STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JAMES D. MORRIS, Complainant, vs. PORT OF SEATTLE, Respondent.	)	CASE NO. 6325-U-86-1222 DECISION 2796-A - PECB DECISION OF COMMISSION

James D. Morris appeared pro se.

Bogle and Gates, by Peter M. Anderson, Attorney at Law, appeared on behalf of the respondent.

On October 23, 1987, Examiner Frederick J. Rosenberry issued a decision on unfair labor practice charges filed by James D. Morris against the Port of Seattle (employer). Both Morris and the employer petitioned the Commission for review.

SUMMARY OF FACTS

A complete statement of facts is set forth in the Examiner's decision. By way of summary, the facts are as follows:

The Port of Seattle recognizes International Longshoremen's and Warehousemen's Union, Local 9 (ILWU), as the exclusive bargaining representative of "warehousemen" employed by the employer.

James D. Morris has worked for the employer from time to time since 1981 as a "casual" warehouseman. He is not a member of the ILWU.

No provision is found in 1981 - 1984 collective bargaining agreement between the Port of Seattle and the ILWU requiring the employer to use the ILWU hiring hall. Nevertheless, the Examiner found that, when hiring employees between 1981 and 1984, the employer relied primarily, if not exclusively, on referrals from the ILWU hiring hall. The Examiner also received some testimony that, for as much as fifty years prior to September of 1986, the ILWU gave preference to its members in its hiring hall dispatching. In 1986, on advice of counsel, the ILWU entered into an agreement with the National Labor Relations Board to change its dispatch practices. Thereafter, union members were no longer given preference.

The Port of Seattle and the union negotiated a new collective bargaining agreement in September, 1985. As part of that process, they agreed to add 44 regular, seniority positions to the employer's warehouse workforce, so that there would be a total of 102 such positions. They agreed to create two seniority lists, an "A" list consisting of the 58 incumbents of pre-existing positions and 24 new positions (totaling 82), and a "B" list of 20 new positions.

To evaluate candidates for the new positions, the parties set up a nine-member evaluation panel consisting of three Port of Seattle management employees and six (of approximately 14) ILWU-represented foremen employed in the warehouse division. The panel was instructed to use as selection criteria: 1) work quality; 2) work quantity; 3) dependability; 4) cooperation; 5) initiative; and 6) experience. They were to use a rating process which would assign points to an applicant in each

evaluation category. They were told not to consider family ties, friendships, race, sex or union affiliation, and they were not provided with information concerning a candidates' minority status or union affiliation.

To create a candidate pool, the employer compiled a list of approximately 103 persons who had performed 160 or more hours of work as casual warehouse workers prior to August 9, 1985. The employer received 84 applications, including one from the complainant herein, James D. Morris.

The panel evaluated the candidates and, based on their scores, selected its 44 nominees for the new positions. Seniority rankings within the "A" list and "B" list were determined by lot. This process concluded on September 25, 1985. On that date, the union's business manager, with the concurrence of the employer, visited the work areas and read off the names of the successful and unsuccessful candidates. Morris was one of the unsuccessful candidates.

Forty ILWU members and 44 non-members had applied for the new positions. Half (42) of those 84 applicants had more work experience than Morris (542 hours), while Morris and the remainder of the applicants had 542 hours or less of work experience. Among those with more than 542 hours of work experience, the ILWU member applicants were 97% successful, while the non-member applicants were only 38% successful. In the second category (less than 542 hours of work), the ILWU member applicants were 70% successful, while the non-member applicants were only 31% successful.

Morris was present on September 25, 1985, when the announcement was made. The list was posted on bulletin boards on the same date. Morris consulted with an attorney within five days after

the September 25, 1985 announcement and posting of the names of the successful applicants. His attorney sent a letter on Morris' behalf to the Port of Seattle on October 1, 1985, alleging discrimination in hiring in favor of union members and citing Chapter 41.56 RCW. The seniority dates for the 44 new seniority positions were implemented beginning October 7, 1985.

Morris filed these unfair labor practice charges with the Commission on March 31, 1986, or six months and five days after he first learned he was not a successful candidate.

The Examiner first concluded that Morris' complaint was barred by the applicable statute of limitations as to the allegations that the selection of employees for the 44 new seniority positions violated Chapter 41.56 RCW.[1] He next concluded that the Port of Seattle violated RCW 41.56.140(1) by its

> ... ongoing use of and acquiescence in the conduct of discriminatory job dispatch practices of the hiring hall operated by ILWU Local 9 ....

(Conclusion of Law No. 3)

Finally, the Examiner concluded that Morris did not prove his allegations that the Port of Seattle controlled, dominated or assisted ILWU Local 9.

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[1] The Examiner further wrote that, even if Morris' complaint were not barred by the statute of limitations, he could not rule in Morris' favor. The Examiner reasoned that there is evidence from which one could conclude that the selection process for the 44 new seniority positions was flawed (i.e., discriminatory). The burden of proof was thereby shifted to the employer to show that Morris would not have made the list in any event. The Examiner found that the employer met this burden of proof.

ISSUES

1. Are the unfair labor practice charges pertaining to the selection of the 44 new seniority employees barred by the limitations period found in RCW 41.56.160? If not, does the evidence support a finding in Morris' favor?

2. Did the Examiner conduct the hearing in a fair and impartial manner, pursuant to applicable rules and regulations?

3. Did the employer acquiesce in the conduct of unlawful job dispatch practices by its ongoing use of the hiring hall operated by ILWU Local 9? On the basis of such a finding, can it be held to have violated RCW 41.56.140(1)? Was this issue properly before the Commission?

DISCUSSION

Statute of Limitations

RCW 41.56.160 states that the Commission shall not process a complaint:

> ... for any unfair labor practice occurring more than six months before the filing of the complaint with the Commission.

This bar is jurisdictional. Like the National Labor Relations Board, we conclude that the clock begins to run when the adverse employment decision is made and communicated to the employee. U.S. Postal Service, 271 NLRB 397 (1984). In this case, the decision unfavorable to Morris was made on or before September 25, 1985, and was communicated to him on that date. These facts are undisputed. Morris was present when the names

of successful and unsuccessful applicants were read. Within days, he visited an attorney, and his attorney wrote a letter on his behalf. Yet, he abandoned representation by an attorney and waited longer than the statutory period to file these charges. We are required to dismiss them with respect to the selection process concluded on or before September 25, 1985.

Having affirmed the Examiner's dismissal on the basis of the statute of limitations, we decline to review the Examiner's findings on the merits of Morris' charges having to do with the 44 new seniority positions.[2]

Conduct of The Hearing

Morris alleges that the Commission's hearing process was flawed because: 1) The Examiner took 8-1/2 months to decide the case; 2) The Examiner refused to enforce subpoenas issued on Morris' behalf; 3) The Examiner erred in giving the employer an extension of time to answer the complaint; 4) The Examiner erred in refusing to grant a pre-hearing conference; and 5) The

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[2] The process of selecting employees for the same 44 seniority positions was at issue in Ryder v. Port of Seattle, 50 Wn.App 144 (Division I, 1987), where the court held that the plaintiff's action was barred because he failed to exhaust his administrative remedies before the Public Employment Relations Commission and because he failed to allege that the union had breached its duty of fair representation. The court held that this Commission would clearly have had jurisdiction, had the plaintiff filed a "timely" complaint with us. Noting that Ryder's complaint was not filed until July of 1986, the court held the claim would have been barred by the statute of limitations set forth in RCW 41.56.160. The court proceeded further, and reviewed the trial court's dismissal on summary judgment, affirming the trial court's dismissal on the basis that no issues of material fact existed showing union discrimination in the selection process for the 44 new seniority positions at the Port of Seattle.

Examiner's decision summarized testimony presented by the employer in a factual and unquestioning manner, thereby showing a bias in favor of the employer.

In view of our conclusions concerning the statute of limitations, these procedural issues are largely moot. Nevertheless, as a courtesy to Morris, who has presented his claims without benefit of legal counsel, we will respond.

With respect to the first complaint, we agree that 8-1/2 months to render a decision is too long. The Commission has a heavy backlog of pending cases, numbering more than 300 for much of the period that this case was awaiting decision. The existence of a backlog of cases pending before the agency and consequent delays are not, however, grounds for overturning a decision. Decisions must be based on the law and the evidence in the record, and not on how long it takes to decide the dispute.

Morris' second complaint concerns information he sought to subpoena. The employer challenged some of the information sought. The Examiner ruled favorably to the employer on its motion to quash, but stated, at footnote 4 in his decision, that:

> ... arguably, all of the subpoenaed data was received into the record as evidence in the course of hearing, although it was not all prepared in accordance with the specific mandates of the subpoenas.

Our review of the record shows that the Examiner's ruling on the subpoenaed information was proper.

With respect to Morris' third complaint, it has been a long-standing practice of the Commission, in exercising its discretion, to grant a party's reasonable request for

extensions of time to answer complaints and file briefs. In this case, it might have been an abuse of discretion not to give the employer additional time to answer, because the record indicates counsel was not properly served with the order assigning the case for hearing. Morris' challenge to the Examiner's action in this regard is without merit.

Morris next contends the Examiner erred in not holding a pre-hearing conference. Yet, there are no rules which require a pre-hearing conference. The choice to hold one is discretionary with the Examiner. The Examiner did not abuse his discretion in choosing not to hold a pre-hearing conference in this case.

Morris' final argument with respect to the Examiner's conduct reflects a misunderstanding of the adjudicatory process. The Examiner necessarily must determine disputed facts. Merely because he chooses to believe one party, or to disbelieve another, does not establish bias. Accordingly, Morris' contentions are without merit.

Use of and Acquiescence to Discriminatory Hiring Hall

At page 24 of his decision, the Examiner stated:

> The record establishes that the port participated in and acquiesced to the ILWU's discriminatory dispatch practices over a long period of time, and continued to do so into the period within six months prior to the filing of the complaint.

The Examiner further found that the employer could not claim lack of knowledge or intent, because it was obligated to investigate the circumstances of any hiring practices. Thus, the Examiner inferred that the employer knew or should have

known of the union's discriminatory practices. Citing Pacific Maritime Assoc., 209 NLRB 519 (1974), the Examiner concluded that the employer committed an unfair labor practice by acquiescing in the maintenance of a discriminatory hiring hall arrangement.

The employer challenges the Examiner's finding that its use of and acquiescence to the union's operation of a discriminatory hiring hall is an unfair labor practice under RCW 41.56.140(1), arguing: 1) The union's discrimination in the operation of its hiring hall was not within the scope of the hearing; 2) The record is silent as to the extent of the employer's usage of the union hiring hall after September 30, 1985; 3) The U.S. Supreme Court, in General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1983) has ruled that an employer cannot be held responsible for the hiring hall operations of a union;[3] and 4) The evidence is insufficient to show that the operation of the hiring hall by ILWU local 9 was unlawful.

We agree with the first and second of the port's arguments, so that it is unnecessary to consider the third and fourth.

The conduct of the hiring hall does appear to have been outside the scope of the complaint. A letter attached to the unfair labor practice complaint filed by Morris discusses, in detail, as to why he believed the 44 new seniority jobs were filled in

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[3] We note that the National Labor Relations Board recently held, in Wolf Trap Foundation, 287 NLRB No. 103 (January 13, 1988), that it would no longer hold an employer strictly liable for its use of a union's discriminatory hiring hall. Rather, the NLRB will henceforth consider the specific circumstances of each case. Despite its change of stance, the NLRB nevertheless, on the facts of the Wolf Trap case, imputed knowledge (and liability) to two employers who lacked actual knowledge of the union's discriminatory conduct.

an unlawful, discriminatory manner. The complaint itself was not clear as to whether it included charges against the union, and the Executive Director wrote to Mr. Morris, asking him to clarify his intentions. In that letter, the Executive Director referred to the "44 seniority jobs" claim against the port. Mr. Morris responded by asking that his claim against the union be dropped, considering its proof an "uphill battle". The Executive Director issued a preliminary ruling letter on August 4, 1986, finding that a cause of action existed on the basis of

> ... allegations [that] concern discrimination on the basis of union membership (or lack thereof) in filling "44 seniority jobs" ...

The hearing itself was primarily concerned with the 44 new seniority jobs. The brief filed by Mr. Morris focused only on the 44 new seniority jobs. Our review of these pre-hearing documents shows that the port was not given reasonable notice that the broader question of union discrimination in the hiring hall operation would be at issue.

It also appears evidence was not presented to establish a cause of action occurring during the six month limitations period. To prove his case, Morris would have to have shown, among other things, that the employer used the hiring hall, and perhaps used it exclusively, during that period. Since the employer had just expanded its regular seniority roster, we cannot necessarily conclude that it had occasion to use the hiring hall during this period.

For the foregoing reasons, we reverse the Examiner's finding of a violation with respect to the use of the hiring hall after October 1, 1985, and make the following amended findings of fact, conclusions of law and order.

AMENDED FINDINGS OF FACT

1. The Port of Seattle is a port district operated under Title 53 RCW and is an employer within the meaning of Chapter 53.18 RCW and Chapter 41.56 RCW.

2. James Morris is a public employee within the meaning of RCW 41.56.030(2) who has from time to time been employed as a casual worker by the Port of Seattle. Morris was an applicant for employment for one of 44 new "seniority" positions filled by the Port of Seattle in August and September of 1985.

3. The Port of Seattle has recognized International Longshoremen's and Warehousemen's Union, Local 9 as the exclusive bargaining representative of regular and casual warehouse employees of the Port of Seattle.

4. The Port of Seattle has a historical and ongoing practice of using the hiring hall operated by ILWU Local 9 as the source of its employees.

5. The Port of Seattle and International Longshoremen's and Warehousemen's Union, Local 9 are parties to a collective bargaining agreement effective from September 4, 1985 to June 30, 1986. During negotiations for said agreement, the port agreed to expand its seniority list by an additional 44 positions.

6. Notice of the vacancies and of the procedure for selection was mailed to prospective candidates in August of 1985. The complainant was one of 84 applicants for the 44 positions.

7. The selection process for assignment to the 44 new seniority positions took place on September 23, 24, and 25, 1985. The complainant was notified on September 25, 1985, that he was not selected.

8. James Morris filed the complaint charging unfair labor practices to initiate these proceedings on March 31, 1986.

AMENDED CONCLUSIONS OF LAW

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

2. The complaint charging unfair labor practices filed by James Morris on March 31, 1986, is beyond the six month statute of limitations set forth in RCW 41.56.160 and is not timely filed with respect to allegations that the notice and procedures for selection of employees to the 44 new seniority positions were unlawful.

3. The employer's ongoing use of and acquiescence in the conduct of discriminatory job dispatch practices of the hiring hall operated by the ILWU Local 9 were not properly joined as issues in this proceeding, precluding the making of a determination as to whether the Port of Seattle has discriminated in hiring or has committed unfair labor practices in violation of RCW 41.56.140(1) by conduct during the period for which the complaint is timely.

4. The complainant has failed to sustain his burden of proof with respect to allegations that the Port of Seattle has controlled, dominated or assisted ILWU Local 9.

AMENDED ORDER

Upon the basis of the foregoing amended findings of fact and amended conclusions of law, and pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, the unfair labor practice charges of the complainant are hereby dismissed.

DATED at Olympia, Washington, this 29th day of April, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, Chairman

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner