City of Seattle, Decision 5852-B (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ANDREW APOSTOLIS,	)	
	)	
Complainant,	)	CASE 12854-U-96-3096
	)	
vs.	)	DECISION 5852-B - PECB
	)	
CITY OF SEATTLE,	)	
	)	ORDER CORRECTING
Respondent.	)	PRELIMINARY RULING
	)	
	)	

This case has been referred back to the Executive Director for clarification of a preliminary ruling previously issued in the matter pursuant to WAC 391-45-110. Having discovered errors, the Executive Director makes and issues this correcting order.

BACKGROUND

On December 3, 1996, Andrew Apostolis filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Seattle as respondent. The above-captioned case was docketed.[1] Apostolis alleged he had been discharged by the City of Seattle because he advocated removing crew chiefs from his bargaining unit represented by Public Service & Industrial Employees, Local 1239 (union), and because he complained that the crew chiefs were unfairly disciplining employees. The complaint alleged "Employer interference with employee rights (RCW ... 41.56.140(1) ..."

[1] Robert Boling filed a companion case on the same date. It was docketed as Case 12855-U-96-3097, was disposed of separately, and is not affected by this order.

The complaint was reviewed by the Executive Director under WAC 391-45-110.[2] A deficiency notice detailing several problems with the complaint was issued on January 21, 1997. The complainant was given a period of 14 days in which to file and serve an amended complaint, or face dismissal of the case.

An amended complaint was filed on February 4, 1997. Using legislative style (i.e., [~~strikeout within brackets~~] to show deletions, and underline to show additions), the statement of facts in the amended complaint is compared to that found in the original complaint, as follows:

> STATEMENT OF FACTS
>
> A. On or about December 22, 1995, complainant was denied access to a shop steward when he was questioned over a possible disciplinary action.
>
> B. Complainant attended union meetings [~~in April, May, June, and July of 1996~~.] on February 20, 1996 and brought a motion to have the crew chiefs removed from the bargaining unit. He again raised the issue on March 19. On April 16, there was a brief discussion about the issue of crew chiefs in the bargaining unit. On June 18 the complainant raised the issue that the crew chiefs were working in violation of the contract when the proposed new contract was being discussed. During this time the complainant advocated having the crew chiefs removed from the bargaining unit because of their ability to dominate the union.

---

[2] At this stage of the proceedings, all of the facts alleged in a complaint are assumed to be true and provable. The question at hand is whether the complaint states a claim for relief available through unfair labor practice proceedings before the Commission. The Executive Director must act on the basis of what is contained within the four corners of the statement of facts, and is not at liberty to fill in gaps or make leaps of logic.

C. On May 17, 1996, and on July 13, 1996 complainant was unfairly written up over alleged unsatisfactory work performance, because of his advocacy of eliminating crew chiefs from the bargaining unit and for his insisting on having a shop steward present during interrogations. He was denied access to a shop steward during questioning on both occasions.

D. On July 16, the complainant again attended a union meeting to raise the issue of crew chiefs being in the bargaining unit. Lenny Hull, a supervisor and crew chief at the Seattle Center, attended the meeting and gave the union leadership a letter stating his opposition to having crew chiefs removed from the bargaining unit. During the meeting, Mr. Hull attempted to intimidate the complainant by "staring him down" at the meeting.

E. [~~B.~~] Complainant sought the aid of two other union members, Robert Boling, and Richard Pedowitz, who likewise believed that the crew chiefs should be removed from the bargaining unit and attended union meetings to support the complainants efforts. At the February, March, April, and June union meetings, these were the only union members from the Seattle Center that attended the meetings. At the July meeting, only the crew chief, the complainant, Boling, and Pedowitz were from the Center.

F. On July 23rd, the claimant again met with personnel officer John Cunningham over the June write-up. Mr. Cunningham refused to remove the unfair write-up from his file, again for the complainant's efforts to have the crew chiefs removed from the bargaining unit and for his insisting on having a shop steward present during questioning.

G. In the latter part of July, [~~C.~~] Complainant participated in informal grievance sessions and argued that crew chiefs were unfairly disciplining members of the workforce. On September 9, 1996, the complainant attended a brown bag lunch in which he complained about unfair treat-

ment by crew chiefs. On September 10, the complainant notified Joe Singh, a supervisor, at a staff meeting about the unfair treatment of employees by the crew chiefs.

H. [~~D.~~] Complainant was terminated on September 17, 1996 for his advocacy of eliminating crew chiefs from the bargaining unit and for his complaints about disciplining the workforce unfairly and for complaining about not having a shop steward present during questioning by management.

I. The Seattle Center is a small plant and knowledge by all management of the protected speech activity of the complainant can be inferred.

The amended complaint again alleged only "Employer interference with employee rights (RCW ... 41.56.140(1) ...".

Errors Occurred

The amended complaint was reviewed under WAC 391-45-110. It is now clear that errors occurred in an order of partial dismissal issued on February 27, 1997.[3]

Failure to Apply Statute of Limitations -

The processing of unfair labor practice complaints is regulated by RCW 41.56.160, which includes:

> 41.56.160 Commission to prevent unfair labor practices and issue remedial orders and cease and desist orders. (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That **a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commis-**

[3] City of Seattle, Decision 5852 (PECB).

> **sion.** This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law. ...
>
> [Emphasis by **bold** supplied.]

The original complaint filed in this matter on December 4, 1996 was timely only as to violations occurring on or after June 4, 1996. Unless related back to allegations found within the original complaint, the amended complaint filed in this matter on February 4, 1997, was timely only as to violations occurring on or after August 4, 1996.

Errors of computation occurred in Decision 5852 with respect to paragraph "C" of the amended complaint, which alleged that Apostolis had been "written up" on May 17, 1996 and July 13, 1996, for requesting union representation during interrogations:

- Even the original complaint in this matter was untimely as to whatever action may have been taken against Apostolis on May 17, 1996. That portion of paragraph "C" should have been dismissed as untimely, on its face.[4]

- The statute of limitations period should have been computed from the date on which the amended complaint was filed, with respect to paragraph "C", since the allegations concerning Apostolis being "written up" were entirely new in the amended complaint and did not clarify or otherwise relate back to any allegation found in the original complaint. Thus, the amended complaint should have been found untimely, on its face, as to

---

[4] The existence of a statute of limitations problem with respect to actions alleged to have occurred on May 17 was pointed out in the discussion section of Decision 5852, but the order referring paragraph "C" to an Examiner was not limited to the July incident.

whatever action may have been taken against Apostolis on July 13, 1996. All of paragraph "C" should have been dismissed.[5]

A preliminary ruling finding a cause of action to exist under WAC 391-45-110 cannot overrule RCW 41.56.160. In this case, it would be proper for the Examiner to entertain and grant a motion for dismissal made by the employer at the close of the complainant's case-in-chief.

Failure to Address Paragraph "H" -

An error of omission occurred, inasmuch as the analysis of the amended complaint and the order of partial dismissal failed to make any mention of paragraph "H". Apostolis argues that the referral of paragraph "C" to hearing carried with it the allegations of paragraph "H", because discharge is a form of discipline, but Decision 5852 was specific:

> The **allegation in Paragraph C** of the amended complaint that Apostolis was disciplined in reprisal for his insistence upon union representation in an investigatory interview is referred [for hearing].

[Emphasis by **bold** supplied.]

The only discipline mentioned in paragraph "C" of the amended complaint was that Apostolis was "written up" in May and July of 1996. That cannot be stretched to encompass a discharge separately alleged as having occurred in September of 1996.

---

[5] Paragraph "F" of the amended complaint was addressed and dismissed in Decision 5852 as failing to state a cause of action, and so is not before the Executive Director at this time. Since it concerned the refusal of an employer official to take a requested action on July 23 that was not alleged in the original complaint, it should also have been dismissed as untimely.

Paragraph "H" of the amended complaint contained a mix of carryover and new allegations. To repeat from the quotation above:

> H. [~~D.~~] Complainant was terminated on September 17, 1996 for his advocacy of eliminating crew chiefs from the bargaining unit and for his complaints about disciplining the workforce unfairly and for complaining about not having a shop steward present during questioning by management.

The carryover allegations and the new allegation in paragraph "H" require separate analysis:

The Carryover Allegations -

The "advocacy of eliminating crew chiefs ... and ... disciplining the workforce unfairly" portion of paragraph "H" was closely related to material set forth in paragraphs B, D, and E of the amended complaint. The discussion of paragraphs B, D, and E in Decision 5852 pointed out the absence of any alleged facts from which it could be concluded that the employer was aware of the statements made by Apostolis at union meetings.[6] Although Decision 5852 did not refer to paragraph "J" by its identifying letter, the "small plant" doctrine asserted in that paragraph was, in fact, explicitly discussed and rejected. Thus, the stated conclusion that "... paragraphs B, D, and E fail to state a cause of action" should have been expanded to encompass both the carryover portion of paragraph "H" and all of paragraph "J".

The New Material in Paragraph "H" -

The "having a shop steward present during questioning" material added in paragraph "H" clearly alleges that the discharge was also

---

[6] The order dismissing paragraphs B, D and E became final, and those paragraphs are not before the Executive Director at this time.

in reprisal for the complainant's requests for union representation. Consider:

> In 1975, the Supreme Court of the United States interpreted Sections 7 and 8(a)(1) of the NLRA as guaranteeing private sector employees **a right to union representation, upon request, at an investigatory interview** called for by the employer, **where the employee reasonably believes that discipline could result. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).**
>
> **... previous cases involving the City of Seattle demonstrate an awareness of the Weingarten precedent by this employer,** even if some of those cases did not arise directly out of a refusal of union representation at an investigatory meeting. In City of Seattle, Decision 2134 (PECB, 1985), an Examiner found an unfair labor practice violation on the basis of a supervisor's remarks that the only reason an employee received discipline was because she had requested that a union shop steward be present at a meeting. [footnote omitted] In City of Seattle, Decision 2773 (PECB, 1987), the Executive Director had consolidated three unfair labor practice charges which all concerned "the extent of employee rights to union representation", and the Examiner found unfair labor practice violations on two of the three complaints, based on the "advice" given by the employer to its employees. [footnote omitted] In City of Seattle, Decision 3079, 3079-A (PECB, 1989), where this employer had strongly contended that the Weingarten precedents did not apply to internal EEO procedures, [footnote omitted] the right of employees to union representation was discussed. ... The Commission found an unfair labor practice violation in that case, based on the right of the union to represent bargaining unit employees in securing their wages, hours and working conditions, including the "EEO" procedures at issue there. In City of Seattle, Decision 3198 (PECB, 1989), the Examiner dismissed a complaint on a finding that the decision on discipline had been made prior to the meeting with the employee, but the clear implication of that decision is that

the right to union representation does apply to meetings held in advance of the decision to discipline.

In addition to the aforementioned administrative proceedings, an internal ... memorandum ... told managers that requests from represented employees for union representation should be honored for meetings where discipline might result. [It] directed his subordinate managers to "err on the side of caution".

... The behavior of City Light management when Hamilton sought union representation is confounding. Hamilton had alerted management that a complaint might be made against him, and had told Gustafson some of the story. Hamilton saw the potential for discipline, whether warranted or not.

Jerochim should have followed the excellent advice in [the cited management directive] by allowing Hamilton to have union representation or refraining from holding the meeting. It is difficult to believe that Jerochim (or any management official) did not realize Hamilton might be subject to discipline for his actions, when all the facts were known. Instead, Jerochim seems to have acted in complete disregard for, or in a conscious attempt to circumvent, the employer's legal obligations.

...

The Extraordinary Remedy

The Examiner awarded attorney fees to the complainant in this case, based on a conclusion that the City of Seattle, and its City Light Department, are repeat offenders in unfair labor practices under the Weingarten precedent. We share the Examiner's frustration with an employer that has continuously attempted in this case to defend the actions of managers that were not only in clear violation of the statute, but also in violation of the employer's own internal directive.

... **The City of Seattle has had plenty of time to train its managers as to those rights.** Its intransigence in asserting meritless defenses in this case suggests that an extraordinary remedy is required, to insure that the employer will, without need for repeated admin-

> istrative procedures, comply with the clear Weingarten precedents.
>
> **Given the documented familiarity of the City of Seattle with Weingarten principles** and the employer's own top-management memorandum directing managers to "err on the side of caution" in considering employee requests for union representation, the Commission concurs with the Examiner's conclusion that **it is necessary to impose an extraordinary remedy, in order to get the City of Seattle ... to acknowledge the right of employees to union representation where the potential for discipline exists.** The award of attorney fees will stand.

City of Seattle, Decision 3593-A (PECB, 1990) [emphasis by **bold** supplied].

Against that background, it is clear that the new material in paragraph "H" of the amended complaint was not considered or ruled upon in Decision 5852:

- The allegation mistakenly found to state a cause of action in paragraph "C" of the amended complaint was described as:

> If [the alleged action] was done in **reprisal for the employee exercising his right under RCW 41.56.040 to insist on union representation** during an investigatory interview, a violation of RCW 41.56.140(1) could be found.

Thus, there was clearly an intention to order further proceedings on alleged violations under Weingarten and its progeny.

- While the employer argues that paragraph "H" was "dismissed by the clear language" of the order of partial dismissal, it does not point to *any* language in Decision 5852, clear or otherwise, which specifically addresses paragraph "H", and thus fails to consider the possibility (and the consequences of the possibility) that paragraph "H" was not addressed. Since the

> content of each of the other paragraphs of the amended complaint was specifically referenced by its identifying letter or substantively discussed in Decision 5852, it would be illogical to interpret the silence concerning the new material in paragraph "H" as encompassing that material within the order of dismissal.

The logical explanation for the failure to mention or deal with the new material in paragraph "H" in Decision 5852 is that it was not considered at that time, and remains to be acted upon.

The Proceedings Before the Examiner

Decision 5852 assigned Examiner Pamela G. Bradburn to conduct further proceedings on:

> The allegation in Paragraph C of the amended complaint that Apostolis was disciplined in reprisal for his insistence upon union representation in an investigatory interview.

Examiner Bradburn opened the hearing in this matter on August 19, 1997.[7] The parties had frequent disagreements about the scope of that hearing, and about the relevance of evidence that Apostolis sought to introduce relating to union animus. At the close of that day, Apostolis made an offer of proof in support of his contention that his allegations regarding "discrimination" permitted him to introduce evidence which, he asserted, would show a union animus on the part of the employer. Examiner Bradburn asked both parties to brief the issue.

---

[7] Apostolis petitioned for review of the partial dismissal, but did not effect timely service of that appeal on the employer. The Commission dismissed the appeal for lack of proof of service. City of Seattle, Decision 5852-A (PECB, 1997). The Superior Court for King County affirmed the Commission's dismissal on August 29, 1997.

Examiner Bradburn discovered the errors noted above, in the course of reviewing the case file in preparation for ruling on the complainant's offer of proof. She then asked the parties to comment on the possibility of returning the case to the Executive Director for clarification of the preliminary ruling. Both parties filed written statements of position. After considering the positions of the parties, the Examiner notified the parties on October 27, 1997, that she was returning the case to the Executive Director in light of an apparent error which deprived the complainant of due process.

DISCUSSION

Correction of Errors is Appropriate

This case arises under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which has a stated purpose of promoting "the continued improvement of the relationship between public employers and their employees ...". RCW 41.56.010. The Public Employment Relations Commission was created under a legislative directive to provide "uniform and impartial ... efficient and expert administration of public labor relations". RCW 41.58.005.

The Commission has won the respect of the Supreme Court of the State of Washington for its administration of Chapter 41.56 RCW and other statutes. See, City of Yakima v. IAFF and YPPA, 117 Wn.2d 655 (1991);[8] Municipality of Metropolitan Seattle v. PERC, 118 Wn.2d 621 (1992);[9] City of Bellevue v. IAFF, 119 Wn.2d 373 (1992);[10]

---

[8] Affirming City of Yakima, Decision 3503-A (PECB, 1990).

[9] Affirming Municipality of Metropolitan Seattle, Decision 2845-A (PECB, 1988).

[10] Affirming City of Bellevue, Decision 3085-A (PECB, 1989).

and City of Pasco v. PERC, 119 Wn.2d 504 (1992).[11] To err is human, however, and even administrative agencies that strive to be "uniform and impartial ... efficient and expert" make (thankfully, few) errors. The credibility of an agency with its clientele and the courts cannot be advanced by a refusal on the part of the agency to correct its own errors when discovered. Nor would waiting until agency errors are reversed by the courts fulfill the "efficiency" component of the Commission's statutory mission.[12]

The Commission has waived application of rules where agency clientele were misled by actions of agency staff,[13] or by the rule itself.[14] As noted by the Examiner in her letter advising the parties that she was returning this case to the Executive Director, it has been the policy of the agency to accept responsibility for and promptly correct its own errors. See, City of Seattle, Decision 4844-A (PECB, 1994);[15] and Spokane County, Decision 5698-A (PECB, 1996).[16]

---

[11] Affirming City of Pasco, Decision 3368-A (PECB, 1990).

[12] In Thompson v. Schweiker, 665 F.2d 936 (9th Cir. 1982), the court wrote at 941: "Fairness in an administrative process is more important than finality of the administrative judgment." The 9th Circuit has long held a similar view on amending judgments to prevent injustice through mistake or inadvertence: "This power is one to make the record speak the truth. It is salutary, and enables courts to prevent injustice through mere mistake or inadvertence of the judge, or counsel, or the clerk." Bernard v. Abel, 156 Fed. 649, 652 (9th Cir. 1907).

[13] City of Tukwila, Decision 2434-A (PECB, 1987).

[14] Island County, Decision 5147-A (PECB, 1995).

[15] A partial dismissal order issued under WAC 391-45-110 was corrected, to eliminate an agency error.

[16] The Commission exercised its authority under WAC 391-45-350 to review an Examiner's decision on its own motion, and to correct an omission.

The employer correctly notes that Apostolis failed to address dismissal of the discriminatory discharge allegation of paragraph H in his petition for review. This argument implies Apostolis was the only person responsible for scrutinizing the order of partial dismissal to insure its completeness and accuracy, but the agency staff also failed to note the disjunctures between the amended complaint and Decision 5852. The agency also has a responsibility to correct its errors, once discovered.

Finally, the employer contends it would be an abuse of discretion to revise the order of partial dismissal after it was upheld by the Commission and the Superior Court. It is true that the order of partial dismissal was affirmed, but it is also true that part of this case remains pending before the agency. The employer supplies no rationale or authority for its suggestion that an incomplete action is somehow insulated from review once the error is discovered. This employer argument is thus also unavailing.

Errors Correctable in this Case

The portion of Decision 5852 which referred paragraph "C" of the amended complaint to an Examiner was an interlocutory order which must be construed in accordance with law. Under RCW 41.56.160(1), "[t]he commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders ...". The purpose of the preliminary ruling process under WAC 391-45-110 is to dispose of cases and allegations that could not yield any remedy for the complaining party, thus avoiding the time and expense of a hearing for the agency and all of the parties. The dismissal of untimely complaints or allegations is routinely accomplished at the preliminary ruling stage. For the Executive Director to refuse to act at this point in this case would, in view of the foregoing discussion, merely postpone the dismissal of paragraph "C" until the time was ripe for the Examiner to grant such a motion. In the

meantime, the parties and the agency would have to incur further time and expense of a fruitless hearing. Thus, a revisiting of the preliminary ruling is appropriate at this time.

Paragraph "H" of the amended complaint has not been ruled upon under WAC 391-45-110 up to this time. The preliminary ruling process implements the requirement of the Administrative Procedure Act (APA), at RCW 34.05.419(2), that defects be called to the attention of a party that initiates an adjudicative proceeding. The APA does not permit an agency to ignore a cause of action just because it was missed during a preliminary review. There is no question that the allegation of discharge in reprisal "for complaining about not having a shop steward present during questioning by management" states a cause of action, and should have been referred for hearing.[17] Accordingly, it is now necessary to issue a preliminary ruling which deals, for the first time, with the new material added in paragraph "H" of the amended complaint in this case.[18]

---

[17] Some or all of the record made at the hearing already held by the Examiner may continue to have probative value. It is unlawful for an employer to discriminate against an employee for exercising protected rights. Educational Service District 114, Decision 4361-A (PECB, 1994), discusses the legal standard used in discrimination cases, including the need to show union animus. Actions which could not themselves be remedied, because of the six-month statute of limitations, may still be probative to establish a background of union animus. Port of Tacoma, Decision 4626-A (PECB, 1995).

[18] Referral of this "discharge for asserting right to union representation" allegation should not, however, be regarded as opening the floodgates to any and all evidence. Relevant evidence will be that which tends to prove or disprove: Union animus; whether Apostolis reasonably believed the interviews could lead to discipline; and any connection between the requests and the discharge.

NOW, THEREFORE, it is

ORDERED

1. Paragraph C of the amended complaint is dismissed as untimely filed.

2. To the extent that it alleges that Apostolis was discharged for his advocacy of removing crew chiefs from the bargaining unit and/or his complaints about unfair discipline of employees, Paragraph H of the amended complaint is dismissed as failing to state a cause of action.

3. The dismissal of Paragraph J of the amended complaint, which is implied in the discussion section of Decision 5852, is confirmed and that allegation is dismissed as failing to state a cause of action.

4. To the extent that it alleges Apostolis was discharged for complaining about the lack of union representation in an investigatory interview, Paragraph H of the amended complaint is referred to Examiner Pamela G. Bradburn for further proceedings under Chapter 391-45 WAC.

5. Pursuant to WAC 391-45-110(2), the City of Seattle shall, within 21 days following the date of this order:

File and serve its answer to the allegation in paragraph "H" of the amended complaint that states a cause of action, as detailed above.

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; and

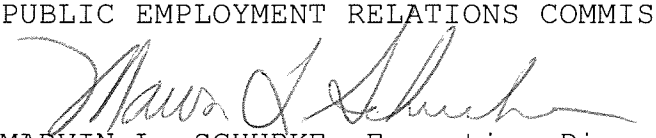
2. Assert any affirmative defenses that are claimed to exist in the matter.

The original answer and one copy 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 for the complainant.

Except for good cause shown, a failure to file an answer within the time specified, or the failure to file 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.

Issued at Olympia, Washington, on the 20th day of November, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

Paragraphs 1, 2 and 3 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.