STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA SCHOOL DISTRICT,	)	
	)	
Employer.	)	
LOIS MEHLHAFF,	)	
	)	
Complainant,	)	CASE 13010-U-97-3138
	)	
vs.	)	DECISION 6070 - EDUC
	)	
TACOMA EDUCATION ASSOCIATION,	)	
	)	
Respondent.	)	ORDER OF DISMISSAL
LOIS MEHLHAFF,	)	
	)	
Complainant,	)	CASE 13011-U-97-3139
	)	
vs.	)	DECISION 6071 - EDUC
	)	
TACOMA SCHOOL DISTRICT,	)	
	)	
Respondent.	)	ORDER OF DISMISSAL

On February 27, 1997, Lois Mehlhaff filed complaints with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Tacoma Education Association (union) and Tacoma School District (employer) committed unfair labor practices in connection with her employment as a substitute teacher working for the employer within the bargaining unit represented by the union. Consistent with the Commission's docketing procedures, two separate

case numbers were assigned: Allegations against the Tacoma Education Association were docketed as Case 13010-U-97-3138; allegations against the Tacoma School District were docketed as Case 13011-U-97-3139.

The complaints were considered by the Executive Director for the purpose of making a preliminary ruling under WAC 391-45-110.[1] In deficiency notices issued April 2, 1997, Mehlhaff was advised of several problems with her complaints, including:

- Lack of standing to file a complaint on behalf of other substitute teachers mentioned in the statements of fact;

- Lack of Commission jurisdiction over contractual claims;

- Lack of Commission jurisdiction over claims based on employer personnel rules or other sources of authority outside of the Educational Employment Relations Act, Chapter 41.59 RCW;

- Insufficient factual details to support a claim that the union's duty of fair representation was violated by invidious discrimination against Mehlhaff; and

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[1] At this stage of the proceedings, all of the facts alleged in a complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

- Insufficient factual details to support a contention that the union and employer colluded in negotiating pay rates which discriminate against substitute teachers.

Mehlhaff timely filed amended complaints on April 10, 1997. She also asked the Commission to hold these cases in abeyance until she obtained a judicial ruling on a claim that the pay she received for replacing an absent teacher in September of 1996 violated RCW 28A.405.900 and/or the employer's personnel policies.

A second set of deficiency notices, issued on June 4, 1997, gave Mehlhaff 14 days to file and serve copies of any papers that she had filed in a court concerning the litigation described in her response to the first deficiency notices. Mehlhaff timely responded that an attorney had advised against filing in court at this time, because the relevant statute of limitations was six years. The cases are again before the Executive Director for processing under WAC 391-45-110.

The Complainant's Allegations

Lois Mehlhaff alleges that the union and employer unlawfully acted together in various ways to her detriment as a regular part-time substitute teacher. The problem with Mehlhaff's allegations in these complaints lies with their focus and their relevancy to the

statutes administered by the Commission, rather than with the volume of material provided.[2]

Similar Allegations Dismissed in the Past -
Mehlhaff has had generally similar claims rejected in previous cases before the Commission:

- She filed companion cases in 1994, alleging that the union and employer had unlawfully negotiated pay rates for substitute teachers that were below the minimum salary for certificated employees imposed by RCW 28A.400.200. Dismissal of those cases for failure to state a cause of action was affirmed by the Commission in Tacoma School District, Decision 5086-A (EDUC, 1995). Mehlhaff petitioned for judicial review of that decision, but there has been no action on her appeal since the Commission certified the record to the court in 1995.

- She filed another set of complaints in 1995, alleging the union and employer had discriminatorily restrained "execution of the leave replacement contract statute". She then reasoned that: (a) RCW 28A.405.900 regulates leave replacement contracts;[3] (b) since that statute does not specify a time

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[2] The original statements of fact filed in these cases consisted of 10 single-spaced pages; the amended versions consist of 12 single-spaced pages.

[3] Mehlhaff never explained away the portion of the cited section which excludes "those certificated employees hired to replace certificated employees who have been granted ... leave" from specified provisions of Chapter 28A.405 RCW.

limit for leaves granted to teachers, it should be interpreted on the basis of the 10 days per year minimum leave rights which school districts are required to grant to full-time teachers under RCW 28A.400.300; (c) a substitute teacher replacing a full-time teacher on leave for more than 10 but less than 30 consecutive days would thus be entitled to pay at the rate provided for full-time teachers under the state salary schedule;[4] and (d) a practice of filling long-term vacancies with several substitute teachers (so none of them work 30 consecutive days) would thus violate employee rights and the leave replacement statute. Those allegations were dismissed in Tacoma School District, Decision 5465 (EDUC, 1996), on the basis that:

1. Mehlhaff lacked legal standing to pursue the rights of other employees;[5]

2. the Commission lacks jurisdiction to determine and remedy violations of Title 28A RCW, which regulates the operation of common school districts;

3. the complaints lacked allegations that the challenged assignment and pay practices discriminated on the basis of union activity or lack thereof; and

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[4] Mehlhaff cites no authority for this conclusion or her distinction between work periods of more and less than 10 days.

[5] The only incident involving Mehlhaff had occurred beyond the six month statute of limitations for filing unfair labor practice complaints imposed by RCW 41.59.150(1)

4. the Public Employment Relations Commission does not assert jurisdiction to determine or remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).

Those dismissals became final when Mehlhaff failed to petition for review by the Commission. Tacoma School District, Decision 5465-A (EDUC, 1996).[6]

The Current Allegations -

In the complaints now before the Executive Director, Mehlhaff appears to assert a new variant on the "leave replacement contracts" theory advanced in earlier cases. From the premise that she is entitled to the rates applied to employees on leave replacement contracts, she alleges that the employer and union colluded, discriminated against her, discriminated between segments of the bargaining unit, interfered with employee rights, and discouraged union membership among substitute teachers by negotiating a rate of pay for substitutes that was less than the "leave replacement contract teacher" rate. She reasons: (a) RCW 28A.405.900 creates a class of "certificated employees hired to replace certificated employees who have been granted ... leave"; (b) persons on leave replacement contracts are paid according to their education and experience placement on the state salary

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[6] Other allegations in those complaints were referred to an Examiner for hearing. His decision dismissing most of the remaining allegations on their merits, Tacoma School District, Decision 5465-D (EDUC, 1997), is now before the Commission on a petition for review filed by Mehlhaff.

schedule;[7] (c) section 57.A of the 1995-1998 collective bargaining agreement, titled "Employee Contract", states that an employee replacing a teacher on a period of sick leave will get a replacement contract, retroactive to the first day, if the sick leave exceeds 30 days; (d) RCW 28A.405.600 and the employer's personnel policy on leaves work together in an unspecified way,[8] to transform Mehlhaff from a substitute teacher to a leave replacement contract teacher when she filled in for a teacher who was absent more than 5 but less than 30 consecutive days;[9] (e) the collective bargaining agreement erroneously calls for her to be paid at the negotiated substitute teacher rate of $87 per day until the 16th consecutive day, when the rate increases to $120 per day; (f) the collective bargaining agreement discriminates by not requiring leave replacement contracts when substitutes fill in for teachers on sick leave for more than 5, but less than 30, consecutive days; and (g) this unlawful language misrepresents Mehlhaff's rights to her, and manipulates her into providing full teaching services at pay rates far below her salary schedule placement.

Lack of Standing to Pursue Claims of Others -

As was clearly indicated in the dismissals of her earlier complaints, Mehlhaff has no legal standing to pursue the rights of

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[7] No authority is cited for this contention.

[8] The policy addresses amounts of sick leave, use of sick leave for family care, and job abandonment if an employee fails to follow proper procedures for notifying the employer of illness and return to work dates.

[9] No authority is cited for the "five days" aspect of this formula.

other employees. Snohomish County Public Utility District 1, Decision 4969 (PECB, 1995); C-TRAN, Decision 4005 (PECB, 1992). Thus, the first deficiency notices issued in these cases set the groundwork for dismissal of her claims about other substitute teachers being short-changed, about assignment of other substitutes in ways that deprived them of benefits available to full-time teachers, about depriving another substitute teacher of work given to an "emergency substitute", about casual substitutes not being called often enough to become regular part-time employees, and about the alleged pay discrimination discouraging other substitute teachers from becoming union members.[10] Mehlhaff's amended complaint acknowledged that she lacks standing to pursue the rights of others, and she re-characterized the allegations on other employees as background material.

Mehlhaff has standing to pursue her claims that the union and/or employer violated her rights under Chapter 41.59 RCW. In these cases, that is limited to claims that: (1) she was discriminated against when she replaced an absent teacher for 18 consecutive days in September of 1996; and (2) that she felt pressured to curb her objections so that substitute teachers would not lose work.

Alleged Interference with Grievance Rights -

The claim which comes closest to the traditional realm of unfair labor practices is the allegation that Mehlhaff "felt pressured" in connection with the pursuit of her quest for improved compensation.

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[10] Mehlhaff herself has been a union member since 1987. Tacoma School District, Decisions 5465-C and 5466-B (EDUC, 1997).

It is clearly an "interference" unfair labor practice for an employer or union to threaten employees with reprisal or force or to discriminate for or against employees in connection with their pursuit of contractual grievances. Valley General Hospital, Decision 1195-A (PECB, 1981).

The amended complaint includes, "Complainant was also disparaged over her 'pay' for this assignment by a science hallway colleague". Apart from the fact that this fleeting reference provides insufficient factual details to meet the requirements of WAC 391-45-050, there is nothing from which to conclude that either the employer or union could be charged with responsibility for the actions of the unnamed "colleague".

The amended complaint includes, "Complainant processed her own grievance twice through Level II on this issue, as [the employer] did not follow the Agreement grievance process." It is well established, however, that the Public Employment Relations Commission does not enforce grievance or arbitration *procedures*. Thurston County Communications Board, Decision 103 (PECB, 1976).

The amended complaint alleges she "felt 'situation pressure' to in the future allow such violations to occur until the end of the school year so as to short circuit loss of the F.T.E. teacher assignment to the sub teacher ...". Again, however, that provides insufficient factual details to meet the requirements of WAC 391-45-050, and provides nothing from which to conclude that either the

employer or union could be charged with responsibility for the actions of the unnamed persons applying pressure.

Violation of Contract -

Mehlhaff attempts to claim *harm from the contract being followed*, rather than claiming a contract violation over which the Commission would not take jurisdiction. She is unhappy with the negotiated time limits on leave replacement contracts, arguing she should be entitled to a leave replacement contract long before she works the 30 consecutive days specified in the contract. Chapter 41.59 RCW grants Mehlhaff the rights to: organize, participate in choosing an exclusive bargaining representative, bargain collectively through that representative, and refrain from organizing and bargaining activities;[11] to individually present grievances to her employer with notice to the exclusive bargaining representative;[12] to assert a right of non-association based upon religious teachings or beliefs;[13] and to pursue unfair labor practice claims involving her own union activities.[14] Notably, the statute does not grant (and the Commission has never enforced) a right of individual bargaining unit members to veto contract provisions negotiated by an employer and an exclusive bargaining representative. As directed by RCW 41.59.110, the Commission has long followed federal precedent which recognizes a practical need for unions to negotiate different

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[11] RCW 41.59.060(1).

[12] RCW 41.59.090.

[13] RCW 41.59.100.

[14] RCW 41.59.140 and .150.

provisions for different segments within bargaining units, so long as the union does not align itself with the employer against the interests of one or more bargaining unit members,[15] and as long as the union and the resulting contract do not discriminate on invidious grounds against bargaining unit members.[16] See, Ford Motor Co. v. Hoffman, 345 U.S. 330 (1953); Auburn School District, Decision 3406 (EDUC, 1990) [allegation that teachers holding master's degrees were discriminated against when union and employer adopted state salary schedule failed to state a cause of action, since union was not obliged to negotiate equal rights for all bargaining unit members]; City of Prosser, Decision 6028 (PECB, 1997); Oak Harbor School District, Decision 5497 (PECB, 1996).

Some of the interests of regular teachers and substitute teachers may be opposed, although each group also needs the other. The Legislature has decided that all non-supervisory teachers employed by a school district must be included in a single bargaining unit. RCW 41.59.080(1); Columbia School District, et al., Decision 1189-A (EDUC, 1981). Thus, there is no basis to delve into a question as to whether substitute teachers would be better off in a separate bargaining unit. Mehlhaff has not alleged sufficient facts to state a cause of action for union alignment with the employer against substitutes who fill in for fewer than 30 consecutive days. There would seem to be rational reasons for a union and employer to

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15 Shoreline School District, Decision 5560 (PECB, 1996).

16 This includes distinguishing between bargaining unit members because of race, color, sex, religion, national origin, family connections, and internal union political disputes.

agree to conserve scarce financial resources, by reserving higher salaries for longer replacement periods.[17] Some will feel harmed by lines, wherever they are drawn. In addition, as noted in Tacoma School District, Decisions 5465-D and 5466-C (EDUC, 1997), the union and employer have agreed to extend many sections of the collective bargaining agreement to substitute teachers.

Pay Claim Based on Statute Outside Commission's Jurisdiction - Mehlhaff alleges she was wrongly paid for 18 consecutive days she replaced an ill teacher in September, 1996.[18] Mehlhaff's current theories are no more successful at stating a cause of action than those she advanced in earlier complaints. As in the past, her claims are based on her own interpretations of state statutes, the collective bargaining agreement and/or the employer's personnel policies:

First, she again relies on statutes and other sources of authority which are beyond the scope of the Commission's jurisdiction. The Commission is not a court of general jurisdiction. It was created by the Legislature, and only possesses the powers and authority granted to it in the statute that established the agency, Chapter 41.58 RCW, and in the substantive statutes it enforces, in this case Chapter 41.59 RCW. Local 2916, IAFF v. PERC, 128 Wn.2d 375 (1995). No language authorizing the Commission to interpret or

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[17] This pay rate distinction is consistent with the unchallenged provision, in Section 27 of the 1995-1998 collective bargaining agreement, specifying that substitute pay increase from $87 per day to $120 per day at the 16th consecutive day.

[18] She was paid at the negotiated rate for substitute teachers.

enforce Title 28A RCW or the policies of the Tacoma School District appears in either Chapter 41.58 or Chapter 41.59 RCW. See, also, Seattle School District, Decision 5774 (EDUC, 1996).

Second, Mehlhaff's claims of alleged violations of RCW 28A.405.900 are not founded upon any authoritative court precedent, or upon any rule, practice or precedent of an administrative agency having authority to interpret or enforce that statute. Thus, there is no basis to embark on an inquiry here as to whether the union and/or employer knew or reasonably should have known that the arrangements they agreed upon deprived Mehlhaff of any ascertainable right, status or benefit. Such a finding would be a necessary pre-condition to the Commission finding any sort of "discrimination" or "breach of duty of fair representation" violation.

The Request for Delay

Mehlhaff has made and reiterated a request that the processing of these cases be delayed for an uncertain time period, possibly extending into the next millennium. Such a delay would be inadvisable, even if this complaint otherwise stated a cause of action:

First, public bodies, including both the Commission and the employer in this case, receive appropriations and make expenditures through annual or biennial budgets, and submit annual or biennial reports on their activities. The Legislature clearly indicated a preference for timely processing of labor-management controversies when it imposed a six month period of limitations on unfair labor practice proceedings before the Commission. RCW 41.59.150.

Second, even if Mehlhaff were able to eventually win a favorable ruling from a court on her proposed interpretation of RCW 28A.405.900, it is distinctly likely that such a ruling would have only prospective application. It would only be after a definitive court ruling that employers and unions would be put on notice that traditional distinctions between full-time and substitute teachers were no longer valid. As suggested above, continuation of traditional arrangements in the face of such notice would be a necessary pre-condition to finding an unfair labor practice violation.

The requested delay is DENIED.

Attempt to Incorporate Prior Complaints

Mehlhaff alleges that the practices objected to in her previous complaints are continuing, and she sought to incorporate them by reference into these cases. As noted above, however, many of the theories advanced by Mehlhaff in her previous complaints have been dismissed, either as insufficient to state a cause of action or on their merits following a hearing. Each case must stand on its own, and each complaint is subject to the "statute of limitations" set forth in RCW 41.59.150. The reference to the previous complaints thus fails to state a claim for relief which can be granted in these proceedings.

NOW, THEREFORE, it is

ORDERED

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

Issued at Olympia, Washington, this 2nd day of October, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.