State - Revenue (Washington Public Employees Association), Decision 8972 (PSRA, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE - REVENUE, Employer.	)	
DAVID LAZAR, Complainant,	)	CASE 19264-U-05-4893
vs.	)	DECISION 8972 - PSRA
WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Respondent.	)	PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On March 10, 2005, David Lazar (Lazar) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Washington Public Employees Association (union) as respondent. Lazar is employed by the Washington State Department of Revenue (employer). The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on April 14, 2005, indicated that it was not possible to conclude that a cause of action existed at that time. Lazar was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the case. A continuance was granted extending the deadline for filing of an amended complaint. On May 16, 2005, Lazar filed an amended complaint. The Unfair Labor Practice Manager dismisses defective allegations of the

[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.

amended complaint for failure to state a cause of action, and finds a cause of action for interference allegations of the amended complaint. The union must file and serve its answer to the amended complaint within 21 days following the date of this Decision.

DISCUSSION

The allegations of the complaint concern union interference with employee rights in violation of RCW 41.80.110(2)(a), inducement of employer to commit an unfair labor practice in violation of RCW 41.80.110(2)(b), and an "other unfair labor practice" violation, by failing to provide adequate notice and allowing all bargaining unit employees to participate in a contract ratification vote.

Unfair labor practice complaints concerning the actions of a union during a contract ratification vote are normally dismissed as the Commission lacks jurisdiction over internal union affairs. *Lewis County*, Decision 464-A (PECB, 1978); *Lake Washington School District*, Decision 6891 (PECB, 1999). However, a different result is possible where a union delegates its representative role to a referendum of all bargaining unit employees. *Branch 6000, Letter Carriers*, 232 NLRB 263 (1977), *aff'd*, 595 F.2d 808 (D.C. Cir. 1979); *Boilermakers Local 202 (Henders Boiler & Tank Co.)*, 300 NLRB 28 (1990). In those circumstances, allegations of union interference with employee rights in violation of RCW 41.80.110(2)(a) may state a cause of action.

Defects in Original Complaint

The deficiency notice pointed out several defects with the original complaint. One, the Commission is bound by the following provisions of Chapter 41.80 RCW:

> RCW 41.80.120 UNFAIR LABOR PRACTICE PROCEDURES--POWERS AND DUTIES OF COMMISSION. (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. This power shall not be affected or impaired by any means of adjustment, mediation, or conciliation in labor disputes that have been or may hereafter be established by law.

The complaint refers to a contract ratification vote but does not allege a specific date for the vote occurring within the six-month limitations of RCW 41.80.120. The complaint does not meet the requirements of RCW 41.80.120. In order for the complaint to be timely under RCW 41.80.120, the complaint must contain specific allegations of union misconduct occurring on or after September 10, 2004.

Two, the Commission has adopted the following rule concerning the filing of an unfair labor practice complaint:

> WAC 391-45-050 CONTENTS OF COMPLAINT. Each complaint charging unfair labor practices shall contain, in separate numbered paragraphs:
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> . . . .
>
> (2) Clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.

The complaint fails to include "times, dates, places and participants in occurrences" concerning the alleged unfair labor practices. The complaint does not conform to the requirements of WAC 391-45-050.

Three, the "remedy requested" portion of the complaint requests that employees be "given a chance to vote on the union security clause as a separate issue." The union shop election provisions of

Chapter 41.06 RCW expired on July 1, 2004. As of that date, union security became a subject for bargaining between the employer and union under the following provisions of Chapter 41.80 RCW, State Collective Bargaining:

> RCW 41.80.100 UNION SECURITY--FEES AND DUTIES--RIGHT OF NONASSOCIATION. (1) A collective bargaining agreement may contain a union security provision requiring as a condition of employment the payment, no later than the thirtieth day following the beginning of employment or July 1, 2004, whichever is later, of an agency shop fee to the employee organization that is the exclusive bargaining representative for the bargaining unit in which the employee is employed. The amount of the fee shall be equal to the amount required to become a member in good standing of the employee organization. Each employee organization shall establish a procedure by which any employee so requesting may pay a representation fee no greater than the part of the membership fee that represents a pro rata share of expenditures for purposes germane to the collective bargaining process, to contract administration, or to pursuing matters affecting wages, hours, and other conditions of employment.

Under RCW 41.80.100, union security provisions are negotiated by an employer and union in the parties' collective bargaining agreement. Chapter 41.80 RCW does not provide for union shop elections by employees.

Four, as the complaint fails to state a cause of action against the employer under RCW 41.80.110(1), there are insufficient factual allegations to support a cause of action that the union induced the employer to commit an unfair labor practice in violation of RCW 41.80.110(2)(b).

Five, in relation to the allegations of an "other unfair labor practice," the complaint fails to explain and specify what "other" rule or statute has been violated by the union's actions.

Allegations of Amended Complaint

In relation to defect one of the deficiency notice, the amended complaint cured this defect by including allegations of union misconduct occurring on or after September 10, 2004. In relation to defect two, the amended complaint cured this defect by including a statement of facts with "times, dates, places and participants in occurrences" concerning the alleged unfair labor practices.

In relation to defect three, the amended complaint alleges that the union violated RCW 41.80.110(2)(b) by inducing the employer to include a "closed shop" union security provision in the agreement. Under a closed shop, the employer is required to hire only union members and bargaining unit employees are required, as a condition of employment, to remain members of the union. Closed shop provisions are illegal under Washington state collective bargaining laws and the federal National Labor Relations Act. Under RCW 41.80.100(1), a collective bargaining agreement may contain a union security provision requiring as a condition of employment, that employees pay an agency shop fee. The collective bargaining agreement attached to the complaint was executed on November 5, 2001, and provides for a term of three years. On September 13, 2004, the employer and union signed a memorandum of understanding indicating that the agreement "shall remain in full force and effect . . . until July 1, 2005." There are insufficient facts alleged in the amended complaint to indicate that the parties' agreement that becomes effective July 1, 2005, contains a union security provision in violation of RCW 41.80.100(1).

In relation to defect four, the amended complaint failed to cure this defect. There are insufficient factual allegations to support a cause of action that the union induced the employer to commit an unfair labor practice in violation of RCW 41.80.110(2)(b).

In relation to defect five, the amended complaint cured this defect by alleging specific violations of rules and statutes by the union's actions.

The deficiency notice indicated that if Lazar filed a timely amended complaint correcting defects one and two:

1. The allegations of inducement of employer to commit an unfair labor practice in violation of RCW 41.80.110(2)(b), and an "other unfair labor practice" violation, would be DISMISSED; and

2. A preliminary ruling would be issued on the allegations of union interference with employee rights in violation of RCW 41.80.110(2)(a), and the complaint would be scheduled for a hearing before an examiner.

While the amended complaint cured defects one and two, the amended complaint contains new "other unfair labor practice" allegations that fail to state a cause of action. Those allegations include:

One, the amended complaint alleges a violation of RCW 41.56.150(1) and (2). The provisions of Chapter 41.56 RCW are inapplicable to Lazar. Chapter 41.56 RCW covers collective bargaining relationships in cities, counties, political subdivisions, municipal corporations, school districts (classified employees only), and other public employers. The complaint indicates that Lazar is a state civil service employee within the meaning of Chapter 41.80 RCW. Lazar is covered by the statutory provisions of Chapter 41.80 RCW, but not the provisions of Chapter 41.56 RCW.

Two, the amended complaint alleges that the union has not provided employees with a copy of the collective bargaining agreement or advised employees of their obligations under the agreement, in violation of WAC 391-95-010(1). Commission rules provide as follows:

> WAC 391-95-010 NOTICE OF UNION SECURITY OBLIGATION. (1) Whenever a collective bargaining agreement negotiated under the provisions of chapter 28B.52, 41.56, 41.59, 41.76, or 41.80 RCW contains a union security provision, the exclusive bargaining representative shall provide each affected employee with a copy of the collective bargaining agreement, and shall specifically advise each employee of his or her obligations under that agreement, including informing the employee of the amount owed, the method used to compute that amount, when such payments are to be made, and the effects of a failure to pay.

WAC 391-95-010 refers to obligations placed on an exclusive bargaining representative when a collective bargaining agreement contains a union security clause. The contract ratification vote referenced in the amended complaint appears to involve a collective bargaining agreement that will take effect on July 1, 2005. The union security obligations of the agreement begin on that date. The obligations of WAC 391-95-010 do not apply to the union until July 1, 2005.

Three, the amended complaint alleges that the union failed to inform employees of the following provisions of Chapter 41.80 RCW:

> RCW 41.80.010 NEGOTIATION AND RATIFICATION OF COLLECTIVE BARGAINING AGREEMENTS.
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> . . . .
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> (7) After the expiration date of a collective bargaining agreement negotiated under this chapter, all of the terms and conditions specified in the collective bargaining agreement remain in effect until the effective date of a subsequently negotiated agreement, not to exceed one year from the expiration date stated in the agreement. Thereafter, the employer may unilaterally implement according to law.

Chapter 41.80 RCW does not place any affirmative obligation on the union to inform employees of the provisions of RCW 41.80.010(7).

Four, the amended complaint alleges that the union did not act in good faith when it negotiated union security provisions in the

agreement, in violation of RCW 41.80.005(2), 41.80.080(3) and 41.56.030(4). As indicated above, the provisions of Chapter 41.56 RCW are inapplicable to Lazar.

The good faith bargaining obligations of Chapter 41.80 RCW are set forth in RCW 41.80.005(2) as follows:

> RCW 41.80.005 DEFINITIONS. . . .
> . . . .
> (2) "Collective bargaining" means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020.

The duty to bargain under Chapter 41.80 RCW exists only between an employer and the incumbent exclusive bargaining representative of its employees. The good faith bargaining obligations of RCW 41.80.005(2) can only be enforced by a public employer or an exclusive bargaining representative. Individual employees do not have standing to process refusal to bargain allegations.

The provisions of RCW 41.80.080(3) read as follows:

> RCW 41.80.080 REPRESENTATION--ELECTIONS--RULES.
> . . . .
> (3) The certified exclusive bargaining representative shall be responsible for representing the interests of all the employees in the bargaining unit. This section shall not be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.

The process used by a union to decide what proposals to present to a public employer in collective bargaining negotiations, and what proposals to accept in negotiations, is purely of a union's own creation. Such process is part of a union's internal affairs and

is often controlled by a union's constitution and/or bylaws. The constitution and bylaws of a union are the contracts among the members of a union for how the organization is to be operated. Disputes concerning alleged violations of the constitution and bylaws of a union must be resolved through internal procedures of the union or the courts. *Enumclaw School District*, Decision 5979 (PECB, 1997).

Five, the amended complaint alleges that the union violated RCW 41.80.050 "in that it was not the representative of over 90% of the bargaining unit and I was not given an opportunity to choose it as such." The provisions of RCW 41.80.050 read as follows:

> RCW 41.80.050 RIGHTS OF EMPLOYEES. Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all such activities except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

Exclusive bargaining representatives are chosen by employees through a confidential cross-check of employer and union records, or by a secret-ballot election by employees under the representation procedures of Chapter 391-25 WAC. The amended complaint fails to allege that the union was not chosen by employees under the representation procedures of Chapter 391-25 WAC.

Six, the amended complaint alleges that the union violated RCW 41.80.080(1)(e) and (3) by failing to represent the interest of all bargaining unit employees in the union contract ratification vote. RCW 41.80.080 applies to representation issues but not to a contract ratification vote conducted by a union.

Seven, the amended complaint alleges that the Commission violated RCW 41.80.005(9) by certifying the union as exclusive bargaining representative when the union never complied with the provisions of RCW 41.06.150(11). On July 1, 2004, the following union shop election provisions of RCW 41.06.150(11) were repealed:

> RCW 41.06.150 RULES OF BOARD--MANDATORY SUBJECTS--PERSONNEL ADMINISTRATION. The board shall adopt rules, consistent with the purposes and provisions of this chapter, as now or hereafter amended, and with the best standards of personnel administration, regarding the basis and procedures to be followed for:
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> . . . .
>
> (11) Collective bargaining procedures:
>
> (a) After certification of an exclusive bargaining representative and upon the representative's request, the director shall hold an election among employees in a bargaining unit to determine by a majority whether to require as a condition of employment membership in the certified exclusive bargaining representative on or after the thirtieth day following the beginning of employment or the date of such election, whichever is the later . . .

Effective July 1, 2004, the provisions of RCW 41.06.150(11) were replaced by RCW 41.80.100. Under RCW 41.80.100, union security provisions are negotiated by an employer and union in the parties' collective bargaining agreement.

RCW 41.80.005(9) provides as follows:

> RCW 41.80.005 DEFINITIONS. . . .
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> . . . .
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> (9) "Exclusive bargaining representative" means any employee organization that has been certified under this chapter as the representative of the employees in an appropriate bargaining unit.

There is no requirement under Chapter 41.80 RCW that a union comply with the now defunct provisions of RCW 41.06.150(11), in order to

qualify as an exclusive bargaining representative under RCW 41.80.005(9).

The allegations of the amended complaint concerning inducement of the employer to commit an unfair labor practice in violation of RCW 41.80.110(2)(b), and an "other unfair labor practice" violation, fail to state a cause of action. The allegations of the amended complaint concerning union interference with employee rights in violation of RCW 41.80.110(2)(a), state a cause of action and will be scheduled for a hearing before an examiner.

Consolidation of Complaints

Four unfair labor practice complaints filed by employees of the Washington State Department of Revenue are pending before the Commission. Three of the complaints were filed against the Washington Public Employees Association, while one complaint was filed against the employer. All of the complaints involve alleged misconduct concerning a contract ratification vote conducted by the union. The complaints were docketed by the Commission as follows:

1) Case 19264-U-05-4893, filed by Lazar against the union on March 10, 2005.

2) Case 19309-U-05-4901, filed by Robert Schauer against the employer on March 23, 2005.

3) Case 19310-U-05-4902, filed by Schauer against the union on March 23, 2005.

4) Case 19311-U-05-4903, filed by Frank Patti against the union on March 23, 2005.

Under WAC 391-45-010, an unfair labor practice complaint "may be filed by any employee . . . ." Class actions are not permitted under Commission rules and individual employees must file their own unfair labor practice complaint. While each complaint processed by

the Commission must state a cause of action (which is summarized by a preliminary ruling) against a respondent under an applicable statute, WAC 10-08-085 provides that "multiple adjudicative proceedings involving common issues or parties . . ." may be consolidated.

Each complaint has been reviewed under WAC 391-45-110. Deficiency notices were issued for all four complaints and the complainants were provided with a 21-day period to file amended complaints to correct any defects. Lazar filed an amended complaint stating a cause of action in Case 19264-U-05-4893, and a preliminary ruling is being issued in this Decision for the complaint. Schauer's complaint against the employer in Case 19309-U-05-4901 and his complaint against the union in Case 19310-U-05-4902 both state causes of actions, and preliminary rulings are being issued for those complaints. Patti did not file an amended complaint in Case 19311-U-05-4903, and an Order of Dismissal is being issued for the complaint.

As the complaints filed by Lazar and Schauer involve common issues and parties, the complaints in Cases 19264-U-05-4893, 19309-U-05-4901 and 19310-U-05-4902 are consolidated under WAC 10-08-085 for further proceedings before the Commission.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the interference allegations of the amended complaint state a cause of action, summarized as follows:

> Union interference with employee rights in violation of RCW 41.80.110(2)(a), by failing to provide adequate notice and allowing all

bargaining unit employees to participate in a contract ratification vote.

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

2. Washington Public Employees Association shall:

File and serve its answer to the allegations listed in paragraph 1 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 amended 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 amended 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 amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

3. The allegations of the amended complaint concerning inducement of the employer to commit an unfair labor practice in violation of RCW 41.80.110(2)(b), and an "other unfair labor practice" violation, are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 9th day of June, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARK S. DOWNING, Unfair Labor Practice Manager

Paragraph 3 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.