STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PIERCE COLLEGE FEDERATION OF TEACHERS, Complainant, vs. COMMUNITY COLLEGE DISTRICT 11 - PIERCE, Respondent.	)	CASE 18486-U-04-4704 DECISION 8788 - CCOL ORDER OF DISMISSAL

Ed Leitner, Representative, for the union.

Christine O. Gregoire, Attorney General, *by Terrance Ryan*, for the employer.

On May 3, 2004, Pierce College Federation of Teachers (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Pierce College (employer) had transferred advising and teaching duties previously performed by counselors, librarians and instructors to categories of employees not included in the bargaining unit, without providing the union an opportunity to bargain. The complaint was amended on June 14, 2004.

Agency staff issued a preliminary ruling, finding that a cause of action existed under 28B.52.073(1)(a) and (e). Examiner Carlos R. Carrión-Crespo was assigned to hold a hearing in this case, which has been scheduled for December 6, 2004.

On November 15, 2004, the employer filed a motion for summary judgment. Upon examining the record and the parties' positions, the Examiner DISMISSES the motion for summary judgment.

ANALYSIS

WAC 10-08-135 sets out the standard for summary judgment in Commission proceedings, as follows:

> A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Commission discussed this rule, reiterated previous decisions and adopted State of Washington Supreme Court standards for summary judgment recently in *State - General Administration*, Decision 8087-B (PSRA, June 9, 2004).[1] The Supreme Court has declared that the purpose of summary judgment is to pierce the formal allegations of fact in pleadings when it appears that there are no genuine issues. *Reed v. Davis*, 399 P.2d 338 (1965). However, the Commission has cautioned that summary judgment resolves the case without the benefit of a full evidentiary hearing and record. Thus, the Examiner will only grant it if the nonmoving party cannot or does not deny any material facts that the moving party alleges. A material fact is one upon which the outcome of the litigation depends. The Examiner will consider the material evidence and all

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[1] The Supreme Court's decisions are based on Civil Rule 56, which contains, in pertinent part, a very similar language: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

reasonable inferences therefrom most favorably to the nonmoving party. The Examiner will deny the motion if a genuine issue of material fact is presented. That will occur if several reasonable persons might reach different conclusions as to the facts. *State - General Administration*, Decision 8087-B.

In this case, the employer submitted three declarations in support of its first two arguments. The union, in turn, alleges that its amended complaint set forth enough facts to warrant a hearing. We will review the declarations attached to the motion complaint in relation to the documents that supported the complaint, as well as to relevant precedent and statutes.

Controverted positions and duties: According to the declarations that the employer submits, the employer's past practice has been to assign the duties of advising students to administrative exempt or classified employees, although the faculty's job descriptions include advising as one of their duties. The advisor will refer a student to a faculty member if necessary, and there is a faculty position titled "instructor/counselor/advisor", and several classified positions titled "program coordinators", both of which advise students.

The amended complaint states that all employees who work to any extent as teacher, counselor, librarian, department head, division head or administrator fall within the definition of academic personnel. According to the complaint, these duties were originally listed in the collective bargaining unit as counselors, librarians and instructors. The union provided with its complaint a copy of a "Teaching Faculty Job Description" for the 2003-04 contract year, which includes both duties, as well as a copy of

Section 5.5 of the Collective Bargaining Agreement. Such Section states that each job description:

> shall include any duties, such as administrative functions, coordinating work, advising, counseling, as well as the disciplines or programs in which the new Faculty members will be expected to teach.

Request to bargain: According to the declarations that the employer submits, the union has never brought the issue of "transferring" or reclassification to the bargaining table. The union alleges that the employer solicited applications for the positions of Educational Advisor and Educational Advisor/Academic Specialist in June 2003, and included the following responsibilities:

- to instruct educational success classes, non-credit learning labs, workshops and/or seminars;
- to assess students in academic and other needs; and
- to provide students educational, career and life-planning advise.

The union provided a copy of both announcements with its amended complaint.

The Commission has declared that "the duty to bargain includes a duty to give notice and provide an opportunity for bargaining prior to implementing changes concerning mandatory subjects of bargaining", *Port of Seattle*, Decision 7271-B (PECB, 2003), and that "[a] party to a bargaining relationship commits an unfair labor practice if it fails to give notice of a change affecting a mandatory subject of bargaining (*i.e.*, presents the other party with a *fait accompli*), or fails to bargain in good faith upon request." *Yakima County*, Decision 6594-C (PECB, 1999). The Commission has also declared that "both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees may

be mandatory subjects of bargaining." *City of Anacortes*, Decision 6863-B (PECB, 2001).

In order to obtain summary judgment, the employer needed to show that it had given notice to the union of its intent to open these positions outside the bargaining unit, which would activate the union's duty to request bargaining on them. Since the declarations that the employer submits do not address such a fact, the employer has not shown it has a right to summary judgment.

Statute of limitations: The employer argues that the Commission should dismiss the complaint because the complaint was filed after six months had passed since the alleged unfair labor practices occurred. Chapter 28B.52 RCW does not set forth for unfair labor practice complaints. The employer argues that the time limitations imposed in Chapter 41.56 RCW should extend to those filed under Chapter 28B.52 RCW, since "when there is a conflict between a statutory provision that treats a subject in a general way and another that treats the same subject in a specific way, the specific statute will prevail."

However, the enactment of a provision in one labor statute and not in another does not show that there is a conflict between them, instead of simply different standards. Also, nothing in the employer's memorandum supports the contention that there is such a relationship between these two acts. While Chapter 41.56 RCW covered only *local* employees until 1987, Chapter 28B.52 RCW covers a particular group of *State* employees. Furthermore, Chapter 41.56 RCW was approved five years *after* the statute that rules these proceedings, so we cannot infer that the latter intended to encompass a group within the former's coverage. Therefore, the

employer's argument does not warrant dismissing the amended complaint.

In conclusion, the employer has not shown that it is entitled to summary judgment. There are controverted facts that must be proven in a hearing.

ORDER

The Motion for Summary Judgment is DISMISSED.

Issued at Olympia, Washington, this 3rd day of December, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CARLOS R. CARRIÓN-CRESPO, Examiner