STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GREEN RIVER UNITED FACULTY COALITION, Complainant, vs. GREEN RIVER COMMUNITY COLLEGE, Respondent.	CASE 8889-U-90-1952 DECISION 4008 - CCOL RULING ON MOTION FOR DISMISSAL

Evelyn Reider, Executive Director, Washington Federation of Teachers, appeared for the complainant.

Ken Eikenberry, Attorney General, by James Tuttle, Assistant Attorney General, appeared for the respondent.

On November 6, 1990, the Green River United Faculty Coalition filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Green River Community College (Community College District 10) had committed unfair labor practices in violation of RCW 28B.52.073. The complaint alleges that the employer unilaterally changed the standards concerning the use of accumulated sick leave, when it refused to allow the use of sick leave by faculty members who called in sick on October 26, 29 and 30, 1990.[1]

The matter was considered by the Executive Director of the Commission, who issued a preliminary ruling pursuant to WAC 391-45-

[1] The employer and union were engaged in collective bargaining negotiations in the autumn of 1990. Several other unfair labor practice charges were filed by the union, arising out of those negotiations. The parties also requested the services of a mediator. The parties signed a collective bargaining agreement covering the period from September, 1990 through September, 1992.

110, finding that the complaint stated a cause of action. Examiner J. Martin Smith has been assigned to conduct further proceedings in the matter, and notice has been issued setting hearing in the matter for March 24, 1992.

THE MOTION FOR DISMISSAL

The Employer's Motion for Dismissal

On February 7,1992, Green River Community College filed a motion for dismissal of the complaint, on the grounds that the Public Employment Relations Commission lacked jurisdiction over the parties for the incidents which occurred in September and October, 1990. The employer contends that the absences of various employees on October 26, 29, and 30 of 1990 were "clearly" a pattern of a "sick-out" or strike on these three days. Hence, the employer asserts that the employees were engaging in a "prohibited" activity.[2] The employer claims that its change of the sick leave policy, i.e., to require a physician's statement that the faculty member was actually ill on the days in question, was a legitimate exercise

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[2] The employer cites RCW 28B.52.078, which states:

> **The right of community college faculty to engage in any strike is prohibited.** The right of a board of trustees to engage in any lockout is prohibited. Should either a strike or lockout occur, the representative of the faculty or board of trustees may invoke the jurisdiction of the superior court in the county in which the labor dispute exists and such court shall have jurisdiction to issue an appropriate order against either or both parties. In fashioning an order, the court shall take into consideration not only the elements necessary for injunctive relief but also the purpose and goals of this chapter and any mitigating factors such as the commission of an unfair labor practice by either party. [emphasis by **bold** supplied].

of its managerial powers, when faced with a strike by the faculty. The employer describes the change in policy as a "temporary" measure, not a permanent unilateral change in the terms of the collective bargaining agreement. In essence, the employer argues that, since the strike was not a protected activity, the Commission lacks jurisdiction over the employer's response to it.

The Union's Response to the Motion for Dismissal

The union's response to the motion, filed on February 20, 1992, alleges that the changes in sick leave policy were made during difficult contract negotiations, without consultation with the union or any proposal to the union, and are properly before the Commission in this unfair labor practice case. While it does not deny the employer's claim that there were a large number of absences on the three days cited by the employer, the union does deny that it was engaged in or encouraged a strike.

The Employer's Motion for Summary Judgment

On March 2, 1992, the employer altered its position, to seek a summary judgment in the matter, and also strike the union's letter response filed on February 20, 1992. Further, the employer sought to exclude evidence of any alleged violation of the sick leave or emergency leave provisions of the parties' contract.

DISCUSSION

The Applicable Statute

Chapter 28B.52 RCW was first enacted by the Legislature in 1971, as a "meet and confer" law designed to regulate collective negotiations between community college districts and organizations representing their academic employees. Authority to administer

Chapter 28B.52 RCW was transferred to the Public Employment Relations Commission, effective January 1, 1976. See, Chapter 41.58 RCW. In 1987, Chapter 28B.52 RCW was substantially amended, imposing a duty to bargain in good faith and empowering the Public Employment Relations Commission to adjudicate certain unfair labor practices.

The Commission's Unfair Labor Practice Jurisdiction

With the amendments adopted in 1987, the authority of the Commission under Chapter 28B.52 RCW was aligned with the authority exercised by the Commission under the Public Employees' Collective Bargaining Act, at RCW 41.56.160, and under the Educational Employment Relations Act, at RCW 41.59.150, as well as with the authority exercised by the National Labor Relations Board under Section 10(a) of the National Labor Relations Act (NLRA).

The conduct prohibited as "unfair labor practices" under Chapter 28B.52 RCW is limited to the types of conduct specified in RCW 28B.52.073. Under numerous Commission precedents, an employer's unilateral change of employee wages, hours or working conditions (i.e., a change made without giving notice to the exclusive bargaining representative, providing an opportunity for collective bargaining, and then bargaining in good faith where requested) is an unfair labor practice of the "refusal to bargain" type. That is the type of conduct alleged by the union in this case, and that is the cause of action advanced to hearing by the Executive Director in his preliminary ruling in this case.

None of the provisions of RCW 28B.52.073 indicate that a strike or other work stoppage by academic employees of a community college district is, per se, an unfair labor practice. In that regard, Chapter 28B.52 conforms to the pattern of the other statutes administered by the Commission, as neither RCW 41.56.150 nor

41.59.140(2) regulates strikes.[3] The Commission has consistently declined to regulate strikes through the unfair labor practice provisions of the statutes. See, Spokane School District, Decision 310-B (EDUC, 1978); Fort Vancouver Regional Library, Decision 2350-A (PECB, 1986).

There is no similar consistency with regard to the fundamental treatment of strikes among the Washington public sector bargaining statutes, although Chapter 28B.52 RCW does address strikes.[4] In doing so, RCW 28B.52.078 details the availability of relief through the courts. Thus, in addition to rights it may have under common law, Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wn.2d 317 (1958), that statute points to the door of the courthouse, not to the Commission, to remedy strikes.

The exclusive jurisdiction of the Commission to adjudicate unfair labor practices under Chapter 28B.52 RCW and the other collective bargaining statutes is not affected by the existence of a strike, lockout or other work stoppage. In particular, the duty of the employer to bargain in good faith continues even where there is a strike, or threatened strike, in existence. Spokane School District, Decision 310-B, supra; PERC v. Spokane School District, WPERR CD-112-10 (Spokane County, 1979); Steilacoom School District, Decision 2527 (EDUC, 1986).

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[3] Such an approach is not universal in the public sector. Section 111.84(2)(e), Wisconsin Statutes, makes it an unfair labor practice for state employees, individually or in concert with others, "To engage in, induce or encourage any employees to engage in a strike, or a concerted refusal to work or perform their usual duties as employes."

[4] RCW 41.56.120 indicates that the chapter does not "permit or grant" the right to strike, while RCW 41.56.490 contains an arguably stronger prohibition applicable to "uniformed personnel". Chapter 41.59 RCW contains no reference to strikes or other work stoppages in support of collective bargaining activities.

The motion to dismiss and motion for summary judgment filed by the employer in this case must be denied:

First, it is clear that the Commission has jurisdiction to hear and determine allegations that there has been a violation of RCW 28B.52.073. A preliminary ruling on this complaint has been issued, stating that an employer's failure to bargain could be a violation of the law.

Second, whether or not any employee has engaged in unprotected activity, or whether the employer was making a lawful response to prohibited activity, raises questions of fact. The core rights of academic employees under Chapter 28B.52 RCW are the rights to form, join, or assist employee organizations for the purposes of collective bargaining, or to refrain from joining or assisting such organizations. If a labor organization files an unfair labor practice charge alleging violations of RCW 28B.52.073, the Administrative Procedures Act, Chapter 34.05 RCW, requires the Commission to decide the matter on the basis of a full evidentiary record.

Finally, the employer misinterprets several of the Commission's previous rulings, especially when it argues that the Commission:

> ... has similarly and consistently held that an unfair labor practice can occur only if an employee is engaged in protected activity ...,

citing City of Tacoma, Decision 1916 (PECB, 1984) and City of Seattle, Decision 2192-A (PECB, 1985). Those cases are distinguishable from the present case. In each of them, an employee had been the recipient of disciplinary action, and alleged that the discipline was actually the result of anti-union discrimination. The cases were considered under the so-called "Wright Line" test,[5] and the Commission ruled that the employees were disciplined

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[5] City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980).

without regard to their protected activities. In contrast, there is no allegation in this case that disciplinary action was taken by the employer against the employees who called in sick, even though some employees apparently received no compensation for some or all of the days involved. The allegations before the Examiner in this case involve "unilateral change", not "discrimination".

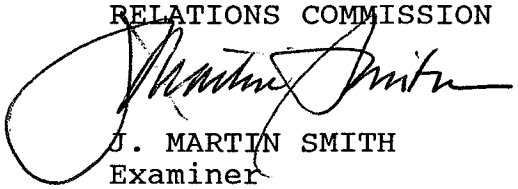
NOW, THEREFORE, it is

ORDERED

The motion for dismissal and motion for summary judgment made by the employer in the above-captioned case are DENIED.

Entered at Olympia, Washington on the 5th day of March, 1992.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION



J. MARTIN SMITH
Examiner