Energy Northwest (International Brotherhood of Electrical Workers, Local 77), Decision 12496 (PECB, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID MCNALLY, Complainant, vs. ENERGY NORTHWEST, Respondent.	CASE 127607-U-15 DECISION 12496 - PECB ORDER OF DISMISSAL
DAVID MCNALLY, Complainant, vs. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 77, Respondent.	CASE 127608-U-15 DECISION 12497 - PECB PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On September 16, 2015, David McNally filed two complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC. The first complaint named Energy Northwest (employer) as respondent. The second complaint named the International Brotherhood of Electrical Workers, Local 77 (union) as respondent. The complaints were reviewed under WAC 391-45-110,[1] and a deficiency notice issued on October 1, 2015, indicated that 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 amended complaints or face dismissal of the cases.

[1] At this stage of the proceedings, all of the facts alleged in the complaints are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaints state a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

On October 19, 2015, the complainant filed amended complaints. The Unfair Labor Practice Manager reviewed the amended complaints. The amended complaint against the employer is dismissed for failure to state a cause of action under the jurisdiction of the Commission. The amended complaint against the union states a cause of action for violation of duty of fair representation by providing inaccurate and intentionally misleading information about the status of grievances filed by David McNally and arbitrarily refusing to allow him to participate in grievance processing meetings concerning grievances that he filed. The remaining allegations against the union are dismissed for failure to state a cause of action.

ISSUES

The allegations against the employer concern:

> Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] by insisting on an agreement titled OS40 Letter of Agreement (LOA), which reduced employees' compensation of overtime hours, in reprisal for employees filing grievances protected by Chapter 41.56 RCW.
>
> 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 March 16, 2015, by its unilateral change in the way bargaining unit employees' overtime hours are recorded, calculated, and compensated, without providing an opportunity for bargaining.

The allegations against the union concern:

> Employee dissatisfaction with an agreement reached between the employer and union in July 2015 concerning the way bargaining unit employees' overtime hours are recorded, calculated, and compensated.
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> Union interference with employee rights in violation of RCW 41.56.150(1) since March 16, 2015, by breach of its duty of fair representation by:
>
> 1. Deciding to settle grievances related to overtime compensation.
> 2. Providing inaccurate and intentionally misleading information about the status of grievances filed by David McNally.

3. Arbitrarily refusing to allow the grievant David McNally to participate in grievance processing meetings concerning grievances that he filed.

Union violations of the collective bargaining agreement (CBA) by failing to follow and enforce grievance processing timelines.

BACKGROUND

The amended complaints describe the complainant and other employees filing grievances regarding overtime calculation and compensation in 2014 and 2015. Interrelated wage and hour claims were investigated by the Department of Labor. In July 2015 the processing of overtime grievances led to a negotiated resolution between the union and employer called OS40 LOA. This agreement clarified how overtime would be calculated and compensated. Upon reaching this agreement, the union withdrew outstanding grievances on the overtime issue.

The amended complaints also allege that the union withdrew one of the complainant's grievances without his knowledge on January 12, 2015. The complainant alleges that the union's decision to withdraw his grievance was arbitrary and took place without an explanation or grievance meeting. The complainant also alleges that he did not discover that the union had withdrawn this grievance until August 27, 2015, a date within the six-month statute of limitations period.

The complainant disagrees with terms of the OS40 LOA and the impact on employees' overtime wages. From the complainant's perspective, the new OS40 LOA forfeited past-due overtime pay that was the subject of several open grievances. The amended complaints are centered on the complainant's frustration with not having the opportunity to participate in a grievance meeting with the union and employer prior to the parties reaching agreement on the new letter of agreement. The complainant argues that the union and employer interfered with his contractual right to process grievances.

The complainant further alleges that pay issues have continued. The complainant believes that employer calculations for the Reactor Operator (RO) stipend and overtime adjustment continue to

be incorrect. Inaccuracies are alleged to have resulted in the complainant having 1,100 dollars garnished from his wages

ANALYSIS

Timeliness and Six-Month Statute of Limitations

The Commission only has the power and authority to evaluate and remedy an unfair labor practice if an unfair labor practice complaint is filed within six months of the occurrence. "[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).

Several sections of the complaints describe events that took place in 2014 and early 2015. These events are outside of the statute of limitations period. To determine timeliness, the Commission looks at the dates of events in the complaint in relation to the filing date. 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). Events described in the complaints that took place prior to March 16, 2015, will be considered for background purposes only.

Discrimination Allegations

Legal Standard

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.

Analysis

The only type of discrimination that the Commission can address is discrimination for engaging in (or refraining from) protected union activity. The complaints raise allegations of employer discrimination. In this case, basic elements of a discrimination allegation are missing from the complaint. There is no evidence that the employer is denying the complainant a right, benefit, or status in reprisal for engaging in or refraining from protected union activities. The complaints describe an individual employee's disagreement with an agreement that was reached between the union and the employer. The facts do not describe the necessary elements for a discrimination cause of action.

Bad Faith Bargaining Allegations

The complaints also allege unilateral change and bad faith bargaining with regard to overtime compensation for employees in the Operations Department. Unilateral change and bad faith bargaining are types of refusal to bargain allegations that fall under RCW 41.56.140(4). 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 complaint.

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). The union representing the bargaining unit that contains the complainant's

job position would have to be the party filing a complaint alleging that the employer bargained in bad faith.

Duty of Fair Representation

Legal Standard

It is an unfair labor practice for a union to interfere with, restrain, or coerce public employees in the exercise of their rights. RCW 41.56.150(1). The Commission explained the legal standard for duty of fair representation in *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012). The duty of fair representation arises from the rights and privileges held by a union when it is certified or recognized as the exclusive bargaining representative under a collective bargaining statute. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2001), *citing City of Seattle,* Decision 3199-B (PECB, 1991). The Commission is vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. While the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances, the Commission does process other types of "breach of duty of fair representation" complaints against unions. *City of Port Townsend (Teamsters Local 589),* Decision 6433-B (PECB, 2000).

A union breaches its duty of fair representation when its conduct toward one of its members is arbitrary, discriminatory, or in bad faith. *City of Redmond,* Decision 886 (PECB, 1980); *Vaca v. Sipes,* 386 U.S. 171 (1967). The employee claiming a breach of the duty of fair representation has the burden of proof and must demonstrate that the union's actions or inaction were arbitrary, discriminatory, or in bad faith. *City of Renton,* Decision 1825 (PECB, 1984).

The Commission has consistently refused to resolve "violation of contract" allegations or attempts to enforce a provision of a collective bargaining agreement through the unfair labor practice provisions it administers. *Anacortes School District,* Decision 2464-A (EDUC, 1986), *citing City of Walla Walla*, Decision 104 (PECB, 1976). The Commission interprets and administers collective bargaining statutes but does not act in the role of arbitrator to interpret or enforce collective bargaining agreements. *State – Corrections (Teamsters Local 313),* Decision 8581

(PSRA, 2004), *citing Clallam County*, Decision 607-A (PECB, 1979); *City of Seattle*, Decision 3470-A (PECB, 1990); *Bremerton School District*, Decision 5722-A (PECB, 1997).

Analysis

The complainant argues the union did not fulfill its duty of fair representation. The amended complaints describe McNally's disagreement with the grievance settlement reached by the employer and union in bargaining. The complainant also describes frustration with the union and employer's agreement to put grievances on hold and decision to later settle them without ever holding a step three grievance meeting. The majority of the allegations against the union are not the types of duty of fair representation complaints that can be remedied by the Commission.

The amended complaints argue that the union and employer did not follow the grievance processing timelines in the CBA. This is a contract violation argument that falls outside of the jurisdiction of the Commission. The Commission has consistently held that any remedy for a contract violation will have to come through the grievance and arbitration machinery of that contract or through the superior courts. *South Whidbey School District*, Decision 11134-A (EDUC, 2011); *Bremerton School District*, Decision 5722-A.

The fact that the complainant disagrees with his union's decisions in bargaining the OS40 LOA does not constitute an unfair labor practice within the jurisdiction of the Commission. Represented employees' wages are bargained by their exclusive bargaining representative. The union has the right to settle grievances or determine which grievances to pursue. The union's decision on processing the grievance is not within the Commission's jurisdiction. Allegations about the processing or settling of grievances must be pursued through the courts. *Seattle School District*, Decision 9359-A (EDUC, 2007).

The complainant's proposed remedy highlights reasons these types of cases must be addressed in the court system. The complainant is seeking a remedial order to compel the employer and union to withdraw the OS40 LOA and allow employees, including the complainant, to participate in grievance meetings to discuss the grievances that were withdrawn as a result of the letter of

agreement. While a union does owe a duty of fair representation to bargaining unit employees with respect to the processing of grievances, such claims must be pursued before a court which can assert jurisdiction to determine (and remedy, if appropriate) any underlying contract violation.

The only allegation against the union that states a cause of action for further case processing before the Commission is:

> Union interference with employee rights in violation of RCW 41.56.150(1) since March 16, 2015, by breach of its duty of fair representation by:
>
> 1. Providing inaccurate and intentionally misleading information about the status of grievances filed by David McNally.
>
> 2. Arbitrarily refusing to allow the grievant David McNally to participate in grievance processing meetings concerning grievances that he filed.

CONCLUSION

The complaints were only timely filed for events that took place on or after March 16, 2015. Allegations before March 16, 2015, are not timely filed.

The amended complaints primarily describe an individual employee's frustration with the overtime calculation agreement negotiated between his employer and his union. They also allege that the union violated its duty of fair representation by settling grievances about overtime calculation and compensation and signing a new overtime agreement with the employer. The complainant's disagreement with the union's decision to settle grievances and sign a letter of agreement on overtime does not, by itself, constitute a duty of fair representation cause of action. The allegations concerning the union's decision to settle grievances and sign OS40 LOA are dismissed for failure to state a cause of action.

The amended complaint against the union states a cause of action for:

> Union interference with employee rights in violation of RCW 41.56.150(1) since March 16, 2015, by breach of its duty of fair representation by:

1. Providing inaccurate and intentionally misleading information about the status of grievances filed by David McNally.

2. Arbitrarily refusing to allow the grievant David McNally to participate in grievance processing meetings concerning grievances that he filed.

The amended complaint against the union also alleges that the union violated the parties' CBA. This is a contract violation argument that falls outside of the jurisdiction of the Commission. The allegations about violations of the CBA are dismissed.

The amended complaints also allege employer discrimination. The facts do not describe that the complainant was singled out or targeted by the employer because of his union activity. Rather, they describe an overtime agreement that was collectively bargained by the complainant's collective bargaining representative. The amended complaints do not contain the necessary elements to state a cause of action for employer discrimination in reprisal for protected union activity. The employer discrimination allegations are dismissed.

Lastly, the amended complaints allege bad faith bargaining and unilateral change by the employer. Only parties to a collective bargaining relationship can file refusal to bargain and unilateral change allegations. Refusal to bargain complaints cannot be filed by an individual employee. The refusal to bargain allegations are dismissed.

ORDER

1. Assuming all of the facts alleged to be true and provable, the amended complaint in Case 127608-U-15 against the union states causes of action, summarized as follows:

> Union interference with employee rights in violation of RCW 41.56.150(1) since March 16, 2015, by breach of its duty of fair representation by:
>
> 1. Providing inaccurate and intentionally misleading information about the status of grievances filed by David McNally.
>
> 2. Arbitrarily refusing to allow the grievant David McNally to participate in grievance processing meetings concerning grievances that he filed.

The above allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

The union shall:

> File and serve its answers to the allegations listed in paragraph 1 of this Order, within 21 days following the date of this Order.

An answer shall:

a. Specifically admit, deny, or explain each fact alleged in the amended complaint, as set forth in paragraph 1 of this Order, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the amended complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

2. The allegations of the amended complaint in Case 127608-U-15 regarding employee dissatisfaction with an agreement reached between the employer and union in July 2015 concerning the way bargaining unit employees' overtime hours are recorded, calculated, and compensated are DISMISSED for failure to state a cause of action.

3. The allegations of the amended complaint in Case 127608-U-15 concerning union interference with employee rights in violation of RCW 41.56.150(1) by breach of its duty of fair representation by its decision to settle grievances related to overtime compensation since March 16, 2015, are DISMISSED for failure to state a cause of action.

4. The allegations of the amended complaint in Case 127608-U-15 concerning alleged contract violations are DISMISSED for failure to state a cause of action.

5. The allegations of the amended complaint in Case 127607-U-15 concerning employer discrimination and interference in violation of RCW 41.56.140(1) are DISMISSED for failure to state a cause of action.

6. The allegations of the amended complaint in Case 127607-U-15 concerning 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)] are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 7th day of December, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 12/7/2015

DECISION 12496 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 127607-U-15

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CASE NUMBER: 127608-U-15

EMPLOYER: ATTN:	ENERGY NORTHWEST MARK REDDEMANN PO BOX 968 RICHLAND, WA 99352-0968 mereddemann@energy-northwest.com (509) 377-8409
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