STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| BREMERTON PATROLMEN'S ASSOCIATION, Complainant, | ) | CASE 7573-U-88-1592 |
| vs. | ) | DECISION 5385 - PECB |
| CITY OF BREMERTON Respondent. | ) | ORDER OF DISMISSAL |

Cline & Emmal, by James M. Cline, Attorney at Law, appeared on behalf of the complainant.

Perkins Coie, by Charles N. Eberhardt, Attorney at Law, appeared on behalf of the respondent.

The complaint charging unfair labor practices was filed in the above-referenced matter on September 16, 1988. Without ever getting to hearing, the case has been the subject of unusual procedural steps and repeated delays, up to and including a proposed amended complaint filed on November 28, 1995. The case is again before the Executive Director for a preliminary ruling pursuant to WAC 391-45-110.[1]

## BACKGROUND

The original complaint alleged that the employer had discharged, rehired and then re-discharged a bargaining unit employee who had

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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.

been a member of the union's negotiating team. The complaint was broken down into five claims: (1) That the employer had "refused to provide information" requested by the union in connection with the discharges; (2) that information that was provided by the employer was not supplied in a timely manner; (3) that the employer had engaged in interference and coercion; (4) that the employer had unilaterally changed substantive disciplinary standards; and (5) that the employer had unilaterally changed department disciplinary standards.

A preliminary ruling letter issued on October 28, 1988, found causes of action to exist only as follows:

> The allegations concern failure to provide information needed for grievance processing and restraint, coercion and intimidation of a public employee because of that employee's assertion of collective bargaining rights.

That preliminary ruling letter also named an Examiner who was to conduct further proceedings in the matter.

A second preliminary ruling letter, issued on December 22, 1988, also found causes of action to exist only for "refusal to provide information" and "interference", but reverted the case to unassigned status.

Another Examiner was assigned on March 16, 1989. A notice of hearing was issued on March 28, 1989. The employer filed its answer on April 21, 1989. A pre-hearing conference was held on May 9, 1989, at which time the union "withdrew" the unilateral change allegations identified as (4) and (5), above. A notice was issued setting dates in June of 1989 for a hearing on the "refusal to provide information" and "interference" allegations. There was reference to settlement efforts in the correspondence from that period, however, and no hearing was held in 1989.

Beginning in January of 1990, there was an exchange of correspondence concerning a proposal to substitute the individual employee as the complainant. In June of 1990, the proposal was amended to request a bifurcation of the proceedings. The remaining allegations of the original complaint were thus bifurcated, as follows:

Case 8673-U-90-1889 was docketed to cover the continued processing of the "interference" allegations, with the individual employee named as the sole complainant.[2]

Case 7573-U-88-1592 was thereafter limited to the "refusal to provide information" allegations, with the union as the sole complainant.[3]

In September of 1990, the processing of this case was suspended at the request of the parties, while they proceeded to arbitrate a grievance concerning the discharge of the employee involved.[4] An

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[2] The separate case was docketed on June 28, 1990. It was subsequently withdrawn by the individual employee in November of 1990, and was closed by City of Bremerton, Decision 3638 (PECB, 1990).

[3] This was consistent with precedent holding that an individual employee lacks standing to pursue a "refusal to bargain" complaint, including the duty to provide information which grows out of the duty to bargain. See, Grant County, Decision 2703 (PECB, 1987).

[4] A "deferral to arbitration" was not required under City of Yakima, Decision 3564-A (PECB, 1992). A "refusal to provide information" is a statutory matter over which arbitrators have no particular expertise. The suspension of proceedings before the agency was thus entirely based on the parties' agreement. While the Commission has indicated a willingness to accept arbitration awards as determinative of "waiver by contract" defenses in unilateral change unfair labor practice cases, there is no similar commitment to accept or defer to rulings by arbitrators on other types of unfair labor practice issues. In a "refusal to provide information" situation, the agency would process a withdrawal if one were to be filed after the completion of related arbitration proceedings, or would proceed de novo on the unfair labor practice case if a dispute remained after related arbitration procedures were concluded.

arbitration award issued in August of 1991 called for reinstatement of the individual employee with full back pay, but the employer filed suit in September of 1991 to block enforcement of that award. A ruling by the Superior Court for Kitsap County was appealed to and reversed by the Court of Appeals, resulting in a remand of the court case to the trial court.

On September 29, 1995, the parties were asked to supply information concerning the current status of this matter, and to state positions on whether any viable case or controversy remains for proceedings before the Commission. The parties were notified that the above-captioned case was now the oldest case pending before the agency, and that it would be dismissed for lack of prosecution in the absence of responses from the parties.

A letter filed by counsel for the union on October 12, 1995 claimed that "a remedy for the breach the Association alleges has yet to be finally resolved by PERC", and was interpreted as a request to withdraw from the agreement which had led to suspension of the unfair labor practice proceedings. To the extent the union was asking the agency to "acknowledge the arbitrator's authority by adopting and incorporating the finding and remedies issued by Arbitrator Jack Calhoun", the parties were advised that no such order was possible.[5]

A letter filed by counsel for the employer on October 30, 1995, fundamentally questioned the existence of a cause of action. The employer cited City of Bellevue, Decision 4324-A (PECB, 1994),

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[5] Like the remedies in other types of unfair labor practice cases, a remedy for a "refusal to provide information" must be fashioned to address that immediate violation. While the issue before the Commission could involve information the union might have sought to use in arbitration, an Examiner would not have reached the merits of the discharge which were addressed by the arbitrator in reinstating the employee involved.

where the Commission ruled that the duty to provide information enforced by the Commission through the collective bargaining law does not apply to due process hearings held under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

The complaint was reconsidered under WAC 391-45-110, and was found insufficient to state a cause of action, in light of the Bellevue decision cited by the employer. On November 14, 1995, the union was given a period of 14 days in which to file and serve an amended complaint which stated a cause of action, or face dismissal of the complaint. The union filed an amended complaint on November 28, 1995.

## ANALYSIS OF AMENDED COMPLAINT

Paragraphs I. and II. of the original complaint merely identified the parties and their relationships. Paragraphs 1 and 2 of the amended complaint are identical, and serve the same purpose.

Paragraph III. of the original complaint was also found to merely identify the parties and their relationships. Paragraph 3 of the amended complaint also makes reference to the parties' 1986 - 1987 collective bargaining agreement, but does so in the past tense.[6]

Paragraph IV. of the original complaint was also found to merely identify the parties and their relationships. To the extent that its original purpose was to relate the union activities of the affected employee as background to the "interference" allegations which followed, this paragraph was rendered immaterial upon the bifurcation of the case. While the original language is repeated

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[6] The original complaint contained information about the then-current status of negotiations for a successor contract. The omission of that information from the amended complaint is not seen as a material change.

in the amended complaint, the information is immaterial to the "refusal to provide information" theory which is the only surviving issue in this case.

Paragraph V. of the original complaint and paragraph 5 of the amended complaint identically refer to a "notice of pre-termination hearing" which was served on the employee on March 16, 1988. While there is no reference in that paragraph or in the attached exhibit to the Loudermill case, it was inferred in the November 14, 1995 preliminary ruling letter that this was a pre-disciplinary action of the type required by Loudermill. The absence of any proposed amendment confirms the accuracy of that inference.

Paragraphs VI., VII. and VIII. of the original complaint contained "refusal to provide information" allegations which were taken to relate only to the "pre-disciplinary hearing" held on March 22, 1988. The preliminary ruling letter issued on November 14, 1995 noted there was no reference in these paragraphs (or in the accompanying exhibits) to any grievance at that stage of the controversy. Paragraphs 6, 7, and 8 of the amended complaint repeat the same allegations, which confirms the accuracy of the inference previously made.

Paragraph IX. of the original complaint alleged that the employee was discharged on March 24, 1988. This provided an additional basis for the inference in the November 14, 1995 preliminary ruling letter that the transactions described in paragraphs VI. through VIII. of the original complaint were in connection with a due process proceeding under Loudermill, rather than a grievance under the collective bargaining agreement. Paragraph 9 of the amended complaint is virtually identical to the original complaint, which further confirms the accuracy of the inference made.

Paragraph X. of the original complaint was a conclusionary "refusal to bargain" allegation, and paragraph XI. of the original complaint

was a re-allegation of the first 10 paragraphs as an introduction to a second cause of action, so neither of them added anything of substance. The amended complaint omits those paragraphs.

Paragraph XII. of the original complaint and paragraph 10 of the amended complaint are similar, both alleging that the employer reinstated the employee and dropped back to a "pre-disciplinary hearing" stage in April of 1988. In the absence of any reference to a grievance under the contract, an inference was made in the November 14, 1995 preliminary ruling letter that this was another attempt at a Loudermill process. The absence of any substantive change in this allegation supports that inference.

Paragraphs XIII. through XV. of the original complaint contained "refusal to provide information" allegations which were taken to relate only to a Loudermill hearing held on April 19, 1988. The preliminary ruling letter issued on November 14, 1995 noted there was no reference in these paragraphs (or in the accompanying exhibits) to any grievance at that stage of the controversy. Paragraphs 11, 12, and 13 of the amended complaint repeat the same allegations, which confirms the accuracy of the inference previously made. Moreover, there is an acknowledgement that the requested information was provided on April 19, 1988.

Paragraph XVI. of the original complaint indicated the employee was discharged again on April 19, 1988. The November 14, 1995 preliminary ruling letter took this as support for the inference that the transactions described in paragraphs XIII. through XV. were in connection with a due process proceeding under Loudermill, rather than a grievance under the collective bargaining agreement. The absence of any change in paragraph 14 of the amended complaint supports the inference previously made.

Paragraph XVII. of the original complaint alleged that the information came too late to be of effective use in what was inferred to

have been a second Loudermill hearing. The November 14, 1995 preliminary ruling letter questioned the existence of a cause of action at that point, based upon City of Bellevue, supra, and the allegation has not been repeated in the amended complaint.

Paragraph 15 of the amended complaint alleges, for the first time, that the employer released portions of the investigating file "sometime after" the employee was disciplined. Apart from being fatally insufficient in terms of the "times, dates, places and participants in occurrences" requirement of WAC 391-45-050(3), this renders the complaint internally inconsistent. Paragraph 12 of the amended complaint states with specificity that the requested information was provided to the union at 8:00 a.m. on April 19, 1988, an hour in advance of the second Loudermill hearing.

Paragraph 15 of the amended complaint goes on to allege, for the first time, that the employee involved had potential grievance rights under three different provisions of the collective bargaining agreement, and that the refusal to provide information interfered with the union's processing of a grievance. This is found to be untimely under RCW 41.56.160, which limits the filing of unfair labor practice complaints to the six months following the complained of acts or events.

Paragraphs 16 through 22 of the amended complaint are similar to the "unilateral change" violations found in claims numbered (4) and (5) in the original complaint. Neither of the preliminary rulings made in 1988 found a cause of action to exist on a "unilateral change" theory. Moreover, the union expressly withdrew those allegations at the pre-hearing conference.[7] In the absence of any timely objections, the pre-hearing statement became a binding stipulation controlling the further course of the proceedings, so

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[7] The abandonment of claims (4) and (5) of the original complaint was duly noted in the statement of results of the pre-hearing conference issued on May 15, 1989.

that the union's attempt to revive those allegations must be rejected on that basis. Even if the procedural history were otherwise, these allegations filed for the first time in 1995 about employer actions in 1988 would have to be dismissed as untimely under RCW 41.56.160.

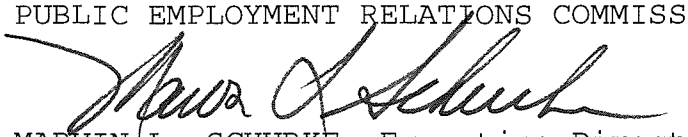
NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED for failure to state a cause of action.

Issued at Olympia, Washington, on the 6th day of December, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.