STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PORT OF SEATTLE, Employer	
HUGH D. WEINREICH, Complainant, vs. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 9, Respondent.	CASE 7850-U-89-1679 DECISION 3294-B - PECB
HUGH D. WEINREICH, Complainant, vs. PORT OF SEATTLE, Respondent.	CASE 7873-U-89-1687 DECISION 3295-B - PECB DECISION OF COMMISSION

Hugh D. Weinreich, appeared pro se.

Michael F. Pozzi, Attorney at Law, appeared on behalf of the union.

Bogle and Gates, by Peter M. Anderson, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on timely petitions for review filed by International Longshoremen's and Warehousemen's Union, Local 9 (union) and the Port of Seattle (employer). Both the union and employer seek reversal of a decision issued on January 16, 1991, by Examiner William A. Lang.[1] The Examiner found

[1] Port of Seattle (ILWU Local 9), Decisions 3294-A and 3295-A (PECB, 1991).

that the union and employer had both committed unfair labor practices in violation of provisions of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

BACKGROUND

The Port of Seattle conducts warehouse and shipping operations at Piers 91 and 106 on the Seattle waterfront. Pier 91 contains a cold storage facility designed to hold perishable products at a constant temperature of 34 degrees Fahrenheit. Pier 106 is the larger of the two facilities, and contains a number of warehouses in which cargo is stored for shipment. The number of warehousemen employed by the Port of Seattle on any given day is determined by the number of ships unloading or loading at these two piers.

International Longshoremen's and Warehousemen's Union, Local 9, is the exclusive bargaining representative of warehousemen employed by the Port of Seattle at Piers 91 and 106. The union and employer have been parties to collective bargaining agreements over a period of many years. The relevant agreement covered the period from July 1, 1986 through June 30, 1989.

The Hiring Hall

The union manages a hiring hall from which the Port of Seattle and other employers can obtain warehousemen, when needed.[2] The hiring hall is operated in accordance with a "Policy Statement For Operating A Joint Dispatch Hall", dated December 9, 1986. A standing joint committee, known as the "J.C.", is comprised of four union members (two members of the union's executive board and two members from its "Pegboard Committee"), together with an equal

---

[2] The record indicates the Port of Seattle was the only employer using the hiring hall, during the relevant time, to supply its fluctuating requirements for warehousemen.

number of employer representatives. The J.C. qualifies applicants based on job requirements. Its decisions on qualifications are final, and are not subject to contractual grievance procedures. The J.C. establishes the number of positions that are needed to fill industry requirements, using three lists for determining dispatch priorities, as follows:

THE "A" BOARD lists persons who have worked in the warehouse industry for 1000 hours per year for a minimum of five years.

THE "B" BOARD lists persons who have worked in the industry for 1000 hours per year for a minimum of two years.

THE "C" BOARD consists of persons identified as being qualified, but who do not meet the experience requirements for the "A" or "B" boards.

Applicants for casual employment pay a fee for the hiring hall service.[3] Typically, an individual seeking work as a warehouseman would go to the hiring hall and indicate his availability for assignment by placing a peg in the hole opposite his name on the appropriate board. When an employer needs workers, it calls the union dispatcher,[4] stating the number of employees that are to report for work at 8:00 a.m. the following day. The dispatcher completes a form noting the name of the foreman making the request and the location where the work is available. The dispatcher then refers persons for the work order, starting with those who are "pegged in" on the "A" board, moving next to those who are "pegged in" on the "B" board, and then finally moving to those who are "pegged in" on the "C" board. The most senior warehousemen on each board are eligible for their choice of assignments. When a dispatch order is filled, the least senior employee referred takes a copy of the dispatch form to the job site.

---

[3] The fee is to recover the reasonable cost for operation of the hiring hall.

[4] Such calls are usually made in the late afternoon, around 4:00 p.m.

Employees referred from the hiring hall will report for work at the same location each day until notified by the foreman that they are laid off. The employee can then go back to the hiring hall and "peg in" to be eligible for another referral.

The Port of Seattle Workforce

The record indicates that up to 102 of the warehousemen who work at Piers 91 and 106 are laid off and recalled from seniority lists administered directly by the Port of Seattle, without going through the hiring hall. Under Section XXI of the 1986-89 collective bargaining agreement between the union and employer, those employees are given seniority rights to shift preference and area assignments, as well as to employment. When the Port of Seattle needs warehousemen, its foremen recall the necessary number by seniority, first using an "A" list which has 82 names, and then using a "B" list which is set at 20 names.[5] Thus, the Port of Seattle uses the Local 9 hiring hall only when its operational needs exceed the number of warehousemen available from its own seniority lists.

Being placed on a Port of Seattle seniority list is regarded by employees as a very valuable property right, both as the source for available work and as the basis for enhanced wages. The wage schedule in effect under the collective bargaining agreement as of July 1, 1988 specified:

"A" list warehouseman	7/1/88	$15.75 hour.
"B" list entry	7/1/88	$11.75 to $15.25 hour at three years.
Casuals	7/1/88	$10.25

[5] These "lists" are separate and apart from the "A Board" and "B Board" used at the hiring hall.

The record indicates that two different methods have been used to place employees on the Port of Seattle seniority lists.

Group Expansion of the Seniority Lists -

An agreement between the union and employer resulted in adding 44 names to the Port of Seattle seniority lists in 1985, using a specially-created screening process.[6] That contract provided:

> SECTION XXI
>
> SENIORITY
>
> A. Seniority Lists and Casual Employment
>
> 1. "A" list - Seniority employees who were employed as of September 4, 1985, shall be "grandfathered" under the conditions provided for in this section.
>
> The Port shall maintain a total of eighty-two (82) seniority employees on the "A" list including the "grandfathered" employees and new hires.
>
> 2. "B" List - Except as provided in this paragraph, there shall be a minimum of 20 employees maintained on the "B" list. However, said minimum shall be reduced by attrition limited to - voluntary terminations, retirements, death, discharges for cause, and promotions to the "A" list as replacements for those who terminate for any of the preceding reasons. Such attrition shall not include layoffs.
>
> 3. Casual Employment - Casuals may be employed so long as the required manning levels for the "A" and "B" seniority lists are maintained.

---

[6] The legitimacy of that screening process was at issue before the Public Employment Relations Commission in Port of Seattle, Decision 2796-A (PECB, 1988) [discrimination allegations advanced by James Morris, dismissed on the basis that the complaint was not timely filed]; and Port of Seattle, Decision 3064-A (PECB, 1989) [discrimination allegations advanced by Gene Minetti, dismissed on the basis that the complainant was not among the applicants eligible for consideration.]

About 24 former "casual" employees were added at that time to the "A" list, which already contained a grandfathered group of 51 employees. About 20 additional employees were placed on the "B" list, which was newly created at that time.

Individual Acquisition of Seniority Rights -
The seniority provisions found in Section XXI of the collective bargaining agreement also provide:

> B. Employment, Layoff, and Break in Seniority
>
> 1. Except for the initial acquisition of new hires to fill the "A" list and the "B" list the following shall apply:
>
> When an employee has completed a forty-five consecutive calendar day probationary period of employment in casual status, he/she shall be placed on the seniority list. Seniority shall prevail both in hiring and layoff. In rare instances it may also be necessary to give due consideration to the capabilities of an individual to perform the work available. Any such instance where a decision is based on the capabilities of an individual to perform the work available, rather than seniority, shall be personally approved by the locally agreed to management representatives. When vacancies occur on the "A" list, they shall be filled on a seniority basis from the "B" list.
>
> The management representative designated by the Port to personally approve a decision based on the capabilities of an individual to perform work available shall be the Manager, Marine Operations and\or Manager, Distribution Center.
>
> ...
>
> 4. "A" list employees shall have seniority over "B" list employees.

The minutes of an October 18, 1988 special meeting of a Port of Seattle / Local 9 "Labor Relations Committee" contain extensive discussion on whether the Port of Seattle should conduct interviews

before putting "casual" employees on seniority status. The union opposed an interview process, and had called the special meeting to discuss the question. During the course of the meeting, the union complained that there were a lot of good people who were not given seniority, because they were not given the opportunity to work more than 45 days on one dispatch. Employer representatives at the meeting stated they were aware of this problem. The union also inquired about an employee who was alleged to have gained seniority by working the 45 days in different areas, and the employer agreed to research that situation.

The Referrals Pre-dating This Dispute

A dispatch list containing five names was issued from the Local 9 hiring hall on October 13, 1988. The employees were to report to foreman Edward Trinka at Pier 91. Hugh Weinreich and several other employees had exercised their seniority rights to decline the assignment. Randy Uecker, Jerry Johnson, Rod Cameron, and Don Sullivan were dispatched from the "B Board" at that time. Marty Arguello was dispatched on the basis of a recently re-activated "red board",[7] and was given seniority preference over Sullivan.

---

[7] On July 28, 1988, Arguello and another employee had petitioned the J.C. for "A Board" status. The committee rejected their request. Arguello and the other employee then requested "A Board" status at a Local 9 membership meeting on September 13, 1988. That motion also failed. Another motion was passed, however, the effect of which was to re-activate a "red board" on which Arguello and the other employee would be given referral preference above those on the "B Board", but not above those on the "A Board". Both the record in these cases and previous decisions involving this employer and union refer to a "red board" or "red list" which was abolished pursuant to a settlement agreement the union made on August 12, 1986 under the unfair labor practice procedures of the National Labor Relations Board (NLRB). That agreement sought to end discrimination, by merging a "book list" limited to union members with a "red list" consisting of non-members. See, Port of Seattle, Decision 3064, supra.

The Acquisition of Seniority

Uecker, Johnson, Cameron, and Arguello (the four) all obtained seniority status under the "individual" method described above.[8] There is evidence that some of them have relatives who are, or have been, employees of the Port of Seattle and/or members of Local 9. The record also discloses that Uecker and Arguello had some social and/or business dealings with Foreman Trinka outside of the Port of Seattle employment relationship.

After the four commenced work, Trinka told his superior that four more warehousemen were needed on the seniority list. Erik Thomsen, the employer's superintendent for marine operations at the Pier 91 cold storage facility, testified that he observed the four, and considered them to be good workers.

During October of 1988, Thomsen and Trinka advised the Labor Relations Committee that they intended to permit the four to obtain seniority status by working more than 45 days. Their 45th consecutive calendar day of employment would have occurred on Thanksgiving Day, November 24, 1988.

At around noon on Wednesday, November 23, 1988, Thomsen informed Trinka that Superintendent Joe Stuntz of Pier 91 had told him that Pier 106 was laying off warehousemen listed on the Port of Seattle seniority lists, and that Trinka must lay off the casual workers from the "B" and "C" boards in order to avoid payment of standby pay to workers with greater seniority. Both Trinka and Thomsen expressed dismay. The record shows that Trinka and Thomsen had telephone discussions on November 23 with Stuntz and with Port of Seattle labor relations official John Swanson. The subject of discussion was whether they could grant seniority to the four

---

[8] Sullivan was laid off on October 27, 1988, and his employment is not at issue in these cases.

regardless of the layoff at Pier 106, or at least give them holiday pay for Thanksgiving Day for "humanitarian reasons".[9] The consensus was that the four could not be given seniority, and had to be laid off. Thomsen was clear in testimony that he gave Trinka the order to lay off the four employees at issue here.

There is a dispute in the evidence as to what was actually done and said to the four on November 23. The record is clear, however, that they were not laid off. Instead, the four were granted seniority status, and were placed on the "B" list as of November 27, 1988.

The "seniority list" workers laid off from Pier 106 on November 23 were notified over the Thanksgiving weekend that they were recalled to work on Monday, November 28. Thus, no "seniority" workers lost any work hours as a result of the November 23 layoff notice.

Internal Processing of the Dispute

On November 29, 1988, Weinreich and a number of other employees wrote to Swanson, objecting to the grant of seniority to the four. The letter asserted that Trinka had retained "casual" employees on November 23, 1988, while "regular employees were laid off on that day", in violation of Article XXI of the collective bargaining agreement. That letter acknowledged that no "seniority" employees lost income, because they were called to report for work on the following Monday, but asked Swanson to state the policy with respect to hiring of casuals. The letter was not characterized as a grievance.

Swanson subsequently discussed the matter with some members of the union, but no further action was taken. The November 29 letter was

---

[9] None of the four had worked sufficient hours during the previous year to qualify for vacation accrual.

not considered or processed as a grievance by either the employer or union.

On January 4, 1989, Thomsen gave Trinka a written reprimand, admonishing him for failing to follow his instructions to lay off the four "casual" employees on November 23, 1988. Thomsen ordered Trinka that, in the future, he was to submit the names of those who are to be laid off to Thomsen. Thomsen warned Trinka that a failure to follow these instructions would result in discipline.

The Cases Before the Commission

On February 9, 1989, Hugh D. Weinreich filed an unsigned complaint form with the Public Employment Relations Commission, alleging that International Longshoremen's and Warehousemen's Union, Local 9, had committed unfair labor practices under RCW 41.56.150(2).[10] That document was subsequently returned to Weinreich by the Executive Director, under cover of a letter which noted the lack of signature and other procedural defects.

On March 22, 1989, Weinreich filed a signed amended complaint against the union, and filed a separate complaint alleging that the Port of Seattle had committed unfair labor practices under RCW 41.56.140.[11]

The cases were reviewed by the Executive Director for the purpose of making a preliminary ruling under WAC 391-45-110. A letter was issued on April 25, 1989, informing Weinreich that allegations relating to violations of a collective bargaining agreement or of the employer's own personnel policies do not state a cause of action for unfair labor practice proceedings before the Commission.

---

[10] Case 7850-U-89-1679.

[11] Case 7873-U-89-1687.

Weinreich filed amendatory materials on May 7, 1989, alleging that the four employees named in the amendment were granted seniority status because of familial and union connections, with the complicity of the employer. Further, Weinreich alleged that the union had failed to process his grievance alleging violation of the collective bargaining agreement.

On May 16, 1989, the Executive Director advised the parties that a hearing would be held, describing the cause of action as:

> Discriminatory conferral of seniority status on the four named individuals, by preference on the basis of union membership, familial relationships and personal relationships with union officers.

A letter was issued on August 8, 1989, designating Examiner William A. Lang to conduct further proceedings in these matters.

The cases were consolidated for hearing before Examiner Lang. The Examiner found that both the employer and union had committed unfair labor practices. These appeals followed, together with requests for extension of the time for filing of appeal briefs.

POSITION OF THE PARTIES

The employer's petition for review alleges factual errors, errors in interpretation of the collective bargaining agreement, and errors in the Examiner's analysis relating to Arguello. The employer contends that any defects relating to the initial dispatch were barred by the statute of limitations, or were outside the scope of these cases. The employer states that there is no basis in the record for finding that the four employees at issue were granted seniority as a result of union membership, familial relationships and/or personal relationships with union officers.

The union maintains that Weinreich does not have standing to bring the claims advanced here, that this dispute is properly a grievance (not an unfair labor practice), that there is no basis for a grievance, and that no meaningful family or personal relationships were involved in the grant of seniority. The union contends that the decision to award seniority was made unilaterally by the employer, by employing them for 45 consecutive days.

Weinreich agrees with the Examiner's decision, and offers rebuttal to various points made by the employer and union.

DISCUSSION

The Jurisdiction of the Commission

The Scope of Unfair Labor Practice Proceedings -
The Commission administers the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. That statute prohibits employers from discriminating **on the basis of union membership or lack thereof**, and prohibits employers from assisting or otherwise involving themselves in the internal affairs of a union. The same law prohibits unions from seeking to induce an employer to commit an unfair labor practice. RCW 41.56.140. Further, a union selected by the majority of the employees in an appropriate bargaining unit obtains **privileged status as exclusive bargaining representative** of that unit, and a companion duty of "fair representation" towards all the employees in the bargaining unit. RCW 41.56.150.

In these cases, the Examiner's finding of unfair labor practice violations (and the Executive Director's preliminary ruling which underlies the proceedings before the Examiner) are based on two fundamental premises with which we concur:

(1) A union breaches its "duty of fair representation" if it solicits or grants benefit for, or causes discrimination against,

any bargaining unit employee based on union membership or lack thereof, or based on grounds such as familial or personal relationships with union officials; and

(2) An employer interferes with employee rights if it discriminates on the basis of union activity, or conspires with a union to discriminate on some unlawful basis.

The Commission does not pass judgment, generally, on the personnel practices of any employer. Thus, we make no comment on the wisdom of hiring friends or relatives of existing employees, or on the Port of Seattle's use of both "seniority list" and "hiring hall" methods for obtaining employees.

Like other contracts, collective bargaining agreements are subject to enforcement in the courts. As noted by the Executive Director in his preliminary ruling, the Commission does not assert jurisdiction to remedy what are purely contract violations through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).

No relief is available to Weinreich here for actions based on "nepotism" or contract violations, unless they are specifically tied to union membership or to misuse of the union's privileged status as the exclusive bargaining representative of Port of Seattle employees.

The Standing of the Complainant -

The union's claim of "lack of standing" is based on the decision in Port of Seattle, Decision 3064-A (PECB, 1989), where it was found that Gene Minetti lacked standing to complain about the acquisition of "seniority" by other employees. The union points out that Weinreich is a union officer, and that the four individuals who obtained seniority are all union members. The union sees those facts as defeating claims of favoritism on the basis of union status. The Commission finds the union's arguments unpersuasive.

Minetti had been employed occasionally by the Port of Seattle, but did not meet the minimum qualifications to have been considered as an applicant for the particular job(s) at issue in his complaint. In distinct contrast, Weinreich was a current employee of the Port of Seattle when the four were granted seniority, and he stood to suffer loss of work opportunities if others received seniority as a result of unlawful actions by the union and/or employer.

Weinreich is not making a claim of discrimination based on union membership or lack thereof. Rather, Weinreich's claims involve a grant of a preference based on familial and personal relationships that would violate the union's duty of fair representation. He asserts that the union acted in concert with the employer to grant seniority to the four disputed individuals. We find, therefore, that he has "standing" to pursue his claim before the Commission.

Processing as a Grievance / Deferral to Arbitration -
The union states that this dispute should properly be handled as a grievance, not as an unfair labor practice case. The union then contends that Weinreich's claims fail as a grievance, because nobody lost work due to the grant of seniority, and because the employer's failure to lay off the four casuals prior to their attaining seniority is not a basis for a grievance. The Commission also rejects those arguments.

This dispute involves a shifting of "seniority" rights among union members. The union could easily feel a duty to represent members other than Weinreich, and could have had conflicts of interest in pursuing a grievance on Weinreich's behalf. It said as much in support of its petition for review.

The unfair labor practice provisions of Chapter 41.56 RCW protect employee rights in relation to the process of collective bargaining. The Commission asserts a statutory jurisdiction in such matters. Our policies call for deferral to arbitration in "unilat-

eral change" unfair labor practice cases, where disputed employer conduct is arguably protected or prohibited by an existing collective bargaining agreement. The Commission does not defer "interference", "domination", or "discrimination" unfair labor practice charges, or other types of "refusal to bargain" charges. City of Yakima, Decision 3564-A (PECB, 1991). Breach of the duty of fair representation is among the allegations for which "deferral" is not appropriate. While some issues in these cases may touch upon or involve the interpretation of the collective bargaining agreement, the issue of whether the union misused its position as exclusive bargaining representative is one which the Commission, not some arbitrator, must decide.

Scope of the Pleadings and Proceedings -

These unfair labor practice cases were filed and prosecuted by an individual employee acting on his own behalf.[12] A number of major and minor procedural defects are noted, beginning with the filing of an unsigned complaint. While leniency towards a pro se litigant is appropriate and desirable, we must also be mindful of statutory requirements and the rights of other parties.

The Examiner delved into the facts concerning the union's re-creation of the "red board" on September 13, 1988. We share the Examiner's concern that the union may have been reverting to practices that it dropped under threat of unfair labor practice proceedings before our counterpart federal agency, but we are also mindful that the documents filed on March 22, 1989 were the first valid complaints under Chapter 391-45 WAC. RCW 41.56.160 imposes a six-month "statute of limitations" on unfair labor practice charges. The Commission enforced that six-month limitation in Port of Seattle, Decision 2796-A, supra. The legitimacy of the union's re-creation of the "red board" cannot be directly considered by the

---

[12] The employer and union have been represented by counsel throughout the proceedings.

Commission here, as the complaint against the union was filed more than six months after that action occurred.

Actions which perpetuate the effect of a previous unlawful action may be regarded as a "continuing violation". In discussing the October 13, 1988 referral of the four employees, the Examiner stated that the dispatch of Arguello required particular scrutiny. The Examiner also appears to have based his decision, at least in part, on a perceived failure of the union to defend its actions.[13] We are troubled by the importance put on this subject, given the complaints and amendments that are before us.

No statement of facts was provided with the unsigned complaint filed against the union on February 9, 1989. The two attached letters only made reference to the conferral of seniority on the four employees. The remedies requested were that the four be removed from seniority, that persons working out of the hiring hall be made whole for loss of earnings, and that the union represent all employees in a fair and impartial manner. There was no reference whatever to the initial dispatch of Arguello.

The complaint filed against the employer on March 22, 1989 was accompanied by the same two letters submitted with the original complaint against the union. The remedies requested from the employer were limited to removal of the four from seniority, and back pay for employees working out of the hiring hall.

The amendatory materials filed on April 5 and May 9, 1989, also focus on the seniority transaction which occurred in November of 1988, rather than on the hiring hall referral 45 days earlier.

---

[13] Paragraph 4 of the Examiner's conclusions of law characterizes the referral of Arguello as "discriminatory", and as a basis for finding that the union committed an unfair labor practice. Further, the Examiner's remedy discussion and remedial order address the "red list" and the situation of Arguello.

Marty Arguello's name was mentioned in describing his familial relationship to another bargaining unit member, but there was no reference whatever to his initial dispatch. As before, the requested remedies related to the removal of the four from seniority, back pay for other employees, and requiring the union to provide fair representation.

In view of the pleadings, and of the Executive Director's preliminary ruling characterizing the case as involving a "discriminatory conferral of seniority status on four named individuals", there was no reason for the union to advance defenses concerning the initial referral. There was no motion to conform the pleadings to the proof, or other procedural action signaling a need for the union to answer and defend on its earlier actions. We conclude that the scope of inquiry on these complaints is properly limited to the allegations of a conspiracy affecting the "grant of seniority" which occurred over the Thanksgiving holiday period in 1988.[14]

Factual Errors Claimed by the Employer

In making his interpretations of fact and decision, and in ordering remedies, the Examiner had the benefit of personal observations during the hearing process. The presentation of arguments, the demeanor of witnesses, and a developed "feel" for a case all come to bear on interpreting the true intentions of the parties. In this case, however, things that may have appeared clear or obvious to Examiner Lang do not show through in the record. On at least

---

[14] Even if it were to be assumed, for purposes of argument, that the initial dispatch of Marty Arguello was unlawful, that only relates to him. The record does not indicate any basis to question the initial referrals of Uecker, Johnson or Cameron. Moreover, the employer had nothing to do with their dispatch. For the tainted dispatch of Arguello to be a factor at all, it would be necessary to conclude that the employer and union conspired to grant seniority to all four in order to favor Arguello.

some points raised by the parties, the Commission finds the record insufficient to support inferences drawn by the Examiner.

Employer Responsibility for Trinka's Actions -
It is clear that the employer has the exclusive authority to grant "seniority" status under the "individual" method described above. The employer could nevertheless be found guilty of an unfair labor practice in this case if it: (1) granted or denied a substantial employment benefit (seniority status) to the four employees on the basis of their union membership or lack thereof; or (2) conspired with the union to grant (or tolerate the granting of) such a benefit based on considerations such as familial or personal relationships to union officials. In either case, there would have to be evidence of an intentional action on the part of the employer. An employer is responsible for the actions of its agents, however, including supervisors colorably acting within the scope of their authority.

We do not find sufficient support in the record for a conclusion that Trinka was acting within expressed or implied instructions from his superiors. Swanson, who has employer-wide labor relations responsibilities, rejected retention of the four when consulted by telephone on November 23. Stuntz, who has facility-wide responsibilities at Pier 91, gave the initial order to lay off the casual employees on November 23, and apparently held to that position. Thomsen, who heads a department within Pier 91, had earlier gone along with Trinka's recommendation that the four be granted seniority status, and was dismayed at the order to lay them off, but the analysis cannot end there. While Thomsen initially joined with Trinka in seeking an alternative to layoff, he later gave Trinka a direct order to lay off the four employees. Further, it is clear that Thomsen gave Trinka a written reprimand for failing to lay off the disputed individuals, and threatened further disciplinary action in the event of recurrences.

A plausible reading of this record is that Trinka was acting on his own initiative, and perhaps in his own interest separate and apart from that of the employer, when he failed or refused to carry out the order to lay off the casual warehousemen. There is some basis to conclude from this record that at least Uecker and Arguello had social and business dealings with Trinka. There is also evidence that Trinka accepted a substantial gift from the four after they attained seniority status.

Other evidence in the record provides a basis to infer that Trinka was playing out a personal agenda. It appears that 14 casual employees, including Weinreich, rejected the October dispatch to work for Trinka at Pier 91. Trinka was regarded as difficult to work for, and the cold storage conditions at Pier 91 were not regarded as a choice assignment. This helps to explain why Trinka would want to get seniority rights for workers that performed well, and seemed to get along with him.

The Examiner concluded that Trinka rescinded the layoffs without authority to do so, but he went on to find the employer guilty of an unfair labor practice. We concur with the Examiner's findings that Trinka's actions were his own, and that Trinka acted in violation of express instructions from his supervisors. In light of that finding, we do not find the record sufficient to support an inference that Trinka's actions constituted unfair labor practices by the employer under RCW 41.56.140.

Union Responsibility for Trinka's Actions -
It is clear that the union had an interest in having more employees obtain "seniority" status with the Port of Seattle. The union, in fact, had recently urged the employer to allow more casuals the opportunity to complete the 45 days of work required to obtain seniority. The union did not have direct control over the grant of seniority, but it could nevertheless be found guilty of an unfair labor practice in this case if: (1) Trinka was acting as an agent

of the union in granting or denying seniority status to employees on the basis of their union membership or relationships; or (2) the union conspired with the employer to grant seniority status to the four based on their union membership or relationships. A union can be held responsible for the actions of its members, if they rise to the level of colorably acting as agents of the union.

The foreman position held by Trinka is within the bargaining unit represented by Local 9. While the separation of "supervisors" from the bargaining units containing their subordinates is explicitly required by RCW 53.18.060(3)(b), and is the customary practice under Commission precedent under Chapter 41.56 RCW,[15] the mere fact of Trinka's membership in the union and/or bargaining unit is not a sufficient basis to infer that he was acting as an agent of the union in the granting of seniority to the four employees.

The record is not persuasive that the union had anything to do with the grant of seniority to the four. There is no direct evidence of a link between Trinka's actions and the union, and there are several levels at which the union could not be held responsible for Trinka's actions benefiting the four employees. For example:

If the employer had independently authorized Trinka's actions to curry favor with union officials, the employer could be guilty of an unfair labor practice but the union would not have induced the discrimination;

---

[15] Supervisors are "public employees" within the meaning of Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). The Commission has, however, exercised its unit determination authority under RCW 41.56.060 to maintain a separation between supervisors and their subordinates, to reduce or prevent conflicts of interest within bargaining units. See, City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

If Trinka acted on his own, but nevertheless on the basis of union membership, the employer could be guilty of an unfair labor practice but the union would not have induced the discrimination.

If Trinka acted independently on the basis of "nepotism" or personal friendships, the employer might discipline him for violation of its personnel policies, but even if the action benefitted union members or their relations, the union would not have induced the action and could not be held responsible for the actions of a rogue employer official.

Contrary to the Examiner, we do not find sufficient evidence in the record to support a conclusion that there was some conspiracy between the employer and union at the point where seniority was granted to the four individuals. There was a conversation between Swanson and union official McRae on November 23, 1988, but it does not appear to have gone beyond a general expression of dismay that workers were being laid off. Employer officials Swanson, Stuntz and Thomsen all thereafter rejected Trinka's concerns, and Thomsen ordered the layoff of the four.

The Processing of the "Grievance"

The Commission has declined to assert jurisdiction in "duty of fair representation" cases arising exclusively from differences of opinion between unions and employees concerning the merits or processing of contractual grievances. Mukilteo School District [Public School Employees of Washington], Decision 1381 (PECB, 1982). That policy is directly related to the absence of Commission jurisdiction to remedy any underlying contract violation. City of Walla Walla, supra. The Commission does assert jurisdiction to police its certifications, and the union could be found guilty of an unfair labor practice in this case if it breached its duty of fair representation by aligning itself in interest against Weinreich or other bargaining unit employees on the basis of unlawful considerations. The Examiner concluded there was a

conspiracy between the union and employer to defeat the rights of Weinreich and other casual employees. This was based, in part, on the employer's and union's handling of the protest letter submitted by Weinreich and others after seniority was conferred on the four. The record does not support a conclusion of impropriety, however.

The Existence of a "Grievance" -
The November 29, 1988 letter signed by union official McRae and several employees was not in the form of a grievance filed under the collective bargaining agreement. Some knowledge can be imputed to Weinreich, as a union official, concerning the procedures for filing and processing contract grievances. If Weinreich and the others who signed the November 29 letter failed to receive the processing normally accorded to a "grievance", they bear some responsibility for that outcome.

The Lack of Processing as a "Grievance" -
The union was open in not pursuing the November 29 letter as a grievance. Union official McRae was a participant in its discussion with the employer. At the meeting between employer official Swanson and bargaining unit members, it was made clear that the letter was not being pursued by the union as a grievance. There is nothing to indicate that Weinreich either asked that the November 29 letter be converted to a grievance, or asked that the union take up the concerns expressed in that letter for formal processing as a grievance under the contract.

The union appears to have made a good faith determination that a grievance would not have merit. The union indicated that it was satisfied there was no contract violation, because no "seniority" employees lost work or pay while the four "casual" employees were retained for the extra day needed to grant them seniority. Without a violation as to the "seniority employees", the union felt it would lose any grievance. While the Examiner appears to have concluded otherwise, a review of the contract and the testimony in

the record regarding the parties' past practice does not support that conclusion.

The Employer's Inaction as Evidence of Conspiracy -
Just as the record indicates legitimate reasons for the union's decision not to process the November 29, 1988 letter as a grievance, there were likewise legitimate reasons for the employer's inaction in response to that letter. The recall of "seniority" employees over the Thanksgiving holiday weekend had eliminated the employer's liability for standby pay due to Trinka's disregard of the order to lay off the four. Had the employer attempted to exclude the four from its seniority lists after they had worked more than 45 consecutive days without a layoff, it would have faced the likelihood of a grievance from or on behalf of those individuals.

Swanson had met with interested members of the bargaining unit after receiving the November 29 letter, and he thought he had addressed their concerns. The testimony of some of Weinreich's witnesses supports Swanson's assertion that he had been told the November 29, 1988 letter was not being presented as a grievance.

A finding of "conspiracy" requires the presence of two or more intentional participants. In view of these facts, the record does not support an inference that the employer's subsequent inaction was part of a conspiracy to cover up or gloss over an unlawful action in granting seniority to the four "casuals". If the employer is out of the alleged conspiracy at the point of granting seniority, and is also out of the alleged conspiracy at the point of processing a grievance, then the conspiracy theory of the case must fail.

Conclusions

To base a finding of "discrimination", the burden of proof is initially upon the complainant to establish a prima facie case

showing that the actions taken could have been unlawfully motivated. City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980). In these cases, the Examiner made a number of inferences, leading to a conclusion that there was a basis to shift the burden of proof to the employer and union. For the reasons indicated above, we are unable to find sufficient evidence in the record to support a number of those inferences, or to support the inferences made over alternate inferences available from this record. Dismissal of the complaint was indicated. The decision of the Examiner is REVERSED.

AMENDED FINDINGS OF FACT

1. The Port of Seattle is a port district operated under Title 53 RCW and is an employer within the meaning of Chapter 53.18 RCW and Chapter 41.56 RCW. The employer conducts warehousing and shipping operations at Pier 91 and Pier 106 on the Seattle waterfront. Pier 91 contains a cold storage facility designed to hold fruits and other perishables. Pier 106 contains a number of warehouses in which cargo is stored.

2. International Longshoremen's and Warehousemen's Union, Local 9, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of warehouse employees of the Port of Seattle.

3. The Port of Seattle and the ILWU Local 9 were parties to a collective bargaining agreement effective from July 1, 1986 through June 30, 1989. Under that agreement, the employer fills most of its manpower requirements through layoff and recall of employees from seniority lists consisting of approximately 102 employees. The gaining of seniority is regarded as a valuable property right by employees, because it provides work preference and salary enhancement.

4. The Port of Seattle has a historical and ongoing practice of using the hiring hall operated by ILWU Local 9 as the source of employees when its own seniority lists have been exhausted and additional help is needed. That hiring hall is operated in accordance with a "Policy Statement For Operating A Joint Dispatch Hall", which creates a joint committee of representatives of the union and employers who choose to participate. The Joint Committee is comprised of two members from the union's executive board and two members from the union's "Pegboard Committee", together with an equal number of employer representatives. Under the "Policy Statement", the hiring hall dispatch system is organized into three lists for determining qualifications for referral: The "A" board consists of those persons who have worked 1000 hours per year for a minimum of five years in the warehouse industry; the "B" board for those persons working 1000 hours for a minimum of two years; and the "C" board who are identified as qualified, but do not qualify for the "A" or "B" boards. Under the collective bargaining agreement, employees referred from the hiring hall are to be laid off prior to the layoff of employees on the Port of Seattle seniority lists.

5. Under Section XXI of the collective bargaining agreement, warehousemen dispatched from the hiring hall may obtain seniority status with the Port of Seattle if they work 45 consecutive days on a single dispatch from the hiring hall.

6. On October 13, 1988, Randy Uecker, Jerry Johnson, Rod Cameron, Don Sullivan, and Marty Arguello were dispatched from the Local 9 hiring hall to report to work for the Port of Seattle at Pier 91. The dispatch was for work under the supervision of Foreman Edward Trinka. Uecker, Johnson, Cameron, and Arguello each had relatives who were employees of the Port of Seattle and/or were members of ILWU Local 9. Uecker had at least occasional social contact with Trinka, and Arguello had

some business relations with Trinka outside of the Port of Seattle employment relationship.

7. Trinka and Eric Thomsen, the employer's superintendent for marine operations, decided to confer seniority status on Uecker, Johnson, Cameron, and Arguello, utilizing the 45-day provision of the collective bargaining agreement, as described in paragraph 5 of these findings of fact.

8. Uecker, Johnson, Cameron, and Arguello had worked 44 consecutive days through Wednesday, November 23, 1988, which was the day before the Thanksgiving holiday. On that date, Thomsen was instructed by Joe Stuntz, the superintendent of Pier 91, to lay off all casual employees including Uecker, Johnson, Cameron, and Arguello. The basis for the layoff directive was that employees on the Port of Seattle seniority lists were being laid off from Pier 106 on that day, so that it would be a violation of the collective bargaining agreement for the employer to retain casual employees at Pier 91.

9. Thomsen and Trinka were dismayed at the order to lay off the casual employees, and they placed telephone calls to seek a way to avoid a layoff. Stuntz and the employer's labor relations official, John Swanson, reiterated that it was necessary to lay off the casual employees. Thomsen ordered Trinka to lay off Uecker, Johnson, Cameron, and Arguello.

10. Trinka failed to effect the layoff of Uecker, Johnson, Cameron, and Arguello on November 23, 1988, with the result that they were placed on the seniority list on November 27, 1988. The evidence does not support a conclusion that Trinka was thereby acting as an agent of either the employer or the union, or that he was acting on the basis of union membership or lack thereof. Trinka was subsequently reprimanded by the

employer for his failure to carry out the order to lay off Uecker, Johnson, Cameron, and Arguello.

11. The layoff of employees with Port of Seattle seniority was canceled over the Thanksgiving holiday weekend of November 24 - 26, 1988, so that no "seniority" employee actually lost work time or pay. That action eliminated any financial liability on the Port of Seattle for the failure of Trinka to lay off Uecker, Johnson, Cameron, and Arguello on November 23, 1988.

12. Hugh D. Weinreich is a public employee within the meaning of RCW 41.56.030(2) who has been employed, from time to time, as a casual warehouseman working out of the hiring hall operated by Local 9. Weinreich is an official of Local 9. Weinreich was qualified and available to obtain "seniority" status at the Port of Seattle in November of 1988. The granting of seniority to Uecker, Johnson, Cameron, and Arguello had the effect of reducing the work opportunities for Weinreich and other employees working out of the Local 9 hiring hall.

13. On November 29, 1988, Weinreich and a number of other employees delivered a letter to Swanson, objecting to the grant of seniority on Uecker, Johnson, Cameron, and Arguello, and citing violations of specific sections of the collective bargaining agreement. Union official John McRae was one of the signators of that letter. The correspondence was not designated or filed as a grievance under the collective bargaining agreement.

14. The union did not grieve the grant of seniority status to Uecker, Johnson, Cameron, and Arguello, and openly indicated its belief that the November 29 letter did not raise any grievable claim under the collective bargaining agreement.

15. Swanson subsequently met with some union members to discuss seniority policies, but did not take action to pursue the November 29 letter as a grievance or otherwise upset the seniority status of Uecker, Johnson, Cameron, and Arguello.

AMENDED CONCLUSIONS OF LAW

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

2. Hugh D. Weinreich has standing under RCW 41.56.140 through .190, to pursue a complaint that his rights and work opportunities as a casual employee of the Port of Seattle have been diminished or adversely affected by an unlawful conferral of seniority status upon Randy Uecker, Jerry Johnson, Rod Cameron, and/or Marty Arguello.

3. The complaint and amended complaint filed in this matter by Hugh D. Weinreich are untimely, under RCW 41.56.160, with respect to an award of preferential referral status to Marty Arguello on October 13, 1988.

4. Hugh D. Weinreich has failed to establish that the conferral of seniority status by the Port of Seattle upon Uecker, Johnson, Cameron, and/or Arguello was discriminatory, based on familial and personal relationships to union members and/or officials, in violation of RCW 41.56.140(1).

5. Hugh D. Weinreich has failed to establish that the failure of ILWU, Local 9, to pursue the grievance of Weinreich and others similarly situated to challenge the conferral of seniority status by the Port of Seattle upon Uecker, Johnson, Cameron, and/or Arguello was discriminatory, based on familial and personal relationships to union members and/or officials, in violation of RCW 41.56.150(1), (2) and (4).

6. Hugh D. Weinreich has failed to establish a prima facie case sufficient to support an inference that the failure of the Port of Seattle to pursue the grievance of Weinreich and others similarly situated to challenge the conferral of seniority status by the Port of Seattle upon Uecker, Johnson, Cameron, and/or Arguello was discriminatory, based on familial and personal relationships to union members and/or officials, in violation of RCW 41.56.140(1) and (2).

AMENDED ORDER

The complaints charging unfair labor practices filed in the above-entitled matters are DISMISSED.

Entered at Olympia, Washington, the 11th day of September, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

Commissioner DUSTIN C. McCREARY did not take part in the consideration or decision of this case.