

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SCOTT LEMKE,	)	
	)	
Complainant,	)	CASE 19825-U-05-5029
	)	
vs.	)	DECISION 9216 - PECB
	)	
IAM & AW, LOCAL 289,	)	
	)	
Respondent.	)	ORDER OF DISMISSAL
	)	
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SCOTT LEMKE,	)	
	)	
Complainant,	)	CASE 19826-U-05-5030
	)	
vs.	)	DECISION 9217 - PECB
	)	
PORT OF SEATTLE,	)	
	)	
Respondent.	)	ORDER OF DISMISSAL
	)	
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On October 3, 2005, Scott Lemke (Lemke) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, concerning allegations against the Port of Seattle (employer) and IAM & AW, Local 289 (union). The Commission docketed the complaint as two case numbers. Case 19825-U-05-5029 concerns allegations of the complaint against the union, while Case 19826-U-05-5030 involves allegations of the complaint against the employer. The complaints were reviewed under WAC 391-45-110,<sup>1</sup> and a deficiency notice issued on November 3,

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<sup>1</sup> At this stage of the proceedings, all of the facts alleged in the complaints are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaints state a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

2005, indicated that it was not possible to conclude that a cause of action existed at that time. Lemke was given a period of 21 days in which to file and serve amended complaints, or face dismissal of the cases.

No further information has been filed by Lemke. The Unfair Labor Practice Manager dismisses the complaints for failure to state a cause of action.

### DISCUSSION

#### Complaint against Union

The allegations of the complaint in Case 19825-U-05-5029 concern union interference with employee rights in violation of RCW 41.56.150(1) and an "other unfair labor practice", by unspecified conduct related to Scott Lemke.

The complaint was filed with Commission Form U-1, Complaint Charging Unfair Labor Practices. A National Labor Relations Board (NLRB) form titled "Charge Against Labor Organization or its Agents" was attached to the complaint. Under "Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)" on the NLRB form, Lemke stated: "Failure to Represent."

The deficiency notice pointed out several defects with the complaint. One, unlike the NLRB, the Commission does not investigate facts which are alleged in a complaint to determine if any collective bargaining statute has been violated. The complainant is responsible for presentation of evidence supporting its complaint at a hearing before an examiner in accord with WAC 391-45-270.

Two, the Commission has adopted the following rule concerning the filing of an unfair labor practice complaint:

WAC 391-45-050 CONTENTS OF COMPLAINT. Each complaint charging unfair labor practices shall contain, in separate numbered paragraphs:

(2) Clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.

(3) A statement of the remedy sought by the complainant.

The complaint does not conform to the requirements of WAC 391-45-050.

Three, the Commission is bound by the following provisions of Chapter 41.56 RCW:

RCW 41.56.160 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS AND CEASE AND DESIST ORDERS. (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That 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.

An attachment to the complaint indicates that Lemke's last work day with the employer was July 21, 2003. The complaint fails to meet the requirements of RCW 41.56.160. In order for the complaint to be timely under RCW 41.56.160, the complaint must contain allegations of union misconduct occurring on or after April 3, 2005.

Four, in relation to the allegations of an "other unfair labor practice," the complaint fails to explain and specify what "other" rule or statute has been violated by the union's actions.

Five, if bargaining unit employees bring issues or concerns to the attention of a union, the union has an obligation to fairly investigate such concerns to determine whether the union believes that the parties' collective bargaining agreement has been violated. This obligation on the union is known as the duty of fair representation. If the union determines that the concerns have merit, the union has the right to file a grievance under the parties' contractual grievance procedure. If the union determines that the concerns lack merit, the union has no obligation to file a grievance. While a union owes a duty of fair representation to bargaining unit employees, the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances. *Mukilteo School District (Public School Employees of Washington)*, Decision 1381 (PECB, 1982). Such claims must be pursued before a court which can assert jurisdiction to determine (and remedy, if appropriate) any underlying contract violation.

#### Complaint against Employer

The allegations of the complaint in Case 19826-U-05-5030 concern employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), discrimination for filing an unfair labor practice charge in violation of RCW 41.56.140(3) and an "other unfair labor practice," by unspecified conduct related to Scott Lemke, in reprisal for union activities protected by Chapter 41.56 RCW.

The complaint was filed with Commission Form U-1. A NLRB form titled "Charge Against Employer" was attached to the complaint. Under "Basis of the Charge" on the NLRB form, Lemke stated:

1. Retaliation
2. Harassment

3. Intimidation
4. Discrimination
5. Being Subject to A Hostile Work Environment

The deficiency notice pointed out several defects with the complaint. One, as for the complaint against the union, the Commission does not investigate facts which are alleged in a complaint to determine if any collective bargaining statute has been violated.

Two, as for the complaint against the union, the complaint does not conform to the requirements of WAC 391-45-050.

Three, as for the complaint against the union, the complaint fails to meet the requirements of RCW 41.56.160. In order for the complaint to be timely under RCW 41.56.160, the complaint must contain allegations of employer misconduct occurring on or after April 3, 2005.

Four, as for the complaint against the union, in relation to the allegations of an "other unfair labor practice," the complaint fails to explain and specify what "other" rule or statute has been violated by the employer's actions.

Five, in relation to the allegations of discrimination under RCW 41.56.140(1), the complaint fails to allege facts indicating that the employer took actions in reprisal for union activities protected under Chapter 41.56 RCW.

Six, in relation to the allegations of violation of RCW 41.56.140(3), a violation concerning discrimination for filing unfair labor practice charges cannot stand absent evidence that Lemke has previously filed an unfair labor practice complaint with

the Commission. The complaint does not contain any such factual allegations.

NOW, THEREFORE, it is

ORDERED

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

ISSUED at Olympia, Washington, this 23<sup>rd</sup> day of January, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARK S. DOWNING, 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.