*Everett School District*, Decision 12926 (PECB, 2018)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| ELISABETH OGLE<br>Complainant,<br>vs.<br>EVERETT SCHOOL DISTRICT<br>Respondent. | CASE 130800-U-18<br>DECISION 12926 - PECB<br>PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL |
| ELISABETH OGLE<br>Complainant,<br>vs.<br>PUBLIC SCHOOL EMPLOYEES OF WASHINGTON<br>Respondent. | CASE 130801-U-18<br>DECISION 12927 - PECB<br>ORDER OF DISMISSAL |

On August 6, 2018, Elisabeth Ogle (Ogle) filed two complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Everett School District (employer) and the Public School Employees of Washington (union) as respondents. The complaint was docketed by the Commission as 130800-U-18 (employer) and 130801-U-18 (union). The complaints were reviewed under WAC 391-45-110.[1] On September 4, 2016, a preliminary ruling and partial deficiency notice was issued for the complaint against the employer. On that same day a full deficiency notice was issued for the complaint against the union. In both instances, the deficiency notices indicated that it was not possible to conclude that certain causes of action existed within the complaint as drafted. Ogle was given a period of 21

[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.

days in which to file and serve an amended complaint, or face dismissal of the complaint. On September 25, 2018, Ogle filed an amended complaint.[2]

The original and amended complaints allege the following unfair labor practices against the employer:

> Employer interference with employee rights in violation of RCW 41.56.140(1), within six months of the date of the filing of the complaint, by threats of reprisal or force or promises of benefit made, through statements made and conduct directed towards Elisabeth Ogle during meetings.
>
> Employer discrimination in violation of RCW 41.56.140(1), [and if so, derivative interference in violation of 41.56.140(1)] within six months of the date of the filing of the complaint, by providing a bad/negative evaluation to Elisabeth Ogle.
>
> Other statutory violations.

The original and amended complaints allege the following unfair labor practices against the union:

> Union interference with employee rights in violation of RCW 41.56.150(1) by breaching its duty of fair representation by engaging in arbitrary discriminatory, or bad faith conduct in the representation of bargaining unit employee Elisabeth Ogle.

Ogle's interference allegation against the employer remains the only allegation in either complaint that states a cause of action. The defective allegations of the complaint and amended complaint against the employer are dismissed for failure to state causes of action. The employer must file and serve their answers to the original and amended complaint within 21 days following the date of this Decision. The complaint against the union is dismissed in its entirety.

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2 On October 8, 2018, Ogle filed a second amended complaint that attempted to correct certain statutory references in her amended complaint. Ogle did not file a motion asking permission to file the second amendment complaint. As explained below, it is unnecessary to consider whether the second amended complaint was properly filed because the alleged statutory violations are outside of this agency's jurisdiction.

## BACKGROUND

The union represents a bargaining unit of paraeducators in the employer's workforce. Elisabeth Ogle is a bargaining unit member and works for the employer.

According to the complaint, Ogle attended a March 23, 2018, meeting with Carol Strolz, the employer's Human Resources director. Everett High School Vice-Principal Michael Takayoshi, union representative Nikki Lenssen, and union local president Laura Rogers were also allegedly at this meeting. The purpose of the meeting was to discuss an event that occurred between Ogle and a student on March 2, 2018. Ogle alleges that Stolz acted in hostile tone and would not allow the complainant to present her rights under the contract. Ogle also alleges that her union representatives did not advocate for her at this meeting.

On April 23, 2018, Ogle allegedly attended a second meeting with Stolz, Takayoshi, and union representative Heather Coon. Coon, Stolz, and Takayoshi allegedly met in private before the meeting. Once the meeting began, Coon allegedly humiliated Ogle when Ogle pointed out that Stolz was not being civil. The employer allegedly imposed district policies on the complainant. During the meeting, Coon, Stolz, and Takayoshi allegedly had a private conference that excluded Ogle.

On May 29, 2018, a third meeting allegedly occurred with Stolz, Takayoshi, Lenssen, and Rogers in attendance. Debbie Kovacs, who works in employer human resources office, Matt Bennett, Julianna Crooker and two unidentified law enforcement officers were also in attendance. The complaint does not explain Bennett's role but Cooker attended the meeting as a witness for Ogle. When Ogle attempted to access information concerning her rights under the contract, Ogle's union representative allegedly told her to put that information away. Takayoshi's conduct towards Ogle was allegedly hostile and statements that he made were allegedly not true. Finally, the complaint alleges that the employer and union violated WAC 181-87-050(10), which is a rule of the Professional Educator Standards Board.

On June 7, 2018, Ogle allegedly attended a fourth meeting with Takayoshi and Wendy Heiser. Heiser took notes at the meeting. During this meeting, a March 2, 2018, incident was discussed. The complaint does not describe what the March 2, 2018, incident was about. Ogle's rating in her evaluation were allegedly reduced and her evaluation allegedly references union activity. The complaint alleges that Takayoshi's conduct towards Ogle was again hostile and that he continued to make statements that were allegedly not true.

## ANALYSIS

*Employer Discrimination*

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 non-discriminatory 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.

*Analysis*

Ogle claim that the employer discriminated against her in violation of RCW 41.56.140(1) fails to state a cause of action. The complaint and amended complaint allege that Takayoshi altered Ogle's evaluation as a result of the March 2, 2018, incident with the student. The only type of discrimination that the Commission can address is discrimination for engaging in (or refraining from) protected union activity. In this case, basic elements of a discrimination allegation are missing from the complaint. While the complaint does describe certain instances where Ogle was involved in protected union activities, the complaint does not indicate that Ogle lost an ascertainable right or benefit or status as a result of that activity.

Finally, Ogle's allegations that the employer violated other statues and rules, including WAC 181-87-050, does not state causes of actions that can be redressed through the statutes this agency administers. 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 (Tacoma Education Association)*, 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 (Tacoma Education Association)*, Decision 5086-A.

*Union's Duty of Fair Representation*

It is an unfair labor practice for a union to interfere with, restrain, or coerce public employees in the exercise of their rights. RCW 41.76.050(2)(a). The duty of fair representation requires an

exclusive bargaining representative to fairly represent all of those for whom it acts, without discrimination. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). 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, 2002), *citing City of Seattle (International Federation of Professional and Technical Engineers, Local 17)*, Decision 3199-B (PECB, 1991).

The Commission is vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute and does not assert jurisdiction over breach of duty of fair representation claims arising exclusively out of the processing of contractual grievances. *Bremerton School District*, Decision 5722-A (PECB, 1997). 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 is more than merely negligent; it must be arbitrary, discriminatory, or in bad faith; or be based on considerations that are irrelevant, invidious, or unfair. *City of Redmond (Redmond Employees Association)*, 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. *City of Renton*, Decision 1825 (PECB, 1984).

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983), the Washington State Supreme Court adopted three standards to measure whether a union has breached its duty of fair representation:

1. The union must treat all factions and segments of its membership without hostility or discrimination.

2. The broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty.

3. The union must avoid arbitrary conduct.

Each of these requirements represents a distinct and separate obligation.

While an exclusive bargaining representative has the obligation to provide fair representation, the courts have recognized a wide range of flexibility in the standard to allow for union discretion in settling disputes. *Allen*, 100 Wn.2d at 375. There is no statutory requirement that a union must accomplish the goals of each bargaining unit member, and complete satisfaction of all represented employees is not expected. A union member's dissatisfaction with the level and skill of representation does not form the basis for a cause of action, unless the member can prove the union violated rights guaranteed in statutes administered by the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004).

*Application of Standard*

The complaint lacks facts alleging that the union breached its duty of fair representation. The complaint alleges Ogle is an employee under Chapter 41.56 RCW and is an employee represented by the union. The complaint also alleges that the union failed to advocate on Ogle's behalf during the March 23, 2018, April 23, 2018, and May 29, 2018, meetings. The complaint lacks facts alleging how the union's conduct was arbitrary, discriminatory, or in bad faith as described above. Ogle's dissatisfaction with the level of representation does not form the basis for a cause of action. Ogle's complaints fail to state a cause of action for union interference.

## ORDER

1. Assuming all of the facts alleged to be true and provable, the interference allegations of the complaint and amended complaint in Case 130800-U-18 state a cause of action, summarized as follows:

Employer interference with employee rights in violation of RCW 41.56.140(1), within six months of the date of the filing of the complaint, by threats of reprisal or force or promises of benefit made, through statements made and conduct directed towards Elisabeth Ogle during meetings.

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

2. The employer shall:

File and serve their 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.

3. The allegations of the complaint and amended complaint in Case 130800-U-18 concerning employer discrimination in violation of RCW 41.56.140(1) and other statutory violations are DISMISSED for failure to state a cause of action.

4. The allegations of the complaint and amended complaint in Case 130801-U-18 concerning union interference in violation of RCW 41.56.150(1) are DISMISSED in their entirety for failure to state a cause of action.

ISSUED at Olympia, Washington, this 24th day of October, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DARIO DE LA ROSA, Unfair Labor Practice Administrator

Paragraph 3 and 4 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

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## RECORD OF SERVICE - ISSUED 10/24/2018

DECISION 12926 – PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBER: 130800-U-18

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|---|---|
| EMPLOYER: | EVERETT SCHOOL DISTRICT |
| REP BY: | GARY COHN<br>EVERETT SCHOOL DISTRICT<br>3900 BROADWAY<br>EVERETT, WA 98201<br>gcohn@everettsd.org<br>(425) 385-4000 |
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| PARTY 2: | ELISABETH OGLE |
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## RECORD OF SERVICE - ISSUED 10/24/2018

DECISION 12927 – PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBER: 130801-U-18

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|---|---|
| EMPLOYER: | EVERETT SCHOOL DISTRICT |
| REP BY: | GARY COHN<br>EVERETT SCHOOL DISTRICT<br>3900 BROADWAY<br>EVERETT, WA 98201<br>gcohn@everettsd.org<br>(425) 385-4000 |
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