STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE LIQUOR AND CANNABIS BOARD, Employer.	
KELVIN DAISE, Complainant, vs. WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Respondent.	CASE 131904-U-19 DECISION 13191 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Kelvin Daise, the complainant.

Lane Hatfield, Attorney at Law, for the Washington Public Employees Association.

On July 8, 2019, Kelvin Daise (complainant), a former employee with the Washington State Liquor and Cannabis Board (employer), filed an unfair labor practice complaint against the Washington Public Employees Association (union). The employer is not a party in the case and is referenced for identification and jurisdictional purposes only. An amended complaint was filed on July 23, 2019, and a preliminary ruling was issued on July 24, 2019, finding a cause of action. A hearing was held on February 4, 2020, in Olympia, Washington, before the undersigned examiner. The parties filed post-hearing briefs on March 24, 2020, to complete the record.

ISSUE

The issue, as framed by the preliminary ruling, involves:

> 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 represent or respond to Kelvin Daise's request for representation.

BACKGROUND

Kelvin Daise, the complainant, was hired as a Licensing Specialist within the Licensing and Regulation Division at the employer around October 2018. Employees within this job classification are in a bargaining unit represented by the union and subject to a collective bargaining agreement between the union and the employer. Pursuant to section 4.5 of the collective bargaining agreement, employees hired into a permanent position "will serve a probationary period of six (6) months" that can be extended "as long as the extension does not cause the total period to exceed twelve (12) months." During this probationary period, the collective bargaining agreement permits the employer to separate any probationary employee at any time, "and such separation will not be subject to the grievance procedure." If the employer separates a probationary employee, it is required to "give a minimum of one (1) calendar day's written notice prior to the effective date of separation."

In March 2019 Daise was notified by his supervisor of deficiencies in his work that would require an extensive period of retraining. Believing that any alleged deficiencies were a product of a lack of training, guidance, and feedback from the employer, Daise reached out to various union representatives to seek assistance. During a March 13, 2019, union membership meeting, Daise met with Stacie Leanos, a member representation specialist with the union. Daise expressed some concerns to Leanos about alleged pay inequities and concerns over a probationary extension. Daise and Leanos subsequently followed up with an email exchange in which the complainant elaborated on his concerns around training and the possible extension of his probation. Separately, on March 28, 2019, Daise met with Kent Stanford, the union president, at the union's main office. The two discussed the issues of probation extensions and Daise's allegation that his constitutional rights were being violated.

On March 28, 2019, the employer scheduled a meeting between Daise, his supervisor (Heidi Braley), and a human resources consultant (Dawn Russell). The meeting was postponed, however, because Daise called in sick that day. On that same day, Russell emailed Leanos a copy of the probation extension letter along with a performance improvement plan. The letter informed Daise that his probation was being extended from April 1, 2019, to July 1, 2019.

Shortly after receiving the probation extension letter, Leanos replied to Russell's email and requested a meeting between herself, Daise, Braley, and Russell to discuss the probation extension and accompanying performance improvement plan. Russell replied to Leanos a few minutes later indicating that the meeting would be rescheduled, at which point Leanos forwarded the entire email exchange to Daise along with a copy of the probation extension letter and performance improvement plan.

Daise emailed Leanos the next day, March 29, in which he informed her that he was going to request a meeting with her and the employer; he also inquired as to why he was not informed about the probation extension or the reasons for it. Leanos responded a few hours later explaining that the employer had tried to meet with him but Daise had called in sick; however, another meeting was being set up for the following week. In her email, Leanos also referenced and explained different provisions of the collective bargaining agreement regarding the probationary period and separation during probation.

The employer rescheduled the meeting with Daise for April 2, but Leanos was not available to be present in Olympia (where the employer's office is located) as she had a previously scheduled meeting in Mount Vernon, Washington. A need to meet as soon as possible existed because Daise was quickly approaching the end of his original six-month probationary period. Pursuant to section 38.1 of the collective bargaining agreement, employees are guaranteed a right to representation but that right "will not unreasonably delay or postpone a meeting."

On March 29, 2019, Leanos forwarded some of her email communication with Daise to Andrea Lee, a local shop steward for the union, notifying her of the situation. After learning that the meeting date had been rescheduled for April 2, when Leanos was not available, Leanos contacted

Lee to inquire about a local shop steward attending the meeting. In her testimony, Lee indicated that she was prepared to represent Daise at the April 2 meeting if necessary.

Lee subsequently had a conversation with another local shop steward, Ray McQuillien, about representing Daise at the April 2 meeting with the employer. McQuillien informed Lee that he had already spoken with Daise about attending this meeting and had agreed to go with him. On April 1, prior to the scheduled meeting, Lee informed Leanos that McQuillien would be handling the representation, as requested by Daise. Both Lee and McQuillien received training on serving as a shop steward and had several years of experience between them in this role.

In advance of the April 2 meeting, McQuillien met with Daise to review his status as a probationary employee and what rights were available to him under the collective bargaining agreement. McQuillien then attended the April 2 meeting with Daise and the employer, and McQuillien asked questions and raised some concerns about the adequacy of training provided to the complainant. Following the April 2 meeting, Leanos did not hear anything further from Daise about the meeting or the performance improvement plan.

By way of letter dated May 10, 2019, Daise was informed by the employer that he was being separated from his probationary appointment as a Licensing Specialist. Daise's last day in the office was that same day. Daise thereafter contacted Russell to "contest/appeal" his termination but was informed by Russell that he would have to do so "through WPEA." In a follow-up email exchange between Leanos and the complainant on May 28, 2019, Leanos explained that his separation could not be grieved under the collective bargaining agreement because he was on probation at the time and did not meet expectations. There is no record of any grievance ever being filed on behalf of the complainant.

During his tenure with the employer, Daise never joined the union as a dues-paying member. However, Leanos testified that she was unaware of Daise's official membership status. Several union officials also stated that it was common for new employees to defer membership in the union until after the completion of their probation. The union has also adopted a policy that welcomes all bargaining unit members to membership meetings and provides representation services

regardless of whether an employee is an active member. As stated by the union president, "It is to the benefit of the WPEA to represent anyone that's in our bargaining unit . . . ."

ANALYSIS

Applicable Legal Standard

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 41.80.110(2)(a). The duty of fair representation originated with United States Supreme Court decisions, holding that an exclusive bargaining representative has the duty to fairly represent all of those for whom it acts, without discrimination. *Steele v. Louisville & 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 (Washington State Council of County and City Employees)*, 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

For the following reasons, I find that the complaint must be dismissed. The Commission's jurisdiction in duty of fair representation cases is limited to (1) conduct by the union that is inherently arbitrary, discriminatory, or in bad faith or (2) decisions that are patently unfair to certain individuals or segments of the union's membership. Questions around the processing of

potential grievances under the contract are not at issue herein and can only be resolved in other judicial forums.

The complainant has failed to carry his burden of proof demonstrating that any of the union's actions to represent and communicate with the complainant with respect to the extension of his probationary period and eventual separation were carried out in a discriminatory or bad faith manner. Regardless of his membership status with the union, officials with the union regularly met and communicated with Daise, explained provisions of the collective bargaining agreement, and accompanied him to employer-initiated meetings regarding his status. Even if sincerely held, Daise's perspective that the union should have done more on his behalf does not equate to a finding that the union's actions herein were arbitrary or discriminatory toward him or some segment of the membership.

Duty of Fair Representation

The record is devoid of any evidence even suggesting that the union interacted with Daise in a hostile or discriminatory fashion based on his probationary or non-dues-paying status. Testimony from several union officials indicated that the union has historically maintained a policy of welcoming all bargaining unit members and providing representation services regardless of any individual's dues paying status. Union officials met with Daise at a membership meeting and at the union's main office and regularly communicated with him over the course of several weeks concerning his probationary status and performance improvement plan. These same union officials also communicated internally with one another to ensure that Daise had representation at an employer-called meeting to review his probation extension, and an experienced union steward accompanied the complainant to this meeting and advocated on his behalf. There is no evidence that throughout any of these exchanges the union ever contemplated Daise's status as a non-dues-paying member. In fact, Leanos testified that she did not even know if he was a dues-paying member.

The differentiation in rights afforded to probationary employees, in contrast to permanent employees, as specified in the collective bargaining agreement does not support a finding that the union was discriminating against a certain segment of the bargaining unit. There is no requirement

or expectation in the law that collective bargaining agreements treat all employees equally. In fact, it is nearly universal that different employees subject to the same collective bargaining agreement enjoy varying levels of rights and benefits. For instance, many agreements specify that a newly hired employee will be paid at a lower rate of pay than another employee with greater seniority at the organization, even though both employees are in the same job classification. Full-time employees typically receive greater levels of health insurance benefits or leave benefits in comparison to part-time employees. It is also common that newly hired employees have lower or no tenure rights in comparison to employees who have completed a probationary period, as is the case herein. Each of these differentiations in labor agreements are normal and lawful unless there was some evidence that they were done to target a protected classification of workers, such as on the basis of race or religion. No evidence exists that all probationary employees with this employer were subjected to an at-will employment status for any unlawful reason.

The limitations expressed by the union in terms of what it could do for Daise in this situation were not arbitrarily determined and were carried out with good faith. The reality is that the collective bargaining agreement permits the employer to extend an employee's probationary period at the employer's discretion and to subsequently terminate a probationary employee at will; such a decision is not subject to the grievance process. The circumscribed nature of the union's response to the situation was a product of its contractual agreement with the employer in terms of the rights of all probationary employees. After receiving notice of the probation extension and performance improvement plan, the union communicated that notice to Daise, sought a meeting with the employer to review the plan, and sent a steward with Daise to attend the meeting and advocate on his behalf. While limited in the number of actions it could take on his behalf because of his probationary status, the steps the union did take were reasonable and consistent with its good faith duty to represent every member.

Questions around whether the union could have alleged different contractual violations on behalf of Daise both lack supporting evidence and are not at issue in this proceeding. Daise has asserted a number of alleged contractual violations by the employer including not providing the required training, a failure to notify him of his probation extension and the reasons therefor, and not providing sufficient notice before separating him from employment. With respect to each of these

claims, and any associated union duty of fair representation, they are alleged contractual violations and outside the Commission's jurisdiction. Notwithstanding this fact, beyond an assertion by Daise as to his belief that various contractual provisions were violated, there is no evidence that he ever supplied any supporting information or documentation to the union detailing such claims. Daise also failed to submit any such information into this record. Because the Commission does not assert jurisdiction over claims arising out of the contractual grievance process, these arguments are not considered in this decision.

The courts have afforded unions a wide degree of latitude in discharging the duty of fair representation. Nothing admitted into the record in this case demonstrates any activity by the union outside of these boundaries. Daise undoubtedly invested a lot of his own resources in taking this position with the employer and was clearly upset by the limits on his ability to challenge his treatment on the job and ultimate separation. This frustration obviously extended to his perceptions around what the union was doing on his behalf. But, dissatisfaction with a union's level of service or disagreement with its decisions is not tantamount to unlawful interference. Unions cannot be all things to all members at all times—a reality that has been accepted repeatedly by the courts of this state in providing unions with considerable discretion over particular decisions with respect to any given member. Even objectively wrong decisions made by unions regarding the representation of members are not unlawful unless there is evidence that the decisions were made for arbitrary, discriminatory, or bad faith reasons. The law protects employees from invidious and unfair decisions, not bad decisions. Reasonable minds may differ over how much the union could have done on behalf of Daise in this situation, but the actions taken by the union herein were not unlawful.

CONCLUSION

The union did not breach its duty of fair representation with respect to Daise in representing and communicating with him over his probation extension and ultimate separation of employment. Daise's assertions that the union could have pursued several alleged contractual violations on his behalf are not within the Commission's jurisdiction. To determine if there is unlawful interference, the complainant has the burden of proof to establish the union's actions were arbitrary,

discriminatory, or in bad faith toward him or a segment of the membership. There is nothing in the record rising to such a level of bad faith, which necessitates dismissal of the complaint.

FINDINGS OF FACT

1. Washington State Liquor and Cannabis Board is a public employer as defined by RCW 41.80.005(8).

2. Washington Public Employees Association is a bargaining representative within the meaning of RCW 41.80.005(9) and represents a bargaining unit that includes employees employed by the Washington State Liquor and Cannabis Board.

3. Complainant Kelvin Daise was a member of the bargaining unit described in finding of fact 2.

4. A collective bargaining agreement between the parties described in findings of fact 1 and 2 existed for the period of July 1, 2017, through June 30, 2019, and was in effect during the time of the complainant's employment with the Washington State Liquor and Cannabis Board.

5. Kelvin Daise was hired as a Licensing Specialist within the Licensing and Regulation Division around October 2018.

6. In March 2019 Daise was notified by his supervisor of deficiencies in his work that would require an extensive period of retraining. Daise believed that any alleged deficiencies were a product of a lack of training, guidance, and feedback from the employer. In an effort to address these concerns, Daise reached out to various union representatives to seek assistance.

7. Daise attended a March 13, 2019, union membership meeting where he met with Stacie Leanos, a member representation specialist with the union. During the membership meeting, Daise expressed some concerns to Leanos about alleged pay inequities and concerns over a probationary extension. Daise and Leanos subsequently followed up with an email exchange

in which the complainant elaborated on his concerns around training and the possible extension of his probation. Separately, on March 28, 2019, Daise met with Kent Stanford, the union president, at the union's main office. The two discussed the issues of probation extensions and Daise's allegation that his constitutional rights were being violated.

8. On March 28, 2019, the employer scheduled a meeting between Daise, his supervisor (Heidi Braley), and a human resources consultant (Dawn Russell). The meeting was postponed, however, because Daise called in sick that day. On that same day, Russell emailed Leanos a copy of the probation extension letter along with a performance improvement plan. The letter informed Daise that his probation was being extended from April 1, 2019, to July 1, 2019.

9. Shortly after receiving the probation extension letter, Leanos replied to Russell's email and requested a meeting between herself, Daise, Braley, and Russell to discuss the probation extension and accompanying performance improvement plan. Russell replied to Leanos a few minutes later indicating that the meeting would be rescheduled, at which point Leanos forwarded the entire email exchange to Daise along with a copy of the probation extension letter and performance improvement plan.

10. Daise emailed Leanos the next day, March 29, in which he informed her that he was going to request a meeting with her and the employer; he also inquired as to why he was not informed about the probation extension or the reasons for it. Leanos responded a few hours later explaining that the employer had tried to meet with him but Daise had called in sick; however, another meeting was being set up for the following week. In her email, Leanos also referenced and explained different provisions of the collective bargaining agreement regarding the probationary period and separation during probation.

11. The employer rescheduled the meeting with Daise for April 2, but Leanos was not available to be present in Olympia (where the employer's office is located) as she had a previously scheduled meeting in Mount Vernon, Washington. A need to meet as soon as possible existed because Daise was quickly approaching the end of his original six-month probationary period.

12. On March 29, 2019, Leanos forwarded some of her email communication with Daise to Andrea Lee, a local shop steward for the union, notifying her of the situation. After learning that the meeting date had been rescheduled for April 2, when Leanos was not available, Leanos contacted Lee to inquire about a local shop steward attending the meeting. The evidence demonstrated that Lee was prepared to represent Daise at the April 2 meeting if necessary.

13. Lee subsequently had a conversation with another local shop steward, Ray McQuillien, about representing Daise at the April 2 meeting with the employer. McQuillien informed Lee that he had already spoken with Daise about attending this meeting and had agreed to go with him. On April 1, prior to the scheduled meeting, Lee informed Leanos that McQuillien would be handling the representation, as requested by Daise. Both Lee and McQuillien received training on serving as a shop steward and had several years of experience between them in this role.

14. In advance of the April 2 meeting, McQuillien met with Daise to review his status as a probationary employee and what rights were available to him under the collective bargaining agreement. McQuillien then attended the April 2 meeting with Daise and the employer, and McQuillien asked questions and raised some concerns about the adequacy of training provided to the complainant. Following the April 2 meeting, Leanos did not hear anything further from Daise about the meeting or the performance improvement plan.

15. By way of letter dated May 10, 2019, Daise was informed by the employer that he was being separated from his probationary appointment as a Licensing Specialist. Daise's last day in the office was that same day. Daise thereafter contacted Russell to "contest/appeal" his termination but was informed by Russell that he would have to do so "through WPEA." In a follow-up email exchange between Leanos and the complainant on May 28, 2019, Leanos explained that his separation could not be grieved under the collective bargaining agreement because he was on probation at the time and did not meet expectations. There is no record of any grievance ever being filed on behalf of the complainant.

16. During his tenure with the employer, Daise never joined the union as a dues-paying member. The evidence showed that Leanos was unaware of Daise's official membership

status. Several union officials also stated that it was common for new employees to defer membership in the union until after the completion of their probation. The union has also adopted a policy that welcomes all bargaining unit members to membership meetings and provides representation services regardless of whether an employee is an active member.

17. The record lacks evidence sufficient to carry the complainant's burden of proof that the union acted toward Daise in an arbitrary, discriminatory, or bad faith manner or that the union's decisions were patently unfair to Daise or any segments of the union's membership.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.80 RCW and chapter 391-45 WAC.

2. As described in findings of fact 5–17, the union did not interfere with employee rights in violation of RCW 41.80.110(2)(a) by breaching its duty of fair representation in refusing to represent or respond to Kelvin Daise's request for representation.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 28th day of April, 2020.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CHRISTOPHER J. CASILLAS, Examiner

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.

RECORD OF SERVICE

ISSUED ON 04/28/2020

DECISION 13191 - PSRA has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 131904-U-19

EMPLOYER:	WASHINGTON STATE LIQUOR AND CANNABIS BOARD
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