STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF SEATTLE, Employer	
PHILIP IRVIN, Complainant, vs. INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17, Respondent.	CASE 8714-U-90-1901 DECISION 3763 - PECB
PHILIP IRVIN, Complainant, vs. CITY OF SEATTLE, Respondent.	CASE 8982-U-90-1980 DECISION 3764 - PECB PRELIMINARY RULING

The complaint charging unfair labor practices in Case 8714-U-90-1901 was filed by Philip Irvin on August 2, 1990. International Federation of Professional and Technical Engineers, Local 17, was named as respondent. Amendatory materials were filed by Mr. Irvin in that case on November 27, 1990 and on December 24, 1990. Case 8982-U-90-1980 was docketed on the basis of a specific request made in Mr. Irvin's December 24, 1990 letter, where he alleged that the City of Seattle had also committed unfair labor practices in connection with the matters alleged in Case 8714-U-90-1901. Both matters are before the Executive Director for the "preliminary ruling" called for by WAC 391-45-110.

The Scope of the "Unfair Labor Practice" Protections

The City of Seattle and its employees are covered by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The unfair labor practice provisions of that statute protect employees, unions and employers from certain types of "process" violations: The employees are protected from interference, restraint, coercion and discrimination related to their pursuit of lawful union activities; employers are prohibited from interfering with internal union affairs; and the duty to bargain in good faith is enforced as between the employer and union. Distinctly absent from the unfair labor practice provisions of Chapter 41.56 RCW is any provision making "violation of contract" an unfair labor practice.[1] Thus, the Commission does not have or assert jurisdiction to resolve all issues arising from the workplace, even though one or more of the parties believes their treatment has been "unfair" in a general sense of that term.

The Duty of Fair Representation

A labor organization recognized or certified as "exclusive bargaining representative" enjoys a special status under RCW 41.56.080 and the counterpart provisions of other collective bargaining laws. Judicial and administrative precedent hold that the duty to bargain in good faith, together with the "interference" and "discrimination" unfair labor practice provisions, impose a "duty of fair representation" upon unions that enjoy the status and privileges of "exclusive bargaining representative". The Supreme

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[1] The public sector collective bargaining laws of some other states, notably Oregon and Wisconsin, do make "violation of contract" an unfair labor practice. Since the first year of its existence, however, the Public Employment Relations Commission has declined to assert jurisdiction to determine or remedy "violation of contract" disputes through the unfair labor practice provisions of Chapter 41.56 RCW. City of Walla Walla, Decision 104 (PECB, 1976).

Court of the United States held in Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944), that a union must not make discriminatory contracts based on irrelevant and invidious considerations such as race.[2] Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), put the duty in terms of: "[T]o make an honest effort to serve the interests of all of those members without hostility to any."

Later, the National Labor Relations Board (NLRB) developed a "duty of fair representation" policy of its own. In Miranda Fuel Co., 140 NLRB 181 (1962), the NLRB found that a union's "irrelevant or invidious" treatment of a bargaining unit member was an unfair labor practice.[3]

Even after the NLRB asserted jurisdiction in the area, cases on the "duty of fair representation" continued to be processed in the courts. In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court of the United States put the union's obligation in terms of: "[T]o serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct ...". The Vaca decision is particularly important here, because the case arose in the setting of a "violation of contract" lawsuit filed in court, and it established the principle that the courts have a direct and legitimate involvement in "duty of fair representation" matters,

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[2] The union had negotiated "seniority" provisions which discriminated against blacks.

[3] Miranda Fuel had involved a union's administering of a negotiated hiring hall in a manner which discriminated against one employee on the basis of "pressure from some [other] employees in the bargaining unit". The case had already been to the Supreme Court of the United States once on a question of whether all "hiring hall" arrangements were unlawful. The employer was found to have responsibility for the union's actions, because the union was acting as the agent of the employer in accomplishing the "hiring" function that is exclusively the employer's.

separate and apart from the unfair labor practice procedures of a collective bargaining law.

The decision in Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982), drew a distinction between two types of "duty of fair representation" situations:

1. Duty to bargain in good faith on behalf of all employees in the bargaining unit, without invidious discrimination. The Commission regulates the collective bargaining process, and has authority to police its certifications. A union which engages in discrimination against represented employees (e.g., on the basis of race, sex, or membership in the union) places in question its right to continued enjoyment of the rights and benefits which accrue to a union holding the status of an "exclusive bargaining representative" under the collective bargaining statute. Steele, supra. The Commission thus processes claims of this type through the unfair labor practice provisions of the collective bargaining law.

2. Duty to consider and act upon contract grievances in a manner that is neither arbitrary, discriminatory nor in bad faith. A remedy for the contract violation is available, if at all, only through the employee's filing of a "violation of contract" lawsuit in the courts. Vaca, supra.[4] Based on the fact that the Commission lacks jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the collective bargaining statute, the Commission does not assert jurisdiction over

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[4] The employee may be required to prove the union's breach of its duty of fair representation as a condition to having standing to sue the employer as a third-party beneficiary to the collective bargaining agreement. Once that hurdle is overcome, the employee can then obtain a court ruling on the "violation of contract" claim and the court can order remedies against the employer.

> "duty of fair representation" complaints involving the processing of such contractual grievances.

Thus, the Commission has recognized and implemented the concept of dual jurisdiction that was outlined by the Supreme Court in Vaca. The Mukilteo case simply involved a disagreement between a union and its member about the meaning and application of the seniority provisions of a collective bargaining agreement; it was properly left to the courts as a "violation of contract" matter. Elma School District (Elma Teachers Organization), Decision 1349 (EDUC, 1982), where the Commission did assert jurisdiction, simply involved an allegation that the union's refusal to process a grievance was a discrimination based on the grievant's lack of union membership; the Commission's inquiry ended with the conclusion that the union discrimination allegation lacked merit.[5]

Application of Precedent

WAC 391-45-050(3) requires an unfair labor practice complainant to file and serve:

> Clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.

For the purposes of the "preliminary ruling" made by the Executive Director under WAC 391-45-110, it is presumed that all of the facts alleged in a complaint are true and provable. The object of that review is to screen out cases or issues where no unfair labor practice violation could be found, even if the complainant proved everything that he or she alleged in the complaint.

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[5] In other words, the Commission did not determine the underlying "violation of contract" issue.

The Original Complaint -
The allegations of the original complaint and the November amendment framed only a dispute concerning the processing of a grievance: The City of Seattle had co-sponsored a "Seattle Employees Association for Gays and Lesbians" (SEAGL) and had denied Irvin's request for co-sponsorship of a competing "Seattle Employees Association for Traditional Morality" (SEATM). Irvin requested union assistance in filing a grievance, and the union is alleged to have refused grievance assistance citing that:

> [S]ince an employee association is a voluntary organization which has no direct bearing upon [the] job, that this falls outside of the scope of the contract.

To that point, the case appeared to fall entirely within the rule of Mukilteo, supra, and the December 12, 1990 preliminary ruling letter advised Irvin that his complaint was subject to dismissal on that basis.

Timeliness of a ruling on "Jurisdiction" -
In the first of six numbered paragraphs in Irvin's December 24, 1990 filing, he appears to contend that he is entitled to a full hearing prior to a ruling on whether the Commission has jurisdiction. It is a fundamental precept of the law, however, that questions of subject matter jurisdiction can be raised and decided at any point in a case.

One of the clear purposes of the "preliminary ruling" process set forth in WAC 391-45-110 is to avoid waste of taxpayer resources for the holding of hearings and deciding of cases by the Commission where it is clear from the outset that the dispute is outside of the jurisdiction of the Commission. Thus, the Commission has repeatedly dismissed cases at the "preliminary ruling" stage where it lacked jurisdiction over the subject matter. City of Walla,

supra;[6] City of Seattle, Decision 205 (PECB, 1977);[7] Mukilteo, supra. The argument is without merit.

Refusal to Process Grievance to Arbitration -
The second and third of the six numbered paragraphs in Irvin's December 24, 1990 filing provide updated information on the status of his grievance.[8] The recent document indicates that a grievance was filed and processed through "Step 3" of the contractual procedure, where it was denied by the employer. The next step would have been arbitration, which was not available to Irvin in the absence of union support for the grievance. The complainant then argues: "Because the Union has affirmatively blocked a primary avenue of legal redress, PERC has jurisdiction in this case."

The argument fundamentally misunderstands Vaca, supra, and Mukilteo, supra. The Vaca case arose out of a union's failure or refusal to process the discharge grievance of a bargaining unit employee. The union's action prevented the employee from getting to arbitration on the grievance, but the Supreme Court distinctly avoided a conclusion that the union's action gave rise to an unfair labor practice cause of action before the NLRB.[9] Instead, the

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[6] The case simply involved a dispute concerning administration of union leave provisions of a contract.

[7] The case simply involved direct allegations of race and sex discrimination under Chapter 49.60 RCW, which is administered by the Human Rights Commission.

[8] The original complaint had said: "I have not yet filed but am intending to pursue a grievance with the City regarding this issue."

[9] Had it done so, previous Supreme Court precedent on the exclusivity of the NLRB's jurisdiction over unfair labor practices would have come into operation, resulting in dismissal of the action filed in court. San Diego Building & Construction Trades Council v. Garmon, 359 U.S. 236 (1959).

Supreme Court preserved the jurisdiction of the courts under Section 301 of the Labor-Management Relations Act of 1947, with respect to "violation of contract" matters. The union's refusal to arbitrate does not give rise to Commission jurisdiction.

Discrimination on basis of Union Membership -
The fourth of the six numbered paragraphs in Irvin's December 24, 1990 letter adds an altogether new allegation. Irvin states that he has not been paying dues to the union for over two years,[10] and he now alleges, for the first time, that:

> [T]he Union is refusing to represent him at least in part because he is not a dues-paying member and because of the conflict surrounding his efforts to withdraw from the Union.

Irvin cites Elma, supra, as a basis for asserting jurisdiction.

While this new allegation certainly states a cause of action for proceedings before the Commission, some care is indicated in defining the scope of the issue to be considered. If the Examiner concludes that the union's refusal to process Irvin's grievance was, in fact, based on Irvin's lack of union membership, then the Examiner will fashion a remedy against the union for that specific misconduct. As was the case in Elma, supra, if the Examiner concludes that the union was not discriminating on the basis of union membership, the allegation will be dismissed. The Examiner will not, under any circumstances, acquire any jurisdiction to resolve the underlying grievance dispute against the employer.

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[10] Indeed, Irvin filed a petition for declaratory ruling on union security obligations on June 23, 1988, pursuant to Chapter 391-95 WAC. A hearing was held and an Examiner issued a decision concluding that Irvin had demonstrated a religious basis for assertion of a right of non-association. Both sides petitioned for review, and the Examiner's decision was reversed by the Commission in City of Seattle, Decision 3344-A (PECB, 1990). That case is now before the Superior Court.

Negotiation of Discriminatory Provisions -

The fifth numbered paragraph in Irvin's December 24, 1990 document alleges:

> [T]here was collusion between [the City of] Seattle and the Union regarding the negotiating of the relevant non-discrimination clause regarding "sexual orientation" and "political ideology." Irvin contends that **this was negotiated with the understanding between Seattle and the Union that discrimination favoring heterosexuals over homosexuals will not be allowed but that discrimination of homosexuals over heterosexuals will be tolerated.** Because of this collusion in drafting the contract in a manner to discriminate against a class of employees, PERC has jurisdiction in this case. [emphasis by underlining in original; emphasis by bold supplied]

In an un-numbered paragraph immediately following the numbered paragraphs in his December 24, 1990 letter, Irvin explicitly states a desire to add the City of Seattle as a respondent, cites RCW 41.56.040, and alleges that the City of Seattle has:

> [D]irectly or indirectly interfered with the collective bargaining process by sponsoring a gay employees organization with an exclusive membership for the purpose of impacting employer policies with the intent of circumventing the collective bargaining process with representatives of the entire collective bargaining unit.

He asks for a "reprimand" against the City of Seattle, and that it be ordered to cease and desist from "sponsorship of a similar organization of the opposing faction of employees".

Consistent with the Commission's docketing procedures, a separate file has been opened for the allegations against the City of Seattle, under Case Number 8982-U-90-1980. There are several problems which preclude processing of these allegations, however.

It is unlawful for an employer to engage in "circumvention" of an exclusive bargaining representative, but such unfair labor practices are found under RCW 41.56.140(4), as violations of the duty to bargain which exists between the employer and the exclusive bargaining representative. As an individual bargaining unit member, Irvin lacks legal standing to pursue allegations of a "refusal to bargain" nature. Only the employer and the exclusive bargaining representative have the right to pursue "refusal to bargain" claims. Grant County, Decision 2703 (PECB, 1987).

The Public Employment Relations Commission clearly has no jurisdiction or authority under Chapter 41.56 RCW to rule directly on allegations of discrimination on the basis of sexual preference. Inquiry to the Washington State Human Rights Commission has confirmed that the state law against discrimination, Chapter 49.60 RCW, does not regulate discrimination on the basis of sexual preference, so there is no state policy on which to base analysis similar to that used with regard to invidious discrimination on the basis of race or sex.[11]

Finally, the complaint lacks the detailed statement of facts that is required by the rules. The requirements of the rules were pointed out to this complainant in the previous preliminary ruling letter, and his response indicates an unwillingness to provide more details. Thus, the Executive Director is called upon to base a preliminary ruling on the extremely vague general claim of an agreement to discriminate among bargaining unit employees on an irrelevant basis. Even if the Executive Director were to overlook the procedural insufficiency of the claim that there was a hidden agenda when the contract non-discrimination clause was negotiated, the allegations utterly fail to put the employer and union on

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[11] The City of Seattle is reputed to have exercised its legislative authority to protect "sexual preference" under an ordinance administered by the City of Seattle Human Rights Department.

notice of the facts they would be required to admit or controvert in an answer or at a hearing.

General Statement-
The sixth of the numbered paragraphs in Irvin's December 24, 1990 document makes a general allegation of "arbitrary, discriminatory, or bad faith conduct on the part of the union", without providing any factual details. The paragraph thus fails to state a cause of action for any separate hearing, decision or remedy.

NOW, THEREFORE, it is

ORDERED

1. CASE 8714-U-90-1901; DECISION 3763 - PECB. The preliminary ruling of the Executive Director made pursuant to WAC 391-45-110 is that:

   a. The matter shall be assigned to an Examiner, when available, for further proceedings under Chapter 391-45 WAC with regard only to the allegation that the union's refusal to arbitrate Irvin's grievance was at least in part based on Irvin's lack of membership in the union.

   b. All of the other allegations against International Federation of Professional and Technical Engineers, Local 17, shall be, and hereby are, dismissed for failure to state a claim for relief available under the procedures of the Public Employment Relations Commission.

2. CASE 8982-U-90-1980; DECISION 3764 - PECB. The preliminary ruling of the Executive Director made pursuant to WAC 391-45-110 is that all of the allegations against the City of Seattle shall be, and hereby are, dismissed for failure to state a

claim for relief available under the procedures of the Public Employment Relations Commission.

Issued at Olympia, Washington, the 18th day of April, 1991.

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.