STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID O'DEA, Complainant, vs. CITY OF TACOMA, Respondent.	CASE 129926-U-17 DECISION 12848 - PECB
DAVID O'DEA, Complainant, vs. TACOMA POLICE MANAGEMENT ASSOCIATION, Respondent.	CASE 129927-U-17 DECISION 12849 - PECB PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On December 19, 2017, David O'Dea filed identical complaints that concern the same events against the City of Tacoma (employer) and the Tacoma Police Management Association (union). The cases were numbered 129926-U-17 (City of Tacoma, Respondent) and 129927-U-17 (Tacoma Police Management Association, Respondent). The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on January 19, 2018, stating that it was not possible to conclude that a cause of action existed at that time. O'Dea was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the complaint. O'Dea was granted an extension to file and serve an amended complaint. On February 23, 2018, O'Dea filed one amended complaint for both cases.

[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.

The unfair labor practice manager dismisses the allegations of the amended complaint against the employer for failure to state a cause of action, and finds a cause of action for the duty of fair representation interference allegations of the amended complaint against the union. The union must file and serve its answer to the amended complaint within 21 days following the date of this decision.

ISSUES

The amended complaint alleges six allegations against the employer:

1. General contract violations, policy or rule violations, general discrimination, conflict of interest and issues of fairness, violation of the Fair Labor Standards Act (29 U.S.C. § 203), violations of Title 5 of the United States Code, and violations of RCW 41.56.080.

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)] by failing to provide information, failing to bargain in good faith, and unilaterally changing an internal investigation.

3. Employer domination in violation of RCW 41.56.140(2) [and if so, derivative interference in violation of RCW 41.56.140(1)] by the employer's September 5, 2017, letter.

4. Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed by failing to process David O'Dea's step 3 grievance in reprisal for union activities protected by Chapter 41.56 RCW.

5. Employer interference with employee rights in violation of RCW 41.56.140(1) within six months of the date the complaint was filed, by denying David O'Dea's right to union representation in connection with an investigatory interview.

6. 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 David O'Dea after he filed a step three grievance to arbitration.

The amended complaint alleges one allegation against the union:

> Union interference with employee rights in violation of RCW 41.56.150(1) within six months of the date the complaint was filed, by breaching its duty of fair representation in not allowing David O'Dea to provide information in the grievance filing and not explaining to O'Dea why the union was not taking the grievance to arbitration.

The allegations of the amended complaint concerning union duty of fair representation state a cause of action under WAC 391-45-110(2) for further proceedings before the Commission.

The amended complaint does not state a cause of action for all six of the allegations against the employer. The allegations against the employer are dismissed.

BACKGROUND

According to the amended complaint, David O'Dea was a Lieutenant with the City of Tacoma (employer) police department and a bargaining unit member of the Tacoma Police Management Association (union). Allegedly, on August 6, 2016, O'Dea was involved in an officer-involved shooting. According to the amended complaint, O'Dea was immediately placed on post-shooting administrative leave, which was standard procedure. Between August 6, 2016, and June 22, 2017, the employer allegedly investigated the incident of August 6 through the use of the Deadly Force Review Board, Internal Affairs Interview, and Disciplinary Review Board. On June 22, 2017, O'Dea was allegedly terminated, effective June 23, 2017.

The complaint alleges on July 13, 2017, there was a Deadly Force Review Board hearing. O'Dea was allegedly compelled to attend this hearing and was repeatedly asked questions during the hearing.

On July 10, 2017, after O'Dea was terminated, the union allegedly filed a step one grievance on O'Dea's behalf as outlined in the parties' collective bargaining agreement (CBA). According to the amended complaint, O'Dea was not allowed an opportunity to provide information to include

in the step one grievance. The employer allegedly denied the step one grievance. Next, the union allegedly submitted the grievance at step two as outlined in the parties CBA. On August 9, 2017, the union allegedly informed O'Dea that it was not taking the grievance to arbitration as outlined in the parties CBA. The amended complaint alleges the union did not provide a reason explaining why the union would not take the grievance to arbitration.

The amended complaint alleges that because the union did not file the step three grievance, O'Dea's attorney filed a step three grievance to arbitration on O'Dea's behalf. The employer allegedly denied the step three arbitration in a letter on September 5, 2017.

ANALYSIS

Timeliness

Applicable Legal Standard

There is a six-month statute of limitations for unfair labor practice complaints. "[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 period 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). The start of the six-month period, also called the triggering event, occurs when a potential complainant has "actual or constructive notice" of the complained-of action. *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

To determine timeliness, the Commission looks at the dates of events in the complaint in relation to the filing date. Multiple violations, each giving rise to its own statute of limitations, may occur as part of a larger event. In *Seattle School District*, Decision 9982-A (PECB, 2009), the employer conducted an investigation of a complaint by an employee against the union representing the employee. In that case, the union filed its complaint on March 13, 2007. The six-month statute of limitations was September 13, 2007. The employer conducted an investigation between May 2006 and July 19, 2006, and issued an investigation report on November 22, 2006. The investigation events occurring before September 13, 2006, were time barred. The union had

knowledge that the employer was investigating the complaint. The investigation events occurring more than six months prior to the union filing its complaint were outside the statute of limitations. However, certain events, such as the issuance of the investigator's report and resulting discipline, was found to be an independent triggering event and was timely filed.

Application of Standard

To determine timeliness, the Commission looks at the dates of events in the complaint in relation to the filing date. The Commission only has the power and authority to evaluate and remedy an unfair labor practice if the complaint is filed within six months of the occurrence. The complaint was filed on December 19, 2017. In order to be timely, the complainant would have needed to describe triggering events that took place on or after June 19, 2017.

Some of the facts alleged in the amended complaint occurred prior to June 19, 2017. Those alleged facts that occurred prior to June 19, 2017, are untimely filed and are only used for background purposes. Those alleged facts that occurred on or after June 19, 2017, are timely filed.

Jurisdiction

Some of the allegations against the employer do not describe allegations that fit within the jurisdiction of the Commission. 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). Just because the complaints do not state a cause of action for 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.

The amended complaint alleges employer violations of the collective bargaining agreement, the Fair Labor Standards Act (29 U.S.C. § 203), Title 5 of the United States Code, general discrimination claims, policy violations, conflicts of interest or issues of fairness. Because all of

these allegations fall outside the agency's authority, the Commission does not have jurisdiction over these claims and the claims are dismissed.

Refusal to Bargain

Applicable Legal Standard

Individual employees can only allege certain types of violations against the employer and union. An individual employee can allege interference, discrimination, and domination violations against the employer. An individual employee can allege interference or discrimination violations against a union.

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4). An exclusive bargaining representative is "any lawful organization which has as one of its primary purposes the representation of employees in their employment relations with employers." RCW 41.56.030(2). The obligation 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). Failure to bargain violations include: failure to meet, failure to bargain in good faith, failure to provide relevant information, circumvention, and unilateral change.

Application of Standard

The amended complaint alleges refusal to bargain violations against the employer including failing to provide information, failing to bargain in good faith, unilateral changes, and a fait accompli. The union that is certified as the exclusive bargaining representative of the bargaining unit at issue 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); *City of Normandy Park*, Decision 12411 (PECB, 2015). The amended complaint does not allege that O'Dea is the exclusive bargaining representative. Thus, the amended complaint does not state a cause of action for employer refusal to bargain and the claims are dismissed.

Domination

Legal Standard

The amended complaint alleges employer domination or assistance of a union in violation of RCW 41.56.140(2). A cause of action for employer domination is provided for in all statutes administered by the Commission. The origins of the violation are based upon the concerns set forth in the test's second clause; that is, whether an employer has attempted to create, fund, or control a company union. *See State – Washington State Patrol*, Decision 2900 (PECB, 1988).

Although the Commission has issued few decisions on employer domination, those decisions have generally revolved around whether employers have unlawfully rendered assistance to unions. Examples of such assistance are allowing the free use of employer buildings and resources for union business, providing aid to employees serving as union officers, or favoring one union over another during a representation proceeding. The meaning of the term "domination" is thus directly tied to the term "assistance" and does not imply a cause of action for alleged negative acts directed toward the union or union members.

An employer's actual or attempted control of a union through assistance, ranging from favoritism to a full-fledged company union, is deleterious to the collective bargaining rights of employees; however, those actions are distinct from interference. It is appropriate to file a complaint alleging employer domination or assistance of a union if the facts suggest that the employer is violating the statute through such acts as rendering assistance to a union or union officers, supporting a company union, or showing favoritism to one union over another during an organizing campaign.

Analysis

In this case, the facts alleged do not describe employer domination of the union. The amended complaint references the statute and alleges that the employer dominated the union when it referenced arbitration costs in a letter on September 5, 2017. This fact alone does not meet the elements necessary to find a cause of action for employer domination. None of the facts alleged in the complaint suggest that the employer involved itself in the internal affairs or finances of the union or that the employer attempted to create, fund, or control a "company union." The claims are dismissed.

Employer Discrimination

Applicable 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.

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).

In response to a complainant's prima facie case of discrimination, the respondent need only articulate its nondiscriminatory reasons for acting in such a manner. The respondent does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant to prove either that the employer's reasons

were pretextual or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Application of Standard

The amended complaint alleges O'Dea filed a grievance after he had been terminated, which was protected activity. Filing and processing grievances have been found to be protected activities under RCW 41.56.140(1). *Valley General Hospital*, Decision 1195-A (PECB, 1981); *Clallam County*, Decision 1405-A (PECB, 1982). The amended complaint does not allege facts to show that O'Dea was deprived of some ascertainable right, status, or benefit after he filed the grievance or that adverse actions taken by the employer after O'Dea filed the grievance had a causal connection to his protected union activity. Thus, the amended complaint regarding employer discrimination is dismissed.

Employer Interference – *Weingarten* Rights

Applicable Legal Standard

Employees have the right to be accompanied and assisted by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action. *Seattle School District*, Decision 10732-A (PECB, 2012); *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975). In *Okanogan County*, Decision 2252-A (PECB, 1986), the Commission held that the rights announced in *Weingarten* are applicable to employees who exercise collective bargaining rights under Chapter 41.56 RCW. *See also Methow Valley School District*, Decision 8400-A (PECB, 2004).

As examiners explained in *State – Washington State Patrol*, Decision 4040 (PECB, 1992) and *Seattle School District*, Decision 10066-B (PECB, 2010), there are four elements necessary for *Weingarten* rights to be applicable:

1. The right to representation attaches only where the employer compels the employee to attend an investigatory meeting.

2. A significant purpose of the interview must be (or becomes) to obtain facts related to a disciplinary action.

3. The employee must reasonably believe potential discipline might result from the information obtained during the interview. *Mason County*, Decision 7048 (PECB, 2000).

4. The employee must request the presence of a union representative.

An employee has a right to union representation at an "investigatory" interview which the employee reasonably believes could result in discipline. *City of Bellevue*, Decision 4324-A (PECB, 1994), *citing National Labor Relations Board v. Weingarten*, 420 U.S. 251; *Okanogan County*, Decision 2252-A. It is the nature of an "investigatory" interview that the employer is seeking information from the employee. A union representative is present to assist the employee at an investigatory interview, not to speak in place of that individual. *City of Bellevue*, Decision 4324-A. Discipline often can and does result from "investigatory" meetings, and the Commission has found interviews to be "investigatory" where they were part of an investigation concerning improper conduct. *Snohomish County*, Decision 4995-B (PECB, 1996). If the interview is not investigatory in nature, *Weingarten* rights do not apply.

Application of Standard

The amended complaint does not state a cause of action for interference with O'Dea's *Weingarten* rights. The amended complaint alleges the respondent compelled O'Dea to attend a Disciplinary Review Board Hearing on July 13, 2017, which was investigatory in nature and the employer asked O'Dea questions. O'Dea alleges that he reasonably believed that discipline may result.

The amended complaint did not allege that O'Dea requested union representation during the July 13 hearing. The law does not require that employers notify employees of their right to request union representation. The burden is on the employee to request union representation if they wish to exercise their *Weingarten* rights. *City of Seattle*, Decision 2773 (PECB, 1987). Employees have a right, under certain circumstances, to union representation, but the employee must make the request for the union to be present. *Okanogan County*, Decision 2252-A (PECB, 1986); *City of Montesano*, Decision 1101 (PECB, 1981); *National Labor Relations Board v. Weingarten*, 420 U.S. 251. Because the amended complaint does not allege facts related to O'Dea

requesting union representation and the employer denying that representation, the employer interference violation is dismissed.

Employer Independent Interference

Applicable Legal Standard

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.

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.

Application of Standard

The amended complaint alleges that O'Dea engaged in protected activity when he filed a step three grievance to arbitration on his own. The amended complaint does not allege facts that the employer made some statement or took some action and O'Dea reasonably perceived the employer's statement or action as a threat of reprisal or force, or promise of benefit associated with

protected activity. Because the amended complaint lacks these facts, the employer independent interference violation is dismissed.

ORDER

1. Assuming all of the facts alleged to be true and provable, the union interference duty of fair representation allegations of the amended complaint in 129927-U-17 state a cause of action, summarized as follows:

> Union interference with employee rights in violation of RCW 41.56.150(1), within six months of the date the complaint was filed, by breaching its duty of fair representation in not allowing David O'Dea to provide information in the grievance filing and not explaining to O'Dea why the union was not taking the grievance to arbitration.

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

2. The union shall:

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

3. The amended complaint in Case 129926-U-17 concerning all six allegations against the employer are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 4th day of April, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, Acting Unfair Labor Practice Manager

Paragraph 3 of this order will be
the final order of the agency on
any defective allegations, 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

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RECORD OF SERVICE - ISSUED 04/04/2018

DECISION 12848 – PECB and 12849 – PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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