STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

HOLLY NORTON, Complainant, vs. MUKILTEO SCHOOL DISTRICT, Respondent.	)	CASE 9096-U-91-2012 DECISION 3964-A - PECB
VICKI COLFELT, Complainant, vs. MUKILTEO SCHOOL DISTRICT, Respondent.	)	CASE 9097-U-91-2013 DECISION 3965-A - PECB DECISION OF COMMISSION

Eric Nordlof, Attorney at Law, filed complaints on behalf of Holly Norton and Vicki Colfelt; and filed a complaint and petition for review on behalf of the Mukilteo Association of Classified Personnel.

Montgomery, Purdue, Blankinship & Austin, by Christopher L. Hirst, Attorney at Law, filed a response on behalf of the Mukilteo School District.

This case comes before the Commission on a timely petition for review filed by the Mukilteo Association of Classified Personnel, seeking to overturn an order of dismissal issued by Executive Director Marvin L. Schurke.

BACKGROUND

These proceedings were commenced on March 25, 1991, when the general counsel of Public School Employees of Washington (PSE)

filed a complaint charging unfair labor practices naming Holly Norton and Vicki Colfelt as complainants. Two separate cases were docketed.[1] The complaints indicated that an affiliate of PSE, the Mukilteo Association of Classified Personnel (MACP), was the exclusive bargaining representative of Norton and Colfelt, but the complaints did not purport to be filed by or on behalf of the MACP.

The statement of facts consisted of nine paragraphs identified by Roman numerals. Paragraph IV alleged that the Mukilteo School District had created two new positions "on or about October 1, 1990", and that the MACP had agreed to exclude one of those positions from the bargaining unit. Paragraph VII alleged that the employer transferred bargaining unit work (driving a school bus) to the newly excluded position,[2] and Paragraph VIII alleged that the employer transferred other bargaining unit work (preparation of state transportation reports) to a former employee who is not in the bargaining unit.[3]

The employer filed a motion for summary dismissal on April 12, 1991. It supported that motion with: (1) A declaration by the president of the MACP, stating that neither he nor the union's executive board had authorized the filing of the complaints; and (2) a declaration by the employer's assistant superintendent, stating that all of the issues raised in the complaints had been agreed upon with the MACP.

On April 30, 1991, the Commission received an affidavit signed by the acting executive director of PSE, stating that PSE's general

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[1] This was consistent with Commission case docketing practices, under which separate case numbers are assigned to the claims of individual complainants.

[2] The time frame given was "subsequent to October 1, 1990".

[3] This also alleged a time frame of "subsequent to October 1, 1990".

counsel had filed the complaints in the names of the individual complainants, in order to prevent the MACP from committing a breach of the duty of fair representation by allowing the time for filing the complaints to lapse.

In a preliminary ruling letter dated May 2, 1991, the Executive Director advised the parties that a complaint alleging violation of the employer's duty to bargain may be brought only by the exclusive bargaining representative, and not by individual employees. The complainants were given 14 days in which to file and serve amended complaints which stated a cause of action, or the complaints would be dismissed.

On May 28, 1991,[4] the general counsel of PSE filed an "amended" complaint which sought to substitute the MACP as the complainant, in place of Norton and Colfelt. The statement of facts accompanying that complaint contained only three paragraphs, and was limited to an allegation that the employer transferred bargaining unit work (preparation of state transportation reports) to a non-bargaining unit former employee "subsequent to October 1, 1990".

The cases again came before the Executive Director pursuant to WAC 391-45-110, and he issued another preliminary ruling letter on October 2, 1991. The Executive Director again concluded that there were defects which precluded the processing of the cases,[5] and allowed an additional 14 days to file and serve an amended complaint. Dismissal was again indicated in the absence of a complaint which stated a cause of action.

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[4] An additional 14 days to file an amended complaint had been requested and granted.

[5] In a footnote citing the "subsequent to October 1, 1990" time frame specified in the amended complaint, the Executive Director stated: "At a minimum, the amended complaint fails to meet the specificity requirements of WAC 391-45-050(3)."

Nothing further was received from the complainant. On January 13, 1992, the Executive Director issued a decision stating:

> 1. The "on or about October 1, 1990" allegations of the original and amended complaints fail to meet the specificity requirements of WAC 391-45-050(3). The filing of the original complaint on March 25, 1991 came only six days short of the end of the "statute of limitations" period for which a complaint could have been timely filed under RCW 41.56-.160. ...
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> 2. The complaints filed on March 25, 1991 were a nullity, because the individual employees lacked standing to pursue the "refusal to bargain" theory which inherently underlies any "skimming" allegation. Although the original complaints were filed by the General Counsel of the state-wide affiliate of the Mukilteo Association of Classified Personnel, the organization itself did not make its presence known until an April 30, 1991 filing in response to a motion to dismiss filed by the employer on April 12, 1991. Even then, the affidavit by the organization at that time indicated that the complaint had been filed in the name of the individuals to prevent the local union from committing a breach of its duty of fair representation ...
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> 3. Even if the "amended" complaint filed by the union on May 28, 1991 were taken as a separate unfair labor practice case, the filing came after the 6-month "statute of limitations" period had passed. ...

Mukilteo School District, Decision 3964, 3965 (PECB, 1991).

The Executive Director thus dismissed both complaints for failure to state a cause of action.

POSITIONS OF PARTIES

The union's petition for review and supporting brief raise three arguments:

First, that the language in the original complaint regarding the hiring of the former employee to prepare state-required transportation reports alleged that such conduct occurred "subsequent to October 1, 1990", and that such language (which is carried forward in the amended complaint) is sufficient to state that the cause of the action occurred within the period of limitations. In addition, it is contended that the employer made no showing that the disputed work was performed at a time which falls outside the period of limitations.

Second, that the original complaint was not a nullity, because the individual bargaining unit members who filed that complaint had standing to pursue the refusal to bargain theory under WAC 391-45-010. In addition, it is alleged that the complaint was actually filed by "an agent of those employees and of the state-wide labor organization with which the [MACP] is affiliated".

Third, that the Executive Director's ruling that the amended complaint did not "relate back" to the date of filing of the original complaint is contrary to "a specific precept of civil pleading in common law, federal rules jurisdiction", as set forth in Rule 15(c) of the Superior Court Civil Rules.

The employer's brief in opposition to the petition for review is in substantial agreement with the Executive Director's decision.

DISCUSSION

Standing to File a Complaint

The language of WAC 391-45-010 provides that a complaint charging unfair labor practices "**may be filed** by any employee, group of employees, employee organization, employer or their agents". Filing does not equate to stating a cause of action, however. Whenever a complaint is filed under WAC 391-45-010, the Executive Director must determine whether the facts alleged within that

complaint are such that an unfair labor practice violation could be found. WAC 391-45-110.

Once an organization is recognized or certified as exclusive bargaining representative, a three-sided relationship is established so that the employer deals with employees through the union. In Stevens County, Decision 1903 (PECB, 1984), a member of a bargaining unit attempted to bring an unfair labor practice charge alleging a unilateral change by the employer, but that complaint was dismissed with the statement that the duty to bargain in good faith exists only between the employer and exclusive bargaining representative, "to the exclusion of bargaining with individual employees or sub-groups of employees":

> ... [It] is the union which is the party offended by a breach of the duty to bargain. In the case at hand, the union has neither authorized the filing of the charges nor intervened in support of the complainant. **It is a necessary party, and its absence is fatal to the complaint.**

Stevens County, at pp 2-3 [Emphasis by **bold** supplied.]

See, also, Grant County, Decision 2703 (PECB, 1987), cited by the Executive Director.

In the cases now before the Commission, the original complaint was filed on behalf of individual employees, and it named those employees (not their union) as the complainants. The MACP was a necessary party to any "refusal to bargain" claim, and its absence was fatal to the original complaint.

It is true that the original filing was made by an official of the state-wide labor organization with which the MACP is affiliated, but the MACP did not authorize that filing. The declaration of MACP President Pearl Taylor so indicates. Neither the affidavit of PSE official Blackwell nor the amended complaint contradicts the

earlier indication that the original filing was made on behalf of Norton and Colfelt. Under these circumstances, it is concluded that the original filing was not actually made by an "agent" acting on behalf of the MACP. The Executive Director properly found that the original complaint failed to state any cause of action.

The Relation Back Doctrine

Chapter 41.56 RCW sets forth a six-month statute of limitations on the filing of unfair labor practice complaints, as follows:

> RCW 41.56.160 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS. 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. ...**

[Emphasis by **bold** supplied.][6]

Although the amended complaint in these cases clearly came more than six months after the complained-of actions, the union argues that it should be considered timely by operation of the "relation back" doctrine set forth in Civil Rule 15(c), as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. **An amendment changing the party against whom a claim is asserted** relates back if the foregoing provision is satisfied and, within the period provided by

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[6] The six-month limitation period may be tolled where the complaining party does not have actual or constructive knowledge of the unfair labor practice. Metromedia, Inc., 232 NLRB 486 (1977).

> law for commencing the action against him, the party to be brought in by the amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

[Emphasis by **bold** supplied.]

As an administrative agency of the state of Washington, the Public Employment Relations Commission is subject to the Administrative Procedure Act, Chapter 34.05 RCW, and to the general procedural rules adopted by the Chief Administrative Law Judge, Chapter 10-08 WAC. The Civil Rules of Procedure (CR) adopted by the courts have never been adopted by this Commission, and do not apply to Commission proceedings. While the Commission has some discretion to adopt procedural principles drawn from other sources, including the common law and National Labor Relations Board precedent, we conclude that the "relation back" doctrine is not applicable in this situation.

Even if CR 15(c) was applicable to Commission proceedings, the union's interpretation of the rule is erroneous. The union seeks here to substitute itself as complainant. The "relation back" doctrine does not apply to a "new plaintiff", but expressly applies only to the addition of a "new defendant" (i.e., "changing the party **against whom a claim is asserted**"). Further, the cases cited by the union applied the "relation back" doctrine to amending a claim, not to adding a new party.

The Specificity of the Amended Complaint

If the Commission were to reverse the Executive Director's dismissal order, the amended complaint is the only basis upon which the case could proceed. That is because the union was absent from

the proceedings until May 28, 1991, when it filed the amended complaint. The only significance to be attached to the original complaint would be that the March 25, 1991 filing date pinpoints a time at which the union clearly knew of the complained-of actions.

The amended complaint filed on May 28, 1991, focused on the employer's transfer of bargaining unit work to a non-bargaining unit former employee. The action at issue was described only as occurring "subsequent to October 1, 1990".[7] To state a cause of action, the union would need to have clearly and concisely alleged that the transfer of bargaining unit work occurred on a "date" no earlier than November 28, 1990. A transfer occurring prior to that date would fall outside of the statute of limitations, but an alternative for the union, under Metromedia, supra, would have been to allege that it gained knowledge of the transfer only after November 28, 1990. No such assertions were made, however.

A complainant must apprise the Commission and the opposite party of the date, or meaningful time frame, when the misconduct is alleged to have occurred. We agree with the Executive Director that the amended complaint failed to meet the specificity requirements of WAC 391-45-050(3).[8]

Conclusion

The Executive Director properly dismissed these cases for failure to state a cause of action.

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[7] The Executive Director's reference to an "on or about" time frame in the dismissal order was in error. The amended complaint did not contain an allegation concerning actions "on or about October 1, 1990".

[8] WAC 391-45-050(3) requires "clear and concise statements of the facts constituting the alleged unfair labor practices, **including times, dates**, places and participants in occurrences".

NOW, THEREFORE, it is

ORDERED

The order of dismissal issued by Executive Director Marvin L. Schurke in the above-captioned matters is AFFIRMED.

Entered at Olympia, Washington, on the 20th day of October, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner