STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA SCHOOL DISTRICT, Employer.	)	
LOIS MEHLHAFF, Complainant,	)	CASE 11256-U-94-2634
vs.	)	DECISION 5086-A - EDUC
TACOMA EDUCATION ASSOCIATION, Respondent.	)	DECISION OF COMMISSION
LOIS MEHLHAFF, Complainant,	)	CASE 11257-U-94-2635
vs.	)	DECISION 5087-A - EDUC
TACOMA SCHOOL DISTRICT, Respondent.	)	DECISION OF COMMISSION

Leon Curtis Mehlhaff, Attorney at Law, represented the complainant.

Michael J. Gawley, Attorney at Law, represented the Tacoma Education Association.

Vandeberg Johnson & Gandara, by Clifford D. Foster, Jr., Attorney at Law, represented the Tacoma School District.

This case comes before the Commission on a petition for review filed by Lois Mehlhaff, seeking to overturn orders of dismissal issued by Executive Director Marvin L. Schurke on May 1, 1995.[1]

[1] Tacoma School District, Decisions 5086 and 5087 (EDUC, 1995).

BACKGROUND

On August 1, 1994, Lois Mehlhaff filed unfair labor practice complaints with the Public Employment Relations Commission, naming the Tacoma Education Association (union) and the Tacoma School District (employer) as respondents.[2] The complaints alleged, generally, that the union and employer interfered with Mehlhaff's rights as a certificated employee under RCW 41.59.140(1)(a) and (2)(a), by knowingly bargaining pay rates for substitute teachers that were not in compliance with the minimum compensation requirements of RCW 28A.400.200.

In a preliminary ruling letter issued on January 18, 1995, the Executive Director advised Mehlhaff that resolution of her complaints would rest primarily on interpretation of statutes which are not directly under the jurisdiction or expertise of the Commission. Mehlhaff was given 14 days in which to provide legal authorities supporting her claims, along with details concerning a court case referred to in an attachment to her complaints.

Mehlhaff responded on January 27, 1995, but provided no citations of any court decisions supporting her claim. She did make reference to a lawsuit in the Superior Court for Pierce County, filed against the employer by five former teachers. Mehlhaff asserted the lawsuit and her unfair labor practice complaints were the same with respect to the interference with the rights of employees.

By letter dated February 23, 1995, the Executive Director advised Mehlhaff that these cases would be held in abeyance until the conclusion of the lawsuit cited in her materials, or until additional information was provided. On March 14, 1995, the

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[2] The complaint filed against the Tacoma Education Association was docketed by the Commission as Case 11256-U-94-2634. The complaint filed against the Tacoma School District was docketed as Case 11257-U-94-2635.

employer and union were invited to submit information regarding the issues raised in these unfair labor practice complaints.

The employer moved for dismissal of these cases on March 28, 1995. It stated that the pending lawsuit filed by five employees involves the issue of whether the employer had conferred a right to a continuing contract on them, and it noted that Mehlhaff was not a party to that lawsuit.[3] The employer also advised that Mehlhaff had filed an individual lawsuit against the employer in the Superior Court for Pierce County, raising allegations similar to those set forth in her unfair labor practice complaints.[4] The employer claimed the minimum salary requirements adopted in 1987 as part of RCW 28A.400.200 do not apply to substitute teachers, and that state budgets adopted since 1987 have included separate funding for substitutes, distinct from the funding provided for certificated staff salaries.

On March 28, 1995, the union also moved for dismissal. It argued that RCW 28A.400.200 is inapplicable to certificated substitute employees, who are employed on a casual or part-time basis. It noted that RCW 28A.400.200 refers to salaries for "certificated instructional staff", and that the term "basic education certificated instructional staff" is defined in RCW 28A.150.100 as "all full time equivalent certificated instructional staff".[5]

On March 30, 1995, the employer supplied a copy of the instructions issued to school districts by the state Superintendent of Public Instruction (SPI) on reporting compensation for certificated staff.

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[3] The employer provided a copy of the summons and complaint in that lawsuit.

[4] The employer also provided a copy of the summons and complaint filed in that lawsuit, which was filed in October of 1994.

[5] The union also supplied copies of pleadings and briefs filed in the lawsuit filed by the five individuals.

Substitute teachers are excluded from the definition of certificated staff for whom compensation must be reported.

On May 1, 1995, the Executive Director dismissed the complaints. He concluded that rules adopted by SPI, on which the Public Employment Relations Commission is entitled to rely, directly contradict the theory advanced by Mehlhaff. The Executive Director also stated that Mehlhaff's pending lawsuit raises allegations similar to the complaints before the Commission, that the interpretation of RCW 28B.200.400 and the validity of the SPI rules could be determined by the court, and that the court would have jurisdiction to make any remedial order appropriate for Mehlhaff.

On May 17, 1995, the complainant filed a petition for review and also filed a motion to amend her complaints. The amended complaint against the union alleges interference with employee rights under RCW 41.59.140(2)(a), inducing the employer to commit a violation of RCW 41.59.140(1)(c), and violations of RCW 41.59.920 and RCW 41.59.930. The amended complaint against the employer alleged interference with employee rights in violation of RCW 41.59.140-(1)(a), discrimination in violation of RCW 41.59.140(1)(c), and violations of RCW 41.59.920 and RCW 41.59.930.

POSITIONS OF THE PARTIES

The complainant argues that dismissal of the case was in error, that the Public Employment Relations Commission is the exclusive remedy for unfair labor practice cases, and that the Executive Director exceeded his authority in several areas. The complainant seeks to amend her complaint to include claims of discrimination and interference with her protected activities.

The union argues that the Commission does not have exclusive jurisdiction to remedy unfair labor practice complaints, that the

Executive Director has the authority to process such complaints, and that the dismissal was supported by the law and facts.

The employer supports the dismissal, on the basis that the complainant alleged no facts showing a violation of RCW 41.59.140. It argues the amendment is procedurally improper and should not be considered at this stage of the proceedings.

DISCUSSION

The Preliminary Ruling Process

WAC 391-45-110 delegates authority to the Executive Director to determine whether the facts alleged in an unfair labor practice complaint are sufficient to warrant further proceedings:

> WAC 391-45-110 INITIAL PROCESSING BY EXECUTIVE DIRECTOR. The executive director shall determine whether the facts as alleged may constitute an unfair labor practice within the meaning of the applicable statute. If it is determined that the facts as alleged do not, as a matter of law, constitute a violation, the executive director shall issue and cause to be served on all parties an order of dismissal containing the reasons therefor; otherwise, the executive director shall cause the contents of the charge to be issued and served as a complaint of unfair labor practices, shall assign the matter to an examiner and shall notify the parties of such assignment. An order of dismissal issued pursuant to this section shall be subject to a petition for review as provided in WAC 391-45-350.

As to factual allegations, the Executive Director assumes that all of the facts alleged in a complaint are true and provable. WAC 391-45-110 operates in a manner similar to CR 12(b)(6), providing for dismissal of complaints failing to state a claim upon which relief can be granted. Our rule gives the Executive Director

authority to prevent the expenditure of time and money for a hearing in cases that fail to state a cause of action.

The Motion to Dismiss

Motion to Dismiss or Motion for Summary Judgment -
The complainant argues that since the union's motion to dismiss contained new material not before the Executive Director in the pleadings, the motion must be considered as a motion for summary judgment. The complainant cites Siegrist v. Simpson Timber Co., 39 Wn.App. 500 (1985), and Downtown Traffic Planning Commission v. Royer, 16 Wn.App. 156 (1980), in support of its position. We find the cited cases distinguishable from the case at issue.

In Siegrist, a party moved for dismissal of an appeal and simultaneously supplied new material to be considered on appeal which was not considered by the state board involved below. The court ruled that the motion must be treated as one for summary judgment, since additional facts and circumstances had to be considered on appeal. Under our procedure, however, the Commission is reviewing the total record in the case, not just that upon which the Executive Director made his decision.

In Downtown Traffic Planning, the court treated a lower court's dismissal as a ruling on a motion for summary judgment, because the trial court based its order on testimony, affidavits, and exhibits of the parties, as well as the pleadings. Here, the Commission is not considering testimony, affidavits, or exhibits. The only materials before us are the complaint and responses the other parties could submit in an "answer".

Even if the material submitted were to be considered beyond the nature of "pleadings", there is support for treating the motion as one for dismissal. The union asserts that the new material supplemented documents submitted by the complainant, and contained

no facts to support the arguments for dismissal, so the documents do not operate to convert that motion into one for summary judgment. The union cites Ortblad v. State, 85 Wn.2d 109 (1975), where the Supreme Court of the State of Washington applied the following reasoning:

> No purpose would exist for treating the motion for judgment on the pleadings as one for summary judgement and granting an opportunity to present factual evidence pertinent under CR 56 if whatever might be proven would be immaterial. ... **[W]hen the content of the interrogatories, depositions and admissions would make no difference to the disposition of the motion, whether considered by the trial court or not, then there is no need to convert the motion ... into a motion for summary judgment** ...

Ortblad v. State, at p. 111. See, also, Loger v. Washington Timber Products, Inc., 8 Wn.App. 921 (1973), petition for review denied, 82 Wn.2d 1011 (1973), at p. 924. [Emphasis by **bold** supplied.]

In the case before us, the content of the material in dispute makes no difference to the disposition of the case so that, under Ortblad and Loger, the motion for dismissal need not be converted into a motion for summary judgment.

The Material is Public Record -

The union asserts that its submission of material and the Executive Director's consideration of that material was proper, because the material was public record. We agree. Courts and administrative agencies may take notice of matters of public record in passing on a motion to dismiss for failure to state a claim upon which relief may be granted. Berge v. Gorton, 88 Wn.2d 756 (1977).[6] The union correctly argues that its submission for convenience of review by

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[6] Berge v. Gorton states that "In considering a CR 12(b)(6) motion, this court may take judicial notice of matters of public record."

the Executive Director does not affect the nature of the motion. The material submitted by the union and employer included briefs, motions, and pleadings involving lawsuits filed in the Superior Court. That material is public record. Since the Commission and its Executive Director can take notice of the documents submitted, we find no error in their consideration.

The Invitation for Respondents to Comment -

The complainant argues that the Executive Director's letter of March 14, 1995, inviting the employer and union to submit information on the legal issue raised in the cases, was ultra vires. The union asserts that state officers vested with the authority to carry out certain official duties are also vested with the power and duty to perform those tasks necessary to carry out those responsibilities. The union cites Smith v. Greene, 86 Wn.2d 363 (1976), in support of its position. Finding that recommendations of college and district presidents regarding tenure of a faculty member were properly made and considered in that case, the Supreme Court wrote:

> The district president need not locate explicit authority in a statute or regulation before he takes any action or writes a letter. Institutions created by the legislature can exercise, in addition to the powers expressly provided by statute, those powers "necessary or fairly implied in, or incident to, powers expressly granted [and] those essential to the declared objects and purposes of such district." Noe v. Edmonds School District 15, 83 Wn.2d 97, 103, 515 P.2d 977 (1973). Also, **a general grant of power or statutory direction to perform official duties, unaccompanied by definite directions as to how the power is to be exercised, implies the right and duty on the part of individual officials to employ the means and methods necessary to comply with statutory requirements**. State ex rel. Taylor v. Superior Court, 2 Wn.2d 575, 585, 98 P.2d 985 (1940).

Smith v. Greene, supra, at p. 372 [emphasis by **bold** supplied].

Under Smith v. Greene and WAC 391-45-110, the Executive Director clearly had the authority to invite comment on the legal issue from the parties to these cases prior to issuing a preliminary ruling.

Timeliness of Union and Employer Responses -
The complainant argues that the responses to the Executive Director's March 14 letter were beyond the 20 days provided by WAC 391-45-350. The cited rule reads, in pertinent part, as follows:

> The examiner's findings of fact, conclusions of law and order shall be subject to review by the commission on its own motion, or at the request of any party made within twenty days following the date of the order issued by the examiner. ...

The complainant misconstrues the rule. The Executive Director's inquiry was not a final order, and did not trigger the time limitations of the cited rule. The rule only relates to the filing of a petition for review within 20 days following the issuance of an appealable order.

Authority to Interpret Rules of Other State Agency -
The complainant suggests that the Executive Director does not have authority to interpret the rules of the state Superintendent of Public Instruction. She cites City of Seattle v. Auto Sheet Metal Workers Local 387, 27 Wn.App. 669 (Division I, 1980), in support of her argument that:

> "legal rulings interpreting ordinances, statutes and charters are the primary business of courts and not the discretion of PERC [sic].
>
> Complainant's brief [emphasis by underline in original].

The union argues that the quotation set forth by the complainant cannot be found in the cited case, and it accuses the complainant

of an attempt to deliberately mislead the Commission. It suggests that the complainant should be sanctioned.

Like the union, we are also unable to locate the quoted passage. We choose not to presume bad faith and impose a sanction, however, for an error that is not pertinent to the disposition of the case.[7]

In making preliminary rulings and determining if the facts as alleged could constitute an unfair labor practice, under WAC 391-45-110, the Executive Director may refer to various sources, including legal authority outside the collective bargaining statutes we administer.

Executive Director's Authority to Dismiss -
The complainant argues that a complaint should not be dismissed unless it appears "beyond a doubt" that the plaintiff cannot prove any set of facts which would entitle her to relief, and that a decision of the court in the lawsuit brought by the five other teachers would be a set of facts entitling her to relief.[8]

The complainant's interpretation of the standard for dismissals is correct. WAC 391-45-110. Here, however, the record shows that assuming all facts alleged by the complainant were true and provable, the allegations do not support a claim for relief available **through unfair labor practice proceedings before the Commission**.

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[7] The Commission was not involved in the cited case. In a later case, City of Pasco v. PERC, 119 Wn.2d 504 (1992), the Supreme Court affirmed a Commission dismissal of an unfair labor practice claim. The court noted that the Court of Appeals construed the collective bargaining act narrowly in Auto Sheet Metal Workers, and noted the Court of Appeals did not have the benefit of the Commission's expertise in that case. To the extent Auto Sheet Metal Workers was inconsistent with Pasco, it was overruled.

[8] The complainant cites Sherwood v. Moxee School District, 58 Wn.2d 351 (1961), for its position.

The Allegations of the Complaint

The Commission's Jurisdiction -

The complaints allege violation of RCW 41.59.140, which reads in pertinent part as follows:

> **RCW 41.59.140 UNFAIR LABOR PRACTICES FOR EMPLOYER, EMPLOYEE ORGANIZATION, ENUMERATED.** (1) It shall be an unfair labor practice for an employer:
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> (a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in RCW 41.59.060.
>
> (c) To encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment or any term or condition of employment, but nothing contained in this subsection shall prevent an employer from requiring, as a condition of continued employment, payment of periodic dues and fees uniformly required to an exclusive bargaining representative pursuant to RCW 41.59.100;
>
> (2) It shall be an unfair labor practice for an employee organization:
>
> (a) To restrain or coerce (i) employees in the exercise of the rights guaranteed in RCW 41.59.060: PROVIDED, That this paragraph shall not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (ii) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

RCW 41.59.920 was alleged to have been violated by both the union and the employer, and reads as follows:

> **RCW 41.59.920 CONSTRUCTION OF CHAPTER--EMPLOYEE'S RIGHTS PRESERVED.** Except as otherwise expressly provided herein, nothing contained in *this chapter shall be construed to deny or otherwise abridge any rights, privileges or benefits granted by law to employees. [1975 1st ex.s. c 288 §20.]

RCW 41.59.930 was also alleged to have been violated by both the union and the employer, and it reads as follows:

> **RCW 41.59.930 CONSTRUCTION OF CHAPTER--EMPLOYER'S RESPONSIBILITIES AND RIGHTS PRESERVED.** Nothing in *this chapter shall be construed to interfere with the responsibilities and rights of the employer as specified by federal and state law, including the employer's responsibilities to students, the public, and other constituent elements of the institution.

As shown by these provisions, the Public Employment Relations Commission only has jurisdiction over certain employer-employee relationships. If allegations do not rise to the level of an unfair labor practice, that does not necessarily mean that the allegations involve lawful activity. It means only that the issues are not matters the Commission deals with.

Exclusivity of Commission Jurisdiction -

The complainant argues that the Commission is the exclusive forum for unfair labor practice complaints. The Supreme Court has clearly stated, however, that the Commission does not have exclusive jurisdiction. See, State v. Northshore School District, 99 Wn.2d 232 (1983), where the court specifically said the Educational Employment Relations Act contains no language directly removing the jurisdiction of the superior courts over cases involving unfair labor practices or involving interpretation of Chapter 41.59 RCW; and City of Yakima v. IAFF, Local 469, 117 Wn.2d 655 (1991).

The Motion to Amend -

Under WAC 391-45-070, a complaint may be amended upon motion by the complainant to the Executive Director or the Examiner prior to the transfer of the case to the Commission. In this case, the complainant sought to amend her complaint at the same time she sought to transfer the case to the Commission. Since the amendment

does not meet the requirements of the rule, we would ordinarily not consider it on that basis. We use the amended complaint, however, to show that even taking those facts as alleged, the Commission has no jurisdiction over the issues Mehlhaff seeks to raise.

Reference to "Substitute Certificated Employees" -
The complainant argues that the Executive Director relied on the union's statement that: "Substitute certificated employees are employed on a casual or part-time basis",[9] in interpreting a document. The complainant contends that this is contrary to previous rulings such as Tacoma School District, Decision 655 (EDUC, 1979), where the Executive Director found:

> [D]aily substitute certificated employees are employed to perform the type of work performed by full time ... certificated employees of the district for a substantial number of days ... have a substantial and continuing interest in the wages, hours and working condition of non-supervisory certificated employees with the district. The remaining substitute certificated employees are employed sporadically and have no reasonable expectation of substantial and continuing employment with Tacoma.

At issue in Tacoma School District was whether some or all substitute teachers were to be included in the bargaining unit consisting of non-supervisory certificated employees. Resolution of unit determination issues is delegated by the Legislature to the Commission under RCW 41.59.080. Acting under authority delegated by the Commission, the Executive Director excluded "casual" employees from the bargaining unit, but included "regular part-time" employees. The Commission reached the same result in Columbia School District, et al., Decision 1189 (EDUC, 1981). The Executive Director repeated an argument advanced by the union here, but the dismissal of the case was not based on a conclusion that

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[9] Executive Director's decision, page 4.

all of the substitute certificated employees are employed on a "casual" basis.

Status as a bargaining unit member does not necessarily guarantee any particular set of wages, hours or working conditions. Such status merely means that the exclusive bargaining representative will be in a position to negotiate the wages, hours and working conditions of the included employees.

The Facts as Alleged -
A review of the record in this case indicates that the facts as alleged do not support a claim for unfair labor practices. The complainant advances an unsupported claim that substitute teachers are entitled to the same minimum salary as "full time equivalent" teachers.

The complainant bases her entitlement upon RCW 28A.400.200, but for purposes of that provision, the term "certificated instructional staff" is defined as "full time equivalent certificated instructional staff" under RCW 28A.150.100(1). In the complaint's statement of facts, paragraph 2.1, the complainant is described as "regular part time teacher sub". Accepting the facts as alleged, on its face, the statute on which she relies does not apply.

The complaint fails to state a cause of action within the narrow range of "breach of duty of fair representation" cases over which we assert jurisdiction. The facts as alleged in this case have similarities to those alleged in Seattle School District, Decision 4917-A (EDUC, 1995); Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982); and City of Seattle, Decision 3862 (PECB, 1991).[10] The Commission has no

[10] Seattle School District dismissed allegations that a union violated a contract by failing to file a grievance, that the complainant was placed in a position of lesser salary, and that the union had a responsibility for her

jurisdiction to remedy allegations that back pay is owed without a close relationship to violations of collective bargaining statutes.

The proposed amendments to the complaints attempt to bolster the allegations with claims of discrimination on the basis of having no continuing contract under Title 28A RCW, and interference with protected activities. None of the allegations rise, however, to the level of discrimination prohibited by the collective bargaining statute or interference with the types of activities protected by those statutes.

The name "Public Employment Relations Commission" is sometimes interpreted as implying a broader scope of authority than is

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placement. The Commission reminded that it 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). Responding to a request by that complainant for the Commission to act on a lawsuit in Idaho, the Commission clarified it had no such authority.

In Mukilteo School District, the complainant alleged that she applied for several positions, but that individuals with less seniority and lower qualifications were hired. The union advised her she did not have a grievance. The Executive Director dismissed her unfair labor practice complaint, stating the Commission lacks jurisdiction to remedy a breach of the duty of fair representation involving the processing of claims under an existing collective bargaining agreement.

In City of Seattle, the complainant alleged the employer refused to classify and pay her in accordance with what she believed was correct for her duties, and that the union was negligent or inefficient in its efforts to process her claims. The Executive Director dismissed the unfair labor practice charges on the basis that nothing in the collective bargaining statute specifies the rates of pay or the personnel procedures to be applied to public employees, and that the Commission lacks jurisdiction to remedy violations of either contracts or personnel procedures. The complainant was advised that her allegations against the union might be of the type which she could pursue in the courts, but that no relief was available through the Commission under Mukilteo.

actually conferred upon the agency by statute. The Commission's jurisdiction is limited to the resolution of collective bargaining disputes between employers, employees and unions. The agency does not have authority to resolve all disputes that might arise in public employment.

Alleged inconsistencies with applicable law are not necessarily a cause of action for unfair labor practices. From the allegations and information provided, the Commission cannot infer bad faith on the part of the union or employer. The Commission's jurisdiction is granted to it by the laws of the State of Washington and is limited to the collective bargaining arena. The complainant seeks redress of issues that are more properly raised in other forums, such as the courts.

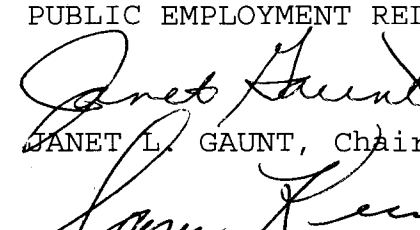
NOW, THEREFORE, it is

ORDERED

The order of dismissal issued by the Executive Director in the above-captioned matter is AFFIRMED.

Issued at Olympia, Washington, the 22nd day of August, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner