

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY SHERIFF'S SUPPORT
GUILD,

Complainant,

vs.

KITSAP COUNTY,

Respondent.

CASE 26328-U-14-6720

DECISION 12022 - PECB

ORDER OF DISMISSAL

On March 3, 2014, the Kitsap County Sheriff's Support Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Kitsap County (employer) as respondent. The complaint was reviewed under WAC 391-45-110,¹ and a deficiency notice issued on March 14, 2014, indicated that it was not possible to conclude that a cause of action existed at that time. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case.

On March 18, 2014, the union filed an amended complaint. The Unfair Labor Practice Manager dismisses the amended complaint for failure to state a cause of action.

DISCUSSION

The allegations of the complaint concern employer interference with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made to all bargaining unit members in connection with union activities regarding the Pamela Morris (Morris) grievance arbitration; and discrimination (and derivative interference) in violation of RCW 41.56.140(1), by

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.

its actions toward Morris regarding her grievance arbitration, in reprisal for union activities protected by Chapter 41.56 RCW. The deficiency notice pointed out the defects to the complaint. The complaint concerns a grievance arbitration filed by the union on Morris's behalf over pay allegedly due her upon her retirement. The parties have scheduled a hearing on the matter. The union alleges that after the hearing was scheduled, the employer claimed that Morris owes the employer money for overpayment discovered in an audit conducted after Morris's retirement. On February 26, 2014, the employer made an offer to forego repayment if the union would withdraw the grievance and pay the arbitrator's cancellation fees. The union states that the amount claimed by Morris is "somewhat less" money than the amount claimed by the employer. The union rejected the employer's settlement offer and made a counter offer requesting that the employer withdraw its offer by the end of business on February 28, 2014. The employer did not respond by the union's deadline, and the union filed its complaint on March 3, 2014.

The union alleges that the employer's settlement offer is unlawful because, in summary:

- the audit of Morris was unnecessary and was conducted only in response to the grievance and for the purpose of gaining leverage against the union and Morris in the grievance;
- it seeks to have the union withdraw its grievance under the threat of legal action against Morris for collection of her alleged overpayment;
- it pits the union and its membership against Morris;
- it pits the union's broader interests and legal obligations against the financial well-being of a bargaining unit member; and
- it discriminates against Morris by threatening to deprive her of wages if she does not drop her grievance.

Jurisdiction

Although grievance arbitrations are contractual matters outside of the Commission's jurisdiction, the union alleges that the employer's offer of settlement constitutes interference and discrimination. Those claims concern statutory rights protected under Chapter 41.56 RCW, and the Commission asserts jurisdiction in this dispute.

Conditional offers of settlement

Conditional offers of settlement are not unlawful, but rather are lawful means to explore alternatives in bargaining. *Whatcom County*, Decision 7244-B (PECB, 2004). An exception to the general rule on conditional offers is conditioning a proposal on the withdrawal of an unfair labor practice complaint, which may be an unfair labor practice. *Public Utility District 1 of Clark County*, Decision 2045-B (PECB, 1989). Such a proposal demands that a party abandon a legal right in exchange for a more favorable offer in bargaining, forcing a decision between short-term gain and long-term preservation of bargaining rights. *Public Utility District 1 of Clark County*, Decision 2045-B; *Wapato School District*, Decision 11107 (PECB, 2011).

Grievance arbitrations are analogous to unfair labor practice complaints

Grievance arbitrations may be considered analogous to unfair labor practice complaints, since they also concern legal rights. The present complaint alleges that the employer's conditional offer of settlement was unlawful. It is not a per se unfair labor practice to make a conditional offer of settlement based upon the withdrawal of an unfair labor practice complaint or grievance. However, it is an unfair labor practice to insist to impasse or unreasonably burden the collective bargaining process by conditioning settlement of a dispute on the withdrawal of a complaint or a grievance. "The settlement of an unfair labor practice is a permissive subject of bargaining, so that proposals can be made, but not insisted upon as a condition to a contract or concession." *Public Utility District 1 of Clark County*, Decision 2045-B.

For example, in contract negotiation cases, the party conditioning bargaining on the withdrawal of a complaint or grievance could commit a violation by unlawfully bargaining to impasse or unlawfully obstructing negotiations by placing unreasonable burdens on bargaining. *Public Utility District 1 of Clark County*, Decision 2045-B; *Wapato School District*, Decision 11107. In the same way, a party making a settlement offer regarding an unfair labor practice complaint or grievance arbitration could use the settlement offer to obstruct or unreasonably burden the adjudication of the dispute.

The present complaint

In the present case, the employer made a conditional settlement offer regarding a grievance arbitration. The union rejected the employer's offer and made a counter offer. The offer and counter offer concern a permissive subject of bargaining. The employer made its offer on February 26. The union made an immediate counter offer, giving the employer two days to accept it. When the employer did not respond, the union filed its complaint on the next business day. The union's objection to the employer's lack of immediate response to the union's counter offer does not state a claim for an unfair labor practice violation. The complaint does not show that the employer conditioned its offer on the union relinquishing its legal right to proceed with the grievance arbitration, or otherwise obstructed or unreasonably burdened the grievance arbitration process. The complaint states that prior to the offer and counter offer Morris's grievance arbitration hearing was set for April 8, 2014; the hearing date apparently remains in place.

The allegations concerning the employer's settlement offer and the union's counter offer do not indicate that unfair labor practice violations could be found. The dispute concerning Morris's alleged overpayment is a contractual matter outside of the Commission's jurisdiction. The complaint does not state a cause of action.

Amended Complaint

The amended complaint adds one factual allegation to the complaint, stating that the employer told the union that in exchange for the employer foregoing its overpayment claim, the union would

have to cancel the arbitration and pay the cancellation fees. In addition, whereas the complaint refers to the employer's statement of February 26, 2014, as a settlement offer, the amended complaint refers to it as a threat.

The amended complaint reiterates the union's position that the audit of Morris and potential collection action (hereinafter, audit/collection) constitute reprisal for the union's and Morris's pursuit of the grievance. The amended complaint also restates the union's view that the audit was unnecessary, and that the employer's claim is without merit. The union states that the employer has placed it in the position of having to choose between pursuing a grievance and enforcing the collective bargaining agreement on behalf of all bargaining unit members, or causing Morris to be subject to legal action by the employer, potentially causing her to lose more money in that action than she would gain through the grievance (Paragraph 1.16 of the amended complaint).

The parties are currently in negotiations over a collective bargaining agreement. A cause of action could exist for an unfair labor practice complaint if the employer had conditioned contract negotiations on the union's withdrawal of the Morris grievance and insisted to impasse on that demand. However, the employer's statement of February 26 was not connected to contract bargaining, but was an offer to settle the Morris grievance. The union's acceptance of the employer's offer would have required it to withdraw its grievance. The employer's explicit demand to that effect does not constitute an unfair labor practice. In unfair labor practice cases, settlement mediations are routinely conducted where settlement offers are made. In those cases, settlement offers by definition require complainants to withdraw their complaints, and such offers are not unfair labor practices, since the unfair labor practice settlement process cannot force complainants to forego their rights to decline settlement and proceed with the unfair labor practice hearings.

In the present case, the union states that it rejected the employer's offer, and that the employer did not respond to the union's counter offer. The employer's lack of response by the union's deadline was apparently a rejection of the counter offer, and the employer had no duty to amend its own offer. However, the employer cannot compel the union to give up its right to proceed with the

arbitration scheduled for April 8, 2014, and the amended complaint does not indicate that the employer has done so.

The union believes that the employer's offer was the product of unlawful actions—the Morris audit/collection. The union bases this allegation, at least in part, on its own investigation that determined the employer's claim to be without merit, and asserts that the employer's position is analogous to the pending grievance and contrary to the terms of the collective bargaining agreement (Paragraph 1.18 of the amended complaint). The union states that the employer has indicated that it must pursue a collection action against Morris because to do otherwise would constitute “a gift of public funds” in violation of the State Constitution (Paragraph 1.21 of the amended complaint—parenthesis in the original).

According to the information provided by the union, were a Commission examiner to be assigned to adjudicate this claim, the examiner would need to conduct an inquiry into the legitimacy of the audit itself in order to determine whether the audit was ordered in reprisal for union activities. That would be a contractual inquiry outside of the Commission's jurisdiction.

An alternative reading of the union's claim is that regardless of the merits of the audit/collection, the employer allegedly pursued this course of action solely in retaliation for Morris's grievance, and thus an examiner would need to only conduct an inquiry into the employer's motives regarding the audit/collection. The union's theory would make the audit/collection analogous to a disciplinary action in reprisal for union activities. However, even if this theory were accepted, an examiner would need to consider the employer's constitutional defense, a course of inquiry that is also outside of the Commission's jurisdiction. *See City of Bellingham*, Decision 6950 (PECB, 2000) (question over illegal gift of public funds is for a court to decide).

The union also appears to allege that the employer's offer and the audit/collection constitute independent interference, because Morris and other bargaining unit members “could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or of other employees (Paragraph 2.1 of the amended complaint).” In support of its argument, the union cites the Commission's recent decision in *City*

of *Mountlake Terrace*, Decision 11831-A (PECB, 2014). In that decision, the Commission clarified the legal standard for an independent interference cause of action. The definition cited by the union has been a long-standing Commission standard, and is now the definitive standard for independent interference claims. However, in *City of Mountlake Terrace*, the Commission did not find an independent interference violation. A reasonable person's view of a threat or promise is not a completely subjective standard that relies for proof solely on an employee's claim of a perceived threat or promise of benefit. In the present case, the union's use of the term "threat" to replace "settlement offer" is insufficient to state a cause of action.

The employer made an offer to resolve the grievance. The union found the offer offensive, but that does not indicate an unfair labor practice violation. The union maintains its legal right to proceed with the present grievance and any subsequent and related grievances. The amended complaint does not cure the complaint's defects.

NOW, THEREFORE, it is

ORDERED

The amended complaint charging unfair labor practices in Case 26328-U-14-6720 is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 31st day of March, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DAVID I. GEDROSE, Unfair Labor Practice Manager

This 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/ DIANE THOVSEN

CASE NUMBER: 26328-U-14-06720 FILED: 03/03/2014 FILED BY: PARTY 2
DISPUTE: ER MULTIPLE ULP
BAR UNIT: NON UNIFORMED
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