STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TWYLA FADER, Complainant, vs. PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Respondent.	)	CASE NO. 3515-U-81-520 DECISION NO. 1381 - PECB ORDER OF DISMISSAL

The complaint charging unfair labor practices was filed in the above-entitled matter on June 29, 1981. The material allegations of the complaint are:

> "I contacted my local MACP representative January 9, 1981, stating that I was not accepted for a position of Secretary I, at Mariner High School. The person hired has less seniority and less qualifications. I met with our local MACP representative on a Saturday before a meeting and he instructed me how to write my background and set up the grievance. I was told the following Monday that he had met with the PSE representative and was told at that time I did not have a grievance. Several days later I called Dick Rnadall (sic) and Ben Blackwell at Puyallup. They again told me I did not have a grievance because I was misinterpreting the contract. I took their word for it, until I had talked with some of the former members of the negotiating team and personnel managers of various companies, they all felt that I was not misinterpreting Section 10.5.4 of the contract. I then went to an attorney to seek further advise (sic).
>
> I have applied for three other secretarial positions in the district since January. Each time a junior employee with less qualifications has been hired. I feel this is unjust and that PSE has not given me fair representation."

Under the heading of "RELIEF SOUGHT", the complainant states:

> "I would like to have Mukilteo School District compelled to comply with the contract."

Interpreting a letter and nine enclosures filed on January 12, 1982 as amendatory to the complaint, it appears that the complainant relies on the following contract language:

> Section 10.5.1. The seniority rights shall be lost for the following reasons:

A. Resignation;
B. Discharge for justifiable cause; or
C. Retirement.

* * *

Section 10.5.4. Employees who change job classifications within the bargaining unit shall retain their hire dates in the previous classification for one (1) year, notwithstanding that they have acquired a new date and a new classification.

Section 10.6. The employee with the earliest hire date, within a general job classification, shall have preferential rights regarding assignment to a new or open position, promotions and layoffs.

Section 10.7. Seniority provision within the school building.

Section 10.7.1. The employee with the earliest hire date within a general job classification within the building where the employee is assigned will have preferential rights regarding: (A) Shift selection, (B) Overtime, (C) Vacations.

Section 10.8. If the District determines that seniority rights should not govern, in accordance to Section 10.6 and 10.7.1 because a junior employee possesses ability and performance substantially greater than a senior employee or senior employees, the District shall set forth in writing to the employee or employees its reasons why the senior employee or employees have been bypassed."

The supplementary materials indicate that the complainant was the eighth most senior employee on the "Educational Aides" seniority list; that a separate seniority list exists for "Secretary"; that the complainant was first employed by the Mukilteo School District as an "instructional assistant" and later as a "teacher's aide"; and that the complainant had prior work experience with other employers as a "secretary". Also indicated within the supplemental materials is a claim that the complainant has not received the written explanantions called for by Section 10.8 of the collective bargaining agreement.

The complaint is before the Executive Director for a preliminary ruling pursuant to WAC 391-45-110. At this stage of the proceedings, it must be assumed that all of the facts alleged by the complainant are true and provable. The question is whether an unfair labor practice violation could be found. Inherent in that determination is a determination that the Public Employment Relations Commission has jurisdiction over the parties and subject matter of the case.

The Mukilteo School District is not named as respondent, although the requested remedy would appear to necessitate an order directed to the Mukilteo School District. The bypassing of seniority claim detailed in the original complaint and failure to give written notice claim identified in the

supplementary materials both relate exclusively to the provisions of the collective bargaining agreement. There is no allegation that the employer has violated rights of the complainant which are secured by RCW 41.56.060 and RCW 41.56.140(1). It has long been established that the Public Employment Relations Commission does not assert jurisdiction through the unfair labor practice provisions of RCW 41.56 to remedy violations of collective bargaining agreements. City of Walla Walla, Decision 104 (PECB, 1976). Violations of collective bargaining agreements, like other causes of action arising from contracts, are remedied through civil litigation in the Courts. Grievance arbitration procedures negotiated by parties within collective bargaining agreements are authorized by RCW 41.56.122(2) and are encouraged by RCW 41.58.020(4), and such procedures operate as a substitute for civil litigation for the enforcement of collective bargaining agreements. There is no allegation that the employer was in collusion with the union in the negotiation of the seniority provisions in a manner discriminatory against the complainant, and there would appear to be no basis for concluding that the Mukilteo School District could be found guilty of an unfair labor practice in this case.

In Miranda Fuel Co., Inc., 140 NLRB 181 (1962), the National Labor Relations Board held that the privileges of acting as an exclusive bargaining representative under Section 9 of the National Labor Relations Act requires that the union must assume the responsibility to act as a genuine representative of all of the employees in the bargaining unit, so that a breach by a union of its duty of fair representation constitutes a violation of Section 8(b)(1)(A) of the Act. In a subsequent case, Local 1367, International Longshoremen's Assn. (Galveston Maritime Assn.), 148 NLRB 897 (1964), enf. 368 F.2d 1010 (5th Circuit, 1966), the NLRB found a union guilty of a "refusal to bargain" violation under Section 8(b)(3) of the Act where the union had negotiated racially discriminatory work assignment provisions in its collective bargaining agreements with the employers.

In Vaca v. Sipes, 386 U.S. 171 (1967), the United States Supreme Court ruled that a cause of action exists in state and federal courts under Section 301 of the Labor-Management Relations Act of 1947 (Taft-Hartly Act) for grievants who can establish that their union has breached its duty of fair representation in connection with the processing of a contractual grievance, thus giving the grievant access to a remedy against the employer for breach of the collective bargaining agreement. The duty of fair representation is characterized in Vaca as union action which is "arbitrary, discriminatory or in bad faith". To those familiar with the Supreme Court's definitive "arguably protected or prohibited" standard for NLRB pre-emption of state and federal court jurisdiction, enunciated in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), the Vaca result opening access to the courts for "fair representation" claims might, at first blush, have seemed an anomaly. The Supreme Court faced the dual remedies issue squarely in Vaca, however, where, after noting the existence of Miranda Fuel, said:

> "There are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. Section 301 charging an employer with a breach of contract." 64 LRRM 2369 at 2374.

and said:

> "... it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many Section 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of the employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong - slight deterrence, indeed, to future union misconduct - or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the (National Labor Relations) Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without remedy for the union's wrong.12/
>
> ---
>
> 12/ Assuming for the moment that Swift breached the collective bargaining agreement in discharging Owens and that the Union breached its duty in handling Owens' grievance, this case illustrates the difficulties that would result from a rule pre-empting the courts from remedying the Union's breach of duty. If Swift did not "participate" in the Union's unfair labor practice, the Board would have no jurisdication to remedy Swift's breach of contract. Yet a court might be equally unable to give Owens full relief in a 301 suit against Swift. Should the court award damages against Swift for Owens' full loss, even if it concludes that part of that loss was caused by the Union's breach of duty? Or should it award Owens only partial recovery hoping that the (National Labor Relations) Board will make him whole? These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals with different procedures, time limitations, and remedial powers must participate."

64 LRRM 2369 at 2375-2376. (Emphasis supplied)

More recently, in Memorandum 79-55 issued by the Office of the General Counsel of the NLRB on July 9, 1979, a narrowed view has been taken as to the types of conduct which will be processed as "fair representation" unfair labor practices. See: San Francisco Web Pressmen and Platemakers (San Francisco Newspaper Printing Company, Inc.), 249 NLRB 88 (1980), which suggests that the Board is accepting the guidelines promulgated by the General Counsel in Memorandum 79-55.

Only two "fair representation" cases have found their way through the procedures of the Public Employment Relations Commission and into its reported decision. The allegations in Elma School District (Elma Teacher's Organization), Decision 1349 (EDUC, 1982), concerned failure to represent based at least in part on the circumstance that the employee involved was not a dues-paying member of the union, clearly requiring scrutiny of the union's actions under the State law counterpart to Section 9 of the NLRA: RCW 41.59.090. In the other case, City of Redmond (Redmond Employees' Association), Decision 886 (PECB, 1980), the allegations involved a refusal of a union, without valid basis, to process a discharge grievance. The Examiner found the union in violation of RCW 41.56.150, but found no violation by the employer, noting the discussion and footnote from Vaca which are set forth above.

The decisions in City of Tacoma, Decision 95-A (PECB, 1977) and Olympia School District, Decision 1366 (PECB, 1982), call attention to the need to recognize the differences between the NLRA and State law. In relation to the instant case, the Olympia decision suggests an even clearer deliniation between "refusal to bargain" and "violation of contract" jurisdictions than may exist under the federal law, by reason of the omission from RCW 41.56 of the NLRA Section 8(d) "modify" provisions. This case arises in a context of limited resources. The complainant indicates that she lacks the resources to retain counsel. At the same time, the Public Employment Relations Commission, like other State agencies, faces substantial limitations on its resources. The allegations in this case arise exclusively out of the complainant's efforts to secure rights she claims under the collective bargaining agreement covering her employment. There is no allegation of arbitrary, discriminatory or bad faith conduct on the part of the union in negotiating that collective bargaining agreement or in the representation of the complaint or others in collective bargaining on matters not set forth in the collective bargaining agreement. Presented with "fair representation" allegations in a suit by this complainant against the employer to compel compliance with the collective bargaining agreement, a Court will be obligated under the principles enunciated in Vaca, supra, to determine both the fair representation and violation of contract allegations. There is some substantial doubt as to the degree, if any, of deference which such a Court would give, or should give, to the results of administrative proceedings. Thus, to turn around the question asked by the Supreme Court in Vaca: What possible sense could there be in a procedure which would permit an administrative agency that has litigated the fault of the union and the terms

of the contract to fashion a remedy only with respect to the union, leaving the injured employee to go to a second tribunal (i.e., the Courts) to repair employer fault for the single injury? Since the complainant would, under WAC 391-45-270, have the burdens of investigation and prosecution of her claim before the Commission, she might well be tempted to exhaust in proceedings before the Commission limited resources which would more efficiently be expended in a single proceeding in the Courts wherein both union and employer might be properly joined as defendants with responsibility for any remedy ordered.

Assuming all of the facts alleged to be true and provable, it is nevertheless the conclusion of the undersigned that the Public Employment Relations Commission lacks jurisdiction to remedy a breach of the duty of fair representation arising exclusively from the processing of claims arising under an existing collective bargaining agreement.

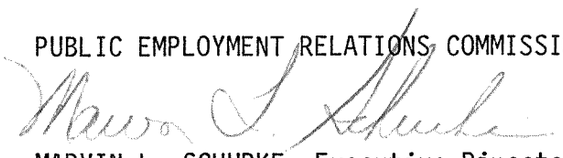
NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-entitled matter is dismissed.

DATED at Olympia, Washington this 25th day of February, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director