Central Kitsap School District, Decision 12231-A (PECB, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TERRI SALTER, Complainant, vs. CENTRAL KITSAP SCHOOL DISTRICT, Respondent.	CASE 26828-U-14-6838 DECISION 12231-A - PECB CORRECTED PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL
CENTRAL KITSAP SCHOOL DISTRICT, Employer.	CASE 26829-U-14-6839
TERRI SALTER, Complainant, vs. CENTRAL KITSAP EDUCATIONAL SUPPORT PROFESSIONALS Respondent.	DECISION 12232-A - PECB ORDER OF DISMISSAL

On November 4, 2014, Terri Salter (complainant) filed two interrelated complaints, one against Central Kitsap School District (employer) and one against the Central Kitsap Educational Support Professionals (union). On November 17, 2014, the complainant amended the complaint against the employer. Because these complaints and amended complaint concerned the same events in the same time period they were consolidated for processing. The complaints and amended complaint were reviewed under WAC 391-45-110,[1] and a notice of partial deficiency was issued

[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.

on November 25, 2014. This correspondence stated that if the complainant did not file a timely amendment correcting the defects:

> The allegations of employer refusal to bargain/unilateral change, employer interference described in paragraph 30, and union interference/duty of fair representation will be DISMISSED; and
>
> A preliminary ruling will be issued under WAC 391-45-110 for allegation concerning:
>
> 1) Employer interference with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made to Terri Salter on November 12, 2014, and
> 2) Discrimination against Terri Salter for filing an unfair labor practice charge in violation of 41.56.140(3) [and if so derivative interference with employee rights in violation of RCW 41.56.140(1)], since November 12, 2014, by retaliating against Salter over routing issues and assignments.

The complainant has not filed a second amended complaint. The Unfair Labor Practice Manager issues a preliminary ruling and notice of partial deficiency in the case against the employer and dismisses the case against the union for failure to state a cause of action. The employer must file and serve its answer to the amended complaint within 21 days following the date of this Decision.

DISCUSSION

Complaint against Employer

The complaint alleges employer interference with employee rights in violation of RCW 41.56.140(1), discrimination for union activity in violation of 41.56.140(3), and refusal to bargain in violation of 41.56.140(4).

Complaint against Union

The complaint alleges union interference with employee rights in violation of RCW 41.56.150(1), by breach 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.

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.

Paragraph 30 of 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 allegation of amended 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 amended complaint was timely filed with regards to this interference claim because the amended complaint does not contain an occurrence date. 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 to correct this defect. The employer interference allegations described in paragraph 30 are dismissed for failure to provide clear and concise statements of the facts.

The allegations concerning employer interference with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made to Terri Salter on November 12, 2014, and discrimination against Terri Salter for filing an unfair labor practice charge in violation of 41.56.140(3) state causes of action for further processing.

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 allegations concerning discrimination against Terri Salter for filing an unfair labor practice charge in violation of 41.56.140(3) and employer interference with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made to Terri Salter on November 12, 2014, state causes of action for further processing. The remaining allegations in the complaint do not state causes of action.

The complaint alleges that the employer made a unilateral change to annual shift bidding. A change is only considered to be unilateral if there is no opportunity for meaningful bargaining. The union and employer agreed to change past practice and hold a single shift bid for bus drivers in August. The complaint does not state a cause of action for unilateral change because the union and employer reached an agreement to change past practice concerning shift bid process for bus drivers.

Paragraph 30 of the complaint also alleges that the employer made threats and took actions that could constitute allegations of employer interference. These employer interference allegations lack required details, including specific dates and persons alleged to have been involved, and are therefore defective.

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.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the interference allegations of the amended complaint against the employer in Case 26828-U-14-6838 state causes of action, summarized as follows:

> Employer interference with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made to Terri Salter on November 12, 2014.

This interference allegation of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. Assuming all of the facts alleged to be true and provable, the discrimination allegations of the amended complaint against the employer in Case 26828-U-14-6838 state a cause of action, summarized as follows:

> Discrimination against Terri Salter for filing an unfair labor practice charge in violation of 41.56.140(3) [and if so derivative interference with employee rights in violation of RCW 41.56.140(1)], since November 12, 2014, by retaliating against Salter over routing issues and assignments.

This discrimination allegation of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

3. Central Kitsap School District shall:

> File and serve their answers to the allegations listed in paragraphs 1 and 2 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.

4. The allegations of the amended complaint against the employer in Case 26828-U-14-6838 concerning employer refusal to bargain/unilateral change in violation of RCW 41.56.140 (4), and employer interference described in paragraph 30, in violation of RCW 41.56.140(1), and other unfair labor practices, are DISMISSED for failure to state a cause of action.

5. The entire complaint against the union in Case 26829-U-14-6839 concerning union interference in violation of RCW 41.56.140(1), and other unfair labor practices, is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 20th day of January, 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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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

CASE NUMBER:	26828-U-14-06838	FILED:	11/04/2014	FILED BY:	PARTY 2
DISPUTE:	ER UNILATERAL				
BAR UNIT:	SCHOOL BUS				
DETAILS:	Against Employer				
COMMENTS:					

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	26829-U-14-06839	FILED:	11/04/2014	FILED BY:	PARTY 2
DISPUTE:	UN FAIR REP				
BAR UNIT:	SCHOOL BUS				
DETAILS:	Against Union				
COMMENTS:					

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