Seattle School District, Decision 9359-A (EDUC, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PATRICIA BAILEY, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	)	CASE 19885-U-05-5047 DECISION 9359-A - EDUC DECISION OF COMMISSION
PATRICIA BAILEY, Complainant, vs. WASHINGTON EDUCATION ASSOCIATION, Respondent.	)	CASE 19886-U-05-5048 DECISION 9360-A - EDUC DECISION OF COMMISSION
ROBERT FEMIANO, Complainant, vs. WASHINGTON EDUCATION ASSOCIATION, Respondent.	)	CASE 19944-U-05-5062 DECISION 9355-A - EDUC DECISION OF COMMISSION

Robert Femiano and Patricia Bailey appeared pro se.

Michael J. Gawley, Attorney at Law, appeared for the union.

Faye Chess-Prentice, Deputy General Counsel, appeared for the employer.

These cases come before the Commission on timely appeals filed by Robert Femiano (Femiano) and Patricia Bailey (Bailey) seeking to

overturn decisions issued by the Unfair Labor Practice Manager, Mark S. Downing (ULP Manager) dismissing and partially dismissing complaints filed against the Seattle School District (employer) and the Washington Education Association (union). The cases involve similar legal and factual issues and have been consolidated for decision herein. We affirm and order the amended complaints to be the subject of further proceedings under Chapter 391-45 WAC consistent with this decision.

ISSUES PRESENTED

1. Did the Unfair Labor Practice Manager improperly exclude certain events as untimely?

2. Does the Commission have jurisdiction over the claim regarding the failure to allow employees to vote on the contract modification?

3. Does the Commission have jurisdiction over the claim of the duty of fair representation (DFR)?

We rule the ULP Manager did not improperly exclude events as untimely and that the Commission does not have jurisdiction over the contract modification and DFR claims.

Issue 1 - Applicable Legal Standard

The statute of limitations for filing an unfair labor complaint under the Educational Employment Relations law (EDUC) is six months from the date of occurrence. RCW 41.59.160(1). The six-month statute of limitations begins to run when the complainant knows, or should know, of the violation. *City of Bremerton*, Decision 7739-A (PECB, 2003). The only exception to the strict enforcement of the six-month statute of limitations is

where the complainant proves it had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Pasco*, Decision 4197-A (PECB, 1994).

Application of Standard

On November 18, 2005, Robert Femiano filed two complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC. The complaints were reviewed by the ULP Manager who issued a joint preliminary ruling and order of partial dismissal. The allegations concerning a violation of RCW 41.59.060 and/or 41.59.090 were found not to state a cause of action. The allegations concerning a violation of RCW 41.59.140(1)(a) and (c) and 41.59.140(2)(a) and (b) were found to state a cause of action and ordered to hearing.

On October 26, 2005, Bailey filed two complaints charging unfair labor practices with PERC under Chapter 391-45 WAC. Similarly, the complaints were reviewed by the ULP Manager who issued a joint preliminary ruling and order of partial dismissal. The allegations against the employer under RCW 41.59.140(1) and (2)(b) were dismissed. The allegation against the union that it violated RCW 41.59.140(2)(a) was found to state a cause of action and ordered to hearing.[1]

The vote on the collective bargaining agreement occurred on September 3, 2004. Negotiations to modify the agreement occurred sometime after that date. In May 2005, the amended collective bargaining agreement was distributed to the employees.

---

[1] Femiano only appealed the decision in the complaint filed against the union. Bailey appealed both the decision against her employer and the decision on the complaint filed against her union.

The ULP Manager stated that the allegations in Femiano's complaint would be limited to conduct occurring on or after May 18, 2005, and allegations in Bailey's complaint would be limited to conduct occurring on or after April 26, 2005. All events occurring before those dates would be considered as background.

Both Femiano and Bailey appealed the decision of the ULP Manager to apply the six-month statute of limitations arguing that exceptions existed. They argue that it was an error for him to fail to include allegations about the "secret meetings" between the union and the employer which allegedly led to modification of the collective bargaining agreement.

However, the ULP Manager does not state anywhere in his decisions that the claims are dismissed for lack of timeliness. He merely states that they fail to state a cause of action.

The statute of limitations began to run when the employees knew, or reasonably should have known, of the violation. Here, the date when they learned that the contract had been modified without a vote would start the running of the time period. The only evidence in the record is that the contract was distributed in May 2005. In Bailey's case, that clearly occurs after April 26. In Femiano's case, as long as the contract was distributed on or after May 18, the claim would be timely. The ULP Manager did not incorrectly apply the six-month statute of limitations.

Issue 2 - Applicable Legal Standard

The complaints concern employer and union interference with employee rights by including language in the collective bargaining agreement that was not ratified by the members.

Employee rights are defined in Chapter 41.59.060 RCW:

> (1)Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter.

Employer and union interference is defined in Chapter 41.59.140:

> (1) It shall be an unfair labor practice for an employer:
> (a) To interfere with, restrain or coerce employees in the exercise of rights guaranteed in RCW 41.59.060.
> . . . .
> (2) It shall be an unfair labor practice for an employee organization:
> (a) To restrain or coerce (i) employees in the exercise of the rights guaranteed in RCW 41.59.060.

In an early decision, the Commission dismissed an employer-filed unfair labor practice complaint alleging that a union unlawfully prevented non-member employees from voting on the formulation of the union's proposals for collective bargaining. *Lewis County*, Decision 464 (PECB, 1978), *aff'd*, Decision 464-A (PECB, 1978). In that case, the Executive Director noted that participation in union affairs is a political right incident to union membership but that right is not a civil or property right. Since the complaint there concerned internal union policies and did not directly affect the employment relationship covered by RCW 41.56, it was dismissed for failure to state a claim.

In *Lake Washington School District*, Decision 6891 (PECB, 1999), the Executive Director dismissed a complaint concerning a union's actions during a ratification process. The complained-of action was found to be entirely within the internal workings of the union which failed to state a cause of action over which the

Commission could exercise jurisdiction. The Executive Director also noted that the courts, not the Commission, have jurisdiction over violations of union constitutions and by-laws.

A different conclusion was reached in a trilogy of recent cases where the Commission ruled that it had jurisdiction over the question of whether a union wrongfully denied non-union members a meaningful and informed vote in the ratification process of the collective bargaining agreement. *Community College District 7 (Shoreline)*, Decision 9094-A (PSRA, 2006); *Western Washington University*, Decision 8849-B (PSRA, 2006); and *Community College District 19 (Columbia Basin)*, Decision 9210-A (PSRA, 2006). In each of these cases, the non-member employees were given the right to vote pursuant to an explicit agreement between the employer and the union. Therefore, the Commission was merely enforcing a right the parties had given the non-members rather than a right that might grow out of the union's constitution or by-laws.

Also, compare *Port of Seattle*, Decision 2549-C (PECB, 1987), where the Executive Director noted that a complaint alleging that a union had aligned itself in interest against one or more bargaining unit employees during a contract ratification process could state a cause of action for violation of the union's duty to fairly represent all bargaining unit employees.

Application of Standard

The ULP Manager dismissed Feminano's and Bailey's claims that both the union and the employer interfered with their bargaining rights when the union and the employer agreed to modify the collective bargaining agreement without submitting the modifications to the employees for a ratification vote. In dismissing these claims, the ULP Manager reasoned that

ratification of a collective bargaining agreement is not a requirement imposed by state law, and including language in a contract that has not been ratified is not an unfair labor practice.

A complaint alleging an unfair labor practice complaint is initially reviewed by the ULP Manager under WAC 391-45-110 to determine whether it states a cause of action. All of the facts are assumed to be true and provable. If the complaint states a cause of action, it is processed accordingly. If it does not, it is dismissed. On review of an order of dismissal processed at the preliminary ruling stage, the Commission must make the same assumption. *Whatcom County*, Decision 8245-A (PECB, 2004).

The ULP Manager correctly decided to dismiss the claims of interference concerning Femiano's and Bailey's right to vote on a modification of their collective bargaining agreement. The vote is strictly a matter of internal union procedure over which the Commission has no jurisdiction. As the ULP Manager noted, the process used by a union to decide which collective bargaining proposals to accept is purely of a union's own creation. Such process is part of a union's internal affairs and is often controlled by a union's constitution and/or by-laws. These documents are the contracts between a union and its members establishing how the organization is to be operated. Disputes concerning alleged violations of the constitution and by-laws must be resolved through internal union procedures or the courts.

Unlike the cases where the Commission found that it had jurisdiction over the contract voting process, here there is no agreement to allow non-members of the union employees to vote.

Further, no facts were alleged by Femiano or Bailey which show that the union or the employer had unfairly aligned themselves against Femiano or Bailey to interfere with their ability to vote on the contract modification. This Commission has no jurisdiction over these claims.

Issue 3 - Applicable Legal Standard

In *Allen v. Seattle Police Officers Guild*, 100 Wn 2d 361 (1983), the Supreme Court specifically recognized that the doctrine of a union's duty of fair representation to all bargaining unit members exists within Chapter 41.56 RCW. A claim of a violation of such duty, however, must be pursued before a court which can assert jurisdiction. It is well established that the Commission does not assert jurisdiction over "breach of the duty of fair representation" claims arising out of the processing of a grievance. *Dayton School District*, Decision 8042-A (EDUC, 2004).

Application of Standard

Femiano appealed the ULP Manager's decision on the grounds that the union breached its duty of fair representation when it did not provide him with an attorney to pursue his whistleblower claim, and when it did not provide him access to the union's budget.

The ULP Manager found that a cause of action did exist with regard to Femiano's claim that the union induced the employer to commit an unfair labor practice concerning his request for budget information. That claim will be the subject of further processing.

The claim of the failure to provide an attorney arises out of his claims concerning an improper transfer. That claim concerns the interpretation of the collective bargaining agreement and the

union decision on processing the grievance, and is not within the Commission's jurisdiction and must be pursued through the courts. The ULP Manager therefore correctly decided to dismiss the duty of fair representation claims.

NOW, THEREFORE, it is

ORDERED

The decisions of the Unfair Labor Practice Manager dismissing the claims against the Seattle School District and the Washington Education Association are AFFIRMED. The complaints shall be the subject of further processing consistent with those decisions. The Seattle School District and the Washington Education Association shall file and serve their answers pursuant to WAC 391-45-210 within 21 days following the date of this order.

Issued at Olympia, Washington, on the 31st day of January, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner