Tacoma School District (Tacoma Education Association), Decision 5465-E (EDUC, 1997)

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-E - EDUC
LOIS MEHLHAFF, Complainant, vs. TACOMA SCHOOL DISTRICT, Respondent.	CASE 11776-U-95-2771 DECISION 5466-D - EDUC DECISION OF COMMISSION

L. Curtis Mehlhaff, Attorney at Law, appeared on behalf of the complainant.

Michael J. Gawley, Attorney at Law, appeared on behalf of the Tacoma Education Association, and appeared specially on behalf of the Tacoma School District.

Susan Schreurs, Attorney at Law, appeared on behalf of the Tacoma School District.

This case comes before the Commission on a petition for review filed by Lois Mehlhaff, seeking to overturn a decision issued by Examiner J. Martin Smith.[1]

---

[1] Tacoma School District, Decision 5465-C (EDUC, 1996), corrected by Decision 5465-D (EDUC, 1997).

BACKGROUND

This case concerns the rights of a certificated substitute teacher. The facts fully outlined in the Examiner's decision are incorporated by reference here, and will not be repeated.

On May 17, 1995, Lois Mehlhaff filed two unfair labor practice complaints with the Commission. One alleged that the Tacoma Education Association (union) had interfered with employee rights, and discriminated against Mehlhaff and substitute teachers as a group.[2] The other alleged that the Tacoma School District (employer) had interfered with employee rights, dominated or assisted the union, and discriminated against Mehlhaff and substitute teachers as a group.[3] Several allegations were dismissed in the preliminary ruling process under WAC 391-45-110.

Examiner J. Martin Smith conducted a hearing on the remaining allegations on July 11, August 28 and 29, October 10, and October 23, 1996. In his decision issued on July 29, 1997, Examiner Smith:

- Found the union violated RCW 41.59.140(2)(a) and (b), by insisting that substitute teachers who choose to join the union pay their annual dues obligations on a basis that was neither "periodic" nor "monthly", and by asking or causing the employer to collect union dues in such a manner. The Examiner thus ordered the union to cease and desist from those viola-

---

[2] Case 11775-U-95-2770. Mehlhaff alleged the union breached its duty to fairly represent substitute teachers, improperly aligned itself against the interests of substitute teachers, and improperly colluded with the employer against the interest of substitutes.

[3] Case 1177-U-95-2771. The complainant alleged that the employer colluded with the union in the union's improper alignment against the interests of substitute teachers.

tions, and to notify substitute teachers they could pay union dues on a monthly basis.

- Dismissed all other allegations against the union, finding that Mehlhaff did not sustain her burden of proof to establish that the union had aligned itself in interest against substitute teachers or deprived them of any other ascertainable right, status or benefit in violation of RCW 41.59.140(2).
- Dismissed the complaint against the employer, finding that Mehlhaff did not sustain her burden of proof to establish that the employer had improperly involved itself in the internal affairs of the union or had discriminated against substitute teachers, in violation of RCW 41.59.140(1).

Mehlhaff petitioned for review, thus bringing the case before the Commission. The union and employer filed responsive briefs.

POSITIONS OF THE PARTIES

Mehlhaff argues that the Examiner's decision is based on inadmissible evidence, fabricated evidence not in the record, and bias against the complainant. She asserts numerous errors of fact, and claims that an objective fact-finder would reach a different set of conclusions. She claims prejudice by the attendance at the hearing of a paid union witness, George Blood, and claims her right to a fair and impartial hearing was violated by the use of Blood's testimony. Mehlhaff asks the Commission to exclude Blood's testimony from the record, and to assign a new Examiner to review the record and issue a new decision based on the narrowed record.

The employer argues that the Examiner properly permitted Blood to be the union's party representative, and properly considered

Blood's testimony in rendering the decision. The employer asserts that Mehlhaff did not meet her burden to prove she was discriminated against because of her protected activities. The employer contends it had reasonable business justifications for not permitting substitute teachers to use optional days or professional growth funds, that Mehlhaff did not work many days in 1994-95 because she limited the scope of assignments she would accept, and that Mehlhaff failed to establish any of her remaining claims. The employer asserts that the Examiner's decision is supported by the record, and requests the Commission to affirm the decision.

The union contends the Examiner properly allowed the union's party representative to be present throughout the hearing. It contends that Mehlhaff waived any objection to Blood's presence, based on having made and then withdrawn her objection at the beginning of the hearing. The union argues that the complainant's failure to cite authority in support of her arguments on appeal results in a waiver of those arguments. The union urges that the Examiner's factual findings are supported by substantial evidence, and that they should be upheld by the Commission on review.

DISCUSSION

Motion to Exclude Respondents' Briefs

On September 10, 1997, Mehlhaff filed a motion to exclude the briefs filed by the employer and union in response to the petition for review, on the basis that the briefs were untimely. That motion is based on the petition for review having been filed in this case on Monday, August 18, 1997, and on the provision of WAC 391-45-350 which allows other parties 14 days following the date on which they are served with a copy of a petition for review and

accompanying brief or written argument to file a responsive brief or written argument.

The employer and union filed their briefs on Wednesday, September 3, 1997. That was more than 14 days after the filing of the petition for review, but one day before the deadline set by the Executive Director in his August 21, 1997 letter acknowledging the filing of the petition for review. We find no error on the part of the employer or union. The Commission has, in the past, waived strict application of its rules under WAC 391-08-003, where parties have been given misdirection by the agency staff. City of Tukwila, Decision 2434 (PECB, 1986). The motion is denied.

Alleged Bias by George Blood's Presence at Hearing

At the hearing in these cases, the union's attorney moved that witnesses be sequestered, and designated George Blood as the party representative for the union. The complainant initially asked that Blood be excluded if he was going to be a potential witness, but then withdrew that objection.[4]

The complainant later reasserted the same objection and sought to offer proof that Blood was not a party or a representative of a party.[5] The Examiner overruled the objection and allowed Blood to

---

[4] The complainant's initial request came after disclosure that Blood had retired from the union's staff. After a short recess and questioning of Blood, who stated he was hired and compensated for special assignments like this one, the complainant specifically withdrew the objection. Tr. 9-17.

[5] Transcript, pp. 230-233. From the description of the document as a "record of service" and the fact that the offered documents were part of the Commission's case file, it is inferred they were documents produced by the Commission's computerized case docketing system.

testify. The complainant did not revisit this issue in the post-hearing brief to the Examiner, but asserts on appeal that Blood was mis-characterized as a party representative when the witnesses were sequestered,[6] and that Blood's testimony was influenced by his observation of the testimony of other witnesses at the hearing.

The complainant's argument based on the fact that Blood was a retired employee hired back by the union to be present at the hearing is neither new information nor persuasive. WAC 10-08-200 gives our Examiners the authority to rule on procedural matters, objections, and motions. WAC 391-45-270 allows Examiners discretion in sequestering witnesses.[7] Blood's retirement and rehiring were both known to the complainant when the initial objection was made and withdrawn. Where witnesses are sequestered, a party is entitled to have a person of its own choosing present to assist its legal counsel. The names of representatives listed in the Commission's docket records are not conclusive, and likely not even probative, with respect to a party's decision on who it chooses to have present to assist its counsel at hearing. Blood had been the union official involved in the disputes being addressed at the hearing, so there was no abuse of discretion when the Examiner allowed the union to designate him as its party representative.

---

[6] Mehlhaff asserts that Robert Graf had been designated as the new party representative for the union. Review of the Commission's docket records for these cases discloses that Graf's name replaced Blood's name in the union's address some time between April and June of 1996.

[7] See, Shoreline School District, Decision 5560-A (PECB, 1996). Generally, trial courts have discretion to exclude witnesses from the courtroom. Egede-Nissen v. Crystal Mountain, 93 Wn.2d 127 (1980). Appellate courts generally do not interfere with that discretion, except in cases of manifest abuse. State v. Grant, 77 Wn.2d 47 (1969).

An alternate interpretation of Mehlhaff's contention is that she was prejudiced by the presence of *any "paid" union witness* at all sessions of the hearing. This was not an argument advanced before the Examiner. In fact, it conflicts with the withdrawal of the initial objection after learning that Blood had been hired back by the union, and also with the complainant's suggestion that Robert Graf (another paid union official) should have been the union's party representative. In addition, the complainant actually made use of Blood's testimony in her post-hearing brief for these cases. We cannot allow the complainant to claim error at this stage of the proceedings as to testimony that she used in her favor at another stage of the same proceedings.

Finally, the complainant has not offered any support to substantiate her claim of unfair prejudice.

The Jurisdiction of the Commission

This case arises under the Educational Employment Relations Act (EERA), Chapter 41.59 RCW. That statute includes:

> RCW 41.59.060 EMPLOYEE RIGHTS ENUMERATED--FEES AND DUES, DEDUCTION FROM PAY. (1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter.
>
> (2) The exclusive bargaining representative shall have the right to have deducted from the salary of employees, upon receipt of an appropriate authorization form which shall not be irrevocable for a period of more than one year, an amount equal to the fees and dues required for membership. Such fees and dues shall be

> deducted monthly from the pay of all appropriate employees by the employer and transmitted as provided for by agreement between the employer and the exclusive bargaining representative, unless an automatic payroll deduction service is established pursuant to law, at which time such fees and dues shall be transmitted as therein provided. If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit.
>
> ...
>
> RCW 41.59.100 UNION SECURITY PROVISIONS--SCOPE--AGENCY SHOP PROVISION, COLLECTION OF DUES OR FEES. A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues. All union security provisions must safeguard the right of nonassociation of employees based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular dues and fees to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the bargaining representative to which such employee would otherwise pay the dues and fees. The employee shall furnish written proof that such payment has been made. If the employee and the bargaining representative do not reach agreement on such matter, the commission shall designate the charitable organization.

Administrative enforcement of both the employee rights and the employer and union obligations imposed by Chapter 41.59 RCW is by

means of the unfair labor practices specified in RCW 41.59.140, as follows:

> RCW 41.59.140 UNFAIR LABOR PRACTICES FOR EMPLOYER, EMPLOYEE ORGANIZATION, ENUMERATED. (1) It shall be an unfair labor practice for an employer:
>
> (a) To **interfere with, restrain, or coerce** employees in the exercise of the rights guaranteed in RCW 41.59.060.
>
> (b) To **dominate** or interfere with the formation or administration of any employee organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made by the commission pursuant to RCW 41.59.110, an employer shall not be prohibited from permitting employees to confer with it or its representatives or agents during working hours without loss of time or pay;
>
> (c) To encourage or discourage membership in any employee organization by **discrimination** in regard to hire, tenure of employment or any term or condition of employment, but nothing contained in this subsection shall prevent an employer from requiring, as a condition of continued employment, payment of periodic dues and fees uniformly required to an exclusive bargaining representative pursuant to RCW 41.59.100;
>
> (d) To discharge or otherwise **discriminate** against an employee because he has filed charges or given testimony under this chapter;
>
> (e) To **refuse to bargain** collectively with the representatives of its employees,
>
> (2) It shall be an unfair labor practice for an employee organization:
>
> (a) To **restrain or coerce** (I) employees in the exercise of the rights guaranteed in RCW 41.59.060: PROVIDED, That **this paragraph shall not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein**; or (ii) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

> (b) To cause or attempt to **cause an employer to discriminate** against an employee in violation of subsection (1)(c) of this section;
> (c) To **refuse to bargain** collectively with an employer, provided it is the representative of its employees subject to RCW 41.59.090. ...

[Emphasis by **bold** supplied.]

The Public Employment Relations Commission does not have authority to resolve any and all disputes arising in public employment, and its jurisdiction in this area is limited to deciding whether alleged conduct constituted one of the unfair labor practices outlawed by the statute. IAFF Local 2916 v. Public Employment Relations Commission, 128 Wn.2d 375 (1995).

The Interference / Restraint / Coercion Prohibitions - RCW 41.59.140(1)(a) and (2)(a) prohibit both employers and unions, respectively, from making threats of reprisal or force or promises of benefit in connection with the exercise by employees of their rights protected by the collective bargaining statute. The definitions of "interference" under the EERA are similar to those used under the Public Employees' Collective Bargaining Act at RCW 41.56.140(1) and 41.56.150(1), and the Commission has been guided by the more numerous precedents developed under Chapter 41.56 RCW in deciding unfair labor practice complaints filed under Chapter 41.59 RCW. An interference violation occurs when an employee could *reasonably* perceive the disputed actions as being associated with their protected union activity. Seattle School District, Decision 2524 (EDUC, 1986).[8]

[8] See, for example, City of Seattle, Decision 3066-A (PECB, 1988); City of Seattle, Decision 3566-A (PECB, 1991); City of Pasco, Decision 3804-A (PECB, 1992); Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995); and King County, Decision 4893-A (PECB, 1995).

The Domination Prohibition -
RCW 41.59.140(1)(b) prohibits employers from involving themselves in the internal affairs of unions, from showing a preference among two or more unions competing for the same group of employees, or from providing financial or other support to a union, any of which could compromise the independence of the "company union" as exclusive bargaining representative of the employees. See, Washington State Patrol, Decision 2900 (PECB, 1987); Spokane Transit Authority, Decision 5742 (PECB, 1996). Proof of intentional employer action is necessary to find such a violation. Pierce County, Decision 1786 (PECB, 1983).

The Discrimination Prohibitions -
Discrimination violations involve intentional acts in response to the exercise of rights protected by a collective bargaining law, and so require a higher standard of proof than an interference claim.[9] The definitions of "discrimination" in violation of RCW 41.59.140(1)(c) and (d) and (2)(b) are similar to those used under RCW 41.56.140(1) and (3) and 41.56.150(2). The standards used by the Commission for deciding such allegations were adapted in Educational Service District 114, Decision 4361-A (PECB, 1994) from the decisions of the Supreme Court of the State of Washington in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991). Thus:

- A complainant claiming unlawful discrimination must first make out a prima facie case, showing that:
    - The employee exercised a right protected by the collective bargaining statute, or communicated an intent to do so;

[9] See, Port of Tacoma, Decision 4626-A (PECB, 1995).

  - The employee was discriminatorily deprived of some ascertainable right, benefit or status; and
  - There was a causal connection between the exercise of the legal right and the discriminatory action.

- Where a complainant establishes a prima facie case of unlawful discrimination, the respondent has the opportunity to articulate legitimate, nonretaliatory reasons for its actions.[10]

- Where a respondent articulates lawful reasons for its actions, the burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that:

  - The reasons articulated by the respondent were pretextual, or
  - Union animus was nevertheless a substantial motivating factor behind the disputed action.

Discrimination for reasons unrelated to the collective bargaining process is generally outside of the Commission's jurisdiction.[11]

Enforcement of the Duty to Bargain -

A duty to bargain exists under Chapter 41.59 RCW only between a covered employer and the organization holding status as the incumbent exclusive bargaining representative of its certificated employees. Individual employees within a bargaining unit are

---

[10] A violation will be found if the employer does not meet this burden of production, as with respect to the first of two discharges of an employee in City of Winlock, Decision 4783 (PECB, 1994).

[11] See, City of Seattle, Decision 205 (PECB, 1977).

third-party beneficiaries to, but not parties to, such a bargaining relationship. Thus, only the employer and union that are the parties to a particular bargaining relationship have legal standing to file or pursue "refusal to bargain" claims.[12]

No "Violation of Contract" Unfair Labor Practice -
The Commission lacks 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); Seattle School District, Decision 4917-A (EDUC, 1995). Such claims must be pursued through the grievance and arbitration machinery within the contract, or through the courts.

Limited "Breach of Duty" Jurisdiction -
An exclusive bargaining representative holds a privileged status under Chapter 41.59 RCW and similar collective bargaining statutes, and owes a *duty of fair representation* to all of the employees in the bargaining unit it represents. Two different types of "breach of duty" situations are identified, however:

- While the courts have found that the duty of fair representation includes the investigation and prosecution of contractual grievances in a manner that is not arbitrary, discriminatory

[12] Under numerous cases dating back to at least Federal Way School District, Decision 232-A (EDUC, 1977), affirmed WPERR CD-57 (King County Superior Court, 1978), employers must give notice and provide opportunity for bargaining, prior to implementing changes affecting the wages, hours or working conditions of union-represented employees. Unions may request bargaining if they desire to change employee wages, hours or working conditions or to negotiate on changes proposed by an employer, but also have discretion to waive their bargaining rights when presented with an opportunity for bargaining. The "good faith" obligation which applies to all bargaining does not compel either party to agree to a proposal or to make a concession. RCW 41.59.020(2).

or in bad faith,[13] the Commission does not assert jurisdiction over fair representation claims arising exclusively out of the processing of grievances. Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982). See, also, Bremerton School District, Decision 5722 (PECB, 1996), affirmed, Decision 5722-A (PECB, 1997). This is closely related to the lack of Commission jurisdiction to remedy any underlying contract violation. Employees claiming rights against the employer must pursue such matters through a civil suit, as a third-party beneficiary of the collective bargaining agreement, in a court which can assert jurisdiction over the employer and the contract. City of Seattle, Decision 4556-A (PECB, 1994).

- The Commission does police its certifications, and will assert jurisdiction over allegations that a union has abused its statutory status and privileges by discriminating against one or more bargaining unit employees on the basis of union membership,[14] or that the union has engaged in some other form of discrimination against bargaining unit employees on a basis prohibited by state or federal law (e.g., race, creed, sex, national origin, etc.).[15]

Again, however, the Commission's jurisdiction in this area is confined to administering the express provisions of RCW 41.59-.140(2) and obligations growing directly and logically out of the union's status as "exclusive bargaining representative.

---

13 Vaca v. Sipes, 386 U.S. 171 (1967).

14 See, Pateros School District (Pateros Education Association), Decision 3744 (EDUC, 1991).

15 See, Allen v. Seattle Police Officers' Guild, 100 Wn.2d 361 (1983)

No Jurisdiction Over Internal Affairs of Unions - Chapter 41.59 RCW contains no provisions expressly regulating the internal affairs of labor organizations,[16] and the Commission has taken a very limited role in this area where regulation would have to originate with the Legislature. See, Oroville School District, Decision 5667 (PECB, 1996); City of Seattle, Decision 5159 (PECB, 1995); and King County, Decision 4253 (PECB, 1992). The constitutions and bylaws of unions are the contracts among the members for how the organization is to be operated, and internal affairs disputes must be resolved through internal procedures or the courts. Enumclaw School District, Decision 5979 (PECB, 1997).

The Allegations Against the Union

Union Security Obligations and Representation Fee - The Examiner found that "representation fee" arrangements of the "agency shop" type were not made applicable to per diem substitute teachers after November 17, 1994, which is the earliest date for which these complaints are timely. The Examiner also found that agency fees and/or representation fees were not a factor in these cases, inasmuch as Mehlhaff never paid such fees.[17]

Mehlhaff argues that the Examiner has not looked at the issue presented to him, and that the agency shop provisions were not uniformly enforced at any time during the applicable time period. The complainant's arguments are without merit for multiple reasons, as indicated below:

---

[16] The Washington statutes currently do not contain a counterpart to the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act).

[17] Mehlhaff chose to voluntarily pay union dues and fees pursuant to Section 11(b) of the collective bargaining agreement.

- Mehlhaff lacks legal standing to assert rights on behalf of the union. The right to negotiate and enforce union security obligations applicable to some or all bargaining unit employees lies entirely with the union,[18] and Mehlhaff has no claim against the union for waiving its right to require dues or fees from substitute teachers.

- Mehlhaff lacks legal standing to assert rights on behalf of any other employee. Since she voluntarily paid dues, and was not among those whose dues and fees were waived by the union, Mehlhaff has no claim against the union.

Since the Commission does not assert jurisdiction over the enforcement of collective bargaining agreements, any rights flowing to Mehlhaff from the contract are not before the Commission for determination or remedy in this case.

Annual Membership Renewal for Substitutes -
The union altered its membership re-enrollment periods to require substitute teachers to renew their local union membership on a year-by-year basis. The Examiner found no violation of the law.

The complainant argues that the Examiner misstated the issue, and that the real issue in regard to the reapplication for membership is that the union's bylaws prohibit the removal of all substitutes from union membership at the end of a school year.[19] The argument

---

[18] The right of a union to negotiate and/or close a loophole in the coverage of a union security provision was validated in Mukilteo School District, Decision 1122-A (EDUC, 1981).

[19] Mehlhaff cites union bylaws which provide that union membership may only be revoked for violation of the Code of Ethics of the National Education Association or for conviction of a crime involving moral turpitude.

mistakes the Commission's jurisdiction, however. As noted above, the Commission does not assert jurisdiction over issues concerning compliance with a union's bylaws.

Absolute One-third Dues for Substitutes -
The Examiner found no fault with the union's action of establishing the annual dues for substitute teachers at one-third of the dues paid by full-time teachers.

Mehlhaff claims the Examiner ignored the fact that contracted teachers working less than full-time have prorated dues obligations, and argues that the real question was whether discriminatory, unreasonable, and nonuniform dues discouraged membership by substitutes. The setting of union dues is largely beyond the purview of Chapter 41.59 RCW, which expressly preserves "the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein". RCW 41.59.140(2)(a). Charging employees who work less than full-time a lower dues rate than is charged to full-time employees is not, on its face, inherently discriminatory. In Tacoma, a substitute teacher who works between one-sixth and one-third of the available days would pay more than a pro-rata share of the annual dues paid by full-time employees,[20] but a substitute teacher who works more than one-third of the available days would still only pay one-third of the dues paid by full-time employees. Mehlhaff has not established that such trade-offs are outside the realm of internal union affairs, and nothing in the statute requires that such dues adjustments be strictly pro-rata. We affirm the dismissal of this allegation.

---

[20] Working 30 of the 180 days in a school year (one-sixth of the days available) is generally required for an employee to be included in the bargaining unit under Tacoma School District, Decision 655 (EDUC, 1979).

Exclusion of Substitutes from Certain Benefits -
In finding that the employer and union lawfully agreed to limit eligibility for "optional days" and "professional growth" benefits to employees with a full-time equivalency (FTE) of .5 or more, the Examiner credited a memorandum of agreement signed by the employer and union.

Mehlhaff disputes the authenticity of the document by which the employer and union confirmed their intentions on these issues, contending it had not been seen by anyone except the signatories before it was presented in a court in 1995, and that the employer did not rely upon the document in turning down her grievance in November of 1994. The complainant is essentially disputing the method used by the employer and union to embody their agreement and/or the processing of the grievance, both of which are matters over which the Commission lacks jurisdiction.[21] We affirm the Examiner's conclusion that an agreement was made by the employer and union on this subject.

Mehlhaff reasons that, as certificated employees and members of the bargaining unit, substitute teachers should be presumed to have the benefit of the negotiated agreement. Our task here is only to determine statutory violations under a collective bargaining law which does not compel agreement on each and every issue negotiated by an employer and union. A union can rarely provide all things desired by all of the employees it represents, and absolute equality of treatment is not the standard for measuring a union's

---

[21] Mehlhaff also contends that the fact that substitute teachers were neither "costed" nor talked about in the negotiations on the optional days provides no basis for their exclusion from those benefits. To the extent Mehlhaff disputes the method the employer and union used to reach an agreement, she asserts a "refusal to bargain" claim for which she lacks standing.

compliance with the duty of fair representation. The Supreme Court of the United States described the wide range of discretion allowed to unions, as follows:

> 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 good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), at 338. See, also, Pe Ell School District, Decision 3801-A (PECB, 1992).

The real question here is whether Mehlhaff has been deprived of any "ascertainable right, status or benefit" so as to invoke the duty of fair representation and/or the "discrimination" provisions of the statute. Differences of treatment which are founded upon a rational basis (e.g., seniority preferences) or market considerations are not unlawful. The facts that Mehlhaff is (1) a certificated employee and (2) a bargaining unit member, do not, as she seems to assume without citation of any external authority,[22] compel

---

[22] In contrast, the employer and union involved in that grandfather of all "duty of fair representation" cases, Steele v. Louisville & Nashville RR, 323 U.S. 192 (1944), knew or reasonably should have known that their agreement on a racially-biased seniority system contravened the U.S. Constitution and federal civil rights laws. Here, Mehlhaff presents no statute, judicial precedent, administrative rule or policy of the Superintendent of Public Instruction, or other administrative precedent supporting her implied proposition that substitute teachers are entitled, as a class, to some or all of the same rights and benefits as full-time teachers.

a conclusion that she was entitled as a substitute teacher to each and every benefit enjoyed by full-time teachers. We affirm the Examiner's decision that, since the complainant has not provided facts or law that would appropriately bring the issue before the Commission, the complainant's arguments lack merit.

Decision Not to Pursue Complainant's Grievances -
Mehlhaff filed a grievance claiming a contractual right to the "optional days" benefit. The union eventually declined to pursue that grievance. The Examiner evaluated the union's handling of that grievance in terms of whether there was discrimination within the meaning of Chapter 41.59 RCW.

Mehlhaff argues here that the record is clear that the union did not represent the complainant. Thus, she asks the Commission to review a "breach of duty of fair representation arising from the processing of a contractual grievance", which falls squarely within the type over which the Commission does not assert jurisdiction.

Abolishment of "Department of Substitutes" -
The union abolished a division which had existed within the union's organization, and which was guaranteed a seat on the union's executive council. In its place, the union created a "substitute issues committee" which was not guaranteed a seat on the union's executive council, and provided for representation of substitute teachers through the same system of zone representatives used for all other bargaining unit employees. The Examiner analyzed the union's actions as a "discrimination" claim, and found the union's action did not constitute an unfair labor practice.

Mehlhaff argues on appeal that the Examiner did not address evidence showing diminution of the substitutes input into the union, ignored evidence showing that the bargaining process has not

produced any gains for substitutes, ignored evidence of poor treatment of substitutes, and ignored the fact that union membership among substitute teachers declined. We find those arguments insufficient to find any unfair labor practice, however:

- Commission precedent clearly includes substitute teachers who qualify as "regular part-time" employees in the same bargaining unit as full-time teachers, and precludes separate bargaining units limited to substitute teachers.[23] Under RCW 41.59.090, the organization which holds majority status in an appropriate bargaining unit is the "exclusive bargaining representative" for that entire bargaining unit. The statute specifically preserves "the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership". Inasmuch as substitute teachers have no statutory right to separate representation or have a department of substitutes within a union's organization, Mehlhaff had no statutory rights to its continued existence.[24]

- No evidence was presented that the representatives from the zones ignored concerns of the substitutes, failed to attend meetings, or otherwise failed to involve the union's dwindling number of members among the substitute teachers.

- The fact that union membership among substitute teachers had declined does not, in and of itself, show that the union either restrained, or coerced employees in the exercise of their rights in violation of RCW 41.59 140(2)(a).

---

[23] Tacoma School District, Decision 655 (EDUC, 1979); Columbia School District, et al., Decision 1189-A (EDUC, 1981); RCW 41.59.080(1).

[24] In this case, the record supports an inference that the Department of Substitutes had taken on a life of its own, holding separate meetings and publishing a newsletter for a portion of the appropriate bargaining unit.

- The lack of what Mehlhaff may perceive as appropriate gains for substitutes during the bargaining process does not, in and of itself, show the union either restrained, or coerced employees in the exercise of their rights in violation of RCW 41.59.140(2)(a).

The Examiner acknowledged Mehlhaff's evidence that substitutes were dealt with differently, but analyzed the issue in terms of whether they had been discriminated against under the terms of the statute. It may seem to Mehlhaff that the Examiner's focus on the Commission's jurisdiction ignored the poor treatment of substitutes in the marketplace, and she would have the Commission find discrimination on the basis that the substitutes disagreed with the union's actions. We agree with the Examiner that our inquiry is limited to the unfair labor practices detailed in RCW 41.59.140, and that there is no evidence here of a statutory violation.

<u>Union Solicitation of Employer Discrimination</u> - Mehlhaff argues that the Examiner misstated the issue as to whether the union engaged in discrimination against substitutes by influencing the employer's representatives, and whether the union allowed its own officials or the employer to disparage the "department of substitutes". The complainant argues that the real issue was enforcement of the collective bargaining agreement. Again, however, the Examiner stated the issue in terms of the statutory jurisdiction of the Commission. The Commission does not have jurisdiction over enforcement of collective bargaining agreements. The Examiner properly found that the union did not (and could not) have anything to do with the employer's determinations about: (1) whether a substitute teacher needed to be called on any particular day; (2) which substitute teacher was to be called; (3) whether there was a shortage of substitutes; or (4) whether a particular substitute was in need of more work or was

over assigned in particular areas. In order to find a violation of RCW 41.59.140(2)(b), the record would have to contain credible evidence that the union had something to do with the employer discriminating against an employee in violation of RCW 41.59.140(c). Since we find no employer discrimination in this case, below, we are hard pressed to find that the union had any influence on any employer discrimination.

Conclusion on Allegations Against Union -
Substitute teachers have historically been treated differently than other certificated employees. Indeed, employer arguments in the early cases on the bargaining unit status of substitute teachers would have excluded substitutes from all bargaining rights under Chapter 41.59 RCW. Statutory coverage for substitutes who meet a minimum threshold of employment, and their inclusion in bargaining units, provides a forum to seek improvement of their wages, hours and working conditions. Statutory and bargaining unit status did not, however, guarantee them any particular level of wages, hours or working conditions. Except in the area of dues payment,[25] this record fails to establish that the union restrained or coerced Mehlhaff in her exercise of collective bargaining rights in violation of RCW 41.59.140(2)(a), or caused or attempted to cause the employer to discriminate in violation of RCW 41.59.140(2)(b).

The Allegations Against the Employer

Allegations of Employer/Union Collusion -
In order for there to be a finding an employer and union have unlawfully conspired or colluded, there must "be some communication on the subject between representatives of those parties". Pateros

[25] The Examiner found and ordered remedy for a violation of the "periodic" and "monthly" terms of the statute.

School District (Pateros Education Association), Decision 3744 (EDUC, 1991). In this case, the Examiner found no collusion between the employer and union in violation of the statute.

Mehlhaff asserts that Exhibits 16, 30 and 34 show that the union instructed the employer to deduct certain dues and fees from various classifications of employees, and that the union told the employer not to collect agency fees from substitute teachers. The record is devoid, however, of evidence that the employer and union colluded on the agency fees. To the contrary, the record supports a conclusion that the union acted alone when it waived collection of agency fees from substitute teachers. The fact that the union's decision was communicated to and acted upon by the employer does not mean those parties colluded to deprive certain employees of their rights under the collective bargaining statute. A union must communicate its dues and fees structures to an employer, if the employer is to fulfill its payroll deduction obligations under RCW 41.59.060(2) and RCW 41.59.100.

Mehlhaff argues that RCW 41.59.100 must be strictly applied: that union security arrangements and agency shop provisions must apply to all members of the bargaining unit, so that the employer has engaged in some unlawful discrimination by agreeing to withhold enforcement of agency shop on all substitute teachers. As the Examiner concluded,[26] the complainant misreads RCW 41.59.100. That provision specifically requires employers to deduct from salary payments "**dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues.**" Employers do not have discretion as to how much of the union security or agency shop provision of a collective bargaining agreement they are going to enforce, but have a duty to enforce the

[26] Examiner's decision, page 33.

entire agreement. Additionally, Mehlhaff would have us enforce the collective bargaining agreement, which is a role where the Commission has no jurisdiction.

Mehlhaff also cites the "hold harmless" clause in the collective bargaining agreement as evidence of collusion between the employer and union, but that argument also lacks merit. The exclusive bargaining representative is clearly the primary beneficiary of union security provisions in a collective bargaining agreement, and may in good faith make concessions in exchange for an employer's agreement on union security. One such lawful inducement would be for the union to undertake the defense (i.e., to hold the employer harmless) in the event of a legal challenge to the union security provisions. The terms cited by Mehlhaff are thus within the range which could be negotiated by the employer and union in good faith.

Mehlhaff argues that the memorandum of agreement which excludes substitute teachers (and others) from optional days and professional growth funds shows that the employer and union chose to negotiate in secret. Collective bargaining negotiation sessions are not public meetings under RCW 42.30.140(4).

Mehlhaff repeatedly claims there is considerable evidence suggesting the memorandum of agreement did not exist on the date shown on the document. We find no such evidence in the record and, indeed, find unrebutted testimony showing it was signed on that date.[27] The complainant would characterize the veracity of employer official Barkley as "strained", but does not provide adequate evidence to impeach that witness. Neither the failure to use the document in 1994 nor the failure to produce it in response to the complainant's

---

[27] Tr., p. 936.

grievance constitutes proof that the document (or the agreement it reflected) was non-existent.

The Allegations of Discrimination -
Mehlhaff engaged in protected activities from May of 1992 through the entire period of this case. She handled grievances, attended union meetings, and filed unfair labor practice complaints. No party disputes her extensive involvement.

Mehlhaff alleged that: (1) She was not called as a substitute teacher at times when she might or should have been called; and (2) she was not allowed access to optional days and professional growth funds.[28]

The complainant would next need to show that the employer had an anti-union animus. Although animus can be inferred from a wide variety of employer behavior,[29] we find no evidence of animus in a thorough review of the record in this case. No anti-union statements were made by employer officials to either the complainant or anyone else;[30] there was no opposition to a current or recent union organizing effort;[31] there is no evidence of anti-union sentiments exhibited by any employer representative. Our task is strictly limited to examining animus toward union activity.

---

[28] In the proceedings before the Examiner, Mehlhaff also alleged the employer engaged in illegal discrimination when it negotiated a higher rate of pay for retired teachers. Mehlhaff failed to present any evidence in support of her claim, which we deem to be abandoned.

[29] See, e.g., Mansfield, Decisions 5238-A and 5239-A (EDUC, 1996), City of Winlock, Decision 4784-A (PECB, 1995).

[30] See, Seattle School District, Decision 5237-B (1996).

[31] See, Educational Service District 114, Decision 4361-A (PECB, 1994).

The complainant alleges that the employer discriminated against her as a substitute employee,[32] but it is not sufficient to show an "anti-substitute animus". As was stated in Seattle School District, Decision 5237-B (1996), it would be an unwarranted extension of the case law to consider evidence of "animus" on grounds other than union activity when finding a causal connection between employee activities protected under a collective bargaining law and adverse actions of an employer.

Because of the lack of union animus on the part of the employer, we are unable to infer a causal connection between the complainant's protected activity and any discriminatory treatment that may have taken place. Thus, even though Mehlhaff pursued grievances and filed unfair labor practice charges, and even if the employer failed to call Mehlhaff at the times she alleged,[33] we remain unpersuaded that the employer's actions or inaction were related to Mehlhaff's union activity.

The complainant has not established a prima facie case of discrimination, so analysis of the reasons articulated by the employer and Mehlhaff's responses to those reasons are not strictly necessary. We choose to comment on some of the issues raised, however.

- Responding to the employer's defense that she restricted her availability, Mehlhaff contends she removed all restrictions from hiring into high schools in the fall of 1994. The evidence shows otherwise. Mehlhaff's exclusion from the substitute roster at the start of the 1995-96 school year was

---

[32] She also claims the record contains evidence of union discrimination against substitute, but the statute does not make that an unfair labor practice by the employer.

[33] The evidence on the alleged failures is, itself, inconclusive.

clearly due to a mistake, and not to any anti-union animus on the part of the employer.

- Mehlhaff disputes the Examiner's characterization of the particular dates she was not called to work, contending she and another activist substitute were being punished. Again, however, the complainant has demonstrated no anti-union animus that would show the complainant was being punished for protected activity.
- The record amply demonstrates that the employer did not discriminate against Mehlhaff when it denied her applications for optional days and professional growth funds, when it collected dues amounts from union members, when it did not deduct union dues from all substitute teachers, or in making assignments to the complainant.

We thus find nothing from which to conclude that a variance from the customary discrimination analysis is warranted here.

The Interference Violation

Mehlhaff presented no evidence with respect to statements allegedly made about the substitutes' organization being led by persons (including Mehlhaff) who the employer would never hire for full-time teaching positions. The allegations are deemed abandoned.[34]

The Complainant's Miscellaneous Arguments

The complainant takes issue with numerous facts discussed by the Examiner, and claims the Examiner misstated evidence, expressed

---

[34] There is no evidence that Mehlhaff ever sought a full-time teaching position, so this claim has not been treated as a discrimination allegation.

bias, and fabricated evidence. The union responds that Mehlhaff's failure to cite any statutory, common law, or Commission precedent in support of her arguments should result in a ruling that she waived any arguments.[35] While the state Court of Appeals and Supreme Court may be unwilling to consider issues which are not supported by citations of authority, we have an obligation to independently assure that our Examiners have properly examined the facts of the record. While legal argument might have supported the complainant in her efforts, we do not choose to discount her entire briefing on the basis of lack of citation to legal authority. We have thus reviewed the complainant's arguments as made.

We have thoroughly reviewed the record, and find sufficient support for the Examiner's findings of fact and conclusions of law. To a great degree, Mehlhaff takes exception to the Examiner's framing of the issues, but we find the Examiner framed the issues in a way which corresponded with the potential statutory violations.[36] The complainant was given the benefit of the doubt throughout the entire proceeding, and was allowed to put on a case at the hearing even where the Commission's jurisdiction was questionable.

---

[35] The union cites Stastny v. Board of Trustees, 32 Wn.App. 239 (1982); Seattle School District v. State, 90 Wn.2d 476 (1978); State v. Fortun, 94 Wn.2d 754 (1980); and Batten v. Abrams, 28 Wn.App. 737 (1981).

[36] In many instances, if the issues were framed as the complainant urges, the Commission would clearly have no jurisdiction over the matter. For example, at page 41 of his decision, the Examiner stated, "Mehlhaff alleges that she was seen by employer officials as a 'troublemaker' ...". In framing a discrimination issue, the Examiner explained "in other words" that the complainant alleged the word went out to discourage regularly-assigned teachers from calling Mehlhaff to substitute in their classrooms. The Examiner thus framed the issue in a way corresponding to potential violations of the statute.

In addition, the complainant has attempted to supply new facts to supplement the record on appeal,[37] urges that the Commission ignore the record, or points out matters that either have no bearing on the outcome of the case or that are so inconsequential as to be immaterial. For example:

- The complainant urges that her date of hire as a teacher was incorrectly stated as September of 1981, and that the Examiner's decision should be corrected at page 6. Mehlhaff now asserts she was hired in 1970 and has worked as a substitute teacher since 1970, but also worked full-time for Tacoma in 1980-81 and Clover Park in 1985-86. Exhibit 43, which shows a hire date of September 17, 1981, was unrebutted at the hearing. The record, including the complainant's own testimony, fails to support the facts now claimed. It thus appears the complainant is attempting to supplement the record on appeal with new facts. Moreover, the matter is of literally no consequence to the outcome of the decision.

- The complainant urges that footnote 6 of the Examiner's decision is misstated, and that she removed any restrictions on her employment in 1994. Exhibit 43 shows her status for the 1994-95 school year as limiting her substitutions to math, chemistry, biology and science; Exhibit 71, which is a "Substitute Teacher Application Renewal" form, signed by the complainant on November 6, 1995, indicates she preferred to

---

[37] The Commission has refused to allow parties to supplement their arguments on appeal with new facts which could have been admitted at hearing, but were not offered. Chelan County, Decision 5559-A (PECB, 1996). See, also, Island County, Decision 5147-D (PECB, 1996); Municipality of Metropolitan Seattle, Decision 2358-A (PECB, 1986); King County, Decision 3318-A (PECB, 1990); and King County, Decision 4299-A (PECB, 1993).

work as a counselor or to teach science, English and special education at the senior high school level; her testimony at page 366 of the transcript, where she stated, "Starting in the fall of 1994 I opened it up to just about anything" is directly contradicted by the documentary evidence.

- The complainant urges that we correct page 7 to reflect a protest by Jon Carlson. Apart from the fact that whether Carlson protested the removal of the list is of no consequence to the outcome of this case, the record supports the Examiner's statement that Mehlhaff protested the incident.

- Mehlhaff argues that the Examiner erred on page 17 of the decision in stating that the union represented her for purposes of Step One and Step Two of the grievance procedure, and in stating that the optional days eligibility for substitutes was sought in the last round of negotiations. While the evidence put on at the hearing appears to be less than specific on these issues, a review of the record indicates that inferences can be made from testimony to support the statements. In addition, the complainant has pointed to no parts of the transcript or exhibits which disprove the statements. Even if they are error, they are harmless, as legal conclusions did not depend on their accuracy.

- The complainant asserts that a reference to Tommaney testifying at hearing was in error. While Tommaney did not testify, sufficient testimony supports the conclusions reached on the issue of optional days. In addition, the error was not material to the conclusions. See, Chelan County, Decision 5559-A (PECB, 1996), where the Commission found any errors by the Examiner to be harmless, where the conclusions reached were not dependent upon the errors.

- The complainant asserts error in the Examiner's discussion of Kvamme's testimony at page 20 of the decision, and claims that Kvamme had never seen the memorandum of agreement prior to the hearing. However, a review of the record shows that Kvamme was aware of the purpose of the document, which is all that the Examiner discussed.

- The complainant asserts error in the Examiner's statement, at page 38, that Luella Buranen cited the memorandum of agreement at page 96 of the contract to support her testimony that substitutes were not eligible for optional days, and only those certificated employees with over a .5 FTE contract were eligible. A review of the record shows that, in fact, Buranen testified that she did not find the requirement on page 96 of the contract. This error is harmless and no conclusion of law was based upon Buranen's lack of citation to authority for her administration of a requirement.

- Mehlhaff complains that the Examiner failed to recognize that Cindy Williams lied under oath. However, a review of the record shows no intention to lie on the part of Williams, but only that she corrected mistakes during her testimony. Her credibility was not questioned by the Examiner, and we find no reason to do so.[38]

---

[38] As the Commission has previously noted:

> We attach considerable weight to the factual findings and inferences therefrom made by our Examiners. They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commission members are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly

- Mehlhaff claims that work assignments and discrimination against Carlson were not at issue, but her arguments and evidence at hearing included Carlson's work assignments in what appears to have been an effort to bolster her own claim of discrimination. The Examiner committed no error by making reference to that material.

- The complainant asserts that the Examiner disparagingly referred to another employee as "a teacher named Fannin", but she has not pointed out anyplace in the record where that person's first name is established. Moreover, this is immaterial and irrelevant to the issues.

- The complainant asserts error in numerous Findings of Fact, stating there is no evidence in the record to substantiate the statements, and that the Examiner showed bias. Mehlhaff did not, however, point to any specific places in the record which would disprove the statements.

We thus decline to amend, and we affirm, the Examiner's findings of fact, conclusions of law and order.

The Tender of Compliance

The union provided timely notice to the Executive Director of its efforts to comply with the remedial order issued by the Examiner. The complainant characterized the tender of compliance as prema-

---

> observed on every appeal, is even more appropriate of a "fact oriented" appeal ...

City of Pasco, Decision 3307-A (PECB, 1990), citing Asotin County Housing Authority, Decision 2471-A (PECB, 1987); Educational Service District 114, supra.

ture, but it was sufficient on the actions ordered. We thus do not require the union to repeat its compliance in this case.

NOW, THEREFORE, it is

ORDERED

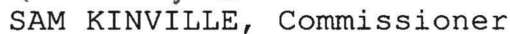
1. The Findings of Fact and Conclusions of Law issued by Examiner J. Martin Smith in the above-captioned matter on July 29, 1996, and corrected on August 7, 1997, are AFFIRMED and adopted as the findings of fact, conclusions of law and order of the Commission.

2. The tender of compliance submitted by the Tacoma Education Association in response to the Examiner's remedial order in Case 11775-U-95-2770 is accepted, and that matter is removed from the Commission's compliance docket.

Issued at Olympia, Washington, on the 16th day of December, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson



SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner