STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LYNN KEMPER, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 16603-U-02-4326 DECISION 8216 - PSRA PARTIAL DISMISSAL AND ORDER FOR FURTHER PROCEEDINGS
LYNN KEMPER, Complainant, vs. WASHINGTON FEDERATION OF STATE EMPLOYEES, Respondent.	CASE 16604-U-02-4327 DECISION 8217 - PSRA PARTIAL DISMISSAL AND ORDER FOR FURTHER PROCEEDINGS

On August 12, 2002, Lynn Kemper (Kemper) filed two complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC. The first complaint named the University of Washington (employer) as respondent and was docketed by the Commission as Case 16603-U-02-4326. The second complaint named the Washington Federation of State Employees (WFSE) as respondent and was docketed by the Commission as Case 16604-U-02-4327.

The complaints were reviewed under WAC 391-45-110,[1] and a deficiency notice issued on April 22, 2003, indicated that it was not possible to conclude that a cause of action existed at that time

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

for some of the allegations in each case. Kemper was given a period of 21 days in which to file and serve amended complaints, or face dismissal of the defective allegations.

On May 15, 2003, Kemper filed an amended complaint in each case. After review of the amended complaints, the Executive Director dismisses the defective allegations for failure to state a cause of action.

DISCUSSION

Under RCW 41.06.340, as amended by the Personnel System Reform Act (PSRA) of 2002, jurisdiction to determine and remedy unfair labor practices concerning state civil service employees was transferred to the Public Employment Relations Commission, effective June 13, 2002. As amended by the PSRA, the operative provision of the state civil service law, RCW 41.06.340, now provides:

> RCW 41.06.340 UNIT DETERMINATION, REPRESENTATION AND UNFAIR LABOR PRACTICE PROVISIONS APPLICABLE TO CHAPTER. (1) . . .
>
> (2) Each and every provision of RCW 41.56.140 through 41.56.160 shall be applicable to this chapter as it relates to state civil service employees. . . .

Rather than the "investigation" process formerly conducted by the Washington State Department of Personnel (DOP) staff, the Commission's rules call for the issuance of a preliminary ruling based on an assumption that all of the facts alleged in a complaint are true and provable. WAC 391-45-110. The question at hand in the preliminary ruling process is whether the complaint states a claim for relief available through unfair labor practice proceedings before the Commission.

Interference Allegations

The complaints allege that the employer interfered with the rights of Kemper by failing to forewarn her that the position for which

she was hired was subject to union security obligations, and that the union interfered with the rights of Kemper by enforcing union security obligations. The deficiency notice indicated that those claims inherently assume that employees have a right to be informed of union security obligations when they are interviewed for or offered employment and/or that they have a right to exemption from union security obligations. No basis for such an assumption is cited in the complaints, and none is found in the state civil service law, Chapter 41.06 RCW. Moreover, no such right is expressly conferred by RCW 41.56.140 through .160, or by any rule promulgated by the Commission.

Discrimination Allegations

The complaints allege that inclusion of the position now held by Kemper in a bargaining unit represented by the WFSE was "discriminatory" and that she was the "only union [research technologist] on campus" and that "For 3 years, [she had] received identical pay and benefits as all other [research technologists], but [has] had to pay union dues, they haven't." The complaints pointed out that other research technologists on the campus were then involved in a representation proceeding,[2] and speculated that the rates of pay and benefits negotiated for other research technologists would not be applied to the position occupied by Kemper.

Commission precedents under RCW 41.56.140 through .160 recognize the right of individual employees to file unfair labor practice charges against both their employer and a union, where the employee claims that the position held or claimed has been improperly

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[2] On August 21, 2002, Service Employees International Union, Local 925, was certified as exclusive bargaining representative of: "All full-time and regular part-time research technologists and scientific instructional technicians of the University of Washington, excluding supervisors, confidential employees, and all other employees." *University of Washington*, Decision 7811-A (PSRA, 2002).

included in or excluded from an existing bargaining unit by agreement of that employer and union. *Castle Rock School District*, Decision 4722-B (EDUC, 1995); *Richland School District*, Decision 2208, 2208-A (PECB, 1985). Several other well-established principles explain the context for those precedents:

- Individual employees do not have standing to file or pursue unit clarification petitions under Chapter 391-35 WAC;[3] and
- The Commission has exclusive jurisdiction to police bargaining relationships and determine appropriate bargaining units under RCW 41.06.340, which could include imposing sanctions upon an "exclusive bargaining representative" which is found guilty of a breach of the duty of fair representation by aligning itself in interest against bargaining unit employees on unlawful grounds;[4] and
- The Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contract grievances,[5] because the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute.[6]

Thus, the "only union [research technologist] on campus" allegation invites close scrutiny of whether the position held by Kemper has been improperly included in a bargaining unit represented by the WFSE (or, looked at from a different direction, has been improperly separated from other research technologists on the campus). The deficiency notice indicated that the complaints were properly filed

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3 *See* WAC 391-35-010.

4 *Elma School District (Elma Teachers Organization)*, Decision 1349 (EDUC, 1982).

5 *Mukilteo School District (Public School Employees of Washington)*, Decision 1381 (PECB, 1982).

6 *City of Walla Walla*, Decision 104 (PECB, 1976).

against both the employer and the WFSE, as they are both necessary parties to any proceeding involving their bargaining relationship. *See Shoreline School District*, Decision 5560, 5560-A (PECB, 1996).

The deficiency notice indicated that the transfer of jurisdiction in the PSRA embraced a time limitation on the filing of unfair labor practice complaints, as follows:

> RCW 41.56.160 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS AND CEASE AND DESIST ORDERS. (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.

The deficiency notice pointed out that these complaints filed on August 12, 2002, could only be considered timely under RCW 41.56.160 for conduct that is alleged to have occurred on or after February 12, 2002, and so could not go back for the entire three-year period described in the complaints.

The amended complaints filed by Kemper modified the original complaints to comply with the six-month statute of limitations set forth in RCW 41.56.160.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the interference and discrimination allegations of the complaint in Case 16603-U-02-4326 state a cause of action, summarized as follows:

> Employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), by

> its conduct on or after February 12, 2002, of including a research technologist position occupied by Lynn Kemper in a bargaining unit represented by the Washington Federation of State Employees.

The interference and discrimination allegations of the complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. Assuming all of the facts alleged to be true and provable, the interference allegations of the complaint in Case 16604-U-02-4327 state a cause of action, summarized as follows:

> Union interference with employee rights in violation of RCW 41.56.150(1), by its conduct on or after February 12, 2002, of including a research technologist position occupied by Lynn Kemper in a bargaining unit represented by the union.

The interference allegations of the complaint will be the subject of further proceedings under Chapter 391-45 WAC.

3. The University of Washington and the Washington Federation of State Employees shall each:

> File and serve its answer to the allegations listed in paragraphs 1 and 2 of this order, within 21 days following the date of this order.

An answer shall:

a. Specifically admit, deny or explain each fact alleged in the complaint, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the complaint, will be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of a hearing as to the facts so admitted. *See* WAC 391-45-210.

4. The allegations of the complaint in Case 16603-U-02-4326 concerning employer interference with employee rights in violation of RCW 41.56.140(1), by failing to forewarn Kemper that the position for which she was hired was subject to union security obligations, are DISMISSED for failure to state a cause of action.

5. The allegations of the complaint in Case 16604-U-02-4327 concerning union interference with employee rights in violation of RCW 41.56.150(1), by enforcing union security obligations against Kemper, are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 24th day of September, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

Paragraphs 4 and 5 of this order will be the final order of the agency on any defective allegations, unless a notice of appeal is filed with the Commission under WAC 391-45-350.