STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF PORT TOWNSEND, Employer.	)	
ELIZABETH JOHNSON, Complainant, vs. TEAMSTERS UNION, LOCAL 589, Respondent.	)	CASE 13611-U-97-3330 DECISION 6433 - PECB ORDER OF PARTIAL DISMISSAL

On December 11, 1997, Elizabeth M. Johnson filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Teamsters Union, Local 589, as respondent. The controversy relates to Johnson's employment with the City of Port Townsend.[1] The com-

[1] Johnson had previously filed two unfair labor practice complaints against her employer:

Case 13445-U-97-3282, filed on October 2, 1997, involved multiple allegations of contract violations, interference and refusal to bargain, which were dismissed as failing to state a cause of action. City of Port Townsend, Decision 6351 (PECB, 1998). There was no appeal, and that case is now closed.

Case 13478-U-97-3289, filed on October 16, 1997, involves allegations of discrimination against Johnson in reprisal for her filing of an unfair labor practice complaint. A preliminary ruling was issued under WAC 391-45-110 in that case on December 4, 1997, finding a cause of action to exist and assigning Katrina I. Boedecker as Examiner. The employer has filed an answer in that case, and a hearing will be scheduled in due course.

plaint was reviewed for the purpose of making a preliminary ruling under WAC 391-45-110,[2] and a deficiency notice was issued on July 8, 1998, pointing out certain problems with the complaint. The complainant was given a period of 14 days in which to file and serve an amended complaint which stated a cause of action, or face dismissal of this case.

Johnson filed an amended statement of facts for this case on July 22, 1998, making reference to the deficiency notice issued on July 8, 1998. Attached to that filing were copies of numerous time sheets dating back to April of 1996. That amendment is now before the Executive Director for processing under WAC 391-45-110.

The Interference Allegations

Johnson has evidently filed her complaints without benefit of legal counsel. Her latest amendment in this case put an entirely new spin on factual allegations which run through all three case files, and justifies a detailed review of the chronology:

1. The complaints in all three cases and the employer's answer in Case 13478-U-97-3289 all indicate that Teamsters Union, Local 589, is the exclusive bargaining representative of City of Port Townsend employees. Curiously, no copy of a collective bargaining agreement between the employer and union is found in any of these case files.

---

[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, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

2. The complaint in Case 13445-U-97-3282 and the employer's answer in Case 13478-U-97-3289, indicate Johnson was hired by the employer in March of 1985 as a custodial/maintenance employee.

3. The complaint in Case 13445-U-97-3282 also alleged Johnson was scheduled to work 6 to 8 hours per day on Saturdays, Sundays and Mondays. That implies a regular schedule of 18 to 24 hours per week, or 45% to 60% of a nominal "full-time" work week of 40 hours. Either of those amounts would clearly be sufficient to categorize Johnson as a "regular part-time" employee under Commission precedent,[3] and to have her position included in any bargaining unit which included custodial/ maintenance employees of this employer.

4. The complaint in Case 13445-U-97-3282 also alleged Johnson was assigned to on-call work, to fill in when another custodial/ maintenance employee was on leave. Clearly, any such work in addition to her regularly-scheduled 18 to 24 hours per week would reinforce a conclusion that Johnson should have been included in any bargaining unit which included custodial/ maintenance employees of this employer.

5. The amendment filed on July 22, 1998 in Case 13611-U-97-3330, together with a union letter enclosed as an exhibit to that amendment, suggests that the union and employer have agreed to exclude persons working (or perhaps persons scheduled to work) less than 80 hours per month from the bargaining unit. The

---

[3] Numerous Commission precedents distinguish "casual" employment from "regular part-time" employment, usually on the basis that persons working more than 1/6 (16.67%) of the full-time work hours are in the latter category and are properly included in a bargaining unit with other employees performing similar work.

employer's answer in Case 13478-U-97-3289 includes, "Under the City's employment system, part time employees are ... not represented by the ... [Teamsters]. Part time employees are not permitted to work beyond 79 hours per month." The deficiency notice stated that Johnson had not set forth facts sufficient to form a conclusion that the hours-per-month qualifier for determining bargaining unit status was arbitrary, discriminatory or in bad faith, but the opposite pertains on the basis of the July 22 amendment and review of the overall situation.[4] This complaint filed on December 11, 1997, can be considered timely for each day of improper exclusion of Johnson from the bargaining unit on and after June 11, 1997.

6. The amendment filed on July 22, 1998 in Case 13611-U-97-3330, together with its accompanying time sheets, allege that Johnson worked and was paid for more than 79 hours in several months prior to August 25, 1997. These facts provided basis for a claim of bargaining unit status even if a 79 hours-per-month qualifier agreed upon by the employer and union were to be found lawful. Again, this complaint could be considered

---

[4] The determination of bargaining units is a function delegated by the Legislature to the Commission. RCW 41.56.060. Unit determination is not a subject of bargaining in the usual mandatory/permissive/illegal sense and, although parties may agree upon unit issues, such agreements do not assure that the unit configuration agreed upon by an employer and union is or will continue to be appropriate. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). Improper exclusion of an employee from the bargaining unit in which he or she belongs is a basis for an "interference" charge filed by an individual employee against the employer and/or union.

timely for each day of improper exclusion from the bargaining unit on and after June 11, 1997.

7. The complaints in all three cases and the employer's answer in Case 13478-U-97-3289 all make reference to a meeting held on August 25, 1997, when an employer official allegedly ordered Johnson to cut her work hours to a level that would exclude her from the bargaining unit.

8. The complaint in Case 13445-U-97-3282 alleged that the employer committed several unfair labor practices, including a denial of Johnson's right to union representation at the August 25, 1997 meeting. Although there was indication that Johnson did not request (and perhaps did not want) union representation at that time, it is recognized that her statements and actions at that time could have been prejudiced by her unlawful exclusion from the bargaining unit and/or the information provided and positions taken by the employer and union.

9. The complaint in Case 13478-U-97-3289 alleges that the employer discriminated against Johnson in reprisal for her filing of the complaint in Case 13445-U-97-3282.

10. The complaint in Case 13611-U-97-3330 described two contacts between Johnson and union officials in September of 1997:

    - The first was on September 23, 1997, when a union representative allegedly indicated unfamiliarity with Johnson's job description, was hostile toward Johnson, stated that Johnson was insubordinate for working more hours than she was authorized to work, and told Johnson the union was not responsible for representing her.

- The second occurred in October of 1997, after Johnson's employment was terminated by the employer, when another union representative allegedly indicated the union was not responsible for representing employees working less than 19 hours per week, and solicited her signing of a waiver of union representation.

The amendatory materials reinforce that the union failed or refused to consider Johnson's actual work record showing some months where she worked in excess of 80 hours.

11. The complaint in Case 13611-U-97-3330, as amended on July 22, 1998, is now deemed sufficient to allege the union interfered with Johnson's rights by its agreement on the hours-per-month qualifier for inclusion in the bargaining unit.

12. The remedy request filed as part of the July 22, 1998 amendment, asks for acknowledgment of Johnson having worked as a "fill-in" in addition to her regular 19-hour schedule. That would clearly have placed her in the bargaining unit. The custom in drafting remedial orders in unfair labor practice cases is to place the parties back in the same positions they would have occupied if no unfair labor practice had been committed. In this case, inclusion of Johnson in the bargaining unit from the outset of her employment (or even from the first month she worked more than 79 hours or since July 22, 1997) could easily have altered the behavior of all parties to this situation:

- The employer would presumably have been paying Johnson at the rates called for in the collective bargaining agreement and would have been respecting her rights as a bargaining unit member, so that its officials might never have taken the positions asserted on August 25, 1997;

- The union would presumably have been treating Johnson as a bargaining unit member, would have had its officials introduce themselves to Johnson, and would have familiarized Johnson with her rights under the collective bargaining agreement prior to August 25, 1997, and would have been prepared to represent Johnson on and after August 25, 1997; and

- Johnson would presumably have been apprised of her status and rights as a bargaining unit employee prior to August 25, 1997, and would have been prepared to request union representation in an appropriate manner if confronted with an hours cut by an employer official on that date.

Thus, a remedy in this case could alter the situation which existed on and before August 25, 1997, and force reconsideration of all subsequent events in that context.[5]

Assuming all of the facts alleged by the complainant to be true and provable, it appears that an unfair labor practice violation could

---

[5] The deficiency notice distinguished two types of "breach of duty" situations identified in Commission precedent, and stated 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). Employees claiming rights against the employer as a third-party beneficiary of a collective bargaining agreement must pursue such matters in a court, which can assert jurisdiction over the employer and the underlying contractual claim if it is satisfied that a breach of the union's duty of fair representation overcomes the employees' failure to exhaust contractual remedies through the grievance procedure and arbitration. Johnson's claim was erroneously understood to fall into that category, while analysis based on the July 22 amendment indicates that Johnson's entire exclusion from the bargaining unit is at issue in this case.

be found against the union. These allegations will be referred to the Examiner already assigned to the case against the employer, for further proceedings on consolidated cases.

Refusal to Bargain Allegations

Johnson marked the box on her complaint form to allege a "union refusal to bargain". The duty to bargain imposed by the Public Employee's Collective Bargaining Act, Chapter 41.56 RCW, exists only between an employer and the organization holding status as "exclusive bargaining representative" of the employees in an appropriate bargaining unit. An individual employee lacks the legal "standing " necessary to file or pursue a refusal to bargain claim under RCW 41.56.150(4). This allegation of the complaint must be dismissed.

NOW, THEREFORE, it is

ORDERED

1. The complaint charging unfair labor practices in the above-captioned matter is DISMISSED to the extent it alleges a union refusal to bargain in violation of RCW 41.56.150(4).

2. The allegations of the complaint charging unfair labor practices concerning the union having interfered with the rights of Elizabeth Johnson, by its agreement and/or actions to exclude her from the bargaining unit represented by the union, are hereby found to state a cause of action for further proceedings under Chapter 391-45 WAC.

   a. Chapter 391-45 WAC **requires the filing of an answer** in response to a preliminary ruling which finds a cause of

action to exist. See, WAC 391-45-110(2). Cases are reviewed after the answer is filed, to evaluate the propriety of a settlement conference under WAC 391-45-260, priority processing, or other special handling.

b. Teamsters Union, Local 589, shall:

File and serve its answer to the complaint within 21 days following the date of this order.

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.

c. 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 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 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.

e. Katrina I. Boedecker of the Commission staff has been designated as Examiner to conduct further proceedings in

the matter pursuant to Chapter 391-45 WAC. The Examiner will issue a notice of hearing. A party desiring a change of hearing dates must comply with the procedure set forth in WAC 391-08-180, including making contact to determine the position of the other party(-ies) prior to presenting the request to the Examiner.

Issued at Olympia, Washington, this 25th day of September, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

Paragraph 1 of this order will be the final order of the agency on the matter covered thereby, unless a notice of appeal is filed with the Commission under WAC 391-45-350.