STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. STATE – OFFICE OF THE GOVERNOR, Respondent.	CASE 23316-U-10-5938 DECISION 10948 - PSRA ORDER OF PARTIAL DISMISSAL

Younglove & Coker, by *Edward Earl Younglove III*, Attorney at Law, and *Anita L. Hunter*, In-House Counsel for the union.

Attorney General Robert M. McKenna by *Janetta E. Sheehan* and *Kara A. Larsen*, Assistant Attorneys General for the employer.

On June 24, 2010, the Washington Federation of State Employees (union) filed an unfair labor practice complaint against the Office of the Governor (employer) with the Public Employment Relations Commission. On June 30, 2010, Unfair Labor Practice Manager David Gedrose issued a preliminary ruling. On October 29, 2010, the employer filed a motion for summary judgment. On December 17, 2010, the union filed a memorandum in opposition to the employer's motion for summary judgment and a cross-motion for summary judgment. Charity Atchison was assigned as Examiner.

APPLICABLE LEGAL PRINCIPLES

An examiner may grant a motion for summary judgment "if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135. "A material fact is one upon which the outcome of the litigation depends." *State - General Administration*, Decision 8087-B (PSRA, 2004), *citing Clements v. Travelers Indem. Co.*, 121 Wn.2d 243 (1993). Summary judgment is only

appropriate when the party responding to the motion cannot or does not deny any material facts alleged by the party making the motion. *State - General Administration,* Decision 8087-B. Summary judgment is inappropriate where there is at least a possibility that the responding party could prevail. *King County Fire District 16,* Decision 9659-A (PECB, 2008) *citing State – General Administration,* Decision 8087-B. The examiner must operate within the context of the preliminary ruling and is confined to ruling on admissions or defects which have become evident since the issuance of the preliminary ruling. *City of Orting*, Decision 7959-A (PECB, 2003).

In the preliminary ruling process, all facts alleged in the complaint are assumed true and provable. However, the complainant must provide a factual basis in order for a cause of action to exist. *See Whatcom County,* Decision 8246-A (PECB, 2004) (speculation in the amended complaint was not a fact on which the preliminary ruling could be based). A cause of action will not exist if the allegation is based on speculation that an event might occur in the future. Evidence of events occurring after the filing of a complaint may not form the basis for finding an employer committed an unfair labor practice. *See Seattle School District,* Decision 5755 (PECB, 1997).

ANALYSIS

In its complaint the union alleged:

> The WFSE believes and therefore alleges that the employer intends, when necessary, to have bargaining unit work performed on furlough days by nonbargaining unit employees, such as managers and supervisors. (See, *e.g., Attachment #9.*) The employer has never initiated or participated in any bargaining regarding the performance of bargaining unit work on any of the furlough days. The employer's intended actions constitute skimming of WFSE bargaining unit work.

(emphasis added).

The preliminary ruling found a cause of action for:

> [2] Employer refusal to bargain in violation of RCW 41.80.110(1)(e) [and if so, derivative "interference" in violation of RCW 41.80.110(1)(a)], by its:
>
> . . . .

> (b) skimming of bargaining unit work previously performed by bargaining unit members of the union on furlough days, without providing an opportunity to bargain;

In its motion for summary judgment, the employer argues that the skimming allegation: is speculative, is unsupported by fact, does not present any material facts, and should be dismissed. In its cross-motion for summary judgment, the union argues: that it "had reason to believe that bargaining unit work would be performed by nonbargaining unit members on furlough days," that such actions did occur, that the union was not given notice of such actions, and that the employer had an obligation to inform the union of its intent and bargain over the matter. The union submitted a declaration from a bargaining unit employee in support of its allegation that bargaining unit work has been skimmed. The declaration in support of the union's motion for summary judgment states:

> On August 6, 2010, September 7, 2010, and October 11, 2010, a supervisor in my division performed work that I or someone else in my bargaining unit would normally perform. The supervisor indicated he had performed this work in emails I received.

In this case, the preliminary ruling stated a cause of action for skimming. A review of the complaint, answer, motions for summary judgment, and supporting documents reveal that no facts exist as to whether skimming actually occurred in the six months prior to the filing of the complaint on June 24, 2010.

CONCLUSION

An unfair labor practice can be based only on incidents occurring prior to the filing of the complaint. The complaint alleges that the union believed that the employer intended to skim bargaining unit work. Alleging employer intent to take an action is not grounds for finding a cause of action. As such, the employer's motion to dismiss the cause of action for skimming is granted.

FINDINGS OF FACT

1. The Office of the Governor (employer) is an employer within the meaning of RCW 41.80.005(8).

2. The Washington Federation of State Employees (union) is an employee organization within the meaning of RCW 41.80.005(7).

3. On June 24, 2010, the union filed an unfair labor practice complaint alleging that the employer intended to skim bargaining unit work.

4. There is no evidence that the employer actually skimmed bargaining unit work prior to the filing of the complaint.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.80 RCW and Chapter 391-45 WAC.

2. The complaint, answer, and motions fail to state any material fact that is at issue regarding skimming of bargaining unit work.

3. Based on Finding of Fact 4, the allegation that the employer skimmed bargaining unit work on furlough days is dismissed.

ORDER

The portion of the complaint charging unfair labor practices filed in the above-captioned matter alleging employer refusal to bargain and, if so, derivative interference for skimming bargaining unit work previously performed by members of the union on temporary layoff days is dismissed.

ISSUED at Olympia, Washington, this 22nd day of December, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CHARITY L. ATCHISON, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.