City of Ocean Shores, Decision 12984 (PECB, 2019)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF OCEAN SHORES Employer.	
DAVID BATHKE, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2109, Respondent.	CASE 131276-U-19 DECISION 12984 - PECB ORDER OF DISMISSAL

On January 25, 2019, David Bathke filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC) under chapter 391-45 WAC, naming the International Association of Fire Fighters, Local 2109 (IAFF) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on February 7, 2019, indicated that it was not possible to conclude that a cause of action existed at that time. Bathke was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the case.

On February 26, 2019, Bathke filed an amended complaint. The allegations of the complaint and amended complaint concern:

> Union discrimination in violation of RCW 41.56.150(2),[2] within six months of the filing of the complaint, by

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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.

2 Bathke's complaint claims the union actions violated RCW 47.64.132. This statutory reference is incorrect. Chapter 47.64 RCW is the collective bargaining law applicable to employees of the Washington State Ferry System. As an employee of a municipality, Bathke potentially enjoys collective bargaining rights under the Public Employees Collective Bargaining Act, chapter 41.56 RCW.

1. inducing the employer to commit an unfair labor practice by insisting that the fire inspector position be demoted in rank in violation of the employer's civil service rules and RCW 41.08.040(1).
2. retaliating against Bathke for filing an unfair labor practice complaint by submitting false accusations to the employer.

Bathke's complaint and amended complaint are dismissed for failure to state a cause of action that can be redressed by the statutes this agency administers.

BACKGROUND

The City of Ocean Shores (employer) operates a municipal fire department that is responsible for fire suppression and emergency response. The employer hired Bathke as the city's fire chief on June 8, 2017. Bathke is the appointing authority for the fire department and Bathke claims that he is an employer within the meaning of RCW 41.56.030(12). Bathke also claims that he is a public employee within the meaning of RCW 41.56.030(11) and that his employment is governed by a collective bargaining agreement between the employer and the exempt employees of the City of Ocean Shores (exempt employees) that covers his position.[3]

The IAFF represents a bargaining unit of nonsupervisory employees employed by the fire department. Corey Kuhl is the current president of the nonsupervisory bargaining unit. The collective bargaining agreement for the nonsupervisory employees specifically excludes the fire chief from the inclusion in that bargaining unit.

The contract between the city and the IAFF provides for three lieutenant positions. Curt Begley held one of the lieutenant positions as a firefighter/paramedic. At an unidentified point in time, Begley accepted the fire inspector position in the employer's workforce.[4] As a result of accepting

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[3] No certification exists for an exempt employees bargaining unit. Additionally, the April 27, 2009, agreement between the employer and the exempt employees, as modified by a July 25, 2015, memorandum of understanding contains no expiration date.

[4] The fire inspector position is an IAFF bargaining unit position.

this position, Bathke alleges that the IAFF took Begley's lieutenants rank away from him in violation of the employer's civil service provisions as well as RCW 41.08.040(1).[5] Bathke learned of this demotion in August 2018. Begley allegedly did not submit any request for a reduction in rank as a result of accepting the fire inspector position.

In September 2018, Bathke spoke with the employer's Civil Service Commission to discuss Begley's demotion. Civil Service Commission Chairman Jim Caudle told Bathke that he was unaware of the demotion and that Begley should have maintained his lieutenant rank. Caudle also stated that the matter would be placed on the Civil Service Commission's agenda. Bathke also told Mayor Crystal Dingler and Human Resources Specialist Dani Smith of his intentions concerning Begley's demotion and Bathke claims that they were supportive of his actions at that time.

On September 7, 2018, IAFF President Corey Kuhl questioned Bathke about reinstating Begley's lieutenant rank. Kuhl told Bathke to "leave [this matter] alone and not take any further action." Bathke responded by stating the proper civil service procedures were not followed and that the employer could be liable for not following those rules. Kuhl stated that Bathke's actions "would be a violation of the Union-Labor Agreement as it only provided for three (3) Lieutenant Positions." Kuhl also allegedly claimed that Begley was unfit to be a lieutenant and stated that if Begley retained his lieutenant rank he would be eligible for a captain's promotion, which could in turn affect Kuhl's chances for a future promotion. Kuhl told Bathke that he wanted Bathke to succeed but that if he proceeded with the Begley matter that "things would not go well for [Bathke's] future in Ocean Shores."

On November 2, 2018, Kuhl accused Bathke of cutting essential services so that Bathke could buy a new command vehicle. Bathke claimed that Dingler required Bathke to acquire the new command vehicle. Kuhl also stated that Bathke had a bulls-eye on his back.

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[5] Chapter 41.08 RCW is a civil service law for firefighters employed by cities and town which lack civil service provisions applicable to firefighters.

On December 13, 2018, Caudle discussed the Begley situation with Bathke and asked if the matter was ready to be set for the Civil Service Commission's meeting at the end of that month. Bathke responded that he was working on the matter. Later that same month, the union took a no confidence vote on Bathke's leadership.

On December 14, 2018, Dingler placed Bathke on administrative leave, allegedly due to the union's no confidence vote. The Civil Service Commission did not hear the Begley matter at its December meeting. On January 16, 2019, Dingler sent a letter to Bathke informing him that "she did not see a path forward for [him] to continue his role as Fire Chief" and that if Bathke did not resign by February 8, 2019, that his employment would be terminated.

On February 8, 2019, Kuhl sent an e-mail to Smith detailing several grievances that the IAFF chose not to file as the employer and IAFF worked through the issues with Bathke. According to the complaint, the grievances outlined in the e-mail were false accusations of past grievances that were designed to retaliate against Bathke.

ANALYSIS

Union Discrimination

Generally, there are two types of union discrimination violations that this agency will process. The first is where a union induces the public employer to take a negative action against a bargaining unit employee. RCW 41.56.150(2). To induce an employer to commit an unfair labor practice, a union must request that an employer do something unlawful under the collective bargaining statutes. For example, a union cannot demand that an employer discharge an employee for nonpayment of a union political action fee or based upon the employee's race, sex, religion, or national origin. *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-A (PECB, 1989). A classic scenario occurs when a union induces the employer to discriminate against an employee based upon union membership. *State – Natural Resources*, Decision 8458-B (PSRA, 2005).

To demonstrate that a union discriminated against an employee by inducing an employer to commit an unfair labor practice, a complainant must establish the following:

1. The employee involved is covered by a collective bargaining statute administered by this agency, and
2. The union requested the employer to commit an act that is an unfair labor practice under the act.

The second type of union discrimination is where a union discriminates against an employee for filing an unfair labor practice complaint with this agency or providing testimony at an agency conducted hearing. RCW 41.56.150(3). To prove that a union discriminated against an employee for filing an unfair labor practice complaint or providing testimony at an agency conducted hearing, the complainant must demonstrate:

1. The employee involved filed charges or provided testimony at an agency conducted hearing involving the union;
2. The union deprived the employee of some ascertainable right, benefit, or status;
3. A causal connection exists between the employee's charges or testimony and the union's action.

A violation concerning discrimination for filing unfair labor practice charges cannot stand absent allegations that the discriminate has previously filed an unfair labor practice complaint with PERC. *Pierce Transit*, Decision 9074 (PECB, 2005).

For both kinds of discrimination, an employee may use circumstantial evidence to establish the prima facie case of discrimination because respondents do not typically announce a discriminatory motive for their actions. *Washington State University*, Decision 11749-A (PSRA, 2013), *citing* 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. *Id.*

Application of Standards

Bathke's allegation that the union committed an unfair labor practice by inducing the employer to commit an unfair labor practice fails to state a cause of action. This agency only has the statutory authority to remedy unfair labor practices under the statutes it administers and 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).[6]

Here, Bathke claims that he is a public employee and therefore he meets the first part of the inducement test. However, his complaint fails to allege facts demonstrating the second part of the test, specifically that the union induced or attempted to induce the employer into committing an unfair labor practice under the statutes this agency administers. Bathke asserts that the union induced the employer to violate employer's civil service provisions as well as RCW 41.08.040(1) by demoting Begley out of his lieutenant rank. Those statues and rules are outside of this agency's jurisdiction. Thus, he failed to allege facts demonstrating the union attempted to induce the employer to commit an unfair labor practice in violation of the pertinent collective bargaining law, chapter 41.56 RCW.

Bathke's allegation that the union retaliated against him for filing an unfair labor practice by submitting false accusations to the employer also fails to state a cause of action. Bathke met the first part of the discrimination for filing charges test by asserting facts demonstrating he filed the

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[6] Just because the complaints do not state a cause of action for an unfair labor practice does not necessarily mean the allegations involve lawful activity. It means that the issues are not matters within the purview of the Public Employment Relations Commission. *Tacoma School District (Tacoma Education Association)*, Decision 5086-A.

instant unfair labor practice complaint. Bathke's complaint lacks facts demonstrating the second and third parts of the test. Although Bathke alleges the union sent the employer a list of false allegations, he has not plead specific facts demonstrating how the union's e-mail was designed to retaliate against him or that the employer took any new employment action against him as a result of the communication. These conclusionary allegations do not set forth any facts in addition to those previously set forth, and are thus insufficient to state a cause of action.

Finally, Bathke's allegation that the union discriminated against him by orchestrating a union no confidence vote fails to state a claim under the unfair labor practice statutes. As noted above, two types of union discriminations are available under the statute: (1) inducing an employer to commit an unfair labor practice and (2) discriminating against an employee for filing an unfair labor practice complaint with this agency or providing testimony at an agency conducted hearing. The facts described in the complaint or amended complaint with respect to this allegation fall into neither category of union discrimination.

ORDER

The amended complaint charging unfair labor practices in the above-captioned matter is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 28th day of March, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DARIO DE LA ROSA, Unfair Labor Practice Administrator

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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 03/28/2019

DECISION 12984 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 131276-U-19

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