STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 469,	)	CASE 8619-U-90-1879
Complainant,	)	DECISION 3880 - PECB
vs.	)	
CITY OF YAKIMA,	)	DECISION OF COMMISSION
Respondent.	)	

Webster, Mrak and Blumberg, by James H. Webster and Lynn D. Weir, Attorneys at Law, appeared on behalf of the complainant.

Menke and Jackson, by Anthony F. Menke, Attorney at Law, appeared on behalf of the respondent.

This case comes before the Commission on a petition for review filed by the City of Yakima. The employer asserts that the Commission lacks jurisdiction over the subject matter of the case.

BACKGROUND

This case arrived before us on an interlocutory appeal. The parties to this proceeding are familiar from a number of current and past unfair labor practice proceedings before the Public Employment Relations Commission. As described in another decision being issued today involving these parties:

> The City of Yakima provides fire suppression and related services to its residents. International Association of Fire Fighters, Local 469 (IAFF), is the exclusive bargaining representative of all "uniformed personnel" of the Yakima Fire Department, excluding the fire

> chief, the deputy fire chief and temporary employees.
>
> The parties executed a collective bargaining agreement on September 22, 1988, which was in effect from January 1, 1988 through December 31, 1989.

City of Yakima, Decision 3564-A (PECB, 1991) [footnote omitted]

We also take notice of the docket records of the Commission for two other pending cases: Case 8840-I-90-198 is an interest arbitration proceeding initiated on October 19, 1990, involving negotiations between these parties to replace their collective bargaining agreement which expired on December 31, 1989;[1] and (2) Case 8442-M-90-3280 is a mediation case filed on February 22, 1990, involving the same contract negotiations.[2]

On June 1, 1990, the union filed a complaint charging unfair labor practices against the employer, alleging:

> On May 1, 1990, the Employer unilaterally altered wages, hours and other terms and conditions of employment of firefighters represented by the Union by assigning bargaining unit work to persons outside the bargaining unit.

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[1] The interest arbitration matter is not being actively processed at this time. The Executive Director withdrew his certification of the dispute for interest arbitration under RCW 41.56.450, after the parties filed extensive unfair labor practice allegations against one another.

[2] Although the mediator has recommended that the parties reached an impasse warranting the initiation of interest arbitration, the case remains open and the mediator continues to be available to assist the parties until such time as a neutral chairman is designated for the interest arbitration panel. This is consistent with long-standing Commission practice designed to prevent disputes from falling into gaps between the dispute resolution procedures specified by the statute.

> Specifically, at the Union Gospel Mission fire the Employer (1) refused to permit bargaining unit employees to report for a level 4 structural alert; and (2) sent bargaining unit employees home while retaining persons working at the fire scene who are not employed in the bargaining unit.
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> The parties' most recent collective bargaining agreement expired December 31, 1989.

A preliminary ruling was issued in this matter on June 15, 1990, pursuant to WAC 391-45-110. Noting the expiration of the parties' latest contract, the Executive Director ruled that "deferral to arbitration" would not be appropriate in this case. The case was thereafter held in abeyance until a staff member was available for assignment as Examiner.

On November 2, 1990, the employer filed a motion for dismissal of this case, citing the union's filing of a grievance on the subject matter of the unfair labor practice complaint. A memorandum of points and authorities submitted at the same time argued that the union made an election of remedies by filing a grievance under the (expired) contract, and that the Commission should defer to the contractual dispute resolution machinery.

The union responded on November 7, 1990, citing the expiration of the parties' 1988-89 contract and contending that the expired contract did not address assignment of bargaining unit work to persons outside of the bargaining unit. The union argued that any contractual waivers expired with the contract, and it denied that it has elected to seek resolution of this dispute under the parties' expired contract.

The case was assigned to Examiner Katrina I. Boedecker on February 8, 1991, and she responded to the employer's motion for dismissal in a letter dated February 22, 1991. The Examiner acknowledged that the allegations of this case fall into the "unilateral change - refusal to bargain" category for which deferral to arbitration

could be considered under Stevens County, Decision 2602 (PECB, 1987). The Examiner noted that the record lacked assurances that the employer would proceed to arbitration without asserting procedural defenses, and that the unfair labor practice case would be held open in any event, to consider and implement the outcome of any arbitration proceedings. The motion for dismissal was denied, but a time period was specified for the parties to make further comment on the propriety of "deferral to arbitration".

The employer filed a letter with the Examiner on March 7, 1991, again arguing that it was "improper" for the union to have filed the above-captioned unfair labor practice complaint after it filed a grievance on the same subject matter under the expired contract.

The union responded in a letter filed with the Examiner on March 11, 1991, again denying that it had invoked the grievance and arbitration machinery of the contract. Moreover, it reiterated that any contractual waivers affecting its unfair labor practice claim had expired with the contract.

Two days later, and prior to any further action by the Examiner, the employer filed this petition for review on March 13, 1991. At the same time, the employer filed a memorandum of points and authorities (with attachments), and a motion for oral argument.[3]

At the direction of the Commission, the Executive Director notified the parties on April 26, 1991 that the Commission was inviting a brief from the union on the limited "jurisdiction" issue framed by the employer's interlocutory appeal. The union filed such a brief.

At the further direction of the Commission, the Executive Director notified the parties on June 11, 1991 that the Commission had

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[3] The Examiner suspended processing of the case after the petition for review was filed, and no further steps have been taken to bring the matter on for hearing.

denied the employer's requests: (1) For filing of a reply brief;[4] and (2) for oral argument.[5]

POSITIONS OF THE PARTIES

The employer acknowledges the expiration of the parties' latest contract on December 31, 1989, and it acknowledges the inability of the parties to negotiate a successor agreement, but it nevertheless argues that the allegations of the unfair labor practice complaint are subject to resolution through the grievance procedure of the expired collective bargaining agreement. It cites the union's action of filing a grievance, and the decision of an Examiner in Clark County, Decision 3451 (PECB, 1990). The employer indicates that it has asserted, and will assert, defenses based upon the contract and the past practices of the parties, including the lack of timeliness or further processing of the grievance under the contract. The employer contends that, by retaining jurisdiction in unfair labor practice cases under Stevens County, supra, the Commission is putting itself in the role of an arbitrator, in contravention of its own precedents, and is re-writing parties' contracts to ignore contractual grievance filing time limits. The employer next argues that the Commission's policies on "deferral to arbitration" have no application, because the union made an election of remedies by filing the grievance on the subject matter.

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[4] The procedures for appeal briefs set forth in WAC 391-45-350 do not allow reply briefs. The request for filing of a reply brief was made in this case before the union's brief was filed, and no specific fact or issue has been cited as a basis for deviation from usual procedure.

[5] Oral argument is not a matter of right under the statutes and rules administered by the Commission. Oral argument has been granted only occasionally, and then only where specific facts or issues are to be addressed. No basis was given for deviation from usual procedure here.

The union contends that the Examiner properly denied the motion for deferral in this case. It argues that the Commission has jurisdiction to hear the union's unfair labor practice complaint, that the Commission's deferral policy is discretionary, and that the employer has not waived procedural defenses to arbitration. The union acknowledges its filing of a grievance on the underlying dispute, but argues that this dispute does not involve the parties' expired contract and it notes the employer's denial of that grievance. It relies on RCW 41.56.160 and Stevens County, supra, in support of its contention that the Commission's discretionary deferral policy is inapplicable in this case. The union reiterates that any waivers contained in the parties' 1988-89 contract expired with that contract. Finally, the union urges that the Commission should reject review of interlocutory decisions applying the deferral policy.

DISCUSSION

The Commission has established precedent concerning the circumstances and procedures by which the Commission will "defer" the processing of a statutory unfair labor practice case,[6] while the parties arbitrate a related dispute through contractual grievance and arbitration machinery contained in their collective bargaining agreement. Stevens County, supra. At the invitation of this employer, we have thoroughly reconsidered and restated our "deferral" policy in the other decision being issued today involving these parties. City of Yakima, Decision 3564-A, supra.

In the present case, the union alleges (and the employer acknowledges) that the parties' latest contract expired more than four months prior to the alleged "skimming" or "subcontracting" of bargaining unit work. There is no indication of a written

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[6] RCW 41.56.140 through .190.

agreement of the parties extending their contract.[7] The most that can be said is that the union behaved at one moment in time as if there were still a contract in effect, when it filed a grievance on the matter. The existence of the mediation and interest arbitration cases, and the union's non-pursuit of the grievance, all support a conclusion that there is no contract in effect.

The employer's reliance here on Clark County, Decision 3451 (PECB, 1990) and Nolde Bros., Inc. v. Bakery Workers, 430 U.S. 243 (1977) is misplaced. The agreement to arbitrate survives the expiration of a collective bargaining agreement **only** with respect to causes of action which arose while the contract was in effect. Even if the union had claimed here that some specific provision of the expired contract would have applied,[8] the Union Gospel Mission fire (which is the sole incident addressed in the complaint) clearly occurred after the contract had expired.

The Executive Director and the Examiner properly concluded that "deferral to arbitration" was not available in this case. Neither a collective bargaining agreement nor viable grievance arbitration machinery was in effect at the time this dispute arose.

Availability of Interlocutory Appeals

The Commission's rules for processing of unfair labor practice cases, Chapter 391-45 WAC, make no provision for appeals to the Commission from interlocutory procedural rulings made by the Executive Director or other members of our staff. In this case, the employer sought to frame its petition for review as raising a

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[7] Anything less than a written agreement might not suffice. See, State ex. rel. Bain v. Clallam County, 77 Wn.2d 542 (1970).

[8] In fact, the union did not cite any contract provision. That omission was one of the bases for denial of the grievance by the fire chief.

question of "jurisdiction", and we accepted argument on that basis. Having considered the employer's arguments, we conclude that no issue of "jurisdiction" is, or ever was, raised by this appeal.

The Commission has, and has always had, jurisdiction over the "unilateral change" unfair labor practices alleged in this case. RCW 41.56.140(4); RCW 41.56.160. Even if the Commission were to "defer" its processing of the case under Stevens County, supra, and City of Yakima, supra, the Commission retains jurisdiction over an unfair labor practice case at all times while its processing is "deferred" pending the outcome of grievance and arbitration procedures.

WAC 391-45-110 calls for the Executive Director to make a "preliminary ruling" in each unfair labor practice case. At that stage of the proceedings, it is assumed that all of the facts alleged in the complaint are true and provable. A right of appeal exists if allegations are dismissed as failing to state a cause of action. In distinct contrast, however, no right of appeal attaches to the Executive Director's conclusion under WAC 391-45-110 that a case should be heard by an Examiner.

Rulings on the propriety of "deferral to arbitration" are commonly made by the Executive Director at the preliminary ruling stage, at or after the time it is determined that a complaint appears to state a cause of action. Rulings on "deferral" can also be made by an Examiner after his or her assignment to the case. Actions taken by the Executive Director and other members of our staff to implement the Commission's "deferral" policies do not involve questions of "jurisdiction". The Commission's action in considering the petition for review in this case should not be taken as indicating that the Commission will accept or rule upon interlocutory petitions for review from "deferral" decisions in the future.

NOW, THEREFORE, it is

ORDERED

The above-captioned case is remanded to Examiner Katrina I. Boedecker for further proceedings under Chapter 391-45 WAC.

Issued at Olympia, Washington, the 17th day of October, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner