Toppenish School District, Decision 10487 (EDUC, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TOPPENISH EDUCATION ASSOCIATION, Complainant,	)	CASE 22522-U-09-5752
vs.	)	DECISION 10487 - EDUC
TOPPENISH SCHOOL DISTRICT, Respondent.	)	PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On June 8, 2009, the Toppenish Education Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Toppenish School District (employer) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on June 19, 2009, indicated that it was not possible to conclude that a cause of action existed at that time for all the allegations of the complaint. The union was given a period of 21 days in which to file and serve an amended complaint correcting the defects or face dismissal of those aspects of the complaint. The union filed an amended complaint on July 9, 2009. The amended complaint states several causes of action, set forth below in paragraph 1 of the Order. The employer must file and serve its answer to the preliminary ruling contained herein within 21 days following the date of the Order.

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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.

DISCUSSION

The allegations of the complaint concern: [1] Employer interference with employee rights in violation of RCW 41.59.140(1)(a) and refusal to bargain in violation of RCW 41.59.140(1)(e), by (a) breach of its good faith bargaining obligations in making regressive demands at the May 20, 2009, bargaining session, (b) its circumvention of the union through direct dealing with employees represented by the union in (i) sending a notice on May 1, 2009, to employees concerning funding, before presenting the notice to the union, (ii) sending letters concerning collective bargaining issues to bargaining unit members on May 6, 2009, before presenting the letters to the union, (iii) sending a letter of May 5, 2009, to bargaining unit members containing allegedly false and misleading information about collective bargaining, and before presenting the letter to the union; [2] employer interference with employee rights in violation of RCW 41.59.140(1)(a), by threats of reprisal or force or promises of benefit made to Terri Winckler as a result of her union activities; [3] employer interference with employee rights in violation of RCW 41.59.140(1)(a) and discrimination in violation of RCW 41.59.140(1)(c), by its non-renewal of bargaining unit member contracts in reprisal for union activities protected by Chapter 41.59 RCW; [4] employer interference with employee rights in violation of RCW 41.59.140(1)(a) and refusal to bargain in violation of RCW 41.59.140(1)(e), by breach of the layoff/recall and balanced budget provisions of the collective bargaining agreement; [5] employer interference with employee rights in violation of RCW 41.59.140(1)(a) and domination or assistance of a union in violation of RCW 41.59.140(1)(b), by removing the union president's report from the School Board agenda.

The deficiency notice pointed out that the allegations of the complaint concerning independent interference and refusal to bargain through circumvention stated causes of action under WAC 391-45-110(2) for further unfair labor practice proceedings before the Commission. However, the allegations were defective concerning claims for employer refusal to bargain through breach of its good faith bargaining obligations, discrimination, breach of the collective bargaining agreement, and domination or assistance of a union.

Regarding a breach of good faith bargaining obligations, WAC 391-45-050 (2) (rule) provides that each complaint charging unfair labor practices shall contain clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences. The complaint alleges that at the negotiation session on May 20, 2009, the employer made regressive proposals, but provides no further information about the allegations. The complaint does not provide sufficient facts to indicate a cause of action for breach of good faith.

Regarding discrimination, the complaint alleges that on May 6, 2009, the employer sent letters of non-renewal of contracts to eight bargaining unit members in reprisal for union activities. The statement of facts does not identify the employees and so does not conform to the rule.

Regarding breach of the collective bargaining agreement (lay-off/recall and balanced budget provisions), the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the

statute. The union must pursue remedies through the grievance process or the courts.

Finally, the union alleges employer domination or assistance of a union. The test for a cause of action for a domination or assistance violation is whether the complainant provides facts showing that the employer has involved itself in the internal affairs or finances of the union, or that the employer has attempted to create, fund, or control a company union. A cause of action for this violation is provided for in all statutes administered by the Commission. The origins of the violation are based upon the concerns set forth in the test's second clause, that is, whether an employer has attempted to create, fund, or control a company union. *See Washington State Patrol, Decision 2900 (PECB, 1988)*. Although the Commission has issued few decisions on this issue, those decisions have generally revolved around whether employers have unlawfully rendered assistance to unions. A few examples of such assistance are: allowing the free use of employer buildings and resources for union business, aid to employees serving as union officers, or favoring one union over another during a representation proceeding. The term "domination" concerns an employer's involvement in the internal affairs or finances of a union, or its attempt to create, fund, or control a company union and does not imply a cause of action for alleged negative acts directed toward the union or union members.

An employer's actual or attempted control of a union through assistance, ranging from favoritism to a full-fledged company union, is deleterious to the collective bargaining rights of employees; however, those actions are distinct from interference, discrimination, and refusal to bargain violations. A union alleging that an employer is interfering with, discriminating

against, or refusing to bargain with the union should file complaints based upon those allegations. A union should not file a complaint alleging employer domination or assistance of a union unless the facts suggest that the employer is violating the statute through such acts as rendering assistance to a union or union officers, supporting a company union, or showing favoritism to one union over another during an organizing campaign.[2] The union has not provided facts indicating a cause of action for employer domination or assistance of a union.

Amended Complaint

The amended complaint does not cure the defective allegation concerning a breach of the employer's good faith bargaining obligations. The union alleges that the employer engaged in regressive bargaining at the negotiation session of May 20, 2009. According to the statement of facts, this was the first meeting at which the employer presented its proposals. The union alleges that the proposals were "'take away' and regression proposals." However, regressive bargaining occurs when one party at the bargaining table evidences an attempt to make a proposal less attractive. This can occur through such actions as a party retreating from an earlier proposal and/or escalating its demands. *See City of Redmond*, Decision 8863-A (PECB, 2006).

Here, the union found the employer's opening proposal unacceptable. An opening proposal by one party does not necessarily constitute an

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[2] This is not intended to be an exhaustive list. Parties should consult Commission precedent or the Commission staff manual for a more comprehensive view of this subject. (See the Commission's web site, at www.perc.wa.gov.)

unfair labor practice simply because the other party finds it repugnant. For example, an employer's claim that a union's opening proposal was unrealistically high would not, on that basis alone, indicate a cause of action for regressive bargaining against a union.

The amended complaint withdraws the following allegations: [1] Employer interference with employee rights in violation of RCW 41.59.140(1)(a) and refusal to bargain in violation of RCW 41.59.140(1)(e), by breach of the layoff/recall and balanced budget provisions of the collective bargaining agreement; and [2] domination or assistance of a union in violation of RCW 41.59.140(1)(b), by removing the union president's report from the School Board agenda.

The amended complaint cures the defective allegation concerning discrimination by identifying the eight employees whose contracts were not renewed.

New Claims

The union seeks to add an allegation concerning employer discrimination through reassigning Doug Radach in reprisal for union activities, as well as an additional claim of interference regarding Terri Winkler. Amendment of an unfair labor practice complaint is allowed under WAC 391-45-070 if the proposed amendment meets four criteria:

- it involves only the same parties as the original complaint;
- it is timely;

- the subject matter is germane to the original complaint; and
- it will not unduly delay the proceedings.

Prior to the appointment of an examiner, amendments are freely allowed upon motion to the Unfair Labor Practice Manager. The union did not file a motion to add the new allegations, including a discussion of the four criteria noted above. Nevertheless, the Unfair Labor Practice Manager finds that the new allegations involve the same parties, are timely and germane, and will not delay the proceedings.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the allegations of the amended complaint in Case 22522-U-09-5752 state causes of action concerning:

   [1] Employer interference with employee rights in violation of RCW 41.59.140(1)(a) and refusal to bargain in violation of RCW 41.59.140(1)(e), by (a) its circumvention of the union through direct dealing with employees represented by the union in (i) sending a notice on May 1, 2009, to employees concerning funding, before presenting the notice to the union, (ii) sending letters concerning collective bargaining issues to bargaining unit members on May 6, 2009, before presenting the letters to the union, (iii) sending a letter of May 5, 2009, to bargaining unit members containing allegedly false and misleading information about collective bargaining, and before presenting the letter to the

union; [2] employer interference with employee rights in violation of RCW 41.59.140(1)(a), by threats of reprisal or force or promises of benefit made to Terri Winckler as a result of her union activities; and [3] employer interference with employee rights in violation of RCW 41.59.140(1)(a) and discrimination in violation of RCW 41.59.140(1)(c), by its (a) non-renewal of contracts for eight bargaining unit members in reprisal for union activities protected by Chapter 41.59 RCW, and (b) reassignment of Doug Radach in reprisal for union activities protected by Chapter 41.59 RCW.

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

2. The Toppenish School District 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, as set forth in paragraph 1 of this Order, 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.

The employer's answer filed on June 17, 2009, was submitted prematurely and does not fulfill the requirements of paragraph 2 of this Order.

3. The allegations of the amended complaint in Case 22522-U-09-5752 concerning employer interference with employee rights in violation of RCW 41.59.140(1)(a) and refusal to bargain in violation of RCW 41.59.140(1)(e), by breach of its good faith bargaining obligations in making regressive demands at the May 20, 2009, bargaining session, are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 27th day of July, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, 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.