STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SHORELINE SCHOOL DISTRICT, Employer.	)	
TONI DELL-IMAGINE, Complainant,	)	CASE 11812-U-95-2783
vs.	)	DECISION 5560 - PECB
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 6, Respondent.	)	PARTIAL ORDER OF DISMISSAL

Gretchen H. Wallace, Attorney at Law, appeared on behalf of the complainant.

Terry Costello, Legal Services Director, Service Employees Council, appeared on behalf of the union.

The above-captioned matter was one of two companion cases docketed on the basis of unfair labor practice charges filed with the Public Employment Relations Commission on June 5, 1995. The complainant alleged that the Shoreline School District and Service Employees International Union, Local 6, had separately and jointly violated her rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Preliminary rulings issued under WAC 391-45-110 found causes of action to exist against both respondents,[1] answers were filed, Pamela G. Bradburn was designated as Examiner to conduct further proceedings in the matters under Chapter 391-45

[1] 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.

WAC, and several days of hearing were held on the consolidated cases.

After the complainant and the employer settled their differences and the complainant requested dismissal of the case against the employer, the union moved for dismissal of the charges against it. The union's motion for dismissal enclosed a copy of the settlement agreement signed by the complainant with the Shoreline School District. The settlement agreement appears to resolve any potential "violation of contract" claim by the complainant against the employer.[2]

The union moved for dismissal on May 1, 1996. Pursuant to arrangements agreed upon by the parties in contemplation of a previously-established schedule for further hearing, counsel for the complainant submitted a response by telefacsimile on May 1, 1996, and subsequently filed that response. This order confirms a ruling communicated by letter on May 1, 1996.

Procedural Posture of the Case

This case is before the Executive Director for reconsideration of the preliminary ruling under WAC 391-45-110. As a general proposition, it has not been the practice or policy of the Executive Director to withdraw or reconsider preliminary rulings except upon a substantial change of circumstances.[3]

There have been some situations in which cases have been pulled back from an Examiner, upon learning of changed circumstances which undermine the complainant's theory of the case. In Vancouver

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[2] An employee has a right to settle a grievance without intervention by the union. RCW 41.56.080.

[3] Motions for dismissal (e.g., at the close of a complainant's case-in-chief, for failure to prove a prima facie case) are for an Examiner to decide.

School District, Decision 2575 (PECB, 1986), a union that had filed "refusal to bargain" charge against an employer later agreed to a representation election and was replaced by another organization as the exclusive bargaining representative of the unit involved in the unfair labor practice case. An earlier preliminary ruling finding a cause of action to exist was then reconsidered on the basis of the changed circumstances, and the unfair labor practice charges were dismissed on the basis that the former incumbent no longer had standing to pursue a "refusal to bargain" theory arising out of the terminated bargaining relationship. The Commission affirmed in Vancouver School District, Decision 2575-A (PECB, 1987).

The "Induce Discrimination" Allegations

The original complaint in this matter included the following allegations:

> 2. Complainant was hired as a Dispatch/ Supervisor ... In performing her duties, Complainant at no time fulfilled the criteria of a "confidential employee" as defined in the act ... Complainant was a statutory employee entitled to full protection of the Act.

Supervisors are public employees within the meaning and coverage of Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). As such, the complainant had a right to refuse to commit an unfair labor practice under RCW 41.56.140.

It is an unfair labor practice under RCW 41.56.140(1) for an employer to discriminate for or against union activity. It is an unfair labor practice under RCW 41.56.150(2) for a union to seek to have the employer discriminate in violation of RCW 41.56.140. The test for discrimination has been laid out in several recent Commission decisions applying the "substantial motivating factor"

test enunciated by the Supreme Court of the State of Washington in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991).

The original complaint filed against the union in this matter included the following allegations of discrimination prohibited by Chapter 41.56 RCW:

> 3. [T]he Employer has ... interfered with employee rights ... and discriminated against Complainant for her protected ... activities and **because she failed to unlawfully assist the Union** ...
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> a. Commencing sometime in 1994 ... **Union adherents ... conspired to get rid of Complainant, because Complainant refused to favor Union adherents in the selection of work assignments and other terms and conditions of employment.** ...

The amendatory letter submitted on July 20, 1995 contained the following material of interest here:

> [The complainant] complained to Pauline Love concerning treatment to herself and others because they were not members and/or not strong supporters of the Union. Evidence will show that the "back drop" of the letter concerned **[the complainant's] refusal to favor Union stewards and supporters in job assignments, which angered the union supporters. ... The union ... engaged in a vendetta against [the complainant]** ...
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> ...
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> **[The complainant] engaged in protected activity. The Union's actions in their mission to terminate her ... were in response to her protected activity and performance of her job wherein she refused to favor Union supporters and stewards because of their status.**

The operative preliminary ruling letter issued on August 17, 1995 stated a cause of action, as follows:

> Union interference with employee rights ... by retaliating when Toni Dell-Imagine refused to make work assignments based on employees' union activities, and by encouraging the employer to discharge Toni Dell-Imagine.

A union will commit a violation of RCW 41.56.150(2) by merely asking the employer to discriminate, even if the employer has the good sense to refuse the request. Thus, a settlement agreement between the complainant and the employer could not affect the viability of this independent charge against the union.

Responding to the union's argument that it has a statutory right to represent employees in the bargaining unit, and to meet and confer with the employer in an attempt to resolve disputes over the application of the collective bargaining agreement, no such effort or meetings would be lawful if they are aimed at obtaining or continuing discrimination on the basis of union activity or lack thereof. Responding to a quotation from The Developing Labor Law on page 14 of the union's motion, it was noted that the Examiner would need to obtain and evaluate a complete evidentiary record to determine "whether the ... union's action ... was arbitrary, invidious, irrelevant, and thus a mask for discriminatory motivation". The union's motion is DENIED as to this issue.

The "Exclusion from Unit" Allegations

The preliminary ruling letter issued in this case on August 17, 1995 stated a cause of action, as follows:

> Union interference with employee rights and inducing the employer to commit a violation, by colluding with the employer to inappropriately exclude the dispatch supervisor position from the bargaining unit. ...

An **employee** (including a former employee claiming a right to reinstatement) has legal standing to file unfair labor practice

charges against both the employer and union, where the employee claims that the position held or claimed has been improperly included in or excluded from an existing bargaining unit by agreement of that employer and union. Castle Rock School District, Decision 4722-B (EDUC, 1995); Richland School District, Decision 2208, 2208-A (PECB, 1985).

Several other well-established principles further establish the context for discussing this issue:

* Individual employees do not have standing to file or pursue unit clarification petitions under Chapter 391-35 WAC. See, WAC 391-35-010.

* The Commission has exclusive jurisdiction to police bargaining relationships and determine appropriate bargaining units under RCW 41.56.060. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). This could include imposing sanctions upon an "exclusive bargaining representative" which is found guilty of a breach of the duty of fair representation by aligning itself in interest against bargaining unit employees on unlawful grounds. See, Elma School District (Elma Teachers' Organization), Decision 1349 (EDUC, 1982).

* The Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contract grievances. Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982). Closely related is that the 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).

As long as the complainant in this case was seeking reinstatement to the dispatch supervisor position which she formerly held with the Shoreline School District, she had a viable interest in having the bargaining unit status of that position determined under Castle

Rock, supra. Any violation of contract or duty of fair representation claims in the case were closely tied to the unit determination claim that is exclusively for the agency to decide.

Close examination of the settlement agreement failed to disclose any reference to either immediate or future reinstatement of the complainant to the dispatch supervisor position. Abandonment of the claim for reinstatement is a substantial change of circumstances which undermines the complainant's theory on this aspect of the case. In the absence of a viable claim for reinstatement to the dispatch supervisor job, the complainant no longer has standing to pursue that matter in unfair labor practice proceedings under Chapter 391-45 WAC. Any dispute between the employer and union concerning the bargaining unit status of that position would be properly brought before the Commission through unit clarification proceedings under Chapter 391-35 WAC. The complainant's standing to pursue a "fair representation" claim against the union is no longer evident, where the underlying grievance is resolved and the employee will be gone from the unit.

For the reasons indicated herein, the Examiner was directed to take no further evidence or argument on the "unit inclusion" issue set forth in the August 17, 1995 preliminary ruling letter.

NOW, THEREFORE, it is

ORDERED

1. The union's motion for dismissal of the discrimination allegations against it in this case is DENIED.

2. The allegations of the complaint regarding collusion by the union to improperly exclude the "dispatch supervisor" position formerly held by Toni Dell-Imagine from the bargaining unit

represented by Service Employees International Union, Local 6, are DISMISSED on the basis that the complainant no longer has standing to pursue such matters.

Issued at Olympia, Washington, on the 10th day of June, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

Paragraph 2 of this order will be the final order of the agency on that matter, unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.