Tacoma School District, Decision 6813 (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA SCHOOL DISTRICT, Employer.	)	
JOHN K. POWELL, Complainant,	)	CASE 14491-U-98-3595
	)	DECISION 6813 - PECB
vs.	)	
LABORERS UNION, LOCAL 252, Respondent.	)	ORDER OF DISMISSAL

On March 29, 1999, John Powell filed two unfair labor practice complaints with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Laborers Union, Local 252 (union) and the Tacoma School District (employer) as respondents. Two separate cases were docketed, consistent with long-established procedure: Case 14491-U-98-3595 covers allegations against the union; Case 14493-U-98-3596 covers allegations against the employer. The cases were reviewed under WAC 391-45-110,[1] and two separate deficiency notices were issued. The complainant was given a period of 14 days in which to file and serve an amended complaint which stated a cause of action against the union in the above-captioned case, or

[1] At this stage of the proceedings, all of the facts alleged in the 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.

face dismissal of the case. Counsel for Powell filed a response, and the case is again before the Executive Director for processing under WAC 391-45-110.

The Executive Director concludes that the previously-noted deficiencies have not been cured, and that the complaint must be dismissed for failure to state a cause of action.

PROCEDURAL BACKGROUND

The controversy concerns Powell's efforts to challenge a three-day suspension for sexual harassment. Although the response to the deficiency notice issued in Case 14493-U-98-3596 disclaimed any intent to pursue a complaint against the employer,[2] the claims are so interrelated that both need to be described in this order.

The Complaint Against the Union

Powell signed the complaint form. Although he inserted "Michael Davis" in the space provided to list an attorney or representative, he did not expressly indicate that Davis is an attorney. In a typewritten statement of facts, Powell alleged the union failed to inform him of his right to grieve the suspension, refused to file a grievance on his behalf, and erred when it told him the date on which his period to grieve began.

---

[2] Accordingly, that case has been closed by a separate order. Tacoma School District, Decision 6795 (PECB, 1999).

The Complaint Against the Employer

Powell also signed this complaint, and inserted "Michael Davis" without expressly indicating that Davis is an attorney. The typewritten statement of facts appears to be identical to that filed in the case against the union. Powell alleged the employer failed to inform him of his appeal rights under Chapter 28A.645 RCW, and responded so tardily to his requests for materials that the time to challenge the suspension under RCW 28A.645.010 had expired by the time he learned of that right.

The Preliminary Ruling Process

WAC 391-45-110 implements RCW 34.05.419(2), which requires administrative agencies to:

> Examine the application, notify the applicant of any obvious errors or omissions, [and] request any additional information the agency wishes to obtain and is permitted by law to require ...

The Executive Director applies statutes, rules, and precedents. The name "Public Employment Relations Commission" is sometimes interpreted as implying broader jurisdiction than is actually conferred upon the agency by statute. The Commission resolves collective bargaining disputes between employers, employees, and unions, and does not have authority to resolve each and every dispute that might arise in public employment. Additionally, the Executive Director must act on the basis of what is contained within the four corners of the statement of facts, and is not at liberty to fill in gaps or make leaps of logic.

The deficiency notice issued in this case indicates the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising solely out of grievance processing, and that the complaint lacks any factual allegations concerning union discrimination which could call into question the union's right to continue as exclusive bargaining representative.

The deficiency notice in the case against the employer indicated the Commission lacks jurisdiction to enforce any rights under Chapter 28A.645 RCW, and that no provision of Chapter 41.56 RCW imposes an affirmative duty on the employer to notify employees how to challenge the discipline it had imposed.

Responses to the Deficiency Notices

Attorney Michael Joslin Davis responded to the deficiency notices, but did not add any new factual allegations against the union. Instead, he contended a delay in issuance of the deficiency notice prevented suing the union and/or employer in court, and he disagreed with the Commission's policy of declining jurisdiction over some "breach of duty of fair representation" claims.

DISCUSSION

Delayed Issuance of Deficiency Notices

While the Commission attempts to comply with the 30-day guideline set forth in the Administrative Procedure Act (APA) for initial review of unfair labor practice complaints, it is not always possible to meet that ideal with the resources available. In this

case, the deficiency notices were issued 109 days after the complaints were filed. Mr. Powell is entitled to an apology, which is hereby tendered for all to see in this published decision.

Claim of Prejudice Unfounded -

Acknowledgment that the deficiency notice was issued 79 days later than called for by the APA guideline does not equate with validation of the prejudice claimed. The response to the deficiency notice asserts:

> ... Had Mr. Powell been notified within the 30 days ... he could have exercised the other options available such as suing the Union and/or the School District in Superior Court.

No statute, rule or precedent is cited for the proposition that access to the courts was lost in the 79 additional days, and none is found. While the six-month period for filing unfair labor practice charges under the National Labor Relations Act (NLRA) was adopted as the appropriate statute of limitations for "breach of duty of fair representation" lawsuits in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), that only applies to the private sector parties governed by the NLRA. Washington cases applying the DelCostello limitation also involve private employers,[3] but the Washington courts would be free to go in a different direction for cases outside of the coverage of the NLRA. RCW 4.16.040 generally allows six years to file claims arising from contracts. The complainant thus assumes too much in making this claim of having been prejudiced by the delay.

---

[3] See, Fowlkes v. International Brotherhood of Electrical Workers, 58 Wn. App. 759, 767-770 (Div.II, 1990).

Agency Impartiality -

Powell further assumes the agency had some obligation to advise him about his legal rights. The response to the deficiency notice included the contention that he could have exercised the other options available if only the Commission had notified him of his complaint's defects within 30 days.

The Commission and its staff maintain an impartial role in all proceedings pending before the agency. WAC 391-08-630(1). The announced purpose of the legislation which created the agency was to provide for the "impartial" resolution of labor-management disputes. RCW 41.58.005(1). As the quasi-judicial body responsible for processing unfair labor practice complaints, the agency is not the complainant's legal advisor. Powell is represented by counsel in this proceeding, and must look to his own attorney for advice about his rights and the forum(s) where they can be pursued.

APA Guidelines Not Mandatory -

The Commission has ruled that the time guidelines in the APA are directory, but not mandatory. In North Franklin School District, Decision 3980-A (PECB, 1993),[4] the Commission acknowledged unfair labor practice proceedings are subject to the APA, but detailed the history of case backlogs pending before the agency and several legislative expansions of the Commission's jurisdiction without

---

[4] In North Franklin, the employer claimed prejudice due to a notice mentioning backpay issued after expiration of an APA time period. While the Commission deleted the backpay reference from the notice, that was based on it having been included in the notice by mistake (because it was not mentioned in the order and the union acknowledged no employee lost pay due to the contracting out), rather than because of failure to meet the APA time guideline.

granting frequent requests for additional staff. The situation has improved, but the backlog has not disappeared: The agency had 436 cases pending as of June 30, 1993; it had 384 cases pending as of June 30, 1999.

The Commission's Jurisdiction

Even if the APA time guidelines were mandatory, they could not create jurisdiction where none exists by statute. It is clear that the complainant disagrees with Commission precedents dividing "breach of duty of fair representation" claims into two categories, but those arguments are without merit.

Violation of Contract Claims -

Numerous decisions since City of Walla Walla, Decision 104 (PECB, 1976) have restated the principle that the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. The explanation for that long line of precedent is that our Legislature patterned Chapter 41.56 RCW after the NLRA, where "violation of contract" claims are pursued through lawsuits in the courts rather than through unfair labor practice proceedings before the National Labor Relations Board (NLRB).[5] Our Legislature did not choose to pattern our statute after public sector collective

---

[5] See, Section 301 of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act), which grants federal courts jurisdiction over contractual claims arising out of bargaining under the NLRA. No counterpart section is needed in Chapter 41.56 RCW, because the superior courts of the state of Washington have constitutional authority as courts of general jurisdiction. See, Blanchard v. Golden Age Brewing Co., 188 Wash. 396 (1936).

bargaining laws in at least Oregon (ORS 243.672(1)(g)) and Wisconsin (Section 111.70(3)(a)(5)), where "violation of contract" is an unfair labor practice processed by an administrative agency.

Fair Representation on Grievances -

Numerous decisions since Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982), have restated the principle that the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances. While it is generally accepted that a union must investigate a grievance of a bargaining unit employee, and must make a good faith decision about whether to pursue the claim, the explanation for the long line of Commission precedent is rooted in both practicality and precedent. A successful claimant before the Commission would be left with an empty victory, because (for reasons already indicated) the Commission could not reach the "violation of contract" underlying a proven breach of the duty of fair representation; under Vaca v. Sipes, 386 U.S. 171 (1967), the courts process such claims under the NLRA, and assert jurisdiction regarding the underlying contract claim if a breach of the duty of fair representation is found.

Union Discrimination -

The Commission asserts jurisdiction over "fair representation" claims arising outside of the contractual orbit, but Powell has not brought his complaint within the class of cases which the Commission processes.

In a case involving this same employer, Tacoma School District (Washington Education Association), Decision 5465-E (EDUC, 1997), the Commission wrote:

> The Commission does police its certifications, and will assert jurisdiction over allegations that a union has abused its statutory status and privileges by discriminating against one or more bargaining unit employees on the basis of union membership, or that the union has engaged in some other form of discrimination against bargaining unit employees on a basis prohibited by state or federal law (e.g., race, creed, sex, national origin, etc.)(footnotes omitted).

Thus, in Port of Seattle, Decision 3294-B (PECB, 1992), the Commission processed allegations that a union misused its position as exclusive bargaining representative to grant seniority status to bargaining unit members based on their union membership or family relationships with other union members. None of the allegations here suggest claims of the type described in Tacoma, however.

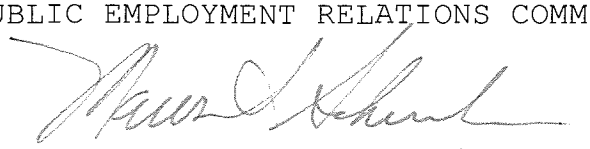
NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-entitled matter is hereby DISMISSED for failure to state a claim for relief available through proceedings before the Commission.

Issued at Olympia, Washington, this 1st day of September, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC-391-45-350.