Lake Washington School District, Decision 11913-A (PECB, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 46, Complainant, vs. LAKE WASHINGTON SCHOOL DISTRICT, Respondent.	CASE 25345-U-12-6485 DECISION 11913-A - PECB DECISION OF COMMISSION

Robblee Detwiler & Black, P.L.L.P., by *Daniel Hutzenbiler*, Attorney at Law, for the union.

K&L Gates LLP, by *Mark S. Filipini*, Attorney at Law, and *Jody N. Duvall*, Attorney at Law, for the employer.

Unfair labor practice complaints must be filed within six months of when the complainant knows or should have known of a violation. Complaints that are filed outside of the statute of limitations will be dismissed as untimely. The Lake Washington School District (employer) notified the union on June 6, 2012, that it would eliminate a bargaining unit position effective June 29, 2012. The union filed its unfair labor practice complaint on December 14, 2012. After an evidentiary hearing, the Examiner dismissed the complaint as untimely. The union appealed.

The issue in this case is whether the Examiner erred when she dismissed the union's complaint as untimely. Skimming does not occur until work has actually been assigned to employees outside of the bargaining unit. Therefore, in a skimming case the statute of limitations does not begin to run until bargaining unit work is assigned to non-bargaining unit employees. In this case, on June 6, 2012, the employer provided unequivocal notice that it intended to assign bargaining unit work to non-bargaining unit employees effective June 29, 2012. The employer eliminated bargaining unit positions on June 29, 2012. The union filed the complaint on December 14, 2012. The union's complaint was timely for a skimming allegation. The case is

remanded to the Examiner to determine, on the existing record, whether the employer skimmed bargaining unit work.

ANALYSIS

Legal Standards

"[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." RCW 41.56.160(1). A cause of action accrues, and the statute of limitations begins to run, at the earliest point in time that the complaint concerning the alleged wrong could be filed. *Municipality of Metropolitan Seattle*, Decision 1356-A (PECB, 1982), *citing Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616 (1945). The start of the six month period, also called the triggering event, occurs when "a potential complainant has actual or constructive notice of the complained-of action." *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

A complaint alleging a unilateral change, such as a skimming violation, must establish both: (1) the existence of a relevant status quo; and (2) a change of employee wages, hours, or working conditions. *Seattle School District*, Decision 11161-A (PECB, 2013), *citing City of Kalama*, Decision 6773-A (PECB, 2000). If there is no change in the status quo, then there has not been skimming. *Seattle School District*, Decision 11161-A, *citing City of Anacortes*, Decision 6863-B (PECB, 2001); *Evergreen School District*, Decision 3954 (PECB, 1991); *City of Seattle*, Decision 2935 (PECB, 1988).

There must be an actual unilateral change for a cause of action for skimming to exist. *State – Office of the Governor*, Decision 10948-A (PSRA, 2011). Thus, in a skimming case, the statute of limitations begins to run when bargaining unit work is assigned outside of the bargaining unit.

Application of Standards

The complaint and preliminary ruling.

On December 14, 2012, the union filed an unfair labor practice complaint. The complaint alleged that on June 6, 2012, the employer informed the union, that effective June 29, 2012, the Electronic Technician/Audio Visual (ET) classification would be eliminated. The ET position had been included in the bargaining unit. On June 20, 2012, the employer posted an opening for

a Technical Solution Analyst (TSA). The TSA was not included in the bargaining unit. The complaint alleged that since June 29, 2012, the employer has assigned ET work to the employees outside of the ET classification.

The union did not allege that it demanded to bargain the employer's decision to remove work from the bargaining unit or the effects of that decision.

The Unfair Labor Practice Manager issued a cause of action for skimming of bargaining unit work without providing an opportunity for bargaining.

Was the complaint timely?

Work must actually be removed from the bargaining unit in order for a skimming violation to occur. In *State – Office of the Governor*, the union filed an unfair labor practice complaint alleging that it had reason to believe the employer intended to skim bargaining unit work. In the complaint, the union alleged the employer skimmed bargaining unit work, but did not provide specific facts about non-bargaining unit employees performing bargaining unit work. The Commission dismissed the complaint as speculative and premature because the union's allegation relied upon a belief about the employer's intent and not specific details of skimming. A skimming violation cannot be found based upon a single party's belief; rather, there must be an actual unilateral change.

Thus, in order for a cause of action for skimming to accrue, the work must actually be removed from the bargaining unit. Until that point, a cause of action for skimming cannot exist. Consequently, if a cause of action for skimming cannot exist until work is assigned outside of the bargaining unit, then the statute of limitations in a skimming case cannot begin to run until the work is assigned to non-bargaining unit employees.

In this case, the union alleged the employer had assigned bargaining unit work to non-bargaining unit employees since June 29, 2012. The union filed its complaint on December 14, 2012. The union's complaint was timely for the skimming allegation because the employer did not assign bargaining unit work to non-bargaining unit employees until June 29, 2012. A review of the evidentiary record reveals that the employer eliminated the ET classification on June 29, 2012. Thus, the Examiner erred when she found the complaint to be untimely.

This decision should not be read as giving a party license to sit on their rights and not police their bargaining units. Upon notice that an employer intends to remove work from a bargaining unit, as occurred in this case, a union must demand to bargain to protect its rights. A failure to demand bargaining could result in a waiver by inaction of a union's bargaining rights. If an employer refuses to bargain the decision or effects with the union, the union must allege a refusal to bargain.

Because of the fact intensive nature of the necessary analysis, we remand the case to the Examiner. Nothing contained in this opinion is meant to presage or signal a desired outcome. Whether or not the union waived its right to bargain is a decision for the Examiner to determine on remand.

The case is remanded to the Examiner to determine, consistent with the preliminary ruling, whether the employer refused to bargain by skimming bargaining unit work. The Examiner is instructed to enter findings of fact and conclusions of law based on the existing evidentiary record.

NOW, THEREFORE, it is

ORDERED

The case is REMANDED to Examiner Page A. Garcia to enter findings of fact and conclusions of law on the existing record.

ISSUED at Olympia, Washington, this 18th day of June, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner