Washington State Ferries, Decision 11335 (MRNE, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JONATHAN D. PEARSON, Complainant, vs. WASHINGTON STATE FERRIES, Respondent.	CASE 24126-U-11-6174 DECISION 11335 - MRNE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Jonathan D. Pearson appeared on his own behalf.

Attorney General Robert M. McKenna by *Don L. Anderson,* Assistant Attorney General, for the employer.

On February 12, 2010, Jonathan D. Pearson (Pearson) filed a complaint charging unfair labor practices against the Washington State Department of Transportation Ferries Division (employer). The complaint was filed with the Marine Employees Commission (MEC) and docketed as MEC Case 11-10. In his complaint, Pearson alleged the employer committed unfair labor practices when it terminated his employment in violation of RCW 47.64.130.

On February 7, 2011, MEC Commissioner John Cox held a hearing on this case. At the commencement of the hearing, the employer moved to dismiss the case for lack of timeliness. Commissioner Cox bifurcated the hearing to first determine if the case was timely filed. After the hearing, the parties filed written briefs regarding the motion to dismiss. On May 12, 2011, Commissioner Cox issued Decision No. 604-MEC which denied the employer's motion and ruled that a hearing would be held on the merits of the complaint.

As a result of legislative action, the MEC became the Marine Employees Division of the Public Employment Relations Commission (Commission) on July 1, 2011. *See* RCW 41.48.065. The

instant unfair labor practice was still active on the MEC's docket, and was transferred to the Commission for further proceedings. A hearing was conducted on November 8, 2011, before Examiner Emily H. Martin. The parties submitted written arguments on January 13, 2012.

ISSUE

1. Did the employer commit an unfair labor practice by interfering, dominating, discriminating or refusing to bargain in violation of RCW 47.64.130(1) when it terminated Pearson?

I find that the employer did not commit an unfair labor practice when it terminated Pearson.

APPLICABLE LEGAL STANDARD

Interference

RCW 47.64.130(1) (a) states that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter. An interference violation is found when a typical employee could, in the same circumstances, reasonably perceive the employer's action as discouraging his or her union activities. *See Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004).

Domination

RCW 47.64.130(1)(b) states that is an unfair labor practice "to dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it." Domination is found when the complainant can show that an employer intended to control or interfere with the administration of the union and/or intended to dominate the internal affairs of the union. *Northshore Utility District*, Decision 10534-A (PECB, 2010).

Discrimination

RCW 47.64.130(1)(c) states it is an unfair labor practice "to encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure of

employment, or any term or condition of employment . . . " and RCW 47.64.130(1)(d) state it is an unfair labor practice to "discharge or otherwise discriminate against an employee because he or she has filed charges or given testimony under this chapter."

In order to prove a discrimination unfair labor practice, a complainant must initially establish a *prima facie* case showing that: (1) the employee participated in an activity protected by the collective bargaining statute or communicated to the respondent an intent to do so; (2) The employer deprived the employee of some ascertainable right, benefit, or status; and (3) A causal connection exists between the employees protected activity and the employer's act. *See University of Washington*, Decision 11091-A (PSRA, 2012).

Refusal to Bargain

RCW 47.64.130(1)(e), it is an unfair labor practice "to refuse to bargain collectively with the representatives of its employees."

The duty to bargain exists only between the employer and the union, which is the exclusive bargaining representative of the employees. *See Renton School District*, Decision 6300-A (PECB, 1998). Thus, individual employees lack standing to file refusal to bargain claims. *South Whidbey School District*, Decision 11134-A (EDUC, 2011).

ANALYSIS

On May 19, 2009, Pearson was terminated from his position as a Master. The events that led to his termination began in May 2001, when Pearson took leave because of a sleep disorder. In October 2001, Pearson was sent a letter from the employer's human resource department which stated that he had been on unapproved leave from May 2001 through December 2001. The letter also requested two types of documents from his doctors, one stating that he could perform the required physical activities of his job, and another stating that he had been unable to work due to medical reason from May to October 2001. On December 14, 2001, Pearson submitted the form that showed he could perform the physical activities. The employer determined that he failed to satisfy the second requirement, proof that the extended leave was unavoidable due to injury or illness. Thus, the leave from May to October 2001 was never approved. Pearson did not return to work.

In 2003, Human Resource Port Captain, Tim Saffle, scheduled a pre-disciplinary proceeding for Pearson due to his absence from work since May 2001. As part of the proceedings, the employer and Pearson had a series of correspondence about Pearson's medical documentation. This correspondence ended on August 18, 2004, when a physician sent documentation releasing Pearson for duty. While Pearson was not disciplined at this time, he also did not return to work.

On December 4, 2008, the employer sent Pearson a letter informing him that the employer intended to separate him from employment effective December 18, 2008. This was part of a clean-up effort the employer had undertaken to remove inactive employees from its employment rolls. On December 15, 2008, Pearson replied by asking to be placed on active status. The employer then began disciplinary proceedings regarding his extended and unauthorized leave. Because Pearson was represented by the International Organization of Masters, Mates and Pilots (union) on June 22, 2009, the union filed a grievance on his behalf regarding his termination. However, on August 18, 2009, the union determined that it would not take Pearson's grievance to arbitration because Pearson had been absent from work for an extended period of time and had not provided acceptable documentation to the employer. Subsequently, Pearson filed his complaint in this unfair labor practice proceeding.

In this proceeding, Pearson argued that the employer made errors in his termination process. This case comes before this Examiner as an unfair labor practice and is not an arbitration of Pearson's grievance regarding his termination. The Commission has a long history of refusing to resolve "violation of the contract" allegations in unfair labor practice proceedings. The remedy for a contract violation must come through the grievance and arbitration machinery of the contract, or through the courts. *South Whidbey School District*, 11134-A (EDUC, 2011), see also *City of Walla Walla*, Decision 104 (PECB, 1976).

Interference

In this case, there is no evidence that the employer interfered with Pearson's rights. Pearson did not show that his termination and the denial of his grievance were connected to any union activity. Furthermore, he did not provide any evidence to show that he was discouraged by the employer to engage in any union activity. The only union activity that Pearson engaged in was filing a grievance after his termination, but there was no evidence that would lead a typical

employee to think that Pearson's union activities were being discouraged by the employer. Therefore, I find that the employer did not interfere with Pearson's rights.

Domination

In 2003, the employer initiated pre-disciplinary proceedings against Pearson. Human Resource Port Captain Tim Saffle initiated the pre-disciplinary proceeding and engaged in correspondence with Pearson regarding his medical documentation. Between 2004 and 2009, Saffle changed positions and became the labor negotiator and representative of the union. Therefore, Saffle represented Pearson during his termination grievance in 2008. However, nothing in the record indicates that the employer dominated the union though Saffle. There was nothing in the record to show that the employer controlled or interfered with the internal affairs of the union. Thus, I find that the employer did not dominate or provide unlawful assistance of the union.

Discrimination

In this case, Pearson did not establish a prima facia case to show that the employer discriminated against him. While Pearson engaged in a protected act when he and the union filed the grievance regarding his termination, and while the employer had deprived him of his employment when they terminated him, Pearson's grievance was a result of his termination and not its cause. There is no evidence of any earlier grievance or other protected collective bargaining activity with a causal link to Pearson's termination.

Pearson has alleged that the employer discriminated against him for participating in the National Guard. Even if this were proven, participation in the National Guard is not a collective bargaining activity and would not be the basis for finding an unfair labor practice violation. Because Pearson did not establish a prima facia case, I find that the employer did not discriminate against Pearson for union activities.

Refusal to Bargain

Because the duty to bargain exists between the employer and the union and not the individual employees, when Pearson filed this unfair labor practice as an individual he lacked standing to file or purse a "failure to bargain" case against the employer.

CONCLUSION

The employer has not committed an unfair labor practice.

FINDING OF FACT

1. The Washington State Department of Transportation Ferries Division is an "employer" within the meaning of RCW 47.64.011(4).

2. Jonathan D. Pearson (Pearson) was a "ferry employee" within the meaning of RCW 47.64.011(6).

3. Pearson belonged to a bargaining unit represented by the International Organization of Masters, Mates and Pilots, which is a "ferry employee organization" within the meaning of RCW 47.64.011(7).

4. Pearson has not worked actively since May 2001.

5. In October of 2001, the employer requested documentation regarding his medical inability to work.

6. Pearson did not provide all of the documentation requested by the employer.

7. In 2008, the employer attempted to remove Pearson and other inactive employees from its employment rolls. When Pearson objected, the employer initiated disciplinary proceedings, which concluded with Pearson's termination.

8. On June 22, 2009, Pearson and the union filed a grievance regarding his termination.

CONCLUSION OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 47.64 RCW.

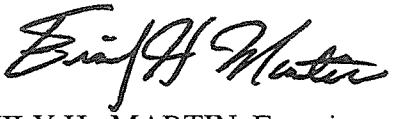
2. By events described in Finding of Fact 4 through 8, the employer did not violate any provisions of RCW 47.64.130(1) when it terminated Pearson.

ORDER

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

ISSUED at Olympia, Washington, this 5th day of April, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



EMILY H. MARTIN, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	24126-U-11-06174	FILED:	07/06/2011	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	MARINE OFFICER				
DETAILS:	See 24196-U MEC #11-10				
COMMENTS:					

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