Bainbridge Island School District (Bainbridge Island Educational Support Professional Association), Decision 13411 (PECB, 2021)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BAINBRIDGE ISLAND SCHOOL DISTRICT, Employer.	
DAVID MUELLER, Complainant, vs. BAINBRIDGE ISLAND EDUCATIONAL SUPPORT PROFESSIONAL ASSOCIATION, Respondent.	CASE 134380-U-21 DECISION 13411 - PECB ORDER OF DISMISSAL

David Mueller, the complainant.

Harriet K. Strasberg, Attorney at Law, for the Bainbridge Island Educational Support Professional Association.

On August 6, 2021, David Mueller (complainant) filed an unfair labor practice complaint against the Bainbridge Island Educational Support Professional Association (union). 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

[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.

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.

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:

> Union restraint or coercion in violation of RCW 41.56.150(1) by unidentified threats made to David Mueller associated with unidentified exercise of rights protected by the applicable collective bargaining laws.
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> Union inducement of employer to commit an unfair labor practice in violation of RCW 41.56.150(2) by not taking a grievance to arbitration.
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> Public Records Act, collective bargaining agreement violations, and violations by Governor Inslee.

The third amended complaint includes some untimely facts and does not include facts necessary to allege a union interference violation or a union discrimination (inducement) 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 March 16, 2020,[2] the employer and union allegedly suspended the collective bargaining agreement. Also on March 16, 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. In documents obtained by Mueller, the union allegedly chose not to negotiate for furloughs or layoffs and instead negotiated to keep people working. In June 2020, Mueller was allegedly instructed to make-up contract base hours.

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 employees 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 union allegedly stated it did not need to comply with a public records request. Mueller alleges this is a public records act violation and an interference violation.

In September 2020, Mueller worked to transport students with special needs. During that time Mueller was working 15.6 hours per week on a four day work week. The previous year, pre-COVID, Mueller had worked 33 hours a week.

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

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2 On page 1, paragraph 2, of the third amended complaint the complainant states it occurred on March 16, 2020.

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

activity trips in violation of the CBA. On an unidentified date, the union allegedly responded that it did not see anything wrong with how activity trips were assigned, the process was a 20 year old process, and approved by a vote of the membership. The union also stated it would not represent Mueller's grievance if pursued. There were multiple meetings with management and emails with all parties. The grievance has processed through all the grievance process steps identified in the collective bargaining agreement. Mueller alleges the union and employer were attempting to run the clock on the grievance even though the complaint alleges the grievance went through the proper steps. The union did not take the grievance to arbitration. The employer allegedly also ignored Mueller's request to go to arbitration.

On August 18, 2021, Governor Inslee announced that all school employees must be vaccinated. Also on August 18, Mueller had a nondisciplinary meeting with the employer for the purpose of improving communication between Mueller and Howes.

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 or choosing to negotiate furloughs in the MOUs are untimely filed. The facts that are alleged after February 6, 2021, are timely filed, but are outside the Commission's jurisdiction, do not include elements of an alleged union interference violation, or a union discrimination (inducement) 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 union 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. Thus the Public Records Act allegations must be dismissed.

Grievance Process Violation/Right to Arbitration

The third amended complaint also alleges that the union violated the CBA by not taking any action, running out the clock for the grievance, 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. On an unidentified date, the union allegedly responded that it did not see anything wrong with how things were being done, the process was a 20 year old process, and approved by a vote of the membership. The union also stated it would not represent Mueller in the step processes if pursued. There were multiple meetings with management and emails with all parties, which took time. The grievance has processed through all the grievance process steps identified in the collective bargaining agreement. The union did not take the grievance to arbitration. The employer allegedly also ignored Mueller's request to go to arbitration.

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, it appears the union investigated Mueller's grievance and attended meetings and participated in email correspondence. The union then 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 does 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). A bargaining representative is any lawful organization which has as one of its primary purposes the representation of employees in their employment relations with employers. Mueller is employed by Bainbridge Island School District, which is the employer in this case. RCW 41.56.140(2). Mueller is represented by the Bainbridge Island Educational Support Professional Association, which is the bargaining representative in this case. Governor Inslee is not the employer or bargaining representative in this case. The complaint is also filed against the union. There are no facts explaining how the employer and union are following Governor Inslee's proclamation. The allegations against Governor Inslee are outside the Commission's jurisdiction.

Union Interference

Applicable Legal Standard

Employees covered by chapter 41.56 RCW have the right to organize and designate representatives of their own choosing for purposes of collective bargaining or exercise other rights under the chapter free from interference, restraint, coercion, or discrimination. RCW 41.56.040. It is an unfair labor practice for a bargaining representative to interfere with, restrain, or coerce public employees in the exercise of rights guaranteed by chapter 41.56 RCW. RCW 41.56.150(1). A showing of intent is not required to prove an interference violation under RCW 41.56.150(1). *King County (Public Safety Employees Union)*, Decision 10183-A (PECB, 2008). To establish union interference and coercion in violation of RCW 41.56.150(1), a complainant must establish the existence of "union tactics involving violence, intimidation and reprisals." *Community College District 13 (Lower Columbia College)*, Decision 8117-B (PSRA, 2005) (citing *National Labor Relations Board v. Drivers Local 639*, 362 U.S. 274 (1960)). The standard for establishing an interference violation is whether the typical employee in similar circumstances reasonably could perceive the conduct as a threat of reprisal or force, or a promise of benefit, related to the pursuit of rights protected by the statute. *Community College 13 (Lower Columbia College)*, Decision 8117-B.

Application of Standard

The third amended complaint lacks facts alleging the existence of union tactics involving violence, intimidation, and reprisal related to the pursuit of rights protected by the collective bargaining statute. The untimely facts allege the union entered into MOUs with the employer. This allegation is not an interference violation. The timely facts allege Mueller filed a grievance and the grievance was processed in accordance with the process in the collective bargaining agreement. The union then decided to not pursue arbitration. 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 v.Seattle Police Officers' Guild*, 100 Wn.2d 361, 375 (1983). 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. Additionally, Mueller requested information from the union under the Public Records Act. The union responded that it was not required to provide information on the act. There

is no allegation that either of these actions was associated with union activity of Mueller or other employees. Thus the interference violations must be dismissed.

Union Discrimination/Union Inducement of Employer to Commit a ULP

Applicable Legal Standard

It is an unfair labor practice for a union to "induce the public employer to commit an unfair labor practice." RCW 41.56.150(2). To induce an employer to commit an unfair labor practice, a union must be requesting that the employer do something unlawful. For example, a union cannot demand that an employer discharge an employee for non-payment of a union political action fee or based upon the employee's race, sex, religion, or national origin. *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-A (PECB, 1989). A classic scenario occurs when a union induces the employer to discriminate against an employee based upon union membership. *State – Natural Resources*, Decision 8458-B (PSRA, 2005).

In *Municipality of Metropolitan Seattle* the union was seeking limitations on assignments that were made available to part-time drivers. At the bargaining table, the employer could legally agree to restrict part-time drivers' shifts. The Commission explained that the mere designation of "part-time" status does not bring an employee into a classification protected from invidious discrimination. Since the employer ultimately could have legally agreed to what the union was seeking, the union was not asking the employer to commit an illegal act.

Application of Standard

Mueller alleges that the union induced the employer to commit an unfair labor practice. In the third amended complaint it appears the alleged violation is related to the parties entering into three MOUs in 2020. These allegations are untimely filed. Additionally, there are no facts in the complaint indicating the union was asking the employer to commit an unfair labor practice. The facts allege the union and employer jointly entered into three MOUs. The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore

possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *University of Washington*, Decision 11414-A (PSRA, 2013). There are no allegations that any of the employer's actions related to the MOU were an unfair labor practice. Thus the allegation 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 13411 - 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 134380-U-21

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