STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 483, Complainant, vs. CITY OF TACOMA, Respondent.	)	CASES 12094-U-95-2849 12163-U-95-2869 12164-U-95-2870 12165-U-95-2871 12166-U-95-2872 DECISION 5408 - PECB ORDER OF DISMISSAL

Welch and Condon, by David B. Condon, Attorney at Law, represented the union.

Cathy Parker, Assistant City Attorney, represented the employer.

On October 6, 1995, Diane Woody filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Tacoma as respondent.[1]

On November 13, 1995, four more employees each filed an unfair labor practice complaint with the Commission, naming the City of Tacoma as respondent.[2] Each of those complaints was accompanied by a statement of facts and other documentation which appeared to be identical to the materials filed by Woody.

All five of these case files were reviewed by the Executive Director for the purpose of making a preliminary ruling pursuant to

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[1] Case 12094-U-95-2849.

[2] Those cases were docketed as follows:

Linda L. Bowen	Case 12163-U-95-2868
Lorraine K. Petersen	Case 12164-U-95-2869
Peggy J. Fillo	Case 12165-U-95-2870
Janice C. Wells	Case 12166-U-95-2871

WAC 391-45-110, and were the subject of a preliminary ruling letter issued on November 20, 1995.[3] It was noted that the complaints appeared to be untimely under RCW 41.56.160, and that individual employees lack legal standing to pursue "refusal to bargain" allegations. The complainants were allowed 14 days in which to file an amended complaint which stated a cause of action.

On December 4, 1995, International Brotherhood of Electrical Workers, Local 483, filed a motion to intervene as the complainant in these matters, and for consolidation of the five cases. That motion was supported by a declaration from the union's attorney which explains that Local 483 is the exclusive bargaining representative of the individual employees, and that all five complaints arise out of the same set of facts. Attached to that motion was a memorandum addressing the "timeliness" question and an amended complaint charging unfair labor practices.

The Motion for Substitution

When employees exercise their statutory right to organize for the purposes of collective bargaining under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a relationship is established between the employer and the organization selected by the employees as their exclusive bargaining representative. The duty to bargain exists only between the employer and that union, to the exclusion of direct dealings between the employer and bargaining unit employees.

Numerous precedents establish that a "refusal to bargain" violation will be found under RCW 41.56.140(4) if an employer implements

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[3] 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.

unilateral changes of the wages, hours or working conditions of its union-represented employees, unless it has first given notice to the exclusive bargaining representative, has provided opportunity for bargaining prior to finalizing its decision, and (upon request) bargains in good faith to an agreement or impasse on the matter. This case concerns alleged unilateral changes of the employer's practices and procedures concerning banking of holidays. Since paid holidays affect both employee compensation (wages) and work time (hours), a unilateral change could be a violation of the union's rights under the statute.

As noted in the preliminary ruling letter, individual employees have no standing to file or pursue "refusal to bargain" charges. Grant County, Decision 2703 (PECB, 1987). The only way that causes of actions could exist in these cases would be for the union to take over their prosecution as the complainant. The motion to substitute the union as complainant is GRANTED.

The Motion to Consolidate

The Commission's computerized case docketing system recognizes that the procedural and substantive rights of individual employees may diverge in the course of resolving a controversy, and so requires that cases filed by individuals (as distinguished from cases filed by or against a labor organization) be docketed separately. The docketing of five separate cases in these matters was driven by the fact that individual employees filed the complaints.

The Commission often consolidates related cases for processing, for purposes of administrative efficiency. The facts alleged and claims raised in these cases are clearly related, if not identical. With the substitution of the union as the complainant, the possibility of divergent results is reduced or eliminated. The motion to consolidate is GRANTED.

The Timeliness of the Complaint

The complaints identify the five employees as office-clerical employees working in the Tacoma Fire Department, within a bargaining unit represented by Local 483. The complaints mention an "elective work-week schedule" practice dating back to 1979, and a "9/80" work schedule in existence since at least 1992. There are references in the complaints to a practice of "banking" holidays.

The preliminary ruling letter directed the attention of the complainants to RCW 41.56.160, which provides:

> The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, 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.** ...
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> [Emphasis by **bold** supplied.]

That period of limitations is computed from the time that the injured party knew or should have known that their rights under the collective bargaining statute have been violated. See, for example, Port of Seattle, Decision 2796-A (PECB, 1988), where the Commission dismissed a discrimination complaint filed more than six months after the employee became aware of the disputed decision.

Paragraphs 6 and 7 of the original statement of facts allege that the Policy #511 issued on July 5, 1994 violated the employees' rights under the collective bargaining agreement.[4] That is a specific act or event which clearly occurred more than six months

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[4] Even if this allegation were timely, the Public Employment Relations Commission does not assert 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).

prior to the filing of the complaint. The amended complaint filed by the union on December 4, 1995 does not alter this conclusion. An un-numbered paragraph acknowledges that the Policy #511 which the employer distributed in July of 1994 implemented a change by precluding employees from shifting back and forth between a "9/80" shift and a "10/40" shift.

Paragraphs 8 and 9 of the original statement of facts alleged the issuance of a revised Policy #511, and detailed changes of holiday practices imposed upon the employees more than six months prior to the filing of the complaint. The amended complaint does not alter this conclusion, as an un-numbered paragraph alleges:

> In December 1994 Fire Department **management issued a revised Policy #511 which changed the previous policy** concerning the "banking" of holidays as specified in the memo from Eileen Lewis, Assistant Chief, dated December 28, 1994, with the attached revision to Policy #511.

[Emphasis by **bold** supplied.]

The union's argument (in its memorandum accompanying the amended complaint), that "it appears that no 'unequivocal and final' decision had been made by the City Fire Department" conflicts with clear factual allegations contained in both the original and amended complaints. While the preliminary ruling process calls upon the Executive Director to assume that all of the facts alleged are true and provable, that does not require disregard of patent conflicts between the facts alleged and the theories advanced.

Paragraph 10 of the original complaint described a failure by management officials to respond to the union's requests for meetings on the matter. That occurred prior to April 6, 1995, however, so even the earliest of these complaints was clearly untimely as to any footdragging by the employer.

Paragraphs 11 through 17 of the original complaint and an unnumbered paragraph in the amended complaint describe the union's subsequent efforts to resolve this matter. Both the original and amended complaints allege that a meeting on this issue was held between the parties on January 19, 1995, which establishes that the union clearly had notice of the disputed unilateral change more than six months prior to the filing of the unfair labor practice complaint.

In its memorandum, the union argues that the time period for filing unfair labor practice charges begins when the union receives unequivocal notice of the employer's decision. The union cites U.S. Postal Service, 271 NLRB 397 (1984) and Chemung Contracting Corp., 291 NLRB 123 (1988), but those cases are not found persuasive. In U.S. Postal Service the NLRB held that the date on which the employee was notified he was terminated was the controlling date for computation of the six month statute of limitations, not the date on which the appeal was finally concluded. In Chemung Contracting Corp. the NLRB rejected a contention that the statute of limitations period began anew with each failure to make insurance contributions, and held that the statute tolled when the union had notice of the employer's intention to not make any payments after the contract expired.

In this controversy, the union contends the employer's position was unclear until August of 1995, when the union was informed that the employer was not persuaded by the discussion to rescind the change in policy. The union's acknowledgement that there was a change to be rescinded (and not just a contemplated change to be implemented or abandoned) is crucial. There is no claim that this change was concealed from the union, as in City of Pasco, Decision 4197-A (PECB, 1994).

The amended complaint further alleges, in regard to the January 19 meeting:

> At that time [management official] Lewis told [union official] Smith that she thought "things could be worked out" in reference to the union's objection to the employer's attempt to unilaterally change the longstanding policy of allowing "banking" of holidays.

In context with the allegations that changes were announced by the memorandums issued in July and December of 1994, the union's additional allegation that the holiday scheduling was "still in the process of being reviewed" does not eliminate the fact that the unilateral change was already in effect. Paragraph 16 of the original complaint was phrased in terms of a refusal to "give clerical back their ability to save holidays", which is inconsistent with the union's current claim that the situation was in a state of flux.

Nor can it be presumed that there had been no actual effect on the employees. The union does not allege that the change of practice concerning the "banking" of holidays was held in abeyance while the discussions took place. Since holidays are specified in state law, there would presumably have been occasions for employees to suffer effects of the unilateral change on at least the New Year's Day holiday, the Martin Luther King Jr. holiday, and the President's Day holiday early in 1995, all of which occurred prior to the six month period for which the Commission could assert jurisdiction.

Taken as a whole, the allegations indicate the union had knowledge of the alleged "unilateral change" prior to April 6, 1995, which was six months prior to the filing of the earliest of these complaints. As was noted recently in a case presenting similar circumstances, City of Spokane, Decision 4937 (PECB, 1994):

> While the union's efforts to resolve these issues with the employer are commendable, the fact of making those settlement efforts does not absolve the union of compliance with the statute of limitation. To the contrary, a

> party faced with delays or avoidance by the opposite party to a dispute may well need to file a timely unfair labor practice complaint to protect its rights, even if settlement negotiations are ongoing. Spokane County, Decision 2167-A (PECB, 1985).

A party which engages in settlement efforts must take care to avoid being lulled into a forfeiture of its statutory rights. On the facts alleged here, these complaints are untimely.

NOW, THEREFORE, it is

ORDERED

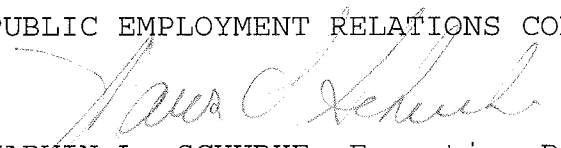
1. The motion to substitute International Brotherhood of Electrical Workers, Local 483, as the complainant in the above-captioned matters is GRANTED.

2. The motion to consolidate the processing of the above-captioned matters is GRANTED.

2. The complaints charging unfair labor practices filed in the above-captioned matters are DISMISSED as untimely under RCW 41.56.160.

Issued at Olympia, Washington, on the 22nd day of December, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.