STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GERALD E. MYKLEBUST, Complainant,	)	CASE 9629-U-92-2171
vs.	)	DECISION 4084 - PECB
CITY OF TUKWILA, Respondent.	)	PARTIAL DISMISSAL

The complaint charging unfair labor practices was filed with the Public Employment Relations Commission in this matter on February 11, 1992. The case came before the Executive Director for a preliminary ruling pursuant to WAC 391-45-110,[1] and a preliminary ruling letter issued to the parties on May 6, 1992 pointed out certain defects in the complaint, as filed. The complainant was given 14 days in which to file and serve an amended complaint. The complainant responded with a letter filed on May 20, 1992.

Contract Violations

The allegations of the original complaint concerned "continuing violations" of a collective bargaining agreement between the employer and United Steelworkers of America, Local 911. In particular, the complaint alleged "repeated" violations of Article XVIII, which regulates the discipline of employees. The complainant notes that he had filed grievances protesting certain of the

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[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

employer's alleged violations, that an arbitration award had been issued with respect to one of those grievances, and that several other grievances were being scheduled for arbitration hearings.

Responding to the complainant's request that the Commission intercede to "take corrective action which will ensure that the city complies with its negotiated labor agreements", the preliminary ruling letter pointed out that the remedies for contract violations must come by means of arbitration or the courts. The Legislature has set forth the "rules" of the collective bargaining process by statute, and has empowered the Public Employment Relations Commission to prevent "process" violations through the unfair labor practice provisions of the statute. While collective bargaining negotiations commonly result in signing of a contract, the Commission has consistently declined to assert jurisdiction to remedy contract violations. City of Walla Walla, Decision 104 (PECB, 1976). Thus, the complainant was advised that his allegations relating solely to disputes about interpretation or application of the collective bargaining agreement do not state a cause of action for proceedings before the Commission. The materials filed on May 20, 1992 do nothing to pursue a "contract enforcement" remedy, and those allegations must be dismissed.

Discrimination Allegations

The "process" rules established by the Legislature do prohibit employers from discriminating against employees in reprisal for their lawful union activities including grievance processing,[2] and the preliminary ruling letter noted "a hint" of discrimination in reprisal for the complainant's pursuit of grievances. The facts alleged were, however, insufficiently detailed to form an opinion that a cause of action exists.

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[2] See, Valley General Hospital, Decision 1195, 1195-A (PECB, 1981).

The additional materials filed by the complainant on May 20, 1992 clarify that the complainant is a police officer holding the rank of "corporal", and that an arbitration award issued on May 31, 1991 sustained a grievance filed by him or on his behalf. They also address two different situations, as described below.

Discipline for Criminal Activity -
The first alleged discrimination relates to an incident which occurred on June 22, 1991, when this complainant and his subordinates consumed beer in a city park during off-duty hours.[3] The complainant was "issued a counseling statement", on November 18, 1991, because:

> 1) we were in violation of RCW 66.44-.100 which makes it a crime to consume alcohol in a public place, and
> 2) "As a corporal and senior officer, you are expected to set an example for other officers. Consuming alcohol in a public place is a violation of the law. ...

The complainant does not deny the incident, but protests the "counseling statement" on the basis of a history of similar incidents involving Tukwila law enforcement officers of even higher rank than himself.

As defined in RCW 41.56.030(4), the subjects of collective bargaining are:

> ... grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer ...

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3 The amendatory materials relate that "choir practice is the euphemism for a late night, off-duty gathering, usually in a park, for the purpose of unwinding, and which may involve the consuming of alcohol."

The issues arising in collective bargaining are traditionally sorted out as "mandatory", "permissive" and "illegal" subjects.[4] RCW 41.56.040 and RCW 41.56.140(1) combine to prohibit employer discrimination against employees for their exercise of collective bargaining rights, but a "discrimination" necessarily involves the withholding or removal of some ascertainable right or benefit to which the employee is otherwise entitled. Therein arises a fatal defect for the complainant on this allegation.

The statute cited by the complainant's supervisors is part of Title 66 RCW, relating to "Alcoholic Beverage Control". Within that title, Chapter 66.44 RCW is titled "Enforcement--Penalties". The specific section reads as follows:

> RCW 66.44.100 OPENING OR CONSUMING LIQUOR IN PUBLIC PLACE--PENALTY. Except as permitted by this title, no person shall open the package containing liquor or consume liquor in a public place. Every person who violates any provision of this section shall be guilty of a misdemeanor, and on conviction therefor shall be fined not more than one hundred dollars. [1981 1st ex.s. c.5 sec. 21; 1933 ex.s. c.62 sec. 34; RRS sec. 7306-34.]

As a statute enacted by the Legislature, the matters regulated by RCW 66.44.100 would appear to be beyond the control of the City of Tukwila, and beyond the reach of the collective bargaining process. In City of Green Bay, Decisions 12352-B, 12402-B (Wis.ERC, 1975), a union representing police officers first filed a grievance to protest the imposition of "administrative" discipline on bargaining unit members for traffic offenses, then filed an unfair labor practice complaint with our Commission's counterpart agency in

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4 See, the decision of the Commission in Federal Way School District, Decision 232-A (EDUC, 1977), citing the decision of the Supreme Court of the United States in NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958).

Wisconsin when the employer granted the grievance, withdrew the "administrative" discipline, and began issuing standard traffic citations to bargaining unit members for their traffic offenses. The unfair labor practice charges were dismissed, based on a finding that the union was advancing an "illegal" proposal in attempting to secure any exemption of police officers from uniform enforcement of criminal laws applicable to all persons. A similar conclusion is indicated here. The complainant has no ascertainable right to be excused from compliance with RCW 66.44.100. Past lax enforcement of state law do not provide him such a right. The allegations concerning the "choir practice" must be dismissed.

Discipline for "Hot Pursuit" -

The second alleged discrimination relates to an incident which occurred on October 7, 1991, when one of the complainant's subordinates engaged in pursuit of a stolen vehicle which crashed in the process of making what appears to have been an evasive maneuver. The complainant was "issued a counseling statement", on October 23, 1991, because he:

> 1) failed to identify that the offense was only a traffic violation, and
> 2) ... failed to assess the circumstances and terminate a pursuit in which the risk to persons and property far out weighed [sic] the necessity for immediate apprehension.

The complainant has filed a grievance which is scheduled for arbitration on June 26, 1992. It appears that the grievant will advance arguments "on the merits" that the incident was done and over within two minutes, that the incident was minimally a criminal traffic misdemeanor of "reckless driving", that there was little danger to other traffic, and/or that other employees have not been disciplined for incidents of equal or greater gravity. The same arguments are advanced as showing that the discipline of the complainant was in reprisal for his previous arbitration victory.

Assuming all of the facts alleged to be true and provable, the complaint now states a cause of action warranting further proceedings under Chapter 391-45 WAC limited to the "discrimination" allegation concerning the "hot pursuit" incident.

As reviewed in City of Yakima, Decision 3564-A (PECB, 1991), the Commission's "deferral to arbitration" policy does not encompass or apply to "interference" and "discrimination" allegations. An arbitrator will be called upon to decide the merits of the complainant's grievance under a standard provided in the contract, such as "just cause", while an Examiner is required to apply the two-part test of City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980).[5] The case is thus not "deferrable" in the usual sense.

The Public Employment Relations Commission currently has the highest backlog of cases in its history, and that precludes the immediate processing of this case. At the same time, it is recognized that the parties will be occupied in coming weeks with the preparation and presentation of their evidence and arguments in arbitration on the related grievance, and that the resulting arbitration award might lead to resolution of this case. Thus, it is concluded that the interests of administrative efficiency will best be served by holding this case in abeyance pending the final outcome of the grievance arbitration proceedings. The parties will be directed to keep the Commission informed of the progress of the grievance arbitration proceedings.

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[5] The burden is initially on the complainant to establish a prima facie case that the deprivation of some ascertainable right was based on reprisal for the pursuit of lawful union activity. If that first test is satisfied, the burden shifts to the respondent, to establish that the same action would have occurred regardless of the employee's protected activity.

NOW, THEREFORE, it is

ORDERED

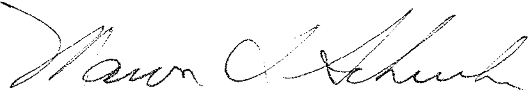
1. The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED IN PART, with respect to the "violation of contract" allegations and with respect to the imposition of discipline for violation of state law.

2. The complaint charging unfair labor practices filed in the above-captioned matter states a cause of action for further proceedings on the allegation of "discrimination" relating to the discipline of the complainant for the "hot pursuit" incident, but shall be held in abeyance pending the outcome of arbitration on a related grievance.

3. The parties are hereby directed to notify the Commission of the progress of the grievance arbitration proceedings, and to supply a copy of any settlement or arbitration award.

Entered at Olympia, Washington, on the 2nd day of June, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

Paragraph 1 of this order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.