City of Bellingham, Decision 10907 (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BELLINGHAM POLICE GUILD, Complainant, vs. CITY OF BELLINGHAM, Respondent.	CASE 23211-U-10-05917 DECISION 10907 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Cline and Associates by *James M. Cline*, Attorney at Law, for the union.

Joan Hoisington, Bellingham City Attorney, by *Peter Ruffatto*, Assistant City Attorney for the employer.

On May 6, 2010, the Bellingham Police Guild (union) filed an unfair labor practice complaint against the City of Bellingham (employer) alleging employer interference, discrimination, and refusal to bargain violations concerning the threatened layoff of three bargaining unit members. A preliminary ruling was issued on May 13, 2010. The employer answered the complaint on June 3, 2010. On July 14, 2010, the employer filed a motion for summary judgment. On August 18, 2010, the union responded to the employer's motion for summary judgment and filed a cross motion for summary judgment. The parties briefed the two motions with initial, response, and reply briefs.

ISSUES

1. Was the complaint in the above-entitled matter filed in a timely manner?

2. Should the parties' cross-motions for summary judgment be granted?

From the evidence presented pursuant to motions for summary judgment, there are no genuine issues of material fact as to the timeliness of the union's complaint. The complaint is untimely under RCW 41.56.160 and is dismissed. Because the complaint is dismissed, no jurisdiction exists to rule on the remaining issues in the parties' motions for summary judgment.

APPLICABLE LEGAL STANDARDS

Motion to Dismiss After Issuance of a Preliminary Ruling

When a party seeks to dismiss a claim found to exist in a preliminary ruling, an examiner must use the summary judgment standard in evaluating the dismissal. The request for dismissal must be based on new evidence discovered after the issuance of the preliminary ruling: "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 issue of the preliminary ruling." *City of Orting*, Decision 7959-A (PECB, 2003) citing *Port of Seattle*, Decision 7603-A (PECB, 2003). There is no process or right for a party to "re-litigate the preliminary rulings issued in unfair labor practice cases" and a summary judgment to dismiss a cause of action found to exist in a preliminary ruling "would have to have been based upon admissions against interest or other statements made by the complainant independent of the complaint itself." *City of Orting*, Decision 7959-A citing *Port of Seattle*, Decision 7603-A.

Summary Judgment Standard

Summary judgment motions are considered under WAC 10-08-135 which states that a "motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that 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). A motion for summary judgment calls upon the examiner to make final determinations on a number of critical issues without the benefit of a full evidentiary hearing and record. The granting of such a motion cannot be taken lightly. *Port of Seattle*, Decision 7000 (PECB, 2000). The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue as to a material fact. "A summary judgment is only appropriate where the party responding to the motion cannot or does not deny any material fact alleged by the party making the motion. . . . Entry of a summary

judgment accelerates the decision-making process by dispensing with a hearing where none is needed." *Pierce County*, Decision 7018-A (PECB, 2001), citing, *City of Vancouver*, Decision 7013 (PECB, 2000). Pleadings and briefs can be sufficient to determine if there is a genuine issue of material fact. *Pierce County*, Decision 7018-A, citing *City of Seattle*, Decision 4687-A (PECB, 1996).

Statute of Limitations

The statute of limitations for filing an unfair labor complaint under the Public Employees' Collective Bargaining Act is six months from the date of occurrence. RCW 41.56.160(1). The start of the six-month period, also called the triggering event, occurs when "a potential complainant has actual or constructive notice of the complained-of action." *Community College District 17 (Spokane)*, Decision 9795-A (PSRA, 2008) citing *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990). The statute of limitations begins "when the respondent presents the offending proposal." *Northshore Utility District*, Decision 10534-A (PECB, 2010), citing *City of Bellevue*, Decision 9343-A (PECB, 2007). An exception to the strict enforcement of the statute of limitations exists 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.

The timeliness of the complaint is a threshold question in any unfair labor practice case. If a complaint is not timely, the Commission does not have jurisdiction to remedy it. *City of Bellevue*, Decision 9343-A citing *Clark v. Selah*, 53 Wn. App. 832 (1989); *Stewart v. Omak School District*, 108 Wn. App. 1049 (2001); *Malpica v. Mary M. Knight School District 311*, 93 Wn. App. 1084 (1999). "The six month statute of limitations has been strictly enforced, even when settlement discussions are occurring." *City of Bremerton*, Decision 7739-A (PECB, 2003). The burden of proof to establish when the complainant learned of the issue giving rise to the unfair labor practice lies with the complainant, not the respondent. *City of Pasco*, Decision 4197-B (PECB, 1999).

ANALYSIS

The preliminary ruling in this case found the following causes of action:

1. Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so derivative "interference" in violation of RCW 41.56.140(1)], by breach of its good faith bargaining obligations in using the threat of layoffs of three bargaining unit members as a bargaining tactic;

2. Employer discrimination [and if so, derivative "interference"] in violation of RCW 41.56.140(1), by its final contract offer to the union, in reprisal for union activities protected by Chapter 41.56 RCW; and

3. Employer independent interference in violation of RCW41.56.140(1), by threats of reprisal or force or promises of benefit made to (a) all bargaining unit members concerning the three layoffs, in connection with the union's collective bargaining activities, and (b) the union president, on December 4, 2010, concerning a city council meeting.

The three causes of action all stem from the employer's alleged use of a threat to layoff three bargaining unit members as a bargaining tactic. In its complaint, the union states: "Indeed, despite the repeated hints, the Guild, until November 18, did not think that the City would issue the layoff notices as a bargaining tactic, because the tactic was unlawful and not hinged to any legitimate operational need and a break from the parties history of good faith contract negotiations with previous City Administrations." Additionally, in its list of requested remedies, the union seeks an "order of interest" back to that same date, November 18, 2009. Accordingly, in the preliminary ruling, the complaint was found timely based on the union's statements that the alleged violation occurred on November 18, 2009.

The employer answered the complaint on June 3, 2010, and raised the statute of limitations as an affirmative defense. In its motion for summary judgment, the employer moved for dismissal of the complaint based on a timeliness argument, asserting that the union was on notice concerning the potential for layoffs based on a myriad of communications beginning as early as 2008. The employer's motion included declarations and attachments purporting to prove this assertion. The employer did not present any evidence that did not exist at the time of the preliminary ruling's issuance nor any admissions or defects in the union's complaint that had "become evident since the issue of the preliminary ruling." As held by the Commission in *City of Orting*, Decision 7959-A citing *Port of Seattle*, Decision 7603-A:

> WAC 10-08-135 does not give respondents a "second bite at the apple" or an opportunity to re-litigate the preliminary rulings issued in unfair labor practice

> cases by the Executive Director or designee under WAC 391-45-110. In responding to 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 issue of the preliminary ruling.

However, on August 18, 2010, the union filed a response to the employer's summary judgment motion and made its own motion for summary judgment. Filed with its response and motion were the sworn declarations of Cliff Jennings, Guild President, and Donna Miller, Guild Second Vice President and Bargaining Committee Chair, which included the following statements:

Declaration of Cliff Jennings:

> On October 15, the Chief advised Donna Miller and me that he was instructed that he needed to prepare some budget contingencies that would involve layoffs. We viewed this statement as a threat as it was clear that it related to the pending unresolved contract.

Declaration of Donna Miller:

> On October 14, the Police Chief advised us that he had been asked to begin developing some possible layoff proposals. But the Chief had already submitted an actual budget proposal that involved no layoffs. As a result, the Guild viewed this as a bargaining tactic, because we had been advised that the necessary budget reductions had already been made.

These admissions are new evidence created after the issuance of the preliminary ruling. Of critical importance, the admissions of Jennings and Miller are "admissions against interest or other statements made by the complainant independent of the complaint itself" which have "become evident since the issue of the preliminary ruling" as contemplated by the Commission in *City of Orting*, Decision 7959-A (PECB, 2003). Therefore, the employer's dismissal request is proper for consideration.

The undenied sworn admissions made by Jennings and Miller state that the union was threatened, and that they considered the threats to be "related to the pending unresolved contract" and a "bargaining tactic," on October 15, 2009, not on November 18, 2009, as originally alleged.

The union's August 18, 2010 motion for summary judgment and reply to the employer's motion for summary judgment further supports this finding. In that motion/response, the union states:

> By October 2009, when the city concocted this approach, it was clear no immediate city budget reductions were anticipated and that this layoff threat was targeted *only* at the Police Guild bargaining unit and was *expressly connected* to the outcome of labor negotiations.

(emphasis in underline added). The employer's response to the union's motion again raised the timeliness issue, this time relying on the declarations of Jennings and Miller concerning the October 14 and 15, 2009, dates. The union was given the opportunity to reply, and did so on September 7, 2010. In the union's reply, it could have denied the statements made in the Jennings and Miller declarations, but did not.

CONCLUSION

The employer communicated their position concerning layoffs to the union, and the union perceived the employer's statements as a threat designed to effect the outcome of labor negotiations, by at least October 15, 2009. To have been timely filed under RCW 41.56.160(1), the complaint in this case must have been filed on or before April 15, 2010. The complaint was filed on May 6, 2010. There is no genuine issue of material fact as to the timeliness of the union's complaint. The complaint is untimely under RCW 41.56.160 and is dismissed. Because the complaint is dismissed, no jurisdiction exists to rule on the remaining issues in the parties' motions for summary judgment.

FINDINGS OF FACT

1. The City of Bellingham is a public employer within the meaning of RCW 41.56.030(13).

2. The Bellingham Police Guild is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The Bellingham Police Guild filed an unfair labor practice complaint with the Commission on May 6, 2010.

4. Based on the complaint, a preliminary ruling was issued on May 13, 2010, finding causes of action to exist for employer refusal to bargain in violation of RCW 41.56.140(4) [and if so derivative "interference" in violation of RCW 41.56.140(1)], employer discrimination [and if so, derivative "interference"] in violation of RCW 41.56.140(1), and employer independent interference in violation of RCW41.56.140(1).

5. On August 18, 2010, after the issuance of the preliminary ruling, the union filed a brief in opposition to the employer's motion for summary judgment and a cross motion for summary judgment.

6. In support of its August 18, 2010 opposition brief/summary judgment motion, the union filed a sworn declaration from Cliff Jennings, Guild President, which stated that "On October 15, the Chief advised Donna Miller and me that he was instructed that he needed to prepare some budget contingencies that would involve layoffs. We viewed this statement as a threat as it was clear that it related to the pending unresolved contract."

7. In support of its August 18, 2010 opposition brief/summary judgment motion, the union filed a sworn declaration from Donna Miller, Guild Second Vice President and Bargaining Committee Chair which stated that "On October 14, the Police Chief advised us that he had been asked to begin developing some possible layoff proposals. But the Chief had already submitted an actual budget proposal that involved no layoffs. As a result, the Guild viewed this as a bargaining tactic, because we had been advised that the necessary budget reductions had already been made."

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. Based upon Findings of Fact 5 and 6, the statute of limitations on this complaint as defined in RCW 41.56.160(1) began to run on October 15, 2010.

3. No genuine issue of material fact remains as to the timeliness of the union's complaint under WAC 10-08-135.

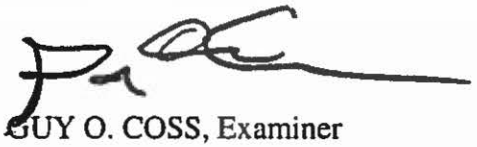
4. The complaint in this case was not timely filed under RCW 41.56.160(1).

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 28th day of October, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



GUY O. COSS, 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.