STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TECHNICAL EMPLOYEES' ASSOCIATION, Complainant,	)	CASE 12192-U-95-2879
	)	DECISION 6063-A - PECB
	)	
	)	CASE 12646-U-96-3017
vs.	)	DECISION 6064-A - PECB
	)	
	)	CASE 13148-U-97-3192
KING COUNTY, Respondent.	)	DECISION 6065-A - PECB
	)	
	)	DECISION OF COMMISSION

Cline and Emmal, by James M. Cline, Attorney at Law, appeared on behalf of the complainant.

Norm Maleng, Prosecuting Attorney, by Richard S. Hayes, Deputy Prosecuting Attorney, appeared on behalf of the respondent.

These cases come before the Commission on a petition for review filed by the Technical Employees' Association (TEA), seeking to overturn an order of dismissal issued by Executive Director Marvin L. Schurke.[1]

BACKGROUND

The Executive Director dismissed three unfair labor practice complaints filed by the TEA against King County (employer), because an earlier decision of the Commission had dismissed related representation petitions in which the TEA had sought certification

[1] King County, Decision 6063, 6064, and 6065 (PECB, 1997).

as exclusive bargaining representative of separate supervisory and non-supervisory units.[2] The employees involved had worked in the Technical Services Division of the former King County Department of Metropolitan Services. That division had, in turn, previously been a division of the Municipality of Metropolitan Seattle (METRO).[3] The representation petitions were dismissed on the basis that the petitioned-for bargaining units failed "to group employees according to a current and/or prospective community of interests", and therefore were not appropriate units under RCW 41.56.060. See, King County, Decision 5910 (PECB, 1997), affirmed, Decision 5910-A (PECB, 1997).

The TEA had filed the first of these unfair labor practice complaints on November 29, 1995.[4] It alleged that the employer interfered with employee rights in violation of RCW 41.56.140(1), by making unilateral changes of employee wages, hours and working conditions in connection with an integration of former METRO operations and employees into the operations and workforce of King County. In a letter dated January 11, 1996, the Executive Director notified the parties that the processing of that complaint would be suspended, pending the outcome of the related representation proceeding.

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[2] Notice is taken of the records in Cases 12015-E-95-1982 and 12504-E-96-2091.

[3] In November of 1992, the electorate of King County approved a ballot measure calling for King County to assume the rights, powers, functions, and obligations of METRO. Reorganization and integration of the two governmental entities were to be implemented over a two-year transition period. METRO ceased to exist as a separate entity on January 1, 1994, and became the Department of Metropolitan Services within King County.

[4] Case 12192-U-95-2879.

On August 16, 1996, the TEA filed its second unfair labor practice complaint,[5] alleging employer interference with employee rights in violation of RCW 41.56.140(1), by unilaterally changing the scope of work performed by former METRO employees, and by implementing an ordinance mandating contracting out of work belonging to the proposed bargaining units. Initial review of that complaint under WAC 391-45-110 resulted in a finding that a cause of action existed, an Examiner was assigned, and the case was scheduled for hearing. Those proceedings were suspended on April 30, 1997, however, by notice to the parties that the case would be held in abeyance pending the outcome of the related representation case.

On May 8, 1997, the TEA filed the third of these cases with the Commission,[6] this time alleging the employer violated RCW 41.56.140(1), by unilaterally implementing classification changes for employees formerly employed at METRO. The parties were notified, by letter of June 13, 1997, that the case would be held in abeyance pending the outcome of the representation case.

After the Commission's September 17, 1997 order affirming the dismissal of the representation petitions, the Executive Director dismissed all three unfair labor practice cases on October 2, 1997, for failure to state a cause of action. The Executive Director ruled that: (1) the propriety of bargaining unit issue was fully litigated in (and controlled by) the Commission's decision in the representation cases; (2) the petitioned-for bargaining units were inappropriate, so that the employer had no obligation to maintain a status quo or revert to a previous status quo when the representation petitions were filed; and/or (3) the Commission's

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[5] Case 12646-U-96-3017.

[6] Case 13148-U-97-3192.

decision in the representation cases precluded a finding that the employer was prohibited from continuing with a merger already in progress when the first representation petition was filed. Additionally, with regard to the case involving alleged contracting out of work, the Executive Director found that the complaint acknowledged that the dollar value of projects handled by King County engineering employees was limited, that the transfer of METRO operations to King County occurred in 1994, and the reorganization that obliterated the transitional Department of Metropolitan Services was implemented by January 1, 1996, all of which were more than six months before the filing of the complaint, so that the complaint was untimely. Additionally, since the TEA never acquired status as an exclusive bargaining representative, it was noted that no refusal to bargain violation could be found.

The union filed a petition for review, thus bringing the cases before the Commission.

POSITIONS OF THE PARTIES

The TEA argues that the dismissal of the representations cases was in error, and that those dismissals do not preclude the processing of these unfair labor practice complaints. It contends the employees have bargaining rights under the statute, and that the employer made unlawful unilateral changes during the pendency of the representation petitions. The TEA claims its unfair labor practice concerning contracting out was not related to the METRO / King County merger, and was improperly dismissed. The TEA urges the Executive Director's statement about a "refusal to bargain" violation is irrelevant, as the complaint concerning contracting out of work was brought as an interference violation. The TEA

argues that King County Superior Court is reviewing the original representation petition, so that the Commission should reinstate the unfair labor practice complaints.

The employer argues that the union's appeal of the representation case dismissals to court is irrelevant to the dismissal of the unfair labor practice charges. It argues that the focus of an interference charge should be on whether the employer prejudiced the union's election bid, rather than on whether there was a unilateral change. The employer contends it maintained the status quo from its perspective, that the changes at issue in these cases were set in motion prior to the filing of the first representation petition, and that no prejudice occurs when an employer follows through on changes set in motion prior to the filing of a petition. The employer urges the Commission to uphold the order of dismissal.

DISCUSSION

The Legal Standards

The Statutory Obligation -

RCW 41.56.040 outlines the right of employees to organize and designate representatives without interference:

> **No public employer, or other person, shall directly or indirectly, interfere with,** restrain, coerce, or discriminate against **any public employee or group of public employees** in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

[Emphasis by **bold** supplied.]

RCW 41.56.140 makes it an unfair labor practice for public employers:

> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
> (2) To control, dominate or interfere with a bargaining representative;
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

RCW 41.56.160 empowers and directs the Commission to prevent any unfair labor practice and to issue appropriate remedial orders, but restricts the processing of any complaint for unfair labor practices occurring within six months before the filing of the complaint with the Commission.

A union that files a representation petition thereby acquires some status in the employment relationship. Specifically, it is entitled to file and prosecute unfair labor practice charges on "interference" or "discrimination" claims under RCW 41.56.140(1), affecting employees in the petitioned-for bargaining unit. Emergency Dispatch Center, Decision 3255-B (PECB, 1990). See, also, Clark County, Decision 5373-A (PECB, 1996).

The "Status Quo" Obligation -

Long-standing Commission precedent and the Commission's rules require an employer to maintain the status quo with respect to the wages, hours and working conditions of employees affected by a petition for investigation of a question concerning representation. See, Klickitat County, Decision 5462 (PECB, 1996) and cases cited

therein; WAC 391-25-470(1)(e); WAC 391-25-490(1)(e). A showing of intent or motivation is not required to find an interference violation. City of Seattle, Decision 2773 (PECB, 1987).

The filing of a representation petition does not, however, preclude an employer from following through with changes set in motion prior to the filing of the representation petition. Bremerton Housing Authority, Decision 3168 (PECB, 1989). If expected by the employees, changes which are part of a "dynamic status quo" do not disrupt a bargaining relationship or undermine support for a union. NLRB v. Katz, 369 U.S. 736 (1962). See, also, Spokane County, Decision 2377 (PECB, 1986). Thus, where wage or benefit increases are previously scheduled, it would be unlawful to withhold them just because a representation petition is filed. See, Emergency Dispatch Center, supra. Conversely, if changes the employees may view as negative merely carry out a "dynamic status quo" (i.e., actions consistent with previously-existing policies and practices), no violation will be found.

The Representation Case

The TEA argues that the dismissal of the representation petitions was in error,[7] but we are neither inclined nor vested with statutory authority to relitigate the representation cases here. We applied the unit determination criteria of RCW 41.56.060 and

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[7] The TEA asserts that the Commission called for wall-to-wall units based on occupational groupings, but that (1) Commission precedent did not indicate that occupational groups were the only appropriate bargaining unit in such circumstances, and (2) the Commission had already certified as appropriate a discreet departmentally based unit of engineers and such a prior certification directly conflicted with the Commission's indication now that a wall-to-wall unit should encompass the same employees.

Commission precedent in making a final order that was subject to judicial review under the Administrative Procedure Act at RCW 34.05.510, et seq. The TEA has exercised its right to petition for judicial review, and the jurisdiction to resolve that controversy now lies with the courts. Neither are we inclined to reinstate these unfair labor practice complaints on the basis of the TEA's speculation that a court will reverse the Commission's decision in the representation case.

The Unfair Labor Practice Allegations

The TEA argues that some bargaining unit must be appropriate for the affected employees to exercise their statutory collective bargaining rights. The TEA argues that the dismissal of its representation petitions does not change the employer's violation of the law in making unilateral changes in wages, hours and working conditions while those petitions were pending before the agency, and that the continued processing of its unfair labor practice complaints is not precluded by the dismissal of its representation petitions.

The employer argues that the propriety of a petitioned-for bargaining unit is largely irrelevant to the analysis of whether the employer's actions in changing working conditions constitute an unfair labor practice, and it asserts that the focus should instead be on whether the employer interfered with the laboratory conditions for an election. We agree with the employer. While unfair labor practice violations can be found based on employer actions during the pendency of representation petitions that ultimately are dismissed, we find that the dismissal of the representation petitions in these instances lead, with one exception, to dismissal of these unfair labor practice cases. We discuss each case below.

Case 12192-U-95-2879

This complaint was filed on November 29, 1995, about three months after the first representation petition. The TEA alleged in part:

> In June 1995 King County executive Gary Locke set forth his proposal for reorganization. ... The King County Council reviewed Gary Locke's proposal and with some amendments approved the plan on September 11, 1995. **Under the ordinance approved by the County Council a reorganization of Metro would be effective January 1, 1996.** The reorganization approved by the County Council would call for reassignment of employees sought to be represented by TEA into separate King County departments. ... **The wages, hours, and working conditions of these employees are different than those currently provided to employees of TSD.** ... In November of 1994, Metro informed employees of TSD [Department of Technical Services], including those represented by TEA that they were intending to make unilateral changes in a series of benefits. These changes were all to be effective January 1, 1996. ... They include a change in salary classification, a change in leave accrual and leave pay out, bus passes, suggestion incentives, holidays, vacation and comp time donation programs, access and use of various leaves, vacation cash out and tuition reimbursement. ... Also in November of 1995 Metro announced to employees represented by TEA that effective January 1, 1996 there would be a number of significant changes to their current health insurance program. ... None of the changes ... were mandated as part of any Metro consolidation.

[Emphasis by **bold** supplied.]

On their face, those allegations provide a strong basis to infer that the complained of changes were set in motion no later than the January 1, 1994 merger. Even if the specific changes were not

expressly mandated, we cannot ignore the federal court decision, legislative action and ballot proposition from which that merger arose, and which require us to take a much broader perspective than the narrow focus supported by the TEA. METRO and King County historically had different personnel systems, salaries, and benefits, so that changes were predictable. The reorganization that is the subject of this complaint came to fruition on January 1, 1996, so that any accompanying or resulting changes of the wages, hours and working conditions of former METRO employees were part of a "dynamic status quo" under Bremerton Housing Authority, supra, and Emergency Dispatch Center, supra.[8]

The Executive Director properly dismissed this complaint. No cause of action exists for unfair labor practice proceedings.

Case 12646-U-96-3017

This complaint was filed August 16, 1996, more than 31 months after METRO was merged into King County and more than 7 months after the King County Department of Metropolitan Services ceased to exist. The TEA initially alleged in this case:

> Going back indefinitely, at least as far as the 1970's, Metro has managed all construction projects in-house, regardless of size. ... **In January of 1994, the legal status of Metro was changed and it became a part of the King County government. The practice in King County of contracting engineering services had been quite different.** King County engineering employees did not handle major projects, and

[8] It is noteworthy that the TEA has not alleged that the changes were in response to, in reprisal for, or were even intended to influence the outcome of, the representation petition.

> **by law the dollar value of projects they were allowed to handle in-house was limited by County ordinance to $10 million. ...**

[Emphasis by **bold** supplied.]

As the Executive Director correctly stated in his order of dismissal, this complaint filed in 1996 is clearly untimely under the six-month statute of limitations set forth in RCW 41.56.160, as to any changes which occurred when or because METRO became part of King County in 1994.

The TEA then went on to allege that an audit by the King County Council in the spring of 1996 led to allegations that there had been significant overpayments to private contractors on two wastewater treatment plants,[9] due to METRO's construction management practices. The allegations also state as follows:

> On April 22, 1996, an ordinance was passed by the King County Council which substantially changed the scope of the work which could be performed by the Technical Services Division. This ordinance was signed into law by the County Executive on May 2, 1996. The ordinance set forth changes in practices, and stated that "clear and certain penalties" for violations of those new practices were required, and directed the Executive to create a new "disciplinary process" for violations of the ordinance.

The Executive Director impliedly took those allegations as sufficient to state a cause of action in his initial review of this case under WAC 391-45-110, but then swept them aside in his order

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[9] Although not expressly stated in the complaint, we infer from the "wastewater treatment" description that these were former METRO operations.

of dismissal because of the earlier statement that a $10 million limit at King County predated the METRO merger. We find these allegations are insufficiently detailed for us to determine whether there was an actionable change within the six-month period for which this complaint is timely, or merely a reiteration of policies already applicable to the employees involved. We are thus remanding this case to the Executive Director for further processing under WAC 391-45-110, including consideration of any amended complaint filed within 14 days following the date of this order. In the absence of a timely amendment which states a cause of action, the case will be dismissed.

Case 13148-U-97-3192

This case was filed on May 8, 1997, well over three years after the METRO / King County merger and more than 16 months after the reorganization which resulted in the disappearance of the Department of Metropolitan Services. This complaint alleges:

> While the TEA petition has been pending, **King County has moved forward with a class and compensation study**. ... For the past several months, the employees covered in the TEA proposed bargaining unit have been reclassified. Such classification occurred December 8, 1996. The Employer has unilaterally established and imposed a classification appeals process for Employees who are dissatisfied with their reclassification.

[Emphasis by **bold** supplied.]

The record in the representation cases showed that, concurrent with the reorganization of its departmental structure, King County undertook a re-examination of the classifications in its merged workforce, as a step toward integrating the operations and creating

new classifications accommodating that integration. That study was ongoing during the January 1, 1994 to December 31, 1995 transition period for which this complaint is clearly untimely under RCW 41.56.160. We find nothing in this complaint to indicate that the employer's actions during the six month statute of limitations period, including whatever occurred on December 8, 1996, deviated from the pre-existing plan. This complaint thus fails to allege anything other than a carrying out of the dynamic status quo.[10]

NOW, THEREFORE, it is

ORDERED

1. DECISION 6063-A - PECB. The order of dismissal issued by the Executive Director in Case 12192-U-95-2879 is AFFIRMED and adopted as the final order of the Commission in that proceeding.

2. DECISION 6064-A - PECB. The order of dismissal issued by the Executive Director in Case 12646-U-96-3017 is VACATED, and the matter is remanded for further processing under WAC 391-45-110 consistent with the foregoing, on the basis of any amended complaint filed and served within 14 days following the date of this order.

3. DECISION 6065-A - PECB. The order of dismissal issued by the Executive Director in Case 13148-U-97-3192 is AFFIRMED and

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[10] Again, the TEA has not alleged that the changes were in response to, in reprisal for, or were even intended to influence the outcome of, the representation petition.

adopted as the final order of the Commission in that proceeding.

Issued at Olympia, Washington, on the 21st day of April, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner