STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JUDY DEIGNAN, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 133281-U-21 DECISION 13336 - EDUC ORDER OF DISMISSAL

Olga Addae, Representative, for Judy Deignan.

Jay W. Schulkin, Attorney at Law, Porter Foster Rorick LLP for the Seattle School District.

On January 12, 2021, Judy Deignan filed an unfair labor practice complaint against the Seattle School District (employer). The complaint was reviewed under WAC 391-45-110.[1] A deficiency notice issued on February 11, 2021, notified the complainant that a cause of action could not be found at that time. Deignan was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case.

On March 3, 2021, Deignan filed an amended complaint. The amended complaint alleges the following causes of action:

> Employer interference in violation of RCW 41.59.140(1)(a) within six months of the date the complaint was filed, by a threat of reprisal or force, or promise of benefit, associated with the protected activity when the employer changed the staffing ratio, overages, and the deletion of the Focus Services at the secondary level.

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[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.

> Employer discrimination in violation of RCW 41.59.140(1)(d) [and if so, derivative interference in violation of RCW 41.59.140(1)(a) within six months of the date the complaint was filed, by requiring Judy Deignan to attend an investigatory meeting in retaliation for filing an unfair labor practice complaint.

The amended complaint is dismissed for a failure to state a cause of action.

BACKGROUND

Judy Deignan works as a certificated teacher at the Seattle School District (employer) whose primary duties are as a secondary special education teacher who uses a special education service model call "Focus." Deignan is represented by the Seattle Education Association (union) for purposes of collective bargaining. The employer and union are parties to a collective bargaining agreement that expires August 31, 2022.

The complaint alleges that in November 2020 the employer removed the Focus special education service model and replaced it with a new service model called "Moderate/Intensive." A major different between the two teaching models is that Focus uses a staffing ratio of 10:1:2 (10 students, 1 teacher, 2 instructional assistants) while Moderate/Intensive uses a 9:1:1 staffing ration. The employer also allegedly modified the special education teacher category list which is used for recall and layoff. These changes were not made through bargaining with the union and are contrary to the current collective bargaining agreement and impacted the special education teachers who teach the Focus service model. The complainant also filed a grievance over staffing ratio, overages, and the deletion of Focus Services at the secondary level.

On January 8, 2021, the complainant allegedly received a copy of the districts response to a grievance filed by an unidentified special education teacher. The district allegedly denied the grievance and asserted that the collective bargaining agreement between the union and employer allowed the employer to make the change to the staffing ratio. The complaint asserts that the employer's response misinterprets the parties' collective bargaining agreement and the employer's interpretation is designed to allow the employer to change the staffing ratio without satisfying its collective bargaining obligations.

Deignan also asserts that on February 22, 2021, her evaluator requested that she attend a meeting and informed her to bring her union representative. Deignan asserts that she perceived the request for this meeting to have been in retaliation for her filing her original complaint.

The complainant requests that the employer bring forth their proposals for new and modified special education service models to negotiations with the union and cease and desist from making changes to special education teaching policies that removed the Focus service model.

ANALYSIS

Employer Interference

It is an unfair labor practice for an employer to interfere with rights protected by chapter 41.59 RCW. To prove an interference violation, a complainant must demonstrate that one or more employees engaged in activity, that the employer made some statement or took some action, and one or more employees reasonably perceived the employer's statement or actions as a threat of reprisal or force, or promise of benefit, associated with the protected activity. *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.

Here, Deignan's allegation that the employer interfered with protected employee rights by changing the staffing ratio fails to state a cause of action for employer interference because Deignan has not claimed that the she was engaged in protected activity when the employer changed the staffing ration. While Deignan's grievance in response to the change in staffing ration was protected activity, the employer has already taken its action and therefore it cannot be said that the change in staffing ration could reasonably be perceived as a threat of reprisal or force, or promise of benefit, associated with the protected activity.

The problem with Deignan's assertion is that the facts of the complaint concern the employer decision to change the special education service model, which is arguably a unilateral change to wages, hours, and working conditions. Unilateral change and bad faith bargaining are types of refusal to bargain allegations. An individual 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*, 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. While an employer who has been found to have breached its good faith bargaining obligation is also found to have derivatively interfered with protected employee rights, derivative interference only attaches when the good faith bargaining obligation has been proved and an independent interference violation cannot be found if the good faith violation has not been proved.

Furthermore, the remedies sought by Deignan can only be achieved through a refusal to bargain violation. The typical remedy for an unfair labor practice violation includes ordering the offending party to cease and desist and, if necessary, to restore the status quo; make employees whole; post notice of the violation; publicly read the notice; and order the parties to bargain from the status quo. *State – Corre*ctions, Decision 11060-A (PSRA, 2012); *City of Anacortes*, Decision 6863-B (PECB, 2001). While the remedies for an interference violation to require an employer to cease and desist from the complained of activity, the remedies do not include a "return to the status quo" order.

Finally, Deignan asserts that the employer is misinterpreting the applicable collective bargaining agreement to allow it to change the special education service model. Allegations that the employer and/or union violated the provisions of a collective bargaining agreement are not matters that this agency can address. Rather, these kinds of arguments and remedies for contract violations must be sought through the grievance and arbitration machinery within the contract, such as the grievance that Deignan has already filed, or through the courts.

Employer Discrimination

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. 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(s) participated in an activity protected by the collective bargaining statute, or communicated to the employer the intent to do so;

2. The employer deprived the employee(s) 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).

Deignan filed her original complained on January 12, 2021, and on February 22, 2021, she was required to attend a meeting with her evaluator and told to being her union representative. The complaints also asserts that a causal connection exists between the unfair labor practice complaint and the meeting. However, the complaints do not describe the results of that meeting and lacks facts demonstrating that Deignan was denied an ascertainable right, benefit, or status. Absent such facts, a complaint alleging discrimination in retaliation for filing an unfair labor practice complaint cannot stand.

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 8th 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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 04/08/2021

DECISION 13336 - EDUC 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 133281-U-21

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