City of Normandy Park, Decision 12411 (PECB, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID BOND, Complainant, vs. CITY OF NORMANDY PARK, Respondent.	CASE 127479-U-15 DECISION 12411 - PECB ORDER OF DISMISSAL

On July 10, 2015, David Bond (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Normandy Park (employer) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on August 6, 2015, stated it was not possible to conclude 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 case.

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.

BACKGROUND

The complaint alleges:

1. Employer discrimination and interference with employee rights in violation of RCW 41.56.140(1) since May 2015 by withholding a wage increase from bargaining unit employee David Bond in reprisal for protected union activity.

2. Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)] since May 2015 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.

> failing to bargain in good faith with its employees' exclusive bargaining representative over employee wage increases.

Bond filed the complaint as an individual employee. Bond's job position is part of a non-supervisory bargaining unit represented by the Public, Professional & Office-Clerical Employees and Drivers Local Union No. 763, affiliated with the International Brotherhood of Teamsters (union). The union and employer negotiated a collective bargaining agreement (CBA) effective from July 1, 2015, through June 30, 2018. This agreement addresses the wages of bargaining unit employees, including Bond. Appendix A of the CBA specifies, "Employees will translate to new pay range (nearest step, no reduction) set forth in A.1 [wage scale] on employees [*sic*] next anniversary date after implementation of this agreement."

Bond's anniversary date falls at the end of June. Based on the language in the CBA, he will have to wait almost a full year before receiving a step increase in June 2016. Bond alleges this is not fair and points out that other employees who are not represented by a union received wage increases on May 1, 2015, without having to wait for their anniversary dates.

ANALYSIS

Legal Standards for Discrimination Allegations

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.56.140(1). An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in discrimination cases. To prove discrimination, the complainant must first set forth a *prima facie* case establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute or communicated to the employer 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 employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the *prima facie* case because respondents do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to common experience give rise to a reasonable inference of the truth of the fact sought to be proved. *See Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

Discrimination Must Be Related to Union Activity for the Commission to Have Authority

The Commission does not have authority to address general allegations of discrimination or unequal treatment. The only type of discrimination that the Commission can address is discrimination for engaging in (or refraining from) protected union activity. In this case, basic elements of a discrimination allegation are missing from the complaint. The complaint describes general union organizing by employees in Bond's bargaining unit but does not describe his involvement in protected union activities. The facts do not indicate that Bond participated in an activity protected by the collective bargaining statute or communicated to the employer an intent to do so.

The complaint also failed to explain a causal connection between Bond's union activity and the timing of the wage increases negotiated between the union and employer. Based on the facts as stated, it appears that the employer is granting Bond's wage increase in accordance with the applicable CBA.

Represented employees' wages are bargained by their exclusive bargaining representative and codified in a CBA. The terms of the CBA provide represented employees with predictability in wage increases. Non-represented employees do not typically have the same level of predictability with regard to future wage increases. The employer retains the discretion on how unrepresented employees' wages will be adjusted and can alter them at any time. The complaint describes the employer using its discretion to give wage increases to non-represented employees. The fact that

the employer chose to give its non-represented employees wage increases on a different time schedule than it negotiated for its represented employees does not, on its own, state a cause of action for discrimination.

Complaint is Missing Dates of Occurrences

Several sections of the complaint are vague and do not include specific dates. WAC 391-45-050(2) requires the complainant to include "[c]lear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences." A complaint must contain the dates of occurrences so that the allegation(s) may be reviewed for timeliness. In this case, it is difficult to determine the exact order, timing, and relationship of the alleged events, because most of the facts described in the complaint do not include dates of occurrences. To determine timeliness the Commission looks at the dates of events in the complaint in relation to the filing date. "[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." RCW 41.56.160(1). The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *City of Bellevue*, Decision 9343-A (PECB, 2007), *citing City of Bremerton*, Decision 7739-A (PECB, 2003).

Bad Faith Bargaining Allegations Cannot Be Filed by an Individual Employee

The complaint also alludes to bad faith bargaining with regard to wages for represented employees. An employee cannot file a refusal to bargain complaint as an individual. *King County*, Decision 7139 (PECB, 2000), *citing Clark County*, Decision 3200 (PECB, 1989); *Enumclaw School District*, Decision 5979 (PECB, 1997). Only the parties to the collective bargaining relationship (the union or the employer) can file a refusal to bargain unfair labor practice case.

The union is the only party with standing to file and pursue refusal to bargain claims against an employer. *Spokane Transit Authority*, Decision 5742 (PECB, 1996); *City of Renton*, Decision 11046 (PECB, 2011). Bargaining in bad faith is a type of refusal to bargain case that falls under RCW 41.56.140(4). The union representing the bargaining unit that contains the complainant's job position would have to be the filing party on a complaint alleging that the employer bargained in bad faith.

CONCLUSION

The only type of discrimination that the Commission can address is discrimination for engaging in or refraining from protected union activity. Bond's complaint describes frustration with the wage increase timing negotiated by his collective bargaining representative. The complaint does not describe Bond's involvement in protected union activities or explain a causal connection between his union activity and the wage increases negotiated between the union and employer. The discrimination allegation is missing necessary elements to warrant further case processing.

The complaint also alludes to bad faith bargaining by the employer. Only parties to a collective bargaining relationship can file a refusal to bargain allegation. The union representing the bargaining unit that contains the complainant's job position would have to be the filing party on a complaint alleging that the employer is failing to bargain in good faith. Refusal to bargain complaints cannot be filed by an individual employee.

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices in the above-captioned matter is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 3rd day of September, 2015.

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.

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 09/03/2015

DECISION 12411 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 127479-U-15

EMPLOYER:	CITY OF NORMANDY PARK
ATTN:	MARK HOPPEN 801 SW 174TH ST NORMANDY PARK, WA 98166 markh@ci.normandy-park.wa.us (206) 248-8246
REP BY:	W. SCOTT SNYDER OGDEN MURPHY WALLACE, P.L.L.C. 901 5TH AVE STE 3500 SEATTLE, WA 98164 ssnyder@omwlaw.com (206) 447-7000
PARTY 2:	DAVID BOND 801 SW 174TH ST NORMANDY PARK, WA 98166 davidb@ci.normandy-park.wa.us (206) 248-7603