STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE NURSES ASSOCIATION, Complainant, vs. MASON GENERAL HOSPITAL, Respondent.	)	CASE 8273-U-89-1792 DECISION 3374 - PECB ORDER OF DISMISSAL

The complaint charging unfair labor practices was filed in the above-captioned matter on November 2, 1989. The complaint has been reviewed by the Executive Director for the purposes of making a preliminary ruling pursuant to WAC 391-45-110. At this stage of the proceedings, it is presumed that all of the facts alleged in the complaint are true and provable. The question at hand is whether an unfair labor practice violation could be found.

The Washington State Nurses Association (WSNA) has been the exclusive bargaining representative of the employer's registered nurses, and it had a collective bargaining agreement with the employer which expired on September 30, 1989. Another organization filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission in July of 1989, seeking to replace the WSNA as exclusive bargaining representative of the employer's registered nurses.[1] The operative allegation of the complaint in this case is that, on or about

[1] Case 8109-E-89-1373. An order was issued on October 18, 1989, directing an election. Mason General Hospital, Decision 3319 (PECB, 1989). The case remains pending.

October 5, 1989, the employer refused to conduct further collective bargaining negotiations with the WSNA towards a new contract, citing the pending representation petition. The WSNA alleges a "refusal to bargain" violative of RCW 41.56.140(4).

In Yelm School District, Decision 704-A (PECB, 1980), the employer and incumbent union shut down negotiations concerning a new contract for the portion of a bargaining unit affected by a "severance" petition, but continued bargaining and concluded a contract on the remainder of the historical unit. The "severance" petitioner advanced the shutdown of bargaining on the disputed employees as evidence of a partial abandonment of the historical bargaining unit by the incumbent, but the Hearing Officer and the Executive Director rejected that theory. On a petition for review, the Commission stated:

> The petitioner takes exception to a ruling by the Hearing Officer which excluded from introduction in evidence an exhibit offered by the petitioner purporting to establish that the [disputed] classification was excluded from final agreements and implementations of agreements between the employer and the [incumbent] after the petition was filed in this matter. We find that the employer followed well-settled principles in avoiding controversial involvement with a class of employees disputed under a question concerning representation. Those parties had, in fact, no other legal option open to them. (Emphasis supplied)

The Commission's ultimate dismissal of the "severance" petition permitted the employer and incumbent union to resume their relationship at the point where they had left off.

The issue of bargaining by an employer and incumbent union on a new contract during the pendency of a representation petition was revisited by the Executive Director in Pierce County, Decision 1588 (PECB, 1983). The incumbent union in that case relied upon a shift

of federal policy indicated in RCA Del Caribe, 262 NLRB 963 (1982) as a basis for its claim that it was entitled to continued negotiations during the pendency of a representation petition, and it sought overturning of the Yelm School District precedent. Noting that Yelm was the decision of the Commission itself, and that the policy enunciated by the Commission was consistent with National Labor Relations Board (NLRB) precedent dating back 38 years to Midwest Piping and Supply, 63 NLRB 1060 (1945), the Executive Director declined to tamper with the Yelm precedent and dismissed unfair labor practice charges filed by the incumbent union. No petition for review was filed with the Commission in that case.

The "shutdown of bargaining for a new contract during the pendency of a question concerning representation" policy enunciated in Yelm and left intact in Pierce County was again found to be controlling in the dismissal of "refusal to bargain" unfair labor practice charges filed by an incumbent union in Selah School District, Decision 2425 (PECB, 1986). There was no petition for review.

The WSNA has filed an extensive memorandum with its complaint, setting forth legal argument in support of its contention that the policy enunciated in Yelm should now be reversed. It particularly relies upon Port of Edmonds, Decision 844-B (PECB, 1980), and upon NLRB decisions issued during and since 1982.

The type of negotiations at issue distinguishes the instant case on the facts from Port of Edmonds, supra. The situation at Mason General Hospital clearly involves the bargaining of a new contract. The employer and incumbent union in Port of Edmonds were in the process of bargaining a new contract at the time, but the unfair labor practice case did not focus on the contract negotiations. Rather, the Port of Edmonds decision concerns whether the employer had a duty to give notice to and bargain with the incumbent union concerning a specific change of wages, hours and working conditions

being contemplated by the employer for implementation prior to the disposition of a pending "decertification" petition.[2] There is no such "unilateral change" mode in the instant case.

Further, the nature of the pending representation question distinguishes the instant case on the facts from Port of Edmonds, supra. The representation case now pending at Mason General Hospital involves an attempt by the United Staff Nurses Union, Local 141, United Food and Commercial Workers, AFL-CIO, to obtain certification as the exclusive bargaining representative of the employees. The WSNA has intervened, and was given a place on the ballot. District 1199 NW, National Union of Hospital and Health Care Employees, Service Employees International Union, AFL-CIO, has intervened and obtained a place on the ballot. By contrast, the representation petition in Port of Edmonds had been filed by employees who sought to rid themselves of their present union representation. Thus, there was no possibility in Port of Edmonds of the employer's bargaining with the incumbent on the specific matter being taken by employees as an expression of preference by the employer among two or more competing organizations.[3]

The decision in Port of Edmonds, supra, is of limited precedential value in any case, because the decision of the Commission was reversed on multiple grounds by the Superior Court. The Supreme Court eventually ruled in that case that the Commission (then) lacked jurisdiction over unfair labor practices by port districts.

The recent drift of the NLRB away from enforcing the appearance of strict employer neutrality is not persuasive as a basis for the

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[2] The employer was considering contracting out its entire operation to a private employer.

[3] The WSNA's mis-characterization of the representation petition at Mid-Valley Hospital as a "decertification" case is neither controlling nor persuasive.

Executive Director to depart from his own rulings in Yelm, Pierce County and Selah, let alone to tamper with Commission precedent that has been operative for more than half of the time since the creation of the agency. As noted in Washington State Patrol, Decision 2900 (PECB, 1988), employer influence in the selection and internal affairs of unions was of key concern in the Congressional debate which preceded adoption of the National Labor Relations Act (NLRA), and Section 8(a)(2) of the NLRA was adopted to preclude improper employer assistance to unions. Such a concern is equally apt under RCW 41.56.040, which secures for public employees "the free exercise of their right to organize and designate representatives of their own choosing" (emphasis supplied). RCW 41.56.-140(2) is the counterpart to Section 8(a)(2) of the NLRA. The NLRB's Midwest Piping doctrine arose out of a case involving competing unions, and out of a concern that an employer has no rightful place in influencing its employees' choice between competing unions. The situation in the instant case presents a risk of employer conduct showing a preference as between competing unions. The NLRB's recent policy opens a possibility for mischief, and is rejected.

The urgency claimed by the WSNA is not compelling. Congress and state legislatures have provided administrative procedures through agencies such as the Commission and the NLRB, to resolve questions concerning representation. The secret ballot election, per WAC 391-25-490, or the confidential cross-check, per WAC 391-25-410, are preferred to recognition strikes. "Laboratory conditions" are maintained for the conduct of representation elections. Lake Stevens-Granite Falls Transportation Cooperative, Decision 2462 (PECB, 1986). The representation case process establishes long-term relationships. Even though it may seem large to the immediate parties at the time, a delay of bargaining during the orderly resolution of a question concerning representation will tend to

soon fade in memory as a minor event in a relationship of many years' duration.

Dismissal of the complaint in this case is also indicated due to intervening developments. The Commission conducted a representation election in the bargaining unit involved on November 6, 1989. The petitioning organization won a clear majority of the employees eligible. While the WSNA has filed objections to the rulings on certain motions, it appears to have lost its status as exclusive bargaining representative. Unless the entire election is reversed, the WSNA will no longer have standing to pursue a "refusal to bargain" charge. Clover Park School District, Decision 377 (EDUC, 1978).

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices in the above-entitled matter is DISMISSED as failing to state a cause of action.

Dated at Olympia, Washington, the 11th day of December, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.