STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| UNITED STAFF NURSES UNION, LOCAL 141, UFCW, | ) | |
| Complainant, | ) | CASE 11436-U-94-2683 |
| vs. | ) | DECISION 5389 - PECB |
| KENNEWICK GENERAL HOSPITAL, | ) | |
| Respondent. | ) | ORDER DENYING MOTION FOR DEFAULT JUDGMENT |

Hafer, Price, Rinehart & Robblee, by M. Lee Price, Attorney at Law, appeared for the union.

Conner, Gravrock & Treverton, by William W. Treverton, Attorney at Law, appeared for the employer.

On November 16, 1994, United Staff Nurses Union, Local 141, filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Kennewick General Hospital had violated RCW 41.56.140(1) and (4). Specifically, the union alleged that the employer unilaterally implemented changes on November 1, 1994, in the health insurance plan for employees in a bargaining unit represented by the union, without negotiating those changes with the union. The union requested that the Commission issue an order rescinding the changes implemented by the employer.

On December 9, 1994, the Executive Director issued a preliminary ruling pursuant to WAC 391-45-110,[1] which indicated that an unfair

[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.

labor practice could be found. The Executive Director invited the employer to file its answer to the complaint within 21 days after the preliminary ruling letter.

The employer did not file an answer within the timeframe established in the preliminary ruling letter. On January 23, 1995, the union filed a motion requesting that the Commission declare the employer in default in this matter, and requesting that the Commission grant the relief requested by the union.

In a response filed on January 26, 1995, the employer opposed default and moved for leave to file an answer. The employer explained that it had lost track of this unfair labor practice complaint among several cases the union had filed against the employer.[2] The proposed answer submitted by the employer at that time admitted the existence of the bargaining relationship and admitted that it had made the complained-of change of insurance benefits, but the employer asserted, as an affirmative defense, that its actions were in accordance with the provisions of the collective bargaining agreement which was in effect between the parties from May 9, 1993 through December 31, 1993.

On March 28, 1995, Rex L. Lacy of the Commission staff was assigned as Examiner to conduct further proceedings in the matter pursuant to Chapter 391-45 WAC.

On April 12, 1995, the Examiner issued a letter allowing the union a period of 14 days in which to respond to the employer's motion

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[2] Notice is taken of the docket records of the Commission, which disclose the existence of several other cases filed by the union against the employer: Case 10947-U-94-2547 (filed February 2, 1994), Case 11279-U-94-2640 (filed August 12, 1994), and Case 11397-U-94-2675 (filed October 21, 1994) remain pending before another Examiner for decision. Case 11494-U-94-2694 (filed by another union on December 27, 1994) also concerns an alleged unilateral change of insurance benefits.

for leave to file a late answer. In a response filed on April 18, 1995, the union re-asserted its original motion, and asked the Commission to decide whether the employer had shown good cause for its failure to answer.

On August 11, 1995, the employer moved for dismissal of the related matters on the basis of mootness. The employer alleged there that the parties had ratified a new collective bargaining agreement which "resolves issues raised" by those cases.

## DISCUSSION

### The Employer's Motion for Dismissal

A copy of the employer's motion for dismissal in the related cases was placed in the file for the above-captioned case, and the Examiner has considered the effect of a settlement in the parties' contract negotiations on this matter. For the reasons indicated below, it is concluded that this case remains viable.

The Commission does not dismiss unfair labor practice charges on the basis of "mootness". As was noted in City of Yakima, Decision 3974 (PECB, 1992), an employer's withdrawal of unilateral changes is not a basis for dismissing an unfair labor practice complaint as moot. If the union desires to pursue its claim that the employer's action was unlawful, the signing of a subsequent collective bargaining agreement does not necessarily deprive the union of its opportunity to do so. It is entitled to a declaration of its rights and, if a violation is found, to at least the posting of a notice to the employees.

If this controversy has been resolved by the subsequent agreement of the parties in contract negotiations, the proper procedure would be for the union to withdraw the complaint in this case. The union

would, in fact, be subject to criticism if it were to cause the Commission to devote scarce resources to litigation of an already-resolved matter. See, Anacortes School District, Decision 2464-A (EDUC, 1986).

## The Default Motion

The requirement for a respondent to file an answer to an unfair labor practice complaint is well established in labor law practice. Chapter 391-45 WAC includes:

> WAC 391-45-190 ANSWER--FILING AND SERVICE. The respondent(s) shall, on or before the date specified therefor in the notice of hearing, file with the examiner the original and three copies of its answer to the complaint, and shall serve a copy on the complainant.
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> ...
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> WAC 391-45-210 ANSWER--CONTENTS AND EFFECT OF FAILURE TO ANSWER. An answer filed by a respondent shall specifically admit, deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. The failure of a respondent to file an answer or the failure to specifically deny or explain in the answer a fact alleged in the complaint shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of the respondent of a hearing as to the facts so admitted.

In this case, the answer was requested in the preliminary ruling letter issued by the Executive Director, in conformity with the Commission's request for the filing of answers at an early stage of case processing. The literal terms of WAC 391-45-170 tie the setting of an answer date to the issuance of a notice of hearing, however, and no notice of hearing has been issued in this case.

The union has not claimed or shown that any actual prejudice resulted from the failure of the employer to respond to the Executive Director's "invitation" of an early answer.[3] The Examiner concludes that the answer which has been offered by the employer in this case should be accepted.

Even if a "default" conclusion were to be reached in this case, the employer would still be entitled to assert affirmative defenses. In this case, the employer's proposed answer admits the essential facts alleged in the complaint (i.e., the existence of the bargaining relationship and the complained-of change of insurance benefits), and so places the employer in virtually the same posture as it would occupy in the event of a "default" ruling. The employer's "waiver by contract" defense must still be considered.

## Propriety of Deferral to Arbitration

The employer changed the benefits made available to bargaining unit employees effective November 1, 1994, which was within the one-year extension period imposed by RCW 41.56.123. That statute provides:

> **RCW 41.56.123 COLLECTIVE BARGAINING AGREEMENTS--EFFECT OF TERMINATION--APPLICATION OF SECTION.** (1) After the termination date of a collective bargaining agreement, all of the terms and conditions specified in the collective bargaining agreement shall remain in effect until the effective date of a subsequent agreement, not to exceed one year from the termination date stated in the agreement. Thereafter, the employer may unilaterally implement according to law. ...
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> [1989 c 46 §1, as amended by 1993 c 398 §4.]

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[3] As this is being written, the Commission is considering rules amendments which, among other things, would require that an answer be filed within a specified period after the issuance of a preliminary ruling. This case must be decided, however, on the rule that was in effect when the answer was called for.

Another relatively recent amendment to the statute seems to have some bearing on this controversy:

> **RCW 41.56.100 AUTHORITY AND DUTY OF EMPLOYER TO ENGAGE IN COLLECTIVE BARGAINING--LIMITATIONS--MEDIATION, GRIEVANCE PROCEDURES UPON FAILURE TO AGREE.** A public employer shall have the authority to engage in collective bargaining with the exclusive bargaining representative and no public employer shall refuse to engage in collective bargaining with the exclusive bargaining representative: PROVIDED, That nothing contained herein shall require any public employer to bargain collectively with any bargaining representative concerning any matter which by ordinance, resolution or charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure and authority to the board created by chapter 41.06 RCW. Upon the failure of the public employer and the exclusive bargaining representative to conclude a collective bargaining agreement, any matter in dispute may be submitted by either party to the commission. **If a public employer implements its last and best offer where there is no contract settlement, allegations that either party is violating the terms of the implemented offer shall be subject to grievance arbitration procedures if and as such procedures are set forth in the implemented offer, or, if not in the implemented offer, if and as such procedures are set forth in the parties' last contract.**
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> [1967 ex.s. c 108 §10, as last amended by 1989 c 45 §1 (emphasis by **bold** supplied).]

The Examiner is not aware of any previous decision interpreting the provision concerning arbitration of implemented offers, but that recently-added language certainly provides additional reason to focus on the parties' contract in this case.

In harmony with the preference for grievance arbitration that is found in RCW 41.58.020(4), the "deferral to arbitration" policy set forth by the Commission in City of Yakima, Decision 364-A (PECB,

1992), directs that arbitrators be given the first opportunity to interpret a collective bargaining agreement which "arguably protects or prohibits" employer conduct at issue in an unfair labor practice case. In the absence of arbitration, the Commission will make any contract interpretation that is necessary to deciding the validity of "waiver by contract" defenses in the unfair labor practice case, even though the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute.[4] In this case, the employer would be relying on RCW 41.56.123 to keep the terms of the collective bargaining agreement that expired on December 31, 1993, in effect as of October and November of 1994.

NOW, THEREFORE, it is

ORDERED

1. Further proceedings in this matter shall be limited to:

   a. Determining the validity of the "waiver by contract" affirmative defense asserted by the employer; and

   b. Determining the remedies which are appropriate in the event that an unfair labor practice violation is found.

2. This unfair labor practice case will be carried on the Commission's docket as an open case in "Deferred to Arbitration" status, while the parties pursue the grievance and arbitration procedures of their collective bargaining agreement. This deferral is subject to the following conditions:

   a. The parties are directed to keep the Examiner advised of the progress of the grievance and arbitration proceedings, by written notice at least once per calendar quarter.

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[4] City of Walla Walla, Decision 104 (PECB, 1976).

b. The parties are directed to supply the arbitrator with a copy of this order, so that the arbitrator will be made aware of the Commission's deferral policy, and of the relationship between the contractual and statutory proceedings.

c. This deferral to arbitration will be subject to reconsideration, upon motion, if the grievance and arbitration procedure is resisted by the employer on procedural grounds or if there is a failure to pursue those procedures.

d. The parties are to supply the Examiner with a copy of any arbitration award resulting from the arbitration proceedings.

e. The Examiner will determine any further proceedings in this unfair labor practice case on the basis of the grievance and arbitration proceedings.

DATED at Olympia, Washington, this 18th day of December, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Rex L Lacy

REX L. LACY, Examiner