STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF REARDAN-EDWALL,	)	
Complainant,	)	CASE 12741-U-96-3060
vs.	)	DECISION 5750-A - PECB
REARDAN-EDWALL SCHOOL DISTRICT,	)	
Respondent.	)	DECISION OF COMMISSION

Eric T. Nordlof, Attorney at Law, appeared for the complainant.

Jeffrey J. Thimsen, Attorney at Law, appeared for the respondent.

This matter comes before the Commission on a petition for review filed by Public School Employees of Washington, seeking to overturn an order of dismissal issued by Executive Director Marvin L. Schurke.[1]

BACKGROUND

On October 3, 1996, the Public School Employees of Washington (union) filed a complaint charging unfair labor practices against the Reardan-Edwall School District (employer), alleging the employer refused to bargain in violation of RCW 41.56.140(4).

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[1] Reardan-Edwall School District, Decision 5750 (PECB, 1996).

The union was certified as exclusive bargaining representative for certain of the employer's classified employees, including bus drivers, on July 31, 1996. The complaint alleges that the employer's classified employees were routinely re-employed from year to year for many years prior to that certification, as long as the employees continued to perform their assigned duties in a satisfactory manner. The complainant alleged that the classified employees had come to expect they would be re-employed from year to year during periods of satisfactory job performance, and that this expectation of continuing employment represented the status quo with respect to job security at the outset of the representation proceedings leading to the union's certification.

The complainant alleged that on May 29, 1996, the employer advised Susan Leonetti, a bus driver, that she would not be re-hired for the 1996-97 school year, and that Leonetti was discharged the next day. Litigation ensued, including unfair labor practice charges before the Commission. Citing a paper written in connection with that litigation, the complainant further alleged:

> On August 19, 1996, the district's attorney, in response to inquiry from PSE, stated that the district would not honor the classified employees' expectation of continued employment from year to year as described *supra*. **The district's position is a unilateral change from the existing *status quo*.**

[Emphasis by *italics* in original; emphasis by **bold** supplied.]

The complainant requested the Commission to: (1) Instruct the employer to reinstate the pre-existing practice of re-employing employees from year to year; (2) Instruct the employer to negotiate in good faith before making changes in job security practices which existed at the outset of the representation proceedings; and (3) Instruct the employer to "make any employees affected by the

district's illegal conduct whole, including reinstatement and payment of lost wages and benefits".

The complaint was considered for the purpose of making a preliminary ruling under WAC 391-45-110, which requires the Executive Director to determine whether the facts as alleged may constitute an unfair labor practice within the meaning of the applicable statute.[2]

On October 30, 1996, Executive Director Marvin L. Schurke issued a deficiency notice, advising the parties that (1) the allegations concerning the past practices by which "instructional year" employees continued in their jobs from year to year were well beyond the period of limitations established in RCW 41.56.160 and are only taken to be background to allegations that follow; (2) that allegations that appeared to re-tell the story of an individual's discharge were already at issue in another case so there was no reason to litigate that matter twice; and (3) that allegations of a unilateral change of job security arrangements for bargaining unit employees included no alleged facts concerning the status of collective bargaining negotiations between the parties or about positions taken by the employer on job security issues in a bargaining context, and only dealt with the status of one classified employee whose discharge was in litigation. The Executive Director advised the parties that the case would be held open for 14 days following the date of the letter, to permit the complainant to file and serve an amended complaint, and that in the absence of a timely amendment which states a cause of action, the case would be dismissed.

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[2] At this 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, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

The complainant did not file an amended complaint in this matter. On December 23, 1996, the Executive Director dismissed the complaint as failing to state a cause of action. On January 9, 1997, the complainant filed a petition for review, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

The union argues that the Executive Director's dismissal was based on incorrect factual assumptions, that the facts alleged suggested a change of practice applicable to bargaining unit employees generally, and that the change of status that the employer imposed on Leonetti was based upon her status as a classified employee, and not on her personal situation. The union contends that the employer's unilateral implementation of a change in the status quo with respect to a single employee is a violation, and that the employer's theory that any classified employee may be separated from employment between instructional years applies to all classified employees. The union asks the Commission to vacate the order of dismissal.

The employer argues that the time for appeal should begin at the expiration of the 14 day time period following the deficiency notice, and that the petition for review should be dismissed as untimely. The employer contends that its letter to the union regarding a terminated bus driver does not constitute nor announce a unilateral change, and that the union's complaint does not support a charge of unilateral change. The employer argues that the other allegations in the complaint should be characterized as background, and that the allegations dealing with Leonetti's termination merely restate allegations already made in a separate complaint, and should not be the basis for a new action. The employer urges that the petition for review be denied.

DISCUSSION

Timeliness of Petition for Review

WAC 391-45-110 allows for a preliminary ruling of cases by the Executive Director and states as follows:

> The executive director shall determine whether the facts as alleged may constitute an unfair labor practice within the meaning of the applicable statute.
>
> (1) If it is determined that the facts as alleged do not, as a matter of law, constitute a violation, the executive director shall issue and cause to be served on all parties an order of dismissal containing the reasons for that action. **An order of dismissal issued pursuant to this section shall be subject to a petition for review as provided in WAC 391-45-350.**
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> (2) If the complaint is found to state a cause of action for unfair labor practice proceedings before the commission, the executive director shall set a period for the respondent to file its answer, which shall be not less than ten days following the issuance of the preliminary ruling.

[Emphasis by **bold** supplied.]

WAC 391-45-350 requires petitions for review to be filed within 20 days following the date of the order.

In this case, the order of dismissal was issued on December 23, 1996. The union filed its petition for review on January 9, 1997, well within the 20 day period. A "deficiency notice" is not an "order of dismissal" referred to in WAC 391-45-110, and the fact that the union did not respond to the deficiency notice in this case has no bearing on the timeliness of its petition for review. Since WAC 391-45-110 requires orders of dismissal to be subject to a petition for review, we must review the complainant's assertions in this matter.

The Complaint Allegations

RCW 41.56.140(4) makes a refusal to engage in collective bargaining on the part of a public employer an unfair labor practice. The duty to bargain under the Public Employees' Collective Bargaining Act is defined in RCW 41.56.030(4) as follows:

> "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including **wages, hours and working conditions**, which may be peculiar to an appropriate bargaining unit ...

[Emphasis by **bold** supplied.]

In order for the collective bargaining process to operate, an employer must give notice of contemplated changes to the exclusive bargaining representative of its employees, and must provide opportunity for bargaining, prior to implementing any change affecting those "mandatory" subjects of bargaining.[3]

It is only after employees have exercised their statutory right to select an exclusive bargaining representative that an employer is prohibited from taking unilateral action in regard to the wages, hours, and working conditions of those employees. See, Franklin County, Decision 1890 (PECB, 1984); City of Tukwila, Decision 2434-A (PECB, 1987); City of Yakima, Decision 3564-A (PECB, 1990); and Snohomish County Fire Protection District 3, Decision 4336-A (PECB, 1994). Since Leonetti's discharge occurred two months prior to the

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[3] Federal Way School District No. 201, 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).

union's certification as exclusive bargaining representative, the discharge or reasons for the discharge cannot be considered the basis for a finding of a unilateral change.[4]

The August 19, 1996 letter from the employer's attorney came after the certification of the union, so the complaint would be timely if the letter represented a unilateral change. However, the letter does nothing more than "explain the employer's position as to Leonetti's employment situation". The letter makes no reference to any change made applicable to bargaining unit members as a whole after the certification of the union as exclusive bargaining representative. Nothing in the allegations provides a reasonable basis for us to infer that any announcement was communicated to the bargaining unit employees, or that the employer in any other manner effectuated a unilateral change in the employees' expectation of employment.

Finally, among the remedies it requests, the union asks the Commission to make "any employees affected" by the district's illegal conduct whole, including reinstatement and payment of lost wages and benefits. The complaint fails, however, to name any other employees affected besides Leonetti. The Commission is unable to conclude from the facts alleged that any such employees exist.

The complainant has provided us no basis on which to conclude that a unilateral change may have taken place, and the facts as alleged do not, as a matter of law, constitute an unfair labor practice.

NOW, THEREFORE, it is

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[4] Leonetti's discharge is the subject of a separate unfair labor practice complaint wherein it was alleged she was discriminatorily discharged in reprisal for her union activities. Only "refusal-to-bargain" allegations are being addressed in the case at hand.

ORDERED

The dismissal of the unfair labor practice complaint filed in the above captioned matter is affirmed.

Issued at Olympia, Washington, on the 18th day of February, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner