STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WHATCOM COUNTY EMPLOYEES FOR WAGE EQUITY, Complainant, vs. WHATCOM COUNTY, Respondent.	)	CASE 17031-U-02-4416 DECISION 8245-A - PECB
WHATCOM COUNTY, Employer,	)	
WHATCOM COUNTY EMPLOYEES FOR WAGE EQUITY, Complainant, vs. TEAMSTERS UNION, LOCAL 231, Respondent.	)	CASE 17849-U-03-4612 DECISION 8246-A - PECB DECISION OF COMMISSION

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These cases come before the Commission on an appeal filed by Whatcom County Employees for Wage Equity (WCEWE), seeking to overturn dismissals issued by Unfair Labor Practice Manager Mark S.

Downing on October 16, 2003.[1] We affirm in part, vacate in part, and remand for further proceedings consistent with this decision.

BACKGROUND

The basic facts are laid out in detail in the order of dismissal, and are incorporated here by reference. All other pertinent facts will be addressed as they become relevant to the issues on appeal.

WCEWE filed a complaint charging unfair labor practices on December 9, 2002, naming Whatcom County (employer) as respondent. Case 17031-U-02-4416. WCEWE alleged the employer interfered with employees' right to select their own representative, by negotiating a successor contract with Teamsters Local 231 (Local 231) while a question concerning representation existed. It cited WAC 391-25-140(4).

WCEWE filed an "amended" complaint on January 14, 2003, purporting to list both the employer and Local 231 as respondents. WCEWE alleged that the employer interfered with employee rights and engaged in unlawful assistance to Local 231 in violation of RCW 41.56.140(1) and (2), and that Local 231 induced the employer to commit unfair labor practices in violation of RCW 41.56.150(1) and (2). The charges against Local 231 were docketed separately, as Case 17849-U-03-4612.

In a deficiency notice issued September 19, 2003, the Unfair Labor Practice Manager stated that, assuming every allegation to be true and provable, no violation of the statute could be found. WCEWE failed to provide any information in response to that deficiency

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[1] *Whatcom County*, Decisions 8245 and 8246 (PECB, 2003).

notice, and the complaints were dismissed. WCEWE filed the present appeal on November 4, 2003, arguing the dismissal was in error. The employer and Local 231 filed separate briefs supporting the dismissal.

DISCUSSION

Standard of Review -

Because we are reviewing an order of dismissal issued at the preliminary ruling stage of case processing under WAC 391-45-110, we are confined to the assumption uniformly applied in that process: All of the facts alleged in the 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 this Commission.

Did the Employer and Local 231 Violate WAC 391-25-140(4)? -

WAC 391-25-140(4) directs an employer to shut down bargaining with an incumbent union on a successor contract when a representation petition is filed challenging the existing bargaining relationship. WAC 391-25-140(4) codifies Commission precedents dating back to *Yelm School District*, Decision 704-A (PECB, 1980), where an employer and incumbent union shut down negotiations concerning a new contract for the portion of a bargaining unit affected by a "severance" petition, but continued bargaining and concluded a contract on the remainder of the historical unit. In that representation case, the Commission stated that the employer "followed well-settled principles in avoiding controversial involvement with a class of employees disputed under a question concerning representation. Those parties had, in fact, no other legal option open to them."

WAC 391-25-140(4) and the precedents on which it is based have been found to be defenses to unfair labor practice charges filed by incumbent unions. The Executive Director revisited the issue of bargaining by an employer and incumbent union in *Pierce County*, Decision 1588 (PECB, 1983), but declined to follow a policy shift announced by the National Labor Relations Board (NLRB) in *RCA Del Caribe*, 262 NLRB 963 (1982). Noting that *Yelm* was a decision of the Commission itself, and that the policy enunciated by the Commission was consistent with NLRB precedents dating back to *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945), the Executive Director dismissed unfair labor practice charges filed in that case. This makes it necessary for us to conclude that an absolute bar on bargaining exists during the pendency of the representation petition.

From the complaint now before us, it appears the employer and Local 231 did shut down their negotiations for a successor contract until the Executive Director dismissed the representation petitions filed by the WCEWE. The WCEWE theorizes that the employer and Local 231 were barred from bargaining until the Commission ruled on a WCEWE appeal from the dismissal of the representation petitions and issued a final order. The question we must answer is when did Decision 7884-A become effective for purposes of allowing the employer and Local 231 the ability to resume bargaining their successor contract.

The order of dismissal was premised on neither the employer nor Local 231 being bound by the normal effects of a pending representation petition at the time the alleged violations occurred, because the WCEWE had effectively withdrawn its first petition and the Commission had not accepted a second batch of petitions filed by the WCEWE. Analysis of this issue calls for understanding the representation case events:

- On June 28, 2002, the WCEWE filed a representation petition seeking certification as exclusive bargaining representative of Whatcom County employees then represented by Local 231. Case 16736-E-02-2765. The bargaining unit description in that petition was the same as the unit description in a collective bargaining agreement that had been in effect between the employer and Local 231 through December 31, 2001.

- During an investigation conference held on September 4, 2002, the WCEWE refused to stipulate the propriety of the bargaining unit it had proposed in its own petition.

- On September 25, 2002, the WCEWE filed four new representation petitions covering some, but not all, of the employees in the bargaining unit originally proposed (an aggregate of approximately 298 employees). In a cover letter accompanying those petitions, the WCEWE asked to withdraw its original petition.

- On October 1, 2002, Local 231 requested that conditions be imposed upon the withdrawal of the original petition, arguing that the new petitions violated WAC 391-25-210.[2]

- On October 23, 2002, the Executive Director ordered the WCEWE to respond to the request made by Local 231.

- The WCEWE filed a response on October 30, 2002, objecting to the request for conditions.

- The Executive Director dismissed all five of the WCEWE petitions on November 7, 2002, citing WAC 391-25-210(4).

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[2] The cited rule is titled "Bargaining Unit Configurations" and includes:

> (4) A party to proceedings under this chapter shall not be permitted to propose more than one bargaining unit configuration for the same employee or employees . . . .

Whatcom County, Decision 7884-A. The Executive Director also imposed a condition that no petition by WCEWE be deemed filed or acted upon for 68 days following the date in which such orders became final.

- On November 21, 2002, WCEWE filed a timely notice of appeal, bringing all five of its petitions before the Commission.

As provided for in RCW 41.56.165, we turn to the state Administrative Procedure Act, Chapter 35.05 RCW, for guidance. RCW 34.05.461(1)(a) states, "[I]f the presiding officer is the agency head . . ., the presiding officer may enter an initial order if further review is available within the agency, or a final order if further review is not available. RCW 34.05.473(2)(a) provides, "[T]he time when an initial order becomes a final order . . ." is when the initial order is entered, if administrative review is unavailable. The Executive Director's order dismissing the representation petitions filed by the WCEWE was an initial order, so it could not be relied upon as a "final" order once the WCEWE filed its notice of appeal.

Turning to the complaint in Case 17031-U-02-4416, we find that it does not contain enough specific information to properly formulate a preliminary ruling under WAC 391-45-110(2):

- We accept that the employer and Local 231 resumed their negotiations on a successor contract at some time following the Executive Director's dismissal of the representation cases in Decision 7884-A. The WCEWE argues that all of the employer and Local 231's negotiations were in violation of WAC 391-25-1404. However, the employer and Local 231 were arguably permitted to resume bargaining on November 7, 2002 (when the Executive Director issued his decision dismissing WCEWE's petitions), but the employer and Local 231 were then arguably

required to cease bargaining on November 21, 2002 (when WCEWE filed its notice of appeal).

- We lack information as to when (if ever) the employer and Local 231 reached a tentative agreement or a final agreement. It is entirely possible that the employer and Local 231 were able to reach an agreement within the window of the petitions being dismissed and WCEWE's notice of appeal.

We therefore remand WCEWE's complaint to the Unfair Labor Practice Manager, for issuance of a deficiency notice giving the WCEWE the customary period to provide specific dates when the employer and Local 231 negotiated, reached a tentative agreement, ratified an agreement and/or signed an agreement.

Interference Allegations May Be Time Barred -
The original complaint filed by the WCEWE on December 9, 2002, only alleged that the employer and Local 231 negotiated in violation of WAC 391-25-140(4). The complaint filed by the WCEWE on January 14, 2003, presented, for the first time, claims that both the employer and Local 231 interfered with WCEWE and employees through their policies and statements. A question arises as to whether the later-filed allegations are timely.

An unfair labor practice complaint must give adequate notice of the acts that are alleged to constitute a violation of a statute. The facts alleged in the complaint must be sufficient to make intelligible findings of fact in a "default" situation. *City of Seattle*, Decision 5852-C (PECB, 1998), *aff'd*, 101 Wn. App. 300 (Division One, 2000). WAC 391-45-050 requires parties to file a detailed complaint, not just a skeletal charge with the Commission to be amended later. *City of Seattle*, Decision 4057-A (PECB, 1993). RCW 41.56.160(1) provides 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 Commission. In previous decisions, this Commission has declined to allow parties to extend the statute of limitations as to new charges by "relating-back" their amended complaint to the date of filing of the original complaint.

The interference and domination allegations added in the later-filed complaint are outside the scope of what was alleged in the original complaint, and must be limited to events that occurred after July 14, 2002.

Actionable Claim Regarding Use of Facilities -
The WCEWE alleges that it was unlawfully denied use of employer time and facilities. For reasons indicated below, we conclude the WCEWE is entitled to a hearing on those allegations.

It is well established that Chapter 41.56 RCW does not give public employees an independent right to use employers' facilities for union business. *See City of Seattle*, Decision 1355 (PECB, 1982). In fact, RCW 41.56.140(2) makes it an unfair labor practice for an employer to provide financial or other support to a union. At the same time, RCW 41.56.040 grants employees the right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right protected by Chapter 41.56 RCW. *Valley Communications Center*, Decision 4145-A (PECB, 1993). RCW 41.56.140(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed within Chapter 41.56 RCW.

When the employees in a bargaining unit provide enough signatures to support a change of representation, the employer is placed in a precarious position. It must recognize the statutory and contractual rights of the incumbent union as the exclusive bargaining

representative of the employees, while at the same time maintaining a stance as close to neutral as possible with respect to showing favoritism to one union over another, and certainly must not appear to control or dominate either union in violation of RCW 41.56.140(2). *Washington State Patrol*, Decision 2900 (PECB, 1987).

If the employees seek a change in representation, an employer that permits the incumbent union to use its facilities for communication with employees during the representation election must then grant any rival union or competing labor organization the same benefit of use it granted to the incumbent union. This requirement naturally stems from the employer's requirement to remain neutral, and to not render "aid" to any incumbent or competing labor organization. *Renton School District*, Decision 1501-A (PECB, 1982).

While this Commission has recognized and adopted requirements that employers have a duty to remain neutral when labor organizations compete for representation of the bargaining unit, we have yet to establish criteria as to what triggers that duty. With the approval of the courts, we look to federal precedent in its interpretation and application of similar state laws when the provisions of the National Labor Relations Act (Act) are similar. *See Skagit Valley Hospital v. PERC*, 55 Wn. App. 348 (1989). We therefore turn to the decisions of the National Labor Relations Board (Board) for guidance in this case.

The requirement of employer neutrality originated in the NLRB's holding that Section 8(a)(2) of the National Labor Relations Act requires employers to follow a course of strict neutrality with respect to competing unions until such time as the real question concerning representation had been resolved. *Midwest Piping*. The Board subsequently required that an employer's duty of strict neutrality only became operative when a representation petition had

been filed, and noted that the doctrine should be "strictly construed" and "sparingly applied." *See, e.g., Ensher, Alexander & Barsoom, Inc.*, 74 NLRB 1443 (1947).

In later decisions interpreting the duty owed, the Board modified the *Midwest Piping* doctrine by removing the requirement that a representation petition actually be filed before any duty is imposed. For example, the Board held that the "sole requirement . . . is that the claim of the rival union must not be clearly unsupportable and lacking in substance." *Playskool, Inc.*, 195 NLRB 560 (1972) *enforcement denied*, 477 F.2d 66 (7th Cir. 1973). By not requiring an actual petition to be filed in order to invoke the duty of neutrality, the Board recognized the existence of the rival union before the invocation of the Board's election procedure. The Board also attempted to remove the possibility of the employer showing preference to the incumbent union that may have worked amicably with that particular employer.

Many of the circuit courts were hesitant to enforce the Board's orders under the "modified" *Midwest Piping* doctrine, often finding that the employers simply "obeyed the duty imposed upon him to recognize the agent that . . . employees have designated." *Playskool Inc.*, 477 F.2d at 70. The flexible, inexact standard set forth by the Board also failed to provide employers and unions a clear standard to discern when the duty of neutrality would arise, as well as whether the competing labor organization had an actual or naked claim.

With its decision in *Bruckner Nursing Home*, 262 NLRB 955 (1982), the Board reversed its earlier decisions modifying the stated rule in *Midwest Piping*, and made the filing of a valid petition the operative event for the imposition of strict neutrality on the part

of the employer. Having a clearly-defined rule of conduct was thought to encourage both employee free choice and industrial stability. Employers no longer had to guess whether a "real" question concerning representation existed.

We believe that the Board's reasoning in *Midwest Piping*, as later clarified in *Bruckner Nursing Home* was sound. RCW 41.56.140(2) parallels Section 8(a)(2) of the NLRA, so interpretations of Section 8(a)(2) are persuasive precedents for interpreting the statute we administer. *Pasco Housing Authority*, Decision 5927-A (PECB, 1997). Therefore, we now hold that once a valid petition has been filed with the Commission, an employer must remain strictly neutral in rival union organizing situations. Exclusive use of employer facilities by one union cannot be permitted during the pendency of a representation proceeding, and contractual clauses granting the incumbent union exclusive access to the employer's facilities may not be enforced at such times.

We now examine whether WCEWE presented an actionable claim when it alleged the employer prevented employees supporting WCEWE from using the employer's telephone system, from receiving emails sent by WCEWE, and from using the employer's conference rooms.

The WCEWE filed its original representation petition on June 28, 2002. There has never been any debate or doubt as to the procedural validity of that petition at the time it was filed. The employer had a duty to maintain neutrality at that time, although the complaint filed on January 14, 2003, is only timely for acts or events occurring on or after July 14, 2002.

The petition filed by the WCEWE became defective on September 25, 2002, when the WCEWE attempted to file its four overlapping

petitions. September 25, 2002, thus marks the end of the period when the employer was obligated to maintain neutrality. Allegations of denial of use of employer facilities thereafter do not state a cause of action.

We vacate the decision dismissing WCEWE's complaint with regard to allegations that the employer denied it equal use of the employer's facilities, and we remand the cases to the Unfair Labor Practice Manager for reconsideration of whether the WCEWE complaint states a cause of action within the standards set forth above.

Did Local 231 Interfere With Employee Rights Though Its Statements?

WCEWE contends that Local 231 intended its ratification process to preclude bargaining unit employees from pursuing a new representation petition under Chapter 391-25 WAC, so that we should assert jurisdiction to find a violation of RCW 41.56.150(1). WCEWE acknowledges, however, that the incumbent exclusive bargaining representative was under no statutory duty to submit any agreement to its membership for ratification.

The amended complaint submitted January 15, 2003, merely alleges that Local 231 "apparently believed that [ratification] would cut off the ability of WCEWE to file a subsequent petition". This overt speculation does not constitute a statement of fact that has to be assumed as true and provable for the purpose of a preliminary ruling. Thus, it cannot constitute a basis for the present appeal. The Unfair Labor Practice Manager properly dismissed this portion of WCEWE's complaint against Local 231.

NOW, THEREFORE, it is

ORDERED

1. The Order of Dismissal issued in the above-captioned matter is VACATED.

2. The above-captioned matters are REMANDED to the Unfair Labor Practices Manager for further proceedings consistent with this decision.

Issued at Olympia, Washington, on the 15th day of December, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner

PAMELA G. BRADBURN, Commissioner

COMMISSIONER DUFFY DID NOT TAKE PART IN THE CONSIDERATION OR DECISION IN THESE CASES.