STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LYNN KEMPER, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent,	)	CASE 16603-U-02-4326 DECISION 8216-A - PSRA
LYNN KEMPER, Complainant, vs. WASHINGTON FEDERATION OF STATE EMPLOYEES, Respondent.	)	CASE 16604-U-02-4327 DECISION 8217-A - PSRA CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Lynn Kemper appeared *pro se*.

Daniel Kraus, Associate Director of Labor Relations, for the employer.

Parr & Younglove, by *Christopher J. Coker*, for the union.

On August 12, 2002, Lynn Kemper filed two unfair labor practice complaints 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 (union) as respondent, and was docketed by the Commission as Case 16604-U-02-4327.

The complaints were reviewed under WAC 391-45-110. A deficiency notice was issued on April 22, 2003, and Kemper filed an amended

complaint on each case on May 15, 2003. A partial dismissal and order for further proceedings was issued on September 24, 2003.[1] A cause of action was found to exist in Case 16603-U-02-4326, on allegations summarized as:

> 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.

A cause of action was found to exist in Case 16604-U-02-4327, on allegations summarized as:

> 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.

Examiner David I. Gedrose held a hearing on March 15, 2004. The parties presented oral closing arguments at that hearing, and did not submit post-hearing briefs.

---

[1] *University of Washington*, Decision 8216 (PSRA, 2003). Unfair Labor Practice Manager Mark S. Downing dismissed Kemper's claims that: (1) the employer interfered with her rights by failing to forewarn her that the "research technician I" position for which she was hired was subject to a union shop obligation; and (2) that the union interfered with her rights by enforcing the union shop obligation on Kemper. It was noted that no right to notice is expressly conferred by any statute or rule. The same order also noted that, although Kemper had alleged unfair labor practices dating back to 1999, her complaint filed in August 2002 could only be considered timely under RCW 41.56.160 for conduct alleged to have occurred on or after February 12, 2002. (The terms "research technician" and "research technologist" are used interchangeably.)

Based on the evidence and arguments advanced by the parties, and the relevant statutes and precedents, the Examiner rules that Kemper failed to prove that the employer discriminated against her or interfered with her employee rights under Chapter 41.06 RCW. Kemper also failed to prove that the union interfered with her rights under Chapter 41.06 RCW. Both complaints are DISMISSED on their merits.

BACKGROUND

The employer is a state institution of higher education with its main campus in Seattle. The employer's "classified" employees are covered by the State Civil Service Law, Chapter 41.06 RCW, and have limited collective bargaining rights under that statute.[2] The employer thus has collective bargaining relationships with several unions representing various bargaining units, and also has classified employees who are not represented for the purposes of collective bargaining.

The union represents six bargaining units within the employer's workforce. One of those units, termed the "campus-wide" unit, includes employees in the employer's Bioengineering Department.

As of February 2002, Kemper worked for the employer as a research technician I in the Bioengineering Department. Kemper voluntarily

---

[2] Notice is taken of Commission records which indicate as many as 41 bargaining units have existed within the employer's classified employee workforce. The evidence in this record also supports a conclusion that bargaining units within the employer's organization are not uniformly organized according to classification or type of work, so that some classifications (such as secretaries) may be divided with some employees included in bargaining units while others are not.

left that position in August 2002, but continued to work for the employer in a different position and department at the time of hearing in this proceeding.

The Personnel System Reform Act (PSRA) was signed into law in 2002, with implementation over a transition period. Among changes that were effective in 2002 was a shift of authority to the Public Employment Relations Commission. Effective June 13, 2002, RCW 41.06.340 was amended to read as follows:

> RCW 41.06.340 DETERMINATION OF APPROPRIATE BARGAINING UNITS -- UNFAIR LABOR PRACTICES PROVISIONS APPLICABLE TO CHAPTER. (1) With respect to collective bargaining as authorized by RCW 41.80.001 and 41.80.010 through 41.80.130, the public employment relations commission created by chapter 41.58 RCW shall have authority to adopt rules, on and after June 13, 2002, relating to determination of appropriate bargaining units within any agency. In making such determination the commission shall consider the duties, skills, and working conditions of the employees, the history of collective bargaining by the employees and their bargaining representatives, the extent of organization among the employees, and the desires of the employees. The public employment relations commission created in chapter 41.58 RCW shall adopt rules and make determinations relating to the certification and decertification of exclusive bargaining representatives.
>
> (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. . . .

Prior to that time, the Washington Personnel Resources Board (WPRB) was responsible for both unit determination and the prevention of unfair labor practices. Prior to 1993, the Higher Education Personnel Board (HEPB) had jurisdiction over the employer's classified employees under a separate civil service law for higher education institutions.

ANALYSIS

Was Kemper's Position in the Campus-Wide Bargaining Unit?

Kemper contests the propriety of including the research position she held in February 2002 in the "campus-wide" bargaining unit represented by the union, and of imposing union shop obligations upon her while she held that position. The employer and union both defend that the position Kemper held was properly included in the "campus-wide" bargaining unit.

Applicable Legal Standards -

The authority to determine and modify bargaining units under Chapter 28B.16 RCW was vested in the HEPB. The unit determination criteria established in that statute included, "duties, skills, and working conditions of the employees, the history of collective bargaining by the employees and their bargaining representatives, the extent of organization among the employees, and the desires of the employees." After the unit determination authority was shifted, the WPRB applied similar criteria in RCW 41.06.150(11).

The Commission now performs the unit determination function under similar criteria in RCW 41.06.340(1), as quoted above. Additionally, the Commission acts under RCW 41.80.070, which includes:

> RCW 41.80.070 BARGAINING UNITS -- CERTIFICATION. (1) *A bargaining unit of employees covered by this chapter existing on June 13, 2002, shall be considered an appropriate unit, unless the unit does not meet the requirements of (a) and (b) of this subsection.* The commission, after hearing upon reasonable notice to all interested parties, shall decide, in each application for certification as an exclusive bargaining representative, the unit appropriate for certification. In determining the new units or modifications of existing units, *the commission shall consider: The duties, skills, and working conditions of the employees; the history of*

> *collective bargaining; the extent of organization among the employees; the desires of the employees; and the avoidance of excessive fragmentation.* However, a unit is not appropriate if it includes:
>
> (a) Both supervisors and nonsupervisory employees. A unit that includes only supervisors may be considered appropriate if a majority of the supervisory employees indicates by vote that they desire to be included in such a unit; or
>
> (b) More than one institution of higher education. For the purposes of this section, any branch or regional campus of an institution of higher education is part of that institution of higher education.
>
> (2) The exclusive bargaining representatives certified to represent the bargaining units existing on June 13, 2002, shall continue as the exclusive bargaining representative without the necessity of an election. . . .

(emphasis added). RCW 41.80.070 also went into effect on June 13, 2002.

Application of Standards -

The HEPB created the bargaining unit now referred to as "campus-wide" in 1969, and modified it several times over the next several years in response to petitions from the union. Of particular interest here, the HEPB ordered the accretion of the "research technician I" classification in the Bioengineering Department into the "campus-wide" unit on February 7, 1973.

In 1995, six employees petitioned the WPRB for exclusion of all clerical and laboratory employees in the Bioengineering Department from the "campus-wide" bargaining unit. The WPRB denied the petition in an order dated September 1, 1995.

This case presents the third occasion for an agency having jurisdiction over these parties to rule on the inclusion of the

"research technician I" classification in the "campus-wide" bargaining unit represented by the Washington Federation of State Employees. Kemper has not provided any legal basis for the Examiner to upset or ignore the rulings of the boards that had the statutory authority to decide the bargaining unit status of the classification.

Was Kemper Deprived of Some Required Notice?

Notwithstanding the partial dismissal of her complaint, Kemper continued to assert at the hearing that the employer's advertising for the "research technician I" job did not notify her that the position was in a bargaining unit represented by a union, and that the employer did not notify her of that fact when she accepted the job.[3]

The employer states that it fulfilled its duty to notify Kemper of her union status within thirty days of her employment.[4]

The union takes the same stance as the employer regarding the inclusion of the research technician in the bargaining unit.

Most of Kemper's testimony at the hearing centered on this issue.[5] Neither the employer nor the union objected to that testimony, and

---

[3] As a remedy, Kemper requests an apology from the employer over its alleged failure to tell her of the job's union status prior to her taking the job.

[4] Kemper acknowledges that she was notified of her bargaining unit status and of the union shop obligation after she commenced her employment in the position.

[5] Even if Kemper had a claim on this issue, it would have been untimely, since the employer's alleged actions took place in 1999.

they even responded with evidence to show they gave Kemper timely notice of her of union shop obligations within 30 days after she commenced her employment. Nothing in those efforts suffices, however, to revive a dead issue. It is unnecessary to elaborate on the final order which dismissed Kemper's "notice" allegations.

Should the Unit Status of the Position be Changed?

Kemper contends that the "research technician I" classification should not be in the "campus-wide" unit represented by the union, and that she was discriminated against because the position she held was the only union-represented research technician on the employer's campus.

The employer denies it discriminated against or interfered with Kemper in the exercise of her bargaining rights.

The union states that the operative actions took place well before February 2002, and that it did nothing to interfere with Kemper's collective bargaining rights between February 2002 and the filing of the complaint in August 2002.

Applicable Legal Standards -

It is an unfair labor practice for a public employer to discriminate against, interfere with, restrain, or coerce public employees in the exercise of their collective bargaining rights. *See* RCW 41.56.140(1) (referring to RCW 41.56.040). RCW 41.56.150(1) similarly prohibits interference by unions.[6]

---

[6] The Commission's jurisdiction in discrimination claims is limited to alleged discriminatory acts related to union activity and collective bargaining. The Commission has no jurisdiction to adjudicate claims involving alleged discrimination based upon sex, race, religion, or similar factors.

An individual employee does not have legal standing to file or process a unit clarification petition under Chapter 391-35 WAC,[7] but individual employees do have legal standing to file and process unfair labor practice complaints alleging interference with their statutory rights and/or discrimination connected with their exercise of rights under a collective bargaining statute.

Commission precedents under RCW 41.56.140 through .160 recognize the right of an individual employee to file unfair labor practice complaints against both an employer and union, where the employee claims that the position they hold has been improperly included in or excluded from an existing bargaining unit by agreement of the employer and union. *Shoreline School District,* Decisions 5560, 5560-A (PECB, 1996); *Castle Rock School District,* Decision 4722-B (EDUC, 1995); *Richland School District,* Decisions 2208, 2208-A (PECB, 1985). Thus:

- The Commission has exclusive jurisdiction to determine appropriate bargaining units, 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; and

- The Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contract grievances, because the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute.

See University of Washington, Decision 8216; *Shoreline School District,* Decisions 5560, 5560-A. Thus, even one employee can

---

[7] WAC 391-35-010 omits individual employees.

challenge bargaining unit status for reasons such as improper inclusion of confidential or supervisory employees, or where no community of interest exists; or improper exclusion which strands an individual without access to statutory bargaining rights.

Application of Standards -

Kemper's only mention of "discrimination" was her allegation that the research technician I position in the Bioengineering Department was the only union-represented research technician in the employer's workforce. There was no evidence, nor did Kemper even imply, that this alleged situation existed because she was singled out for adverse treatment based upon her union status. Rather, the evidence Kemper presented suggested this was not the case. There is no basis in the record for a discrimination action against the employer. Kemper's remaining claims against the employer and union are that they interfered with her rights under Chapter 41.56 RCW.

Kemper invokes the right to refrain from union activity that flows from the right to designate "representatives of their own choosing" established in RCW 41.56.040. It is evident that Kemper's choice is "no" representation.

Kemper points out that, although the employer had other research technicians in its workforce when she commenced her employment in the Bioengineering Department in 1999, she was the only research technician in a bargaining unit and the only one subjected to a union shop obligation. Thus, Kemper states that she had to pay union dues while other research technicians did not, and that the situation continued until she left the Bioengineering Department in 2002.[8]

---

[8] As a remedy, Kemper asks that she be reimbursed for six months of union dues.

The key to an unfair labor practices claim in this context would be in demonstrating not only that the inclusion or exclusion was improper, but that the employer or union separately or in collusion had unlawfully aligned themselves against the interest of the employee and restricted the employee's collective bargaining rights. Here, the fact that other research technicians were unrepresented in 1973 was a circumstance for the HEPB to consider in ruling on whether to include the Bioengineering Department research personnel in the "campus-wide" bargaining unit, just as it was a circumstance for the WPRB to consider in ruling that the Bioengineering Department research personnel should remain in the "campus-wide" bargaining unit. The bargaining unit status of the position Kemper accepted in 1999 flowed from HEPB and WPRB decisions issued years earlier and cannot be related in any way to Kemper's preference to refrain from union activity.[9]

Kemper offered no evidence that the bargaining unit was inappropriate, or that the employer or the union had unlawfully conspired to keep her in it. The preliminary ruling noted that Kemper's claim that she was the "only union [research technologist] on campus" invited close scrutiny of whether the position held by Kemper was

---

[9] The situation of other research technicians on the employer's campus has since changed. On August 21, 2002, Service Employees International Union (SEIU), 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).

Kemper may have had an argument for inclusion in the SEIU bargaining unit based upon changed circumstances, but certification of the SEIU unit came nine days after she filed her original complaint, and she did not file an amended complaint until May 15, 2003. By then any claim based upon the SEIU certification was untimely.

improperly included in the bargaining unit represented by the union, or in the alternative, improperly separated from other research technologists on the campus. *University of Washington*, Decision 8216. The burden is on the complainant to prove interference claims, and Kemper had the burden to prove that the inclusion of the research technician in the campus-wide unit was inappropriate, or in the alternative, that the position's exclusion from an appropriate unit was a violation of her collective bargaining rights, and that the union and the employer, acting alone or in concert, unlawfully interfered with her right to be in an appropriate bargaining unit. Kemper's focus was on her having to pay union dues while the non-research technicians did not, and she did not provide evidence on the "unit" issue.[10] The record in this case thus presents no evidentiary basis for the Examiner to rule on whether the campus-wide unit continues to be the appropriate unit placement for the research technician in the Bioengineering Department.[11]

FINDINGS OF FACT

1. The University of Washington is an employer of classified employees who are covered by Chapter 41.06 RCW.

2. The Washington Federation of State Employees is a labor organization which has been certified as the exclusive bargaining representative of employees covered by Chapter 41.06 RCW.

---

[10] In fact, she stated that since she was no longer in the position, its present inclusion in the campus-wide bargaining unit does not concern her.

[11] In the alternative, the claim concerning the propriety of the unit placement is moot, since Kemper left the disputed position and has no further interest in it.

3. By an order issued in 1973, the former Higher Education Personnel Board included research technicians working in the Bioengineering Department of the University of Washington in a so-called "campus-wide" bargaining unit represented by the Washington Federation of State Employees.

4. On a date not established in this record, the "campus-wide" bargaining unit at the University of Washington became a union shop by vote of the employees under RCW 41.06.150(12) or its predecessor.

5. By an order issued in 1995, the Washington Personnel Resources Board rejected a proposal to remove research technicians working in the Bioengineering Department of the University of Washington from the "campus-wide" bargaining unit.

6. Responding to an advertisement in 1999, Lynn Kemper applied for and was hired for a position in the "research technician I" classification in the Bioengineering Department, within the "campus-wide" bargaining unit. Thereafter, the employer and union enforced union shop obligations upon Kemper while she held that position until 2002.

7. The inclusion of the position held by Kemper in the campus-wide bargaining unit resulted from administrative decisions of the agencies charged with responsibility for applying Chapter 41.06 RCW, rather than from any agreement or action of the University of Washington and the Washington Federation of State Employees.

8. Lynn Kemper has failed to establish a causal connection between her inclusion in the campus-wide bargaining unit and any exercise of her right to refrain from union activities or to have no union representation.

9. Kemper failed to produce any evidence that either the employer or union, acting alone or in concert, unlawfully included Kemper in the campus-wide bargaining unit, or unlawfully excluded her from a more appropriate bargaining unit.

10. Kemper voluntarily left the position of research technician I in August 2002, and at the time of the hearing was employed in another (non-union) position with the employer in another department.

11. The exclusion of other research technician positions in the employer's workforce from any bargaining unit until 2002 was the result of administrative decisions applying Chapter 41.06 RCW, and Lynn Kemper ceased to have any interest in or legal standing to challenge that situation when she left the disputed position in 2002.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under RCW 41.06.340 and Chapter 391-45 WAC.

2. Based on the foregoing findings of fact, Lynn Kemper has failed to sustain her burden of proof to establish that the University of Washington discriminated against her or interfered with her employee rights by including her in a bargaining unit represented by the Washington Federation of State Employees, so that no violation of RCW 41.56.140 has been established in Case 16603-U-02-4326.

3. Based on the foregoing findings of fact, Lynn Kemper has failed to sustain her burden of proof to establish that the Washington Federation of State Employees interfered with her employee rights by including her in a bargaining unit repre-

sented by the Federation, so that no violation of RCW 41.56.150 has been established in Case 16604-U-02-4327.

ORDER

1. The complaint charging unfair labor practices filed in Case 16603-U-02-4326 against the University of Washington is DISMISSED on its merits.

2. The complaint charging unfair labor practices filed in Case 16604-U-02-4327 against the Washington Federation of State Employees is DISMISSED on its merits.

Issued at Olympia, Washington, this 15th day of June, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, Examiner

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.