Northshore Utility District (Washington State Council of County and City Employees), Decision 10304-A (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

NORTHSHORE UTILITY DISTRICT,	)	
	)	
Complainant,	)	CASE 22194-U-09-5665
	)	
vs.	)	DECISION 10304-A - PECB
	)	
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES,	)	DECISION OF COMMISSION
	)	
Respondent.	)	
	)	

Audrey B. Eide, General Counsel, for the union.

Davis Grimm Payne Marra, by *Joseph G. Marra*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by Northshore Utility District (employer) seeking review, reversal, and amendment of the Preliminary Ruling and Order of Partial Dismissal issued by Unfair Labor Practice Manager David I. Gedrose.[1] The Washington State Council of County and City Employees, AFSCME Council 2 (union) supports the Unfair Labor Practice Manager's decision.

ISSUES PRESENTED

1. Is the employer's assertion that the Unfair Labor Practice Manager improperly narrowed the scope of the complaint properly before this Commission on appeal?

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[1] *Northshore Utility District (Washington State Council of County and City Employees)*, Decision 10304 (PECB, 2009).

2. Did the Unfair Labor Practice Manager commit reversible error when he dismissed the employer's claim that certain union statements interfered with bargaining unit employees' protected rights?

We affirm the Unfair Labor Practice Manager's decision in its entirety.[2] The employer's challenge to the preliminary ruling is not properly before this Commission at this time. Additionally, the Unfair Labor Practice Manager did not err in dismissing the employer's allegations that the union interfered with protected employee rights when the employer failed to cure the defects in its complaint.

ISSUE 1 - Employer's Challenge to the Preliminary Ruling

The Preliminary Ruling Process

In *King County,* Decision 9075-A (PECB, 2007), the Commission outlined and explained the preliminary ruling process for unfair labor practice cases processed under Chapter 391-45 WAC. We incorporate that discussion by reference, but also highlight recent changes to the administrative rules governing unfair labor practice complaints that codify many of the standards announced in the *King County* decision that are pertinent to the matter before us.

As part of the 2008 rules revision, the Commission revised and clarified the preliminary ruling process by amendment of WAC 391-45-110. The pertinent part of that rule, including the 2008 amendment, now states:

> WAC 391-45-110 Deficiency notice — Preliminary ruling — Deferral to arbitration.
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> The executive director or a designated staff member shall determine whether the facts alleged in the complaint may constitute an unfair labor practice within the meaning of the applicable statute.

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[2] Because we are reviewing an order of dismissal issued at the preliminary ruling stage of case processing under WAC 391-45-110, we are confined to the assumption uniformly applied in that process: All of the facts alleged in the complaint are assumed to be true and provable. *Whatcom County*, Decision 8246-A (PECB, 2004).

> (1) If the facts alleged do not, as a matter of law, constitute a violation, a deficiency notice shall be issued and served on all parties, identifying the defects and specifying a due date for the filing and service of an amended complaint. If the defects are not cured within twenty-one days, an order shall be issued and served, dismissing the defective allegation(s) and stating the reasons for that action. Unless appealed to the commission under WAC 391-45-350, an order of dismissal issued under this subsection shall be the final order of the agency on the defective allegation(s), with the same force and effect as if issued by the commission.
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> (2) If one or more allegations state a cause of action for unfair labor practice proceedings before the commission, a preliminary ruling summarizing the allegation(s) shall be issued and served on all parties.
>
> *(a) A preliminary ruling forwarding a case for further proceedings is an interim order which may only be appealed to the commission by a notice of appeal filed after issuance of an examiner decision under WAC 391-45-310.*
>
> (b) The preliminary ruling limits the causes of action before an examiner and the commission. *A complainant who claims that the preliminary ruling failed to address one or more causes of action it sought to advance in the complaint must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling.*

(emphasis added). WAC 391-45-110(2)(a) specifically precludes parties from appealing a preliminary ruling to the Commission. Rather, if a complainant disagrees with a preliminary ruling or wishes the preliminary ruling to be clarified, WAC 391-45-110(2)(b) permits a complainant to seek clarification of the preliminary ruling, including the possibility of amending the preliminary ruling. If the complainant still disagrees with the preliminary ruling issued by the Executive Director or his or her designee (typically the Unfair Labor Practice Manager), then the complainant may need to amend its complaint under WAC 391-45-070.

Here, the Unfair Labor Practice Manager found the employer's complaint stated the following cause of action:

> Union interference with employee rights in violation of RCW 41.56.150(1) and refusal to bargain in violation of RCW 41.56.150(4), by (a) its unilateral change to the practice of resolution of discipline for Kevin Milliken, without providing an opportunity for bargaining, and (b) breach of its good faith bargaining obligations regarding negotiations over just cause provisions of the collective bargaining agreement.

Based upon the standards clearly set forth above, the employer's challenge to the preliminary ruling is not properly before the Commission at this time. If the employer believes that the Unfair Labor Practice Manager has somehow not captured the essence of its complaint in the preliminary ruling, it is free to seek clarification from the Unfair Labor Practice Manager, or the employer may file a second amended complaint.

ISSUE 2 - Dismissal of Other Allegations

In unfair labor practice proceedings, the ultimate burdens of pleading, prosecution, and proof all lie with the party that files the complaint. The Commission and its staff maintain an impartial posture as quasi-judicial decision-makers in unfair labor practice proceedings, and the agency does not "investigate" charges, draft complaints, or "prosecute" complaints in the manner familiar to those who practice before the National Labor Relations Board. *City of Seattle*, Decision 8313-B (PECB, 2004). WAC 391-45-050(2) requires that an unfair labor practice complaint must contain, in separate numbered paragraphs, a clear and concise statement of the facts constituting the alleged unfair labor practices, including the time, place, date, and participants in occurrence. WAC 391-45-050; *City of Seattle*, Decision 5852-C (PECB, 1998). The facts set forth in the complaint also must be sufficient to make intelligible findings of fact in a "default" situation. WAC 391-45-110; *Apostolis v. City of Seattle*, 101 Wn. App. 300 (2000).

The Unfair Labor Practice Manager dismissed the employer's allegations that two different statements made by the union could constitute union interference with protected employee rights because the employer failed to specifically name employees who may have been threatened by the union's statements. We agree.

Union's September 11, 2008 E-mail

The first union statement that the employer challenges is a September 11, 2008 e-mail sent by union representative J. Pat Thompson to Alycien Cockbain, union officers Mick Holte and Ken James, with copies sent to Fanny Yee, employer representative Joseph G. Marra, and Labor Relations

Mediator/Adjudicator Paul Schwendiman claiming that bargaining unit employees are "at-will".[3] The employer asserts that this characterization reasonably threatens employees' job security and interferes with their protected rights.

Here, other than these six individuals, no employees appear to have received this e-mail, and the employer is not claiming that this e-mail was distributed to all bargaining unit employees. Thus, without a factual allegation that Thompson's e-mail was broadcast to the bargaining unit employees, including dates, times, and individuals, the Unfair Labor Practice Manager properly dismissed this portion of the employer's complaint.

Union's October 8, 2008 Memorandum

The second union statement that the employer challenges is an October 8, 2008 memorandum sent by union officers Holte and James to all bargaining unit employees informing them of the status of negotiations. The memorandum also comments on a "petition" circulating amongst bargaining unit employees that Holte and James describe as being critical of certain union decisions and notes that if the union is decertified, bargaining unit employees would lose their 2009 cost-of-living increase. The employer argues these statements are misleading and potentially have the effects of discouraging employees from exercising their statutory right to file a decertification petition.

Although this memorandum was broadcast to bargaining unit employees, we find none of the statements contained within the memorandum could constitute a union interference violation. The union's statement that bargaining unit employees may lose their negotiated cost-of-living increase if the union is decertified is, in fact or at least arguably, true. Once employees decertify an exclusive bargaining representative, an employer is no longer obligated to provide any previous negotiated benefit that employees enjoyed under a collective bargaining agreement. *See City of Kalama*,

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[3] The employer's complaint fails to identify who Alycien Cockbain is, what her position is, and who she represents. However, it appears from the tone of the correspondence that she worked for the employer. Additionally, based upon the employer's complaint it appears that Fanny Yee is an employer representative.

Decision 6739 (PECB, 1999)(fundamental principles of contracts logically dictate that a contract between an employer and union terminates in all respects when the union is decertified).

With respect to the employer's claim that certain statements made within the memorandum may have had a chilling effect on employees wanting to file a decertification petition, the employer still needed to provide a factual statement identifying which employees are claiming the union's statement interfered with their rights. Without a sufficiently detailed complaint, the employer has not filed a sufficiently detailed complaint under Chapter 391-45 WAC.

NOW, THEREFORE, it is

ORDERED

The Preliminary Ruling and Partial Order of Dismissal issued by Unfair Labor Practice Manager David I. Gedrose is AFFIRMED.

Issued at Olympia, Washington, the 10th day of June, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner