Seattle School District, Decision 9355 (EDUC, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ROBERT FEMIANO, Complainant, vs. WASHINGTON EDUCATION ASSOCIATION, Respondent.	)	CASE 19944-U-05-5062 DECISION 9355 - EDUC PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL
ROBERT FEMIANO, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	)	CASE 19945-U-05-5063 DECISION 9356 - EDUC PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On November 18, 2005, Robert Femiano (Femiano) filed two complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC. Femiano is employed by the Seattle School District (employer). The first complaint concerns allegations against the Washington Education Association (union) and was docketed by the Commission as Case 19944-U-05-5062. The second complaint concerns allegations against the employer and was docketed as Case 19945-U-05-5063.

The complaints were reviewed under WAC 391-45-110,[1] and a deficiency notice issued on December 8, 2005, indicated that it was

[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.

not possible to conclude that a cause of action existed at that time for some of the allegations of the complaints. Femiano was given a period of 21 days in which to file and serve amended complaints, or face dismissal of the defective allegations of the complaints.

On December 27, 2005, Femiano filed amended complaints against the union and the employer. The Unfair Labor Practice Manager dismisses defective allegations of the amended complaints for failure to state a cause of action, and finds causes of action in the amended complaints for: 1) Union interference with employee rights and inducement of employer to commit an unfair labor practice in Case 19944-U-05-5062; and 2) Employer interference with employee rights and discrimination in Case 19945-U-05-5063. The employer and union must file and serve their answers to the amended complaints within 21 days following the date of this Decision.

DISCUSSION

Complaint against Union - Case 19944-U-05-5062

Original Complaint

The allegations of the complaint filed by Femiano on November 18, 2005, concern union interference with employee rights in violation of RCW 41.59.140(2)(a), inducement of employer to commit an unfair labor practice in violation of RCW 41.59.140(2)(b), and refusal to bargain in violation of RCW 41.59.140(2)(c), by divulging Femiano's name to employer officials in connection with a union request for budget information, failing to represent Femiano in the processing of a grievance concerning his transfer, and denial of representation by a union attorney at a whistle blower hearing.

Deficiency Notice

The deficiency notice indicated that the allegations of the complaint concerning union interference with employee rights and

inducement of employer to commit an unfair labor practice, by divulging Femiano's name to employer officials in connection with a union request for budget information, stated a cause of action under WAC 391-45-110(2) for further unfair labor practice proceedings before the Commission.

The deficiency notice pointed out that it was not possible to conclude that a cause of action existed at that time for the allegations of the complaint concerning union interference with employee rights, inducement of employer to commit an unfair labor practice and refusal to bargain, by failing to represent Femiano in the processing of a grievance concerning his transfer, and denial of representation by a union attorney at a whistle blower hearing.

The deficiency notice stated that the complaint contained several defects. One, the Commission is bound by the following provisions of Chapter 41.59 RCW:

> RCW 41.59.150 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES--SCOPE. (1) The commission is empowered to prevent any person from engaging in any unfair labor practice as defined in RCW 41.59.140: 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 complaint contains information concerning events occurring more that six months before filing of the complaint. Events described in the statement of facts attached to the complaint occurring before May 18, 2005, will be considered merely as background information. The complaint is limited to allegations of union misconduct occurring on or after May 18, 2005.

Two, the statement of facts attached to the complaint makes reference to alleged violations of the parties' collective

bargaining agreement. 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). The Commission acts to interpret collective bargaining statutes and does not act in the role of arbitrator to interpret collective bargaining agreements. *Clallam County*, Decision 607-A (PECB, 1979); *City of Seattle*, Decision 3470-A (PECB, 1990); *Bremerton School District*, Decision 5722-A (PECB, 1997).

Three, if bargaining unit employees bring issues or concerns to the attention of a union, the union has an obligation to fairly investigate such concerns to determine whether the union believes that the parties' collective bargaining agreement has been violated. This obligation on the union is known as the duty of fair representation. If the union determines that the concerns have merit, the union has the right to file a grievance under the parties' contractual grievance procedure. If the union determines that the concerns lack merit, the union has no obligation to file a grievance. While a union owes a duty of fair representation to bargaining unit employees, 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). Such claims must be pursued before a court which can assert jurisdiction to determine (and remedy, if appropriate) any underlying contract violation.

Four, while ratification of a tentative agreement reached in collective bargaining negotiations by a vote of union members is customary, and may even be required by a union's constitution and bylaws, it is not a requirement imposed by state law. In *Naches*

Valley School District, Decision 2516 (EDUC, 1987), *aff'd*, Decision 2516-A (EDUC, 1987), an examiner held as follows:

> Nothing in Chapter 41.59 RCW (or, for that matter, in the NLRA [National Labor Relations Act] or Chapter 41.56 RCW) requires employee ratification of the agreements reached between employers and unions duly recognized or certified as exclusive bargaining representative of those employees.

Inclusion of language in a collective bargaining agreement that has not been ratified by union members is not an unfair labor practice.

The process used by a union to decide what proposals to accept in contract 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 duty to bargain under Chapter 41.59 RCW exists only between an employer and the incumbent exclusive bargaining representative of its employees. The refusal to bargain provisions of RCW 41.59.140(2)(c) can only be enforced by an employer. Individual employees do not have standing to process refusal to bargain allegations.

Amended Complaint

In relation to defect one concerning the six-month statute of limitations, the amended complaint alleges that certain union misconduct occurring before May 18, 2005, only became known to Femiano after that date. The only exceptions to strict enforcement

of the six-month statute of limitations have occurred in cases where a complainant shows it had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Seattle*, Decision 5930, citing *City of Pasco*, Decision 4197-A (PECB, 1994). In accordance with *City of Bremerton*, Decision 7739-A (PECB, 2003), the statute of limitations begins to run when Femiano knew or should have known of the violation of his rights.

In relation to defect two, the amended complaint continues to make references to alleged violations of the parties' collective bargaining agreement. Those allegations do not state a cause of action.

In relation to defect three concerning the union's duty of fair representation, the amended complaint contains a header above paragraph (1) of the statement of facts reading: "Breach of Duty to Provide Fair Representation (RCW 41.59.140)." The amended complaint alleges that the union aligned itself against Femiano because he asked for budget documents. The reference in the header to RCW 41.59.140, which defines unfair labor practices for employers and unions, does not add any factual allegations to the complaint.

In *Dayton School District (Dayton Education Assn.)*, Decision 8042-A (EDUC, 2004), the Commission explained its policy concerning assertion of jurisdiction over "breach of duty of fair representation" claims as follows:

> It has long been established that remedies for violations of collective bargaining agreements must be sought through the grievance and arbitration machinery within the contract or through the courts, and that the Commission does not assert jurisdiction to remedy contract violations through the unfair labor practice provisions of the statutes it administers. *City of Walla Walla*, Decision 104 (PECB, 1976).

> Consistent with the policy first enunciated in *Walla Walla*, two types of "breach of duty of fair representation" claims have been identified and treated separately:
>
> First, the Commission does not assert jurisdiction over "fair representation" claims arising from contract disputes. The reasoning behind that policy is:
>
> > What possible sense could there be in a procedure which would permit an administrative agency that has litigated the fault of the union and the terms of the contract to fashion a remedy only with respect to the union, leaving the injured employee to go to a second tribunal (i.e., the Courts) to repair employer fault for the single injury?
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> *Mukilteo School District (Public School Employees of Washington)*, Decision 1381 (PECB, 1982).
>
> Second, the Commission does police its certifications, and will assert jurisdiction in cases where a union is accused of aligning itself against one or more bargaining unit employees on some improper or invidious basis. (footnote omitted)

The Commission further stated in *Dayton School District (Dayton Education Assn.)*:

> [I]f the dispute stems from a contract violation, the Commission would exercise jurisdiction only if the complaint (as amended) contains factual allegations that the union aligned itself against Stoermer on the basis of union membership (or lack thereof), or that the union discriminated against her on some invidious basis such as race, creed, sex or national origin.

The amended complaint in paragraph (26) alleges that the union "disallowed [Femiano] access to his rights afforded by the CBA [collective bargaining agreement]" when Femiano "asked for attorney support, under CBA Article III, Sec I . . . ." Femiano's allegations concern enforcement of contractual rights. The amended complaint fails to contain factual allegations concerning duty of fair representation claims that come within the Commission's jurisdiction.

In relation to defect four concerning ratification of contract provisions by union members, the amended complaint states in paragraph (13): "the complainant fully accepts the Commission ruling of December 8, 2005, that union ratification is not required by any Washington statute." The amended complaint agrees with the conclusion of the deficiency notice that inclusion of language in a collective bargaining agreement that has not been ratified by union members is not an unfair labor practice. Those allegations do not state a cause of action.

In relation to defect five concerning Femiano's lack of standing to process refusal to bargain allegations, the amended complaint deletes the allegations concerning union refusal to bargain in violation of RCW 41.59.140(2)(c).

The amended complaint adds several allegations concerning "other unfair labor practice" violations by the union. One alleged violation is described in a header above paragraph (1) of the statement of facts as: "Failure to Provide Adequate Notice of Change in CBA (RCW 41.58.040)." RCW 41.58.040 reads as follows:

> RCW 41.58.040 DUTIES OF EMPLOYERS AND EMPLOYEES. In order to prevent or minimize disruptions to the public welfare growing out of labor disputes, employers and employees and their representatives shall:
>
> (1) Exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;
>
> (2) Whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and
>
> (3) In case such dispute is not settled by conference, participate fully and promptly in such meetings as

> may be undertaken by the commission under this chapter for the purpose of aiding in a settlement of the dispute.

The provisions of RCW 41.58.040 were discussed by an examiner as follows in *City of Anacortes*, Decision 1210 (PECB, 1981):

> The language of RCW 41.58.040 is derived from Section 204(a) of the [*federal*] Labor Management Relations Act (LMRA). Section 204(a) is found in Title II of the Act, titled "Conciliation of Labor Disputes in Industries Affecting Commerce; National Emergencies", wherein the Federal Mediation and Conciliation Service is chartered. Analysis of National Labor Relations Board (NLRB) and Public Employment Relations Commission cases does not reveal an instance where Section 204(a) or RCW 41.58.040 have been interpreted as a source of rights and obligations separate from those imposed by RCW 41.56.030(2) [Section 8(d) LMRA - *see definition of "collective bargaining" in RCW 41.59.020(2)*] as enforced by RCW 41.56.140(4) [Section 8(a)(5) LMRA - *see RCW 41.59.140 (1)(e) and .140(2)(c)*].

(emphasis added).

Chapter 41.58 RCW is a general statute adopted in 1975 creating the Public Employment Relations Commission. While Chapter 41.58 RCW establishes general principles about collective bargaining, RCW 41.58.040 does not provide for a source of rights and obligations separate from the "refusal to bargain" unfair labor practice provisions of Chapter 41.59 RCW. The allegations concerning a violation of RCW 41.58.040 do not state a cause of action.

Another alleged "other unfair labor practice" by the union is described in paragraph (24) of the amended complaint as a violation of "RCW 41.56.080 by adding the words 'decision is not grievable'" to the parties' collective bargaining agreement in relation to transfers. Chapter 41.56 RCW contains the following provisions:

> RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION. The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent, all the public employees within the unit without regard to membership in said bargaining representative: PROVIDED, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance.

RCW 41.56.080 is inapplicable to Femiano. 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 Femiano is a certificated employee of a school district within the meaning of Chapter 41.59 RCW. As such, Femiano is covered by the statutory provisions of Chapter 41.59 RCW, but not the provisions of Chapter 41.56 RCW.

Chapter 41.59 RCW contains the following provisions, which are similar to those found in RCW 41.56.080:

> RCW 41.59.090 CERTIFICATION OF EXCLUSIVE BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION. The employee organization which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent all the employees within the unit without regard to membership in that bargaining representative: PROVIDED, That any employee at any time may present his grievance to the employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, as long as such representative has been given an opportunity to be present at that adjustment and to make its

> views known, and as long as the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect.

The obligations of an exclusive bargaining representative under RCW 41.59.090 may give rise to a "breach of duty of fair representation" claim by an employee. However, 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)*. The allegations concerning a violation of RCW 41.56.080 and/or RCW 41.59.090 do not state a cause of action.

Complaint against Employer - Case 19945-U-05-5063

Original Complaint

The allegations of the complaint filed by Femiano on November 18, 2005, concern employer interference with employee rights in violation of RCW 41.59.140(1)(a), and discrimination in violation of RCW 41.59.140(1)(c), by its transfer of Femiano in reprisal for union activities protected by Chapter 41.59 RCW.

Deficiency Notice

The deficiency notice indicated that the allegations of the complaint stated a cause of action under WAC 391-45-110(2) for further unfair labor practice proceedings before the Commission, and pointed out several defects with the complaint. One, as for the complaint against the union, the complaint contains information concerning events occurring more that six months before filing of the complaint. Events described in the statement of facts occurring before May 18, 2005, will be considered merely as background information. The complaint is limited to allegations of employer misconduct occurring on or after May 18, 2005.

Two, the complaint makes reference to alleged violations of the parties' collective bargaining agreement. As for the complaint against the union, the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute.

Amended Complaint

In relation to defect one, the statute of limitations begins to run when Femiano knew or should have known of the violation of his rights.

In relation to defect two, the amended complaint continues to make references to alleged violations of the parties' collective bargaining agreement. Those allegations do not state a cause of action.

The amended complaint adds several allegations concerning "other unfair labor practice" violations by the employer. One alleged violation is described in a header above paragraph (1) of the statement of facts as: "Failure to Bargain in Good Faith (RCW 41.59.140)." As indicated for Femiano's complaint against the union, the reference to RCW 41.59.140 defining unfair labor practices for employers and unions, does not add any factual allegations to the complaint. Femiano has no standing to process refusal to bargain allegations against the employer in violation of RCW 41.59.140(1)(e).

Another alleged "other unfair labor practice" by the employer is described in a header above paragraph (1) of the statement of facts as: "Failure to Provide Adequate Notice of Change in CBA (RCW 41.58.040)." As indicated for Femiano's complaint against the union, RCW 41.58.040 does not provide for a source of rights and obligations separate from the "refusal to bargain" unfair labor

practice provisions of Chapter 41.59 RCW. The allegations concerning a violation of RCW 41.58.040 do not state a cause of action.

The amended complaint adds an alleged violation of RCW 41.56.080 by the employer. As for the complaint against the union, the provisions of RCW 41.56.080 are inapplicable to Femiano. While the similar provisions of RCW 41.59.090 may give rise to a "breach of duty of fair representation" claim by an employee, 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)*. The allegations concerning a violation of RCW 41.56.080 and/or RCW 41.59.090 do not state a cause of action.

Consolidation of Complaints

WAC 10-08-085 provides that "multiple adjudicative proceedings involving common issues or parties" may be consolidated. The deficiency notice indicated that as the complaints filed by Femiano involve common issues and parties, the complaints in Cases 19944-U-05-5062 and 19945-U-05-5063 are consolidated 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 and inducement of employer to commit an unfair labor practice allegations of the amended complaint in Case

19944-U-05-5062 state a cause of action, summarized as follows:

> Union interference with employee rights in violation of RCW 41.59.140(2)(a), and inducement of employer to commit an unfair labor practice in violation of RCW 41.59.140(2)(b), by divulging Robert Femiano's name to employer officials in connection with a union request for budget information.

The interference and inducement of employer to commit an unfair labor practice allegations of the amended 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 and discrimination allegations of the amended complaint in Case 19945-U-05-5063 state a cause of action, summarized as follows:

> Employer interference with employee rights in violation of RCW 41.59.140(1)(a), and discrimination in violation of RCW 41.59.140(1)(c), by its transfer of Robert Femiano in reprisal for union activities protected by Chapter 41.59 RCW.

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

3. The Washington Education Association and the Seattle School District shall:

> File and serve their answers 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 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.

4. The allegations of the original complaint in Case 19944-U-05-5062 concerning union interference with employee rights in violation of RCW 41.59.140(2)(a), inducement of employer to commit an unfair labor practice in violation of RCW 41.59.140(2)(b), and refusal to bargain in violation of RCW 41.59.140(2)(c), by failing to represent Femiano in the processing of a grievance concerning his transfer, and denial of representation by a union attorney at a whistle blower hearing, are DISMISSED for failure to state a cause of action. The allegations of the amended complaint in Case 19944-U-05-5062 concerning other unfair labor practices by the union, are DISMISSED for failure to state a cause of action.

5. The allegations of the amended complaint in Case 19945-U-05-5063 concerning other unfair labor practices by the employer, are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 16th day of June, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARK S. DOWNING, Unfair Labor Practice Manager

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.