

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KEVIN KEMP,	)	
	)	
Complainant,	)	CASE 20958-U-07-05349
	)	
vs.	)	DECISION 9659-A - PECB
	)	
KING COUNTY FIRE DISTRICT 16,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
_____	)	

*Susan Rae Sampson*, Attorney at Law, for the complainant.

Williams and Williams, by *Kinnon W. Williams*, Attorney at Law, for the employer.

On March 7, 2007, Kevin Kemp (Kemp) filed an unfair labor practice complaint with the Public Employment Relations Commission under Chapter 391-45 WAC. The complaint alleged that King County Fire District 16 (employer) committed an unfair labor practice within the meaning of Chapter 41.56 RCW. On March 22, 2007, the Commission issued a deficiency notice. Kemp filed an amended complaint on April 12, 2007. On April 30, 2007, the Commission issued a preliminary ruling, finding a cause of action to exist for employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), by cancelling Kemp's previously assigned overtime in reprisal for union activities protected under Chapter 41.56 RCW. The Commission assigned Examiner Paul T. Schwendiman to conduct further proceedings.

On May 16, 2007, the employer filed its answer and a motion to dismiss based on untimeliness of the complaint. Kemp responded to

the employer's motion on May 30, 2007. The employer filed a reply to Kemp's response on June 14, 2007.

#### ISSUE PRESENTED

Does a question of material fact exist regarding the timeliness of Kemp's complaint? The Examiner concludes that no question of material fact exists concerning the timeliness of the complaint. The complaint is untimely, and the Examiner dismisses the complaint.

#### APPLICABLE LEGAL PRINCIPLES

Motion to Dismiss. A respondent has no right to appeal a preliminary ruling finding a cause of action to exist. In analyzing a motion for summary judgment, an Examiner must operate within the context of a preliminary ruling that has been issued by higher authority, and is confined to ruling on admissions or defects which have become evident since the issuance of the preliminary ruling. When an Examiner entertains a motion for dismissal filed after a preliminary ruling has been issued, the criteria applied are those used in deciding summary judgment motions. *City of Orting*, Decision 7959-A (PECB, 2003).

WAC 10-08-135 provides for summary judgment where there is no genuine issue of material fact, and where the moving party is entitled to judgment as a matter of law. A "material fact" is one upon which the outcome of the litigation depends. *State - General Administration*, Decision 8087-B (PSRA, 2004).

Because a summary judgment involves making a final determination without the benefit of a full evidentiary hearing and record, the

granting of such a motion cannot be taken lightly. *City of Orting*, Decision 7959-A. A summary judgment is appropriate only where the party responding to the motion cannot or does not deny any material facts alleged by the party making the motion. Pleadings and briefs can be sufficient to determine if there is a genuine issue of material fact. The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue as to a material fact. *Pierce County*, Decision 7018-A (PECB, 2001).

Summary judgment is inappropriate where there is at least a possibility that the party responding to the motion could ultimately prevail. *State - General Administration*, Decision 8087-B. However, if there is no genuine issue as to any material fact, summary judgment should be granted as there is no reason to hold a hearing. *Spokane International Airport*, Decision 7889-A (PECB, 2003).

Statute of Limitations. The statute of limitations for filing an unfair labor complaint under the Public Employees' Collective Bargaining Act (PECB) is six months from the date of occurrence. RCW 41.56.160(1). The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *City of Bremerton*, Decision 7739-A (PECB, 2003). There is an exception to the strict enforcement of the statute of limitations, where the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Bellevue*, Decision 9343-A (PECB, 2007).

Processing a related grievance does not toll the six-month statute of limitations. *King County*, Decision 3558-A (PECB, 1990). The statute of limitations is not jurisdictional, and may be waived by the parties where (a) all named respondents have furnished the

complainant(s) with an express written waiver of the limitations period prior to the expiration of the six-month limitations period, and (b) a copy of such written waiver is submitted to the Commission at the time the complaint is filed, or in timely response to a preliminary ruling. *City of Seattle*, Decision 4057-A (PECB, 1993).

### ANALYSIS

Kemp's complaint was filed on March 7, 2007. Thus, the alleged cancellation of his previously assigned overtime must have occurred on or after September 7, 2006, to be timely under RCW 41.56.160.

The employer's motion to dismiss relies on a letter dated November 16, 2006, attached to Kemp's amended complaint. The employer argues that the letter should be viewed as an admission that the overtime cancellation occurred, and that Kemp had knowledge of the cancellation, on April 13, 2006. Attached to the motion was a sworn declaration of Deputy Chief Jim Torpin stating that Torpin had no knowledge of cancellation of Kemp's scheduled overtime other than an April 13, 2006, occurrence.

The Motion to Dismiss. The Examiner is confined by *City of Orting*, Decision 7959-A, to ruling on admissions which have become evident since the issue of the preliminary ruling. Thus, the Examiner can not rely on the letter of November 16, 2006, or any of the many other documents attached to the complaint and amended complaint, as an admission by the complainant. It is also possible that other evidence presented by Kemp at a hearing might show that scheduled overtime was cancelled on or after September 7, 2006, even in absence of Torpin's personal knowledge of such cancellation. Thus, granting the motion to dismiss based on the Torpin declaration is

also inappropriate because there is a possibility Kemp could ultimately prevail.

Kemp's admission in his response is accepted. Kemp's response to the motion to dismiss admitted that the "factual basis" for his response was that "the ULP complained of first occurred over six months ago." In reply, the employer again noted that Kemp admitted he did not file his complaint within six months of the cancellation of his overtime.

Applying the Commission's *City of Orting* criteria for ruling on a motion to dismiss after a preliminary ruling is issued, the Examiner accepts Kemp's admission that his complaint was untimely filed as this admission in his response is independent of his complaint as amended.

Kemp's Argument. Kemp argues in his response that even though he knew of the cancellation of his overtime prior to September 7, 2006, the six-month statute of limitations should be tolled as internal grievance procedures were not completed until after September 7, 2006. Kemp advances two reasons for tolling the statute of limitations while his grievance was processed: 1) he could not "know" that an unfair labor practice had occurred so long as management still had the opportunity to correct the alleged unfair labor practice; and 2) allowing exhaustion of the internal remedies is appropriate as a public policy supporting resolution of disputes at the lowest possible level, thereby promoting judicial economy.

The employer argues in reply that the statute of limitations should not be tolled during the processing of Kemp's grievance, citing *City of Seattle*, Decision 5930 (PECB, 1997); *North Franklin School*

*District*, Decision 3844 (PECB, 1991); and *King County*, Decision 3558-A.

Processing a grievance does not toll the statute of limitations.

The Examiner finds merit in the employer's argument that processing of Kemp's grievance did not toll the statute of limitations. Like Kemp, the complainant in *King County*, Decision 3558-A argued the Commission should stay the running of the statute of limitations while the parties attempted to resolve the dispute during the processing of his grievance, and the Commission should encourage the parties to engage in settlement efforts prior to filing complaints, *i.e.*, apply the six-months period very liberally. The Commission found no merit to these arguments, stating that six months is ample time to either resolve a dispute or recognize that no agreement on a resolution will be forthcoming. The Examiner concurs with the Commission's reasoning.

Kemp admitted he knew of the overtime cancellation prior to September 7, 2006. The Examiner finds no merit in Kemp's argument that he could not "know" that an unfair labor practice had occurred so long as management still had the opportunity to correct the alleged unfair labor practice, up until the time of the employer's final decision to deny his grievance. The *City of Bellevue* Decision 9343-A, exception to the strict enforcement of the six-month statute of limitations, where the complainant had no actual or constructive notice of the acts or events which are the basis of the charges, is not applicable. Here, Kemp admitted that prior to September 7, 2006, he knew of the cancellation of his overtime that was the basis of his unfair labor practice complaint.

The employer did not waive the six-month statute of limitations.

The Examiner notes only one exception to tolling of the statute of

limitations to allow more than six months for settlement discussions. In *City of Seattle*, Decision 4057-A, the respondent waived any defense based on timeliness in writing. The Commission accepted that written waiver as tolling the six-month statute of limitations. The Commission also established the procedure to be utilized in the future for accepting a waiver of the statute of limitations: (a) all named respondents must furnish the complainant(s) with an express written waiver of the limitations period prior to the expiration of the six-month limitations period; and (b) a copy of such written waiver must be submitted to the Commission at the time the complaint is filed, or in timely response to a preliminary ruling letter from the Commission. *City of Seattle*, Decision 4057-A.

Here, no copy of a written waiver of the statute of limitations has been submitted to the Commission. Thus, the statute of limitations was not waived by the employer.

#### CONCLUSION

The Examiner concludes that there is no genuine issue of material fact as to the timeliness of Kemp's complaint. The complaint is untimely under RCW 41.56.160 and is dismissed.

#### REMEDY

The employer has requested attorney fees. The remedy is denied. The remedial authority conferred on the Commission by RCW 41.56.160 is triggered by the finding of an unfair labor practice violation. *Whatcom County*, Decision 7288-A (PECB, 2002). No unfair labor practice violation was found here. Thus, no remedy may be granted.

FINDINGS OF FACT

1. King County Fire District 16 is a public employer within the meaning of RCW 41.56.030(1).
2. Kevin Kemp is a public employee within the meaning of RCW 41.56.030(2).
3. Kemp filed an unfair labor practice complaint with the Commission on March 7, 2007, and amended that complaint on April 12, 2007.
4. Based on the complaint as amended, a preliminary ruling found a cause of action to exist for employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), by cancelling Kemp's previously assigned overtime in reprisal for union activities protected under Chapter 41.56 RCW.
5. Kemp had knowledge of the alleged cancellation of his previously assigned overtime prior to September 7, 2006.
6. No copy of a written waiver of the six-month statute of limitations under RCW 41.56.160 has been submitted to the Commission.
7. No genuine issue of material fact exists as to the timeliness of Kemp's complaint.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.



2. The complaint in this case was not timely filed under RCW 41.56.160.

ORDER

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

ISSUED at Olympia, Washington, this 30<sup>th</sup> day of July, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



PAUL T. SCHWENDIMAN, 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.