STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF PORT TOWNSEND, Employer.	)	
ELIZABETH JOHNSON, Complainant,	)	CASE 13611-U-97-3330
vs.	)	DECISION 6433-B - PECB
TEAMSTERS UNION, LOCAL 589, Respondent.	)	DECISION OF COMMISSION

Elizabeth M. Johnson appeared pro se.

Davies, Roberts & Reid, LLP, by Michael R. McCarthy, Attorney at Law, appeared on behalf of Teamsters Union, Local 589.

This case comes before the Commission on an appeal filed by Teamsters Local 589 seeking to overturn the Findings of Fact, Conclusions of Law and Order issued by Examiner Walter M. Stuteville.[1] We affirm, but modify the remedy.

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[1] City of Port Townsend, Decision 6433-A and 6684 (PECB, 1999). The Examiner dismissed allegations against the employer in a consolidated proceeding, Case 13478-U-97-3289. No appeal was filed in regard to the case against the employer, and that matter is not before us.

BACKGROUND

This case involves a dispute between Elizabeth M. Johnson and Teamsters Union, Local 589 (union), regarding Johnson being denied union representation in regard to the termination of her employment with the City of Port Townsend (employer). The applicable collective bargaining agreement defines employees who work less than 80 hours per month as "part-time", and excludes them from the bargaining unit.

The employer hired Johnson as a substitute custodian, in May of 1995. Initially, she worked less than 80 hours per month and was considered a part-time employee excluded from the bargaining unit. For several months during 1996, and during much of 1997, Johnson actually worked more than 80 hours per month.

On August 25, 1997, an employer official met with Johnson to discuss the number of hours she was working. Shop Steward Sheila Spears attended the meeting at the request of the employer, but did not contribute to the meeting. A confrontation ensued between Johnson and the employer representative, and Johnson left the meeting.

Johnson sensed her discharge was imminent, and she had a telephone conversation with a union representative, Dan Treosti, on September 24, 1997. They discussed her hours, and whether the union could represent her. Treosti asked to meet with Johnson, but Johnson declined and the discussion became contentious. Treosti then asked if Johnson would like to speak with the secretary-treasurer of the

union, and she said, "Yes." Johnson hung up, however, by the time the secretary-treasurer picked up the telephone.

Also on September 24, 1997, Treosti sent a letter to Johnson, as follows:

> Per the Labor Agreement by and between the City of Port Townsend and Teamsters Union Local 589, you have not been hired into the Bargaining Unit we represent.
>
> Per our telcon of 9-24, you said to me that you took it upon yourself to work extra hours that contributed to your working over 80 hours per month.
>
> The City did not hire you to work over 80 hours and has not informed us that you are a new employee within the Bargaining Unit. Therefore, we have no jurisdiction of representation for you.
>
> If and when the City hires you within the Bargaining Unit, we will be happy to represent your interests in your employment with the city of Port Townsend.

The employer terminated Johnson's employment on October 8, 1997, based on her "insubordination and violent behavior" and her lack of attendance at two hearings which had been scheduled to provide her an opportunity to defend against potential disciplinary action.

In her unfair labor practice complaint filed on December 18, 1997, Johnson alleged that the union interfered with employee rights by denying her representation in connection with the termination of her employment. Johnson amended her complaint on July 22, 1998.

Examiner Walter M. Stuteville held a hearing. In his decision issued on May 18, 1999, the Examiner ruled that Johnson became a member of the bargaining unit upon actually working more than 80 hours per month, and that she thereupon became eligible for all rights and union representation conferred upon bargaining unit employees under RCW 41.56.080. The Examiner held that the union interfered with Johnson's rights under RCW 41.56.040 by failing and refusing to represent Johnson, and thereby committed an unfair labor practice under RCW 41.56.150(1). The Examiner ordered the union to represent Johnson as a bargaining unit employee in regard to the controversy concerning her work hours, and in regard to her discipline and discharge. The Examiner also ordered the union to represent Johnson if she was reinstated to employment, so long as she remains a member of the bargaining unit. In addition, the Examiner ordered the union to request permission from the employer to read the notice attached to the order into the record at an open, public meeting of the city council and to permanently attach a copy of the notice to the minutes of that meeting, and (if permission was granted) to read and attach the notice as ordered.

On June 7, 1999, the union filed an appeal, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

Contending that an "interference" charge was not invoked, the union argues the complaint should be analyzed only as a discrimination claim. The union contends it had no notice that Johnson had ever

worked in excess of 80 hours in a month, or that she believed herself to be within the scope of the bargaining unit as of August 25, 1997. The union claims the Examiner did not articulate any legal duty that was breached, or any right of Johnson that was denied, even assuming Johnson was a full-fledged bargaining unit member on August 25, 1997. The union also claims the Examiner made no finding of any action by Sheila Spears that breached any legal duty of the union. The union particularly asks the Commission to overturn the requirement for it to read the notice at a city council meeting, claiming that remedy is onerous, extraordinary, and inappropriate, where there are no findings of arbitrary, discriminatory, or bad faith conduct by the union. It contends the union's actions were, at worst, based on a good faith mistake and are undeserving of the imposed remedy. Finally, the union asks the Commission confine the "Notice" to the facts of the case, and to delete portions which require it to represent Johnson in regard to her hours of work and to pledge to not "interfere with, restrain or coerce employees" in the exercise of their rights under state collective bargaining laws.

Johnson did not file a brief in response to the union's appeal.

DISCUSSION

Interference Claim Invoked

Johnson's complaint clearly indicated a charge of union interference with employee rights, alleged the union advised her it was not

responsible for representing her, alleged a union representative was hostile toward her, and that the union violated RCW 41.56.150-(1) and (4) by "failing to engage in collective bargaining on employee's behalf and by attempting to coerce her into saying she worked 19 hours per week as a condition for representation". The complaint requested that the union be required to represent Johnson. Thus, contrary to the union's contentions, the complainant clearly invoked an interference claim against the union, and the union clearly had notice of the claim.

The Legal Standards

Chapter 41.56 RCW prohibits unions from interfering with or discriminating against a public employee who exercises rights secured by the statute:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE BARGAINING REPRESENTATIVE. 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.
>
> . . .
>
> RCW 41.56.150 UNFAIR LABOR PRACTICES FOR BARGAINING REPRESENTATIVE ENUMERATED. It shall be an unfair labor practice for a bargaining representative:
>
> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**

> (2) To induce the public employer to commit an unfair labor practice;
>
> (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.]

The Commission determines and remedies unfair labor practices under RCW 41.56.160.

While complaints involving employer conduct occur with more frequency, either a union or employer can commit an "interference" violation. The standards are similar: A violation occurs if employees can reasonably perceive conduct as a threat of reprisal or force or a promise of benefit related to the pursuit of rights protected by Chapter 41.56 RCW. A finding of intent is not necessary.[2] In Municipality of Metropolitan Seattle, Decision 2746-A (PECB, 1989), an interference violation was found where the union deleted favorable assignments from a bid process.

Duty of Fair Representation -

A duty of fair representation grows out of the status held by a union once it is certified or recognized as "exclusive bargaining representative" under the Public Employees' Collective Bargaining Act. RCW 41.56.080 states:

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[2] City of Mercer Island, Decision 1580 (PECB, 1983). For a full discussion of legal standards, see, City of Seattle, Decision 3199-B (PECB, 1991).

> RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION. The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and **shall be required to represent, all the public employees within the unit without regard to membership in said bargaining representative:** PROVIDED, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance.
>
> [Emphasis by **bold** supplied.]

The Public Employment Relations Commission is vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. While the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances,[3] the Commission does process other types of "breach of duty of fair

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[3] See, Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982) and decisions citing that case. That line of precedent is closely related to the long-established principle that the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. See, City of Walla Walla, Decision 104 (PECB, 1976) and decisions citing that case.

representation" complaints against unions. See, e.g., City of Seattle, Decision 3199 (1989), affirmed, Decision 3199-A (PECB, 1989), and City of Seattle, Decision 3872-B (PECB, 1993).

Commission precedent establishes that the duty of fair representation is breached if the union's conduct toward one of its members is arbitrary. City of Redmond, Decision 886 (PECB, 1980). A breach of duty of fair representation claim was considered in City of Seattle, Decision 2746-A (PECB, 1989), but was dismissed because the record did not establish the complainant had been singled out and treated differently than other members of the bargaining unit.

Membership in a bargaining unit entitles an employee to union representation. In order to prove a breach of the duty of fair representation, the employee must demonstrate the union's actual refusal to process a grievance or take other desired action. In Port of Tacoma, Decision 1396-A (PECB, 1983), the employee did not demonstrate any such refusal, and did not demonstrate that any detriment was suffered by reason of his lack of union representation, so the allegation against the union was dismissed.

In the case at hand, the Examiner fully described the duty of fair representation. As stated in Castle Rock School District, Decision 4722 (EDUC, 1994):

> A duty of fair representation arises from the status of "exclusive bargaining representative" that is conferred upon a union under RCW 41.56.090. Under that duty, the union must represent fairly the interests of all bargaining unit members during negotiations, adminis-

> tration, and enforcement of collective bargaining agreements. The standard, set forth by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967), requires that the union deal with all employees without hostility, or discrimination, in a reasonable nonarbitrary manner and in good faith. Pateros School District, Decision 3744 (1991).
>
> All bargaining unit members are protected by the doctrine, even an employee who actively opposes the union or its leadership. Even those who refuse to become members are covered unless they are subject to a lawful union shop or other union security arrangements under the contract. However, the duty extends only to members within the bargaining unit.

Thus, the type of "duty of fair representation" claims processed by the Commission are those which call into question a union's status as exclusive bargaining representative. See, Tacoma School District (Tacoma Education Association), Decision 5465-E (EDUC, 1997); Pe Ell School District (Pe Ell Education Association), Decision 3801-A (EDUC, 1992); Pateros School District (Pateros Education Association), Decisions 3744 (EDUC, 1991); King County (Amalgamated Transit Union, Local 587), Decision 5889 (PECB, 1997).

The Unfair Labor Practice Forum -

The Examiner correctly processed Johnson's claim as an unfair labor practice complaint. The Commission previously stated:

> As noted in Washington State Patrol, Decision 2900 (PECB, 1988), one of the primary objects of the NLRA was to protect employees against unlawfully-created bargaining relationships. **An employee who feels that he or she has been**

> **improperly included in or excluded from a bargaining unit by agreement of an employer and union has a right to seek relief by filing unfair labor practice charges against those parties.**
>
> ...
> If the Commission finds nothing awry, these complaints must be dismissed and the union and employer will be permitted to continue their relationship in its traditional scope. On the other hand, **if the Commission finds that the union and employer have maintained an improper bargaining relationship, they must be found guilty of unfair labor practices ... and must be ordered to rectify the situation** for [that complainant] and future employees.

Castle Rock School District, Decision 4722-B (EDUC, 1995) [emphasis by **bold** supplied].

In this case, the collective bargaining agreement excluded "part-time, seasonal and temporary employees" from the bargaining unit and defined "part-time employees" as those working less than 80 hours per month. Johnson worked in excess of 80 hours in four months in 1996, and the employer paid her for the hours she claimed. Her work hours continued to increase during 1997, when she was paid for up to 115 hours in a month. She worked more than 80 hours in nearly every month during 1997, through August. The union acquired a duty of fair representation to Johnson.

The union's arguments as to the lack of a finding in the Examiner's decision regarding any breach of a legal duty by Spears are misplaced. The Examiner clearly stated, on pages 13-14 of his decision, that Spears did not take up the subject matter of the August 25 meeting with Treosti or any other member of the union's

staff. Paragraph 9 of the Examiner's Findings of Fact states that Spears did not represent or assist Johnson at the August 25 meeting. Paragraph 11 states that Spears did not take any steps to represent or assist Johnson after the August 25 meeting.

The union argues that it had no notice, as of August 25, 1997, that Johnson had ever worked in excess of 80 hours a month, or that she believed herself to be properly within the scope of the bargaining unit. Apart from any duty to discover Johnson's status and situation, the union was notified of a potential issue when Sheila Spears was asked to be present at the meeting on August 25, 1997. Having been put on notice at that time, further inquiry into whether Johnson qualified for bargaining unit membership could have determined the issue. While the union argues that it needed notice that Johnson worked in excess of 80 hours a month, a collective bargaining agreement provision calling upon the employer to give it notice of new hires does not altogether excuse the union from its obligation to keep abreast of unit membership.

Johnson clearly contacted the union on September 24, 1997. Again, it did not make sufficient inquiry as to the number of hours per month Johnson actually worked. By September 24, 1997, the union clearly had notice that Johnson met the parameters of the collective bargaining agreement for inclusion in the bargaining unit. This is clear from Dan Treosti's letter to Johnson of the same date, in which Treosti acknowledged that Johnson told him she had worked more than 80 hours per month. Nevertheless, the union refused to represent her on that date, and indicated its position both orally and in writing. The fact that Johnson's extra work

contributed to her working over 80 hours per month, and the fact that the employer did not hire her to work over 80 hours and did not inform the union that she was a new employee within the bargaining unit, do not alter the fact that the union had clear notice by then that Johnson had worked over 80 hours a month. The union still declined to represent her, and did not even make inquiries as to the number of hours she worked.[4]

The union argues that the Examiner did not articulate any legal duty of the union breached, or any right of Johnson denied. However, the Examiner clearly stated that the union had a duty to assist Johnson in her communications with the employer, make inquiries on her behalf, and speak on her behalf where appropriate. If the union had represented Johnson, the employer would have had an opportunity to deal with more objective, and less emotional, arguments. The union breached its duty of fair representation.

Remedy

We are deleting that portion of the Examiner's order which calls for reading the notice into the record at an open, public meeting of the City Council, and for attaching a copy of that notice to the minutes of that meeting. While the union is, without question, guilty of failing to represent Johnson, its actions in this case can also be interpreted as a misguided attempt to honor the collective bargaining agreement. We recognize that the union made efforts. We also consider Johnson's lack of cooperation with the

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[4] Such an inquiry would have been consistent with its statutory obligation.

union, and her refusal to pursue discussions with the business agent and secretary-treasurer of the union. We consider that the union was influenced by Johnson's lack of cooperation.

Interference violations have been described as "technical" in some cases where a party has acted quickly to cure its violation, as in Pierce County, Decision 1786 (PECB, 1983), or where the violation was based on appearances without intent, as in Renton School District, Decision 1501 (PECB, 1982). The respondents in those cases were only required to cease and desist their unlawful activity and post notices. We conclude that a similar remedy should be adopted in this case.

The order and notice prescribed by the Examiner properly include a general directive that the union refrain from interfering with employee rights. Similarly, the Examiner properly directed the union to represent Johnson in the event she wins reinstatement to her position within the bargaining unit.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact and Conclusions of Law issued in the above-captioned matter on May 18, 1999, by Examiner Walter M. Stuteville, are AFFIRMED and adopted as the Findings of Fact and Conclusions of Law of the Commission.

2. The Order issued by the Examiner is amended to read as follows:

[Case 13611-U-97-03330; Decision 6433-A - PECB] Teamsters Union, Local 589, its officers and agents; shall immediately:

a. CEASE AND DESIST from:

i) Failing and refusing to represent Elizabeth Johnson as a part-time employee covered by the collective bargaining agreement between the union and the City of Port Townsend.

ii) In any other manner, interfering with, restraining or coercing employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

i) Represent Elizabeth Johnson, as a regular part-time employee included in the bargaining unit and covered by the collective bargaining agreement, in regard to the controversy concerning her work hours discussed at the meeting held on August 25, 1997, and thereafter.

ii) Represent Elizabeth Johnson, as a regular part-time employee included in the bargaining unit and covered by the collective bargaining agreement, in regard to her discipline and discharge following or resulting from the August 25, 1997 meeting.

iii) If Elizabeth Johnson is reinstated to employment with the City of Port Townsend, represent her in all matters pertaining to her wages, hours and working conditions so long as she remains a member of the bargaining unit.

iv) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of Teamsters Union, Local 589, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

v) Notify Elizabeth Johnson, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide her with a signed copy of the notice required by the preceding paragraph.

vi) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

Issued at Olympia, Washington, on the 12th day of January, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE WILL provide representation to Elizabeth Johnson as a regular part-time employee of the City of Port Townsend, based on her having actually worked in excess of the 80 hours per month required for status as a member of the bargaining unit.

WE WILL represent Elizabeth Johnson in regard to her hours of work, as discussed on August 25, 1997.

WE WILL represent Elizabeth Johnson in regard to her discharge based on her comments and actions taken on August 25, 1997, without proper union representation.

WE WILL NOT interfere with, restrain or coerce employees of the City of Port Townsend in the exercise of their rights under the collective bargaining laws of the State of Washington.

DATED: _____

TEAMSTERS UNION, LOCAL 589

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

603 EVERGREEN PLAZA BUILDING
P. O. BOX 40919
OLYMPIA, WA 98504-0919

RECORD OF SERVICE

THE ATTACHED DOCUMENT, IDENTIFIED AS: DECISION 6433-B - PECB HAS BEEN SERVED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION BY DEPOSIT IN THE UNITED STATES MAIL, ON THE DATE ISSUED INDICATED BELOW, POSTAGE PREPAID, ADDRESSED TO THE PARTIES AND THEIR REPRESENTATIVES LISTED IN THE DOCKET RECORDS OF THE COMMISSION AS INDICATED BELOW:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ BETTY PASSMORE

CASE NUMBER: 13611-U-97-03330 FILED: 12/18/1997 ISSUED: 01/12/2000

FILED BY: PARTY 2 DISPUTE: UN FAIR REP DETAILS:

COMMENTS:

Employer: CITY OF PORT TOWNSEND
Attn: JULIE MCCULLOCH, MAYOR
540 WATER STREET

PORT TOWNSEND, WA 98368
360-385-3000

Rep by: TIMOTHY L. MCMAHAN
CITY OF PORT TOWNSEND
540 WATER ST
PORT TOWNSEND, WA 98368
(360) 385-5991

MICHAEL HILDT
CITY OF PORT TOWNSEND
540 WATER ST

PORT TOWNSEND, WA 98368
(360) 385-3000

Party # 2 ELIZABETH JOHNSON
Attn:

P O BOX 1113

HADLOCK, WA 98339
360-732-6808

Rep by:

Party # 3 TEAMSTERS UNION, LOCAL 589
Attn: DOUG BUSH
1305 S C ST PO BOX 4043

PORT ANGELES, WA 98362
350-452-3388

Rep by:

MICHAEL R. MCCARTHY
DAVIES ROBERTS & REID
101 ELLIOTT AVE W, STE 550

SEATTLE, WA 98119
(206) 285-3610