STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 77, Complainant,	CASE 9444-U-91-2103
vs.	DECISION 4057-A - PECB
CITY OF SEATTLE, Respondent.	DECISION OF COMMISSION

This case comes before the Commission on a petition for review filed by International Brotherhood of Electrical Workers, Local 77, seeking to overturn a preliminary ruling issued by Executive Director Marvin L. Schurke, dismissing the case under WAC 391-45-110.

BACKGROUND

IBEW Local 77 filed a complaint charging unfair labor practices with the Commission on October 28, 1991, alleging that the City of Seattle (employer) had unilaterally "skimmed" bargaining unit work. At issue is an alleged assignment of work normally performed by "electrician constructors" in Local 77's bargaining unit to an employee in a bargaining unit represented by a different union. The complaint indicated that the situation dated back to October of 1990, when an employee hired for a newly created "maintenance electrician" position was assigned to the bargaining unit represented by the other union. Attached to the complaint was a copy of a June 21, 1991 letter in which an employer official had reviewed the situation, noted the failure of the parties to negotiate a result, and specifically acknowledged the possibility of future

proceedings initiated by Local 77 before the Public Employment Relations Commission. That letter continued:

> If a third party determination is pursued, it is agreed that we will waive any defense based on timeliness or negotiation, provided that the current incumbent remains in the subject position regardless of title, pay or union jurisdiction.

The letter was addressed to Local 77, and indicated that a copy was sent to an official of the employer's personnel department.

The matter came before the Executive Director for initial processing pursuant to WAC 391-45-110. In a preliminary ruling letter sent to the parties on February 28, 1992, the Executive Director called attention to RCW 41.56.160, which provides that no unfair labor practice complaint shall be processed for actions occurring more than six months prior to the filing of the complaint with the Commission. The union was given a period of 14 days following the date of the letter in which to file and serve an amended complaint showing a timely cause of action.

The union responded on March 5, 1992, pointing out that the employer had agreed to waive any defense based on the timeliness of the complaint. The union asserted that the condition set forth in the employer's letter had been satisfied. Citing National Labor Relations Board (NLRB) and judicial precedent to the effect that the six-month statute of limitations on unfair labor practices is ordinarily a waivable matter, and is not jurisdictional, the union took the position that the employer waived any timeliness defense, and that the Commission has jurisdiction in this case.

In his order of dismissal issued on May 1, 1992, the Executive Director stated that the requirements of the statute cannot be set aside, and that the parties lack authority to confer jurisdiction on the Commission by agreement where none exists by statute.

POSITIONS OF THE PARTIES

The union takes the position that the six-month limitation period set forth in RCW 41.56.160 is a statute of limitations that is subject to waiver by the employer, rather than a restriction on the Commission's jurisdiction. It contends that the provision should be construed in accordance with federal authorities construing the National Labor Relations Act (NLRA), and that federal precedent supports a finding of "waiver" by the employer in this case.

The employer has not denied its written waiver of any "timeliness" defense in this case. It did not file a brief in the matter, and has taken no position on the union's petition for review.

DISCUSSION

The "Statute of Limitations"

As originally enacted in 1967, the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, contained no "unfair labor practice" provisions. Administration of the statute was delegated to the Department of Labor and Industries, which had been operating a "state mediation service" under Chapter 43.22 RCW.

Unfair labor practice provisions were added to Chapter 41.56 RCW in 1969, when RCW 41.56.140 through 41.56.190 were adopted. RCW 41.56.140 and 41.56.150 generally parallel some, but not all, of the provisions of Sections 8(a) and (b) of the NLRA. RCW 41.56.160 through 41.56.190 establish procedures which are generally parallel to some, but not all, of the provisions of Section 10 of the NLRA. Of particular interest in this case, the unfair labor practice provisions added to the state law in 1969 did not specify any limitation on unfair labor practice filings that is comparable to

the six-month period of limitations that is found in Section 10(b) of the NLRA.[1]

The Public Employment Relations Commission was created in 1975 with a structure and staffing that is not fully comparable to that of the NLRB. In particular, RCW 41.58.005 calls upon the Commission to be "impartial", and the state law lacks both the independently appointed official and the funding for an investigation/prosecution arm which are represented by the office of General Counsel at the NLRB. While the unfair labor practices delineated in the federal and state laws are generally similar, the differences in structure and staffing led to adoption of some state procedures which are quite different from the NLRB's procedures.

Shortly after assuming responsibility for administration of Chapter 41.56 RCW in 1976, the Commission adopted the predecessor to our present unfair labor practice procedures:

1. Rather than filing a skeletal "charge" which is to be fleshed out later, a party aggrieved by an alleged unfair labor

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[1] Section 10(b) of the NLRA (29 U.S.C. Section 160(b)) provides, inter alia:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, ... *Provided*, **That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made**, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. ...

[Emphasis by **bold** supplied.]

practice is required to file a detailed complaint with the Commission. WAC 391-45-050.

2. Rather than conducting an "investigation" in which the agency may substitute its judgment for that of the charging party as to the quality or sufficiency of the facts, the Executive Director makes a "preliminary ruling" based on the assumption that all of the facts alleged in a complaint are true and provable. The preliminary ruling process determines whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Commission. WAC 391-45-110.

3. Rather than taking over the responsibility for the prosecution of a case which states a cause of action, as does the General Counsel of the NLRB, those functions are left to the aggrieved party. WAC 391-45-270.

4. The Commission's "Examiner" functions in an impartial role, comparable to that of an "administrative law judge" (formerly "trial examiner") at the NLRB. WAC 391-45-270; 391-45-310.

In 1981, then-Governor John Spellman called for expenditure reductions by state agencies, and solicited changes of statutes and practices which would raise State revenues and/or reduce State costs. The Commission responded with several cost-cutting proposals, among them amendments to specify a six-month limitation on unfair labor practice filings, similar to the federal law. Those proposals were then submitted to the Legislature.

House Bill 136 was considered during the 1983 legislative session. The bill amended RCW 41.56.160 to specify:

> 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.]

The bill was passed by a vote of 92 to 0 in the House of Representatives and by a vote of 45 to 0 in the Senate, and became law.

Past Commission Rulings

The Commission has consistently dismissed complaints where the alleged violations occurred beyond the six-month period specified in RCW 41.56.160. City of Seattle, Decision 1887 (PECB, 1984); Fort Vancouver Regional Library, Decision 2396 (PECB, 1986); Port of Seattle, Decision 2796-A (PECB, 1988); King County, Decision 3558, 3558-A (PECB, 1990).

Two Commission decisions have indicated, by dicta, that the six-month limitation found in RCW 41.56.160 is jurisdictional. Port of Seattle, supra, and North Franklin School District, Decision 3844 (PECB, 1991). Neither of those decisions contains any indication that the respondent had waived its right to assert the limitations defense, however. We also note that most prior cases decided by the Commission under the six-month limitation provision resulted from motions for dismissal or expressed arguments advanced by the respondents in those cases. We therefore view this as a case of first impression.

Rulings Under the NLRA

The federal courts have uniformly ruled that the six-month limitation provision found in Section 10(b) of the NLRA is a "statute of limitations", and not a restriction of the jurisdiction of the NLRB. NLRB v Vitrionic Division of Penn. Corp., 630 F.2d 561, 563 (8th Circuit, 1979); Shumate v NLRB, 452 F.2d 717, 721 (4th Circuit, 1971). The NLRB has therefore issued complaints where the six- month period has expired, if there has been a waiver.

The Commission and the Washington courts have looked to decisions construing the NLRA in interpreting parallel provisions of Chapter

41.56 RCW. In State ex rel. Washington Federation of State Employees v Board of Trustees, 93 Wn.2d 60, 67-68 (1980), the Supreme Court stated,

> Washington's Public Employee's Collective Bargaining Act, RCW 41.56, is substantially similar to the National Labor Relations Act. ... In construing state labor acts which appear to be based upon or are similar to the NLRA, decisions under that act, while not controlling, are persuasive.

The six-month limitations provision of RCW 41.56.160 is substantially the same as the six-month limitation contained in the NLRA. This was recognized by the Commission in King County, Decision 3558-A, supra, which viewed the two provisions as "parallel".

We conclude that the six-month limitation provision found in RCW 41.56.160 should be applied as a "statute of limitations", and not as a restriction on the Commission's jurisdiction. To assist the administrative process, however, we find it appropriate to apply certain pre-conditions to the acceptance of a mutual waiver of the limitations period:

1. The Executive Director will continue to raise "statute of limitations" problems at the preliminary ruling stage of unfair labor practice proceedings; and

2. The Executive Director will continue to dismiss complaints filed more than six months after the acts or events at issue, unless:

(a) All named respondents have furnished the complainant(s) with an express written waiver of the limitations period prior to the expiration of the six-month limitations period; and

(b) A copy of such written waiver is submitted to the Commission at the time the complaint is filed, or in timely response to a preliminary ruling letter from the Executive Director.

Disposition of the Instant Case

In the case now before the Commission, the employer furnished the union with a written waiver of the six-month limitations period, but the employer's June 21, 1991 letter came more than six months after the disputed hiring in October of 1990. Under the administrative conditions set forth above, such a waiver would not suffice to preserve an unfair labor practice claim. We find it appropriate, however, to apply those conditions only prospectively, and not retroactively to bar the complaint filed in this case.

The record indicates that the waiver relied upon by the union was given by the employer in order to assist the collective bargaining process, and to further good relations between the parties. In the words of the union, the employer waived any timeliness defense "... because of the parties' discussions of the issue both in the grievance context and the negotiations". The union acted in understandable reliance upon federal authorities construing the substantially similar NLRA provision. It had no prior notice that the above-described administrative conditions would be imposed by the Commission.

The Commission has authority, under WAC 391-08-003,[2] to waive administrative rules when a waiver serves the purposes of Chapter

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[2] WAC 391-08-003 provides:

> The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency, and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. **The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver.**

41.56 RCW, and is not shown to prejudice another party. See, Central Kitsap School District, Decision 3671-A (PECB, 1991). There has been no claim or showing of prejudice herein. We therefore conclude that acceptance of the employer's waiver of the six-month limitations period will, under the limited circumstances of this case, effectuate the purposes of Chapter 41.56 RCW.

NOW THEREFORE, it is

ORDERED

The Executive Director's order dismissing the complaint filed in the above-captioned matter is VACATED, and the case is remanded for further proceedings under Chapter 391-45 WAC.

Issued at Olympia, Washington, the 9th day of February, 1993.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner