STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID LAZAR,	)	
	)	
Complainant,	)	CASE 20403-U-06-5197
	)	
vs.	)	DECISION 9422 - PSRA
	)	
WASHINGTON STATE - REVENUE,	)	PRELIMINARY RULING
	)	AND ORDER OF PARTIAL
Respondent.	)	DISMISSAL
	)	
	)	

On May 19, 2006, David Lazar (Lazar) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Washington State Department of Revenue (employer) as respondent. The complaint was docketed by the Commission as Case 20403-U-06-5197. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on June 28, 2006, indicated that it was not possible to conclude that a cause of action existed at that time for some of the allegations of the complaint. Lazar was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the defective allegations. A continuance was granted under WAC 391-08-180, providing additional time for Lazar to file an amended complaint.

On August 14, 2006, Lazar filed a document entitled "Response to Deficiency Notice." The response will be considered as an amended

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

complaint under WAC 391-45-070. The Unfair Labor Practice Manager dismisses defective allegations of the amended complaint for failure to state a cause of action, and finds a cause of action for interference allegations of the amended complaint. The employer must file and serve its answer to the amended complaint within 21 days following the date of this Decision.

DISCUSSION

The allegations of the complaint concern employer interference with employee rights in violation of RCW 41.80.110(1)(a), by prohibiting employees from discussing union issues on work property and/or during employee work time. The deficiency notice indicated that the allegations of the complaint concerning employer interference with employee rights by prohibiting employees from discussing union issues on work property, state a cause of action under WAC 391-45-110(2) for further unfair labor practice proceedings before the Commission.

The deficiency notice stated that other allegations of the complaint contain several defects. One, Commission precedent allows for employer policies prohibiting employees from discussing union issues during employee work time. In *State - Department of Labor and Industries*, Decision 9348 (PSRA, 2006), an examiner stated as follows:

> Valid distribution policies balance the rights of employers, the rights of unions, and the rights of employees. *King County*, Decision 7819 [(PECB, 2002)]. Employers have the right to maintain discipline and productivity in their work place. Unions have the right to self-organization and to fend off decertification campaigns. Employees have the right to not self-organize or to seek decertification of the incumbent exclusive bargaining representative.
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> Precedents developed under the [federal] National Relations Act are persuasive in the interpretation of

> similar provisions found in Chapter 41.80 RCW. *See Nucleonics Alliance, et al v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984). The National Labor Relations Board (NLRB) has generally allowed employers to forbid distribution of literature by employees both during working time and in working areas, as distribution poses special issues such as littering and involves a message of a permanent nature that is designed to be retained by the recipient for reading or rereading at his convenience. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). (footnote omitted) However, employers may not prohibit distribution in nonwork areas or in mixed areas during nonworking time. *United Parcel Service*, 327 NLRB 317 (1998). Employers generally may restrict employee use of its property for distribution purposes, but may not do so in ways that discriminate against protected communications as opposed to other kinds of non-job-related uses. *Sprint/United Mgmt. Co.*, 326 NLRB 397 (1998). A rule that is presumptively valid may still be unlawful if it is promulgated or enforced in a discriminatory manner.

In *Community College District 7 - Shoreline (Washington Federation of State Employees)*, Decision 9094-A (PSRA, 2006), the Commission stated:

> Commission precedent considers any rule creating an absolute prohibition of solicitation or communication on an employer's premises to be overly broad on its face if they are not restricted to working hours. *City of Seattle*, Decision 5391-C (PECB, 1997).

The deficiency notice indicated that the complaint did not state a cause of action concerning employer interference with employee rights by prohibiting employees from discussing union issues during employee work time.

Two, RCW 41.80.110(1)(a) prohibits employer interference with employee rights, and threats of reprisal or force or promises of benefit associated with the union activity of employees made by employer officials are unlawful. Paragraph 5 of the statement of facts alleges that "[m]anagement has retaliated against . . ." and

paragraph 9 alleges that "discussion of employee concerns about union behavior and intentions was suppressed . . . ." 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:
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> . . . .
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> (2) Clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.

The allegations of paragraphs 5 and 9 of the complaint do not conform to the requirements of WAC 391-45-050(2). The alleged facts in those paragraphs are insufficient to conclude that the employer made any threats of reprisal or force or promises of benefit, in violation of RCW 41.80.110(1)(a).

Three, paragraph 7 of the statement of facts refers to a public records request for employee home address information. The Commission has no jurisdiction concerning public records requests under Chapter 42.17 RCW. Parties involved in a representation petition pending before the Commission are entitled to receive employee names and addresses under WAC 391-25-130.

Allegations of Amended Complaint

The information in sections I, II, and III on pages 1 and 2 of the amended complaint, appear to be legal arguments in support of the factual allegations of the complaint. These sections refer to RCW 41.56.040 and 51.80.050. The provisions of RCW 41.56.040 are inapplicable to Lazar. Chapter 41.56 RCW covers collective bargaining relationships in cities, counties, political subdivisions, municipal corporations, school districts (classified employees only), and other public employers. The complaint

indicates that Lazar is a state employee. As such, Lazar is covered by the statutory provisions of Chapter 41.80 RCW, but not the provisions of Chapter 41.56 RCW. Lazar's statutory reference to RCW 51.80.050 appears to be a reference to RCW 41.80.050, which sets forth various rights of employees.

Sections I, II, and III of the amended complaint make reference to alleged violations of 1st Amendment rights under the U.S. Constitution. The Commission does not have jurisdiction over constitutional claims. Claims concerning an employee's constitutional rights must be pursued before a court.

Paragraph 4 on pages 2 and 3 of the amended complaint objects to the deficiency notice's use of the phrase "union issues" in a summary of the allegations of the complaint. That phrase has been modified to read "workplace concerns" in this preliminary ruling.

Paragraph 6 on page 5 of the amended complaint adds new allegations under subsection 7 concerning removal of documents from the employee lunch room. Those allegations do not state a cause of action, as they fail to conform to the requirements of WAC 391-45-050(2) concerning the provision of "times, dates, places and participants in occurrences."

Paragraphs 10 and 12 on pages 6 through 14 of the amended complaint contain what appear to be quotations from another state employee, Dennis Redmon. Commission rules provide as follows:

> WAC 391-45-010 COMPLAINT CHARGING UNFAIR LABOR PRACTICES--WHO MAY FILE. A complaint charging that a person has engaged in or is engaging in an unfair labor practice may be filed by any employee, employee organization, employer, or their agents.

Class action complaints are not permitted under Commission rules. Individual employees must file their own unfair labor practice

complaint. Lazar does not have standing to process allegations of employer misconduct concerning Redmon.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the interference allegations of the amended complaint state a cause of action, summarized as follows:

> Employer interference with employee rights in violation of RCW 41.80.110(1)(a), by prohibiting employees from discussing workplace concerns on work property.

The interference allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. The Washington State Department of Revenue shall:

> File and serve its answer to the allegations listed in paragraph 1 of this Order, within 21 days following the date of this Order.

An answer shall:

a. Specifically admit, deny or explain each fact alleged in the amended complaint, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the amended complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

3. The allegations of the amended complaint concerning employer interference with employee rights in violation of RCW 41.80.110(1)(a), by prohibiting employees from discussing union issues during employee work time, are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 1st day of September, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARK S. DOWNING, Unfair Labor Practice Manager

Paragraph 3 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.