Central Kitsap School District, Decision 12227 (PECB, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DEBBIE COREY, Complainant, vs. CENTRAL KITSAP SCHOOL DISTRICT, Respondent.	CASE 26822-U-14-6832 DECISION 12227 - PECB ORDER OF DISMISSAL
CENTRAL KITSAP SCHOOL DISTRICT, Employer.	CASE 26823-U-14-6833 DECISION 12228 - PECB
DEBBIE COREY, Complainant, vs. CENTRAL KITSAP EDUCATIONAL SUPPORT PROFESSIONALS Respondent.	ORDER OF DISMISSAL

On November 4, 2014, Debbie Corey (complainant) filed two interrelated complaints, one against Central Kitsap School District (employer) and one against the Central Kitsap Educational Support Professionals (union). Because these complaints concern the same events in the same time period they were consolidated for processing. The complaints were reviewed under WAC 391-45-110,[1] and a deficiency notice issued on November 25, 2014, indicated that it was not possible to

[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.

conclude that a cause of action existed at that time. The complainant was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the cases.
No further information has been filed by the complainant. The Unfair Labor Practice Manager dismisses the complaint for failure to state a cause of action.

DISCUSSION

Complaint against Employer

The complaint alleges employer interference with employee rights in violation of RCW 41.56.140(1), and refusal to bargain in violation of 41.56.140(4) by its unilateral change in the past practice concerning annual shift bidding for bus drivers.

Complaint against Union

The complaint alleges union interference with employee rights in violation of RCW 41.56.150(1), by breech of its duty of fair representation in agreeing to change the past practice concerning annual shift bidding for bus drivers without providing the membership the opportunity to fully discuss and vote on the change.

The consolidated complaints have been carefully reviewed and compared to the legal standards for these types of allegations. The complaints are being dismissed because they have defects and raise issues that are not under jurisdiction of the Commission.

BACKGROUND

The union represents a unit of classified employees who work for the employer. The unit includes a wide variety of job classifications such as custodians, professional/technical positions, paraeducators, and bus drivers.

On June 16, 2014, employees in the bargaining unit ratified a 2014-2017 collective bargaining agreement.

On July 24, 2014, bus drivers received a letter from the employer's transportation director informing them that there would be one shift bid in August. The letter emphasized "We will only bid once this year!" Prior to this letter the parties had a long standing practice of having an August bid process for special needs bus drivers. Then in mid-October all bus drivers and assistants would bid on their yearly route.

The employer and union did not negotiate any change to the shift bid language in the CBA. The language states:

> **Section 5 - Runs**
>
> **Section 5.1.** All regular and/or Special Education runs shall be posted annually by the Transportation Supervisor.
>
> **Section 5.2.** On or before November 1 of each year, employees, in seniority order and according to District procedure, shall bid annually on their year's assigned route provided such driver meets licensing requirements.

The shift bid took place in August. The complaint describes employee frustrations around not having as much time to look at the route schedules as in past years. The change in bid process resulted in some senior drivers getting less hours and FTE than junior drivers.

The complaint alleges that an unspecified group of drivers met with the union to discuss the shift bid process changes. The union declined the employees' request that it file an unfair labor practice complaint over a unilateral change in shift bid past practice. According to the complaint "A union rep told drivers this was negotiated between our Union President and the District."

ANALYSIS

Refusal to Bargain/Unilateral Change

The complaint alleges that the employer unilaterally changed past practice with regards to shift bidding for bus drivers. Unilateral change is a type of refusal to bargain violation. Exclusive bargaining representatives (unions) or employers may pursue refusal to bargain claims because they are the parties subject to bargaining obligations under 41.56 RCW. *Island County (Island County Deputy Sheriffs' Guild)*, Decision 11003 (PECB, 2011).

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). The duty to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *University of Washington*, Decision 11414-A (PSRA, 2013).

The determination as to whether a duty to bargain exists is a mixed question of law and fact for the Commission to decide.

In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1). A finding that a party has refused to bargain in good faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *See Spokane School District No. 81*, Decision 310-B (EDUC, 1978).

Unilateral Change

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007); *METRO (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). A complainant alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject

of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995). The duty to bargain requires an employer considering changes that affect a mandatory subject of bargaining to give notice to the exclusive bargaining representative of its employees prior to making that decision. *City of Yakima*, Decision 11352-A (PECB, 2013); *Lake Washington Technical College*, Decision 4712-A (PECB, 1995). Formal notice is not required; however, in the absence of formal notice, the employer must show that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998).

To be timely, notice must be given sufficiently in advance of the decision or the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A. The notice would not be considered timely if the employer's action has already occurred when the employer notified the union (a *fait accompli*). *Washington Public Power Supply System*. If a *fait accompli* is found to exist, the union will be excused from requesting bargaining. *Id*. A *fait accompli* will not be found if an opportunity for bargaining existed and the employer's behavior does not seem inconsistent with a willingness to bargain upon request. *Washington Public Power Supply System, citing Lake Washington Technical College,* Decision 4721-A. The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*.

The facts stated in the complaint indicate that the change in shift bidding practice was negotiated between the union president and the employer. Because the union and employer both agreed to change past practice and conduct only one shift bid, the change in past practice concerning shift bid process was not a unilateral change. The decision to conduct a single shift bid was a negotiated and agreed upon change. The fact that the complainant does not like or personally benefit from agreement between the employer and union to hold a single shift bid does not make the single shift bid an unfair labor practice.

Employer Interference

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. RCW 41.56.140(1). The Commission recently clarified the standard for employer interference in *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). To prove interference, the complainant must prove, by a preponderance of the evidence, the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd*, 98 Wn. App. 809 (2000) (remedy affirmed). An employer interferes with employee rights when an employee 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. *Kennewick School District*, Decision 5632-A (PECB, 1996).

An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A, *aff'd*, 98 Wn. App. 809 (2000)(remedy affirmed).

The complainant is not required to demonstrate that the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

The complaint against the employer alleges:

> The School District wants employees who advocate for the contract to be silenced. Some employees have been targeted in our evaluations for bringing contract issues forward. Our district interfered with many employees rights in contact concerns for example: employees discussing contract language and have been told not to discuss ??? in the lounge by the Director.

This type of allegation could constitute an interference cause of action, but the complaint is vague and is missing important details, including dates and persons alleged to have been involved. A "[c]lear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences" is required by WAC 391-45-050(2).

It is not possible to conclude that the complaint was timely filed with regards to these interference claims because the complaint lacks dates of the alleged unfair labor practice violations. The names of the employees who were silenced or targeted in evaluations need to be identified in the complaint as well as the employer agents alleged to have interfered with employee rights. The complainant had the opportunity to amend the complaint, but did not file an amendment to add these necessary details. The employer interference allegations are dismissed for failure to provide clear and concise statements of the facts.

Union Interference/Duty of Fair Representation

The Commission explained the test for union interference: "Interference violation exists when an employee could reasonably perceive actions as a threat of reprisal or force, or promise of benefit, associated with union activity of the employee or other employees. Employee is not required to show intention or motivation to interfere . . . ." *King County (Amalgamated Transit Union, Local 587)*, Decision 8630-A (PECB, 2005).

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

Much of the complaint describes why employees are dissatisfied with the shifts they bid during the August 2014 shift bid process. Some employees are frustrated that their union agreed to a change in past practice around the timing of the shift bidding and guaranteed hours for special education bus drivers at the beginning of the school year. Often when collective bargaining decisions are being made that effect a large group of employees, not all employees in the group are going to agree with, or feel the same way, about the decision. Employees' dissatisfaction is not in itself enough to establish an interference cause of action or breach of duty of fair representation. The complaint did not contain any facts to indicate that the union's decision to allow the employer to change past practice regarding annual shift bids was arbitrary, discriminatory, or done in bad faith. Rather, the facts indicate that the union exercised its discretionary decision making authority. The Commission generally does not get involved in internal union affairs. *Western Washington University (Washington Public Employees Association)*, Decision 8849-B (PSRA, 2006). The complainant can seek relief on this issue through internal union procedures or the courts.

CONCLUSION

The complaints allege that the employer made a unilateral change to annual shift bidding. There is no cause of action for unilateral change because the facts state that the union and the employer agreed to change the past practice and hold a single shift bid for bus drivers in August.

The complaints contain vague allegations that the employer made threats and took actions that could constitute employer interference. The employer interference allegations are dismissed for failure to provide clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences as required by WAC 391-45-050(2).

The allegations of union interference and breach of duty of fair representation do not state a claim that is actionable before the Commission. The fact that some bus drivers are upset with the effects of the union and employer's agreement to change the way that the annual shift bid of bus runs was administered is not an unfair labor practice under the jurisdiction of the Commission. The disagreements between special education bus drivers and other bus drivers described in the complaint are matters of internal union affairs and politics. The complaint did not contain any facts to indicate that the union's decision to allow the employer to change past practice regarding annual shift bids was arbitrary, discriminatory, or done in bad faith.

The Public Employment Relations Commission only has jurisdiction over certain employer-employee relationships. The Commission's jurisdiction is limited to the resolution of collective bargaining disputes between employers, employees, and unions. The agency does not have authority to resolve all disputes that might arise in public employment. *Tacoma School District*, Decision 5086-A (EDUC, 1995). Unions are private organizations. The Commission generally does not get involved in internal union affairs. *Western Washington University (Washington Public Employees Association)*, Decision 8849-B. If the allegations do not rise to the level of an unfair labor practice it does not necessarily mean the allegations involve lawful activity. It means that the issues are not matters within the purview of the Commission. *Tacoma School District*, Decision 5086-A.

Assuming all the facts were true and provable, the complaints do not state a cause of action.

NOW, THEREFORE, it is

ORDERED

The complaints charging unfair labor practices in the above captioned matters are DISMISSED for failure to state a cause of action.

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JESSICA J. BRADLEY, Unfair Labor Practice Manager

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.