contention that the Executive Secretaries will be performing bargaining unit work. The District failed to bargain in good faith on the matter of the Executive Secretaries and the Records Coordinator positions.

Enclosed with the complaint was a copy of a grievance filed by the union concerning the matter.

In a letter filed with the Commission on November 3, 1982, the respondent again asserted that the Public Employment Relations Commission was without jurisdiction over it, and requested dismissal of the complaint. In a letter dated November 4, 1982, the undersigned Executive Director advised the parties that the matter would be held in abeyance pending the outcome of the other litigation, which was then pending before the Washington State Supreme Court. That litigation having come to its conclusion, the captioned matters are now ripe for action.

For the purposes of making a preliminary ruling under WAC 391-45-110, it must be assumed that all of the facts alleged in the complaints are true and provable. The question at hand is whether the complaints state a cause of action for unfair labor practice proceedings before the Public Employment Relations Commission. The statement of facts filed in the second case, and particularly paragraph 5 thereof, clarifies facts implied in the first case, i.e. that the parties were in a hiatus between contracts at the time of the unilateral action complained of. Unilateral changes made during

bargaining can constitute an unfair labor practice, just as unilateral removal of work from a bargaining unit or refusal to bargain concerning bargaining unit positions can constitute an unfair labor practice. Assignment of the cases to an Examiner is indicated under WAC 391-45-110, unless the employer's motion for dismissal is found to have merit.

The issue of the Commission's jurisdiction requires interpretation of RCW 41.56.020. The employer contends that it is entirely excluded from the jurisdiction conferred on the Public Employment Relations Commission by Chapter 41.56 RCW, based on the reference in RCW 41.56.020 to RCW 54.04.180. While it is clear that there is to be something different about the treatment accorded to public utility districts, it is equally clear that there are at least two interpretations available as to what that different treatment should be. Review of the legislative and judicial history of collective bargaining in Washington is instructive, as a number of statutes and decisions of the Supreme Court, as well as decisions of the Commission, bear on the issue.

Chapter 49.08 RCW, originally adopted as Chapter 58, Laws of 1903, authorized the Department of Labor and Industries to assist in the resolution of disputes between employers and employees. At one time, an assistant director of the Department of Labor and Industries was designated, by statute, as "Chief State Labor Mediator". (See: RCW 43.22.260 prior to enactment of Chapter 296, Laws of 1975, 1st. ex. sess.). Under the authority of Chapter 49.08 RCW, the Department of Labor and Industries came to provide dispute resolution services to labor and management which we would now term as "mediation" and "grievance arbitration". Where all parties consented to the process, the Department of Labor and Industries also conducted representation elections or cross-checks to assist in the resolution of disputes concerning selection of an exclusive bargaining representative. The Department of Labor and Industries did not purport to assert jurisdiction to conduct representation proceedings in the absence of agreement by all parties. The department did not purport to determine "unfair labor practice" allegations.

Congress enacted the National Labor Relations Act in 1935, setting the National Labor Relations Board in place to resolve representation, unit determination and unfair labor practice disputes in industries affecting interstate commerce. Congress amended that statute by the Labor-Management Relations Act of 1947 (Taft-Hartley Act) which, among other things, established the Federal Mediation and Conciliation Service to "assist parties to labor disputes in industries affecting commerce to settle such disputes through mediation and conciliation". LMRA Section 203(a). As defined in Section 2(2) of the NLRA, the term "employer" specifically excludes the states and their political subdivisions.

Chapter 47.64 RCW (Chapter 148, Laws of 1949) was enacted by the legislature to regulate collective bargaining between the Washington State Ferries system, then operated by an entity known as the Washington Toll Bridge Authority, and its employees. The (original) Marine Employees Commission was established to administer the statute.

Public utility districts are municipal corporations of the State of Washington, authorized by RCW 54.04.020. (Chapter 1, Laws of 1931). Chapter 54.04 was amended in 1963 to provide:

> 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.
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> 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.

No other provision dealing with collective bargaining or the resolution of labor disputes is found in Title 54 RCW, and no provision is made in Title 54 RCW to specifically designate an administrative agency charged with responsibility for the resolution of labor disputes arising under RCW 54.04.170 and 54.04.180.

The Washington Public Power Supply System (WPPSS) is a "joint operating agency" created by a combination of cities and public utility districts under authority of RCW 43.52.360 (Chapter 281, Laws of 1953, as last amended by Chapter 184, Laws of 1977, ex. sess., Section 6). RCW 43.52.391 provides in part:

> 43.52.391 POWERS AND DUTIES OF OPERATING AGENCY. Except as otherwise provided in this section, a joint operating agency shall have all the powers now or hereafter granted to public utility districts under the laws of this state...

None of the other provisions in the section deal with employee relations or collective bargaining.

Chapter 28.72 RCW (later recodified as Chapter 28A.72 RCW) was enacted by the legislature in 1965 (Chapter 143, Laws of 1965). It provided for "professional negotiations" in which an organization elected by a majority of the certificated employees of a school district was entitled to "meet, confer and negotiate" with the representatives of the school district "to

communicate the considered professional judgment of the certificated staff prior to the final adoption" of district policies on a variety of subjects. Administration of impasse procedures (but not of any representation procedures or unfair labor practices) was delegated to the Superintendent of Public Instruction.

Port districts are municipal corporations of the State of Washington, authorized by RCW 53.04.010 (Chapter 92, Laws of 1911, as last amended by Chapter 147, Laws of 1963). Chapter 101, Laws of 1967 (codified as Chapter 53.18 RCW) set forth certain rudimentary definitions and procedures for the conduct of employment relations by port districts and for the resolution of labor disputes arising between port districts and their employees. The Department of Labor and Industries was designated to resolve certain disputes under Chapter 49.08 RCW.

The Public Employees Collective Bargaining Act, Chapter 41.56 RCW, was first enacted as Chapter 108, Laws of 1967, ex. sess.. RCW 41.56.020 then provided:

> 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 except as otherwise provided by RCW 47.64.030, 47.64.040, 54.04.170, 54.04.180, 28.72.010 through 28.72.090, and chapter 53.18 RCW. (emphasis supplied)

The Department of Labor and Industries was designated to administer the provisions of Chapter 41.56 RCW, which were then primarily composed of definitions (currently RCW 41.56.030(1) through (4)), a statement of the rights of employees (RCW 41.56.040), a requirement that all disputes concerning selection of a bargaining representative be submitted to the administrative agency for resolution (RCW 41.56.050), the standards for determination of appropriate bargaining units (RCW 41.56.060), the procedures for determining questions concerning representation (RCW 41.56.060 and 41.56.070), the principle of "exclusive representation" (RCW 41.56.080), authorization to the administrative agency to adopt rules (RCW 41.56.090), authorization to public employers to bargain (RCW 41.56.100), authorization to the administrative agency to mediate disputes (RCW 41.56.100), provision for checkoff of union dues (RCW 41.56.110) and a disclaimer of any legislative authorization of strikes (RCW 41.56.120).

Section 13 of Chapter 108, Laws of 1967, ex. sess., also amended the state civil service law, Chapter 41.06 RCW, adding collective bargaining provisions to be administered by the Department of Personnel and the State Personnel Board. At the time Chapter 41.56 RCW was enacted, the distinction between state government and the municipal corporations was made clear. The Governor had vetoed collective bargaining legislation for state and local

government employees in 1965, partly upon a conclusion that both judicial opinion and attorney general opinion had already established that local units of government were authorized to enter into collective bargaining agreements, and partly because of anticipated conflicts between collective bargaining and existing merit systems. Journal of the Senate, March 31, 1965, pages 1127-1128. In a message returning a partial veto of Chapter 108, Laws of 1967, ex. sess. to the legislature, the Governor expressed concern that a stricken provision concerning the authority to adopt administrative rules would have permitted the Department of Labor and Industries to regulate collective bargaining for civil service employees of the state itself, and reiterated concerns for separation expressed in the previous veto message. Session Laws, 1967 Extraordinary Session, page 1891.

Chapter 41.56 RCW was amended by Chapter 215, Laws of 1969, ex. sess., to proscribe certain unfair labor practices and to establish administrative procedures for determination of unfair labor practice disputes.

Chapter 36, Laws of 1969 ex. sess., (codified as Chapter 28B.16 RCW), established a merit system and collective bargaining rights for non-academic employees of the state institutions of higher education, subject to administrative jurisdiction of the Higher Education Personnel Board. The collective bargaining provisions are similar to those contained in Chapter 41.06 RCW.

Chapter 196, Laws of 1971 ex. sess., (codified as Chapter 28B.52 RCW) established for academic employees of State community college districts a "meet and confer" process similar to that then provided in Chapter 28A.72 RCW for certificated employees of common school districts. Authority to administer the impasse resolution procedure was delegated to the State Board on Community College Education.

In Roza Irrigation District v. State of Washington, 80 Wn.2d 633 (1972), the Supreme Court considered an appeal from a lower court decision holding that Chapter 41.56 RCW was inapplicable to irrigation districts. The Department of Labor and Industries had attempted to assert jurisdiction over the employer in that case. At the outset of its decision, the Supreme Court held that the term "municipal corporation", as used in RCW 41.56.020, was broad enough to include irrigation districts, and that it was the legislative intent to include them in the coverage of the statute. In a second portion of its decision, the Supreme Court surveyed authorities concerning municipal corporations, including making reference to public utility districts and port districts, and reinforced its conclusion that irrigation districts were within the term "municipal corporation", as used by the legislature. Turning, then, to the policy and language of Chapter 41.56 RCW, the Supreme Court wrote:

> The employees covered are "all public employees" except those expressly exempted (emphasis supplied).

Holding that Chapter 41.56 RCW was remedial legislation entitled to liberal construction to effect its purpose, the Supreme Court rejected employer arguments concerning a restrictive intent of the legislature, based on the absence of a restrictive intent expressed in the statute or a plausible reason why the legislature should have chosen to deny irrigation district employees the protections of the Act. Going on, the Supreme Court rejected employer arguments that the legislature had in mind that irrigation district employees were to be covered by the federal collective bargaining laws or classified as agricultural employees, stating:

> If the legislature had in fact made an express exception in the case of irrigation districts, this theory might be considered as a possible explanation, but we find no expression of a legislative intent to exempt such districts. (emphasis supplied).

The Roza court noted that different treatment was to be given to public utility districts and port districts but, in light of the holdings already made that the irrigation district was wholly within the coverage of Chapter 41.56 RCW, the discussion of a point not directly before the court is of limited guidance.

The Supreme Court again considered the scope of jurisdiction of Chapter 41.56 RCW in Zylstra v. Piva, 85 Wn.2d 743 (1975), where it decided an appeal from a lower court decision holding that the employees of the Pierce County Juvenile Court were excluded from the coverage of Chapter 41.56 RCW by reason of being employees of the state. Reiterating its decision in Roza, supra, the Supreme Court reversed the lower court decision, stating that it was

> "... seeking to preserve for these employees as large a sphere of collective bargaining as possible, in accord with the stated purpose of the bargaining act. RCW 41.56.010".

Accordingly, the employees were allowed to invoke the collective bargaining rights conferred by Chapter 41.56 RCW as against Pierce County, which was their employer for purposes of wages and wage-related matters, to the extent of matters controlled by the county.

Records transferred by the Department of Labor and Industries to the Public Employment Relations Commission under RCW 41.58.801 indicate that while it administered both Chapter 41.56 RCW and Chapter 53.18 RCW, the Department of Labor and Industries took the position that RCW 41.56 and RCW 53.18 were

mutually exclusive enactments. Accordingly, the Department declined to assert jurisdiction with respect to unfair labor practice allegations involving a port district. See: Port of Seattle, L&I Case 0-1707 (Director's decision, October 31, 1974). So far as it appears, the issue was not subjected to judicial review at that time. Further, the transferred records would appear to indicate that the Department of Labor and Industries took a similar, or even more distant, approach with respect to public utility districts.

The Public Employment Relations Commission was created by Chapter 5, Laws of 1975-76, 2d ex. sess. (codified as Chapter 41.58 RCW). Chapter 288, Laws of 1975, 1st ex. sess., now codified as Chapter 41.59 RCW, had earlier repealed Chapter 28A.72 RCW and vested administrative jurisdiction for collective bargaining involving school district certificated employees in an independent labor relations agency. Chapter 296, Laws of 1975, 1st. ex. sess., had amended Chapter 28B.52 RCW to transfer administrative jurisdiction from the State Board on Community College Education to a new independent labor relations agency; had amended Chapters 41.56 RCW, 49.08 RCW and 53.18 RCW to transfer administrative jurisdiction from the Department of Labor and Industries to the new agency; and had amended Chapter 47.64 RCW to abolish the (original) Marine Employees Commission and to transfer administrative jurisdiction to the new agency. To say that things changed thereafter is an understatement! Within the first few years of its existence, the Public Employment Relations Commission made innumerable changes in the interpretation of the collective bargaining statutes and in the practices and procedures of collectve bargaining in public employment. Entirely new sets of administrative rules were developed, subjected to public hearing and adopted as part of the Washington Administrative Code (Title 391 WAC). A process of "investigation" of unfair labor practice allegations was abandoned in favor of the preliminary ruling process now contained in WAC 391-45-110, in order to assure that complainants (who must prosecute their own claims before the Commission) will have their opportunity to a hearing prior to any judgment being passed on the quality or sufficiency of their factual allegations. The precedents of the Department of Labor and Industries with respect to "supervisors" were rejected, and supervisors were found to be employees within the meaning of Chapter 41.56 RCW, appropriately allocated to separate bargaining units of supervisors. City of Tacoma, Decision No. 95-A (PECB, April 8, 1977). A refined definition was applied to the term "confidential" as used in RCW 41.56.030(2), limiting that term to those having access to confidential information concerning the labor relations policies of the employer. Edmonds School District, Decision No. 231 (PECB, 1977).

The willingness of the Supreme Court to give broad construction to the scope of coverage of Chapter 41.56 RCW continued after the creation of the Public

Employment Relations Commission and the changes implemented by the Commission. In Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (August 27, 1977), the Supreme Court unanimously held that supervisors are public employees under Chapter 41.56 RCW absent an expressed statutory exclusion. In International Association of Firefighters v. City of Yakima, 91 Wn.2d 101 (1978), the Supreme Court, citing Edmonds School District, supra, with approval, reiterated the liberal construction policy enunciated in Roza, supra, and held the "confidential" exclusion to the narrow grounds of those persons having a fiduciary relationship with the employer regarding labor relations policy.

It was seemingly inevitable that the Public Employment Relations Commission should have to decide disputes concerning its own jurisdiction and the inter-relationship between the several substantive statutes administered by the Commission. In Yakima Valley College, Decision 240 (CCOL, 1977), the Commission concluded that it did not have unfair labor practice jurisdiction over the employer, which is a state institution. In Eastern Washington State College, Decision 245 (PECB, 1977), the Commission concluded that the employer was a state institution (rather than a municipal corporation or political subdivision of the state), and so was exempt from the coverage of Chapter 41.56 RCW. The Eastern Washington decision was affirmed by the Superior Court for Spokane County (Nos. 239906 and 239907, September 1, 1978), and an appeal to the Supreme Court was later dismissed at the request of the appellant union.

In Port of Edmonds, Decision No. 378 (PECB, 1978) and in Port of Seattle, Decision No. 384 (PECB, 1978), the undersigned Executive Director dismissed unfair labor practice allegations against port districts. The decision of the Department of Labor and Industries, cited above, the separate enactments, and a perceived "absence of a clear grant of administrative authority to regulate unfair labor practices" were cited as reasons for concluding that the Commission lacked jurisdiction in the matters. Rejected at that time was an argument that the provisions of Chapter 41.56 RCW became applicable to port districts in the absence of a contrary provision contained in Chapter 53.18 RCW. There was no petition for review in either of the cases, and so the issue was not considered at that time by either the full Commission or by the courts.

In Port of Seattle, Decision No. 599 (PECB, February 27, 1979), the employer had responded to an unfair labor practice complaint filed against it by stating:

> It is our understanding that the Commission declined jurisdiction in an earlier case involving the Port of Seattle. Please be advised that the Port of Seattle does not contest the Commission's jurisdiction in this or any other unfair labor practice case involving the Port.

> As you know, RCW 41.56.020 provides that the Statute shall apply to any municipal corporation or any political subdivision of the State of Washington "except as otherwise provided by...Chapter 53.18 RCW". The Port of Seattle can find nothing in Chapter 53.18 RCW which provides "otherwise" or in a different manner than the provisions of RCW 41.56.140 through RCW 41.56.190.

Nevertheless, the complaint was dismissed based on "the absence of a clear legislative definition of and grant of authority to prevent unfair labor practices."

In Washington Public Power Supply System, Decision No. 622 (PECB, April 4, 1979), an unfair labor practice complaint was dismissed for lack of jurisdiction. The creation of WPPSS under RCW 43.52.360, and the authority conferred on WPPSS by RCW 43.52.391, were reviewed. The various public employee collective bargaining statutes of the State of Washington were again interpreted as separate and mutually exclusive enactments. There was no petition for review, and so the matter was not considered at that time by either the Public Employment Relations Commission or the courts.

The inter-relationship between Chapter 41.56 RCW and the other statutes referred to in RCW 41.56.020 was first squarely addressed by the full Commission on an appeal by the Port of Seattle from Decision No. 599, supra. In Port of Seattle, Decision No. 599-A (PECB, 1979), decided May 16, 1979, the Commission wrote:

> Port districts are municipal corporations of the State of Washington, created by Title 53 of the Revised Code of Washington (RCW). Chapter 41.56 RCW has been viewed by the Supreme Court as "remedial in nature" and "entitled to a liberal construction to effect its purpose". Roza Irrigation District v. State, 80 Wn.2d 633 (1972). The Court there recognized the exclusion of certain quasi-municipal corporations, including port districts, from RCW 41.56; but the issue raised in this case was not before the Court. We deal here with the interpretation and application of the exclusionary language rather than with the mere acknowledgement of its existence.
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> In Zylstra v. Piva, 85 Wn.2d 743 (1975), our Supreme Court concluded that the Superior Courts of this State are not public employers covered by RCW 41.56. It then delved into the question of how much of RCW 41.56 could be applied to employees of Superior Courts who are also employees of counties covered by RCW 41.56. The Court gave RCW 41.56 the most expansive possible reading, making it applicable to the counties as to matters controlled by the counties, even though other aspects of the employment relationship were controlled by a non-covered employer.
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> The Roza and Zylstra precedents support the position taken by the employer early in the processing of this case. The Yakima Valley College, Decision No. 240

> (CCOL, 1977) and Eastern Washington State College, Decision No. 245 (PECB, 1977) decisions of this Commission are distinguished by the fact that neither of those employers were "municipal corporations or political subdivisions" of the State in any sense, but were agencies or instrumentalities of the State itself.
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> While it administered both RCW 41.56 and RCW 53.18, the Department of Labor and Industries chose to interpret those statutes as mutually exclusive systems of rights and obligations respecting labor relations. We see no statutory basis for such interpretation. RCW 53.18 was enacted as Chapter 101, Laws of 1967, and contains certain definitions, rights and limitations. RCW 41.56 was first enacted after RCW 53.18, as Chapter 108, Laws of 1967, 1st extraordinary session, and has been amended substantively since that time. RCW 41.56 contains a broader range of rights and obligations than RCW 53.18. Specifically, RCW 41.56 provides for the definition and prevention of unfair labor practices. There is nothing in RCW 53.18 which provides "otherwise".

Accordingly, the Commission reversed the order of dismissal in that case and remanded the case for further proceedings. Subsequently, in Port of Ilwaco, Decision Nos. 970, 970-A (PECB, 1980), Port of Edmonds, Decision No. 844-B (PECB, 1980), Port of Edmonds, Decision No. 1191 (PECB, 1982), Port of Tacoma, Decision No. 1396-A (PECB, 1983) and Port of Seattle, Decision Nos. 1624, 1624-A (PECB, 1983), the Commission has consistently applied the unfair labor practice provisions of Chapter 41.56 RCW to cases involving port districts. In Port of Seattle, Decision No. 890 (PECB, 1980), the unit determination provisions of Chapter 41.56 RCW were applied to supplement the sketchy unit determination provisions of Chapter 53.18 RCW in determining a dispute arising from a petition for investigation of a question concerning representation.

During 1980, the Commission adopted entirely new sets of "consolidated" rules for processing of cases before the Commission, Chapters 391-25, 391-35, 391-45, 391-55, 391-65, and 391-95 WAC. No distinction is made in those rules between cases arising under Chapter 41.56 RCW and cases arising under Chapter 53.18 RCW. Between the time of adoption of those new rules and the effective date of Chapter 15, Laws of 1983, the rules of the Commission indicated that the provisions of Chapter 41.56 RCW would be applied to supplement the provisions of Chapter 47.64 RCW, particularly in the representation, unit clarification and unfair labor practice areas.

In January, 1980, the International Guards Union of America (Independent) filed a petition with the Public Employment Relations Commission, seeking a representation election in a unit of security guards employed by the Washington Public Power Supply System. The case was docketed under Case No. 2517-E-80-459 as a "private sector" matter under Chapter 49.08 RCW. WPPSS

responded to the petition with an assertion that the Public Employment Relations Commission lacked jurisdiction, relying in part on Decision No. 622, supra. The services of the Commission were offered under Chapter 49.08, on the theory that if WPPSS was entitled to act under RCW 54.04.180 in the same manner that an employer in private industry might do, then it was also entitled to the services provided by the Commission to private employers under Chapter 49.08 RCW. Both WPPSS and the union accepted the Commission's services on those terms. A representation election was conducted, which the union lost. A certification was issued, citing Chapter 49.08 RCW as the statutory authority for the Commission's participation in the proceedings.

In July, 1981, Oil, Chemical & Atomic Workers, Local 1-369, filed a petition with the Commission seeking certification as exclusive bargaining representative of security guards employed by WPPSS. The services of the Commission were offered to the parties on the same basis as in the previous case. In this instance, however, WPPSS contested the propriety of having this particular union certified as the representative of its guards, since both the union and its affiliates admit to membership persons other than guards. Accordingly, WPPSS declined to stipulate to intervention by the Commission under Chapter 49.08 RCW. Without obtaining a formal decision rejecting jurisdiction under Chapter 41.56 RCW or exhausting administrative appeals, both the union and WPPSS initiated lawsuits in the Superior Court of Benton County.

In a decision issued on November 23, 1981, the Superior Court saw the question to be whether WPPSS was subject to RCW 54.04 and, based on RCW 43.52.391, the court concluded that it was. Accordingly, the court held that there was no mandatory requirement for the Commission to invoke its jurisdiction under Chapter 41.56 RCW. The court ruled separately on an issue raised by WPPSS concerning the applicability of section 9(c)(3) of the National Labor Relations Act. Both parties appealed, and the issues were certified to the Supreme Court.

Shortly thereafter, the parties to the first case now before the Executive Director were advised by the undersigned that this matter would be held in abeyance. It was noted that the theory of PERC's refusal to assert jurisdiction over WPPSS was thought to be equally applicable to all public utility districts operating under Title 54 RCW, so the outcome of that litigation was expected to have a significant impact on the processing or dismissal of the instant case. The scenario did not play out as anticipated. In Nucleonics Alliance v. Washington Public Power Supply System, _____ Wn.2d _____ (Nos. 48438-4 and 48578-0, decided February 2, 1984), the Supreme Court ruled on the issue of the Commission's jurisdiction over the Washington Public Power Supply System. As often happens in complex litigation, the Supreme Court found that there were more than two answers to the questions asked, and it decided the case in a manner which did not squarely address the issue presently before the Executive Director under WAC 391-45-110.

The majority decision, joined in by seven members of the Supreme Court, reiterated the remedial nature of Chapter 41.56 RCW and the policy of limiting any exceptions, then turned its attention to whether WPPSS was a public utility district. Stating:

> A broad construction of the exception, RCW 54.04.170 and RCW 54.04.180, from the covered class of municipal corporations would not effect the purpose of providing the right of public employees to join and be represented by labor organizations.

Nucleonics, at page 6 of the slip opinion.

The Supreme Court majority disagreed with the interpretation of RCW 43.52.391 urged by WPPSS (and therefore also with Decision No. 622, supra, and with the decision of the Superior Court). The Supreme Court held that WPPSS was not a public utility district, and that all of the provisions of Chapter 41.56 RCW are applicable to WPPSS. Accordingly, the Supreme Court majority did not need to decide the precise inter-relationship between Chapter 41.56 RCW and RCW 54.04.170 and 54.04.180. Two members of the Supreme Court filed a separate opinion taking an entirely different approach. The denomination of their opinion as a "dissent" is curious, at least on the issue of jurisdiction, since they also would have reversed the Superior Court and given the Commission jurisdiction over WPPSS. They would have done so by a more circuitous route, allowing WPPSS to share the public utility district "exception", but then going on to interpret that exception in a manner virtually identical to the interpretation set forth by the Commission in Port of Seattle, Decision No. 599-A. NO member of the court adopted the view of PERC's jurisdiction set forth in Decision No. 622.

To dismiss the complaint at this stage of the proceedings, the Executive Director would have to be convinced that the Public Employment Relations Commission completely lacked jurisdiction over the parties and/or the subject matter of the dispute. Even then, the dismissal would not be the final word on the matter, as the union would have a right to petition for review of the case by the full Commission (which has never had occasion to rule on the issue) under WAC 391-45-350 and eventually by the courts under Chapter 34.04 RCW. Conversely, a finding that a cause of action exists would not preclude the employer from raising jurisdictional arguments at any point in the proceedings before the Examiner, in proceedings before the Commission under WAC 391-45-350, or eventually in proceedings for judicial review under Chapter 34.04 RCW. The preliminary ruling must be made without benefit of an evidentiary record or full legal arguments from the parties, based on what guidance is available.

The interpretation urged by the employer is that RCW 54.04.180 exempts public utility districts from the coverage of Chapter 41.56 RCW. This might be termed the traditional or historical interpretation, as it is the same

interpretation adopted by the Department of Labor and Industries with respect to Chapter 53.18 RCW, and by the undersigned in three port district cases and in Decision No. 622, supra. That interpretation of the "except as otherwise provided by" language of RCW 41.56.020 maximizes the effect of the exception. In Roza, and in Zylstra, and in Metro, and in Yakima, and in Nucleonics, the Supreme Court has minimized the exceptions and exclusions from Chapter 41.56 RCW, looking in each case for expressed, rather than implied, limitations on the scope of coverage of the statute. Had the legislature intended to exclude either port districts, as a class, or public utility districts, as a class, from the coverage of Chapter 41.56 RCW, it could easily have said so. It did not, and instead left us to give meaning to "as provided otherwise".

The alternative interpretation is that the statutes should be harmonized with one another. The Commission expressly rejected the precedent left behind by the Department of Labor and Industries when it asserted jurisdiction over port districts in Port of Seattle, Decision No. 599-A (PECB, 1979). The references to RCW 54.04 and to RCW 53.18 are found together in RCW 41.56.020, separated only by a few type-strokes, and there is no evident reason why RCW 41.56.020 should be interpreted differently as between them. The differences between port districts and public utility districts would seem to be in the details of how their separate statutes are to be harmonized with the provisions of Chapter 41.56 RCW.

Analysis of the interface between Chapters 41.56 and 53.18 RCW is the easier task, because Chapter 53.18 RCW is quite visibly a fragmentary body of law. Chapter 41.56 supplies exclusions of elected officials and appointed officials, employee rights, unit determination criteria to be applied by the Commission, representation case procedures to be administered by the Commission, designation of unfair labor practices, unfair labor practice procedures to be administered by the Commission, mediation by the Commission and various other provisions where Chapter 53.18 is silent.

The harmonization of statutes between Chapter 41.56 RCW and the provisions in Chapter 54.04 RCW may, at first, appear more difficult or even impossible. The federal statutes applicable to private employers and private employees are extensive, and huge volumes of case law have been developed under them by the National Labor Relations Board and by the courts. Yet, there are numerous similarities. Comparison of the statutes readily indicates that Chapter 41.56 RCW is patterned after the federal law. Comparisons of the rules, practices and precedents established by the Commission interpreting Chapter 41.56 RCW with those developed under the federal law indicates that the Commission has often cited and relied upon federal precedent, or has taken the trouble to distinguish federal precedent where it concluded that different policies are indicated. There are many points where the statutes,

rules, precedents and practices of private sector labor relations do not provide otherwise than as are provided under Chapter 41.56 RCW: e.g. showing of interest requirements; contract bar policies; certification bar policies; secret ballot representation elections; the concept of certification as exclusive bargaining representative; the right of individual employees to pursue their own grievance; employer interference, domination, discrimination and refusal to bargain unfair labor practices; union interference, solicitation of discrimination, discrimination and refusal to bargain unfair labor practices; the duty to bargain in good faith; a scope of collective bargaining defined in terms of wages, hours and conditions of employment; union shop, but not closed shop; definition of the "confidential" exclusion in terms of those having access to the labor relations policies of the employer; separation of "supervisors" from bargaining units containing the employees they supervise; the legislative policy favoring final and binding arbitration of grievances, and the duties imposed on employers and employees to attempt to resolve their differences. There are a few substantive areas in which Chapter 41.56 RCW makes provisions which are above and beyond the provisions of federal law: e.g., exclusions of elected and appointed officials from the coverage of the Act (RCW 41.56.030(2)), the provision of arbitrators from the agency staff (RCW 41.56.125), and the right of an employee to be absent from work to represent his or her bargaining unit during legislative sessions (RCW 41.56.220). The foregoing are examples, and neither list of examples is intended as an exhaustive analysis of the similarities (or by implication the differences) between the statutes or practices. But in enacting the National Labor Relations Act and the Labor-Management Relations Act of 1947, Congress did more than specify employee rights. It recognized the wisdom of providing an impartial administrative agency to resolve unit determination disputes, to resolve questions concerning representation, to enforce the rules of the process (as set out in the unfair labor practice provisions of the Act), to supply impartial mediators and to endorse arbitration of grievances. The dissenting opinion in Nucleonics points out the significant gap in Chapter 54.04 RCW: i.e., the absence of an administrative agency. In enacting RCW 54.04.170 and 54.04.180, the legislature can be presumed to have known that it could not confer on the National Labor Relations Board jurisdiction with respect to public utility districts, which are state-authorized municipal corporations exempt from the coverage of the federal law. RCW 54.04.170 and RCW 54.04.180 were, therefore, at most a partial adoption of the body of law represented by the federal statutes, giving public utility districts and their employees substantive rights with no procedures for their implementation. Four years later, the legislature authorized the Department of Labor and Industries to perform for "...any... municipal corporation...of the state of Washington except as otherwise provided by...RCW 54.04.170, 54.04.180" administrative functions similar to those performed in the private sector by the National Labor Relations Board and the Federal

Mediation and Conciliation Service. Eight years after that, the legislature authorized the Commission to offer its mediation services to any municipal corporation of the state, without distinction as to public utility districts. (RCW 41.58.020). The gap is particularly evident in the second of the cases now before the Executive Director, where the employer is accused of having unilaterally removed positions from the bargaining unit. Under a harmonized reading of the statutes, the underlying issues are of a type particularly appropriate for, and commonly resolved by, unit clarification proceedings before an impartial labor relations agency. There is no evident expression of legislative intent to refuse harmonization of the statutes. A question remains as to whether the "except as otherwise provided" language should be interpreted as going beyond administration of the similarities to enforcement by the Commission of the provisions of the federal law where they are different (or where Chapter 41.56 RCW is silent), but that goes beyond the scope of what is necessary to make preliminary rulings on the cases before the Executive Director.

If there has been a mis-interpretation of the exception for public utility districts in RCW 41.56.020, it dates back to the earliest administrative interpretations following the 1967 enactment of Chapter 41.56 RCW. The Supreme Court has repeatedly and consistently given RCW 41.56.020 the broadest possible application. While administrative agencies are justly criticized for overstepping their jurisdiction, it should not be necessary to force an administrative agency into performing each and every task set out for it by the legislature. Based on the precedents established by the Supreme Court, as noted above, and based on the interpretation of the "except as otherwise provided" language of RCW 41.56.020 by the Commission in Port of Seattle, Decision No. 599-A (PECB, 1979) and in subsequent cases, the Executive Director is satisified that the complainant has at least a colorable claim that the Public Employment Relations Commission has jurisdiction in the matter. The precedent, if any remains, of Washington Public Power Supply System, Decision 622 (PECB, 1979) is hereby expressly overruled.

NOW, THEREFORE, it is

ORDERED

Examiner William A. Lang of the Commission staff is designated to conduct further proceedings in the matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

DATED at Olympia, Washington, this 16th day of March, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director