STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY, Employer,	
KATHY McGUIRE, Complainant, vs. WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 1811-C, Respondent.	CASE 8360-U-90-1816 DECISION 3705 - PECB RULINGS ON: * MOTION FOR DISMISSAL * SUMMARY JUDGMENT

W. James Young, Attorney at Law, National Right To Work Legal Defense Foundation, Inc., appeared on behalf of the complainant.

Pamela G. Bradburn, General Counsel, appeared on behalf of the union.

On January 11, 1990, Kathy McGuire (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The complainant alleged that the Washington State Council of County and City Employees, Local 1811-C, had committed violations of RCW 41.56.150(1) by refusing to comply with her request for a "reduction of dues obligation to equal only the pro rata costs of collective bargaining" with her employer, Snohomish County.[1]

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[1] Also on January 11, 1990, McGuire filed a petition with the Commission under Chapter 391-95 WAC, seeking a ruling on her union security obligations. The Executive Director subsequently dismissed that petition in the absence of a "religious" basis for the claimed exemption from union security obligations. Snohomish County, Decision 3579 (PECB, 1990).

THE PRELIMINARY RULING PROCESS

Attached to the complaint were copies of letters which McGuire had sent to the union and her employer. An October 2, 1989 letter addressed to the union had demanded a reduction of her dues obligation. A letter dated January 3, 1990, from McGuire to Snohomish County, had requested that her dues be held in escrow pending resolution of her demand for a dues reduction.[2] Other documents filed with the Commission included copies of letters and documents submitted to the Office of Financial Management and to the Public Disclosure Commission during February of 1990.

On April 9, 1990, the Executive Director sent a preliminary ruling letter to McGuire, informing her of procedural and substantive defects. Specifically, it appeared that the complaint had not been properly served on the union, and it lacked the statement of facts required by WAC 391-45-050. McGuire was allowed 14 days in which to file and serve an amended complaint.

McGuire filed an amended complaint, with a statement of facts, on April 20, 1990. The essence of the amended complaint is that the complainant desired to become an "agency dues payer" because of her differences with the union concerning "the abortion issue". While there was some indication that the union was willing to comply with her request, there was also indication that McGuire felt that the dues amount claimed by the union for representation was too high. There was no indication, however, that McGuire had challenged the dues amount through the procedure provided by the union. As a remedy, McGuire requested a "reduction of her dues obligation to equal only the pro rata costs of collective bargaining activities."

On June 27, 1990, the Executive Director sent another preliminary ruling letter to McGuire, informing her that her complaint appeared

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[2] The employer agreed to do so on January 22, 1990.

to be premature, and did not state a cause of action. McGuire was again allowed 14 days in which to file an amended complaint.

On July 11, 1990, McGuire filed another letter and accompanying documents indicating that the union had imposed conditions on its grant of a reduction or elimination of McGuire's union security obligations.

A preliminary ruling letter issued by the Executive Director on September 20, 1990 concluded that the complaint stated a cause of action with regard to the failure of the union to respond to the complainant's challenge of the dues amount. William A. Lang of the Commission staff was designated Examiner to conduct further proceedings in the matter.

THE PRE-HEARING MOTIONS

Notice was issued on September 26, 1990, setting the matter to be heard on November 7, 1990.

On September 27, 1990, the union filed a motion for dismissal of the complaint. A supporting affidavit of Pamela G. Bradburn attested to a number of facts which are germane to this decision:

1. Prior to August, 1990, the union did not have a procedure for resolving challenges to its dues allocations under Chicago Teacher's Union v. Hudson, 475 U.S. 209 (1985), preferring to handle such challenges on an individual basis.

2. The union published a Hudson notice in an edition of its newspaper which was mailed to union members about the middle of the month of August, 1990. That procedure required agency fee requests to be filed, in writing, at the council's offices by September 14,

1990. Copies of that procedure were made available to employees who sent in a self-addressed envelope with $.45 postage affixed.

3. The agency fee was established on the basis of independently audited financial statements for 1988, as follows: 76.126% of the international's dues level, and 99.5% of the local's or council's dues level.[3] Information on that dues breakdown was made available to employees who sent a self-addressed envelope with $.85 postage affixed.

4. Timely challenges to the union's dues allocation were to be consolidated in one proceeding conducted before an impartial arbitrator under the American Arbitration Association's Rules For Impartial Determination of Union Fees, as amended January 1, 1988. The arbitrator was to be appointed by the American Arbitration Association.

5. The full amount of McGuire's dues has been held in escrow since October, 1989, in an interest-bearing account.

The complainant was given time to file a response to the motion, and she did so on October 19, 1990. The complainant also moved for summary judgement.

The union was given an opportunity to reply to the motion for summary judgment, and it did so by a second motion for dismissal dated November 15, 1990. An affidavit filed in support of the

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3 Total membership dues is $ 24.90 per month. The reduced amount for agency shop dues is estimated at:

76.126% of the International fee of $5.10	= $ 3.88
100% of Snohomish Labor Council	= $ .12
99.5% of Local 1811-C (dues of $1.60)	= $ 1.59
99.5% of Council 2 (dues of $18.08)	= $17.99
Total agency dues owing	= $23.58

union's second motion for dismissal attests that, on November 8, 1990, the union refunded the full amount of McGuire's escrowed dues, with interest. The documents indicated that the union had also issued written notice to the employer, asking it to refund any dues which it held in escrow for McGuire. The union informed McGuire that it would not accept further dues payments from her. The union also advised McGuire that, in the event that it decided in the future to ask for dues payments from her and she objected to the amount, the union would accord her every protection of its Hudson procedure. The union urged that this case is moot.

On November 29, 1990, complainant replied to the union's second motion for dismissal, submitting a second motion for summary judgment together with a supporting memorandum.[4] The complainant contends that the case is not mooted in its entirety by the union's voluntary forbearance of enforcing union security, and urges the Examiner to grant a portion of the relief requested. Specifically, the complainant seeks a "declaratory judgment" under RCW 34.04.080 and WAC 391-08-500,[5] to the effect that the seizure of McGuire's dues monies was illegal and that she does not have any future obligation to the union until they adopt a lawful apportionment procedure under the Hudson precedent.

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[4] The complainant argued that, under the Superior Court Civil Rules, the motion for dismissal was improper, and should be treated as a motion for summary judgment pursuant to the Superior Court Civil Rules and WAC 391-08-230. The Examiner notes, however, that the Superior Court Civil Rules do not apply to proceedings before the Commission. See: Renton School District No. 403, Decision 2004 (PECB, 1984).

[5] Chapter 34.04 RCW has been repealed. It was replaced by a new Administrative Procedures Act, Chapter 34.05 RCW, which authorizes declaratory orders under RCW 34.05.240 in certain situations. The WAC rule cited was repealed by WSR 90-06-070, filed 3/7/90, effective 4/7/90.

DISCUSSION

The Public Employment Relations Commission has historically asserted jurisdiction under the unfair labor practice provisions of collective bargaining statutes, where an employee has accused a union (and, sometimes, an employer as a party to the collective bargaining agreement) of enforcing an unlawful union security obligation on the employee. See: Mukilteo School District, Decision 1122 (EDUC, 1981); Pierce County, Decision 1847 (PECB, 1984). The theory for doing so is that a union violates the "inducing the employer to commit an unfair labor practice" provision by asking for enforcement of an unlawful union security obligation, and an employer unlawfully discriminates on the basis of union activity or lack thereof if it enforces an unlawful union security obligation.

In Brewster School District, Decisions 2779, 2780, 2781, and 2782 (EDUC, 1987), it was held that the "union security" provisions of RCW 41.59.100 are to be interpreted as having the affirmative obligations of Hudson engrafted onto them, as follows:

> 1) Adequate explanation of the basis of the fee. The union must provide adequate information explaining the basis for the agency shop fee to the employee. This includes identifying the expenditures for collective bargaining, contract administration and grievance adjustment that were provided for the benefit of nonmembers as well as members, not just the money that had been expended for purposes that did not benefit non-members.[2] The union need not provide non-members with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an

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2 These requirements go beyond those of WAC 391-95-010, which pre-dates Hudson and merely calls for notice of the total fee, without background detail.

> independent auditor. The employee has the burden of raising an objection, but the union bears the burden of proving the proportion of political to total union expenditures.
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> 2) Reasonably prompt opportunity to challenge the amount of fee before an impartial decisionmaker. The non-member's objections must be addressed in an expeditious, fair and objective manner. The procedure cannot be controlled by the union. Special judicial procedures are not necessary, nor is a full administrative hearing with evidentiary safeguards (as had been mandated by the Seventh Circuit in the Hudson case). An expeditious arbitration might satisfy the requirement so long as the arbitrator's selection did not represent the union's unrestricted choice.
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> 3) Escrow for amounts reasonably in dispute while challenges are pending. The risk that non-member contributions might be temporarily used for impermissible purposes must be minimized. A rebate after the fact was held not sufficient. On the other hand, escrow of 100% of the dues amount was not required. If information initially provided to the employee by the union includes a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories. If the union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.

Thus, while the Commission has not undertaken to become the arbiter of dues apportionment issues, the Commission may be called upon to review breaches of the procedural rights of employees through the unfair labor practice provisions of the act.

This controversy arises under RCW 41.56.122, which is titled: "Collective Bargaining Agreements--Authorized Provisions". Like the RCW 41.59.100 provision interpreted in the Brewster cases, RCW

41.56.122 provides, in pertinent part, that a collective bargaining agreement may contain union security provisions. While there are some differences,[6] the general effect of the two statutory provisions is similar in imposing a fundamentally "financial" obligation upon bargaining unit employees.

Based on the documents supplied, and particularly on the admissions against interest contained in the union's initial affidavit (i.e., that a Hudson procedure was not in place until publication in the union's newspaper in the middle of August, 1990), an unfair labor practice violation can be found in this case for the time period beginning on or after October 20, 1989,[7] and continuing until the union's publication of its Hudson procedure. The union's complete failure to safeguard the complainant's constitutional rights when requiring dues payments under RCW 41.56.122 (i.e., by not having a Hudson procedure in place during that period) was an unfair labor practice in violation of RCW 41.56.150(1). That violation is not nullified or rendered moot by the union's subsequent correction of its misconduct.

REMEDY

The straightforward remedy for the type of violation found in this case would be to prohibit the union from seeking to enforce the union security provisions as they relate to McGuire, until such

[6] RCW 41.56.122 lacks the reference to "agency shop" found in RCW 41.59.100. RCW 41.56.122 permits the union to collect "an amount of money equivalent to regular union dues and initiation fee", while RCW 41.59.100 permits the union to collect "the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues".

[7] I.e., six months prior to the April 20, 1990 date on which McGuire properly filed a complaint charging unfair labor practices with the Commission.

time as a Hudson procedure is in place. Included in such a remedy would be an order for a refund of the entire amount of dues money unlawfully demanded from McGuire and a requirement for posting of a notice to employees explaining that an unfair labor practice violation had occurred. While the union's actions during the intervening period do not eliminate the basis for finding an unfair labor practice violation, they do necessitate some adjustment of the remedial order.

The union has now adopted a Hudson procedure.[8] Thus, there is no need to order the union to refrain from enforcing union security obligations as to periods following its adoption of its Hudson procedure.

The Supreme Court stated in Hudson that none of the money collected from objecting employees could be used - even temporarily - for non-representational purposes. Id. at 305. In this controversy, however, the union has gone well beyond what the Supreme Court requires under Hudson, by giving up control over the entire union security amount, rather than merely the portion which could be reasonably questioned by McGuire. The union has attempted to end the matter, by refunding all of the dues escrowed by itself and by the employer, including money collected after the union adopted its Hudson procedure. So far as it appears from the documents before the Examiner, the complainant has, in fact, received the entire

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8 The union's Hudson procedure does not, on its face, appear defective. In line with the guidelines in the Brewster School District cases, there is provision for the disclosure of expenses and verification of the reduced agency fee by independent audit. Copies of the audited statement justifying the reduced fee and a hearing procedure is available at minimal charges. There also appears to be a reasonable opportunity to challenge the amount of the fee before an arbitrator, along with provision for the escrow of the disputed amounts while the challenges are pending.

sum. Thus, there is no need to order the union to refund amounts collected from McGuire in the name of union security obligations.

The complainant argues that the release of the escrowed funds is not sufficient to safeguard her constitutional rights, as she may be again placed in the same position because of the union security clause of the collective bargaining agreement. Thus, the complainant now seeks "declaratory" relief that she has no future union security obligation until the union "comes into full compliance of the law". Under the newly-adopted Administrative Procedures Act, RCW 34.05.240 provides for any person to petition an agency for a declaratory order with respect to the applicability of a rule, order or statute enforceable by the agency. That process is not appropriate, however, unless there is an actual controversy to be decided,[9] and there is also the requirement that the adverse affect on the petitioner outweighs any adverse affects on others or on the general public.[10] For the reasons which follow, the Examiner finds that "declaratory" relief is not appropriate in this case.

WAC 10-08-250 provides for the form and filing of petitions for declaratory orders,[11] and calls for a determination by the Commission itself. The complainant has not invoked that procedure.

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9 An order based on hypothetical facts would be merely an advisory opinion.

10 An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by declaratory order proceeding.

11 Chapter 10-08 WAC is adopted by the Chief Administrative Law Judge of the State of Washington to regulate general functions and duties performed in common by various agencies. The Public Employment Relations Commission repealed WAC 391-08-500 in light of the adoption of a "model rule" on the subject in WAC 10-08-250.

Even if the WAC 10-08-250 procedure had been properly invoked, there is no indication in the documents now before the Examiner that the union has agreed to determining the matter by an order, or that it is possible to do so on the facts at hand.[12]

But, there is a further difficulty with the request for declaratory relief in this case. As the attorney for the complainant impliedly recognized in one of the briefs filed with the Examiner: "[T]he union triggers no disclosure requirement until it voluntarily seeks to collect service fees from the non-union members." Tierney v. City of Toledo, 824 F.2d 1497, 1503 (at fn. 2) (6th Cir. 1987). The union's return of the dues previously collected from McGuire, together with its forbearance as to the future enforcement of union security obligations on McGuire, removes the "actual controversy" which is a necessary pre-condition to the issuance of any declaratory relief. While it is true that the union security obligation contained in the collective bargaining agreement could be invoked by the union at some time in the future, a cause of action would not exist until: (1) Union security obligations were actually invoked against McGuire; (2) a challenge to the amount demanded by the union was made by McGuire; and (3) a challenge made by McGuire under such circumstances was denied by the union or a procedural defect was alleged. It is certainly conceivable that information provided by the union in response to such a future challenge would satisfy the complainant and, thereby, end the matter. Whether the procedures followed at such a time were within the requirements of Hudson (or, for that matter, within any embellishments on Hudson that may have become applicable by that time) would require evidence and analysis based on the facts existing at that time, none of which are now before the Examiner.

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[12] To the contrary, the union sought to avoid a hearing and determination by rendering the controversy moot with the refund of all escrowed funds and the forbearance of future dues collections from the complainant.

NOW, THEREFORE, it is

ORDERED

1. The motion for summary judgment filed on behalf of Kathy McGuire is GRANTED IN PART. The Washington State Council of County and City Employees, Local 1811-C, its officers and agents, shall immediately:

   a. Cease and desist from:

      (1) Enforcing union security obligations on Kathy McGuire for any period on or after October 20, 1989 for which the union did not have in effect a procedure to protect the constitutional rights of employees by collecting from objecting employees only the portion of the union dues and initiation fees attributable to its collective bargaining responsibilities as exclusive representative.

      (2) In any other manner interfering with, restraining, or coercing public employees in the exercise of their rights secured by RCW 41.56.040.

   b. Take the following affirmative action to effectuate the policies of the Public Employees' Collective Bargaining Act:

      (1) Refund to Kathy McGuire, with interest, all money collected from her under the union security provisions of the collective bargaining agreement between the union and Snohomish County for the period on or after October 20, 1989 for which the union did not have in effect a procedure to protect the constitutional rights of employees as described

above, except that this obligation shall be proportionally satisfied by payments made, by release of escrow or otherwise, prior to the date of this order and this order shall not be deemed to interfere with or contradict the union's refund of funds for other periods.

(2) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

(3) Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

(3) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

2. The motion for dismissal filed by the Washington State Council of County and City Employees, AFSCME, AFL-CIO, is GRANTED IN

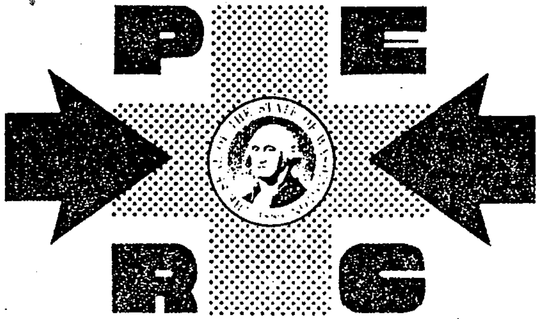
PART, with respect to periods for which it has not made, and does not now make, a demand for enforcement of union security obligations against Kathy McGuire.

Dated at Olympia, Washington on the 30th day of January, 1991.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

WILLIAM A. LANG
Examiner

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



PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL refund amounts unlawfully collected from Kathy McGuire under the union security provisions of the collective bargaining agreement between Snohomish County and the Washington State Council of County and City Employees.

WE WILL NOT seek to enforce union security obligations on Kathy McGuire for any period on or after October 20, 1989 for which the union did not have in effect a procedure to protect the constitutional rights of employees, by collecting from objecting employees only the portion of the union dues and initiation fees attributable to its collective bargaining responsibilities as exclusive representative.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce employees of Snohomish County in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: ____________________

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, AFL-CIO

BY: ______________________________
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza, FJ-61, Olympia, Washington 98504. Telephone: (206) 753-3444.