STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA SCHOOL DISTRICT, Employer.	)	
LOIS MEHLHAFF, Complainant, vs. TACOMA EDUCATION ASSOCIATION, Respondent.	)	CASE 11775-U-95-2770 DECISION 5465 - EDUC ORDER OF PARTIAL DISMISSAL

On May 15, 1995, Lois Mehlhaff filed two unfair labor practice complaints with the Public Employment Relations Commission, under Chapter 391-45 WAC. The complaints alleged, generally, that the Tacoma School District (employer) and the Tacoma Education Association (union), had violated RCW 41.59.140 in regard to the treatment and assignment of substitute teachers. Two separate cases were docketed.[1]

A preliminary ruling letter was issued in the above-captioned matter on February 14, 1996, pursuant to WAC 391-45-110.[2] The parties were advised that certain problems existed with the complaint, as filed. The complainant was given 14 days in which to file and serve an amended complaint which stated a cause of action,

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[1] The above-captioned matter covers the allegations against the union. Case 11776-U-95-2771, which covers the allegations against the employer, has been the subject of separate correspondence and rulings.

[2] At this stage of the proceedings, all facts alleged in a 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 Commission.

or face dismissal of her complaint. An amended complaint filed on February 27, 1996 has now been reviewed under WAC 391-45-110.

The Context of this Controversy

In 1975, the Legislature gave the certificated employees of school districts collective bargaining rights through the Educational Employment Relations Act, Chapter 41.59 RCW. Change is often a focus of the collective bargaining process, as employees seek to improve their wages, hours and working conditions, and employers seek to improve their competitive standing through reorganization and the introduction of new methodologies. As with any contemplative process, change through collective bargaining is more likely to be evolutionary than revolutionary. The Commission noted in Shelton School District, Decision 579-B (EDUC, 1984), "Good faith bargaining is never 'from scratch', but from the status quo." The obligation to maintain the status quo, and to bargain any changes of employee wages, hours and working conditions from that base, took effect on January 1, 1976.

Chapter 41.59 RCW has previously been found applicable to substitute teachers who can be characterized as "regular part-time" employees. In Tacoma School District, Decision 655 (EDUC, 1979), this union pressed for and won the inclusion of certain substitute teachers in the bargaining unit it represents. While those who had not worked at least 30 days during the current or immediately preceding school year were found to be "casual" employees excluded from the bargaining unit, substitute teachers were deemed to be "regular part-time" employees if they either: (1) worked more than 20 consecutive days in the same assignment; or (2) worked more than 30 days in the applicable measurement period. In Columbia School District et al., Decision 1189-A (EDUC, 1981), the Commission embraced the so-called 20/30 test as a rule of state-wide application, based on language in RCW 41.59.080(1) which precludes the possibility of: (1) leaving substitute teachers out of the

bargaining unit which must include all non-supervisory certificated employees of the employer; or (2) creating a separate bargaining unit for substitute teachers.

The decisions in Tacoma and Columbia, supra, as well as others where the status of substitute teachers have been determined, amply indicate that there is a long history of employment practices for substitute teachers which are substantially different from (less beneficial than) the wages and benefits provided for teachers who are contracted for specific positions. Inclusion of substitute teachers in a bargaining unit under Chapter 41.59 RCW gave the exclusive bargaining representative a forum to seek improved wages, hours and working conditions for substitute teachers.

The duty of fair representation imposed upon an exclusive bargaining representative does not require that it negotiate the same rights and benefits for all employees in the bargaining unit that it represents. As suggested above, improvements for substitutes from industrial practices which minimized their rights and benefits were likely to be evolutionary. Status as bargaining unit members certainly did not guarantee substitute teachers the same rights and benefits as the contracted teachers in the same bargaining unit. In examining the allegations of this complaint, it is constantly necessary to look for actions occurring within the period that commenced six months prior to the filing of the complaint.[3] The failure of the union to seek, and the failure of the employer to grant, a negotiated change of long-standing industrial practices is not automatically evidence of any violation of the complainant's rights under the collective bargaining statute. It is only where an employer and/or union have brought their status and power to bear to prejudice the rights of an employee that a cause of action exists before the Commission.

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[3] RCW 41.59.150 imposes a six-month period of limitations on unfair labor practice charges.

Introductory Materials

Paragraphs 2.1 and 2.2 - B.1 in the original complaint were understood to be background and introductory materials. It was noted that Melhaff only has legal standing to assert violations of her own rights. The amendment does not address those paragraphs.

The General Allegations

Paragraph 2.2 - B.2 was found to state a cause of action, based on allegations that the union discriminates against substitute teachers who are within the bargaining unit, and discourages them from membership in the union. Those allegations are not repeated in the amended complaint, but neither are they expressly withdrawn. They will be forwarded to an Examiner for a decision on the merits.

Allegation That Union Dues Clauses Are Unfair

Paragraph 2.2 - B.3 of the original complaint was found insufficient in the preliminary ruling letter, although several more specific allegations in the same subject area were found to state a cause of action. The amendment contains an extensive restatement of Paragraph 2.2 - B.3, broken down into sub-paragraphs (a) through (c), but this material is still general in nature. These materials are taken to be introductory to the more specific allegations that follow, and do not state any independent cause of action.

Paragraph 2.3 of the original complaint used very general terms to allege a variety of union misconduct under numbered sub-paragraphs which followed. The preliminary ruling letter took this material to be only introductory only. The amendment does not address this paragraph, so its earlier characterization stands.

Both the original complaint and the amendment contain several allegations under a "Paragraph V.1.0" headed: "**Discriminatory**

Reprisal Nonuniform Dues / Punitive Dues Deduction / Agency - Shop - Provision Violation".

Paragraph V.1.0 - 1.1 of the original complaint was found to be vague as to the dates of a change of dues rates and collection procedures adopted by the union. The amendment clarifies that the change is alleged to have taken place with the paychecks issued at the end of November of 1994, and details the disparate effect on employees who work less than 90 days in a year. This allegation now states a cause of action in the context of RCW 41.59.140(2)(b), which leads back to "periodic dues and fees uniformly required" language of RCW 41.59.140(1)(c) and to RCW 41.59.100.[4]

Paragraphs of V.1.0 - 1.2 was found to state a cause of action in the preliminary ruling letter, on allegations that the union neither collect uniform dues amounts, nor utilizes a uniform period for collection.[5] The amendment provides details of the dues paid by this complainant during the 1994-95 school year, and provides further support to the existence of a cause of action.

Paragraph V.1.0 - 1.3 of the original complaint alleged hostility against substitute teachers during intra-union discussions. The preliminary ruling letter noted that this complaint filed in May of 1995 appeared to be untimely under RCW 41.59.150 for the events alleged. The amendment moves this material to paragraph 1.2(b),

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[4] The preliminary ruling letter also questioned the relevance of citations of RCW 41.59.920 and 41.59.930. The amendment repeats those citations, but does not address the concern raised in the preliminary ruling letter. No cause of action is found on the basis of RCW 41.59.920 or 41.59.930.

[5] A $182.67 dues amount now being collected from substitute teachers over a period of four months is contrasted with:
(a) $548.00 annual dues amount collected from full-time teachers in 12 monthly installments; and
(b) $2.00 per day worked (up to 90 days in a year) formerly charged to substitute teachers.

which characterizes the by-laws change as a discriminatory move against the substitutes. As so amended, this material can be used as background to the "discrimination" violation alleged in paragraph 1.2.

Paragraph V.1.0 - 1.4 of the original complaint was found to state a cause of action, based on allegations that the exclusion of substitute teachers from union security obligations violates the requirement of uniformity within the bargaining unit. While the amendment expressly deletes this paragraph number, the material appears in the amendment as paragraphs 1.2(c) and 1.2(d). It still states a cause of action in that location.[6]

Paragraph V.1.0 - 1.5 of the original complaint described the filing of a grievance and a lawsuit pursued in the district court. The preliminary ruling letter indicated those allegation did not state a cause of action for proceedings before the Commission. The amendment provides further details, but does not cure the fundamental problem that the Public Employment Relations Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute,[7] and does not assert jurisdiction to enforce contractual grievance procedures.[8] This allegation is dismissed.

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[6] The statute has not been interpreted as imposing a single form of union security. Put another way, employers and unions may have some range for negotiation on union security. Mukilteo School District Decision 1222-A (EDUC, 1981). The complainant would have the burden of proof to establish that the system adopted was not "uniform", but the union and/or employer would be able to counter with evidence that the system they negotiated had a rational and non-discriminatory basis.

[7] City of Walla Walla, Decision 104 (PECB, 1976).

[8] Thurston County Communications Board, Decision 103 (PECB, 1976).

Paragraph V.1.0 - 1.6 of the original complaint alleged that the union has used its dues structure and collection system to discourage substitute teachers from becoming or remaining members of the union. This was found to state a cause of action in the preliminary ruling letter, in relation to paragraphs 1.2 and 1.4, above. This material is not repeated in the amendment, but is not expressly withdrawn. It will be forwarded to the Examiner.[9]

Allegations Concerning Leave Replacement Contracts

The original complaint contained allegations under a heading: **"Paragraph V.2.0 Restraint of Granted-Leave Assignment Rights".**

Paragraphs V.2.0 - 2.1, V.2.0 - 2.2 and V.2.0 - 2.3 were all found in the preliminary ruling letter to involve employer practices concerning assignment of substitute teachers in violation of state laws which are not administered by the Commission. Additionally, the preliminary ruling letter noted that the examples cited in paragraphs 2.1 and 2.2 related to other employees, so that Lois Melhaff has no legal standing to pursue them. The amendment relocates materials and generally alleges that discrimination regarding "monetary interests" creates "intense anger, frustration, fear, and feelings of futility", but does not cure the noted defects. The complainant still lacks standing to pursue the rights of other employees, who would have to come forward with their own complaints. Further, the Public Employment Relations Commission has no jurisdiction to hear, determine, or remedy alleged viola-

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[9] The Supreme Court of the State of Washington recently held that the Commission lacked jurisdiction to impute a requirement in Chapter 41.56 RCW for union security clauses to conform to constitutional requirements set forth by the Supreme Court of the United States in Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986). The "uniformity" concept is clearly set forth in Chapter 41.59 RCW, however.

tions of the "contracting" requirements of Title 28A RCW. These allegations do not state a cause of action, and will be dismissed.

The amendment adds a new paragraph V.2.0 - 2.4, which contains very general allegations that the union has aligned itself in interest against the substitute teachers. This material does not rehabilitate other allegations which fail to state a cause of action. To the extent that this material is supplemental to allegations which state a cause of action, it will be considered as part of those allegations and does not state any independent cause of action.

Allegations Concerning Optional Days

The original complaint contained several allegations under a heading: "**Paragraph V.3.0 - Discriminatory Coercion on "Optional Days Pay" & Professional Growth Funds / Discrimination - Agreement Rights Interference**".

Paragraphs V.3.0 - 3.1 and V.3.0 - 3.2 of the original complaint alleged that certain substitute employees sought to enforce a right to "optional days" under the collective bargaining agreement, but were told by employer and union officials that those negotiated provisions were not applicable to substitute teachers. The preliminary ruling letter pointed out that the complaint was untimely, to the extent that the exclusion of substitutes from the "optional days" or "professional growth funds" provisions was negotiated prior to November 17, 1994. The amendment appears to use these materials only as background to other allegations.

The amendment includes a new paragraph 3.3(a) which describes the complainant's efforts to process a grievance and lawsuit under an allegedly "flawed" grievance procedure. The rejection of the grievance and/or lawsuit on procedural grounds does not create any "violation of contract" jurisdiction for the Commission where none exists under the statute. See, City of Walla Walla, supra.

The amendment includes a new paragraph 3.3(b) which details the complainant's processing of grievances. While the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances,[10] it does police the conduct of organizations holding the privileged status of "exclusive bargaining representative" under the statute. A union which makes a grievance processing decision on unlawful grounds (e.g., race, creed, sex, national origin, or union membership/activity) could be subject to sanctions under the unfair labor practice provisions of the statute, up to and including loss of its status as exclusive bargaining representative.[11] If the union has aligned itself in interest against the substitute teachers, however, then a violation could be found under the last two sentences of paragraph 3.3(b), for refusing to process Melhaff's grievance on the optional days issue.[12]

The amendment includes a new paragraph 3.3(c) which alleges that the union tolerated employer demands that she cease processing her various grievances. There is no indication that the union was present at the meeting described in the amendment, and the contract does not require union involvement in grievance processing until the third step of the grievance procedure. The paragraph is insufficient to state a cause of action.

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[10] Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982).

[11] A union is not required to prosecute every grievance to arbitration. Unions do not breach their duty of fair representation when they settle or withdraw a member's grievance in good faith, so long as the union is not arbitrary, discriminatory, or in bad faith. Lindsey v Metropolitan Seattle, 49 Wn.App. 145 (Division 1, 1987); Humphrey v Moore, 375 U.S. 335 (1964); Allen v Seattle Police Guild, 100 Wn.2d 361 (1983).

[12] In the absence of finding a violation on the "exclusion from membership" theory covered elsewhere in this order, however, this paragraph will necessarily fail.

The amendment includes a new paragraph 3.4 which alleges that the 1995-1998 contract discriminatorily excludes substitute teachers from access to professional growth funds. There is no indication that there has been any change of practice during the period that began six months prior to the filing of the complaint. This paragraph thus fails to state a cause of action.

The amendment includes a new paragraph V.3.0 - 3.5 which alleges: that the contract: (a) excludes substitute teachers from benefits for covering classes; and (b) subjects substitute teachers to feedback procedures not applicable to regular classroom teachers. Again, there is no indication of any change within the period for which this complaint could be timely. These materials fail to state a cause of action.

Allegations Concerning Providing Lists and Agreements

The original complaint contained several allegations under a heading: "**Paragraph V.4.0 - Discriminatory Restraint of Teacher - Sub Phone / Address Lists, Notice, and Collective Bargaining Agreements**".

Paragraphs V.4.0 - 4.1 and V.4.0 - 4.2 of the original complaint alleged that the union and employer refused to provide copies of the collective bargaining agreement to all substitute teachers at the beginning of the 1994-95 school year, and refused to provide the names and addresses of all substitutes so as to maintain the viability of the "Department of Substitutes" within the union. The preliminary ruling letter noted it was troublesome that not all bargaining unit employees would receive copies of the contract, but that the allegation appeared to be untimely. Additionally, it was noted that the duty to provide information which arises out of the collective bargaining process extends only between the employer and the exclusive bargaining representative, so that there was no basis for a separate organization of substitutes to demand or receive

information. Further, while it was alleged that notices and newsletters had only been mailed to substitutes who were **members** of the union, this complainant who is a member of the union lacks standing to complain on behalf of other employees. Finally, it was noted that there was no allegation that non-members were denied actual notice of the matters included in the newsletters and memos, so that these allegations did not state a cause of action. The amendment sets forth materials under paragraph 4.1 which clearly indicate the complainant's desire to have lists of substitute teachers, but always in the context of her activities on behalf of a separate organization or caucus of the substitute teachers. The amendment to paragraph 4.2 poses the examples of others as a basis for why full distribution of the collective bargaining agreement could be of value, but does not demonstrate any statutory basis to require that employees be given a copy of the contract in the absence of enforcement of union security obligations against them.[13] These allegations still fail to state a cause of action.

The original complaint contained several allegations under a heading: **"Paragraph V.5.0 - Discriminatory Restrained Collective Bargaining / Discrimination Within Noncontract Class / Discriminatory Per-diem Minimum Between Contract & Non-contract Classes"**.

Paragraphs V.5.0 - 5.0 through V.5.0 - 5.4 of the original complaint alleged, generally, that union officials solicited representatives from the substitute teacher contingent to provide "input" to the union's negotiators. The complainant details how the person selected was unable to perform in that role. The preliminary ruling letter found the allegations to be unclear as to what issues pertinent to substitute teachers were compromised (or

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[13] The only "provide a copy of the contract" requirement in the statute or rules is found in WAC 391-95-010, as a condition precedent to enforcement of union security obligations. As noted above, the failure to impose union security obligations in a uniform manner is a viable issue in this case.

even discussed), and as insufficient to state a cause of action. The amendment provides more details, but largely confirms that the complainant's perspective is founded on the concept of separate representation of the substitute teachers. The Commission does not regulate the internal affairs of unions, particularly as to their selection of representatives and their procedures for internal communications. As indicated above, the failure to seek or acquire a change of the status quo does not inherently indicate unlawful action on the part of the union.

The amendment adds a paragraph 5.2(a) which appears to allege "age discrimination" in relation to a two-tiered wage structure that has been in effect since the 1993-1995 contract was signed. This is untimely, and so fails to state any cause of action.

The amendment adds a paragraph 5.2(b) which complains that the president of the union has never attended meetings of the substitutes' organization. As suggested above, the complainant starts from the incorrect premise that the substitutes' organization has (or even can hold) some rights and benefits under Chapter 41.59 RCW, when it is not the exclusive bargaining representative. The allegation fails to state a cause of action.

Paragraph V.5.0 - 5.4 of the original complaint reiterated allegations concerning violations of "minimum pay" standards of RCW 28A.400.200 et seq. and provisions of Chapter 28A.150 RCW over which the Commission has no jurisdiction. Those allegations are deleted in the amendment, and will be dismissed.

The amendment adds a paragraph 5.5 which alleges that the union is obligated to inform substitute teachers of their entitlement to unemployment compensation for days that they do not work during the school year. The failure to disseminate doubtful legal advice under another statute, as outlined by the complainant, is not an unfair labor practice under Chapter 41.59 RCW.

The amendment adds a paragraph 5.6 which alleges that the union has a duty (from an unspecified source) to require the employer to exhaust its supply of substitute teachers before "emergency" substitutes are utilized under a rule adopted by the State Board of Education. If there is such a duty, it would not be for the Public Employment Relations Commission to enforce under Chapter 41.59 RCW. The allegation fails to state a cause of action.

Allegations of Union Hostility Toward Substitutes

The original complaint contained several allegations under a heading: **"Paragraph V.6.0 - Restraint / Reprisal / Hostility in Protected Activity"**. Paragraph 6.1, 6.2, 6.3 and 6.4 of the original complaint alleged that the union abolished its "department of substitutes", a separate newsletter aimed at the substitutes, and a vice-chairman position within the organization, and that the meeting place for teacher substitutes was changed, to silence the substitute teachers. The preliminary ruling letter noted that key facts were missing, and that these events appeared to constitute the internal affairs of the union which would not be regulated under RCW 41.59.140. The amendment details the existence and demise of the "department of substitutes", and also details hostile statements made by union officials at about the same time the allegedly discriminatory dues structure was being put in place. These allegations are now sufficiently detailed to warrant a hearing on whether the union has aligned itself in interest against a segment of the bargaining unit it is obligated to represent. The allegations will be forwarded to the Examiner.

The original complaint contained several allegations under a heading: **"Paragraph V.7.0 Discriminatory Restrained Representation for Teacher-Sub Union Members"**. Paragraphs 7.1 and 7.2 of the original complaint alleged that the union deleted substitute teachers from membership after the end of the prior school year, and required them to re-apply for membership rather than have the

benefit of a "continuing" membership as did regular full-time certificated teachers. The preliminary ruling letter found a cause of action to exist, on the basis that utilizing the membership "renewal" system in the fashion described seemed calculated to delete as many substitute teachers as possible from union membership, and to thereby dilute their voting rights on "building representatives" and the union's executive council. The amendment details further actions of this nature through the autumn of 1995. These allegations are forwarded to the Examiner.

The original complaint contained several allegations under a heading: "**Paragraph V.8.0 Union Induced Employer Discrimination on Protected Union Activity / Against Teacher-Sub Organization Officers**". Paragraphs 8.1 and 8.2 of the original complaint seemed to address claims against the Tacoma School District, to wit: Whether employer officials advised substitute teachers to avoid the so-called department of substitutes within the union. The preliminary ruling letter found allegations that the union's business representative allowed the practice to continue unchallenged were too vague to constitute a cause of action. The amendment details the involvement of the union official, and his refusal to pursue discrimination allegations in the face of an announced shortage of substitute teachers. This allegation will be forwarded to the Examiner for further proceedings.

The original complaint contained several allegations under a heading: "**Paragraph V.9.0 Discriminatory Reprisal Exclusion of Teacher Subs from Union Governance / Violation of Protected Activity**". Paragraphs 9.1, 9.2, 9.3 and 9.4 of the original complaint repeated allegations that a by-laws change made by the union on May 2, 1995, was orchestrated by the union to dilute the representation of substitute teachers in union governance. The preliminary ruling found the allegations of paragraph 9.1 to state a cause of action for interference with the rights of employees under RCW 41.59.140, but questioned whether other allegations

stated any independent cause of action. The amendment adds further factual details which inter-relate the events as part of an alleged scheme to exclude substitute teachers from membership and activity in the union. The allegation will be forwarded to the Examiner.

NOW, THEREFORE, it is

ORDERED

1. J. Martin Smith of the Commission staff is designated as Examiner, to conduct further proceedings consistent with the foregoing, on paragraphs 2.2 - B.2; V.1.0 - 1.1, 1.2(b), 1.2(c), 1.2(d), 1.6, 3.3(b), 6.0, 6.1, 6.2, 6.3, 6.4, 7.1, 7.2, 8.1 - 8.2, 9.1, 9.2, 9.3, 9.4 of the complaint, as amended.

   a. PLEASE TAKE NOTICE THAT, the person or organization charged with an unfair labor practice in this matter (the "respondent") shall:

      File and serve its answer to the complaint within 21 days following the date of this letter(order).

   b. An answer filed by a respondent shall:

      1. Specifically admit, deny or explain each of the facts alleged in the complaint, except if the respondent is without knowledge of the facts, it shall so state, and that statement will operate as a denial.

      2. Specify whether "deferral to arbitration" is requested, and include a copy of the collective bargainig agreement and other grievance documents on which a "deferral" request is based.

      3. Assert any other affirmative defenses that are claimed to exist in the matter.

   c. The original and three copies shall be filed with the Commission at its Olympia office. A copy of the answer

shall be served, on the same date, on the attorney or principal representative of the person or organization that filed the complaint.

d. Except for good cause shown, a failure to file an answer within the time specified, or the failure of an answer to specifically deny or explain a fact alleged in the complaint, will be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

2. Except for the paragraphs identified in paragraph 1 of this order, the allegations of the complaint in the above-entitled matter are dismissed as failing to state a cause of action.

Issued at Olympia, Washington, on the 12th day of March, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, Senior Staff Member

Paragraph 2 of this order will be the final order of the agency on those matters unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.