STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 690, Complainant, vs. LINCOLN COUNTY, Respondent.	CASE 128467-U-16 DECISION 12648 - PECB CASE 128468-U-16 DECISION 12649 - PECB ORDER OF DISMISSAL

On September 29, 2016, Teamsters Local 690 (union) filed two unfair labor practice complaints under Chapter 391-45 WAC against Lincoln County (employer). Case 128467-U-16 concerns the non-commissioned employees bargaining unit, and Case 128468-U-16 concerns the commissioned employees bargaining unit. After determining that the issues in both cases were sufficiently similar, the Unfair Labor Practice Manager consolidated the cases for further processing under WAC 10-08-085. The complaints were reviewed under WAC 391-45-110,[1] and a deficiency notice issued on October 28, 2016, indicated that it was not possible to conclude a cause of action existed at that time. The union was given a period of 21 days in which to file and serve amended complaints or face dismissal of the cases.

On November 18, 2016, the union filed amended complaints in both cases. On December 8, 2016, the union filed a second amended complaint in Case 128467-U-16. Because the amended complaints involved the same parties, appeared to be timely filed, and were germane to the subject matter of the complaints as originally filed, they qualified for further case processing under WAC 391-45-070.

Having reviewed the substance of the November 18 amended complaint in Case 128468-U-16 and the December 8 second amended complaint in Case 128467-U-16, the Unfair Labor Practice Manager dismisses both cases for failure to state a cause of action.

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[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 claims for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

ISSUES

The allegations of the December 8 second amended complaint in Case 128467-U-16 and the November 18 amended complaint in Case 128468-U-16 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 passing Resolution 16-22 requiring that collective bargaining contract negotiations be open to the public, a requirement that would not apply evenly to all employees of the employer, in reprisal for union activities protected by Chapter 41.56 RCW.
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> 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 September 6, 2016, by unilaterally passing a resolution making collective bargaining contract negotiations open to the public, without providing the union with an opportunity for bargaining.

The amended and second amended complaints (hereafter, "complaints") do not state a cause of action for discrimination, unilateral change, or refusal to bargain because the complaints lack the necessary elements to support allegations of these types of violations. Specifically, the complaints do not describe how the employer deprived any of its employees of some ascertainable right, benefit, or status. The complaints also do not show that the passage of Resolution 16-22 resulted in a material change to a mandatory subject of bargaining, such as employee wages, hours, or working conditions. Finally, the complaints do not provide specific examples of the employer refusing to meet and bargain at reasonable times and places.

BACKGROUND

The complaints allege that the Board of Lincoln County Commissioners passed Resolution 16-22 on September 6, 2016. That resolution stated, "From this day forward, Lincoln County shall conduct all collective bargaining contract negotiations in a manner that is open to the public; and Lincoln County shall provide public notice of all collective bargaining negotiations in accordance with the Open Public Meetings Act (RCW 42.30.060–42.30.080) . . . ." The complaints allege that, among other provisions, the Open Public Meetings Act includes notice requirements for meetings, rules concerning meeting times and locations, and rules governing advance distribution of meeting agendas.

According to the complaints, on September 7, 2016, the employer informed the union of the passage and content of Resolution 16-22. The complaints allege that the employer failed to provide the union with notice and an opportunity to bargain over changes to conditions of bargaining, such as making collective bargaining negotiations open to the public, prior to passing Resolution 16-22.

The complaints also allege that because the enforcement of Resolution 16-22 would not apply evenly to all employees of Lincoln County, the employer would effectively discriminate and retaliate against union employees in violation of RCW 41.56.140(1).

ANALYSIS

Applicable Legal Standards

Discrimination for Union Activity

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. An 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, the complainant 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).

Refusal to Bargain and Unilateral Change

As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith, upon request; and bargains to agreement or to a good faith impasse concerning any mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010), *citing Skagit County*, Decision 8746-A (PECB, 2006).

RCW 41.56.030(4) outlines the mutual obligation of the employer and the exclusive bargaining representative:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and *collective negotiations on personnel matters, including wages, hours and working conditions*, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

(emphasis added).

The threshold question is whether the dispute involves a mandatory subject of bargaining. To state a cause of action for unilateral change, the complainant must allege 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).

Whether a particular item is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a

balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.* 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. *Vancouver School District*, Decision 11791-A (PECB, 2013), *citing Spokane School District*, Decision 310-B (EDUC, 1978).

Application of Standards

Discrimination for Union Activity

The complaints make general allegations of discrimination but do not describe any specific instances in which the employer deprived any of its employees of some ascertainable right, benefit, or status. Nor do the complaints explain how the passage of Resolution 16-22 amounted to such deprivation. The allegations of discrimination in reprisal for union activity are dismissed for failure to state a cause of action.

Refusal to Bargain and Unilateral Change

The complaints would have needed to describe a change to a mandatory subject of bargaining in order to state a cause of action for unilateral change. The topics that are impacted by the passage of Resolution 16-22—such as meeting times and locations, advance notification of meeting dates and distribution of meeting agendas, and who may attend bargaining meetings—fall under bargaining procedures, or ground rules. In past cases the Commission has held that ground rules for bargaining are not mandatory subjects of bargaining; rather, they are permissive subjects of bargaining. *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012). Parties are not required to reach agreement on ground rules for collective bargaining negotiations.

The deficiency notice issued in these cases placed the union on notice that the original complaints did not appear to describe a change to a mandatory subject of bargaining. In its amended and second amended complaints filed in response to the deficiency notice, the union made legal

arguments and included citations to case law.[2] However, the facts of the cases cited by the union are clearly distinguishable from the facts alleged in these cases. The cited cases involved allegations of employers refusing to meet and bargain at reasonable times and places.

To state a cause of action for refusal to bargain similar to the cases cited in the amended complaints, the union would have needed to describe specific incidents where the employer actually refused to meet and bargain at reasonable times and places. None of the facts alleged in the present cases demonstrate such conduct. Rather, the complaints seem to make arguments about the potential impacts of Resolution 16-22 on future collective bargaining—specifically, the union's ability to schedule and hold future bargaining meetings. Absent examples of specific conduct by the employer that could constitute a refusal to bargain, these types of arguments appear to be speculative and prematurely filed. The Commission has consistently held that it will not take action on speculative or prematurely filed allegations. *See Kitsap County*, Decision 11611-A (PECB, 2013); *State – Office of the Governor*, Decision 10948-A (PSRA, 2011).

Arguments and Answers Filed by the Employer

This decision was issued at the preliminary ruling phase of case processing. WAC 391-45-110 addresses the preliminary review process. At this stage of an unfair labor practice proceeding, the only relevant inquiry is whether, based on the facts as alleged, the complaint states a cause of action for further case processing. The Commission has clearly stated that during the preliminary review process it is not appropriate for the unfair labor practice manager to go beyond assuming whether the facts as alleged are true and provable or to consider possible arguments that would arise before an examiner. *Kitsap County*, Decision 12022-A (PECB, 2014).

On December 12, 2016, the employer filed answers to the complaints. These answers were prematurely filed and raise legal arguments that would normally arise before an examiner. Respondents are only required to file answers to complaints that are found to state a cause of action

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2 *General Electric Company*, 173 NLRB 253 (1968), *enforced, General Electric Company v. National Labor Relations Board*, 412 F.2d 512 (2d Cir. 1969); *Evergreen General Hospital*, Decision 1949 (PECB, 1984); *Columbia College Chicago*, 363 NLRB 154 (2016).

for further case processing. In determining whether these cases stated a cause of action, the Unfair Labor Practice Manager did not consider the arguments contained in the employer's answers.

CONCLUSION

The complaints do not contain sufficiently specific facts to support allegations of discrimination, unilateral change, or refusal to bargain. The discrimination allegations are deficient because the complaints do not describe any instances in which the employer deprived any of its employees of some ascertainable right, benefit, or status. Similarly, the complaints do not state a cause of action for unilateral change because they do not explain how the employer's decision to adopt Resolution 16-22 and make bargaining meetings open to the public constituted a change to a mandatory subject of bargaining. Finally, while the complaints allege that the passage of Resolution 16-22 could frustrate the bargaining process by making it difficult to schedule and hold bargaining meetings, they do not describe any specific examples of the employer refusing to meet and bargain at reasonable times and places. Thus, the complaints lack the necessary elements to qualify for further case processing before this agency.

ORDER

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

ISSUED at Olympia, Washington, this 10th day of January, 2017.

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 01/10/2017

DECISION 12648 - PECB and DECISION 12649 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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