STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ANACORTES EDUCATION ASSOCIATION, Complainant,	)	CASE NO. 6016-U-85-1124
vs.	)	DECISION 2464-A - EDUC
ANACORTES SCHOOL DISTRICT NO. 103, Respondent.	)	DECISION OF COMMISSION

Harriet Strasberg, attorney at law, Washington Education Association, appeared for the complainant.

Kane, Vandeberg, Hartinger & Walker, by William A. Coates, attorney at law, appeared for the respondent.

The alleged unilateral change at issue in this unfair labor practice case was reconciled by the parties through the grievance procedure in their collective bargaining agreement. We are asked to review the decision of Examiner William A. Lang, who dismissed the unfair labor practice charges on the basis of their previous resolution and awarded attorneys' fees and costs to the school district.

The charges in this case were filed after the Superintendent of the Anacortes School District, Dr. C. Duane Lowell, announced in a speech to faculty members that several teachers whose students had performed well on achievement tests would receive a certificate of excellence and a $50 increase in their classroom supply budgets. The recognition of teachers in this manner was not provided for in the parties' collective bargaining agreement.

The Anacortes Education Association (AEA) objected to Dr. Lowell's announcement, and filed both a grievance under the contract and these unfair labor practice charges. Soon thereafter, Dr. Lowell issued a statement in a public meeting of the school board announcing that the awards would not be issued and that his actions had been a mistake. He therein apologized to the teaching staff for the events which had occurred. Dr. Lowell's announcement at the school board meeting was reported upon in the Anacortes American newspaper.

The grievance was settled by the parties. The school district agreed "to cease and desist" from implementation of the awards, and it agreed to "follow only those criteria and procedures negotiated between the district and association for the purpose of evaluating teachers."

The unfair labor practice charges were not withdrawn. The Executive Director assigned an examiner without making any inquiry concerning the propriety of deferral to arbitration. After the employer filed its answer identifying no disputed issues of fact, the examiner cancelled the scheduled hearing and issued a ruling on the pleadings, holding that the charges were frivolous and a misuse of agency resources.

The Anacortes Education Association has petitioned for review, claiming that the employer committed an unfair labor practice, that the controversy was not moot, and that the award of attorneys' fees was improper.

The Anacortes School District supports dismissal of the complaint and the award of attorneys' fees, contending that no change actually occurred, that the controversy was moot, that there was no further effective remedy available through unfair labor practice proceedings and that the award of attorney's

fees would be good public policy (although it acknowledged it was "unable to find any basis for the Commission to follow precedent under 42 U.S.C. Sec. 1988" to award attorneys' fees).

DISCUSSION

We affirm the dismissal of the unfair labor practice charges, albeit on different or additional grounds. We reverse the award of attorneys' fees.

Existence of a Cause of Action

There are a three plausible theories upon which this case could be dismissed. In addition to the previous resolution of the dispute through the grievance process (mootness), it is arguable that this is purely a contractual dispute, so that we lack jurisdiction,[1] or that even if we have jurisdiction, we should defer to the remedial process selected by the parties in their contract. Further, were we to not dismiss the charges, we could nevertheless rule that no further relief is appropriate, since the school district has already agreed to cease and desist from repeating its transgression.

We conclude that dismissal is appropriate, and that the most appropriate theory therefore is that this is a proper matter for deferral to the grievance machinery in the contract. The notion of deferral to contractual dispute resolution machinery appears among the reported decisions of this agency at least as early as City of Richland, Decision 246 (PECB, 1977) and at least as recently as Hoquiam School District, Decision 2489 (PECB, 1986). Deferral has been common where employer conduct

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1 City of Walla Walla, Decision 104 (PECB, 1976); Clallam County, Decision 607-A (PECB, 1979).

at issue in a "unilateral change" unfair labor practice case is arguably protected or prohibited by the collective bargaining agreement between the parties. The complaint in this case neither specifically asserted a contract violation nor disclosed that a grievance was pending, although it mentioned that there was a collective bargaining agreement in existence. As the processing of the case went forward it became clear, however, that the association had claimed that the employer's conduct was prohibited by the collective bargaining agreement, and that the employer had even conceded the point. There is no allegation that the procedures used in reaching the grievance settlement or the settlement itself were not fair, or that they were repugnant to the purposes of the statute. See, Seattle School District, Decision 2079-B, 2079-C (PECB, 1986); Spielberg Mfg. Co., 112 NLRB 1080 (1955). Having asserted that the alleged conduct violated the collective bargaining agreement and prevailed in that argument, the association has removed the issue from the arena for bargaining protected by our unfair labor practice jurisdiction.

On a very practical level, we are not convinced that the association would gain anything by the exercise of our jurisdiction and remedial authority. It asks for a cease and desist order, which it essentially already has. It asks for an order requiring the employer to post notice of its violation, so that all bargaining unit members will be aware of the events which transpired, but we note that Dr. Lowell's announcement and apology were made at a public meeting of the school board, which was attended by several teachers and parents. Further, it was reported upon in the local press.

Sanctions for Frivolous Prosecution

We reluctantly reverse the examiner's award of attorneys' fees. We share the examiner's surprise that these charges were prosecuted after the grievance was settled. The association seems intent upon garnering an extra pound of flesh.

An award of attorneys' fees cannot be sustained unless such an award is based upon a statute, a contract or a recognized ground in equity. The precedent for awarding attorneys fees in unfair labor practice cases is found in State ex. rel. WFSE v. Board of Trustees, 93 Wn.2d 60 (1980) and Lewis County v. PERC, 31 Wn.App. 853 (Division II, 1982). In those cases, the authority to award attorneys' fees was inferred from RCW 41.56.160, which allows us "to issue appropriate remedial orders" in unfair labor practice cases.[2] Similarly, RCW 41.59.150(2) states that once the Commission has determined that an unfair labor practice has occurred, it may "take such affirmative action as will effectuate the purpose and policy of this chapter, ..." An express underlying condition to any remedy in both statutory provisions is that an unfair labor practice must have occurred, and the award must be against the party committing it.[3] There is nothing in Chapter 41.59 RCW which suggests that this Commission has the power to award

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2 The NLRB has based attorneys' fee remedies on its remedial authority under Section 10(c) of the NLRA. See, Heck's Inc., 215 NLRB 765, 767 (1974).

3 Other requirements for attorneys' fees also exist, viz: the award must be necessary to make the Commission's order effective, and the defense to the charges must be frivolous. Lewis County, supra.

attorneys' fees against the charging party in this situation.[4] We are admonished by the Educational Employment Relations Act (EERA) at RCW 41.59.110 to consider the "rules, precedents and practices of the National Labor Relations Board" in our administration of the EERA, but we find nothing in the NLRA and little in NLRB precedent that is helpful in this situation. 42 U.S.C. Sec. 1988, cited by the employer [having to do with civil rights actions], is too remote from the NLRA, NLRB and EERA to be of any assistance here.

NOW, THEREFORE, it is

ORDERED

1. The order dismissing the complaint is AFFIRMED.

2. The order assessing costs and attorneys' fees is REVERSED.

ISSUED at Olympia, Washington, this 10th day of November, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, Chairman

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner

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4 Equitable grounds, not applicable to the facts of this case, exist for the award of attorneys fees in certain situations. See, Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975); Letter Carriers v. U. S. Postal Service, 590 F.2d 1171 (D.C. Cir., 1978).