Tacoma School District, Decision 6655 (EDUC, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA SCHOOL DISTRICT, Employer.	)	
LOIS MEHLHAFF, Complainant, vs. TACOMA EDUCATION ASSOCIATION, Respondent.	)	CASE 13337-U-97-3251 DECISION 6655 - EDUC ORDER OF DISMISSAL

Lois Mehlhaff filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Tacoma Education Association (union) violated RCW 41.59.140 in connection with her employment as a substitute teacher working for the Tacoma School District (employer) in a bargaining unit represented by the union. The complaint was reviewed by the Executive Director for the purpose of making a preliminary ruling under WAC 391-45-110,[1] and a deficiency notice was issued. Mehlhaff filed an amended complaint.

The complaint is being dismissed, because the problems pointed out in the deficiency notice were not addressed, or were not corrected.

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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.

DISCUSSION

Timeliness

The deficiency notice indicated the complaint was untimely, in part, under the six-month statute of limitations set forth in RCW 41.59.140. The limitation period is computed from the date on which a complainant knew or reasonably should have known of a violation of their rights. City of Pasco, Decision 4197-A (PECB, 1994); Port of Seattle, Decision 2796-A (PECB, 1984). This case filed on August 8, 1997, can be considered timely only as to ***actions*** occurring on or after February 8, 1997.

Paragraph 1 of the original complaint alleged the complainant knew by January 16, 1997, of a change in the employer's method for hiring substitute teachers. That defect was not cured in the amendment.

Paragraph 2.1 of the original complaint suffered from a similar procedural defect with respect to an allegation that the complainant made contact with a union official on "the next day". That was interpreted, in the context of other allegations, as meaning January 17, 1997. This defect was not cured in the amendment.

The amendment added new allegations to paragraph 1 of the complaint, as follows:

> 1. ... the union did not consult with nor investigate any of the effects of the changes they were negotiating with the affected parties (substituted teachers). ...,
>
> 2. ... all information the union used to "decline" to negotiate was from the school district.
>
> 3. ... the union [did not] consider or investigate the effects of the changes on the substitute teachers. ...

The amendment failed to specify the dates of the newly-alleged occurrences, however, and thus cannot be found to be timely.

The amendment also added a new paragraph 2.3 which is understood as an attempt to address the timeliness issue, as follows:

> 2.3 Not until the receipt of the February 13, 1997 letter from Bob Graf did complainant become aware of the extent and procedures that the union had exercised to align itself against the interests of substitute teachers. All of the events itemized in the Bob Graf letter became known for the first time on February 13, and, as such, all "negotiations" itemized in the letter are timely.

A copy of the cited letter was attached to the amendment. It stated:

> You have requested that the T.E.A. file a demand to bargain on an alleged change in working conditions for substitutes with implementation of the SubFinder System.
>
> We must decline this request. T.E.A. has been working with the District, as part of our last contract settlement on better ways to use technology to contact substitutes. At our Labor/-Management meeting in October with Superintendent Shoemake, we were informed that the District was looking at the SubFinder System. We received a presentation on the SubFinder System at Labor/Management in December 1996. T.E.A. checked with Seattle, who uses the same system, and all reports were positive. We also checked to see if there would be any policy or procedure changes and found none. Finally, John Cahill attended the SubFinder Training for Principals to ensure that there are no changes in practice and there are none at this time.
>
> The SubFinder System was configured to retain and enhance current practices for our substitutes and regularly employed full and part time members. When initial problems are cleared up, we believe the system will benefit the substitute, as well

> as the class room teacher, and put more substitute members to work each day. We find no unilateral change in working conditions.

The fact she did not receive the letter until February 13 might save this complainant from the six-month limitation if Graf's letter was an actionable occurrence, but nothing in that letter suggests the union engaged in any conduct which was, on its face, unlawful. Graf's letter was not so much an event in itself, as a recitation of previous events. The amendment thus goes only to the ***extent*** of her knowledge on and after February 13, 1997. The complainant knew of the change as of January 16, 1997. Graf's letter did not relieve the complainant of her responsibility to ascertain details of matters important to her employment.[2]

Lack of Standing

Paragraph 2.1 alleged the change of hiring procedure was implemented before agreement with the union, but the deficiency notice pointed out that individual employees lack legal standing to pursue "refusal to bargain" claims. Mukilteo School District, Decision 3964-A (PECB, 1992).[3] This was not addressed in the amendment.

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[2] The six-month period has been extended in certain cases where a lack of knowledge was attributable to concealment of the facts by the violator, as in North Franklin School District, Decision 3980-A (PECB, 1992). Neither the original complaint nor the amendment in this case sets forth facts that would support a conclusion that the union concealed its actions from complainant.

[3] While the union might have had a cause of action under RCW 41.59.140(1)(e), if the employer unilaterally changed employee wages, hours or working conditions prior to satisfying its bargaining obligation, that would not empower an individual bargaining unit employee to stand in shoes that belong only to the union.

Internal Union Affairs

The deficiency notice pointed out that paragraphs 4.1 through 4.8 delve into an area of internal union affairs, where the Commission has limited jurisdiction. The constitutions and bylaws of unions are the contracts among the members for how the organization is to be operated. Disputes involving internal union affairs must be resolved through internal procedures, or through the courts. Enumclaw School District, Decision 5979 (PECB, 1997). This defect was not cured in the amendment.

The amendment alleges that the union did not consult any substitute teachers about the effects of what it was negotiating with the employer. However, Chapter 41.59 RCW does not regulate how a union is to formulate its own proposals, or how a union is to decide whether to accept or reject employer proposals. Lewis County, Decision 556-A (PECB, 1979). Similarly, the statute does not require ratification of agreements by bargaining unit employees. Naches Valley School District, Decision 2516-A (EDUC, 1987). Thus, a union can decide whether to submit any offer to its membership for approval. University of Washington, Decision 4668-A (PECB, 1994).

A union that has been recognized or certified as an "exclusive bargaining representative" under the statute owes a duty of fair representation to all employees is represents.[4] It must not engage in discrimination against any bargaining unit employee (such as based on race, national origin, sex, creed, handicap, or union membership). Seattle School District, Decision 4917-A (EDUC,

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[4] That is, it must treat all portions of its membership without hostility or discrimination, to exercise its discretion regarding the rights of individual members in good faith and honesty, and to avoid arbitrary conduct. Allen v. Seattle Police Guild, 100 Wn.2d 361 (1983).

1995). No such discrimination is alleged in this case, which concerns a change affecting all substitute teachers, and where there is no alleged discrimination within that class.

Similarly, an exclusive bargaining representative must not align itself in interest against an employee it has a duty to represent. City of Redmond, Decision 886 (PECB, 1980); Pierce County Fire District 2, Decision 4307 (PECB, 1993). That obligates a union to exercise good faith, but does not obligate a union to satisfy all bargaining unit members or to entirely eliminate all differences in the way employees are treated. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). To warrant a hearing, an unfair labor practice complaint filed by an employee must allege ***facts*** which could constitute a basis for finding hostility, bad faith, dishonesty, or arbitrary conduct on the part of the union which deprives the employee of a right protected by the statute. Paragraph 2.2 does not allege facts which could support a finding that the union's inaction was arbitrary, discriminatory or in bad faith. See, City of Bonney Lake, Decision 4916 (PECB, 1994). The mere fact that some employees benefit more than others from contract changes does not violate any union obligation. METRO, Decision 2320 (PECB, 1986); City of Pasco, Decision 2327 (PECB, 1986); Bellevue Community College, Decisions 4067 (CCOL, 1993).

Paragraph 3 of the complaint details how the new system implemented by the employer has changed the situation of substitute teachers, but none of those changes are unlawful on their face. It is not even clear that the alleged changes impact all substitute teachers negatively; the changes may well be viewed as positive by many substitute teachers. Accordingly, paragraph 3 does not state a cause of action for further proceedings before the Commission.

Finally, while the amendment also alleges the union relied on information provided by the employer, that falls far short of a basis for a finding that the union has accepted the support of, or has fallen under the influence of, the employer. See, Washington State Patrol, Decision 2900 (PECB, 1987). Apart from the conflict between the amendment and the independent actions described in Graf's letter attached to that amendment, the quality and extent of the work done by the union is a matter of internal union affairs. Absent any facts suggesting unlawful discrimination, the complainant would have to pursue her claims through the union's internal procedures or the courts, or could seek a change of representation for the bargaining unit through representation procedures authorized by RCW 41.59.070 and implemented through Chapter 391-25 WAC.

Violation of Contract

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

Paragraph 3 of the amendment alleges a violation of the collective bargaining agreement,

> [B]y requiring substitutes to be available seven days a week, the "SubFinder" system amends, defacto, the silent provisions of the current agreement,

With respect to any "silent provisions", State ex rel Bain v. Clallam County, 77 Wn.2d 542 (1970) sets forth strong public policy reasons for requiring that all agreements reached in collective bargaining must be reduced to written form to be enforceable.

Paragraphs 4.1 through 4.8 of the original complaint concerned the complainant's assignments for May 14 through 16, 1997. While the matters described might have been the basis for a grievance under the collective bargaining agreement between the union and employer, the deficiency notice pointed out that they do not state a cause of action before the Commission. This defect was not addressed by the amendment.

Duty of Fair Representation on Grievances

The complainant's reliance on Vaca v. Sipes, 386 U.S. 171 (1967) is not persuasive. A well-established principle closely related to the absence of "violation of contract" jurisdiction, is that the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances. Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982). An employee claiming rights as a third-party beneficiary to a collective bargaining agreement would have to pursue the matter in a court which could assert jurisdiction over, determine, and remedy any underlying contract violation.[5]

The amendment added a new paragraph 5 in which the complainant alleges that the union refused to pursue grievances concerning the new hiring procedure and/or assignments she received under that procedure. Mukilteo, supra, is applicable here. Paragraph 5 fails to state a claim for relief available through unfair labor practice proceedings before the Commission.

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[5] An employee who pursues such a claim may be called upon to prove a breach of the duty of fair representation in order to overcome a "failure to exhaust contractual remedies" defense.

Insufficient or Vague Allegations

Certain of the allegations set forth insufficient facts to find a cause of action exists. WAC 391-45-050(2) requires that a complaint charging unfair labor practices contain "[c]lear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences". The Executive Director must act on the basis of what is contained within the four corners of a statement of facts, and is not at liberty to fill in gaps or make leaps of logic.

The amendment added a new paragraph 3.1, referring to an enclosed "Subfinder System, Substitute Information Sheet" as detailing some of the changes in working conditions. What is lacking is any base reference from which to evaluate what was changed.

Paragraphs 4.1 through 4.8 concern changes of the complainant's assignment without compensation, but were also described as:

> [E]vidence of the union's alignment against the interest of complainant and all substitute teachers and evidence of changes to the agreement caused by the union's alignment in interest against complainant and substitute teachers.

There is no evident linkage, however, between the assignment and pay issues (which might be a basis for a grievance under the collective bargaining agreement) and any perceived alignment in interest by the union.

Violation of Other Laws

A paragraph 3.1 added in the amendment can also be read as claiming that being on-call seven days a week violates state rules concerning compensation for on-call and overtime work. However, the

Washington Minimum Wage Act, Chapter 49.46 RCW, is administered by the Department of Labor and Industries. The Public Employment Relations Commission has no authority to enforce either that statute or federal wage/hour laws. These allegations thus fail to state a claim for relief available through unfair labor practice proceedings before the Commission.

Modification of the Collective Bargaining Agreement

Paragraph 3 of the amendment alleges that the employer and union agreed to change the collective bargaining agreement as to,

> Substitutes who are called to work a full day shall be paid at the full daily rate and section 45(e) which provides for compensation for "staff members who are required by the principal to cover for another teacher.

Regardless of whether they are an outgrowth of a labor-management committee process or of more conventional negotiations, nothing precludes an employer and union from agreeing to changes during the term of a collective bargaining agreement. Indeed, unions and employers have a mutual duty to "Exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions ...". RCW 41.58.040(1). Negotiating is the essence of the ongoing duty to bargain.[6] In the absence of alleged discrimination or other violation of law, successful negotiation of changes in working conditions is to be praised, not condemned.

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[6] Indeed, if a union fails to request bargaining in a timely manner after being notified of a contemplated change, it will be found to have waived its bargaining rights by inaction. Lake Washington Technical College, Decision 4721-A (PECB, 1995).

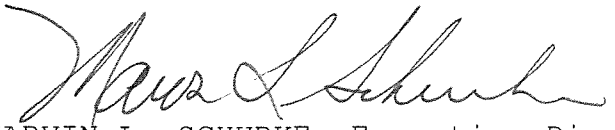
NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-entitled matter is hereby DISMISSED.

Issued at Olympia, Washington, this 6th day of March, 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.