City of Orting, Decision 7959 (PECB, 2003)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLIAM SANTOS, Complainant,	)	CASE 16345-U-02-4189
vs.	)	DECISION 7959 - PECB
CITY OF ORTING, Respondent.	)	ORDER WITHDRAWING NOTICE OF HEARING AND GRANTING MOTION TO DISMISS

On April 10, 2002, William Santos filed a complaint charging unfair labor practices with the Commission under Chapter 391-45 WAC, naming the City of Orting (employer) as the respondent. Rather than checking one of the boxes on the complaint form to indicate a specific statutory violation, Santos marked the box to indicate "other unfair labor practice."

In the statement of facts submitted with the complaint form, Santos alleged that he has been a reserve police officer in the employer's police department since February 1997, that he tested for a position as a full-time police officer in 1999 and was ranked first on the hiring list, that the employer subsequently filled two vacancies for full-time police officers with applicants who ranked below him on the hiring list, that he was hired as a full-time police officer in 2001, and that he was discharged by the employer before he completed his training.

Rather than contesting the termination of his employment, Santos contended that he was not provided an opportunity to respond to his accusers or to be informed of the specifics of the accusation because of his contact with the mayor in 2000. The documentation filed in support of the complaint included a copy of a collective bargaining agreement between the employer and a union which, by its

terms, covered all regular full-time and regular part-time police officers.

On June 18, 2002, Director of Administration Mark S. Downing issued a deficiency notice under WAC 391-45-110, noting: The complaint failed to state what statute had been violated; and the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements or violations of statutes not within its statutory jurisdiction. Santos was advised of his right to file and serve an amended complaint.

On July 8, 2002, Santos filed an amended complaint asserting employer interference, restraint and/or coercion with the exercise of his collective bargaining rights, in violation of RCW 41.56.140(1). Santos therein alleged that he attempted to use the grievance procedure of the collective bargaining agreement in 1999 to protest his being passed-over for a full-time position. The amended complaint otherwise followed the basic format of the original complaint with respect to allegations concerning his eventual hire as a full-time officer and the termination of his employment on October 12, 2001. Santos contended that both a reprimand given to him during his training and the termination of his employment were in retaliation for his attempt to file a contract grievance in 1999. In the amended complaint, Santos added a request that the employer be found guilty of an unfair labor practice in terminating his employment.

A preliminary ruling was issued on July 15, 2002, finding a cause of action to exist on the allegation that Santos was discriminated against in retaliation for trying to file a grievance in 1999.

In its answer filed on August 2, 2002, the employer asserted that it had no knowledge as to whether Santos attempted to use the grievance procedure of the collective bargaining agreement, and therefore denied that allegation. The employer admitted that it hired Santos on July 1, 2001, that he attended the police academy,

and that his employment was terminated on October 12, 2001. In its answer, the employer contends that: Santos lacks standing to pursue a complaint under the statute; the complaint fails to state a cause of action; and the complaint is untimely under the limitation period set forth in RCW 41.56.160. The answer contained declarations of various individuals with respect to alleged facts, argument, and case citation in support of the employer's contentions both with respect to evidence and law, ending with a request for dismissal with prejudice and award of costs and fees.

A notice of hearing was issued on September 9, 2002. On September 27, 2002, the employer filed a purported "appeal" of the notice of hearing, along with a motion for dismissal of the complaint. On November 19, 2002, the Examiner gave Santos until December 9, 2002, to file and serve a response to the employer's motion. Santos filed a response in due course.

The Examiner has considered the matter, and concludes that the employer's motion for dismissal should be granted.

POSITIONS OF PARTIES

The employer's "standing" argument is premised on an absence of detailed factual allegations in support of the claim that Santos engaged in protected grievance filing activity in 1999. The employer contends Santos had no rights under the collective bargaining agreement or the grievance procedure contained in that contract. It also contends that, as an "at will" employee, Santos had no property right, interest in, or expectation of continued employment. The employer's "no cause of action" theory is predicated upon the failure of Santos to furnish evidence of unlawful interference or discrimination, and on the lapse of two years between the alleged protected activity and the discharge as negating a causal connection between any such events. With respect to its "untimely" defense, the employer notes that the original

complaint was predicated upon a failure to give him an opportunity to face his accusers and to offer a defense prior to his discharge on October 12, 2001 (rather than on the discharge itself), and was only timely for events that occurred on or after October 10, 2001.

The employer notes that the original complaint pointed to a conversation that Santos had with the employer's mayor in 2000, and that the challenge to the discharge itself was raised for the first time in the amended complaint filed on July 8, 2002. The employer urges that the amendment raising a new claim does not relate back to the original complaint, and that the challenge to the discharge must be viewed as a new complaint which could only have been timely if filed on or before April 12, 2002 (i.e., within six months following the discharge that occurred on October 12, 2001).

Santos filed a multifaceted response to the employer's motion. He argues (for the first time) that the termination of his employment violated due process rights guaranteed to him by the 14th Amendment to the United States Constitution.[1] Next, he contends the employer violated his rights under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), by terminating him on October 12, 2001, without giving him an opportunity to defend himself. He offers arguments premised on the collective bargaining agreement between the employer and the union that represents the police officers and his employment relationship with the employer as a reserve officer, all directed at demonstrating that the termination of his employment violated the terms of the collective bargaining agreement.[2] Lastly, Santos insists that the employer discharged him for contacting the mayor in 2000.

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[1] In particular, Santos claims the training officer who reprimanded him on October 10, 2001, did not permit Santos to defend himself on the merits of the matter.

[2] Santos contends that his contacts in 2000 within the employer's police hierarchy prior to contacting the mayor was in conformance with the grievance provisions of the collective bargaining agreement.

DISCUSSION

With the clarifications provided by Santos in response to the employer's motion, it is now evident that his complaint fails to state a claim upon which relief may be granted.

Constitutional "Due Process" Rights

The Public Employment Relations Commission is a state agency, created by Chapter 41.58 RCW and charged with the administration of certain state laws regulating collective bargaining and resolving disputes arising in collective bargaining between employers, employees and unions. The name of the agency has sometimes been misinterpreted as implying a broader scope of authority than is actually conferred upon the agency by statute. The Commission does not have authority to resolve each and every dispute that might arise in public employment.

There is no question that the federal constitution guarantees "due process" rights, and the Commission's procedures must provide due process of law to the parties that appear before it, but that does not give the Commission authority to enforce due process rights. Instead, the enforcement of constitutional rights must be sought through state or federal courts. The Commission is not a court of general jurisdiction, and its decisions declining to enforce rights under *Loudermill* recognize that public employees have some constitutional rights that are above and beyond the reach of this state agency.[3]

Timeliness of the Complaint

RCW 41.56.160(1) provides, in relevant part, "a complaint shall not be processed for any unfair labor practice occurring more than six

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[3] *City of Tacoma*, Decision 3346 (PECB, 1990).

months before the filing of the complaint with the Commission." An amended complaint that merely explains or amplifies allegations raised in the original complaint will be regarded as "relating back" to the original complaint, but new allegations in an amended complaint must be evaluated under RCW 41.56.160 as if they were a new complaint.

When a complaint charging unfair labor practices is filed under Chapter 391-45 WAC, the Commission staff neither "investigates" in the manner familiar to those who practice before the National Labor Relations Board nor exercises prosecutorial discretion as to whether the charging party has sufficient evidence to sustain their claim. In making a preliminary ruling under WAC 391-45-110 (and thus in determining whether a hearing should be held on a complaint), the Executive Director of the Commission or designee reviews the complaint upon the (rebuttable) assumption that all of the facts alleged in the complaint are true and provable. The issuance of a preliminary ruling directing an answer and initiating the hearing process does not guarantee that a violation will be found. Additionally, the Commission's procedures do not include pre-hearing discovery.

In this case, the employer's motion raised a substantial question as to whether the amended complaint filed by Santos should be treated, in whole or in part, as a new complaint. The answer to that question requires analysis of the subject matter of both documents:

The original complaint did not allege that the employer unlawfully terminated his employment on October 12, 2001. Rather, Santos took issue with the alleged denial of an opportunity for him to review the allegations made against him while he was at the police academy, and with the alleged denial of an opportunity for him to rebut those allegations. Supporting that interpretation of the original complaint, the Examiner notes that Santos contended

any other police officer would have been afforded such opportunities, and he ascribed the withholding of such opportunities in his case to reprisal for a conversation he had with the employer's mayor in 2000. There was no reference to protected union activity, or to earlier processing of a grievance under a collective bargaining agreement.

The amended complaint does allege that the employer unlawfully terminated his employment on October 12, 2001, and that the discharge was in retaliation for his attempt to file a grievance in 1999 under the terms of the collective bargaining agreement between the employer and the union representing its police officers. Even if the amendment to cure the lack of a statutory citation is accepted as an amplification that relates back to the original complaint, the same cannot be said for the challenge to the discharge itself. The amended complaint must thus be evaluated as a new complaint with regard to the new allegation challenging the discharge.

The pre-hearing exchange of correspondence discloses facts and circumstances that may have been unavailable to (or at least unclear to) the Director of Administration when the preliminary ruling was issued. It is now clear that Santos waited until the end of the period of limitations prescribed by RCW 41.56.160, and then filed a complaint only as to theories more suited to a "due process" lawsuit in the courts. By the time a deficiency notice was issued and he filed his amended complaint on July 8, 2002, the time period for a direct challenge to his discharge had long since passed. While mindful that Santos appears *pro se* and is not an attorney, no reasonable construction of the July 8, 2002, filing can result in a conclusion other than it is a new charge. Because the termination occurred on October 12, 2001, the complaint filed on July 8, 2002, was untimely. Under the facts provided by Santos since the issuance of the preliminary ruling, the Examiner

concludes that the amended complaint must be dismissed as to the allegation that the discharge itself was unlawful.

The "Discrimination for Union Activity" Claim

Some of the rationale espoused by the employer in this case cannot, as a matter of law, be sustained. Even for a probationary employee, the filing of grievances is an activity protected by the statute. *Valley General Hospital*, Decision 1195-A (PECB, 1982). To make an attempted exercise of statutory rights unprotected merely because of the wording of a particular collective bargaining agreement would produce absurd results, wherein employees could be put at peril by the actions of other parties. Such a constraint is not permitted by statute, as it would undoubtedly inhibit the exercise of statutory rights by employees and could reasonably be perceived as putting them at risk if they attempt to pursue their statutory rights. Further, the concept of "at will" employment does not negate or diminish the rights of employees under the collective bargaining statute, including the right to collectively protect their wages, hours and working conditions. Thus, an "at will" employee may not be terminated in retaliation for engaging in activities protected by statute.

A preliminary ruling was issued once Santos alleged that the employer acted in reprisal for his pursuit of grievance rights in 1999. As laid out in numerous Commission decisions based on *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991), the complainant in a discrimination case must make out a prima facie case consisting of multiple components, as follows:

> [T]hat: (1) the employee has participated in protected activity or communicated to the employer an intent to do so; (2) the employee has been deprived of some ascertainable right, benefit, or status; and (3) there is a causal connection between those events, i.e., that the em-

> ployer's motivation for the discharge was the employee's exercise of or intent to exercise statutory rights.

Brinnon School District, Decision 7210-A (PECB, 2001). As to the first of those components, a hearing would be necessary to resolve any factual dispute as to whether Santos actually attempted to file a grievance under a collective bargaining agreement in 1999, or as to whether the employer had knowledge of such an attempt at the time it investigated the charges against Santos in October of 2002. As to the existence of a causal connection, a hearing would also be necessary to determine the significance (if any) of the time lapse between the alleged protected activity in 1999 and the challenged investigation in 2001. Both of those considerations deal with inferences and quanta of proof, not irrebuttable presumptions. With the discharge itself out of the picture, the Examiner has carefully considered whether the original complaint alleges that Santos was deprived of any ascertainable right, status, or benefit. Arbitrators of discipline and discharge grievances commonly impose some "industrial due process" requirements that include a right of employees to notice of the charges against them, a fair investigation by the employer, and/or an opportunity to respond to the charges against them, but the deficiency notice issued by the Director of Administration aptly pointed out long-standing precedent that the Commission does not assert jurisdiction to remedy contract violations through the unfair labor practice provisions of the collective bargaining statutes.

The unfair labor practice provisions of Chapter 41.56 RCW protect applicants for employment from discrimination in reprisal for their protected union activities, but nothing in that statute expressly gave Santos a right to: (a) promotion from a reserve police officer status; (b) hiring as a full-time police officer based on his being ranked first on the hiring list; (c) notice of the charges made against him by the training officer at the police academy; or (d) an opportunity to respond to the charges which were made against

him at the police academy. Thus, the Examiner concludes that the response to the employer's motion returns the case to the situation which existed when the deficiency notice was issued, and that Santos again fails to allege facts sufficient to find a discrimination violation under RCW 41.56.140(1).

NOW, THEREFORE, it is

ORDERED

1. The notice of hearing issued in this matter is withdrawn.

2. The motion for dismissal of the complaint in the above-captioned matter is GRANTED.

3. The complaint charging unfair labor practices in the above-captioned matter is DISMISSED.

Issued at Olympia, Washington, this 10th day of January, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Vincent M. Helm

VINCENT M. HELM, Examiner

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.