STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF KENNEWICK, Complainant,	CASE 13900-U-98-3419
vs.	DECISION 6427-A - PECB
KENNEWICK SCHOOL DISTRICT, Respondent.	DECISION OF COMMISSION

Elyse B. Waldman, Attorney at Law, appeared for the complainant.

The respondent made no appearance.

This case comes before the Commission on a notice of appeal filed by Public School Employees of Kennewick, seeking to overturn an order of dismissal issued by Marvin L. Schurke.[1] The Executive Director held that violations of the parties' collective bargaining agreement must be remedied through contractual grievance and arbitration procedures or through the courts, and thus, refusal to bargain and interference claims failed to state a cause of action. We affirm the dismissal of the case.

BACKGROUND

On May 7, 1998, Public School Employees of Kennewick, an affiliate of Public School Employees of Washington (PSE), filed a complaint

[1] Kennewick School District, Decision 6427 (PECB, 1998).

charging unfair labor practices with the Commission under Chapter 41.56 RCW, alleging that the Kennewick School District had violated RCW 41.56.140. The statement of facts filed by PSE contained the following:

> **According to the parties' Collective Bargaining Agreement, seniority is to be given preference when employees are considered for promotions and assignment** to new or open positions, so long as the employees' ability and performance are substantially equal.
>
> Mary Lou Benbow is employed by the Kennewick School district as a school bus driver and is represented by PSE. She has been working for the Kennewick School District for approximately twelve years and is one of the most senior drivers. As she moved up the seniority list, she was able to bid on and receive the more desirable bus routes.
>
> On November 24, 1997, the district **removed Mary Lou Benbow from a desirable bus route she had been awarded based on her seniority.** Although this was prompted by a complaint by a parent, the district ultimately denied that it was a disciplinary action against Ms. Benbow.
>
> Although the district denied this was a disciplinary action, it refused to assign Ms. Benbow another route. Instead, the district advised Ms. Benbow that she would be expected to do the work assigned by Mr. Schwebke (her supervisor) on a daily basis.
>
> After her removal, Ms. Benbow specifically requested that she be permitted to use her seniority to "bump" into another desirable route. The district **refused to allow her to use her seniority to "bump", thus denying her the seniority rights the parties contracted for.** She was also advised that she would be paid equal to the hours she previously made only if that was "possible" and if she was "available for work".

[Emphasis by **bold** supplied.]

PSE alleged that the employer's removal of Benbow from her route, the failure to provide adequate assurances of no loss of pay, and the refusal to allow Benbow to use her seniority to "bump" constituted "unilateral" action interfering with Benbow's rights under the collective bargaining act. PSE requested the Commission to order the employer to honor the bargained-for seniority rights of bargaining unit members.

The complaint was reviewed by the Executive Director for the purpose of making a preliminary ruling under WAC 391-45-110.[2] On May 29, 1998, the Executive Director issued a deficiency notice, stating that the challenged employer actions appeared to be alleged violations of the seniority provisions of the parties' collective bargaining agreement; that the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute; and that remedies for contract violations must be sought through the grievance and arbitration machinery within the contract or through the courts.[3] Thus, the complaint did not state a cause of action as filed. PSE was allowed 14 days in which to file and serve an amended complaint which stated a cause of action, or face dismissal of the complaint.

PSE filed an amended complaint on June 12, 1998. The allegations stated in the amended complaint include the following:

---

[2] At that stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether the complaint, as filed, states a claim for relief available through unfair labor practice proceedings before the Commission.

[3] The Executive Director cited City of Walla Walla, Decision 104 (PECB, 1976).

> **According to the parties' Collective Bargaining Agreement, seniority is to be given preference** when employees are considered for promotions and assignment to new or open positions, so long as the employees' ability and performance are substantially equal. However, there is no provision in the collective bargaining agreement which allows an employee with seniority to "bump" another employee with less seniority from the employee's current position.
>
> Mary Lou Benbow is employed by the Kennewick School District as a school bus driver and is represented by PSE. She has been working for the Kennewick School District for approximately twelve years and is one of the most senior drivers. As she moved up the seniority list, she was able to bid on and receive the more desirable bus routes.
>
> During the fall of 1997, Ms. Benbow experienced difficulty with certain students who refused to obey the school district rules with regard to riding on the bus. One of these students was suspended from riding on the bus. After this suspension, the district received a complaint from the student's parent. Following this complaint, Ms. Benbow was removed from her route. She was also advised that she was being verbally reprimanded.
>
> Although the district subsequently denied that this was a disciplinary action, it refused to assign Ms. Benbow another route. Instead, the district advised Ms. Benbow that she would be expected to do the work assigned by Mr. Schwebke (her supervisor) on a daily basis.
>
> After her removal, Ms. Rogers specifically **requested that Ms. Benbow be permitted to use her seniority to "bump"** into another desirable route. Ms. Benbow was advised that she would be paid equal to the hours she previously made only if that was "possible" and if she was "available for work". Although **this pronouncement involved a unilateral change in Ms. Benbow's working conditions, the district refused to engage in collective bargaining with regard to this issue.**

> The district's unilateral change in Ms. Benbow's working conditions will have a continuing effect on other employees within the unit who will now be vulnerable to unilateral removal from their routes for non-disciplinary reasons, with no assurance of equal routes or pay. **This constitutes a change in the working conditions** of members of the bargaining unit which is a mandatory subject of bargaining.
>
> The district's unilateral removal of Ms. Benbow from her route, failure to provide adequate assurances of no loss of pay and refusal to bargain the impact of her removal from her route constitutes an interference with Ms. Benbow's rights under RCW 41.56.140(1) and a refusal to bargain under RCW 41.56.140(4).

Again, however, PSE's first remedy request was for the Commission to order the employer to honor the bargained-for seniority rights of bargaining unit members. It also asked for an order requiring the employer to engage in good faith bargaining with regard to an employee's rights upon removal from the employee's position for reasons other than discipline.

The Executive Director dismissed the case on September 24, 1998, based on the premise that the union was seeking a remedy for alleged violations of the parties' collective bargaining agreement, which must be sought through the grievance and arbitration machinery within the contract or through the courts. The Executive Director stated that allegations about the future impact of the employer's actions on other employees did not alter the fact of the underlying contract violation. Both the refusal to bargain claim and the interference claim were thus considered insufficient to state a cause of action. PSE filed a notice of appeal on October 13, 1998, bringing the case before the Commission.

POSITIONS OF THE PARTIES

PSE appealed on the basis that: (1) the dismissal failed to determine that the removal of bargaining unit work from a bargaining unit member constituted a change of working conditions of the bargaining unit member; (2) the dismissal failed to determine that the removal of bargaining unit work was a mandatory subject of bargaining; and (3) the dismissal failed to determine that the employer's actions in removing bargaining unit work constituted an interference violation under RCW 41.56.140(1).

A letter was sent to the parties on October 14, 1998, acknowledging the filing of the notice of appeal, and setting due dates for briefing by the parties. Nothing further has been received from the union or the employer.

DISCUSSION

The Violation of Contract Claims

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). The claims set forth in relation to Benbow's seniority rights under the collective bargaining agreement are "violation of contract" claims which do not state a cause of action. See, e.g., Seattle School District, Decision 4917-A (EDUC, 1995); Tacoma School District, Decision 5465-E (EDUC, 1997); and Bremerton School District, Decision 5722-A (PECB, 1997). Remedies for contract violations must be sought through the grievance and arbitration machinery within the contract or through the courts.

The Refusal to Bargain Claim

PSE appears to claim that, because there is no provision in the collective bargaining agreement that allows an employee with seniority to "bump" another employee with less seniority from the employee's current position, there was a duty to bargain when it specifically requested Benbow be permitted to use her seniority to "bump" into another desirable route. Accepting as true the union's allegation that the employer refused to engage in collective bargaining, we agree with the Executive Director that the complaint failed to state a cause of action.

As defined in RCW 41.56.030(4), the duty to bargain extends to "...grievance procedures and ... personnel matters, including wages, hours and working conditions ...". The parties had a collective bargaining agreement in effect for the September 1, 1994 through August 31, 1997 period. PSE was asking the employer to do something which was not agreed upon by the parties. The employer was not obligated to make special arrangements for an employee outside the seniority rights set forth in the collective bargaining agreement, so no occasion for bargaining arose out of the facts presented by PSE. The issue appears to be one that could be proposed during negotiations for a subsequent contract.

The Unilateral Change Allegation

PSE alleged that the employer's pronouncement that Benbow "would be paid equal to the hours she previously made only if that was 'possible' and if she was 'available for work'" involved a unilateral change in Benbow's working conditions. PSE also alleged that the change in Benbow's working conditions would have a continuing effect on other employees, "who will now be vulnerable

to unilateral removal from their routes", so that the actions constituted a change in working conditions for members of the bargaining unit. These allegations do not alter the fact that the dispute originates with a "violation of contract" claim.

An employer commits an unfair labor practice under RCW 41.56.140(4), if it implements changes of a mandatory subject of bargaining for its union-represented employees without having exhausted its obligations under a collective bargaining statute.[4] No duty to bargain arises from a reiteration of established policy, or from a change which has no material effect on employee wages, hours, or working conditions.[5] In order for there to be a "unilateral change" giving rise to a duty to bargain, there must have been some material change from the status quo.[6]

There is nothing in PSE's allegations that indicate the employer's actions even rose to the level of a deviation from an existing policy. Even if it would have, the Commission has long declined to find unilateral changes on isolated deviations from existing policies. In City of Yakima, Decision 3564-A (PECB, 1991), the

---

[4] See, NLRB v. Katz, 369 U.S. 736 (1962); Federal Way School District, Decision 232-A (EDUC, 1977, citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), affirmed, Federal Way Education Association v. Public Employment Relations Commission, WPERR CD-57 (King County Superior Court, 1978); and Green River Community College, Decision 4008-A (CCOL, 1993).

[5] Clark County Fire District 6, Decision 3428 (PECB, 1990); City of Yakima, Decision 3954 (PECB, 1991); and Green River Community College, Decision 4008-A (CCOL, 1993).

[6] See, e.g., Kitsap County Fire District 7, 2872-A (PECB, 1988); Pierce County Fire District 3, Decision 4146 (PECB, 1992); King County, Decision 4258-A (PECB, 1994); City of Pasco, Decision 4197-A (PECB, 1994); and City of Yakima, Decision 3564-A (PECB, 1991).

erroneous enforcement of a long-standing rule was not, by itself, a unilateral change giving rise to a duty to bargain. In Snohomish County, Decision 4995-B (PECB, 1996), the union failed to prove that the employer used a specific release form in fitness for duty evaluations on a consistent basis in the past, or that the employer had agreed to change the form and then failed to do so.[7]

An isolated instance does not rise to the level of a unilateral change, without indication that a normally bargainable specific past practice or policy of the employer was changed. In addition, a hypothetical vulnerability of other employees is not cause for a unilateral change violation.

The Interference Allegation

The complainant in this case makes no allegations of threats of reprisal or force or promises of benefit, and we find nothing in the allegations which would constitute the basis for an interference violation.

To establish an independent interference violation under RCW 41.56.140(1), a complainant needs to establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. City of Seattle, Decision 3066 (PECB, 1989), affirmed, Decision 3066-A (PECB, 1989). See, also, City of Pasco, Decision 3804-A (PECB, 1992), and cases cited therein.

To be entitled to a finding that there has been a derivative interference violation under RCW 41.56.140(1), a complainant must

---

[7] See, also, City of Burlington, Decision 5841-A (PECB, 1997).

prove a violation of RCW 41.56.140(2), (3) and/or (4). Because violation of a collective bargaining agreement is not a violation of RCW 41.56.140(2), (3) or (4), there is no possibility of such a finding in this case.

NOW THEREFORE, it is

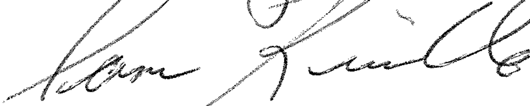
ORDERED

The dismissal of the complaint charging unfair labor practices filed in the above-captioned matter is AFFIRMED.

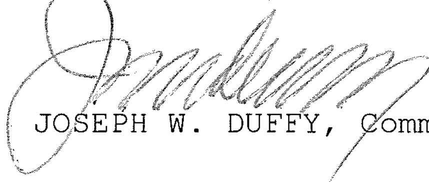
Issued at Olympia, Washington, on the 15th day of December, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson



SAM KINVILLE, Commissioner



JOSEPH W. DUFFY, Commissioner