Washington State Department of Corrections, Decision 13095 (PSRA, 2019)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JASON PARKER, Complainant, vs. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent.	CASE 132111-U-19 DECISION 13095 - PSRA ORDER OF DISMISSAL

On September 16, 2019, Jason Parker filed a complaint charging unfair labor practices with the Public Employment Relations Commission under chapter 391-45 WAC, naming the Washington State Department of Corrections (employer) as respondent. On September 23, 2019, Parker amended his complaint. Parkers amended complaint alleged the employer interfered with Parker's protected employee rights and discriminated against him for exercising protected activity. The amended complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on October 1, 2019, indicated that it was not possible to conclude a cause of action existed at that time. Parker was given a period of 21 days in which to file and serve a second amended complaint or face dismissal of the case.

On October 8, 2019, Parker filed a second amended complaint. The second amended complaint reasserts the allegations of the first amended complaint and also asserts that the employer unilaterally changed working conditions without first providing notice and bargaining Parker's union. Parker's first and second amended complaints are dismissed for failure to state causes of action.

---

[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.

ANALYSIS

Parker works as a custody and corrections officer at the Washington State Penitentiary. His position is included in a bargaining unit of corrections officers represented by Teamsters Local 117. The union and employer are parties to a collective bargaining agreement that expires on June 30, 2021.

Allegations of the First Amended Complaint

According to the first amended complaint, on May 9, 2019, the employer gave Parker an investigatory notice alleging that Parker had sent "numerous unprofessional, disrespectful, discourteous, bully and/or harassing emails to a variety of [Department of Corrections] employees." The notice also informed Parker that he had failed to comply with an employer issued directive regarding the sending of e-mails to Department of Corrections' employees. Parker alleges that the at-issue e-mails were only sent to management and human resources employees, none of whom are represented by the Teamsters.

Parker also claims that the May 9, 2019, investigatory notice directed him not to discuss the investigation with anyone except Assistant Secretary Rob Herzog, a human resources professional, Parker's union representatives, Parker's legal counsel, or a person with whom Parker has a legal relationship with. Finally, Parker alleges that Department of Corrections' employees are generally aware that they can be disciplined for discussing pending investigations with bargaining unit members.

Allegations of Second Amended complaint

The second amended complaint resasserts the allegations of the first amended complaint and also claims that the employer unilaterally changed working conditions by enforcing workplace bullying/harassment policies and without providing training about workplace bullying/harassment policies. The second amended complaint also alleges that on September 27, 2019, Parker signed an investigation participation form that specifically asked whether other bargaining unit employees had dicusssed an active or pending complaint with Parker.

Applicable Legal Standard - Discrimination

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.80.110(1)(a). 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 (AFGE Local 1170)*, 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 Standards

Parker's complaints fail to allege that he either exercised protected activity or that a causal connection exists between any alleged protected activity and the employer's actions. Under Washington law, "concerted activities for . . . mutual aid or protection" are not protected under the collective bargaining statutes. *City of Seattle*, Decision 489 (PECB, 1978), *aff'd*, 489-A (PECB, 1979). Although the Personnel System Reform Act of 2002, chapter 41.80 RCW, the Public Employees Collective Bargaining Act, and chapter 41.56 RCW protect employees engaged in union activities, neither protects "concerted activity." The Commission has specifically declined to grant protection for concerted activity. *City of Tacoma*, Decision 4444 (PECB 1993); *City of Bellevue*, Decision 4242 (PECB, 1992). The discimrination allegation is dismissed.

Applicable Legal Standards – Interference

An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *See 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 a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Application of Standard

None of the facts alleged in Parker's complaints constitute an interference violation. Parker's complaint specifically states that the employer precluded him from discussing the May 9, 2019, investigatory notice. Importantly, the complaints do not allege facts claiming the employer precluded Parker from discussing other terms and conditions of employment with bargaining unit members. The complaints also do not allege facts that the subject matter of the May 9, 2019, investigation concerned terms and conditions of employment that would be of interest to other bargaining unit employees.

With respct to the allegation in Parker's second amended complaint claiming the employer interfered with protected employee rights through its investigation participation form, Parker once again fails to allege that he was engaged in protected activity that was protected by the collective bargaining laws. Absent such allegation, an intereference violation cannot be found.

Applicable Legal Standards – 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).

Application of Standards

Parker lacks standing to allege a unilateral change violation. Unilateral change and bad faith bargaining are types of refusal to bargain allegations. An employee cannot file a refusal to bargain complaint as an individual. *King County (Washington State Council of County and City Employees)*, Decision 7139 (PECB, 2000), *citing Clark County*, Decision 3200 (PECB, 1989); *Enumclaw School District (PSE of Washington)*, Decision 5979 (PECB, 1997). Only the parties to the collective bargaining relationship (the union or the employer) can file a refusal to bargain unfair labor practice case. This allegation must be dismissed.

ORDER

The amended 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 7th day of November, 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 11/07/2019

DECISION 13095 - 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 132111-U-19

EMPLOYER: WASHINGTON STATE DEPARTMENT OF CORRECTIONS

REP BY:
FRANKLIN PLAISTOWE
OFFICE OF FINANCIAL MANAGEMENT
LABOR RELATIONS SECTION
PO BOX 47500
OLYMPIA, WA 98504-7500
labor.relations@ofm.wa.gov

SHARON ENGLISH
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DRIVE SW
PO BOX 40145
OLYMPIA, WA 98504-0145
sharone2@atg.wa.gov

J. SHAWN HORLACHER
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA,, WA 98504-0145
shawn.horlacher@atg.wa.gov

PARTY 2: JASON PARKER

REP BY:
JASON PARKER
501 ELZORA LOOP
MILTON-FREEWATER, OR 97862
jwparker33@gmail.com