STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PATRICK MCMANUS, Complainant, vs. CITY OF KIRKLAND, Respondent.	CASE 127780-U-15 DECISION 12546 - PECB ORDER OF DISMISSAL
PATRICK MCMANUS, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2545, Respondent.	CASE 127787-U-15 DECISION 12547 - PECB ORDER OF DISMISSAL

On December 15, 2015, Patrick McManus (complainant) filed an unfair labor practice complaint against the City of Kirkland (employer), which was assigned case number 127780-U-15. On December 16, 2015, the complainant filed an identical complaint against the International Association of Fire Fighters, Local 2545 (union), which was assigned case number 127787-U-15. The Unfair Labor Practice Manager reviewed the complaints under WAC 391-45-110 to determine whether, assuming all the alleged facts were true and provable, the complaints stated claims for relief available through the Commission's unfair labor practice proceedings.

The complaints were determined to be deficient because they did not state claims for relief available through unfair labor practice proceedings before the Commission. A deficiency notice indicating the same was issued on December 30, 2015. The complainant was given a period of 21 days in which to file and serve amended complaints or face dismissal of the cases.

On January 13, 2016, the complainant filed supplemental documents amending his complaints. The Unfair Labor Practice Manager reviewed the amended complaints and dismisses the complaints and amended complaints as untimely and for failing to state a cause of action.

ISSUES

The allegations of the complaints and amended complaints concern:

1. Employer domination or assistance of a union in violation of RCW 41.56.140(2) [and if so, derivative interference in violation of RCW 41.56.140(1)] in 2012.

2. Employer interference with employee rights in violation of RCW 41.56.140(1) in 2012.

3. Union interference with employee rights in violation of RCW 41.56.150(1) by breach of its duty of fair representation in 2012.

4. Alleged violations of State Civil Service Law, specifically RCW 41.06.176.

5. Alleged violations of State Employee Whistleblower Protection laws, specifically RCW 42.40.035.

6. Civil rights violations.

The complaints and amended complaints are untimely filed and raise allegations that are not within the jurisdiction of the Commission.[1]

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[1] In the deficiency notice the complainant was also notified that the statements of facts attached to the original complaints did not comply with the requirements for filing a complaint charging unfair labor practices described in WAC 391-45-050. Complaints must contain numbered paragraphs in the attached statement of facts. In these cases a few of the paragraphs in the original statements of facts were numbered, but the majority of the paragraphs in the complaints were not. Numbering all paragraphs is important to allow the respondent to reference specific allegations within the complaints when filing an answer. Although this is not the reason for the dismissal, this deficiency was not corrected in the amended complaints.

BACKGROUND

The complainant works as a firefighter for the City of Kirkland. On February 16, 2011, the complainant was promoted to the position of Probationary Fire Lieutenant. The position had a one-year probationary period. On February 1, 2012, the employer notified the complainant of its decision to remove him from the lieutenant position and revert him to his previous position of Firefighter V. The employer explained it was demoting the complainant because he did not disclose to the employer that he had been convicted of a gross misdemeanor in King County Superior Court and was operating with EMT credentials that were in probationary status as a result of a stipulated agreement he had entered into with the Department of Health.

The complainant grieved his demotion in February 2012. The complainant alleges that the union refused to represent him and decided not to move his grievance to arbitration.

During the six months preceding the filing of these complaints, the complainant alleges he obtained documents from 2012 and learned of additional information regarding the circumstances surrounding his demotion. The complainant also alleges that in November 2015 he learned of actions the union took in 2015 to represent another employee. In that situation the union argued that a special directive made the employer's disciplinary decision inapplicable. The complainant argues that if the union had made the same arguments on his behalf back in 2012, he might have been successful in grieving his demotion. The complainant alleges that this newly obtained information serves as evidence of unfair labor practices committed by the union and employer with regard to his demotion.

ANALYSIS

Timeliness

Six-Month Statute of Limitations

There is a six-month statute of limitations for unfair labor practice complaints. "[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). The six-month statute of limitations period begins to run when the complainant knows or should know of the violation. *City of Bellevue*, Decision 9343-A (PECB, 2007), *citing City of Bremerton*, Decision 7739-A (PECB, 2003). 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).

An exception to the strict enforcement of the six-month statute of limitations may exist where the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Bremerton*, Decision 7739-A, *citing City of Seattle*, Decision 5930 (PECB, 1997); *City of Pasco,* Decision 4197-A (PECB, 1994) (employer's direct dealing with bargaining unit employee and existence of separate agreement on reimbursement of training expenses were concealed from union). However, the Commission has also ruled that the statute of limitations period begins to run when an adverse employment action is communicated to employees and where the employer does not attempt to conceal its actions, even if the exclusive bargaining representative did not have actual notice of the alleged violation. *City of Chehalis,* Decision 5040 (PECB, 1995).

Complaints Are Untimely Filed

To determine timeliness, the Commission looks at the dates of events in the complaint in relation to the filing date. The complaints were filed on December 15, 2015 (against the employer) and December 16, 2015 (against the union). In order to be timely, the complainant needs to describe events that took place on or after June 15, 2015 (against the employer) and on or after June 16, 2015 (against the union).

According to the complaints, the complainant's demotion occurred in 2012. Documents submitted by the complainant show that he had actual and constructive notice he was being demoted from a probationary lieutenant position on February 1, 2012. In 2012 the complainant was also put on notice that his union would not be taking his demotion grievance to arbitration.

The complainant explains that he knows the original event happened on February 1, 2012, but did not know the rules to represent himself and did not learn of the Public Employment Relations Commission and its services until recently. RCW 41.56.160(1) does not allow for the statute of limitations period to be extended because an individual or organization did not know about their statutory rights.

The allegations concerning the complainant's demotion and related grievance occurred more than six months before these complaints were filed with the Commission. The allegations involving the employer's 2012 decision to demote the complainant during his probationary period and the union's 2012 decision not to grieve the demotion were not timely filed.

Facts Do Not Describe Concealment

The amended complaints consist mainly of legal argument, not additional facts. The complainant argues that the employer and union concealed their unfair labor practices. While the complainant alleges that he first learned of the potential unfair labor practices in October 2015, there are no allegations of concealment of documents that would have been a matter of public record. Although the complainant repeatedly uses the term concealment, the statements of facts do not describe concealment which would have prevented the complainant from discovering the documents within the six-month statute of limitations period, by exercise of due diligence.

It does not appear that the union or employer prevented the complainant from obtaining the 2012 e-mails, phone records, or other correspondence he requested within his six-month statute of limitations period. The test for applying the statute of limitations is based on when the complainant knew or reasonably should have known of the disputed action. Even if the amended complaints otherwise stated a cause of action, dismissal is appropriate because they lack sufficient factual allegations to support an exception to the statute of limitations.

The fact that the complainant recently made records requests and obtained documents regarding events that occurred in 2012 does not extend the six-month statute of limitations period.

Subsequent Events Do Not Change Statute of Limitations for Past Unfair Labor Practices

The amended complaints allege that the statute of limitations period should be calculated using November 8, 2015—the date on which the complainant found a document called Special Directive 10.8008, Department Guiding Principles—as the triggering date. The directive is alleged to show the fire department rules and regulations not being in effect since June 17, 1998. The complainant argues that if he had known about the existence of this directive back in 2012, he could have used it to fight his demotion, which was based on allegations that he had violated fire department rules and regulations and city rules. The complainant further argues that the fact the union did not use Special Directive 10.8008 to challenge his demotion is evidence that the union failed to represent him. The complainant argues the union did not fulfill its duty of fair representation because it did a better job of representing another employee's grievance in 2015 than it did in representing his 2012 grievance. This is an entirely retrospective duty of fair representation argument.

Learning of new information in 2015, which in hindsight could have been helpful in arguing a 2012 grievance case, does not extend the six-month statute of limitations period for filing a complaint charging unfair labor practices.

Commission Has Limited Jurisdiction

Duty of Fair Representation

It is an unfair labor practice for a union to interfere with, restrain, or coerce public employees in the exercise of their rights. RCW 41.56.150(1). The duty of fair representation originated with decisions of the Supreme Court of the United States holding that an exclusive bargaining representative has the duty to fairly represent all of those for whom it acts, without discrimination. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). The duty of fair representation arises from the rights and privileges held by a union when it is certified or recognized as the exclusive bargaining representative under a collective bargaining statute. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002), *citing City of Seattle (International Federation of Professional and Technical Engineers, Local 17),* Decision 3199-B (PECB, 1991).

The Commission is vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute and does not assert jurisdiction over breach of duty of fair representation claims arising exclusively out of the processing of contractual grievances. *Bremerton School District*, Decision 5722-A (PECB, 1997).

The complaints and amended complaints raise issues with the union's decision not to pursue and ultimately arbitrate a grievance over the complainant's 2012 demotion. Such issues do not make types of duty of fair representation allegations that can be remedied by the Commission. While an exclusive bargaining representative has the obligation to provide fair representation, the courts have recognized a range of flexibility in the standard to allow for union discretion in settling disputes. *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 375 (1983). There is no statutory requirement that a union must accomplish the goals of each bargaining unit member, and complete satisfaction of all represented employees is not expected. A union member's dissatisfaction with the level and skill of representation does not form the basis for a cause of action, unless the member can prove the union violated rights guaranteed in statutes administered by the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004).

The union's decision not to move the complainant's grievance to arbitration is not within the Commission's jurisdiction. Allegations about the processing or settling of grievances must be pursued through the courts. *Seattle School District*, Decision 9359-A (EDUC, 2007).

No Jurisdiction Over Chapter 41.06 RCW, State Civil Service Law

The complaints and amended complaints allege violations of State Civil Service Law, specifically RCW 41.06.176. The Public Employment Relations Commission does not have the authority to address alleged violations of State Civil Service Law. The Washington State Personnel Resources Board is the agency with jurisdiction to enforce Chapter 41.06 RCW. However, Chapter 41.06 RCW does not apply to city employees. It only applies to state employees and certain employees of state higher education institutions and community colleges. RCW 41.06.010, .020, and .040.

No Jurisdiction Over Chapter 42.40 RCW, State Employee Whistleblower Protection

The complaints and amended complaints also allege violations of State Employee Whistleblower Protection laws, specifically RCW 42.40.035. The Public Employment Relations Commission does not have the authority to address alleged violations of State Employee Whistleblower Protection laws. The Washington State Auditor's Office enforces the whistleblower aspects of Chapter 42.40 RCW. These laws apply to state government and state employees only. RCW 42.40.010 and .020. The Washington State Human Rights Commission also has jurisdiction over whistleblower workplace reprisal or retaliatory action.

No Jurisdiction Over Civil Rights Violations

The complaints and amended complaints also make references to violations of the complainant's civil rights. The Public Employment Relations Commission does not have jurisdiction to enforce civil rights laws. The Washington State Human Rights Commission has jurisdiction over employment discrimination in the state of Washington. The Equal Employment Opportunity Commission is a federal agency that also has jurisdiction over discrimination. Lastly, civil rights cases can be pursued in the courts.

CONCLUSION

The events concerning the complainant's demotion and related grievance took place in 2011 and 2012. The six-month statute of limitations in Chapter 41.56 RCW precludes the processing of these unfair labor practice complaints and amended complaints because they were not timely filed. The fact that the complainant recently made records requests and obtained documents regarding events that occurred in 2012 does not extend the six-month statute of limitations period. Similarly, learning of new information in 2015, which in hindsight could have been helpful in arguing a 2012 grievance case, does not extend the six-month statute of limitations period for filing a complaint charging unfair labor practices.

The other allegations of the complaints and amended complaints concerning State Civil Service Law, State Employee Whistleblower Protection, and civil rights violations are outside of the jurisdiction of the Commission.

ORDER

The complaints and amended complaints charging unfair labor practices in the above-captioned matters are DISMISSED for untimeliness and for failure to state a cause of action.

ISSUED at Olympia, Washington, this 11th day of February, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JESSICA J. BRADLEY, Unfair Labor Practice Manager

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.

COLLECTIVE BARGAINING
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RECORD OF SERVICE - ISSUED 02/11/2016

DECISION 12546 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 127780-U-15

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COLLECTIVE BARGAINING
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RECORD OF SERVICE - ISSUED 02/11/2016

DECISION 12547 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 127787-U-15

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