STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VANCOUVER ASSOCIATION OF EDUCATIONAL OFFICE PERSONNEL,	)	CASE NO. 6286-U-86-1211
Complainant,	)	DECISION NO. 2575 - PECB
vs.	)	
VANCOUVER SCHOOL DISTRICT,	)	ORDER OF DISMISSAL
Respondent.	)	

The above-entitled proceedings were commenced by a complaint charging unfair labor practices filed with the Public Employment Relations Commission (PERC) on March 14, 1986. The complaint alleged that the Vancouver School District had violated RCW 41.56.140(4) and (1), by refusing to bargain with the Vancouver Association of Educational Office Personnel (VAEOP). A preliminary ruling was issued on May 12, 1986, assigning an examiner for further proceedings. A second preliminary ruling was issued on July 3, 1986, cancelling a scheduled hearing date in the context of a "disclaimer" filed by VAEOP in a representation proceeding then pending before PERC.[1] The complainant was ordered to show cause why the complaint should not be dismissed as failing to state a claim for relief which can be granted. On July 21, 1986, the complainant filed a "memorandum on dismissal", wherein it responded to the show-cause order, together with an amended complaint. The matter is again before the Executive Director for a preliminary ruling pursuant to WAC 391-45-110.

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1 Vancouver School District, Case No. 6425-E-86-1129, filed by "Classified Public Employees Association/ WEA" on June 3, 1986. Notice is taken of the proceedings, documents on file and certification issued in that proceeding.

The amended complaint recites a history in which VAEOP has been the exclusive bargaining representative of clerical employees of the respondent. The parties are alleged to have had a two-year collective bargaining agreement in effect through the 1985-86 school year, with a wage opener in 1985. It is alleged that VAEOP began investigating affiliation with another union in the Autumn of 1984 (i.e., around the time the most recent collective bargaining agreement became effective). VAEOP opened negotiations with the respondent on the wage opener in 1985, and those negotiations eventually were carried on under the auspices of a PERC mediator, but no agreement was reached. The amended complaint recites various steps taken by VAEOP towards affiliation with the Classified Public Employees Association/WEA (CPEA/WEA), culminating with an "election"[2] conducted in January, 1986. The amended complaint then recites the making of a request to the employer for recognition of the affiliation and resumption of bargaining on the 1985 wage opener, and the employer's refusal to bargain.

The amended complaint cannot be taken in isolation. Matters of record before the Commission in this case file and in related proceedings have a bearing on the determination of whether a cause of action presently exists for unfair labor practice proceedings. A number of conflicts are noted between the allegations of the amended complaint and the behavior of the parties on matters of record.

The original complaint charging unfair labor practices filed in this matter on March 14, 1986 listed only "Vancouver Association of Educational Office Personnel (VAEOP)" as complainant.

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2 The "election" was not conducted by or under the auspices of the Public Employment Relations Commission. The docket records of the Commission show no representation case pending before the Commission in January, 1985 that involved these parties.

Its omission of any reference to the CPEA/WEA conflicts with the allegations of the amended complaint, which would have PERC find a valid affiliation was consummated with an election conducted on January 21, 1986, some 52 days before the original complaint was filed.

Different from the allegations of an "affiliation" between VAEOP and CPEA/WEA that are found in the amended complaint, the original complaint alleged that:

> 1. The employer has refused to bargain with VAEOP and its contracted bargaining consultant, Doc Dengenis.
>
> 2. The contract contains clear and unambiguous language stating the Association has the right to use outside consultants in bargaining.
>
> (emphasis added)

The name of "Doc Dengenis" was listed on the original complaint in the space provided for the "agent or attorney" for the complainant.[3]

When the case was first reviewed pursuant to WAC 391-45-110, the situation appeared to involve a complete shutdown of bargaining between an independent organization (VAEOP) and the employer, with a possible sub-issue concerning the right of the union to bring in an outside consultant to assist it at the bargaining table. Such allegations clearly state a cause of action, and were processed accordingly.

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[3] Only the address given for Dengenis - that of the Washington Education Association office in Federal Way- provides a clue to the possible existence of a relationship between VAEOP and the WEA.

The representation petition filed by CPEA/WEA on June 3, 1986 made no reference to VAEOP. The first reference in that case file to VAEOP is the collective bargaining agreement supplied by the employer on June 16, 1986 in response to a routine request by PERC for a list of employees and copy of any existing contract.

On June 17, 1986, the Commission received a letter on the letterhead of the Washington Education Association, as follows:

> The Vancouver Association of Educational Office Personnel has filed an unfair labor practice charge docketed with PERC under Case No. 6286-U-86-1211. The Association does not wish this unfair labor practice complaint to block the representation in the above-cited matter. Please consider this letter a request from the Association to proceed with the representation case proceedings in a manner as expeditious as possible.

The letter was signed by the attorney listed on the representation petition as counsel for the CPEA/WEA.

The existence of a cause of action in the instant unfair labor practice case was called into question in the preliminary ruling letter issued on July 3, 1986 because of a letter written on the letterhead of VAEOP and filed with PERC on June 27, 1986, as follows:

> This is to inform you that the Vancouver Association of Educational Office Personnel does not wish to be on the ballot for the upcoming election for the Vancouver secretaries, clerks and staff assistants.
>
> Sincerely,
>
> Carla Gooding
> V.A.E.O.P. President 1986-87

On the face of the documents filed with the Commission up to that time, VAEOP appeared to be a separate organization from the CPEA/WEA. Once VAEOP had disclaimed the bargaining unit in the context of pending representation proceedings initiated by the CPEA/WEA, there appeared to be no possibility of finding a "refusal to bargain" violation favoring VAEOP or of ordering the employer to bargain with VAEOP.

The memorandum and amended complaint filed on July 21, 1986 were signed by the attorney who was identified in the representation petition as counsel for the CPEA/WEA. In essence, those documents suggested, for the first time on this record, that VAEOP and CPEA/WEA may be one-and-the-same by reason of a valid affiliation transaction. This conflicted, of course, with the previous documents giving VAEOP the appearance of a separate organization, but the matter was set aside for further consideration. The order of dismissal contemplated by the July 3, 1986 preliminary ruling was never issued.

The "internal affairs" rights of unions concerning affiliation and merger have been the subject of recent decisions of both PERC and of the Supreme Court of the United States.[4] The Pierce County[5] decision relied upon by the complainant involved a merger of two local unions of the same international union, and was particularly influenced by the fact that all of the employees there had started out under the same constitution and bylaws. Accordingly, Pierce County would seem to be of questionable value as precedent for the situation at hand, where both the original complaint and the amended complaint portray VAEOP as starting out entirely independent of the

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4 Financial Institutions Employees v. NLRB, ___ U.S. ___, 106 S.Ct. 1007 (1986) [involving employees of Seattle-First National Bank].

5 Pierce County, Decision 2209 (PECB, 1985).

CPEA/WEA. The more recent decision in Skagit Valley Hospital, et. al., Decision 2509 (PECB, October 20, 1986) affirms the validity of an affiliation of two formerly independent organizations through an exercise of internal union affairs, where conducted with due process under the constitutions and bylaws of the organizations involved. Patience is a virtue in such situations, since they must be determined on the basis of a full evidentiary record made at a hearing. The proceedings in Skagit involved extensive unfair labor practice hearings, and the decision was issued almost 14 months after the cases were filed. Assuming in the instant case that all of the facts alleged in the amended complaint concerning "affiliation" were true and provable, the most that could have been done under Chapter 391-45 WAC in July of 1986 would have been to re-start the hearing process in this unfair labor practice case. One of the painful realities of such situations is that, even under the best of circumstances, a bargaining order stemming from this unfair labor practice case was months away.

Correspondence contained in the representation case file indicates that by July 21, 1986, the employer was resisting signing an election agreement under Chapter 391-25 WAC because of the potential interest of additional labor organizations, at least one of which appears to have participated in the "election" conducted by VAEOP.[6] Another such organization filed a letter with PERC indicating that it was attempting to obtain authorization cards to support a motion for intervention. Such a background could well have given CPEA/WEA cause for concern

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6 One of the references in that correspondence was to an organization other than CPEA/WEA having received 100 votes in the "election". The amended complaint alleges that 247 employees voted in the VAEOP "election", but does not allege the number of employees who voted for CPEA/WEA. The amended complaint indicates that there are 264 employees in the bargaining unit.

about whether pursuit of these unfair labor practice proceedings would be fruitful. The whole purpose of representation proceedings under Chapter 41.56 RCW and Chapter 391-25 WAC is to identify the one organization which has the support of a majority of the employees, so as to be entitled to certification as exclusive bargaining representative of those employees. An employer faced with two groups, each claiming to be the incumbent, has defenses available in a "refusal to bargain" case which would not be available in the absence of such facts. Additionally, it appears that substantial issues might have been raised in this unfair labor practice case as to whether VAEOP had fouled the validity of any affiliation transaction by its conduct (such as by holding a home-grown representation election giving employees multiple alternatives from which to choose).

The next event of significance was the filing, on August 1, 1986, of a letter signed by VAEOP President Gooding on the letterhead of VAEOP, as follows:

> Please disregard my letter to you dated June 25, 1986. Our association would like to have the following choices listed on the upcoming affiliation election ballot:
>
> VAEOP
>
> VAEOP/CPEA
>
> No representation.
>
> Thank you.

Thus, contrary to the allegations of the amended complaint filed in this case only 10 days earlier, VAEOP sprang back to life in the representation case, taking on the appearance of an entity separate and apart from CPEA/WEA.

Representatives of the employer and of the CPEA/WEA joined in an election agreement filed with the Commission on August 13, 1986. They therein adopted the same ballot choices proposed in Ms. Gooding's letter filed on August 1, 1986, adding only "WEA" to the "VAEOP/CPEA".

The Commission conducted a representation election by mail ballot in Case No. 6425-E-86-1129, providing the employees with a choice between "VAEOP", "VAEOP/CPEA/WEA" and "NO REPRESENTATION". The tally of ballots issued on October 1, 1986 indicates that 221 ballots were cast for "VAEOP/CPEA/WEA", while 9 ballots were cast for "VAEOP" and no ballots were cast for "NO REPRESENTATION". No objections were filed. A certification of "VAEOP/CPEA/WEA" was issued on October 10, 1986.

Representation proceedings can be an expedient alternative to unfair labor practice litigation in affiliation and merger situations. Even with the detours and delays noted above, the representation proceedings in Case No. 6425-E-86-1129 were processed from filing of the petition to certification in less than 5 months, which is far less time than even the most optimistic-realistic estimate of the time necessary to litigate the "successor union" issue in an unfair labor practice case. On the other hand, there are some costs associated with taking the expedient course.

By signing an election agreement putting "VAEOP" on the ballot for the representation election, the other parties were necessarily stipulating that VAEOP was an existing lawful organization (i.e., a "bargaining representative" within the meaning of RCW 41.56.030(3)) which was qualified to be certified as exclusive bargaining representative of the employees in the unit agreed to be appropriate. Since the employees were being offered a choice between "VAEOP" and "VAEOP/CPEA/WEA"

(together with the statutorily required availability of casting a ballot against having union representation) the parties necessarily recognized that VAEOP had an existence separate and apart from VAEOP/CPEA/WEA. Such stipulations are entirely inconsistent with the "affiliation" theory advanced in the amended complaint. For the unfair labor practice case to state a cause of action, it is necessary for VAEOP to have ceased to exist on or about January 21, 1986, and only VAEOP/CPEA/WEA survived. As in Yakima County, Decision 2380-A (PECB, October 10, 1986), where the Commission found that stipulations made in the second of two representation proceedings had breathed new life into a labor organization which had been found in the earlier case to have suffered a "schism", the stipulations made by the parties in this situation: (1) to list VAEOP as the incumbent exclusive bargaining representative, and (2) to make a choice for VAEOP available to employees on the election ballot, confirm that VAEOP and its bargaining rights remained alive until the new exclusive bargaining representative was certified.

The "refusal to bargain" charges stemming from the VAEOP/employer relationship which pre-dated the filing of the representation petition no longer state a cause of action. VAEOP stood for election and lost its status as exclusive bargaining representative of the employees. Clover Park School District, Decision 692 (EDUC, 1979).

The bargaining rights of VAEOP/CPEA/WEA commenced with October 10, 1986, the date of its certification. The expedient course has been taken, and its bargaining rights for the future are clear, but that newly-certified exclusive bargaining representative does not have a cause of action for unfair labor practice charges to demand bargaining for a period when the

employees were subject to a representation petition[7] or were represented by another organization (VAEOP).

NOW, THEREFORE, it is

ORDERED

The complaint and amended complaint charging unfair labor practices filed in the above-entitled matter are dismissed for failure to state a cause of action.

Dated at Olympia, Washington, this 20th day of November, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

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7 See, Yelm School District, Decision 704-A (PECB, 1978).