

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SILVIA ZARATE, Complainant, vs. WASHINGTON FEDERATION OF STATE EMPLOYEES, Respondent.	CASE 133299-U-21 DECISION 13328 – PSRA ORDER OF DISMISSAL
SILVIA ZARATE, Complainant, vs. WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, Respondent.	CASE 133314-U-21 DECISION 13329 – PSRA ORDER OF DISMISSAL

Ada K. Wong and Jordan T. Wada, Attorneys at Law, AKW Law, P.C., for Silvia Zarate.

Cheryl L. Wolfe, Senior Counsel and Sara L. Wilmot, Assistant Attorney General, Attorney General Robert W. Ferguson, for the Washington State Department of Children, Youth, and Families.

On January 19, 2021, Sylvia Zarate (complainant) filed an unfair labor practice complaint against the Washington Federation of State Employees (union). This agency docketed that complaint as case 133299-U-21. On January 27, 2021, Zarate amended her complaint against the union and also indicated that she was filing a complaint against the Washington State Department of Children, Youth, and Families (employer). The agency docketed the complaint against the employer as case

133314-U-21. Both complaints were reviewed under WAC 391-45-110¹ and deficiency notices were issued on February 25, 2021, notifying Zarate that a cause of action could not be found at that time for either case. Zarate was given a period of 21 days in which to file and serve amended complaints or face dismissal of both cases.

On March 18, 2021, Zarate filed an amended complaint for both cases. The amended complaint is dismissed for failure to state a cause of action.

BACKGROUND

Silvia Zarate worked for the Washington State Department of Children, Youth, and Families (employer) between February 2008 and December 2020. Her position was represented by the Washington Federation of State Employees (union) for purposes of collective bargaining.

According to the amended complaint, in 2017 Zarate and four other coworkers reported several complaints to the employer and union regarding a supervisor who was engaged in bullying and harassing behavior. Although a different employee allegedly filed a grievance about the behavior, the complaint asserts that Zarate took the lead for the complaint.

In January 2020, Zarate was placed on special assignment due to a Child Protective Services (CPS) investigation that was initiated against her. Zarate allegedly contacted the Children's Ombudsman to raise concerns regarding the employer mishandling her case and alleges that the ombudsman forwarded personal emails to the CPS investigative team. Zarate contacted her union representative in February 2020 and the union agreed to provide representation.

¹ At this stage of the proceedings, all of the facts alleged in the complaint or amended 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.

On July 30, 2020, the CPS team allegedly approved a finding of physical abuse against Zarate. The employer also started an investigation Zarate concerning allegations of the misuse of state resources.

Zarate went on medical leave between April 15, 2020, and August 17, 2020. According to the complaint, she was granted Family Medical Leave Act that expires on May 21, 2021. On August 17, 2020, she returned to work with certain restrictions. That same day she attempted to contact the employer's Human Resources department and learned that there was an additional investigation against her. On August 19, 2020, Zarate received a Human Resources investigation letter associated with the CPS investigation. That same day she received an email confirming that she was being investigated for physical abuse of a child and for the misuse of state resources.

On August 28, 2020, Zarate received a certified letter from the employer officially informing her that the department had made a founded finding of abuse against her. On September 1, 2020, the employer allegedly required Zarate to sign a document that stated she needed to "provide truthful responses" and that a "failure to do so, as determined by a fair and thorough investigation, may result in disciplinary action, up to and including dismissal." On September 2, 2020, Zarate appealed the founded finding decision through the employer's processes

The employer required Zarate to attend an investigatory interview on September 14, 2020. Gus Gonzalez, a union representative, attended this meeting via videoconference. At the time of this interview, a criminal complaint was pending in Yakima County Superior Court concerning the allegations of abuse of a child. Zarate notified the employer and Gonzalez that she could not answer questions concerning the founded finding. Gonzalez allegedly informed Zarate that she needed to answer all of the employer's questions despite the fact that there was an ongoing criminal investigation. Gonzalez apparently allowed Zarate to not answer certain questions based upon legal advice from other sources. Zarate alleges that neither the employer nor Gonzalez informed her of her constitutional right to remain silent during the interview.

On September 15, 2020, the Yakima County Sheriff's Department served Zarate with a criminal summons stating a charge of Assault 2 of a child. On that same day the employer denied Zarate's

appeal of the founded finding and Zarate subsequent appealed that decision to the Office of Administrative Hearings. Zarate appeared for arraignment on October 6, 2020, where she entered a not-guilty plea.

On October 12, 2020, the employer notified Zarate and Gonzalez that it had completed its investigation. On November 10, 2020, Zarate signed a one-day waiver of her union rights because she wanted her personal attorney present at a November 12, 2020, predisciplinary meeting with the appointing authority.

On November 17, 2020, Zarate sent a grievance letter to the employer voicing concerns that the employer was moving forward with discipline despite the fact that the criminal case was ongoing as well as her administrative appeal. Zarate also sent that letter to the union. On November 19, 2020, Zarate also contacted the union to determine if they had received her letter. The union confirmed that it had received the letter. Zarate did not receive a response from the employer and on November 30, 2020, she emailed the appointing authority her letter a second time.

On December 14, 2020, the employer terminated Zarate's employment with the department. The complaint alleges that the employer terminated Zarate's employment in violation of the department's administrative policies, RCW43.216.270, and Laws of 2020 ch. 270 (which offers greater protections to employees with founded findings). Zarate contacted Gonzalez that same date to explore the possibility of the union pursuing a grievance on her behalf.

On December 15, 2020, the union contacted Zarate to discuss her grievance as well as the possibility of working out an agreement with the employer to allow Zarate to resign and receive unemployment benefits in exchange for Zarate's agreement not to sue the state. Zarate refused and asked the union to start the grievance process. On December 16, 2020, Gonzalez contacted Zarate and informed her that he would get the process going. According to the amended complaint, Gonzalez was scheduled to be on vacation between December 21, 2020, and January 4, 2021,

leaving little time for the grievance to be filed.² On December 22, 2020, the union's local grievance committee met to discuss Zarate's situation. That same day the local grievance committee contacted Zarate to inform her that they were not going to process her grievance. Zarate appealed that decision to the state grievance committee. After this meeting, Zarate also provided Gonzalez additional information about her case and Gonzalez allegedly ensured Zarate that he would include that information in the submission to the state grievance committee.

On January 8, 2021, the state grievance committee met with Zarate. During this meeting, they allegedly only ask questions about the allegations of misuse of state resources despite the fact that she tried to explain the complexity of her case as well as the numerous alleged violations of the collective bargaining agreement and other mitigating factors. The state grievance committee informed Zarate that same day that her appeal was denied and the union would not pursue the grievance on her behalf.

ANALYSIS

Case 133299-U-21 – The Complaint Against the Union

Zarate asserts that the union's actions breached its duty of fair representation by failing to properly support her grievance seeking to overturn her termination. Zarate also alleges that the union interfered with her protected rights when it suggested to her that they could secure her unemployment benefits if she agreed to resign and to not sue the state over her dismissal. Neither of these claims state a cause of action before this agency.

A union, within reason, may decline to pursue a grievance at any stage of the grievance procedure. If a bargaining unit employee raises an issue or concerns with a union, the union has an obligation to fairly investigate such concerns to determine whether the union believes that the parties' collective bargaining agreement has been violated. *State – Labor and Industries, Decision 8263*

² The amended complaint alleges that the grievance was due December 11, 2020. Examined against the other facts in the amended complaint, this date appears to be incorrect.

(PSRA, 2003). If the union determines the concerns have merit, the union has the right to file a grievance under the parties' collective bargaining agreement. If the union determines that the concerns don't lack merit, the union has no obligation to file a grievance. While a union owes this duty of fair representation to bargaining unit members, claims must be pursued before a court which can assert jurisdiction to determine, and remedy, any underlying contractual violation. *State – Labor and Industries*, Decision 8263.

For example, in *Mukilteo School District (Public School Employees of Washington)*, Decision 1381 (PECB, 1982) an allegation that the union refused to process a grievance was insufficient to state a cause of action. The decision explained that the Commission will not assert jurisdiction if allegations arise exclusively from the processing of claims under an existing collective bargaining agreement. Instead, the Commission will only assert jurisdiction for "duty of fair representation" if an employee alleged arbitrary, discriminatory, or bad faith conduct by the union in negotiating a collective bargaining agreement or in the representation of the complainant or others in collective bargaining. *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012) (citing *Mukilteo School District (Public School Employees of Washington)*, Decision 1381). To establish a cause of action, the complainant must allege its union aligned itself in interest against employees it represents based on invidious discrimination, such as such as union membership, race, sex, national origin. *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A.

Zarate's amended complaint has not alleged facts demonstrating that the union took some action aligning itself against bargaining unit employees on an improper or invidious basis. Rather, the allegations that the union failed to process her grievance raised arise exclusively from the processing of a grievance concerning her termination.

Finally, 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 chapter 41.56 RCW. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004). The amended complaint suggests that Zarate's union representatives should have

advised her of her right under *Garrity v. New Jersey*, 385 U.S. 493 (1967) (a public employee cannot be compelled, by the threat of serious discipline, to make statements that may be used in a subsequent criminal proceeding or be terminated for refusing to waive their Fifth Amendment right to remain silent), a union's failure to advise a member of those rights does not state a cause of action unless the alleged facts demonstrate the union did so for invidious reasons.

Case 133314-U-21 – The Complaint Against the Employer

Zarate asserts that the employer's actions violated numerous provisions of the collective bargaining agreement that covered her employment. This agency has consistently refused to resolve "violation of contract" allegations or attempts to enforce a provision of a collective bargaining agreement through the unfair labor practice provisions it administers. *Anacortes School District*, Decision 2464-A (EDUC, 1986) (citing *City of Walla Walla*, Decision 104 (PECB, 1976)). The Commission has consistently held that any remedy for a contract violation will have to come through the grievance and arbitration machinery of that contract, or through the superior courts. *South Whidbey School District*, Decision 11134-A (EDUC, 2011) (citing *Tacoma School District*, Decision 5722-E (EDUC, 1997)).

Finally, the allegations that the employer violated the department's administrative policies, RCW 43.216.270, and Laws of 2020 ch. 270, do not state causes of action before this agency. This agency only possess authority to redress violations of the unfair labor practice provisions of the collective bargaining statute and lacks authority to redress violations of other state laws. Zarate has not alleged that the employer terminated her for exercising a protected right, such as exercising her *Weingarten* rights or filing a grievance and absent such facts the complaint against the employer must be dismissed.

ORDER

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

ISSUED at Olympia, Washington, this 1st day of April, 2021.

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.



RECORD OF SERVICE

ISSUED ON 04/01/2021

DECISION 13328 - 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 133299-U-21

EMPLOYER: WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES

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