STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JOHN R. MROZ, Complainant, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 6, Respondent.	CASE 7650-U-88-1607 DECISION 3245-A - PECB
JOHN R. MROZ, Complainant, vs. KING COUNTY, Respondent.	CASE 7651-U-88-1608 DECISION 3351 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Abelite & Gallagher, by J. Michael Gallagher, Attorney at Law, appeared for the complainant.

Hafer, Price, Rinehart and Scherwin, by John Burns, Attorney at Law, appeared on behalf of SEIU Local 6.

Laura Rasset, Labor Relations Specialist, appeared on behalf of King County.

On October 31, 1988, John R. Mroz filed complaints charging unfair labor practices with the Public Employment Relations Commission, alleging that his exclusive bargaining representative, Service Employees International Union, Local 6, and his employer, King County, had committed unfair labor practices in violation of RCW

41.56.140 and 41.56.150. The Executive Director reviewed the complaints under WAC 391-45-110, and the complainant was directed to file additional information. An amended complaint was filed on February 7, 1989. The Executive Director then issued a preliminary ruling on February 28, 1989, finding that a cause of action could exist against both the union and employer. A hearing on the consolidated matters was conducted before Examiner Walter M. Stuteville on July 17 and 18, 1989, in Seattle, Washington. The parties filed post-hearing briefs.

BACKGROUND

At all times relevant to this proceeding, John R. Mroz was a utility worker employed by King County in its Natural Resources and Parks Department. As an employee of King County, Mroz was within a bargaining unit represented by Local 6, and was covered by the collective bargaining agreement between the employer and union. Sally Obringer is the union business agent responsible for administering the collective bargaining agreement covering the Natural Resources and Parks Department. Christine Spieth is the secretary-treasurer of the union.

As an employee of King County, Mroz worked under the direction of Ken Croy, whose title has been variously called "crafts coordinator" or "equipment coordinator". Croy and others who perform "leadworker" responsibilities and/or supervisory functions on behalf of the employer are nevertheless within the same bargaining unit as utility workers.[1]

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[1] The union and the employer were in negotiations for a new collective bargaining agreement at the time of the hearing in this matter. The composition of the bargaining unit was under discussion in those negotiations.

During the latter months of 1987, Mroz began bringing a tape recorder to his assigned work site. He testified that he used the tape recorder only to record his own words for later incorporation into a diary of daily events. Other employees apparently believed that Mroz was recording their conversations, and they complained to both Croy and to the union concerning Mroz's tape recorder. Croy met with Mroz, and requested that Mroz not bring the tape recorder to work. Mroz refused the request.

Reacting to complaints from other bargaining unit members, Obringer contacted the employer,[2] and requested that action be taken to stop the disruption caused by the presence of the tape recorder. Croy thereafter consulted with his immediate supervisor, John Keizer, and Employee Relations Manager Wes Moore, after which he issued a written directive to Mroz dated January 15, 1988, as follows:

> John, as we discussed this morning concerning a resolution to the issue of your tape recorder, a decision has been made. Since you will not comply with my request to remove the recorder from the job site, I am, at this time, giving you a direct order to leave the recorder off the job site.
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> I have discussed this with John Keizer and Wes Moore of Personnel. It was decided that the direct order be issued and that if the order is not followed, further disciplinary action will be taken.

Mroz appealed the directive through the grievance procedure in the collective bargaining agreement. During the processing of that grievance, Mroz was represented by Christine Spieth. As a result of the grievance, the parties agreed to remove the word "further" from Croy's directive, thus acknowledging that the directive was

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[2] Obringer testified that she talked to Bill Hutsenpillar, chief of park maintenance. Croy testified that, in fact, Obringer talked to him concerning Mroz's tape recorder.

a warning of potential discipline but was not, itself, a disciplinary action. Other issues remained unresolved and the grievance was processed through the contractual procedure, up to the scheduling of an arbitration hearing.

The grievance was apparently settled "at the courthouse steps" on the day of the scheduled arbitration hearing. Under the terms of that settlement, Mroz was permitted to bring his tape recorder to the job site, so long as it did not interfere with the performance of his work or with the work of other employees.[3]

PRE-HEARING PROCEDURES

In a January 18, 1989 preliminary ruling letter, the Executive Director provided the following analysis:

> You have clarified that the basic nature of the complaint is that the employer and union have tolerated or conspired to maintain a bargaining relationship in which the inclusion of "supervisors and other management personnel" in the same bargaining unit with their subordinates has resulted in conflicts of interest and prejudice to the bargaining rights of rank-and-file employees. The possibility of such a conflict has long been recognized by the Commission, and was the basis for an order in City of Richland, Decision 279-A (PECB, 1978) . . . , excluding supervisors from a bargaining unit.

The February 7, 1989 amended complainant contained the following statement:

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3 At the hearing in this matter, Mroz stated some dissatisfaction with the terms of that settlement, asserting that he had wanted a "restraining order" issued against the King County Administrator to be included in the grievance settlement.

> Thus, an actual conflict of interest, unfair labor practice and breach of the duty of fair representation exists: the union advises the employer that adverse action is appropriate and then attempts to represent the employee against whom the adverse action is taken in a grievance filed by that employee.

Based upon that amended complainant, the Executive Director limited the cause of action assigned for hearing to:

> The actions of the employer and union to maintain a bargaining relationship in a mixed unit of supervisors and rank-and-file employees resulting in prejudice to the rights of the complainant due to conflicts of interest within the bargaining unit.
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> . . .
>
> . . . the complaint does not state a cause of action concerning, and the Commission will not determine the merits of, the complainant's underlying grievance concerning use of a tape recorder on the job.

The union filed its answer on April 20, 1989, and a notice of hearing was issued on April 21, 1989.

The union filed a motion for summary judgment on May 31, 1989, wherein it alleged that the Commission does not have jurisdiction in the above-entitled matter. It argued that a complaint which alleges a breach of the duty of fair representation does not state a cause of action within the jurisdiction of the Commission, and it cited Othello School District, Decision 3037 (PECB, 1988) as the most recent precedent on the subject.

On June 9, 1989, the union filed a supplemental motion for dismissal of the unfair labor practice charges against it. In that motion, the union recognized that the issue of fair representation had been eliminated from the case by the Executive Director's

preliminary ruling, but it then moved for dismissal of the remaining charge relating to the propriety of supervisors being included in the existing bargaining unit. The union argued that the statutes delineating unfair labor practice charges, RCW 41.56.140 and 41.56.150, do not provide for the determination of appropriate bargaining units or for the splitting up of bargaining units. It argued, further, that the complainant had not followed the procedures under Title 391 WAC or RCW 41.56.060 regarding determination of an appropriate bargaining unit, so that there could be no issue remaining to be litigated between the parties.

King County filed its answer on July 3, 1989. The employer also denied liability in this proceeding on the basis that the issue was more appropriately a unit clarification case than an unfair labor practice case.

On July 3, 1989, the union filed a second supplemental motion for dismissal, this time alleging that complainant Mroz had, in fact, been terminated from King County employment on June 28, 1989, with no reasonable anticipation of returning to work. Therefore, the union reasoned, Mroz no longer had standing to proceed with the matter charged before the Commission.

The union's motion for dismissal and its first supplemental motion for dismissal were denied by a written order issued by the Examiner on July 7, 1989.[4]

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[4] King County (SEIU, Local 6), Decision 3245 (PECB, 1989). The Examiner ruled that an employee who believes that his or her collective bargaining rights have been interfered with or prejudiced because of a bargaining unit composition maintained by his or her employer and an exclusive bargaining representative does, indeed, have recourse through the unfair labor practice procedures of Chapter 41.56 RCW.

The union's second supplemental motion for dismissal was denied by the Examiner at the opening of the hearing on July 17, 1989. The complainant's allegations relate to facts and events which all occurred while Mroz was an employee of King County within a bargaining unit represented by the union. The complainant had standing when the events giving rise to his unfair labor practice charges occurred, and the subsequent termination of his employment relationship with the employer is of no consequence.

POSITIONS OF THE PARTIES

The complainant argues that a conflict of interest became apparent during the course of processing the tape recorder grievance, because the union was advising the employer to ask an employee to refrain from certain conduct, while simultaneously defending the employee's right to engage in that same conduct. The complainant argues further, that this conflict of interest results from the union continuing to represent, and from management continuing to bargain with a bargaining unit which includes both rank-and-file employees and their supervisors. The complainant thus charges that there is collusion between management and the union in the processing of grievances, which results in an interference in the protected rights of rank-and-file bargaining unit members. Finally, the complainant contends that the fact it took 18 months to resolve the tape recorder grievance proves a lack of diligence on the part of the union.

The union responds that the complainant did not prove interference with his statutory rights. It argues that the union never suggested disciplinary action against the complainant, but proposed a possible resolution of the issue in its appropriate role as the representative of all bargaining unit members. The union also asserts that the complainant did not prove that interference

resulted from the composition of the bargaining unit, or that Croy was, in fact, a supervisor. Finally, the union reiterates its assertion that an individual employee has no standing to question the composition of a bargaining unit.

The employer argues that the Executive Director's reliance on a potential, rather than actual, conflict of interest comes from unit clarification case analysis that is inappropriate as a standard in an unfair practices case. Further, the employer contends that neither it nor the union should be held accountable for unfair practices concerning an issue which would otherwise involve a Commission hearing to be resolved. The employer argues that the Richland standard should only be applicable where a clear detriment to protected rights is proven, and that such is not the case here. Finally, the employer asserts that it should not be held liable for a situation that, by administrative rule, it could not have changed during the life of the present collective bargaining agreement.[5]

DISCUSSION

The Existence of a Cause of Action

The briefs filed by both the employer and union re-argue that an individual employee should not be allowed to file an unfair labor practice charge where modification of a bargaining unit is the actual remedy requested. In reality, their arguments go to the extent of the remedies available in an unfair labor practice case. The Commission has jurisdiction concerning both unit determinations, under RCW 41.56.060, and unfair labor practices, under RCW 41.56.160. The latter statute provides:

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[5] The employer refers to WAC 391-35-020, and to the policy enunciated by the Commission in Toppenish School District, Decision 1143-A (PECB, 1981).

> COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS. The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

Unit determination is not a subject for bargaining in the usual mandatory/permissive/illegal sense, although parties may agree on units. City of Richland, Decision 279-A (PECB, 1978); affirmed, 29 Wn.App 599 (Division III, 1981); review denied 96 Wn.2d 1004 (1981). Under the clear language of RCW 41.56.160, the availability of unit clarification proceedings does not diminish the authority of the Commission, under the unfair labor practice provisions of the statute, to remedy a violation where it finds that an employer and union have made an agreement on unit determination that interferes with employee rights.

The conclusion reached in the foregoing paragraph is reinforced by the fact that individual employees lack standing to file unit clarification petitions. WAC 391-35-010 limits standing in unit clarification proceedings to the employer and the incumbent exclusive bargaining representative. The sole and exclusive remedy for an employee who believes that his or her rights under Chapter 41.56 RCW have been prejudiced by action of the employer and/or union is through the unfair labor practice procedure. This extends to situations where the prejudice to employee rights is alleged to flow from the way a bargaining unit is composed or conducted. The cases cited by the union, City of Seattle, 1229-A (PECB, 1982); City of Seattle, 2611 (PECB, 1987); City of Seattle, 2612 (PECB, 1987); and City of Seattle, 2640 (PECB, 1987), are inapposite. They were all unit clarification cases, and are not relevant here.

Conflict of Interest

Chapter 41.56 RCW does not define "supervisor", nor does it exclude supervisors from its coverage. In fact, a supervisor is a "public employee" within the meaning of the statute. METRO v. Labor and Industries, 88 Wn.2d 925 (1977). As an exercise of its unit determination authority under RCW 41.56.060, the Commission has long held that supervisors should be excluded from the bargaining units which contain their rank-and-file subordinates, in order to avoid a potential for conflicts of interest within the bargaining unit. City of Richland, supra. In implementing that unit determination policy, the Commission has looked for the types of authority over employees that are listed in the definition of "supervisor" found in Section 2(11) of the National Labor Relations Act and the similarly worded definition found in RCW 41.59.020(d):

> (d) . . . supervisor . . . means any employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment, . . .

The potential for conflict of interest was described in more pragmatic terms in the Richland case, as follows:

> The problem(s) inherent in grouping supervisors and nonsupervisors in the same bargaining unit are evident in the instant case. The president of the union local is a battalion chief. As a supervisor he owes a certain fiduciary duty to management. As union president he also owes a fiduciary duty to the union membership. The dilemma is apparent when an employee under his supervision files a grievance with him. In whose interest

> should he act? What pressures will he receive from either the City of the Union? Further, is it not more likely that grievances with regard to the battalion chief's actions, including imposed discipline, would not be filed? How could the aggrieved employee count on the support of his union? Wouldn't discussion at union meetings of problems with supervision be stifled? Supervisors tend to owe a higher degree of allegiance to management than do the rank and file, or at least this is traditionally the rank and file's view. The collective bargaining process would best be served by generally excluding supervisory personnel from a unit composed of subordinate employees. This conclusion was reached as well by the NLRB, prior to the 1947 Taft-Hartley Act's exclusion of supervisors from the ambit of the National Labor Relations Act.

Thus, the focus of attention in such matters is on "authority". The job titles assigned to positions by employers are not conclusive in this analysis.

It is important to note that the complainant has the burden of proof in an unfair labor practice case. WAC 391-45-270. That circumstance is distinctly different from unit clarification proceedings, which are "investigatory" in nature. To sustain his allegation of supervisory interference with the exercise of his collective bargaining rights as a rank-and-file employee, the complainant must establish two elements: First, the complainant must prove that the bargaining unit does, indeed, include supervisors as defined by Commission precedent; second, the complainant must prove that the inclusion of such supervisors in the bargaining unit has, in fact, resulted in interference with his rights and lawful union activity as an employee. It is not enough to merely prove that there are supervisors in the bargaining unit, or that there were differences of view among the rank-and-file employees in the unit. In this case, the complainant presented only limited evidence on this point.

Under direct examination by the complainant's counsel, Croy stated that he believes that he is a supervisor, and that the "mixed" bargaining unit created a conflict for him in the fulfillment of his responsibilities. Such testimony does not shed much light on his actual authority under the Commission's precedent on supervisor exclusions from bargaining units.

More illuminating is an analysis of the actions taken by Croy during the processing of the tape recorder grievance. Upon receiving complaints from employees where he and Mroz both worked, Croy initiated a discussion with Mroz concerning the tape recorder. Croy was rebuffed. Rather than acting directly and independently, as would be consistent with the approach of a person who really believed that he was empowered to act, Croy consulted with his own immediate supervisor and with the employer's labor relations director, both of whom are management personnel outside of the bargaining unit. From that consultation came the direct order to Mroz that was signed by Croy, but backed by the authority of Support Supervisor John Keizer.

Although Croy himself believed that his "direct order" to Mroz was a disciplinary action, the union argued, and the employer eventually agreed, that Croy's memorandum was not a disciplinary action. Rather, the order was characterized as a warning of potential disciplinary action. Thus, Croy did not "discipline, . . . adjust . . . grievances, or . . . effectively recommend such action" as an exercise of independent judgment.

The complainant is not persuasive with his argument that Croy participates in "management" meetings with other supervisors concerning job assignments and employee discipline. The issue here is not whether he confers with supervisors or managers, or even whether Croy has some "management" or "coordinator" responsibilities. The issue is Croy's relationship with the rank-and-

file employees in the bargaining unit, and whether he exercises supervisory control over them.

This case must be decided only on the evidence presented by the complainant. RCW 41.56.160. The facts available to the Examiner lead to the conclusion that Croy is likely at the first level of authority, with little or no indicia of supervisory responsibilities. Croy demonstrated no independent ability to insist on compliance with his instructions to Mroz, or to independently institute disciplinary action. It is the impact of an individual's actual authority over the members of the bargaining unit which creates either the potential for or an actual conflict of interest. Renton School District, Decision 3287 (PECB, 1989). Without further evidence that an employee was involved in directing the workforce: evaluating; hiring; or firing other employees; or any other of the criteria for the establishment of supervisory status, the Examiner finds no basis to find that Croy exercised supervisory responsibilities.

If Obringer did in fact contact Croy, as he testified she did, such contact was not an interference with rights protected by Chapter 41.56 RCW. Croy had no direct authority to act on information from the conversation, and he acted only as a conduit for information passing between Mroz and his own superiors. He did not act independently as a supervisor with the responsibility in the matter. The complainant's charge that the employer and union participated in the maintenance of a conflict of interest cannot be sustained.

Duty of Fair Representation

Without the presence of a supervisor in the bargaining unit, the conflict of interest charge against the union is reduced to a charge of a breach of the duty of fair representation in the

processing of Mroz's tape recorder grievance. As a general proposition, the Commission does not assert jurisdiction through the unfair labor practice provisions of the statute to determine or remedy violations of collective bargaining agreements. City of Walla Walla, Decision 104 (PECB, 1976). Nor does it determine or remedy breaches of the duty of fair representation exclusively involving the processing of contractual grievances. Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982). The Commission has asserted jurisdiction, however, over "duty of fair representation" allegations involving a union's discriminatory alignment of itself in interest against members of the bargaining unit it represents. Elma School District, Decision 1349 (PECB, 1982).

Faced with the not-uncommon problem of having conflicting opinions within a single bargaining unit, the union chose to appoint different staff persons to represent those factions during the processing of the tape recorder grievance. Obringer had been discussing the issue with members of the bargaining unit who were opposed to the use of a tape recorder by Mroz on the job site, so a more senior union official, Spieth, was designated to represent Mroz. It was observed in City of Pasco, Decision 2327 (PECB, 1985), that there is no statutory requirement that guarantees that each member of a bargaining unit will have their individual goals accomplished. In an objective examination of this situation, it would appear that the union acted fairly. Regardless of whether a conflict of interest had occurred with the phone call by other bargaining unit employees and/or supervisors to Obringer, the union attempted to insulate the grievant from any further effects of such discussions.

In light of the nature of the grievance, which did not involve a loss of work time or wages, the union acted fairly and in a non-arbitrary fashion in its attempt to resolve the issue. It was not,

for example, obligated to hire outside counsel for Mroz. As a matter of fact, the union could have decided to support those employees who objected to the presence of the tape recorder at the work site, and to refuse Mroz support for his grievance, as long as that determination was not arbitrary, discriminatory or in bad faith. Allen v. Seattle Police Officer's Guild, 32 Wn.App. 56 (Division I, 1982). The complainant has failed to sustain his burden of proof in this regard.

The Examiner similarly remains unpersuaded by the complainant's charges that the union was dilatory in its processing of the grievance during the 18 months that it remained pending, or that the union improperly attempted to persuade Mroz to drop the tape recorder grievance. The complainant did not explain how the time spent processing the grievance prejudiced either the issue or Mroz himself. Again, there was no consideration of lost work time or back wages in the processing of the grievance. Although Mroz explained how he used the tape recorder on the job, he did not testify that he was negatively impacted by not having the recorder available during that time period. There was no testimony that Mroz's co-workers found the use of a tape recorder necessary to their successful completion of their assignments. Thus, the Examiner concludes that the union could properly have deemed the tape recorder grievance to be a low priority issue, and a "no-win" situation for the union. The complainant's arguments concerning the union's attempts to get the grievance dropped appear to imbue the issue with a significance not apparent to this Examiner. The issue that gives rise to this argument is clearly de minimis, given the nature of the grievance, and would not persuade this Examiner to rule against the union.

FINDINGS OF FACT

1. King County is a public employer within the meaning of RCW 41.56.030(1).

2. Service Employees International Union, Local 6, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of King County employees which includes utility workers employed in the King County Natural Resources and Parks Division. Sally Obringer is the union business representative assigned to the utility workers bargaining unit. Christine Spieth is the secretary-treasurer of the union.

3. John Mroz was an employee of the King County Natural Resources and Parks Division, and a member of the bargaining unit represented by SEIU Local 6, at all times pertinent to this case. Mroz worked under the immediate direction of Ken Croy, an equipment coordinator employed within the bargaining unit represented by SEIU Local 6.

4. Late in 1988, some of Mroz's co-workers complained about his bringing his personal tape recorder to the job site. Following those complaints, Obringer contacted the King County Resources and Parks Division to relay the employee concerns.

5. Croy discussed the use of the tape recorder with Mroz and directed that he stop bringing it to the work site. Mroz refused to comply with Croy's directive.

6. Croy thereafter consulted with his supervisor, John Kaiser, and the employer's Employee Relations Director, Wes Moore. On January 15, 1989, Croy issued a written notice to Mroz,

invoking the name and authority of Kaiser to warn Mroz against bringing his tape recorder to the work site.

7. Mroz filed a grievance concerning the warning issued to him by Croy. He was represented by Spieth during the processing of the grievance. The employer and union agreed that the notice issued by Croy was not itself a disciplinary action.

8. The grievance was scheduled for arbitration, but was settled between the exclusive bargaining representative and the employer on the date of the scheduled arbitration hearing.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. In his decisions and actions in relation to the use of a tape recorder at the work site by John Mroz and in relation to the grievance filed by John Mroz, Ken Croy did not demonstrate that his position carries with it the indicia of a supervisory position that could properly be excluded under RCW 41.56.060 from a bargaining unit which includes rank-and-file employees of the employer.

3. Under the circumstances described in the record in this proceeding, King County and SEIU Local 6 have not interfered with the protected rights of the complainant under Chapter 41.56 RCW by maintaining a bargaining relationship for a bargaining unit which included both Ken Croy and John Mroz.

4. Under the circumstances described in the record in this proceeding, SEIU Local 6 did not breach its duty of fair

representation by taking 18 months to process the grievance filed by John Mroz to arbitration, or by asking the grievant to consider dropping the grievance.

ORDER

1. The complaint charging unfair labor practices filed against King County in Case 7650-U-88-1607 is hereby DISMISSED.

2. The complaint charging unfair labor practices filed against Service Employees International Union, Local 6, in Case 7651-U-88-1608 is hereby DISMISSED.

Issued at Olympia, Washington, the 17th day of November, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

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