STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ENUMCLAW SCHOOL DISTRICT, Employer,	
JOHN MACDONALD, Complainant, vs. PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Respondent.	CASE 13111-U-97-3176 DECISION 5979 - PECB
JOHN MACDONALD, Complainant, vs. ENUMCLAW SCHOOL DISTRICT, Respondent.	CASE 13110-U-97-3175 DECISION 5980 - PECB ORDER OF DISMISSAL

Unfair labor practice charges which John Macdonald filed with the Public Employment Relations Commission, on April 23, 1997, named two respondents. Two separate cases were docketed, consistent with the Commission's docketing procedure, as follows:

- Case 13110-U-97-3175 was opened for allegations of "unlawful assistance" made against the Enumclaw School District;

- Case 13111-U-97-3176 was opened for allegations of "breach of contract" and/or "breach of duty of fair representation" made against Public School Employees of Washington (PSE).

The setting for those allegations is described here by reference to earlier case files,[1] as follows:

- PSE has historically been the exclusive bargaining representative of a "wall-to-wall" bargaining unit of classified employees of the Enumclaw School District.[2]

- The employer and PSE appear to have been parties to a collective bargaining agreement which expired on August 31, 1996.[3]

- The bylaws of the local PSE chapter appear to have historically required affirmative votes from various component groups within the "wall-to-wall" unit (e.g., educational assistants, custodial/maintenance, food service, secretaries, transportation) to ratify collective bargaining agreements.[4]

- Macdonald's earlier unfair labor practice complaint alleged that the custodians asked PSE that they be "released to join

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[1] Notice is taken of the Commission's docket records and files for:

Case 12837-U-96-3093, which was an unfair labor practice case filed by Macdonald on November 25, 1996, naming PSE as the respondent; and

Case 12845-E-96-2147, which was a representation case filed by Local 286 on December 2, 1996, seeking to represent employees historically represented by PSE.

[2] The petition in Case 12845-E-96-2147 identified PSE as the incumbent exclusive bargaining representative; there were no objections to an investigation statement issued in that case, which framed an issue as to the propriety of a severance from a "wall-to-wall" unit.

[3] A copy of the expired contract was attached to the complaint in Case 12837-U-96-3093; the petition in Case 12845-E-96-2147 indicated the "current [sic] contract expired on September 1, 1996";

[4] A copy of the bylaws was attached to the complaint in Case 12837-U-96-3093.

the Operating Engineers" in November of 1996, and had received no reply to that request.[5]

- Macdonald's earlier unfair labor practice complaint alleged that PSE unlawfully took steps to amend its bylaws in November of 1996, to eliminate a provision which gave the custodians a "right to vote down the contract".[6]

- Local 286 filed its representation petition on December 2, 1996, seeking a severance of custodial, maintenance, and mechanic employees from the historical "wall-to-wall" bargaining unit. PSE moved for intervention in that proceeding on December 5, 1996. The showing of interest submitted by Local 286 was found insufficient, and a deadline of December 20, 1996 was established for Local 286 to cure that defect. A notice issued on January 22, 1997, to schedule an investigation conference for February 5, 1997, was amended the next day to reschedule the investigation conference for February 6, 1997. An investigation statement issued on February 7, 1997, and corrected on February 11, 1997, framed an issue as to the propriety of the severance sought by Local 286. A hearing scheduled for March 5, 1997 was postponed to March 27, 1997,

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[5] Statement of facts in Case 12837-U-96-3093, second paragraph.

[6] Statement of facts in Case 12837-U-96-3093, third and fourth paragraphs. No precedent was cited for the "custodians have a right to vote separately on contracts" proposition which inherently underlies this allegation. To the contrary, the term "unit" implies that a bargaining relationship covers all of the employees who have been grouped together under the community of interest criteria of RCW 41.56.060 for the purposes of collective bargaining. See, RCW 41.56.080. While unit-wide ratification votes on contracts are common, the same cannot be said for arrangements of the type which apparently existed in the bylaws of this PSE chapter.

at the request of recently-retained counsel for Local 286, over strong objections of PSE. An exchange of correspondence concerning a possible amendment occurred on March 25, 1997.

- A deficiency notice concerning Case 12837-U-96-3093 was sent to Macdonald on March 26, 1997, under WAC 391-45-110.[7] After noting a problem as to Macdonald's legal standing to file on behalf of other employees, the deficiency notice stated:

> Macdonald alleges that PSE discriminated against him by not allowing the custodial employees to be "released" from the bargaining unit. A discrimination violation can only be found if a party is unlawfully deprived of some ascertainable right, and the "right" being asserted here does not exist. The determination of appropriate bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060. Even where employers and unions agree upon units, those agreements are not binding upon the Commission. City of Richland, Decision 279-A (PECB, 1978), affirmed, 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). Individual employees within a bargaining unit will be eligible voters if a question concerning representation is determined, but do not have a right to veto their inclusion in a bargaining unit. There is no evident basis to conclude here that Macdonald had any right to be excluded from the bargaining unit based on his request to PSE, so that no violation could be found.
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> An exclusive bargaining representative owes a duty of fair representation to all of the employees in the bargaining unit it repre-

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[7] At this stage of the proceedings, all of the facts alleged in the complaints are assumed to be true and provable. The question at hand is whether either or both complaints state claims for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

> sents, but that does not compel equal treatment on every issue. The Public Employment Relations Commission polices its certifications, and will assert jurisdiction in cases where it is alleged that an exclusive bargaining representative has aligned itself in interest against employees within the bargaining unit based upon unlawful considerations such as race, creed, sex, national origin, etc., or on union membership or lack thereof, but there are no such allegations in this complaint. Thus, it does not appear that an unfair labor practice violation could be found.

Macdonald was given a period of 14 days in which to file and serve an amended complaint in that case, but did not do so.[8]

- Local 286 withdrew its representation petition on March 26, 1997, and that case was closed on March 27, 1997.[9]

The above-captioned cases came before the Executive Director for preliminary rulings under WAC 391-45-110, and a deficiency notice issued on June 7, 1997 pointed out several problems with Macdonald's latest complaints.

The Complainant's Legal Standing

Correspondence in the files again suggested that Macdonald was attempting to file charges on behalf of other custodial, maintenance, and mechanic employees of the Enumclaw School District. The deficiency notice pointed out that an "exclusive bargaining

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[8] Macdonald did not respond to that deficiency notice, and an order of dismissal was issued as Enumclaw School District, Decision 5936 (PECB, June 5, 1997). No petition for review was filed, and the dismissal stands as the final order in that case.

[9] Synopsis of Case 12845-E-96-2147. The final order was Enumclaw School District, Decision 5885 (PECB, 1997).

representative" under RCW 41.56.080 has legal standing to pursue rights on behalf of individual employees within the bargaining unit it represents, but individual employees only have legal standing to file and pursue complaints asserting their own rights. It thus appeared that Macdonald lacked standing to proceed on behalf of the other employees mentioned in his complaint. Macdonald was given 14 days in which to respond.

In a response filed on June 24, 1997,[10] counsel for Macdonald acknowledged:

> John Macdonald is the charging party. The charge references other ... employees only insofar as they are affected ....

Thus, any processing of these cases could go forward only as to claimed violations of Macdonald's individual rights.

The "Inducement" Allegation Against the Union

The statement of facts attached to the complaints now before the Executive Director appears to focus on events which followed the withdrawal of the representation petition by Local 286.[11] Macdonald alleges that the local PSE chapter induced the maintenance workers to vote in favor of a new collective bargaining agreement, by promising to "release" them from the bargaining unit. The

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[10] This otherwise tardy response was accepted, upon discovery that the deficiency notice had not been sent to Macdonald's attorney in a timely manner.

[11] A paragraph alleging that PSE "obtained a letter stating that the Union had authority to release the maintenance workers" is insufficient to state a cause of action, in the absence of any factual details as to when that event took place.

complaint further alleges that, after the ratification of the agreement, the chapter's parent organization informed the maintenance workers that the Enumclaw chapter did not have authority to release the employees.[12] The deficiency notice issued in these cases repeated many of the principles set forth in the prior case:

> The complaint evidences a fundamental misunderstanding of unit determination principles. The determination of bargaining units is a matter delegated by the Legislature to the Public Employment Relations Commission in RCW 41.56.060 and any dispute concerning selection of an exclusive bargaining representative must be submitted to the Commission under RCW 41.56.050. Unit determination is not a subject for bargaining between employees, unions or management in the usual mandatory/permissive/illegal sense. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). Employers and unions can agree on unit matters, but their agreements are not binding on the Commission in its administration of the criteria set forth in the statute. Thus, it has long been established that: (1) A union lacks the authority to unilaterally disclaim part of an appropriate bargaining unit [footnote citing Kent School District, Decision 127 (PECB, 1976) omitted]; and (2) the Commission will not process petitions seeking decertification of a portion of an existing bargaining unit [footnote citing City of Seattle, Decision 1229-A (PECB, 1982) omitted]. Thus, the "inducement" alleged in this case had no legal significance, and could not form the basis for finding an unfair labor practice violation against either the local chapter or the parent organization.

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[12] Local 286 has also continued its involvement after withdrawing its representation petition. An April 2 letter attached to the complaints now before the Executive Director was a reply to a request for recognition submitted by Local 286 on April 1, 1997.

The response filed on June 24, 1997, asserts that PSE was motivated by bad faith, that it induced Macdonald (and other employees) to ratify a contract based upon false pretenses, and that it thereby breached its duty of fair representation. The response declined to make any amendment of the complaint.

The complainant's response to the deficiency notice is neither persuasive nor satisfactory. The complaint fails to allege that Macdonald was deprived of any ascertainable right, status or benefit protected by the statute, and therefore fails to allege facts on which PSE could be found to have discriminated against Macdonald in breach of its duty of fair representation.

Macdonald clearly did not have any statutory right to have PSE release the custodial/maintenance employees from the historical bargaining unit. As noted by reference to City of Richland, supra, the consent of the employer would also have been necessary before any agreed change of the unit structure could be effected. Lacking the consent of the employer on a matter that is not a mandatory subject of collective bargaining, the Kent School District decision cited in the earlier case clearly precluded PSE from unilaterally disclaiming the custodial/maintenance portion of the historical bargaining unit. The severance question could have been decided by the Commission, but Local 286 withdrew the representation petition which was the only practical vehicle for obtaining a ruling on that issue. Even if Macdonald was under a mistaken impression as to his own rights or as to the powers of PSE,[13] repetition of such an unfounded claim does not cause such a right to spring into existence.

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[13] Such an assumption strains credulity, as Macdonald had received the deficiency notice in the earlier unfair labor practice case well in advance of the filing of these cases.

The entire employee ratification process is an outgrowth of custom and union bylaws, not of the statute itself.[14] The deficiency notice issued in this case pointed out that the Commission has very limited authority regarding the internal affairs of unions, that the bylaws and constitutions of unions are the contracts among the members for how the organization is to be operated, and that internal affairs disputes must be resolved through "internal procedures **or the courts**" [emphasis by **bold** supplied]. A statement in the response that the PSE bylaws lack procedures for internal disputes does not vest the Commission with jurisdiction in what still amounts to a dispute concerning the internal affairs of PSE.

The "Unlawful Assistance" Allegation Against the Employer

Macdonald alleged that the employer's refusal to accept release of the custodial/maintenance workers from the historical bargaining unit constituted an expression of assistance or favoritism toward PSE. The deficiency notice pointed out that the employer of petitioned-for employees is always a necessary party to representation proceedings under Chapter 391-25 WAC, that employers are entitled to voice their opinions on unit determination matters, and that employers often resist "severance" petitions. Although no copy is on file, it appears that Local 286 made another demand for recognition after withdrawing its representation petition. Faced

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[14] See, Naches Valley School District (Naches Valley Education Association), Decision 2516 (EDUC, 1987), affirmed, Decision 2516-A (EDUC, 1987). This is closely related to the principle, described above in reference to Macdonald's earlier unfair labor practice case, that he did not have any ascertainable right to the continued existence of bylaws which bifurcated a bargaining unit that was deemed appropriate under RCW 41.56.060, or to continued existence of bylaws which permitted the custodial/maintenance employees to veto contracts negotiated for the entire unit.

with an existing bargaining relationship with PSE as the incumbent exclusive bargaining representative of the custodial/maintenance employees and no pending petition, the employer properly avoided controversial involvement with the unit determination question and referred Local 286 to the Commission's processes. Neither an employer's announced preference for an existing unit structure, nor the mere fact that it happens to agree with an incumbent union about the impropriety of a proposed severance, could be a basis for finding a violation of RCW 41.56.140(2).

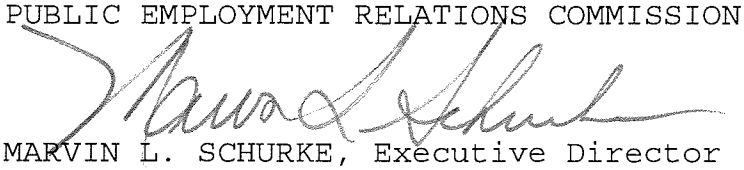
NOW, THEREFORE, it is

ORDERED

The complaints charging unfair labor practices filed in the above-captioned matters are DISMISSED as failing to state a cause of action.

Issued at Olympia, Washington, on the 8th day of July, 1997.

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.