

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF VANCOUVER,	)	
	)	
Employer.	)	
-----	)	
NAVIN K. SHARMA,	)	
	)	
Complainant,	)	CASE 14615-U-99-3658
	)	
vs.	)	DECISION 6933 - PECB
	)	
VANCOUVER POLICE OFFICERS' GUILD,	)	PARTIAL DISMISSAL
	)	AND PRELIMINARY
Respondent.	)	RULING
	)	
-----	)	
NAVIN K. SHARMA,	)	
	)	
Complainant,	)	CASE 14869-U-99-3744
	)	
vs.	)	DECISION 6934 - PECB
	)	
CITY OF VANCOUVER,	)	PARTIAL DISMISSAL
	)	AND PRELIMINARY
Respondent.	)	RULING
	)	
-----	)	

On June 1, 1999, Navin K. Sharma filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Vancouver Police Officers' Guild (union) as respondent. Sharma is identified as an employee of the City of Vancouver (employer), working in a bargaining unit for which the union is the exclusive bargaining representative. He alleged that the union had interfered with his rights, in violation of RCW 41.56.150(1), in reprisal for his participation in an internal affairs investigation.

The complaint was reviewed by the Executive Director under WAC 391-45-110.<sup>1</sup> A deficiency notice issued on July 19, 1999, indicated it was not possible to conclude that a cause of action existed at that time. Sharma was given 14 days in which to file and serve an amended complaint or face dismissal of the case. After several continuances granted with the consent of the union, Sharma filed an amended complaint on October 11, 1999. The amended complaint named both the union and the employer as respondents.

Under long-established procedures, the Commission docketed two separate cases where an employee files unfair labor practice charges against both their employer and union. Accordingly, Case 14869-99-U-3744 was docketed for the allegations against the employer contained in the amended complaint.

A second deficiency notice was issued on November 3, 1999, based upon the October amendment. Sharma was again given 14 days in which to file and serve an amended complaint or face dismissal of deficient allegations. On November 16, 1999, Sharma filed his November amendment, which amounts to a second amended complaint against the union in Case 14615-U-99-3658, and an amended complaint against the employer in Case 14869-99-U-3744.

#### DISCUSSION

Some of the allegations still fail to state a cause of action, and are dismissed. Other allegations state a cause of action, and are

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<sup>1</sup> At this stage of proceedings, all of the facts alleged in the complaint were assumed to be true and provable. The question at hand was whether, as a matter of law, the complaint stated a claim for relief available through unfair labor practice proceedings before the Commission.

being assigned to an Examiner for further proceedings under Chapter 391-45 WAC.<sup>2</sup>

### Untimely Allegations

RCW 41.56.160 imposes a six-month limitation on the filing of unfair labor practice complaints, and untimely allegations are routinely dismissed under WAC 391-45-110. The original complaint was insufficiently detailed to form any opinion on its timeliness.

The November deficiency notice pointed out various allegations of the October amendment that appeared to be untimely. In particular:

- Paragraph 5 alleges the employer commenced an internal investigation in July of 1998, concerning allegations of homophobic activity at a domestic violence training session held on June 5, 1998, and that bargaining unit employees John Chapman and Scott Creager were alleged to have left behind a homophobic cartoon and to have been involved in other unprofessional behavior, along with other employees. This can only be taken as background material.
- Paragraph 6 alleges Sharma was interviewed as part of the internal investigation, while Paragraph 7 alleges the allega-

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<sup>2</sup> In making this preliminary ruling, the Executive Director is aware that a hearing has already been held on, and the Commission has already ruled on, allegations that the employer committed unfair labor practices by its interrogation of bargaining unit employees about what occurred at certain union meetings. See, City of Vancouver, Decision 6732-A (PECB, 1999). While that case is now on appeal in the courts, each complaint filed with the Commission must be processed on its own merits. Thus, the processing of the above-captioned case is not dependent upon or controlled by the related case. A different Examiner is assigned to these cases.

tions against Chapman and Creager were sustained. This appears to have occurred between July and September of 1998, and can only be taken as background material.

- ▶ Paragraph 8 contains multiple sub-paragraphs describing alleged instances of harassment and differential treatment against Sharma. Most of those occurred prior to December 1, 1998, which is the earliest date for which any complaint in this case can be considered timely as against the union.
  - ▶ Subparagraph (a) concerns a failure or refusal to respond to a request for comments on a draft Sharma had prepared, but those responses were requested in advance of a command staff meeting scheduled for September 30, 1998.
  - ▶ Subparagraph (b) concerns a "cold shoulder" treatment Sharma experienced "beginning shortly after the" internal investigation interview. As indicated in the July deficiency notice, this is too vague to form a basis for further proceedings under Chapter 391-45 WAC.
  - ▶ Subparagraph (c) concerns a briefing held on November 11, 1998.
  - ▶ Subparagraph (d) concerns the failure of unspecified persons to post a printed label in the stall used by Sharma for his SWAT equipment. This was noticed by Sharma in "early November 1998".
  - ▶ Subparagraph (e) concerns denial of Sharma's requests for participation in training sessions, but the specific examples given concern a class held on November 20, 1998.
  - ▶ Subparagraph (f) concerns another refusal of a training request. This is alleged to have occurred on November 14, 1998.

Sharma's November amendment did not respond to the characterization of these materials as untimely. All of these materials can only be taken as background to any timely allegations which do state a cause of action.

The November deficiency notice also pointed out that many of the allegations in the October amendment do not relate back to the original complaint. The purpose of a complaint charging unfair labor practices is to put both the Commission and the respondent(s) on notice of the charges being advanced by a complainant. In this case, the original complaint contained only exceedingly vague references, as follows:

2. On December 10, 1998, Mr. Sharma learned that **he had been discussed** at a Vancouver Police Officers Guild board meeting and subsequent general membership meeting during which **he was described as "not a friend of the Guild", and needing to be "taught a lesson"**.
3. Subsequently, Mr. **Sharma experienced acts of harassment, including the posting of [the internal investigation] interview transcript, posting of information about him, cold shoulder/silent treatment, lack of cooperation ...**

[Emphasis by **bold** supplied.]<sup>3</sup>

Unless allegations against the union in the October amendment relate back to those terms, they could be considered timely only if they occurred on or after April 11, 1999. Inasmuch as the employer was not named as a respondent until October 11, 1999, allegations

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<sup>3</sup> The deficiency notice characterized the additional words "other actions" as being so vague as to be insufficient under any circumstances.

against the employer can be considered timely only if the acts or events occurred on or after April 11, 1999. In that light:

- Paragraph 8(h) of the October amendment alleges that Sharma discovered a break-in of his SWAT locker on December 8, 1998, and that Sharma found it necessary to purchase a replacement uniform out of personal funds. This new material did not relate back to the original complaint, and so is untimely.
- Paragraph 8(k) describes a conversation between Sharma and his immediate supervisor shortly after December 10, 1998. To the extent Sharma seeks a remedy against the employer for the advice given to him by his supervisor prior to April 11, 1999, the complaint is untimely.
- Paragraph 8(l) alleges that a sergeant went through Sharma's personnel file, and told another sergeant of concerns about the way Sharma did his work. To the extent Sharma seeks a remedy against the employer for misconduct by an employer agent, this fails to state a claim for relief in the absence of allegation that it occurred on or after April 11, 1999.
- Paragraph 8(m) alleges that Sharma knew, by January of 1999, that Chief Maas had learned about events at a union meeting soon after November 30, 1998, and that the chief met with Creager and Chapman, but made no effort to contact Sharma about the matter. The complaint is untimely as to misconduct by an employer agent prior to April 11, 1999.
- Paragraph 9(e) expands upon paragraph 8(m), describing a meeting between Sharma and employer officials upon Sharma's return to work in January of 1999. The complaint is untimely as to misconduct by an employer agent prior to April 11, 1999.

- Paragraph 9(f) concerns irregularities in the handling of Sharma's personnel file in January of 1999. The complaint is untimely as to misconduct by an employer agent prior to April 11, 1999.
- Paragraph 9(h) concerns reactions to a union letter dated March 2, 1999, including that Sharma was removed from his patrol assignment and reassigned to desk duty. The complaint is untimely as to misconduct by an employer agent prior to April 11, 1999.
- Paragraph 9(i) concerns a failure of the chief to award a commendation to Sharma on an unspecified date. The complaint is untimely as to misconduct by an employer agent prior to April 11, 1999.
- Paragraph 9(j) concerns the employer's promotion of a union officer at a time unspecified other than as, "during the time when Officer Sharma was receiving such negative treatment". To the extent Sharma seeks a remedy against the employer for misconduct by an employer agent, this fails to state a claim for relief in the absence of allegation that it occurred on or after April 11, 1999.
- Paragraph 9(l) alleges that others associated with Officer Sharma began to experience sarcasm and cold shoulder treatment at an unspecified time. To the extent Sharma seeks a remedy against the employer for misconduct by one or more employer agents, this fails to state a claim for relief in the absence of allegation that the alleged misconduct occurred on or after April 11, 1999.

These allegations are being dismissed.

Breach of Duty of Fair Representation by Union

A labor organization which has been certified or recognized as "exclusive bargaining representative" of a bargaining unit enjoys a privileged status and an exclusive ability to invoke the duty to bargain conferred upon the employer, but it also has a duty to provide fair representation to all of the employees in the bargaining unit. While there is no specific duty of fair representation in either the Railway Labor Act, the National Labor Relations Act (NLRA), or Chapter 41.56 RCW, decisions of the Supreme Court of the United States elevate the duty of fair representation to a matter with constitutional implications. In Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944), the Supreme Court reasoned that a "commensurate statutory duty toward its members" arises from the power vested in a union by status as exclusive bargaining representative.<sup>4</sup>

In Miranda Fuel Co., 140 NLRB 181 (1962), the National Labor Relations Board held that a breach of a union's duty to properly represent bargaining unit employees amounts to an "interference" violation under the NLRA counterpart to RCW 41.56.150(1), thus bringing the duty of fair representation within the jurisdiction of agencies charged with administration of collective bargaining statutes patterned after the NLRA. Thus, the statute prohibits a union "when acting in a statutory representative capacity, from taking any action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."

While the Public Employment Relations Commission does not assert jurisdiction over "breach of duty of fair representation" claims

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<sup>4</sup> In Steele, black employees sued to invalidate a seniority system which discriminated on the basis of race.



arising exclusively out of the processing of contractual grievances,<sup>5</sup> the Commission has asserted jurisdiction, and has found violations, where unions are accused of aligning themselves in interest against employees in the bargaining units they represent.

[T]he Commission will police its certifications, and will assert jurisdiction over "duty of fair representation" claims which call a union's status as exclusive bargaining representative into question. See, Tacoma School District (Tacoma Education Association), Decision 5465-E (EDUC, 1997); Pe Ell School District, Decision 3801-A (EDUC, 1992); Pateros School District (Pateros Education Association), Decisions 3744 ... (EDUC, 1991); King County, Decision 5889 (PECB, 1997).

City of Port Townsend, Decision 6433-A (PECB, 1999), citing Castle Rock School District, Decision 4722-B (EDUC, 1995).

See, also, METRO, Decision 1695 (PECB 1983) and Elma School District, Decision 1349 (EDUC, 1982).

Sharma is identified as having been born in India, and as the only City of Vancouver police officer who is of that national origin. Against that background:

- Paragraph 8(j) of the October amendment alleges that Sharma first learned on December 10, 1998,<sup>6</sup> of actions and comments

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<sup>5</sup> See, Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982).

<sup>6</sup> Giving Sharma the benefit of the doubt, and in view of specific allegations that "Discussions regarding Officer Sharma are not documented in the minutes of either meeting", he will be given an opportunity to prove that his complaint filed June 1, 1999, is timely as to actions that occurred on November 30, 1998, because of their concealment from him until a later date.

made by union board members at a union meeting held on November 30, 1998, including:

- ▶ Sharma's testimony in the earlier internal investigation was discussed at the union general membership meeting and at a union executive board meeting, where Creager and union officer Chapman pushed to make only Sharma's portion of the testimony public, and union officer Howard Anderson supported the harassment of Sharma.
  - ▶ Creager, Chapman, and an employee named Luse wanted to "teach Officer Sharma a lesson" and "send a message" to other officers about "saying too much" in an internal investigation.
  - ▶ Luse and Anderson advanced the idea of boycotting a fundraiser Sharma had promoted.
  - ▶ Sharma was specifically labeled as not being a "friend of" the union.
  - ▶ Sharma was labeled as a "snitch".
  - ▶ Sharma's general integrity was discredited.
  - ▶ The union leadership advised a sergeant to either get on board with union actions toward Sharma or jump ship.<sup>7</sup>
- Paragraph 8(g) alleges that Creager gave "short and sarcastic" answers to Sharma in a work-related discussion they had on December 7, 1998.

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<sup>7</sup> This allegation appears to be duplicated in paragraph 9(c) of the October amendment.

- Paragraph 8(h) alleges that Creager gave "short, sarcastic and abrupt" responses when approached by Sharma on December 8, 1998, and in follow-up discussions about the disappearance of items from Sharma's SWAT locker.
- Paragraph 8(i) alleges that Creager and Chapman refused to respond to Sharma's work-related training plans, resulting in cancellation of the training program.
- Paragraph 8(l) alleges that Luse went through Sharma's personnel file despite not being one of Sharma's immediate supervisors, and took steps to discredit Sharma with another sergeant.
- Paragraph 9(a) concerns a conversation in December of 1998, when a union officer named Reynolds told Sharma that he and other sergeants felt Sharma was involved in too many projects outside of regular patrol duties.
- Paragraph 9(b) alleges that Chapman minimized or rejected Sharma's complaints of harassment during a meeting on December 13, 1998.
- Paragraph 9(d) alleges that Sharma experienced "a cold shoulder" from many union members, causing him stress and a loss of work time.
- Paragraph 9(g) of the October amendment had alleged that Sharma was off work in February and March of 1999, but did not attribute that absence to any union misconduct. The November amendment adds that Sharma's absence was due to stress arising from the internal affairs incident.

- Paragraph 9(h) alleges that Sharma suffered a deteriorating work atmosphere after March 19, 1999, when he became aware of a letter posted on the union bulletin board in which Sharma was improperly and inaccurately singled out as responsible for a previous unfair labor practice complaint filed by the union against the employer, and that the letter eventually led to Sharma's removal from patrol duty.
- Paragraph 9(m) alleges that Sharma learned, on May 5, 1999, that Creager and Chapman had complained that Sharma was showing up late or missing monthly SWAT training missions without explanation, when Sharma had actually been on prearranged and approved vacation or assignments, or had earlier received permission from Creager or Chapman for the absence.
- Paragraph 9(o) alleges that Creager advised Sharma, on May 14, 1999, that other SWAT members were upset with Sharma, but Creager would not explain why despite a request from Sharma.
- Paragraph 9(p) alleges that Creager and Chapman attempted to change the physical standards for SWAT-TEMS personnel during the summer of 1999, in contravention of work product assembled by Sharma.
- Paragraph 9(q) of the October amendment had alleged that a sergeant not identified as aligned with the union had a conversation in connection with an evaluation of Sharma in June of 1999, and that there had been some mishandling of documentation concerning Sharma's traffic citations and a meritorious service award. The November deficiency notice indicated this could not be attributed to the union without some greater ties than were present. The November amendment

alleges that the individuals suspected of the unauthorized file removals were sergeants with close ties to the union, in addition to being Sharma's supervisors.

- Paragraph 9(r) alleges that Creager bears at least partial responsibility for a July 7, 1999 accusation that was critical of Sharma, because Creager failed to disclose or pass along that Sharma was properly excused from the activity and the scheduled participant was re-assigned to another activity.
- Paragraph 9(s) alleges that at least Creager and Chapman failed or refused to respond to a July 20, 1999 e-mail message from Sharma, requesting information about a July 21, 1999 training session.
- Paragraph 9(u) alleges that the secretary-treasurer of the union sent an e-mail message to the employer in October of 1999, objecting to Sharma's involvement in a program where Sharma had arranged for a presentation by a "noted speaker".

The foregoing allegations against the union are summarized as alleging:

Union interference with employee rights and breach of its duty of fair representation, in violation of RCW 41.56.150(1), and union seeking to induce the employer to commit unfair labor practices, in violation of RCW 41.56.150(2), by harassment of and discrimination against bargaining unit employee Navin Sharma, and by seeking to have the employer take actions against Sharma.

Assuming all of the facts alleged to be true and provable, these allegations state a cause of action.

Sufficiency of Remaining Allegations

The November deficiency notice indicated that several allegations in the October amendment were insufficient. The November amendment addressed some of these concerns.

Paragraph 9(k) of the October amendment concerned the employer's acceptance of a union officer as having passed probation at a time unspecified other than as, "during the time when Officer Sharma was receiving such negative treatment". The November amendment clarifies that this incident occurred on April 13, 1999. This is now summarized as follows:

Employer interference with employee rights, in violation of RCW 41.56.140(1) and/or unlawful assistance to the union in violation of RCW 41.56.140(2), by employment action favorable to a union official known to be engaged in the unlawful harassment of Officer Sharma.

Assuming all of the facts alleged to be true and provable, this allegation now states a cause of action.

Paragraph 9(n) of the October amendment alleged that Sharma was concerned upon learning that the chief had requested copies of all internal affairs investigation transcripts from another internal affairs investigation. The November deficiency notice indicated that, while this occurred within the period for which the complaint is timely against the employer, it did not provide any basis to infer a causal connection between Sharma's protected activities and the employer action. The November amendment clarifies that the employer's action was outside of the normal process and was different from how previous internal affairs had been investigated. This is now summarized as:

Employer interference with employee rights, in violation of RCW 41.56.140(1), by appearing to place Officer Sharma under investigative scrutiny when he was known to be victim of unlawful harassment by the union and its adherents.

Assuming all of the facts alleged to be true and provable, this allegation states a cause of action.

Paragraph 9(s) of the October amendment alleged that an employee who was not otherwise identified as aligned with the union's action against Sharma embarrassed Sharma by demanding to know, while Sharma was engaged in a conversation with a cadet, why Sharma was late for a training session. The November deficiency notice indicated this could not be attributed to the union without some greater ties than were present in the October amendment. The November amendment alleges that this situation illustrates how the union's cold shoulder treatment can damage an employee's performance. Assuming all of the facts alleged to be true and provable, this allegation states a cause of action as an additional incident under the "breach of duty of fair representation" allegations summarized above.

Paragraph 9(t) of the October amendment alleged that a private attorney hired by the employer as an independent investigator to follow up on the internal affairs investigation "doodled" when Sharma was making a response, was vocally dismissive of Sharma's concerns, and otherwise expressed a lack of interest in Sharma's situation. The November deficiency notice indicated that, while this appeared to have occurred within the period for which the complaint is timely against the employer, it did not provide any basis to infer a causal connection between Sharma's protected activities and the employer action. The November amendment alleges

that this incident exemplifies the employer's effort to deter and discourage Sharma from pursuing his rights. This is summarized as:

Employer interference with employee rights, in violation of RCW 41.56.140(1), by discouraging Officer Sharma from pursuit of his rights under Chapter 41.56 RCW.

Assuming all of the facts alleged to be true and provable, this allegation states a cause of action.

Paragraph 11 of the October amendment alleged that the earlier actions of Chief Maas encouraged and emboldened the union leadership in its actions against Sharma, but no employer actions were identified within the period for which the complaint against the employer is timely. The November amendment does not reference any specific employer actions, thus this paragraph is insufficient to state a cause of action.

NOW, THEREFORE, it is

ORDERED

1. The following allegations are DISMISSED as failing to state a cause of action: Paragraphs 5, 6, 7, 8(a), 8(b), 8(c), 8(d), 8(e), 8(f), 8(h) concerning a break-in of Sharma's SWAT locker, 8(k), 8(l) concerning misconduct by an employer agent, 8(m), 9(e), 9(f), 9(h) concerning misconduct by an employer agent, 9(i), 9(j), 9(k), 9(l), and 11.
2. The remaining allegations of the complaints in the above-captioned cases shall be the subject of further proceedings under Chapter 391-45 WAC. Specifically: Paragraphs 8(g), 8(h)



concerning responses by Creager, 8(i), 8(j), 8(l) concerning Luse going through Sharma's personnel file, 9(a), 9(b), 9(c), 9(d), 9(g), 9(h) concerning posting of a union letter, 9(m), 9(n), 9(o), 9(p), 9(q), 9(r), 9(s), 9(t), 9(u), as summarized above.

3. The Vancouver Police Officers' Guild and the City of Vancouver shall each:

File and serve an answer to the allegations against them listed in paragraph 2 of this Order, within 21 days following the date of this Order.

An answer filed by a respondent shall:

- a. Specifically admit, deny or explain each of the facts alleged in the complaint, except if the respondent is without knowledge of the facts, it shall so state, and that statement will operate as a denial; and
- b. Assert any affirmative defenses that are claimed to exist in the matter.

The original answer and one copy shall be filed with the Commission at its Olympia office. A copy of the answer shall be served, on the same date, on the attorney or principal representative of the person or organization that filed the complaint. Except for good cause shown, a failure to file an answer within the time specified, or the failure of an answer to specifically deny or explain a fact alleged in the complaint, will be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of a hearing as to the facts so admitted. See, WAC 391-45-210.

4. Walter M. Stuteville of the Commission staff is designated as Examiner, to conduct further proceedings under Chapter 391-45 WAC and this Order.

Issued at Olympia, Washington, on the 14<sup>th</sup> day of January, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

Paragraph 1 of this order will be the final order of the agency on any defective allegations, unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

603 EVERGREEN PLAZA BUILDING  
P. O. BOX 40919  
OLYMPIA, WA 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON  
SAM KINVILLE, COMMISSIONER  
JOSEPH W. DUFFY, COMMISSIONER  
MARVIN L. SCHURKE, EXECUTIVE DIRECTOR

RECORD OF SERVICE

THE ATTACHED DOCUMENT, IDENTIFIED AS: DECISION 6934 - PECB HAS BEEN SERVED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION BY DEPOSIT IN THE UNITED STATES MAIL, ON THE DATE ISSUED INDICATED BELOW, POSTAGE PREPAID, ADDRESSED TO THE PARTIES AND THEIR REPRESENTATIVES LISTED IN THE DOCKET RECORDS OF THE COMMISSION AS INDICATED BELOW:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /s/ *Betty Passmore*  
BETTY PASSMORE

CASE NUMBER: 14869-U-99-03744 FILED: 11/02/1999 ISSUED: 01/14/2000  
FILED BY: PARTY 2 DISPUTE: ER MULTIPLE ULP DETAILS: Er interference and domination

COMMENTS:

Employer: CITY OF VANCOUVER  
Attn: ROYCE E POLLARD, MAYOR  
PO BOX 1995

VANCOUVER, WA 98668-1995  
206-696-8200

Rep by:

Party # 2 NAVIN K SHARMA  
Attn: VANCOUVER POLICE DEPT  
703 BROADWAY, STE 500

VANCOUVER, WA 98660-3306  
360-694-8318

Rep by:

Party # 3 VANCOUVER POLICE OFFICERS GLD  
Attn: HOWARD ANDERSON  
PO BOX 1201

VANCOUVER, WA 98660-1201  
360-696-8292

Rep by: