STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF RENTON, Employer.	
KAREN FOWLER Complainant, vs. WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, COUNCIL 2, AFSCME AFL-CIO, LOCAL 2170, Respondent.	CASE 23853-U-11-6092 DECISION 11047 - PECB PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On March 9, 2011, Karen Fowler (Fowler) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Washington State Council of County and City Employees, Council 2, AFSCME – AFL-CIO, Local 2170 (union) as respondent. The complaint was docketed by the Commission as Case 23853-U-11-6092. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on March 25, 2011, indicated that it was not possible to conclude that a cause of action existed at that time for certain allegations of the complaint. Fowler was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the defective allegations of the complaint.

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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.

On April 13, 2011, Fowler filed an amended complaint. The Unfair Labor Practice Manager finds a cause of action for certain allegations of the amended complaint as set forth in Paragraph 1 of the Order, and dismisses the defective allegations of the amended complaint for failures to state causes of action, as set forth in Paragraph 2 of the Order. The union must file and serve its answer to the amended complaint within 21 days following the date of this Decision.

DISCUSSION

Original Complaint

The allegations of the complaint concern union interference with employee rights in violation of RCW 41.56.150(1); and the union inducing the employer to commit an unfair labor practice in violation of RCW 41.56.150(2) [and if so, derivative interference in violation of RCW 41.56.150(1)], by its actions toward Karen Fowler concerning her layoff and rescission of her layoff benefits.

Allegations of the complaint concerning union interference state a cause of action under WAC 391-45-110(2) for further unfair labor practice proceedings before the Commission, regarding the union's failure to notify Fowler over an alleged change in part-time employee seniority calculations, despite knowing she was filing a grievance (layoff grievance) regarding those calculations as they related to her layoff, telling her it would not file a grievance over the rescission of layoff benefits (rescission grievance), and breach of its duty of fair representation in failing or refusing to file and pursue the rescission grievance.

The deficiency notice pointed out the defects to the complaint concerning allegations over the union's breach of its duty of fair representation in not filing a layoff grievance, and inducing the employer to commit an unfair labor practice. In addition, Fowler did not attach a copy of the collective bargaining agreement to the complaint or specify the number of employees in the bargaining unit.

Union Interference Claims

It is an unfair labor practice for a union to interfere with employee rights in violation of RCW 41.56.150(1). Interference claims may consist of allegations that the union made threats of reprisal or force or promises of benefit that an employee reasonably perceived as connected to the employee's union activities or status. Proof of unlawful intent is not necessary to find a violation. *King County (Amalgamated Transit Union Local 587),* Decision 8630-A (PECB, 2005).

Interference claims also encompass allegations of a union's breach of its duty of fair representation. In most cases, the Commission does not assert jurisdiction over breach of duty of fair representation claims arising exclusively out of the processing of contractual grievances. While a union does owe a duty of fair representation to bargaining unit employees with respect to the processing of grievances, such claims must be pursued before a court which can assert jurisdiction to determine (and remedy, if appropriate) any underlying contract violation. *Mukilteo School District (Public School Employees of Washington),* Decision 1381 (PECB, 1982). However, the Commission will assert jurisdiction if there is an indication of arbitrary, discriminatory, or bad faith conduct on the part of the union based upon improper or invidious reasons, such as union activities or membership or lack thereof (union activities or status), or such matters as race, creed, sex, national origin, and the like. *See Dayton School District (Dayton Education Association),* Decision 8042-A (EDUC, 2004).

Thus, an employee could file a claim for interference based upon: (a) a reasonable perception of union threats of reprisal or force or promises of benefit connected to union activities or status, and (b) for breach of the duty of fair representation based upon a failure or refusal to file or pursue a grievance on the employee's behalf because of improper or invidious reasons.

Fowler makes several related claims against the union:

- The employer and union entered into an agreement in violation of the collective bargaining agreement that resulted in the adjustment for seniority calculations for

part-time employees, and she was laid off, despite her belief that under the contract she had seniority over at least one full-time employee;

- The union communicated to her that she had the right to grieve her layoff, but then the union grievance committee (on advice of legal counsel) voted not to pursue the grievance, telling her that a grievance based upon part-time status would not succeed, without telling her of the alleged change to seniority calculations for part-time employees;

- She was the first person impacted by the change in seniority calculations; and

- The union told her that the rescission of her layoff benefits was between her and the employer and was not a basis for a grievance.

Layoff

Fowler alleges that on October 9, 2009, the employer and union came to an agreement at a labor-management meeting to change the seniority calculation for part-time employees, but that Fowler was never made aware of this change. The change in calculation of seniority resulted in an adjustment to Fowler's seniority date, which resulted in her layoff. That Fowler was not aware of the alleged change in seniority calculation was not in itself an unfair labor practice. However, Fowler alleges that union representatives never told her of the alleged agreement of October 9, 2009, that she was never informed by the union that her seniority had changed, and that she filed the layoff grievance in the belief that her layoff violated the plain language of the collective bargaining agreement. Fowler alleges that part-time and full-time employees were treated differently in the layoff in violation of the contract. However, Fowler does not allege that the October 2009 agreement or her layoff were directed specifically against her based upon improper or invidious actions by the union.

A union has the authority to negotiate changes to wages, hours, and working conditions on behalf of its members, and can decide which proposals it will negotiate with the employer. *Seattle School District,* Decision 9359-A (EDUC, 2007). In the present case, the union and employer

could legally agree at the bargaining table to change the seniority calculations for part-time employees, and "the mere designation of 'part-time' status does not bring an employee into a classification protected from invidious discrimination." *Metro (Amalgamated Transit Union, Local 587),* Decision 2746-A (PECB, 1989).

Fowler's allegation that she was the first person impacted by the change in seniority calculations could be an indication of unlawful action if the complaint showed that the union's alleged agreement with the employer was connected to Fowler's union activities or status, race, creed, sex, national origin, or the like. However, Fowler does not allege invidious or improper reasons for her layoff, but alleges discrimination based upon her part-time status; as noted, that is not a protected class.

At issue in interference claims is whether an employee could reasonably perceive threats of reprisal or force or promises of benefit in connection with union activities. Proof of unlawful intent is not necessary to find a violation. *King County,* 8630-A. Fowler has stated a cause of action for interference concerning allegations that the union allowed her to file a layoff grievance over changes in her seniority calculation, while allegedly knowing that the employer and union had agreed to change those calculations for part-time employees.

However, the union did not breach its duty of fair representation in deciding not to pursue the layoff grievance. The layoff was not unlawful based upon the facts presented in the complaint. The statement of facts makes clear that the union told Fowler that it would not pursue her grievance based upon advice of legal counsel that the grievance lacked merit, and the union's grievance committee voted not to pursue it. Fowler has not presented facts indicating that the union's decision not to pursue the layoff grievance was based upon reasons that were arbitrary, discriminatory, or in bad faith.

Inducement to Commit an Unfair Labor Practice

It is an unfair labor practice in violation of RCW 41.56.150(2) for a union to request an employer to take unlawful action against an employee based upon improper or invidious reasons. *Metro,*

Decision 2746-A. In the present case, as previously noted, the adjustment of part-time employees' seniority would by itself not be an unlawful act, since the employer and union could have legally agreed to that at the bargaining table. *Metro.* Even if the agreement in the present case was that layoff benefits would be granted to laid off part-time employees, that agreement would not be unlawful if it applied to all part-time employees. There is no indication in the complaint that the union specifically requested the employer to layoff Fowler. There is also no indication that the union requested the employer to rescind layoff benefits for part-time employees who filed grievances over layoffs, including rescinding Fowler's benefits. The complaint cites an employer official telling Fowler of the rescission of benefits, and the employer's purpose for imposing it, but the employer's statement does not indicate that the union was in agreement with the concept or had suggested it.

Residual Claims: Breach of Contract, Refusal to Bargain

Breach of contract

Fowler alleges that the employer and union violated the collective bargaining agreement by their agreement over the seniority calculations for part-time employees. The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. *City of Walla Walla*, Decision 104 (PECB, 1976).

Refusal to bargain

The employer and union had no duty to negotiate with Fowler, and Fowler does not have standing to process refusal to bargain claims. Only a union holding the status of exclusive bargaining representative has standing to collectively bargain with an employer, and an employer has no duty to bargain with individual employees. Only a union has standing to file and pursue refusal to bargain claims. *Spokane Transit Authority*, Decisions 5742 and 5743 (PECB, 1996).

It is understood that the complaint does not specifically allege breach of contract or refusal to bargain. The rulings on residual claims are made in the interest of averting any possible misunderstandings in the processing of this complaint or an amended complaint.

Timeliness

Fowler filed her complaint on March 9, 2011. RCW 41.56.160(1) provides "That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." Although the complaint refers to an alleged agreement between the employer and union in October 2009, the allegations involving that information are untimely, and in any case do not state causes of action. The causes of action granted in this preliminary ruling all concern allegations occurring on or after September 9, 2010.

Procedural Issues

The complaint contains only a portion of the full collective bargaining agreement required to be attached under WAC 391-45-050(5)(c)(ii) (rule), and does not specify the number of employees in the unit [rule, 5(f)].

Amended Complaint

Layoff

The amended complaint has a collective bargaining agreement attached, specifies the number of employees in the unit, and adds some additional facts concerning the layoff. Fowler re-alleges union interference and the union inducing the employer to commit an unfair labor practice. She states that in August 2010 she had a dispute with her supervisor. She alleges a hostile work environment, and that her supervisor targeted her for layoff for unexplained reasons, but provides no supporting facts for this claim, nor does she provide facts showing that it was in reprisal for her union activities. In fact, the amended complaint does not identify any union activities related to the union other than Fowler's filing her layoff grievance and wanting to file a rescission grievance. She states that she had spoken with other employees about reporting the situation to the employer's human resource department, although she did not make the report to human resources. She states that the other employees, although initially supportive of her, withdrew their support. She states that her supervisor and the local union president were friends, and implies that other union members were involved in the lack of support from her colleagues.

The name "Public Employment Relations Commission" is sometimes interpreted as implying a broader scope of authority than is actually conferred upon the agency by statute. The agency does not have authority to resolve each and every dispute that might arise in public employment, but only has jurisdiction to resolve collective bargaining disputes between employers, employees, and unions. The Commission does not have jurisdiction over hostile work environment claims unrelated to union activities. The amended complaint does not cure the complaint's defects concerning the layoff. Fowler has not provided facts indicating that the layoff resulted from her union activities or were based on improper or invidious actions by the union.

Inducing the Employer to Commit an Unfair Labor Practice

The amended complaint also does not cure the complaint's defects regarding the claim of the union inducing the employer to commit an unfair labor practice. There are no facts indicating that the union was involved with Fowler's layoff or the rescission of her layoff benefits. Fowler's suppositions concerning the alleged involvement of union members in her dispute with her supervisor do not provide facts showing that the union violated RCW 41.56.150(2).

Fowler also re-alleges that the union did not follow the collective bargaining agreement over layoffs, but provides only argument on this issue, rather than additional facts showing an improper or invidious basis for union actions; breach of contract and refusal to bargain claims are inapplicable.

Breach of the Duty of Fair Representation: Layoff Grievance

Fowler also re-alleges that the union breached its duty of fair representation in allowing her to file the layoff grievance, but then refused to pursue it, when the union knew the grievance would be denied. The issue in a claim for breach of the duty of fair representation is whether the union failed to pursue the layoff grievance for unlawful reasons. The amended complaint provides only argument, with no new facts indicating unlawful union actions, and does not cure the defects to the complaint.

However, a cause of action was given for union interference based upon Fowler's allegation that the union knew the layoff grievance would be denied and let her file it anyway. A cause of action for interference in this instance is distinct from a cause of action for breach of the duty of fair representation: The allegation does not require proof that the union acted with unlawful intent; the issue is whether Fowler reasonably perceived that the union's alleged actions interfered with her collective bargaining rights under Chapter 41.56 RCW.

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:

> Union interference with employee rights in violation of RCW 41.56.150(1), by: (a) threats of reprisal or force or promises of benefit made to Karen Fowler in (i) failing to inform her that the union and employer had agreed to change seniority calculations for part-time employees, while knowing that she intended to file a layoff grievance over that change, (ii) telling her that the rescission of her layoff benefits was a dispute between her and the employer; and (b) breach of its duty of fair representation in failing or refusing to file and pursue the rescission grievance.

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

Washington State Council of County and City Employees, Council 2, AFSCME – AFL-CI0, Local 2170 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.

2. The allegations of the amended complaint in Case 23853-U-11-6092 concerning union interference in violation of RCW 41.56.150(1), by breach of its duty of fair representation towards Karen Fowler in deciding not to pursue the layoff grievance; and the union inducing the employer to commit an unfair labor practice in violation of RCW 41.56.150(2) [and if so, derivative interference in violation of RCW 41.56.150(1)], are DISMISSED for failures to state causes of action.

ISSUED at Olympia, Washington, this 28th day of April, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, Unfair Labor Practice Manager

Paragraph 2 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23853-U-11-06092	FILED:	03/09/2011	FILED BY:	PARTY 2
DISPUTE:	UN MULTIPLE ULP				
BAR UNIT:	MIXED CLASSES				
DETAILS:	-				
COMMENTS:					

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