City of Seattle (Seattle Police Management Association), Decision 12091 (PECB, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF SEATTLE,

Employer.

GREGORY SCHMIDT,

Complainant,

CASE 25660-U-13-6572

VS.

DECISION 12091 - PECB

SEATTLE POLICE MANAGEMENT ASSOCIATION,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Respondent.

Gregory Schmidt appeared on his own behalf.

Snyder & Hoag, by David Snyder, Attorney at Law, for the union.

The central allegation in this case involves an employee's complaint that his union interfered with his rights and induced the employer to commit an unfair labor practice when the employer demoted him from a director position to a lieutenant position.¹ A secondary allegation in the employee's complaint involves the union's removal of the employee from the union group e-mail list resulting in the employee not being invited to two union luncheons. The union filed a motion for summary judgment requesting dismissal of this case.

I grant the motion. The employee did not file the allegation addressing his demotion within the six month statute of limitations.² Although the employee timely filed his secondary allegation that the union improperly deleted him from its e-mail list, I dismiss that allegation because it does not state a cause of action.

Throughout this decision, I use the term "demotion" despite the Seattle Public Safety Civil Service Commission's ruling that Schmidt's transfer did not meet the Seattle Municipal Code's definition of "demotion."

Because I decide the central issue in this case based on the statute of limitations, this decision will not address the union's argument that collateral estoppel bars re-litigation of Schmidt's demotion.

ISSUES

As framed by this agency's preliminary ruling, this case raises two issues:

- 1. Did the union interfere with Gregory Schmidt's rights by breaching its duty of fair representation towards him?
- 2. Did the union induce the employer to commit an unfair labor practice by requesting Schmidt's demotion in reprisal for union activities protected by Chapter 41.56 RCW?

This decision does not reach these issues because, as a matter of law, the undisputed facts require dismissal of the primary allegation in Schmidt's complaint concerning his demotion because Schmidt did not file the allegation within the applicable statute of limitations. This decision also dismisses a secondary issue raised in Schmidt's complaint alleging the union removed Schmidt from the union's group e-mail resulting in Schmidt not being invited to two union luncheons because the allegation is an internal union matter and does not state a cause of action. As a result, I grant the union's motion for summary judgment and dismiss Schmidt's complaint.

PROCEDURAL HISTORY

On April 24, 2013, Gregory Schmidt (Schmidt), a lieutenant employed by the City of Seattle's Police Department (employer), filed an unfair labor practice complaint against the Seattle Police Management Association (union or SPMA). The union serves as the exclusive bargaining representative for the Seattle Police Department's supervisory uniformed personnel holding the rank of lieutenant and above, excluding the chief of police, confidential employees, non-supervisory uniformed personnel, and all non-uniformed employees. *City of Seattle*, Decision 689-D (PECB, 1981). The employer and union were parties to a collective bargaining agreement at all times addressed in this decision.

On April 30, 2013, Unfair Labor Practice Manager David Gedrose issued a preliminary ruling finding causes of action for union interference with employee rights and union inducement of the employer to demote Schmidt:

- [1] Union interference with employee rights in violation of RCW 41.56.150(1), by breach of its duty of fair representation towards Gregory Schmidt (Schmidt); and
- [2] Union inducement of the employer to commit an unfair labor practice in violation of RCW 41.56.150(2) [and derivative interference in violation of RCW 41.56.150(1)], by requesting the demotion of Schmidt in reprisal for union activities protected by Chapter 41.56 RCW.

The Commission assigned Jamie L. Siegel to serve as Examiner. In a pre-hearing conference call on May 31, 2013, Schmidt and then-union attorney Mark McCarty agreed to delay scheduling the hearing because of pending motions in a related matter before the Seattle Public Safety Civil Service Commission (SPSCSC). Subsequently, Schmidt and McCarty agreed to schedule the hearing on November 13 and 14, 2013, if the SPSCSC case ended before October 1, 2013; if the SPSCSC case did not end before October 1, Schmidt and McCarty agreed to hold the hearing on January 14 and 15, 2014.

As the January hearing dates approached, the parties agreed to reschedule the hearing for April 17 and 18, 2014. The union filed a motion for summary judgment on March 19, 2014. I postponed the hearing and directed both parties to file briefs and supporting evidence on the motion. On May 12, 2014, after fully reviewing and considering the complaint, answer, preliminary ruling, and the briefs, declarations, and exhibits submitted, I granted the union's motion for summary judgment dismissing the employee's complaint and advised the parties this written decision would follow.

BACKGROUND

Schmidt has served as a lieutenant with the Seattle Police Department since 1996. On April 2, 2008, he was promoted to the position of director of communications which, at that time, could be filled by either a lieutenant or a captain. As a director, Schmidt earned additional compensation above what he previously earned as a lieutenant.

The union and the employer, in an attempt to resolve several areas of concern, entered into a Memorandum of Agreement (MOA) dated May 28, 2010. One topic in the MOA addressed the reclassification of one of two director positions to the rank of captain:

One of the current directors (either the Communications Center Director [Schmidt's position] or the Community Relations Director) will be reclassified to the permanent civil service rank of captain. It is understood that if the position that is reclassified to the permanent civil service rank of captain is abrogated, the remaining director position will then be reclassified to the permanent civil service rank of captain.

Schmidt was aware of the MOA. When the other director position was reclassified, Schmidt believed the requirement in the MOA had been satisfied and his position would remain unchanged. During the pertinent time periods, Schmidt was not on the eligibility list to be promoted to captain.

On June 24, 2011, an assistant police chief told Schmidt he would be reassigned. The employer eliminated the additional compensation he received as a director in March of 2012. On April 14, 2012, the chief of police notified Schmidt he would be demoted.

In the spring and summer of 2012, after his demotion, Schmidt contacted the union, asking for information, records, and assistance. Schmidt met with union executive board members on May 3, 2012.

Rather than file a grievance under the terms of the collective bargaining agreement, on March 12, 2012, Schmidt chose to file an appeal with the Seattle Public Safety Civil Service Commission (SPSCSC). Schmidt's appeal argued he was improperly demoted from director to lieutenant. The SPSCSC heard the appeal on October 24 and 25, 2013, and issued its decision on December 20, 2013. The SPSCSC ruled: (1) no basis existed to treat the director position as a separate rank or classification, and (2) Schmidt's reassignment was not disciplinary and was therefore not a demotion.

When Schmidt was demoted, the employer reclassified the director of communications position to be filled by a captain. Eric Sano, the union's president, was on the eligibility list to be promoted to captain but was not selected for the position. The union filed a grievance on Sano's behalf. The grievance processing eventually resulted in the union filing a lawsuit against the employer in King County Superior Court. The litigation settled out of court and Sano was promoted to a captain position.

APPLICABLE LAW

Statute of Limitations

Most legal systems, including administrative agencies, establish a statute of limitations, a maximum time period after an alleged violation when legal proceedings based on the alleged violation must be filed. The statute of limitations for filing an unfair labor practice complaint is six months after the date of the alleged violation. RCW 41.56.160(1).³ The six-month statute of limitations begins to run when the complainant knew or should have known of the alleged violation. *City of Bellevue*, Decision 9343-A (PECB, 2007). With adverse employment actions, the clock starts when the adverse employment decision is made and communicated to the complainant. *City of Bellevue*, Decision 9343-A. The only exception to the Commission's strict enforcement of the six-month statute of limitations is when the complainant had no actual or constructive notice of the acts or events which are the basis of the complaint. *City of Bellingham*, Decision 10907-A (PECB, 2012).

Duty of Fair Representation

A union commits an unfair labor practice if it interferes with, restrains, or coerces public employees in the exercise of their rights. RCW 41.56.150(1).

When a union is certified as the exclusive bargaining representative, the union assumes a duty of fair representation. A union breaches its duty of fair representation when its conduct is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012). In rare circumstances, the Commission asserts jurisdiction in duty of fair representation cases. *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A. The Commission asserts jurisdiction in duty of fair representation cases when an employee alleges its union aligned itself in interest against employees it represents based on invidious discrimination. *City of Seattle (Seattle Police Officers' Guild)*. In such cases, the employee bears the burden of establishing that the union took some action aligning itself against bargaining unit employees on an improper or invidious basis,

RCW 41.56.160(1) states: "[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. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law."

such as union membership, race, sex, national origin, etc. City of Seattle (Seattle Police Officers' Guild).

Union Inducement

It is an unfair labor practice for a union to induce an employer to commit an unfair labor practice. To induce an employer to commit an unfair labor practice, a union must request the employer do something unlawful. *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-A (PECB, 1989). If an employer can legally agree to what a union seeks, the union commits no violation. *METRO (ATU, Local 587)*, Decision 2746-A.

Summary Judgment Standards

The law authorizes the Commission and its examiners to grant a motion for summary judgment "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." WAC 10-08-135. The Commission applies the same standards in ruling on summary judgment as do Washington courts. *State - General Administration*, Decision 8087-B (PSRA, 2004). The courts and the Commission define a material fact as one upon which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243 (1993); *State - General Administration*, Decision 8087-B.

When the moving party shows there are no genuine issues as to any material fact, the nonmoving party bears a responsibility to present evidence demonstrating that there are material facts in dispute. Consistent with Civil Rule 56, if the nonmoving party fails to do so, summary judgment may then be appropriate. *Atherton Condo Ass'n v. Blume Dev. Co*, 115 Wn.2d 506 (1990). Civil Rule 56(e) specifically states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Commission does not grant summary judgment motions lightly since doing so involves making a final determination without the benefit of a hearing. *City of Orting*, Decision 7959-A (PECB, 2003). In ruling on a motion for summary judgment, the Commission must consider the

material evidence and all reasonable inferences most favorably to the nonmoving party and deny the motion if reasonable people might reach different conclusions as to the facts. *Paul D. Wood v. City of Seattle*, 57 Wn.2d 469 (1960).

ANALYSIS

Schmidt's complaint describes a number of matters spanning several years. Schmidt's central allegation is that the union breached its duty of fair representation and induced the employer to commit an unfair labor practice when the employer demoted him from a director position to a lieutenant position. Schmidt's secondary allegation is that the union's removal of Schmidt from the union group e-mail list resulted in the union not inviting him to two union luncheons. Schmidt did not file his allegation concerning his demotion within the statute of limitations. Although Schmidt timely filed his secondary allegation addressing the e-mail list, that allegation does not state a cause of action.

This decision first addresses the statute of limitations issue and then addresses the issue involving the union's removal of Schmidt from the union group e-mail list.

The Statute of Limitations Bars Schmidt's Complaint Addressing His Demotion

Schmidt filed his complaint on April 24, 2013. To be timely, the actions he challenged must have occurred on or after October 24, 2012. Schmidt learned of his demotion on June 24, 2011, although the employer did not reduce his compensation until February 28, 2012. Schmidt asserts he did not receive the police chief's notice of his demotion until April 2012. Even using the latest of the three dates as the event triggering the start of the statute of limitations period, these uncontested facts prove Schmidt had actual notice of his demotion prior to October 24, 2012.

Additionally, prior to October 24, 2012, Schmidt decided to appeal his demotion through the Seattle civil service process instead of using the contractual grievance process. Prior to October 24, 2012, Schmidt engaged in e-mail communication with Sano, met with the union's executive board, and was frustrated with his union because he felt it was not providing him timely information and support.

Schmidt's response to the union's motion for summary judgment asserts the statute of limitations should not bar his complaint for the following three reasons: (1) he did not discover key information until after the statute of limitations expired; (2) the union engaged in a continuing violation; and (3) the parties reached an e-mail agreement to toll the statute of limitations. I reject each argument as detailed below.

1. Schmidt knew or should have known sufficient information to file a timely complaint. Schmidt argues he did not discover the extent of the union's role in his demotion until after the six month statute of limitations expired. Based on undisputed facts, I find Schmidt knew or should have known sufficient information to file a timely complaint.

In his brief, Schmidt focuses much attention on the May 28, 2010 MOA. Schmidt argues the May 28, 2010 MOA represents disputed material facts sufficient to defeat summary judgment. He argues the MOA unfairly interfered with his bargaining rights:

The crux of this issue, but for the unfair treatment of the Complainant, and the inducement and interference with Management Rights, by signing an MOA, an MOA that only benefits some members, and not enforcing all parts of the CBA to which a member is entitled protection, the Complainant could still be a Director, or a higher position in the SPD as Past Practice has shown.

Complainant's response to motion for summary judgment at 18.

Instead of supporting his argument that material facts remain in dispute, Schmidt's focus on the 2010 MOA supports the conclusion, as a matter of law, that the statute of limitations expired and bars his complaint. As early as 2010, Schmidt knew the union had bargained with the employer to create more opportunities to promote bargaining unit employees to the captain rank. Schmidt knew as early as 2010 that the union at minimum supported, if not encouraged, the possibility of reclassifying Schmidt's director position to a captain position, a position for which Schmidt was not then eligible. Although Schmidt may have believed his position "safe" after the other director position referenced in the MOA was reclassified, he knew or should have known that the union and employer could pursue other reclassifications, including reclassification of his director position.

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After Schmidt was demoted and his position was reclassified, he may not have known the details of interactions between the union and the employer but he had sufficient knowledge to file a timely complaint concerning the union's involvement. When he eventually filed his complaint, he asserted: "Further review, discovery of documents, testimony, and research will assist in uncovering what role Eric Sano and SPMA Officers had in influencing, inducing, contriving, and in conjunction with SPD to ultimately bring about my demotion." Complaint at Summary of Facts 14. Schmidt could have made the same allegation nine months earlier.

Schmidt alleges that he learned new facts supporting his claims against the union for the first time at the SPSCSC hearing. Knowledge of new information is not the same as knowledge of alleged violations. As noted above, the undisputed facts prove Schmidt knew of the alleged violations prior to October 24, 2012.

Schmidt also argues the union hid critical facts from him. The law anticipates this possibility by providing that the six-month statute of limitations does not begin to run until the complainant knew or should have known of the alleged violation. Here, while Schmidt did not know all the details of the union's involvement in his demotion, he had sufficient information about the union's role to file a timely complaint.

2. Schmidt raises no facts supporting his continuing violation allegation.

Schmidt alleges that the union's actions are part of a continuing pattern of conduct: "Further, the actions of the SPMA were part of a continuing pattern of conduct that is so close or identical that the events going back to 2008 are part in parcel to the actions of the 6 months leading up to the Complainant filing with PERC." Complainant's response to motion for summary judgment at page 2.

The continuing violation doctrine is sometimes used in state or federal employment discrimination cases to override the statute of limitations. In that setting, the doctrine has been used to relieve a plaintiff of a statute of limitations bar if the plaintiff can show a series of related acts, one or more of which falls within the limitations period. The Commission has previously rejected the continuing violation doctrine. *City of Bellingham*, Decision 10907-A (PECB, 2012).

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While I leave open the possibility that a case could present sufficient facts to apply the continuing violation doctrine, the facts in this case do not warrant consideration of an exception. Other than asserting the statute of limitations should not apply because the union engaged in a continuing pattern of conduct, Schmidt raises no facts or evidence supporting the assertion.

3. No facts demonstrate the parties reached an agreement to toll the statute of limitations. Schmidt's complaint asserts that he and the union reached a "tolling agreement" in e-mails from March 2013. Complaint at Summary of Facts 36, 49. Schmidt submitted no evidence of a tolling agreement to support this allegation. In his response to the union's summary judgment motion, he submitted a variety of e-mails, but none includes discussion of tolling the statute of limitations, let alone agreement to toll the statute of limitations. Even if the parties had reached an agreement in March 2013 purporting to toll the statute of limitations, this alleged agreement would not have been timely because the agreement would have been reached outside the six month statute of limitations.

The Complaint Involving the Union's E-Mail List and Luncheon Do Not State a Cause of Action. Schmidt argues the union deleted his name from the union's group e-mail distribution list resulting in the union not inviting him to two union luncheons. Schmidt alleges he was not invited to an all member union luncheon on December 5, 2012. The union sent a group e-mail on November 27, 2012, and he did not receive the e-mail and did not attend the luncheon. The union also sent an e-mail on March 21, 2013, about a subsequent luncheon to be held on April 4, 2013. Although Schmidt did not receive the e-mail directly, a colleague forwarded it to him. A few days before the luncheon, Schmidt received an e-mail from the union asking if he would be attending the luncheon. Complaint at Summary of Facts 37 through 42. Schmidt previously received the union's group e-mails and asserts the union intentionally removed his name from the union's e-mail distribution list.

While this secondary allegation was filed in a timely manner, it addresses a purely internal union dispute over which the Commission does not assert jurisdiction. Unions are private

The requirements for a tolling agreement were addressed in *City of Seattle*, Decision 4057-A (PECB, 1993). The Commission has not ruled on the viability of such agreements since it issued that decision.

organizations. The Commission generally does not get involved in internal union affairs. Western Washington University (Washington Public Employees Association), Decision 8849-B (PSRA, 2006).

FINDINGS OF FACT

- 1. Gregory Schmidt (Schmidt) has served as a lieutenant with the City of Seattle's Police Department (employer) since 1996. On April 2, 2008, he was promoted to the position of director of communications which, at that time, could be filled by either a lieutenant or a captain. As a director, Schmidt earned additional compensation above what he previously earned as a lieutenant.
- 2. The Seattle Police Management Association (union or SPMA) serves as the exclusive bargaining representative, as defined by RCW 41.56.030(2), for the Seattle Police Department's supervisory uniformed personnel holding the rank of lieutenant and above, excluding the chief of police, confidential employees, non-supervisory uniformed personnel, and all non-uniformed employees. The employer and union were parties to a collective bargaining agreement at all times addressed in this decision.
- 3. The union and the employer, in an attempt to resolve several areas of concern, entered into a Memorandum of Agreement (MOA) dated May 28, 2010. One topic in the MOA addressed the reclassification of one of two director positions to the rank of captain:
 - One of the current directors (either the Communications Center Director [Schmidt's position] or the Community Relations Director) will be reclassified to the permanent civil service rank of captain. It is understood that if the position that is reclassified to the permanent civil service rank of captain is abrogated, the remaining director position will then be reclassified to the permanent civil service rank of captain.
- 4. Schmidt was aware of the MOA. When the other director position was reclassified, Schmidt believed the requirement in the MOA had been satisfied and his position would

remain unchanged. During the pertinent time periods, Schmidt was not on the eligibility list to be promoted to captain.

- 5. On June 24, 2011, an assistant police chief told Schmidt he would be reassigned. The employer eliminated the additional compensation he received as a director in March of 2012. On April 14, 2012, the chief of police notified Schmidt he would be demoted.
- 6. Rather than file a grievance under the terms of the collective bargaining agreement, on March 12, 2012, Schmidt chose to file an appeal with the Seattle Public Safety Civil Service Commission (SPSCSC).
- 7. In the spring and summer of 2012, after his demotion, Schmidt contacted the union, asking for information, records, and assistance. Schmidt met with union executive board members on May 3, 2012. Prior to October 24, 2012, Schmidt was frustrated with his union because he felt it was not providing him timely information and support.
- 8. When Schmidt was demoted, the employer reclassified the director of communications position to be filled by a captain. Eric Sano, the union's president, was on the eligibility list to be promoted to captain but was not selected for the position. The union filed a grievance on Sano's behalf. The grievance processing eventually resulted in the union filing a lawsuit against the employer in King County Superior Court. The litigation settled out of court and Sano was promoted to a captain position.
- 9. On April 24, 2013, Schmidt filed the present unfair labor practice complaint against the union. To be timely, the actions he challenged must have occurred on or after October 24, 2012.
- 10. As early as 2010, Schmidt knew the union had bargained with the employer to create more opportunities to promote bargaining unit employees to the captain rank. Schmidt knew as early as 2010 that the union at minimum supported, if not encouraged, the possibility of

reclassifying Schmidt's director position to a captain position, a position for which Schmidt was not then eligible. Although Schmidt may have believed his position "safe" after the other director position referenced in the MOA was reclassified, he knew or should have known that the union and employer could pursue other reclassifications, including reclassification of his director position.

- 11. After Schmidt was demoted and his position was reclassified, he may not have known the details of interactions between the union and the employer but he had sufficient knowledge to file a timely complaint concerning the union's involvement.
- 12. Schmidt raises no facts or evidence to support his continuing violation allegation.
- 13. Schmidt raises no facts or evidence supporting that he and the union reached an e-mail agreement in March 2013 to toll the statute of limitations.
- 14. Schmidt argues the union deleted his name from the union's group e-mail distribution list resulting in the union not inviting him to two union luncheons. Schmidt alleges he was not invited to an all member union luncheon on December 5, 2012. The union sent a group e-mail on November 27, 2012, and he did not receive the e-mail and did not attend the luncheon. The union also sent an e-mail on March 21, 2013 about a subsequent luncheon to be held on April 4, 2013. Although Schmidt did not receive the e-mail directly, a colleague forwarded it to him. A few days before the luncheon, Schmidt received an e-mail from the union asking if he would be attending the luncheon. Schmidt previously received the union's group e-mails and asserts the union intentionally removed his name from the union's e-mail distribution list.
- 15. Schmidt's allegations in Finding of Fact 14 address a purely internal union dispute over which the Commission does not assert jurisdiction.

CONCLUSIONS OF LAW

- 1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.
- 2. No genuine issue as to any material fact exists under WAC 10-08-135, and the Seattle Police Management Association is entitled to judgment as a matter of law.
- 3. The allegations filed in this case relating to Gregory Schmidt's demotion are untimely under RCW 41.56.160.
- 4. Based on actions described in Finding of Fact 14, the allegations in Schmidt's complaint that the union removed Schmidt's name from the union's group e-mail list do not a state a cause of action.

ORDER

Gregory Schmidt's complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 20th day of June, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JAMIE L. SIEGEL, 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

1 Kjane

BY:/S/ DIANE THOUSEN

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25660-U-13-06572

FILED:

04/24/2013

FILED BY:

PARTY 2

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See 26167-S-13-0396

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