STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LOIS MEHLHAFF,	)	
	)	
Complainant,	)	CASE 11776-U-95-2771
	)	
vs.	)	DECISION 5466 - EDUC
	)	
TACOMA SCHOOL DISTRICT,	)	
	)	ORDER OF
Respondent.	)	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 was issued in the above-captioned matter on November 9, 1995, 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, or face dismissal of her complaint. An amended complaint filed on November 20, 1995, has now been reviewed under WAC 391-45-110.

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[1] The above-captioned matter covers the allegations against the employer. Case 11775-U-95-2770, which covers the allegations against the union, 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.

Introductory Materials

Paragraphs numbered 2.1, 2.2, and 2.3 in the original complaint were understood to be only background and introductory materials. The amendment does not address those paragraphs.

Allegations Regarding Union Dues

The original complaint set forth several allegations under the heading "**V.1.0 Discriminatory Punitive - level Nonuniform Dues / Dues Deduction Agency-Shop-Provision Violation**".

V.1.0 - 1.1 of the original complaint was found to state a cause of action for an "interference" violation, on the basis of an alleged agreement between the employer and the union to exact discriminatory or punitive union dues from substitute teachers. Those allegations are not repeated in the amended complaint, but neither are they expressly withdrawn. They will be forwarded to an Examiner for a hearing and decision on the merits.

V.1.0 - 1.2 of the original complaint, addressing "agency shop" or "union security" clauses, was described in the preliminary ruling letter as unclear. The amended complainant deletes this paragraph.

V.1.0 - 1.3 of the original complaint was found to state a cause of action, on the basis of an alleged agreement between the employer and union to systematically exclude substitute teachers from membership and activity in the union. The amended complaint adds that the failure to deduct representation fees from all substitute teachers violates the "uniformity" precept of the statute. This allegation will be forwarded to an Examiner. While an employer and union may be able to negotiate rational and non-discriminatory exclusions from union security obligations under Mukilteo School District, Decision 1222-A (EDUC, 1981), that is a defense which must be asserted and proved by a respondent.

Paragraph V.1.0 - 1.4 of the original complaint, addressing a "violation of contract" claim, was found insufficient to state a cause of action in the preliminary ruling letter. The amended complainant deletes this paragraph.

Allegations Regarding Substitute Pay Rates and Assignments

The original complaint set forth several allegations under the heading "**V.2.0 Discrimination/Interference with Rights in Granted-Leave Assignments**".

V.2.0 - 2.1 alleged, generally, that substitute teachers were not being paid at appropriate rates for days they worked. The preliminary ruling letter noted that the Commission does not enforce rights conferred by Title 28A RCW, and noted the facts alleged were insufficient to conclude that a "discrimination" violation could be found. The amended complaint contains general allegations of "discrimination with respect to monetary interests ... which produces anger, frustration and fear ... and feelings of futility and disparagement", but those statements do not rehabilitate this paragraph.[3] This complainant has no legal standing to pursue the situations of other employees, which are set forth in three examples given in the amendment. The amendment makes reference to a conversation which the complainant overheard, but the conversation dealt with the hiring of another employee, so that this complainant also lacks legal standing to pursue that matter. This amendment to a complaint against the employer seems to allege that the union has not forced the employer to require the physician verification of sick leave absences greater than five days, but that would only be properly addressed in the case against the

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[3] The complainant's theory concerning an entitlement to leave replacement contracts seems to focus on a 10-day maximum duration of sick leave. It is noted, however, that RCW 28A.400.300(2)(e) permits individual employees to accumulate up to 180 days of sick leave.

union. The amendment suggests that the employer may use two or more substitutes to fill in where a regular teacher is absent more than ten days, but does not set forth facts sufficient to form a conclusion that the employer's practices discriminate on the basis of union activity or lack thereof.[4] These allegations still fail to state a cause of action, and will be dismissed on that basis.

V.2.0 - 2.2 set forth examples where this complainant alleged that other employees had not been paid at the correct rates. The preliminary ruling letter pointed out 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. City of Walla Walla, Decision 104 (PECB, 1976), and found no cause of action to exist. The amendment deletes this paragraph, and it will be dismissed.

V.2.0 - 2.3 set forth additional examples of the type described in paragraph 2.2, but often without sufficient dates to assess whether the allegations were timely under the six-month period of limitations set forth in RCW 41.59.150. The amendment deletes this paragraph.

V.2.0 - 2.4 alleged that a "right to monetary protection" under an unspecified statute. The preliminary ruling letter noted that the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances. Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982). The amendment seems to allege that compensation practices which have been in effect for an unspecified period discriminate against substitute teachers, but there is no indication of any change of practice. The practices challenged by the complainant

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[4] Assignment practices might well be a mandatory subject of bargaining in contract negotiations which affect substitute teachers.

have impliedly been in effect for many years. The complaint does not state a cause of action, and must be dismissed.

Allegations Regarding Professional Growth and Grievance Procedures

Allegations set forth in the original complaint under the heading "**V.3.0 Defacto Discrimination/Unprotected Interest in Professional-Growth Monies and Grievance Process**" were found insufficient to state a cause of action, as follows:

V.3.0 - 3.1 alleged that the complainant was entitled to optional days under the applicable collective bargaining agreement. The preliminary ruling letter found the allegation failed to state a cause of action, citing Walla Walla, supra.

V.3.0 - 3.2 related to an alleged threat against the complainant for her pursuit of a grievance, but the preliminary ruling letter noted that the allegation was untimely under the six-month period of limitations set forth in Chapter 41.59 RCW.

V.3.0 - 3.3 concerned the union's refusal to process a grievance. The preliminary ruling letter pointed out the absence of Commission jurisdiction under Mukilteo School District, supra. It also would have been apt to point out that this allegation of union misconduct seems misplaced in a case against the employer.

The amendment did not revise or rehabilitate paragraphs 3.1, 3.2 or 3.3 in any way. Instead, the amendment merely asked that they be considered as background to two new allegations which were set forth as paragraphs 3.4 and 3.5.

V.3.0 - 3.4(a) in the amendment states that the complainant filed a lawsuit in court concerning her claim for optional days, but that it was dismissed as untimely. The complainant asserts that the grievance procedure is "flawed", but a failure to properly assert contractual rights does not create jurisdiction for the Commission where none existed in the first place. This must be dismissed.

V.3.0 - 3.4(b) in the amendment alleges that an employer official demanded that the complainant make a written request for inclusion of substitute teachers in a telephone directory issued by the employer. No cause of action exists under Chapter 41.59 RCW.

V.3.0 - 3.5(a) in the amendment alleges that exclusion of substitute teachers from the optional days provisions of the contract discriminates against a segment of the bargaining unit. While the Commission does not enforce rights which the complainant may claim under Title 28A RCW, it appears that a violation could be found (in conjunction with the allegations in paragraphs 1.1 and 1.3, above) if the differentiation of rights and benefits within the bargaining unit is based on unlawful considerations. While an employer and union may be able to negotiate rational and non-discriminatory differences within a bargaining unit, that is a defense which must be asserted and proved by a respondent.

V.3.0 - 3.5(b) appears to have been skipped over in the amendment.

V.3.0 - 3.5(c) in the amendment refers to contract provisions concerning coverage of classes by teachers regularly assigned to a building when no substitute teacher is available, and makes vague references to an "alternate 3-period day" at one of the employer's high schools. The facts alleged are insufficient to form a conclusion that a violation of RCW 41.59.140 could be found. Moreover, there are no facts which tie this complainant to any change of practice or to any application of the cited language within the six months previous to the filing of the complaint. As noted above, the Commission does not remedy contract violations. City of Walla Walla, supra. This allegation must be dismissed.

Allegations Regarding Staff Directories

Several allegations were set forth in the original complaint under the heading "**V.4.0 Discriminatory Restraint of Teacher-Sub Phone/**

Address Lists & 1993-95 Agreement Rights Information / Interference with Administration of Teacher Sub Organization".

V.4.0 - 4.1 and 4.2 of the original complaint dealt with the omission of substitute teachers from staff directories. These allegations were found insufficient to state a cause of action, inasmuch as nothing in Chapter 41.59 RCW requires an employer to publish any directory, this complainant lacks standing to pursue any "refusal to bargain" theory which might be available to the union, the Commission does not enforce the statutes which require disclosure of public records, and this complainant lacked standing to pursue any "refusal to provide information" theory which the union might be able to assert. The amendment combines these paragraphs, but does not cure their defects. There can only be one "exclusive bargaining representative" of a bargaining unit under RCW 41.59.090,[5] and RCW 41.59.080(1) specifically requires that all non-supervisory certificated employees of a school district be included in the same bargaining unit. The complainant and other union members may have formed a seemingly separate organization within the Tacoma Education Association, but are not entitled to the bargaining rights and organizational information that could be obtained from the employer by an "exclusive bargaining representative" under the statute.

V.4.0 - 4.3 of the original complaint dealt with the failure of the employer to provide copies of the collective bargaining agreement to all new substitute teachers. The preliminary ruling letter found the allegation was untimely. The amendment asserts that the employer did not distribute copies of the contract to employees who were first hired within six months prior to the filing of the original complaint, and that it also failed to distribute copies of

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[5] In fact, the employer could easily commit an "unlawful assistance and domination" violation under RCW 41.59.140-(1)(b), if it were to deal with an employee organization other than the "exclusive bargaining representative".

the contract at orientation sessions held since the filing of the original complaint. That still does not cure the fundamental problem, noted earlier in the preliminary ruling letter, that this complainant lacks standing to pursue the "distribution of contract" allegation. The complainant was not among the "new" substitute employees that the amendment alleges were not given copies of the staff directory or the collective bargaining agreement. This allegation must be dismissed.

Allegations Concerning Wage Discrimination

The original complaint contained two allegations under the heading "**V.5.0 Illegal Intra Teacher-Sub-Class Wage Discrimination**".

V.5.0 - 5.1 of the original complaint concerned a two-tiered wage system under which retired Tacoma teachers are paid a premium beginning on a date prior to the time they could have qualified for bargaining unit status under Tacoma School District, Decision 655 (EDUC, 1979). The preliminary ruling letter found a cause of action to exist on those allegations, in light of the allegations of systematic exclusion of substitute teachers from union membership. These allegations are not repeated in the amended complaint, but neither are they expressly withdrawn. They will be forwarded to an Examiner for a hearing and decision on the merits.

V.5.0 - 5.2 of the original complaint alleged that provisions of Title 28A RCW required that particular rates of pay be applicable to a substitute teacher after the employee being replaced has been on sick leave for more than 10 days. The preliminary ruling letter found this insufficient to state a cause of action, and amendment deletes the allegation. It will be dismissed.

V.5.0 - 5.3 is new material in the amendment. It alleges that the employer 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,[6] as outlined by the complainant, is not an unfair labor practice under Chapter 41.59 RCW.

Allegations Regarding Discrimination for Union Activity

Several allegations were set forth in the original complaint under the headings "**V.6.0 Protected Union Activity / Discrimination**" and "**V.7.0 Protected Employment - Relations Activity**".

V.6.0 - 6.1 and 6.2 of the original complaint alleged that an employer official responsible for calling (hiring) substitute teachers has been advising substitutes not to attend meetings of the substitute teachers' organization "because they're led by subs the district won't hire". It is alleged that the complainant first learned of this conduct in March of 1995. The preliminary ruling letter found a cause of action to exist on those allegations. These allegations are not repeated in the amended complaint, but neither are they expressly withdrawn. They will be forwarded to an Examiner for a hearing and decision on the merits.

V.7.0 - 7.1, 7.2, 7.3 and 7.4 of the original complaint alleged that the employer has discriminated against the complainant in retaliation for her filing charges under Chapter 41.59 RCW, and for her other protected activities, by not calling her for substitute work at a rate consistent with her past years of service. The preliminary ruling letter found a cause of action to exist on those

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[6] The Employment Security Act, Chapter 50.04 RCW, contains no special provisions regarding substitute teachers. Jennings v Employment Security Dept., 34 Wn.App. 592 (1983); Berland v Employment Security Department, 52 Wn.App. 401 (1988) and Abulhosn v Employment Security Department, 106 Wn.2d 486 (1986) stand for the proposition that substitute teachers are disqualified from unemployment benefits except in cases where they have been demoted from full-time to substitute because of a district-wide layoff.

allegations. These allegations are not repeated in the amended complaint, but neither are they expressly withdrawn. They will be forwarded to an Examiner for a hearing and decision on the merits.

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 1.2, 1.3, 3.5(a), 5.1, 6.1, 6.2, 7.1, 7.2, 7.3, and 7.4 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

REX L. LACY, Senior Staff Mediator

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.