STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VIVIAN WOMACK, Complainant, vs. OTHELLO SCHOOL DISTRICT, Respondent.	CASE NO. 6998-U-87-1424
VIVIAN WOMACK, Complainant, vs. PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Respondent.	CASE NO. 7176-U-87-1466 DECISION 3037 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Thomas Cordell, Attorney at Law, appeared on behalf of the complainant.

Robert L. Eckert, Assistant Superintendent, appeared on behalf of respondent Othello School District.

Caroline Lacey, Staff Legal Counsel, appeared on behalf of respondent Public School Employees of Washington.

On August 27, 1987, Vivian Womack filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Othello School District had committed unfair labor practices within the meaning of RCW

41.56.150(1), (2) and (3).[1] The complaint was reviewed by the Executive Director pursuant to WAC 391-45-110, and a letter was directed to the complainant on October 29, 1987, pointing out defects in the complaint as filed. An amended complaint was filed on December 4, 1987.

On December 4, 1987, Womack filed a second complaint charging unfair labor practices with the Commission alleging that Public School Employees of Washington, Othello Chapter (hereinafter PSE) had committed unfair labor practices within the meaning of RCW 41.56.150(4) and RCW 41.59.140(1)(c).[2]

On January 5, 1988, the Executive Director issued a preliminary ruling pursuant to WAC 391-45-110, consolidating the two complaints for hearing and assigning Rex L. Lacy as Examiner to make and issue findings of fact, conclusions of law and order. A hearing was conducted on March 22, 1988, at Othello, Washington. Prior to close of the hearing, the parties were directed to file simultaneous post-hearing briefs on May 20, 1988. On May 17, 1988, the parties were granted a delay in filing briefs until May 31, 1988. On July 5, 1988, the complainant filed an unsolicited "Response to Brief of Respondent". On September 2, 1988, the Examiner allowed the respondents 14 additional days to respond to the complainant's unsolicited brief.

On September 9, 1988, the employer advised the Examiner that the complainant had been hired for full-time work as of August 23, 1988, and that she had worked all but eight days since the close of the hearing in March, 1988. Citing the response made on September 9, 1988, by the employer, PSE filed documents on

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September 13, 1988, requesting that the unfair labor practice complaints be dismissed. In the alternative, PSE requested additional time to file its response brief. On September 14, 1988, the Examiner refused to dismiss the unfair labor practice complaints, and allowed PSE an additional ten days to file its response.

On September 15, 1988, PSE made a motion to reopen the hearing, seeking to have the information concerning the complainant's work record since March, 1988 admitted into evidence. PSE also renewed its request for a continuance in the filing of its response brief. On September 19, 1988, the employer requested that the hearing be reopened to take testimony on the complainant's work record since March, 1988. On October 3, 1988, the Examiner denied the motions to reopen the hearing. PSE then filed its final brief in the matter.

BACKGROUND

Othello School District No. 147-163-55, located in Adams County, Washington, is a "public employer" within the meaning of RCW 41.56.030(1). James L. Jungers is Superintendent of Schools. Robert L. Eckert is Assistant Superintendent of Schools.

Public School Employees of Washington, Othello Chapter, is the exclusive bargaining representative of all classified employees of the Othello School District. Included in the bargaining unit are employees who perform custodial and maintenance services on the employer's buildings and grounds. Trudy Worsham is president of the chapter, and Bud Myers is PSE's area representative.

The employer and PSE have had a series of collective bargaining agreements, the latest of which was effective from September 1, 1985 to August 31, 1987. Article VIII, Section 8.8 of the collective bargaining agreement sets forth the employment procedures the district follows when hiring individuals to fill new or vacant bargaining unit positions.

> **Section 8.8. Employment Procedures.**
>
> A. Application for employment forms or for requests to move from one job level or job classification to another are available at the Office of the Superintendent.
>
> B. All new employees must begin on Step 1 on the salary schedule and be placed on a probationary period of thirty (30) working days. Employees on probationary status will not be covered by the local chapter grievance procedures.
>
> New employees may be granted experience step placement on the salary schedule for comparable experience prior to employment in the Othello School District after the thirty (30) day probationary period. A maximum of three (3) experience steps may be allowed subject to receipt of written verification of satisfactory comparable experience of three (3) or more years from the employee's previous employer. PSE will be notified of any new placements above step one. For employee rehire, the above paragraph is applicable, and, more specifically, for aide rehire, approved credit(s) received after original hire date will be applicable on second hire date after thirty (30) day probation.

Vivian Womack has been employed by the Othello School District since 1984, as a "temporary" employee. Under the employment practices prevailing in the bargaining unit involved, such "temporary employees" are not assigned to any one facility and do not work a set schedule of hours. Rather they are "on

call". Womack worked primarily as a substitute for custodial employees who were on approved leaves of absence. Womack worked 316 hours during the 1984-85 school year, implying at least 39 days of work at eight hours per day. During the 1985-86 school year, she worked 666 hours, also implying somewhat in excess of 30 days of work in the one-year period.

In 1985, Womack applied for a vacant permanent custodial position that had been advertised in accordance with the terms of the collective bargaining agreement. She was not selected to fill the vacancy. When she requested the reason she was not selected for the position, Womack was informed by Eckert that another employee with greater district seniority was hired to fill the position.

During the 1986-87 school year, Womack worked in excess of 1000 hours for this employer. From February, 1987, to August, 1987, Womack replaced the custodian assigned to work at Othello High School, John Joy, while he was on an extended leave of absence due to poor health. While serving as Joy's replacement, Womack worked "full-time".

In August, 1987, Joy notified the employer that he was unable to return to work. The Othello High School custodial position was then declared vacant, in accordance with the terms of the collective bargaining agreement, and was posted and advertised as required by the collective bargaining agreement. A full-time custodian at Scootney Springs Elementary School claimed the position under the seniority provisions of Article VII, SECTION 7.5, of the collective bargaining agreement, which provides:

> **Section 7.5.** The employee with the greatest seniority, (earliest hire date), shall have absolute preferential rights

> regarding shift selections, vacation periods, overtime/extra work projects, and layoffs. Absolute preferential rights means that seniority and willingness of employee are the only two factors to be considered. The employee with the greatest seniority shall have preferential rights regarding promotions and assignment to new or open jobs or positions when ability and performance are substantially equal with junior employees, based on the District's minimum qualifications set forth in writing in the job description advertising the new or open position. If the senior employee is bypassed, the District shall set forth in writing its reasons why the senior employee or employees have been bypassed.

Thereafter, the custodial position at the Scootney Springs Elementary School was advertised in accordance with the contract. Several district employees and some persons outside of the district's workforce applied for the position. Womack, Betty Salisbury, and Octavia Salas, all temporary employees of the employer, were finalists for the job. Salisbury, an employee with less seniority, but more experience at Scootney Springs than Womack, was selected to fill the position.

Womack asked Eckert why she was by-passed for the position, and why Salisbury was selected. Eckert informed Womack, both orally and in writing, that Salisbury was selected because she had custodial experience at Scootney Springs while Womack did not. Because she was not satisfied with Eckert's reason for being bypassed for the Scootney Springs position, Womack contacted PSE officials Worsham and Myers about being passed over for the Scootney Springs position. She was advised by Myers that he believed the employer had applied the contract properly in the selection of Salisbury to fill the position. Myers advised Womack to file a grievance under the terms of the collective bargaining agreement if she desired to challenge the employer's selection of Salisbury for the position.

Article IX sets forth the procedure for resolving contractual disputes as follows:

> **GRIEVANCE PROCEDURE**
>
> Section 9.1. For the purpose of this contract, a grievance is a claim by the grievant that the contract has been violated, misinterpreted, or misapplied. The individual employee (hereinafter called the grievant) may feel free to go to his/her immediate supervisor without the grievance committee of the local chapter of PSE with the grievance in written form. In this regard the grievant must be the individual who has personally experienced the grievance. This initial registering of the grievance should take place as soon as the grievant is aware of the grievance or within a thirty (30) day period thereof.
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> Section 9.2. If no satisfactory agreement is reached in conference between the employee and the supervisor, the grievant and the Local Chapter Grievance Committee may make a written appeal to the Superintendent, for a hearing and a proposed settlement within ten (10) days of the unsatisfactory disposition of the supervisor.
>
> Section 9.3. Should dissatisfaction still exist by the grievant, an appeal must be made within ten (10) days to the School Board, through the Secretary. Written record of all prior actions must be available to the Board.
>
> Section 9.4. If a satisfactory agreement cannot be reached, the grievant may appeal to the Public Employment Relations Commission through the State organization of the Public School Employees Association of Washington, for a decision. The appeal must be made within ten (10) days.

Womack did not file a grievance. Womack did initiate these unfair labor practice proceedings, in which she has alleged,

generally, that the school district had failed to treat her as a union member and that the union had failed to bargain on her behalf.

In assigning the case for hearing, the Executive Director read the complaint as alleging that the complainant had been excluded from the bargaining unit represented by the union, and concluded that an unfair labor practice violation could be found if the employer and union made an agreement concerning bargaining unit status which "improperly deprives the complainant of her collective bargaining rights under the statute".

POSITIONS OF THE PARTIES

The complainant contends that she should have been selected for the Scootney Springs Elementary School custodial position, because she had more seniority than the employee who was selected for the position. She asserts that she was willing to work at Scootney Springs, that her custodial experience at Othello High School qualified her for the Scootney Springs position, and that the employer has not abided by the collective bargaining agreement between the district and the union. Additionally, the complainant contends that the union has breached its duty of fair representation because it has not properly represented Womack in this matter.

The employer contends that it has applied the collective bargaining agreement in filling the positions at Othello High School and Scootney Springs Elementary School, and points out that the school district is permitted by the terms of the collective bargaining agreement to select the employee it considers to be the best candidate for a vacant position. The

employer notes that it notified Womack she had been bypassed for the position, as required by the collective bargaining agreement, and, further, that the district has not conspired with the union to prevent Womack from being selected for the position at Scootney Springs Elementary School.

The union contends that the employer followed the terms of the collective bargaining agreement when it filled the positions at Othello High School and Scootney Springs Elementary School. It also notes that the employer is permitted by the terms of the collective bargaining agreement to select the applicant the district considers the most qualified for a vacant position, that the district properly notified Womack of the reasons why she had been bypassed for the Scootney Springs custodian position, and that the union has not conspired with the district to prevent Womack from being selected.

DISCUSSION

Throughout the hearing, the employer and the union, and even the complainant herself, described Womack as a "temporary" employee. That terminology, as used by the parties, would seemingly exclude Womack from the bargaining unit and, therefore, from application of the terms and conditions of the collective bargaining agreement. Both Commission precedent on the statutory rights of employees and the facts of the case indicate that may not be the case in these matters, however.

Womack had been working as a substitute for other employees of the school district who were on approved leaves of absence. The Commission has determined that school district classified employees who are employed, on an on-call basis, for more than 30 days within any 12-month period ending during the current or

immediately preceding school year, and who continue to be available for employment, are regular part-time employees of the particular school district, and are to be included in an existing bargaining unit with full-time and regular part-time employees performing similar work. Sedro Woolley School District No. 101, Decision 1351-C (PECB, 1982). Womack worked more than 30 days in each school year since 1984, and she continued to be available for employment during the 1987-88 school year, and so met the test for inclusion in the bargaining unit.

There is nothing in the record, however, to indicate that Womack was ever excluded from consideration for a position on the basis of not being a member of the bargaining unit. The parties have thus totally missed the issue on which this case was assigned for hearing by the Executive Director.

The Duty of Fair Representation

The doctrine of the duty of fair representation was judicially developed by the United States Supreme Court in a proceeding involving racial discrimination that was brought under the Railway Labor Act. Steele v. Louisville and Nashville, 323 U.S. 192 (1944). In that case, the Court held that "an exclusive bargaining representative has the duty to represent fairly and without discrimination all those for whom it acts." The same Court applied the duty of fair representation to a union subject to the National Labor Relations Act (NLRA) in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), where the Court stated:

> ... The bargaining representative ... is responsible to, and owes complete loyalty to, the interests of all whom it represents .... A wide range of reasonableness must be allowed a statutory representative in

> serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

In 1957, the duty of fair representation was extended to include the representation of employees through the grievance procedure. Conley v. Gibson, 355 U.S. 541 (1957).

In 1962, the National Labor Relations Board (NLRB) adopted the doctrine of fair representation that had been developed by the courts, holding that a breach of the duty of fair representation amounts to an unfair labor practice because:

> Section 7 ... gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment.

Miranda Fuel Company, Inc., 140 NLRB 181 (1962).

In 1967, the Supreme Court re-defined the judicially developed duty of fair representation in Vaca v. Sipes, 386 U.S. 171 (1967), where the Court specifically recognized the union's status as exclusive bargaining agent as the source of the duty:

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct .... It is obvious that [plaintiff's] ... complaint alleged a breach by the Union of a duty grounded in federal statutes ....

The issue in Vaca was the refusal of the union to process a grievance through arbitration. The grievant, who had been on

sick leave, grieved the employer's refusal to reinstate him because of his health. The union obtained, at the union's expense, a doctor's examination that did not support the grievant's position. Nevertheless, the union processed the grievance through the initial steps of the grievance procedure, tried to obtain less vigorous work for the grievant, and succeeded in obtaining an offer from the employer to refer the grievant to a rehabilitation center. Thereafter, the union refused to demand arbitration of the grievance. The Supreme Court held that the union's failure to demand arbitration was not an unfair labor practice, and that the union's efforts had satisfied its duty of fair representation.

In handling a non-frivolous grievance, a union has the responsibility to investigate the grievance objectively, in more than a perfunctory manner. American Postal Workers Union Local 4193, 226 NLRB 160 (1976). The importance of the grievance upon the grievant is also a factor in evaluating the extent of the union's duty. The duty of fair representation is more than an absence of bad faith or hostile motivation. It includes the avoidance of arbitrary conduct. A union must have a reason for not processing a bargaining unit member's grievance. The NLRB has stated:

> Sometimes the reason will be apparent, sometimes not. When it is not, the circumstances may be such that we will have no choice but to deem the conduct arbitrary if the union does not tell us what it is.

General Truck Drivers Local 315, 217 NLRB 95 (1975).

If the investigation of the grievance indicates that the grievance is clearly meritless, then a breach of duty will not be found based on the union's refusal to arbitrate. Buffalo Newspaper Guild, 220 NLRB 17 (1975).

RCW 41.56.080 sets forth the statutory duty of an exclusive bargaining representative to represent bargaining unit members in terms similar to Section 9 of the NLRA, as follows:

> **RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION.** The bargaining representative which has been determined to represent a majority of 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 in 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 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.

PERC precedent recognizing the existence of a duty of fair representation to the grievance procedure dates back to at least City of Redmond, Decision 886 (PECB, 1980) and Elma School District, Decision 1349 (PECB, 1982).

Limited PERC Jurisdiction in Fair Representation Cases

In his initial preliminary ruling letter issued on October 29, 1987, the Executive Director pointed out:

> In a series of decisions issued since Mukilteo School District, Decision 1381 (PECB, 1982), the Commission has drawn a distinction between two types of "duty of fair representation" cases that exist. If the allegation concerns discrimination in

> the bargaining process, the Commission processes the complaint. If the complaint deals with a union's processing of a dispute under terms of a collective bargaining agreement, the affected employee must pursue his or her legal rights in the state court system. The courts have jurisdiction to remedy violations of contract, and so may address the underlying dispute as well as any breach of the duty of fair representation.

Numerous cases have been dismissed since Mukilteo, where the only allegation was a disagreement between the complainant employee and his or her union concerning the viability of a grievance. The Examiner does not understand the Executive Director to have deviated from that policy in these cases.

Was There a Breach of the Duty of Fair Representation in the Bargaining Process?

Having determined that Womack was in fact a regular part-time employee during 1987, the question turns to whether there was a breach of the duty of fair representation by the union in its bargaining with the employer concerning the rights of such regular part-time employees. The Supreme Court held in Ford Motor Co. v. Huffman, supra, that an exclusive bargaining representative is required "to make an honest effort to serve the interests of all those members without hostility to any", but at the same time recognized:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the

> unit it represents, subject always to complete faith and honesty of purpose in the exercise of its discretion.

In fulfilling its representation obligation, a union may agree to contractual provisions which adversely affect the interests of bargaining unit members without committing a breach of the duty of fair representation. Dwyer v. Climatrol Indus., Inc., 544 F.2d 307 (7th Circuit, 1976), cert. denied. 430 U.S. 932 (1977). Thus, a union may "negotiate for and agree to contract provisions involving disparate treatment of distinct classes of workers ... as long as such conduct is not arbitrary or taken in bad faith." Williams v. Pacific Maritime Ass'n, 579 F.2d 1321 (7th Circuit, 1978). On the other hand, where the union's conduct in collective negotiations is motivated by hostility to a segment of the persons it represents, or by illegal considerations, the union may be found to have breached its duty. Red Ball Motor Freight, Inc., 157 NLRB 1237 (1966). It follows that, in order to prove a breach of the duty of fair representation, it is not sufficient to show merely "that the union improperly balanced the rights and obligations of the various groups it represents." Freeman v. Locomotive Engineers, 375 F.Supp 81, 93; aff'd, 493 F.2d 628 (5th Circuit, 1974).

In the case at hand, PSE and the employer have agreed, at some time during the history of their bargaining relationship, to the contract provisions now set forth in Article 7, Section 7.5, and in Article 8, Section 8.8. The latter section allows the employer to bypass more senior bargaining unit employees, and to hire an employee with less seniority when the employer considers the junior employee to be the better candidate for an available position. The employer is obligated only to give the bypassed employee a written statement of the reasons they were not selected for the position. Seniority preferences, where

they exist, are entirely a result of bargaining. There is nothing in the statute which requires an absolute seniority preference in hiring and promotion, and there is no evidence in this record that supports a finding that the union and the employer negotiated the contractual provisions applicable here in order to discriminate against any current or prospective bargaining unit employee. The Examiner thus concludes that the complaint in this case is subject to dismissal under Mukilteo School District, supra, as alleging, at most, a breach of the duty of fair representation in connection with the processing of a grievance.

Failure to Exhaust Contractual Remedies

In an action against an employer alleging a breach of the duty of fair representation that involves a "breach of a labor contract" containing a contractual grievance procedure designed to resolve disputes concerning the interpretation or application of the contract, the Supreme Court has held that, prior to commencing an action:

> ... individual employees wishing to assert contractual grievances must attempt use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress.

Republic Steel Corp v. Maddox, 379 U.S. 650 (1965).

In Vaca, supra, the Supreme Court recognized the principle that exhaustion of contract remedies is a prerequisite to an action by the employee against the employer for breach of the labor contract. The courts have generally held that employees, acting as individuals, are required to exhaust their contractual remedies prior to instituting legal actions against their exclusive bargaining representative.

Article IX of the collective bargaining agreement applicable in this case provides for an orderly procedure to resolve disputes involving the interpretation of the provisions of the labor agreement. The record clearly establishes that Womack contacted Eckert for the reasons she was bypassed for the Scootney Springs custodial position, without first seeking assistance from PSE. Eckert informed her of the employer's reasons for selecting a less senior employee. When Womack was displeased by the response, she contacted PSE. Myers informed Womack of her right to file a grievance if she did not agree with the union and the employer. Womack chose not to file a grievance, and so failed to exhaust her remedies under the collective bargaining agreement. For that additional reason, this case should be dismissed.

FINDINGS OF FACT

1. Othello School District, is a "public employer" within the meaning of RCW 41.56.030(1).

2. Public School Employees of Washington, Othello Chapter, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the recognized exclusive bargaining representative of an appropriate unit of classified employees of the Othello School District. Included in the bargaining unit are employees holding the job classification of custodial employees.

3. The employer and PSE were parties to a collective bargaining agreement which was effective from September 1, 1985 to August 31, 1987. That agreement set forth the job bidding procedures and seniority rights of bargaining unit employees at the time this matter arose.

4. Vivian Womack, a "public employee" within the meaning of RCW 41.56.030(2), was initially hired by the district in 1984 as a substitute custodial employee. As a substitute, Womack has replaced other employees who have been absent from work on an approved leave of absence. She has performed routine custodial and janitorial services at Othello High School since her original employment date. From February, 1987, to August, 1987, Womack worked full-time as the replacement for the custodial employee permanently assigned at Othello High School, while he was on sick leave.

5. In August, 1987, pursuant to the terms and provisions of the collective bargaining agreement, the custodial position at Othello High School was declared vacant by the employer and was advertised as required by the collective bargaining agreement. An employee theretofore assigned to Scootney Springs Elementary School exercised his seniority rights under the collective bargaining agreement, and claimed the position at the high school.

6. The employer then advertised the position at Scootney Springs Elementary School as required by the collective bargaining agreement. Vivian Womack applied and was one of the finalists for the position. The employer awarded the position to Betty Salisbury, who had less seniority than Womack but had regularly worked as a substitute for custodians at the Scootney Springs Elementary School.

7. Womack requested the reason why Salisbury had been chosen for the position and was informed, in writing, as required by the collective bargaining agreement, that Salisbury was selected because of her experience at Scootney Springs Elementary School.

8. Womack contacted PSE regarding being by-passed for the Scootney Springs Elementary position. Union official Bud Myers informed Womack that he believed that the employer had properly applied the terms of the contract to her situation. Additionally, Myers informed Womack of her right to file a grievance if she disagreed with the employer's decision in the matter.

9. Womack did not file a grievance, and thereby failed to exhaust the contractual remedies at her disposal.

10. There is no evidence from which to conclude that the Othello School District and Public School Employees of Washington, Othello Chapter, conspired to deprive Womack of any contractual or statutory rights by negotiating the provisions of the applicable collective bargaining agreement or in application of that agreement when the employer selected a less senior employee than complainant Womack for the custodial position at Scootney Springs Elementary School.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. Othello School District has not violated RCW 41.56.140 by its actions described in paragraphs 3, 6, 7 and 10 of the foregoing Findings of Fact, or by selecting a less senior employee than the complainant in apparent compliance with the terms and provisions of the applicable collective bargaining agreement.

3. Public School Employees of Washington, Othello Chapter, has not breached its duty of fair representation or otherwise violated RCW 41.56.150 by its actions described in paragraphs 3, 8 and 10 of the foregoing Findings of Fact.

ORDER

Based upon the entire record in this matter, the complaints charging unfair labor practices are DISMISSED.

DATED at Olympia, Washington, this 4th day of November, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.