STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID MUELLER, Complainant, vs. BAINBRIDGE ISLAND SCHOOL DISTRICT, Respondent.	CASE 134379-U-21 DECISION 13410 - PECB ORDER OF DISMISSAL

David Mueller, Complainant.

Aaron D. Kelley and *Mark F. O'Donnell*, Attorneys at Law, Preg O'Donnell and Gillett for the Bainbridge Island School District.

On August 6, 2021, David Mueller (complainant) filed an unfair labor practice complaint against the Bainbridge Island School District (employer). On August 17, 2021, Mueller filed an amended complaint. On August 19, 2021, Mueller filed a second amended complaint. The second amended complaint was reviewed under WAC 391-45-110. [1] A deficiency notice issued on August 31, 2021, notified Mueller that a cause of action could not be found at that time. Mueller was given a period of 21 days in which to file and serve a third amended complaint or face dismissal of the case.

[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 September 7, 2021, Mueller filed a third amended complaint. The Unfair Labor Practice Administrator dismisses the third amended complaint for timeliness and failure to state a cause of action.

ISSUES

The third amended complaint alleges the following:

> Employer interference with employee rights in violation of RCW 41.56.140(1) outside the six month statute of limitations, by not allowing a grievance to proceed to arbitration, not allowing David Mueller to speak during a staff meeting, or disciplining Mueller for an outburst in the staff meeting regarding unidentified activity protected by RCW 41.56.
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> Other Allegations outside of the Public Employment Relations Commission's (PERC) jurisdiction.

The third amended complaint includes some untimely facts and does not include facts necessary to allege an interference violation within the Commission's jurisdiction.

BACKGROUND

David Mueller is a Bus Driver for the Bainbridge Island School District (employer) and is represented by the Bainbridge Island Educational Support Professional Association (union).

On March 25, 2020, Governor Inslee ordered all nonessential personnel to stay home. April 14, 2020, Governor Inslee issued proclamation 20-46, for employers to seek alternative work arrangements and protect high-risk workers from certain impacts to their employment and benefits.

On either March 13 or 16, 2020,[2] the employer and union allegedly suspended the collective bargaining agreement (CBA). On March 16, 2020, the employer and union agreed to a memorandum of understanding (MOU) that allegedly promised no loss of compensation and individuals who qualified for benefits would keep their benefits. The employer allegedly did not offer furloughs to employees. Allegedly the Care's Act, Family First Coronavirus Response Act (FFCRA), and furloughs were not discussed during the development of the MOU. In the spring of 2020 three MOUs were created, and allegedly none of them addressed what the state and federal government were doing. Based on the MOU, in June 2020, Mueller was allegedly instructed to make-up base hours by cleaning instead of being furloughed.

On August 17, 2020, the union and employer held a zoom meeting for bargaining unit members. During the meeting the union and employer explained a new MOU, which listed options for the upcoming school year. The options allegedly included: the use of leave without pay, using personal sick leave and personal days – FFCRA leave rights, or a high risk exemption only for the employee based on OSPI guidance. In a public records request sent in April 2021,[3] Mueller requested a recording of the August 17 meeting, notes, minutes, or agenda. The employer allegedly stated it did not have any of these to provide. Mueller alleges this is a public records act violation. On unidentified dates, Mueller took FMLA because it was dangerous for his wife to be exposed to the virus if Mueller brought it home from work. Mueller alleges this is an interference violation.

In September[4] Mueller worked to transport students with special needs. During that time Mueller was working 3.12 hours four days a week. A hybrid schedule began in January and Mueller's hours increased to 5.04 hours four days a week. The previous year, Mueller had worked 33 hours a week.

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2 On page 1, paragraph 2, of the third amended complaint the complainant states it occurred on March 16, 2020. On page 6, paragraph 1, the third amended complaint states the MOU was dated March 13, 2020, and the MOU changed or suspended the collective bargaining agreement.

3 On page 2, paragraph 4, the third amended complaint merely states "I asked in a public records request recently for the video, minutes, notes, and agenda from the August 17, 2020 zoom meeting." On page 6, paragraph 2, the third amended complaint states that a public records requests was filed in April 2021.

4 Based on the chronology of the complaint, it is presumed September 2020.

On May 1, 2021, Mueller's activity trip was canceled and coworkers bypassed Mueller's turn to drive. In May 2021, Mueller filed a grievance because the coworkers were depriving Mueller of activity trips in violation of the CBA. There were emails and meetings related to the grievance held over several months. Allegedly, management after months of emails and meetings allowed the grievance to go through the approved steps in the CBA, but there allegedly was no action.[5] The employer allegedly denied moving the grievance to arbitration. The CBA only allows for grievances to be filed only if the union carries the grievance forward. On an unidentified date, the union informed Mueller it would not support the grievance proceeding to arbitration.

On an unidentified date, prior to June 16, 2021, Mueller emailed Mary Howes, Transportation Manager, asking for time to speak about the activity trip concerns during the upcoming all staff meeting. Howes did not give approval. On June 16, Mueller asked again for time to speak, and Howes said she was still thinking about whether to allow Mueller to speak. Howes ended up refusing to allow Mueller to speak. During the meeting Mueller was really upset and had a loud argument with Howes because Mueller was not allowed to speak about the activity trips during the meeting. Howes stated she felt threatened by Mueller raising his voice and Mueller immediately left the building.

On June 25, 2021, Mueller met with the employer to discuss the events of June 16. Mueller brought a union representative to the meeting. During the meeting the employer asked questions related to the events of June 16. Also during the meeting Mueller asked for transcripts and the zoom meeting from the August 2020 meeting. The employer did not provide these. The employer provided Mueller a copy of a policy letter on bullying and told Mueller he would be terminated if the behavior continued.

On August 18, 2021, Governor Inslee announced that all school employees must be vaccinated. Mueller alleges that Governor Inslee bypassed Congress and HIPPA laws. Mueller alleges

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[5] Page 3, paragraph 5, states this information. On page 6, paragraph 3, the third amended complaint states the grievance did not step through the grievance step processes – it timed out without action after the union president stated the union would not pursue the grievance to arbitration.

Governor Inslee suspended CBA's to negotiate budget through proclamation, has selectively mentioned what rules or regulations are being modified in his proclamations, and is ignoring constitutional and civil rights. Mueller alleges Governor Inslee is a party to the complaint because of the proclamation related to vaccination.

On August 18, 2021, Mueller had a nondisciplinary meeting with the employer for the purpose of improving communication between Mueller and Howes after the June 16 incident. A union representative attended this meeting. During the meeting the employer also allegedly thanked Mueller for bringing the activity driving violation to their attention.

ANALYSIS

Timeliness

There is a six-month statute of limitations for unfair labor practice complaints. "[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." RCW 41.56.160(1). The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *City of Bellevue*, Decision 9343-A (PECB, 2007) (citing *City of Bremerton*, Decision 7739-A (PECB, 2003)). 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. *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

The only exception to the strict enforcement of the six-month statute of limitations is when the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Renton*, Decision 12563-A (PECB, 2016) (citing *City of Pasco*, Decision 4197-A (PECB, 1994)). Under the "discovery rule," the statute of limitations does not begin to run until the complainant, using reasonable diligence, would have discovered the cause of action. *U.S. Oil & Refining Co. v. State Department of Ecology*, 96 Wn.2d 85, 92 (1981). The doctrine of equitable tolling requires the exercise of reasonable diligence on the part of the complainant. *Adult Residential Care, Inc.*, 344 NLRB 826 (2005). The party asserting equitable tolling should apply bears the burden of proof. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379 (2009).

To prove that the statute should be tolled, the complainant would need to show deception or concealment of the facts forming the basis of the unfair labor practice complaint and the exercise of diligence by the complainant. *City of Renton*, Decision 12563-A (citing *Millay v. Cam*, 135 Wn.2d 193, 206 (1998)).

The Commission has also ruled that the statute of limitations begins to run when an adverse employment action is communicated to employees and where the employer does not attempt to conceal its actions, even if the exclusive bargaining representative did not have actual notice of the alleged violation. *State – Corrections*, Decision 11025 (PSRA, 2011) (citing *City of Chehalis*, Decision 5040 (PECB, 1995)).

To determine timeliness, the Commission looks at the dates of events in the complaint in relation to the filing date. The complaint was filed on August 6, 2021. In order to be timely, the complainant would have needed to describe events that took place on or after February 6, 2021. Many of the alleged facts occurred prior to February 6, 2021. Both of the amended complaints provided additional information related to those events. Those facts occurring prior to February 6, 2021, are reviewed as background information. The interference violation related to the employer and union suspending the CBA with the MOUs in 2020 and not allowing furloughs in the MOUs are untimely filed. The facts that are alleged after February 6, 2021, are timely filed, but do not include elements of an alleged interference violation.

Allegations Outside Jurisdiction

Applicable Legal Standard

The third amended complaint describes some alleged violations that are outside the jurisdiction of the Commission. The Commission's jurisdiction is limited to the resolution of collective bargaining disputes between employers, employees, and unions. The agency does not have authority to resolve all disputes that might arise in public employment. *Tacoma School District (Tacoma Education Association)*, Decision 5086-A (EDUC, 1995). Just because the complaint, amended complaint, and second amended complaint do not state a cause of action for an unfair labor practice does not necessarily mean the allegations involve lawful activity. It means that the

issues are not matters within the purview of the Commission. *Tacoma School District (Tacoma Education Association)*, Decision 5086-A.

In addition to untimely filed allegations, the third amended complaint alleges public records act violations, grievance process violations, and allegations against Governor Inslee as the employer. These types of allegations are outside the Commission's jurisdiction.

Application of Standard

Public Records Request

The third amended complaint alleges the employer violated the Public Records Act (PRA) when it could not provide the video, minutes, notes, and agenda from the August 17, 2020, meeting. Public records requests made under the Washington State Public Records Act (chapter 42.56 RCW) or the Freedom of Information Act (FOIA) do not fall within the Commission's jurisdiction.

The Commission's jurisdiction on information request cases is limited to requests pertaining to collective bargaining information. Unlike public records requests, these collective bargaining information request complaints are a type of refusal to bargain allegation. 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*, 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.

Grievance Process Violation/Right to Arbitration

The third amended complaint also alleges that the employer violated the CBA by not taking any action or not moving the grievance to arbitration. In May 2021, Mueller filed a grievance because coworkers were depriving Mueller of activity trips in violation of the CBA. Over several months there were allegedly emails back and forth and meetings held, but allegedly no action was taken. The CBA only allows for grievances to be filed if the union carries the grievance forward. On an unidentified date, the union informed Mueller it would not support the grievance proceeding to arbitration. The employer did not move the grievance to arbitration either.

The Commission has consistently refused to resolve "violation of contract" allegations or attempts to enforce a provision of a CBA 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 interprets and administers collective bargaining statutes but does not act in the role of arbitrator to interpret or enforce collective bargaining agreements. *State – Corrections (Teamsters Local 313)*, Decision 8581 (PSRA, 2004) (citing *Clallam County*, Decision 607-A (PECB, 1979); *City of Seattle*, Decision 3470-A (PECB, 1990); *Bremerton School District*, Decision 5722-A (PECB, 1997)). An unfair labor practice complaint is not the appropriate avenue to address alleged violations of the parties' CBA. The CBA can be enforced through the contractual grievance procedure or through the courts.

A union 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 (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.

Here the union chose to not pursue the grievance in arbitration. The unfair labor practice process is not the proper venue for challenges to the CBA's grievance process and access to arbitration. Thus the alleged violation of the CBA and denial of arbitration are dismissed.

Allegations Against Governor Inslee

The third amended complaint does not allege facts related to an unfair labor practice violation under the Commission's jurisdiction. On August 18, 2021, Governor Inslee announced that all school employees must be vaccinated. The third amended complaint do not allege any facts regarding how this announcement was an unfair labor practice within the Commission's

jurisdiction. Mueller alleges that Governor Inslee bypassed Congress and HIPPA laws. Mueller alleges Governor Inslee suspended CBA's to negotiate budget through proclamation, has selectively mentioned what rules or regulations are being modified in his proclamations, and is ignoring constitutional and civil rights. Mueller alleges Governor Inslee is a party to the complaint because of the proclamation related to vaccination. The Commission does not have jurisdiction to enforce HIPPA, proclamations, constitutional, or civil rights laws. Additionally, the facts do not allege any unfair labor practice violation related to these events.

Governor Inslee is also not a party to this case. A public employer is any officer, board, commission, council, or other person or body acting on behalf of any public body governed by this chapter, or any subdivision of such public body. RCW 41.56.030(13). Mueller is employed by the Bainbridge Island School District, which is the employer in this case. There are no facts explaining how the employer is following the proclamation. The allegations against Governor Inslee are outside the Commission's jurisdiction.

Interference

Applicable Legal Standard

Generally, the burden of proving unlawful interference with the exercise of rights protected by chapter 41.56 RCW rests with the complaining party or individual. 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

Based on the timely filed facts, those occurring after February 6, 2021, the third amended complaint does not allege that the employer made threats of reprisal or force or promises of benefit to Mueller associated with the union activity of Mueller or of other employees.

Filed Grievance

Mueller alleges that his activity trip was canceled on May 1, 2021, and coworkers bypassed his turn to drive. Afterward, Mueller filed a grievance in May 2021 alleging coworkers were depriving Mueller of activity trips in violation of the CBA. The employer corresponded through email and held meetings related to the grievance over several months. The grievance either allegedly went through the steps in the CBA but there was no action or the grievance timed out. None-the-less the union determined with that the grievance would not be pursed to arbitration. The employer also did not take the grievance to arbitration. Mueller alleges this was an interference violation. Mueller does describe employer action (not taking the grievance to arbitration or the timing of the process), but does not describe how that action was associated with union activity of Mueller or other employees. The complaint alleges the union decided to not pursue the grievance to arbitration. Because there is no allegation that the denial of arbitration or timing of the process was not associated with union activity, it does not state a cause of action for interference before the Commission and must be dismissed.

June 16, 2021, Meeting Outburst

The allegations regarding being allowed to speak during the June 16, 2021, staff meeting lacks facts necessary for an interference violation. Mueller does not provide facts describing how not being allowed to speak at a staff meeting was associated with union activity of Mueller or other employees. Prior to June 16, 2021, Mueller emailed Mary Howes asking for time to speak during the June 16 all staff meeting about how the activity trips were supposed to be assigned. Howes did not give approval after that request. On June 16 Mueller again asked for time to speak and Howes said she was still thinking about it. Howes ended up refusing to allow Mueller to speak during the meeting. Mueller was really upset and had a loud argument with Howes during the meeting. Howes stated she felt threatened by Mueller raising his voice and Mueller immediately left the building.

Mueller does not allege how the denial of speaking at the meeting was associated with union activity of Mueller or other employees.

June 25, 2021, Discipline Meeting & August 18, 2021, Nondisciplinary Meeting

The allegations of the June 25, 2021, meeting lacks facts alleging an interference violation. Mueller met with the employer on June 25 to discuss the events of June 16. Mueller had a union representative present at the meeting. During the meeting the employer asked questions regarding the events of June 16. During the meeting Mueller asked for transcripts and the zoom meeting from August 2020, but the employer did not provide them. The employer provided Mueller a copy of a policy letter on bullying and informed Mueller he would be terminated if the June 16 behavior continued. On August 18 Mueller had a nondisciplinary meeting with the employer for the purpose of improving communication between Mueller and Howes after the June 16 events. None of these facts allege the elements necessary for an interference violation. The only actions the employer took were holding meetings, where a union representative was present, and the employer did not provide the information Mueller requested. There are no allegations that those employer actions were associated with union activity of Mueller or other employees, thus the allegations must be dismissed.

ORDER

The third amended complaint charging unfair labor practices in the above-captioned matter is DISMISSED for timeliness and failure to state a cause of action.

ISSUED at Olympia, Washington, this 5th day of October, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, 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 10/05/2021

DECISION 13410 - PECB 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 134379-U-21

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