

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF REDMOND, Employer.	
PAUL RICHARDS, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 2829, Respondent.	CASE 133219-U-20 DECISION 13311-A - PECB ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Paul Richards, the complainant.

Alex J. Skalbania, Attorney at Law, Skalbania & Vinnedge, PSC, for the International Association of Fire Fighters Local 2829.

Paul Richards, formerly a firefighter with the City of Redmond (employer), filed the complaint in this case on December 7, 2020. After receiving a deficiency notice, Richards filed an amended complaint on January 21, 2021. After a preliminary ruling and partial dismissal of allegations was issued on February 18, 2021, Richards' remaining allegations claim was that the International Association of Fire Fighters Local 2829 (union) interfered with employee rights in violation of RCW 41.56.150(1) by breaching its duty of fair representation. The union filed a motion for summary judgment with supporting documents on May 10, 2021. Richards filed a response to the summary judgment motion with one supporting document on May 24, 2021. The union filed a reply brief on June 2, 2021, to complete the record.¹

¹ In Richards' response brief filed on May 24, 2021, Richards withdrew the cause of action regarding the union settling grievances in exchange for removal of the fire chief and deputy fire chief from office. Richards' withdrawal limited the preliminary ruling to one cause of action involving the alleged disclosure of "privileged" information.

ISSUES

1. Are there genuine issues of material fact in dispute that would prevent judgment in this case?
2. Was Richards' complaint timely filed?
3. Did the union breach its duty of fair representation by disclosing "privileged" information to the employer during an investigation of Richards?

The union's motion is granted. There are no issues of material fact in dispute that would prevent judgment. This case was not timely filed. Even if Richards had timely filed the complaint, the union's disclosure that unrelated documents were in Richards' investigation file did not violate the union's duty of fair representation. The case is dismissed.

BACKGROUND

Richards was employed by the City of Redmond as a firefighter. The union represents the employer's fire fighters. On January 31, 2019, the employer informed the union via email that it was considering disciplinary action against Richards, including the possibility of termination of employment. As part of this email, the employer attached various documents to compose an investigation file that it asserted was supportive of its claim that Richards had engaged in misconduct.

After reviewing the documents, the union determined that some of the documents were not related to the allegations the employer was making against Richards. On February 7, 2019, the union's representative disclosed to the employer's lead investigator, via text, that the "wrong incident [was] referenced and attached to the findings [of the employer's investigation of Richards]." The union informed the employer about the unrelated documents to limit the scope of charges against Richards and to protect the privacy of those people listed in those documents. The union representative's text also contained a request for a phone conversation between the union representative and the employer's investigator about the topic.

On February 15, 2019, the employer sent the union an email, stating that the union and employer had a phone conversation about the documents. The employer stated it had incorrectly included documents unrelated to the charges against Richards in the investigation file sent to the union and Richards. In that email, the employer also directed Richards to remove the unrelated documents from the file and return them to the employer. The union forwarded this communication to Richards in an email on February 15, 2019. Richards acknowledged this communication from the union in an email Richards sent to the union on February 18, 2019. Richards informed the union that he had destroyed the unrelated documents.

The employer terminated Richards' employment on June 10, 2019. The union filed a grievance regarding the termination. In September 2019, the union settled the grievance for a monetary payment to Richards.

On July 7, 2020, Richards received documents via a Public Records Act request. These documents contained the February 7, 2019, text mentioned above.

ANALYSIS

Applicable Legal Standards

Summary Judgment

An Examiner may grant a motion for summary judgment “if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” WAC 10-08-135. “A material fact is one upon which the outcome of the litigation depends.” *State – General Administration*, Decision 8087-B (PSRA, 2004) (citing *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243 (1993)). The Commission applies the same standards in ruling on motions for summary judgment as do Washington courts. *State – General Administration*, Decision 8087-B.

The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue as to a material fact. “A summary judgment is only appropriate where the party responding to the motion cannot or does not deny any material fact alleged by the party making the motion. . . . Entry of a summary judgment accelerates the decision-making process by

dispensing with a hearing where none is needed.” *Pierce County*, Decision 7018-A (PECB, 2001) (citing *City of Vancouver*, Decision 7013 (PECB, 2000)). When the moving party shows that there are no genuine issues as to any material fact, the nonmoving party bears a responsibility to present evidence demonstrating that there are material facts in dispute. *City of Seattle (Seattle Police Management Association)*, Decision 12091 (PECB, 2014).

Consistent with Civil Rule 56, if the nonmoving party fails to do so, summary judgment may then be appropriate. *Id.*; *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506 (1990). Civil Rule 56(e) specifically states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Pleadings and briefs can be sufficient to determine if there is a genuine issue of material fact. *Pierce County*, Decision 7018-A (citing *City of Seattle*, Decision 4687-A (PECB, 1996)).

The Commission does not grant summary judgment motions lightly since doing so involves making a final determination without the benefit of a hearing. *City of Orting*, Decision 7959-A (PECB, 2003).

Timeliness

The statute of limitations for filing an unfair labor practice complaint under the Public Employees' Collective Bargaining Act is six months from the date of occurrence. RCW 41.56.160(1). The start of the six-month period, also called the triggering event, occurs when “a potential complainant has actual or constructive notice of the complained-of action.” *Community College District 17 (Spokane Community College)*, Decision 9795-A (PSRA, 2008) (citing *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990)).

An exception to the strict enforcement of the statute of limitations exists where the complainant had no actual or constructive notice of the acts or events that are the basis of the charges. *City of Bellevue*, Decision 9343-A (PECB, 2007).

Duty of Fair Representation

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 agreement. *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. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

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 and must demonstrate that the union's actions or inactions were arbitrary, discriminatory, or in bad faith. *City of Renton (Washington State Council of County and City Employees)*, Decision 1825 (PECB, 1984).

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 Standards

There Are No Genuine Issues of Material Fact

Read as whole, the pleadings, briefs, and other submissions of the parties are factually consistent and contain the necessary undisputed facts to render a decision. The union supplied several declarations and other documents along with its summary judgment motion. The union's submissions describe the process by which it came to represent Richards in the grievance against

the employer and how the union communicated with the employer and Richards during the grievance process. Richards' response to the union's summary judgment motion did not substantially add to or dispute any of the material facts submitted by the union. Rather, Richards' response consisted mostly of argument about why Richards felt the union's actions wronged Richards.²

Summary Judgment Is Appropriate on the Basis of Timeliness

The union asserts that Richards' complaint was not timely filed because the disclosure of information at issue in this case took place in February 2019—more than six months before Richards filed the complaint on December 7, 2020. Richards asserts that Richards did not know it was the union who prompted the removal of documents until Richards reviewed a document received via a Public Records Act request on July 7, 2020. This was less than six months before Richards filed the complaint.

Richards also asserts that because the allegation survived the preliminary ruling process, it must be timely. But the preliminary ruling process is distinct from the summary judgment process. At the preliminary ruling stage, only the facts asserted in the complaint are at issue. WAC 391-45-110. Once a party moves for summary judgment and asserts facts not in the complaint that suggest an allegation is not timely, it is appropriate for an Examiner to evaluate all the facts presented to determine whether an issue of material fact exists that requires a hearing. *See City of Orting*, Decision 7959-A. The Commission has affirmed Examiners who have dismissed cases on timeliness grounds on a motion for summary judgment, notwithstanding a prior preliminary ruling. *See, City of Bellingham*, Decision 10907-A (PECB, 2012). In the present case, there were new, un rebutted facts presented by the union that were not in the complaint, and there are no material facts in dispute regarding whether the complaint was timely as discussed below.

² Richards submitted one document with the summary judgment response: the employer's Personnel Manual. Richards references the manual to suggest that the February 7, 2019, text message between the union representative and the employer's investigator violated the employer's policy against conducting business via text. Richards does not explain how the policy or its alleged violation would be relevant to this duty of fair representation case. I find that the employer's policy regarding text messages is not relevant to this case and do not consider it in issuing this decision.

For purposes of determining the ultimate issue in the case, I find the material issue to be that Richards knew of the disclosure of information, not that Richards knew who prompted the disclosure. Richards had constructive knowledge of the material disclosure more than 21 months before the complaint was filed. This was in the form of an employer email chain forwarded to Richards by the union representative on February 15, 2019. This information was not in Richards' complaint. After receiving the union's email, Richards went through the grievance process regarding the termination, and the grievance was settled. More than a year after the grievance was settled, Richards filed this complaint.

Richards claims he did not know in February 2019 that the removal of documents had been prompted by the union pointing out to the employer that the information was unrelated to Richards. But whether or not Richards knew it was the union who alerted the employer that unrelated information had been included in the investigation file is not a material fact for deciding this duty of fair representation case. The union had no duty to notify Richards prior to taking action to correct the investigation file on Richards' behalf. Indeed, the union was fulfilling its duty to Richards by attempting to curtail the employer's use of unrelated information in its investigation of Richards. Richards has presented no evidence to suggest that the union's disclosure was made for an invidious or discriminatory purpose. In fact, Richards has presented no evidence that would lead to an inference that the union's actions were anything but part of its normal representation of Richards. In the absence of this evidence, Richards' knowledge of who initiated the process to correct the investigation file is not a material issue of fact.

Richards knew of the disclosure of unrelated documents in the investigation file well outside the six-month statute of limitations. Richards' complaint was not timely filed.

Summary Judgment Is Also Appropriate on the Merits of the Case

Often, if a matter is dismissed as untimely, this ends the inquiry. However, in this case, the facts surrounding the timeliness issue also go directly to the merits of the case and thus it is appropriate to address those merits here.

On January 31, 2019, the employer sent an email to the union, informing the union that it was considering terminating Richards' employment. The employer attached supporting documents to

the email. After reviewing the documents, the union disclosed to the employer that some of these documents were unrelated to Richards. The employer responded by email on February 15, 2019, stating that it had incorrectly included unrelated documents in the investigation file and directed Richards to remove and return those documents to the employer. The union forwarded the email to Richards on the same day. On February 18, 2019, Richards acknowledged the union's email and informed the union that Richards had destroyed the unrelated documents.

Richards speculates in a response brief that other "privileged information" might have been disclosed by the union but did not provide any evidence to support such a theory. Speculation is not evidence that supports a denial of summary judgment. *See State – Office of the Governor, Decision 10948-A (PSRA, 2011)* (explaining that reliance on belief about a party's intent with no specific facts is not sufficient to preserve allegation). Thus, the only disclosure at issue here is the union's disclosure that the employer included unrelated documents in the investigation file which the employer sent to the union.

A great deal of Richards' complaint and response to the union's summary judgment motion are dedicated to asserting that the employer's case for terminating Richards was weak. But the employer's termination of Richards is not the issue in this case. The only issue is whether the union disclosing to the employer that the employer had included unrelated information in its investigation file sent to the union was a violation of the union's duty of fair representation. It was not. Without evidence sufficient to create a reasonable inference that union's actions were discriminatory, arbitrary, or in bad faith; or based on considerations that are irrelevant, invidious, or unfair, Richards' allegation cannot survive summary judgment. Richards has supplied no such evidence. The undisputed evidence is that the union informed the employer about the unrelated documents to limit the scope of charges against Richards and to protect the privacy of those listed in the unrelated documents. These were reasonable actions by the union. The fact that Richards was apparently dissatisfied with the tactics or quality of the union's representation is not sufficient to prove a violation of the duty of fair representation. *See Dayton School District (Dayton Education Association), Decision 8042-A.*

CONCLUSION

All of Richards' allegations other than the allegation regarding disclosure of "privileged" information have been dismissed or withdrawn. There are no issues of material fact in dispute that would prevent judgment on the remaining allegation. This case was not timely filed. Even if Richard had timely filed the complaint, the union's disclosure that unrelated documents were in Richards' investigation file did not violate the union's duty of fair representation to Richards. The case is dismissed.

FINDINGS OF FACT

1. The City of Redmond is a public employer within the meaning of RCW 41.56.030(13).
2. The International Association of Fire Fighters Local 2829 is a bargaining representative within the meaning of RCW 41.56.030(2) and represents firefighters employed by the employer.
3. Complainant Paul Richards was a firefighter for the employer and a member of the bargaining unit described in finding of fact 2.
4. On January 31, 2019, the employer informed the union via email that it was considering disciplinary action against Richards, including the possibility of termination of employment. As part of this email, the employer attached various documents as an investigation file that it asserted was supportive of its claim that Richards had engaged in misconduct.
5. After reviewing the investigation file, the union determined that some of the documents were not related to the allegations the employer was making against Richards.
6. On February 7, 2019, the union's representative disclosed to the employer's lead investigator, via text, that the "wrong incident [was] referenced and attached to the findings [of the employer's investigation of Richards]." The union informed the employer about the unrelated documents to limit the scope of charges against Richards and to protect the privacy of those people listed in those documents. The union representative's

February 7, 2019, text contained a request for a phone conversation between the union representative and the employer's investigator about the topic.

7. On February 15, 2019, the employer sent the union an email, stating that the union and employer had engaged in a phone conversation about the documents. The employer stated it had incorrectly included documents unrelated to the charges against Richards in the investigation file sent to the union and Richards. In that email, the employer also directed Richards to remove the unrelated documents from the file and return them to the employer.
8. The union forwarded this communication to Richards in an email on February 15, 2019. Richards acknowledged this communication from the union in an email Richards sent to the union on February 18, 2019. Richards informed the union that he had destroyed the unrelated documents.
9. The employer terminated Richards' employment on June 10, 2019. The union filed a grievance regarding the termination. In September 2019, the union settled the grievance for a monetary payment to Richards.
10. On July 7, 2020, Richards received documents via a Public Records Act request. These documents contained the February 7, 2019, text mentioned in finding of fact 6.
11. Richards filed an unfair labor practice complaint with the Commission on December 7, 2020.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.56 RCW and chapter 391-45 WAC.
2. Based upon findings of fact 7 and 8, the statute of limitations on this complaint as defined in RCW 41.56.160(1) began to run on February 18, 2019.
3. No genuine issue of material fact remains as to the timeliness of Richards' complaint under WAC 10-08-135.

4. The complaint in this case was not timely filed under RCW 41.56.160(1).
5. No genuine issue of material fact remains as to the union's disclosure to the employer that the employer had included unrelated information in its investigation file of Richards under WAC 10-08-135.
6. Based on findings of fact 4–11, the union's disclosure to the employer that the employer had included unrelated information in its investigation file of Richards was not a violation of the union's duty of fair representation in violation of RCW 41.56.150(1).

ORDER

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

ISSUED at Olympia, Washington, this 31st day of August, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



LOYD J. WILLAFORD, 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 08/31/2021

DECISION 13311-A - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 133219-U-20

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