

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,

Employer.

KENNETH L. FISHER,

Complainant,

vs.

WASHINGTON FEDERATION OF
STATE EMPLOYEES,

Respondent.

CASE 131345-U-19

DECISION 13005 - PSRA

PRELIMINARY RULING AND
ORDER OF PARTIAL DISMISSAL

On March 6, 2019, Kenneth L. Fisher (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC) under chapter 391-45 WAC, naming Washington Federation of State Employees (union) as respondent. The complaint was reviewed under WAC 391-45-110,¹ and a deficiency notice was issued on March 29, 2019, indicating that it was not possible to conclude that a cause of action existed at that time. Fisher was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the case. Fisher filed an amended complaint on April 19, 2019.

The Unfair Labor Practice Administrator dismisses the defective allegations of the complaint for failure to state a cause of action, and finds a cause of action for the union failure to provide a duty of fair representation and union discrimination allegations of the complaint. The union must file and serve its answer to the union failure to provide a duty of fair representation and union discrimination allegations within 21 days following the date of this decision.

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.

ISSUES

The amended complaint alleges:

Union interference with employee rights in violation of RCW 41.80.110(2)(a) within six months of the date the complaint was filed, by breaching its duty of fair representation in refusing to take Kenneth Fisher's two grievances to arbitration.

Union interference with employee rights in violation of RCW 41.80.110(2)(a) within six months of the date the complaint was filed, by breaching its duty of fair representation in refusing to respond to Kenneth Fisher's October 16 request to file a grievance on his behalf regarding an investigation.

Union discrimination in violation of RCW 41.80.110(2)(c) [and if so derivative interference in violation of RCW 41.80.110(1)(a)] within six months of the date the complaint was filed by refusing to respond to Kenneth Fisher's October 16 request to file a grievance for Kenneth Fisher in September 2018 communicating his intent to file an unfair labor practice charge with the Commission.

The allegations of the amended complaint concerning duty of fair representation related to the October 16 request to file a grievance and the discrimination allegations state a cause of action under WAC 391-45-110(2) for further case proceedings before the Commission.

The amended complaint does not state a cause of action for the duty of fair representation allegation related to the two grievances. The duty of fair representation allegation related to the two grievances is dismissed.

BACKGROUND

Kenneth Fisher is an employee of the Washington State Department of Transportation (employer). Fisher's position is represented by the Washington Federation of State Employees (union). On August 20, 2018, Fisher was allegedly issued discipline of a 6-month, 5 percent reduction-in-pay effective September 5, 2018.

The union allegedly filed two grievances on Fisher's behalf on September 5, 2018. The grievances were allegedly processed through the third step of the parties' grievance procedure.

On an unidentified date, Fisher's grievances were presented at hearing to the union's grievance review committee. On February 22, 2019, the committee rejected Fisher's request for his grievances to proceed to arbitration.

ANALYSIS

Interference – Duty of Fair Representation

Applicable Legal Standard

It is an unfair labor practice for a union to interfere with, restrain, or coerce public employees in the exercise of their rights. RCW 41.80.110(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 amended complaint lacks facts alleging that the union breached its duty of fair representation. The amended complaint alleges Fisher is an employee under chapter 41.80 RCW and is an employee represented by the union. The amended complaint alleges that Fisher requested that the grievance proceed forward to mediation and/or arbitration, and the union rejected the request to proceed to arbitration on February 22, 2019. The complaint lacks facts alleging how the

union's processing of the grievance was arbitrary, discriminatory, or in bad faith. Fisher's dissatisfaction with the level of representation does not form the basis for a cause of action. The Commission 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). The facts alleged in the amended complaint arise exclusively out of the processing of a contractual grievance, thus the allegation must be dismissed.

ORDER

1. Assuming all of the facts alleged to be true and provable, duty of fair representation related to the October 16 request to file a grievance and the discrimination allegations of the amended complaint state a cause of action, summarized as follows:
 - a. Union interference with employee rights in violation of RCW 41.80.110(2)(a) within six months of the date the complaint was filed, by breaching its duty of fair representation in refusing to respond to Kenneth Fisher's October 16 request to file a grievance on his behalf regarding an investigation.
 - b. Union discrimination in violation of RCW 41.80.110(2)(c) [and if so derivative interference in violation of RCW 41.80.110(1)(a)] within six months of the date the complaint was filed, by refusing to respond to Kenneth Fisher's October 16 request to file a grievance for Kenneth Fisher in September 2018 communicating his intent to file an unfair labor practice charge with the Commission

The duty of fair representation related to the October 16 request to file a grievance and the discrimination allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. Union 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 amended complaint concerning the duty of fair representation related to the two grievances in violation of RCW 41.80.110(2)(a) is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 20th day of May, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


EMILY K. WHITNEY, Unfair Labor Practice Administrator

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.



RECORD OF SERVICE

ISSUED ON 05/20/2019

DECISION 13005 - PSRA 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 131345-U-19

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